EMPLOYMENT LAW—TITLE VII—UNITED STATES SUPREME COURT CLARIFIES STANDARDS FOR STATISTICAL EVIDENCE AND BURDENS OF PROOF IN PRIVATE LITIGATION UNDER THE DISPARATE IMPACT THEORY—*Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989).

Title VII of the Civil Rights Act of 1964 (Act)[1] prohibits an employer from discriminating against individuals on the basis of race, gender, religion, color, or national origin.[2] The United States Supreme Court has interpreted Title VII to forbid both intentional discrimination and the use of facially neutral employment practices that adversely affect a protected class.[3] Imple-

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1 42 U.S.C. § 2000e (1982).

2 42 U.S.C. § 2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (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
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> (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.

3 International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977). In *Teamsters*, the Court summarized the two theories of discrimination that can be asserted under a given set of facts in a Title VII action: disparate treatment and disparate impact. *Id.* The Court explained that disparate treatment occurs when an employer "treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Id.* The Court stressed that, in a disparate treatment action, proof of discriminatory motive is necessary but may "be inferred from the mere fact of differences in treatment." *Id.* Proof of discriminatory motive, however, is not required in a disparate impact action, which involves "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." *Id.* One commentator has indicated that the disparate impact theory is targeted at facially neutral employment policies which correlate with gender or race rather than at those practices which are race or gender based. Cox, *The Future of the Disparate Impact Theory after* Watson v. Fort Worth Bank, 4 B.Y.U. L. REV. 753, 756 (1988).

Disparate treatment discrimination has been classified as either individual disparate treatment or systemic disparate treatment. 1 C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION § 2.2 (2d ed. 1988) [hereinafter SULLIVAN, ZIMMER & RICHARDS]. In an individual disparate treatment action, the plaintiff attacks an employer's single selection decision. *Id.* The Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), set forth the typical prima facie case:

> The complainant . . . [must show] (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he

mentation of the second component has prompted the Supreme Court to recognize a private cause of action where statistical evidence is used to prove the disparate impact of those employment practices.[4]

With little guidance from the Act's sweeping language, the Court has struggled to define the evidentiary standards and burdens of proof in disparate impact litigation.[5] In recent years, the

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> was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

To rebut the inference of intentional discrimination arising from a prima facie case of disparate treatment, the defendant must produce evidence of a legitimate, nondiscriminatory reason for its determination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-54 (1981). One commentator noted that this "means only that the employer must present credible evidence of a race and gender neutral reason for its challenged action; it need not justify this reason or establish the objectively superior qualifications of the person it actually selected for a position." Cox, *supra*, at 755-56. If the employer successfully rebuts the prima facie case, the plaintiff must then prove that the assigned reason is pretextual. *McDonnell Douglas*, 411 U.S. at 804. The plaintiff retains the burden of persuasion throughout the litigation. *Burdine*, 450 U.S. at 253. If the plaintiff proves that race or gender was a substantial factor in the employment decision among other legitimate reasons for an employment decision, the employer assumes the burden of demonstrating that the same decision would have been made in the absence of any consideration of race or gender. Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). *See* Note, *Once Plaintiff Demonstrates Illegitimate Factor Motivated Employment Decision, Defendant Must Show that Same Decision Would Have Been Made Absent the Unlawful Factor to Avoid Liability*—Price Waterhouse v. Hopkins, 20 SETON HALL L. REV. 860 (1990) (authored by L. Filardi).

[4] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). For a description of statistical tests used to prove disparate impact, *see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1331-94 (2d ed. 1983) [hereinafter SCHLEI & GROSSMAN].

[5] *See, e.g.*, Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (plaintiff must prove that employment practice which selects minority applicants at significantly lower rate than nonminority applicants does not serve employer's legitimate goals); Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988) (plaintiff assumes burden of proving that specific employment practice causing denial of employment opportunities to minorities is not job related); Connecticut v. Teal, 457 U.S. 440 (1982) (evidence that entire selection process creates racially balanced work force at "bottom line" does not immunize employer from liability); New York Transit Auth. v. Beazer, 440 U.S. 568 (1979) (employer must prove manifest relationship between challenged criteria and denied employment opportunity); Dothard v. Rawlinson, 433 U.S. 321 (1977) (employer must show that discriminatory employment practice is necessary for efficient and safe job performance); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (employer shoulders burden of proving that selection criteria which chooses individuals for employment in racial pattern different from pool of applicants is related to legitimate interest in trustworthy and efficient workmanship); *Griggs*, 401 U.S. 424 (employer assumes burden of demonstrating that employment practice which excludes minorities at disproportionate rate has manifest relationship to job performance).

Court has retreated from its initial reliance on the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures (EEOC Guidelines)[6] and a broad interpretation of the disparate impact model.[7] This trend toward requiring more rigorous statistical analysis from disparate impact plaintiffs and limiting the employers' burden of proof is evident in the case of *Wards Cove Packing Co. v. Atonio*.[8]

In *Wards Cove*, two companies annually hired individuals to work in their Alaskan canneries during the summer salmon runs.[9] Alaskan natives who resided in nearby villages, and Filipinos who were hired through a local union, filled most of the unskilled can-

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6 Congress created the Equal Employment Opportunity Commission, 42 U.S.C. §§ 2000e-4 to 2000e-5 (1982), "to make certain that the channels of employment are open to persons regardless of their race and that jobs . . . are strictly filled on the basis of qualification." H.R. REP. No. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2516. To achieve this goal, the EEOC enacted the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1-7.18 (1989), to help employers determine whether their procedures used to hire, promote, demote, and refer employees are prohibited by Title VII. *Id.* at § 1607.1-7.2. The EEOC Guidelines describe at least one statistical standard for proving the adverse impact of selection procedures on a given minority group, *id.* at § 1607.43(D), as well as elaborate on methods for demonstrating that such procedures are related to job performance. *Id.* at § 1607.14. The EEOC Guidelines also explain that procedures which are shown to be job related or in conformance with 29 C.F.R. § 1607.6 are not considered discriminatory. *Id.* at § 1607.3(A).

7 *See, e.g.*, *Watson*, 108 S. Ct. at 2789 n.3 (EEOC Guidelines' enforcement standard under which adverse impact can be inferred provides no "more than a rule of thumb for the courts"). One commentator has stated that the Court's decision in New York Transit Authority v. Beazer, 440 U.S. 568 (1979) "may indicate that the Court is retreating from its endorsement of general population statistics and that it may increasingly require plaintiffs to demonstrate the effect of challenged practices on the employer's actual [work force] or applicant pool." Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45, 70 (1979). Another scholar asserted that the Court's decisions in *Beazer* and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), a disparate treatment case, indicated a move to reduce the employer's burden in disparate impact cases to resemble the defendant's burden in disparate treatment cases. Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C. L. REV. 419 (1982). In discussing the *Watson* decision, another commentator noted that the plurality's interpretation of the disparate impact theory "substantially narrow[ed] the scope of the theory and limit[ed] the employer's burden of proof under it." Cox, *supra* note 3, at 753.

8 109 S. Ct. 2115 (1989).

9 *Id.* at 2119. The canneries operated only at that time of the year. *Id.* Some workers, most of whom possessed a variety of skills, arrived a few weeks early to prepare the facilities and equipment for the canning operation. *Id.*

nery line positions.[10] White workers, hired through out-of-state recruiting efforts, filled most of the primarily skilled noncannery positions.[11]

In 1974, a class of nonwhite current and former cannery employees brought a Title VII action against the companies.[12] The employees charged that the employers' hiring and promotion practices with respect to noncannery positions, which included the use of separate hiring channels, a preference for rehires, nepotism, the absence of objective hiring criteria, and a policy of not promoting employees from within, caused "racial stratification of the work force." This, the employees contended, denied them and other minorities noncannery employment because of their race.[13] The plaintiffs asserted all claims under the Title VII liability theories of disparate impact and disparate treatment.[14]

Following a bench trial, the Federal District Court for the Western District of Washington entered judgment for the defendants.[15] The court first denied the plaintiffs' disparate treatment claims.[16] The court then rejected their disparate impact challenge to the companies' use of subjective employment criteria,[17] reasoning that such practices were not amenable to dispa-

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[10] *Id.* Local 37 of the International Longshoremen Workers Union hired and dispatched the Filipinos. *Id.*

[11] *Id.* The companies' offices in Oregon and Washington hired individuals for these positions during the winter months. *Id.* The salaries for virtually all of the noncannery jobs were higher than for the cannery jobs. *Id.* at 2119-20. Individuals holding the skilled noncannery positions included engineers, machinists, quality control personnel, cooks, store-keepers, carpenters, and bookkeepers. *Id.* at 2119 n.3.

[12] *Id.* at 2120.

