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Two Faces of Disparate Impact Discrimination

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by
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INTRODUCTION

FOR decades, courts and commentators have debated the relationship between discrimination against a protected group and evidence that members of that group are disproportionately excluded from an opportunity or benefit.[1] For example, would distinguishing between job candidates on the basis of a standardized test that excludes substantially more African-Americans than other racial groups be probative of discrimination because of race?[2] Would distinguishing between candidates on the basis of height, resulting in the exclusion of substantially more women or Asians than men or other ethnic groups, be probative of discrimination because of sex or national origin?[3]

Few would argue that proof of disproportionate impact is irrelevant to the issue of discrimination; exactly how it relates, however, is more controversial.[4] The relationship depends on the theory of discrimination.[5] Indeed, the relevance of disparate impact evidence, like any evidence, depends on what it is being offered to establish.[6] But there is no consen-

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1. Writing in 1976, Professor Brest stated:

> Of the civil rights issues that have emerged during the past decade, two of the most controversial and important involve the propriety of granting racial preferences to traditionally disadvantaged minorities and the operational relevance of the fact that a color-blind practice has a disproportionate adverse impact on the members of a racial minority group. Any attempt to resolve these issues must begin by examining the rationales for, and parameters of, the antidiscrimination principle [or other theories to remedy discrimination].

Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 4-5 (1976); *see also infra* Section I (describing the variety of theories using evidence of disparate impact to prove illegal discrimination).

2. *Compare* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact [on black applicants resulting from a civil service exam] is not irrelevant, but is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.") *with* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("If an employment practice [such as a general intelligence test] which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). *Cf.* The Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973b (1988) ("No citizen shall be denied the right to vote . . . because of his failure to comply with any test [in a jurisdiction with less than 50% of the persons registered or voting in the presidential election] . . . [if] the test . . . has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color.")

3. Under Title VII, "a plaintiff need only show that the facially neutral standards in question [such as a height minimum] select applicants for hire in a significantly discriminatory pattern", and then "the employer must meet 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.' " Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

4. *See supra* notes 1-3; *see also* Welch, *Superficially Neutral Classifications: Extending Disparate Impact Theory to Individuals*, 63 N.C.L. Rev. 849, 874-75 (1985) ("[T]he use of statistics has become routine in Title VII cases not because the law mandates proportional outcomes but because of what disproportionate outcomes tell us about discriminatory behavior.") (footnote omitted).

5. *See supra* note 1.

6. *See* James, *Relevancy, Probability and the Law*, 29 Calif. L. Rev. 689, 690-91 (1941).

sus on what constitutes discrimination under the various antidiscrimination laws.[7] That is the crux of the problem.

The current debate over the theory of disparate impact discrimination under Title VII of the Civil Rights Act of 1964[8] has been raised implicitly in cases focusing on disputes over particular evidentiary issues.[9] Because these issues have been resolved without explicit articulation of a disparate impact theory of discrimination, the evidentiary rulings[10] have led to inconsistent interpretations of disparate impact doctrine[11] under Title VII.

The debate became more pronounced in the Supreme Court's controversial decision, *Wards Cove Packing Co. v. Atonio*,[12] which adopted certain evidentiary standards for disparate impact cases that were inconsistent with standards adopted over two decades ago in the landmark decision *Griggs v. Duke Power Co.*[13] In response, Congress is considering legislation to reverse *Wards Cove* and to restore the *Griggs* standards.[14] Even this recent controversy, however, focuses on resolving

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7. *See infra* Section I.

8. *See* 42 U.S.C. § 2000e to 2000e-17 (1988).

9. *See infra* notes 16-17 and accompanying text. The most explicit discussion of the theoretical debate occurred in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988). *Compare id.* at 985-91 (plurality) (disparate impact doctrine prohibits facially neutral practices that operate "functionally equivalent" to intentional discrimination) *with id.* at 1001-06 (Blackmun, J., concurring) (disparate impact doctrine focuses on the effect of facially neutral practices, not on the employer's intent). *See also* Connecticut v. Teal, 457 U.S. 440, 458-59 (1982) (Powell, J., dissenting) (disparate impact doctrine focuses on ultimate impact on protected group to raise inference of discrimination against individual group members).

10. *See infra* Appendix—Summary of Comparison of Evidentiary Issues.

11. *See, e.g.*, Cox, *Substance and Process in Employment Discrimination Law: One View of the Swamp*, 18 Val. U.L. Rev. 21, 46 (1983) [hereinafter "Cox I"] (suggesting that the "incoherence [of the Supreme Court's interpretation of disparate impact discrimination] is traceable to the Court's failure to explain which of a number of plausible but largely inconsistent functions the [disparate impact] model serves"); Cox, *The Future of the Disparate Impact Theory of Employment Discrimination after Watson v. Fort Worth Bank*, 1988 B.Y.U. L. Rev. 753, 753 [hereinafter "Cox II"] (analysis of the *Watson* Court's split on "the function of the impact model and the structure of litigation under it"); Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 Am. U.L. Rev. 799, 826 (1985) ("Judicial attempts to impose limitations on the [disparate impact] model . . . have been . . . unconvincing because there is no agreement on the [model's] underlying theory.").

12. 490 U.S. 642 (1989). *Compare id.* at 655-61 (requiring employees both to isolate cause of disparate impact and to bear burden of persuasion that employer's business necessity justification was not reasonable) *with id.* at 668-73 (Stevens, J., dissenting) (allowing employee to prove that one or more of employer's practices caused the disparate impact and requiring employer to persuade that its use of disparately impacting criterion was necessary to its business).

13. 401 U.S. 424 (1971). *Griggs* required the employee to prove the disparate impact of the employer's practices, and required the employer to persuade that its use of disparately impacting criterion was necessary to its business. *See id.* at 430-33.

14. *See* The Civil Rights Act of 1991, H.R. 1, 102d Cong., 1st Sess., §§ 3-4, 137 Cong. Rec. H53 (daily ed. Jan. 3, 1991).

Last session Congress passed the Civil Rights Act of 1990, a bill that contained identical language. *See* S. 2104, 101st Cong., 2d Sess., §§ 3-4, 136 Cong. Rec. S9966-67 (daily

the inconsistencies of disparate impact doctrine at an evidentiary level.

This Article attempts to redirect the discussion of disparate impact doctrine under Title VII from resolution of discrete evidentiary issues to debate on the fundamental theoretical split in the doctrine. Only by acknowledging and developing two competing theories of disparate impact discrimination can the incoherent state of Title VII law be explained and resolved.[15]

The first theory, implicitly espoused in *Wards Cove* and other recent Supreme Court decisions,[16] would prohibit only discrimination based on explicit or pretextual use of an individual's race, color, religion, sex or national origin. This theory would permit an employer to make distinctions based on any facially neutral criteria, including those resulting in disparate impact on protected groups, unless the employer used those criteria as a pretext for discrimination based on a prohibited factor. The theory finds pretextual discrimination only when the employer uses disparately impacting criteria unreasonably. This fault-constrained theory will be referred to as the "Fault Theory."

The second theory, implicitly espoused in *Griggs*, other previous Supreme Court decisions[17] and the Civil Rights Act of 1991,[18] would prohibit not only discrimination based on explicit or pretextual use of one of the prohibited factors, but also discrimination based on any biased or non-neutral criteria that an employer uses without business justification. Distinctions based on facially neutral criteria that result in disparate impact on protected groups would be deemed non-neutral. An employer would not be permitted to use such a suspect criterion unless its use was justified by the needs of the business. This effects-focused theory will be referred to as the "Effects Theory."

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ed. July 18, 1990); H.R. 4000, 101st Cong., 2d Sess., §§ 3-4, 136 Cong. Rec. H6746, H6769 (daily ed. Aug. 3, 1990); Conference Report on S. 2104, 101st Cong., 2d Sess., §§ 3-4, 136 Cong. Rec. S15327 (daily ed. Oct. 16, 1990); 136 Cong. Rec. H9984 (daily ed. Oct. 17, 1990). President Bush vetoed the legislation, and the Senate was unable to override his veto. *See* 136 Cong. Rec. S16562 (daily ed. Oct. 24, 1990).

15. Both of these disparate impact theories have been developed within the context of Title VII. *See* cases cited *infra* notes 16-17. The applicability of either theory to contexts beyond Title VII remains an issue for another day. *Cf.* Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 Neb. L. Rev. 345, 353-62 (1980) (suggesting inappropriateness of expanding the applicability of disparate impact discrimination theory beyond its original context).

16. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 655-61 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985-98 (1988) (plurality); New York Transit Auth. v. Beazer, 440 U.S. 568, 584-87 & n.31 (1979); Connecticut v. Teal, 457 U.S. 440, 457-63 (1982) (Powell, J., dissenting); Dothard v. Rawlinson, 433 U.S. 321, 339-40 (1977) (Rehnquist, J., concurring); Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring).

17. *See Wards Cove*, 490 U.S. at 668-73 (Stevens, J., dissenting); *Watson*, 487 U.S. at 1000-10 (Blackmun, J., concurring); *Teal*, 457 U.S. at 448-56; *Beazer*, 440 U.S. at 598-602 (White, J., dissenting); *Dothard*, 433 U.S. at 329-32; Washington v. Davis, 426 U.S. 229, 246-48 (1976); *Albemarle Paper*, 422 U.S. at 427-36; Griggs v. Duke Power Co., 401 U.S. 424, 430-35 (1971).

18. H.R. 1, *supra* note 14, at §§ 3-4.

Relying on these theoretical guidelines, the Article develops coherent evidentiary contours for each theory[19] and compares the consequences of adopting each theory at both a theoretical and an evidentiary level.[20] This exercise exposes the substantive choices resulting from the two competing, but now internally consistent, theories.

Comparison of the Fault and the Effects Theories exposes two distinct visions of equality. Because the Fault Theory allows an employer to use facially neutral but disparately impacting criteria absent evidence of the employer's fault, virtually all traditional standards of the workplace will remain unaltered. Consequently, only those underrepresented groups who effectively assimilate to the preexisting, facially neutral standards of a given employer will be employed. By contrast, because the Effects Theory prohibits an employer from using disparately impacting selection criteria unless they are justified by the needs of the business, the merits of many traditional standards of the workplace will be re-evaluated, and where those standards cannot be justified by the needs of the business, they will be eliminated. Consequently, those members of underrepresented groups who are different from more traditional members of the work force, but who can also be productive, will be given employment opportunities.

The analysis in this Article reveals both the advantages of the Effects Theory as a tool to advance genuine equality of employment opportunity as mandated by Title VII[21] and the shortcomings of Fault Theory, which, by requiring employer fault in addition to disparate effects on protected groups, limits achievement of Title VII's purposes without sufficient justification.[22]

I. THE SPECTRUM OF DISPARATE IMPACT THEORIES

Courts and commentators have generated a wide variety of theories for explaining why and under what circumstances disparately impacting policies constitute unlawful discrimination. Those theories can be divided into three categories: the narrowest theories, including the Fault Theory, are concerned with disparate impact as possible evidence of intentional discrimination; a more moderate group of theories views impact as problematic when caused by historical discrimination against a protected group; the most expansive theories, including the Effects Theory, see disparate impact as a harm in itself and may prescribe corrective action on that basis alone. The contours of the Fault and Effects Theories can be

19. *See infra* Section IIB; *cf.* Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429, 439-66 (1985) (challenging as "wrong" evidentiary choices consistent with a distinct theory).

20. *See infra* Section II.

21. *See id.*

22. *See id.*

further elucidated by situating them within this spectrum of disparate impact discrimination theories.

A. *Intent-Based Theories*

1. Discriminatory Purpose Theory

The most restrictive use of disparate impact evidence occurs under the rubric that demands proof of purposeful discrimination. The key to discriminatory purpose theories is subjective intent to distinguish between candidates based on their protected status.[23] In *Personnel Administrator v. Feeney*,[24] a Massachusetts law granting absolute preference to military veterans for state jobs was found not to constitute purposeful gender discrimination. The Supreme Court made this finding notwithstanding that the state intended to prefer veterans and that the state was aware that ninety-eight percent of veterans were male and that consequently women would be excluded from a vast majority of state jobs. Rather, to strike the law, discriminatory purpose doctrine required that Massachusetts be shown to have adopted the veteran's preference " '*because of*,' not merely '*in spite of*,' " its inevitably discriminatory effects.[25] Thus, evidence that the preference resulted in overwhelming and inevitable adverse impact on women was relevant to, but not dispositive of,[26] the issue of gender discrimination under the discriminatory purpose theory of the equal protection clause of the fourteenth amendment.[27]

In the Title VII context, courts have also narrowly interpreted discriminatory purpose, which is necessary to establish disparate treatment discrimination.[28] In *American Federation of State, County, and Munici-*

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23. The consequences of finding such purposeful discrimination depend on the law. Under the Constitution, classifications purposefully based on race would "be subjected to the strictest scrutiny and are justified by the weightiest of considerations." Washington v. Davis, 426 U.S. 229, 242 (1976). Under Title VII, purposeful discrimination based on race or color would be prohibited and purposeful discrimination based on religion, sex, or national origin would be excused only where those factors are proved to be "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business." 42 U.S.C. § 2000e-2(e)(1) (1988).

24. 442 U.S. 256 (1979).

25. *See id.* at 279 (emphasis added).

26. The disparate impact of a practice has been found determinative in extreme cases. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 480-81 (1954) (although substantial numbers of Mexican-Americans were eligible, none had served on juries in 25 years); Norris v. Alabama, 294 U.S. 587, 590-91 (1935) (none of 666 male African-Americans in the population had ever served on a jury); *cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (overwhelming statistics would establish prima facie case of disparate treatment under Title VII).

27. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977); Washington v. Davis, 426 U.S. 229, 242-46 (1976).

28. Disparate treatment discrimination occurs where

> [t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Teamsters, 431 U.S. at 335 n.15.

pal Employees, AFL-CIO v. State of Washington,[29] the state paid employees according to the market value of their jobs despite its awareness that the policy resulted in a twenty percent undercompensation for jobs held predominantly by women yet judged by the state's own study to be of comparable worth. The court ruled that the evidence of this impact, coupled with evidence of historical sex-based wage discrimination and sex segregation in jobs, was insufficient to establish discriminatory motive.[30]

Even where courts draw an inference of discriminatory intent by using relevant disparate impact evidence,[31] that inference can be rebutted by showing that, despite the discriminatory effects, the decisionmaker intended to accomplish a facially neutral purpose rather than a discriminatory one.[32] Thus, in *Personnel Administrator v. Feeney*,[33] the inference of purposeful discrimination raised by the impact of the veterans preference system on women did not "ripen into proof" where the legislative history supported an interpretation of the preference as a legitimate legislative effort to reward veterans, not to prefer men.[34] In the face of such an "innocent" explanation, the inference of discriminatory intent can be reasserted only by proving that the employer's facially neutral explanation was actually a "pretext" for its discriminatory purpose.[35]

The most obvious criticisms of this intent requirement are the difficulty of proving subjective intent,[36] judicial reluctance to find the defend-

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29. 770 F.2d 1401 (9th Cir. 1985).

30. *See id.* at 1407-08; *cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 337-38 (1977) (employees raised inference that employer and union engaged in practice of purposeful discrimination with evidence of significant underrepresentation of blacks and Hispanics in the workforce coupled with testimony regarding over forty specific instances of discrimination).

31. To find an inference of discriminatory purpose, courts will evaluate both plaintiff's prima facie proof and defendant's challenge to the factual accuracy of that proof. *See Teamsters*, 431 U.S. at 361-362 & n.50.

32. In rare cases, the prima facie proof cannot be explained by *any* non-discriminatory reason. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 340-42 (1960) (prima facie case showed 28-sided boundary that eliminated virtually all African-American voters).

33. 442 U.S. 256 (1979).

34. *See id.* at 279 & n.25; *see also* American Fed'n of State, County, and Mun. Employees v. State of Washington, 770 F.2d 1401, 1406-08 (9th Cir. 1985) (unequal pay resulted from paying according to the market, not from preferring men); *cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 & n.24 (1977) (company's affirmations of good faith failed to rebut prima facie case of disparate treatment).

35. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978); *Teamsters*, 431 U.S. at 331, 337.

