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A Path through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine

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A PATH THROUGH THE MAZE: DISPARATE IMPACT AND DISPARATE TREATMENT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AFTER *BEAZER* AND *BURDINE*†

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I. INTRODUCTION

The Supreme Court has recognized two distinct types of prima facie violations of Title VII of the Civil Rights Act of 1964:[1] disparate impact[2] and disparate treatment.[3] In a disparate impact case the plaintiff attempts to demonstrate that a neutral rule, fair on its face and objectively applied, has a significantly greater effect on persons protected under Title VII than on the majority group.[4] In a disparate treatment case, the plaintiff attempts to demonstrate that he is the victim of intentional, but covert, discrimination.[5] Theoretically, in a disparate impact case the intent of the defendant is irrelevant; in a disparate treatment case it is critical.[6]

Since the Supreme Court's early recognition of the two types of Title VII violations, the Court has failed to clarify several major elements of each case. Most noticeably lacking are articulations of: (1) the relationship between the evidentiary burdens and orders of proof imposed on Title VII litigants, and (2) the relationship between the substantive defenses in each case. The latter problem is compounded by the Court's failure to describe adequately the defenses in either case. Critics assert that the Supreme Court's analysis of disparate impact and disparate treatment cases violates the principles underlying Title VII.[7] In their view, the Court is revolutionizing Title VII on an *ad hoc* basis without attempting to explicate a theory to support its decisions.[8] This article suggests

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[1] 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. III 1979).

[2] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[3] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-02 (1973). Of course, a prima facie case also may be established by showing overt discrimination. In such cases the defendant admits discrimination but offers a statutorily sanctioned excuse. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 332-33 (1977).

[4] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. at 429.

[5] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. at 801 (1973).

[6] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[7] *See, e.g.*, Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979) [hereinafter cited as Friedman]; Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981) [hereinafter cited as Note, *Business Necessity*].

[8] Friedman, *supra* note 7, at 56; Note, *Business Necessity*, *supra* note 7, at 420-21.

that no such revolution is occurring, but rather that the Court's opinions represent an evolution toward an explicable merger of disparate impact and disparate treatment cases.

This article, through an analysis of the relationship between disparate impact and disparate treatment cases, explores the theory that recent Supreme Court decisions foreshadow an ultimate merger of the two types of cases. First, the article examines the development of similar orders of proof in both cases. Next, the substantive defenses to Title VII claims are explored. The recent Supreme Court cases of *New York City Transit Authority v. Beazer,*[9] and *Texas Department of Community Affairs v. Burdine*[10] are analyzed in light of their support for the proposition that the defendant's burden in disparate impact cases is diminishing[11] and thereby merging with that of the disparate treatment defendant. The Court's tendency to blur distinctions between the two defenses is also examined. Finally, while presenting a viable analytic framework which distinguishes the two types of cases, the article suggests a theory and structure for the eventual merger of disparate impact and disparate treatment cases.

II. Disparate Treatment and Disparate Impact — Their Relationship in Supreme Court Opinions

There are relatively few Supreme Court decisions bearing directly on the orders of proof and the substance of defenses in disparate impact and disparate treatment cases.[12] In order to simplify the analysis and resolution of the problems raised by these decisions this article will first analyze the relationship between the orders of proof in disparate treatment and disparate impact cases.[13] The more challenging problem of the relationship of the defenses will then be analyzed.[14] This attempt to separate the relationship issues into distinct compartments is somewhat artificial and is not adhered to rigidly, but is necessary for purposes of clarity.

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[9] 440 U.S. 568 (1979).

[10] 101 S. Ct. 1089 (1981).

[11] For an interesting pre-*Burdine* article containing analysis of this issue see Note, *Business Necessity, supra* note 7.

[12] Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981); New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24-25 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-80 (1978); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425-36 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-07 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 429-32 (1971).

[13] See text and notes at notes 15-51 *infra*.

[14] See text and notes at notes 52-182 *infra*.

A. *Relationship Between the Orders of Proof in Disparate Treatment and Disparate Impact cases*

The Supreme Court gave its judicial blessing to the disparate impact method of proving a violation of Title VII in its seminal Title VII opinion, *Griggs v. Duke Power Company.*[15] In *Griggs* the plaintiff showed that the neutral policies of the employer had a disproportionate impact on blacks by eliminating significantly more blacks than whites from jobs.[16] In the Court's view, this demonstration of disproportionate impact sufficed to require the defendant to show that the practice was related to job performance.[17] In analyzing the defendant's case, the Court sought to determine whether the credentials bore "a demonstrable relationship to successful performance of the jobs for which [they were] used."[18] Under *Griggs*, then, the defendant in a Title VII case must bear the burden of proof once the plaintiff shows disparate impact. There was no suggestion in *Griggs* that the plaintiff would have a further opportunity for rebuttal after the defendant demonstrated job-relatedness.

Two years after *Griggs,* in *McDonnell Douglas Corp. v. Green,*[19] the Court described the allocation of burdens when the plaintiff claims intentional but covert discrimination.[20] The Court first described the plaintiff's initial burden of proof. In order to establish a prima facie case the plaintiff must show:

> (i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he 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.[21]

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[15] 401 U.S. 424 (1971). The employment credentials challenged in Griggs were high school diplomas and intelligence tests. *Id.* at 425-26. The Court found that such criteria perpetuated the effects of prior discrimination. *Id.* at 430. Disparate impact may also result from the application of a rule to the work force after it has been selected. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136, 139-41 (1977).

While *Griggs* was a credentials case involving criteria which perptuated the effects of past discrimination, the disparate impact theory has not been limited to such cases. *See, e.g.*, Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1295 (8th Cir. 1975) (use of conviction records may have disparate impact on blacks); Johnson v. Pike Corp. of America, 332 F. Supp. 490, 493-94 (C.D. Cal. 1971) (garnishment rule may have disparate impact on blacks).

[16] 401 U.S. at 430 & n.6.

[17] *Id.* at 431.

[18] *Id.* For an analysis of the development of this "business necessity" or "job-relatedness" standard by the Supreme Court see text and notes at notes 60-126 *infra.*

[19] 411 U.S. 792 (1973).

[20] *Id.* at 802, 804.

[21] *Id.* at 802.

Although the Court noted in *McDonnell Douglas*,[22] as well as in subsequent decisions,[23] that the stated requirements are not rigid and, indeed, may be adapted to suit various cases, they nonetheless remain valid today.[24]

Once a plaintiff has established a prim facie case, an inference of intentional discrimination is deemed to exist.[25] In order to overcome the plaintiff's prima facie case, *McDonnell Douglas* requires the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[26] In contrast to the *Griggs* decision *McDonnell Douglas* affords the discriminatory treatment plaintiff an opportunity to rebut the defendant's case. To do so the plaintiff must show that the "legitimate, nondiscriminatory reason" was a "pretext or [was] discriminatory in its application."[27] That is, the plaintiff may rebut by showing the employer's reason is a mask to cover intentional discrimination. Although the *McDonnell Douglas* opinion did not lucidly articulate the distinctions between disparate impact and disparate treatment cases per se, the Court did recognize the existence of such distinctions.[28]

In *Albemarle Paper Co. v. Moody*,[29] a disparate impact case decided in 1975, the Court began paralleling the orders of proof in disparate impact and disparate treatment cases. In *Albemarle,* the Court stated that the plaintiff in a disparate impact case also has the opportunity to rebut the employer's defenses.[30] In a case involving discriminatory testing or selection criteria, this rebuttal consists of showing that a substitute device would accomplish the employer's job-related purpose with a less discriminatory impact on the protected class.[31] The *Albemarle* Court stated that such a demonstration would be evidence that the employer was using its criterion merely as a pretext for intentional discrimination.[32] The Court cited *McDonnell Douglas* in support of both the plaintiff's opportunity to rebut the defendant's case and the stated effect of the rebuttal evidence — *viz.*, to show pretext.[33]

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[22] *Id.* at 802 n.13.

[23] *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089, 1092 n.5 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575-77 (1978); International Bhd. of Teamsters v. United States, 431 U.S 324, 358-60 (1977).

[24] *See* Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. at 1094, n.6.

[25] Furnco Constr. Co. v. Waters, 438 U.S. 567, 576-77. The Court made clear in *Burdine* that this inference was the equivalent of a presumption of intent to discriminate. 101 S. Ct. at 1094 & n.7.