[13] *Id.* The plaintiffs' statistics showed "a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in [both skilled and unskilled] noncannery positions." *Id.* at 2121. The parties disputed the exact degree of the discrepancy. *Id.* at 2121 n.5. The plaintiffs also challenged the defendants' racially segregated dining and housing facilities. *Id.* at 2120.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* Subjective selection criteria are those which involve discretionary decisions. Cox, *supra* note 3, at 766. Such decisions may entail assessing performance under objective criteria, or assessing performance under inherently subjective criteria. *Id.* at 766-67. Commentators have recognized the difficulty in distinguishing between subjective and objective employment practices. *See* Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 68-69 (1988) (factor ordinarily measured objectively may be characterized as subjective when supervisor relies on recollection and observation and, in contrast, an appraisal based in part on subjective factors may later be considered verifiable evidence); Cox, *supra* note 3, at 766 (stating that "even facially objective criteria are subjectively created" and that there are degrees of subjectivity and objectivity).

rate impact review.[18] Finally, the court found that the plaintiffs failed to prove that the employers' objective employment practices caused disparate impact.[19] On appeal, a panel of the United States Court of Appeals for the Ninth Circuit initially affirmed the district court's judgment.[20] The Ninth Circuit, sitting *en banc*, later vacated that decision and determined that subjective hiring practices may be challenged under the disparate impact model.[21] The court also concluded that, once the plaintiff identifies specific employment practices or criteria which caused disparate impact, the employer bears the burden of proving that business necessity justified use of the challenged practices.[22] On remand, the Ninth Circuit panel, applying the *en banc* ruling, held that the plaintiff class established a prima facie case of disparate impact with regard to hiring practices for all noncannery positions.[23]

The United States Supreme Court granted certiorari to address issues regarding the proper application of the disparate impact theory in a Title VII action.[24] The Supreme Court reversed the court of appeals' judgment and remanded the case for an assessment of whether the plaintiff could establish a prima facie disparate impact violation.[25] The Court determined that the disparate impact plaintiff must identify one or more specific employment practices[26] that caused a statistically significant disparity between the "racial composition of the qualified persons in the labor market and the persons holding at-issue jobs."[27] The defendant, in the Court's view, must then produce evidence showing that the challenged practice served the employer's legitimate

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18 Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2120 (1989).

19 *Id.* These objective practices included an English language requirement, a rehiring preference, a failure to publicize noncannery openings, and alleged nepotism in hiring. *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* (citing Atonio v. Wards Cove Packing Co., 827 F.2d 439 (9th Cir. 1987), *rev'd*, 109 S. Ct. 2115 (1989)). The Ninth Circuit panel reached this conclusion by comparing the high percentage of nonwhite persons employed as cannery workers with the low percentage of nonwhite persons employed as noncannery workers. *Antonio*, 827 F.2d at 444-45. In remanding the case for further proceedings, the panel instructed the district court that the employer bears the burden of proving that business necessity justified the practices which caused the disparate impact. *Wards Cove*, 109 S. Ct. at 2120. The district court's dismissal of the plaintiffs' disparate treatment claims remained undisturbed.

24 *Wards Cove*, 109 S. Ct. at 2121.

25 *Id.* at 2123-24.

26 *Id.* at 2124.

27 *Id.* at 2121.

goals.[28] The plaintiff who fails to meet the burden of persuasion on this issue, the Court continued, must prove that equally effective practices would have produced a more desirable racial effect.[29]

In 1971, the United States Supreme Court was given its first opportunity to interpret Title VII of the Civil Rights Act of 1964 in terms of employment discrimination in *Griggs v. Duke Power Co.*[30] In *Griggs*, the Court outlined the basic structure of litigation under the disparate impact theory.[31] Chief Justice Burger, writing for a unanimous Court,[32] held that any employment practice which excludes minorities at a disproportionate rate is prohibited if it is not related to job performance.[33] The Court deferred to the EEOC Guidelines which stated that Title VII permits only the use of job related tests,[34] noting that the legislative history of Title VII supported the Commission's construction.[35] The *Griggs* majority emphasized that the employer assumes the burden of demonstrating that such a practice was manifestly related to the job opportunity that was denied to the plaintiff.[36] The touchstone, the Court stressed, is business necessity.[37] Applying these principles, the majority found that the corporate employer in

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28 *Id.* at 2125-26 (citations omitted).

29 *Id.* at 2126-27.

30 401 U.S. 424 (1971). *See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 61-62 (1972) (citations omitted) ("[*Griggs*] provided the first occasion for the [Supreme Court] to determine the nature and scope of the prohibition on racial discrimination in employment under the Civil Rights Act of 1964. . . . The [opinion] redefine[d] discrimination in terms of consequence rather than motive, effect rather than purpose.").

31 *See Griggs*, 401 U.S. at 424. Scholars have asserted that "the order and allocation of proof set forth in *Griggs* and refined in [subsequent disparate impact cases] represents . . . an analytical tool for evaluating evidence and not a three-step procedure by which evidence is presented." SCHLEI & GROSSMAN, *supra* note 4, at 1325.

32 *Griggs*, 401 U.S. at 425. Justice Brennan did not participate in the decision. *Id.* at 436.

33 *Id.* at 431.

34 *Id.* at 433-36. The Court referred to the EEOC's interpretation of 42 U.S.C. § 2000e-2(h) which "authorizes the use of 'any professionally developed ability test' that is not 'designed, intended *or used to* discriminate because of race . . . .' " *Id.* at 433 (emphasis in original) (citing 42 U.S.C. § 2000e-2(h)(1982)).

35 *Id.* at 434.

36 *Id.* at 432.

37 *Id.* at 431. Business necessity and job relatedness are intertwined, judicially created defenses to a claim of disparate impact. SULLIVAN, ZIMMER & RICHARDS, *supra* note 3, at § 4.3.2 ("[t]he difference between the two is that job relatedness is confined to showing that the performance of the employee on the job is affected, while business necessity may take into account factors not directly related to employee performance on a particular job").

Griggs violated Title VII by selecting individuals for certain desirable positions based upon their attainment of a high school education and satisfactory scores on two professionally developed tests.[38] Chief Justice Burger reasoned that these criteria, which disqualified blacks at a significantly higher rate than whites,[39] were not shown to "bear a demonstrable relationship" to the successful performance of the positions for which they were used.[40]

The Court did not have occasion to clarify the correct standard of proof for job relatedness until four years later in *Albemarle Paper Co. v. Moody*.[41] As in *Griggs*, the plaintiffs in *Albemarle* challenged an employer's use of aptitude tests for job placement—[42] tests that few blacks were able to pass.[43] Applying the exacting standards set forth in the EEOC Guidelines, the *Albemarle* Court

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38 Griggs v. Duke Power Co., 401 U.S. 424, 431-36 (1971). The Duke Power Company plant was organized into five departments. *Id.* at 427. The highest paying jobs in the Labor Department paid comparatively less than the lowest compensated positions in the other four departments. *Id.* The company placed only those new employees who passed two aptitude tests and possessed a high school diploma and only those incumbent employees who either passed the tests or possessed a high school diploma in the more lucrative departments. *Id.* at 427-28. The plant used the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test. *Id.* at 428.

39 *Id.* at 430 n.6. In one administration of the tests, fifty-eight percent of the whites passed, while only six percent of the blacks passed. *Id.* Also, North Carolina census figures revealed that thirty-four percent of the state's white males had high school diplomas, while only twelve percent of the state's black males completed high school. *Id.* Thus, the test and diploma requirements prevented disproportionate numbers of black persons from acquiring skilled jobs. *Id.* at 426.

40 *Id.* at 431. The Court reached this conclusion despite evidence that the criteria were facially neutral, applied fairly, and intended to improve the quality of the work force. *Id.* at 429-31. The Court reasoned that Congress, in enacting Title VII, intended to remove "artificial, arbitrary, and unnecessary barriers to employment [that] operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431. Consequently, the Court continued, "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." *Id.* at 430. The Court further stated that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.

41 422 U.S. 405 (1975). The Court granted certiorari to address "the showing required to establish the 'job relatedness' of pre-employment tests." *Id.* at 413 (citations omitted).

42 *Id.* at 410-11. The company administered the Revised Beta Examination, which allegedly measured nonverbal intelligence, and the Wonderlic Personnel Test, which allegedly measured verbal facility. *Id.* Scores on these tests determined eligibility for placement in various skilled lines of progression at a plant which manufactured paper products from raw wood. *Id.* at 427-29.

43 *Id.* at 428-29.

held that a validation study conducted by the employer in support of its position did not prove that the aptitude tests were related to the relatively skilled factory positions at issue.[44] In

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[44] *Id.* at 429-36. Four months before trial, the defendant hired an industrial psychology expert to determine whether the aptitude tests were job related. *Id.* at 429. The expert compared aptitude test scores of current employees with their supervisors' judgments of their relative abilities. *Id.* at 430. Although the study revealed a statistically significant correlation between the two figures, the majority found the study materially defective in several respects when measured against the EEOC Guidelines to which the Court accorded great deference. *Id.* at 431. The study showed statistically significant correlations for too few jobs. *Id.* It compared test scores with subjective rankings of supervisors who were not told any specific criteria to consider. *Id.* at 432-33. The study tested mostly upper level employees rather than entry level employees. *Id.* at 433-34. It tested only job-experienced, white workers. *Id.* at 435.

