DePaul Law Review

Volume 46
Issue 2 *Winter 1997*

Article 2

On a Blindered Impact Model: A Response

Paul N. Cox

ON A BLINDERED IMPACT MODEL: A RESPONSE

*Paul N. Cox**

* Professor of Law, Indiana University School of Law—Indianapolis.

INTRODUCTION

Professors Ramona Paetzold and Steven Willborn recently explored the disparate impact model of employment discrimination in *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, published in the *North Carolina Law Review*.[1] They approached the model from the perspective of what they termed two "new lenses": the concurrence and stratification lenses.[2] Both lenses address matters of causation and both appear to be responses to questions raised by the Supreme Court's opinion in *Wards Cove Packing Co. v. Antonio*,[3] and by the partial internment and partial codification of *Wards Cove* by the Civil Rights Act of 1991.[4]

As a generalization, the disparate impact model prohibits employer use of status-neutral employment criteria that generate a disparate adverse effect by race, gender, etcetera,[5] unless the criteria are justified by "business necessity."[6] In *Wards Cove*, the plaintiff attacked the defendant-employer's employee selection practices by comparing the composition of the employer's two work force categories: cannery workers (predominately nonwhite) and noncannery workers (predominately white).[7] The Supreme Court rejected this comparison as not probative on two grounds: (1) the cannery work force was not a "qualified labor pool" from which the noncannery work force was selected, and (2) the plaintiff had not identified particular neutral employment criteria and established that the criteria generated a disparate effect.[8] The first of these grounds is somewhat opaque, but a potential explanation is that a plaintiff must control for qualifications not in dispute, including, perhaps, ones not expressly required by the defendant.[9] Call this the comparability implication: to determine

1. Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325 (1996).

2. *Id.* at 331-51.

3. 490 U.S. 642 (1989).

4. Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (1991).

5. The extent of the etcetera is unclear. For example, the impact model may not be available in the context of age discrimination.

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

7. 490 U.S. at 647-50. Although the plaintiffs identified a number of challenged practices, they sought to establish disparate effect through evidence of "bottom line" imbalance: cannery workers were predominately nonwhite and noncannery workers predominately white. *Id.* at 657. They failed to present evidence of the causal relationship between the challenged practices and allegedly unlawful "effect." *See id.*

8. *Id.* at 651-58.

9. This is a potential explanation because the Court indicated in part that the cannery workers were not qualified for skilled noncannery positions and in part that self-selection might explain the absence of nonwhites in unskilled noncannery positions. *Id.* at 653-54. This may mean that the plaintiff must control for undisputed qualifications—those not challenged but expressly re-

whether a neutral criterion has a disparate effect, the persons subjected to it must be otherwise comparable or homogeneous. Professors Paetzold and Willborn treat this implication through their "stratification lens": it is possible that the observed disparate effect of an employer requirement (e.g., an employment test) is attributable to an antecedent cause (e.g., differences in education level or quality of education) not expressly identified as a criterion.[10] If data is disaggregated (stratified) to account for this antecedent cause, substantial disparities in majority-group/minority-group performance under the employer's requirement may disappear.[11] In their view, this form of "stratification" is or should normally be ignored for prima facie case purposes under the disparate impact model: the employer faces liability for use of the test regardless of the antecedent reasons for the test's disparate effect.[12]

Congress purported to "overrule" *Wards Cove* in the Civil Rights Act of 1991.[13] However, the 1991 Act partially codifies *Wards Cove* by incorporating the Supreme Court's requirement that the plaintiff identify the particular criterion attacked and establish that the criterion caused a disparate impact.[14] The 1991 Act creates an exception if criteria "are not capable of separation for analysis."[15] An ambiguity in the Act is the meaning and scope of this exception.[16] Professors

---

quired—and for other variables that are not attributable to employer "discrimination." However, the Court's perception of undisputed qualifications appears to have been a broad one, potentially including qualifications not expressly required by an employer, because one of the plaintiff's complaints was the employer's failure to utilize objective criteria. *Id.* at 647. An implication is that the Court was insisting upon a statistical comparison of homogeneous workers or applicants. *See* Allen v. Seidman, 881 F.2d 375, 378-79 (7th Cir. 1989) (suggesting this interpretation of *Wards Cove* but finding homogeneity under the facts of the case).

10. Paetzold & Willborn, *supra* note 1, at 336-42.

11. *Id.* at 338-39.

12. *Id.* at 353-56. *But see id.* at 387-97 (exploring possible legitimate uses of stratification). The authors' analysis of stratification is addressed later in this article. *See infra* notes 232-49 and accompanying text.

13. Public Law No. 102-166, § 2, 105 Stat. 1071 (1991). The cited findings section declares that *Wards Cove* weakened the scope and effectiveness of Title VII. *Id.* Section 105 of the Act, codifying the impact model, declares that an interpretive memorandum is the exclusive legislative history, and that memorandum declares that the terms "business necessity" and "job related" in the Act "reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989)." 137 CONG. REC. S15276 (daily ed. Oct. 25, 1991) (Statement of Sen. Danforth).

14. Civil Rights Act (Title VII) § 703(k), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

15. 42 U.S.C. § 2000e-2(k)(B)(i).

16. Moreover, while the Act clearly overturns another aspect of *Wards Cove* by placing the burden of persuasion on the defendant to establish "business necessity," 42 U.S.C. § 2000e-2(k)(B)(i), it is ambiguous in further respects. The Court had defined the content of business necessity in *Wards Cove* as neither requiring "essentiality" nor permitting "insubstantial justifica-

Paetzold and Willborn address the 1991 Act's exception to the requirement of plaintiff identification of a particular criterion and proof of its disparate effect through their "concurrence lens": multiple criteria may generate a disparate effect only when considered jointly, so the exception should be read as deeming such a joint effect an instance of inseparability.[17] Moreover, a particular criterion may generate a disparate effect where this effect is disguised by the effects of other criteria, and the disparate effect of the particular criterion should be deemed an instance of separability.[18]

The concurrence and stratification "lenses" identified by Professor Paetzold and Willborn are valuable clarifications of phenomena that readings of the impact model must confront and are significant contributions to scholarship addressing the model. This response disputes neither the facts of such phenomena nor their importance to the legal causation questions raised by these authors. The response disputes, rather, the implications the authors wish to derive from the lenses or, perhaps, the framework from which they approach the lenses. As this framework is consistent with that offered by Julie Allen and Professors Ronald Allen and Mayer Freed (hereinafter "the Allen authors") in *A Positive Theory of the Employment Discrimination Cases*[19] published in *The Journal of Corporation Law*, this response disputes that positive theory as well.

The framework is this: the impact model is "blind" to antecedent causes and to actual impact upon actual employees or applicants, so the model protects individuals; it is not an equal achievement for groups model; it is not a model attacking only "barriers" to employment attributable to particular instances of societal discrimination; and it is not a device for prohibiting disparate treatment.[20] Rather,

---

tions." 490 U.S. at 659. The Act merely repeats pre-*Wards Cove* judicial language regarding the defense: a "challenged practice" must be "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(B)(i). Even if the Act is viewed as wiping *Wards Cove* from "the books," this would be ambiguous, as prior case law supports both strict (difficult to establish) and relaxed (not difficult to establish) versions of the defense. *Compare* Albermarle Paper Co. v. Moody, 422 U.S. 405, 430-36 (1975) (requiring strict compliance with validation standards of E.E.O.C. Selection Guidelines), *with* New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979) (finding that a criterion has a manifest relationship to employment if it significantly serves a legitimate employment goal even if not required by that goal), *and* Washington v. Davis, 426 U.S. 229, 250-51 (1976) (ignoring the validation requirement and employing a reasonable relationship test).

17. Paetzold & Willborn, *supra* note 1, at 356-64, 383-84.

18. *Id.* at 381.

19. Julie O. Allen et al., *A Positive Theory of the Employment Discrimination Cases*, 16 J. CORP. L. 173 (1991). Professors Paetzold and Willborn also recognize the similarity. Paetzold & Willborn, *supra* note 1, at 374 n.163.

20. Paetzold & Willborn, *supra* note 1, at 370-74.

the model is what the Supreme Court said it was in *Griggs v. Duke Power Co.*:[21] a prohibition of "unnecessary" barriers to minority employment.[22] The response is that the model's blindness is at best unclear, that its protection of individuals is problematic, and that its function is undetermined. In short, the model remains as incoherent as this writer argued it was in 1983.[23]

This is not to say that the model could not be clarified by the framework offered by Professors Paetzold and Willborn, or even that it might be judicially clarified in the manner that they and the Allen authors suggest. To the extent, therefore, that the framework is advocacy of an "ought," this response's critique of the existing clarity of the model is, in fact, unresponsive. Some critical thoughts on the matter of the desirability of the "ought" will nevertheless be offered. In particular, it will be argued here that an anti-barrier rationale for the model is not substantially distinct from the rationales that Professors Paetzold and Willborn reject. Which of these rejected rationales is the best account of the model remains dependent upon the, as yet, judicially unclarified meanings to be assigned to the elements of the model, in particular the "business necessity" element largely ignored by Paetzold and Willborn and by the Allen authors.

I. A Summary of the "Deconstruction" Argument with (Relatively Minor) Quibbles

Professors Paetzold and Willborn believe that the concurrence and stratification lenses supply "insights into the essential nature of the disparate impact model."[24] What is their view of this "essential nature"? The following summarizes their argument, registering minor quibbles along the way.

First, according to *Deconstructing Disparate Impact*, the key to understanding the model is causation, and the key to understanding causation is the "ordinary disparate impact case."[25] The paradigm for the

21. 401 U.S. 424 (1971).

22. *Id.* at 431.

23. Paul N. Cox, *Substance and Process in Employment Discrimination Law: One View of the Swamp*, 18 Val. U. L. Rev. 21, 23 (1983) [hereinafter Cox, *Substance and Process*]. A number of the positions I take in this article are critically addressed by Paetzold & Willborn, *supra* note 1, at 368-74, 368 n.142, 370 n.147, 372 n.156, 373-74 n.161, and by Allen et al., *supra* note 19, at 174 n.3, 176 n.16, 190 n.96, 196 n.140, and I would now be critical, albeit for different reasons, of many others in the article. This response is both a defense of some and a clarification, given my current thinking, of other of these positions.

24. Paetzold & Willborn, *supra* note 1, at 351.

25. *Id.*

ordinary case is *Griggs v. Duke Power Co.*,[26] where the Supreme Court first announced its adoption of the model. At issue in *Griggs* was an employer's use of a high-school-diploma requirement and an intelligence-test requirement.[27] The adverse effect of the high-school-diploma requirement was demonstrated by the fact that 34% of whites and 12% of blacks in the population of the state in which the employer was located possessed such a diploma.[28] The test's adverse impact was demonstrated by evidence of disparities in the scores of white and black test takers in samples of such test takers unrelated to the employer's experience with the test.[29]

Second, the Court in *Griggs* focused on the disparities generated by these employer requirements without engaging in a stratification exercise. That is, the Court did not seek to discover the reason for the impact in antecedent social causes. Stratification, for example, might have revealed that high school graduation is explained by differences in income correlated with race. From the Court's failure to engage in this exercise, Professors Paetzold and Willborn conclude that causation is viewed "with blinders" in ordinary cases: antecedent causes are ignored.[30] The implication, quite in keeping with the Court's pronouncement in *Griggs* that intentional discrimination is not required under impact theory, is that "employers may be held legally responsible for impacts that are 'caused' in substantial part by factors external to employers."[31]

I invoke a quibble at this point. There is a sense in which the Court, in fact, did allude to "stratification" in *Griggs*: the Court's opinion explains group differences in test performance as attributable to differences in the "social" allocation of educational resources, particularly in the form of intentional school segregation.[32] The failure of Professors Paetzold and Willborn to note this point is potentially (but as will be seen below, not fatally)[33] embarrassing to their later thesis that the model is not limited to criteria that operate to perpetuate intentional "societal discrimination."[34] However, the point also reinforces their argument that the impact model, at least in *Griggs,* was "blindered." The Court, after all, did impose employer liability for

26. 401 U.S. 424 (1971).
27. *Id.* at 425-26.
28. *Id.* at 430 n.6.
29. *Id.*
30. Paetzold & Willborn, *supra* note 1, at 352-56.
31. *Id.* at 354.
32. 401 U.S. at 430.
33. *See infra* note 59 and accompanying text.
34. Paetzold & Willborn, *supra* note 1, at 376.

disparate effect regardless of the antecedent social sources of that effect, even while simultaneously recognizing these antecedent social causes.

Third, *Griggs* also suggests, according to these authors, that the impact model is "blindered" in a second way: it does not require a plaintiff to prove "actual disparate impact in the workplace"; hypothetical impact will do.[35] By this the authors apparently mean[36] that the Court in *Griggs* recognized liability for use of both the diploma and test requirements without inquiring into whether they had redundant effects, that is, whether persons subject to the diploma requirement would have been excluded, even in its absence, by the test requirement.[37] An implication the authors draw from the Court's failure to consider the "net effect" of the two criteria (i.e., the failure to inquire into possible redundancy) is that the "joint effect" of multiple criteria may nevertheless be attacked under the impact model.[38] This is an invocation of the concurrence lens: even if criteria considered separately have no disparate effect, they may, considered jointly, have such an effect. The legal conclusion asserted from these possibilities is that a successful disparate impact model attack may be made either in the case of a joint disparate effect or in the case of the disparate effect of a separate criterion (even though, in the latter case, there is either no effect when the single criterion is considered jointly or where there is no net effect from joint consideration due to redundancy).

