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Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII

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ARTICLE

ALTERNATIVES TO CHALLENGED EMPLOYEE SELECTION CRITERIA: THE SIGNIFICANCE OF NONSTATISTICAL EVIDENCE IN DISPARATE IMPACT CASES UNDER TITLE VII

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In contrast to most recent commentary and a superficial reading of Supreme Court cases, Professor Lamber rehabilitates the concept of a distinct disparate impact theory under Title VII of the 1964 Civil Rights Act. She examines one important evidentiary question—the significance of alternative employee section criteria—to expose underlying policy questions often buried in technical questions of form. Others have argued that the Supreme Court's apparent analytical and evidentiary alignment of disparate impact and disparate treatment cases shows that Title VII bars only "intentional discrimination" and thus the purpose of alternatives evidence is quite limited. Professor Lamber presents a different view, arguing that a proper understanding of the Court's Title VII decisions and of the specific interests employers assert to justify criteria demonstrates that using alternatives to evaluate these justifications need not impose undue burdens on employers. Identifying typical fact patterns in Title VII litigation, she then illustrates three ways in which alternatives evidence can be relevant. Professor Lamber concludes that the utility of alternatives evidence depends on the kind of selection criterion challenged and the employer's reason for using it.

INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] represents an unequivocal Congressional commitment to eliminate discrimination in the workplace. That commitment is not, however, unambiguous. Although the legislation has been in place for only twenty years, it has spawned an enormous number of cases, involving considerable money and emotion. Despite the wealth of litigation, no consensus has yet emerged on the appropriate balance of the competing interests of employers and employees. Many discrimination cases turn on evidentiary questions

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1. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e-2000e-17 (1982)).

or, even more formalistically, on the right order of proof, but few focus in any systematic way on the significance of the evidence. This Article examines an evidentiary question important in Title VII cases—the significance of alternative employee selection criteria—and confronts the policy questions underlying usage of alternatives evidence that Congress, the courts, and society have not resolved. Although this examination will not, by itself, settle the balance of competing interests under Title VII, it will assist that larger debate.

Under the prevailing view, showing the existence of alternative employee selection criteria only aids in determining whether there is intentional discrimination.[2] Most commentary and a superficial reading of Supreme Court decisions suggest that employees alleging discrimination must show that alternative selection criteria are so superior to the existing criteria that a court can infer discriminatory motivation from an employer's failure to adopt them. Further, the literature typically assumes that alternatives are relevant only after the defendant has satisfied its burden of justification. This view is based on the combined effect of several Supreme Court Title VII cases and is linked with the view that Title VII only prohibits what can be characterized as intentional discrimination.

This Article argues that the utility of establishing alternatives has been misunderstood and that such proof should not be so limited in time or purpose. A proper understanding of the Supreme Court's Title VII decisions and of the specific interest that employers assert as justifying a selection criterion demonstrates that using alternatives to evaluate this justification need not impose an undue burden on the employer. This Article suggests an approach for determining when and how evidence of alternative selection criteria is relevant in disparate impact claims under Title VII.[3] The significance of alternatives evidence and

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2. Booth & MacKay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121 (1980); Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 after* Beazer *and* Burdine, 23 B.C.L. REV. 419 (1982); Maltz, *The Expansion of the Role of the Effects Text in Antidiscrimination Law: A Critical Analysis*, 59 NEB. L. REV. 345 (1980); Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following* Texas Dep't of Community Affairs v. Burdine, 55 TEMP. L.Q. 372 (1982); Thompson & Christiansen, *Court Acceptance of Uniform Guidelines Provisions: The Bottom Line and the Search for Alternatives*, 8 EMPL. REL. L.J. 587 (1983); Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979). *See also* Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981) [hereinafter cited as Ga. Note]; Note, *Rebutting the* Griggs *Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 U. ILL. L. REV. 181 [hereinafter cited as Ill. Note].

3. The Supreme Court has recognized two theories of liability under Title VII, termed "disparate treatment" and "disparate impact." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Describing disparate treatment as the most easily understood type

the appropriate time to consider such evidence are not merely technical questions for the litigant, although they can, in effect, decide the case. More importantly, they raise fundamental issues about the relevance of motivation in Title VII litigation, about the intrusion on an employer's autonomy tolerated in order to eliminate unintended discrimination, and about the commitment of the Supreme Court to its original disparate impact decision.

The Supreme Court enunciated the disparate impact theory of liability in *Griggs v. Duke Power Company*,[4] its first substantive interpretation of Title VII. In addition to defining discrimination to include neutral policies not intended or consciously used to discriminate, the Court recognized the employer's right to promulgate policies regardless of their adverse impact if the policies genuinely supported legitimate business interests. Although the Court did not fully explain what policies might be legitimate, it stated that "any test used must measure the person for the job and not the person in the abstract."[5]

The Court's second disparate impact case was *Albemarle Paper Company v. Moody*,[6] in which the Court addressed more specifically the employer's burden of justifying pre-employment tests with an adverse impact. Relying extensively on the then existing Equal Employment Opportunity Commission (EEOC) testing guidelines,[7] the Supreme Court concluded that the employer's "validation" attempt was "materially defective" in several respects.[8] Remanding the case to the district

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of discrimination, the Supreme Court has defined the claim as one in which the defendant intentionally treats some people less favorably than others because of their race or gender. *Id.* Proof of discriminatory motivation is critical although motive can sometimes be inferred from evidence showing differences in treatment along race or gender lines. "Disparate impact" claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. In contrast to disparate treatment claims, the disparate impact theory of liability does not require proof of discriminatory motivation. *Id.*

Some aspects of the disparate impact theory of liability are well-settled. There is general agreement on the order and allocation of proof. The plaintiff must show that an employment policy has substantial adverse impact on protected groups. If the defendant chooses not to rebut this evidence of adverse impact, it must justify the use of the employment policy. Most courts agree that defendants bear the burden of persuasion, not simply production, on this issue, but do not agree about the substance of the defendant's burden. Most courts have decided that plaintiffs bear the burden on any argument concerning the existence of alternatives to the challenged policy. That is, the plaintiff must identify alternatives with less adverse impact and must persuade the court that they serve the employer's purposes equally well.

4. 401 U.S. 424 (1971).

5. *Id.* at 436.

6. 422 U.S. 405 (1975).

7. *Id.* at 431, relying on EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (1970) (revised version codified at 29 C.F.R. § 1607 (1984)).

8. *Albemarle*, 422 U.S. at 431-35. While "validation" is a technical and complex subject, the basic notion is straightforward. In essence, a validation study empirically shows a rela-

court because the appropriate standard for proving "job-relatedness" had previously not been clear,[9] the Court wrote:

> If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." . . . Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination.[10]

Thus, if the defendant were to establish that its testing program was job-related, the plaintiffs would still have the opportunity to show that, given alternative procedures, the defendant chose the challenged tests as a way to continue excluding blacks from all-white jobs.

Although the Court's decision was reasonable in the factual context of *Albemarle*,[11] the question remains whether the Court meant to

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tionship between performance on a test and performanee on the job. *See infra* text accompanying notes 161-72. *See also infra* note 173.

9. *Albemarle*, 422 U.S. at 436.

10. *Id.* at 425 (quoting McDonnell Douglas v. Green, 411 U.S. 792 (1973)).

This approach was originally suggested by *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1118-19 (1971), written before the Supreme Court's decision in *Griggs*. The suggested scheme for allocating burdens of proof and persuasion states that if the "plaintiff can show that an equally good predictor of job performance exists that does not have as substantial an effect on minority employment, the court then should require the company to substitute this new predictor for the one it is using." *Id.* Unfortunately, the Harvard article does not say why.

The article is also unclear in its conceptualization of disparate impact. For example, in one place it discusses the inferences to be drawn from a rule with an adverse impact, suggesting that impact is evidence of intentional discrimination, *Id.* at 1151; in another it discusses the value of the job-relatedness standard without reference to any evidence of past discrimination or pretext, suggesting disparate impact is a separate conceptual theory of discrimination, *id.* at 1116-28. For a more general discussion of the difference between adverse impact as evidence of intentional discrimination and adverse impact as a theory of recovery, see Lamber, Reskin & Dworkin, *The Relevance of Statistics to Prove Discrimination: A Typology*, 34 HASTINGS L.J. 553 (1983).

11. This allocation of proof makes sense because the validation requirements of the EEOC testing guidelines are quite stringent and include investigation of suitable alternatives with less adverse impact. *See* 29 C.F.R. § 1607.3 (1984). To the extent that the employer satisfies this obligation, the plaintiff's most obvious argument in rebuttal is that, notwithstanding the statistical connection between the tests and job performance, the testing program masks racial discrimination.

At the time *Albemarle* was decided, EEOC had its own guidelines on employee testing procedures. In 1978, the four federal civil rights enforcement agencies (Departments of Justice and Labor, EEOC, and the Civil Service Commission) promulgated the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290 (1978) (codified at 29 C.F.R. § 1607 (1984)) [hereinafter cited as Uniform Guidelines]. The provision concerning investigation of alternatives is substantially the same in both guidelines. *See id.* at § 3B. The agencies assert that imposing this obligation is not inconsistent with *Albemarle*. *See* Adoption of Questions and Answers to Clarify

exclude the use of alternatives evidence for purposes other than showing "pretext." There is nothing in the opinion to suggest that it did.[12] In fact, the Supreme Court has never explained how proof of discriminatory motivation applies to disparate impact cases; nor has the Court said that evidence of less discriminatory alternatives is relevant only to establish such motivation. In three subsequent decisions, the Court has reiterated that the plaintiff has the burden of proving alternatives and twice has said that the purpose is to prove intentional discrimination.[13] But, "none of the relevant decisions has focused upon this apparent inconsistency" of imposing an intent element in a case where intent is not at issue.[14]

The simple answer to the question of how discriminatory motivation is important in disparate impact cases may be that intention is always an important factor in a discrimination case.[15] *Albemarle*'s discussion of alternatives may suggest only that a plaintiff is not precluded from bringing the intention of the defendant into issue in a disparate impact case. By raising the possibility of pretext, the Court stated what was already understood to be true: a plaintiff can raise both intentional and unintentional claims in the same lawsuit and with respect to the same selection criterion.[16] If this answer is the reason that discriminatory motivation is a factor in disparate impact cases, nothing the Court said in *Albemarle* about the purpose of alternatives evidence or the intent standard limits the relevance of alternatives evidence when discriminatory motivation is not at issue.

Nor has the Supreme Court said that alternatives may only be considered after the defendant has met its burden of justification. Although

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and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 12,003 (1979) [hereinafter cited as Uniform Guidelines: Questions and Answers].

12. The above-quoted part of the opinion does little more than raise questions. Why, for example, did the Court say the defendant's motivation is relevant to a claim notable for not requiring proof of impermissible motivation? Why did the Court burden the plaintiff on an issue that seems logically part of the defendant's justification? Why did the Court raise the question of alternatives when the issue was not necessary to the resolution of the case? There is nothing in the record to suggest that the parties argued the issue or that the Court specifically focused on it. Nor has the Court returned to the issue in subsequent cases.

13. The Court did not mention pretext in Dothard v. Rawlinson, 433 U.S. 321 (1977). The other disparate impact cases are New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) and Connecticut v. Teal, 457 U.S. 440 (1982).

14. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 694 (1981).

15. *Cf.* Furnish, *supra* note 2, at 423; Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 322-23 (1983).

16. C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 30-33 (1980). *See also* Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

in *Albemarle* the Court said that the plaintiffs' opportunity to show that alternatives were available arises after the defendant meets its burden of justification, it did not say that evidence of alternatives could be raised only by rebuttal. More importantly, the Court did not attempt to justify any such limitation. Actual litigation might not proceed in as rigid a fashion as the Court's discussion would suggest. Instead, the plaintiff may introduce all its evidence in its case in chief before the defendant proceeds.[17] The important issue is what to make of the evidence, not when is it presented.[18]

This Article illustrates three ways in which evidence of workable alternatives can be relevant. First, such evidence may support an inference of intentional discrimination, as the Court in *Albemarle* said, although the plaintiff probably would also have to show that the defendant knew of the alternatives.[19] This use of alternatives evidence is uncommon, but it is not controversial. Second, such evidence may illustrate that the relationship between the selection criterion and the employer's purpose is not substantial enough to justify use of that criterion. This use of alternatives evidence ought to be noncontroversial because it merely tests whether an asserted relationship in fact exists.

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17. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 16, at 59, 65.

18. The significance of the proof ought to determine when it is presented, not vice versa. Even if alternatives may only be presented in rebuttal, this order need not limit the probative value of the evidence. *Cf.* Smith, *supra* note 2, at 403-04 (under *Albemarle*'s framework, alternatives must be limited to impermissible motive issue; otherwise the defendant runs the risk of having its defense deemed unproven simply because the plaintiff proves there are alternatives). *See also* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1273-74 (1981) (rebuttal should be eliminated because it is redundant).

The lower courts that have considered the question do not agree about the significance of establishing the existence of alternative selection procedures. There are, however, surprisingly few decisions that focus on the issue. Some courts merely repeat *Albemarle*'s conclusion that alternatives are to prove pretext. Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992-94 (5th Cir. 1982). Others reject proffered alternatives because they are not feasible or do not adequately serve the same interest of the employer; none of these courts reach the question of the significance of alternatives. Contreras v. City of Los Angeles, 656 F.2d 1267, 1285 (9th Cir. 1981). Still others consider alternatives, or suggest factors a court should consider in assessing whether there are "acceptable alternatives," but simply assume the evidence is relevant in some unspecified way. Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 (6th Cir. 1981). Finally, other courts consider evidence of alternatives as providing an opportunity to scrutinize more rigorously the necessity of the employer's selection procedure, but they seldom discuss the apparent inconsistency with the Court's decision in *Albemarle*. Parson v. Kaiser Alum. & Chem. Corp., 575 F.2d 1374, 1389 (5th Cir. 1978); Allen v. City of Mobile, 464 F. Supp. 433, 440-41 (S.D. Ala. 1978).

19. Thompson & Christiansen, *supra* note 2, at 598. In order to infer intentional discrimination in similar situations under the Constitution, the plaintiff would need to show the defendant knew of the alternatives and rejected them because the defendant subjectively desired the adverse impact. Personnel Adm'r of Mass. v. Feeney, 422 U.S. 256 (1979). Neither the applicability of *Feeney* to Title VII nor the definition of intentional discrimination under Title VII is clear. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 16, at 18-22.

Third, evidence of alternatives may suggest that the employer's interest in using a particular selection criterion is not sufficiently important if other selection criteria would accomplish the same goal. This use is controversial because it intrudes upon the employer's autonomy to structure its selection process.

Using alternatives in these ways will, of course, require courts to evaluate decisions made by employers. Courts may be reluctant to do so because such evaluations seem beyond judicial competence and are likely to cause broad debate.[20] Recognizing the relevance of alternatives to evaluate the adequacy of an employer's justification does not, however, call for substituting judicial judgments for management authority over a broad range of decisions. Instead, with evidence of alternatives, the plaintiff asks the court to evaluate whether a specific business judgment was made in accordance with statutory standards.[21]

Part I of this Article summarizes the argument for limiting evidence of alternatives to proving intentional discrimination at the rebuttal stage and provides a detailed critique of that argument. Part II describes a functional approach for judging the utility of evidence of alternatives after reviewing the nature of the defendant's burden of proof. It identifies three typical factual patterns under the disparate impact theory. First, plaintiffs challenge a paper and pencil test that defendants say is a valid predictor of successful job performance. Sec-

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20. This larger debate concerns the role of federal judges given far-reaching changes in the nature and form of judicial business. *Compare* Chayes, *The Supreme Court, 1981 Term—Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 1, 59 (1982) (judges cannot escape the painful necessity of policy choice by claiming that in sustaining official action judges are exhibiting appropriate deference to other decisionmakers and, as a result, cannot be held responsible for policy decisions made elsewhere) *with* Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 106 (1979) (there are unprecedented pressures on judges to abandon their historical position as neutral arbiters and to assume the manipulative role of power brokers; the efficacy of this role can be sustained only by transforming the popular view of the judiciary). *See also* O. FISS, THE CIVIL RIGHTS INJUNCTION (1978); D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978).

21. This sort of practice is familiar to the law. For example, the Supreme Court continues to stress the National Labor Relations Board's duty to balance an employer's management prerogatives against the statutory rights of employees to organize and bargain collectively. *See, e.g.*, Beth Israel Hosp. v. NLRB, 437 U.S. 483, 505-06 (1978) (Court upheld NLRB decision to allow employees to organize on company property notwithstanding management's objections that such activity would disrupt health care operations and disturb patients). And recently, the Supreme Court interpreted the Bankruptcy Code to permit an employer's unilateral rejection of a collective bargaining agreement, but only if the bankruptcy court makes an independent judgment that rejecting the labor contract serves a successful reorganization. NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984) (Court made clear that the bankruptcy court's function was to scrutinize the decision to reject the labor contract in contrast to the more general "business judgment" standard).

ond, plaintiffs challenge a nonscored, objective criterion that defendants assert is related to successful job performance. And, third, plaintiffs challenge a nonscored, objective criterion that defendants argue is important for reasons unrelated to job performance, such as economic or political self-interest. These patterns illustrate that the utility of alternatives evidence depends on a proper understanding of the specific interest the employer asserts as justifying the challenged criteria.[22] In Part III the Article concludes with an examination of several recent court of appeals decisions to illustrate, in light of the proposed functional approach, the vitality and consistency of the disparate impact theory of discrimination.

I. A Reassessment of Some Common Notions and an Alternative

The prevailing view is that alternatives evidence is limited to proving intentional discrimination at the rebuttal stage in a disparate impact case. This view is based on two arguments. First, the Supreme Court's decisions analyze both disparate impact and intentional discrimination cases within an increasingly similar framework which should be encouraged rather than resisted. Second, the employer's burden of justifying a selection criterion with an adverse impact is a limited one and using alternatives to evaluate the adequacy of this justification implies an undesirable shift in the relative burdens of proof.

The contrary view—that alternatives evidence can show much more than simply intentional discrimination—is based on a recognition of disparate impact and disparate treatment as two fundamentally different theories of liability. The Supreme Court never has waivered in its understanding that a showing of intent is not required to prevail in a disparate impact case. From *Griggs* to *Connecticut v. Teal*, the Court has stressed that disparate impact is a separate and complete claim under Title VII. Furthermore, nothing in the Supreme Court's decisions is intended to limit the utility of alternatives evidence. This view of the Supreme Court's decisions not only provides the doctrinal rationale for the functional analysis that follows in Part II but also highlights the policy questions often buried in technical discussions of burdens of proof.

This Part looks at the Supreme Court's relatively few substantive decisions under Title VII, but not in simple chronological order. Section A confronts the application of the disparate treatment analytical

22. These three fact patterns are not an exhaustive catalogue of disparate impact allegations, but rather illustrate the issues raised in this article concerning the nature of the defendant's burden of proof and the relevance of evidence of alternatives. These patterns are also illustrations where the applicability of the disparate impact theory is not in question.

framework to disparate impact claims and concludes that analytical and evidentiary similarities exist only when there are functional similarities between the two theories. Section B presents the Court's problematic opinion in *New York City Transit Authority v. Beazer*, questioning a common reading of *Beazer* that places it in direct contradiction to the Court's statements, both before and after *Beazer*, that disparate impact does not require a showing of intent. Finally, Section C reviews two other Supreme Court decisions that support the view that the utility of alternatives evidence is not limited to showing intentional discrimination and that reaffirm the conceptual distinction between the theories of liability under Title VII.