Justice Blackmun, in dissent, objected to the Court's rigid application of the EEOC Guidelines, reasoning that it would force employers to engage in subjective quota systems of employment selection in conflict with the intent of Title VII. *Id.* at 449 (Blackmun, J., concurring in part and dissenting in part). The Justice stated that

> pre-employment tests, like most attempts to predict the future, will never be completely accurate. We should bear in mind that pre-employment testing, so long as it is fairly related to the job skills or work characteristics desired, possesses the potential of being an effective weapon in protecting equal employment opportunity because it has a unique capacity to measure all applicants objectively on a standardized basis.

Id.

Justice Burger, also in dissent, contended that the EEOC Guidelines "interpret no section of Title VII and are nowhere referred to in its legislative history" and are "entitled to the same weight as other well-founded testimony by experts in the field of employment testing." *Id.* at 452 (Burger, J., concurring in part and dissenting in part).

Three techniques have been approved by the EEOC to prove that a challenged employment practice is related to job performance: criterion-related validation, content validation, and construct validation. 29 C.F.R. § 1607.5(A) (1989). For a detailed discussion of these methods, *see* SULLIVAN, ZIMMER & RICHARDS, *supra* note 3, at § 4.5; SCHLEI & GROSSMAN, *supra* note 4, at 162-90. A criterion-related validation study shows the correlation between performance on an employment test and performance on the job. 29 C.F.R. § 1607.14(B)(2) (1989). A content validation study reveals the degree to which a selection procedure "is a representative sample of the content of the job." 29 C.F.R. § 1607.14(C)(1) (1989). A construct validation strategy demonstrates the extent to which an employment test measures a behavioral characteristic. 29 C.F.R. § 1607.14(D) (1989). The choice of a validation strategy can determine the outcome of Title VII litigation. SULLIVAN, ZIMMER & RICHARDS, *supra* note 3, at § 4.5.5.

The employer in *Albemarle* attempted to demonstrate the criterion-related validity of its employment tests. *Albemarle*, 422 U.S. at 429-36; SULLIVAN, ZIMMER & RICHARDS, *supra* note 3, at § 4.5.1. Although testing experts prefer this strategy, *id.* at § 4.5.5, commentators have noted that few tests can be found valid under the EEOC's interpretation of criterion-related validation studies. *Id.* at § 4.5.1 (citing Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L. J. 121, 125 (1980)).

addition, the majority elaborated on the basic structure of disparate impact litigation originally set forth in *Griggs*.[45] The Court essentially parallelled the order of proof with that of disparate treatment cases.[46] The Court stated that a complaining party or class establishes prima facie discrimination by showing that the racial composition of applicants selected for employment opportunities through the use of screening tests is significantly different from the racial composition of the pool of applicants.[47] The majority further held that the employer then carries the burden of proving that such tests are related to a legitimate interest in trustworthy and efficient workmanship.[48] If the employer succeeds in meeting this burden, the Court continued, the complaining party has the opportunity to show that other selection devices would serve the employer's legitimate goals without causing a similarly unacceptable racial disparity.[49] Such a showing, the Court explained, would be evidence that the defendant used such tests as a pretext for discrimination.[50]

One year later in *Washington v. Davis*,[51] the Supreme Court undermined the certainty that the EEOC Guidelines had provided for proving job relatedness.[52] *Davis* involved a written Civil Service test that excluded a disproportionately high number of blacks applying for employment as police officers in the District of Columbia.[53] Writing for the majority, Justice White held

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45 *Albemarle*, 422 U.S. at 425. Commentators have noted that the *Albemarle* Court refined the allocation of proof in disparate impact cases. SCHLEI & GROSSMAN, *supra* note 4, at 84.

46 *See* Furnish, *supra* note 7, at 421-25; Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1293 (1988).

47 *Albemarle*, 422 U.S. at 425. Specifically, the Court stated that the plaintiff establishes prima facie discrimination by showing that the employer's tests "select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

48 *Id.* (citing *McDonnell Douglas*, 411 U.S. at 801).

49 *Id.* (citing *McDonnell Douglas*, 411 U.S. at 801).

50 *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804-05).

51 426 U.S. 229 (1976).

52 *Id.* This development was emphasized by Justice Brennan's dissenting opinion which noted the majority's failure to rely on the EEOC Guidelines. *Id.* at 263 (Brennan, J., dissenting). *See* Kandel, *Burden of Proof after* Watson: A Major Shift in Disparate Impact Litigation?, 14 Employee Relations L. J., 263, 266 (1988). Scholars have noted that subsequently promulgated EEOC Guidelines have tended to follow the less rigorous approach to test validation which was employed by the *Davis* Court and which "generally comports with recent developments in industrial psychology." SULLIVAN, ZIMMER & RICHARDS, *supra* note 3, at § 4.5.1.

53 *Davis*, 426 U.S. at 232-34. The examination, designed by the Civil Service Commission, tested vocabulary, verbal ability, reading, and comprehension. *Id.* at

that the police department was entitled to summary judgment under Title VII standards despite the department's failure to prove a direct relationship between test scores and job performance.[54] The Court reasoned that evidence of a positive correlation between test scores and performance in the police training program was sufficient to validate the test because such training was an important prerequisite to adequate job performance.[55]

Despite the Court's acceptance of statistical comparisons to prove employment discrimination, its reluctance to enunciate specific guidelines for such analysis forced the lower courts to undertake this task.[56] Eventually, the Court began to clarify the role of statistical comparisons in proving the discriminatory impact of selection devices on a protected group.[57] In doing so, the Court endorsed methods of statistical analysis different from those employed in *Griggs* and *Albemarle*.[58] One such mode of analysis, comparing the percentage of minorities in the employer's work force with the percentage of minorities in the relevant labor pool, was used in the disparate treatment case of *International Brotherhood of Teamsters v. United States*.[59] In *Teamsters*, the United States instituted an action against a national common

234-35 (citing Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972), *rev'd*, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976)).

54 *Id.* at 248-52. Because Title VII did not protect federal employees at that time, *id.* at 238 n.10, the plaintiffs alleged discrimination under the due process clause of the fifth amendment to the United States Constitution and D.C. CODE ANN. § 1-320 which, like Title VII, contained language prohibiting employment discrimination on the basis of religion, race, color, or national origin. *Id.* at 233 n.2. While the Court rejected the applicability of the *Griggs* analysis to constitutional claims, *id.* at 238-48, it reviewed the lower court's *Griggs* analysis with reference to the D.C. Code. *Id.* at 248-52.

55 *Id.* at 250. The Court determined that a validation study showing the relationship between test scores and performance in the training program supported the district court's conclusion that a direct relationship existed between the two. *Id.* at 251 n.17. The majority noted that "some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen." *Id.* at 250.

56 *See* Waintroob, *supra* note 7, at 69.

57 *Id.* at 69-89.

58 *Id.* The *Griggs* and *Albemarle* case involved pass/fail comparisons. SCHLEI & GROSSMAN, *supra* note 4, at 1333. Such statistics compare the percentage of minorities who would satisfy the employer's criteria with the percentage of nonminorities who would meet the criteria. *Id.* at 1332. In *Griggs*, the pass/fail comparisons involved potential applicants, while in *Albemarle* they pertained to actual applicants. *Id.* at 1333. This approach was set forth in 29 C.F.R. § 1607.4(D).

59 431 U.S. 324 (1977). *Teamsters* involved a population/work force comparison. SCHLEI & GROSSMAN, *supra* note 4, at 1334. In such a case, either the general population, or a portion of it, is compared with the employer's work force. *Id.* For a thorough discussion on statistical proof of discrimination, *see id.* at 1331-94.

carrier of motor freight, and an associated union, alleging that the defendants had intentionally discriminated against minorities in hiring persons to work as line drivers.[60] The Supreme Court held that the evidence introduced at trial, consisting of statistical proof bolstered by testimony of discriminatory practices, was sufficient to establish a prima facie Title VII violation.[61] The majority opinion, authored by Justice Stewart, emphasized the important role statistics play in proving discrimination.[62] In this case, Justice Stewart recognized that the statistics showed that, while minorities accounted for nine percent of the employer's work force, they accounted for only seven tenths of a percent of the line driver positions.[63] Furthermore, the Court noted a rela-

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[60] *Teamsters*, 431 U.S. at 328-29. Specifically, the United States claimed that the defendants "had engaged in a pattern or practice of" discriminatory hiring in violation of § 707(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a). *Id.* at 328-29 n.1. At the time of suit, that provision authorized the Attorney General to institute a civil action to redress "pattern or practice" violations. *Id.* The government argued that the defendants "regularly and purposefully treated negroes and Spanish-surnamed Americans less favorably than white persons." *Id.* at 335. Commentators have labelled this form of discrimination systemic disparate treatment. *See supra* note 3 and accompanying text for a discussion on systemic disparate treatment.