36. *See* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. Rev. 36, 113 (1977); Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 140-41 (1976); Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 Tex. L. Rev. 41, 57 (1986); Rutherglen, *Disparate Impact under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297, 1309-11 (1987); Segal, *Sexual Equality, the Equal Protection Clause, and the ERA*, 33 Buffalo L. Rev. 85, 126 (1984); Weinzweig, *Discriminatory Impact and Intent Under the Equal Protection Clause: The Supreme Court and the Mind-Body Problem*, 1 Law & Inequality 277, 300, 318-19, 336-38 (1983); Willborn, *supra* note 11, at 806-07. *But see* Brest, *Palmer v. Thompson: An Approach to the Problem of*

ant to be a purposeful discriminator,[37] the futility of prohibiting discriminatory action that can be reinstituted without any change except for motive[38] and the disutility of prohibiting laudable action whose only fault was adoption for improper reasons.[39]

A more fundamental criticism occurs where discrimination has been defined to include *only* purposeful discrimination.[40] This narrow prerequisite unduly restricts remediable discrimination to that which is consciously intended.[41] But the idea that all conduct is benign, except that which is consciously intended to harm, contradicts much of what we know of the dynamics of prejudice and discrimination. Moreover, although the equal protection clause has been interpreted to encompass only purposeful discrimination against protected groups,[42] that narrow view is inconsistent with judicial interpretation of legislation,[43] including

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Unconstitutional Legislative Motive, 1971 S. Ct. Rev. 95, 119-24 (1971) (illicit legislative motive may be established by resort to surrounding circumstances and legislative history).

37. *See* Eisenberg, *supra* note 36, at 83; Karst, *The Costs of Motive-Centered Inquiry*, 15 San Diego L. Rev. 1163, 1164-65 (1978); Segal, *supra* note 36, at 127; Shoben, *The Use of Statistics to Prove Intentional Employment Discrimination*, 46 Law & Contemp. Probs. 221, 240-41 (1983); Weinzweig, *supra* note 36, at 319.

38. *See* Brest, *Reflections on Motive Review*, 15 San Diego L. Rev. 1141, 1144-45 (1978); Eisenberg, *supra* note 36, at 113; Segal, *supra* note 36, at 127; Weinzweig, *supra* note 36, at 318-19.

39. *See* Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring); Eisenberg, *supra* note 36, at 112. *But see* Brest, *supra* note 36, at 127-29 (law is not "good" if enacted with improper motivation).

40. This is not to say that motive analysis should not be sufficient, just that it should not be necessary. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (relying on motive to uncover individual instance of racial discrimination under Title VII); Weinzweig, *supra* note 36, at 336-39 (impact, not motive, is crucial factor in determining discrimination; but motive must be considered); *cf.* Palmer v. Thompson, 403 U.S. 217 (1971) (refusing to consider motive under Constitution); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1207 (1970) (motive inapplicable to disadvantageous distinction model). *But see* Brest, *supra* note 36, at 109-25 (criticizing the *Palmer* decision).

41. *See* Brest, *supra* note 1, at 7-8, 14; Eisenberg, *supra* note 36, at 81-83, 147; Friedman, *supra* note 36, at 57; Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 319 (1987); Schnapper, *Two Categories of Discriminatory Intent*, 17 Harv. C.R.-C.L. L. Rev. 31, 40 n.39 (1982); Segal, *supra* note 36, at 87, 92, 125; Willborn, *supra* note 11, at 807.

42. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

43. *See, e.g.*, *id.* at 248 (making evidence of disparate impact determinative for requiring serious judicial scrutiny when accomplished by "legislative prescription . . . such as in the field of public employment"); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584 (1983) (Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* does not require proof of discriminatory intent); Voting Right Act Amendments of 1982, 42 U.S.C. § 1973b (1988) (prohibiting use of tests based on their effect and regardless of intent in determining status to vote); Note, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine Into the Fair Housing Act*, 54 Fordham L. Rev. 563, 567-69 (1986) (Title VIII of the Civil Rights Act of 1964, 42 U.S.C. § 2000f, prohibits facially neutral but disparately impacting practices, regardless of discriminatory intent); *cf.* Maltz, *supra* note 15, at 353-62 (questioning appropriateness of applying disparate impact analysis beyond Title VII); Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. Tol. L. Rev. 1261 *passim*

Title VII,[44] wherein courts have adopted broader and more sophisticated models of discrimination than those focused exclusively on conscious discriminatory intent.

2. Fault Theory

Responding to concerns about the discriminatory purpose theories, some commentators would expand the parameters of intent.[45] They would permit pretextual use of the prohibited factors to be established inferentially through objective evidence.[46] For example, instead of relying only on evidence of subjective intent, these commentators would strengthen the presumption of intent arising from the doctrine of foreseeable consequences[47] and would excuse objectively reasonable decisions regardless of intent.[48] These theories, which rely on objective evidence, most closely resemble the Fault Theory.

Like other theories requiring intentional discrimination, the Fault Theory under Title VII is ultimately concerned that the employer avoid distinctions based on a candidate's race, color, religion, sex or national

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(1983) (applying modified disparate impact analysis under Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34).

44. Both the Fault and the Effects Theories encompass broader interpretations of Title VII. *See supra* notes 16-18 and accompanying text.

45. Intent can infect decisions not just in the goal chosen, but also in the means selected to achieve that goal. *See* Schnapper, *supra* note 41, at 37-40, 51-54. Others would expand the concept of intent from focusing solely on the decisionmaker's purpose, to include the decisionmaker's knowledge, recklessness and/or negligence. *See, e.g.*, Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 67-68 (1972) (analogizing disparate treatment to negligence); Shoben, *supra* note 37, at 232-37 (advocating expansion of intent to include recklessness from tort law); Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 Yale L.J. 111, 121 (1983) (advocating adoption of intent standards from criminal law). *But cf.* Cox, *Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther*, 22 Duq. L. Rev. 65, 113 (1983) (intent for disparate treatment cases narrower than intent under law of torts).

46. *See* Rutherglen, *supra* note 36, at 1298-1300, 1309-11, 1345; Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 262-65, 277 (N.D. Tex. 1980); *cf.* Cox I, *supra* note 11, at 47, 108-18 (legitimate interpretation of Title VII's impact model as an "approximat[ion] [of] a disparate treatment model"); Cox II, *supra* note 11, at 757 (interpretation implying "that the impact theory [under Title VII] is merely an extension of disparate treatment theory designed to capture pretextual use of race and gender neutral employment criteria").

47. *See* Gold, *supra* note 19, at 588-96; Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 283-84 (1979) (Marshall, J., dissenting); Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring); Comment, *Proof of Racially Discriminatory Intent under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburg*, 12 Harv. C.R.-C.L. L. Rev. 725, 752-55 (1977); *cf.* Ely, *supra* note 40, at 1263-65 (motive evaluation, applicable to random choice situations such as jury selections, includes doctrine of foreseeable consequences).

48. *See* Gold, *supra* note 19, at 590-92; Rutherglen, *supra* note 36, at 1320-29; *cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 343 n.24 ("affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion") (citation omitted).

origin. Specifically, it focuses on eradicating pretextual use of the prohibited factors.[49]

Accordingly, evidence of disproportionate effects is necessary, but not sufficient, to prove disparate impact discrimination.[50] The employee must also prove that the employer used the criterion unreasonably. The theory focuses on the employer's objective reasonableness in using a facially neutral criterion that in fact distinguishes between candidates based on their protected status.[51] Only the *unreasonable* use of a disparately impacting criterion—e.g., one used without any business justification[52]—would establish that the adverse effect actually resulted from intentional discrimination based on a protected characteristic rather than from legal distinctions based on a facially neutral factor.

Although these more objectively based intent theories do avoid the difficulties of determining the decisionmaker's subjective intent, they do so in a manner that seems to undercut their focus:

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49. *See* 42 U.S.C. § 2000e-2(a) (1988). The plurality in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Scalia), require that the effects of the disparately impacting criterion "be functionally equivalent to intentional discrimination." *Id.* at 987-91. They would find functional equivalence "where facially neutral job requirements necessarily operated to perpetuate the effects of [the employer's] intentional discrimination that occurred before Title VII was enacted." *Id.* at 987 (citing Griggs v. Duke Power Co., 401 U.S. 424, 426-28, 431-32 (1971)). They further defined disparate impact discrimination to encompass the Bank's practice of leaving promotion decisions to the unchecked discretion of lower-level supervisors who may have infected the selections with their discriminatory intent or subconscious prejudices. *See id.* at 990; *see also* Connecticut v. Teal, 457 U.S. 440, 458-59 (1982) (Powell, J., dissenting) (In cases "involving direct proof of discriminatory intent[,] the plaintiff seeks to establish direct, intentional discrimination . . . . In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process' 'built-in headwinds.' ") (citation omitted); American Fed'n of State, County, and Mun. Employees v. State of Washington, 770 F.2d 1401, 1405 (9th Cir. 1985) ("The theory is based in part on the rationale that where a practice is specific and focused we can address whether it is a pretext for discrimination in light of the employer's explanation for the practice."); Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982) (disparately impacting criterion may "raise 'an inference that employment decisions are tainted by intrusion of illegitimate concerns' ") (citation omitted).

50. *But see* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 678 n.29 (1989) (Stevens, J., dissenting) ("The Court suggests that the discrepancy in economic opportunities for white and nonwhite workers does not amount to disparate impact within the meaning of Title VII unless respondents show that it is 'petitioners' fault.' . . . This statement distorts the disparate impact theory, in which the critical inquiry is whether an employer's practices *operate* to discriminate. . . . Whether the employer intended such discrimination is irrelevant.").

51. *See* Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 n.5 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

52. *See, e.g.*, Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 825 (M.D. Ala. 1989) (invalidating a disparately impacting test that fell "so far below acceptable and reasonable minimum standards that the test could not be reasonably understood to do what it purports to do").

> it is hardly a solution to the analytic problem to give the causal terms a psychological gloss and then "presume" as a matter of law that whenever, in the court's judgment, the use of the criteria cannot be justified on efficiency grounds, the "motivation" of the employer was a racial one. The bootstrap quality of [this] reasoning is apparent.[53]

More fundamentally, the Fault Theory allows evidence of a merely "reasonable" purpose to undercut the presumption of discriminatory intent raised by the disparate impact of a facially neutral criterion.[54] Given the traditionally broad interpretations of "reasonableness," few disparately impacting policies will fail to meet this standard. Consequently, although the Fault Theory is structurally distinct from subjective intent theories, in fact only the limited discrimination that is found to be unreasonable or consciously intended will be remedied.[55]

B. *Causation Theories*

Other theories divorce discrimination from intent.[56] They would prohibit facially neutral but disparately impacting classifications proved to be caused by the prohibited factors, without considering intent. The causation theories are distinguished by the degree of causal nexus required between the facially neutral criterion and a prohibited criterion. The narrowest of these causation theories would prohibit only disparately impacting criteria proved to be caused both in fact and proximately by a prohibited factor.[57] More expansively, some causation theories would prohibit criteria proved attributable or causally related to a prohibited

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53. Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 298 (1971); *cf.* Shoben, *supra* note 37, at 228-29 ("Because the issue is intent, however, the actual validity of the device should not control; it is the employer's good faith belief in validity that should dispel the inference of intent.").

54. Professor Brest recognized this shortcoming of the Fault Theory when he pointed out that

> race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference. . . . By the phenomenon of racially selective sympathy and indifference I mean the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group.

Brest, *supra* note 1, at 7-8; *cf.* Schnapper, *supra* note 41, at 58-59 (advocating expanded intent theory because discriminatory purpose theory fails to uncover means discrimination); Note, *supra* note 45, at 124 (criticizing discriminatory purpose theory where an "innocent" purpose, rather than a legitimate purpose, overcomes disparate impact evidence).

55. *See supra* note 41 and accompanying text.

56. *See, e.g.*, Brest, *supra* note 1, at 5 (Title VII's antidiscrimination provision disfavors any race-dependent decisions and conduct); Fiss, *supra* note 53, at 298 (fair employment laws prohibit use of criterion, not intent); Willborn, *supra* note 11, at 807 (Title VII prohibits use of criterion, regardless of motive).

57. *See* Eisenberg, *supra* note 36, at 57, 62-64. *But see* Perry, *A Brief Comment on Motivation and Impact*, 15 San Diego L. Rev. 1173, 1180-81 (1978) (critique of Eisenberg).

factor.[58] Finally, some causation theories virtually presume prior discrimination from evidence of disparate impact on historically disadvantaged groups.[59]

Requiring evidence of the causal connection between past discrimination and its perpetuation today has been criticized because such proof "strain[s] the judicial system[,] . . . consume[s] scarce resources and yield[s] unsatisfying results."[60] On the other hand, the credibility of the theory suffers when the relationship between the underlying theory and the evidence to support it becomes less exacting. Thus, theories premised on compensating for past discrimination are criticized when someone other than the past perpetrator is required to provide the remedy[61] and when non-victims of the past discrimination are permitted to recover based merely on their membership in the group victimized by the past discrimination.[62] Indeed, as the evidentiary connection between historical discrimination and the disparate impact becomes more attenuated,

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58. *See, e.g.*, Brest, *supra* note 1, at 5 ("but for" race discrimination); *cf.* Cox I, *supra* note 11, at 46-47, 101-07 (one legitimate interpretation of Title VII's impact model is that it is a "quasi-compensatory" model); Cox II, *supra* note 11, at 758-59 ("If the theory [under Title VII] is . . . confined to those particular criteria that perpetuate past discrimination . . . so that some evidence of perpetuation were required, the theory would pursue distributional goals for the limited purpose of partially redressing past societal discrimination."). *But see* Eisenberg, *supra* note 36, at 93-98 (criticizing Brest's "but for" theory as unworkable and too far-reaching).

59. *See, e.g.*, Blumrosen, *supra* note 45, at 71, 89 ("[t]he generating principles of *Griggs* [are] that discrimination is defined by adverse consequences to minorities as a group and that the right to be free from such discrimination runs to the benefit of members of the group unless the respondent can justify his actions"); Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 U.C.L.A. L. Rev. 305, 369 (1983) (evidence of adverse impact on traditionally disadvantaged groups justifies redress under Title VII because of "the legacy of past discrimination"); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 559 n.100 (1977) ("First, the plaintiff must be a member of a group that has suffered from a history of discrimination and that is still suffering from that discrimination. Second, there must be government action that disproportionately affects the group. And third, there must be some causal connection between the history of discrimination and the disproportionate character of the impact. These prima facie requirements should not be onerous."); Perry, *supra* note 57, at 1178-81 (disparately impacting laws or policies must be subject to "an unusually heavy burden of justification . . . for the simple reason that the disproportionate character of the impact is not ethically neutral but is a function of prior massive societal discrimination against blacks"); *see also* Friedman, *supra* note 36, at 44 (advocating the access principle to overcome adverse effects upon disadvantaged group resulting from employer's selection criteria); Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 Cornell L. Rev. 1, 13 (1979) ("Discrimination can result from a combination of neutral policies and a tradition of societally imposed inequity.").

60. Fiss, *supra* note 36, at 145; *accord* Perry, *supra* note 57, at 1180; Segal, *supra* note 36, at 140; Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78, 92 (1986).

61. *See* Eisenberg, *supra* note 36, at 57-59; Willborn, *supra* note 11, at 809-10. *But see* Sullivan, *supra* note 60, at 92-96 (commenting that requiring only past wrongdoers to engage in affirmative action results in "retributive justice" rather than social equality).

62. *See* Willborn, *supra* note 11, at 810-11; *cf.* Sullivan, *supra* note 60, at 95-96 (recog-

disparate impact theory becomes more focused on effects than causation. In that instance, the "disadvantageous effect on a disfavored class," rather than perpetuated wrongdoing, becomes the cornerstone for judicial scrutiny.[63]

These "causation" theorists also differ in terms of their goals. Some would use the presumption of discrimination to require the government or, in the Title VII context, the employer to prove that its policy does "not exacerbate the effects of prior discrimination any more than is reasonably necessary to achieve the governmental [or employment] objective."[64] Others would additionally allow the presumption to justify equal achievement, or more proportional distribution of jobs, to compensate for the prior discrimination.[65] Steering a middle course, one author would not excuse disparately impacting criteria even when justified by business necessity, nor would he remedy the disparate impact through group advancement. Instead he would require that in all disparate impact cases employers take affirmative measures—such as training, counseling or education—to overcome the criteria's negative impact on the protected group.[66]

Criticism has been most vocal on this point—whether historically caused discrimination can justify affirmative remedial measures for members of previously harmed groups. Indeed, resentment against "quota" selections has fueled recent efforts to restrict theories of disparate impact to intentional discrimination.[67] These critics argue that allowing preferential treatment of disparately impacted groups goes beyond antidis-

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nizing compensatory theory of affirmative action to raise "protests about windfalls to nonvictims and injustice to innocents").