A. The Symmetry of the Disparate Impact and Disparate Treatment Theories

In describing the analytical framework for disparate impact cases in *Albemarle Paper Co. v. Moody*, the Supreme Court borrowed from an earlier decision involving an allegation of intentional discrimination against an individual.[23] In that case, *McDonnell Douglas v. Green*,[24] the Court set out a three-step approach for analyzing such claims. First, the plaintiff bears the initial burden of establishing a prima facie case by eliminating the most common nondiscriminatory reasons for rejection and thus supporting an inference that the employer intentionally discriminated on the basis of race.[25] Second, the burden then shifts to the defendant to rebut this inference by "articulat[ing] some legitimate, nondiscriminatory reason" for the plaintiff's rejection.[26] The defendant's burden is simply to produce sufficient evidence to raise an issue of fact, not to persuade the court. Third, if the defendant carries this burden of production, the plaintiff then has the "opportunity to show that [the employer's] stated reason for rejection was in fact pretext."[27] Thus, the plaintiff still has the opportunity to demonstrate that, whatever the stated reasons, the decision was in reality racially premised.[28]

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23. *Albemarle*, 422 U.S. at 425 (citing McDonnell Douglas v. Green, 411 U.S. 792 (1973)).

24. 411 U.S. 792 (1973).

25. *Id.* at 802. The plaintiff's prima facie case is established by showing that he belonged to a racial minority, that he applied and was qualified for a job for which the employer was seeking applicants, that he was rejected despite his qualifications, and that after his rejection the position remained open and the employer continued to seek applicants.

26. *Id.*

27. *Id.* at 804.

28. *Id.* at 805 n.18.

Following the analytical framework set out in *McDonnell Douglas*, the Court in *Albemarle* described the issue at the rebuttal stage of a disparate impact case also as one of "pretext." This analysis suggests some symmetry between the disparate impact and intentional discrimination theories in terms of their order and nature of proof. A claim under either theory proceeds with the three-step approach: the plaintiff's prima facie case, the defendant's response, and then the plaintiff's rebuttal. And, under either theory, the issue at the rebuttal stage is described as whether the plaintiff's evidence establishes "pretext."

Subsequent Supreme Court cases sometimes are read to affirm this symmetrical analysis for disparate impact and intentional discrimination claims.[29] Moreover, these subsequent cases arguably support the view that evidence of alternatives is relevant only to show pretext, not to evaluate the adequacy of the defendant's justification. The better view, however, is that the interpretations and limitations of proving intentional discrimination do not necessarily apply to disparate impact cases. Uniformity in the order and allocation of proof for the two theories is desirable only if the procedures do not mask real differences; and crucial differences do exist. Arguments advanced in disparate impact claims are fundamentally different from those advanced in disparate treatment claims, so the burdens of proof in disparate treatment cases should not determine the burdens in disparate impact cases.

1. THE BROAD VIEW OF *FURNCO* AND *SWEENEY*

In *Furnco Construction Co. v. Waters*,[30] the Court considered the relevance of alternative hiring practices that would have enabled the employer to consider more minority group applicants. The plaintiffs, three black bricklayers, challenged the hiring practices of Furnco, a mason contractor. Furnco did not have its own work force; for each contract, it hired a job superintendent and the superintendent in turn hired bricklayers in whom he had confidence. Bricklayers were not hired at the job site, nor were applications taken from those who came to the job site. The job superintendent hired principally from an existing list of bricklayers, all white, with whom the superintendent had worked. This list was supplemented by the names of a few black bricklayers obtained from other sources.[31]

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29. *E.g.*, Furnish, *supra* note 2, at 423-25; Ga. Note, *supra* note 2, at 408.

30. 438 U.S. 567 (1978).

31. The reason for this "affirmative" action, according to the court of appeals, Waters v. Furnco Construction Co., 551 F.2d 1085, 1087 (7th Cir. 1977), was Furnco's involvement in another case involving racial discrimination. The general manager suggested hiring the plaintiffs in the other case.

The plaintiffs alleged that Furnco violated Title VII under both the disparate treatment and disparate impact theories, but the district court found in favor of the defendants. The court of appeals reversed, holding in favor of the plaintiffs' disparate treatment claim. The Supreme Court then reversed this determination because the court of appeals had placed too heavy a burden on the defendants to rebut the disparate treatment prima facie case.

Reaffirming the three-step approach of *McDonnell Douglas*, the Court explained that the plaintiffs' evidence established a prima facie case "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[32] When the prima facie case is understood in this light, the Court continued, "it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration."[33] The employer was not required to prove that his employment practices allowed him to consider the most minority employment applications. According to the Court, Title VII did "not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."[34]

Applying *Furnco*'s holding to the issue of alternatives in disparate impact cases, proponents of the limited use of alternatives evidence would argue that the failure to consider alternatives should never affect the adequacy of the defendant's justification. Because Title VII does not impose a duty on the defendant to maximize the hiring of minority employees, the defendant's justification cannot be measured against this maximization standard. Thus, if alternatives are relevant at all, their existence can only go to prove intentional discrimination on the part of the defendant in choosing the challenged selection criterion over another.

Employers can take the *Furnco* holding one step further and argue that the existence of less discriminatory alternatives is irrelevant at any stage of liability analysis. If the employer need not maximize the hiring of minority employees, it makes no difference that another selection criterion would serve the employer's interest equally well with less discriminatory impact.[35] That is, no inference of intentional discrimination may be drawn from the failure to choose an alternative criterion.

The view that evidence of alternatives should not affect the adequacy of the defendant's justification finds further support in *Board of*

32. *Furnco*, 438 U.S. at 577.
33. *Id.*
34. *Id.* at 577-78.
35. *See* Booth & MacKay, *supra* note 2, at 191-92.

Trustees of Keene State College v. Sweeney.[36] The Supreme Court remanded this case to the court of appeals because again, according to the Court, the court of appeals had misunderstood the nature of the evidence necessary to rebut a prima facie case of intentional discrimination against an individual. Sweeney alleged that Keene State College had denied her promotion to professor because of her sex. The court of appeals, affirming the district court's decision in her favor, rejected the defendant's challenge to the sufficiency of the plaintiff's evidence. In discussing the order and nature of proof in a disparate treatment case, the court said that the defendant's burden was to offer evidence that "some legitimate, nondiscriminatory reason accounted for its actions."[37] The court also stated, however, that the defendant was required "to prove absence of discriminatory motive."[38] In a per curiam decision by five justices, the Supreme Court remanded the case because it could not tell which of the two conflicting standards the court of appeals had applied and because of the implication in the lower court's opinion that there is no difference between the two standards.[39] According to the Supreme Court majority, articulating a nondiscriminatory reason suffices to meet a prima facie case of individual disparate treatment.

Proponents of the limited use of alternatives evidence often rely on *Sweeney*'s rationale to support their view.[40] In discussing the difference between "articulating a legitimate nondiscriminatory reason" and "proving the absence of discriminatory motive," the Supreme Court noted that the latter "would make entirely superfluous the third step in the *Furnco-McDonnell Douglas* analysis, since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring contrary proof from the employee as a part of the third step."[41] Applied to disparate impact cases, this rationale suggests that considering alternatives to evaluate the defendant's justification would make the rebuttal stage in *Albemarle* similarly superfluous.

Proponents of the limited use of alternatives evidence also rely on *Sweeney*'s distinction between affirming a nondiscriminatory motive

36. 439 U.S. 24 (1979).

37. Board of Trustees of Keene State College v. Sweeney, 569 F.2d 169, 177 (1st Cir. 1978).

38. *Id.*

39. *Sweeney*, 439 U.S. at 24 n.1.

40. Booth & MacKay, *supra* note 2, at 192; Furnish, *supra* note 2, at 436; Thompson & Christiansen, *supra* note 2, at 600. *See also* Ga. Note, *supra* note 2, at 409 n.172.

41. *Id.* The third step in the *McDonnell Douglas* analysis is the plaintiff's opportunity to show that the stated reasons are a pretext.

and negating a discriminatory one.[42] Proving the existence of a good motive does not necessarily negate the existence of an improper one.[43] The same distinction applies in the context of alternatives in disparate impact cases. Proving that an employment policy is related to job performance and even that some alternatives do not adequately predict job performance does not necessarily mean acceptable alternatives are unavailable. Considering alternatives to evaluate the defendant's justification not only makes *Albemarle*'s rebuttal stage superfluous, it also implicitly places on the defendant the nearly impossible burden of proving the absence of less discriminatory alternatives. Proving the existence of a negative is difficult and *Sweeney* does not require it of defendants in disparate treatment cases. Similarly, defendants in disparate impact cases should not be required to bear this impossible burden.

2. LIMITATIONS OF *FURNCO* AND *SWEENEY*

Although some commentators have argued in favor of a unitary analysis for discrimination cases under Title VII,[44] the analytical

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42. The *Sweeney* dissenters argued that the *McDonnell Douglas* standard raised two questions: whether the defendant had to prove or merely state its argument and whether the argument could be a legitimate reason or had to disprove a discriminatory reason. The dissent also argued that there was no need for a remand in *Sweeney* because, whatever the potential confusion, the defendant's burden was not really at issue. The court of appeals' subsequent decision, Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979), reaffirming the district court's judgment for the plaintiff, supports the dissent's view of the merits of the case. The Supreme Court's unanimous opinion in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), makes clear that the defendant's burden in rebutting a prima facie case of intentional discrimination is one of production, not persuasion.

43. The question of mixed motives arises in non-Title VII cases as well. In Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), the Supreme Court held that the burden was on school officials to show that a teacher who had been fired in violation of his first amendment rights would have been fired even in the absence of that reason. In NLRB v. Transportation Mgmt. Corp., 103 S. Ct. 2469 (1983), the Court upheld the NLRB's "Wright Line" rule for evaluating dual motive discharges under which the employer can avoid a finding of an unfair labor practice if it proves that the discharge would have occurred in any event and was for valid reasons. Thus, the Court recognizes both proper and improper motives can co-exist; the question is whether the adverse action would have occurred without the impermissible motive. *See also* Village of Arlington Hts. v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (factors to consider in evaluating motive). For a discussion of the policies underlying mixed motive decisions, see Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982); Jackson & Heller, *The Irrelevance of the Wright Line Debate: Returning to the Realism of* Erie Resistor *in Unfair Labor Practice Cases*, 77 NW. U.L. REV. 737 (1983).

44. *E.g.*, Booth & MacKay, *supra* note 2, at 191 n.271 (the holdings of *Furnco* and *Sweeney* should be equally applicable in disparate impact cases, but the authors do not explain why); Note, *Proving Title VII Sex-Based Wage Discrimination after* County of Washington v. Gunther, 4 CARDOZO L. REV. 281, 306 n.124 (1983) (the Supreme Court frequently relies on disparate treatment cases to determine the burden of proof in disparate impact cases). *See also* Furnish, *supra* note 2, at 440; Ga. Note, *supra* note 2, at 419.

frameworks, and thus burdens of proof, are different for disparate impact and disparate treatment claims. *Furnco* and *Sweeney* were analyzed appropriately as disparate treatment cases. But, the issue in these cases—whether the defendant made a race- or gender-based decision—is fundamentally different from the issues raised by a disparate impact claim. In a disparate impact claim the issues are whether a facially neutral rule falls more harshly on minority group members and whether use of the rule is unjustified. Additionally, the plaintiff's evidence in a disparate treatment case usually is circumstantial, supporting the inference that the employment decision was in fact based on race or gender. In contrast, the plaintiff's evidence in a disparate impact case is most often direct evidence that a selection criterion disqualifies proportionally more blacks than whites, or more women than men. In either case the evidentiary burden, which shifts to the defendant, is determined by the nature of its defense.

Theoretically, the defendant has at least two choices under either theory: the defendant may either deny the allegation or seek to justify its actions. In disparate treatment cases such as *Furnco*, the employer denies the claim that racial considerations motivated its hiring decisions by offering some nonracial reason for its decisions. Thus, the defendant meets the plaintiff's prima facie case by offering some reason for not drawing the inference suggested by the plaintiff's evidence. The Court's unanimous opinion in *Texas Department of Community Affairs v. Burdine* makes clear that evidence of any lawful reason will suffice to rebut this inference.[45] With disparate treatment claims such as in *Dothard v. Rawlinson*,[46] in which the plaintiffs challenged a state regulation excluding women as prison guards, the defendant chose the second approach. The state admitted that the regulation intentionally discriminated but justified the gender distinction under Title VII's "bona fide occupational qualification" (bfoq) provision.[47]

The defendant can also attack a plaintiff's disparate impact claim in two ways. First, the defendant may deny that the rule has a meaningful adverse impact on the minority group in question by challenging the accuracy or significance of the plaintiff's statistical evidence or by arguing that the selection procedure is not the cause of any adverse im-

45. 450 U.S. 248, 256-58 (1981). The Court also said that the stated reason must be clear and reasonably specific and set forth through admissible evidence. *See also infra* note 84.

46. 433 U.S. 321 (1977).

47. 42 U.S.C. § 2000e-2(e) (1982). The bfoq exception, which allows employers to discriminate if it is "reasonably necessary to the normal operation of that particular business or enterprise," is a narrow one and available only for discrimination based on sex, religion, or national origin—not race.

pact.[48] Second, the defendant may admit the existence of the disparity and the causal effect of the rule yet seek to justify the use of the selection criterion. Only when the defendant seeks to justify the rule does the issue arise concerning the relation of the rule to job performance or to other legitimate business considerations.

Thus, *Furnco* and *Sweeney* concerned issues fundamentally different from those raised by the later stages of proof in disparate impact claims. Denying a claim, as the defendants did in *Furnco* and *Sweeney*, is analytically different, and risks different consequences, than seeking to justify one's actions. And denying a claim of intentional discrimination differs even more from justifying a rule with an adverse impact when good faith is not at issue. Because the defendant advances different arguments in the two situations, it makes no sense to make the substance of proof the same for all disparate impact and disparate treatment cases.[49] The defendant's burden in disparate treatment cases, therefore, should not determine the defendant's burden in disparate impact cases.

Similarly, the Court's rationale in *Furnco* and *Sweeney* should not be extended to disparate impact cases in determining the relevance and purpose of alternatives evidence. The plaintiffs in *Furnco* alleged that the defendant made hiring decisions on the basis of race. The Supreme Court agreed with the court of appeals that the plaintiffs had established a prima facie case of discrimination under *McDonnell Douglas v. Green*. In addition to proving that they had done everything within their power to apply for employment and that they were qualified, the plaintiffs introduced evidence of past exclusions and of the failure of the employer to take applications for employment.[50] To rebut this inference of intentional racial discrimination, the defendant did not have to prove that it "pursued the course which would . . . allow him to consider the *most* employment applications."[51] The Court said that Title VII "does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees"[52] in order to dispel the adverse inference that the hiring decisions were made on the basis of race. Even here, however, the Court did not preclude the consideration of alternative hiring practices altogether. Plaintiffs still may argue that the failure

48. These difficult questions are often litigated, and are discussed elsewhere. *Compare* Lamber, Reskin & Dworkin, *supra* note 10, *with* Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978). *See also* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980); Comment, *Judicial Refinement of Statistical Evidence in Title VII Cases*, 13 CONN. L. REV. 515 (1981).

49. Smith, *supra* note 2, at 392-94.

50. *Furnco*, 438 U.S. at 570-71.

51. *Id.* at 577.

52. *Id.* at 577-78.

to adopt a different, more open hiring practice, such as taking applications or hiring at the job site, is some evidence that the defendant's "legitimate nondiscriminatory reason" is in fact a pretext for discrimination.[53] For example, an employer's practice of taking no applications and hiring graduates only from Goldsboro Christian College[54] would be compelling evidence that the employer intended to hire only whites.[55]

The Court's decision in *Furnco* did not say that the existence of alternative hiring practices is irrelevant. It did not say that under Title VII an employer is never required to change its hiring practices with the effect that a new procedure would maximize hiring minority employees. Instead, the Court said only that proving the unavailability of alternative, minority-maximizing hiring practices is not part of the defendant's burden in rebutting an inference of intentional discrimination based on circumstantial evidence.[56]

In contrast, in a disparate impact case, the question of alternatives arises only after the plaintiff has established the adverse effect of a selection criterion, his prima facie case. Evidence of workable alternatives can then serve to undermine the defendant's attempt to justify the criterion. The existence of alternatives could suggest that the selection criterion is not sufficiently related to the employer's stated goal or that the employer's interest advanced by a particular selection criterion is rela-

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53. *Id.* at 578. The Court's opinion allows this possibility, although such evidence was not sufficient to prove pretext in this case. *See* Waters v. Furnco Construction Co., 688 F.2d 39 (7th Cir. 1982).

54. Goldsboro was one of two schools who challenged the Internal Revenue Service's decision to terminate the schools' status as tax exempt organizations under the Internal Revenue Code (§ 26 U.S.C. 501(c)(3) (1982)), in Bob Jones v. United States, 461 U.S. 574 (1983), because the schools admittedly followed racially discriminatory policies.

55. The inevitability of such an inference depends on many factors, such as the normal hiring practices in an industry or the reasons for a limited or specialized pool of applicants. For example, a university may limit hiring of assistant professors to those from the top 10 or 15 Ph.D. programs. While this limitation excludes consideration of those from Ph.D. programs at most predominantly black institutions, it does not exclude all blacks. The question is whether the selectivity is legitimate, whether there are real differences in the quality of schools.

56. Standing alone, *Furnco* is a difficult case because of the Supreme Court's brusque treatment of the court of appeals' decision, the defendant's separate hiring schemes for blacks and whites, and the implication that the plaintiffs could not maintain a disparate impact challenge as a matter of law, rather than because of the facts. The meaning of the case is made easier by the Court's subsequent unanimous decision in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (the defendant's burden in rebutting a claim of individual disparate treatment is the burden of production, not persuasion). Also, a fairer reading of the court of appeals' decision in *Furnco* might have avoided some confusion. The court did not require *Furnco* to adopt hiring procedures that maximize hiring minority employees as a duty of Title VII. Rather the court was attempting a compromise between the company's whites-only list and the plaintiffs' demand that the company hire at the employment site. Waters v. Furnco Construction Corp., 551 F.2d 1085, 1088-89 (7th Cir. 1977).

tively uncompelling. This evidence is relevant because the conceptual definition of disparate impact includes the employer's justification as well as evidence of adverse impact.

Nor should the Court's rationale in *Sweeney* determine the significance of showing that acceptable alternatives exist. In *Sweeney*, the Court rejected the notion that the defendant must prove the "absence of discriminatory motive"[57] in order to rebut an individual's claim of disparate treatment. It did so for two reasons. First, this standard would make the third step of the *McDonnell Douglas* analysis superfluous because the defendant would have to prove what *McDonnell Douglas* contemplated the plaintiff would prove.[58] Second, proving the absence of discriminatory motive would impose on the defendant a substantially different, heavier burden than *McDonnell Douglas* warrants.

In the case of the former, the Court's concern in *Sweeney* was not the number of stages in the analysis; rather, the Court was concerned with the consequence of eliminating the rebuttal stage. In individual disparate treatment cases, eliminating the rebuttal would alter significantly the defendant's burden. This different burden would require the defendant to prove that the reason for its action was nondiscriminatory, rather than simply to offer another explanation for its action. It would elevate the plaintiff's prima facie case to the equivalent of a factual finding of discriminatory refusal to promote, rather than simply raise an inference. It was the imposition of these substantively different burdens that the Court in *Sweeney* rejected. The defendant in *Sweeney*, like the defendant in *Furnco*, had merely responded to the plaintiff's prima facie case with some reason to dispel the inference suggested by the plaintiff's evidence and did not disprove the plaintiff's prima facie case.

The view that alternatives are relevant in judging the adequacy of the defendant's justification in disparate impact cases does not require the defendant to prove what *Albemarle* contemplated the plaintiff should prove.[59] Evidence establishing the plaintiff's prima facie case supports a factual finding that the challenged selection criterion has an adverse impact on the minority group in question. If the defendant attempts to justify this criterion, the defendant's burden is in the nature of an affirmative defense.[60] The effect of not limiting the use of alternatives evidence to the plaintiff's rebuttal does not necessarily change these substantive burdens or who bears the burden of persuasion on the alter-

57. *Sweeney*, 439 U.S. at 25.

58. *Id.* at 24 n.1.

59. *See supra* text accompanying notes 6-18.

60. *See, e.g.*, Smith, *supra* note 2, at 392-94. *Contra* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1333 (3d Cir. 1981).

native issue. The argument that plaintiff's opportunity for rebuttal somehow limits the utility of alternatives evidence to proving intentional discrimination assumes some independent significance to a three-step analysis. Surely the number of steps in an analysis is not the point. The order of proof should be allocated in light of the issues, evidence, and burdens of proof, not vice versa.