Systemic disparate treatment occurs when an employer intentionally uses a proscribed criterion in making a variety of employment decisions. SULLIVAN, ZIMMER & RICHARDS, *supra* note 3, at § 2.3. The plaintiff establishes a prima facie case either by providing evidence of formal discriminatory policies, or "by showing a pattern of decision making that reveals a racial bias." *Id.* The later can be accomplished by presenting statistical evidence which shows "a gross and longlasting disparity between the racial composition of the employer's work force (the 'observed') and what the composition should be had the employer not discriminated (the 'expected')." *Id.* To determine the expected composition, the plaintiff frequently looks at "the racial composition of the labor market from which the defendant could be expected to pick its workers." *Id.* Such evidence can be buttressed by witness testimony supporting the inference of discriminatory policies. *Id.* The defendant's most promising defense is to show that the prima facie case is flawed due to an inaccurately defined labor market. *Id.* The employer may introduce "evidence of the effect of race and gender neutral considerations (such as qualifications not considered in the prima facie case and the effect of self-selection by applicants) on the disparity disclosed by plaintiff's proof." Cox, *supra* note 3, at 760. Professor Cox explained that the employer, "in effect, 'articulates legitimate nondiscriminatory reasons' for the disparity." *Id.* (citations omitted). In *Teamsters*, Spanish-surnamed and black persons who were hired, according to the government, were assigned to less desirable, lower paying positions as local city drivers or servicemen. *Teamsters*, 431 U.S. at 329. Line drivers, or over-the-road drivers, haul freight over long distances between company terminals. *Id.* at 329 n.3.

[61] *Teamsters*, 431 U.S. at 337-38. The Court stated that the testimony of witnesses "brought the cold numbers convincingly to life." *Id.* at 339.

[62] *Id.*

[63] *Id.* at 337. While 5% of the company's total employees were black and 4% were Spanish-surnamed Americans, only 0.4% of the company's line drivers were black and 0.3% were Spanish-surnamed Americans. *Id.*

tively high percentage of the minorities as compared with nonminorities in the employer's work force held lower paying, less desirable jobs.[64] The Court acknowledged the probative force, in an intentional discrimination suit, of statistics showing an ethnic or racial imbalance.[65] The majority reasoned that ordinarily the ethnic and racial composition of the defendant's work force would reflect that of the segment of the population from which employees are selected.[66] The Court further indicated that general population figures might not accurately reflect the group of qualified job applicants.[67]

The Court continued to clarify the role of statistics in employment discrimination litigation in *Hazelwood School District v. United States*,[68] another 1977 decision involving an allegation of intentional discrimination.[69] In *Hazelwood*, the United States Attorney General brought an action against the Hazelwood School District and some of its officials alleging that they engaged in "pattern or practice" discrimination against blacks in hiring teachers in violation of Title VII.[70] Justice Stewart, again writing for the Court, asserted that the plaintiff's proof of prima facie discrimination would ideally reveal a statistically significant disparity between the percentage of minorities in the employer's work force relative to the appropriate labor pool.[71] The Court stressed that carefully defining the relevant labor market is crucial, because this determination affects the validity of any tests of statistical significance.[72] The majority determined that this in-

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[64] *Id.* at 337-38. Eighty-three percent of the blacks working for the company and 78% of the Spanish-surnamed Americans working for the company held lower paying serviceman and city operations jobs, while only 39% of nonminority persons held such jobs. *Id.*

[65] *Id.* at 339.

[66] *Id.* at 339-40 n.20. The Court admitted, however, that "Title VII imposes no requirement that a work force mirror the general population." *Id.*

[67] *Id.*

[68] 433 U.S. 299 (1977).

[69] *Id.* at 301.

[70] *Id.* This action was instituted before the 1972 amendments to Title VII which permitted the EEOC to bring such enforcement actions against private employers. *Id.* at 301 n.1.

[71] *Id.* at 308. Thus, the Attorney General should have compared the percentage of black teachers in the Hazelwood School District with the percentage of black teachers in the relevant labor pool, rather than with the percentage of black students in the Hazelwood school system. *Id.* The statistics showed that the percentage of black teachers in the Hazelwood School District was 1.4% in the 1972-73 school year and 1.8% in the 1973-74 school year. *Id.* In contrast, the percentage of qualified black teachers in the area, according to the 1970 census, was at least 5.7%. *Id.*

[72] *Id.* at 311-12 n.17. The Court approved of calculating the standard deviation

volves identifying both the skills required for the at-issue jobs[73] and the geographical boundaries within which potential applicants reside.[74]

Notwithstanding the parameters established in *Teamsters* and *Hazelwood*, the Court in *Dothard v. Rawlinson*,[75] reaffirmed the probative value, in disparate impact litigation, of the type of statistical comparison employed in *Griggs*.[76] In *Dothard*, the Alabama Board of Corrections refused to hire a woman for work as a correctional counsellor because she did not meet the statutory minimum weight requirement of one hundred and twenty pounds.[77] She instituted a class action charging that this requirement, along with a minimum height standard of five feet two inches, operated to discriminate against women in violation of Title VII.[78] In an opinion authored by Justice Stewart, the Court reiterated that a plaintiff may establish a prima facie Title VII violation by showing that an employer's facially neutral standards selected applicants in a significantly discriminatory pattern.[79] The Court recognized that the Alabama Board of Corrections' height and weight requirements, which in combination operated to exclude approximately forty-one percent of the national female population, but only less than one percent of the national male population, had such a discriminatory effect.[80] The majority stressed

to determine the significance of statistical disparities. *Id.* at 309 n.14. This calculation in the majority's opinion, reveals "predicted fluctuations from the expected value of a sample." *Id.*

73 *Id.* at 308-10. Specifically, the Court stated that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.* at 308 n.13. The Court indicated that in *Teamsters* a comparison involving the general population rather than the class of truck drivers was probative, because driving a truck, unlike teaching school, is a skill readily acquired or commonly possessed by most persons. *Id.*

74 *Id.* at 310-12. The *Hazelwood* Court identified several factors to be considered by the district court, on remand, to determine whether the relevant labor market included the City of St. Louis, which had a relatively high number of black teachers due to special recruiting efforts. *Id.* These factors included the extent to which St. Louis City School District teachers desired to work in Hazelwood, and the extent to which the city district actively diverted teachers from applying to Hazelwood. *Id.* at 312.

75 433 U.S. 321 (1977).

76 *Id.* at 329. *See* SCHLEI & GROSSMAN, *supra* note 4, at 1351.

77 *Dothard*, 433 U.S. at 327.

78 *Id.* at 328-29. Her claim asserted that the two facially neutral qualification standards operated to disproportionately exclude women from being employed by the Alabama Board of Corrections. *Id.*

79 *Id.* at 329.

80 *Id.* at 329-30.

that comparative statistics concerning actual applicants were not essential to a finding of discriminatory impact, because that group of persons would not necessarily represent the potential applicant pool.[81] Otherwise qualified individuals, the Court reasoned, might not apply upon realizing their inability to meet the allegedly discriminatory standards.[82]

After concluding that the plaintiff class had established a prima facie case of employment discrimination, the *Dothard* Court considered whether the defendants had successfully rebutted this case with evidence that the criteria were job related.[83] The Court suggested that the defendant must prove more than mere job relatedness to meet this burden in a disparate impact suit.[84] Although the majority restated the *Griggs* position that the defendant must show that the challenged selection method was manifestly related to the employment opportunity in question,[85] it also noted that the defendant must demonstrate that the practice is necessary for efficient and safe job performance.[86] The Court held that the employer, by failing to present evidence establishing a correlation between minimum weight and height requirements and job performance, had not met this burden.[87]

The Court's opinion in *New York City Transit Authority v. Beazer*,[88] decided just two years after *Dothard*, signaled a new reluctance to infer adverse impact on plaintiffs from the theoretical impact of employment practices on the general population.[89] The *Beazer* decision also beaconed a new willingness to impose less rigorous defense standards in disparate impact suits.[90] The plaintiff class in *Beazer* had sought to prove that the New York City Transit Authority's refusal to employ methadone users dis-

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[81] *Id.* at 330.

[82] *Id.* The Court explained that "reliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population." *Id.*

[83] *Id.* at 331.

[84] *Id.* at 331-32 n.14. *See* Furnish, *supra* note 7, at 427-28.

[85] *Dothard*, 433 U.S. at 329.

[86] *Id.* at 331-32 n.14.

[87] *Id.* at 331. In a concurring opinion, Justice Rehnquist argued that merely articulating a job related reason for use of given selection criteria should be sufficient to defeat the plaintiff's prima facie case. *Id.* at 339-40 (Rehnquist, J., concurring).