A quibble: the concurrence lens conclusion is something of a stretch if predicated simply on *Griggs*. The Court did not consider these complexities in that case, so it is difficult to see why these conclusions should be deemed implications of that failure. Some support for these conclusions, however, may be found in the authors' next point.

Fourth, the concurrence lens supports the Supreme Court's conclusion in *Connecticut v. Teal* that the impact model protects "individuals."[39] The Court's conclusion appears peculiar because individuals

35. *Id.*

36. There is another sense in which actual disparate impact is not necessary: it is the impact on the protected group viewed generally or as a whole, and not the impact on the protected group within the employer's work force or applicant pool, that is of concern. *See* Cox, *Substance and Process*, *supra* note 23, at 53-54; *cf.* Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 651 (1989) (finding that a cannery work force was not a good proxy for a qualified population or labor pool).

37. Paetzold & Willborn, *supra* note 1, at 357. This treatment apparently treats the high school and test requirements in *Griggs* as joint employment requirements for the same position for the purpose of illustration.

38. *Id.*

39. 457 U.S. 440, 453-54 (1982).

have no right under the impact model to freedom from "unnecessary barriers" absent proof of disparate effect on the group defined by their protected status.[40] The authors nevertheless offer the following account of "individual protection": the impact model, viewed through the concurrence lens, is concerned with whether the protected group as a whole is excluded by a criterion, even where it has no actual effect on any actual employee or applicant (at least where actual employees or applicants would have been excluded by a redundant criterion).[41] In the Paetzold and Willborn example,[42] two employer-selection requirements, a test and a diploma requirement, are perfectly redundant: all applicants who pass the test possess a high school diploma and all who fail the test lack the diploma. It is assumed that the test is justified and that it excludes all of the applicants who lack a diploma. It is also assumed that the diploma has an unjustified disparate impact. According to Paetzold and Willborn, black applicants who lack the diploma may attack the requirement even though they would be excluded by the test, and this means that the impact model focuses upon the "individual effect" of the diploma, not its actual effect in the particular workplace.[43] This apparently means that black applicants excluded by the diploma requirement have standing to enjoin its use, even though they also would be legitimately excluded by the test, because the diploma has a disparate effect on blacks as a group, even though it has no actual effect on actual black applicants. However, an individual minority employee or applicant may obtain compensatory, as well as injunctive, relief if actually affected by a criterion that has a disparate effect on the group as a whole, even though it has no actual effect on other actual minority employees or applicants.[44] In the example, if one black applicant passed the test but lacked the diploma, he could obtain a compensatory remedy.[45]

This view of "individual protection" serves to explain *Teal*'s rejection of a "bottom line balance" defense. The Court concluded that a subgroup of the protected group could challenge a component of a selection process under the impact model, even though the group was not excluded by the selection process itself.[46] *Teal*, therefore, supports the concurrence thesis, at least to the extent that the disparate effect of distinct criteria may be attacked even where there is no "net" dis-

40. *Id.* at 457 (Powell, J., dissenting).
41. Paetzold & Willborn, *supra* note 1, at 357-62, 359 n.106.
42. *Id.* at 358.
43. *Id.* at 359.
44. *Id.* at 361-62.
45. *Id.* at 360-61.
46. Connecticut v. Teal, 457 U.S. 440, 451-52 (1982).

parate effect from criteria considered in combination. *Teal* also lends support, in a way in which *Griggs*' failure to address complexities does not, for the further thesis that the joint disparate effect of combined criteria may be attacked where criteria considered separately produce no effect. This is because *Teal* implies that it is the long term effect of criteria on the protected group as a whole, and not "bottom line balance" in a work force, that is of concern.

Fifth, the authors derive from the above a proposition about the rationale or function of the impact model: the model is explained neither by an equal achievement rationale nor by a variation on equal treatment.[47] An equal achievement rationale for the impact model views the model as designed to ensure a distributional objective: equal (or proportional) distribution of employment between, e.g., race and gender, groups.[48] The authors argue, however, that "other elements" of the impact model, in particular the requirement that the plaintiff identify and attack particular criteria and the business necessity defense, "constrain" blindered causation and limit its effectiveness as an instrument of equal achievement.[49] This argument apparently concedes that "blindered causation," considered independently, points to equal achievement. However, the authors, in a footnote, indicate that the concurrence lens, insofar as it implies rejection of inquiry at the "bottom line," also undermines an equal achievement explanation.[50]

An equal treatment rationale for the impact model views the model as approximating a prohibition of disparate treatment, or discrimination motivated or caused by protected status. "Discriminatory intent" is difficult to establish, but the combination of a disparate adverse effect on the protected group and the absence of a business justification for this effect gives rise to a suspicion of disparate treatment or is a state of affairs closely resembling disparate treatment.[51] The authors reject this explanation on the basis of "blindered causation." First, and as a matter of stratification, evidence of an antecedent social cause of disparate impact undermines any inference that the employer caused this impact.[52] Yet blindered causation will generally preclude this employer excuse. Second, and as a matter of concurrence, "[e]vidence that a criterion has a disparate impact when considered

47. Paetzold & Willborn, *supra* note 1, at 364-74.

48. Cox, *Substance and Process*, *supra* note 23, at 47 (relying upon Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1970)).

49. Paetzold & Willborn, *supra* note 1, at 369.

50. *Id.* at 368 n.142.

51. Cox, *Substance and Process*, *supra* note 23, at 108-17.

52. Paetzold & Willborn, *supra* note 1, at 372-73.

individually, but no disparate screening effect when an employer used it in combination with other criteria, would tend to undermine" a claim that the employer adopted the criterion for the purpose of discriminating.[53] There is a third reason, mentioned by the authors but not directly invoked by them in the context of their critique of the equal treatment rationale, that nevertheless appears to influence their conclusion. They argue that the business necessity defense "has very little to do with discrimination directly"[54] because any inference of intent arising from the absence of a justification is "weak."[55] It is said to be weak because criteria may be adopted from "custom, ignorance, or thoughtlessness."[56]

Given their rejection of the equal achievement and equal treatment rationales, Professors Paetzold and Willborn propose a third rationale: the model prohibits unnecessary barriers that disproportionately exclude protected groups.[57] This rationale is not limited to barriers that perpetuate past societal discrimination because courts are not equipped to identify such social causes.[58] (At least as good a reason, however, is that the Supreme Court has expressly rejected such a limitation.)[59] According to *Deconstructing Disparate Impact*, the anti-barriers rationale, as seen through the stratification and concurrence lenses, is supported by "efficiency" in that the rationale avoids difficult issues of determining intent and of disentangling the net effects of multiple criteria, and by the proposition that the rationale produces an acceptable level of "precision" in identifying inappropriate criteria linked to protected status at relatively low cost.[60] This low-cost notion is in part a reference to avoiding the litigation costs entailed if antecedent social causes (stratification) were excuses or if net effects of criteria were in issue and in part a reference to the "low social value" of criteria not justified by business necessity.

A number of quibbles may be registered regarding these matters of efficiency and precision. First, whether criteria not justified by business necessity are of low social value depends, as the authors recognize, upon whether the courts are competent assessors of this value and upon whether the standard of justification adopted is one that

53. *Id.* at 372-73.
54. *Id.* at 369.
55. *Id.* at 369 n.145.
56. *Id.*
57. *Id.* at 374.
58. *Id.* at 374-75.
59. Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 988 (1988).
60. Paetzold & Willborn, *supra* note 1, at 374-77.

identifies "low social value."[61] If business necessity requires indispensability,[62] criteria abandoned under such a standard are not plausibly characterized as ones of "low social value."

Second, it is not clear whether the concurrence and stratification lenses save or exacerbate litigation costs. Under the authors' proposals, concurrence avoids the "cost" of identifying net effects of redundant criteria but multiplies the bases upon which plaintiffs may attack criteria and, therefore, the efforts employers must undertake to anticipate such attacks. Under their stratification proposals, plaintiffs may employ stratification to attack express criteria having no aggregate adverse effect if accounting for antecedent variables not expressly required by an employer nevertheless demonstrates an effect.[63] The authors would also permit defensive use of such an antecedent, but not an expressly required, variable (such as education) where "closely related to legitimate employer interests" and justified by business necessity.[64] These proposals potentially multiply both the complexity and cost of litigation by rendering the possibilities they identify worthy of exploration, even if a general rule against stratification would tend to remove the issue from the litigation table.

Third, while it may be the case that an anti-barriers conception would clarify the meaning of disparate effect and, thus, generate some efficiencies by rendering the law more predictable, it is problematic to assume that this would enhance "efficiency" when that term is broadly construed. If, for example, the authors' version of the impact model enhances the prospects for successful lawsuits which deter the use of criteria with "high social value" (given "imprecision" in judicial assessment of business necessity), it may be better from a social efficiency point of view to reject that version in favor of one that would discourage lawsuits (as by recognizing a general "stratification" defense). However, it may be that by "efficiency" and "precision" the authors mean only "judicial workability." If this is the case, it may be conceded that the concurrence and stratification lenses serve to render the impact model workable. They do so, however, through a kind of formalism: a conscious effort not to engage in an inquiry into the complexities of social causation through stratification or to confront the difficult questions of cognizable harm that could arise absent

61. *Id.* at 376 n.169.

62. *See, e.g.*, Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 798 (8th Cir. 1993); E.E.O.C. v. Rath Packing Co., 787 F.2d 318, 332 (8th Cir.), *cert. denied*, 479 U.S. 910 (1986); Firefighters Inst. for Racial Equal. v. City of St. Louis, 549 F.2d 506, 511-14 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977).

63. Paetzold & Willborn, *supra* note 1, at 396-97.

64. *Id.* at 393-94.

blindered "concurrence." Such workability may be a virtue, but it is no guarantee of "precision" in the identification of "inappropriate" criteria of "low social value."

Again, however, these are quibbles. They are not the points of interest in this response. The response, rather, is to the view taken in *Deconstructing Disparate Impact* regarding the function or rationale for the impact model. It is to this that I now turn.

II. On Protecting Individuals

As previously noted, Professors Paetzold and Willborn contend that the impact model protects individuals.[65] In this conclusion, they have the support of the Supreme Court's majority opinion in *Connecticut v. Teal*.[66] More importantly, they offer an explanation of the Court's contention: a protected individual adversely affected by an employment criterion that disproportionately excludes a protected group viewed as a whole, e.g., the otherwise-qualified African-American population generally, may obtain a compensatory remedy for this effect even though members of the protected group in the employer's work force actually subjected to the criterion were not adversely affected or even though the protected group is proportionately represented in the work force.[67]

A. The Meaning of Individual Protection

Why is the "individual protection" point of importance? One possibility is that it answers a technical question about standing to sue and the availability of a compensatory remedy. Another, however, is that a more general point about the nature of the right or entitlement is being made: that the impact model protects individuals, not groups. *Deconstructing Disparate Impact* clearly makes the former point.[68] Does it make the latter? Professors Paetzold and Willborn appear to make the latter point for three reasons: they speak in terms of "the individual nature of Title VII's protections";[69] they reject an equal (group) achievement rationale for the model;[70] and they appear to endorse the theory of the Allen authors that Title VII protects individuals on a probabilistic basis.[71]

---

65. *See supra* notes 40-46 and accompanying text.
66. 457 U.S. 440 (1982).
67. Paetzold & Willborn, *supra* note 1, at 357-62.
68. *See supra* notes 39-46 and accompanying text.
69. Paetzold & Willborn, *supra* note 1, at 361 n.112.
70. *Id.* at 371.
71. *Id.* at 374 n.163.

If *Deconstructing Disparate Impact* makes the second point, what is its importance? At least conventionally, it is the disparate treatment or intentional discrimination model of prohibited conduct, not the disparate impact model, that is associated with protection of individuals; yet, Professors Paetzold and Willborn reject attempts to understand the impact model in terms of the treatment model.[72] If by "protecting individuals" one means that the impact model protects an individual entitlement, one is at least alluding to and invoking the support of individualist political commitments or seeking to establish connections to legal traditions understood in terms of these commitments. To argue, instead, that the impact model recognizes and enforces a group entitlement is, from an individualist political perspective, to begin an indictment of the model and from an anti-individualist, call it communal, perspective, to begin a defense of it. From a more objective or explanatory perspective, the individual entitlement and group entitlement characterizations are invoked to say something about important distinctions between legal traditions reflecting individualist commitments and legal traditions not doing so.

Consider, for example, this argument: the common law, at least as classically conceived, is individualistic, transactional, and derivative from social practice.[73] Among the implications of this characterization is that legal procedure, substantive law, and remedy are intertwined such that, for example, standing to enforce an entitlement is a function of identifying the individual recognized as having it, and remedy is limited by the extent of harm to the status quo represented by the entitlement.[74] Post-New Deal law or the law of the "Administrative State," by contrast, is collectivist, prospective, and directive of social practice.[75] Among the implications are that procedure, substantive law, and remedy are not interdependent or mutually defined.[76] So, standing, for example, is merely a tool by means of which a collective objective may be attained and should be assessed by reference to its efficacy in this respect. A second example: the scope and content of remedy need have no necessary relation to individual entitlement, as its function is that of effecting directed reform.[77] There

72. *Id.* at 368-69.