63. *See* Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 Geo. L.J. 89, 90, 118 (1984); *infra* Section IC.

64. Perry, *supra* note 59, at 561; *see also* Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. Pitt. L. Rev. 555, 575, 577 (1985) (purpose of effects theory is to promote productive efficiency in order to redistribute the employment opportunities, rather than employment itself).

Responding to the same motivations as the causation theorists, one author advocates disallowing decisions based on equally unethical foundations as the prohibited factors, i.e. factors deemed the functional equivalent of the prohibited factors. *See* Fiss, *supra* note 53, at 241-43, 296, 299. Under that theory, even facially neutral factors would be prohibited if they result in a disparate impact on protected groups and if the factor is also both an inaccurate predictor of productivity and beyond the control of the individuals to whom it is applied. *See id.* at 299. He would include those denied opportunities due to past discrimination among those deemed to lack control. Thus, African-Americans denied access to decent educations would be deemed to lack control for their inability to pass standardized tests. *See id.* at 302-04.

65. *See* Blumrosen, *supra* note 45, at 89, 103; *see also* Chamallas, *supra* note 59, at 316-17, 344, 366 (allowing equal achievement gives more flexibility to employer and more quickly achieves a balanced workforce).

66. *See* Friedman, *supra* note 36, at 63-64.

67. *See* United States Department of Justice, *Report to the Attorney General Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action* 76-86 (1987); *infra* notes 370-376 and accompanying text.

crimination principles to principles of redistributive justice.[68] Finally, many question whether providing even compensatory preferential treatment to members of previously harmed groups results in negative effects, such as stigma and backlash.[69]

Debate over disparate impact theory has polarized between the intent-based theories, which are criticized for being too narrow to eradicate subtle forms of discrimination, and the causation theories, which are criticized as forms of unfair preference for particular social groups. In this debate, the effects-based theories are frequently subsumed, with the causation theories, into the broad category of affirmative action. This misconception has obscured important differences between the two latter groups of theories and has muddied the debate about disparate impact discrimination.

C. *Effects-Based Theories*

The most expansive disparate impact theories hold that disparate effects alone should be sufficient to compel judicial scrutiny.[70] They rely strictly on evidence of disparate impact to identify suspect selection criteria and argue that such evidence is presumptively sufficient to demonstrate that facially neutral practices are actually biased against the underrepresented group—and in favor of the preferred group—and should be prohibited absent justification.[71] These theories seek to ensure

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68. *See, e.g.*, Brest, *supra* note 1, at 48-52 (blurring compensatory and redistributive goals); Ely, *supra* note 40, at 1255-61 (proportionality at heart of pure impact tests); Fiss, *supra* note 53, at 297 ("even if the aim of fair employment laws be redistribution, clearly this redistributive goal is not to be pursued without restraint"); *infra* note 85 (describing alternative theories not based on antidiscrimination principles).

69. *See, e.g.*, Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 958-59 (1982) (preferential treatment programs are condescending to their beneficiaries); Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 Calif. L. Rev. 3, 8 (1979) (group-based right keeps "minority applicants in a cloud of suspected incompetency"); Chamallas, *supra* note 59, at 309 (affirmative action creates a divisive influence in the workplace); Friedman, *supra* note 36, at 99 ("Strict racial proportionality . . . may produce increased racialism, stigmatization[,] . . . hostility towards the preferred by those not preferred, injury to the self-esteem[,] . . . and a national sense of society's decreased commitment to individual improvement, autonomy, and responsibility.").

70. These theories are analogous to strict liability theories because the effects themselves result in a finding of discrimination, regardless of fault. *See* Blumrosen, *supra* note 45, at 67; Shoben, *supra* note 37, at 231 & n.60; Taub & Williams, *Will Equality Require More than Assimilation, Accommodation or Separation from the Existing Social Structure?*, 37 Rutgers L. Rev./Civ. Rts. Devs. 825, 837 (1985); *see also supra* note 59 (causation theories focusing on effects). They are distinguishable from strict liability theories, however, in that the consequence of a finding of discrimination is judicial scrutiny, not liability.

71. For example, see Bartholet, *supra* note 69, at 958-59; Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1075 (1978); Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 Tex. L. Rev. 1, 39 (1977); Shoben, *supra* note 37, at 238; Taub & Williams, *supra* note 70, at 836-38; Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treat-*

neutral process and, as a byproduct, more proportional representation.[72] The Effects Theory most closely resembles these theories.[73]

The Effects Theory would require that employers use not just facially neutral, but *actually* neutral selection criteria in order to ensure equal employment opportunity.[74] Thus, an employer's use of a facially neutral criterion that results in disparate impact on a protected group is both necessary and sufficient to establish a suspect practice.[75] The theory focuses on the consequences of an employer's selection practice, rather than the employer's state of mind or the historical cause of the disparity.[76]

Under the Effects Theory, an employer's justification for a criterion serves not to rebut the disparate impact of the criterion, but rather to limit liability for its use.[77] Thus, an employer could use a biased criterion

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ment Debate, 13 N.Y.U. Rev. L. & Soc. Change 325, 331-32 (1984-85); *cf.* Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 265 (N.D. Tex. 1980) (impact substitutes for more direct evidence of equal treatment); Cox II, *supra* note 11, at 759 ("To the extent that an employment selection criterion fails to measure talents or capacities relevant to job performance, its use may be said to be incompatible with an objective [under Title VII] of distributing employment by reference to merit."); Willborn, *supra* note 11, at 801, 826-28 (impact based on prohibited factors and not justified by business necessity defense under Title VII reflect market imperfections that encourage employers to use insufficiently accurate proxies to evaluate productivity potential).

72. Equal achievement might be a byproduct of the theory, but is not a necessary result. *See* Caldwell, *supra* note 64, at 577-78. *But see* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. Rev. 531, 552 (1981) (*Griggs* authorizes use of race-conscious affirmative action programs); Cox II, *supra* note 11, at 797 (envisioning theory of presumed bias from disparities as "a legal engine for ensuring proportional distribution of employment"); *cf. supra* note 65 and accompanying text (proportional representation achieved through presumption of discrimination).

73. The Effects Theory discussed in this Article was most influenced by the theory articulated by Professors Taub and Williams. *See* Taub & Williams, *supra* note 70, at 836-38; Taub, *Book Review*, 80 Colum. L. Rev. 1686, 1691-95 (1980) (reviewing C. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979)); Williams, *supra* note 71, at 331-32.

74. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use.").

75. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 678 n.29 (1989) (Stevens, J., dissenting) (for disparate impact discrimination, "critical inquiry is whether an employer's practices *operate* to discriminate"); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1004 (1988) (Blackmun, J., concurring) ("the disparate impact caused by an employment practice is *directly* established by the numerical disparity . . . [and absent business necessity,] this effect itself runs afoul of Title VII.").

76. *See Wards Cove*, 490 U.S. at 669-70 (Stevens, J., dissenting); *Griggs*, 401 U.S. at 432.

77. *See Wards Cove*, 490 U.S. at 667-70 (Stevens, J., dissenting). This is similar to the BFOQ exception under disparate treatment theory. *See generally* Perry, *Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination under Title VII*, 12 Indus. Rel. L.J. 1 (1990)

whenever it is shown to be a business necessity.[78] Where such a criterion can be shown to correlate with differences in productivity, for example, it can be used despite its non-neutrality.[79] Consequently, the theory prohibits only unnecessary group-based impact.

These effects-based theories are criticized as going beyond the dictates of antidiscrimination principles. Critics question how discrimination based on a facially neutral criterion can violate laws against discrimination based on specified prohibited criteria.[80] Such criticism rests on a narrow interpretation of antidiscrimination laws that is inconsistent with their remedial purposes. The effects-based theories are also criticized as "lack[ing] meaningful limits."[81] At the same time, they are criticized as being insufficiently responsive to unlawful discrimination[82] because they focus on too limited a context[83] and rely on the status quo for

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(advocating use of BFOQ in disparate treatment theory as model for business necessity in disparate impact theory).

78. *See Watson*, 487 U.S. at 1002-05 (Blackmun, J., concurring); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) ("Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.").

79. *See* M. Zimmer, C. Sullivan & R. Richards, Cases and Materials on Employment Discrimination 330 (2d ed. 1988); *cf.* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973) (distinguishing *Griggs* because it "dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions").

80. *See* Washington v. Davis, 426 U.S. 229, 245 (1976); Rutherglen, *supra* note 36, at 1299.

81. Taub & Williams, *supra* note 70, at 841; *see Washington*, 426 U.S. at 248; Eisenberg, *supra* note 36, at 98; Lawrence, *supra* note 41, at 320-21; *cf.* Cox I, *supra* note 11, at 52, 81 (without limits, the theory becomes transformed into an equal achievement theory).

To accommodate concern that a pure effects theory would be rejected as insufficiently limited, Professors Taub and Williams would require, as a fallback, that "[a]t a minimum . . . those neutral rules which are traceable to, build on, reproduce or perpetuate the old notions and hierarchies must be justified by a business necessity." Taub & Williams, *supra* note 70, at 841; *see also* Segal, *supra* note 36, at 140 (limiting pure effects test under Equal Rights Amendment to where "impact 'is traceable to and reinforces, or perpetuates, discriminatory patterns similar to those associated with facial discrimination,' " thereby focusing on the harm caused by the factor rather than the motivation and avoiding the requirement of unravelling "a complex chain of events to show how the disparate impact was caused") (quoting *Equal Rights Amendment: Hearings on H.J. Res. 1 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 98th Cong., 1st Sess. (1983) (testimony of Ann Freedman)).

82. *See, e.g.*, Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003, 1032 (1986) (neutral remedies required by antidiscrimination principle may result in remedies for no one; for example, to avoid discriminating against women by providing inadequate leave policies, an employer may respond with a no-leave policy for everyone); *cf.* Williams, *supra* note 71, at 374-75 (antidiscrimination gives courts limited function to be carried further by legislatures).

83. *See, e.g.*, Colker, *supra* note 82, at 1034 (criticizing disparate impact theory for challenging only "*detrimental* effects of a *neutral* policy" "within an employer's workforce over a limited time period"); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118, 1165-68 (1986) (disparate impact doctrine fails to accommodate need to integrate spheres of work and

justification.[84]

D. *Summary*

Although other theories rely on substantive notions distinct from the more limited goal of avoiding discrimination against protected classes,[85]

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family for all employees); Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 Yale L.J. 913, 966-67 (1983) (equality requires more profound restructuring than that required by disparate impact); Littleton, *Reconstructing Sexual Equality*, 75 Calif. L. Rev. 1279, 1325-27, 1329-32 (1987) (equality theory is limited because it accepts male-biased structures without requiring complementary female-biased structures).

84. *See*, Littleton, *supra* note 83, at 1324-26 & n.240; Note, *Toward a Redefinition of Sexual Equality*, 95 Harv. L. Rev. 487, 507-08 (1981); *cf.* Freedman, *supra* note 83, at 960-61 (recognizing that the Brennan-Marshall approach lacks affirmative theory of sex equality to allow challenge to rationally based sex distinctions); Taub, *supra* note 73, at 1693-95 (criticizing disparate impact doctrine for allowing employers to justify exclusionary practices with the male-biased status quo); Taub & Williams, *supra* note 70, at 843 (justifying exclusionary practices with male-biased structures undercuts equality).

85. Other theorists reject the antidiscrimination principle as not being sufficiently effective in achieving equality. *See, e.g.*, Chamallas, *supra* note 59, at 309 & n.18, 377 n.334 (citing Eleanor Holmes Norton at the EEOC Commissioners Meeting, Dec. 22, 1977, Daily Labor Rpt. (BNA) No. 43, at E-1 to E-4 (Mar. 3, 1978)); Colker, *supra* note 82, at 1005, 1012-13; Freedman, *supra* note 83, at 965-68; Littleton, *supra* note 83, at 1292-93 & nn.82 & 86, 1302; Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 Or. L. Rev. 265, 292 (1984). Thus, some advocate alternative theories of justice for groups and use evidence of disparate impact to trigger scrutiny thereunder. *See, e.g.*, C. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 117, 127 (1979) (advocating "inequality" approach, asking whether the policy in question integrally contributes to the powerless position of women); Colker, *supra* note 82, at 1005 n.7, 1015, 1019-20, 1033 (articulating anti-subordination principle); Fiss, *supra* note 36, at 146-48 (advocating a theory of redistribution spawned out of a concern for the welfare of the group impacted); Lawrence, *supra* note 41, at 328, 356-61 (challenging practices interpreted to convey "a symbolic message to which the culture attaches racial significance"); Wildman, *supra*, at 269, 306 (advocating "participatory perspective" ensuring full societal participation). *But cf.* Brest, *supra* note 1, at 48-52 (requiring more normative theories than the antidiscrimination principle to support group-based theories of justice); Cox I, *supra* note 11, at 46, 100-01, 118 (reading *Teal* to discredit disparate impact theory modelled on equal achievement premise); Cox II, *supra* note 11, at 758 ("if the theory [under Title VII] is applicable to all criteria that produce disparities, a general objective of distributional equality is implied"); Ely, *supra* note 40, at 1255, 1257-60 (rejecting disparate impact because it affirmatively commands racial balance); Fiss, *supra* note 53, at 244-45 (equal achievement requires theory of distributive justice); Taub, *supra* note 73, at 1690-93 (evaluating less powerful groups by distinct standards may backfire into reinforcing less-than-equal status of the protected group).

Others would identify differences between protected groups and either revalue or affirmatively accommodate those differences, rather than require non-discrimination based on them. *See, e.g.*, Kay, *Models of Equality*, 1985 U. Ill. L. Rev. 39, 45-46, 78 (accommodate immutable sex differences); Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1008-10 (1984) (accommodation of biological reproductive differences); Littleton, *supra* note 83, at 1296-97, 1301 (advocating "equality of acceptance" requiring pairing of male and female characteristics and revaluing female characteristics); Scales, *Towards a Feminist Jurisprudence*, 56 Ind. L.J. 375, 435-36 (1980-1981) (accommodate pregnancy and breastfeeding "to restore to women the opportunity to live a continuous life, integrated with respect to career and procreation just as are the lives of men"); Note, *supra* note 84, at 506-07 (advocating revaluing feminine characteristics). *But see* Williams, *supra* note 71, at 341-43, 365-74 (advocating equality approach rather than special

both the Fault and the Effects Theories are based on principles of antidiscrimination, the cornerstone of Title VII. The following examination of the specific goals and evidentiary contours of these competing antidiscrimination theories, however, demonstrates that the Effects Theory is most consistent with Title VII's principles and purposes.

II. COMPARING THE FAULT AND EFFECTS THEORIES UNDER TITLE VII

A. *The Distinct Theories of Discrimination*

The concept of equality has been defined to have two distinct meanings: equal treatment—requiring that the selection process treat individuals equally[86]—and equal achievement—requiring that the process result in equal distribution of rewards or benefits.[87] Both the Effects and the Fault Theories seek to achieve only the former by ensuring nondiscrimination within the process, rather than in the outcome of that process.[88]

The theories fundamentally disagree, however, on what *constitutes* equal treatment. Fault Theorists interpret equal treatment to require that all individuals be judged by the same facially neutral standards. An employer's use of any standard, except either explicit or pretextual use of an individual's protected status,[89] would be deemed nondiscriminatory.[90] In contrast, Effects Theorists interpret equal treatment to require that

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treatment approach to avoid costs attached to recognizing women's differences); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rts. L. Rep. 175, 196-98 (1982) (same).