[88] 440 U.S. 568 (1979).

[89] Waintroob, *supra* note 7, at 70. Waintroob stated that the *Beazer* decision indicated that the Court may require future plaintiffs to demonstrate a challenged practice's effect on the employer's actual applicant pool or work force. *Id.*

[90] *See* Furnish, *supra* note 7, at 429-32.

proportionately excluded black and Hispanic persons.[91] The Court held that the plaintiffs' statistics, which revealed nothing about the racial composition of potential applicants who use methadone, or about employees suspected of using methadone or dismissed for methadone use, had not established a prima facie case of disparate impact.[92] The majority noted further that if the class had made this showing, the Transit Authority had adequately proven that the requirement was job related.[93] Rather than mentioning the recently articulated stringent job relatedness standard set forth in *Dothard*,[94] the *Beazer* Court referred to the language of *Griggs* and *Albemarle*, indicating that the defendant must prove a manifest relationship between the challenged criteria and denied employment opportunity.[95] The majority stated that the Transit Authority's safety goals justified this result.[96]

In 1982, the Supreme Court considered whether an em-

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[91] *Beazer*, 440 U.S. at 584-85 n.25. Four individuals brought a class action on behalf of those individuals who were or would be discharged from, or refused employment with, the Transit Authority due to participation in methadone maintenance programs. *Id.* at 576.

[92] *Id.* at 582-87. Evidence that black or Hispanic individuals made up 81% of the employees referred to the Transit Authority's medical consultant for suspected drug policy violations revealed nothing about "the racial composition of the employees suspected of using methadone" or about the number of Hispanic, black, or white persons dismissed for methadone use. *Id.* at 585 & n.26. Furthermore, evidence that Hispanic or black persons made up 63% of those enrolled in New York City public methadone maintenance programs provided no information about the number of individuals in treatment programs who worked for or sought employment with the Transit Authority. *Id.* at 585. The Court further stated that

> [t]his statistic therefore reveals little if anything about the racial composition of the class of [Transit Authority] job applicants and employees receiving methadone treatment. More particularly, it tells us nothing about the class of otherwise-qualified applicants and employees who have participated in methadone maintenance programs for over a year—the only class improperly excluded by [Transit Authority's] policy. . . . The record demonstrates, in fact, that the figure is virtually irrelevant because a substantial portion of the persons included in it are either unqualified for other reasons—such as the illicit use of drugs and alcohol—or have received successful assistance in finding jobs with employers other than [the Transit Authority]. Finally, we have absolutely no data on the 14,000 methadone users in the *private* programs, leaving open the possibility that the percentage of blacks and Hispanics in the class of methadone users is not significantly greater than the percentage of those minorities in the general population of New York City.

Id. at 585-86 (footnotes omitted).

[93] *Id.* at 587.

[94] *See supra* notes 84-86 and accompanying text.

[95] *Beazer*, 440 U.S. at 587 n.31.

[96] *Id.*

ployer was immunized from disparate impact liability by evidence that the entire selection process resulted in a racially balanced work force at "bottom line."[97] The Court rejected this possibility in *Connecticut v. Teal*.[98] *Teal* involved a written examination which disproportionately excluded blacks from further promotion consideration.[99] The test was not shown to be job related.[100] Despite the test, blacks as a group were well-represented among the persons ultimately promoted by the employer.[101] Justice Brennan, writing for a majority of the Court, held that the excluded blacks had suffered discrimination under Title VII.[102] The Court reasoned that the test fell within the literal meaning of Title VII.[103] Justice Powell, writing for the dissent, contended that the

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97 Connecticut v. Teal, 457 U.S. 440, 445-51 (1982). In the years following *Griggs*, most lower federal courts considered only the overall effect of a selection process on the minority composition of the employer's work force, or the bottom line impact on minority persons. *See* Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of* Connecticut v. Teal, 20 HARV. J. ON LEGIS. 99, 102 (1983). This fact, together with the difficulties of validating job selection procedures, prompted employers to adopt voluntary affirmative action programs. *Id.* at 102-103; Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 954 (1982). Such programs received Supreme Court approval despite their reliance on race-based selection procedures. *Id.* at 954-55. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979).

In *Weber*, the Court upheld a program which reserved 50% of the positions in a training program for minorities and excluded certain white persons who had more seniority than some of the blacks selected. *Id.* at 197, 204. In response to a claim that the program constituted reverse discrimination, the Court asserted that it would be ironic if an act passed to help minorities "constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Id.* These programs permitted employers to provide employment opportunities to minorities without abandoning their selection procedures or undertaking expensive and uncertain validation efforts. *See* Blumrosen, *supra*, at 102.

98 457 U.S. at 450.

99 *Id.* at 443-45. Four black Connecticut state employees were excluded by their scores on a written examination from further consideration for promotion to permanent supervisory positions. *Id.* at 442-44. They instituted an action against the state, agencies, and officials alleging, *inter alia*, that the defendants "violated Title VII by imposing, as an absolute condition for consideration for promotion, that applicants pass a written test that excluded blacks in disproportionate numbers and that was not job related." *Id.* at 444. The test passing rate for the identified black candidates "was approximately 68 percent of the passing rate for the identified white candidates." *Id.* at 443. These passing rates "indicated a prima facie case of adverse impact upon minorities." *Id.* at 445.

100 *Id.*

101 *Id.* at 444.

102 *Id.* at 451.

103 *Id.* at 448. The Court further stated that a favorable bottom line neither precludes a prima facie case of disparate impact nor provides a defense to such a suit. *Id.* at 442.

majority blurred the distinction between the disparate treatment theory, which protects individuals from the effects of intentional discrimination, and the disparate impact theory, which effectively protects minority groups from the adverse effect of facially neutral criteria.[104] The dissent asserted that the Court had previously considered whether a defendant's total selection process adversely impacted the protected group.[105] Justice Powell speculated that the Court's holding might force employers to choose between "eliminat[ing] tests or rely[ing] on expensive, job-related, testing procedures, the validity of which may or may not be sustained if challenged."[106]

Teal did not discuss whether a plaintiff could use the adverse effect produced by an entire selection process to establish a prima facie case of discrimination.[107] Another issue which had not surfaced in *Griggs* and its progeny was whether a disparate impact plaintiff could attack an employer's use of subjective selection criteria.[108] Both of these issues were partially addressed

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104 *Id.* at 456-57 (Powell, J., dissenting). The Justice stated that in disparate treatment cases, the plaintiff attempts to prove direct, intentional discrimination by the employer against him. *Id.* at 458 (Powell, J., dissenting). In a disparate impact case, Justice Powell maintained, the plaintiff seeks to create an inference that "as a member of [a] disproportionately excluded group, [he] was . . . a victim of that process' 'built-in headwinds.' " *Id.* at 459 (Powell, J., dissenting) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)). The dissent further opined that "[t]here can be no violation of Title VII . . . in the absence of disparate impact on a *group*." *Id.* at 459.

105 *Id.* at 458 (Powell, J., dissenting).

106 *Id.* at 463 (Powell, J., dissenting).

107 *Id.* at 448-52. The ability to rely on such evidence would appear to be essential to a plaintiff unable to identify specific discriminatory criteria in a multicomponent selection process. In an opinion subsequent to *Teal*, Griffin v. Carlin, 744 F.2d 1516 (11th Cir. 1985), the Eleventh Circuit noted that *Teal* did not prohibit disparate impact challenges to entire selection systems. *Id.* at 1524. The court reasoned that limiting disparate impact analysis to cases in which a single selection criterion caused adverse impact exempts situations in which the interaction of several components caused adverse impact. *Id.* at 1525 (citing Gilbert v. City of Little Rock, Ark., 722 F.2d 1390 (8th Cir. 1983) *cert. denied*, 466 U.S. 972 (1984)). *See also* SULLIVAN, ZIMMER & RICHARDS, *supra* note 3, at § 4.2.1.4 (*Teal* suggests that disparate impact analysis applies to bottom line of multicomponent employment systems).