[26] 411 U.S. at 802.

[27] *Id.* at 806.

[28] For example, the Court in a footnote distinguished *McDonnell Douglas* from cases where credentials standards have an "exclusionary effect" on minorities. *Id.* at 802 n.14. Later in the opinion the Court described the substance of the plaintiff's claim for relief as providing the distinction between *McDonnell Douglas* and *Griggs*. *Id.* at 805-06.

[29] 422 U.S 405 (1975).

[30] *Id.* at 428.

[31] *Id.*

[32] *Id.*

[33] *Id.*

The *Albemarle* decision provides an interface between disparate treatment and disparate impact cases. The Court has adopted parallel orders of proof by allowing the plaintiff in both cases to have the final opportunity to rebut the defendant's claims by showing that the defendant intentionally discriminated. The *Albemarle* Court failed to explain, however, why proof that the defendant's challenged practice was a pretext for intentional discrimination is relevant in a discriminatory impact case, where — unlike a discriminatory treatment case — the intent of the defendant is not at issue. It could be argued that the existence of an intent to discriminate is always pertinent in a Title VII discrimination case. Accordingly, the disparate impact plaintiff should have an opportunity to bring intent into issue by showing the existence of lesser-impacting methods of accomplishing the employer's acceptable purpose. The *Albemarle* decision was silent, however, on the availability of other methods of showing pretext in disparate impact cases. Absent an explanation by the Court, placing a rebuttal burden on the plaintiff may be either an attempt to create consistency between the orders of proof in disparate treatment and disparate impact cases or a reflection of the Court's view that the distinctions between the two types of cases are not as great as their underlying theories suggest.[34]

The parallel orders of proof established in *Albemarle* were perpetuated by the Court in *Dothard v. Rawlinson,*[35] another disparate impact case. The *Dothard* opinion repeated *Albemarle's* statement that proof of lesser-impacting alternatives which accomplish the defendant's purpose rebut the defense of job-relatedness.[36] Like *Albemarle,* the *Dothard* opinion gave no explanation of why lesser-impacting alternatives are relevant in a disparate impact case or why it is logical to place that burden on the plaintiff. Unlike *Albemarle,* however, the *Dothard* opinion did not state that the lesser-impacting alternatives are relevant because they tend to show pretext. The absence of reference to pretext in *Dothard* may have been a sign that the Court was consciously perpetuating the disparate impact/disparate treatment dichotomy by avoiding the issue of intent. Absent a contrary statement by the Court, proof of the existence of lesser-impacting alternatives need not necessarily raise the issue of the employer's intent. For instance, the existence of such an alternative might suggest that the use of the disputed criterion by the defendant is less necessary than alleged,

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[34] It is notable that a burden of demonstrating the absence of lesser-impacting alternatives was placed on the defendant by many lower federal courts, a fact that was not analyzed by the Court in *Albemarle* or in any subsequent decision. *See, e.g.,* Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1297-98 (8th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 245-46 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 798-800 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971). See also Note, *Business Necessity, supra* note 7, at 397-99; Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII,* 46 U. CHI. L. REV. 911, 920 (1979) [hereinafter cited as Comment, *Business Necessity Defense*].

[35] 433 U.S 321 (1977).

[36] *Id.* at 329.

thereby undercutting the disparate impact defense without putting the defendant's intent in issue. Whatever the implications of such a showing, the *Dothard* Court's imposition of the rebuttal burden preserved the consistency of the orders of proof between disparate impact and disparate treatment cases.

In contrast to *Dothard*, the Supreme Court's 1979 decision in *New York City Transit Authority v. Beazer*[37] clearly established discriminatory intent as an element of the plaintiff's rebuttal in a disparate impact case.[38] The Title VII issues in *Beazer* came before the Court in a peculiar context.[39] The case was originally decided by the district court on the theory of a constitutional violation.[40] It was under Title VII, however, that the district court later awarded attorney's fees.[41] The court based the award on its finding that the defendant's practices were in violation of Title VII.[42] The court of appeals found that the statutory issues had been preempted and affirmed the constitutional analysis.[43] The Supreme Court, compelled to review the statutory issue before reaching the constitutional question, found that even if the plaintiff had established a prima facie case of disparate impact,[44] such a case was overcome by the defendant's job-relatedness defense.[45] The Court apparently assumed that the disparate impact plaintiff would have an opportunity to rebut the defendant's case.[46] To the plaintiff in *Beazer,* however, such an opportunity was meaningless since the issue of intent was decided by the district court in favor of the defendant in the context of the constitutional claim.[47] Since there was an express finding that "the rule was not motivated by racial animus,"[48] the plaintiff could not successfully claim that the rule "was merely a pretext for intentional discrimination."[49]

The *Beazer* decision clearly injected the issue of intentional discrimination into disparate impact cases. No mention was made of the relevance of lesser-impacting alternatives, which seemed to be the rebuttal method prescribed in *Dothard* and *Albemarle.*[50] The decision thus leaves little room to argue that the imposition of a rebuttal burden only serves to give the plaintiff an opportunity to undercut the defense of job-relatedness, without raising the issue of intent.[51]

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[37] 440 U.S. 568 (1979).

[38] *Id.* at 587.

[39] For a more extensive discussion of the *Beazer* case see text and notes at notes 91-126, *infra.*

[40] 399 F. Sup. 1032, 1057-58 (S.D.N.Y. 1975).

[41] 414 F. Supp. 277, 278-79 (S.D.N.Y. 1976).

[42] *Id.* at 278.

[43] 558 F.2d 97, 99-100 (2d Cir. 1977).

[44] The Court was not persuaded by the statistical proof of disparate impact offered. 440 U.S. at 584-87.

[45] *Id.* at 587.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] See text and notes at notes 29-36 *supra.*

[51] A similar conclusion is reached in Note, *Business Necessity, supra* note 7, at 418.

Under *Beazer,* it appears that the inability of the plaintiff to prove discriminatory intent effectively precludes the possibility of rebutting job-relatedness defense. Although the Court apparently assumed intent would be the only issue on rebuttal, it was once again silent on the question of why intent was at issue at all in a discriminatory impact case.

In both disparate impact cases and disparate treatment cases, then, the plaintiff shoulders a burden of rebuttal. The existence of the rebuttal burden (or opportunity, depending upon the party's perspective) in disparate impact cases parallels the rebuttal burden in disparate treatment cases. That the orders of proof are parallel is not startling; it may be logical to have such uniformity. Uniformity is especially warranted if plaintiffs allege both disparate impact and disparate treatment. The more critical relation between the two types of cases, however, is to be found in the substance of the rebuttal. In both disparate treatment and disparate impact cases the plaintiff's rebuttal must focus on the issue of the defendant's intent to discriminate. A focus on the defendant's intent is logical in disparate treatment cases, where intent is the central issue. Its importance in disparate impact cases has yet to be articulated by the Court. Perhaps, as stated earlier, the opportunity to show intentional discrimination should always be available to a Title VII claimant. Whatever the reason behind the Court's decision, its articulation of the rebuttal opportunity's existence is the first and least complicated link between disparate impact and disparate treatment cases. Such a link suggests that, in the Court's view, the distinctions between the cases are not intransigent. Furthermore, as the proceeding analysis will demonstrate, just as the Court has established similar orders of proof in disparate impact and treatment cases, so too has it begun to establish similar substantive burdens of proof in both cases.

B. *Relationship Between Substantive Defenses in Disparate Treatment and Disparate Impact Cases*

Crucial to any analysis of the relationship between disparate impact and disparate treatment cases are the respective burdens of proof imposed upon Title VII defendants. The burdens on the defendant have been labelled as the defense of "business necessity" in disparate impact cases,[52] and "articulating a legitimate non-discriminatory reason" in disparate treatment cases.[53] Careful analysis of recent Supreme Court opinions suggests that decisions in disparate treatment cases have an effect on the defendant's burden in disparate impact cases. These issues will be analyzed in the following order: first, the Court's treatment of the defendant's burden in disparate impact cases will be

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[52] C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 1.5(d), at 53 (1980) [hereinafter cited as SULLIVAN, ZIMMER & RICHARDS].

