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SUBJECTIVE CRITERIA IN TITLE VII DISPARATE IMPACT ANALYSIS: BURDENS AND STANDARDS OF PROOF

Merrick T. Rossein

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I. INTRODUCTION

Twenty-five years ago, Congress enacted the 1964 Civil Rights Act,[1] the first comprehensive civil rights legislation[2] since the Reconstruction civil rights statutes.[3] One of its provisions, Title VII,[4] prohibits discrimination in employment based on race, color, sex, national origin and religion. This statute has provided a strong vehicle[5] for minorities and women to challenge the myriad of

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1. Pub. L. No. 88-352, 78 Stat. 243 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000h(6) (1982)).

2. The Civil Rights Act of 1957, 42 U.S.C. §§ 1975-1975f (1982), was the first civil rights act passed since the Civil Rights Act of 1875, 18 Stat. 335. It established the United States Civil Rights Commission to investigate and report to the President and Congress the status of civil rights in this country. The Commission had no civil rights law enforcement authority; however, it played an important role as a reliable reporter of civil rights developments until President Reagan destroyed the bipartisan and objective tradition by discharging three members of the Commission. *See* Berry v. Reagan, 32 Empl. Prac. Dec. (CCH) ¶ 33,898, *dismissed as moot*, 732 F.2d 949 (D.C. Cir. 1983) (district court preliminarily enjoined President's dismissal of two commissioners). In response to the public outcry and objections from Congress, a new structure for the Commission was established whereby both Congress and the President would appoint members. 42 U.S.C. § 1975 (1982). The Civil Rights Act of 1960, 42 U.S.C. § 1971 (1982), had, among other things, a limited federal elections voting record provision. The Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973-1973bb-1 (1982), is a comprehensive voting rights statute with enforcement powers conferred on the Attorney General and aggrieved persons. The twenty-fourth amendment to the United States Constitution eliminated poll tax on federal elections. U.S. CONST. amend. XXIV.

3. The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, was enacted pursuant to the thirteenth amendment. It contained a list of federally protected rights and its most important provisions, derived from § 1 and now codified at 42 U.S.C. §§ 1981 and 1982 (1982) mandated that all persons born in the United States are citizens and that all citizens shall have the same right as white persons to make and enforce contracts and own or lease property. The Supreme Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), held that the portion of § 1 that survived as § 1982 prohibited *private* racial discrimination in the sale or rental of real or personal property. Later, the Court extended *Jones* and applied § 1981 to other settings: Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973) (private swimming club excluded blacks); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975) ("remedy against discrimination in private employment on the basis of race"); Runyon v. McCrary, 427 U.S. 160 (1976) (prohibited private school from excluding children solely because they were black). The Court heard reargument in Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988) (per curiam), an employment race discrimination case, to reconsider its decision in *Runyon*. After ratification of the fourteenth and fifteenth amendments, the Reconstruction Congress again legislated to protect blacks. The Civil Rights Act of 1870, § 16, 16 Stat. 144, reenacted key provisions of the 1866 Act to alleviate doubts about the constitutionality of that Act. *See* Eisenberg, *Federal Protection of Civil Rights*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (L. Levy ed. 1986). It also provided protection for black voting rights. The federal effort to protect voting rights was expanded by the Enforcement Act of 1870, 16 Stat. 170. The Civil Rights Act of 1875, 18 Stat. 335, provided for equal enjoyment of accommodations. The Supreme Court invalidated the 1875 Act in the Civil Rights Cases, 109 U.S. 3 (1883). The rejection of a strong federal role in the enforcement of civil rights in that case "conditioned the entire course of legal development in this [black rights] area for the next eighty years." Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 388 (1967). *See also* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

4. 42 U.S.C. §§ 2000e-2000e-17 (1982) (originally enacted as Pub. L. No. 88-352, §§ 701-718, 78 Stat. 253 (1964)); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978); Civil Rights Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. 1155 (1982).

5. *See, e.g.*, Greene, *Twenty Years of Civil Rights: How Firm a Foundation?*, 37 RUTGERS L. REV. 707, 721-30 (1985); Norton, *Equal Employment Law: Crisis in Interpretation—Survival Against the Odds*, 62 TUL. L. REV. 681 (1988).

conscious[6] and unconscious[7] historically erected[8] impediments that severe-

6. For instance, in the early years of Title VII, it was not unusual for employers to segregate lunch and recreational areas, lockers, restrooms, water fountains and other physical facilities. *See, e.g.*, Firefighters Inst. for Racial Equality v. St. Louis, 549 F.2d 506, 514 (8th Cir. 1977) (employer sponsored social events organized along racial lines); United States v. Jacksonville Terminal Co., 451 F.2d 418, 458 (5th Cir. 1971) (toilet, locker and shower facilities segregated based on race). Intentional discrimination continued into the 1980s. *See, e.g.*, Domingo v. New England Fish Co., 727 F.2d 1429, 1434, *modified*, 742 F.2d 520 (9th Cir. 1984) (segregated housing in measurably worse conditions for non-whites); Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982) (when plaintiff objected to pervasive use of racial slurs, employer responded by advising him that "racial slurs were 'just something a black man would have to deal with in the South'"). Of course, racial harassment is not confined to the South, as implied by the employer's statement in *Walker*. *See, e.g.*, Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1420 (7th Cir. 1986) (black employee at Harvey, Illinois, plant subjected to racial graffiti on company bulletin boards and bathroom walls, such as " 'the KKK is not dead, nigger' " and other racial threats; supervisors "failed to take more than half-hearted measures to stop the harassment" and also participated in making racist comments). Examples of intentional discrimination continue to the present. *See, e.g.*, Hall v. Gus Constr. Co., 842 F.2d 1010, 1014-15 (8th Cir. 1988) (female traffic controllers at road construction site constructively discharged as a result of hostile and abusive sexual harassment); Legrand v. Trustees of Univ. of Ark. at Pine Bluff, 821 F.2d 478, 483 (8th Cir. 1987) (employer's reasons for discharge and failure to rehire black electricians pretext for intentional discrimination). However, after 25 years of Title VII litigation, employers intent on discriminating have become sophisticated in masking the more overt manifestations of racial and sexual animus. *See, e.g.*, Barnes v. Yellow Freight Sys., Inc., 778 F.2d 1096, 1101 (5th Cir. 1985) ("Today, employers, and their supervisors, who might choose to discriminate on the basis of race have become . . . too sophisticated to use racial epithets or to leave glaring tracks if an employee is being discharged for race-related reasons. Instead, the motive is veiled behind apparently neutral remarks about business necessity, an employee's inadequate performance, attitude and the like.").

7. *See* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); J. KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970).

8. The subordination of women and minorities, particularly blacks, in the United States, of course, has different historical roots and sometimes takes different forms. *Compare* D. BELL, RACE, RACISM AND AMERICAN LAW (2d ed. 1980); D. BELL, AND WE ARE NOT SAVED (1987); A. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978); M. BERRY, BLACK RESISTANCE/WHITE LAW (1971); E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1976); E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 (1988) *with* L. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA (1986); E. DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848-1869 (1978); A. KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982); J. JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985) (recounting the weight of racial prejudice compounded by sexual prejudice). Prior to the enactment of the fourteenth amendment, blacks were not citizens under state or federal law. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); Pendleton v. State, 6 Ark. 509 (1846). This denial of citizenship to blacks and native Americans at the federal level was accomplished by the framers of the United States Constitution. *See* Claiborne, *Black Men, Red Men, and the Constitution of 1787: A Bicentennial Apology from a Middle Templar*, 15 HASTINGS CONST. L.Q. 269 (1988) (Constitution affirmed status of blacks as chattels and native Americans as aliens in their own land). White women were not completely excluded from the body politic, but the right to vote was restricted to propertied adult males. *See* R.STOREY, OUR UNALIENABLE RIGHTS 47-49 (1965). Thus, it took the fifteenth amendment for blacks and the nineteenth amendment for women before they could vote. Black women have been placed in a super-subordinate position from early on. *See, e.g.*, A. DAVIS, WOMEN, RACE AND CLASS 23 (1983) (black slave women often received harsher treatment than their male counterparts). Racist ideology and hegemony continues to affect the use of anti-discrimination laws. *See* Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). One commentator suggests a framework for incorporation of an "anti-subordination principle into all equal protection analysis." This analysis rejects policies that, even if facially neutral, perpetuate historical subordination of groups. Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986). *See also* R. DWORKIN, LAW'S EMPIRE 386-87 (1986) (Professor Dworkin's "banned sources" theory is similar to Professor Colker's anti-subordination principle. "The banned sources theory would distinguish between affirmative action programs designed to help blacks and Jim Crow laws designed to keep them in a state of economic and social subjugation.").

ly impeded equal opportunities throughout society and in the working life of this country.[9] The statute was the product of decades of black struggle[10] which culminated in the political and social agitation of the late 1950s and early 1960s led by the black church and student civil rights movement.[11] The grassroots'

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9. The economic disparities between whites and blacks were substantial in 1963 when the legislation that subsequently became the 1964 Civil Rights Act was introduced. For example, the median average wage for black males was 59.9% that of whites and 50.3% for black women. H.R. REP. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2391, 2514. The unemployment rate of non-whites in 1962 was 124% higher than the rate for whites. *Id.* at 2513. Blacks were almost totally excluded from professional and higher-paying jobs. For example, only .5% of all professional engineers were nonwhite. 110 CONG. REC. 2508 (1964) (citing *Hearings Before the Gen. Subcomm. of Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 445 (June 1963)). There was virtually no economic data concerning the disparities between men's and women's income and job opportunities reported in the committee reports, hearings and debates on the 1964 Civil Rights Act because the original bills excluded sex as a protected category. *See infra* notes 20-23 and accompanying text.

The economic disparities and resultant social dislocation continue to be significant. *See, e.g.*, Swinton, *Economic Status of Blacks 1987*, in NATIONAL URBAN LEAGUE, THE STATE OF BLACK AMERICA 1988 (1988). For example, the per capita income of blacks was 58.3% that of whites. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, MONEY, INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES Table 13 (Current Population Reports, Series P-60, No. 157, 1986). Thirty-one percent of all persons below the poverty level were black. *Id.* at Table 16. Women represented 25.1% of persons below the poverty line. *Id.* Minorities and women are concentrated in lower skilled, lower paying jobs. For example, women, as of 1980, comprised 1.6% of carpenters, 15% of production supervisors, 14.9% of sales representatives, 98.8% of secretaries, and 83.5% of cashiers. NATIONAL RESEARCH COUNCIL, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB (1986). Women earn only 64 cents to every dollar earned by men. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, MONEY, INCOME & POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES, *supra*, at Table 13.

Blacks constitute 60% of the urban underclass in the United States. *See* Lauter & May, *A Saga of Triumph, A Return to Poverty: Black Middle Class Has Grown But Poor Multiply*, L.A. Times, Apr. 2, 1988, § 1 at 16, col. 3. For a thorough analysis of the tremendous social dislocation afflicting the black underclass, see W. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987).

Although the disparities remain large, equal employment laws have had a significant positive impact on the participation of minorities and women in the labor force. *See* EMPLOYMENT PATTERNS OF MINORITIES AND WOMEN IN FEDERAL CONTRACTOR AND NONCONTRACTOR ESTABLISHMENTS, 1974-1980: A REPORT OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEPT. OF LABOR (1984) [hereinafter EMPLOYMENT PATTERNS] (study of contractors subject to nondiscrimination and affirmative action requirements of Exec. Order No. 11,246, 3 C.F.R. 339 (1965), in comparison to noncontractors).

10. The struggle for equality and empowerment started with the resistance of blacks to slavery. *See, e.g.*, E. GENOVESE, *supra* note 8. After emancipation, black people continued to fight subjugation and discrimination. *See, e.g.*, W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880 (1935); E. FONER, *supra* note 8.

11. The historical accounting of the civil rights struggles of the 1950s and 1960s continues to be examined and reexamined by historians and other social commentators. One of the most compelling accounts is the six-part television series, *Eyes on the Prize: America's Civil Rights Years* (PBS television broadcast, 1986) (available on videotape from Blackside, Inc., a Boston film company). The series "chronicles these extraordinary times as segregated America is forced, in a single decade, to take a giant step from a feudal state toward a free and open democracy." J. WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965 (1987). The words of the leaders of what has been called the Second Reconstruction, from their common ground and different perspectives, offer a unique view of this period. *See, e.g.*, S. CARMICHAEL & C. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA (1967); J. FARMER, LAY BARE THE HEART: AN AUTOBIOGRAPHY OF THE CIVIL RIGHTS MOVEMENT (1985); J. FORMAN, THE MAKING OF BLACK REVOLUTIONARIES; A PERSONAL ACCOUNT (1972); M. KING, STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY (1958); R. WILKENS, STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS (1982). The role of the black church, particularly the efforts of the Southern Christian Leadership Conference, and key events in 1963 and 1964 are among many aspects examined in a comprehensive treatment of this period. *See* D. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP

organizing and demands for freedom and empowerment were complemented by courtroom challenges to segregation and Jim Crowism which asserted the guarantees of the Constitution, particularly the fourteenth amendment.[12]

Each year from 1943 until 1964, a bill prohibiting discrimination in em-

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CONFERENCE (1986) [hereinafter D. GARROW, BEARING THE CROSS]. *See also* W. WALKER, THE SOUL OF BLACK WORSHIP (1984). For views of the role of black students during this period, see C. CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960's (1981); H. ZINN, SNCC: THE NEW ABOLITIONISTS (1964). The continued role of violence to impede those fighting for civil and human rights is another part of the story. *See, e.g.*, S. CAGIN & P. DRAY, WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI (1988); D. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965 (1978). The use of government resources to disrupt efforts to organize against racial oppression is a particularly sad aspect of this history. *See* D. GARROW, THE FBI AND MARTIN LUTHER KING, JR.: FROM "SOLO" TO MEMPHIS (1981). The various presidential actors and their roles in advancing and/or impeding the march toward racial equality is another crucial part of this period. *See* C. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION (1977); R. BURK, THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS (1984); V. NAVASKY, KENNEDY JUSTICE (1971).

No view of the period would be complete without listening to the voices that chronicled the hopes, aspirations and struggles of black people through poetry, novels, short stories, music and art. Langston Hughes eloquently wrote an unpublished poem, *Dream of Freedom*, for the NAACP:

> There is a dream in the land
> With its back against the wall
> By muddled names and strange
> Sometimes the dream is called.
>
> There are those who claim
> This dream for theirs alone–
> A sin for which, we know,
> They must atone.
>
> Unless shared in common
> Like sunlight and like air,
> The dream will die for lack
> Of substance anywhere
>
> The dream knows no frontier or tongue,
> The dream no class or race.
> The dream cannot be kept secure
> In any one locked place.
>
> This dream today embattled,
> with its back against the wall–
> To save the dream for one
> It must be saved for all.

L. Hughes, Dream of Freedom (Apr. 1, 1964) (unpublished poem). *See* Edwards, *The Annual John Randolph Tucker Lecture: The Future of Affirmative Action in Employment*, 44 WASH. & LEE L. REV. 763, 763-64 (1987). *See also* L.HUGHES, SELECTED POEMS (1959); T. MORRISON, BELOVED (1987); A. WALKER, MERIDIAN (1976).

12. The legal assault on the "separate but equal" doctrine articulated in Plessy v. Ferguson, 163 U.S. 537 (1896) began in 1938 when the Supreme Court declared unconstitutional the denial of legal education to blacks in Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). Concerted legal challenges were led by black attorneys such as Charles Houston, Thurgood Marshall, Robert Carter and Constance Baker Motley. For a biography of Charles Houston, see G. MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983). The NAACP, most often the organization leading the way, was joined by the Urban League, the American Jewish Congress and the American Civil Liberties Union. *See* Lytle, *The History of the Civil Rights Bill of 1964*, 4 J. OF NEGRO HIST. 275, 279 (1966). *Missouri ex rel. Gaines* was followed by Sipuel v. Board of Regents of the Univ. of Okla., 332 U.S. 631 (1948) (black applicant entitled to secure legal education); Sweatt v. Painter, 339 U.S. 629 (1950) (black person denied admission to University of Texas School of Law and admitted to newly established law school for blacks, denied equal protection of laws); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (black graduate stu-

ployment was introduced in Congress.[13] The power of the committee chairmen, southern Democrats who were often staunch segregationists, and the effective tool of the filibuster,[14] ensured defeat for this proposed legislation. As the organizing and plans for the historic August 28, 1963 March on Washington neared completion,[15] President Kennedy submitted a proposed Civil Rights Act to Congress. The proposal did not contain a fair employment provision; the Administration feared that the inclusion of such a provision would kill any

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dent assigned seat in classroom and library specified for Negroes, pursuant to state law that instruction of Negroes in higher education be "upon a segregated basis"). Other cases challenged race discrimination in other areas of life. *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (racially restrictive covenant barred); Morgan v. Virginia, 328 U.S. 373 (1946) (discrimination in interstate travel barred). The landmark school desegregation decision in Brown v. Board of Educ., 347 U.S. 483 (1954) was seen by some as a catalyst for the emergence of political agitation. *See* Lytle, *supra*, at 280 ("This [*Brown*] decision cloaked the civil rights movement in a mantle of legitimacy and gave it the moral nourishment necessary to every social revolution."). For a compelling discussion of the *Brown* case, see R. KLUGER, SIMPLE JUSTICE (1975). For an analysis of desegregation in the North, see P. DIAMOND, BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION (1985); and from a social commentator's view, see J. LUKAS, COMMON GROUND (1985) (school integration in Boston from the viewpoints of black, Irish and "Yankee" families).

The lawyers' work to protect and sustain the civil rights movement continued throughout the period. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963) (first amendment rights of free speech and association); NAACP v. Alabama, 357 U.S. 449 (1958) (right of free association part of the fourteenth amendment's "liberty," protecting association's membership list from compelled disclosure). The tactic of sit-ins engendered numerous state criminal prosecutions in which the protestors' attorneys fought back with the fourteenth amendment and federal nondiscrimination statutory provisions. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964) (after state and local public accommodations laws were enacted, criminal prosecutions based on former law should be dismissed); Garner v. Louisiana, 368 U.S. 157 (1961) (conviction of 16 blacks for disturbing the peace after refusing to move from seats reserved for whites at a lunch counter on the grounds that there was no evidence to sustain the conviction); Boynton v. Virginia, 364 U.S. 454 (1960) (black law students' trespass convictions for refusing to leave white section of a restaurant in Richmond bus terminal reversed under nondiscrimination clause of Interstate Commerce Act). *See also* D. BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 8, at 279-361; A. KINOY, RIGHTS ON TRIAL 151-296 (1983) (particularly Chapter 8 discussing Dombrowski v. Pfister, 380 U.S. 479 (1965), where Louisiana unsuccessfully attempted to use its Subversive Activities and Communist Control Law to harass and prosecute the Southern Conference Educational Fund).

13. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 7 (1973) (noting bills introduced from 1943). *See also* N. Schlei, *Foreword*, in EMPLOYMENT DISCRIMINATION LAW (B. Schlei & P. Grossman eds. 1983) (noting President Kennedy's belief that inclusion of a fair employment provision in the proposed civil rights bill of 1963 would be too explosive—and result in no legislation).

14. *See* Lytle, *supra* note 12, at 276-77.

15. *See* T. GENTILE, MARCH ON WASHINGTON: AUGUST 28, 1963 (1963); A. SCHLESINGER, A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 969-70 (1965) (In a meeting with civil rights leaders in June 1963, President Kennedy acknowledged "that the demonstrations in the streets had brought results; they had made the executive branch act faster and were now forcing Congress to entertain legislation which a few weeks before would have had no chance."). Judge A. Leon Higginbotham, now serving on the United States Court of Appeals for the Third Circuit, noted the important role of political agitation in the passage of the civil rights statutes. As a member of the National Commission on the Causes and Prevention of Violence, in dissent he wrote:

> [T]he major impetus for the Civil Rights Acts of 1957, 1960, 1964 and 1965, which promised more equal access to the opportunities of our society, resulted from the determination, the spirit and the nonviolent commitment of the many who continually challenged the constitutionality of racial discrimination and awakened the national conscience.

ADDITIONAL STATEMENT OF JUDGE HIGGINBOTHAM, COMMISSION STATEMENT ON CIVIL DISOBEDIENCE, NAT'L COMM'N ON THE CAUSES & PREVENTION OF VIOLENCE 16 (Dec. 1969).

chances of passage of the other provisions.[16]

Recognizing the critical importance of work for both economic empowerment and human dignity,[17] the civil rights forces pressed for an employment provision in the proposed legislation.[18] They succeeded, and much of the debate about the bill centered around the proposed Title VII.[19] The initial proposal prohibited discrimination based upon race, religion and national origin.[20] Females were excluded from its protection. Although women had gained the protection of the Equal Pay Act[21] that year, it offered limited rights.[22]

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16. *See* C. WHALEN & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985). The original bill submitted to Congress by President Kennedy contained a provision permitting the President to establish a Commission to regulate discrimination by government contractors. This provision had long ago been established by executive orders of previous presidents. *See* N. Schlei, *supra* note 13, at ix-x. President Roosevelt issued Executive Order No. 8802, 3 C.F.R. 957 (1938-43 comp.), prohibiting discrimination in employment by defense contractors. From 1941 to 1961 successive presidents issued executive orders proscribing employment discrimination in federal contracting. *See* Jones, *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 392-97 (1988).

17. The March on Washington was planned as a call for "jobs and freedom." For example, John Lewis, now a member of Congress from Georgia, was chairman of the Student Nonviolent Coordinating Committee in 1964 and addressed the march. Among other things, Lewis said:

> We march today for jobs and freedom, but we have nothing to be proud of. For hundreds and thousands of our brothers are not here. They have no money for their transportation, for they are receiving starvation wages . . . or no wages at all. While we stand here, there are sharecroppers in the Delta of Mississippi who are out in the fields working for less than three dollars a day for twelve hours of work.

J. FORMAN, *supra* note 11, at 336. Employment became an early focus of the Southern Christian Leadership Conference. Its "Operation Breadbasket" sought jobs for blacks from target industries. The Reverend Jesse Jackson brought this approach north to Chicago. *See* D. GARROW, BEARING THE CROSS, *supra* note 11, at 462-63. For a discussion of black labor and unions, see H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1985). The universal right to work, to have a decent standard of living, without distinctions of any kind, was set out as an international aspiration by the United Nations Charter. *See* U.N. CHARTER art. 1, para. 2 and 3.

18. *See* C. WHALEN & B. WHALEN, *supra* note 16, at 26-27, 35. The Kennedy bill was introduced into the House of Representatives by Emanuel Celler, chairman of the Judiciary Committee, which was given jurisdiction by the Speaker of the House. *Id.* at 4. An amendment containing a new and much more far-reaching employment section was offered by Representative Peter Rodino. It established the Equal Employment Opportunity Commission (EEOC) and conferred upon it the power to investigate, and after a hearing, order any discriminatory practices to cease. *Id.* at 35. This proposal was modeled on the National Labor Relations Act. The key Republican member of the Committee, William McCulloch, and the White House were upset with the amendment. *Id. passim.* The cease and desist enforcement authority contained in this amendment was eliminated in the final bill. Thus, the administrative process was circumvented and the federal courts were given de novo review. *See* H.R. REP. NO. 914, 88th Cong., 1st Sess., *reprinted in* 1963 U.S. CODE CONG. & ADMIN. NEWS 2391, 2515-16. Later, the EEOC, in addition to private parties, was given the authority to file cases in court de novo. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 836-45 (1972).

19. *See* 110 CONG. REC. 1518-30 (1964).

20. *See* H.R. 7152, 88th Cong., 2d Sess., 110 CONG. REC. 1511 (1964).

21. Enacted as § 6(d) of the Fair Labor Standards Act, 29 U.S.C. § 206(d)(1) (1982).

22. The Act provides:

> No employer having employees subject to [the minimum wage provisions of the FLSA] shall discriminate, within any establishment . . ., between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .

29 U.S.C. § 206(d)(1) (1982). The Act permits differences in wages if paid pursuant to: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." *Id.*

Opponents of the legislation introduced an amendment to include sex as a protected category, apparently strategizing that the spectre of opening opportunities to women in the workplace would unleash sexist forces and defeat the entire bill.[23] The attempt failed. Thus, women joined blacks and other minorities as the beneficiaries of this legislation. Invoking closure for the first time in a filibuster against civil rights legislation, the Civil Rights Act of 1964 was passed. It embodied the hope and aspirations of minorities and women for equal and full participation in all aspects of American society.

Title VII, now twenty-five years[24] a remedial mechanism to challenge job discrimination, gained substantive strength as it evolved and has survived a concerted effort by the Reagan Administration to undermine its vitality.[25] Although

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23. *See* 110 CONG. REC. 2577-84 (1964). Judge Howard Smith of Virginia, then Chairman of the powerful Rules Committee and an ardent opponent of civil rights legislation, offered an amendment to include sex after two weeks of floor debate. He and nine of the eleven members who spoke in behalf of the amendment voted against the civil rights bill. *See also* Kanowitz, *Sex-Based Discrimination in American Law: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310-12 (1968) ("In the context of that debate [on the Civil Rights Act of 1964] and of the prevailing Congressional sentiment when the amendment was offered, it is abundantly clear that a principal motive in introducing it was to prevent passage . . . ."); Vaas, *supra* note 13, at 441-42. Representative Edith Green, regarded as a champion of equal rights for women and a member of the President's Commission on the Status of Women, opposed treating discrimination against women together with the proposed protected groups. 110 CONG. REC. 1511 (1964); Kanowitz, *supra*, at 311-12. Representative Griffiths supported the amendment, raising the spectre that black women would be given an advantage over white women without the inclusion of sex: "I rise in support of this amendment primarily because I feel as a white woman when this bill has passed this House and the Senate and has been signed by the President that white women will be last at the hiring gate." 110 CONG REC. 2578 (1964). The racism exhibited by some women's rights supporters was a reminder of the racial divisions between abolitionists and some prominent fighters for women's suffrage in an earlier era. *See* E. DUBOIS, *supra* note 8, at 95-96, 100, 110 (discussing Elizabeth Cady Stanton's and Susan B. Anthony's collaboration with George Francis Train, an open and virulent racist.)

24. The bill was signed on July 2, 1964, but became effective on July 5, 1965.

25. ACLU, IN CONTEMPT OF CONGRESS AND THE COURTS—THE REAGAN CIVIL RIGHTS RECORD (1984); Chambers, *Racial Justice in the 1980's*, 8 CAMPBELL L. REV. 29, 31-34 (1985); *Report of the Washington Council of Lawyers*, 1 N.Y.L. SCH. HUM. RTS. ANN. 199 (1983); Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785; Wolvovitz & Lobel, *The Enforcement of Civil Rights Statutes: The Reagan Administration's Record*, 9 BLACK L.J. 252 (1986). Associate Justice Thurgood Marshall characterized Reagan as among the Presidents most hostile to the civil rights of blacks. *See* N.Y. Times, Sept. 9, 1987, at A1, col. 1. In 1984, the Supreme Court in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) barred race-conscious *layoffs*. The Justice Department read the decision as the death of race-conscious affirmative action. Chambers, *supra*, at 32. Led by Assistant Attorney General for Civil Rights, William Bradford Reynolds, the Department pressured 50 cities, counties and states to abandon goals and timetables for hiring and promotion established under consent decrees brought by the Justice Department in the Johnson, Nixon and Carter Administrations. The attempt failed, and in the next two terms the Supreme Court made clear that race and sex conscious affirmative remedies were lawful under Title VII or the fourteenth amendment. Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (plurality) (court-ordered race-conscious goal benefiting nonvictims of discrimination in private employment); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (consent decree utilizing quotas benefiting nonvictims of discrimination in public employment); United States v. Paradise, 480 U.S. 149 (1987) (plurality) (promotion quota lawful under fourteenth amendment to remedy discrimination against blacks in Alabama State Police); Johnson v. Transportation Agency, 480 U.S. 616 (1987) (voluntary affirmative action plan by public employer used sex as one factor in promotion decision). The Department of Labor (administered by the Office of Federal Contract Compliance Programs (OFCCP)) and Attorney General Meese attempted to eliminate the use of goals and timetables in the enforcement of Exec. Order No. 11,246, 3 C.F.R. 339 (1965). This attempt also failed after widespread opposition from Congress, some sectors of the business community and even dissent within the Reagan cabinet. *See Affirmative Action: Joint Oversight*

Title VII enumerates a list of prohibited employment actions,[26] it does not define discrimination. Congress intended that the statute's remedial goals should be interpreted broadly,[27] and the courts have liberally construed its provisions.[28]

The Supreme Court developed two principal theories of discrimination and an analytical framework for the trial courts to utilize in evaluating the evidence. The first theory, disparate impact, articulated in *Griggs v. Duke Power Com-*

Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary and the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 99th Cong., 1st Sess. 223-24 (1985) (statement of William S. McEwen, Chairman, Equal Employment Opportunity Committee, National Association of Manufacturers); Ellis, *Victim-Specific Remedies: A Myopic Approach to Discrimination*, 13 N.Y.U. REV. L. & SOC. CHANGE 575, 603-04 & nn.145-48 (1984-85). The EEOC's secret attempt to eliminate goals and timetables also was reversed. *See Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 2d Sess. 1 *passim* (1986); *Nomination of Clarence Thomas of Missouri to be Chairman of the Equal Employment Opportunity Commission: Hearing Before the Senate Comm. on Labor and Human Resources*, 99th Cong., 2d Sess. 10, 36-58 (1986) (statement of Clarence Thomas, Chairman, EEOC).

Lastly, President Reagan has appointed to the federal judiciary ideological conservatives hostile to victims of discrimination. One study found that, although Reagan-appointed judges differed very little from other Republican judges generally, in the area of discrimination suits they were "more extreme." Note, *All The President's Men: A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 783 (1987).

26. *See* §§ 703 and 704, 42 U.S.C. §§ 2000e-2 and -3 (1982). Unlawful employment practices are enumerated covering employers, employment agencies, labor organizations and training programs. For example, with respect to employer practices, the statute reads:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. at § 2000e-2(a)(1) and (2). The retaliation provision states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

27. *See* Norton, *supra* note 5, at 689 ("courts have regarded Title VII as a law whose framers intended an expansive interpretation").

28. Justice Marshall explained the importance of Title VII as a remedial statute:

> [I]t is important to bear in mind that Title VII is a remedial statute designed to eradicate certain invidious employment practices. The evils against which it is aimed are defined broadly: "to fail . . . to hire or to discharge . . . *or otherwise to discriminate* . . . with respect to . . . compensation, terms, conditions, or privileges of employment," and "to limit, segregate, or classify . . . *in any way* which would deprive or *tend to deprive* any individual of employment opportunities *or otherwise adversely affect his status.*"

International Bhd. of Teamsters v. United States, 431 U.S. 324, 381 (1977) (Marshall, J., concurring in part and dissenting in part) (quoting 42 U.S.C. § 2000e-2(a) (Supp. V 1970)). *See also* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 425 (8th Cir. 1970) ("Title VII of the Civil Rights Act of 1964 is to be accorded a liberal construction in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness and humiliation of racial discrimination.").

pany,[29] and its progeny,[30] is the high water mark of the Court's interpretation of Title VII. The theory's focus is on the *effects* of employment policies or practices on protected groups. It is irrelevant whether the employer intended to discriminate. It is this theory that the Supreme Court in its 1988 Term in *Watson v. Fort Worth Bank & Trust*[31] both strengthened and, in a plurality opinion, began laying the groundwork for gutting a powerful engine for equal opportunity.

The second theory, disparate treatment, developed after *Griggs* in *McDonnell Douglas Corp. v. Green*[32] and its progeny,[33] provided a structure for challenging intentional discrimination. The plurality in *Watson*, among other things, failed to recognize the significant distinctions between, and the theoretical underpinning of, these two theories. Through a procedural device, the allocation of evidentiary burdens,[34] the *Watson* plurality threatens to reverse *Griggs* and create a severely weakened Title VII.

The issue presented to the Court in *Watson* was whether subjective criteria applied by an employer in a promotion decision could be analyzed under the disparate impact theory. It was clear from *Griggs* and its progeny that objective criteria, such as a scored test or a high school diploma requirement, could be analyzed under the impact theory. In an eight-to-zero decision, the Court expanded the theory to apply to subjective criteria. Justice Kennedy, not yet appointed, took no part in the consideration or decision. However, the plurality of Chief Justice Rehnquist and Justices O'Connor, White and Scalia took a "fresh" look at *Griggs* and its progeny and reinterpreted this precedent to lighten the burden on the defendant in impact cases in general, and even more so in subjective criteria impact cases.[35] Justices Blackmun, Brennan and Marshall vigorously asserted the plurality's mischaracterization of the Court's previous decisions.[36] Justice Stevens expressed his displeasure with the plurality addressing an issue on which certiorari was not granted.[37] Therefore, he refused to offer an opinion on the allocation of burdens and the level of proof required.

Another proof issue was raised but not decided in *Watson*. The plurality

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29. 401 U.S. 424 (1971). For an excellent discussion of the development of the impact theory, see Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

30. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977); Connecticut v. Teal, 457 U.S. 440 (1982).

31. 108 S. Ct. 2777 (1988).

32. 411 U.S. 792 (1973).

33. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983). The disparate treatment principles are often referred to as the *McDonnell-Burdine* standard because the *Burdine* articulation of the order and allocation of proof is a more precise explanation of the basic test first set out in *McDonnell Douglas*.

34. For an excellent discussion of burdens of proof and their impact on justice in the Title VII context, see Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981).

35. 108 S. Ct. at 2788-91.

36. *Id.* at 2792.

37. *Id.* at 2797.

stated that the plaintiff in her prima facie case must identify the specific employment practice that is challenged.[38] This, they said, is especially important where the employer combines subjective criteria with standardized rules or tests.[39] Three justices disagreed. Justice Blackmun noted that such a requirement cannot "be turned around to shield from liability an employer whose selection process is so poorly defined that no specific criterion can be identified with any certainty, let alone be connected to the disparate effect."[40]

The Court granted certiorari in *Wards Cove Packing Co. v. Atonio*,[41] which raises the allocation and standard of burdens issue.[42] Justice Kennedy may determine whether *Griggs* is reversed.

This Article discusses the two principal theories of discrimination under Title VII and argues that the allocation of the burden of persuasion to the employer on the issue of job-relatedness under disparate impact analysis should remain intact and that employers should be held to the same level of proof in validating subjective criteria as they are in validating objective criteria.

Part II of the Article contains an overview of the order and allocation of proof in disparate impact and treatment cases, including disparate treatment "pattern or practice" class actions and direct evidence cases.

Part III offers a critical examination of the legislative history of Title VII and discusses contemporaneous construction of the statute by the government agencies responsible for its enforcement, the theoretical and practical distinctions between the impact and treatment models, and the public policy underlying the development of these models. The basic thesis advanced in Part III is that the shifting of the burden of persuasion to the employer after a demonstration of a prima facie case by the plaintiff in a disparate impact case is vital to effectuating the goal of creating a society that provides equal employment opportunities.

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38. *Id.* at 2788. Justice Kennedy agreed with this view in American Fed'n of State, County & Mun. Employees v. Washington, 770 F.2d 1401, 1405-06 (9th Cir. 1985) (Kennedy, J.) (impact analysis limited to challenge of "a specific, clearly delineated employment practice applied at a single point in the job selection process"; "decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis").

39. *Watson*, 108 S. Ct. at 2788.

40. *Id.* at 2797 n.10.

41. 810 F.2d 1477, *vacated and remanded*, 827 F.2d 439 (9th Cir. 1987) (en banc), *cert. granted*, 108 S. Ct. 2896 (1988).

42. 56 U.S.L.W. 3670 (U.S. Mar. 29, 1988) (No. 87-1387). The questions the Court will address are: (1) Does statistical evidence that shows only concentration of minorities in jobs not at issue fail, as a matter of law, to establish disparate impact of hiring practices where employer hires for at-issue jobs from outside workforce and does not promote from within or provide training for such jobs, and where minorities are not underrepresented in at-issue jobs? (2) Did court below, in applying disparate impact analysis, improperly alter burdens of proof and engage in impermissible fact-finding in disregard of established precedent? (3) Did court below permit error in allowing employees to challenge cumulative effect of wide range of alleged employment practices under disparate impact model?

Part IV examines the basis for applying psychometric principles to the validation of subjective criteria. Psychological and testing literature provided many insights in developing this part. Acceptance of this approach will substantially advance the effective enforcement of a national policy against discrimination in the workplace.

II. THE PRINCIPAL THEORIES OF DISCRIMINATION—DISPARATE IMPACT AND DISPARATE TREATMENT

The Supreme Court has developed two principal theories of discrimination under Title VII. The disparate impact theory focuses on the *effect* that an employment policy or practice has on a protected group. The disparate treatment theory is used to determine whether a particular person was intentionally discriminated against. The theories serve different purposes. The United States, as *amicus curiae* in *Wards Cove Packing Co. v. Atonio*[43] urges the Court to "recognize a parallelism between disparate impact and disparate treatment analysis."[44] Adoption of this argument would defeat a central purpose of Title VII. The two theories, including the order and allocation of proof previously developed by the Court and the theoretical foundations, are set out in this section.