The second concern of the Court in *Sweeney* was to avoid imposing the burden of proving the absence of discriminatory motive. Proving the absence of discriminatory motive is a more onerous burden than proving the existence of a proper one. That is, even if the defendant proved the existence of a proper motive, such proof would not necessarily negate the existence of an improper motive.[61] The Court's rejection of both such burdens as an appropriate formulation of the defendant's burden in individual disparate treatment cases makes clear that the defendant's burden in such cases is one of denial, not affirmative justification.[62]

Most courts also agree that, under the disparate impact theory, the defendant need not prove the absence of less discriminatory alternatives.[63] It is not necessary, however, to limit consideration of alternatives altogether in order to avoid the burden of proving the negative. Considering alternatives in evaluating the defendant's justification does not in itself impose on the defendant the burden of proving the absence of less discriminatory alternatives. Only if the existence of alternatives were dispositive would the effect be to require the defendant to prove the absence of alternatives to avoid liability. The suggestion that alternatives evidence is relevant to more than proving intentional discrimination does not make the evidence dispositive of the defendant's liability. While alternatives evidence can be used to evaluate the relationship between the selection criterion and the employer's purpose, or to judge the importance of the employer's interest in a particular selection criterion, this evidence is merely relevant, not dispositive.[64]

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61. *See supra* notes 42-43.

62. Contrary to the suggestion of Booth & Mackay, *supra* note 2, *Sweeney* does not discuss the defendant's burden of justification in disparate impact cases. The authors cite the portion of the court of appeals' decision where it talks about proving the absence of discriminatory motive, but proving the absence is clearly not "in connection with proof of job-relatedness." Booth & MacKay, *supra* note 2, at 192 n.275.

63. *See, e.g.*, Wright v. Olin Corp., 697 F.2d 1172, 1191 n.29 (4th Cir. 1982); Chrisner v. Complete Auto Trans., Inc., 645 F.2d 1251, 1260 (6th Cir. 1981); Contreras v. City of Los Angeles, 656 F.2d 1267, 1271-72 (9th Cir. 1981); Guardians Ass'n v. Civil Scrv. Comm'n, 630 F.2d 79, 110 (2d Cir. 1980).

64. This point is similar to Ely's in Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). He argues that the reason courts traditionally were reluctant to inquire into legislative motivation was the assumption that motive was dispositive—it "invalidate[d] laws which by their language and their effects fully satisfy the Constitution's various

Thus, *Sweeney* clarifies that the defendant's burden in individual disparate treatment cases is merely to rebut the adverse inference suggested by the plaintiff's prima facie case. The Court's concern about not imposing undue burdens on the defendant must be understood in this limited context. In justifying a selection criterion that has an adverse impact, defendants advance a fundamentally different argument: specifically, that notwithstanding the selection criterion's adverse impact, the criterion is legitimate because it relates to job performance or other important business considerations. At most, *Sweeney* supports the notion that, when the plaintiff in a disparate impact case uses less discriminatory alternatives to prove that the defendant intentionally discriminated, the burden is on the plaintiff.[65] Determining who has the burden of proof, however, does not determine the significance of the evidence.

B. New York City Transit Authority v. Beazer

The Court's decision in *New York City Transit Authority v. Beazer*[66] is critical to the question of the relevance of alternatives evidence. The Transit Authority, operating the subway system and certain bus lines in New York City, had a policy against employing persons who used narcotic drugs. Methadone, used in the treatment of heroin addiction, was considered a narcotic for purposes of the Authority's rule. The plaintiffs, representing all persons who had been or would have been subject to the rule, alleged that the application of the employer's rule to methadone maintenance program participants was unconstitutional as a violation of the fourteenth amendment's equal protection clause, as well as a violation of Title VII and Section 1981.[67]

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tests of legitimacy." *Id.* at 1207. Once it is clear that an official's state of mind simply triggers judicial scrutiny and demands a justification, the reason for not inquiring into motivation disappears.

One could also argue that if the burden were to prove the nonexistence of alternatives, that burden is not so onerous. For example, several courts have suggested that the defendant can make a preliminary demonstration that other alternatives are not feasible or do not serve the same interest of the employer. The plaintiff can then offer in evidence alternatives the defendant failed to consider. *See, e.g.*, Contreras v. City of Los Angeles, 656 F.2d 1267, 1290 n.4 (9th Cir. 1981) (dissenting opinion); Chrapliwy v. Uniroyal, 458 F. Supp. 252, 270 (N.D. Ind. 1977); Uniform Guidelines: Questions and Answers, *supra* note 11, at 12,003.

65. *Albemarle*, 422 U.S. at 425.

66. 440 U.S. 568 (1979).

67. 42 U.S.C. § 1981 (1982), providing that "all persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens," prohibits employment discrimination based on race. *See also* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). It is less clear that § 1981 prohibits discrimination on the basis of gender. Runyon v. McCrary, 427 U.S. 160, 169 (1976) (§ 1981 does not address sex segregation in schools) (dictum); Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313 (1977).

The basis of the equal protection challenge was not that the methadone rule implied racial discrimination, but rather that the blanket exclusion of all users from all jobs was not rationally related to any legitimate interest of the defendant.[68] The district court found the employer's policy unconstitutional, and the finding subsequently was affirmed by the court of appeals.

In a supplemental opinion issued nearly a year later the district court ruled that the blanket exclusion also violated Title VII, thereby permitting the court to award attorney's fees to the plaintiffs.[69] The court concluded that the blanket exclusion had an adverse impact on blacks and Hispanics.[70] Because the court already had determined in its constitutional analysis that the rule was not rationally related to any business need of the Transit Authority,[71] such impact was not justified according to Title VII standards.[72]

Criticizing the lower courts for deciding the constitutional issues before the statutory one, the Supreme Court reversed the district court's determinations on both issues. The Court characterized the plaintiffs' Title VII statistical showing as "at best" weak and then stated that the prima facie case was "assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is 'job-related.'"[73] According to the Supreme Court, the district court found that the blanket exclusion of all methadone users signifi-

68. Thus, the plaintiffs did not allege that the adverse impact of the no-drug rule was the equivalent of racial discrimination in violation of the fourteenth amendment's equal protection clause, an argument rejected by the Supreme Court in Washington v. Davis, 426 U.S. 229 (1976), nor did the district court treat drug users as a suspect class, 399 F. Supp. 1032, 1057-58 (S.D.N.Y. 1975). In rejecting the lower courts' findings of unconstitutionality, however, the Supreme Court in *Beazer* stated that the lower courts scrutinized the Transit Authority's rule too closely, *Beazer*, 440 U.S. at 592-94. *See also* Ill. Note, *supra* note 2, at 208 n.166 (although district court used the phrase "no rational relationships," the court exercised a more exacting scrutiny).

69. The Title VII decision was necessary for the attorney's fees award until Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)), which provides for attorney's fees to prevailing parties on constitutional claims such as those under § 1983.

70. New York City Transit Authority v. Beazer, 414 F. Supp. 277, 278-79 (S.D.N.Y. 1976).

71. *Id.*

72. Once the district court found an adverse impact on blacks and Hispanics, the Title VII violation was clear because a rule that cannot be justified under constitutional standards cannot be justified under Title VII. In contrast, finding an act constitutionally permissible does not settle the question of whether a statutory standard is violated. In Board of Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 408-21 (1978) (Stevens, J. dissenting), four justices did not reach the question of the constitutionality of the medical school's special admission program, but found it violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982), prohibiting racial discrimination in federally funded programs.

73. *Beazer*, 440 U.S. at 587.

cantly served the Transit Authority's interests in safety and efficiency.[74] Because the *Griggs* standard only required that a rule bear a "manifest relationship to the employment in question,"[75] the nexus suggested by the district court was sufficient. The Supreme Court then said that "[t]he District Court's express finding that the rule was not motivated by racial animus foreclose[d] any claim in rebuttal that it was merely a pretext for intentional discrimination."[76] Finally, the Court concluded that the Transit Authority's blanket exclusion of methadone users was rationally related to the Authority's interest in a capable and reliable work force, thus constitutionally permissible.

1. THE BROAD VIEW OF *BEAZER*

Beazer provides the clearest evidence and most persuasive argument that, if relevant at all, evidence of alternatives is relevant only to establish intentional discrimination. *Beazer* has several implications. First, since *Beazer* was argued and analyzed as a disparate impact case, there is no doubt about its applicability to future disparate impact cases, as there may be with the two disparate treatment cases, *Furnco* and *Sweeney*, discussed above.

Second, the Court in *Beazer* clearly equated the rebuttal stage of disparate impact analysis with proof of discriminatory motivation. Because all the parties and the lower courts had conceded that the Transit Authority's policy was not adopted with a racially discriminatory purpose, the Court concluded that all plaintiffs' rebuttal arguments were foreclosed.

Third, the Court did not consider evidence of alternatives in determining either that the defendant met its burden or that the plaintiffs failed to meet theirs. The Court did not measure the defendant's justification in terms of the availability of alternative procedures that also served the employer's interest but with less adverse impact. Alternatives existed, as the district court found, but they played no part in the Supreme Court's determination. Thus, the Court seemed to reject the idea that evidence of alternatives can aid in judging the adequacy of the defendant's justification.

Finally, *Beazer* suggests a diminution of the defendant's burden of proof.[77] In the district court the defendant admitted that the challenged

74. *Id.* at 587 n.31. Given the district court's conclusion that the no-drug rule was not rationally related to any interest of the employer, it is clear that the district court did not conclude what the Supreme Court said it did.

75. *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

76. *Beazer*, 440 U.S. at 587.

77. Furnish, *supra* note 2, at 439.

rule did not result from a reasoned policy decision and stipulated that it never studied the ability of methadone users to perform jobs at the Transit Authority.[78] The defendant also stipulated that one reason for the rule was fear of adverse public reaction if it were generally known widely that the Transit Authority employed persons with a history of drug abuse, including persons participating in methadone maintenance programs.[79] The defendants proved only that some, but not all or substantially all, participants in methadone maintenance programs were unemployable by the Transit Authority.[80] The majority opinion in *Beazer* stated that "the record thus demonstrates" job-relatedness.[81]

In finding the Transit Authority's rule "job-related," the Court imposed no meaningful burden on the employer. While the record might be read as supporting the Court's conclusion about some methadone maintenance participants, the Court's statement was based primarily on its *assumptions* about the employability of most methadone maintenance participants. Such assumptions were far less than the proof required by the Supreme Court's previous disparate impact cases.[82] Because the Court held that the rule was justified on this limited evidence, the decision in *Beazer* can be read to suggest that the defendant's burden in disparate impact cases differs little from the "articulate, but not prove" burden in disparate treatment cases.[83] The burdens would not be exactly the same, since the defendant's burden in disparate treatment cases is to articulate a nondiscriminatory, rather than a reasonable, basis for its actions. But the point is that the plaintiff's prima facie case would be rebutted without evidence that persuaded the court.[84]

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78. *Beazer*, 440 U.S. at 609 n.15 (White, J. dissenting).

79. *Id.*

80. *Id.* at 577-78.

81. *Id.* at 587 n.31.

82. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977). *See also* Furnish, *supra* note 2, at 431-32.

83. The reference is to the defendant's burden in McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973) (articulate some legitimate, nondiscriminatory reason). Booth & MacKay, *supra* note 2, at 192-93 say this characterization of the defendant's burden of proof is a holding in *Beazer*. *Accord* Thompson & Christiansen, *supra* note 2, at 600. Since the Court purports to judge the Transit Authority's rule by traditional standards, this diminution is only implied. *Cf.* Ga. Note, *supra* note 2, at 414-15 (while the opinion in *Beazer* is susceptible to such a reading, the opinion is not conclusive because of the weakness of the plaintiff's statistics and the Court's failure to focus on the defendant's burden); Comment, *supra* note 2, at 918 (while the Court seemed to apply a lenient standard, it did not make explicit "the parameters of the defense").

84. The argument is that *Beazer* suggests lowering the burden of proof to one of production, rather than persuasion. The suggested similarity does not extend to the kind of reason offered by the defendant. While the Supreme Court has not directly addressed the question of what constitutes a legitimate reason in individual disparate treatment cases, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), strongly suggests that "legitimate" simply means not linked to race or gender. C. SULLIVAN, M. ZIMMER & R. RICHARDS, *supra* note 16, at 62. *Compare*

2. ANOTHER READING OF *BEAZER*

The common reading of *Beazer* is outlined above. The Court upheld the validity of the Transit Authority's exclusion rule on the basis of the Court's assumptions rather than the defendant's proof of the rule's relationship to job performance. The Court did not consider evidence of alternatives in deciding whether the defendant met its burden or the plaintiffs failed to meet theirs. Finally, the Court equated the plaintiff's rebuttal with proof of discriminatory motive, foreclosing consideration of the plaintiff's evidence that less discriminatory alternatives were available to the defendant. According to this view, the defendant's burden of proof in disparate impact cases is nearly identical to that in disparate treatment cases.

Certainly the Court could have explained its decision more adequately, but *Beazer* need not be read as signaling a substantial alteration of the disparate impact theory of liability. The district court apparently treated the Title VII issue as an afterthought.[85] The Supreme Court's opinion dealt summarily with the defendant's burden of proof and the plaintiff's rebuttal in one short paragraph and one footnote.[86] Limiting the utility of alternatives evidence, however, was not argued

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Furnish, *supra* note 2, at 437 (the employer's reason must have a connection with the business goal of securing a competent and trustworthy workforce) *with* Smith, *supra* note 2, at 379 (the issue in disparate treatment cases is not whether the defendant is able to prove a business reason for a particular action, but rather whether the defendant intentionally discriminated). In contrast, disparate impact analysis restricts justifications to those that are related to business interests. The scope of permissible justifications is discussed *infra* text accompanying notes 135-59.

The Third Circuit has adopted this minimal burden for disparate impact cases. NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981). In *Medical Center*, plaintiffs challenged the medical facility's decision to relocate in the suburbs under Title VI of the Civil Rights Act of 1964, alleging the plan had an adverse impact on minority group members. In rejecting the claim, the court relied entirely on its understanding of Title VII cases. The court said it was illogical to impose a heavier burden on a defendant in disparate impact cases than in disparate treatment cases because the allegation of intentional discrimination is more serious. Moreover, reducing the defendant's burden in disparate impact cases is consistent with the rationale of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), which can be read to imply a symmetry between the approach to disparate impact and disparate treatment cases. *Medical Center*, 657 F.2d at 1335-36. According to the court, "uniformity in the procedural aspects of impact and intent cases is highly desirable and should not be sacrificed on dubious theories. . . . Although one need not worship at its shrine, symmetry is not always sinful." *Id.* at 1336. The court, however, misconceived the nature of the disparate impact prima facie case and the purpose of the defendant's response. *See supra* text accompanying notes 44-49. *Cf.* Kirby v. Colony Furniture Co., 613 F.2d 696, 703 & n.5 (8th Cir. 1980) (author of opinion says defendant's burden is at least one of producing evidence, and he would say also one of persuasion, suggesting controversy).

85. *Beazer*, 440 U.S. at 582 (the district court apparently decided the Title VII claim only to award attorney's fees).

86. *Id.* at 587 & n.31.

by the defendant, nor did the Court focus on the issue.[87] If one does not try to make *Beazer* more difficult than it is, or stand for more than it does, one sees several reasons why the result in *Beazer* was not dependant upon applying defendant's burden of proof in disparate treatment cases to disparate impact cases.

First, the parties did consider evidence of alternatives. In its brief, the defendant stated that "whether the employment policy in question is a business necessity includes consideration of the alternative practices available to the employer."[88] The defendant argued that the only alternative to the blanket exclusion was individualized determinations of employability. While other cases have required defendants to use individualized determinations,[89] *Beazer* did not involve the simple administration of a strength test or the validity of a standardized intelligence test. Without the rule, the employer would have been required to distinguish among various kinds of methadone users and to monitor the treatment of those methadone users it did employ. Moreover, an underlying issue in *Beazer* was the efficacy of methadone maintenance programs for treating heroin addiction. One could conclude that the Court considered evidence of alternatives but rejected the alternative as unworkable.[90]

Second, the Court may have upheld the Transit Authority's blanket exclusion because it recognized the Authority's public image as a legitimate, although not job-related, interest of the employer. The Transit Authority stated that one reason for the rule was its fear of adverse public reaction if it were generally known that the Authority employed persons with a prior history of drug abuse, including persons participating in methadone maintenance programs.[91] In the dissent's view, the Transit Authority was not the type of official body that nor-

87. This inadequate treatment suggests that the Court was eager to reach the constitutional issue in order to reverse the lower courts' rulings in favor of the plaintiffs. The Court criticized the lower courts for their eagerness to reach the constitutional issues. *Id.* at 582-83. For a discussion of the constitutional aspects of *Beazer*, see Note, *The Employment Interest and an Irrational Application of the Rationality Test:* New York City Transit Authority v. Beazer, 51 U. COLO. L. REV. 641 (1980).

88. Brief for Petitioners at 53, New York City Transit Authority v. Beazer, 440 U.S. 568 (1979).

89. *E.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight is not a legitimate proxy for strength); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (standardized intelligence tests are not useful in determining who to hire or promote).

90. A similar conclusion is reached in cases alleging age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982). In Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 237-38 (5th Cir. 1976), the court upheld the company's rule placing a maximum age of 40 on new bus drivers. The court acknowledged that individuals age at different rates but found that individual qualifications cannot be reliably determined. *Accord* Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974).

91. Brief for Petitioners at 7, *Beazer*.

mally makes such judgments to which it may reasonably expect the Court to defer.[92] The majority, however, did defer to the Transit Authority's judgment in deciding that the rule was constitutional.[93]

One may certainly question whether an interest in image is a legitimate reason to sustain a rule that adversely affects blacks and Hispanics. Under Title VII, the question is whether the notion of "business necessity" should include and protect such interests of public employers. One reading of *Beazer* suggests that such non-job-related interests are legitimate, at least given the total employment picture at the Transit Authority.[94] Arguably, the Court approved the Authority's blanket exclusion because the Court was not prepared to require employment of drug addicts, including those dependent on methadone, by an industry whose primary interest is the safe transportation of the public.[95]

Finally, although the Court clearly equated the plaintiff's rebuttal with proof of discriminatory motive, the Court's decision did not make evidence of alternatives irrelevant. After summarily finding the Transit Authority's exclusion rule "assuredly job-related," the Court said that "the District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination."[96] This statement is clearly right. If the parties agree or the Court decides that a rule is not racially motivated, the plaintiff can hardly argue later that it is. The Court did not, however, say that pretext is the only relevant issue on rebuttal. If the Court considered alternatives to the blanket exclusion but rejected them as unworkable, then the Court's limitation of the plaintiff's rebuttal is even more understandable. The Court was merely stating the obvious: if alternatives are considered but rejected, the plaintiff can make no further argument based on their existence; a finding of fact that a rule was not racially motivated similarly precludes further argument that it was.[97]

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92. *Beazer*, 440 U.S. at 609 n.15 (White, J., dissenting).

93. *Id.* at 592-94.

94. Blacks and Hispanics were not underrepresented in the Transit Authority's workforce. Forty-six percent of Authority's employees were black and Hispanic, and blacks constituted 15%, Hispanics 5%, of the relevant labor market. Brief for Petitioners at 52-53, *Beazer*. *See also* Ga. Note, *supra* note 2, at 414. The Supreme Court subsequently rejected the argument that this "bottom line" excuses the employer from proving the job-relatedness of a selection procedure, at least in the context of the need to validate a written test. *See* Connecticut v. Teal, 457 U.S. 440 (1982), discussed *infra* text accompanying notes 127-34.

95. Smith, *supra* note 2, at 399.

96. *Beazer*, 440 U.S. at 587.