[53] *Id.*, § 1.2, at 7.

shown;[54] then, the evolution of the defendant's burden in disparate treatment cases will be discussed;[55] finally, the implications of the relationship between the substantive defenses in both types of cases will be analyzed.[56]

1. The Supreme Court's Interpretation of the Defendant's Burden in Disparate Impact Cases — A Diminution of the Defendant's Responsibility

The startling thing about Supreme Court decisions that describe the defendant's burden in disparate impact cases is how little substance they contain.[57] Lower federal court interpretations of the sketchy language in Supreme Court opinions have resulted in a rigorous burden being imposed on the defendants.[58] In the Court's view, however, the defendant's burden in disparate impact cases is less demanding than some lower court opinions[59] would suggest.

In *Griggs v. Duke Power Co.* the Court used both the terms "business necessity"[60] and "related to job performance"[61] (job-relatedness) in referring to the defendant's burden. It has been suggested that the job-relatedness standard is more demanding than the standard of business necessity.[62] Business necessity might justify criteria unrelated to job performance.[63] It has also been suggested that business necessity is a broader-based concept which can be applied when the scrutinized criterion is a business policy of general applicability.[64] In contrast, job-relatedness is a narrower concept which applies in testing cases.[65]

As described in *Griggs v. Duke Power Co.*[66] the defendant's burden is to demonstrate that the allegedly discriminatory selection criteria are a "reasonable measure of job performance."[67] The phrase "business necessity" appeared in *Griggs,* but the reference was in a paragraph that linked the concept to a showing of job-relatedness.[68] What the defendant must show to demon-

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[54] See text and notes at notes 57-126 *infra.*

[55] See text and notes at notes 127-162 *infra.*

[56] See text and notes at notes 164-182 *infra.*

[57] Other commentators have noted the Court's failure to define specifically the defense in disparate impact cases. SULLIVAN, ZIMMER & RICHARDS, *supra,* note 52, at 53-55.

[58] *See* Note, *Business Necessity, supra* note 7, at 386-400, and Comment, *Business Necessity Defense, supra* note 34, at 918-20, 933-34, for an analysis of the lower court development of the business necessity defense.

[59] *See, e.g.,* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

[60] *See* Griggs v. Duke Power Co., 401 U.S. at 431.

[61] *Id.*

[62] *See* SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, § 1.5(d), at 54.

[63] *Id.*

[64] Note, *Business Necessity, supra* note 7, at 388-89.

[65] *Id.*

[66] 401 U.S. 424.

[67] *Id.* at 436.

[68] *Id.* at 431. For analysis of the possible distinction between "job-related" and "business necessity" standards, *see* SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, § 1.5(d), at 54; Note, *Business Necessity, supra* note 7 at 387-91.

strate job-relatedness may be gleaned from the Court's statements that Duke Power's failure to study the relationship of the criteria it used to actual job performance was fatal to its defense.[69] According to *Griggs,* the burden is on the employer to show "that any given requirement [has] a *manifest* relationship to the employment in question."[70] In *Griggs,* then, the burden placed on the defendant was that of proving to the Court's satisfaction that the requirement did in fact substantially relate to job performance.[71] The defense of business necessity has grown from use in the testing and selection criteria context of *Griggs* to application in all disparate impact cases.[72] While the lower courts were charting more particular standards for the defense,[73] post-*Griggs* Supreme Court decisions instead charted an uncertain course through the seas of business necessity.

Albemarle Paper Company v. Moody,[74] the next disparate impact case faced by the Court, required greater analysis of the method by which the defendant can attempt to demonstrate a correlation between test results and job performance in order to establish a job-relatedness defense.[75] The defendant in *Albemarle* attempted to demonstrate that the tests were in fact a *reasonable* measure of job performance.[76] The Court applied the job-relatedness standard of *Griggs*[77] and ruled that the company's use of slipshod methods of test validation did not demonstrate a sufficient correlation with job performance to constitute a Title VII defense.[78] It would be reasonable to expect that a Court so rigorous in demanding proof of job-relatedness in testing cases[79] would be equally rigorous in other disparate impact cases. In fact, however, the Court has never again dealt so explicitly with the substance of the defendant's burden in disparate impact cases.

In its 1977 decision in *Dothard v. Rawlinson*,[80] the Court recited the *Griggs* language that the defendant has the "burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question."[81] In a footnote, however, the Court stated that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."[82] This footnote suggests that something more

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[69] 401 U.S. at 431.

[70] *Id.* at 432 (emphasis added).

[71] *Id.*

[72] See note 58 *supra.*

[73] *Id.*

[74] 422 U.S. 405 (1975).

[75] *Id.* at 425-36.

[76] *Id.* at 429-30.

[77] *Id.* at 425.

[78] *Id.* at 431-35.

[79] The Court in *Albemarle* ratified the EEOC Guidelines, 29 C.F.R. § 1607.1-1607.18 (1981), relating to employment test validation studies. 422 U.S. at 430-31. The Court applied the guidelines to the validation study in *Albemarle* and detailed the various ways in which the study was "materially defective." *Id.* at 431-36.

[80] 433 U.S. 321 (1977).

[81] *Id.* at 329 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

[82] 433 U.S. at 331 n.14.

than mere job-relatedness must be shown by the defendant before his burden is met. The Court in *Dothard* found that the burden was not met because the employer had failed to introduce evidence directly correlating the challenged criteria (minimum height and weight) with job performance.[83] The opinion clearly stated that the defendant's burden is to establish this correlation between the criteria and job performance and, in the Court's view, the record fell far short of the requisite demonstration.[84] Justice Rehnquist's concurrence was more restrained and suggested instead that a mere articulation of a job-related reason should be sufficient to defeat the plaintiff's prima facie case.[85]

The distinction between the standard delineated by the *Dothard* majority and that propounded by Justice Rehnquist's concurrence is noteworthy. There is a significant difference between establishing a correlation between a challenged practice and job performance by an offer of proof, and merely asserting that such a correlation exists. Although more than a bare assertion in the complaint might be necessary to establish the defendant's burden under Justice Rehnquist's standard, it is clear that a burden of proof would not be placed on the defendant. At most, the defendant would have a burden of producing evidence on the question of job-relatedness. In contrast, the *Dothard* majority opinion suggests that the burden placed on the defendant in a disparate impact case is a burden of proof.[86] That is, in order to persuade the Court that the challenged criterion is legitimate, the defendant must show, not merely assert, a sufficient relationship between the allegedly discriminatory criterion and the job for which it is used, or present the business reason which compels its use.[87]

The *Dothard* majority's statement that the defense is required to show that the challenged criteria are necessary for the safe and efficient operation of the business reinforces the rigorousness of its standard.[88] Although the proposition

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[83] *Id.* at 331.

[84] *Id.* at 332.

[85] *Id.* at 339 (Rehnquist, J., concurring). Justice Rehnquist referred specifically to the *McDonnell Douglas* disparate treatment opinion to support his standard. *Id. See* Note, *Business Necessity, supra* note 7, at 410-11.

[86] 433 U.S. at 329.

[87] The burden of proof guideline is not especially helpful in defining the substance of the defense in other than testing or credentials cases. *Dothard* was cited with approval in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), where the Court stated that neutral policies which had a disparate impact on women might stand if "a company's business necessitates [their] adoption." *Id.* at 143. The company's seniority system and its impact on women was the rule challenged in *Satty*. *Id.* at 138. In a footnote, the Court suggested that economic and efficiency interests of the firm as reflected in efficient job performance may be critical. *Id.* at 143 n.5. The failure of Nashville Gas Company to enter any proof of business necessity, however, precluded the Court from engaging in a meaningful exposition of what would be considered a business necessity. *Id.* Since *Satty* involved neutral rules which were *not* selection criteria, it is particularly unfortunate that the Court was denied the opportunity to analyze further the substance of the defense. In Note, *Business Necessity, supra* note 7, at 404, 410, the author pointed out that the Court, in business necessity cases, often has been denied the opportunity to analyze the magnitude of the defendant's burden because frequently the defendant offers no proof of the need for the challenged criteria.

[88] 433 U.S. at 331 n.14.

did not have a source in prior Supreme Court decisions and, indeed, the Court cited no case in support of it, it was typical of the formulations found in some lower federal court opinions.[89] *Dothard* leads to the conclusion that the Court was implicitly sanctioning the defense as posited by the lower federal courts,[90] while continuing to give a rebuttal opportunity to the plaintiff.