Still others endorse theories of distributive or economic justice to require more equal access to certain fundamentals. *See, e.g.*, Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 Cornell L. Rev. 993, 1054 (1989) (advocating study of "race and class, both white supremacy and capitalism"); D. Bell, Race, Racism and American Law 661-65 (2d ed. 1980) (recognizing both race and class subordination); Freeman, *Antidiscrimination Law: A Critical Review*, in The Politics of Law: A Progressive Critique 110 (D. Kairys ed. 1982) ("The underlying theoretical question is . . . the extent to which anything significant can be done about the concededly unique problem of racism without paying attention to class structure and the forces that maintain it"); *cf.* Brest, *supra* note 1, at 5 ("To adopt the antidiscrimination principle as the exclusive principle of *racial* justice surely does not preclude adopting these or other principles concerned with *economic* justice."); *id.* at 53 (distinguishing more normative fundamental interest doctrine from the antidiscrimination principle); Fiss, *supra* note 36, at 143 (same); Freeman, *supra* note 71, at 1060-61 (same).

Because these alternatives theories are not based on the antidiscrimination principles underlying Title VII, they are largely outside the scope of this Article.

86. *See, e.g.*, R. Dworkin, Taking Rights Seriously 273 (1977) (requiring "equal concern and respect"); Fiss, *supra* note 53, at 237 (requiring that race be ignored).

87. *See, e.g.*, R. Dworkin, *supra* note 86, at 273-74 (requiring "same distribution of goods and opportunities"); Fiss, *supra* note 53, at 237-38 (looking to "outcome" and "actual distribution of jobs among racial classes . . . [with regard to] both the quantity and the quality (measured, for example, by pay level and social status) of the jobs").

88. *See supra* note 72. *But cf.* Blumrosen, *supra* note 45, at 103-107 (preferring equal achievement to equal process of validation under causation theory of disparate impact); Chamallas, *supra* note 59, at 356, 366-68 (same).

89. The Fault Theorists would demonstrate pretext by establishing that the facially neutral but disparately impacting factor was used unreasonably. *See infra* Section IIB.

individuals be judged not just by the same standards, but by standards that are facially and *consequentially* neutral with regard to the individuals' protected characteristic,[91] unless the standard is required by business necessity.[92] For example, in a society that relegated African-Americans to inferior educational systems, awarding employment opportunities only to those passing facially neutral intelligence tests would constitute same treatment but not neutral treatment.[93] The Effects Theory would require that such tests be limited to situations where business needs required their use.

1. Legislative Support for Both Theories

Neither Title VII's language nor its legislative history resolves the debate over whether it requires only same treatment or also neutral treatment. The Fault Theorists, who limit the definition of equality to same treatment, argue that Title VII's antidiscrimination provision, Section 703(a),[94] explicitly supports the interpretation that the employer would not be discriminating against a member of an underrepresented group "because of such individual's race, color, religion, sex, or national origin"

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90. *Cf.* Fiss, *supra* note 53, at 237 ("equal treatment" requires that "[i]ndividual[s'] . . . race should be 'ignored', that is, not held against them").

91. The Effects Theorists would demonstrate non-neutrality by showing that the facially neutral factor results in disparate impact, thus establishing that the factor preferred one group to the exclusion of another. *See infra* Section IIB.

92. *Cf.* R. Dworkin, *supra* note 86, at 273-74 ("treatment as an equal" requires "equal concern and respect").

93. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). Similarly, purposefully restricting employment to white males prior to Title VII and subsequently awarding employment benefits based on past experience or seniority would be same treatment, but not neutral treatment. *See* Watkins v. Scott Paper Co., 530 F.2d 1159, 1192-93 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); Stevenson v. International Paper Co., 516 F.2d 103, 117 (5th Cir. 1975); Walker v. Jefferson County Home, 726 F.2d 1554, 1558 (11th Cir. 1984); *cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 345, 352-53 (1977) (although seniority system perpetuates past discrimination, it is immunized under Section 703(h), 42 U.S.C. § 2000e-2(h)). Another example of same but not neutral treatment would be to require employees to be available for work Monday through Saturday, thus accommodating only the Christian sabbath. *See* Protos v. Volkswagen of Am., 797 F.2d 129, 134-35 (3d Cir.), *cert. denied*, 107 S. Ct. 474 (1986). In such instances, same treatment is actually unequal treatment. Title VII allows an employer to make such decisions absent proof (i) of subjective intent to discriminate under the disparate treatment theory, (ii) of objective unreasonableness under the Fault Theory, or (iii) of business necessity under the Effects Theory.

94. Section 703(a) of Title VII provides:

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

42 U.S.C. § 2000e-2(a) (1988).

unless the employer overtly or pretextually considered the individual's protected status.

But the antidiscrimination provision also supports the Effects Theorists' neutral treatment interpretation. Although a distinction based on a facially neutral criterion appears to discriminate against an individual because of a characteristic other than a protected one,[95] to the extent that it excludes a disproportionate number of candidates of a protected class, it can also be said to "discriminate against" individuals because of their protected status in violation of Title VII.[96] The disproportionate correlation between the individual's group affiliation and the criterion demonstrates the actual non-neutrality of the merely *facially* neutral factor. For example, the use of height as a selection criterion, although facially neutral, actually results in preference for men to the exclusion of women because men are on average taller than women. A disproportionate number of women will be excluded because of a sexual characteristic, and thus will be discriminated against because of their sex.[97]

Although Title VII's language accommodates both the same- and neutral-treatment interpretations, Fault Theorists maintain that legislative history limits Title VII to the same-treatment interpretation. Professor Gold argues that the 88th Congress, which enacted Title VII, contemplated prohibiting only discrimination intentionally based on the prohibited factors themselves.[98] The excessive narrowness of this interpretation becomes evident, however, when the Act is considered in its entirety. Title VII expressly exempts from liability employers' use of such neutral criteria as membership in certain Communist organizations,[99] national security requirements,[100] bona fide systems based on seniority, merit,

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95. *See supra* note 80 and accompanying text.

96. Statistical disparate impact extends the prohibition against distinguishing between candidates based on the characteristics of group membership to distinguishing on the basis of other characteristics shown to correlate with group membership. *See generally* Willborn, *supra* note 11, at 814-26 (discussing statistical discrimination theory).

97. Unusual females, who are taller, will not be adversely affected by this criterion.

98. *See* Gold, *supra* note 19, *passim*. *But cf.* Chamallas, *supra* note 59, at 326-28 (support for equal achievement as well).

99. Section 703(f) of Title VII provides that

> the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer . . . with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization.

42 U.S.C. § 2000e-2(f) (1988).

100. Section 703(g) of Title VII provides in pertinent part:

> Notwithstanding any other provision of this [title], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, [or] for an employer to discharge any individual from any position . . . if —
>
> (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed,

quantity or quality of production or work location,[101] professionally developed ability tests[102] and veterans preferences adopted pursuant to law.[103] If only overt or pretextual use of the prohibited factors could lead to employer liability, these provisions, which single out particular facially neutral selection criteria for protection, would be superfluous.

Moreover, the ninety-second Congress endorsed a more expansive interpretation of Title VII than that advanced by the Fault Theorists when it approved the *Griggs*[104] effects-based theory of disparate impact dis-

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is subject to any requirement imposed in the interest of the national security of the United States. . .; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

42 U.S.C. § 2000e-2(g) (1988).

101. Section 703(h) of Title VII provides in pertinent part:

> Notwithstanding any other provision of this [title], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such diffeerences [sic] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (1988).

To the extent employers use these Section 703(h) factors with an intent to discriminate based on a protected characteristic, however, Section 703(h) provides no protection. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 353, 355-56 (1977).

102. Section 703(h) also provides that

> [it shall not] be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h) (1989). The Supreme Court has interpreted this provision to protect only job-related professionally developed ability tests. *See* Connecticut v. Teal, 457 U.S. 440, 452 (1982); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 & n.21 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 & n.10, 435-36 (1971). *But cf.* Rutherglen, *supra* note 36, at 1304-06 (Section 703(h) added to ensure prohibition of pretextual discrimination).

103. Section 712 of Title VII provides that "[n]othing contained in this [title] shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preferences for veterans." 42 U.S.C. § 2000e-11 (1988).

104. The Supreme Court distinguished the discrimination in *Griggs* from disparate treatment discrimination by pointing out that "Congress directed the thrust of the [Civil Rights] Act [of 1964] to the *consequences* of employment practices, not simply the motivation." *Griggs*, 401 U.S. at 432. Moreover, the Court found the employer liable for disparate impact discrimination notwithstanding the lower court's express finding of no intentional discrimination. *See id.* at 428-29, 436.

In *Griggs*, the company required a high school diploma and a passing standardized test score for hire and transfer into its traditionally all-white departments. *See id.* at 427-28. Blacks failed both requirements in disproportionately high numbers. *See id.* at 430 & n.6. Although the requirements perpetuated the company's pre-Act overt race discrimination and might have been related to the inferior education resulting from society's intentional race discrimination in education, the Court focused not on whether plaintiffs were victims of either the employer's pre-Act race discrimination or society's race discrimination in education, but rather on whether plaintiffs were victims of the employer's diploma and test requirements. *See id.* at 430-33. Based only on the disparate effects of these facially neutral but disparately impacting criteria, the Court required the company to establish that its purpose for adopting the criteria constituted "a genuine business need" and that it

crimination during deliberations on the 1972 amendments to Title VII.[105] That Congress recognized employment discrimination to comprise " 'systems' and 'effects' rather than simply intentional wrongs."[106]

To date, the Supreme Court has not entered this debate over whether Title VII's legislative history precludes interpretations that go beyond prohibiting intentional use of protected characteristics as selection criteria. Notably, however, the Court has credited parties' Title VII claims in several cases[107] challenging an employer's use of facially neutral but disparately impacting criteria, beginning in 1971 with *Griggs v. Duke Power Co.*[108] Moreover, in *Connecticut v. Teal*[109] the Court cited the 1972 legislative history as Congress' endorsement of "the disparate-impact analysis employed by the Court in *Griggs*."[110] Even recent decisions[111] espousing the more limited Fault Theory do not reject the Effects Theory based on a limited interpretation of either Section 703(a) or the legislative history of the Act.

Section 703(j) of Title VII,[112] however, restricts the interpretation of

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was "manifest" or "demonstrable" that the criteria did in fact achieve the business purpose. *See id.* at 431-32. The company failed to establish business necessity because, although it established a sufficiently important business purpose—predicting successful job performance—,it failed to prove that the criteria were effective in achieving that purpose. *See id.* at 431-32 & n.7, 436. The Court, therefore, held the company liable for disparate impact discrimination, noting that "[n]othing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." *Id.* at 436.

105. *See Teal*, 457 U.S. at 447 n.8 (citing S. Rep. No. 415, 92d Cong., 1st Sess. 5 (1971)); Blumrosen, *Griggs Was Correctly Decided—A Response to Gold*, 8 Indus. Rel. L.J. 443 *passim* (1986); Chamallas, *supra* note 59, at 328-29; Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688, 719 nn.186-187 (1980); Thompson, *The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold*, 8 Indus. Rel. L.J. 105 *passim* (1986). *But cf.* Gold, *Reply to Thompson*, 8 Indus. Rel. L.J. 117, 119 (1986) (absent amendment or reenactment of pertinent provisions of Title VII, 1972 legislative history did not "ratify" disparate impact theory).

106. S. Rep. No. 415, 92d Cong., 1st Sess. 5 (1971); *see* H.R. Rep. No. 238, 92d Cong., 1st Sess. 8 (1971), *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2156-57.

107. *See* cases cited *supra* note 17.

108. 401 U.S. 424 (1971).

109. 457 U.S. 440 (1982).

110. *Id.* at 447 n.8; *accord* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 665-66 & n.9 (1989) (Stevens, J., dissenting); *supra* notes 104-105. *See generally* Fiss, *supra* note 53, at 240 (likely that neither statutory language nor legislative history regarding goals of fair employment statute is decisive).

111. *See* cases cited *supra* note 16.

112. Section 703(j) of Title VII provides that

> [n]othing contained in this [title] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community . . . or in the available work force in any community.

42 U.S.C. § 2000e-2(j) (1988).

Section 703(a) by providing that preferential treatment of a protected group is not required when based merely on evidence of disparate impact in an employer's workforce compared with the population or available labor force in the community.[113] Fault Theorists cite this provision to reject evidentiary standards consistent with the more expansive Effects Theory.[114] The antipreference provision, however, does not undermine the Effects Theory's neutral-treatment interpretation. Indeed, the provision is irrelevant to both theories.

The antipreference provision bars the compelled[115] preference for protected group members based merely on statistical imbalance between the employer's workforce and the community's labor pool. It does not address an employer's use of prohibited factors or non-neutral factors as selection criteria. Under both theories, the violation is established not by an abstract imbalance between the employer's workforce and the community's labor pool, but rather by evidence that the imbalance was caused by the employer's practice, i.e. either an expressly prohibited or a disparately impacting criterion.[116] The focus of disparate impact doctrine is on an employer's qualifying standards, not the employer's workforce in the abstract.[117] Nothing in Section 703(j) insulates an em-

113. Interpretation of Section 703(a) is also limited by Section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1), the bona fide occupational qualification ("BFOQ") defense to disparate treatment discrimination, which limits the employer's cost of achieving equal employment opportunity. Because the business necessity response to disparate impact discrimination is even more respectful of employer's interests, Section 703(e)(1) would not restrict the interpretation of Section 703(a) for disparate impact discrimination. *Cf.* Perry, *supra* note 77, *passim* (advocating use of the BFOQ exception as a model for the business necessity response to disparate impact discrimination).

114. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651-53, 659-60 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991-95 & n.2, 999-1000 (1988) (plurality); Connecticut v. Teal, 457 U.S. 440, 463 (1982) (Powell, J., dissenting); Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in judgment); Gold, *supra* note 19, at 457-63; Rutherglen, *supra* note 36, at 1313-16, 1326-27.

115. *Cf.* United Steelworkers v. Weber, 443 U.S. 193, 205-08 (1979) (distinguishing voluntary affirmative action).

116. *See* Shoben, *supra* note 71, at 38-40. The employees must establish that one or more of the employer's practices caused the imbalance. *See infra* Section IIB2a.

The disparate treatment theory comes closer to violating the antipreference provision because evidence of an abstract imbalance between the employer's workforce and the community labor force does raise an inference of discriminatory purpose that must be overcome by employer's neutral explanation. *Cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 334-40 (1977) (unskilled jobs). *But cf.* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977) (skilled jobs and legitimate geographical constraints); *Wards Cove*, 490 U.S. at 650-51 (applying restrictions to disparate impact case). The requirement of subjective intent, however, insulates disparate treatment discrimination from violating the antipreference provision. *See* Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1133 (9th Cir.1985), *reheard en banc on other grounds*, 810 F.2d 1477 (9th Cir. 1987).

117. *See, e.g.*, *Wards Cove*, 490 U.S. at 662-63 (Stevens, J., dissenting) (Title VII's concern with effects promotes "our national goal of eliminating barriers that define economic opportunity not by aptitude and ability but by race, color, national origin, and other traits that are easily identified but utterly irrelevant to one's qualification for a particular job") (footnote omitted); Griggs v. Duke Power Co., 401 U.S. 424, 429-30

ployer from liability for erecting discriminatory barriers to employment.

Moreover, Section 703(j) restricts the granting of preferential treatment. By contrast, both the Fault and the Effects Theories are concerned respectively with eliminating preference based on the prohibited factors themselves[118] or preference based on criteria that prefer one group at the expense of another.[119] Thus, both theories focus on equalizing the selection process[120] by eliminating discriminatory criteria rather than by requiring proportionate selections from that process.[121]

In sum, neither the language nor legislative history of Title VII conclusively resolves the theoretical debate between the Fault Theory's same-treatment interpretation of equality and the Effects Theory's neutral-treatment interpretation.[122]

(1971) (Title VII's goal "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees"); Rule v. Local 396, Int'l Ass'n. of Bridge, Structural and Ornamental Ironworkers, 568 F.2d 558, 566 (1977) (accepting *Griggs*' standards); *cf.* Chamallas, *supra* note 59, at 333-34 ("systematic disadvantaging as evidenced by group adverse impact" does not violate Section 703(j)).

118. *See supra* Section IIA (Fault Theory).

119. *See supra* Section IIA (Effects Theory).