73. *See, e.g.*, Donald H. Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 BUFF. L. REV. 871, 876-83 (1986); Jerry L. Mashaw, *"Rights" in the Federal Administrative State*, 92 YALE L.J. 1129, 1153-59 (1983).

74. Gjerdingen, *supra* note 73, at 876-78. For a defense of this classical scheme in terms of corrective justice, see ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 22-55 (1995).

75. Gjerdingen, *supra* note 73, at 876-83; Mashaw, *supra* note 73, at 1152-58.

76. Gjerdingen, *supra* note 73, at 883.

77. *Id.* at 883; Mashaw, *supra* note 73, at 1155.

have been a number of impressive efforts to examine and explain these differences, but a useful one for present purposes may be that of distinguishing between a corrective justice concerned with "wrong moves" in human relations conceived of as transactions, on the one hand, and a directive justice concerned with effecting desired distributive patterns in human relations conceived in terms of status, on the other.[78]

The impact model has at least on occasion been employed as an example within this directive category,[79] and there are persuasive reasons for thinking it a good example. While it is surely the case that "individuals" may obtain compensatory remedies when adversely affected by a neutral employment criterion, they must first establish group harm in the form of disproportionate exclusion of the protected group and their status as members of that group. It may be the case that, as Professors Paetzold and Willborn contend, an employee enjoying protected status excluded by a criterion may obtain a compensatory remedy even though no other actual employees enjoying that status were adversely affected by the criterion,[80] but the remedy remains contingent upon proof that the protected group as a whole would be excluded by the criterion. The implication clearly would seem to be that such a neutral criterion is suspect by virtue of its projected distributive consequences and that compensatory remedies are devices by means of which persons are induced to bring such suspect criteria to the attention of the "administrative state." A similar point may be made concerning standing. Under the argument of *Deconstructing Disparate Impact*, persons enjoying protected status and actually subjected to a neutral criterion may attack it for purposes of an injunction, even where not harmed in fact by its disparate effect on the protected group as a whole.[81] They might therefore be said to be individuals protected by the impact model in the purely descriptive sense that they may invoke the model, but the instrumental use of their standing for the purpose of effecting a desired distribution of employment to the group defined by their status is the plausible explanation of this descriptive "fact."

Is there nevertheless a basis for conceiving of the impact model as "protecting individuals" in some deeper sense than a description of

78. Gjerdingen, *supra* note 73, at 876-78.

79. Paul N. Cox, *The Supreme Court, Title VII, and "Voluntary" Affirmative Action—A Critique*, 21 IND. L. REV. 767, 785-816 (1988) [hereinafter Cox, *Affirmative Action*]; *cf.* Mashaw, *supra* note 73, at 1154, 1165-66 (using discrimination cases as examples within a directive conception).

80. Paetzold & Willborn, *supra* note 1, at 360-62.

81. *Id.* at 358-59.

remedy and standing? The most sophisticated effort to find such a basis is that of the Allen authors,[82] and Paetzold and Willborn appear to endorse that effort.[83] The Allen authors contend that the Supreme Court's interpretations of Title VII, at least prior to the *Wards Cove* decision, are best explained by a single rationale: "elimination of barriers to employment that are a function of certain personal characteristics."[84] Thus, "Title VII is violated if a person's employment prospects are marginally diminished for reasons associated with those characteristics and if there is no adequate business justification for the barrier."[85] Moreover, disparate treatment, or "intentional discrimination," is not, according to the Allen authors' view, the central or paradigmatic evil attacked by Title VII; rather, it is merely a clear example within the noted rationale.[86]

The disparate treatment model of employment discrimination is conventionally viewed as protecting individuals by removing status (e.g., race) as a legitimate ground for decision: employers must be "status blind" and must therefore allocate employment opportunities on the basis of individual characteristics (e.g., "merit").[87] The Allen authors' position regarding Title VII's protection of individuals is somewhat distinct. As I understand that position, individuals are protected by Title VII in the sense that their probability of obtaining an employment opportunity is rendered unaffected by status (their "prospects" are rendered not "marginally diminished").[88] Call this an "equalizing probabilities" explanation of Title VII. Disparate treatment entails a clear-cut reduction in the probability of obtaining an opportunity: persons of a disfavored status are excluded from employment.[89] Disparate impact, however, also entails this reduction: a status-neutral criterion generating a disparate impact is one correlated

82. *See generally* Allen et al., *supra* note 19.

83. Paetzold & Willborn, *supra* note 1, at 374 n.163.

84. Allen et al., *supra* note 19, at 177.

85. *Id.*

86. *Id.*

87. Cox, *Affirmative Action*, *supra* note 79, at 772-85.

88. At least this is my reading of the Allen theory. The Allen authors suggest that Title VII targets barriers that are a function of status. Allen et al., *supra* note 19, at 177. I take this to mean a mathematical function: a relationship between the values of two variables. They also say that "Title VII is violated if a person's employment prospects are marginally diminished for reasons associated with" status. *Id.* at 177. I take this to mean that the probability of obtaining some employment opportunity is reduced by a barrier that is a function of status—i.e., that success under the barrier (the value of the success variable) is related to status (the value of the status variable). This relationship may be interpreted as establishing probability ("prospects for") if the relationship is employed as a predictor, e.g., status predicts success. Notice that the prediction is predicated in the Allen authors' theory solely on status. *Id.*

89. *Id.* at 192.

with protected status in that individuals of the status disproportionately excluded by the criterion have a lower probability of obtaining an opportunity than those of a status disproportionately included by the criterion.[90]

There is, of course, a sense in which "equalizing probabilities associated with protected status" protects individuals. By defining the entitlement in question in probabilistic terms, the rationale enables a view of the individual in these terms. The right implied by the rationale is an "individual right" because the individual is conceived in terms of her probability of success. This probability is itself established by reference to group success: the individual's probability of success is given by calculating the success rate of the group of which she is a member. Still, this conception of the individual is not alien to common practices. One relevant analogue is an actuarial calculation founded on group averages.[91] The value of an individual entitlement to a lifetime annuity is, for example, a function of the "individual's" projected lifespan, a matter determined by group average.

Nevertheless, there is something peculiar about this "individual protection" characterization of the equalizing probabilities rationale, and this peculiarity may help to unlock important distinctions between the disparate impact and disparate treatment models. Consider a race neutral criterion, such as a graduate-degree requirement, that disproportionately excludes a racial group. Mr. Jones, a member of that group, happens to possess such a graduate degree. Insofar as Mr. Jones is concerned, the "equalizing probabilities" rationale is apparently "blind" to his possession of the requisite credential: the probability of his obtaining the opportunity for which the degree is required is determined by reference to his racial status, not by reference to other variables. If Mr. Jones has an "individual right" to equalized probabilities, but probability is a function solely of status, the analysis would seem to require that Mr. Jones' individuating characteristics, apart from his status, be ignored.

Perhaps this interpretation, however, is wrong in at least one sense: perhaps Mr. Jones lacks standing to attack the graduate-degree requirement if he possesses the degree.[92] Does such a standing require-

90. *Id.* at 180-81.

91. *Id.* at 184-85.

92. *See, e.g.*, Melendez v. Illinois Bell Tel. Co., 79 F.3d 661, 667-68 (7th Cir. 1996) (holding that the plaintiff must show that he was personally injured by the defendant-employer's alleged discriminatory employment practice in order to have constitutional standing); Robinson v. Polaroid Corp., 732 F.2d 1010, 1016 (1st Cir. 1984) (holding that laid-off employees had to a show a causal connection between the application of the employer's "ten year" seniority rule and the alleged discriminatory impact on the protected class in order to have standing).

ment render the equalized probabilities rationale one of "individual protection"? The argument that it does seems straightforward: persons lacking the graduate degree have an "individual right" to be free from the impediment it presents to the probability of their success. The argument, however, is not quite correct, for it is only persons of a particular status who also lack the degree that have a claim. Status provides the basis for the probability calculation. The hypothesized standing requirement serves to identify the subgroup within the minority group whose probability of success is actually impeded, and may serve to establish a necessary stake in the litigation for Article III purposes,[93] but it remains a particular status, and not other indicia of probability, that is the basis for the probability calculation. The individuating characteristics of persons who lack the graduate degree are as ignored in the probability calculation as the individuating characteristics of those who possess the degree.

Why might the "blindness" of the equalizing probabilities rationale to individuating characteristics be important to an "individual" versus "group" characterization of the rights implied by the disparate treatment and disparate impact models? One possibility, consistent with a species of "individualist" rhetoric, is that "individual merit," not "status," should be the basis for allocation of employment opportunities. This possibility has the virtue of invoking the historical hostility of "individualist" commitments to status allocation, and the further individualist virtue of assuming individual entitlement to individuating characteristics, but it is inadequate at the level of generality at which it is stated. It is inadequate because the statement may be read as advocating an authoritative, state-enforced notion of desert, and the impact model, given its focus on the "business necessity and job related" justification for employment criteria generating an adverse impact, may be read as consistent with such a state-enforced notion of desert.[94] The difficulty is that individualists tend to be hostile to such a notion.[95]

Consider, however, another reading of the "individual merit not status" precept in combination with the point made above that the Allen authors' "equalizing probabilities" rationale ignores individuating characteristics. The alternative reading is that of authoritatively pre-

93. Coe v. Yellow Freight Sys., Inc., 646 F.2d 444, 451-53 (10th Cir. 1981).

94. Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, 1183-98 (1991).

95. FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 85-102 (1960). There are, of course, ambiguities in the notion of "individualism." For Hayek's account of these, see FRIEDRICH A. HAYEK, *Individualism: True and False*, *in* INDIVIDUALISM AND ECONOMIC ORDER 1-32 (Gateway ed. 1972) (1948).

cluding employer reliance upon status and leaving the matter of "merit" to "private" regulation: status is inalienable, but the meritorious or non-meritorious character of individual characteristics apart from status is a matter of what price they might bring in a market. This alternative is approximately that suggested by the disparate treatment model. Notice two points about this alternative. First, it contemplates a right to "freedom from" consideration of one's status that simultaneously limits the freedom of action both of its possessor and of others. This is not peculiar. It is in the nature of rights, including individual ones, that they constrain others (rights are in fact the obligations of others)[96] and protecting a right through an inalienability rule always constrains its possessor.[97] Second, the alternative reading creates a narrow "right" and, therefore, a narrow obligation. The reading generates an Hohfeldian privilege regarding aspects of the individual apart from status (even though this privilege is parasitic on assumed alienable entitlements to these aspects, such as Mr. Jones' graduate degree).[98]

The importance of these points lies in contrasting them to the implications of the disparate impact model, particularly as viewed from an "equalizing probabilities" perspective. First, the individual right to equal prospects contemplated by this perspective again constrains the freedom of action of the possessor of the right and of others by rendering inalienable a characteristic that, absent the prohibition of the model, could be alienated. If the hypothetical employer's graduate-degree requirement is invalidated, the employer may not formally purchase and Mr. Jones may not formally sell the human capital represented by the degree. Second, the right and, therefore, the obligation created is no longer narrow. The scope of the Hohfeldian privilege has been dramatically reduced.[99]

---

96. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-32 (1913).

97. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1972).

98. In Hohfeld's scheme, "a privilege is the opposite of a duty and the correlative of a 'no right.'" Hohfeld, *supra* note 96, at 32. The notion is invoked here, not from a devotion to the complexities and difficulties of the Hohfeldian scheme, but to suggest that what is sometimes called a "general right to liberty" entails the absence of a "right" in another to compel an act or to compel refraining from one. *Id.*

99. *Cf.* Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687, 1693-94 (1986) (noting the distinction between negative and positive liberty as one of extent of the governmental role in the allocation of goods).

B. *Individualist Rights and Egalitarian Rights*

Is the distinction therefore merely one of degree, whether this degree is viewed as degree of freedom of contract or degree of governmental decision? Perhaps it is, but the matter of degree masks a difference in kind. Individualist political philosophies are notable for their commitment to short lists of rights, precisely because rights are legal obligations and the individualist commitment is hostile to legal obligation.[100] Individualist rhetoric, therefore, invokes images of "freedom from interference" or "negative freedom."[101] This stance clearly implies that the right generated by even the disparate treatment prohibition is problematic,[102] but, given the prohibition, it further implies that this right should be narrowed to a minimum, a process clearly evident in the Supreme Court's recent precedent regarding the disparate treatment theory.[103] Moreover, the stance implies that the right should be assimilated to a common law baseline and should, therefore, take on the integrated attributes of that base-

---

100. ANTHONY DE JASAY, CHOICE, CONTRACT, CONSENT: A RESTATEMENT OF LIBERALISM 33-51 (1991); *see* LOREN E. LOMASKY, PERSONS, RIGHTS AND THE MORAL COMMUNITY 3-15 (1987) (lamenting the abuse of rights and favoring basic rights); JAN NARVESON, THE LIBERTARIAN IDEA 41-61 (1988) (favoring the version of negative rights).

101. Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118-72 (1969). Berlin contrasts negative liberty with positive liberty, and positive liberty is often equated, as in Rosenfeld, *supra* note 99, at 1693-94, with the egalitarian notion of a distribution of goods sufficient to enable pursuit of objectives. Berlin's usage is distinct but perhaps related: positive liberty is a state of Kantian freedom, particularly understood in terms of undistorted choice or absence of "false consciousness." *See* BERLIN, *supra*, at 132-34.

102. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS, THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 147-266 (1992) (criticizing employment discrimination law generally, including the disparate treatment prohibition on what may be thought to be individualist grounds). It should be noted, however, that Professor Epstein's critique is premised upon a utilitarian and consequentialist argument. *See id.* The associational freedom he advocates is, therefore, grounded in a kind of collectivism, and one consistent at some levels of abstraction with legal realist and post-New Deal Law's conception of law as a purposive instrument for achieving a desired end-state. *Id.* This, however, may be explained by the necessity of a distributive background for a corrective conception of law, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 323-24 (1990), or as use of an efficiency criterion as a proxy for libertarian commitments, ANTHONY KRONMAN, THE LOST LAWYER 234-35 (1993). Professor Epstein's recommendations are compatible with a corrective form of justice, so his utilitarian collectivism might be a proxy for such a conception.

103. *See, e.g.*, St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2745 (1993) (holding that proof of pretext does not mandate a judgment for the plaintiff); Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1703 (1993) (finding motivation independent of protected status not illicit even if improper); Price Waterhouse v. Hopkins, 490 U.S. 228, 262-63 (1989) (O'Connor, J., concurring) (arguing that disparate treatment requires "but for" causation); *id.* at 285 (Kennedy, J., dissenting) (noting that the burden of persuasion remains at all times on the plaintiff and qualifications of a person hired need not be superior to those of the plaintiff); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 258-59 (1981) (same).

line.[104] One would therefore expect, and the expectation is confirmed by precedent, that disparate treatment will be conceived as a "wrong move" within a status quo assumed not to entail such a move;[105] that remedies will be narrowly compensatory;[106] that standing will be confined to a limited class of tangible victims of the "wrong move";[107] and that the background norms within which the prohibition is understood will be those compatible with the individualist stance.[108]

Contrast these points to "statist" political commitments,[109] particularly of egalitarian liberal varieties. Egalitarian liberalism tends, particularly when predicated upon Kantian autonomy,[110] simultaneously to deny that persons deserve or are entitled to their individuating characteristics and to insist upon distributional equality, typically equality framed in terms of a welfare criterion.[111] The consequence, when combined with a strong postulate of governmental competence to bring about desired social end-states, is a simultaneous constriction of "rights," in one sense of the term, and expansion of these "rights," in another.

Rights, in the first sense, afford absolute protection of individual choice of and commitment to ends, but are highly limited in that the private, individual realm they contemplate is one of Kantian deliberation, or intellectual liberty, disconnected from the human ends contemplated in this deliberation and from means to the satisfaction of

---

104. *See* Gjerdingen, *supra* note 73, at 878 (noting the integrated nature of the common law scheme and the assumption of the legitimacy of the status quo).

105. *Biggins*, 113 S. Ct. at 1707 (holding that age must be a determinative factor); *Burdine*, 450 U.S. at 253 (placing the burden of persuasion on the plaintiff).

106. *Cf. Hopkins*, 490 U.S. at 278 (O'Connor, J., concurring) (arguing that there is no liability if the same action would have been taken without considering status).

107. *Cf. id.* (arguably treating the victim of sexist statements not as a victim absent tangible job loss, but query whether this would be the case if the plaintiff attacked the statements). For a discussion of causation consistent with a "wrong move" view, see Paul N. Cox, *A Defense of "Necessary Cause" in Individual Disparate Treatment Theory Under Title VII*, 11 ST. LOUIS U. PUB. L. REV. 29, 39-68 (1992) [hereinafter Cox, *Necessary Cause*].

108. *Cf.* McKennon v. Nashville Banner Publ'g Co., 115 S. Ct. 879, 886-87 (1995) (holding that after-acquired evidence of misconduct cuts-off "compensatory remedies," arguably implying an "at will" background assumption). For a discussion of this background assumption, see Cox, *Necessary Cause*, *supra* note 107, at 51.

109. *See* Mashaw, *supra* note 73, at 1152-58 (employing a "statist" characterization).

110. "Kantian autonomy" means a state of freedom characterized by a detached and deliberative choice of ends, a notion associated with "positive liberty" and "intellectual freedom." This conception of freedom is typically associated with Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971). *But see* CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 77-85, 118-30 (1987) (criticizing Kant and Rawls from, perhaps, a classically liberal perspective); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (criticizing Rawls from a communitarian perspective).

111. RAWLS, *supra* note 110, at 72, 310-15.

these ends.[112] Rights, in the second sense, are malleable, instrumental means of effecting state-determined distributive end-states.[113]

The absolute autonomy rights of the first sort resemble the rights of the individualist scheme; the malleable rights of the second sort do not. Consider a right in the Hohfeldian sense, a sense requiring a correlative duty.[114] As rights entail duties, the broader a right and the more numerous are rights, the greater the scope and number of duties. Rights are therefore in substantial tension with "liberty" or Hohfeldian "privilege," understood as a realm of action free from (legal) obligation and, therefore, free from a requirement of justification of such action before public authority. This realm (whether it extends to "commercial" or is limited to "intellectual" freedom) requires a basic set of rights or entitlements, but depends as well upon a short list, and a predictable one, of relatively narrowly limited entitlements (that is, of the legal obligation of others).[115] Individualist property rights and egalitarian autonomy rights tend to display these features, the former in service of commercial or market "freedom," the latter in service of limiting rights as constraints on redistributive moves by the state.[116]

However, egalitarian "instrumental" rights do not display these features. The premise underlying egalitarian instrumental rights is that social arrangements (and human interactions within these) are contingent upon state permission. This is evident in post-New Deal conceptions of law as the purposive instrument of the state;[117] in legal realist critiques of individualist "freedom" as dependent upon contingent state allocations;[118] in social choice theory's assumption that arrangements are contingent on collective choice;[119] and in accounts of the "Administrative State" generally.[120] As previously noticed, egalita-

112. RONALD DWORKIN, A MATTER OF PRINCIPLE 181-204, 316-31 (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, xi, 91-92, 264-65 (1978).

113. *Cf.* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 112, at 90-96 (distinguishing rights from goals, arguments from principle, and arguments from policy). Note that the distinction in the text is not an attempt to invoke Dworkin's theory of adjudication; it is a distinction, rather, about the nature of legal claims and their justifications.

114. Hohfeld, *supra* note 96, at 28-59.

115. *See supra* note 100 and accompanying text.

116. *See* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 112, at 316-31 (discussing a limited version of anti-discrimination principle enabling state-fostered affirmative action).

117. *See, e.g.*, Gjerdingen, *supra* note 73, at 878-83; Mashaw, *supra* note 73, at 1131.

118. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471 (1923).

119. ROBERT GRAFSTEIN, INSTITUTIONAL REALISM 179-84 (1992).

120. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 32-46 (1990); Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 884-90 (1987).

rian autonomy rights effectively serve this premise by limiting their scope and number as constraints on the state. Individualist rights, by contrast, assume as a premise that social arrangements and human interactions are not contingent upon the permission of the state.[121] A slogan suggesting this distinction exaggerates but plausibly depicts it: in the individualist scheme, everything is permitted that is not forbidden and in the egalitarian, instrumental one, nothing is permitted that is not affirmatively permitted.[122]

If this is the case, egalitarian, instrumental rights should and do display features distinct from individualist rights: the duties they create tend to be expansive; they are often vague (thus increasing prospects for requiring public justification of "private" action); and there are long lists of such rights. The evidence for these propositions would seem clear, whatever one's commitments in contemporary debates concerning "regulation" and "deregulation."

Given the propositions, what is "individual" about individualist rights and egalitarian autonomy rights, and what is collective or "group like" about egalitarian, instrumental rights? The individual character of the former and group character of the latter are implied by the distinct premises of the individualist and egalitarian positions noted above. Individualist rights and egalitarian autonomy rights have in common a notion, albeit of substantially distinct contents and scopes, of a protected "private" sphere not contingent on state approval; this sphere is clearly identified with the individual. This is so, whether for reasons of conceptions of the human dignity of the individual or for reasons of equating rational actor status to the individual and deeming the sphere instrumentally necessary given this premise. Egalitarian instrumental rights, by contrast, are "group like" precisely because they serve as means to the achievement of the distributive

121. One variation on this theme is that legal rights are natural or pre-political; another is that they are derivative from social practice; a third is that they reflect a contractarian or conventionalist *modus vivendi*. *See, e.g.*, FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY (1976) (presenting a conventionalist theory); BRUNO LEONI, FREEDOM AND THE LAW (3d ed. 1991) (presenting a derivative theory); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974) (presenting a Lockean theory). The premise, with the possible exception of some natural rights theories, does not require a denial of historical contingency and may be combined with utilitarian (particularly indirect, evolutionary utilitarian) elements. *Cf.* ROBERT C. ELLICKSON, ORDER WITHOUT LAW, HOW NEIGHBORS SETTLE DISPUTES (1991) (presenting a conventionalist account of norms with wealth maximization criterion as an explanation of content). However, purely utilitarian accounts, suggested by economic analysis of law, may on some readings be inconsistent with the premise, even if they produce conclusions resembling those predicated on the premise. *See, e.g.*, GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 164-70 (1976) (objecting to "Coasian analysis" on grounds of its alleged organic premises).

122. DE JASAY, *supra* note 100, at 47-51; GRAFSTEIN, *supra* note 119, at 179-84.

pattern purposively sought by a state conceived as the continuous author of social arrangements and human interactions. A group focus would seem to be inherent in this conception of the state and its objectives because such a focus is necessary to the notion of a distributive pattern. Notice that it is not purposive instrumentalism per se that constitutes the distinction. Neoclassical economic and utilitarian support for individualist rights clearly present instrumentalist, and collective, justifications for individualist rights.[123] Rather, it is the premise of ongoing, continuous state assessment of the distributive pattern, and the use of legal duty in service of this assessment, that generates the distinction. Such duties are simply about ensuring adherence to state-directed patterns.

Egalitarian instrumentalist rights, therefore, tend to be enforced under relatively unpredictable standards rather than relatively predictable rules, ensuring that "private" decision is continuously contingent upon "public" approval. Enforcement is triggered by departures from desired distributive patterns defined in terms of status, not by "wrong moves" or narrowly defined actions. The obligations imposed may be formally related to a particular event or action, but this is because that event or action is correlated with a departure from desired patterns and deemed an effective pressure point for correcting this departure. These factors add up to a group conception of a right: the right is a group right in that it establishes in terms of status the distributive pattern desired by the state, and power conferred on individuals to assert the right is a means by which this pattern is to be achieved.[124]

The equalizing probabilities rationale for Title VII would seem consistent with this depiction of a group right. True, the rationale is stated in terms of individual probability of obtaining an opportunity, but this probability is itself established by reference solely to status. Moreover, this matter of probability would seem itself intimately related to egalitarian distribution: to equalize probabilities in terms of

123. *See* EPSTEIN, *supra* note 102, at 15-27 (emphasizing functional justifications for private property and freedom of contract); *see id.* at 59-78 (presenting efficiency arguments). Note, however, that organic premises of economic analysis are in some tension with political commitments underlying individualist rights. *See supra* note 102. The reconciliation may depend upon judgment, e.g., about the presence and magnitude of transaction costs and therefore of "market failure," a proposition that obviously implies indeterminacy for the analysis. *Cf.* James E. Krier & Stuard J. Schuab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. Rev. 440, 452 (1995) (noting that the tension in the economic analysis of law between the assumption of transaction costs and the inability to specify damages renders the choice between the property rule and the liability rule problematic).

124. *See* Gjerdingen, *supra* note 73, at 880-83 (discussing an "end state" concept of rights); Mashaw, *supra* note 73, at 1138-50 (noting a "shift away from individualist and toward statist conceptions of rights").

status is to ensure that persons have equal means of achievement, a strategy quite distinct from ensuring that they are equally free from some particularized obstacle to achievement.[125] It is, of course, plausible to characterize this distinction as reflecting distinct conceptions of individualism, one associated with "positive liberty," the other with "negative liberty"; however, the distinction, whether framed in these terms, or in group/individual terms, remains an important distinction.[126]

C. *The Allen Authors' Theory as Positive Theory*

Of course, the importance of the distinction just discussed may not be reflected in the law of Title VII. The Allen authors apparently think it is not, for it is their contention that the Supreme Court's Title VII precedent consistently reflects what I have termed the equalizing probabilities rationale. Like Professors Paetzold and Willborn, the Allen authors contend that the impact model targets "barriers" to employment opportunity that "marginally diminish" prospects of employment when this diminishment is associated with protected status and when "there is no adequate business justification for this barrier."[127] The Allen authors further contend that the disparate treatment prohibition is a subset of the impact model: excluding persons for reasons of their status diminishes their prospects, and status is not an adequate business justification.[128] These claims require that much Supreme Court rhetoric be ignored, but this is unobjectionable; the Allen authors present a "positive theory," one that predicts outcomes without reference to rhetoric.

There is much to be said for the Allen authors' equalizing probabilities theory. It often appears consistent with the cases, particularly when it is considered with their further claim that Supreme Court opinions in the Title VII context should be understood as concerned with the matter of sufficiency of the evidence, rather than with the substantive features of Title VII's prohibitions.[129] Nevertheless, the contention here is that Title VII precedent reflects an unresolved tension between "individualist" and "group" commitments, that the precedent is therefore not consistent with a single, equalizing probabilities theory, and that resolution of the tension may, counter to

125. Rosenfeld, *supra* note 99, at 1689-98; *cf.* Peter Westen, *The Concept of Equal Opportunity*, 95 ETHICS 837, 844 (1985) (presenting equality as freedom from particular obstacle theory).