A. Disparate Impact—A Group-Based Concept of Equality

Disparate[45] impact cases involve facially neutral selection devices or criteria that disproportionately affect members of a protected group.[46] Neutral factors contain no specific reference to any protected group. The selection devices may be standardized[47] ("objective"), subjective[48] ("discretionary"), or a combination of both.[49] Objective criteria include educational requirements;[50] employ-

43. 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988).

44. Brief for the United States as Amicus Curiae Supporting Petitioners at 28, Wards Cove Packing Co. v. Atonio (1988) (No. 87-1387).

45. The terms "disparate" and "adverse" impact are used interchangeably by the courts without any apparent difference in definition or application.

46. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977) ("Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.").

47. Connecticut v. Teal, 457 U.S. 440 (1982) (written examination); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (drug policy); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements); Washington v. Davis, 426 U.S. 229 (1976) (constitutional challenge; written test of verbal skills); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written aptitude test); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (high school diploma and intelligence test).

48. Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988) (subjective judgment of supervisors of candidates for promotion). *See also* Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1479 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) (employer hired for higher paying jobs individual "best for the job").

49. 108 S. Ct. at 2786. The Court noted that selection systems that combined both "subjective" and "objective" criteria would generally be considered subjective.

50. *See, e.g.*, Walls v. Mississippi Dep't of Pub. Welfare, 730 F.2d 306 , 316-17 (5th Cir. 1984) (college degree requirement for Social Worker I; high school diploma or its equivalent for clerk-typist).

ment tests;[51] height and weight requirements;[52] experience requirements;[53] arrest and conviction records;[54] credit, garnishment and bankruptcy records;[55] drug history;[56] dress requirements[57] and physical requirements.[58] Subjective criteria include attitude, initiative, personality, ability to take directions, alertness and ability to communicate.[59] Proof of discriminatory motive is not required,[60] except possibly at the "pretext" stage.[61] Statistical evidence is essential to a prima facie case.[62]

The Supreme Court defined a three-step order and allocation of proof in the seminal case of *Griggs v. Duke Power Co.*[63] and its progeny, especially *Albemarle Paper Co. v. Moody.*[64] First, (prima facie case) on the basis of proba-

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51. *See, e.g.*, Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 189 (5th Cir. 1983) (Employment tests are "the kind of employment practice to which the disparate impact model traditionally has applied.").

52. Dothard v. Rawlinson, 433 U.S. 321 (1977).

53. *See, e.g.*, Walker v. Jefferson County Home, 726 F.2d 1554 (11th Cir. 1984) (requirement of prior supervisory experience for position of housekeeping department supervisor).

54. *See, e.g.*, Avant v. South Cent. Bell Tel. Co., 716 F.2d 1083 (5th Cir. 1983); McCray v. Alexander, 29 FEP Cases 653, 658 (D. Colo. 1982).

55. *See, e.g.*, Keenan v. American Cast Iron Pipe Co., 707 F.2d 1274 (11th Cir. 1983).

56. *See, e.g.*, Beazer v. New York City Transit Auth., 440 U.S. 568 (1979).

57. Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

58. *See, e.g.*, Berkman v. City of New York, 536 F. Supp. 177 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983) (physical agility test for firefighters). *See also* Berkman v. City of New York, 812 F.2d 52 (2d Cir.), *cert. denied*, 108 S. Ct. 146 (1987).

59. *See, e.g.*, Green v. USX Corp., 570 F. Supp. 254, 260 (E.D. Pa. 1983), *aff'd in part, rev'd in part*, 843 F.2d 1511 (3d Cir. 1988).

60. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups. . . . But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.").

61. *See infra* notes 106-10 and accompanying text.

62. Statistical proof has developed into a complex and sophisticated process. It requires the assistance of statisticians, labor market economists and computer experts. Because of the tremendous cost and time required, many private litigants are forced to forego the benefits of Title VII. The use of statistics raises questions concerning the proper source of statistics (e.g., applicant flow v. labor market), geographic scope (e.g., Nationwide v. Standard Metropolitan Statistical Area, etc.), time frame (e.g., before or after suit was filed) and the weight (e.g., two or three standard deviations). *Wards Cove* raises the issue of the appropriate source of statistics in determining whether plaintiffs made out a prima facie case. This issue is not discussed in this article. For a range of discussion on statistical proof, see D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980 & Cum. Supp. 1987); Rossein, *Statistical Proof in Employment Discrimination Litigation: Use and Requirements*, in CIVIL RIGHTS LITIGATION AND ATTORNEY FEES HANDBOOK (Lobel ed. 1986); Braun, *Statistics and the Law: Hypothesis Testing and Its Application to Title VII Cases*, 32 HASTINGS L.J. 59 (1980) (use of chi square test); Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985); Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980); Laycock, *Statistical Proof and Theories of Discrimination*, 49 LAW & CONTEMP. PROBS. 97 (1986); Meier, Sacks & Zabell, *What Happened in* Hazelwood: *Statistics, Employment Discrimination and the 80% Rule*, 1984 AM. B. FOUND. RES. J. 139 (1984) (critical evaluations by statisticians of the use of the binonial significance test); Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978) (criticizing EEOC's 80% rule).

63. 401 U.S. 424 (1971). For a discussion of the development of the impact theory, see Blumrosen, *supra* note 29.

64. 422 U.S. 405 (1975); Dothard v. Rawlinson, 433 U.S. 321 (1977); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Connecticut v. Teal, 457 U.S. 440 (1982).

tive statistics presented by the plaintiff, does the employment practice have a disparate impact on the protected group of which the plaintiff is a member? The burden of persuasion is on the plaintiff. The employer may challenge the statistical proof at this stage. Second, (business necessity or job-relatedness) if the requisite impact is established by the plaintiff, has the employer met its burden of persuasion[65] by proving that the practice is "job related" or constitutes a "business necessity?" Third, (alternative selection devices) if "job-relatedness" or "business necessity" is established by the employer, are there alternative means of selection that would serve the employer's needs without an adverse impact on the protected group, or is the employer's defense of the challenged selection device a mere pretext for unlawful discrimination? The burden of persuasion should be on the employer.

1. Prima Facie Case

To establish a prima facie case, the plaintiff must first identify a facially neutral practice or an aggregation of practices and then must prove that the challenged employment policy or practice disproportionately impacts on a protected group.[66] Generally, statistical evidence that establishes a disparity[67]

65. This article will demonstrate that the Supreme Court's decisions have squarely placed the burden of persuasion on the employers and that the plurality's "reinterpretation" in *Watson*, if accepted in *Wards Cove*, would be a reversal. An often cited treatise, B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1325 (2d ed. 1983), asserts that there is a question whether the burden on the defendant is one of persuasion or production. As discussed *infra* notes 77-90 and accompanying text, this is a misreading of the cases. In the 1983-85 Cumulative Supplement, the authors appear to back away from this view when they state that "the burden shifts to the employer to *justify* that practice by showing a relationship to the employment in question." *Id.* at 314 (Cum. Supp. 1983-85) (emphasis added). However, review of even the cases it cites for this articulation of the burden makes clear that the burden is one of persuasion. *Id.* at 314 n.135. *See, e.g.*, Hawkins v. Bounds, 752 F.2d 500, 503 (10th Cir. 1985) ("Once the plaintiff makes a prima facie showing that a practice has an adverse impact, the burden shifts to the employer *to prove* that the practice is mandated by business necessity.") (emphasis added); Levin v. Delta Air Lines, Inc., 730 F.2d 994, 997 (5th Cir. 1984) ("Once a prima facie violation has been established, the burden shifts to the employer *to justify* the particular employment practice.") (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)) (emphasis added); Walker v. Jefferson County Home, 726 F.2d 1554, 1558 (11th Cir. 1984) ("The burden of *persuasion* shifts to the employer to prove business necessity and rebut the plaintiff's prima facie case.") (citations omitted); Lynch v. Freeman, 817 F.2d 380, 383 (6th Cir. 1986) (The employer may "rebut" a prima facie case "by showing that the practice complained of is required by business necessity.").

66. *Griggs*, 401 U.S. at 430-32; *Albemarle*, 422 U.S. at 425; *Dothard*, 433 U.S. at 328-30.

67. The degree of disparity has not been defined exactly, but in *Watson* seven justices agreed that the disparities must be "sufficiently substantial." 108 S. Ct. at 2788-89; 2792 n.2 (Blackmun, J., concurring in part and concurring in the judgment). The Court has characterized the "sufficiency" differently. *See Griggs*, 401 U.S. at 426 ("requirements [that] operate[d] to disqualify Negroes at a substantially higher rate than white applicants"); *Albemarle*, 422 U.S. at 425 ("that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants"); *Dothard*, 433 U.S. at 329 (employment criteria that "select applicants for hire in a significantly discriminatory pattern"); *Beazer*, 440 U.S. at 584 ("statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities"); *Teal*, 457 U.S. at 446 ("significantly discriminatory impact"). The courts have primarily relied upon three statistical tests. One, if the difference between the expected and observed number of protected group members is greater than two or three standard deviations. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299, 309 n.14 (1977) (citing

between the race or sex of the group selected by the practice and the race and sex of the group available for the job, such as the general work force, the qualified labor market or actual applicants,[68] will be sufficient to prove that an employment practice is discriminatory. For example, if a scored test is the challenged practice in a race case, plaintiff would introduce data comparing the pass rate for blacks and whites;[69] or a plaintiff may challenge a skill requirement in hiring by comparing the percentage of blacks in the relevant labor market to the percentage of blacks in the workforce;[70] or regression analyses when the challenged practice includes multiple criteria such as education, experience and performance.[71]

In *Griggs*, Duke Power Company utilized a high school diploma requirement and a pen-and-paper objective test to qualify employees for manual labor jobs.[72] No special skills were required. The Court accepted the plaintiff's showing of adverse impact by comparing the 34% white males in North Carolina who had diplomas with the 12% black males who had diplomas.[73] The disparate impact of the objective test was shown through the introduction of an Equal Employment Opportunity Commission study which indicated that a similar test administered at another time and location resulted in a 58% pass rate for whites and a 6% pass rate for blacks.[74]

At the prima facie stage, the defendant may rebut the plaintiff's statistical evidence by challenging the accuracy, reliability, or relevancy[75] of the statistical evidence and/or by offering more probative evidence.[76] The defendant tries to demonstrate problems with the source of statistics (e.g., applicant flow versus labor market), geographic source (e.g., Nationwide versus Standard Metropolitan Statistical Area), time frame (e.g., before suit was filed versus

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Castaneda v. Partida, 430 U.S. 482, 496-97 & n.17 (1977)). Two standard deviations corresponds to the second widely used test, statistical significance at the .05 level, which means that "there exists, at most, a one in 20 possibility that the observed result could have occurred by chance." Segar v. Smith, 738 F.2d 1249, 1282-83 & n.28 (D.C. Cir. 1984). The third test is based upon the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1987) [hereinafter Uniform Guidelines]. Adverse impact is inferred if selection of protected group members is at a rate less than four-fifths of the rate at which the group with the highest rate is selected. 29 C.F.R. § 1607.4(D) (1987). *See, e.g.*, Guardians Ass'n of New York City Police Dep't v. Civil Serv. Comm'n, 630 F.2d 79, 85 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981). This rule has been criticized as statistically unsound. Shoben, *supra* note 62.

68. *See supra* note 62.

69. I.e., 45% of whites but only 16% of blacks passed.

70. I.e., blacks represent 40% of the service workers in the Atlanta Standard Metropolitan Statistical Area but only 7% of the employer's workforce.

71. A multiple regression analysis is a statistical construct that measures in relation to a single dependent variable (e.g., promotion) the effect of several independent variables (e.g., work experience, education, performance, race, sex, age).

72. *Griggs*, 401 U.S. at 427-28.

73. *Id.* at 430 n.6.

74. *Id.*

75. *See, e.g.*, Fudge v. Providence Fire Dep't, 766 F.2d 650 (1st Cir. 1985) (small sample size defeated plaintiff's prima facie case).

76. *See, e.g.*, Page v. U.S. Indus., Inc., 726 F.2d 1038 (5th Cir. 1984).

after) and the weight (e.g., standard deviation).

2. Defendant's Burden to Prove Business Necessity or Job-Relatedness

Once a prima facie case sufficient to survive a Rule 41(b) motion[77] is established and the defendant fails to rebut the statistical case, the burden of persuasion shifts to the defendant to prove that the challenged criterion is job related or justified by some business necessity.[78] *Griggs*[79] established that a test (or selective device) with a discriminatory impact must be shown to be job related to survive Title VII scrutiny, but it was not until *Albemarle*[80] that the Court explained how a defendant may prove job-relatedness. If the defendant fails to validate the test or a validation study does not meet the requirements of *Albemarle*, the court must rule in favor of the plaintiff.[81] In essence, this creates an irrebuttable presumption. Nonvalidated or insufficiently validated tests with a disproportionate impact are unacceptable under Title VII.

In *Griggs*, the Court stated that "Congress has placed on the employer the burden of showing that any given requirement . . . [has] . . . a manifest relationship to the employment in question."[82] Further, it noted that "[t]he touchstone is business necessity" and "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[83] In *Albemarle*, the Court relied on the Uniform Guidelines on

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77. FED. R. CIV. P. 41(b) states, in relevant part:

> After the plaintiff, in an action tried by the court *without a jury*, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

(emphasis added). A district court ruling on a Rule 41(b) motion "is not to make any special inferences in the plaintiff's favor. . . . Instead it is to weigh the evidence, resolve any conflicts in it, and decide for itself where preponderance lies." C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2371, at 224-25 (1971) (citations omitted). For a directed verdict in a *jury* case, FED. R. CIV. P. 50 applies. Most Title VII cases are tried without a jury because the statute does not provide that right. *See* §§ 706(3)-(5), 42 U.S.C. §§ 2000e-5(f)(3)-(5) (1982). Title VII focuses on equitable relief. The Supreme Court expressed approval of this consensus view in Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979) (no right to a jury trial under Title VII "[b]ecause the Act expressly authorizes only equitable remedies"). Back pay is considered essentially "legal damages" and an integral part of equitable relief. *See, e.g.*, Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975). When claims are brought under Title VII and 42 U.S.C. § 1981 or 42 U.S.C. § 1983, and the plaintiff is seeking punitive damages, jury trials are available on all factual issues determining the legal claim under §§ 1981 and 1983 and on the common issues of fact related to Title VII. *See, e.g.*, Thomas v. Resort Health Related Facility, 539 F. Supp. 630, 634 (E.D.N.Y. 1982).

78. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The touchstone is *business necessity*. If an employment practice which operates to exclude Negroes cannot be shown to be related to *job performance*, the practice is prohibited.") (emphasis added).

79. *Id.* at 432 (the employer has "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question").

80. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

81. For a discussion of validating subjective criteria, see *infra* notes 216-58 and accompanying text.

82. 401 U.S. at 432.

83. *Id.* at 431.

Employee Selection Procedures issued by the Equal Employment Opportunity Commission, the Departments of Justice and Labor and the Civil Service Commission, which set out standards for validating tests.[84] The Court noted that the Guidelines were not administrative "regulations" promulgated pursuant to formal procedures established by Congress[85] but stated that they constitute " '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.' "[86]

The standard for proof of job-relatedness was articulated in *Albemarle*: "[D]iscriminatory tests are impermissible unless shown, by professionally accepted methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' "[87] In a later case, *Dothard v. Rawlinson*,[88] the Court invalidated a height and weight requirement for prison guards that disproportionately excluded women applicants and was not proven to be "job related." The Court required that "the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.' "[89] However, in a footnote often cited by lower courts,

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84. 29 C.F.R. § 1607 (1988) [hereinafter Uniform Guidelines].

> Validity refers to the degree to which a test correlates with a relevant measure or criterion of job performance. Unless those people who score relatively high on a test are also likely to perform better on the job, a test lacks validity for that purpose and is useless for selecting personnel for the job in question.

J. KIRKPATRICK, TESTING AND FAIR EMPLOYMENT 6-7 (1968).

85. Section 713(a), 42 U.S.C. § 2000e-12 (1982), authorizes the Equal Employment Opportunity Commission to issue *procedural* regulations in conformity with the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1982). The Guidelines address substantive issues.

86. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (citing *Griggs*, 401 U.S. at 433-34). The extent to which the Court is willing to accord deference to the Commission's interpretations varies. Chief Justice Burger, who authored *Griggs*, distinguished *Albemarle* on the grounds that the Guidelines supplemented rather than interpreted specific statutory language. 422 U.S. at 451-52. The Court in Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) relied upon the Sex Discrimination Guidelines, 29 C.F.R. § 1604 (1985), in holding that a claim of "hostile" sexual environment is actionable under Title VII, even though the victim has not been denied a tangible job benefit. The Affirmative Action Guidelines, 29 C.F.R. § 1608 (1985), were approvingly referred to in Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) and Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986). *But see* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), in which the Court rejected the EEOC's Sex Discrimination Guidelines with respect to pregnancy. This decision was overturned by Congress' enactment of the 1978 Pregnancy Discrimination Act, § 701(k), 42 U.S.C. § 2000e-(k) (1982). *See also* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) (Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605 (1987) inconsistent with the statute "[t]o the extent that the guidelines . . . require the employer to accept any alternative favored by the employee short of undue hardship"). Other courts have sanctioned the Guidelines. *See, e.g.*, Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc) (Uniform Guidelines); Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983), *aff'd in part, rev'd in part*, 812 F.2d 52 (2d Cir. 1987) (Uniform Guidelines); Hawkins v. Anheuser-Busch Inc., 697 F.2d 810 (8th Cir. 1983) (Uniform Guidelines); United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981) (National Origin Guidelines, 29 C.F.R. § 1606 (1987)); Ensley Branch of NAACP v. Seibels, 616 F.2d 812 (5th Cir. 1980) (Uniform Guidelines); Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981) (Uniform Guidelines).

87. 422 U.S. at 431 (quoting 29 C.F.R. § 1607.4(c)).

88. 433 U.S. 321, 322 (1977).