108 Those cases had dealt with "standardized" selection tests or criteria. Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2784-85 (1988) (citing Connecticut v. Teal, 457 U.S. 440 (1982) (written examination); New York Transit Auth. v. Beazer, 440 U.S. 568 (1979) (rule against employing drug addicts); Dothard v. Rawlinson, 433 U.S. 321 (1977) (weight and height requirements); Washington v. Davis, 426 U.S. 229 (1976) (written verbal skills test); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (written aptitude tests); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (written aptitude test and high school diploma)). As a result, lower courts had disputed the applicability of subjective criteria to the disparate impact

in the Court's 1987 plurality opinion of *Watson v. Fort Worth Bank and Trust*.[109] The Supreme Court granted certiorari in *Watson* to determine whether subjective selection devices may be evaluated under the disparate impact model.[110] The Court unanimously answered that particular question in the affirmative.[111] The opinions, however, diverged with respect to articulating the evidentiary standards applicable in such cases.[112] To prevent employers from adopting numerical quotas in response to extending disparate impact analysis to subjective employment practices, the *Watson* plurality explained in detail how evidentiary standards operate to keep disparate impact analysis within proper bounds.[113] To establish a prima facie case, the *Watson* plurality stressed, the plaintiff must identify the specific employment practices that allegedly caused any observed statistical disparities.[114]

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model, *see* Atonio v. Wards Cove Packing Co., 810 F.2d 1480-81 n.1 (9th Cir. 1987) (list of cases), *vacated*, 827 F.2d 439 (9th Cir. 1987), *rev'd*, 109 S. Ct. 2115 (1989), and this topic was the focus of discussion among scholars. *See, e.g*, Bartholet, *supra* note 97 (*Griggs* standards should apply to subjective systems which select individuals for professional employment); Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869 (1985) (disparate impact review of discretionary decisions should accord principled and limited deference to such decisions); Rigler, *Title VII and the Applicability of Disparate Impact Analysis to Subjective Selection Criteria*, 88 W. VA. L. REV. 25 (1985) (subjective criteria are amenable to disparate impact review); Rose, *supra* note 17.

[109] 108 S. Ct. 2777 (1988) (plurality opinion).

[110] *Id.* at 2797 (Stevens, J., concurring).

[111] *Id.* at 2787. The Court determined that the *Griggs* analysis would be of little use to plaintiffs if it was limited to standardized selection practices. *Id.* at 2786. The plurality implied that a subjective employment practice involves exercising personal judgment. *Id.* at 2785. Because a selection system which combined both subjective and objective criteria usually must be considered subjective in nature, the Justices posited, a contrary holding would allow employers to escape a disparate impact challenge merely by incorporating a subjective component into the selection process along with nondeterminative objective criteria. *Id.* at 2786.

The Court added that it would be unreasonable to prevent plaintiffs from using the disparate impact theory where unbridled supervisory discretion could cause the same results as intentional discrimination. *Id.* The Court reasoned that even if actual discriminatory intent did not underlie an employer's decision to use subjective criteria, subconscious prejudices and stereotypes could spark an application resulting in disparate impact. *Id.*

[112] *See id.* at 2790 (O'Connor, J., plurality opinion) (defendant need only produce evidence that legitimate business reasons justify use of controversial employment practices); *id.* at 2794 (Blackmun, J., concurring in part and concurring in judgment) (employer must persuade court that employment practice producing statistical disparity is manifestly related to employment in question); *id.* at 2797 (Stevens J., concurring in judgment) (inappropriate to address evidentiary standards without focusing on particular factual context).

[113] *Id.* at 2788.

[114] *Id.* Justice O'Connor declared that the plaintiff is responsible for providing such evidence especially in situations where an employer uses subjective criteria

Justice O'Connor, writing for the plurality, contended that the plaintiff must also offer statistical evidence sufficient to demonstrate that each challenged practice had resulted in a denial of employment opportunities to individuals because they are members of a protected class.[115]

The *Watson* plurality further stated that an employer need not introduce formal validation studies which reveal that a given criterion, such as a passing score on an objective test, predicts actual job performance.[116] Justice O'Connor also asserted that the plaintiff retains the burden of proof at every stage of the litigation.[117] The plurality explained that, once the plaintiff establishes a prima facie case of disparate impact, the defendant need only produce evidence that legitimate business reasons justified use of the controversial employment practices.[118] The sharply divided *Watson* Court conclusively resolved only that the plaintiff, a black bank employee, could on remand establish a prima facie violation of Title VII by showing that promotion decisions, left to the unfettered discretion of supervisors, adversely impacted her protected class.[119] It was against this background that the Supreme Court decided *Wards Cove Packing Co. v. Atonio*.[120]

The *Wards Cove* majority began its analysis by attacking the statistical comparisons used to establish the plaintiffs' prima facie

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along with more rigid standardized tests or rules. *Id.* The plurality further observed that the Court's earlier formulations, while not mathematically rigid, had consistently stressed the need for substantial statistical disparities to raise an inference of causation. *Id.* at 2789 (citing Connecticut v. Teal, 457 U.S. 440, 446 (1982); New York Transit Auth. v. Beazer, 440 U.S.568, 584 (1979); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Washington v. Davis, 426 U.S. 229, 246-47 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971)).

[115] *Id.* at 2788-89. Justice O'Connor recognized that the defendant's power to introduce evidence which discredited the plaintiff's statistical proof protected the defendant from the potentially harsh effects of expanding disparate impact analysis to subjective criteria. *Id.* at 2789-90. The plurality stated that the defendant may disparage the probative weight of the plaintiff's evidence, impeach its reliability, or offer rebutting evidence. *Id.*

[116] *Id.* at 2790. The Court noted the difficulty of validating discretionary employment decisions, and thus, approved of judicial deference in evaluating such decisions, because courts are typically less competent than employers to alter business practices. *Id.* at 2791.

[117] *Id.* at 2790.

[118] *Id.* The Court added that it sought to prevent employers from enacting quota systems contrary to Title VII's nondiscrimination purpose in order to avoid litigation in which the employer would be unable to defend its selection criteria. *Id.* at 2791.

[119] *Id.* at 2786-87.

[120] 109 S. Ct. 2115 (1989).

case.[121] The Court expressed its preference for ascertaining the percentage of minorities among qualified individuals in the labor market, as compared with persons holding the desired jobs.[122] Justice White, writing for the majority, asserted that the court of appeals erred in finding a prima facie case of disparate impact by comparing the racial composition of the noncannery and cannery work forces.[123] The Court maintained that such a comparison was inappropriate because the cannery work force did not reflect the potential labor force or qualified applicant pool for the jobs at-issue.[124]

The defendant's employment practices, in the Court's view, were not considered to have resulted in a disparate impact on minorities where the absence of such persons holding desired positions was due to an insufficient number of qualified minority applicants for reasons not attributable to any wrongdoing of the defendant.[125] The majority set forth that if Title VII required a racially balanced work force, employers would adopt racial quotas to avoid defending the business necessity of its practices in time-consuming and expensive litigation.[126] The Court stressed that Congress expressly rejected this result in drafting Title VII.[127]

Justice White also criticized the court of appeals for comparing the racial composition of the cannery work force with the racial composition of the unskilled noncannery work force, even though the positions in both required somewhat fungible skills.[128] The Court stated that if the percentage of minority applicants selected for employment was not significantly lower than the percentage of qualified minority applicants, the employer's

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121 *Id.* at 2121-24.

122 *Id.* at 2121. Relying on the case law set forth in New York Transit Auth. v. Beazer, 440 U.S. 568, 585 (1979), and Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977), the Court noted that plaintiffs' prima facie cases can rest on comparison with the racial composition of " 'otherwise-qualified applicants' for at-issue jobs," where "labor market statistics [are] difficult [or] impossible to ascertain," or with " 'figures for the general population [which] accurately reflect the pool of qualified job applicants . . . .' " *Id.* at 2121 n.6.

123 *Wards Cove*, 109 S. Ct. at 2121-22.

124 *Id.* at 2122.

125 *Id.* The majority noted that if evidence suggested that employer practices deterred minorities from applying for at-issue positions, the Court's analysis would be different. *Id.* at 2122 n.7 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977)).

126 *Id.* at 2122.

127 *Id.* (citing 42 U.S.C. § 2000e-2(j) (1982)).

128 *Id.*

selection system probably did not cause a disparate impact.[129] The majority posited that there was no disparate impact regardless of the percentage of minority workers in other segments of the employer's work force.[130] The Court maintained that the class of cannery workers did not reflect the potential labor force for the unskilled noncannery positions, because it was both too narrow and too broad.[131] The class was too narrow, the majority reasoned, because this group excluded all qualified persons who were not cannery workers.[132] The potential labor market for noncannery positions, the Court explained, undoubtedly included persons who were not employed as cannery workers.[133] The class was too broad, Justice White continued, because many of these workers did not seek employment as unskilled noncannery workers, and the evidence did not suggest that the employers' practices deterred them from becoming applicants.[134]

The Court then reaffirmed the *Watson* plurality's insistence that the plaintiff isolate the specific employment practice which created the adverse impact.[135] The majority contended that an employer who engaged in discriminatory practices cannot avoid Title VII liability by showing that his bottom line work force was racially balanced.[136] Similarly, a Title VII plaintiff cannot establish a prima facie case of disparate impact merely by exposing a bottom line racial imbalance in the work force.[137] The Court posited that a contrary ruling would make employers potentially liable for countless innocent causes of racial imbalances in their work forces.[138] The majority opined that liberal discovery rules giving plaintiffs wide access to employers' records, as well as the record-keeping requirements of the EEOC Guidelines, ensure that the specific causation requirement does not unduly burden Title VII plaintiffs.[139]