The Supreme Court's 1979 decision in *New York City Transit Authority v. Beazer*,[91] however, substantially undermined the rigorousness of the defense in disparate impact cases. The plaintiffs in *Beazer* challenged the validity of a Transit Authority anti-narcotics rule. The rule excluded users of methadone, a drug used in supervised programs to remove dependence on illicit drugs, from all jobs in the Transit Authority.[92] Some Transit Authority jobs involved the safety of the employee or others;[93] other jobs were not safety-critical.[94] Despite evidence that most methadone users who had been in a methadone program for one year were free from drug use,[95] the Transit Authority applied its anti-narcotic rule to exclude *all* methadone users from *all* jobs.[96] In 1975, the district court held this broad application of the anti-narcotics rule to be without rational basis, and in violation of the equal protection clause.[97] Apparently the district court thought that it would be constitutional to exclude all methadone users from *some* jobs, but not all methadone users from all jobs.[98] One year later, in awarding attorneys' fees, the district court held that the rule's disparate impact on blacks and hispanics[99] constituted a violation of Title VII.[100]

On appeal, the Second Circuit affirmed on constitutional grounds but did not analyze the Title VII issue.[101] Upon review, the Supreme Court majority

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[89] A classic lower federal court formulation of the defense appears in Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971):

> Collectively these cases conclusively establish that the 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.

Id. at 798 (footnotes omitted). See also note 58 *supra*.

[90] *See* Note, *Business Necessity*, *supra* note 7, at 401.

[91] 440 U.S. 568 (1979).

[92] *Id.* at 571-72, 577.

[93] *Id.* at 571.

[94] *Id.*

[95] *Id.* at 575-76, 575 n.9.

[96] *Id.* at 571-72.

[97] 399 F. Supp. 1032, 1057-58 (S.D.N.Y. 1975).

[98] *Id.* at 1058.

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

[100] *Id.* at 278.

[101] 558 F.2d 97, 99-100 (2d Cir. 1977). The court of appeals declined to reach the Title VII issue because it found attorney's fees awardable under the Civil Rights Attorney's Fees

criticized the lower court for resolving the constitutional issue prior to the statutory claim.[102] Instead of remanding to the Court of Appeals on the Title VII issue, however, the Supreme Court proceeded to issue an opinion on the merits.[103]

Initially, the opinion attacked the validity of the statistics found by the lower court to establish a prima facie case under the disparate impact theory.[104] The Court's dismissal of the Title VII claim, however, did not rest solely on the weakness of the prima facie case.[105] In a one-sentence conclusion the opinion stated that the application of the anti-narcotics rule to exclude *all* methadone users from *all* jobs was "job related."[106] Therefore, even if the plaintiff had made out a prima facie case, a valid defense existed. This conclusion was supplemented by a short, one-paragraph footnote.[107]

The standard applied to excuse the Transit Authority's rule in *Beazer* is not as demanding as that in the majority opinion in *Dothard*; indeed, it is similar to Justice Rehnquist's concurrence in *Dothard*.[108] In fact, the Court did not cite *Dothard*, its most recent explication of the defense in disparate impact cases. Instead, it referred to *Griggs* and *Albemarle* for the general "manifest relationship to the employment in question" formulation of the defense burden found in those early disparate impact cases.[109] The Court's logic, as set forth in a footnote, was that (a) the safety goals of the employer require the Transit Authority to exclude all narcotics users and a majority of methadone users; (b) all methadone users could be excluded from "safety sensitive" jobs; (c) the safety goals are served by totally excluding all methadone users from all jobs; (d) therefore, the rule as applied is manifestly related to the employment in question.[110]

The majority's approach to the standard of the defense in *Beazer* was attacked by Justice White in dissent.[111] For Justice White it was "insufficient" that the whole rule had "some relationship to the employment" because part of the rule did not.[112] Like the majority, the dissent did not cite to *Dothard*, but harked back to *Griggs* and *Albemarle*.[113] The dissent's view was that since the defendant did not show that a "higher quality labor force"[114] would result from

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Award Act of 1976, 42 U.S.C. § 1988, which was passed before the lower court decree became final. 558 F.2d at 99-100.

[102] 440 U.S. at 582.

[103] *Id.* at 582-83. The failure of the Court to remand the Title VII issue has been criticized elsewhere. *See* Friedman, *supra* note 7, at 51.

[104] 440 U.S. at 584-87.

[105] *Id.* at 587.

[106] *Id.*

[107] *Id.* at 587 n.31.

[108] See text and note at notes 85-87.

[109] 440 U.S. at 587 n.31.

[110] *Id.*

[111] *Id.* at 597, 602 (White, J., dissenting).

[112] *Id.*

[113] *Id.*

[114] *Id.*

the application of the rule, that such quality was necessary, *or* that "the cost of making individual decisions . . . was prohibitive,"[115] the defense of job-relatedness/business necessity had not been established.[116]

Contrary to the *Beazer* majority view, the standard imposed in *Griggs v. Duke Power Co.* does not uphold the Transit Authority rule. The problem with the *Beazer* interpretation of the defense is that it allows an employer to exclude all persons with a particular characteristic, or lack thereof, from all jobs because most of the persons with that characteristic cannot perform some jobs. Taken to a logical extreme, such a rationale would permit a university to require a college degree for all university jobs, from full professor to maintenance crew, on the theory that most or all persons without a college degree could not perform the job of instructor. If the criterion in question does not have a disproportionate impact on a protected class, of course, the employer may require any peculiar thing he wishes of his employees. Prior to *Beazer,* however, if the criterion did have a disparate impact, the defendant was required to prove the existence of a reason which necessitated the criterion.[117] The reason described above would have been too broad to have met this standard. The standard may have excused the exclusion of all persons without a college degree from any teaching position. Across the board exclusion of all these persons from all jobs, however, would be at odds with the purpose of Title VII[118] unless the defendant could demonstrate some additional explanation for their exclusion. The requirement of this additional explanation in discriminatory impact cases was made by cases like *Griggs, Albemarle* and *Dothard,* but not dealt with in *Beazer.* The departure in the *Beazer* reasoning from that in *Griggs* is clear. *Griggs* requires the employer to use selection criteria which measure "the person for the job and not the person in the abstract."[119] The thrust of *Griggs* is that individualized determinations must be made whenever possible. The *Beazer* Court abandoned that objective by allowing a rule with a "readily identifiable and severable" element unrelated to job performance to survive a Title VII discriminatory impact challenge.[120]

Arguably, the analysis of the defense in *Beazer* was not perceived by the majority as critical to the decision. This would excuse its careless treament.

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[115] *Id.*

[116] *Id.*

[117] See text at notes 113-16 *supra.*

[118] In Griggs v. Duke Power Co. the Court addressed this issue generally:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

401 U.S. at 433.

[119] *Id.* at 436.

[120] 440 U.S. at 602 (White, J., dissenting).

Since in the Court's view the statistical evidence seemed to be insufficient to establish disparate impact[121] the Court's analysis of the "defense" presented by the Transit Authority was not a necessary element of the decision. The Court devoted pages to analyzing the weakness of the prima facie case[122] and only a paragraph to the defense that was presented.[123] Its conclusion is most accurately stated as a finding that the plaintiff did not carry the ultimate burden of persuading the Court that there had been a Title VII violation.[124] In addition, the Court viewed the lower court's finding of a Title VII violation as only an "afterthought" in order to ensure the plaintiff's attorneys' fees.[125] This probably did not dispose the Court to view the Title VII claim hospitably. Finally, it is possible that the Court believes that the burdens placed on the Transit Authority to separate acceptable from unacceptable methadone users, and to monitor those users over the course of their employment, would be great, and that requiring such individual determinations might compromise the safe performance of the jobs in question.[126] In sum, the substance of the defense might have been better explained by the Court. The Court's choice not to do so may imply that this was not the critical aspect of the opinion, and that its treatment of the defense did not signal the application of a new standard.