89. *Id.* at 329 (quoting *Griggs*, 401 U.S. at 432).

the Supreme Court expanded this requirement when it wrote that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."[90]

Many courts use "job related" and "business necessity" as interchangeable standards and the courts of appeals have adopted different terms used by the Supreme Court.[91] Often courts assign general definitions to these terms. The most illuminating discussions occur in relation to the specific factual contexts of the cases. For example, two distinctly different theories of business necessity are articulated in the Ninth Circuit's decisions in *Contreras v. City of Los Angeles*[92] and *Blake v. City of Los Angeles.*[93] The Ninth Circuit in *Blake* and other courts[94] have held that the employer must prove that the practice literally is necessary to the operation of the business. *Contreras* adopted a considerably more lenient standard. The employer need only show a legitimate business purpose for the practice and that the practice does serve the purpose. The United States as *amicus curiae* in *Wards Cove Packing Co. v. Atonio* urges the Court

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

91. *See, e.g.*, Aguilera v. Cook County Police & Corrections Merit Bd., 760 F.2d 844, 847 (7th Cir.), *cert. denied*, 474 U.S. 907 (1985) (practice must be "reasonable" or "efficient"); Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1495 (9th Cir 1983), *cert. denied*, 467 U.S. 1255 (1984) (citation omitted) (practice must have " 'legitimate and overriding business justifications' "); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 93-94 (6th Cir. 1982); Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1016-17 (11th Cir. 1982); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262 (6th Cir. 1981) ("indispensability is not the touchstone"; "practice must substantially promote the proficient operation of the business"); Williams v. Colorado Springs School Dist., 641 F.2d 835, 842 (10th Cir. 1981) ("practice must be essential, the purpose compelling"); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 370 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (practice must bear a "manifest relationship to the . . . employment"); Kirby v. Colony Furniture Co., 613 F.2d 696, 703, 705 n.6 (8th Cir. 1980) (practice must be shown to be necessary to safe and efficient job performance; and there must be a *compelling need* for the employer to maintain the practice); Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1389 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979) (citation and emphasis omitted) (practice must " 'foster safety and efficiency . . . [and] be essential to that goal' "); Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 837 (D.C. Cir. 1977) (citation omitted) (practice must have an " 'overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business' ").

92. 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

93. 595 F.2d 1367 (9th Cir. 1979).

94. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). The court wrote:

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

In United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) the court noted that "[n]ecessity connotes an irresistable demand . . . . [A practice] must not only directly foster safety and efficiency of a plant, but also be essential to those goals." *Accord* EEOC v. Rath Packing Co., 787 F.2d 318, 332 (8th Cir. 1986); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 93-94 (6th Cir. 1982); Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1016-17 (11th Cir. 1982); Williams v. Colorado Springs School Dist., 641 F.2d 835, 840-42 (10th Cir. 1981); Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 837 (D.C. Cir. 1977); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 245-47 (5th Cir. 1974).

to "adopt a single governing formulation"[95] and points to the "legitimate business reasons"[96] standard articulated by the plurality in *Watson* as the best standard.

In *Contreras*, the City would not have satisfied the higher standard of *Blake*. For example, one of the plaintiffs had successfully performed an auditor's job for a year and a half before being required to take a test for the position, resulting in her losing the job.

These contrasting views raise fundamental issues about Title VII. Should Title VII be construed to prevent an employer from improving the quality of its work force even if not absolutely necessary to its business? On the other hand, a theoretically superior group of employees may not in fact be any better at performing the tasks of a job than employees who are merely adequate. In that situation, the selection criterion imposing the higher standard should not be tolerated when it has an adverse impact on a protected group of employees. The courts appear to be balancing the importance of the challenged practice to the employer's operation against the injury sustained by the plaintiff class.

Unguided subjective criteria utilized by employers in hiring and in other employment decisions are recognized by the courts as creating an inference of discrimination.[97] The leading case, *Rowe v. General Motors Corp.*,[98] established early on a healthy skepticism of subjective criteria which, when applied to protected group members, result in a disproportionate number of adverse employment decisions. However, the nature of the job involved influences the quantum of subjectiveness the court will tolerate before it is willing to conclude that a presumption of discrimination has been established.[99] For instance, subjective criteria applied to hiring decisions for jobs involving little skill, prior training or experience[100] are more often seen as discriminatory than when

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95. Brief for the United States as Amicus Curiae Supporting Petitioners at 23, Wards Cove Packing Co. v. Atonio (No. 87-1387).

96. Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2790 (1988).

97. *See, e.g.*, Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985) ("subjective practices such as interviews and supervisor recommendations are capable of operating as barriers to minority advancement"); Wright v. Olin Corp., 697 F.2d 1172, 1181 (4th Cir. 1982) ("[s]ubjective rating systems have a clear potential for abuse and may hide race or sex discrimination"); Burrus v. United Tel. Co. of Kan., Inc., 683 F.2d 339 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982) (subjective criteria provides an opportunity for unlawful discrimination).

98. 457 F.2d 348, 359 (5th Cir. 1972) ("All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management."). A major concern in *Rowe* was that the supervisors responsible for the decisions were virtually all white. *Id.*

99. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982) (criticizes differential standards as elitist, with no legal basis for distinguishing between upper and lower level selection methods). *See also* Shidaker v. Bolger, 593 F. Supp. 823, 834 (N.D. Ill. 1984), *rev'd in part on other grounds sub nom.* Shidaker v. Carlin, 782 F.2d 746 (7th Cir. 1986) ("[T]he validity of subjective devices increases in direct proportion to the level of employment sought.").

100. *See, e.g.*, Green v. United States Steel Corp., 570 F. Supp. 254 (E.D. Pa. 1983), *aff'd and rev'd in part*, 843 F.2d 1511 (3d Cir. 1988) (laborer position in steel mill).

those criteria are used to fill upper level management, professional or academic positions.[101]

Some decisions suggest that the courts are more willing to defer to the employer's job-relatedness explanation when the job calls for the exercise of judgment and subjective skills involving public safety.[102] For example, in *Davis v. City of Dallas*,[103] plaintiffs challenged a police department's requirement that applicants for the force have completed at least 45 semester hours of college credit with at least a "C" average. Black applicants were adversely affected. No empirical data was offered by the defendant to show that officers with college credits performed their duties better than officers without such education. The department had previously required a high school diploma. The defendant "validated" the requirement by offering expert testimony that college education "fill[ed] the gap of inexperience in the handling of a crisis situation for an unexperienced officer."[104]

The court of appeals was not terribly bothered by the lack of empirical data in affirming the district court's finding that the City met its burden under *Griggs*, noting that: "[b]ecause of the professional nature of the job, coupled with the risks and public responsibility inherent in the position, . . . empirical evidence is not required to validate the job-relatedness of the educational requirement."[105] Although public safety concerns should be a factor in determining the standard the employer must meet to show job-relatedness, it is nevertheless important for the employer to validate the requirement through probative data. The standard that should be applied in subjective criteria cases is set out later in this Article.

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101. *See, e.g.*, Zahorik v. Cornell Univ., 729 F.2d 85, 93 (2d Cir. 1984) (academic tenure claim) ("Courts, moreover, are understandably reluctant to review the merits of a tenure decision . . . . [T]riers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion.") (citation ommitted); Mason v. Continental Ill. Nat'l Bank, 704 F.2d 361 (7th Cir. 1983) (managerial position); Burrus v. United Tel. Co. of Kan., 683 F.2d at 339 (10th Cir. 1982) (accountant). *See also* Note, *The Double-Edged Sword of Academic Freedom: Cutting the Scales of Justice in Title VII Litigation*, 65 WASH. U.L.Q. 445 (1987) (note argues that the courts' deference to academic institutions imposes unreasonable burdens on the plaintiff).

102. *See, e.g.*, Spurlock v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1972) in which the court addressed the issue of whether a college degree requirement for the position of flight officer, among others, was job related:

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related . . . . The courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job.

103. 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).

104. *Id.* at 222.

105. *Id.* at 217.

Few cases proceed past Stage Two, the job-relatedness or business necessity requirement.

3. Opportunity to Show Alternative Selection Device

However, the third step or surrebuttal stage allows the plaintiff an opportunity to overcome the defendant's proof of job-relatedness by showing that a less discriminatory alternative selection device would also serve the employer's interest. It is not clear who has the burden of persuasion at this step. The Supreme Court in *Albemarle* wrote that, if job-relatedness is shown, "it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"[106]

There is a split in the circuits on which party has the burden of proof.[107] The EEOC's Uniform Guidelines on Employee Selection Procedures place the burden on the defendant.[108] It is appropriate for the employer to retain the burden of proving the absence of suitable alternative selection devices, both because the employer best knows its own particular needs and because the job-relatedness step is in the nature of an affirmative defense as to which the defendant generally bears the burden of persuasion.[109]

The showing that a less discriminatory alternative selection device would also serve the employer's interest implies that the employer's choice was influenced by the discriminatory impact of the selection device; in other words, that the selection device is a pretext for discrimination. In *Connecticut v. Teal*, the Court wrote that if an employer meets its job-relatedness burden "the plaintiff may prevail, if he shows that the employer was using the practice as a mere

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106. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citation omitted). *See also* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (citing the language in *Albemarle*).

107. *Compare* Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir. 1980) (employer asserting business necessity defense must prove that there is no alternative to the challenged practice) *and* Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980) (defendant must demonstrate that there are no alternative devices which would equally or better accomplish the defendant's business purpose) *with* Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1261 (6th Cir. 1981) ("The burden of establishing the presence of available alternatives, however, belongs only to the plaintiff and must be sustained in the third stage of the analysis."). *See also* Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 TEX. L. REV. 41, 49-51 n.40 (1986) (arguing that the employer should have the duty to "make a reasonable investigation of less discriminatory alternatives but not subjecting it to liability when the plaintiff can unearth an alternative device not detected by such a reasonable investigation").

108. 29 C.F.R. § 1607.3B (1986). It reads in relevant part:

> [T]he user should include . . . an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines.

109. *See* Belton, *supra* note 34.

pretext for discrimination."[110] Thus, it appears that intent does play a role in what is a non-intent related form of discrimination. Intent is irrelevant at the prima facie and job-related stages of proof. The third step, however, does not focus on animus or state of mind in the same sense as in disparate treatment cases.

B. Disparate Treatment—An Intentional Discrimination Concept

Disparate treatment under Title VII involves treating individuals differently on the basis of their race, color, sex, national origin or religion.[111] A disparate treatment case is usually an individual case focused on the employer's discriminatory motive. The plaintiff attempts to prove intentional bias, and the employer asserts a legitimate nondiscriminatory reason for the employment decision. When the claim is that the employer's treatment of the plaintiff is part of a pattern and practice of discrimination against members of the plaintiff's protected class, a class action theory of treatment is available. The Supreme Court's conceptual framework for the order and allocation of proof was set out in *McDonnell Douglas Corp. v. Green*[112] and its progeny.[113] The tripartite standard for establishing whether or not different treatment based upon the plaintiff's protected status exists, is as follows: (1) the plaintiff must establish a prima facie case; (2) the defendant must articulate some legitimate, nondiscriminatory reason for the employment action; and (3) the plaintiff must then prove that the defendant's reason was a mere pretext for discrimination.[114]

The burden of persuasion remains with the plaintiff under the *McDonnell Douglas* model.[115] The defendant has a burden of production.[116] Some circuits hold that upon a plaintiff's presentation of *direct* evidence of discrimination the burden of persuasion shifts to the defendant.[117] The Supreme Court

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110. 457 U.S. 440, 447 (1982).

111. The Supreme Court articulated the conceptual theory of a disparate treatment case in International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (citation omitted).

> Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

112. 411 U.S. 792 (1973).

113. Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978); Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983). *See supra* note 33 and accompanying text.

114. *McDonnell Douglas*, 411 U.S. at 804; *Burdine*, 450 U.S. at 256.

115. 411 U.S. at 802. The *McDonnell Douglas* Court stated that "[t]he complainant in a Title VII trial must carry the *initial burden* under the statute of establishing a prima facie case . . . ." (emphasis added). Thus it was less than clear until its progeny that the burden of persuasion remained with the plaintiff throughout the tripartite standard.

116. *See* Belton, *supra* note 34.

117. Fields v. Clark Univ., 817 F.2d 931 (1st Cir. 1987); Blalock v. Metal Trades, Inc., 775 F.2d 703, 712 (6th Cir. 1985); Miles v. M.N.C. Corp., 750 F.2d 867, 875 (11th Cir. 1985); Bell v. Birmingham Linen Serv., 715 F.2d 1552 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). *Contra* Sims v. Cleland, 813 F.2d 790 (6th Cir. 1987).

held in an age discrimination case that "the *McDonnell* test is inapplicable where the plaintiff presents direct evidence of discrimination."[118] Those courts which support the shift of the burden of persuasion argue that the *McDonnell Douglas* analysis was intended for cases where direct evidence of discrimination is lacking.[119] The reason these courts present for placing the burden of persuasion on the defendant upon the introduction of direct evidence is that such evidence squarely addresses the intent element of disparate treatment. Thus, the defendant's burden to rebut the plaintiff's case is proportionately greater. When the plaintiff offers direct evidence, the trier omits separate analyses of the plaintiff's prima facie case and the defendant's articulation of a nondiscriminatory reason and proceeds immediately to a consideration of pretext.

The *McDonnell Douglas* tripartite formula in reality is most often not trifurcated. Rather the trier considers all three steps simultaneously: plaintiff presents the prima facie case and anticipates the defendant's reasons for the actions. Thus, at this stage the plaintiff's burden of showing pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination."[120]

1. Prima Facie Case

The structure of the prima facie case is set out in *McDonnell Douglas*[121] and may be established by circumstantial evidence. The four elements include: (1) plaintiff is a member of a protected group; (2) plaintiff applied and was qualified for the position; (3) plaintiff was rejected; and (4) the position remained open and the employer continued to seek applicants.

McDonnell Douglas was a discharge and failure to rehire race discrimination case. The Court stated that the prima facie structure was flexible depending on the differing factual situations.[122] This basic model has been applied in sex,[123] national origin,[124] age,[125] and disability[126] discrimination cases.

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118. Trans World Airlines v. Thurston, 469 U.S. 111, 121 (1985). Since the *McDonnell* formula has generally been accepted by the courts in claims under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982) (prohibiting discrimination in employment against individuals who are at least 40 years of age, but less than 70), this proof standard should be applied by the Court in Title VII cases.

119. For an excellent discussion of direct and circumstantial evidence in which the court talks about the difference between the *nature of the evidence* offered in proof, see EEOC v. Electrolux Corp., 611 F. Supp. 926 (E.D. Va. 1985).

120. *Burdine*, 450 U.S. at 256.

121. 411 U.S. at 802.

122. *Id.* at 802 n.13. "The prima facie case method established in McDonnell Douglas was 'never intended to be rigid, mechanized or ritualistic.' " United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

123. *Burdine*, 450 U.S. 248.

124. Shah v. General Elec. Co., 816 F.2d 264 (6th Cir. 1987).

125. Barnes v. Southwest Forest Indus., 814 F.2d 607 (11th Cir. 1987); Buckley v. Hospital Corp. of America, 758 F.2d 1525 (11th Cir. 1985).

126. Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985).

An example of a variation of the prima facie structure is a case of sexual harassment under Title VII.[127] Other examples of the adoption and/or modification of the *McDonnell Douglas* model come from the range of employment decisions in an employer's work force including hiring,[128] promotion,[129] job assignment,[130] transfer,[131] compensation,[132] training,[133] discipline,[134] layoff,[135] discharge[136] and retaliation.[137]

If the plaintiff successfully establishes a prima facie case, a "presumption" is created that the employer unlawfully discriminated.[138] This "inference of unlawful discrimination"[139] is raised "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[140] Thus, the stage is set for the second part of the *McDonnell Douglas* allocation of proof. The defendant must produce evidence to rebut this presumption of discrimination.

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127. The District of Columbia Circuit in Bundy v. Jackson, 641 F.2d 934, 953 (D.C. Cir. 1981), held, for instance, that the employee's prima facie case of *quid pro quo* sexual harassment consists of the following:

(1) that she was subjected to sexual harassment; and

(2) that she was denied a benefit [or was discharged] for which she was eligible and of which she had a reasonable expectation.

The Supreme Court in Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) confirmed that there are two forms of sexual harassment violative of Title VII. The first, the *quid pro quo* or, in other words, the "put-out-or-get-out" demand made of a woman by someone with the power or apparent authority to hire, promote or fire her or, in some other way, cause an adverse employment decision. The other is the "hostile environment," even where the female employee suffered no tangible adverse employment action.

128. Grigsby v. Reynolds Metals Co., 821 F.2d 590 (11th Cir. 1987).

129. Falcon v. General Tel. Co., 815 F.2d 317 (5th Cir. 1987); Autry v. North Carolina Dep't of Human Resources, 820 F.2d 1384 (4th Cir. 1987).

130. Spears v. Board of Educ. of Pike County, 843 F.2d 882 (6th Cir. 1988).

131. Kent County Deputy Sheriff's Ass'n v. Kent County, 826 F.2d 1485 (6th Cir. 1987), *reh'g denied sub nom.* Kent County Deputy Sheriff's Ass'n v. Heffron, 835 F.2d 1146 (6th Cir. 1987).

132. Feazell v. Tropicana Prods., Inc., 819 F.2d 1036 (11th Cir. 1987); Covington v. Southern Ill. Univ., 816 F.2d 317 (7th Cir.), *cert. denied*, 108 S. Ct. 146 (1987).

133. Rowlett v. Anheuser-Busch, 832 F.2d 194 (1st Cir. 1987).

134. Johnson v. Legal Serv. of Ark., Inc., 813 F.2d 893 (8th Cir. 1987).

135. Coston v. Plitt Theatres, Inc., 831 F.2d 1321 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1471 (1988).

136. Nix v. WLCY Radio/Rahall Communication, 738 F.2d 1181, *reh'g denied*, 747 F.2d 710 (11th Cir. 1984).

137. The components of a prima facie case of reprisal include: (1) that she engaged in a statutorily protected activity; (2) that the employer took an adverse personnel action; and (3) that a causal connection existed between the two. Mitchell v. Baldridge, 759 F.2d 80 (D.C. Cir. 1985); McKenna v. Weinberger, 729 F.2d 783, 790 (D.C. Cir. 1984) (footnote omitted); *see also* Smalley v. City of Eatonville, 640 F.2d 765, 769 (5th Cir. 1981); Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980). In cases of alleged retaliatory discharge, failure to hire or failure to promote, the plaintiff must also show as part of the prima facie reprisal case that he was qualified for the position. Williams v. Boorstin, 663 F.2d 109, 116-17 (D.C. Cir. 1980); *see also* Irvin v. Airco Carbide, 837 F.2d 724 (6th Cir. 1987); Canino v. EEOC, 707 F.2d 468, 471-72 (11th Cir. 1983).

138. *Burdine*, 450 U.S. at 254-55 & nn. 8 & 9 (1981). The *Burdine* Court used both the terms "presumption" and "inference" of discrimination. A presumption is a rule of law that assumes temporarily a certain factual situation based on proof of other related facts. It is not evidence but a procedural device that shifts the burden of production to the other party. A presumption is rebuttable. An inference is a process of reasoning that permits a deduction based on human reason and experience. The end result, like a presumption, has the directive force of the rule of law. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 342 (3d ed. 1984); Belton, *supra* note 34, at 1221-23.