97. *Cf.* Furnish, *supra* note 2, at 424. (*Beazer* "leaves little room to argue that the imposition of a rebuttal burden *only* serves to give the plaintiff an opportunity to undercut the defense of job-relatedness. . . ." (emphasis added). This statement is also right. Plaintiff's rebuttal is not a limited opportunity to make only one argument. Depending on the facts and the defenses argued,

Thus, the Court's decision in *Beazer* is consistent with, rather than an alteration of, the traditional disparate impact theory of liability. One could, of course, disagree on the merits with the suggested conclusions. For example, one could argue that individualized determinations were possible at the Transit Authority or that some other alternative existed, that "image" was not a legitimate interest, or that the Court's statement limiting rebuttal was too sweeping. These disagreements, however, differ significantly from suggestions that *Beazer* signals a diminished standard of liability for the defendant.

Clearly, there is much to criticize in the Court's opinion. The Court incorrectly characterized the district court's record as showing that the blanket exclusion of all methadone users from all jobs significantly served the Transit Authority's interests in safety and efficiency. In fact, in reaching its decision on the constitutional issues, the district court stated that "the blanket exclusionary policy against persons on methadone maintenance is *not rationally related to the safety needs, or any other needs*, of the [Transit Authority]."[98] The district court reiterated this conclusion in its Title VII opinion.[99] Contrary to the Supreme Court's characterization, the district court simply did not find the required nexus between the exclusion rule and the jobs at the Transit Authority.

Furthermore, the Court disposed of the Title VII issue on the merits rather than remand the case to the court of appeals.[100] The majority concluded that it was appropriate to reach the merits in this case because the Title VII issue was fully litigated in the district court, involved the application of settled legal principles to uncontroversial facts, and had been carefully briefed in the Supreme Court.[101] It is difficult, however, to accept the characterizations that the facts are uncontroversial, the legal issues settled, or the attention paid to the issues careful, if the Court was substantially altering the nature of disparate impact liability in one paragraph and one footnote. While the Court should have remanded the case for reasons of judicial economy and efficiency, it had the authority to decide the Title VII claim. The failure to remand, however, supports the view that the Court did not intend to alter the disparate impact theory of liability.[102]

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rebuttal can provide different opportunities. Moreover, rebuttal is not the only appropriate time to raise alternative selection criteria.

98. *Beazer*, 399 F. Supp. 1032, 1036 (S.D.N.Y. 1975) (emphasis added).

99. *Beazer*, 414 F. Supp. 277, 278-79 (S.D.N.Y. 1976).

100. As the dissent pointed out, the Court's common practice in this kind of situation is to remand the unexplored basis for relief. *See Beazer*, 440 U.S. at 597 (White, J., dissenting).

101. *Id.* at 583 n.24.

102. *Contra* Maltz, *supra* note 2, at 351-52 (failure to remand means alternatives are only relevant to intent). *See also*, Note, *Employment Discrimination—Plaintiff's Prima Facie Case and*

Moreover, the Court's treatment of the defense burden perhaps was not critical to its decision for two reasons independent of the issue of alternatives. First, the plaintiff's statistical evidence was weak. The plaintiffs relied on evidence showing that blacks and Hispanics were overrepresented in methadone maintenance programs compared to their proportions in the population. The majority characterized the statistics used for this comparison as "virtually irrelevant" and incomplete.[103] More importantly, the overrepresentation of blacks and Hispanics in methadone programs, even if based on more refined statistics, provided only tangential support for the claim that the Transit Authority's no-drug rule excluded disproportionately more blacks and Hispanics than Anglos. The dissent argued that the Court could infer that overrepresentation in methadone maintenance programs would lead to a higher rate of exclusion from Transit Authority jobs.[104] But, the plaintiffs' statistics merely suggest disparate impact. At most, these statistics were indirect evidence and supported an inference that the court was not required to draw.[105] The practical problem suggested by the plaintiffs' evidence in *Beazer* is that inaccurate statistical comparisons obscure the "artificial, arbitrary, and unnecessary barriers to employment"[106] created by the defendant's rule.

Second, *Beazer* is more appropriately characterized as a challenge to the exclusion of present and former drug addicts from employment. As such, the case raises issues concerning section 504 of the Rehabilitation Act of 1973,[107] which prohibits discrimination on the basis of handicap in federally assisted programs. The suggestion that the real issue in *Beazer* is not racial discrimination but rather handicap discrimination does not mean that the outcome of a section 504 challenge is obvious or that the decision would have been easier.[108] Casting *Beazer* as a handicap discrimination case does, though, provide a perspective for the Court's stingy interpretation of Title VII. Although a blanket rule disqualifying methadone maintenance participants would seem to violate section 504, the Court had not yet held that section 504 applied to employment discrimination.[109]

Defendant's Rebuttal in a Disparate Impact Case, 54 TUL. L. REV. 1187, 1197 (1980) (failure to remand is inconsistent with Court's previous Title VII cases).

103. *Beazer*, 440 U.S. at 586.

104. *Id.* at 598-602.

105. Lamber, Reskin & Dworkin, *supra* note 10, at 595, 597.

106. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

107. 29 U.S.C. § 794 (1982).

108. The plaintiffs argued the effect of § 504 was to moot the case. *Beazer*, 440 U.S. at 580-81.

109. The Court only recently held that § 504 applied to discrimination in employment. Consolidated Rail Corp. v. Darrone, 104 S.Ct. 1248 (1984). Moreover, the Court declined to give §

Finally, a more fundamental reason to resist reading *Beazer* as signaling a lower standard of Title VII liability lies in the basic difference between the disparate impact and disparate treatment theories. The primary reason advanced for reading *Beazer* as lowering the disparate impact standard is the similarity between the disparate impact and disparate treatment defenses suggested by the Court in *Beazer*. If the decision is interpreted as allowing the Transit Authority's unjustified, overly broad rule to stand in the face of significant adverse impact, the defendant's burden is nothing more than to articulate a legitimate, nondiscriminatory reason for the hiring practice.[110] So characterized, the burdens of proof and the utility of alternatives evidence are basically the same in disparate impact and disparate treatment cases. But the Supreme Court continues to stress that disparate impact and disparate treatment are conceptually and fundamentally different theories of discrimination.[111] Why should we read *Beazer* to suggest that they are not? There ought to be a good reason for accepting *Beazer*'s implication of merger, and the Court did not give us one. Had the Court intended a drastic change in the disparate impact theory, it likely would have made the change explicit and would have adequately explained it.[112] If we resist the implication of merger, *Beazer* neither diminishes the burdens of proof nor changes what evidence is relevant. Furthermore, if the analogy to disparate treatment is inaccurate but one maintains that *Beazer* signals a new standard, the new standard must be that cost or change sufficiently justifies a rule that has an adverse impact on minority group members. Any employer interest can meet this standard. At a minimum, the Supreme Court's decision in *Griggs* rejected this cost justification. Thus, without the analogy to disparate treatment or the

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504 its first judicial construction at this stage of the litigation, given that the original action in *Beazer* was brought before § 504 was enacted. For a general discussion of liability under § 504, see Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984); Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness*, 97 HARV. L. REV. 997 (1984); Note, *Death Knell for* Trageser: *Section 504 of the Rehabilitation Act in Light of* North Haven, 85 W. VA. L. REV. 371 (1983).

110. Belton, *supra* note 18, at 1246-47; Furnish, *supra* note 2, at 439.

111. *See infra* text accompanying notes 127-34.

112. The Court has done so on other occasions involving Title VII controversies. In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court explicitly reversed the unanimous view of the courts of appeals that § 703(h), exempting bona fide seniority systems from the prohibitions of Title VII, did not protect seniority systems that perpetuated the effects of past racial discrimination. In General Electric v. Gilbert, 429 U.S. 125 (1976), the Court explicitly reversed the unanimous view of the courts of appeals that discrimination on the basis of pregnancy in fringe benefit programs was a violation of Title VII. Whether the Court adequately explained its reasoning is questionable, but the Court at least attempted to do so. *See The Supreme Court, 1976 Term*, 91 HARV. L. REV. 241, 242-43, 256-58 (1977).

merger of the theories, *Beazer* is a difficult case about former drug addicts, a case with faulty evidence and a bad track record.

C. Additional Support from Other Supreme Court Decisions

The view that evidence of alternatives is not limited to proving intentional discrimination finds further support in two other Supreme Court cases, *Dothard v. Rawlinson*[113] and *Connecticut v. Teal.*[114] In *Dothard v. Rawlinson* the plaintiff challenged the validity under Title VII of Alabama's minimum height and weight requirements for prison guards. In upholding the district court's judgment in favor of the plaintiffs, the Court described the latter stages of the disparate impact analysis: "Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relation to the employment in question.'"[115] If the employer proves that the challenged requirements are job-related, the plaintiff then may show that other selection devices without a similar discriminatory effect also would serve the employer's legitimate interest in "efficient and trustworthy workmanship."[116] Although quoting *Albemarle Paper Co. v. Moody*, the Court did not repeat that the purpose of such a showing would be to prove "pretext" or intentional discrimination.[117]

Moreover, in discussing the defendant's failure to meet its burden of proof, the Court noted that alternative hiring practices were available to the defendant. The defendant argued that height and weight have a relationship to strength and that a "sufficient but unspecified amount of [strength] is essential to effective job performance" of prison guards.[118] The Court rejected this argument for two reasons. First, the defendant failed to offer any evidence correlating height and weight with strength to justify the specific standard. Second, the Court expressed suspicion that strength was the important job quality it was asserted to be, noting that the defendant's purpose could have been

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113. 433 U.S. 321 (1977).

114. 457 U.S. 440 (1982).

115. *Dothard*, 433 U.S. at 329 (quoting *Griggs*, 401 U.S. at 432).

116. *Id.*

117. Justice Rehnquist's opinion for the three concurring justices also repeated the three-part analysis in *Albemarle* without limiting the purpose of alternatives evidence. *Id.* at 339. Justice Rehnquist said that if the defendant had argued the job qualification was the appearance of strength, rather than actual strength, the employer could have prevailed. He also stated that the defendant's burden is one of production, rather than persuasion. *Id.* at 339-40. Subsequent disparate impact opinions of the Court do not endorse this statement. *See also infra* note 139. *Cf.* Furnish, *supra* note 2, at 428; Ga. Note, *supra* note 2, at 410-11.

118. *Dothard*, 433 U.S. at 331.

achieved by "adopting and validating a test for applicants that measures strength directly."[119]

Those who argue for a restricted use of alternatives see *Dothard* as an exception and thus dismiss its importance.[120] With a more modest reading of the other cases—such as *Furnco, Sweeney*, and *Beazer*—*Dothard* is not an exceptional case but is merely the continuation of a pattern: evidence of alternatives can be relevant in disparate impact cases in various ways and is not limited to proving intentional discrimination on the part of the defendant.[121]

The real limitation of *Dothard* is the Court's finding that a more obviously discriminatory rule was permissible. During the pendency of the case, Alabama's Board of Corrections adopted regulation 204, which segregated prison guard jobs on the basis of sex. Under the regulation, only men were qualified to be prison guards in contact positions in all-male maximum security institutions. The Court upheld the regulation as within the "bona fide occupational qualification" exception of Title VII.[122] According to the Court, the particular factual circumstances of violence and disorganization in the state's prisons meant that a woman's ability to maintain order as a prison guard would be directly reduced by her womanhood.[123]

The adoption of regulation 204 during the litigation suggests that the purpose of the height and weight requirement was, in fact, to exclude as many women as possible from the job of prison guard. When the state's covert attempt became vulnerable, it simply made the exclusion overt. The existence of this discriminatory motive, although acceptable under Title VII according to the Court, supports the argument that the distinctions between disparate impact and disparate treatment are not as great as the underlying theories suggest.[124] With the decision

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119. *Id.* at 332.

120. *E.g.*, Maltz, *supra* note 2, at 351-52 & n.38; Ill. Note, *supra* note 2, at 204 n.144.

121. *Dothard* is an exceptional case in another sense, representing the broadest application of the disparate impact theory. *Dothard* involved several facts that distinguish it from other disparate impact cases decided by the Court. It involved gender, not racial, diserimination; the selection criterion was objective but not a scored pencil and paper test; the Court found the disparate impact definition of discrimination in the general provisions prohibiting discrimination, not in an interpretation of § 703(h) concerning professionally developed tests. In outlining the burdens of proof, the Court clearly distinguished between the disparate impact and treatment theories of discrimination and did not rely on or cite McDonnell Douglas v. Green, 411 U.S. 792 (1973).

122. *Dothard*, 433 U.S. at 336. *See also supra* note 47 and accompanying text for discussion of the "bfoq" exception.

123. The implications of the Court's substantive conclusion have been severely criticized. *See, e.g.*, Note, *Title VII, Sex Discrimination and a New Bona Fide Occupational Qualification—How Bona Fide?*, 30 U. FLA. L. REV. 466 (1978); Note, *Sex as a Bona Fide Occupational Qualification: Defining Title VII's Evolving Enigma, Related Litigation Problems, and the Judicial Vision of Womanhood After* Dothard v. Rawlinson, 5 WOMEN'S RTS. L. REP. 107 (1979).

124. Furnish, *supra* note 2, at 442.

in *Dothard*, all cases in which the Court applied the disparate impact theory had evidence or a history of intentional discrimination underlying them.[125] Consequently, one could have surmised that disparate impact was merely a different method of getting to the elusive question of discriminatory motive.[126]

The Supreme Court's most recent disparate impact case, however, has no hint of intentional discrimination against minority group members. In *Connecticut v. Teal*,[127] the plaintiffs challenged Connecticut's selection process for welfare supervisors. The state's promotion scheme required, first, passing a written test and, second, consideration of work experience, recommendations, and seniority. Evidence showed that disproportionately more blacks than whites failed the test but that disproportionately more blacks than whites were promoted. The plaintiffs argued that the scheme violated Title VII because the state had not "validated" the written test, showing it to be job-related. The state argued that the result of the entire process, reflecting no adverse impact on minority group members, precluded the finding of a Title VII violation.[128]

In rejecting the defendant's "bottom line" argument, the Court made clear that there was no hint of intentional discrimination against blacks. The Court said "resolution of the factual question of intent is not what is at issue in this case. Rather, [defendants] seek simply to justify discrimination against [plaintiffs], on the basis of their favorable treatment of other members of [plaintiffs'] racial group."[129] Moreover, the court of appeals had characterized the second stage of Connecticut's promotion process as including an affirmative action

125. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (history of overt racial diserimination). *Cf.* New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) (no history or evidence of intentional racial discrimination and the Supreme Court upheld a blanket exclusion of methadone maintenance participants). According to Furnish, *supra* note 2, at 442-43, this similarity (intentional discrimination underlying disparate impact claim) accounts for the Court's failure to maintain the theoretical separation of disparate impact and disparate treatment theories. *But see* Connecticut v. Teal, 457 U.S. 440 (1982), discussed *infra* text accompanying notes 127-34.

126. *See, e.g.*, Furnish, *supra* note 2, at 442-44; Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 296-304 (1971).

127. 457 U.S. 440 (1982).

128. The defendant argued both that the so-called "bottom line" precluded the plaintiffs from establishing a prima facie case and, alternatively, that it provided a defense. *Id.* at 447 n.7. For a more detailed discussion of the Court's decision in *Connecticut v. Teal*, see Chamallas, *supra* note 15; Note, *The Bottom Line Concept Under Title VII:* Conneeticut v. Teal, 24 B.C.L. REV. 1131 (1983); Note, *The Bottom Line Concept in Title VII Litigation:* Connecticut v. Teal *and the Relevance of End Results*, 15 CONN. L. REV. 821 (1983); Note, *The Bottom Line Defense in Title VII Actions: Supreme Court Rejection in* Connecticut v. Teal *and a Modified Approach*, 68 CORNELL L. REV. 735 (1983).

129. *Teal*, 457 U.S. at 454.

component to ensure a significant number of minority supervisors.[130] Although the defendants contested this characterization, their reaction means not that there was intentional discrimination against blacks but merely that there was no intention to favor black applicants.

The Court also made clear that disparate impact is not merely another way of proving intentional discrimination. In rejecting the defendants' "bottom line" argument, the Court noted that the defendants had confused unlawful discrimination with discriminatory intent. Although a nondiscriminatory "bottom line" is relevant in rebutting an inference that a particular action was intentionally discriminatory, the same "bottom line" could not excuse validating a test with an adverse impact.[131] The Court concluded by saying that "[e]very *individual* employee is protected against both discriminatory treatment and against 'practices that are fair in form, but discriminatory in operation.'"[132]

With the decision in *Teal*, the Court revitalized the controversy over the burden of proof placed on defendants to justify a test or other selection criterion with an adverse impact. Had the Court endorsed the bottom line theory, employers would have been able to set up any employment process with impunity, so long as the process resulted in an appropriate racial balance.[133] The Court's rejection of the "bottom

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130. *Id.* at 444.

131. *Id.* at 454.

Although the Supreme Court clearly rejected the bottom line theory when the selection procedure was an absolute barrier to continuing in the selection process, the Court did not discuss the applicability of the bottom line theory when the selection procedure with an adverse impact was simply one of several factors. Employers can argue that *Teal* does not apply when there is not an identifiable step during the selection process at which to measure adverse impact. One district court, however, has rejected this view of *Teal*, Williams v. City of San Francisco, 31 Fair Empl. Prac. Cas. (BNA) 885, 887 (N.D. Cal. 1983).

132. *Id.* at 455-56 (quoting *Griggs*, 401 U.S. at 431). Although the main disagreement between the majority and the dissent concerns the point in the selection process to measure adverse impact, Justice Powell's dissenting opinion asserts that Justice Brennan's majority opinion is fundamentally flawed, confusing "the *aim* of Title VII with the legal theories through which its aims were intended to be vindicated." *Id.* at 458 (Powell, J., dissenting) (emphasis original). The dissenting opinion also implies that individuals cannot bring disparate impact claims. Justice Powell's opinion, however, suggests its own confusion about the difference between adverse impact as a theory of recovery and adverse impact as a kind of evidence to prove intentional discrimination. *Id.* at 458-59 & n.3. *See* Lamber, Reskin & Dworkin, *supra* note 10, at 554-55.

133. For a thorough discussion of the arguments in favor of the bottom line see Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C. CENT. L.J. 1 (1980); Chamallas, *supra* note 15. While employers support the bottom line as a way to avoid justifying selection criteria with an adverse impact, these commentators argue that the result in *Teal* will hurt rather than help minority group members' advancement in the workplace, at least in the short run.

They contend that an immediate increase in the number of minority group members in the workplace is more important than eliminating the adverse consequences of a given selection criterion or justifying its use. *See* Chamallas, *supra* note 15, at 361-70; Blumrosen, *The 'Bottom Line' After* Connecticut v. Teal, 8 EMPLOYEE REL. L.J. 572, 574-75 (1983). *See also*, Bartholet, *Applica-*

line," however, means there will be increased efforts to justify selection criteria with an adverse impact and thus reemphasizes the importance of determining the nature of the defendants' burden as well as the utility of alternatives evidence in disparate impact cases.[134]

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tion of Title VII to Jobs in High Places, 95 HARV. L. REV. 947, 1027 (1982). Proponents of the bottom line also fear that employers will too easily validate selection criteria that exclude significant numbers of minority group members. *See* Comments of Eleanor Holmes Norton, Excerpts from Transcript of EEOC Commissioners Meeting (Dec. 22, 1977), DAILY LABOR REP. (BNA) No. 43, at E-4 (Mar. 3, 1978). The approach suggested here mitigates this latter danger by placing validation in the larger context of the purposes of Title VII. *See infra* notes 161-207. Most importantly, they assert that *Teal* may reduce the incentive for employers to engage in affirmative action because it no longer shields the use of unjustified criteria. Chamallas, *supra* note 15, at 370-76.