120. The remedy appropriate for both theories would include enjoining unequal standards that are based on either the prohibited factors or non-neutral factors. *See* Williams, *supra* note 71, at 364-65. In addition, both theories would remedy discrimination by making whole those individuals previously judged by the unequal standards. *See* Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1988); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-21 (1975). For example, if there were no other standards, reinstatement would be appropriate. If the employer had other legitimate standards, successful plaintiffs would be judged according to them. *See, e.g.*, Evans v. City of Evanston, 881 F.2d 382, 386 (7th Cir. 1989) (to receive make-whole relief, plaintiffs must pass new physical agility test and perform well enough on other measures to show "but for unfair scoring of the 1983 test they would have been hired in 1983"); Ross v. Buckeye Cellulose Corp., 733 F. Supp. 363, 377-78 (M.D. Ga. 1990) (to demonstrate individual injury caused by discriminatory practice, each plaintiff must prove that he/she was qualified under employer's bona fide job qualifications). Individuals discriminated against under either theory would be entitled, therefore, to evaluation by equal rules, not to proportional selections.

121. *See supra* notes 86-88 and accompanying text (equal treatment vs. equal achievement); *see also* Caldwell, *supra* note 64, at 570-71 (equal achievement rejected in Section 703(j)); Segal, *supra* note 36, at 130 n.253 (distinguishing affirmative action from neutral process of disparate impact); Shoben, *supra* note 71, at 38-40 (disparate impact analysis creates rebuttable inference of exclusion, not obligation for preferential hiring); *cf.* Fiss, *supra* note 53, at 297 (antidiscrimination structure of laws restricts their redistributive aim). *But see* Belton, *supra* note 72, at 552 (allowing race-conscious affirmative action based on disparate impact alone); *cf.* Chamallas, *supra* note 59, at 356-57 (affirmative action appropriate alternative to validation under causation theory); Blumrosen, *supra* note 45, at 93, 103-06 (same).

122. If Congress adopts the Civil Rights Act of 1991, the evidentiary decisions reflected in its language would provide more explicit support for the Effects Theory. *See infra* Appendix—Summary of Comparison of Evidentiary Issues. Even that legislation, however, would not conclusively resolve the debate between the Fault and Effects Theories.

2. Neutral Treatment Interpretation More Consistent with Congressional Purpose

Congress enacted Title VII in order to equalize employment opportunities by removing "barriers that have operated in the past to favor an identifiable group of white employees."[123] Although improving employment opportunities of protected groups might result in a more efficient economy, this benefit was clearly a by-product of the central aim of improving employment conditions for those previously excluded.[124]

In specified circumstances, however, Congress balanced its primary commitment to eradicate discrimination against employers' needs to operate their businesses. First, the antipreference provision in Section 703(j)[125] clarifies that Title VII does not require an employer to maintain proportional representation between its workforce and the relevant labor pool. As discussed above, however, that provision does not excuse an employer's creation of imbalance through the use of discriminatory selection criteria.[126] Moreover, the Bona Fide Occupational Qualification defense to disparate treatment discrimination in Section 703(e)(1)[127] excuses discrimination based on religion, sex or national origin where the employer proves that those criteria are essential to the operation of its business.[128] The following comparison of the consequences of adopting each theory's interpretation of equality[129] shows that the Effects Theory's

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123. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); *see also* United Steelworkers v. Weber, 443 U.S. 193, 203 (1979) (It was clear to Congress that " '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which . . . traditionally [were] closed to them.' ") (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)); *cf.* Caldwell, *supra* note 64, at 575-77 (recognizing Congress' goal and supporting an effects-focused approach to achieve it); Gold, *supra* note 19, at 580-84 (recognizing Congress' goal but challenging *Griggs*' implementation of that goal).

Of course, Title VII broadly prohibits "discrimination against *any* individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1988) (emphasis added); *see infra* notes 184-188.

124. Although Title VII broadly prohibits discrimination on the basis of an individual's protected status, with certain specified exceptions, Title VII only constrains those inefficient practices that interfere with employment opportunities of protected groups. *See infra* note 183. *But cf.* Gold, *supra* note 19, at 580-82 (1964 Congress recognized economic harms from purposeful discrimination).

125. *See supra* note 112.

126. *See supra* notes 113-121 and accompanying text.

127. Section 703(e)(1) of Title VII provides that

> it shall not be an unlawful employment practice for an employer to hire and employ an employee . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

42 U.S.C. § 2000e-2(e)(1) (1988).

128. *See* Dothard v. Rawlinson, 433 U.S. 321, 332-36 (1977); Diaz v. Pan Am. World Airways, 442 F.2d 385, 388-89 (5th Cir. 1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232, 234-36 & n.5 (5th Cir. 1969); *cf.* Western Air Lines v. Criswell, 472 U.S. 400, 421-22 (1985) (case arising under the Age Discrimination in Employment Act).

129. In addition, Section IIB, *infra*, examines the evidentiary choices dictated by the two theories and the consequences of those choices.

neutral-treatment interpretation more fully achieves Congress' remedial purpose while respecting employers' legitimate discretion to run their businesses.

The consequence of requiring only the same treatment of all individuals rather than consequentially neutral treatment can be illustrated by the Supreme Court's decisions in *General Electric Co. v. Gilbert*[130] and *Nashville Gas Co. v. Satty*.[131] In *Gilbert* the Court ruled that General Electric's exclusion of pregnancy from its nonoccupational sickness and accident benefit plan *did not* constitute gender discrimination.[132] In *Satty*, however, it ruled that the Gas Company's exclusion of pregnancy from the company's normal disease and disability policy[133] *did* constitute gender discrimination.[134]

The two decisions are reconcilable only from the same-treatment, but not from the neutral-treatment, perspective. The exclusion of only one sex-specific disability—pregnancy—from General Electric's benefit plan, which covered a multitude of risks including some male-specific risks, was not deemed discriminatory against women because " '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' "[135] Having determined that both sexes were treated the same, the majority viewed the women's challenge as demanding special treatment[136] because "pregnancy-related disabilities constitute[d] an *additional* risk, unique to women."[137] Thus, because women and men were treated the same under the benefit plan, the exclusion of pregnancy did not constitute sex discrimination. The fact that both sexes were judged on a male standard was not determinative for the Fault Theorists.[138]

In apparent contradiction, the exclusion of pregnancy from Nashville

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130. 429 U.S. 125 (1976).

131. 434 U.S. 136 (1977).

132. *See Gilbert*, 429 U.S. at 138-39.

133. The policy allowed retention of accumulated seniority following disability and accrual of additional seniority during disability. *See Satty*, 434 U.S. at 140 & n.3.

134. *See id.* at 139-40.

Subsequent to these decisions, Congress reversed *Gilbert* by adopting The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1982), which added Section 701(k) to Title VII and defined sex to include pregnancy, childbirth and related medical conditions.

135. General Elec. Co. v. Gilbert, 429 U.S. 125, 138 (1976) (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974)).

136. The Court also rejected the claims because women already received comparable benefits without including pregnancy coverage. *See Gilbert*, 429 U.S. at 138; *see also Satty*, 434 U.S. at 152 n.6 (Powell, J., concurring) ("a fair reading of the evidence in *Gilbert* demanded that the total compensation of women in terms of disability-benefit plans may well have exceeded that of men"); *infra* Section IIB2d.

137. *Gilbert*, 429 U.S. at 139; *cf.* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 70-71 (1986) (employee's religious need accommodated where he did not lose job, but lost pay, for absence from work caused by religion).

138. *See* Williams, *supra* note 71, at 346 ("[T]he statute did not create a 'double' standard. Rather, it made man the standard (whatever disabilities men suffer will be compensated) and measured women against that standard (as long as she is compensated for anything he is compensated for, she is treated equally).").

Gas Company's leave policy, which allowed for retention of accumulated seniority and accrual of additional seniority, was deemed discriminatory against women. This result was distinguished from *Gilbert* by characterizing the exclusion as different treatment of women—not denial of special treatment—because pregnant women did not receive the same seniority benefits that accrued to men.[139] Thus, from the same-treatment perspective, an employer's use of pregnancy to distinguish between individuals constitutes discrimination only when it deprives female workers of the same employment opportunities awarded to and appropriate for male workers.

The Effects Theorists found the special-treatment/different-treatment[140] distinction between *Gilbert* and *Satty* to be illusory. Indeed, General Electric's failure to insure women for medical risks arising from pregnancy, while insuring men for *all* medical risks including vasectomies and prostatectomies, could also be characterized as different treatment requiring judicial scrutiny.[141] This semantic distinction merely obscured the discriminatory treatment caused by using the disparately impacting criterion of pregnancy.

Under the Effects Theory's neutral-treatment approach, the rulings appear inconsistent. Because pregnancy has an obvious disparate impact on women, it could not be deemed a neutral criterion in any context.[142] The Effects Theorists challenge the ruling in *Gilbert* because it is only from the male perspective, not a gender-neutral perspective, that exclusion of pregnancy from an employee benefit package constitutes same

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139. *See* Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977) ("We held in *Gilbert* that 703(a)(1) did not require that greater economic benefits be paid to one sex or the other 'because of their differing roles in the 'scheme of human existence,'" . . . . But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.") (citation omitted); *id.* at 144-45 (distinguishing *Gilbert* and finding that the *Gilbert* challenges to sick and disability leave payments were properly brought under Section 703(a)(1)).

140. *See* General Elec. Co. v. Gilbert, 429 U.S. at 147-48, 155, 160 (Brennan, J., dissenting); *id.* at 161-62 (Stevens, J., dissenting).

The Effects Theorists also rejected the Court's benefit/burden and Section 703(a)(1)/703(a)(2) distinctions. *See Satty*, 434 U.S. at 154 & n.4 (Stevens, J., concurring); *Gilbert*, 429 U.S. at 154-55, 158 (Brennan, J., dissenting); *id.* at 161-62 (Stevens, J., dissenting); *cf.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 647 (1989) (challenging segregated dorms and eating as disparately impacting under Section 703(a)(2)); *Satty*, 434 U.S. at 142-43 (challenging Gas Company's leave policy under Section 703(a)(2)).

141. General Electric's failure to cover pregnancy could also be characterized as a burden or discrimination that "adversely affects [the woman's] status as an employee" under Section 703(a)(2). *But cf. Satty*, 434 U.S. at 154 & n.4 (Stevens, J., concurring) (distinguishing *Gilbert* as affecting pregnancy, not the pregnant employee). Such an interpretation makes indistinguishable the Gas Company's failure to reinstate past seniority or to award seniority during the leave because of pregnancy.

142. For example, the context in *Gilbert*, 429 U.S. at 127, was that pregnancy was the only risk excluded from the employer's nonoccupational sickness and accident benefit plan and the context in *Satty*, 434 U.S. at 138, was that pregnancy was the only disability excluded from the company's normal disease or disability leave policy.

treatment.[143] Because they require genuine neutrality, they would find employers' use of pregnancy in that context to violate Title VII. Consistent with Title VII's antidiscrimination goals, this theory requires more respect for and equal accommodation of all perspectives, not just the perspectives of those in power.[144]

The same treatment/neutral treatment debate also figured in *Lynch v. Freeman*.[145] There the majority espoused a neutral-treatment interpretation of equality and found disparate impact discrimination where the employer's rule prohibiting the use of indoor toilets caused a disproportionate number of women to become ill from using the unsanitary, outdoor toilets.[146] Using a same-treatment approach, the dissent would have found no discrimination from the rule, despite its consequent medical problems for women, because it disagreed "that working conditions for all must be upgraded to some unstated standard before women can have full access to the workplace."[147] The *Lynch* case clearly demonstrates how the Fault Theory would allow women to enter the workforce only to the extent that they can assimilate to the male-oriented workplace. Indeed, the court's myopia regarding the non-neutrality of workforce standards and its hostility to examining the business necessity of the current arrangements highlight the limitations of the same-treatment interpretation.[148] Only by adopting the Effects Theory's neutral-treatment interpretation will workplace standards equalize to genuinely accommodate diverse groups of workers.

The Effects Theory, however, is not insensitive to employers' legitimate interests in workplace productivity. Indeed, all standards found to prefer one group over others would be examined for their business necessity. The theory would require courts to examine whether those found "unqualified" under traditional workplace standards are actually unqual-

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143. *See Gilbert*, 429 U.S. at 151-53, 160 (Brennan, J., dissenting); *id.* at 161-62 (Stevens, J., dissenting).

144.

> A perspective may go unstated because it is so powerful and pervasive that it may be presumed without defense; it may also go unstated because it is so unknown to those in charge that they do not recognize it as a perspective. Presumptions about whose perspective matters ultimately may be embedded in the final, typically unstated assumption: when in doubt, the status quo is preferred, and is indeed presumed natural and free from coercion.

Minow, *Foreword: Justice Engendered*, 101 Harv. L. Rev. 10, 54 (1987); *accord* Littleton, *supra* note 83, at 1328-30 (accommodating equally "gendered complements," such as service in the military and service as a mother); *cf.* Johnson v. Transportation Agency, 480 U.S. 616, 620-21 (1987) (accommodating "innocent" majority workers in affirmative action plans); United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (same).

145. 817 F.2d 380 (6th Cir. 1987).

146. *See id.* at 388-89.

147. *Id.* at 391 (Boggs, J., dissenting); *accord id.* at 390 (Boggs, J., dissenting) ("Sanitary napkin dispensers would clearly be a convenience for women only."). The "unstated standard" sought by the women in *Lynch* is a neutral standard that could accommodate both men and women.

148. According to the Fault Theory, Title VII prohibits only the employer's use of the protected factors themselves.

ified to do the work. Thus, based on *Gilbert*, *Satty* and *Lynch*, the male-oriented standards would be re-examined.[149] When not justified by the needs of the business, those male-based standards would be replaced by androgynous ones.[150] Only by prohibiting discrimination based on non-neutral criteria will individuals who differ from the non-neutral norm[151] be allowed employment opportunities unless their differences are shown to have consequences inconsistent with the requirements of the business. Under the Effects Theory, therefore, employees can expect truly equal, not just formally equal, treatment.[152] Consequently, adopting the neutral-treatment interpretation of equality comports more fully with Title VII's remedial purposes, without sacrificing employers' interests.

B. *The Evidentiary Contours of the Theories*

The defining components in any disparate impact case are (i) an employer's use of a facially neutral criterion (ii) that results in disparate impact based on race, color, religion, sex or national origin and (iii) that cannot be justified by business needs. The evidence sufficient to satisfy these components differs under the Fault and the Effects Theories.

Under the Fault Theory, evidence that an employer's facially neutral criterion disparately affects a protected group would not by itself demonstrate that the employer was pretextually treating employees differently in violation of Title VII. To establish a violation, the theory requires not only that the employer used a disparately impacting criterion, but that it did so unreasonably. This requirement—employer fault—dictates evidentiary choices at each stage of the disparate impact discrimination case.

In contrast, under the Effects Theory, evidence that an employer's facially neutral criterion causes a disparate impact is sufficient to demonstrate the non-neutral treatment of employees. Evidentiary choices necessary to prove discrimination, therefore, focus on the impact caused by any facially neutral criterion—not on the employer's fault. Proof of such impact, however, does not establish the employer's liability; it merely mandates judicial scrutiny regarding the business necessity for the crite-

149. Although *Gilbert* and *Satty* discussed pregnancy—now also an explicitly protected factor, *see supra* note 134—the lessons from the same treatment/neutral treatment debate are equally applicable to more facially neutral criteria where the adverse effect is less extreme. *See supra* note 93 and accompanying text.

150. *See* Taub & Williams, *supra* note 70, at 837-38; Williams, *supra* note 71, at 363.

151. *See, e.g.*, Finley, *supra* note 83, at 1154 ("[T]o hide the fact of difference from the prevailing norm means being treated according to a 'faulty neutrality,' or a standard that, because it was not created with the difference in mind, advances the dominant group to the detriment of those who are not, in fact, like it.") (footnote omitted); Minow, *supra* note 144, at 32 (suggests analyzing difference as a relational concept—women are different from men—rather than an intrinsic concept—women are different in themselves).

152. *See* Taub & Williams, *supra* note 70, at 836, 839-40; Williams, *supra* note 71, at 331, 364-65; *cf.* Brooks, *Racial Subordination through Formal Equal Opportunity*, 25 San Diego L. Rev. 881, 893-98 (1988) (challenging formalism of disparate treatment discrimination).

rion. At the business necessity stage, the court would evaluate the employer's business justification for using the criterion.