In spite of this possibility, *Beazer* nevertheless suggests a diminution in the defendant's burden in disparate impact cases. It ignored seemingly inevitable precedent such as *Dothard*; it misapplied the standards of the cases that were cited, such as *Griggs*; and it relegated the analysis of the defense to a footnote. If the Court intends to establish a less demanding defense in disparate impact cases than that posited in *Griggs* and *Dothard,* and applied by the lower federal courts, it should do so explicitly with an explanation for the change. Nevertheless, this diminution of the defendant's burden in *Beazer* can be read as a signal to the federal courts hearing disparate impact cases — a signal that becomes clearer when amplified by the evolution of the defendant's burden in disparate treatment cases in Supreme Court opinions.

2. The Evolution of the Defendant's Burden in Disparate Treatment Cases — Implications for Disparate Impact Cases

In *McDonnell Douglas Corp. v. Green*[127] the Supreme Court stated that the defendant's burden in a disparate treatment case is to "articulate some legitimate nondiscriminatory reason for the employee's rejection."[128] This descrip-

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[121] 440 U.S. at 584-87.

[122] *Id.*

[123] *Id.* at 587 & n.31.

[124] *Id.* at 587 n.31.

[125] *Id.* at 582.

[126] For a description of the jobs in question *see id.* at 571 & n.2. It has been noted that courts are less demanding of employers when the challenged criteria are alleged to ensure the public from a safety risk. SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, § 1.5(d), at 56-57.

[127] 411 U.S. 792 (1973).

[128] *Id.* at 802.

tion of the defendant's burden raises two questions. First, how much evidence must the defendant introduce in order to meet his burden of articulating a nondiscriminatory reason?[129] Second, what sort of reason will the court recognize as a legitimate nondiscriminatory one? The problem of how much the defendant must show to "articulate a legitimate non-discriminatory reason" vexed lower federal courts, some of which assumed that the burden placed on the defendant was a burden of proof.[130] The controversy continued until the Supreme Court's recent decision in *Texas Department of Community Affairs v. Burdine.*[131] The implications of the evolutionary course followed by the Court on its way to *Burdine,* a disparate treatment case, are crucial, however, for an understanding of the defense in disparate impact cases.

Two pre-*Burdine* decisions paved the way for the ultimate resolution of the quantum of proof controversy. The Supreme Court's 1979 decision in *Furnco Construction Company v. Waters,*[132] a disparate treatment case, suggested that the defendant's burden was "merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race."[133] The Court's *per curiam* opinion the next term in *Board of Trustees of Keene State College v. Sweeney*[134] forebode a clarification of the defendant's burden that was manifested in the 1981 *Burdine* decision. In *Sweeney,* a two-paragraph opinion remanding the case to the court of appeals,[135] the Court stated that the standard required by *Furnco* was that of articulating some nondiscriminatory reason, not proving "the absence of discriminatory motive," which the majority thought might have been the standard applied by the lower court.[136] The

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[129] For an excellent analysis of the ambiguities in evidentiary issues created by the Supreme Court in disparate treatment cases prior to Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981), *see* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases,* 32 STAN. L. REV. 1129 (1980) [hereinafter cited as Mendez].

[130] *Compare, e.g.,* Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980) (burden placed on defendant is burden of proof) *with* Loeb v. Textron, Inc., 600 F.2d 1003, 1011-12 (1st Cir. 1979) (burden placed on defendant is burden of production). *See* Mendez, *supra* note 129, at 1135-39; Friedman, *supra* note 7, at 4-6. Prior to *Burdine,* as Professor Mendez discussed in his article, the plaintiff's prima facie case created a presumption of intentional discrimination. Mendez, *supra* note 129, at 1149-50. Although the Court has not expressly used the term "presumption," the thrust of the opinions strongly suggested that a presumption was created. *Id.* The existence of the presumption was made explicit in *Burdine.* 101 S. Ct. at 1094 & n.7. The remaining issue was what burden the presumption placed on the defendant. Did it require the defendant to produce "some evidence[,] . . . substantial evidence. . . . [o]r [did it] shift the burden of persuasion . . .?" Mendez, *supra* note 110, at 1144. Despite cogent arguments that the burden of persuasion on the issue of intent should be on the defendant who has better access to such information, *id.* at 1157-61, the common view was that the defendant's burden on that issue is only one of production. *Id.* 1151-53. The decision in *Burdine* made clear that the defendant's burden is a burden of production of a legitimate nondiscriminatory reason for his action. 101 S. Ct. at 1094-96.

[131] 101 S. Ct. 1089 (1981).

[132] 438 U.S. 567 (1978).

[133] *Id.* at 577.

[134] 439 U.S. 24 (1978).

[135] *Id.* at 25.

[136] *Id.* at 24-25 & n.1.

Court suggested that all the employer need do to defend successfully in a disparate treatment case is provide an "explanation" of his behavior.[137] Requiring the defendant to prove the absence of discriminatory motive, said the Court, would merge the defendant's burden with the plaintiff's rebuttal burden.[138]

The dissent in *Sweeney* criticized the majority for reading *Furnco* as having changed the standard of defense for disparate treatment cases.[139] The dissent noted that while the defendant's burden in a disparate treatment case is a burden of production, the burden of persuasion remains on the plaintiff throughout.[140] The dissent was concerned with the manner in which the defendant met his burden — how could articulation differ from proof?[141] The answer to the question posed by the dissent in *Sweeney* was resolved, along with several other points, in the Court's unanimous opinion in *Burdine* the next term.

The *Burdine* decision made explicit several points which were implict in earlier disparate treatment cases. First, the Court made clear that the plaintiff's prima facie case creates a presumption of intentional discrimination by the defendant.[142] As the Court stated in *Furnco* and repeated in *Burdine,* the plaintiff's case "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."[143] The term "presumption," however, had not been used in *Furnco. Burdine* clearly stated that the "inference" referred to in *Furnco* is in fact a rebuttable presumption.[144]

The Court also determined that the effect of this presumption of intentional discrimination is to shift the burden of production, not the burden of persuasion, to the defendant.[145] The Court recognized that the burden on the defendant is identical to that described in the majority and dissent in *Sweeney.*[146] The burden of production is met if the defendant raises "a genuine issue of fact" as to whether its action was motivated by discriminatory reasons.[147] In the Court's own words, the defendant must produce "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."[148] This statement answered the question posed by the dissent in *Sweeney* as to how the defendant could meet his burden. The burden is met by producing sufficient evidence to

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[137] *Id.* at 25 n.2.
[138] *Id.* at 24 n.1.
[139] *Id.* at 25-29 (Stevens, J., dissenting).
[140] *Id.* at 29.
[141] *Id.* at 28-29.
[142] 101 S. Ct. at 1094-95 & n.7.
[143] *Id.* at 1094 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. at 577).
[144] 101 S. Ct. at 1094-95.
[145] *Id.*
[146] *Id.* at 1095.
[147] *Id.* at 1094.
[148] *Id.* at 1096.

undercut the presumption of discrimination even without ultimately persuading the Court of the absence of any discriminatory motive. In the Court's view, this burden of production both requires the defendant to meet the plaintiff's prima facie case and gives the plaintiff a fair opportunity for rebuttal.[149] The amount or quality of the defendant's evidence must be "evaluated by the extent to which it fulfills these [two] functions."[150]

An analysis of the *Burdine* Court's discussion of the burdens of proof and production in disparate treatment cases, suggests that the minimal nature of the defendant's burden is a fair consequence of the ease with which the plaintiff establishes a prima facie case.[151] Apparently, since little is required to create the presumption of discrimination, fairness compels that little be required to overcome the presumption. The rationale behind the Court's description of the defendant's burden in *Burdine* raises important implications for disparate impact cases.

Although the *Burdine* opinion focuses solely on disparate treatment cases, where intentional discrimination is the "elusive factual question,"[152] there is some reason to expect that its effect will be felt in disparate impact cases as well. First, although the *Burdine* Court recognized distinctions between the factual issues in disparate impact and disparate treatment cases, those distinctions were described as differences in the "character of the evidence presented."[153] The Court did not analyze how the differences in factual issues between the two types of cases might relate to the evidentiary burdens placed upon the parties. Nevertheless, the implication in *Burdine* remains that the nature of the defendant's burden in a Title VII case is a response to the degree of hardship imposed upon the plaintiff to establish his prima facie case.[154] This principle may have important ramifications in disparate impact cases.