126. Rosenfeld, *supra* note 99, at 1689-98.

127. Allen et al., *supra* note 19, at 177.

128. *Id.*

129. *Id.*

the position of both the Allen authors and Professors Paetzold and Willborn, ultimately favor the individualist pole represented by the disparate treatment prohibition. The contentions obviously require a rebuttal of the capacity of the equalizing probabilities rationale as a positive predictor. The rebuttal focuses upon the Allen authors' treatment of *General Electric Co. v. Gilbert*,[130] *City of Los Angeles Department of Water and Power v. Manhart*[131] and *UAW v. Johnson Controls, Inc.*[132]

At issue in *Gilbert* was an employer's exclusion of pregnancy from its insurance against nonoccupational disability.[133] The Supreme Court rejected a Title VII attack on this conclusion, after declining to equate gender with pregnancy (or the risk of pregnancy), on the basis that the evidence failed to disclose a difference between the "aggregate risk protection" afforded men and women by the insurance.[134] The Allen authors quite plausibly conclude that the Court was therefore concerned with discriminatory effects, not "discriminatory animus": there is no Title VII liability "in cases which exhibit animus but no discriminatory effect."[135] On this quite plausible reading of the case, disparate treatment is not itself Title VII's target; disparate effects (unequal probabilities) are the target. Disparate treatment is merely evidence of the effect (evidence inconsistent with the actual effect of the insurance scheme at issue in *Gilbert*).[136]

Manhart has been viewed as inconsistent with *Gilbert*,[137] but this is not the Allen authors' reading. In *Manhart*, female employees were required to make larger contributions to a pension plan than similarly situated male employees to ensure equal monthly retirement benefits.[138] The difference in contribution was required by virtue of the projected greater longevity of women—an actuarial calculation founded solely on gender status and one that, if accurately made, rendered the actuarial value of pensions "equal" as between men and women.[139] One would therefore expect, in keeping with the Allen authors' reading of *Gilbert*, that "animus," understood as status motive,[140] would not generate liability because "effects" were equal. The

130. 429 U.S. 125 (1976).
131. 435 U.S. 702 (1978).
132. 499 U.S. 187 (1991).
133. 429 U.S. at 127-28.
134. *Id.* at 138-40.
135. Allen et al., *supra* note 19, at 183.
136. *Id.* at 177-78.
137. *See Manhart*, 435 U.S. at 723-25 (Blackmum, J., concurring).
138. *Id.* at 705.
139. *Id.*
140. For a discussion of the meaning of motive, see *infra* notes 154-56 and accompanying text.

Court nevertheless imposed liability, expressly on the basis that Title VII protects "individuals" from differentiation on the basis of status and that this individual right is not defined by probability associated with status.[141]

One would therefore further think that *Manhart* falsifies the equalizing probabilities theory. This, however, is not the Allen authors' view. First, they contend that the Court's emphasis upon Title VII's protection of individual, rather than group, rights confirms their theory.[142] This, however, is a peculiar view; it equates, I believe erroneously, the nonactuarial conception of individual right that the Court invokes with the actuarial conception of individual right that the Allen authors propose. Second, they embrace the Court's rationale for distinguishing *Gilbert*: the classification in *Manhart* was between all-male and all-female groups, whereas the classification in *Gilbert* was between pregnant and non-pregnant persons, the latter including both men and women.[143] The Court's distinction is typically thought to be unpersuasive,[144] but the Allen authors think it is consistent with their theory: overt sex classifications (as in *Manhart*) generate disparate impact "by definition," neutral ones (as in *Gilbert*) do not.[145]

This second effort to reconcile *Manhart* and *Gilbert* is also peculiar. It trades on an assumption (one consistent with the Court's before the Pregnancy Discrimination Act[146]) that pregnancy is not gender. That assumption seems doubtful: if the insurance plan in *Gilbert* is viewed as excluding protection against the risk of pregnancy, a view consistent with a probabilities approach, it would seem to entail an instance of "overt sex classification" generating disparate impact "by definition."[147] The capacity of the equalizing probabilities rationale to predict results accurately is therefore limited by its dependence upon a further prediction outside the rationale—one about judicial characterization of the classification in issue.

Even given, however, an assumption that pregnancy is not gender, the Allen authors' view of *Manhart* is peculiar. Why should "overt sex classification" be thought to produce a disparate impact "by definition" when disparate impact is defined in terms of equalizing probabilities? If it is the case that women outlive men, and if it is

141. *Manhart*, 435 U.S. at 709.

142. Allen et al., *supra* note 19, at 191.

143. *Id.* at 192 (relying on *Manhart*, 435 U.S. at 715).

144. *See, e.g.*, *Manhart*, 435 U.S. at 723-25 (Blackmum, J., concurring).

145. Allen et al., *supra* note 19, at 192.

146. Title VII, section 701(k) now equates sex and pregnancy. Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 676-82 (1983).

147. *Gilbert*, 429 U.S. at 161-62 (Stevens, J., dissenting).

further the case that probabilities are to be equalized on the basis of those supplied by status, the employer's compensation policy in *Manhart* would seem to have been compelled by Title VII, not prohibited by it.[148] *Gilbert* is clearly consistent with the Allen authors' theory, but *Manhart* can be reconciled with that theory only by changing the terms of reference.

To their credit, the Allen authors concede that *Johnson Controls* may be read as sharply distinguishing disparate impact and disparate treatment theories.[149] At issue in *Johnson Controls* was an employer rule excluding women from a toxic work environment on the basis of risks of fetal harm.[150] The court of appeals had treated this rule as subject to the "business necessity" defense, a defense formally reserved for the disparate impact theory.[151] The Supreme Court rejected this treatment on the basis that the rule constituted facial disparate treatment to which only the more limited BFOQ (bona fide occupational qualification) defense was available.

The Allen authors reconcile *Johnson Controls* with their theory on two bases. First, the *Johnson Controls* Court argued that "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination."[152] According to the Allen authors, this confirms the theory that illicit motive serves merely an evidentiary role in establishing unequal probabilities.[153] The difficulty with this view is that it confuses two senses of the term "motive." It is clear that an express rule excluding women requires a decision maker to identify the gender of an employee or applicant for employment in applying the rule. This necessary reference to status is clearly what is meant by "illicit motive," "intentional discrimination," or "disparate treatment."[154] It is equally clear that the rationale for employing status as a basis for decision may be arguably "beneficent." Motive as rationale for use of status does not,

148. *See, e.g.*, George J. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits:* Manhart *Revisited*, 49 U. CHI. L. REV. 489, 494-505 (1982) (arguing that fairness requires calculation on actuarial basis of value of fringe benefits to the individual); Spenser L. Kimball, *Reverse Sex Discrimination:* Manhart, 1979 AM. B. FOUND. RES. J. 83, 99-104 (arguing that the proper focus is upon the present actuarial value of the expected benefits and that there is no unfair discrimination if they are equal).

149. Allen et al., *supra* note 19, at 208.

150. UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989).

151. *Id.* at 887.

152. UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991).

153. Allen et al., *supra* note 19, at 207.

154. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1705 (1993); City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 711 (1978); *see* PAUL COX, 1 EMPLOYMENT DISCRIMINATION § 7.01 (2d ed. 1992).

however, obviate disparate treatment. Rather, motive as rationale is typically invoked as a defense—the BFOQ under Title VII and "compelling" or "important" justifications within equal protection doctrine.[155] In short, the Court's rejection in *Johnson Controls* of the notion that "beneficent purpose" obviates disparate treatment confirms the independence of the disparate treatment model; it does not support the Allen authors' theory that illicit motive is merely evidentiary.[156]

The second basis upon which the Allen authors seek to reconcile *Johnson Controls* with their theory is that the Court's opinions may be read as treating the BFOQ as a cost defense.[157] Although debatable, this may be assumed for present purposes. The assumption's implication is thought by the Allen authors to support their view that there is no substantial distinction between disparate treatment and disparate impact theories, apparently because both "business necessity" and BFOQ then become "adequate business justifications"[158] for barriers that produce unequal probabilities. The problem is that for this reading to be persuasive the matter of "adequate business justification" must entail a unitary standard. If disparate treatment is merely evidence of disparate impact as unequal probability,[159] why should the employer's excuse for this impact vary with the form of evidence? This variation in form, however, is what is recognized in *Johnson Controls*: "business necessity" is a more lenient defense,[160] even if "cost can be a legitimate factor in analyzing a BFOQ claim."[161]

None of what has been said here in rebuttal of the Allen authors' theory obviates, however, the claim that the Allen authors' theory fits, sans its claim to an "individual orientation,"[162] many of the Supreme Court's Title VII precedents. In particular, the equalizing probabilities theory "fits" *Connecticut v. Teal*, albeit for a reason distinct from that which the Allen authors articulate. Recall that *Teal* rejects the

155. *See, e.g.*, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

156. This equating of motive with rationale also places in question other of the Allen authors' views of the Supreme Court's disparate treatment precedent. To the extent that they mean "rationale" by their use of the term "motive," it is clear that they are correct in rejecting "motive" as a required element of even a disparate treatment theory. But this would not itself justify their further belief that all Title VII cases are disparate impact cases. The difference between the Allen authors and me on this matter may lie in distinct conceptions of "causation." Their probabilistic view is distinct from my common law or conventionalist view.

157. Allen et al., *supra* note 19, at 208.

158. *Id.* at 177.

159. *Id.* at 177-78.

160. UAW v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991).

161. Allen et al., *supra* note 19, at 208.

162. *Id.* at 200.

"bottom line" defense: a barrier generating a disparate impact is subject to attack under the impact model regardless of proportional representation of the group adversely affected.[163] The Allen authors[164] and Professors Paetzold and Willborn[165] say that this is because individuals adversely affected by the barrier were harmed. However, they were harmed, in the sense of harm rendered material by an equalizing probabilities theory, by the lower probability of selection given by group selection rates. The barrier produced long-run distributional harm, the harm of a risk of group exclusion, regardless of the employer's effort to achieve by alternative means "bottom line" balance.

The Allen theory may also "fit" the Supreme Court's affirmative action cases,[166] despite, as the Allen authors recognize, the tension between their theory and those cases.[167] The persuasive Allen explanation of the cases is that "when merit runs out" (when job-related qualifications are controlled for), random selection or affirmative action are the sole means remaining of selecting employees.[168] Random selection from qualified subpopulations would, in the long run, generate proportionate representation and would provide equal probabilities of selection. However, it would also render the employer's BFOQ

163. *See supra* notes 40-46 and accompanying text.

164. Allen et al., *supra* note 19, at 196.

165. Paetzold & Willborn, *supra* note 1, at 358-59.

166. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616 (1987); United Steelworkers v. Weber, 443 U.S. 193 (1979).

167. Allen et al., *supra* note 19, at 196-97 (indicating that their theory does not predict the affirmative action cases). The Allen authors deny that *Teal* is inconsistent with the affirmative action cases. *Id.* at 196 n.139. They do so, however, on the basis of an interpretation of these cases, *see infra* notes 168-69 and accompanying text, which they concede requires a "tight constraint" in interpreting them. *Id.* at 197. My disagreement entails some fundamental differences in the definition of terms. For example, the Allen authors say that individuals received "perfectly equal treatment" in the affirmative action cases. *Id.* at 196 n.139. As it is clear, however, that the affirmative action plans at issue "favored members of particular groups," *id.* at 198, I fail to see how the individuals disfavored under such plans received "perfectly equal treatment." Another example: the Allen authors say that a group rights theory fails to predict the affirmative action cases because "whites and males were discriminated against as groups." *Id.* at 197. It is not, however, the case that whites and males were discriminated against as groups in the affirmative action cases (even though they were discriminated against as individuals). As white and male proportion is maintained under affirmative action plans meeting the Supreme Court's requirements, these plans entail no "group discrimination."

In my view, there is a tension between *Teal* and the affirmative action cases because the latter imply that proportional representation is the legal objective and *Teal*'s rejection of a bottom-line balance defense removes an employer incentive to this end. *Teal* may be consistent with the affirmative action cases, however, if proportional representation is understood, not in terms of short-term proportion in particular work forces, but, rather, as long-term proportion to be achieved by imposing liability for employer practices that give effect to group differences. This latter possibility is quite close to the Allen authors' theory, but it remains in my view a group rights theory.

168. *Id.* at 199.

questionable where particular samples deviate by reason of chance from expected proportion.[169] Affirmative action is the employer's means of obviating this risk.[170]

This variation on an "arguable violation" theory of affirmative action[171] is quite plausible. Indeed, and despite the reservations the Allen authors express about the consistency of their theory with affirmative action,[172] it would seem a predictable consequence of their theory. The employer incentive structure generated by an equalizing probabilities mandate points to proportional representation of groups by imposing costs of justification on criteria generating unequal probabilities.[173] Moreover, affirmative action, when "goals" are tied to the composition of qualified populations, serves to equalize probabilities despite the disparate treatment it necessarily entails. *United Steelworkers v. Weber* resembles *General Electric Co. v. Gilbert* in this respect: there is no liability for disparate treatment if there is no disparate effect. The tension between the Allen authors' theory and "voluntary" affirmative action that troubles the Allen authors again lies in the characterization of the theory as generating an "individual right,"[174] but the tension disappears if it is recognized that this right is defined in terms of a probability and that this probability is determined by group status.