139. *Burdine*, 450 U.S. at 253.

140. *Id.* at 254.

2. Defendant's Articulation of a Legitimate, Nondiscriminatory Reason

At the second stage of the *McDonnell Douglas* tripartite analysis, the defendant has the intermediary burden of producing evidence to rebut the plaintiff's prima facie case. To accomplish this, the defendant must articulate lawful reasons for its employment action.[141] This burden is satisfied by the defendant producing "*admissible* evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."[142] Or, in other words, the defendant's evidence must raise a genuine issue of fact as to whether it intentionally discriminated against the plaintiff.[143]

The proffered reason(s) must be "clear and reasonably specific."[144] If the defendant carries its burden, the factual inquiry of the ultimate question, intentional discrimination, "proceeds to a new level of specificity."[145] Because of this, the *Burdine* Court expected defendants to attempt to persuade the trier of fact that the decision was lawful, even though the formal burden of persuasion remained on the plaintiff.[146]

3. Plaintiff's Opportunity to Prove Pretext

If the defendant meets its burden of production and since the burden of persuasion remains with the plaintiff, the plaintiff "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision."[147] Thus, the ultimate burden of proving intentional discrimination converges. The plaintiff may prevail in two ways: first, by directly persuading the court that a discriminatory reason more likely motivated the employer; or, second, by demonstrating that the employer's asserted reason is not credible.[148] There are three types of evidence available to the plaintiff to prove his/her prima facie and ultimately his/her pretext case: (1) comparative; (2) statistical; and (3) direct. A good example of the use of all three types is found in *Miles v. M.N.C. Corporation.*[149]

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141. *McDonnell*, 411 U.S. at 802. The burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Burdine*, 450 U.S. at 248. Further, the defendant's burden must be "legally sufficient." *Id.* It is not clear whether the two words, "legitimate" and "nondiscriminatory," have separate meanings or are merely redundant.

142. *Burdine*, 450 U.S. at 257 (emphasis added). The Court noted that the defendant could not rely on its answer to the complaint or other evidence not admitted. *Id.* at 255 n.9.

143. *Id.* at 254-55. The Court noted that this procedural device is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 255 n.8.

144. *Id.* at 258.

145. *Id.* at 255.

146. *Id.* at 258.

147. *Id.* at 256.

148. *Id. See* United States Postal Service Bd. of Gov's v. Aikens, 460 U.S. 711, 717!18 (1983).

149. 750 F.2d 867 (11th Cir. 1985).

4. Disparate Treatment Pattern and Practice Class Actions

The claim in a disparate treatment class action is that the employer's differential treatment of the plaintiff is part of a "pattern or practice" of discriminatory treatment toward other members of plaintiff's protected group.[150] Thus, in *International Brotherhood of Teamsters v. United States*,[151] the Court held that the plaintiff must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice."[152] In other words, the plaintiff must show more than "isolated or 'accidental' or sporadic discriminatory acts."[153]

Pattern and practice plaintiffs generally establish a prima facie case upon presentation of statistical evidence that creates an inference of classwide discrimination.[154] The Supreme Court in *Teamsters* stated that a prima facie case was proved where the plaintiff presented "gross" disparities between the percentage of blacks in the general population and the percentage in the employer's work force, in addition to evidence of individual disparate treatment.[155]

Before the burden shifts to the employer to rebut the inference of discrimination, the defendant can attempt to attack the validity of the statistics by demonstrating that the proof is unreliable because it is inaccurate or inappropriate,[156] or that the disparities are not statistically significant. Whether the burden of persuasion or merely the burden of production shifts to the employer has not been directly decided by the Supreme Court. However, in *Teamsters*, the Court implied that it is a burden of persuasion that shifts, because upon failure of the employer to dispel the inference of the existence of a pattern or practice of discrimination, the Court will infer that all class members were victims of discrimination.[157]

There is a split among the courts of appeals on this issue. The Sixth Cir-

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150. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). The statutory source for a "pattern or practice" suit evolved from § 707(a) of Title VII, 42 U.S.C. § 2000e-6(a) (1982), which originally authorized the Attorney General to file civil actions in federal district courts when he had "reasonable cause to believe that any person . . . is engaged in a pattern or practice of resistance to the full enjoyment of [Title VII]." The Equal Employment Opportunity Act of 1972 transferred these functions to the Equal Employment Opportunity Commission. Private plaintiffs may also seek relief under the pattern and practice theory. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

151. 431 U.S. 324 (1977).

152. *Id.* at 336.

153. *Id.*

154. *Id.* at 339.

155. *Id.* at 337. The data presented by the United States showed that of almost 6,500 current employees only 5% were black and 4% Hispanic. In the more desirable line-driver jobs, 0.4% were black and 0.3% were Hispanic. *Id.*

156. *Id.* at 339-40 n.20. The analysis at this stage virtually parallels the presentation of statistical proof in adverse impact cases. *See supra* note 62.

157. *Id.* at 362. "The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Id.*

cuit in *Lujan v. Franklin County Board of Education*[158] and the Eighth Circuit in *Craik v. Minnesota State University Board*[159] held that the burden of persuasion shifts to the defendant. In contrast, one Eleventh Circuit case, *Maddox v. Claytor*,[160] held that the defendant's burden is one of production to articulate a legitimate, nondiscriminatory reason for its decision. A subsequent Eleventh Circuit case, *Cox v. American Cast Iron Pipe Co.*,[161] took the position that the burden of persuasion shifts to the defendant.

Upon failure of the employer to dispel the plaintiff's inference, the case proceeds to the remedial stage which addresses relief for individual class members.[162] The employer has the burden at this stage of proving that any given individual class member was not unlawfully discriminated against.[163]

III. Foundations of Group-Based Structure of Proof

The foundations of Title VII laid over the last twenty-five years were built to reflect this country's commitment to eradicate all forms of job discrimination. The fundamental theoretical underpinnings and social goals should be reaffirmed by maintaining the basic structure of proof developed by the Court in disparate impact cases. Shifting the burden of persuasion to the employer after the plaintiff establishes a prima facie case of disproportionate impact is warranted for the following reasons: the critical differences between *individual* disparate treatment and *group-based* disparate impact cases; the legislative history of the 1964 Act and the 1972 amendments confirms Congress' intent that Title VII prohibits both types of discrimination; contemporaneous administrative interpretation is consistent with Congressional goals; and public policy of opening employment opportunities to those previously excluded.

A. Congressional Goals in Enacting Title VII—Legislative History of the 1964 Act and the 1972 Amendments

1. The 1964 Act

Congress had two principal goals in enacting Title VII. While the main thrust, initially, was to prohibit purposeful discrimination,[164] "it was clear to

158. 766 F.2d 917, 929 (6th Cir. 1985).
159. 731 F.2d 465, 470 (8th Cir. 1984).
160. 764 F.2d 1539, 1546 (11th Cir. 1985). *See also* Rossini v. Ogilvy & Mather, 597 F. Supp. 1120 (S.D.N.Y. 1984).
161. 784 F.2d 1546, 1559 (11th Cir. 1986).
162. 431 U.S. at 361-62.
163. *See, e.g.*, Dillon v. Coles, 746 F.2d 998 (3d Cir. 1984).
164. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII").

Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' . . . and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed."[165] Eradicating intentional discrimination and opening up opportunities historically closed served another Congressional purpose. The committee reports and debates are replete with references to Congress' intent to improve the economic status of blacks[166] and the realization that discrimination was "a pervasive practice" throughout the coun-

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165. United Steelworkers of Am. v. Weber, 443 U.S. 193, 203 (1979) (quoting 110 CONG. REC. 6548 (remarks of Sen. Humphrey)). One commentator suggests a third goal: to minimize governmental interference with traditional management prerogatives. Friedman, *supra* note 107. While maintenance of employer prerogatives in running their businesses has been articulated, the intervention of anti-discrimination mandates necessarily take primacy. Employer autonomy is reduced in light of the critical national importance of securing equal opportunity in the workplace. An example of the concern for employer control is *Weber*, 443 U.S. at 206 (quoting H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, 29 (1963)) (noting that the compromises wrought in the passage of Title VII included a demand by some legislators "as a price for their support that management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible").

166. For the complete text of the House congressional reports, including hearing testimony, and the House and Senate debates recorded in 110 CONG. REC. (1964), see U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1968) (reprinted 1988). *See generally* C. WHALEN & B. WHALEN, *supra* note 16; Lytle, *supra* note 12; Vaas, *supra* note 13.

For examples of congressional concern for the economic plight of black people, see, e.g., *supra* note 9; 110 CONG. REC. 6547-50 (1964) (remarks of Sen. Humphrey). Senator Humphrey, one of the floor managers of the bill, expressed this concern:

> The Negro is the principal victim of discrimination in employment. According to Labor Department statistics, the unemployment rate among nonwhites is over twice as high as among whites. More significantly, among male family breadwinners, those with dependents to support, the unemployment rate is three times as high among nonwhites as among whites. And although nonwhites constitute only 11 percent of the total work force, they account for 25 percent of all workers unemployed for 6 months or more.
>
> Discrimination also affects the kind of jobs Negroes can get. Generally, it is the lower paid and less desirable jobs which are filled by Negroes. For example, 17 percent of nonwhite workers have white collar jobs; among white workers the figure is 47 percent. On the other hand, only 4 percent of the whites who are employed work at unskilled jobs in non-agricultural industries; among nonwhites the figure is 14 percent.

Id. at 6547. Similarly, Representative McCulloch, the ranking minority member of the House Judiciary Committee and one of the authors of H.R. 7152, the omnibus bill that subsequently became the Civil Rights Act of 1964, noted:

> In 1962, nonwhites made up 11 percent of the civilian labor force, but 22 percent of the unemployed. Approximately 900,000 nonwhites were without jobs during the year—thereby constituting an unemployment rate of 11 percent. This was more than twice the rate of white unemployed workers . . . . Moreover, among Negroes who are employed, their jobs are largely concentrated among the semiskilled and unskilled occupations.

H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 27 (1963); *see also Equal Employment Opportunity: Hearings on H.R. 405 and Similar Bills Before the General Subcomm. on Labor of the Comm. on Education and Labor*, 88th Cong., 1st Sess. 47 (1963) (Rep. Cohelan stated: "The U.S. Commission on Civil Rights has reported that the limitations on employment opportunities for Negroes are reflected in their earnings; that where the heads of families have received equivalent formal education, the median income of Negro families is considerably less than that of white families."). Congress was also concerned that discrimination against blacks adversely impacted on the national economy. For instance, Representative McCulloch observed:

> The effect of this severe inequality in employment is felt both on the personal level and on the national level . . . . The failure of our society to extend job opportunities to the Negro is an economic waste. The purchasing power of the country is not being fully developed. This, in turn, acts as a brake upon potential increases in gross national product . . . . Through toleration of discriminatory

try that "permeate[d] the national social fabric—North, South, East and West."[167] The recognition that equal employment opportunity required Congress to address both "overt and covert discriminatory selection devices, intentional or unintentional,"[168] was evident. The embodiment of Congress' broad prohibition of practices resulting in the denial of employment opportunities was contained in section 703(a)(2) of Title VII.[169]

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practices, American industry is not obtaining the quantity of skilled workers it needs. With 10 percent of the work force under the bonds of racial inequality, this stands to reason. Similarly, an examination of job openings that are regularly advertised discloses that the country is not making satisfactory use of its manpower. Consider how our shortage of engineers, scientists, doctors, plumbers, carpenters, technicians, and the myriad of other skilled occupations could be overcome in due time if we eliminate job discrimination.

H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 28 (1963). Similarly, Senator Kuchel, the co-floor manager of H.R. 7152 in the Senate, commented:

Job discrimination because of one's race is an evil which affects not only the individual, but also the future of a constantly expanding America, for if our economy is to continue to grow, so that we can produce the goods and services needed to provide a better life for our fellow citizens here at home . . . then our country must utilize to the fullest the talents and skills of each of our citizens, regardless of his race.

110 CONG. REC. 6562 (1964); *see also* 110 CONG. REC. 6547 (1964) (Senator Humphrey remarked, "[t]he Council of Economic Advisers has recently estimated that full utilization of the present educational attainment of nonwhites in this country would add about $13 billion to our gross national product. So, discrimination in employment . . . is costing the American economy billions of dollars in loss of income.").

167. *See, e.g.*, H.R. REP. No. 570, 88th Cong., 1st Sess. 2 (1963) ("Job discrimination is extant in almost every area of employment and every area of this country. It ranges in degrees from patent absolute rejection to more subtle forms of invidious distinctions. Most frequently, it manifests itself through relegation to 'traditional' positions and through discriminatory promotional practices.").

168. S. REP. No. 867, 88th Cong., 2d Sess. 5 (1964). Senator Clark, who wrote the Senate Report and later became one of the bipartisan Senate floor leaders for Title VII, explained:

Overt or covert discriminatory selection devices, intentional or unintentional, generally prevail throughout the major part of the white economic community. Deliberate procedures operate together with widespread built-in administration processes through which nonwhite applicants are automatically excluded from job opportunities. Channels for job recruitment may be traditionally directed to sources which by their nature do not include nonwhites; trainees may be selected from departments where Negroes have never worked; promotions may be based upon job experience which Negroes have never had.

Id.

Secretary of Labor Wirtz stated in his testimony before the Senate Labor Committee: "Discrimination has become, furthermore, institutionalized so that it obtains today in some organizations and practices and areas as the product of inertia, preserved by forms and habits which can best be broken from the outside." *Id.* Language similar to § 703(a)(2) (the provision held to be the basis of the disparate impact theory) appeared in S. 1937, § 4(a), a bill introduced by Senator Humphrey. It was reported favorably out of the Senate Labor Committee. It defined "equal employment opportunity in broad terms to include a wide range of incidents and facilities, and encompasse[d] all aspects of discrimination in employment because of race, color, religion, or national origin." *Id.* at 10. Section 4(a) made unlawful the discriminatory denial of "equal employment opportunity," including any practice which "results or tends to result in material disadvantage or impediment to any individual in obtaining employment or the incidents of employment for which he is otherwise qualified." *Id.* at 24. Lastly, the report declared that the substantive provision was "designed specifically to reach into all of the institutionalized areas and recesses of discrimination, including the so-called built-in practices preserved through form, habit, or inertia." *Id.* at 11.

169. See *supra* note 26 for full text of this provision. Section 703(a)(1), also contained in note 26, is the provision making disparate treatment unlawful. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

2. The 1972 Amendments

Congress amended Title VII in 1972[170] and endorsed the *Griggs* effects test and the Court's requirement that the employer prove the existence of an overriding business necessity.[171] The Court in *Connecticut v. Teal*[172] noted that "[t]he legislative history of the 1972 amendments to Title VII . . . demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*." The Court explained that "[b]oth the House and Senate Reports cited *Griggs* with approval, the Senate report noting: 'Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs.'"[173]

While, in 1964, outlawing purposeful discrimination was the principal goal of Congress, in 1972 Congress reiterated in even stronger terms than in 1964 the need to combat disparate impact discrimination. The recognition that "institutional" barriers were a different type of discrimination from discrimination

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170. Pub. L. No. 92-261, 86 Stat. 103 (1972). *See generally Legislative History of the Equal Employment Opportunity Act of 1972, Subcommittee on Labor of the United States Senate Committee on Labor and Public Welfare* (1972) (containing House and Senate Reports, text of bills and Congressional debates contained in the Congressional Record).

The legislative history most relevant to this article pertains to those amendments that extended the protection of § 703(a)(2) to "applicants for employment" as well as employees, and the amendments that extended the coverage of Title VII to federal and state employees. §§ 701(a), (b), and (e), 42 U.S.C. §§ 2000e-(a), (b), and (e) (1982); § 717, 42 U.S.C. § 2000e-16 (1982).

171. *See, e.g.*, H.R. REP. No. 238, 92d Cong., 1st Sess. 8 (1971); *see also id.* at 22 ("[I]f the use of the test acts to maintain existing or past discriminatory imbalances in the job, or tends to discriminate against applicants on the basis of race, color, religion, sex, or national origin, the employer must show an overriding business necessity to justify use of the test."); *id.* at 8 ("showing of an overriding business necessity for the use of such criteria"). Although no one suggested in the debates of the 1972 amendments that the employer's burden was merely that of articulating a legitimate reason for engaging in practices that systematically excluded minorities or women, Congress was clear that the employer's burden was substantial. For instance, Senator Dominick explained that under *Griggs*, " 'employment tests, even if fairly applied, are invalid, if they have a discriminatory effect and can't be *justified* on the basis of business necessity.' " 118 CONG. REC. 697 (1972) (citation omitted) (emphasis added).

172. 457 U.S. 440, 447 n.8 (1982).

173. *Id.* (quoting S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971)). *See also* H.R. REP. No. 238, 92d Cong., 1st Sess. 8 (1971). Congress further ratified *Griggs* by providing that: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated . . . present case law as developed by the courts would continue to govern the applicability and construction of Title VII" 118 CONG. REC. 7564 (1972). *See also* Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421, 470 (1986) (in language that could hardly be more explicit, "[t]he section-by-section analysis" submitted to both houses "confirmed Congress' resolve to accept prevailing judicial interpretation regarding the scope of Title VII"). Congress adopted the *Griggs* effects test and rules of law to define prohibited conduct by the Voting Rights Act as well as the Rehabilitation Act. The legislative history of the Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973 (1982), shows express reliance on *Griggs*: "the results test to be codified in Section 2 is a well defined standard, first enunciated by the Supreme Court and followed in numerous lower federal court decisions." S. REP. No. 417, 97th Cong., 2d Sess. 17, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 192, 193. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1982), has been similarly held to incorporate *Griggs* standards. Alexander v. Choate, 469 U.S. 287 (1985).

motivated by animus was more pronounced.[174] And, the pervasiveness of institutional discrimination had become clear from the six years of Title VII litigation that preceded the 1972 amendment process.[175]

Interpreting Congress' *actions* in 1972 with respect to the disparate impact theory is very different from the statutory analysis of congressional *inaction* in the recent reargument in *Patterson v. McLean Credit Union*[176] where the Court considered reversing its decision in *Runyon v. McCrary*.[177] In *Patterson*, both sides advanced various theories of statutory interpretation[178] to explain the import of Congress' failure to overturn the Court's decisions interpreting the Civil Rights Act of 1866.[179] In *Wards Cove*, the Court was asked to overturn *Griggs* in face of the overwhelming evidence that Congress ratified the effects test developed in *Griggs* and reemphasized its goal, first stated in the legislative history of 1964, of opening *opportunities closed by institutional barriers*, in addition to outlawing purposeful discrimination. Whether applying the

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174. *See, e.g.*, S. REP. No. 415, 92d Cong., 1st Sess. 14 (1971) ("where discrimination is institutional, rather than merely a matter of bad faith, . . . corrective measures appear to be urgently required"). Further, Congress extended Title VII to federal employees, who previously could invoke only Civil Service Commission administrative remedies, because the Commission had erroneously "assume[d] that employment discrimination in the Federal Government is solely a matter of malicious intent on the part of individuals," and "ha[d] not fully recognized that the general rules and procedures that it had promulgated may in themselves constitute systemic barriers to minorities and women." *Id.; see also* H.R. REP. No. 238, 92d Cong., 1st Sess. 24 (1971). Title VII was extended to state employees for similar reasons. *See* H.R. REP. No. 238 at 17 ("widespread discrimination against minorities exists in State and local government employment and . . . the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices").