Turning to the nature of the employer's defense, the major-

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129 *Id.* at 2123.
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.* at 2124.
136 *Id.* (citing Connecticut v. Teal, 457 U.S. 440, 450 (1972)).
137 *Id.* The Court noted that disparate impact analysis has always considered the effect of specific employment practices on minorities. *Id.*
138 *Id.* at 2125 (citing Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2787 (1988)).
139 *Id.* (citing Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 (1988)). The Court explained that the EEOC Guidelines require certain

ity articulated that the dispositive issue was whether the challenged practice significantly served the defendant's legitimate employment goals.[140] The touchstone of this query, the Court declared, was "a reasoned review of the employer's justification for his use of the challenged practice."[141] The majority emphasized that the practice need not be essential nor indispensable to pass muster, as such a level of scrutiny would be extremely difficult to meet.[142] Relying on the authority of the recently decided *Watson* plurality opinion, the Court in *Wards Cove* repeated that the disparate impact plaintiff retains the burden of persuasion throughout disparate impact litigation.[143] Thus, the majority determined that the employer carries only the burden of production with respect to the defense of job relatedness.[144] The Court noted that this allocation of proof comports with standard federal court practice and mirrors the rule applied in disparate treatment cases.[145] The majority acknowledged that earlier opinions could be interpreted otherwise, but suggested that this allocation was required by the statutory language of Title VII.[146] The Court noted that the plaintiff who is unable to prove that a particular selection device is not job related can nevertheless prevail in a disparate impact suit.[147] The plaintiff can accomplish this, the majority set forth, by demonstrating that another employment practice would serve the defendant's legitimate business goals with a less adverse racial effect.[148]

Justice Stevens authored a dissenting opinion in which Justices Brennan, Marshall, and Blackmun joined.[149] Justice Stevens approved of the majority's decision to remand for additional findings of fact, but rejected the Court's conclusion that the

employers to maintain records of the effect of practices on the opportunities for employment of persons by identifiable sex, race, or ethnic groups. *Id.*

140 *Id.* at 2125-26.

141 *Id.* at 2126.

142 *Id.*

143 *Id.* (citing *Watson*, 108 Ct. at 2790).

144 *Id.* Most lower courts had previously held that the employer assumed the burden of persuasion on the justification defense. *See id.* at 2130 (Stevens, J., dissenting).

145 *Id.* at 2126.

146 *Id.* The majority observed that "[t]he persuasion burden here must remain with the plaintiff, for it is he who must prove that it was 'because of such individual's race, color,' etc., that he was denied a desired employment opportunity." *Id.* (citing 42 U.S.C. § 2000e-2(a) (1982)).

147 *Id.* at 2126-27.

148 *Id.*

149 *Id.* at 2127 (Stevens, J., dissenting).

plaintiffs' statistical comparison did not support a prima facie case.[150] While the dissent did not dispute the Court's articulation of the appropriate groups for racial comparisons, it questioned the majority's insistence on precision in defining the relevant labor market.[151] The problem with this approach, Justice Stevens explained, was that it failed to take into account the special circumstances of the particular case.[152] The dissent maintained that by comparing racial compositions within the defendant's work force, the plaintiffs identified a pool of workers possessing both a familiarity with the industry and a characteristic undisputedly required for employment in the jobs at-issue, namely, a willingness to do seasonal work in remote areas of Alaska.[153] Justice Stevens contended that using this labor market for statistical comparisons would be more probative than using the defendants' "untailored" general population, which had ambiguously defined parameters.[154] The dissent acknowledged that while evidence of racial stratification in the employer's work force may not alone establish a prima facie case, it comprises a "significant element" when considered along with other obvious barriers to job opportunities for minorities.[155]

Justice Stevens further disapproved of the majority's requirement that the plaintiff identify the specific selection devices which allegedly caused any statistical disparities.[156] While admitting that the "causal link must have substance," the Justice argued that the act need not be the primary or sole cause of the harm.[157] The dissent claimed that proof of numerous questionable practices ought to strengthen the plaintiffs' claim that the defendants' practices caused racial disparities.[158]

Relying on the principles set forth in *Griggs*, Justice Stevens

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[150] *Id.* at 2133 (Stevens, J., dissenting).

[151] *Id.*

[152] *Id.*

[153] *Id.* at 2134 (Stevens, J., dissenting).

[154] *Id.* at 2134-35 (Stevens, J., dissenting). Justice Blackmun in a short separate dissenting opinion argued that the industry structure rendered all other statistical comparisons meaningless. *Id.* at 2136 (Blackmun, J., dissenting).

[155] *Id.* at 2135-36 (Stevens, J., dissenting). Such barriers, the dissent contended, were the practices of recruiting employees for noncannery jobs from outside the defendants' work force, disseminating information about the availability of at-issue jobs by word of mouth, conducting nepotistic hiring, and maintaining housing and boarding facilities which separated cannery from noncannery workers. *Id.* at 2135 (Stevens, J., dissenting).

[156] *Id.* at 2132 (Stevens, J., dissenting).

[157] *Id.*

[158] *Id.* at 2133 (Stevens, J., dissenting).

rejected the majority's characterization of the defendant's burden in disparate impact cases.[159] Arguing that Title VII is directed to the *consequences* of hiring practices rather than the motivation, the dissent asserted that a facially neutral practice which operates to disqualify minorities is lawful only if it advances a valid business purpose, or, put another way, has a "manifest relationship" to the denied employment opportunity.[160] " 'The touchstone,' " the dissent declared, "is business necessity."[161]

Justice Stevens asserted that the Supreme Court had earlier recognized Congress' intention to place the burden of proof with respect to the job relatedness defense on the employer.[162] The dissent observed that this result is consistent with the order of proof in ordinary civil trials in which the defendant assumes the burden of proof of an affirmative defense once the plaintiff demonstrates harm.[163] In a disparate impact case, Justice Stevens noted, the harm—adverse disproportionate impact of selection criteria on a particular minority group—is proven by the plaintiff's statistical evidence.[164] The dissent explained that, in contrast, the disparate treatment plaintiff appropriately retains the burden of proof at all times.[165] The reason for this, Justice Stevens posited, is that the harm—intentional discrimination—is at issue throughout the litigation.[166]

In a separate dissenting opinion, Justice Blackmun faulted the Court for altering the order of proof, prohibiting the use of racial stratification evidence, and requiring rigid statistical proof of causation.[167] Anticipating harsh consequences resulting from the majority's decision, Justice Blackmun expressed doubt that the majority appreciated the severity of society's longstanding problem with race discrimination.[168]

To one unfamiliar with the development of disparate impact jurisprudence, the *Wards Cove* majority's articulation of eviden-

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159 *Id.* at 2128-33 (Stevens, J., dissenting).

160 *Id.* at 2129 (Stevens, J., dissenting).

161 *Id.* at 2132 (Stevens, J., dissenting) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

162 *Id.* at 2129 (Stevens, J., dissenting) (citation omitted).

163 *Id.* at 2131 (Stevens, J., dissenting).

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.* at 2136 (Blackmun, J., dissenting). Justices Brennan and Marshall also joined this dissenting opinion. *Id.*

168 *Id.*

tiary standards and burdens of proof would appear uneventful. The plaintiff's ability to identify at least one act of the defendant which caused harm assumes a central role in the ordinary civil trial.[169] When injury is defined as unjustifiably using selection methods that adversely affect a protected group, then one would expect the plaintiff to carry the burden of proving both that the employer utilized such practices and was unjustified in doing so.[170] Despite the logical appeal of imposing this traditional litigation structure on disparate impact cases, such an approach contravenes longstanding Title VII precedent and drastically reduces the effectiveness of the disparate impact theory as a weapon against employment discrimination.[171]

One new roadblock to a successful disparate impact suit is the majority's requirement that any statistical comparison used to establish a prima facie case reflect, as closely as possible, the adverse effect of a specific employment practice on particular minority persons who sought an opportunity or would have pursued one but for the employer's challenged practice.[172] In rigidly adhering to this rule, the Court refuses to permit reasonable inferences from somewhat imprecise statistical comparisons, which are often the best available due to factors such as the nature of the industry or questionable employment practices. One such practice may be the employer's failure to keep adequate records of the racial effect of the selection system. Another practice may be the employer's drawing of geographical boundaries that circumvent obvious potential labor pools, and thus reduce the probative value of applicant statistics. Despite evidence that such circumstances in *Wards Cove* forced the plaintiffs to provide, in the majority's view, substandard racial comparisons, the Court summarily disregarded those statistics.[173] In discounting evi-

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169 *See, e.g.*, 2 RESTATEMENT (SECOND) OF TORTS § 281 (1965).

170 *See, e.g.*, *id.* at §§ 328 A, 433 B.

171 Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2136 (1989) (Stevens, J., dissinting); *id.* at 2136 (Blackmun, J., dissenting). Penda Hair of the NAACP Legal Defense and Educational Fund stated that the *Wards Cove* decision "does not make it impossible to prove [disparate impact] cases, but makes it more difficult. The important point about *Griggs* was that once you carried the prima facie case, the burden shifted and it was a tremendous litigation advantage." Stewart, *Civil Rights: Just a Trim?*, 75 A.B.A. J. 40, 44 (Aug. 1989).