III. Equal Achievement and Approximated Disparate Treatment

Professors Paetzold and Willborn reject two rationales for the disparate impact model: an equal achievement rationale and an approximated disparate treatment rationale.[175] The Allen authors reject at least the latter of these rationales as they think that the disparate treatment prohibition is an evidentiary means of attacking disparate impact, the treatment prohibition "approximates" the impact prohibition, rather than the other way around.[176] Willborn, Paetzold, and the Allen authors also think that an "anti-barriers" rationale is both dis-

169. *Id.* at 199-200.

170. *Id.* A somewhat similar explanation of affirmative action is presented in Cox, *Affirmative Action*, *supra* note 79, at 835-51.

171. *See* Johnson v. Transportation Agency, 480 U.S. 616, 647-57 (1987) (O'Connor, J., concurring); United Steelworkers v. Weber, 443 U.S. 193, 209-12 (1979) (Blackmun, J., concurring).

172. Allen et al., *supra* note 19, at 197-98.

173. Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 652-53, 659 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991-93 (1988) (plurality opinion); Cox, *Affirmative Action*, *supra* note 79, at 786-90, 795-808.

174. Allen et al., *supra* note 19, at 197-98.

175. Paetzold & Willborn, *supra* note 1, at 368-74.

176. Allen et al., *supra* note 19, at 177.

tinct from an equal achievement rationale and an approximated disparate treatment rationale and is a better explanation of Title VII cases than either.[177]

What is at stake in these questions? One matter at stake is an incoherence thesis. The equal achievement and approximated disparate treatment rationales were borrowed by this writer from Professor Fiss to argue that Title VII precedent was internally inconsistent: some of the precedent supports one of the rationales and some the other.[178] An implication of the incoherence argument is clearly that distinct political commitments determine the impact model's function in particular cases. The equal achievement rationale is that the model's function is to effect proportional distribution of employment opportunity by status—a state-determined distributive end-state. The approximated disparate treatment rationale is that the model's function is to "overenforce" the disparate treatment prohibition, capturing suspected or subtle disparate treatment in the prohibitory net. The overenforcement theory, if correct, arguably reinforces an incoherence argument because the theory postulates both a pure disparate treatment theory that underinclusively attacks illicitly motivated employment action (by placing greater litigation risk on plaintiffs) and an approximated disparate treatment theory that overinclusively attacks illicitly motivated employment action (by placing greater risk on defendants).[179]

Apart, however, from this species of incoherence, the approximation rationale enables constraints on the implications of the impact model and, therefore, reflects a political commitment opposed to these implications. The implications are those argued in the preceding sections of this response and captured in the equal achievement rationale—that the model functions as an ensurer of the distributive objectives of the state. The approximation rationale confines the model, rendering it less efficacious as a means to such ends and more consistent with a "corrective justice" baseline. As I share a commitment to that baseline, I favor an effort to confine the model.

The anti-barriers rationale responds to these contentions at two levels. If viable, it both rebuts the claim of incoherence and rebuts the claim that the source of incoherence lies in commitments to clashing political moralities. The question would therefore seem to be whether it is viable. Viability requires that the anti-barrier rationale is distinct

177. *Id.* at 176-79; Paetzold & Willborn, *supra* note 1, at 368-74.

178. Cox, *Affirmative Action*, *supra* note 79, at 806-08; Cox, *Substance and Process*, *supra* note 23, at 49-53.

179. Cox, *Substance and Process*, *supra* note 23, at 108-17.

from both of its competitors. The argument now to be presented is that it is not.

A. Watson v. Fort Worth Bank & Trust

The strongest argument in precedent for the anti-barrier view, particularly as that view is articulated by the Allen authors, is arguably *Watson v. Fort Worth Bank & Trust.*[180] The plurality opinion in *Watson* is noteworthy for three reasons: (1) it (along with concurring opinions) declares that the impact model is applicable to subjective criteria; (2) it foreshadows the later majority opinion in *Wards Cove* (by requiring plaintiff identification of the "particular criterion" or "barrier" attacked and proof that the criterion caused impact and by relaxing the business necessity defense); and (3) it eliminated from contention a perpetration of societal discrimination rationale for the impact model (one that would limit the "barriers" subject to attack under the model to those that "give effect" to some overt instance of discrimination by third parties).[181]

The Allen authors believe that *Watson* supports their equalizing probabilities version of an anti-barrier rationale. They do so on the basis that the plurality and concurring opinions both indicate that motivation is superfluous under Title VII.[182] They quote the following passage from the plurality opinion for the first proposition:

> [W]e are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices .... Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain .... If an employer's undisciplined system of subjective decision-making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices

180. 487 U.S. 977 (1988).

181. *Id.* at 988-99. The limited version of the anti-barriers rationale was suggested both by *Griggs*' reliance on segregated education as a reason for disparate effect, *see supra* notes 28-29 and accompanying text, and by the remedial rationale for affirmative action, *see* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (finding "traditionally segregated job categories"). Its rejection is indicated by *Watson* and by the Court's conversion of "segregated job category" (a phenomenon attributable to systematic disparate treatment on the part of the craft unions in *Weber*) into "social discrimination" (understood as any distributional disparity regardless of its causes) in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

182. Allen et al., *supra* note 19, at 201.

> may be said to "adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(2). We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.[183]

According to the Allen authors, this means that Title VII prohibits "unjustified impediments" to individual achievement and that "the employer's motivation for placing the impediments does not matter."[184] At one level, this characterization is quite plausible. The plurality opinion, again foreshadowing *Wards Cove*, is clearly suggesting in the quoted passage a convergence of treatment and impact models, a convergence confirmed by its (and *Wards Cove*'s) effort to render the impact model's procedural elements—in particular the burden of persuasion and a relaxed version of the business necessity defense—more consistent with disparate treatment precedent. It surely is also the case that the quoted passage equates the effect of disparate treatment and disparate impact: in the plurality's words (not quoted above), impact theory attacks employment practices that "in operation [are] functionally equivalent to intentional discrimination."[185]

Notice, however, that intentional discrimination (disparate treatment) is the paradigm in this statement; impact theory is limited by the statement to "functional equivalence." Motivation is "irrelevant" to disparate impact theory but only in the sense that functional equivalence is a substitute for illicit motivation. Illicit motivation is the passage's contemplated "core" of Title VII's prohibitions and functional equivalence is the "penumbra."

The Allen authors' reading seeks to make unequal probability the core. The reading is supported by the passage's emphasis upon equivalent effects, at least if equivalence is understood in terms of probability. Is this, however, the *Watson* plurality's understanding of the effects in question? First, note that the plurality's example of equivalent effects is the effects of "subconscious stereotypes and prejudice."[186] It is true that "conscious prejudice" is not "conscious motivation," but a decision caused by unconscious prejudice closely resembles a decision caused by conscious motivation. In both decisions, the effects are produced by status, as such, in the mind of the

183. *Id.* at 202 (citing *Watson*, 487 U.S. at 990-91).

184. *Id.*

185. *Watson*, 487 U.S. at 987.

186. *Id.* at 990.

decider.[187] Moreover, a portion of the plurality opinion omitted from the quoted passage strongly indicates that risks of disparate treatment generated by subjective processes motivated the plurality's extension of the impact model.[188] The "effects" with which the plurality was concerned in the passage, therefore, appear intimately connected to a particular type of reason for these effects, a reason narrower than a correlation between a "barrier" and status.

Second, and more importantly, the *Watson* plurality's discussion of the effects of subjective criteria cannot be separated from its discussion of business necessity. This separation of the meaning of "impact" from the meaning of business necessity characterizes both the Paetzold and Willborn analysis and the Allen authors' analysis. Paetzold and Willborn view business necessity as a mere "constraint on the [impact] model's power" and as having "very little to do with discrimination directly."[189] The Allen authors never directly address the meaning or role of business necessity, but their theory generally suggests a view similar to that of Paetzold and Willborn.[190] The difficulty with these views is that the incoherence thesis—the thesis that the impact model may be manipulated to function either as an equal achievement or as an approximated disparate treatment theory—rests primarily upon the distinct contents that may be assigned business necessity.[191]

The latter manipulation is evident in the *Watson* plurality opinion. The plurality opinion, rather, expressly suggests the necessity of accounting for both "impact" and the content of the defense in establishing the meaning of the impact model by stating that Title VII's anti-quota provision means "that employers are not required to avoid

187. *Cf.* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 957 (1989) (reversing the groups test of disparate treatment).

188. *Watson*, 487 U.S. at 990. That portion reads as follows:

> It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. Especially in relatively small businesses like respondent's, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. *It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent.*

Id. (emphasis added)

189. *See* Paetzold & Willborn, *supra* note 1, at 369.

190. *See* Allen et al., *supra* note 19, at 177 (expressing theory in terms of "unjustified" barriers marginally diminishing employment prospects).

191. Cox, *Affirmative Action*, *supra* note 79, at 786-90; Cox, *Substance and Process*, *supra* note 23, at 95-97; *cf.* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1308-11 (1987) (discussing the use of disparate impact theory as means of attacking pretext).

'disparate impact' as such."[192] The Court then recognizes that, absent the "evidentiary safeguards" that it goes on to supply, the impact model would generate "quotas and preferential treatment" to avoid imbalances in work force composition—a clear reference to the "risk" of an equal achievement function.[193] Finally, the Court strengthens the business necessity "defense" by imposing the risk of non-persuasion on the plaintiff and, at least as importantly, by relaxing the standards under which it is assessed. Thus, according to the *Watson* plurality, validation studies are not required even for objective criteria;[194] a "manifest relationship" between an employment criterion and employment is established if the criterion "significantly serves" a legitimate purpose even though not "required" by it.[195] Furthermore, courts should recognize that they are less competent than employers in assessing employment practices.[196]

These pronouncements add up to a "reasonableness" test of business necessity. That test's relevance to the meaning of "discrimination" under the impact model is that "impact as such," under the particular line of precedent represented by *Watson*,[197] is not prohibited; rather, impact generated by a "barrier" unsupported by a "reasonable" relationship to a business purpose is suspect. Business necessity is, therefore, not a constraint on discrimination understood as an undesirable effect nor an invitation to judicial balancing of distributional objectives and business interests. Rather, business necessity, understood in terms of reasonableness, is intimately connected to the content of that which is prohibited: effects "functionally equivalent" to disparate treatment because not plausibly explained by a business reason independent of status.

There is, of course, an alternative version of "business necessity," one that would require validation,[198] view "manifest relationship" as requiring "essentiality,"[199] reject judicial deference to employer judgment, and impose a risk of non-persuasion on defendants. The alternative version, an alternative manipulation of the defense, is that

192. *Watson*, 487 U.S. at 992. The Civil Rights Act contains an anti-quota provision. Civil Rights Act (Title VII) § 703(j), 42 U.S.C. § 2000e-2(j) (1994).

193. *Watson*, 487 U.S. at 993.

194. *Id.* at 998.

195. *See id.* (quoting New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979)).

196. *See id.* at 999.

197. Other lines of precedent suggest a quite distinct understanding. *See infra* notes 198-99 and accompanying text.

198. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-36 (1975).

199. *See, e.g.*, E.E.O.C. v. Rath Packing Co., 787 F.2d 318, 332 (8th Cir.), *cert. denied*, 479 U.S. 910 (1986); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

advocated by the dissent in *Watson*,[200] later by the dissent in *Wards Cove*[201] and, perhaps, but problematically, adopted in the Civil Rights Act of 1991.[202] This version would warrant the view that business necessity is a mere "constraint on the model's power" because it would operate as a modest brake on the distributive implications of a prohibition of disparate effect. It is, however, no less a version of the defense intimately connected to the meaning of discrimination under the impact model because the costs of justification it would impose on employers would clearly imply that "disparate impact as such" is discrimination. This point is clearly evident in the portion of the dissenting opinion in *Watson* relied upon by the Allen authors:

> The prima facie case of disparate impact established by a showing of significant statistical disparity is notably different from a prima facie showing of disparate treatment. Unlike a claim of intentional discrimination, which the *McDonnell Douglas* factors establish only by inference, the disparate impact caused by an employment practice is *directly* established by the numerical disparity. Once an employment practice is shown to have discriminatory consequences, an employer can escape liability only if it persuades the court that the selection process producing the disparity has "a manifest relationship to the employment in question." [*Connecticut v. Teal*, 457 U.S. 440, 446 (1982), quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).] The plaintiff in such a case has proved that *the employment practice has an improper effect*; it is now up to the employer to prove that the discriminatory effect is justified.[203]

The Allen authors quote this passage in the dissenting opinion in support of a contention that it is the "unjustified discriminatory effect that violates Title VII."[204] This is clearly an accurate characterization of the *Watson* dissent's view. Contrary to what the Allen authors say and what Paetzold and Willborn imply by treating business necessity as a "constraint on power," it is not the *Watson* plurality's (or the *Wards Cove* majority's) view. It is precisely the "impropriety" of disparate effect "as such" that the *Watson* plurality is at pains to deny: "employers are *not* required to avoid 'disparate impact' as such."[205]

Nevertheless, there is an interpretation of the Allen theory that would render it "functionally equivalent" to the *Watson* plurality's position. Although the Allen authors do not directly address the content

---

200. 487 U.S. at 1000-11 (Blackmun, J., concurring).

201. 490 U.S. at 662-79 (Stevens, J., dissenting).