175. For instance, Senator Dominick, who sponsored the Nixon Administration's court-enforcement approach as an alternative to the proposal to give EEOC cease-and-desist powers, stated that " 'most discriminatory treatment is institutional: subtle practices that leave minorities at a disadvantage.' " 118 CONG. REC. 697 (1972). *See also* 118 CONG. REC. 944-45 (1972) (remarks of Sen. Spong) ("a significant part of the problem today is not the simple, willful act of some employer but rather the effect of long-established practices or systems in which there may be no intent to discriminate or even knowledge that such is the effect").

176. 108 S. Ct. 1419 (1988) (reargument in this race discrimination case brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982)). *See supra* note 3.

177. 427 U.S. 160 (1976). The Court held that 42 U.S.C. § 1981 prohibited a private school from excluding children because they were black.

178. The briefs for petitioner and several *amici* strongly rely on several legislative inaction arguments. *See* Brief for Petitioner on Reargument at 71-100, Patterson v. McLean Credit Union, 108 S. Ct. 1419 (1988) (No. 87-107); Brief of 66 Members of the United States Senate and 118 Members of the United States House of Representatives as *Amici Curiae* in Support of Petitioner at 20-28, *Patterson*; Brief on Reargument for the Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* in Support of Petitioner at 11-16, *Patterson. Contra* Brief of Washington Legal Foundation at 26-30, *Patterson. See also Symposium:* Patterson v. McLean, 87 MICH. L. REV. 1 (1988) (Farber, *Statutory Interpretation, Legislative Inaction and Civil Rights*, at 2-19; Aleinikoff, *Updating Statutory Interpretation*, at 20-66; Eskridge, *Interpreting Legislative Inaction*, at 67-137).

179. *See supra* note 3.

ing the "plain meaning" or "intent" statutory analysis to section 703(a)(2),[180] the conclusion firmly established that the disparate impact theory developed by *Griggs* and its progeny should not be overruled by the Court.[181]

B. Administrative Interpretations of Section 703(a)(2)

Contemporaneous constructions of statutes are given great deference by

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180. The debate within the courts and academia about statutory interpretation has accelerated in the last few years, in part because of Justice Scalia's interest and the Reagan Administration's advocacy of "original intent," especially in constitutional interpretation. Two methodologies dominate the debate: textualism (or plain meaning) and intentionalism (or purpose analysis). These models are premised on legislative supremacy and separation of powers. *See generally* W. ESKRIDGE & P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988). The strict "textualist" approach has declined in recent years because of the recognition that many statutory questions simply cannot be answered by applying the statute's plain or most probable meaning. Consequently, where the language itself does not provide a satisfactory answer, most scholars of legislation look at the larger "context" of the statute. Three distinctly different "contextual" approaches have evolved. First, the interpretation which best advances the basic "purpose" of the statute. *See, e.g.*, H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958). *See also* United Steelworkers of Am. v. Weber, 443 U.S. 193, 201-08 (1979) as an example of an application of this approach. Second, the law and economic proponents, such as Judge Posner, argue that the interpreter should answer the question the way the legislature originally enacting the statute would have, through "imaginative reconstruction." *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985). For an example of "imaginative interpretation," see Justice Rehnquist's dissent in *Weber*, 443 U.S. at 219-55. *See also* Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (also criticizes Hart & Sacks but appears to defend plain meaning rule). Third, taking approaches from literary theory that show how literary texts change from reader to reader and over time, "dynamic" interpreters look at statutory texts as transformed every time they are interpreted. *See, e.g.*, Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). Eskridge argues that statutory interpretation involves understanding and reconciliation of three perspectives:

> (1) the statutory text, which is the formal focus of interpretation and a constraint on the range of interpretive options available (textual perspective); (2) the original legislative expectations surrounding the statute's creation, including compromises reached (historical perspective); and (3) the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time (evolutive perspective).

Id. at 1483. *See also* R. DWORKIN, *supra* note 8 (arguing that statutes should be interpreted similarly to common law) and Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982) (analogy to literature). For an example of dynamic interpretation, see Justice Blackmun's concurring opinion in *Weber*, 443 U.S. at 209-16. Lastly, Justice Scalia rejects relying on legislative history. He first looks to the plain meaning; and then, if it is not determinate, he searches for other sources of meaning, such as similar language in other statutes, *see, e.g.*, Pierce v. Underwood, 108 S. Ct. 2541, 2549-51 (1988), or analogizes it with related legislation, *see, e.g.*, United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 108 S. Ct. 626 (1988).

Applying any one of these methodologies leads to the same conclusion that Title VII makes available to victims of discrimination a disparate impact analysis which shifts the burden to the employer to prove job-relatedness. The dynamic theory is better suited to deciding cases of such fundamental importance.

181. Principles of *stare decisis* also mandate adherence to *Griggs* and its progeny. *Stare decisis* "weigh[s] heavily" and precludes a departure from precedent where Congress had the opportunity to reject the "Court's interpretation of its legislation" but declined to do so. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977). *Accord* NLRB v. International Longshoremen's Ass'n, 473 U.S. 61, 84 (1985). Not only did Congress in 1972 decline to reject the Court's interpretation of § 703(a)(2) articulated in *Griggs*, it adopted and highlighted it. *See also* Patsy v. Board of Regents, 457 U.S. 496, 501-02 (1982) (in deciding whether to overrule an earlier case, the Court is required to determine whether that act "would be inconsistent with more recent expressions of Congressional intent"); Monell v. Department of Social Serv., 436 U.S. 658, 695-96 (1978). *See also* Guardians Ass'n v. Civil Serv. Comm'n of the City of New York, 463 U.S. 582, 612 (1983) (O'Connor, J., concurring) (constrained to follow Court's prior interpretation of Title VII).

the Supreme Court.[182] The Court in *Local 28, Sheet Metal Workers v. EEOC*[183] noted that *Griggs*' interpretation of section 703(a)(2) was consistent with contemporaneous interpretations of both the Justice Department and the EEOC, agencies charged with the enforcement of Title VII.[184] The administrative guidelines on disparate impact have been construed as "expressing the will of Congress."[185] And, the EEOC interpreted section 703(a)(2), in guidelines adopted in 1966 and elaborated in 1970, as prohibiting the use of any test or selection technique that is discriminatory in operation unless the employer could establish job-relatedness.[186]

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182. The parameters developed by the Court with respect to administrative interpretation of statutes are set forth by Chief Justice Warren in Udall v. Tallman, 380 U.S. 1 (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men [and women] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' "

Id. at 16 (quoting Unemployment Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 153 (1964) and Power Reactor Dev. Co. v. International Union of Elec., Radio & Mach. Workers, 367 U.S. 396, 408 (1961)) (citations omitted). *See also* Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 n.95 (collects cases and articulates ten factors which the Court considers in deciding to defer to administrative interpretations).

183. 478 U.S. 421, 465-66 (1986).

184. Both agencies have enforcement responsibilities under Title VII. The Justice Department may initiate a civil action against state and local bodies and the EEOC may bring a civil action against any nongovernment respondent. 42 U.S.C. § 2000e-5(f) (1982). *See also* 42 U.S.C. § 2000e-6 (1982) (authority for "pattern or practice" actions); Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1155 (1982), *and* in 92 Stat. 3781 (1978).

185. *Griggs*, 401 U.S. at 434. *See Albemarle*, 422 U.S. at 431 (because Guidelines are consistent with statutory language and legislative history, they are "entitled to great deference"); *see also* Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421, 465-66 (1986); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 518 (1986). *Cf.* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976) (EEOC Guidelines on sex discrimination not followed because they contradicted agency's earlier positions and were inconsistent with Congress' plain intent); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 93-95 (1973). Congress reversed *Gilbert* by enacting the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)). Other recent reversals of the Court by Congress in civil rights cases include the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 31 (1988) (reversing Grove City College v. Bell, 465 U.S. 555 (1984), which limited the reach of Title IX of the Educational Act of 1972), and the Voting Rights Act amendments of 1982, 42 U.S.C. § 1973 (1982) (reversing City of Mobile v. Bolden, 446 U.S. 55 (1980), in which a plurality rejected precedent by requiring proof of discriminatory purpose).

186. EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.3, 1607.13 (1970) (elaborating EEOC Guidelines on Employment Testing Procedures, *reprinted in* EMPL. PRAC. GUIDE (CCH) ¶ 16,904 (1967)). *See also Griggs*, 401 U.S. at 433 n.9. The EEOC's 1970 revision prior to the Court's decision in *Griggs* treated disparate impact and treatment discrimination as distinct evils, prohibiting both.

> The principle of disparate or unequal treatment must be distinguished from the concepts of validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by Title VII where other employees, applicants or members have not been subject to that standard.

C. Theoretical Underpinnings—Group-Based Concept of Equality

The *Griggs/Albemarle* impact theory was the high water mark of the Supreme Court's interpretation of Title VII. It signaled a broad approach to effectuate the eradication of the myriad forms of overt, subtle, conscious and unconscious discrimination. As the Court wrote:

> The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices . . . . What is required . . . is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[187]

The critical necessity of eliminating all the "built-in headwinds"[188] for minorities and women in the working life of this country requires lawyers, representing either plaintiffs or defendants, and judges to recall the essential human values embodied in the Civil Rights Act of 1964. In times of retreat from a national commitment to the rigorous enforcement of the civil rights laws and spirit,[189] lawyers play an important role in assuring that our country does not become two societies, one white and privileged, the other minority, female and outside the mainstream.[190]

The concept of equality embodied in *Griggs* recognizes the group interest in assuring that group members are not injured in employment because of discrimination throughout society. *Griggs* redefined discrimination as the operation of a society that adversely affected minority (and women) group members, not simply isolated acts of aberrant individuals. It was a recognition of the eco-

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29 C.F.R. § 1607.11 (1970). The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1986)—which superseded the EEOC Guidelines and were adopted by the EEOC, the Department of Justice, the Department of Labor and the Civil Service Commission in 1978—similarly require the application of disparate impact analysis to "any selection procedure" and embrace the evidentiary standards of *Griggs*. *See* 29 C.F.R. § 1607.3 (1988). Like the EEOC Guidelines, the Uniform Guidelines separately prohibit both unjustified disparate impact and disparate treatment in the use of selection procedures. *See* 29 C.F.R. § 1607.11 (1988) ("The principles of disparate or unequal treatment must be distinguished from the concepts of validation.").

187. *Griggs*, 401 U.S. at 429-30, 431.

188. *Id.* at 432.

189. *See supra* note 25.

190. *See supra* note 9.

nomic and social facts of our society and its employer-employee systems. Thus, Title VII includes a concern for equal opportunity in addition to equal treatment, focusing on the harm to both groups and individuals. The litigation of Title VII must consistently be related to the social problems that generated the enactment of the 1964 Civil Rights Act and that continue to be a structural part of our economy. Although state of mind continues to be an essential component of disparate treatment cases, it is conduct measured in terms of adverse consequences inflicted on minorities and women that must become embedded in our jurisprudential and sociological ideas. The principle of liberal construction[191] of this essential remedial civil rights statute must be applied to ensure that Title VII continues to be a serious response to a complex social problem.

In a case that some commentators saw as a retreat from the group-centered concept first articulated in *Griggs*,[192] the Supreme Court in *Connecticut v. Teal*[193] ruled that a plaintiff could state a disproportionate impact claim when one of the selection criteria disproportionately excludes members of a protected group even though the end result of the total selection process is balanced. Rejection of the "bottom-line" concept as a defense to the prima facie case was seen by some as discouraging employers from voluntarily implementing affirmative action plans.[194]

In *Teal*, four black employees of the Department of Income Maintenance of the State of Connecticut were promoted provisionally to supervisory positions and served almost two years. To obtain permanent status, they had first to receive a passing score on a written examination. Permanent promotions were then made from the list of eligibles generated by the written examination by considering past performance, recommendations and, to a lesser extent, seniority. The Department then applied an affirmative action program. The four plaintiffs failed the exam and were not further considered. Of the original forty-eight black candidates, 22.9% were promoted and 13.5% of the whites were promoted, resulting in eleven blacks promoted out of forty-six promoted to permanent positions.[195]

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191. *See supra* note 28.

192. *See, e.g.*, Blumrosem, *The Group Interest Concept, Employment Discrimination and Legislative Intent: The Fallacy of* Connecticut v. Teal, 20 HARV. J. ON LEGIS. 99 (1983).

193. 457 U.S. 440 (1982).

194. *Id.* If an employer that successfully, through an affirmative action program, hired protected group members at a rate equal to or greater than the available pool and nevertheless was liable for a disparate impact on part of the hiring or promotion practice, it is argued that employers would lose their incentive.

195. 457 U.S. at 444.

In holding that where "'an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process,' that barrier must be shown to be job related,"[196] the Court reasoned that section 703(a)(2) focused on employment practices that create a discriminatory bar to *opportunities*.[197] Further, it noted that the section prohibits practices that deprive "*any individual of employment opportunities*."[198]

Thus, the Court in *Teal* emphasized Title VII's focus on preserving individual rights to equal opportunity. However, at the same time, it reaffirmed that when blacks as a group are disproportionately excluded from consideration by a non-validated examination disproportionate impact cannot be measured only at the bottom line. The key issue in *Teal* is at what point in the process does one determine whether there has been a disproportionate exclusion of a protected group?

D. Critical Distinctions Between Individual Disparate Treatment and Class-Wide Disparate Impact Evidentiary Analyses

The two principal theories of discrimination, disparate treatment and disparate impact, were developed to analyze the different kinds of evidence typically presented in these distinctly different types of cases. On the one hand, the *McDonnell Douglas* individual disparate treatment model involves a discrete act of intentional discrimination against a single individual.[199] On the other hand, the *Griggs* disparate impact model was developed for analyzing evidence concerning employment practices and policies that affect large numbers of people on a classwide basis.[200] Similarly, the direct evidence[201] and the *Teamsters* pattern or practice[202] intentional discrimination models were also developed for analyzing evidence involving large numbers of people on a classwide basis.

In a disparate treatment case, the plaintiff has a low prima facie threshold usually established through circumstantial evidence. The plaintiff's prima facie case is "not onerous"[203] because it is designed to eliminate the most common

196. *Id.* at 445.

197. The Court also cited New York Transit Auth. v. Beazer, 440 U.S. 568, 584 (1978) ("A prima facie violation of the Act may be established by statistical evidence showing that an employment practice has the effect of denying members of one race equal access to employment *opportunities*.").

198. 457 U.S. at 455-56. The Court also cited its prior decision in Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978), in which it wrote: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."

199. See *supra* Part II.B for a full discussion of the order and allocation of proof.

200. See *supra* Part II.A for the order and allocation of proof.

201. See *supra* notes 117-19 and accompanying text for a discussion of direct evidence cases.

202. See *supra* Part II.B.4 for a discussion of pattern or practice cases.

203. *Burdine*, 450 U.S. at 253. Essentially, the plaintiff need only show that he was a protected group member, that he was qualified for a position and that he was rejected. *See supra* Part II.B.1.

reasons for his failure to be hired, promoted or otherwise treated equally. This minimal showing simply "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[204] The purpose of the order of proof in these cases is gradually to narrow the issue of the employer's intent.

The prima facie case does not in itself establish a violation of section 703(a)(1). Thus, the employer need only articulate a legitimate, nondiscriminatory reason for its employment decision. It must produce sufficient evidence to raise "a genuine issue of fact as to whether it discriminated against the plaintiff."[205] At the final stage, the plaintiff must prove that the employer's articulated reason is a mere pretext for intentional discrimination. In other words, it is not until the final and third stage that the plaintiff actually proves discrimination by eliminating both the most common nondiscriminatory motivations for the employer's apparently discriminatory treatment, but also the particular nondiscriminatory reasons proffered by the employer. Thus, in an individual disparate treatment case, the burden of persuasion on the ultimate issue occurs in the final stage. For this reason, it makes sense not to place the burden of persuasion on the employer at the second stage.

In stark contrast, in a disparate impact case, the plaintiff's prima facie burden is significantly different. Plaintiffs face a much higher prima facie burden, usually consisting of substantial probative statistical evidence of adverse impact. This proof constitutes direct evidence of a violation of section 703(a)(2). The plaintiff's burden is indeed an onerous one, and the statistics relied on are often vigorously disputed.[206]

The heavier burden carried by plaintiffs convincingly demonstrates the very evil that type of analysis is designed to uncover. Unless rebutted by the employer, a ruling for the plaintiff is compelled. Merely requiring the same slight burden that the employer has in a treatment case would be inappropriate in an impact case. The distinctions in proof justify the shifting of a burden of persuasion.

Although the Court has never termed it as such, the employer's burden in responding to a disparate impact prima facie case is in the nature of an affirmative defense.[207] In other words, failure to justify the business necessity of the challenged practices and procedures ends the case because the prima facie case

204. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

205. *Burdine*, 450 U.S. at 254-55.

206. *See supra* note 62. Because of the complexity and sophisticated nature of statistical proof, the assistance of experts is usually necessary. In an ominous development, at least one court of appeals held that a prevailing plaintiff in a Title VII case was precluded from receiving full reimbursement for the expert's fees because a federal court is bound by the $30 per day limit imposed by 28 U.S.C. § 1821 (1982). Gilbert v. City of Little Rock, 867 F.2d 1062 (8th Cir. 1989) (citing, among other cases, Crawford Fitting Co. v. Gibbons, 482 U.S. 437 (1987)) ($93,946 fees claimed compared to $900 awarded under statute). If this becomes the law, it will have a devastating impact on plaintiffs' ability to retain experts in order to meet their heavy threshold requirement.

207. For a discussion of affirmative defenses, see C. WRIGHT & A. MILLER, *supra* note 77, at § 2371.

establishes a presumptively illegal practice. Where the plaintiff proves the elements of a prima facie case through showing a causal connection between the injury to the protected group (e.g., disproportionate rate of hire) and the employer's conduct (e.g., application of subjective interview process), the defendant must affirmatively prove the necessity for the challenged practice. The policy rationale favoring this model is discussed later.