Whether *Teal* reduces the incentive for employers to engage in affirmative action is an unanswered empirical question. *Id.* at 313. Employers engage in affirmative action for other reasons including union, employee or customer pressure and their own public image. *See id.* at 373. Moreover, not all bottom line results stem from affirmative action efforts. While the operation of fortuitous offsetting selection devices may have the same result as conscious affirmative action in some instances, it may also mean that when a disproportionately high number of minority group members are qualified they will in the end be underrepresented if the employer's workforce is only compared at the bottom line. Thus, the bottom line may represent a maximum as well as a minimum standard by which to measure discrimination. Compare Chamallas, *supra* note 15, at 375-76 (fortuitous offsetting selection devices the same as conscious affirmative action) with Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 30 (1977) (equal opportunity means more than hiring "acceptable" numbers of minority group members), in which each discusses situations where an admittedly valid selection criterion favoring blacks is coupled with an unvalidated test that has an adverse impact on blacks.

In addition to the distinction between conscious affirmative action and fortuitous offsetting devices, one can argue that any protection from Title VII liability ought to depend on the existence of a plan, rather than ad hoc efforts. United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (important feature of employer's affirmative action efforts is the existence of a plan rather than an ad hoc response). *Teal* itself raises this question because the state maintained that it took no affirmative action in the selection of welfare supervisors and, whatever it did to achieve the bottom line result, it did only after the plaintiffs filed suit. *Teal*, 457 U.S. at 444.

The Court in *Weber* was concerned not only with the existence of a plan but also with its content. The employer hired experienced craft workers and the employer's affirmative action effort was to increase the number of minority group members who met the requirement. If the affirmative action effort in *Weber* had been similar to the effort in *Teal*, the employer would have simply hired more blacks who had experience. Although this latter approach would have the advantage of increasing blacks in the workplace in the short run, the former expands job opportunities in both the short and the long run. *Cf.* Chamallas, *supra* note 15, at 349 (merely coincidental factual peculiarity that the affirmative action measure takes the same form as the challenged practice).

Finally, *Teal* is consistent with *Weber*. Although voluntary affirmative action may stem from the employer's wish to be insulated from Title VII liability, the Court in *Weber* apparently refused to adopt this "arguable violation" theory as its justification for permissible affirmative action under Title VII. *See, e.g., Weber*, 443 U.S. at 212 (Blackmun, J., concurring). Affirmative action is permissible but it does not excuse employers from other Title VII obligations. The real distinction between *Weber* and *Teal* is the kind of affirmative action efforts Title VII encourages.

134. Chamallas, *supra* note 15, at 370-79, addressed the question of the relative priority that should be given to achieving "bottom line" equality and to encouraging use of "valid," nondiscriminatory employment procedures but apparently only in terms of formal validation. *Id.* at 374 & nn. 328-29. While validation was at issue in *Teal*, the discussion *infra* text accompanying

II. A Functional Approach to Disparate Impact Cases and Evidence of Alternatives

This section focuses more directly on the competing interests of employers and minority group members by identifying the ways in which the existence of alternatives can be used. In addressing this issue, it is essential to understand, first, what interest the defendant asserts as a justification and second, why such an interest might justify adverse impact. Decisions will differ depending on the kind of selection criterion challenged and the employer's reason for using it.

A. Defendant's Burden: Business Necessity/Job-Relatedness Controversy

In *Griggs v. Duke Power Co.*, the Supreme Court described the defendant's burden of proof for disparate impact cases in several ways: (1) The employer must show "that any given requirement [has] a manifest relationship to the employment in question."[135] (2) "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[136] (3) The defendant must show that the policies bear a "demonstrable relationship to successful performance of the jobs" for which they are used.[137]

Because the Supreme Court needed only to reject an erroneously narrow view of Title VII to find in favor of the plaintiffs, it left unanswered most questions about the substance of the defendant's burden of proof.[138] First, what kind of business purposes can justify employer practices that have an adverse impact? Does the reason the practice has an impact influence the kind of business purpose that is permissible? Second, what kind of proof is required to establish the nexus between the employer's purpose and the challenged employment practice? Is empirical evidence required? Third, how important must the employer's purpose be? Is a "legitimate" purpose sufficient or need the purpose be "substantial," "essential," or "compelling"? And fourth, what is the

notes 161-207 indicates that formal validation is not always necessary or sufficient depending on the defendant's reason for using a selection criterion.

135. *Griggs*, 401 U.S. at 432.

136. *Id.* at 431.

137. *Id.*

138. For general discussions of *Griggs*, including its unresolved questions, written soon after the Court's decision, see Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Discrimination*, 71 MICH. L. REV. 59 (1972); Wilson, *A Second Look at* Griggs v. Duke Power Co.: *Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972). *See also* Comment, *supra* note 2, at 916-17.

relationship between the terms "business necessity" and "job-related"? Did the Court use the terms synonymously, as rough equivalents, or to suggest that proof of both was required?[139]

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139. Even though the defense standard was left ambiguous, one could argue that the real meaning of *Griggs* is that the Court limited the scope of permissible justifications. This limitation is relatively easy to determine in the context of private, profit-making employers, but it becomes more difficult once public employers are subject to Title VII. *See infra* note 154 and text accompanying notes 153-59.

There is the entirely different possibility that the Court in *Griggs* did not intend to establish a separate conceptual definition of discrimination which needs to be considered. Several such alternate interpretations of the Court's opinion exist. First, the decision could rest solely on the interpretation of § 703(h), exempting professionally developed ability tests from the general prohibitions of Title VII. The Court's decision in *Dothard v. Rawlinson* rejects this limitation by applying the disparate impact analysis to a height and weight requirement. Neither the Court nor the state discussed this extension of *Griggs*. Second, the *Griggs* decision could rest on the factual setting of the case. Because the Duke Power Company had openly discriminated in the past and adopted the challenged requirements on the eve of Title VII's effective date, the decision could be seen as a recognition of the "perpetuating the effects of past discrimination" definition of discrimination. However, the Court's subsequent decision in *Connecticut v. Teal* does not involve any history of overt racial discrimination. Third, the decision in *Griggs* could rest on a different conception of intentional discrimination. This reading of *Griggs* follows Professor Fiss' theory of functional equivalence, *supra* note 126, at 296-304 (neutral rules with an adverse impact that are unrelated to business needs are the equivalent of intentional discrimination). The correctness of this view of *Griggs* depends on what kinds of business needs justify challenged employment policies. Fourth, the Court could have been creating a bfoq exception for race. Such action would be inconsistent with the statute, which expressly limits the bfoq to sex, religion, and national origin, and subsequent cases do not support this reading. Williams, *supra* note 14, at 671.

In contrast to these restrictive interpretations, the decision could indicate the desirability of racial quotas in order to improve the economic position of minority group members. Blumrosen, *The 'Bottom Line' After* Connecticut v. Teal, 8 EMPLOYEE REL. L.J. 572, 574-75 (1983) argues that the adverse impact theory was simply a means to the end of increased minority participation, rather than independently important. However, the Court's rejection of the bottom line theory in *Connecticut v. Teal*, and its refusal to adopt the "arguable violation" theory as its justification for upholding the affirmative action plan in United Steelworkers v. Weber, 443 U.S. 193 (1979), negates this view.

The Supreme Court has had several opportunities to limit the disparate impact theory and it has not done so, despite encouragement from Justice Rehnquist. In General Electric v. Gilbert, 429 U.S. 125 (1976), concerning the validity of excluding pregnancy from fringe benefit plans, Justice Rehnquist said: "Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of § 703(a)(1), *but cf.* McDonnell Douglas Corp. v. Green, the respondents have not made the requisite showing of gender-based effects." *Id.* at 137 (emphasis added, citation omitted). This statement brought separate concurrences from Justices Stewart and Blackman, rejecting the suggestion that *Griggs* was no longer good law. Again writing for the majority in *Furnco*, Justice Rehnquist argued the proper approach was the analysis contained in *McDonnell Douglas Corp. v. Green* (disparate treatment). In a footnote, he distinguished disparate impact claims, stating: "This case did not involve employment tests which we dealt with in *Griggs* . . . nor particularized requirements such as height and weight specifications considered in *Dothard*. . . .", *Furnco*, 438 U.S. at 575 n.7, suggesting the disparate impact theory is limited to challenging those two kinds of neutral rules. The kinds of employment practices subject to disparate impact analysis remains controversial. *See* Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982).

When Congress amended Title VII in 1972, it specifically approved the court interpretations that rested on the disparate impact theory: "In any area where the new law does not address itself,

Subsequent Supreme Court decisions shed little additional light on the nature of the evidence necessary to satisfy the defendant's burden of proof. In *Albemarle Paper Co. v. Moody* the Court said that the standardized intelligence tests at issue are impermissible unless predictive of or significantly correlated with important work behavior.[140] Two years later, however, the Court accepted a validation attempt that departed significantly from this standard.[141]

In *Dothard v. Rawlinson* the Court held that the defendant's burden was to show that its height and weight requirements had "a manifest relationship to the employment in question."[142] Although the Court reiterated *Griggs'* job-related standard, it also said that a discriminatory employment practice "must be shown to be *necessary* to safe and efficient job performance to survive a Title VII challenge."[143] This latter description of the defendant's burden suggests that a showing of job-relatedness may not be sufficient to avoid liability.[144]

Finally, in *New York City Transit Authority v. Beazer*, again quoting *Griggs*, the Court said the defendant's burden was to show that the rule excluding methadone users bore "a manifest relationship to the employment in question."[145] The defendant met this burden by showing that the "goals [of safety and efficiency] are significantly served by—even if they do not require—TA's rule."[146] This conclusion about the

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or in any areas where a specific contrary intention is not indicated, it was assumed *that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.*" Franks v. Bowman Transp. Co., 424 U.S. 747, 764 n.21 (quoting 118 CONG. REC. 7166 (1972) (emphasis added by the Court)). The Court reaffirmed this view of the legislative history in *Teal*, 457 U.S. at 447 n.8 (1982).

140. *Albemarle*, 422 U.S. at 431.

141. *See* Washington v. Davis, 426 U.S. 229 (1976) (a non-Title VII case). In *Washington v. Davis*, the plaintiffs challenged the constitutionality of the District of Columbia Police Department's pre-employment test said to measure verbal ability. After rejecting *Griggs'* disparate impact analysis to decide the constitutional question, the Court used Title VII principles in analyzing the non-Title VII statutory issues. The defendant's evidence of validation differed from the EEOC's guidelines in two ways. First, the evidence showed only that performance on the test was related to performance in police training school. It did not show that performance in training school was related to job performance. Second, the defendant did not use the most demanding method of validation. *See also* National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978) (mem.), *aff'g.*, United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1978) (approved use of National Teachers' Examination for hiring and classifying teachers based on validation study which showed the test measured the familiarity of the candidate with the content of teacher training courses rather than actual job performance). For a more general discussion of *Washington v. Davis* and the validation issue, see Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17; Maltz, *supra* note 2, at 349-50.

142. 433 U.S. 321, 329 (1977) (quoting *Griggs*, 401 U.S. at 432).

143. *Id.* at 332 n.14 (1977) (emphasis added).

144. *See* Furnish, *supra* note 2, at 427-29; Ga. Note, *supra* note 2, at 410-11.

145. 440 U.S. 568, 587 n.31 (1979).

146. *Id.*

defendant's burden, in direct contrast to *Dothard*, suggests that the defendant need not even prove that a requirement is job-related.[147]

During this same period, the lower federal courts were faced with applying the Supreme Court's vague standards expressed in broad and varied language. These cases involved the application of the business necessity/job-related defense not only in cases raising issues similar to those in the Supreme Court's cases but also in cases raising substantially different issues under different factual situations. In some cases, for example, the employers did not argue that selection criteria were justified because they were related to job performance, but rather, that they were important for other reasons.[148] Using alternate formulations of the defendant's burden of proof, lower federal courts developed an equivalent standard by which to evaluate this different sort of justification.

The Fourth Circuit took the lead in recasting the burden of proof in *Robinson v. Lorillard Corp.*[149] It said the *Griggs* test as applied to non-job-related justifications was "whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."[150]

> Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose

147. The Supreme Court's most recent disparate impact case, *Connecticut v. Teal*, repeats the *Griggs'* test but does not discuss the nature of the defendant's justification burden because of the "bottom line" issue.

148. *See, e.g.*, Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). Plaintiffs challenged the validity of seniority systems that perpetuated the effects of past overt discrimination. Typically, the employer would argue that such seniority systems were justified for reasons unrelated to job performance, such as providing stability and predictability, and reflecting the product of collective bargaining. Employers also argued that § 703(h) in Title VII exempted seniority systems unless there was proof of intentional discrimination in their creation or maintenance. In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court agreed with this broad exemption, rejecting the courts of appeals' substantive conclusion concerning the scope of § 703(h). The Court suggested that if there were no § 703(h) the disparate impact analysis with its heavy burden of justification would be appropriate. *Id.* at 349.

149. 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971). The opinion is similar to decisions in other circuits, e.g., Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Jones v. Lee Way Motor Freight, 431 F.2d 245 (10th Cir. 1970), but it is subsequent to and relies on *Griggs*. *See* Wilson, *supra* note 138, at 854 n.62.

150. *Robinson*, 444 F.2d at 798.

> advanced, or accomplish it equally well with a lesser differential impact.[151]

In sum, both Supreme Court and lower court cases provide clues but no definitive answers to the questions raised by the Court's decision in *Griggs*. Regarding business practices that can justify adverse impact, *Albemarle* and *Griggs* assert that an employer's interest in the ability of employees to perform their jobs is substantial. *Robinson* holds that an employer may have legitimate interests other than those related to job performance. Regarding the proof required of the defendant, *Albemarle* and *Dothard* require specific evidence to establish the nexus between the employer's purpose and the challenged practice. *Beazer* implies that the nexus can simply be assumed. Regarding the importance of the employer's interest, *Dothard* states that the challenged practice must be necessary to safe and efficient job performance, but stops short of requiring the practice to be absolutely necessary. *Beazer* suggests a wholesale diminution of the defendant's burden of proof, but the premise of the defendant's justification is unclear and the Court's discussion is inadequate.

These cases not only fail to answer the questions raised by *Griggs*, they complicate some issues, such as the relationship between the terms "business necessity" and "job-relatedness." There are several possible relationships. The Court might have intended two separate defenses: one involving proof that an employment policy is related to job performance (job-related), and the other involving proof that an employment policy is necessary to the business (business necessity). Or, the Court might have intended the terms to be synonymous: concern for successful job performance is a business necessity and it is necessary for a business to be concerned about job performance. If the terms express real differences in the kinds of permissible justifications, there are two possible consequences. An employer might possibly justify its policy on the basis of either standard or might be required to satisfy both. The Supreme Court has not addressed the question. In *Griggs, Albemarle*, and *Dothard*, the employers attempted to justify the challenged employment policies on the basis of job performance but failed to prove any relationship between the two. In *Beazer*, the Court dealt briefly and summarily with the defendant's justification; the Court's primary concern was to evaluate the plaintiff's prima facie case.[152]

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151. *Id. Seę* Williams, *supra* note 14, at 690-93; Comment, *supra* note 2, at 918-20, for parsing of this requirement. *See also* United States v. Bethlehem Steel, 446 F.2d 652, 662 (2d Cir. 1971).

152. To resolve the issue, one could argue that *Beazer* implicitly overruled *Dothard*. For example, Smith, *supra* note 2, at 401-04, argues that evidence of alternatives can be used only to

By defining disparate impact claims in terms of the employer's interest as well as the effect of selection criteria on minority group members, the Supreme Court has suggested that Title VII requires a balancing of those often incompatible interests.[153] In disparate impact decisions courts need to confront the nature of this accommodation

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show intentional discrimination because any other use, such as undercutting the nexus between the policy and the employer's goals, would imply that the employer needs to prove that an employment policy is both "job-related" and a "business necessity." *See also* Ill. Note, *supra* note 2, at 207-10. For reasons already discussed, see *supra* text accompanying notes 85-112 & 127-34, the Court's treatment of the defense issue in *Beazer* and its subsequent decision in *Connecticut v. Teal*, suggest *Beazer* does not overrule *Dothard*. Rebutting this argument more directly would require developing the distinctions between the notions of "job-relatedness" and "business necessity." This course of argument would reify the terms, which members of the Court, in other contexts, have cautioned against. *See, e.g., Teal*, 457 U.S. at 458 (Powell, J., dissenting). The Court has also cautioned against the rigid application of models of proof given the infinite variety of factual patterns that emerge in Title VII litigation. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981). This kind of direct rebuttal would also shift the discussion away from the real issues that need to be considered.

Clearly, the *Griggs* Court did not intend to limit a defendant's justification to considerations of how well employees do their jobs. After all, a company's primary motive is maximizing profits—accomplished in a variety of ways by pursuing a number of different policies. *See, e.g.*, Rothschild & Werden, *Title VII and the Use of Employment Tests: An Illustration of the Limits of the Judicial Process*, 11 J. LEGAL STUDIES 261, 269-71 (1982). In this context, the Court's use of "job-related" and "business necessity" expresses different but roughly equivalent notions. Less clear is whether the Court's subsequent use of "business necessity" put some gloss on the showing required to prove that an employment practice is related to job performance. For example, under *Dothard*'s second standard, it is unclear whether an employer must show that a particular policy, as opposed to another policy, is necessary to predict successful job performance.

Why must the employer prove more than that the employment practice is job-related, as *Dothard* implies? Contrary to this implication, if the defendant can prove an employment practice is related to job performance, that employer has met the same standard as an employer who has formally validated a test's relationship to job performance, the burden of proof *Griggs* and *Albemarle* set. Yet, courts often inquire into whether a challenged employment practice is necessary, even if the employer's justification is that the practice is related to job performance. The controversy in the lower federal courts is over what level of necessity defendants must show, not whether such an inquiry is appropriate in the first place. *See, e.g.*, Chrisner v. Complete Auto Trans., Inc., 645 F.2d 1251, 1261-62 (6th Cir. 1981) and discussion *infra* text accompanying notes 173-83; Contreras v. City of Los Angeles, 656 F.2d 1267, 1276-80 (9th Cir. 1981). *Cf.* Comment, *supra* note 2, at 933-34 (any real business purpose satisfies burden).

There is also a semantic problem lurking in the issue of the difference between job relatedness and business necessity. Some commentators and Supreme Court opinions start from the premise that the *Griggs* test is "business necessity" and that the question of job-relatedness is simply a version of business necessity. *E.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977); Williams, *supra* note 14, at 687-89. Others start from the premise that the test is "job-relatedness" and that business necessity may be a version of that. *E.g.*, Smith, *supra* note 2, at 401. While the resolution of this problem is not crucial in determining the relevance of alternatives evidence, *but cf.* Ill. Note, *supra* note 2, at 207-10, the former view makes it easier to understand how the question of "necessity" comes into the analysis.

153. Although a balancing approach is always subject to misuse, a statute addressing nondiscrimination in employment almost compels balancing because of the interdependent nature of the many legitimate interests involved. *Compare* Ga. Note, *supra* note 2, at 385 (courts must balance the congressional commitment to equal employment opportunity with the congressional

between an employer's interest in advancing its own legitimate business prerogatives and minority group members' interest in equal employment opportunity.[154] One way to determine whether an accommodation is possible is to examine alternative selection criteria that have less adverse impact than the one actually used. The nature of the defendant's burden of proof thus affects the significance of alternatives evidence. If the defendant's burden is easily met, the practical effect of showing that alternatives exist will be limited. If, on the other hand, the scope of an employer's permissible justification is narrow, evidence of alternatives can be important in resolving disparate impact claims.

In *Griggs*, the Supreme Court read the congressional purpose of Title VII broadly, with the balance weighted toward minority group members. The Court required that defendants show more than that the selection procedure was commonly used, that it seemed "obviously" related to maximizing profits, or that it was rationally related to merit, to justify policies with an adverse impact.[155] The Supreme Court decisions of the following decade retreated from this pro-plaintiff tilt in so-

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desire to minimize interference with legitimate business prerogatives) *with* Comment, *supra* note 2, at 917, 924-25 (no balancing because a legitimate business purpose is a complete defense).