In *Dothard v. Rawlinson*,[155] the Court described the plaintiff's burden in disparate *impact* cases thus: "[A] plaintiff need *only show* that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern."[156] In *Dothard* the plaintiff demonstrated the disparate impact of minimum height and weight restrictions on women by using "generalized national statistics."[157] The Court accepted such a showing.[158] In *Griggs v. Duke Power Co.*, the plaintiff used statewide census figures to demonstrate the disparate impact of a high school diploma requirement on blacks.[159] Although proving disparate impact sometimes may require sophisticated statistical

[149] *Id.* at 1095.
[150] *Id.*
[151] *Id.* at 1094.
[152] *Id.* at 1094 n.8.
[153] *Id.* at 1093 n.5.
[154] *Id.* at 1094.
[155] 433 U.S. 321 (1977).
[156] *Id.* at 329 (emphasis added).
[157] *Id.* at 329-30 & n.12.
[158] *Id.* at 330-31.
[159] 401 U.S. at 430 n.6.

analysis,[160] as in *Dothard* and *Griggs*, the plaintiff's burden may properly be described as "not onerous." If it is the non-onerous nature of the plaintiff's burden in disparate treatment cases that mandates a reduced burden on the defendant, it seems reasonable to anticipate a parallel diminution of the defendant's burden in cases where the plaintiff need only show disparate impact.

Not only is it logical to expect that the substance of the *Burdine* defense may be extended to disparate impact cases, but the Court's reasoning in *Sweeney* further supports such an extension. The *Sweeney* Court reasoned that proof of the absence of discriminatory motive should not be required of the defendant since such a requirement would effectively merge the plaintiff's rebuttal burden into the defendant's burden.[161] Since the plaintiff in disparate impact cases also has a rebuttal burden, which the Court insists must focus on the defendant's intent,[162] the reasoning in *Sweeney* is equally applicable to such suits. Thus, the Court may find that a disparate impact defendant's burden should be downgraded, since imposing a stricter burden may supplant the plaintiff's rebuttal burden.

In sum, the Court's treatment of the defendant's evidentiary burden in disparate treatment cases raises important implications for disparate impact cases as well. If the defendant's burden of proof in disparate treatment cases is in part a function of the rigorousness of the plaintiff's prima facie case, the burden of proof imposed on the disparate impact defendant might be expected to be subjected to the same standard. In addition, since the disparate treatment plaintiff's burden on rebuttal does not require the defendant to establish the total absence of discriminatory motive on his part, it seems reasonable to assume that the disparate impact defendant need not make such a showing either since intent has been held to be a crucial element of the plaintiff's rebuttal in disparate impact cases also. Furthermore, the application of principles used in disparate treatment cases to disparate impact cases reinforces the reading of *Beazer* as marking a diminution in the disparate impact defendant's burden of proof.

3. Relationship between the Substance of the Defendant's Burden in Disparate Treatment and Disparate Impact Cases

The Court's view of the substance of the "legitimate nondiscriminatory reason" standard is instructive in discerning the relationship between disparate impact and disparate treatment cases. Although the *Burdine* opinion stated

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[160] Much has been written on this subject. *See, e.g.*, D. BALDUS & R. COLE, STATISTICAL PROOF IN DISCRIMINATION CASES (1980); SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, § 1.8; Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977); Smith & Abram, *Quantitative Analysis and Proof of Employment Discrimination*, 1981 UNIV. OF ILL. L. REV. 33.

[161] 439 U.S. at 24 n.1.

[162] See text and notes at notes 37-51 *supra*.

that the defendant in a disparate treatment case need only raise a question of fact concerning the existence of a legitimate nondiscriminatory reason, not prove its existence,[163] the opinion never did define just what constitutes a legitimate nondiscriminatory reason. Nevertheless, a view of the Court's definition of a "legitimate nondiscriminatory reason" may be gleaned from the contexts in which the standard has been applied in disparate treatment cases. In *McDonnell Douglas*, for example, the plaintiff's involvement in criminal activity directed at the defendant was found to be a legitimate nondiscriminatory reason for the defendant's failure to rehire the plaintiff.[164] In *Furnco,* the defendant argued that his desire to hire employees "whose capability had been demonstrated to defendant's . . . superintendent" should overcome the plaintiff's case.[165] Although the Supreme Court did not expressly find that this was a legitimate, nondiscriminatory reason, it did not reject the possibility that the court of appeals, on remand, could so deem it.[166] The *Furnco* opinion further suggested that for a reason to be deemed legitimate, it should be related to the employer's business goals.[167] This proposition was bolstered by statements in *McDonnell Douglas* that both the defendant and society share the goal of assuring "efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."[168]

For the employer's reason to be deemed sufficient to overcome the presumption against him in a disparate treatment case, then, it must have a connection with the business goal of securing a competent and trustworthy work force.[169] As analyzed earlier, the employer's interest in competent and trustworthy workmanship also underlies the job-relatedness or business necessity defense in disparate impact cases.[170] The point towards which the defendant should direct his evidence in both disparate treatment and disparate impact cases is, therefore, the ultimate relationship between the two defenses, and perhaps a ground for merging them. In fact, the Court in *Albemarle,* a disparate impact case, cited the *McDonnell Douglas* reference to the defendant's interest in trustworthy workmanship as being relevant to the plaintiff's rebuttal burden in disparate impact cases.[171]

At one level, then, the defenses are similar though they arise in distinct factual contexts. The defendant in a disparate treatment case must produce evidence of a legitimate business-related reason which could explain behavior

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[163] 101 S. Ct. at 1096.

[164] 411 U.S. at 802-03 & n.17.

[165] 438 U.S. at 574.

[166] *Id.* at 578.

[167] *Id.* at 577.

[168] 411 U.S. at 801.

[169] *See* Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964,* 66 IOWA L. REV. 63, 102 (1980).

[170] See text and notes at notes 57-126 *supra.*

[171] 422 U.S. at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. at 801).

that otherwise appears discriminatory. The defendant in a disparate impact case must show a job-related need for a rule or criterion which adversely affects persons protected under Title VII. As noted earlier these reasons are based upon the business goals of the employer. The major distinction between the substance of the respective defenses is the degree of clarity with which the defendant must demonstrate the connection between the business goal and the challenged practice. As earlier analysis indicated, the defendant's burden in disparate treatment cases is now to produce evidence that will raise a genuine issue of fact or doubt on the question of his actual motivation.[172] In contrast, the pre-*Beazer* disparate impact defendant must establish the correlation between the challenged criteria and job performance. The above analysis[173] suggests that in disparate impact cases, the defendant's burden eventually may be reduced to a requirement that he produce evidence that will raise a genuine issue as to the necessity of the challenged practice.[174]

Justice Rehnquist's majority opinion in *Furnco* supports this implication. In *Furnco,* the Court accepted without comment the district court's finding that the prima facie case of *disparate treatment* was overcome by a demonstration of *business necessity.*[175] Although an excuse which rises to the level of business necessity certainly would meet the standards of a legitimate nondiscriminatory reason even prior to *Burdine,* allowing the district court's confusion of defenses to pass without comment suggests that the Court does not recognize any distinctions between the defenses, but rather views them as interchangeable. This view is consistent with Justice Rehnquist's opinion in *Dothard,* a disparate impact case which described the defendant's burden in language which could have been extracted from *Burdine,*[176] a disparate treatment case.

Despite its recognition of the theoretical distinctions between disparate treatment and disparate impact cases,[177] the Court has never been forced to articulate the importance of these distinctions in terms of the defendant's burdens. In this context, parroting the lower court's finding of business necessity in a disparate treatment case suggests a blurring of the distinctions between disparate impact and disparate treatment defenses. Because proving

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[172] See text and notes at notes 145-51 *supra.*

[173] See text and notes at notes 152-71 *supra.*

[174] Justice Rehnquist's concurrence in Dothard v. Rawlinson, 433 U.S. at 339, and the majority opinion in New York City Transit Authority v. Beazer, 440 U.S. at 587, implied such a diminution of the defendant's burden. In *Dothard* Justice Rehnquist stated that, in his view, the defendant's burden is to "advance job-related reasons for the qualification," and described this burden as met by "offering evidence or by making legal arguments," *i.e.,* the burden articulated in *Burdine.* 433 U.S. at 339 (Rehnquist, J., concurring).

[175] 438 U.S. at 573.

[176] *Compare* Dothard v. Rawlinson, 433 U.S. at 329 *with* Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. at 1094.