The following discussion of the competing theories' evidentiary contours reveals how the Fault Theory's requirement of fault unjustifiably restricts employees' ability to challenge criteria that result in disproportionate exclusion of protected groups. It further reveals that the Effects Theory's focus on the criterion's impact and on the employer's business justification for the criterion more appropriately addresses Title VII's concerns. In sum, this section provides additional support for preferring the Effects Theory in Title VII disparate impact cases.

1. The Facially Neutral Criterion

Both theories agree that disparate impact doctrine is limited to challenging an employer's facially neutral criteria, i.e. criteria that are not explicitly prohibited by Title VII and that are applied to all candidates regardless of their protected status.[153] Thus, disparate impact doctrine has been used to challenge the uniform application of criteria such as testing or minimum height requirements.[154] Only the Fault Theory, however, would limit the type of facially neutral criteria subject to

153. In Beard v. Whitley County REMC, 656 F. Supp. 1461, 1468-69 (N.D. Ind. 1987), *aff'd*, 840 F.2d 405 (7th Cir. 1988), the employer's decision to award a wage increase to the predominantly male trades and crafts group, but not the predominantly female office and clerical group, was not analyzed under disparate impact theory because the employer did not apply one neutral rule to all employees, but rather treated them differently based on their employment category. *See id.* at 1471-72. The decision to treat the groups differently might raise an inference of disparate treatment: that the reason the male-dominated jobs got the increase whereas the female dominated jobs did not was because of sex.

The employer did explain, however, that it decided to treat the trades-and-crafts group differently from the office-and-clerical group to be consistent with the wage scales for those jobs in the market. Although the use of the market to distinguish between the occupational groups for the raise would be a facially neutral practice, there was no evidence that the policy resulted in a disparate impact based on a protected factor in the case. *See id.* at 1469-70; *see also* Thomas v. Metroflight, Inc., 814 F.2d 1506, 1508 (10th Cir. 1987) (ad hoc application of facially neutral rule undercuts disparate impact analysis, but may raise disparate treatment analysis); Yartzoff v. State of Oregon, 745 F.2d 557, 559 (9th Cir. 1984) (per curiam) ("There was no evidence that the employer ever applied the subjective criteria to anyone but the plaintiff."); Domingo v. New England Fish Co., 727 F.2d 1429, 1436 (9th Cir. 1984) (no facially neutral factor where employer recruited cannery workers from one source and higher paid non-cannery workers from different source); Fiss, *supra* note 53, at 291-96 (analyzing non-uniform application of facially neutral standards as intentional discrimination).

154. *See generally* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989) (nepotism, separate hiring channels, rehire preferences, subjective decisions); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) (subjective decisions of supervisors); Connecticut v. Teal, 457 U.S. 440, 443 (1982) (written examination); New York City Transit Auth. v. Beazer, 440 U.S. 568, 571-72 (1979) (no methadone use); Dothard v. Rawlinson, 433 U.S. 321, 323-24 (1977) (minimum 120-pound weight and minimum 5 feet 2 inch height requirements); Albemarle Paper Co. v. Moody, 422 U.S. 405, 410-411 (1975) (Revised Beta Examination and Wonderlic Personnel Test); Griggs v. Duke Power Co., 401

challenge.[155]

a. *Subjective Criteria*

One now-resolved evidentiary dispute[156] was whether facially neutral but subjective criteria were appropriately subject to disparate impact challenge. The Effects Theory allows challenge to any of an employer's selection practices, regardless of their subjectivity.[157] The theory focuses on whether the employer's criterion, no matter how complicated or unclear, results in a disparate impact based on a prohibited factor. Such impact is sufficient to identify the practice as non-neutral.[158] In that instance, the employer would be required to justify the criterion as necessary for its business.

By contrast, the Fault Theory limits such challenge to objective criteria only, arguing that subjective criteria are insufficiently "well-defined" to be amenable to disparate impact challenge.[159] Thus, absent a more "clearly delineated" criterion, employees cannot inferentially prove pretextual discrimination using the disparate impact rubric, but rather are limited to proving it directly under the disparate treatment theory.[160] Without such clarity, courts would be unable to determine "whether those neutral acts are a non-job-related pretext to shield an invidious judgment."[161]

Consequently, the Fault Theory would immunize from judicial scrutiny all subjective criteria[162] unless supported by more direct evidence of

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U.S. 424, 425-28 (1971) (high school diploma and two professionally prepared aptitude tests).

Congress exempted from disparate impact challenge certain selection criteria used for certain purposes. *See* 42 U.S.C. §§ 2000e-2(f)-(h), 2000e-11 (1988); *supra* notes 99-103.

155. *See infra* notes 303-304, 306 and accompanying text.

156. *See infra* note 165 and accompanying text.

157. *See* Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. Ill. L. Rev. 869, 903-07.

158. *See* Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985); Bauer v. Bailar, 647 F.2d 1037, 1042-43 (10th Cir. 1981).

159. *See* Spaulding v. University of Wash., 740 F.2d 686, 709 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984).

160. *See id.* at 708-09; *see also* Zahorik v. Cornell Univ., 729 F.2d 85, 95 (2d Cir. 1984) (disparate impact analysis applies primarily to "quantifiable or objectively verifiable selection criteria which are mechanically applied"); Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 801 (5th Cir. 1982) (arguing that "the failure to post job openings, the use of a level system, and evaluating employees with subjective criteria . . . are [not] akin to the 'facially neutral employment policies' the disparate impact model was designed to test").

The issue of subjectivity is often related to the issue of isolating the particular facially neutral criterion causing the impact. *See infra* Section IIB2a.

161. *Spaulding*, 740 F.2d at 708; *accord Pouncy*, 668 F.2d at 800; Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1132 (9th Cir. 1985) ("Congress was concerned about mandating color blindness with as little intrusion into the free market system as possible."), *reheard en banc on other grounds*, 810 F.2d 1477 (9th Cir. 1987).

162. The distinction between objective and subjective criteria may be less than clear. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989 (1988) ("However one might distinguish 'subjective' from 'objective' criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature.").

the employer's conscious discriminatory intent. This consequence is particularly troubling because it is precisely the ill-defined nature of subjective criteria that makes them susceptible to concealing discrimination.[163] Thus, to ensure against discrimination, subjective criteria should be scrutinized as closely as more well-defined criteria. Only the Effects Theory requires equal scrutiny of subjective criteria.[164]

Recognizing that employers could effectively undercut disparate impact analysis and insulate themselves from challenge by including subjective criteria in their selection processes, the Supreme Court unanimously decided that subjective criteria are as amenable to disparate impact challenge as objective criteria.[165]

b. *The Control Element*

A second, yet unresolved, evidentiary dispute regarding facially neutral criteria concerns the relevance of employer control over the adoption of, and employee control over compliance with, the criteria. The Effects Theory attributes no relevance to either employer or employee control in disparate impact cases. The Fault Theory, however, allows control to determine the availability of disparate impact challenge.

Effects Theorists require justification for any disparate impact caused by a facially neutral criterion, regardless of whether the employer had control over its use. Thus, the employer would be responsible for the disparate effects of any of its practices, regardless of fault.

Fault Theorists, however, would exempt from challenge those criteria over which the employer has no control. This is consistent with their view that only unreasonable use of a disparately impacting factor violates Title VII. Thus, an employer would not be at fault for any disparate impact resulting from a criterion that it felt compelled to use.

Using this rationale, several courts have refused to examine employers' use of market wage rates to set salaries, despite proof that the market had a disparate impact based on gender.[166] Without specific proof by any employer, these courts categorically concluded that all employers are merely " 'price-takers' " who "deal with the market as a given,"[167] even

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163. *See id.* at 1009-10 (Blackmun, J., concurring).

164. *See id.* at 1008-10 (Blackmun, J., concurring).

165. *See id.* at 989-91 (Kennedy, J., took no part in the case). However, the Court remained divided along theoretical lines in discussing the evidentiary contours of the disparate impact discrimination doctrine now made applicable to subjective criteria. *Compare id.* at 989-99 (O'Connor, J., joined by Rehnquist, C.J., White, and Scalia, J.J.) (advocating evidentiary rulings consistent with Fault Theory) *with id.* at 1000-10 (Blackmun, J., joined by Brennan and Marshall, J.J.) (advocating evidentiary rulings consistent with Effects Theory). This discussion was dictum because the district court and court of appeals ruled as a matter of law, without evaluating employee's evidence, that disparate impact doctrine was inapplicable to claims involving subjective criteria. *See id.* at 984.

166. *See, e.g.*, Spaulding v. University of Wash., 740 F.2d 686, 708 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984); Beard v. Whitley County REMC, 656 F. Supp. 1461, 1469-70 (N.D. Ind. 1987), *aff'd*, 840 F.2d 405 (7th Cir. 1988).

167. *Spaulding*, 740 F.2d at 708; *cf.* Liberles v. County of Cook, 709 F.2d 1122, 1133

when the employers were public entities. The employers were deemed not sufficiently "culpable" to be required to justify their use of the market within the context of their particular business.[168]

In reality, however, the employer has no less discretion over whether to pay according to the market than over whether to hire according to customer preferences[169] or test results. What might distinguish these standards is not the employer's control, but rather the employer's costs of not using them. Legitimate business costs, however, are precisely what the court examines at the business necessity stage of disparate impact cases, after finding a disparately impacting criterion.[170]

Categorically exempting from judicial scrutiny those criteria that, like the market, have an admittedly disparate impact undermines Title VII's remedial nature. When Congress meant to exempt facially neutral factors from disparate impact challenge, it did so.[171] Other than the congressionally authorized exemptions, courts should require employers to justify *their* use of disparately impacting criteria, either as reasonable or necessary, on a case-by-case basis under the standards of business necessity.[172] This expansive interpretation of disparate impact doctrine is designed not to hold the employer responsible for the market's gender discrimination, customers' prejudices or inadequate educational systems, but rather to require that the employer justify using those discriminatory measures in its business.

Evaluation of the market at the business necessity stage under the Effects Theory allows the court to judge whether to excuse an employer's use of the market criterion, despite its impact on women, based on consideration of the business costs to the employer of eliminating use of the criterion.[173] This is consistent with Title VII's aim of accounting for employer needs when considering whether to prohibit a particular practice. Evaluating the market during the prima facie case under the Fault Theory, on the other hand, requires the court to protect an employer's use of the market based solely on concerns regarding the employer's fault in adopting the criterion. By requiring the determination during the prima facie case, the employer is not even required to explain why it adopted

(7th Cir. 1983) ("no showing that the assignment and compensation policy was dictated by the federal government"); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 897 (C.D. Calif. 1976) (city not responsible for hiring from entire county rather than from city if it could "demonstrate that economic forces beyond . . . [its] control dictated that . . . [the county] would provide the bulk of applicants").

168. *See Spaulding*, 740 F.2d at 708.

169. *See* Diaz v. Pan Am. World Airways, 442 F.2d 385, 387-88 (5th Cir. 1971); Willborn, *supra* note 11, at 832.

170. *See infra* Section IIB3.

171. *See* 42 U.S.C. §§ 2000e-2(f)-(h), 2000e-11 (1988); *supra* notes 99-103.

172. *See infra* Section IIB3; *cf.* Beard v. Whitley County REMC, 656 F. Supp. 1461, 1469-70 (N.D. Ind. 1987) (finding reliance on the market inappropriate and unworkable in disparate impact analysis), *aff'd*, 840 F.2d 405 (7th Cir. 1988).

173. *See infra* Section IIB3.

the criterion.[174] Not only does this judgment fail to account for the exclusionary effect of the criterion, it also requires the court to exonerate an employer's use of a non-neutral criterion on the more amorphous basis of fault rather than on the more objective and congressionally recognized ground of business need. Thus, it is more consistent with Title VII's policies to adopt the Effects Theory's approach of evaluating the merits of all disparately impacting criteria, even those involving high business costs, at the business necessity stage.

The debate over the relevance of control in disparate impact doctrine also focuses on the employee's discretion over whether to comply with the employer's standard. Effects Theorists would require employer justification for the criterion, regardless of employee control. Thus, employees would be compelled to comply with the employer's disparately impacting standards only when justified by the needs of the business.

Fault Theorists, on the other hand, would exempt from challenge those factors over which the employee has control.[175] They would require an employer to explain its use of an impacting factor only when employees are unable, not just unwilling, to comply. Where the employees are able to comply, it is their discretion, not their protected status, that results in their exclusion.

Citing employee control, courts have upheld English-only rules applicable to bilingual employees[176] as well as grooming requirements, such as hair length and style.[177] Thus, without any evidence of even a rational business purpose for imposing the rule, Fault Theorists would uphold the employer's discretion to compel employee compliance with standards employees are able to meet, even when they result in a disparate impact.

What the Fault Theory fails to account for, however, is the cost to the employee of complying with the employer's facially neutral rule.[178] In-

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174. *See infra* note 322.

175. This concern for employee control is reminiscent of the causation theorists' focus on the cause of the disparity. *See supra* notes 56-63 and accompanying text; *cf.* Fiss, *supra* note 53, at 299 (requiring lack of employee control in addition to lack of productivity for criterion to be deemed "functional equivalent" of prohibited factor).

176. *See* Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

177. *See* Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1092 (5th Cir. 1975); *cf.* Contreras v. City of Los Angeles, 656 F.2d 1267, 1273-74 (9th Cir. 1981) (evidence of disparate impact caused by exam challenged on basis of evidence that employees failed to study for exam), *cert. denied*, 455 U.S. 1021 (1982). *But cf.* Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 815-16 (M.D. Ala. 1989) (crediting impact data on the pass/fail rates of blacks and whites taking the test for first time, while rejecting data on pass rates that included candidates passing the test after multiple retakes).

178. *See, e.g.*, Gutierrez v. Municipal Court, 838 F.2d 1031, 1040 (9th Cir. 1988) (recognizing hardship imposed by English-only rule, court found such rules to be subject to disparate impact theory), *vac. as moot*, 490 U.S. 1016 (1989); Lynch v. Freeman, 817 F.2d 380, 386 (6th Cir. 1987) (finding that company's "outside toilet" policy disparately impacted against women despite employer's argument that women could have avoided the impact by taking such affirmative steps as carrying their own toilet paper, carrying and using toilet seat covers or refraining from sitting on the toilets, pursuing better compli-

deed, courts have enforced such employment requirements despite their socio-cultural association.[179] For example, no-beard policies have been enforced in spite of racially linked medical problems[180] or religious practices[181] that prohibit the employee from shaving. Thus, adoption of the Fault Theory may result in insensitivity to precisely those racial, ethnic or religious based hardships[182] Title VII was enacted to redress.

By examining all of an employer's disparately impacting criteria, regardless of employer/employee control, the Effects Theory focuses on the employer's business need for the criterion, rather than the more variable and complex issues of either the employer's "fault" or the employee's "innocence." Moreover, the Effects Theory will require employees to assimilate to standards of the preferred group only when necessitated by the particular needs of the employer's business, not merely to accommodate a power struggle between the employer and the employee.

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ance with toilet service contract and checking out the waterless hand cleaner); *Willingham*, 507 F.2d at 1087 (enforcing hair-length policy for men in 1970 to disassociate business from "counter-culture types"); Wallace v. Debron Corp., 494 F.2d 674, 676 (8th Cir. 1974) (employer unsuccessfully sought to avoid judicial scrutiny of its no-garnishment policy by arguing that garnishment resulted from employee's voluntary conduct); Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 Harv. Women's L.J. 73, 118-19 (1982) (recognizing clothing as expression of image, particularly for women in patriarchal society); *cf.* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1602, 1606 (1990) (employee who lost job for ingesting peyote for sacramental purposes at Native American Church denied unemployment benefits); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68, 70 (1986) (employee denied use of personal business leave day for mandatory religious observance because employee was fully accommodated where he was given day off, even if it was without pay); United States v. Board of Educ., 911 F.2d 882, 891 (3d Cir. 1990) (undue hardship for school district to disobey state criminal statute forbidding religious attire in classrooms by allowing devout Muslim right to wear religious attire in classroom).

179. *See, e.g., Garcia*, 618 F.2d at 266-67 (English-only rule upheld despite testimony that, "because Spanish is his primary language, he found the English-only rule difficult to follow," and despite recognition of the importance of Spanish to the "ethnic identification for Mexican-Americans"); Rogers v. American Airlines, 527 F. Supp. 229, 231-32 (S.D.N.Y. 1981) (enforcing prohibition of all-braid hairstyle, regardless of its significance for Black American women); Carswell v. Peachford Hosp., 26 Empl. Prac. Dec. (CCH) ¶ 32,012, at 21,555 (N.D. Ga. 1981) (same); Wofford v. Safeway Stores, 78 F.R.D. 460, 469 (N.D. Cal. 1978) (employer may require employees to be clean shaven). *See generally* Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. Rev. 303 (1986) (discussing tension between a singular "American" identity and Constitutional tolerance for cultural diversity).