154. Typically, the private employer's interests are in safety, efficiency and productivity. Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 108 (1974) [hereinafter cited as Yale Note]. What is efficient, however, is often controversial. *See* Fiss, *supra* note 126, at 253-63; Rothschild & Werden, *supra* note 152, at 263-65, 269-72. It is more difficult to identify the public employer's interests, which may include the profit-maximizing motives associated with the private sector, but may extend to other intangible concerns such as promoting a sense of political community. *E.g.*, Village of Arlington Hts. v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (upholding the power of a predominantly white middle class suburb to exclude a low income housing development when motivated by a desire to protect property values and the integrity of the Village's zoning plan); Starns v. Malkerson, 401 U.S. 985 (1971), *aff'g mem.*, 326 F. Supp. 234 (D. Minn. 1970) (upholding a state university regulation conditioning in-state tuition on one year's residence in the state); Halter v. Nebraska, 205 U.S. 34 (1907) (upholding constitutionality of state statute preventing commercial exploitation of American flag).

Courts are, of course, not free to impose their own view of social policy. They should be guided by Congress' intent embodied in Title VII. The trouble is that the intent is not clearly expressed in the statute and its legislative history is similarly unrevealing. *See generally* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966). *See also* Chamallas, *supra* note 15, at 323-29; Rothschild & Werden, *supra* note 152, at 265-69; Wilson, *supra* note 138, at 852-85. *Cf.* Cox, *Substance and Process in Employment Discrimination Law: One View of the Swamp*, 18 VAL. U.L. REV. 21, 95-97 (1983). As usual, the legislative history has something for everybody.

155. The defendants argued that even though its tests were not specifically related to particular jobs they increased the overall quality of the workforce, but the Supreme Court rejected this argument. *Griggs*, 401 U.S. 424, 431-32. *See also* Lerner, Washington v. Davis: *Quantity, Quality and Equality in Employment Testing*, 1976 SUP. CT. REV. 263, 268 (arguing that the Supreme Court is struggling to reduce the gross disproportion in the burdens of proof heretofore placed on defendants as contrasted with plaintiffs).

cial policy, with the Court rarely affirming a finding of discrimination if the defendant put forth any defense at all.[156]

Moreover, in *Furnco Construction Co. v. Waters*, the Supreme Court cautioned the court of appeals against imposing its own notions of how to structure business practices. The message to be drawn from *Furnco* is that, within some range of legitimate judgment, employers have discretion to determine job requirements as well as the feasibility of alternative employment procedures.[157] Discretion does not mean absolute freedom, however, and the question remains how to determine this range of legitimate discretion.[158] The issue, in terms of the defendant's justification and the existence of alternatives, is how to avoid excessive infringement of the employer's right to structure its business as it sees fit, and at the same time to protect the interests of minority group members. In *Connecticut v. Teal*, the Supreme Court narrowed the range by precluding the employer from choosing between validating tests with adverse impact and structuring its employment process to eliminate adverse impact.[159] In so doing, the Court recognized a third set of interests to be accommodated—the interests of individual minority group members that may conflict with the interests of the group as a whole.

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156. Ga. Note, *supra* note 2, at 404.

157. The fact that *Furnco* is a disparate treatment case, alleging intentional discrimination in the hiring of bricklayers without clear evidence of adverse impact, is not significant for the argument made here in the text.

158. The lower federal courts are divided on this issue. Some hold that Title VII tolerates adverse impact on minority group members so long as the impact is incidental to criteria that genuinely predict or significantly correlate with job performance. Others take the view that Title VII only allows criteria with an adverse impact when forbidding them would seriously undermine or damage the business. For a list, see *Contreras*, 656 F.2d at 1289.

The former view emphasizes the efficient relationship between the sclection criteria and the job while the latter inquires into the importance of the interest the employer advances. In terms of the range of employer discretion, the former does not greatly restrict the employer's discretion, since requiring a substantial relationship between the selection criterion and the job merely advances the employer's own interest. That is, it would be inefficient for an employer to use one selection criterion when another is a better predictor of the kind of employee desired. *See* Rothschild & Werden, *supra* note 152, at 263-65; Comment, *supra* note 2, at 924-25. The latter view restricts employer freedom and discretion because it does not always uphold an employer's admittedly legitimate interest in the face of what the court and the plaintiff agree is a better procedure. There is a similar distinction in cases based on the equal protection clause of the fourteenth amendment. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 994-96, 1082-92 (1978).

159. *Cf.* Chamallas, *supra* note 15, at 381-83, who criticized the Court's decision in *Teal* because courts ought to defer to employer choice (between validation and the bottom line) whenever the employer has demonstrated that it is not indifferent to equality concerns. The approach suggested here does not apply to those situations. *See also supra* note 133.

B. Factual Patterns in Disparate Impact Cases

Factual differences in disparate impact cases illustrate when and how alternatives evidence is relevant. One can identify at least three typical fact patterns. First, plaintiffs challenge a paper and pencil test that defendants say predicts job performance. Second, plaintiffs challenge a nonscored, objective criterion that defendants assert is also related to job performance. Third, plaintiffs challenge an objective, nonscored criterion that defendants argue is important for reasons unrelated to job performance, such as economic or political self-interest.

Depending on the nature of the employer's justification for the practice in question, the role of alternatives evidence will vary. First, the evidence may suggest that the employer intentionally discriminated against plaintiffs in choosing the selection criterion. Second, evidence of alternatives may illustrate that the relationship between the selection criterion and the employer's purpose is not substantial enough to justify its use in the face of its adverse impact. Third, evidence of alternatives may suggest that the employer's interest in using a particular selection procedure is not sufficiently *important* to justify its continued use. The distinction between the relationship of the selection criterion and the employer's purpose, on the one hand, and the importance of an employer's particular goal, on the other hand, will be illustrated further below. In short, the distinction is similar to that in the equal protection requirement that "classifications by gender must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives."[160]

1. FACTUAL PATTERN #1

The by now classic fact situations in *Griggs* and *Albemarle* illustrate the first pattern. Plaintiffs allege that a paper and pencil test, neutral in design and administration, has an adverse impact on blacks. To justify the use of the test, defendants assert that it is job-related. The preferred method of proving that a test is job-related is through a formal validation study.[161] In essence, this study shows that there is a rela-

160. Craig v. Boren, 429 U.S. 190, 197 (1976) (emphasis added).

161. For a discussion of the intricacies of validation and the Uniform Guidelines on Employee Selection Procedures, see generally Booth & MacKay, *supra* note 2; Johnson, Albemarle Paper Co. v. Moody: *The Aftermath of* Griggs *and the Death of Employee Testing*, 27 HASTINGS L.J. 1239 (1976); Wilson, *supra* note 138; Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 CATH. U.L. REV. 605 (1979); Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employers*, 41 GEO. WASH. L. REV. 505 (1973).

tionship between performance on the test and performance on the job.[162] Thus, the defendant shows that, although the test has an adverse impact, the use of the test is not unlawful because it measures abilities that direct observation shows are necessary or desirable for the job. Although the notion of validation is relatively straightforward, it poses a difficult, and sometimes impossible, burden for the defendant. In general, the courts carefully scrutinize the quality of the test's development, the quality of the test itself, and the specific use made of the test.[163]

a. Utility of alternatives

In cases falling within this first pattern, evidence of less discriminatory alternatives would consist chiefly of other tests or different forms of the same test that measure the same traits but on which minority groups members do better. For example, plaintiffs could argue that an oral examination would be as revealing as a written test or that a different written test could measure the same traits or skills as the challenged test.[164] The significance of such evidence of less discriminatory alternatives can be two-fold: the evidence could raise the inference of intentional discrimination, or it could suggest the particular test is not important to the employer for the claimed purpose. The other use of the alternatives evidence—to illustrate that the relationship between the requirement and the employer's interest is not substantial enough—is not

162. The Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,295 (1978) (codified at 29 C.F.R. § 1607 (1983)), describe three validation techniques: content validation, criterion validation, and construct validation, §§ 5(B), 14; and specify when each is appropriate and how each is performed. In general, content validation begins with job analysis data and then involves showing that the test is related to and representative of the content of the job, or in other words, that the test is an accurate sample of the job. The classic illustration of a test that can be content valid is a typing test for clerical workers. Criterion validation uses empirical evidence to show that the test successfully predicts job performance and involves a statistical comparison of test scores with job performance scores. The traits measured are, for example, good vision, hearing, or, as in Washington v. Davis, 426 U.S. 229 (1976), verbal ability. Construct validation is similar to criterion validation but is used for more abstract traits, such as intelligence or verbal fluency. In construct validation one measures the degree to which applicants have identifiable abstract traits that have been statistically shown to be important to successful job performance. The tests in *Griggs* would be subjected to construct validation. Although testing professionals prefer criterion or construct validation, there are few examples of such validation efforts upheld in the courts. In contrast, content validation is often feasible for the defendants. *See, e.g.*, Guardians Ass'n v. Civil Service Comm'n, 630 F.2d 79, 93-94 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

163. *See, e.g.*, Guardians Ass'n v. Civil Service Comm'n, 630 F.2d 79, 93-94 (2d Cir. 1980) (an example of a court grappling with "second generation" tests, designed with the Guidelines' requirements in mind).

164. For example, the plaintiffs argue for oral rather than written tests in *Contreras*, 656 F.2d at 1285.

relevant in these cases because successful validation, by definition, shows the necessary relationship.[165]

To raise the issue of intentional discrimination, the plaintiffs could assert that the defendant chose the written test because minority group members would fare poorly on it. For example, the plaintiffs in *Griggs* or *Albemarle* could have argued that the use of standardized intelligence tests, rather than some other measure of ability, suggests, particularly in light of the timing, that the defendants were attempting to maintain their previously segregated work force.[166]

The other use of alternatives evidence here is to suggest that the interest of the employer in using the particular test is not sufficiently important. For example, the plaintiffs could argue that a test based on preparation manuals ought to be substituted for a traditional aptitude test.[167] The aptitude test may be job-related because it measures learning skills, which are important to successful job performance, but may have an adverse impact because it reflects inadequate training minority group members have received. The substituted test would measure knowledge gained from materials studied during training or probationary periods. Assuming this test had less adverse impact and served the same needs as the aptitude test, the plaintiffs would argue that the existence of the new test is evidence that the use of the particular aptitude test is not "important" or necessary to the employer's business interests.

b. Consequences of using alternatives

In cases where defendants "validate" the job-relatedness of the challenged test, plaintiffs rarely are able to prove intentional discrimination by showing that other tests with less adverse impact serve the

165. The primary question in cases involving validation efforts is the strength of the relationship that is necessary to support the test. Thus, validation serves the same purpose as the second use of alternatives but under different terminology. In fact, this similarity suggests an additional reason for the expanded use of alternatives. *See infra* note 173. *But cf.* Washington v. Davis, 426 U.S. 229 (1976) (Court accepted validation that showed only the relation of the test to training school, not performance on the actual job).

166. On July 2, 1965, the effective date of Title VII, the Duke Power Company dropped its racial hiring restrictions but then required applicants for nonlabor jobs to pass two aptitude tests. Later, the Company allowed present employees to transfer with either a passing score on the tests or a high school diploma. *Griggs*, 401 U.S. at 427-28. In *Albemarle* the Court described the validation effort as taking place "on the eve of trial." *Albemarle*, 422 U.S. at 411.

The plaintiffs in neither case made any argument about intentional discrimination. Because the defendants did not prove that the tests were related to job performance, the question of pretext did not arise.

167. The example is from Bartholet, *supra* note 133, at 1024-25.

same interests of the employer.[168] Such a showing is theoretically possible since proof of job-relatedness often rests on empirical evidence that the test is a better predictor of successful performance than a random selection process. No doubt other tests can predict successful job performance better than random selection, and some perhaps better than the challenged test.

The infrequency with which plaintiffs are able to produce such evidence may have two quite different implications for the analytical framework of *Albemarle*. On the one hand, the difficulty of showing workable alternatives to the use of a validated test supports the view that the utility of alternatives evidence is limited. On the other hand, because no cases exist in which the courts have determined that the plaintiff has demonstrated acceptable alternatives to validated tests, the Court's decision in *Albemarle* may indicate that plaintiff's opportunity in rebuttal is not thus limited. It seems unlikely the Court would bother to mention, in dicta, the possibility of proof so elusive in nature.

Using alternatives to challenge the importance of the employer's interest in a particular test may be more fruitful. This use is based on the implication of the Court's opinion in *Dothard v. Rawlinson*. In describing the defendant's burden, the Court said that "a discriminatory practice must be shown to be necessary to safe and efficient job performance."[169] The plaintiff would argue that the employer's burden of proof is not met simply by showing that a test is job-related. Where a less discriminatory alternative test exists, the employer's aptitude test is not "necessary."

A court's willingness to impose such an additional burden depends on its evaluation of the employer's interests. If the substitute test is as good a predictor as the aptitude test and has less adverse impact, using the substitute test would be consistent with the employer's own interests.[170] If the substitute is only marginally better at predicting job performance or if the cost of devising the substitute is substantial, then requiring the substitute is not consistent with the employer's interests. This evaluation also involves determining the level of "necessity" that an employer must show. While some courts have articulated an absolute necessity standard,[171] an accommodation of the conflicting inter-

168. *E.g.*, *Contreras*, 656 F.2d at 1285; Booth & MacKay, *supra* note 2, at 190 (no cases where plaintiff has demonstrated acceptable alternatives to the use of validated test). *Accord* Rothschild & Werden, *supra* note 152, at 273; Thompson & Christiansen, *supra* note 2, at 601.

169. *Dothard*, 433 U.S. at 332 n.14.

170. Unless, of course, the employer's interest is to discriminate against minority group members, or the employer has some "irrational" attachment to the challenged rule.

171. *E.g.*, Kirby v. Colony Furniture, 613 F.2d 696, 705 n.6 (8th Cir. 1980) (business necessity means a compelling need); Allen v. City of Mobile, 464 F. Supp. 433 (S.D. Ala. 1978) (must show test is an absolute necessity).

ests of the employer and minority group members suggests a "reasonably necessary" standard.[172]

Cases falling within this first pattern most closely parallel the factual situation in *Albemarle*. If the defendant succeeds in validating a challenged paper and pencil test, many of the questions that plaintiffs can raise about the job-relatedness standard already are answered in the defendant's favor. Thus, in cases of this kind, evidence of alternatives has been of limited utility; usually the case is won or lost on the validation issue.

2. FACTUAL PATTERN #2

The second pattern involves nonscored objective selection criteria, such as height and weight or previous experience requirements, that the defendant asserts are related to job performance. This pattern differs from the first in that the challenged selection criterion is not a paper and pencil test and the defendant is unlikely to engage in a formal validation study to establish the criterion's job-relatedness.[173]

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172. *E.g., Contreras*, 656 F.2d at 1277; *Guardians Ass'n*, 630 F.2d at 109.

173. Distinguishing pattern #1 and pattern #2 on the basis of whether an employer has formally validated the selection criterion is an empirically accurate description of factual differences in disparate impact cases. This distinction leaves unanswered the question whether Title VII requires formal validation to justify unscored objective criteria to the same extent as required to justify traditional tests. The primary basis for requiring validation is the Court's deference in *Griggs* to the then existing EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (August 1, 1970). The present Uniform Guidelines on Employee Selection Procedures, as did the guidelines in *Griggs*, suggest validation is required in all cases where the criteria have substantial adverse impact, because of the broad applicability of the Guidelines. *See* Uniform Guidelines, *supra* note 11, at §§ 2B & 16Q, 43 Fed. Reg. at 38,296 & 38,308 (1978) (codified in 29 C.F.R. §§ 1607.2B, 1607.16Q (1984)). On the other hand, the Court did not defer to the EEOC's guidelines with respect to the high school diploma requirement also challenged in *Griggs*. *Griggs*, 401 U.S. at 433 n.8. And the Uniform Guidelines allow alternate approaches for establishing job-relatedness when a challenged selection procedure has not been validated:

> When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or *otherwise justify continued use* of the procedure *in accord with Federal law*.

Uniform Guidelines, *supra* note 11, at § 6B(1), 43 Fed. Reg. at 38,299 (August 25, 1978) (codified in 29 C.F.R. § 1607.6B(1) (1984)) (emphasis added).

Commentators and courts disagree over the necessity of validating nonscored objective criteria. *Compare* Bartholet, *supra* note 133, at 989 (fundamental principles of validation apply to all selection procedures) *with* Lerner, *supra* note 141, at 39 (formal validation is not necessary to justify selection procedures in all cases). *Compare* Greenspan v. Automobile Club, 495 F. Supp. 1021, 1034 n.15 (E.D. Mich. 1980) (rejecting defendant's argument that validation is not required to justify prior experience requirement) *with* League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 900-02 (C.D. Cal. 1976) (rejecting plaintiff's argument that educational requirements must be validated according to EEOC guidelines). While validation is a useful method for proving a correlation between job performance and a selection procedure (or more

In these cases the plaintiff alleges, for example, that a minimum height and weight requirement has an adverse impact on women, because height and weight are related to, although not determined by, gender. Or, the plaintiff alleges that a selection criterion preferring candidates with previous experience has an adverse impact on blacks because blacks have been prevented from getting the necessary experience. To justify the use of the selection criteria, the defendant argues that they are related to job performance. For example, in *Dothard v. Rawlinson*, the defendants could have argued that a minimum height and weight requirement was a useful proxy for the "appearance of strength," which is necessary to be a successful prison guard.[174] Simi-

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likely, for showing that an assumed correlation does not exist), the teehnique is not inherently superior to other forms of evidence. At most, validation represents expert testimony, but experts can base their opinions on other information or express their opinions in other ways. The appropriate focus at this stage of Title VII litigation should be on what the evidence proves, and not what kind of evidence it is.

The prevailing preference for establishing the job-relatedness of a scored pencil and paper test—but not unscored objective criteria—through validation may be explained in several ways. First, as stated above, the Court's deference to the EEOC's guidelines requiring validation was in the context of the Court's discussion and interpretaton of § 703(h), which exempts "professionally developed ability tests." The Court adopted the EEOC's construction of § 703(h) to require that employment tests be job-related and that employers have available data demonstrating that the test is predictive of job performance. *Griggs*, 401 U.S. at 433 n.9. The Court stated that § 703(h) has no applicability to the high school diploma requirement and imposed the burden for its justification as a fundamental part of the nondiscrimination provisions of Title VII itself. *Id.*

Second, it arguably is appropriate to treat traditional paper and pencil tests with greater suspicion and thus subject to stricter justification standards than other objective criteria. Standardized tests, especially IQ and general aptitude tests, historically have had a severe adverse impact on minority group members and are unlikely to be related to the performance of the specific jobs in question. *But cf. Albemarle*, 422 U.S. at 449 (Blackmun, J., concurring) (pre-employment testing possesses the potential of being an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis).

Third, the biggest contribution of formal validation is to provide information about noncommonsense relationships, that is, where the relationship between a certain score on an intelligence or aptitude test and job abilities is not readily apparent. *See* Williams, *supra* note 14, at 691 n.290. In contrast, the resolution of the question of whether a skill or ability, once properly measured, is necessary to a particular job is not especially furthered by formal validation. For example, few would argue that a good back is not related to a manual laborer's job performance. The fact that validation is not especially helpful does not mean that the required relationship between a nonscored objective criterion and the employer's purpose is any less substantial.

These explanations for the preference of validating scored pencil and paper tests are different from the argument that the principles of validation simply do not apply to nonscored objective criteria or that these criteria are inherently impossible to validate. These arguments are reported but rejected by Bartholet, *supra* note 133, at 986, because, as she points out, validation is technically possible. The question is whether the validation technique is worth the effort.

Finally, if the defendant does engage in formal validation, there is little difference between these cases and the cases discussed in pattern #1. There is, however, likely to be more argument over the validation effort itself because of the views reported by Bartholet.

174. This is the argument Justice Rehnquist suggests. *Dothard*, 433 U.S. at 339-40 (Rehnquist, J., concurring).

larly, defendants could argue that a requirement of two years truck driving experience is a reasonable way of insuring that employees are qualified to operate trucks on public highways, even though truck driving is a minor part of their job.[175]

a. Utility of alternatives

In cases falling within this second pattern, alternatives can serve all three stated purposes: the evidence could raise an inference of intentional discrimination; it could illustrate that the relationship between the requirement and the employer's interest is not substantial enough to justify the requirement's continued use; or it could suggest that the particular requirement is not especially important to the employer.