[177] *See* Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. at 1093 n.5; International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15; McDonnell Douglas Corp., v. Green, 411 U.S. at 806.

business necessity is more difficult than establishing the absence of discriminatory intent, the inevitable result of a blurring of the distinctions is a diminution of the substance of the defense in disparate impact cases.

The business necessity defense in *Furnco*[178] was apparently grounded in the employer's claim that (a) the failure to hire qualified persons would create a serious problem, as it would for most employers, and (b) using another method would not assure the hiring of qualified persons.[179] Despite the lower court's acceptance of the defense, it does not seem to meet the standard of business necessity, since the defendant did not demonstrate that the safe and efficient operation of the business required this hiring method. Therefore, despite the lower courts conclusion, it appears that although the defendant had a business necessity for a qualified work force, he did not prove a business necessity for the hiring method used to achieve this goal. Since *Furnco* was a disparate treatment case, the failure to show business necessity was not fatal. However, the implication in *Furnco* that the defendant met the burden of showing business necessity is confusing. This confusion of defenses with the permission by the Court strongly suggests a dilution of the standards used in determining business necessity, not a bolstering of those used in determining legitimate nondiscriminatory reasons.

The trend toward reducing the defendant's burden in disparate impact cases was made clearer in *New York City Transit Authority v. Beazer.* As described earlier, *Beazer* allowed the establishment of a defense in a disparate impact case when the defendant did nothing more than articulate a legitimate nondiscriminatory reason.[180] Application of this standard to disparate impact cases was anticipated by Justice Rehnquist's concurrence in *Dothard.*[181] The defendant in *Beazer* simply alleged that methadone users would affect the overall quality of the work force and excluding them from all jobs would obviously eliminate them from the jobs that they could not perform.[182] As noted earlier, this allegation, although accepted by the *Beazer* Court, is not sufficient to demonstrate a substantial correlation between job performance for each job in the Transit Authority and the rule banning all methadone users. In short, it is not a demonstration of a *Griggs* or *Dothard* defense in disparate impact cases.

The relation between the substance of the business necessity defense in

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[178] In *Furnco* the district court analyzed whether the defendant's method of hiring workers either created both a disparate impact on blacks or was the result of disparate treatment of blacks. 438 U.S. at 569. The district court found that the plaintiffs did not prove either a case of disparate impact or a case of disparate treatment. *Id.* Although it is not clear whether the district court found a prima facie case of disparate treatment, *id.* at 573, the Supreme Court's opinion states that even if it had been established it had been overcome by the district court's finding of a business necessity. *Id.*

[179] *Id.* at 570-71.

[180] See text and notes at notes 106-20 *supra.*

[181] 433 U.S. at 339 (Rehnquist, J., concurring).

[182] See text and notes at notes 106-10 *supra.*

disparate impact cases and the legitimate nondiscriminatory reason defense in disparate treatment cases augurs a greater identification of the defendant's burden in the two cases. The Court has apparently failed to consider the necessary relationship between the substance of the defenses and the fundamental nature of each case — intentional discrimination versus adverse impact without intent. That the *Beazer* Court did not distinguish the substance of the defenses in these cases indicates either a lack of care or an intentional signalling of the ultimate merger of the defendant's responsibilities.

III. Choosing A Path Through the Maze — Separation or Merger of Disparate Treatment and Disparate Impact Cases

The above analysis strongly suggests that the impetus towards merging disparate impact and disparate treatment defenses is inevitable. Other commentators have propounded policy reasons that they claim would halt this development if recognized by the Court.[183] There does exist, however, a relatively simple justification for preserving the distinctions between these defenses.

The march to merge defendants' burdens in disparate impact and disparate treatment cases might be halted if the Court were to focus carefully and explicitly on the nature of the factual issues found in each of these types of cases. As the Court recognized in *Burdine,* the factual issues in disparate treatment and disparate impact cases are distinct.[184] In disparate treatment cases, the ultimate issue of fact is the intent of the defendant.[185] The inquiry focuses on whether the evidence is sufficient to prove that the defendant intended to discriminate against the plaintiff.[186] In disparate impact cases the ultimate issue is whether the challenged criterion has a disproportionate impact on a protected class which cannot be excused by business necessity.[187] Of course, the Court has injected the intent issue into disparate impact cases by way of the plaintiff's rebuttal.[188] Nevertheless, apart from the plaintiff's burden on rebuttal, the justification for placing a more substantial burden on the defendant in disparate impact cases than in disparate treatment cases merits analysis.

As noted earlier, if a plaintiff in a disparate treatment case establishes a prima facie case[189] a presumption of intentional discrimination arises.[190] The defendant in a disparate treatment case is free, of course, to challenge the validity of the plaintiff's prima facie case. For example, the defendant might

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[183] *See, e.g.,* Note, *Business Necessity, supra* note 7, at 419-22.

[184] 101 S. Ct. at 1093 n.5.

[185] International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15.

[186] *Id.*

[187] *Id.*

[188] *See, e.g.,* New York City Transit Auth. v. Beazer, 440 U.S. at 587.

[189] Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. at 1094 nn.6 & 7; McDonnell Douglas Corp. v. Green, 411 U.S. at 802. See text and notes at notes 19-24 *supra.*

[190] Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. at 1094.

try to establish that the plaintiff was not qualified for the job, thereby eliminating a crucial element of the prima facie case. Beyond an attempt to undercut the plaintiff's prima facie case, the defendant's success in a disparate treatment case rests on the ability to overcome the presumption of intentional discrimination.[191]

In a disparate impact case, the plaintiff uses statistics to show the disparate effect of the challenged employment practice.[192] The defendant in a disparate impact case, like his disparate treatment counterpart, may also make a two-level response to the plaintiff's prima facie case. First, the defendant may attack the statistical evidence by which the discriminatory impact is demonstrated.[193] This first level of attack challenges the conclusion of disparate impact that would otherwise be drawn from the plaintiff's prima facie case, just as the defense in a disparate treatment case attacks the conclusion of intentional discrimination by producing evidence of a legitimate nondiscriminatory reason. At the second level, however, the defense of business necessity *accepts* the plaintiff's proof of disparate impact but shows that this impact is the result of a necessary practice. This is a conceptually different approach from that in disparate treatment cases where the defendant only disputes the presumption of the plaintiff's prima facie case.

The preceding analysis shows that the defense in disparate impact cases has a distinct genesis from that in disparate treatment cases. Each defense was designed to effectively undercut distinct prima facie cases. It may be asserted that, contrary to the suggestion in *Burdine,*[194] it is the *nature* of the prima facie case, *not* the ease with which the plaintiff may establish it, which should be the critical aspect in quantifying the defendant's burden. If the defendant's burden in disparate treatment and disparate impact cases is responsive to the nature of the plaintiff's case rather than to the difficulty of establishing the plaintiff's case, the Court's sanctioning of a much less onerous burden for defendants in disparate treatment cases would not necessarily imply a similar diminution of the defense in disparate impact cases.

The problem with relying on an explanation grounded in a conceptual distinction between the defenses based upon the nature of the plaintiff's case is the Court's apparent failure to see this particular distinction between disparate impact and disparate treatment cases. Moreover, the *Beazer* case suggests that the Court is decreasing the defendant's burden in disparate impact cases in tandem with its recognition of a less onerous defense burden in disparate treatment cases. There appears to be some validity in this tandem diminution, since there is a relationship between the two types of cases.

Thus, although the merger of the Court's treatment of disparate impact and disparate treatment cases may be criticized, several logical similarities ex-

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[191] *Id.*

[192] *See* SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, §§ 1.5(c), 1.8.

[193] *Id.*, § 1.5(d) at 51-53.

[194] 101 S. Ct. at 1094.

ist. As noted earlier,[195] intent to discriminate should always be relevant in a Title VII case. Currently, intent to discriminate is a sufficient, but not necessary, element in proving discrimination under Title VII. Therefore, although a plaintiff may establish a Title VII violation without proving intent, a court would always be interested in evidence of the defendant's intent to discriminate even when intent is not a necessary element of plaintiff's prima facie case.