202. *See supra* note 16 (discussing the ambiguities of the 1991 Act).

203. Allen et al., *supra* note 19, at 203 (citing *Watson*, 487 U.S. at 1004) (emphasis added).

204. *Id.*

205. 487 U.S. at 992; *see supra* notes 192-96 and accompanying text (discussing the plurality opinion in *Watson*).

of business necessity, suppose that they would agree with the plurality's version of the defense. Such agreement is perhaps suggested by their discussion of the ease with which employers can defend subjective criteria.[206] On the assumption that this is their view, *Watson* and *Wards Cove* may be plausibly read both as "homogenizing the proof rules in Title VII litigation" and as moving toward a single understanding of Title VII's prohibition.[207] Moreover, this single understanding might then plausibly be characterized as a prohibition of "unreasonable" barriers that "marginally diminish prospects." Such a characterization, however, would be functionally indistinct from an "approximated disparate treatment" characterization *unless* it were taken to preclude liability for disparate treatment in the absence of disparate effect (as in the Allen authors' reading of *Gilbert*).[208] If the "unreasonable barriers" characterization were not so understood so that disparate treatment could generate liability even absent disparate impact, the approximation theory would seem the better of the characterizations.

B. The Paetzold and Willborn Case Against Equal Achievement and Approximated Disparate Treatment: A Rebuttal

1. Equal Achievement

Recall that Professors Paetzold and Willborn argue that "without constraints" their "blindered causation" version of the impact model "would articulate a strong equal achievement conception of equality."[209] This is entirely plausible. Indeed, it is a variation on the themes argued above. Nevertheless, Paetzold and Willborn reject the equal achievement rationale for two reasons. First, the requirement that a particular employment practice be identified and the business necessity defense have "little to do with discrimination directly" and, therefore, operate as "constraints" on the model's power.[210] These show that productivity concerns "limit pursuit of the 'equal achievement' concept of equality."[211] Second, the Supreme Court's rejection of "bottom line balance" in *Teal* and rejection of prima facie liability

206. Allen et al., *supra* note 19, at 203.

207. *Id.* at 203-04 (taking this homogenization view of *Wards Cove*). This homogenization was, however, at least partially blocked by the 1991 Act, *see supra* note 16, which was enacted *after* the publication of the Allen authors' article.

208. Allen et al., *supra* note 19, at 183-84.

209. Paetzold & Willborn, *supra* note 1, at 368.

210. *Id.* at 369.

211. *Id.*

for "bottom line imbalance" in *Watson* are inconsistent with an equal achievement objective.[212]

Consider the first of these arguments. It is quite correct that the "particular employment practice" and "business necessity" defense operate as "constraints on the power" of the impact model.[213] The question is how much constraint they impose. The less particular the required identification and the more justification required for business necessity, the less constraint on "power." The less constraint on "power," the more it is true that the "blindered" impact model "articulate[s] a strong equal achievement conception of equality."[214] It is, therefore, untrue that the "particular requirement" and "business necessity" matters have "little to do with discrimination directly."[215] They have everything to do with it, precisely because their substantive content determines the direction in which the impact model moves along a spectrum, the terminal poles of which are distinct conceptions of equality. The *Wards Cove* majority moved the impact model in the direction of the disparate treatment pole. The *Wards Cove* dissent and the more problematic congressional reaction to *Wards Cove*[216] move the impact model in the direction of the equal achievement pole. These events confirm the incoherence thesis.

Consider, now, Paetzold and Willborn's second argument, one from bottom-line balance and imbalance. It is quite correct that *Teal*'s rejection of bottom-line balance as a defense and *Wards Cove*'s rejection of prima facie liability for bottom-line imbalance are inconsistent with an equal achievement objective, at least if that objective is understood in terms of proportionate distribution of employment by status in each particular work force.[217] If *Teal* and *Wards Cove* were combined with the relaxed version of business necessity articulated in *Wards Cove*, the functional result would be to move the impact model substantially in the direction of an approximated disparate treatment prohibition and, therefore, to confirm that the *resulting* model is not one of equal achievement.[218] Suppose instead, however, that the Civil Rights Act of 1991 is interpreted not only as imposing the risk of nonpersuasion

212. *Id.* at 368-69 n.142.

213. *Id.* at 369.

214. *Id.* at 368.

215. *Id.* at 369.

216. *See supra* note 16.

217. An alternative understanding of "equal achievement," however, is "long-run" distributional equity, as suggested by equalizing probabilities.

218. *Cf.* Allen v. Seidman, 881 F.2d 375, 381 (7th Cir. 1989) (suggesting that, under *Wards Cove*, business necessity "should perhaps be renamed the 'issue of legitimate employer purpose'").

regarding business necessity on employers (which it clearly does) but also as overturning *Wards Cove*'s relaxed version of the substantive standards for assessing "necessity" (which it may or may not do).[219] The consequence would then be to confirm incoherence: impact is defined in such a way (by virtue of rejection of bottom-line measurements) as to render direct pursuit of "equal achievement" out of bounds, but business necessity would be defined in such a way that it would not impose a substantial constraint on the "power" of blindered causation to generate equal achievement.

Perhaps, however, this is incorrect. Perhaps the result would then be, as what Professors Paetzold and Willborn suggest, an "anti-barriers" conception of the impact model distinct from an equal achievement objective. The problem with this view lies in the reason for thinking an anti-barriers conception is distinct. The reason, again, is that the particularity (non-bottom-line measurement) requirement and business necessity defense operate as constraints on the power of the model to generate equal achievement.[220] So the reason "at bottom" is that the anti-barriers view is less efficacious in generating equal achievement than it would be absent these constraints. This can be conceded, but the concession does not obviate the equal achievement implications of an anti-barrier view. The employer-incentive structure generated by the anti-barrier view (assuming a strict business necessity requirement for justification) remains that of foregoing "barriers" and substituting proportional distribution.[221] Perhaps Professors Paetzold and Willborn recognize this in their statement that "the anti-barrier role [of their theory] can fit roughly into the equal achievement rationale."[222] Nevertheless, a "rough" equal achievement rationale remains an equal achievement rationale.

2. *Disparate Treatment*

According to Professors Paetzold and Willborn, the "blindered treatment of causation under the disparate impact model makes the [approximated disparate treatment prohibition] explanation of [the impact model's] function very unsatisfying."[223] The reasons offered are these:

---

219. *See supra* note 16.

220. Paetzold & Willborn, *supra* note 1, at 368-69.

221. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991-93 (1988); *cf.* Allen et al., *supra* note 19, at 199-200 (treating affirmative action as a means of avoiding adverse inferences when "merit runs out").

222. Paetzold & Willborn, *supra* note 1, at 377.

223. *Id.* at 372.

> If the goal is to approximate the results of intention-based models, one would hardly expect the model to ignore relevant—indeed, even conclusive—evidence of intent. . . . Evidence that a disparity was caused in part by social conditions may well undermine any inference that the employer caused the disparity intentionally—but such evidence is irrelevant for a disparate impact claim. Evidence that the employer selected a criterion for the purpose of screening out blacks is crucial for an intent-based model—but irrelevant for a disparate impact claim. Evidence that a criterion has a disparate impact when considered individually, but no disparate screening effect when an employer used it in combination with other criteria, would tend to undermine an intent-based claim—but would be irrelevant to a disparate impact claim.[224]

This argument rests on the assumption of "blindered causation."[225] The "stratification lens" articulated by Professors Paetzold and Willborn generally precludes examination of social causes of a disparity, and such causes would rebut illicit motive as the cause of a disparity. Moreover, the "concurrence lens" would permit disaggregation and aggregation of criteria in an effort to discover disparities, but this process of discovering hidden disparities implies that the employer was unaware of them, a state of ignorance inconsistent with a discriminatory "purpose."

One obvious line of response is to attack the "blindered" premise of the argument, but this exercise is postponed to the final section of this response.[226] At present, the premise will be assumed. Upon that premise, the Paetzold and Willborn argument is well taken: blindered causation is indeed inconsistent with a prohibition merely of illicit motivation. Is a prohibition merely of illicit motivation, however, what is meant by an "approximated disparate treatment prohibition"?

Illicit motivation certainly is part of what is meant by an approximation theory, for such a theory captures within its net "suspected disparate treatment" as pretextual use of status-neutral criteria. It would seem apparent, however, that the "functional equivalence" notion underlying the approximation theory is at least potentially broader than a mere targeting of pretext. In the first place, the approximation rationale can be understood as targeting in part "unconscious preju-

---

224. *Id.* at 372-73.

225. Paetzold and Willborn also argue, however, that self-selection (lack of interest in some jobs by some groups) should not be taken into account in assessing disparate impact. *Id.* at 373 n.160. If not taken into account, the irrelevance of self-selection to disparate impact is inconsistent with an approximated disparate treatment rationale for the disparate impact model. A difficulty with this argument is that *Wards Cove* suggests expressly that self-selection should be taken into account. Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 653-54 (1989).

226. *See infra* notes 232-63 and accompanying text.

dice."[227] Disparate treatment, on this account, is a causal notion, albeit one requiring the defendant's conscious or unconscious *use* of status as a criterion for decision.[228] In the second place, the approximation theory can be understood as targeting *risks* of disparate treatment. It is true that a judicial refusal to stratify, and therefore to consider social causes of a disparity, precludes a defendant's reliance upon such social causes as reasons independent of status for the disparity, even where the defendant was unaware of these causes.[229] It is also true, however, that the question of the defendant's awareness, if placed in issue, generates risks of judicial error. Overenforcing the disparate treatment prohibition by excluding awareness as an issue, in circumstances where both "blindered disparities" and an "unreasonable" justification for the employment criterion generating them are present, allocates this risk to defendants.[230] The same point obviously may be made about the possibility of employer ignorance of disparities discovered through the concurrence lens.

It is, of course, the case that a form of incoherence is suggested by an overenforcement explanation of "approximation." Why should the risk of judicial error be so heavily imposed on plaintiffs in pure disparate treatment cases, but instead be heavily imposed on defendants in approximation cases? Perhaps the presence of substantial disparities justifies this distinction,[231] but perhaps it does not.

Apart from pretext, unconscious prejudice and risks of disparate treatment, the approximation rationale should be understood *as an approximation*—as the direction in which the disparate impact theory may be made (or manipulated) to point. To clarify this depiction, consider the following story. Assume that a hypothetical Supreme Court Justice is committed to the disparate treatment prohibition pole on the spectrum of possible conceptions of equality. Assume, further, that the Justice is stuck with *Griggs v. Duke Power Co.* as precedent. Given that she is stuck with *Griggs*, it remains possible to exploit its ambiguities in a way that minimizes the "equal achievement" implications of the precedent. An obvious possibility is to relax the business necessity "defense." The result, from this hypothetical Justice's perspective, will be less than perfect, but it is a result closer to, and therefore an approximation of, the one she favors. It is, of course, also

227. *See supra* notes 186-87 and accompanying text.

228. Cox, *supra* note 154, § 7.01[3].

229. Paetzold & Willborn, *supra* note 1, at 372.

230. Cox, *Substance and Process*, *supra* note 23, at 108-18.

231. *Id.* at 109.

possible to tell a different story, one about a Justice favoring an opposite pole and inclined to point the impact model in the other direction.

IV. On Stratification and Concurrence

A. *Stratification*

Consider, again, the story of the Justice committed to a disparate treatment prohibition pole in her understanding of equality. Call her the Reactionary Justice (the modifier being used here with a sense of ironic pride). What would she think of Professors Paetzold and Willborn's concurrence and stratification lenses? It was earlier conceded that the "blindered" version of causation generated by these lenses may be inconsistent with a pure disparate treatment model—one targeted at illicit motivation and one that, in good individualist and common law fashion, places risks of judicial error on plaintiffs and, therefore, assumes the legitimacy of the distributive status quo.[232] Our hypothetical Justice is therefore unlikely to favor blindered causation. Her hypothetical counterpart, the Justice committed to the opposite pole, is just as likely to favor blindered causation.

Consider, first, the matter of stratification. This requires a brief attempt to summarize the Paetzold and Willborn analysis, utilizing an example they present. The example is an employer's use of a test.[233] The test may generate a disparate impact among test takers or it may not. Assume, first, that it does when the data is aggregated, i.e., all test takers are considered without reference to variables other than status. However, if the data is disaggregated so as to account for another variable, education, disparate impact disappears: there is no pass-rate difference by status within the subgroup of test takers with college degrees and no pass-rate difference by status within the subcategory of test takers without college degrees.

In short, there is on this assumption a disparate impact when heterogenous persons with respect to education level are considered, but there is no disparate impact when homogeneous persons with respect to education level are considered. The situation is ripe for what Paetzold and Willborn term a defensive use of stratification.[234] In their scheme, however, the employer may not argue that it is not responsible for the effects of a criterion it does not use (education level) or for education level as a social cause of the (aggregate) disparity.[235]

232. *See supra* notes 225-27 and accompanying text.
233. Paetzold & Willborn, *supra* note 1, at 336-42.
234. *Id.* at 390.
235. *Id.* at 393.

Rather, the employer may employ stratification (the disaggregated level of analysis) only to argue that "business necessity" justifies the employer's implicit use of education level as an employment criterion.[236] Paetzold and Willborn would therefore permit a "weak" defensive use of stratification. An alternative, call it a "strong" defensive use, would deny that the employer is responsible for the effects of education. Our Reactionary Justice would prefer strong defensive use.