To raise the issue of intentional discrimination, plaintiffs might allege that a minimum height and weight requirement was chosen over other criteria because women generally are shorter and weigh less than men. Thus, the plaintiff would allege that the employer knew the criterion would exclude most women and chose the minimum with that result in mind. The plaintiff would argue that the necessary quality, appearance of strength, was chosen because a woman's physical appearance does not typically connote strength. In fact, the employer has chosen a traditionally male image to describe qualified applicants. In such a case the plaintiffs would argue that other criteria, such as corrections training or conspicuously armed and uniformed employees, also would serve the employer's purposes.

The second use of less discriminatory alternatives illustrates that the relationship between the requirement and the employer's interest is not substantial enough to permit the continued use of the challenged requirement. For example, again in *Dothard*, the Supreme Court suggested that, because strength could be measured directly, it was unlikely the employer was using the height and weight standard as a proxy for strength.[176] Even if the employer had been doing so, alternative measures would have served better the employer's stated purpose. Although the "appearance of strength" standard would be less susceptible to a simple performance test, there are other alternatives to the absolute height and weight minimum, such as individual determinations to see who "appears" strong.

Here, alternatives are offered as evidence of the relative inefficiency of the selection criterion used by the defendant. The determination of

175. This example is based on the facts of Chrisner v. Complete Auto Trans., Inc., 645 F.2d 1251 (6th Cir. 1981).

176. *Dothard*, 433 U.S. at 332.

inefficiency is left to ordinary evidentiary standards, because the defendant did not formally validate the selection criterion. If the employer has not established through empirical evidence that meeting a minimum height and weight standard makes a person a better prison guard, the plaintiff attacks the assumption that it does. Evidence that available alternatives serve the employer's purpose equally well or better is important in resolving this issue.[177]

The third use of less discriminatory alternatives suggests that the employer's interest in using the challenged selection criterion is not sufficiently important if other selection criteria would accomplish the same goal. For example, in a case involving a requirement of two years of truck driving experience, the plaintiff could argue that other criteria, such as completion of truck driving school, on the job training, or a performance test, would accomplish the employer's goal of having employees who are qualified to operate trucks on public highways. According to this argument, the employer's interest in using the experience requirement is not sufficiently important to allow its continued use in the face of its impact. Similarly, in *Dothard* the plaintiffs would have argued that the employer's interest should be to hire those who actually can maintain control, not simply those who appear to be able to do so. Like the second use of alternatives, these arguments also are related to the defendant's job-relatedness justification. This evidence questions, however, the adequacy of the employer's interest in using the particular criterion in question, rather than evaluating the relationship between the selection criterion and the employer's purpose.

b. Consequences of using alternatives

The cases forming this pattern provide an insight into the job-relatedness/business necessity controversy, particularly the Supreme Court's articulation of the defendant's justification in *Dothard.* The Court said there that a discriminatory employment practice "must be shown to be necessary to safe and efficient job performance." *Dothard* and the other cases in this second pattern differ factually only slightly from those in the first pattern where plaintiffs challenge a paper-and-pencil test and employers' attempt to validate it. The absence of validation attempts, however, can affect the analysis of the justification issue and of the appropriate use of alternatives evidence. Thus, judicial in-

177. For example, in Blake v. City of Los Angeles, 595 F.2d 1367, 1382 (9th Cir. 1979), in which female plaintiffs challenged a physical abilities test required to qualify for the Los Angeles Police Department, the court found the fact that the police department had functioned successfully for five years without the challenged test indicated that the rule was not necessary to the department's efficient operation.

quiries into the "necessity" of a selection criterion in such cases can be nothing more than a substitute for the showing that the defendant would make with formal validation.

Inquiries into the "necessity" of a selection criterion can arise in two ways.[178] The court could use a "necessity" test to evaluate the relationship between the criterion and good job performance. The plaintiff might argue that although there is an apparent relationship, for example, between height and weight and police work, the universality of the relationship does not withstand scrutiny. Or, the plaintiff might argue that the criterion does not necessarily advance the employer's interest. That is, although height and weight may be tangentially related to police work, there are better, more efficient measures to ensure good job performance. So understood, this use of alternatives should be noncontroversial because the consideration of alternatives serves simply to evaluate the employer's assertions.[179]

The court could use a necessity test in a second way, to evaluate the importance of the employer's interest in using the particular selection criterion in question. This use of alternatives does not question the employer's interest in having employees who do their jobs well; rather, it scrutinizes the choices an employer makes in achieving that goal. For example, a plaintiff might question the importance of possessing one trait—height and weight—rather than another trait—education. She

178. That is, to evaluate the fit between the selection criterion and the job or to scrutinize the employer's interest in a particular selection criterion. More so than in other patterns of cases, these two issues are sometimes entangled, in argument or analysis, causing courts mistakenly to reject evidence of alternatives. For example, it is not clear that the majority in *Chrisner* recognized the two different reasons for inquiring into the necessity of the previous experience requirement. For another reading of the opinion see *infra* text accompanying notes 210-16.

Sometimes the two issues overlap because what seems to be the "efficient" employment decision is incorrectly identified. For example, before the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-k (1982)), many employers required that an unpaid mandatory maternity leave begin as early as possible. Plaintiffs would argue that such a broad rule disqualified many individuals who could in fact adequately perform their jobs. The defendant would respond that while some might be able to perform their jobs, there was no efficient way to identify those individuals. Thus, a broad rule satisfied the means-ends test because it appeared to be the least expensive way of avoiding unqualified workers. *E.g.*, Harriss v. Pan American World Airways, 649 F.2d 670 (9th Cir. 1980). The employer, however, simply had shifted the cost of misjudging who is able to work onto the employees. Because the Pregnancy Discrimination Act requires employers to treat pregnancy as another medical condition, which usually means paid leaves, the employer has a financial incentive to devise a method for identifying those who can in fact perform their jobs, rather than paying them not to work. Forcing the employer to internalize the costs of its inefficient rule often educates the company to a heightened understanding of efficiency.

179. *See, e.g., Dothard*, 433 U.S. at 331-32. *Accord* Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 371-72 (4th Cir. 1980) (evaluating alternatives in upholding the necessity of airline's mandatory maternity leave for flight attendants after the thirteenth week of pregnancy as related to job performance).

might also attack the importance of measuring the existence of an admittedly job-related trait in a certain way. For example, an employer who wants healthy employees requiring applicants to run five kilometers in under thirty minutes. Or, the plaintiff might argue that the employer defined good job performance too narrowly: a successful classroom teacher is one about whom there are few complaints.

Using the necessity test in this second way is controversial because it intrudes on the employer's autonomy to structure its selection process.[180] For example, rather than requiring applicants to run five kilometers in under thirty minutes, the employer might be required to rely on certificates from physicians. But an employer's right to resist such intrusions is not absolute; Title VII requires an accommodation with the conflicting interests of minority group members.[181]

A plaintiff's success in using evidence of alternatives to undermine a defendant's justification and the court's willingness to scrutinize the justification in these cases also may depend on the reason for the selection criterion's adverse impact. For example, an employer may require supervisors to have previous experience in the job to be supervised. The plaintiff asserts that an alternate standard, such as good leadership ability, would serve the employer's interest equally well. The employer will respond that previous experience in the supervised job is useful because it makes the supervisor more effective.[182] If minority group members have been excluded from the supervised job, they will have been discriminatorily denied the opportunity to gain the necessary experience. The previous experience requirement is perceived as unfair because minority group members are excluded through no fault of their own. Moreover, the effects of the experience requirement will continue to place them at a disadvantage in gaining promotions. Under these facts a court might find the employer's interest in previous experience inadequate, although related to job performance, given society's other interests, such as securing equal employment opportunity. In contrast, if minority group members have not been denied the opportunity, but have for various reasons simply failed to gain experience, the requirement is more reasonable. The employer's interest in preferring some qualities over others and determining its own hiring and promotion

180. *Compare* Comment, *supra* note 2, at 924-25 (unfair to use criterion only if it is unrelated to efficiency) *with* Yale Note, *supra* note 154, at 113-15 (test criterion against the best alternatives available to achieve the employer's stated goals).

181. *See supra* notes 153-54 and accompanying text.

182. The example is borrowed from Smith, *supra* note 2, at 401 n.153. The plaintiff could argue either that experience in a job, while related, does not in fact make an employee a better supervisor of it or that even if previous experience directly fosters better job performance in the supervisory job, the employer's interest in using experience, rather than leadership abilities, is insufficient.

standards is sufficient to override the impact of the requirement.[183] The point is that evidence of alternatives is a useful way to address this policy question, which ought not be buried in technical questions of form.

3. FACTUAL PATTERN #3

The third pattern of cases litigated under the disparate impact theory involves challenges to nonscored objective selection criteria that the defendant asserts are justified for reasons unrelated to job performance. This pattern is similar to the second because the challenged selection criteria are not traditional paper and pencil tests, so the defendant is unlikely to engage in formal validation studies to justify their use. Thus, issues raised because of the lack of formal validation apply to this pattern of cases as well. This pattern differs from the first two in that the defendant does not attempt to justify the selection criteria as related to or predictive of job performance. Instead, the defendant asserts they are justified for other business reasons.

For example, a black plaintiff might challenge a residency requirement for city employees. If the city's population or work force is predominantly white, the plaintiff will allege that the residency requirement has an adverse impact on blacks. To justify the requirement, the defendant does not argue that living within the city limits makes employees better employees, but rather that the residency requirement advances other legitimate interests of the city, such as economic and political self-interest.[184] Similarly, a private sector employment policy that

183. Another difficult case would involve a police department's hiring requirement that applicants have previous experience as police officers within the state. In defense of this previous experience, the police department would argue that it eliminates the need for applicants to attend the training academy, thereby getting new officers on the job quicker and at less cost, in addition to being obviously job-related. If minority group members have been underrepresented in police departments throughout the state, the narrowly defined previous experience requirement would continue the underrepresentation. The question is whether the police department's argument ought to justify this narrowly defined hiring qualification.

184. In McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976), the Court upheld the constitutionality of such a residency requirement because it was not irrational or in violation of the right to travel. Because Title VII requires different justifications for rules with an adverse impact, *McCarthy* is not determinative.

The city could also argue that the residency requirement is related to employee work quality by showing that being tied to the community, being closer to work, and being involved in the community's future affects job performance. It would seem, however, that economic and political self-interest is the more straightforward reason for such residency rules.

Some public employers have argued that the disparate impact theory of discrimination should not be applicable to them because it prohibits discrimination beyond the scope of the fourteenth amendment's equal protection clause. *See, e.g., Beazer*, 440 U.S. at 583 n.23, 584 n.25; *Dothard*, 433 U.S. at 323 n.1. Alternatively, they argue that the courts should be more deferential in evaluating a state's justification for a rule with an adverse impact. *Dothard*, 433 U.S. at 331 n.14. Although the Supreme Court has not explicitly addressed the constitutionality of the disparate

limits higher level jobs to present employees may have an adverse impact if blacks are underrepresented in the employer's work force. The employer may assert that such a scheme is legitimate because it provides career ladders or promotional opportunities for present employees, even if the previous experience is not related to or correlated with successful performance in the higher level job.[185]

Another illustration of this factual pattern is found in *Robinson v. Lorillard Corp.*, the case most often relied upon for the strict "business necessity" test.[186] At issue was the validity of a seniority system that perpetuated past racial discrimination. Seniority systems are desirable because of the stability and predictability they provide for decisions about employee promotions, layoffs, or transfers. They often are unrelated to job performance standards.[187] In *Robinson* the court reasoned that a facially neutral seniority system violated Title VII unless justified by an "overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business."[188]

a. Utility of alternatives

Evidence of alternatives can be especially useful in cases falling within this pattern. It can serve the same three purposes discussed in the context of a nonscored objective criterion that is justified as related to job performance. For example, if the city asserts support of the tax base

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impact theory of discrimination as applied to states, the Court upheld the constitutionality of the 1972 amendments to Title VII eliminating the exemption for public employers, in an eleventh amendment challenge to back pay awards against a state employer under Title VII. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (upholding the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103). The courts could accommodate some of the substantive concerns of a state, by recognizing as reasonable and legitimate the different (nonprofit) interests of public employers, rather than by adopting a more lenient standard of review, in evaluating their justifications for a rule with an adverse impact.

In contrast, public employers should arguably be held to higher standards of justification. Public employers are already regulated by the Constitution, with restraints on permissible behavior not applicable to private employers. According to this view, private employers would enjoy greater discretion in deciding which policies and interests to advance through their workforce.

185. This example is similar to the one discussed *supra* text accompanying notes 182-83. In this instance, however, the defendant does not assert that experience is related to job performance, although it could do so.

186. *See supra* text accompanying notes 148-51.

187. Line of progression seniority, in which a worker in a job lower in the line acquires the necessary skills for jobs higher in the line, can be related to job performance standards if properly implemented. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 246-47 (5th Cir. 1974) (explanation of line of progression). For a discussion of seniority systems and the Title VII issues raised by them, see Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

188. *Robinson*, 444 F.2d at 798. *Robinson* is used only to illustrate an employment criterion not purported to measure job performance, not for its substantive conclusion about seniority systems. *See supra* note 148.

in defense of its residency rule, a city is likely to tax a nonresident's income produced in the city to the same extent that the city taxes residents' income. The existence of this alternative, the plaintiff can argue, raises the inference of intentional discrimination.[189] The city's real motive, according to the plaintiff, is to preserve the predominantly white character of the city.

Second, the plaintiff could argue that the residency requirement does not effectively serve the employer's stated interest. Assuming that the employer's economic and political self-interest is legitimate, the plaintiff would argue that the residency requirement does not substantially advance that interest. For instance, the requirement may be premised on the notion that resident employees contribute to the economic base of the city—spending money there, buying houses, paying property taxes, lowering unemployment. The plaintiff would need to argue that the defendant's assumptions are inaccurate; that is, there is no significant difference between resident and nonresident employees in where they spend their money—residents may rent, not buy; the requirement may have no effect on the unemployment rate.

The third and most common argument under this fact pattern is that the employer's interest apparently served by the requirement is not sufficiently important to overcome the requirement's adverse impact. This argument tests the scope of permissible justifications. In the case of the residency requirement, the plaintiff would argue that the residency rule is not sufficiently important to the city's economic and political welfare.[190] In the case of job experience, the plaintiff would argue that providing promotional opportunities through an experience requirement reflects too narrow an interest to be condoned in light of the adverse impact on minority group members. The plaintiff also could argue that the requirement has too great a cost, especially if minority group

189. Such an inference is also supported by the fact that the residency requirement is at odds with the employer's efficiency interests in hiring the best qualified workers. Because the city does not stand to gain under the rule, the plaintiff suggests that the defendant chose the residency requirement because of its racial impact.

190. This argument is more persuasive if the city is Grosse Point, Michigan and the plaintiff is from Detroit; or the city is Beech Grove, Indiana and the plaintiff is from Indianapolis, because of the racial composition of each city and their histories of discrimination. *See, e.g.*, United States v. Board of School Comm'rs, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) (court of appeals upheld cross-district desegregation remedy for segregated Indianapolis Public Schools because state Uni-Gov statute (setting up unified government for City of Indianapolis and Marion County but excluding school districts and the cities of Beech Grove, Speedway, Lawrence, and Southport) was tainted with racial discriminatory motive); Milliken v. Bradley, 484 F.2d 215, 245 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974) (court of appeals ordered 53 suburban school districts to participate in the desegregation of the Detroit schools because "any less comprehensive a solution than a metropolitan area plan would result in an all black system immediately surrounded by practically all white suburban school systems. . . .").

members are underrepresented in the employer's workforce because of past discrimination.

In either example, the plaintiff can use evidence of alternatives to question the employer's interest in using a particular selection criterion. For example, if the residency rule is premised on the notion that resident employees enhance the identity of the city as a political unit, the plaintiff could argue that alternatives, such as giving preference to those with substantial previous community service, serve this interest equally well.[191] Alternatives to the job experience requirement include giving weight, but not an absolute preference, to previous experience with the same employer, or filling only some higher level openings through internal promotions.[192] Such alternatives provide an opportunity to see if it is possible to reformulate the employer's underlying goals to accommodate minority group members' interests in equal employment opportunity without undercutting the employer's other legitimate interests.[193]

b. Consequences of using alternatives

This pattern of cases raises two initial questions: may an employer justify a selection criterion with an adverse impact without regard to job performance; and if so, how should courts evaluate these non-job-related justifications?

In answer to the first question, the Supreme Court has intimated that non-job-related concerns are permissible. Formulating the disparate impact theory in *Griggs*, the Supreme Court said:

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191. *Cf.* Zobel v. Williams, 457 U.S. 55 (1982) (Alaska's mineral income distribution plan based on the length of residency in Alaska violates the equal protection clause of the fourteenth amendment). In a separate concurrence, Justice O'Connor suggests that a distribution plan based on a desire to compensate citizens for prior contribution to the state is reasonable under some circumstances, if it does not infringe "the right to travel." *Id.* at 72 & n.1 (O'Connor, J., concurring).

192. For example, internal promotions are common at institutions of higher education not only for reasons of morale but also because it is less expensive to hire at the assistant professor entry level than the full professor level. This common practice and the expectation of promotion do not prevent the university from hiring some professors from other institutions or recognizing a beginner's other qualifications with an entry level appointment as a full professor.

193. Reformulating the underlying goals is also seen in equal protection challenges under the fourteenth amendment. For example, in *Bakke*, 438 U.S. at 315-19, Justice Powell's dispositive opinion suggests that race can be a factor in admission programs for higher education institutions if the purpose is diversity in the student body, but it cannot be a factor simply for its own sake.

Another way to accommodate Title VII's policy of nondiscrimination with policies unrelated to job performance is to exempt minority group members from the requirement. While this action would further the employer's goals because some employees would satisfy the requirement, it raises the issue of whether such a program is permissible affirmative action under the standards suggested by United Steelworkers v. Weber, 443 U.S. 193 (1979). *See also supra* note 133.

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[194]

Although initially some lower courts read this language as limiting the scope of permissible justifications to those that related to job performance,[195] the better view is that the Court did not intend the job performance language to limit the defendant's justification.[196] It is probable that the Court used the job performance language as an example of what would constitute business necessity in the *Griggs* situation, because the employer asserted that using the test would result in better overall job performance.[197]

An interest in successful job performance, as *Griggs* said, is a paramount concern of employers, but they often have other interests as well. Their interests in efficiency and productivity, as well as their right to structure their businesses, may not manifest themselves in specific job performance standards. These concerns should not automatically be excluded as permissible justifications, although they do raise the question of the scope of non-job-related interests that are insulated. Although the Court has implied that a broader defense is permissible, it has not explicitly articulated the scope of such a defense.[198]

If selection criteria can be justified without regard to job performance, how should courts evaluate these non-job-related justifications? Evaluation requires extrapolation from the traditional job-relatedness standard. The job-relatedness standard itself is inappropriate because the employer does not argue that the selection criterion is related to job performance. Here, the issue is whether the employer's asserted inter-

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194. *Griggs*, 401 U.S. at 431.

195. *E.g.*, Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971).

196. Wilson, *supra* note 138, at 850-51; Note, *Employment Discrimination-Company Rule Calling for Discharge After Several Wage Garnishments Discriminates Against Black Employees in Violation of Title VII of the Civil Rights Act of 1964*, 85 HARV. L. REV. 1482 (1972).

197. Duke Power Company admitted that the challenged requirements were not specifically related to particular jobs but argued that the requirement would upgrade the quality of its workforce. *Griggs*, 401 U.S. at 428, 434.