It also seems logical that concepts of disparate impact could arise in a disparate treatment case. For example, consider a case in which a person otherwise qualified for a job is turned down because he has filed for bankruptcy. The employer produces evidence of his nondiscriminatory reason — he does not hire any bankrupts because they create an additional administrative burden. The "legitimate nondiscriminatory reason" explaining his behavior is embodied in a neutral rule. The defendant has produced evidence of a legitimate nondiscriminatory reason which may be sufficent to overcome the plaintiff's prima facie case of disparate treatment. The neutral rule which excuses his behavior, however, might result in an adverse impact on a protected class, for example, blacks. This adverse impact is of course the core of a plaintiff's case of disparate impact.

This analysis suggests that the disparate impact/disparate treatment dichotomy is more precise in theory than it is in practice. In fact, the disparate impact cases were decided by the Court against a factual backdrop which suggests disparate treatment. Although *Griggs* and *Albemarle* were brought by the plaintiffs, and decided by the Court, under a disparate impact theory, the facts in each case contain substantial hints of intentional discrimination.[196] Similarly, in *Dothard,* the employee's challenge to the "neutral criteria" resulted in the employer establishing an explicitly discriminatory policy.[197] In addition, some

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[195] See text and notes at notes 33-34 *supra.*

[196] The *Griggs* facts have been reviewed in many places, including SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, § 1.5(a), at 33-35, and in Comment, *Business Necessity Defense, supra* note 34, at 913-16. Prior to 1965 when Title VII was passed, Duke Power Company, a North Carolina employer, had overtly discriminated against blacks. In 1965, after Title VII was passed, the employer instituted requirements which effectively perpetuated the effects of past discrimination. 401 U.S. at 427-28, 430. Although the court of appeals did not find any intent to discriminate after the Act was passed, *id.* at 428, it is logical that an employer who intended to discriminate might choose a "neutral" rule to achieve the same result covertly. It would be more difficult to prove intent in such a case, but certainly the backdrop of explicit discrimination casts a shadow on the employer's adoption of neutral rules which just happened to have a disparate impact on blacks, thereby accomplishing the same result as the explicitly discriminatory policy. Similarly in *Albemarle,* another North Carolina employer stopped segregating jobs on a black-white basis when Title VII was passed after years of explicit discrimination. 422 U.S. at 426-29. At that time the employer instituted tests which effectively precluded blacks from jobs they had failed to achieve earlier due to explicit discrimination. *Id.*

[197] While the challenge to the neutral height and weight criteria was pending, the defendant adopted a rule that required corrections personnel in contact positions to be the same sex as the prisoners. 433 U.S. at 324-25 and n.6. This suggests that the challenged height and weight rule indeed was intended to exclude women.

of the Court's disparate treatment cases contained facts which suggest the potential for disparate impact. This potential was explicit in *Furnco*[198] and implicit in *McDonnell Douglas*.[199]

Some commentators have focused on the theoretical distinctions between disparate impact and disparate treatment cases without recognizing the practical relationships between them.[200] A close reading of the cases demonstrates that despite their premise that intent is not relevant, the Supreme Court has not applied the disparate impact theory to find discrimination where there has been no evidence or history of intent to discriminate.[201] Arguably, then, the Court's failure to continue the theoretical separation of disparate impact and disparate treatment cases is merely part of the evolution of the Court's handling of the Title VII cases. The merger is consistent with the factual contexts in which the Title VII cases decided by the Court arose.

It is possible that the disparate impact case will merge with the disparate treatment or intent to discriminate case in the following manner. Recall that the goal of the plaintiff's initial burden in a disparate treatment case is to create a presumption that the defendant intended to discriminate against the plaintiff.[202] The Court, by a slight adjustment in approach, could permit a presumption of intentional discrimination to be created by showing that a policy of the defendant has an overwhelmingly disparate impact on a protected class of which plaintiff is a member. If the challenged rule affected primarily one minority group, or women, for example, a presumption could be established that the defendant instituted the rule to exclude such persons from jobs. In fact, the Court has sanctioned the use of the disparate impact prima facie case in class-wide disparate treatment cases by validating the use of statistics in such cases.[203] For example, in *International Brotherhood of Teamsters v. United States*[204] the Court recognized that numbers showing gross disparity in the composition of the work force were highly relevant in demonstrating intent to discriminate.[205] Commentators have argued that impact alone should be

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[198] The district court in *Furnco* ruled on the plaintiff's challenge to the defendant's hiring practice on a disparate impact theory as well as a disparate treatment theory. 438 U.S. at 569. Justice Marshall dissented in *Furnco* because of the Court's view that plaintiffs were precluded from pursuing their disparate impact claim on remand. *Id.* at 583-85 (Marshall, J., dissenting). In his dissent Justice Marshall emphasized that intent need not be shown in a disparate impact case and stated that "... nothing in today's opinion ... is inconsistent with this approach." *Id.* at 583.

[199] 411 U.S. at 805 & n.19.

[200] *See, e.g.*, Note, *Business Necessity, supra* note 7; Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. OF ILL. L. F., 69, 71-73; B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW chs. 2, 4-6 (1976 & Supp. 1979). *But see, e.g.*, SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, § 1.4(e); Friedman, *supra* note 7, at 13-15.

[201] See text and notes at notes 196-97 *supra*.

[202] See text and notes at notes 19-25 *supra*.

[203] *See* SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, § 1.4(b) & (c).

[204] 431 U.S. 324 (1977).

[205] *Id.* at 339 n.20.

enough to show intentional discrimination,[206] and that on this basis such intent could have been found in *Griggs*.[207]

Using this approach, once the plaintiff shows disparate impact, he will have created a presumption of the defendant's intent to discriminate and the burden then will shift to the defendant to overcome this presumption of discrimination by evidence sufficient to explain his behavior. If a presumption of intent to discriminate is established, one could argue that any explanation that would undercut the presumptive intent should be sufficient to overcome the plaintiff's prima facie case. There is nothing in *Burdine*, however, to suggest that the defendant's burden of production of evidence may be severed from the employer's interest in trustworthy and efficient workmanship.[208] In other words, in a case involving a rule that excluded from all jobs persons who could not lift 150 lbs., the defendant still should be required to produce evidence that the rule served a purpose that was connected with the employer's and society's interest in trustworthy and efficient workmanship. The presumption should not be allowed to be overcome by a claim that the defendant did not *actually* intend to discriminate.[209] The employee then should be given the opportunity to show pretext. In establishing pretext the existence of lesser-impacting alternatives, though not controlling, may be useful in showing the employer's intent.

The merger of disparate impact cases into disparate treatment cases will not work perfectly under current standards, however. *Burdine's* recognition of the different factual issues in disparate treatment and disparate impact cases[210] suggests that the Court will recognize the need for accommodation in developing standards if the two cases are merged. There will, no doubt, be some further evolution and adjustment of the standards as the merger occurs. While the Court's evolutionary course might be criticized, the Court is not undertaking a radical or *ad hoc* departure from the factual realities of its early Title VII opinions. The pressing need is for the Court to recognize explicitly and analyze the path it is charting.

CONCLUSION

The recent Supreme Court decisions of *New York City Transit Authority v. Beazer* and *Texas Department of Community Affairs v. Burdine* indicate a diminution of the defendant's burden of proof in disparate impact cases and a merger of the defendant's burden in such cases with that of the disparate treatment de-

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[206] *See, e.g.*, SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, § 1.4(b) at 20-22.

[207] *Id.* at 21.

[208] On the issue of defendant's interest in trustworthy and efficient workmanship, see text and notes at notes 163-71, *supra; See also* SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, at 20.

[209] SULLIVAN, ZIMMER & RICHARDS, *supra* note 52, § 1.4(b), at 20.

[210] 101 S. Ct. at 1093 n.5.

fendant. An analysis of the orders of proof and the relationships between substantive defenses in disparate treatment and disparate impact cases suggests that the nature of these two types of cases justifies a return to separate treatment. Yet their merger seems likely in light of the above-noted Supreme Court decisions. The Court has developed identical orders of proof, as well as similar substantive defenses and rebuttal burdens for each type of case. Such a merger reflects the underlying similarities between the cases and is in some part a function of the degree to which the cases are intertwined in practice, if not in theory. It is submitted that the Court should focus on the nature of the plaintiff's prima facie case, rather than on the ease with which the plaintiff can establish it, in determining the defendant's burden in both disparate treatment and disparate impact cases. A merger of this sort would serve to recognize the inherent differences between the two types of cases while, at the same time, account for their practical similarities.

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