Now consider an alternative assumption: no disparate effect is displayed at the aggregate level, but one is detected where the data is disaggregated. Thus, when the data is considered without reference to the education level of test takers, there is no pass-rate difference by status. When, instead, the data is divided by education level, there is a pass-rate difference in one education level category but not the other (or there is a pass-rate difference of different magnitudes in both, or there is a pass-rate difference favoring one status in one category and the other status in the other category). The situation is ripe for what Paetzold and Willborn term an offensive use of stratification: the plaintiff seeks to disaggregate data in search of disparate effect.[237] Professors Paetzold and Willborn would permit this offensive use to the extent that the stratifying variable (e.g., education level) is reasonably related to the employer's express criterion (e.g., the test).[238] They would also again permit the employer to justify the stratifying variable as required by business necessity.[239]

What would Reactionary Justice think of an offensive use of stratification? She obviously would object. The plaintiff again seeks to render the employer responsible for a "social cause" of a disparity and, therefore, to use the employer as an instrument for effecting the distributive end-state the plaintiff hopes the state will adopt as its objective. For simplicity's sake, call this opposition an extension of Reactionary's inclination to adopt "strong defensive use of stratification" as law.

---

236. The Paetzold and Willborn analysis is more complex than suggested in the text because it addresses both "confounding effects" and "interaction effects." *Id.* at 339-40. A confounding effect occurs when aggregated data eliminates or reduces the effect that would be observed were the data stratified (as where no disparity exists in the aggregate). *Id.* An interaction effect occurs where interaction between the variables (e.g., test and education level) generates, in effect, a third variable (interaction) that may affect subgroups differently. *See id.* at 340. This more complex analysis, however, does not affect Paetzold and Willborn's legal recommendations or the critique in the text.

237. *Id.* at 395.

238. *Id.* at 396.

239. *Id.* at 396-97.

If strong defensive stratification, contrary to the weak defensive stratification depicted by Paetzold and Willborn, is possible, either as a required aspect of the plaintiff's case or as a potential means of rebutting disparate effect, *Griggs* can be largely interred, even as an approximated disparate treatment theory. The reason is that quite plausibly suggested by Paetzold and Willborn: the model would no longer be "blind" to social causes outside the control of employers. The implication is that employers would be relieved of legal responsibility for these social causes; their use of neutral criteria that "give effect" to socially caused disparities would not itself be deemed discrimination.

Is this a possibility? Paetzold and Willborn think not, for the plausible reasons that a strong defensive stratification was not done in *Griggs* and its progeny and that doing so would indeed help to inter *Griggs*.[240] Strong defensive stratification is not, however, beyond the realm of possibility. In the first place, the congressional failure to define disparate impact in the Civil Rights Act of 1991 places no textual bar to strong defensive stratification. One may, of course, say that the 1991 Act's "spirit" would be violated, but there is no agreement, including among the legislators who enacted the legislation,[241] about the meaning of the impact model and, therefore, no congressional agreement about spirit. There is also no judicial agreement that spirit is controlling.[242] Absent an intelligible spirit, it is therefore possible to say that *Wards Cove* survives the 1991 Act to the extent not textually overturned and that it is textually overturned only to the extent of its allocation of risk of non-persuasion. *Wards Cove*, while it certainly does not compel strong defensive stratification, at least provides a basis for it.

Specifically, recall that the Court in *Wards Cove* objected to the plaintiff's use of the cannery work force as an assumed source for skilled noncannery workers on the ground that the former was not a "pool of qualified job applicants."[243] A possible implication is that plaintiffs must account for qualifications, even if not expressly required by an employer, in establishing the subpopulation of persons relevant to assessment of the effect of a particular, challenged criterion.[244] The Court's reason for its qualified labor pool requirement

240. *See id.* at 352-64.

241. *See* 137 CONG. REC. S15362 (daily ed. Oct. 29, 1991) (statements of Senators Danforth, Kennedy, Hatch and Dole). The authors of the legislation do not seem to agree about its meaning.

242. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989).

243. Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 651-55 (1989).

244. *See supra* note 9 and accompanying text.

suggests this implication: "If the absence of minorities holding . . . skilled positions is due to a dearth of qualified nonwhite applicants *(for reasons that are not [the employer's] fault)* [the employer's] selection methods . . . cannot be said to have had a 'disparate impact' on nonwhites."[245] Other readings of this aspect of *Wards Cove* are possible (most particularly one that limits the qualified labor pool requirement to that of accounting for unchallenged express qualification requirements), but so, too, is a strong defensive stratification reading.[246]

Would a strong defensive stratification reading of *Wards Cove* be so inconsistent with *Griggs* as to be precluded (it being clear from the 1991 Act at least that *Griggs*, whatever its meaning or spirit, has been codified)? Perhaps, but the Allen authors have ironically provided a line of argument (twisted from their original intent) for saying otherwise. The Allen authors suggest a reading of Title VII precedent from a sufficiency of evidence perspective: the precedent is largely about sufficiency, not articulation of substantive principle.[247] Consider an application of this line of argument to *Griggs*: the fact that the Court did not address stratification does not imply that it is unavailable defensively; the Court merely deemed the evidence before it as sufficient. This reading requires that the implications of an argument made by the Court in *Griggs*—that disparities in test performance are attributable to discrimination in education—be downplayed.[248] That argument implies that employers are to be responsible for criteria that give effect to disparities generated by other criteria that are not expressly required, an implication obviously inconsistent with strong defensive stratification. Ignoring the implications of precedent is not, however, alien to judicial technique. The referenced argument in *Griggs* also implies that the barriers subject to attack under the impact model may be limited to those that give effect to particular instances of "social discrimination"—an implication interred in *Watson* and rejected by Paetzold and Willborn.[249]

These thoughts are not offered as a prediction. They are offered, rather, as a note of caution. The Paetzold and Willborn analysis of

245. *Wards Cove Packing Co.*, 490 U.S. at 651-52 (emphasis added).

246. *See* Allen v. Seidman, 881 F.2d 375, 378-79 (7th Cir. 1989) (suggesting this stratification reading but finding adequate homogeneity under the circumstances of the case). *But see* Mozee v. American Commercial Marine Serv. Co., 940 F.2d 1036, 1049-50 (7th Cir. 1991) (suggesting that qualification requirements must in fact be used by employer to be taken into account in establishing qualified labor pool).

247. Allen et al., *supra* note 19, at 177.

248. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

249. *See supra* notes 58-59 and accompanying text.

stratification is persuasive given its premises about the functions of the impact model and may well prevail in doctrine. If it prevails, the result, absent a further doctrinal shift from a relaxed to a strict version of business necessity, would remain incoherent. However, this incoherence would not undermine the consistency of the Paetzold and Willborn analysis with an equal achievement premise (even if a "rough" one). The cautionary note is that the premises remain in dispute.

B. Concurrence

A similar cautionary note regarding concurrence is warranted. The Paetzold and Willborn analysis of concurrence is again persuasive given a premise of commitment to a "rough" version of equal achievement. In short, Paetzold and Willborn would interpret the Civil Rights Act of 1991's requirement that "particular" criteria be identified and causation established (unless criteria are not "capable of separation for analysis") as permitting a disparate impact model attack on any disparity, whether observed only when criteria are considered jointly, observed only when not considered jointly, or observed both when considered separately and jointly.[250]

Although predicated on an excellent analysis of the ambiguities of the 1991 Civil Rights Act, a number of the Paetzold and Willborn conclusions are debatable. First, consider Reactionary Justice's potential response to the situation in which neither of two distinct criteria (e.g., a high-school-diploma requirement and a five-year-experience requirement) produce a disparate effect when considered separately but jointly produce such an effect.[251] It makes sense to treat the joint operation of such criteria as a "barrier" subject to the impact model if one is engaged in banning practices inconsistent with one's distributive objectives, but this is not Reactionary's enterprise. Reactionary might therefore be inclined to view the criteria as "capable of separation for analysis" (as evidenced by data indicating an absence of separate effects)[252] and to further view the impact model as limited to attacks on distinct criteria. Consider, however, whether Reactionary might entertain an approximated disparate treatment rationale for considering joint effects. It might be the case that joint effects are not apparent and, therefore, give rise to no inference of pretext, but it

250. Paetzold & Willborn, *supra* note 1, at 380-87.

251. This is Paetzold and Willborn's "cell 5." *Id.* at 381.

252. This assumes the availability of data for establishing the absence of separate disparate effects.

might also be the case that they are apparent and do give rise to such an inference.[253]

Second, and assuming that Paetzold and Willborn are correct in their view that joint or concurrent effect should be subject to attack even where separate effect is absent, their contention regarding application of business necessity to this situation may be debated. The contention is that the employer cannot justify joint effect by justifying the criteria separately, but must justify "use of the components together."[254] The rationale is that permitting separate justification permits use of redundant criteria: "the second criterion added to the first does not increase overall usefulness of the selection process to the employer."[255] It may or may not be the case that a second criterion adds little by way of utility to the employer to the first, and this is the point of Paetzold and Willborn: the employer should prove that it adds more utility. The authors say that their justification of a joint effect proposition follows from their anti-barriers rationale,[256] and it perhaps does. Consider, however, whether it might not also follow from a suspected disparate treatment rationale. If it is in fact the case that the second criterion adds nothing to the first, this absence of joint utility raises at least an inference that status is an explanation of joint effect. Which of these (anti-barriers or suspected disparate treatment) explanations of a justification of joint effect requirement would best fit such a requirement turns on just how much additional utility the employer must derive from the second criterion. Paetzold and Willborn's willingness to reject "slight improvement in prediction" as a justification for joint effect[257] may be consistent with the distributional objectives of a rough equal achievement explanation, but this is because of the standard of justification they would invoke, not the meaning of impact they advocate.

Third, and most crucial, the notion that the joint effects of criteria that generate no separate effects are subject to attack appears inconsistent, as Paetzold and Willborn apparently recognize,[258] with an employer defense created by the 1991 Civil Rights Act. Under the Act, if an employer "demonstrates that a specific employment practice does not cause the disparate impact, the [employer] shall not be required to

253. *See* Paetzold & Willborn, *supra* note 1, at 373.

254. *Id.* at 385. The authors say this with respect to a "cell 6 situation," but cell 6 entails neither separate nor joint impact. *Id.* at 381. I am therefore assuming a typographical error and that they mean "cell 5."

255. *Id.* at 385 n.200.

256. *Id.* at 385.

257. *Id.* at 385 n.200.

258. *Id.* at 386.

demonstrate that such practice is required by business necessity."[259] Unless the combined use of separate criteria is deemed the "specific practice" of which an employer must make this demonstration, the quoted provision would seem to exclude the joint or concurrent effect situation from the scope of the impact model.

Paetzold and Willborn view this employer defense as inconsistent with the anti-barrier view.[260] It may also be inconsistent with an approximated disparate treatment view. In the first place, as indicated above, joint effects may plausibly be seen to be within the scope of the approximation rationale. In the second, the quoted employer defense would seem to reinforce the Paetzold and Willborn contention that another situation, one in which separate criteria used in combination produce no disparate effect but when considered in isolation produce an effect, is subject to the impact model.[261] This latter situation is a variation on *Connecticut v. Teal*, the precedent most embarrassing for an approximated disparate treatment rationale conceived in terms of pretext.[262] It is also the situation, noted by Paetzold and Willborn,[263] in which employers are least likely to have been aware of disparate effect and, therefore, least likely to have adopted a criterion "because of" that effect.

Happily, at least for this writer, this embarrassment is not one for an incoherence thesis. The quoted employer defense then merely suggests, as would seem obvious in any event, that Congress is no less subject than the judiciary to the clash of political moralities underlying incoherence.

CONCLUSION

There is an honorable tradition, particularly among law professors, of making sense of seemingly confused and contradictory tendencies within law by reducing them to a few articulable principles and reconciling the seeming confusion to those principles. Both *Deconstructing Disparate Impact* and *A Positive Theory of Employment Discrimination Cases* are significant and valuable contributions within this tradition.

There is also a counter-tradition, one that attempts the "deconstruction" (in a sense distinct from the Paetzold and Willborn usage) of the first, often in service of reaffirming confusion. The incoherence thesis

259. Civil Rights Act (Title VII) § 703(K)(1)(B)(ii), 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (1994).
260. Paetzold & Willborn, *supra* note 1, at 384.
261. *Id.* at 381-82.
262. *See* Cox, *Substance and Process*, *supra* note 23, at 45-53.
263. Paetzold & Willborn, *supra* note 1, at 372-73.

defended here is perhaps a species of this counter-tradition, albeit not from the political perspective commonly associated with it. The counter-tradition need not imply disrespect for the tradition; indeed, the tradition and counter-tradition are mutually dependent.

It should also be apparent that underlying tradition and counter-tradition there are agendas. This is true of the incoherence thesis, or, at least, what I have come to believe of the incoherence thesis. The agenda underlying the incoherence thesis, if accepted, would create coherence through substantial pruning of precedent. The result would no doubt then become itself a target of other forms of deconstruction from the perspective of a distinct agenda. It is in my view unfortunate when tradition and counter-tradition, agenda and counter-agenda, appear not merely in the law reviews but in the cases as well. It is perhaps, however, unfortunate in much the same way that scarcity is unfortunate—a matter to be regretted only by reference to utopian musings. In any event, the phenomenon has at least the (debatable) virtue of keeping legal academics in business.