172 *Wards Cove*, 109 S. Ct. at 2121-24.

173 *Id.* Justice Stevens noted that the companies in *Wards Cove* kept no statistical personnel records. *Id.* at 2133 n.20 (Stevens, J., dissenting). While the dissent did not suggest that the employers were at fault for their failure to do so, it recognized the difficulty this failure imposed on the plaintiffs. *Id.*

Justice Stevens cited as one questionable employment practice the companies'

dence of a racial disparity between two groups of workers and requiring data on actual applicants for the preferred positions, the Court ignored the likelihood that discriminatory practices— not an indifference to preferred jobs or an inability to perform certain tasks—effectively barred nonwhites from applying for those positions.[174]

Another disquieting aspect of the *Wards Cove* opinion is the majority's requirement that the plaintiff identify the specific discriminatory components responsible for a racial disparity.[175] Lower courts, recognizing that complex multicomponent selection systems could prevent such identification, had permitted plaintiffs to base their prima facie cases on bottom line racial disparities.[176] The *Wards Cove* decision implicitly prohibits such bottom line challenges.[177] On the surface, the plaintiff's burden

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custom of recruiting employees for desirable positions from "outside the work force rather than from lower-paying, overwhelmingly nonwhite, cannery worker positions." *Id.* at 2135 (Stevens, J., dissenting) (citation omitted). The dissent further observed:

> Information about availability of at-issue positions [was] conducted by word of mouth; therefore, the maintenance of housing and mess halls that separate[d] the largely white noncannery work force form the cannery workers, coupled with the tendency toward nepotistic hiring, [were] obvious barriers to employment opportunities for nonwhites. . . . [I]t would be quite wrong to conclude that these practices have no discriminatory consequence.

Id. (footnotes omitted).

174 *Id.* at 2123. The majority failed to notice, as the *Dothard* Court had, that "[t]he application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

175 *Wards Cove*, 109 S. Ct. at 2124-25.

176 *See, e.g.*, Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985); Gilbert v. City of Little Rock, Ark., 722 F.2d 1390, 1396-98 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

177 *Wards Cove*, 109 S. Ct. at 2124-25. Professor Cox noted that the *Watson* plurality, in imposing such a requirement, seemed to preclude attacks on bottom line results of multicomponent selection processes. Cox, *supra* note 3, at 781. He further asserted that the plurality decision's effect on subjective employment practices remained uncertain. *Id.* He observed:

> [A]n attack on a subjective judgment itself founded upon multiple considerations of relative advantage or disadvantage may not be precluded. The judgment, once identified, is a subjective criterion. Less clear is whether the plurality would permit impact theory attacks on standardless delegation of hiring or promotion authority. Arguably, the act of delegation, or the failure to provide a standard for the exercise of delegated authority, are specific criteria that may be challenged.

Id. Another scholar noted that courts were unlikely to require that plaintiffs identify selection practices not defined by the employer and they would simply identify

appears no more foreboding than the employer's inability, as required by *Teal*, to defend a Title VII suit with evidence of a racially balanced bottom line.[178] It is nonetheless inconsistent with the *Teal* Court's seeming determination to expand the Title VII protection afforded to plaintiffs.[179] Furthermore, the majority's requirement permits the adoption of complex systems, such as the one at issue in *Wards Cove*, that cause racial disparities and require no justification.[180] The majority's approach reveals the Court's insensitivity to the importance of battling discrimination with respect to selection of professional employees where complex, discretionary selection systems are most likely to be found.[181]

Perhaps the most startling barrier to a successful disparate impact suit is the employer's limited burden of justifying a challenged criterion.[182] While the Court in *New York Transit Authority v. Beazer* had already indicated that precise statistical correlations between the challenged criteria and success in the at-issue jobs

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the employment practice believed to have caused their adverse treatment. Mertens, Watson v. Fort Worth Bank & Trust: *Unanswered Questions*, 14 EMPLOYEE RELATIONS L. J. 163, 171 (1988).

178 Connecticut v. Teal, 457 U.S. 440, 445-52 (1982). The *Wards Cove* Court, in effect, adopted a mutuality argument. *Wards Cove*, 109 S. Ct. at 2124-25. As explained by one commentator, "the mutuality argument is that if an employer cannot use system statistics to defend against a challenge to an element of that system, then plaintiffs should not be permitted to use system statistics to attack an element or elements of that system." Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799, 830 (1985).

179 *Teal*, 457 U.S. at 448-49. Commentators observed:

> [S]traightforward application of *Teal* would lead to the conclusion that disparate impact analysis does apply to the bottom line of a multicomponent employment system. By showing that blacks are underrepresented in upper level jobs, and overrepresented in lower level jobs, plaintiff would appear to be demonstrating the existence of a barrier to the employment opportunities of blacks. That barrier is the cumulative result of the employer's recruiting, hiring, and promotion practices that blocked blacks from equal access to higher level jobs. After *Teal*, the *Griggs* language concerning employer practices and policies is less important than the showing of barriers to employment opportunities of women and minority males.

SULLIVAN, ZIMMER & RICHARDS, *supra* note 3, at § 4.2.1.4, at 158.

180 *See supra* note 107 and accompanying text.

181 *See* Bartholet, *supra* note 97, at 998-99. Bartholet has noted, however, that regardless of who assumes the burden, the notion of identifying a specific practice is not insurmountable, even in the multicomponent environment, as long as courts employ sophisticated statistical methods and computer technology to determine factors that played a key role in complex, subjective decision making systems. *Id.* at 999-1000.

182 *Wards Cove*, 109 S. Ct. at 2125-26.

were unnecessary,[183] the Court had never before suggested that the plaintiff bears the burden of persuasion on this issue.[184] Because proving, or disproving, the validity of an employer's practice is a difficult and expensive task, placement of that burden on the plaintiff will undoubtedly cause many disparate impact plaintiffs to lose, settle, or decline to bring a suit.[185] In the few cases that survive these preliminary obstacles, plaintiffs will likely need to prove that alternative practices would support the employer's legitimate goals with a less racially undesirable effect.[186]

The *Wards Cove* Court's rationale for its newly articulated evidentiary standards—that they will guard against the compelled adoption of affirmative action programs—is unpersuasive.[187] The *Teal* Court had previously indicated that employers are not immunized from Title VII liability by enacting such plans.[188] The *Wards Cove* majority, apparently recognizing that the *Teal* decision had offered employers unsatisfactory alternatives,[189] ironically extended *Teal*'s logic to impose an equally weighty burden on disparate impact plaintiffs. The Court's aversion to affirmative action programs reflects its misunderstanding of the Civil Rights Act's purpose "to enhance the status of minorities as *groups* in

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183 New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); *supra* notes 93-96 and accompanying text.

184 *Wards Cove*, 109 S. Ct. at 2130 (Stevens, J., dissenting).

185 *See* Kandel, *supra* note 52, at 264. Because the defendant adopted and maintained the challenged practice, one scholar noted, the defendant is better situated to prove, rather than merely articulate, a legitimate business purpose. Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following* Texas Department of Community Affairs v. Burdine, 55 TEMP. L.Q. 372, 395 (1982). Requiring the plaintiff to assume the burden of persuasion with respect to this defense, Smith argued, drastically undercuts his or her ability to prevail. *Id.*

186 The employer can undoubtedly produce some common sense justification for selection practices. Bartholet, *supra* note 97, at 957. Consequently, only a plaintiff who can prove the existence of less discriminatory alternatives will prevail. *Wards Cove*, 109 S. Ct. at 2126-27.

187 *Wards Cove*, 109 S. Ct. at 2122.

188 Connecticut v. Teal, 457 U.S. 440, 445-51 (1982).

189 Professor Blumrosen observed that:

> *Teal* forces the employer to select from among alternatives that are not satisfactory from the perspective of either equal employment opportunity or sound business management. Employers may drop formal selection devices in favor of more subjective procedures. They may divert resources that could otherwise go into training or recruiting into expensive and uncertain validation efforts. Finally, employers may decide that further affirmative action programs are no longer worth the effort since they will not protect employers from direct discrimination suits.

Blumrosen, *supra* note 97, at 103.

American society."[190] Indeed, at least one scholar predicted that *Teal*, in refusing to protect employers that enacted such programs, would stunt efforts to combat employment discrimination.[191] In a similar manner, by virtually shielding employers from Title VII liability, the *Wards Cove* decision reduces the employer's incentive to actively fight employment discrimination and guarantees that it will continue to pervade our society for many years to come.

Emilie M. Meyer

[190] *Id.*

[191] *See id. See also* Bartholet, *supra* note 97, at 957-58 (discussing importance of affirmative action alternative to validation of selection procedures used in professional work forces).