In sum, the prima facie showing of an individual disparate treatment case is simply the first step in a process to extract the employer's intent. In contrast, the disparate impact analysis focuses solely on the *effect* of an employer's practice. A prima facie showing of statistical disparity is complete proof of unlawful discrimination, unless the presumption of illegality is rebutted by proof of the business necessity of the challenged practice. The distinctions are stark and rational and justify shifting the burden of persuasion, rather than merely production, to the employer in a disparate impact analysis.

E. Public Policy

Title VII is one of the most important legislative enactments of this century. It was born out of the struggles of black people, particularly in the South, in the 1950s and 1960s and was embraced by people of this country as a moral necessity. It has meant, for minorities and women, a national commitment to eradicate both the worst forms of invidious discrimination and the institutional barriers that excluded them from reaching for and realizing their full potential as contributing workers. Denial of job opportunities also results in a denial of dignity and political and economic empowerment. In its short twenty-four-year life as a remedial civil rights statute, Title VII has contributed significantly to the transformation of the working life of this country.[208] Many of its goals

208. While there are no studies measuring Title VII 's sole impact on the labor market, the participation of women and minorities has increased significantly since its effective date. At least one study of contractors subject to the nondiscrimination and affirmative action requirements of Exec. Order No. 11,246 demonstrated that the laws had a significant positive impact. *See* EMPLOYMENT PATTERNS, *supra* note 9. Title VII became effective in July, 1965. Between 1965 and 1975, women increased their representation in the civilian labor force from 39% to 46%, a rate that rose to 50% by 1985. U.S. BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS (June, 1985). By the year 2000, about 47% of the workforce will be women. U.S. DEP'T OF LABOR, OPPORTUNITY 2000: CREATIVE AFFIRMATIVE ACTION STRATEGIES FOR A CHANGING WORKFORCE 7 (1988) (citing W. JOHNSON & A. PACKER, WORKFORCE 2000 (Hudson Inst. 1987)). By the year 2000, minority group members, especially blacks and Hispanics, will represent almost a third of all new entrants into the labor force–twice their current share. *Id.* at 8. In 1965, approximately eight million black Americans were in the workforce, which increased to 9.3 million in 1975 and 12.4 million in 1985. *Id.* at 8-9. Increased participation by women in some professions has been significant. For example, from 1979 to 1986, female auditors and accountants increased from 34% to 45%, from 10% to 15% in the legal profession (in 1983, 36% of law graduates were women), from 28% to 40% in computer programming, from 4% to 9% in electronic engineering and from 22% to 29% in management and administration (in 1983, 42% of business majors were women). U.S. CENSUS BUREAU, MALE-FEMALE DIFFERENCES IN WORK EXPERIENCE, OCCUPATIONS AND EARNINGS (1987). Black women comprise the largest increase in the non-white labor force, and it is estimated that they will outnumber black men in the workforce. OPPORTUNITY 2000, *supra*, at 9. Black women already outnumber black men in higher education. *Id.* (citing *As Black Women Rise in Professional Ranks, Marriage Gets Chancey*, Wall St. J., May 16, 1986, at 1, col. 1).

are yet unrealized. "Built-in headwinds" continue to impede the movement of minorities and women into many sectors and levels of employment.[209] Wage disparities between women and minorities and white men remain large. Nevertheless, the disparate impact analysis developed by the Court in *Griggs* to effectuate section 703(a)(2) continues to be a vital part of a national effort to provide equal opportunities for members of protected groups historically discriminated against.

The proposal by the Solicitor General in *Wards Cove* would thwart the specific remedial purpose of section 703(a)(2) by making it virtually impossible to prevail on a claim of disparate impact. In effect, the provision would be repealed as an independent substantive section of Title VII. The Solicitor General's proposal to replace the *Griggs* standard would legitimize practices that have a disproportionate impact whenever the employer could simply articulate a "legitimate, nondiscriminatory reason" for its actions. As a result, the plaintiff would have both the burden of proving a prima facie case of disparate impact and the burden of disproving business necessity.

The employer's burden of proving an "overriding business necessity" in section 703(a)(2) cases is appropriately high to fulfill the critical public policy of creating a society free from discrimination based on racial, sexual or other status. An employer will usually defend business necessity based upon validation of the measurement in question.[210] Placing this burden on the plaintiff undercuts the important public policy of encouraging employers continually to verify the business necessity of all of their practices and procedures.[211] Reversing the burden will send a message that conducting job validation studies in advance of litigation will only expose the employer to a greater risk of liability than it faces in litigation where the plaintiffs are unlikely to conduct a full validation study.

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209. *See supra* note 9.

210. The Solicitor General suggests that subjective selection procedures are impossible to validate. *See* Brief for the United States as *Amicus Curiae* at 25 n.35, Wards Cove Packing Co. v. Atonio (No. 87-1387); Brief for Petitioners at 47, *Wards Cove*. This argument is dispelled in Part IV of this Article.

211. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978) [hereinafter "Uniform Guidelines"]. Pursuant to the Uniform Guidelines, employers must maintain records "of persons by identifiable race, sex, or ethnic group" in order to determine whether a selection device has an adverse impact on protected group members, 29 C.F.R. § 1607.4 (1978), and maintain records by race, etc., of the number of persons hired and number of applicants, 29 C.F.R. § 1607.15 (1978). *See also* Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2796 (Blackmun, J., concurring in part and concurring in the judgment) ("an employer that complies with the EEOC's recording requirements, 29 C.F.R. §§ 1607.4 and 1607.15 (1987), and keeps track of the effect of its practices on protected classes, will be better prepared to document the correlation between its employment practices and successful job performance when required to do so by Title VII"). Procedures which result in an adverse impact constitute discrimination unless validated. 29 C.F.R. § 1607.3 (1988).

As a practical matter, only the employer has sufficient resources[212] and access to, and familiarity with, the employment records and jobs at issue to conduct a validation study.[213] It is a complex and time-consuming process. Validation studies require a thorough understanding of the requirements of the job, everyday access to the workplace[214] and substantial access to current employees.

Discrimination and equal opportunity in the workplace cannot be accomplished solely by employers. Decent schools, housing and health care, for instance, are also vital to providing everyone with all the tools necessary to compete in the job market.[215] Nevertheless, employers should play a significant role in achieving the goals of Title VII. Placing the burden of proving business necessity on employers is a small but vital burden.

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212. It is sensible for employers, as part of a national scheme to end discrimination, to bear these and other costs. Employers make up these costs through tax policies that permit the employer to consider validation studies as a normal business expense.

The Equal Employment Advisory Council ("EEAC") suggests without documentation in its *amicus* brief that validation studies cost between $100,000 and $400,000. *See* Brief for EEAC at 21 n.4, *Wards Cove.* That estimate is in stark contrast with a survey of 1339 employers which found that most validation studies cost as little as $5,000. *See* Friedman & Williams, *Current Use of Tests for Employment*, in 2 ABILITY TESTING: USES, CONSEQUENCES, AND CONTROVERSIES 99, 110-11 (1982) ("In all size categories, most companies that validated their test or nontest selection procedures spent less than $5000 per job studied.").

Congress rejected the notion of a cost-based defense in considering the 1978 Pregnancy Discrimination Act amendment to Title VII. Opponents complained that compliance would be too costly. Representative Hawkins, sponsor of the amendment, replied:

> Eradicating invidious discrimination by definition costs money; it is cheaper to pay all black workers less than all white workers, or all women less than all men. The fact that it would cost employers money did not prevent Congress from enacting the Equal Pay Act or Title VII, and it should not prevent this Congress from making clear that Title VII prohibits this form of sex discrimination as well.

LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT 26 (1979) (committee print prepared for the Senate Committee on Labor and Human Resources). The Senate Report concluded: "Even a very high cost could not justify continuation of the policy of discrimination against pregnant women which has played such a major part in the pattern of sex discrimination in this country." *Id.* at 48. The Supreme Court explicitly rejected a cost-based defense on three separate occasions. Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983); Los Angeles Dep't Water & Power v. Manhart, 435 U.S. 702 (1978). *See also* Hayes v. Shelby Mem. Hosp., 726 F.2d 1543, 1552 n.15 (11th Cir. 1984); Smallwood v. United Airlines, Inc., 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); Robinson v. Lorillard, 444 F.2d at 799-800 and n.8; Gathercole v. Global Assocs., 545 F. Supp. 1280, 1282 (N.D. Cal. 1982).

213. *Cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 360 n.45 (1977):

> [T]he employer [is] in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records [are] the most relevant items of proof. If the refusal to hire was based on other factors, the employer and its agents [know] best what those factors were and the extent to which they influenced the decisionmaking process.

214. Civil discovery and access to the EEOC files are insufficient substitutes for everyday access. Also, sometimes plaintiffs are barred from the workplace. *See, e.g.*, Belcher v. Bassett Furniture Indus., Inc., 588 F.2d 904 (4th Cir. 1978).

215. *See* Friedman, *supra* note 107, at 52 (arguing that race neutrality disregards the "sad history of educational, social, and economic discrimination"). Other commentators discount race as the dominant factor. *See, e.g.*, T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 42-48 (1984) (asserting that the effects of demographic, cultural, and geographic differences on incomes and occupations of racial groups often account for the disparities attributed primarily to discrimination). *See also* EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (6th Cir. 1988) (employer presented historical, sociological and other evidence that women were not interested in sales positions). The *Sears* argument is refuted in M. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION (forthcoming).

IV. VALIDATION OF SUBJECTIVE CRITERIA

Subjective criteria[216] are amenable to the same "psychometric scrutiny" as objective screening devices, such as written tests.[217] Employers in proving the business necessity of a challenged subjective practice should be required to present probative evidence, similar to that required when an objective test is challenged.[218] The Uniform Guidelines define the procedures that are subject to disparate impact review as "[a]ny measure, combination of measures, or procedures used as a basis for any employment decision."[219] Moreover, the Guidelines reference the professional standards described in the "Standards" prepared jointly by the American Psychological Association (APA), the American Educational Research Association (AERA) and the National Council of Measurement in Education (NCME).[220] These Standards are applicable to subjective selection devices.[221] Whether it is an objective or subjective selection

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216. The term subjective means "[m]easures that require the statement of opinion, beliefs, or judgments." I. GOLDSTEIN, TRAINING IN ORGANIZATIONS 136 (2d ed. 1986) ("For example, rating scales are subjective measures, while measures of absenteeism are more objective. (However, supervisors' ratings of the absenteeism level of employees could turn that measure into a subjective criterion.)"). *Id.*

217. Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2795 n.5 (1988) (Blackmun, J., concurring in part) (citing the American Psychological Association Brief as *amicus curiae*). The United States as *amicus curiae* in *Wards Cove* suggested in a footnote that subjective selection procedures are impossible to validate. *See* Brief for the United States as *Amicus Curiae* at 25, n.35, *Wards Cove*; Brief for Petitioners at 47, *Wards Cove* (offering no explanation).

218. For a scholarly discussion of validating a scored test, see Guardians Ass'n of New York Police Dep't, Inc. v. Civil Serv. Comm'n of New York, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981). In Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981), the Eighth Circuit appears to require total compliance with the Guidelines.

219. 29 C.F.R. § 1607.16(q) (1988). It reads in relevant part:

> Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements *through informal or casual interviews* and unscored application forms.

(emphasis added).

220. 29 C.F.R. § 1607.5(c) (1988) (The Uniform Guidelines "are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards . . . prepared by a joint committee of the American Psychological Association (APA), the American Educational Research Association (AERA), and the National Council of Measurement in Education (NCME)."). *See also* 29 C.F.R. § 1607.1(B) (1988) (the Guidelines "incorporate a single set of principles which are designed to assist employers . . . to comply with requirements of Federal law prohibiting employment practices which discriminate on the grounds of race, etc.").

221. The APA's STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1985) [hereinafter STANDARDS], and its DIVISION 14 OF INDUSTRIAL-ORGANIZATION PSYCHOLOGY, THE PRINCIPLES FOR VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES (1987) [hereinafter PRINCIPLES]. The term "testing" is generic and refers to "standardized ability . . . instruments, diagnostic, and evaluative devices, interest inventories, personality inventories, and projective instruments." STANDARDS, *supra*, at 3. It also includes samples of observable behavior "relevant to . . . employment decision-making." *Id.* at 4. The PRINCIPLES similarly apply both to standardized tests and "performance tests, . . . personality [and] interest inventories, . . . biographical data forms or scored application blanks, interviews, . . . experience requirements, . . . appraisals of job performance, . . . [and] estimates of advancement potential." PRINCIPLES, *supra*, at 1. The Uniform Guidelines "provide a framework for determining" both "the proper use of tests" and "other selection procedures." 29 C.F.R. § 1607.1(B) (1988). They "apply to tests and other selection procedures which

device, the evidence presented to prove business necessity must be sufficiently probative to demonstrate that the device does what it purports to do—accurately measure the desired performance.

The professional judgment of the organizations whose Standards and Principles form the backbone of the Guidelines leads to the conclusion that subjective assessment devices can be scientifically[222] scrutinized under the applicable standards, principles and guidelines.

A. Validity and Reliability

Employers must ensure that their selection devices are both reliable and valid. "Reliability refers to the degree to which test scores are free from errors in measurement."[223] Validity is considered the more important; however, both are crucial.[224] Validation is the process to determine the degree to which certain inferences from a particular selection device are appropriate, meaningful

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are used as a basis for any employment decision[,] including "hiring and promotion." *Id.* at § 1607.2(B). *See also id.* at § 1607.15(A)(1) (referring to selection procedures "either standardized or not standardized"); B. SCHNEIDER & N. SCHMITT, STAFFING ORGANIZATIONS 14 (2d ed. 1986):

> Typically we think of a test as an examination of some kind responded to with paper and pencil. . . . In fact, industrial psychologists and the Uniform Guidelines on Employee Selection Procedures (1978) have defined the word "test" in much broader terms and the courts have adopted this definition. In brief, a test is defined as any form of collecting information when that information is used as a basis for making an employment decision. So, interviews are tests, as are application blanks, . . . performance appraisals used as a basis for making promotions (which, obviously are selection decisions), and any other kind of information used for making employment decisions.

222. Courts should look to the "scientific" and professional standards developed by industrial and educational psychologists and other experts to set the parameters of reliability and validity. However, courts will need to probe the assumptions derived from the particular facts and subject the findings to the scrutiny of reason. The Second Circuit noted in Guardians Ass'n of New York Police Dep't, Inc. v. Civil Serv. Comm'n of New York, 630 F.2d 79, 89 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), that, while the "study of employment testing . . . has necessarily been adopted by the law as a result of Title VII," it is "not primarily a legal subject." Instead,

> [i]t is part of the general field of educational and industrial psychology, and possesses its own methodology, its own body of research, its own experts, and its own terminology. The translation of a technical study such as this into a set of legal principles requires a clear awareness of the limits of both testing and law. It would be entirely inappropriate for the law to ignore what has been learned about employment testing in assessing the validity of these tests. At the same time, the science of testing is not as precise as physics or chemistry, nor its conclusions as provable. While courts should draw upon the findings of experts in the field of testing, they should not hesitate to subject these findings to both the scrutiny of reason and the guidance of Congressional intent.

Id.

223. STANDARDS, *supra* note 221, at 19. *See also* PRINCIPLES, *supra* note 221, at 39.

224. STANDARDS, *supra* note 221, at 9 ("validity is the most important consideration in test evaluation"). *See also* A. ANASTASI, PSYCHOLOGICAL TESTING 27 (5th ed. 1982) ("Undoubtedly the most important question to be asked about any psychological test concerns its validity . . . ."); L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 125 (4th ed. 1984) ("Obviously, no aspect of a test is more important than validity . . . .").

or useful.[225] The predictions inferred from a device must have a high rate of accuracy for the device to be considered "validated." It must predict performance of a *specific* task or set of tasks.[226] Validity studies can be accomplished in a number of ways.

First, of course, the employer must maintain accurate records to measure the impact on protected group members.[227] Once an impact is determined, the Guidelines detail various validation procedures and allow the employer to pursue new strategies for validation "as they become accepted by the psychological profession."[228] Three methodologies for conducting validity studies are set out in great detail in the Guidelines.[229]

The employer must start with a job analysis, utilizing any of the validation methodologies.[230] A job analysis is a process by which the employer identifies the critical components of successful job performance.[231] The analysis includes the articulation of the knowledge, skills and abilities, or other personal characteristics or behaviors the demonstration of which determine proficiency at the job. The sources of data include judgments of job incumbents, their supervisors, personnel specialists and job experts, as well as job descriptions,

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225. STANDARDS, *supra* note 221, at 9; PRINCIPLES, *supra* note 221, at 4. *See also* L. CRONBACH, *supra* note 224, at 125 (if the proposed interpretation proves to be sound and relevant, it is valid); A. ANASTASI, *supra* note 224, at 131 ("[validity] concerns *what* the test measures and how well it does so. It tells us what can be inferred from test scores.").

226. *See* A. ANASTASI, *supra* note 224, at 432 ("The simple psychometric fact that test validity must be ascertained for specific uses of the test has long been familiar . . . . An invalid test or one that includes elements not related to the job under consideration may unfairly exclude minority group members who could have performed the job satisfactorily.").

227. 29 C.F.R. §§ 1607.4, 1607.15 (1988).

228. 29 C.F.R. § 1607.5(A) (1988).

229. *See* 29 C.F.R. § 1607.14 (1988) ("[t]echnical standards for validity studies"). The three methodologies include: (1) Criterion-related validity "consists of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance"; (2) Content validity consists "of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated"; and (3) Construct study consists "of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated." *Id.* at § 1607.5(B). Although there are three categories of accumulating validity evidence, validity is "a unitary concept." STANDARDS, *supra* note 221, at 9. *See also* Bersoff, *Testing and the Law*, 36 AM. PSYCHOLOGIST 1047, 1051 (1981) ("[I]nsofar as the courts have interpreted the test standards and . . . the Uniform Guidelines . . . to mean that content, criterion, and construct validity are distinct forms of validation, those interpretations are oversimplified, if not erroneous.").

230. *See* Standard 10.4, STANDARDS, *supra* note 221, at 60-61 (content validation); Standard 10.1, STANDARDS, *supra* note 221, at 60 (criterion-related); and Standard 10.8, STANDARDS, *supra* note 221, at 61 (construct-related).