198. The Supreme Court considered employment policies unrelated to job performance in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (policy to deny accumulated seniority to employees returning from mandatory maternity leave); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (collectively bargained seniority system that perpetuated past discrimination against Blacks and Hispanics); General Electric v. Gilbert, 429 U.S. 125 (1976) (exclusion of pregnancy related disabilities from an employer's disability insurance program). Since the decisions rest on other issues, the Court did not reach the question of the nature of the defendant's justification. *See* Williams, *supra* note 14, at 689-93.

est, and the relationship of that interest to the criterion, satisfy a measure of appropriateness equivalent to job-relatedness. This question, in turn, provides the plaintiff with an opportunity to use evidence of alternatives to undercut the defendant's justification in the same way the plaintiff questions the justification of any nonscored selection criterion. The plaintiff can use evidence of alternatives to suggest that the selection criterion does not, in fact, advance the employer's interest or that the employer's interest in using the selection criterion does not reach the necessary level of importance.[199]

In using alternatives to argue that the selection criterion does not, in fact, advance the employer's interest, the plaintiff again attacks either the existence of the underlying relationship or the strength of the association between the criterion and the employer's stated need. Such an attack is possible because ordinarily the employer has not formally validated the criterion. A more obvious, common sense connection, however, often exists between the criterion and the employer's business interest in cases falling within this third fact pattern, than in cases where the defendant asserts a job performance justification. For example, a city's residency rule appears more obviously related to its economic and political self-interest than a height and weight requirement to police work or than performance on a standardized intelligence test to assigning low level jobs in a power plant.[200] But, sometimes the apparently obvious relationship does not withstand scrutiny. Examining evidence of alternatives to evaluate the defendant's argument in favor of a substantial relationship is particularly useful in exposing inaccurate assumptions about such relationships and their strength.[201]

Even when the nexus between the employer's policy and purpose exists, alternatives evidence can be helpful in evaluating the importance of the employer's interest in a particular selection criterion. Consider again the previous experience requirement. The employer can readily establish that limiting jobs to those already internally employed will clearly advance its interest in providing career ladders or promotional

199. For example, the real interest advanced by requiring employees to reside within the city may be patronage; that is, to provide jobs for those who voted for the lawmakers. While a residency rule would advance that interest and that interest is important to the city's lawmakers, the question is whether it is a legitimate interest, occupying a place in public sector employment similar to the notion of job-relatedness in other contexts.

200. *But cf.* Smith v. Olin Chemical Corp., 555 F.2d 1283, 1286 (5th Cir. 1977) (en banc) (defendant need not prove that a "good back" is related to performance on manual labor job because it is "patently neither artificial nor arbitrary, and is obviously related to business necessity"). For a complete discussion of *Smith*, see 48 MISS. L.J. 1099 (1977).

201. The strictness of the test in *Robinson*, 444 F.2d at 798, should be understood in this light. The court was formulating some measure equivalent to *Griggs'* job-relatedness test to evaluate the appropriateness of seniority systems that perpetuated the effects of past discrimination.

opportunities. Here the issue is the great cost of thus achieving the employer's goals. The employer's costs include sacrificing its own interest, because the requirement severely limits the pool of qualified applicants for high level jobs. Minority group members suffer the further restriction of employment opportunities, for reasons unrelated to job performance. With evidence of alternatives, the plaintiff argues that these costs are too great because a more limited alternative would accomplish a similar goal for the employer.

Using alternatives in this latter way—to argue that an employer's selection criterion is not sufficiently important—plaintiffs must first show that not all business reasons can justify a selection criterion with an adverse impact. Supreme Court decisions involving employment practices unrelated to job performance do suggest some limitation on the scope of a justification unrelated to job performance. In *Nashville Gas Co. v. Satty*,[202] involving an employer's policy of denying accumulated seniority to employees returning to work from mandatory maternity leave, the Court analyzed the policy using the disparate impact theory. Justice Rehnquist, writing for the Court, stated "If a company's business necessitates the adoption of particular leave policies, . . . Title VII is not violated. . . ."[203] However, "since there was no proof of any business necessity adduced with respect to the policies in question,"[204] the Court did not analyze the scope of the defense.[205]

A simple statement of the business necessity standard indicates that, whenever the plaintiff shows that alternatives can serve the same interests of the employer, the criterion sought to be justified cannot be a necessity. By definition, one policy is not necessary if its objectives can be accomplished by an alternate policy. This simple statement obscures, however, the inquiries necessary to apply the standard fairly: (1) Is the alternative "available" in terms of feasibility and cost to the employer? (2) Will the alternative accomplish the same goal? (3) How narrowly can the employer define its goal? (4) How much freedom does the Court or the plaintiff have to recast the employer's stated interest?

In a footnote in *Satty*, Justice Rehnquist wrote that the employer's policy of denying accumulated seniority to employees might easily conflict with the employer's own economic and efficiency interests, since inexperienced employees are favored over experienced ones.[206] This observation suggests that whenever an employment policy does not serve the employer's economic and efficiency interests, as understood by

202. 434 U.S. 136 (1977).
203. *Id.* at 143.
204. *Id.*
205. *See supra* note 198.
206. *Satty*, 434 U.S. at 143 n.5.

the Court, it is not a business necessity. An employer can be expected to argue that it has the discretion to advance one interest (discouraging employees on certain kinds of leave from returning to work) over another (experienced employees preferred over inexperienced employees). This assertion of discretion requires the defendant to articulate fully the conflicting interests and thus expose them to judicial scrutiny.

In direct contrast to the view that alternatives always defeat a selection criterion unrelated to job performance, some commentators argue that any genuine business purpose should be sufficient to justify a selection criterion with an adverse impact.[207] Neither extreme is advanced here. The business necessity standard seeks to accommodate the employer's and the minority group member's conflicting interests. Evidence of alternatives is extremely relevant in striking the balance. Examining alternatives is an effective way to identify policy choices and to evaluate their costs. The contrary view, that evidence of alternatives is limited to proving intentional discrimination, is not only an inaccurate view of the disparate impact theory but also risks inadequate consideration of fundamental issues of social policy.

III. The Functional Approach Applied: Reconciling Apparently Inconsistent Decisions

The three factual patterns examined in Part II are not offered as absolutes. In specific cases the plaintiff might challenge more than one kind of selection criterion or the defendant might seek to justify a criterion as related to both job performance and "business necessity." Or, a case might present a variation on one of these factual patterns. For example, an employer might justify requiring a supervisor to have previous experience in the job to be supervised because it encourages hard work in the supervised job, or enhances employee morale. The purpose is not to judge performance in the job for which experience is required and it differs from providing promotional opportunities. Still, recognizing the basic factual patterns of disparate impact cases illustrates the different defenses asserted and thus the different uses of alternatives evidence.

These differences account for some of the apparent inconsistencies in lower federal court decisions involving the disparate impact theory. While some courts and commentators view the court of appeals' decisions as inconsistent with Supreme Court doctrine,[208] some of the dif-

207. *E.g.*, Comment, *supra* note 2, at 923-32.

208. *See, e.g.*, Cox, *supra* note 154, at 85; Comment, *supra* note 2, at 933-34; Ill. Note, *supra* note 2, at 203-07. *See also* Chrisner v. Complete Auto Transit, 645 F.2d 1251 (6th Cir. 1981); Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981).

ferences reflect the varying factual patterns of disparate impact challenges.[209] In fact, a close reading of several recent lower court cases shows that the lower federal courts are grappling with the very issues the Supreme Court has avoided.

In *Chrisner v. Complete Auto Transit*,[210] the court took what appeared to be a broad view of "business necessity" but in fact suggested that the employer would be liable if its employment policy did not advance sufficiently its job performance goals. There, a female plaintiff had challenged the employer's requirement that "yard employees" have two years of truck driving experience.[211] The employer's business involved transporting new automobiles by tractor-trailer from the manufacturer to dealers across the country. Yard employees worked at the employer's terminal and inspected cars, assigned them identification numbers, drove them to a loading area, and loaded them onto the tractor-trailers. The job occasionally required rearranging tractor-trailers at the terminal or using public highways to drive them to an overflow lot. The district court concluded that the adverse impact of the two year requirement was unjustified because the employer had required experience for only a brief time, and did not require it at the time of the trial.[212]

The court of appeals reversed the lower court on the justification issue. According to the majority, the district court had rejected the business necessity defense solely because the company had not shown the unavailability of alternative hiring procedures that would have less adverse impact on female applicants.[213] The court of appeals said that the plaintiff bears the burden of affirmatively proving the existence of alternatives with less adverse impact, that the defendant must prove that the requirement "substantially promote[s] the proficient operation of the business," and that the business necessity defense entails considerations which are a function of the job's demands.[214]

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209. *But see* NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) (not only does plaintiff bear the burden of persuasion on the alternatives issue but also on the issue of business necessity or job-relatedness) discussed *supra* note 84. *See also* Smith, *supra* note 2, at 403.

210. 645 F.2d 1251 (6th Cir. 1981).

211. Prospective employees could substitute truck driving school for the experience requirement. *Id.* at 1256.

212. Chrisner v. Complete Auto Transit, Inc., 25 Fair Empl. Prac. Cas. (BNA) 481, 483 (E.D. Mich. 1978). The employer instituted the new requirement in part at the request of the union who sought to avoid layoffs of yard employees who could not transfer to truck driving positions because they were not qualified. The company abandoned the experience requirement during a wildcat strike and did not revive the policy after the strike was over. *Chrisner*, 645 F.2d at 1256.

213. *Chrisner*, 645 F.2d at 1260. The dissent disputes the characterization of the district court's action. *Id.* at 1264.

214. *Id.* at 1262.

In remanding the case, the court suggested several factors to consider in deciding whether the plaintiff sustained her burden in proving the existence of alternatives, but did not suggest that the factors must add up to a finding of intentional discrimination.[215] Instead, the factors might show that truckdriving was not an important or essential function of the job and, therefore, that the two year experience requirement was not substantially related to job performance. Thus, in a case where the defendant has not formally validated the requirement, the plaintiff could use evidence of alternatives to argue that the relationship was not substantial enough to justify the adverse impact of the requirement. In discussing the importance of the employer's interest, the court did not suggest that job performance was an insufficient interest but rather that the district court should consider how important experience in truck driving was to the successful performance of yard employees' work.[216]

Similarly, in *Contreras v. City of Los Angeles*,[217] the court took what appeared to be a broad view of business necessity, but in fact, it applied the narrow prevailing standards to justify a paper and pencil test. In *Contreras*, the plaintiff alleged that an auditor's examination unlawfully discriminated against Hispanic applicants.[218] Deciding that the plaintiff's evidence of statistical disparities established a prima facie case, the court of appeals turned to the question of the defendant's burden. The question, the court said, is: "[W]hat must an employer show to meet its burden of proving that pre-employment tests, having a disproportionate, adverse impact on a racial minority, are sufficiently justified by business need to survive a Title VII challenge?"[219] The court concluded that tests with an adverse impact are impermissible unless "shown, by professionally accepted methods, to be predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job or jobs for which candidates are being evaluated."[220] According to the district court and a majority of the court of appeals, the defendant met this burden.[221]

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215. *Id.* at 1263.

216. Thus the case fits within pattern #2, discussed *supra* text accompanying notes 173-83, and evidence of alternatives is used to argue that the means/end relationship suggested by the defendant is not substantial, similar to the Supreme Court's use of alternatives in *Dothard*, 433 U.S. at 331-32.

217. 656 F.2d 1267 (9th Cir. 1981).

218. The plaintiffs also alleged that the accountant's examination unlawfully discriminated but could not show that the test had a substantial adverse impact on Hispanic applicants. *Id.* at 1274.

219. *Id.* at 1276.

220. *Id.* at 1280.

221. The dissent disputes this characterization of the evidence. *Id.* at 1294-95 (Tang, J., dissenting).

In reaching this unsurprising conclusion, the majority found it necessary to harmonize the ninth circuit's previous decision in *Blake v. City of Los Angeles*[222] with its other business necessity defense precedents. In *Blake*, female plaintiffs challenged the validity of the Los Angeles Police Department's minimum height standard and its physical ability test. In reversing the district court's award of summary judgment for the defendant, the court in *Blake* stated that the employer must show that the selection devices are "so closely job related that their use was justified by business necessity."[223] At most, the defendant had shown, and the district court had accepted, a mere rational relationship between the height requirement and police duties. The plaintiff in *Contreras* argued that this language in *Blake* meant that the business necessity defense required more than showing that a selection criterion is important to successful job performance. The *Contreras* court accepted the plaintiff's argument but then rejected *Blake* as a precedent. Thus, one could characterize the *Contreras* decision as taking a broad view of business necessity: the court refused to require the defendant to prove more than that the auditor's test accurately predicted or correlated with important elements of work behavior.

It would be a mistake to do so. The majority and the plaintiff in *Contreras* failed to understand the factual differences between their case and *Blake*. The plaintiffs in *Blake* argued, and the court of appeals there agreed, that the defendant had not met its burden of showing that there was a substantial relationship between the selection device and successful performance as a police officer. The defendant had defined its interest in terms of job performance and the plaintiffs introduced evidence of alternatives to convince the court that the height requirement was not related to job performance. In contrast, the question in *Contreras* was the validity of a paper and pencil test. By requiring rigorous efforts to establish the test's validity, the court did not adopt a relaxed standard of justification.[224]

Finally, in *Wright v. Olin Corporation*,[225] the court took what appeared to be a narrow view of "business necessity." In fact, the court extrapolated appropriately from the job-relatedness justification in a case involving an employment policy unrelated to job performance.

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222. 595 F.2d 1367 (9th Cir. 1979).

223. *Id.* at 1379.

224. Thus, *Contreras* fits within pattern #1, discussed *supra* text accompanying notes 161-72, and evidence of alternatives is used to argue that the defendant's interest in using the test is not important. As discussed, the court's willingness to accept the plaintiff's argument must depend on the efficiency of the alternative, which the plaintiff did not show. *Blake* involved non-paper and pencil tests that the defendant attempted but failed to validate. *Blake*, 595 F.2d at 1380-83.

225. 697 F.2d 1172 (4th Cir. 1982).

Wright is a rare case in which the court expressly dealt with the theoretical underpinnings of the disparate impact and disparate treatment theories of liability as well as the implications of *Albemarle* and *Beazer* for the significance of alternatives evidence. The plaintiffs challenged the employer's "fetal vulnerability" policy that restricted female access to jobs requiring contact with toxic chemicals.[226] The district court analyzed the issue under the disparate treatment theory and held that the program was justified by sound medical evidence, and was instituted without intent to discriminate on the basis of sex.[227] The court of appeals reversed and remanded, finding the issue best analyzed under the disparate impact theory.

The court of appeals announced several principles to guide the district court's decision on remand. First, although providing workplace safety is in general a matter of business necessity, this interest does not establish in a particular case that a specific safety-related measure is sufficiently compelling to override conflicting private interests protected by Title VII. Second, the business necessity defense cannot be established by proof that the employer subjectively and in good faith believed the employment policy was necessary and effective. Instead, independent, objective evidence is required. Third, the plaintiff may introduce evidence of alternatives to show either that the policy is in fact a pretext for intentional discrimination or that the specific "fetal vulnerability" program was "unnecessary overkill" in light of the defendant's purpose.[228] The court thus was willing to support a broad range of employer discretion, including defining its legitimate interest to encompass protecting the unborn. In evaluating the choices actually made, the court required objective evidence to support the effectiveness of the particular "fetal vulnerability" program and adequate consideration of alternatives with less impact.[229]

These three cases illustrate several points: first, the usefulness of alternatives evidence in determining liability under the disparate impact theory; second, the way evidence of alternatives can be used to show intentional discrimination, to measure means-ends relationships, or to evaluate the utility of an employer's scheme; third, the inquiry into the existence of alternatives need not involve excessive infringement of an

226. The plaintiffs also alleged race and gender discrimination in recruitment, hiring, job assignments and classifications, promotion, terminations, re-employment and its seniority system. The district court found in favor of the defendants on all counts. The court of appeals affirmed, except for the fetal vulnerability policy. *Id.* at 1176.

227. *Id.* at 1182-83.

228. *Id.* at 1191.

229. Thus, *Wright* fits within pattern #3, discussed *supra* text accompanying notes 184-211, and the court suggests evidence of alternatives can be used to argue that the means/end relationship is not substantial enough or that the employer's underlying goals can be reformulated.

employer's range of legitimate judgment. These courts agreed that evidence of alternatives is relevant to liability determinations. The results differ, however, because of the courts' willingness to strike a balance between the competing interests of the employer and minority group members.

In contrast, the Supreme Court's treatment of these issues in *New York City Transit Authority v. Beazer* is troubling.[230] For example, it is unclear whether the defendant argued that its blanket exclusion for all methadone users was justified for job performance reasons or by "business necessity." If the employer asserted that the blanket exclusion was related to employees' job performance, the Court merely presumed that the nexus existed. The Court accepted this assertion without requiring any supporting evidence, let alone evidence approximating the more technical validation process. However, like the residency and previous experience requirements discussed in Part II, there is a common sense connection between job performance and current methadone use. If the rule applied to past methadone users, the connection would be less obvious, but the Court did not consider the validity of the rule as it applied to past users.[231] To the extent that the blanket exclusion denied jobs to methadone users who were capable of successful job performance, the employer was faced with a conflict of interests: it was inefficient to exclude from the pool those applicants who could do the work; it also was inefficient to devise a system to permit individual determinations of employability among methadone users.

On the other hand, the employer may have asserted that the blanket exclusion was justified for reasons unrelated to job performance. The Transit Authority stated that one reason for the rule was its fear of adverse public reaction if it generally were known that the Transit Authority employed persons with a history of drug abuse. The question that the Court should have addressed is whether such an interest is sufficiently important in the face of the adverse impact of the rule and, if so, why. Because the Court does not speak to the issue, it does not articu-

230. *See supra* text accompanying notes 66-112.

231. As Justice Powell pointed out in a separate opinion, the Transit Authority's policy also applies to former methadone users if they have not been free of methadone for at least five years. *Beazer*, 440 U.S. at 594-97. The majority admitted that a policy excluding former users would be harder to justify but limited its consideration to current users because, in its view, there was no evidence that the Transit Authority enforced its rule more broadly. *Id.* at 572 n.3. According to the district court, people who had successfully concluded participation in a methadone maintenance program recently would clearly be subject to the rule. *Beazer*, 399 F. Supp. at 1036. What was unclear was whether the Transit Authority would enforce its rule against those who had been free of methadone for more than five years. *Id.* The Court's reluctance to consider the application of the rule in light of its potential application to former users suggests that it viewed the defendant's justification as one of job performance.

late the scope of such a defense or distinguish between permissible and impermissible discriminatory tastes.[232] The troubling aspect of *Beazer* is the Court's failure, when given the opportunity, to explain the nature of the business necessity defense or its relation to evidence of alternatives.

CONCLUSION

The Supreme Court's Title VII decisions neither limit the utility of alternative selection criteria nor suggest any reason for treating this evidence differently from other kinds of nonstatistical evidence. The contrary view—that alternatives are relevant only to intentional discrimination—not only misreads the Court's interpretations of Title VII but also risks ignoring fundamental factual differences among disparate impact cases. The factual patterns in disparate impact cases discussed here show that the utility of alternatives evidence differs depending on the kind of selection criterion challenged and the employer's reason for using it. Recognizing the differences in defenses, and consequent uses of alternatives, makes it possible to reconcile apparently inconsistent Supreme Court and lower federal court decisions.

Bigger issues loom. The limitation of this Article's analysis is that it concerns objective employment decisions and perhaps implies that employers make decisions only on the basis of explicit, objective, factors. In fact, employers make judgments within a more complex system. Real world employment decisions may not always be rational or objective. Companies may be successful in choosing employees by following hunches, exploiting consumer concerns, or having simple good luck. Successful employment decisions in govenment are even more serendipitous. The larger issues surrounding Title VII—the meaning of equality and the nature of government regulation—remain. For example, is the disparate impact theory appropriate for challenging extremely discretionary selection procedures, involving subjective evaluations of applicants or no fixed employment policies? If so, what is the nature of the burden that the employer must bear to justify them? Such issues are unlikely to be debated effectively, let alone resolved, while there is an exaltation of the form of evidence over what the evidence proves. The analysis suggested by this Article, in spite of its objective world focus, is intended to contribute to the analytical framework in which future debate can take place.

232. *See* G. BECKER, THE ECONOMICS OF DISCRIMINATION 14-17 (2d ed. 1971). *See also* Fiss, *supra* note 75, at 257-63; Rothschild & Werden, *supra* note 152, at 263-65.