231. PRINCIPLES, *supra* note 221, at 5-6.

training manuals and other documents.[232] Relative weights must be assigned to the various factors that determine job proficiency. A close connection between the selection device and the articulated job content or behavioral characteristic must be demonstrated.[233]

The employer's choice of particular selection devices and systems reflects its explicit or implicit assumption that evaluation of the performance through use of the particular selection device can predict performance on the job. This assumption can only be verified by the accumulation of evidence or data supporting an inference regarding the job-relatedness of the selection device. For both subjective and objective selection devices, accurate predictors of job performance are critical to provide a method of job selection that will best serve the employer's needs, while guarding against considerations such as a person's race or sex that are non-job-related. Validation reduces the potential for discrimination and enhances the quality of the selection devices.

B. Validation of Widely-Used Subjective Devices

The Supreme Court in *Albemarle* recognized early on the need to closely examine subjective performance rating systems where the employer failed to provide adequate guidance to the evaluators.[234] In reviewing an employer's study comparing test scores with subjective supervisory rankings, the Court admonished that the Guidelines require that the rankings be elicited with care.[235] The Court criticized the vague standards because:

> There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria of any kind. There is, in short, simply no way

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232. *See* PRINCIPLES, *supra* note 221, at 19-20; B. SCHNEIDER & N. SCHMITT, *supra* note 221, at 47; Thompson & Thompson, *Court Standards for Job Analysis in Test Validation*, 35 PERSONNEL PSYCHOLOGY 865 (1982). For books that discuss job analysis procedures, *see, e.g.*, S. GAEL, JOB ANALYSIS: A GUIDE TO ASSESSING WORK ACTIVITIES (1983); E. LEVINE, EVERYTHING YOU EVER WANTED TO KNOW ABOUT JOB ANALYSIS (1983).

233. Standard 10.5, STANDARDS, *supra* note 221, at 61.

234. Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 (1975).

235. *Id.* at 432-33. The Guidelines provide, at 29 C.F.R. §§ 1607.5(b)(3) and (4) (1978):

> (3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.
>
> (4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisor's prejudice, as when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

> to determine whether the criteria actually considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.[236]

More recently, in *Green v. USX Corp.*,[237] the Third Circuit reviewed subjective criteria applied in an interview process in a challenge by unsuccessful black applicants for labor positions. It held that the employer had to prove that the hiring practice was significantly correlated with relevant work behavior. There is nothing mysterious about subjective selection devices; and the courts should simply transfer their experience in reviewing validation evidence in objective disparate impact cases to the myriad of purely subjective and multi-component[238] devices. Three commonly used subjective selection devices are discussed below.

1. Interviews

Most subjective criteria are applied in interviews or evaluation systems. The employment interview is one of the most widely-used selection tools.[239] It is often subject to various interview biases.[240] Interview judgments, of course, can be valid indicators of subsequent job performance.[241] Interview questions

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236. 422 U.S. at 433. Note 32 cautioned that "[i]t cannot escape notice that Albemarle's study was conducted by plant officials, without neutral, on-the-scene oversight, at a time when this litigation was about to come to trial. Studies so closely controlled by an interested party in litigation must be examined with great care." *Id.* at 433 n.32.

237. 843 F.2d 1511 (3d Cir. 1988).

238. In *Wards Cove*, the petitioners argue that plaintiffs presented only "cumulative" evidence of the impact and that they should be required to identify specific practices and demonstrate a specific disparate impact causally associated with each practice at issue in a multi-component system. Petitioners' Brief at 31, *Wards Cove*. To the contrary, the Ninth Circuit found that the plaintiffs challenged sixteen specific personnel practices used by the employer and that six were well-founded. In any case, the adequacy of cumulative evidence would depend on the specific facts. For instance, if the employer utilizes a system with a series of sequential steps that are scored and a certain number of applicants are eliminated at each step, the effects of each aspect of the screening process can be separately ascertained. *Cf.* Connecticut v. Teal, 457 U.S. 440, 443-44 (1982) (a qualifying written exam followed by consideration of other criteria). However, like in *Wards Cove*, if the employer maintains a multifactorial selection process, with subjective elements and unweighted components, plaintiffs should not be required to separately and independently ascertain the specific impact. *See* Green v. USX Corp., 843 F.2d 1511, 1524 (3d Cir. 1988); Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984). The United States conceded in *Wards Cove* that "if [multiple] factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole." Brief of the United States as *Amicus Curiae* at 22, *Wards Cove*.

239. *See* H. HENEMAN & D. SCHWAB, PERSPECTIVES ON PERSONNEL/HUMAN RESOURCES MANAGEMENT (3d ed. 1988).

240. Arvey, *Unfair Discrimination in the Employment Interview: Legal and Psychological Aspects*, 86 PSYCHOLOGY BULL. 736 (1979). For example, "stereotyping" occurs in which an applicant is judged "based on his or her group membership [e.g., race or sex] rather than on the basis of his or her unique characteristics." B. SCHNEIDER & N. SCHMITT, *supra* note 221, at 388-89. Also, the interviewer often adopts the attitude that "I am wonderful and I have the following attitudes and opinions, so if candidates I interview have the same attitudes and opinions, they must also be wonderful." *Id.* at 389. A common bias, the "halo" effect, occurs where an interviewer is unduly influenced by a single trait which colors the judgment of the employee's other traits. A. ANASTASI, *supra* note 224, at 612.

241. *See* Arvey & Campion, *The Employment Interview: A Summary and Review of Recent Research*, 35 PERSONNEL PSYCHOLOGY 281 (1982).

carefully linked to job analysis and performance criterion data in one study validly predicted future job performance for women and blacks.[242] However, this connection between job analysis and performance criterion data is insufficient to establish interview validity. The skill of the interviewer in data gathering and interpretation must also be established.[243] Employers should document interviewer training and provide a structured interview guide to improve reliability, including a structured set of questions based on a job analysis.[244] It is advisable to have a panel or series of individual interviews that include members of protected groups as interviewers.[245] Records should be kept to identify those interviewers correlating decisions with subsequent job performance to determine whose decisions are most reliable and valid.[246]

2. Rating Scales

Rating scales are widely used by employers. They involve data accumulated casually and informally, and in contrast with interviews "they typically cover a longer observation period and the information is obtained under more realistic conditions."[247] They are subject to a variety of biases.[248] One study found that the race of the rater and ratee affected the rating scales.[249]

Once more, the starting point in developing a reliable and valid rating system is conducting a rigorous job analysis.[250] In promotion decisions, ratings

242. *See* Latham, Saari, Pursell & Campion, *The Situational Interview*, 65 J. APPLIED PSYCHOLOGY 422 (1980).

243. A. ANASTASI, *supra* note 224, at 610-11.

244. *See* B. SCHNEIDER & N. SCHMITT, *supra* note 221, at 395.

245. Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527, 545 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981) (in a race promotion case, the court noted that no black evaluator had ever participated in the process); Wright v. National Archives & Record Serv., 609 F.2d 702, 714 (4th Cir. 1979) (court noted the presence of blacks on a promotion panel in rejecting race claim).

246. *See* B. SCHNEIDER & N. SCHMITT, *supra* note 221, at 390-94; Hakel, *Employment Interviewing*, in PERSONNEL MANAGEMENT (K. Rowland & G. Ferris eds. 1982). *See also* Green v. USX Corp., 843 F.2d 1511, 1516 (3d Cir. 1988) (employer policy required records of interviews, where subjective criteria were applied, and an explication of the rationale for the decision; nevertheless these requirements were largely ignored).

247. A. ANASTASI, *supra* note 224, at 611.

248. The potential bias includes: (1) *Opportunity bias* occurs if raters do not have the opportunity to observe the employee, but have the opportunity to do so with a competing employee; (2) *halo effect* occurs when raters are unduly influenced by a single favorable or unfavorable trait which colors their judgment on the individual's other traits; (3) *error of central tendency* is the tendency to place persons in the middle of the scale and to avoid extremes; and (4) *leniency error* is the reluctance of many raters to assign unfavorable ratings. *See* A. ANASTASI, *supra* note 224, at 612; I. GOLDSTEIN, *supra* note 216, at 255.

249. Kraiger & Ford, *A Meta-analysis of Ratee Race Effects in Performance Ratings*, 70 J. APPLIED PSYCHOLOGY 56 (1985). White raters assigned significantly higher ratings to white ratees than black ratees. Seventy-four studies were reviewed involving 17,159 ratees in which the rater was white and 14 studies involving 2,420 ratees in which the rater was black. Race effects were more pronounced in real-life settings than in laboratory settings and more likely when the proportion of blacks in the workforce was small. However, in another study of a workplace that was highly racially integrated and where participants in the study had been exposed to human relations training, no racial effect was found. Schmidt & Johnson, *Effect of Race on Peer Ratings in an Industrial Situation*, 57 J. APPLIED PSYCHOLOGY 237 (1973).

250. PRINCIPLES, *supra* note 221, at 10.

of past performance are valid if the ratings are both valid and related to future performance. Job analyses of both positions should be conducted, indicating the extent to which the two jobs overlap.[251] Literature critiquing rating scale formats in the Title VII context provides useful descriptions.[252] Failure to provide written criteria for raters was one factor resulting in a finding of discrimination by one court.[253]

The skill of the rater, similar to that of the interviewer, is another crucial determinant to the usefulness of a rating scale.[254] Generally, immediate supervisors report the most accurate information.[255] Raters who have been trained show increased reliability.[256] In sum, conducting a job analysis to clearly define the parameters of the job, structuring rating formats, and training the raters are all part of a rigorous psychometrically valid rating system.

3. Experience Requirements

Employers frequently review an applicant's past experience to predict fu-

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251. *See* Cascio & Bernardin, *Implications of Performance Appraisal Litigation for Personnel Decisions*, 34 PERSONNEL PSYCHOLOGY 211, 217 (1981).

252. *E.g., id.*; Distefano, Pryer & Erffmeyer, *Application of Content Validity Methods to the Development of a Job-Related Performance Rating Criterion*, 36 PERSONNEL PSYCHOLOGY 621 (1983); Field & Holley, *The Relationship of Performance Appraisal System Characteristics to Verdicts in Selected Employment Discrimination Cases*, 25 ACAD. MGMT. J. 392 (1982); Kleiman & Durham, *Performance Appraisal, Promotion and the Courts: A Critical Review*, 34 PERSONNEL PSYCHOLOGY 103, 114 (1981); Landy & Farr, *Performance Rating*, 87 PSYCHOLOGICAL BULL. 72, 73 (1980). In one format, the graphic rating scale, several dimensions to be rated were listed vertically. Raters make rating decisions along a horizontal 5 to 9 point scale. For example, if the dimension to be rated is "accuracy," the scale may use a numerical or one-word verbal rating, e.g., 1 to 5 or "high" to "low"; it may use a range of descriptions, e.g., at one end of the scale, would be "makes too many errors"; at the other end, "almost never makes mistakes." Another format, behaviorally anchored rating scale (BARS), uses dimensions derived by raters who use the scale with different points on each dimension anchored by statements describing actual job behavior which illustrate specific levels of performance, e.g., using "accuracy" in rating an auditor, the statements could include a range from "makes frequent errors in totaling accounts" to "errors in totaling accounts are consistently rare." *See generally* B. SCHNEIDER & N. SCHMITT, *supra* note 221, at 101-06.

253. Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 192 (5th Cir. 1983) (unwritten subjective criteria for promotions coupled with no written criteria for raters).

254. Kleiman & Durham, *supra* note 252, at 113.

255. L. CRONBACH, *supra* note 224, at 512.

256. A. ANASTASI, *supra* note 224, at 612. *See also* Standard 1.13, STANDARDS, *supra* note 221, at 16 ("When criteria are composed of rater judgments, the degree of knowledge that raters have concerning ratee performance should be reported. If possible, the training and experience of the raters should be described."); PRINCIPLES, *supra* note 221, at 10 ("It may . . . be necessary to train raters in the observation and evaluation of performance. Further, supervisors should be expected to be familiar enough with the demands of the job to evaluate overall performance."). Rater training is discussed in, e.g., Bernardin & Pence, *Effects of Rater Training: Creating New Response Sets and Decreasing Accuracy*, 65 J. APPLIED PSYCHOLOGY 60 (1980); Borman, *Format and Training Effects on Rating Accuracy and Rater Errors*, 64 J. APPLIED PSYCHOLOGY 410 (1979); Ivancevich, *Longitudinal Study of the Effects of Rater Training on Psychometric Error in Ratings*, 64 J. APPLIED PSYCHOLOGY 502 (1979); Latham, Wexley & Pursell, *Training Managers to Minimize Rating Errors in the Observation of Behavior*, 60 J. APPLIED PSYCHOLOGY 550 (1975). *See also* Wilson v. Michigan Bell Tel. Co., 550 F. Supp. 1296, 1301 (E.D. Mich. 1982) (written evaluations by the raters required and each evaluator discussed the criteria in a supervised discussion). *See generally* I. GOLDSTEIN, *supra* note 216, at 254-59.

ture performance. The past experience must focus on "specific, job-relevant past achievements, rather than on the passive exposure implied by the customary education and experience records."[257] Once more, use of past experience must start with a job analysis and include a structured rating format and training for the evaluators.[258]

V. CONCLUSION

The critical national goal embodied in section 703(a)(2) of Title VII to "achieve equality of employment opportunities" by removing "artificial, arbitrary and unnecessary barriers to employment" must be maintained and enhanced. The group interest concept of equality articulated so profoundly in *Griggs* led logically to the structure of proof that requires the employer to prove business necessity after the plaintiff meets its heavy burden of proving a disproportionate impact on a protected group. Reversing the allocation of burdens would effectively repeal the disparate impact theory as an independent substantive provision. It is essential that the Supreme Court speak definitively and reaffirm the analytical framework of *Griggs*. Equally important is the application by the courts of psychometric principles to the validation of subjective criteria.

The economic and social facts of our society and the essential human values embodied in the Civil Rights Act of 1964 require a renewed commitment to substantially advancing the effective enforcement of a national policy against discrimination in the workplace.

ADDENDUM

After this article went to print, the Supreme Court, in a 5-4 decision in *Wards Cove Packing Co. v. Atonio*,[259] reversed the eighteen-year-old *Griggs* allocation of burdens and articulated a new standard of proof. The procedural hurdle placed in plantiff's path by the reallocation of proof is enormous. First, the majority added an element to the plaintiff's prima facie case, requiring the plaintiff to "'begin by identifying the specific employment practice that is challenged . . . .'"[260] This requirement, said the Court, was especially necessary where the employer combines subjective criteria with the use of standardized

257. A. ANASTASI, *supra* note 224, at 616.

258. Research on the use of valid prior experience data includes, Brush & Owens, *Implementation and Evaluation for an Assessment Classification Model for Manpower Utilization*, 32 PERSONNEL PSYCHOLOGY 369 (1979); Korman, *The Prediction of Managerial Performance: A Review*, 21 PERSONNEL PSYCHOLOGY 295 (1968); Owens & Schoenfeldt, *Toward a Classification of Persons*, 46 J. APPLIED PSYCHOLOGY 329 (1979); Reilly & Chao, *Validity and Fairness of Some Alternative Employee Selection Procedures*, 35 PERSONNEL PSYCHOLOGY 1 (1982); Schoenfeldt, *Utilization of Manpower: Development and Evaluation of an Assessment-Classification Model for Matching Individuals with Jobs*, 59 J. APPLIED PSYCHOLOGY 583 (1974). *See generally* B. SCHNEIDER & N. SCHMITT, *supra* note 221, at 378-82.

259. 57 U.S.L.W. 4583 (U.S. June 6, 1989) (No. 87-1387).

260. *Id.* at 4587 (quoting Watson v. Forth Worth Bank & Trust, 108 S.Ct. 2777, 2788 (1988)).

rules or tests. Thus, the plaintiff must isolate and identify the "'specific employment practices that are allegedly responsible for any observed statistical disparities.'"[261]

Second, and more importantly, the *Wards Cove* majority formulated a new burden and standard of proof to analyze the employer's response after a prima facie case is established. The case shifts to a two-component analysis of the employer's justification for its use of the selection criteria or device. First, the employer's justification is reviewed, and second, if plaintiffs fail to prevail, they still have the opportunity to show that alternative selection devices or tests, without a similar undesirable racial effect, would also serve the employer's legitimate interest(s).

The justification stage is structured as follows. The employer carries the burden of *producing* evidence of a business justification for the employment practice. The burden of *persuasion* remains on the plaintiff, unlike under *Griggs* and its progeny, where it shifted to the defendant after a prima facie case was established.

For the majority, "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[262] Further, "[t]he touchstone of this inquiry is a reasoned review of the employer's justification . . . ."[263] Although the Court admonished against a "mere insubstantial justification," the Court provides a wide latitude to the employer's offered justification by stating that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster."[264] The majority does "acknowledge that some of our earlier decisions can be read as suggesting otherwise."[265]

This understatement is disingenuous. Without explicitedly stating so, a bare majority overrules the unanimous *Griggs* decision authored by Chief Justice Burger and supported by the Nixon Administration. The shifting of the burden and the redefinition of the standard, through a procedural device, effectively repeals much of the disparate impact theory as an independent substantive provision. Previously, after the demonstration of a prima facie case, the employer met its burden only if it could show that the challenged requirement had a "manifest relationship to the employment in question."[266] For eighteen years, "[t]he touchstone [was] business necessity" and "[i]f an employment practice which operate[d] to exclude Negroes [could not] be shown to be related to job performance, the practice [was] prohibited."[267] Now, the *Wards Cove* majori-

261. *Id.*
262. *Id.* at 4588.
263. *Id.*
264. *Id.*
265. *Id.*
266. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
267. *Id.* at 431.

ty articulates the "touchstone" as a "reasoned review of the employer's justification,"[268] a considerably more lenient standard. The starkness of this new standard's change is evident when contrasted with the Court's further elaboration of the *Griggs* standard in *Albemarle Paper Co. v. Moody.*[269]

Despite the *Wards Cove* majority placing the burden on the plaintiff to prove that the employer's selection device is not job related, employers are, nevertheless, required to validate their selection devices. First, the majority continued the Court's deference to the Uniform Employee Selection Guidelines when it noted that employers, subject to the Guidelines, must maintain records showing disparate impact.[270] Procedures that have an adverse impact constitute discrimination unless justified.[271] The Guidelines set forth acceptable types of validity studies to justify the use of the selection device.[272] Further, the majority does not upset the approval in *Albemarle* of professionally accepted methods of validating selection devices.[273] Plaintiffs will continue to challenge practices using the disparate impact theory. To avoid liability and to meet the national goal of equal opportunities, employers must validate both objective and subjective criteria.

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268. 57 U.S.L.W. at 4588
269. 422 U.S. 405 (1975); see Part II.A of this Article.
270. 57 U.S.L.W. at 4587-88.
271. 29 C.F.R. § 1607.3 (1988).
272. *See id.* § 1607.5 (1988).
273. 422 U.S. at 431.