180. *See* EEOC v. Greyhound Lines, 635 F.2d 188 (3d Cir. 1980); Bradley v. Pizzaco of Neb., Inc., 51 Empl. Prac. Dec. (CCH) ¶ 39,355, at 59,450-51 (D. Neb. 1989), *aff'd in part, rev'd in part*, 55 Empl. Prac. Dec. (CCH) ¶ 40,565 (8th Cir. 1991).

181. *See* Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383-84 (9th Cir. 1984). In *Bhatia*, a new statutory requirement of gas-tight face seal for safety equipment impacted those with facial hair, including those observing Sikh religion. *See id.*

182. *Cf.* Fiss, *supra* note 53, at 302 (recognizing past racial discrimination as impediment to individual control); Minow, *supra* note 144, at 50-54 (sensitivity enhanced by ability to see from another's perspective).

2. Proving Disproportionate Impact

Whichever facially neutral criteria are subject to scrutiny, disparate impact doctrine requires proof that the criteria distinguish between candidates based on one of the prohibited characteristics.[183] Although Congress had particular concern with "the plight of the Negro in our economy,"[184] the antidiscrimination provision of Title VII indicates Congress' intent to remove barriers based on any individual's protected status.[185] Consequently, all groups, even Euro-American males, are protected.[186] Under both theories, it is the employer's use of discriminatory criteria—either the prohibited factors themselves or non-neutral factors—that necessitates judicial scrutiny, not harm to any particular group.[187] Accordingly, an employer's process will be viewed as discrimi-

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183. By its language, Title VII constrains employers from discriminating in employment only "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

Absent a contract or a statute, an employer had unlimited discretion to award or withhold employment opportunities at will: for good reason, bad reason or no reason. *See generally* Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 563-67 nn.1-5, 335 N.W.2d 834, 835-37 nn.1-5 (1983) (discussing the employment-at-will doctrine). Title VII changed the at-will employment relationship by prohibiting an employer's discretion to select among its employees based on their race, color, religion, sex or national origin. *See* Chamallas, *supra* note 59, at 331-32; Willborn, *supra* note 11, at 821-22.

184. 110 Cong. Rec. 6548 (1964) (statement of Sen. Humphrey).

185. *See* 42 U.S.C. § 2000e-2(a); *supra* note 94.

186. *But cf.* Segal, *supra* note 36, at 140-41 (advocates of the Equal Rights Amendment would limit disparate impact discrimination to that impact that "is traceable to and reinforces, or perpetuates, discriminatory patterns similar to those associated with facial discrimination") (quoting *Equal Rights Amendment: Hearings on H.J. Res. 1 Before the Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1983) (testimony of Ann Freedman)); Taub & Williams, *supra* note 70, at 841 (same limitation under Title VII). *But see* Sherry, *supra* note 63, at 111 ("it is the evidence of prejudice against one class, and not the fact that the *classification* may be based on inaccurate stereotypes of both classes, that suggests the use of heightened scrutiny"). Moreover, group justice theories would grant protection only to specific groups. *See supra* note 85; *cf.* Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986) (impact on disfavored class relevant "because it is reasonable to presume that such a practice is a means by which historical discrimination is perpetuated"); Blumrosen, *supra* note 45, at 103-06 (disparate impact applicable to minorities only under causation theory); Chamallas, *supra* note 59, at 366-68 & n.300, 369 & n.312 (same).

Disparate treatment discrimination theory is also symmetrical, applying to all groups. *See* McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

187. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Craig v. Alabama State Univ., 804 F.2d 682, 688 (11th Cir. 1986); *see also* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1990) ("A selection rate for *any* race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact.") (emphasis added); *cf.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 677 n.25 (1989) (Stevens, J., dissenting) ("Absent any showing that the 'underrepresentation' of whites in this stratum [cannery workers] is the result of a barrier to access, the 'overrepresentation' of nonwhites does not offend Title VII"); Weisbord v. Michigan State Univ., 495 F. Supp. 1347, 1352 (W.D. Mich. 1980) (refusing to dismiss disparate impact claim by white male). *But cf.* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 710 n.20 (1978) ("Even under Title VII . . . the male employees would not prevail [in challenging the disparate impact of equal contributions by men and women to pension]. Even a com-

natory whenever its criteria disproportionately eliminate any group, whether it be a traditionally underrepresented group or Euro-American males.[188]

Both theories also agree that disparate impact doctrine would be applicable only if the impact can be traced to the *employer*.[189] Evidence of abstract disparate impact in the employer's workforce compared with the relevant labor pool would not establish a Title VII violation.[190] The antidiscrimination provision of Section 703(a) does not make an employer

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pletely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.").

188. To the extent that bottom-line statistics are correlated with disparate impact discrimination in traditional selection criteria, *see infra* Section IIB2d, however, the theory will benefit underrepresented groups more frequently than Euro-American males. This result will aid in equalizing the unequal status quo. *See Griggs*, 401 U.S. at 430-31.

Allowing symmetrical application of disparate impact doctrine has been criticized for ignoring American social history and for failing to allow employers to defend their affirmative action programs by resort to disparate impact. *See* Colker, *supra* note 82, at 1034-35; *cf.* Segal, *supra* note 36, at 141 n.307 (progressive income tax excused at disparate impact stage because it does not reinforce wage discrimination against women). Whether the criterion perpetuated or remedied past invidious discrimination could be evaluated at the business necessity stage, however. Courts have viewed as "compelling" an employer's business purpose to remedy past discrimination. *See* Johnson v. Transportation Agency, 480 U.S. 616, 637 (1987); United Steelworkers v. Weber, 443 U.S. 193, 209 (1979). Thus, if a disparately impacting criterion helped remedy past discrimination, it might be excused as a business necessity.

189. *See Wards Cove*, 490 U.S. at 672-73 (Stevens, J., dissenting).

190. *See* The Civil Rights Act of 1991, H.R. 1, *supra* note 14, at § 4; Robinson v. Adams, 830 F.2d 128, 131 (9th Cir. 1987).

Although the majority and dissent in *Wards Cove* disagreed on the probative value of evidence that a disproportionate number of nonwhite workers held the lower paying cannery jobs, both agreed that such evidence unconnected to employer's practices would not establish a prima facie case of disparate impact discrimination. *Compare Wards Cove*, 490 U.S. at 651-52 (rejecting internal workforce comparison and requiring comparison between the jobs at issue and the qualified population in the relevant labor market) *with id.* at 674-78 (Stevens, J., dissenting) (attributing internal disparity to employer where work was seasonal and in remote areas of Alaska and where employer used facially neutral criteria like nepotism, word-of-mouth recruitment, separate housing and mess halls). Moreover, both the majority and dissent in *Wards Cove* would not hold the employer responsible for the underrepresentation of whites in the cannery jobs. *See id.* at 653-54, 677 n.25; *cf.* Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 801 (5th Cir. 1982) (rejecting proof of imbalance in the workforce because employee "has not shown, nor can he show, that independent of other factors the employment practices he challenge[d] have caused the racial imbalance in Prudential's work force"); EEOC v. Joint Apprenticeship Comm., 895 F.2d 86, 91 (2d Cir. 1990) (remand for proof on causal connection between statistical disparities and employer's practices).

Comparative evidence of an employer's applicants or the otherwise qualified population and those actually hired would demonstrate the employer's responsibility for any hiring disparity. *See* Green v. USX Corp., 896 F.2d 801, 805 (3d Cir.), *cert. denied*, 111 S. Ct. 53 (1990); Sledge v. J.P. Stevens & Co., 52 Empl. Prac. Dec. (CCH) ¶ 39,537, at 60,495 (E.D.N.C. 1989). Moreover, evidence of comparisons within the employer's workforce would demonstrate the employer's responsibility for any promotion disparity, where the employer promotes from within. *See* Griffin v. Carlin, 755 F.2d 1516, 1526 (11th Cir. 1985); Powers v. Alabama Dep't of Educ., 854 F.2d 1285, 1294-95 (11th Cir. 1988).

responsible for achieving proportional balance in its workforce; it only prohibits the employer from *causing* such imbalances.[191] Requiring an employer to disprove its role in causing all otherwise unexplained imbalances in its workforce is inconsistent with Title VII's antipreference provision.[192] Title VII, therefore, requires that the employees prove that the impact is attributable to the employer.[193] The two theories disagree, however, on exactly how to prove that an employer's criterion results in a disparate impact based on the prohibited factors.

a. *Causation of Impact*

Although both theories require that the impact be attributable to the employer,[194] they differ on how precisely employees must isolate the cause of the disparate impact. Effects Theorists allow employees to establish disparate impact by proving that one or more of the employer's practices caused the impact.[195] In contrast, Fault Theorists may[196] require employees to establish disparate impact by isolating the *single* criterion that caused the impact.[197] The Supreme Court[198] and Congress[199]

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191. Section 703(a) of Title VII makes it an unlawful employment practice for an *employer* to discriminate against an individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1988).

192. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651-53 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991-93 (1988) (plurality); *see also supra* note 112 (quoting Title VII, § 703(j), 42 U.S.C. § 2000e-2(j) (1988)).

193. Under the Effects Theory, employees can link the employer *either* to a disparity in its workforce or to the employer's facially neutral criterion that causes an impact on the population in the relevant labor market. *See infra* Sections IIB2a & IIB2b. Under the Fault Theory, however, employees must link the employer *both* to a disparity in its workforce and to the one facially neutral practice causing the impact. *See id.*

194. *See supra* notes 189-193 and accompanying text.

195. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 672-73 (1989) (Stevens, J., dissenting); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1010 n.10 (1988) (Blackmun, J., concurring); *infra* note 199.

196. The uncertainty regarding this dispute is due to the context in which the issue has arisen. Fault Theorists demand that employees identify the disparately impacting practice in cases where employees failed to establish any connection between the disparate impact on the employer's workforce and the employer's practice. *See Wards Cove*, 490 U.S. at 650-53; *Watson*, 487 U.S. at 983-84; Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800-01 (1982). In addition, the language used to specify the causation requirement ambiguously requires the employees to isolate the specific practice or *practices*. *See Wards Cove*, 490 U.S. at 656-57; *Watson*, 487 U.S. at 994-97 (plurality); *Pouncy*, 668 F.2d at 800-02. Moreover, requiring that employees isolate only one criterion reaffirms the undisputed requirement that employees establish causation between the impact and the employer, whether it be through one or more of the employer's practices, to avoid "employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.' " *Wards Cove*, 490 U.S. at 657 (citation omitted); *accord Watson*, 487 U.S. at 992 (plurality); *Pouncy*, 668 F.2d at 801-02.

197. *See Wards Cove*, 490 U.S. at 656-57; *Watson*, 487 U.S. at 994 (plurality). *But cf.* Belton, *Causation in Employment Discrimination Law*, 34 Wayne L. Rev. 1235, 1266-69 (1988) (criticism of *Watson*).

198. *See, e.g.*, *Wards Cove*, 490 U.S. at 656-57 (adopting a Fault Theory position).

199. Congress is considering legislation to adopt the position of the Effects Theory.

are currently debating this causation issue.

To the Effects Theorists, proof that a group of the employer's criteria results in disparate impact establishes that at least one of those practices is a non-neutral barrier to the employment opportunities of a protected group. Absent excuse, this violates Title VII. Even if the source of the impact cannot be more precisely pinpointed, the Effects Theory requires the employer either to disprove the impact or to justify the criteria as necessary to its business.[200] Requiring the employer to bear these burdens most effectively results in uncovering and, absent justification, in eliminating non-neutrality in the selection process because the employer, both architect and user of the process, has superior access to evidence necessary for proof on these issues.

Analogously, in *Price Waterhouse v. Hopkins*,[201] the Supreme Court shifted to the employer the burden of disproving discrimination once the employee established a multiple causation disparate treatment case.[202] The ruling clarified that an employee need not prove that she was discriminated against "solely" because of her protected status.[203] Similarly, an employee should not have to prove that any one selection criterion caused the disparate impact against her protected group.[204]

See The Civil Rights Act of 1991, H.R. 1, *supra* note 14, at § 4 (employee responsible for proving which specific practice caused disparate impact only if "the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact").

200. *See* The Civil Rights Act of 1991, H.R. 1, *supra* note 14, at § 4; Willborn, *supra* note 11, at 829-30.

201. 490 U.S. 228 (1989).

202. In *Price Waterhouse*, the employee proved that sex was a motivating or determinative factor in the decision not to make her a partner, but Price Waterhouse proved that the employee's interpersonal skills were also motivating or determinative factors in the decision. *See id.* at 250-52. In the context of a disparate treatment case, a finding of mixed motive amounts to a multiple causation case.

Based on evidence that gender was one motivating factor causing her rejection, the Court shifted the burden of persuasion to the employer to prove that, even absent consideration of her gender, Hopkins would have been rejected for non-discriminatory reasons. *See id.* at 250 (persuade by a preponderance of the evidence); *id.* at 259 (White, J., concurring) (same); *id.* at 261, 271 (O'Connor, J., concurring) (agreeing with plurality to shift burden of persuasion, but only upon proof by direct evidence).

203. *Cf.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 672-73 (1989) (Stevens, J., dissenting) ("Although the causal link must have substance, the act need not constitute the sole or primary cause of the harm.") (citing Restatement (Second) of Torts §§ 431-433 (1965) and Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)); 110 Cong. Rec. 2728 (1964) (rejecting amendment requiring sole causation).

204. Based on evidence that at least one of a group of an employer's selection criteria resulted in a disparate impact, the employer should bear the burden of proving that each criterion in that group either does not contribute to the impact or can be justified as a business necessity.

The *Price Waterhouse* Court supported shifting the persuasion burden on policy grounds because the employer's suspect consideration of gender necessitated consideration of what would have happened had the employer not used gender and because the employer had superior access to the evidence necessary to resolve the hypothetical question. *See Price Waterhouse*, 490 U.S. at 250 & n.13. Policy would also support shifting

The Fault Theory, by contrast, would require an employee to isolate the single factor causing the disparate impact in order to safeguard employers' discretion in operating their businesses.[205] Under that theory, proof that one criterion had a disparate impact merely raises an inference that the employer used that factor pretextually in violation of Title VII. Where several of an employer's criteria are proved to have a disparate impact, however, the inference of a violation becomes even more attenuated. In such a case the employer would not be required either to disprove the disparate effect or to explain the reasonableness of each of the implicated criteria.[206] Thus, under the Fault Theory, because such proof establishes only a somewhat attenuated inference of pretextual discrimination, the burden shifting under *Price Waterhouse* would be unavailable.[207]

Adoption of the Fault Theory's causation requirement might necessitate more precise proof of causation for even single employment practices that are viewed as consisting of complex, multiple subparts.[208] For example, how would the employer's decision to use a multi-question examination[209] be distinguished from using a multi-part selection process?[210]

More important, requiring that employees isolate the disparate effect of each criterion insulates from challenge criteria for which no distinct

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the burden of persuasion in a disparate impact case because the employer's suspect use of at least one disparately impacting criterion necessitates isolation of the disparate impact's cause and because the employer has superior access to the evidence necessary to resolve that issue.

205. *Cf.* Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800-01 (5th Cir. 1982) (requiring that employee specify impacting criterion to give employer knowledge of challenged criterion and to promote fair allocation of burdens at trial); Rutherglen, *supra* note 36, at 1340 (limiting employees' causation obligation to requiring notice of practices challenged); Cox II, *supra* note 11, at 782 (requiring isolation of cause of impact only at trial).

206. The Fault Theorists are concerned that by easing up on the connection between the criterion and the impact, "the distinction between disparate impact and disparate treatment would diminish and intent would become a largely discarded element." Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1133 (9th Cir. 1985), *reheard en banc on other grounds*, 810 F.2d 1477 (9th Cir. 1987). They also support requiring isolation of the criterion causing the impact to make disparate impact cases more manageable for the courts. *See supra* notes 159-161 and accompanying text. *But see* Willborn, *supra* note 11, at 830-31 (manageability is "insufficient justification for immunizing all nonspecific criteria from disparate impact attack").

207. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 270-73 (1989) (O'Connor, J., concurring).

208. *See* American Fed'n of State, County, and Mun. Employees v. State of Washington, 770 F.2d 1401, 1407 (9th Cir. 1985).

209. The Supreme Court has consistently found disparate impact resulting from a multi-question examination to be sufficient evidence of causation under disparate impact doctrine. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 452 (1982); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

210. *Cf.* Arnold v. United States Postal Serv., 863 F.2d 994, 999 (D.C. Cir. 1988) (employer's Career Path Policy, consisting of three steps, counted as one selection criterion). *But cf. infra* Section IIB2d (Fault Theory would examine employer's process only where adverse effect occurred at the bottom line).

disparate impact evidence exists.[211] For example, in *Powers v. Alabama Department of Education*,[212] employees challenged the many practices comprising the state's complicated promotion process.[213] Alabama did not argue that the disparate impact was caused by factors other than *its* discriminatory practices, a defense that would have succeeded under either the Fault or Effects Theory.[214] Rather, the state defended by pointing to the employees' failure to isolate the specific cause of the disparate impact. Indeed, the employer obfuscated detection of the cause by arguing that the proved effect resulted not from the practice under consideration at the moment, but from another practice that was also challenged.[215] Recognizing the circularity of the state's defense, the court of appeals remanded with instructions that the state show either that its requirements did not have a discriminatory effect or that they were justified as a business necessity.[216] Thus, the *Powers* court resolved the causation issue consistent with the Effects Focused Theory.[217]

As *Powers* illustrates, disallowing challenge to a group of employer practices provides an incentive for employers to create multilayered, ill-defined selection processes "to shield from liability an employer whose

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211. *Cf.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658 n.10 (1989) (company exempted from keeping records on impact of its practices because it was only seasonal employer); *id.* at 673 n.20 (Stevens, J., dissenting) (company failed to keep records from which employees could prove distinct cause of impact); Wilkins v. University of Houston, 654 F.2d 388, 402 (5th Cir. 1981) (salary determined by simultaneous operation of multiple factors that cannot be factored independently); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.15 (1990) (employer's obligation to keep records of bottom-line impact is narrower than its exposure for within-the-process impact, *see infra* Section IIB2d). Of course, where the disparately impacting criterion can be identified, the employer would not be required to justify any criteria except those causing the impact. *See, e.g.*, Rivera v. City of Wichita Falls, 665 F.2d 531, 536, 538-39 & n.11 (5th Cir. 1982) (no need to validate all components of hiring process where employee can precisely evaluate impact of each component and only written test resulted in statistically significant impact).

212. 854 F.2d 1285 (11th Cir. 1988).

213. *See id.* at 1295. The promotion process required eligible employees—those attaining certain minimum experience in the next lower job classification—to apply for promotion. Such employees were first ranked on the basis of 45% education and training, 45% experience, and 10% supervisory evaluations; if those rankings were high enough, they were certified and interviewed. *See id.* at 1288-89.

214. *See supra* notes 189-193 and accompanying text.

215. Alabama sought to avoid justification of its evaluation process by arguing that the disparity resulted from its experience requirement, a practice also subject to challenge. *See Powers*, 854 F.2d at 1293-94. In addition, the district court rejected the employees' statistics because they failed to control for employees who did not apply, despite the fact that it would have been futile to apply absent meeting the eligibility requirements that were also challenged. The district court also rejected the statistics because they failed to control for employees who were not certified, despite the fact that the evaluation process was one factor in the decision to certify and that the certification process was also subject to challenge. *See id.* at 1296-98.

216. *See* Powers v. Alabama Dep't of Educ., 854 F.2d 1285, 1299 (11th Cir. 1988).

217. *See id.* at 1292 n.11, 1293 n.13 (although recognizing the plurality decision in *Watson*, the court continued to follow contrary 11th circuit precedent, waiting for a majority to adopt the *Watson* opinion, which the Supreme Court did in *Wards Cove*).

selection process is so poorly defined that no specific criterion can be identified with any certainty, let alone be connected to the disparate effect."[218] Allowing employers to insulate themselves from challenge by combining criteria so that the impact of any one component is not ascertainable would undermine disparate impact doctrine, regardless of the theory.

The debate over challenge to multiple factors is reminiscent of the debate over whether disparate impact doctrine allowed challenge to subjective criteria.[219] To the extent that either the subjectivity or multiplicity of the employer's selection process obscures precise definition of the employment qualifications used, it also obscures potential bias or pretext.[220] Indeed, it is precisely these selection criteria that require judicial scrutiny to ensure equal employment opportunity.[221] Just as the Supreme Court ruled[222] that an employer's use of subjective criteria does not protect it from claims of disparate impact discrimination,[223] the use of multiple criteria or one criterion with multiple components should similarly not afford immunity.

b. *Impact on Whom?*

The two theories also disagree about whether the disparate effect of an employer's criterion can be proved by evidence of an effect on individuals in the relevant labor pool or only by proof of an effect on actual applicants or otherwise qualified individuals.[224] The Effects Theory allows

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218. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1010 n.10 (1988) (Blackmun, J., concurring in part); *see also* Rutherglen, *supra* note 36, at 1340 (moderating requirement to isolate criterion by allowing employee to prove connection between multiple criteria with aggregate impact); Cox II, *supra* note 11, at 782 (excusing requirement to plead exact cause of impact to avoid employer hiding behind employee's ignorance of its process).

219. *See supra* Section IIB1a.

220. *See* Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 San Diego L. Rev. 63, 93 (1988).

221. *See supra* Section IIB1a.

222. *See supra* note 165 and accompanying text.

223. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989-91 (1988); Friedman, *supra* note 36, at 72 n.109; *see also* Sledge v. J.P. Stevens & Co., 52 Empl. Prac. Dec. (CCH) ¶ 39,537, at 60,499 (E.D.N.C. 1989) (where "the surviving officials still working for defendant have no idea of the bases on which they made their employment decisions[,] . . . the identification by plaintiffs of the uncontrolled, subjective discretion of defendant's employing officials as the source of the discrimination . . . sufficed to satisfy the causation requirements of *Wards Cove*."); Green v. USX Corp., 896 F.2d 801, 805 (3d Cir.) (employees identified disparately impacting criteria to be a subjective interview process "consisting essentially of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant"), *cert. denied*, 111 S. Ct. 53 (1990).

224. The evidentiary debate in this Section focuses on proving the adverse effect of one of the employer's facially neutral criteria. Thus, the debate presumes that the criterion is attributable to the employer. *See supra* notes 189-193 and accompanying text. Moreover, the debate focuses on only one of the employer's criteria. *But cf. supra* Section IIB2a (dealing with multiple causation question).

evidence of disparate impact at the societal level. Thus, in *Griggs v. Duke Power Co.*,[225] the Supreme Court allowed the employees to use census figures to demonstrate that the company's high school diploma requirement had a racially disparate impact and to use another employer's test results to demonstrate that the company's test requirement also had a racially disparate impact.[226] Similarly, in *Dothard v. Rawlinson*,[227] relying on census figures for the entire nation, the Court found that Alabama's height and weight criteria disparately impacted on women,[228] noting that "[t]here is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants."[229]

The Fault Theory, on the other hand, requires proof of disparate impact on the employer's actual candidates or otherwise qualified and interested individuals.[230] Thus, in *New York City Transit Authority v. Beazer*,[231] the Supreme Court questioned whether employees' evidence that sixty-three percent of the methadone-maintained people in New York City's public programs were black or Hispanic established that the Transit Authority's rule excluding methadone-maintained persons had a disparate impact based on race or national origin.[232] The Court found the evidence "weak" at best,[233] criticizing the figures in part because they did not indicate how many participants in methadone-maintenance programs ever worked or sought work with the Transit Authority.[234] In effect, the Court demanded evidence of harm to actual applicants or employees of the Transit Authority.[235]

In sum, the Fault Theorists reject evidence of disparate effect in society[236] in favor of evidence from the employer's actual applicants,[237] ab-

225. 401 U.S. 424 (1971).
226. *See id.* at 430 & n.6, 432.
227. 433 U.S. 321 (1977).
228. *See id.* at 329-30 & n.12.
229. *Id.* at 330; *accord id.* at 337-39 (Rehnquist, J., concurring). *But see id.* at 348 (White, J., dissenting) (requiring impact on actual applicants absent showing by plaintiff/employee that those statistics are distorted by the employer's discrimination).
230. *See* Gold, *supra* note 19, at 439-45.
231. 440 U.S. 568 (1979).
232. *See id.* at 585-86.
233. *See id.* at 587. *But see id.* at 598-600 (White, J., dissenting) (societal figures prove disparate impact).
234. *See id.* at 585. The Court also criticized the evidence because it did not account for methadone-maintained persons in private programs, *see id.* at 585-86 & n.27, nor did it establish that participants in methadone maintenance programs were otherwise employable, i.e. enrolled in the methadone program for over a year, not using illicit drugs, or not already employed. *See id.* at 585-86. Unless either the racial/ethnic make-up of methadone-maintained persons in private programs differed from public programs or the racial/ethnic make-up between otherwise employable and unemployable methadone-maintained persons differed, the Court's criticisms would not alter the conclusion that the employer's no-methadone rule had a disparate effect based on race and national origin. *See id.* at 599-601 & n.7 (White, J., dissenting).
235. *See id.* at 583-87.
236. Societal evidence of impact would be unavailable for criteria such as subjective

sent employee's evidence that this is inappropriate.[238] The Effects Theorists, however, allow impact to be proved with evidence from the general population in the relevant labor market[239] as well as from the employer's actual candidates or otherwise qualified individuals.

The evidentiary debate about the necessity of requiring proof of disparate impact on the employer's workforce or otherwise qualified candidates cannot be explained by logic. For example, to establish that the *employer's* practices caused the impact[240] logically requires eliminating the inference that particularized geographical constraints[241] or legitimate qualifications,[242] rather than the employer's challenged requirements, caused the impact. By necessity, societal impact would be irrelevant to prove this proposition.[243] To establish the *impact* of the criterion, how-

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evaluations or selection criteria unique to the employer. In those instances, the only available evidence would be the impact on the employer's applicants. *See* Shoben, *supra* note 71, at 8.

237. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-55 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 996-97 (1988) (plurality); Dothard v. Rawlinson, 433 U.S. 321, 348 (1977) (White, J., dissenting); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983); Bradley v. Pizzaco of Neb., Inc., 51 Empl. Prac. Dec. (CCH) ¶ 39,355, at 59,452 (D. Neb. 1989), *rev'd*, 55 Empl. Prac. Dec. (CCH) ¶ 40,565, at 65,957 (8th Cir. 1991); Cox II, *supra* note 11, at 773.

238. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 367 (1977) (prior discrimination may discourage minority applicants); *Dothard*, 433 U.S. at 330 (applicant pool evidence may be inappropriate "since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory"); Shoben, *Employee Recruitment by Design or Default: Uncertainty Under Title VII*, 47 Ohio St. L.J. 891, 891 (1986) (recruiting techniques can have impact on applicant pool).

239. *See* Bradley v. Pizzaco of Neb., Inc., 55 Empl. Prac. Dec. (CCH) ¶ 40,565, at 65,957 (8th Cir. 1991). *But see* Boardman & Vining, *The Role of Probative Statistics in Employment Discrimination Cases*, 46 Law & Contemp. Probs. 189, 216 (1983) (limiting population to those with necessary specialized skills); Friedman, *supra* note 36, at 69 n.95 (same); Shoben, *supra* note 71, at 34-35 (same).

Population data ought to be preferred because legally relevant impact is defined in terms of impact on all potential applicants, not merely those to whom the criterion was applied. *See* Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof under Title VII*, 91 Harv. L. Rev. 793, 798 (1978); Shoben, *supra* note 71, at 8. To extrapolate impact on the pool of all potential applicants from impact on a sample of that group requires testing for statistical significance. *See infra* notes 265-266 and accompanying text.

240. *See supra* notes 189-193 and accompanying text.

241. *See e.g.*, Robinson v. Adams, 830 F.2d 128, 133-34 (9th Cir. 1987) (Pregerson, J., dissenting) (requiring appropriate geographic statistics to establish that employer's practices caused disparate impact); *cf.* League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 897 (C.D. Calif. 1976) (city would not be responsible for hiring from entire county rather than from city if it could "demonstrate that economic forces beyond [its] control dictated that Orange County would provide the bulk of applicants").

242. Only qualifications that are not challenged, that have no impact or that are proved to satisfy business necessity would be deemed legitimate. *See supra* introduction to Section IIB.

243. Similarly, to establish purposeful discrimination under the disparate treatment theory would logically require proof that accounted for all the explicitly nondiscriminatory reasons for which the employer rejected the employees. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977); *cf.* Maltz, *supra* note 15, at 347 n.13 (distin-

ever, there is no inherent reason to limit the proof of impact to applicants or otherwise qualified individuals. Consequently, the evidentiary choice can only be explained by distinctions between the theories.

The Effects Theory examines employers' use of any non-neutral criteria. Demonstrating discriminatory effect by either societal or workforce evidence would therefore be sufficient to establish the criterion's non-neutrality. The Fault Theory, by contrast, focuses on an employer's unreasonable use of a criterion as a way to reveal pretextual discrimination based on the prohibited factors. An employer's application of a facially neutral criterion that does not disparately affect *its* workforce would undercut the inference that the employer used the facially neutral criterion pretextually.[244]

Limiting proof of a criterion's impact to its impact on applicants or otherwise qualified individuals actually combines two distinct causation questions: the neutrality of the selection criterion—whether the employer's practice has a disparate impact based on a prohibited factor; and the standing of the plaintiff-employees to recover—whether the employees seeking redress were adversely affected by the disparately impacting criterion, rather than another legitimate criterion. The Fault Theory, focusing on the *employer's* unreasonable use of the criterion, resolves both causation questions together.[245] The Effects Theory, however, keeps the questions separate:[246] evidence of disparate impact on society would establish the criterion's non-neutrality; evidence that the employees were adversely affected by this policy, and not by another legitimate criterion, would establish their standing.[247]

The consequences of the Fault Theory's restricting proof of impact to applicants, employees or otherwise qualified individuals are multiple. Initially, such a restriction allows the employer to shift the focus among its exclusionary criteria in a circular fashion. Indeed, where the employees challenge more than one of the employer's selection criteria, the merit of each of those criteria becomes the critical issue. It would be inappropriate to allow an employer to bar challenge to one criterion by requiring

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guishing between using proof of impact to establish disparate impact and disparate treatment cases); Shoben, *In Defense of Disparate Impact Analysis Under Title VII: A Reply to Dr. Cohn*, 55 Ind. L.J. 516, 516 (1980) (clarifying distinction between using evidence of disparate impact to prove discriminatory purpose compared with proving the impact of employer's selection criteria). *But cf.* Shoben, *supra* note 71, at 8-9 (distinctions between uses of disparate impact not always explicit).

244. *Cf.* Cox I, *supra* note 11, at 55-56 (requiring impact on applicants consistent with theory focusing on illicit motive).

245. *Cf. supra* notes 189-193 and accompanying text. Under the Fault Theory, an employer could defend a showing of impact with a showing that the population used to prove the disparate impact was not harmed by the employer's use of the criterion.

246. *See* Welch, *supra* note 4, at 869-77; *cf.* Cox I, *supra* note 11, at 56-57 (breaking out questions of impact and standing to support group rights theory of disparate impact).

247. Under the Effects Theory, employees use evidence of societal impact not to create a class action from the population at large, but rather to demonstrate one essential element of the case—the disparate impact of the selection criterion.

proof of compliance with another challenged criterion.[248]

More practically, limiting proof of disparate impact to the effect caused by a particular criterion holds disparate impact doctrine hostage to availability of evidence, which to some extent is controlled by the employer. Indeed, those employers with particularly poor records for employing traditionally underrepresented groups would be in the best position to avoid challenge to their criteria because virtually no members of the previously excluded group would be candidates for opportunities,[249] particularly opportunities to be distributed among those already employed.[250] Moreover, individual employees would be barred from challenging criteria that the employer applies to too small a sample group[251] or for which the employer keeps no records from which to detect disparate impact.[252]

Even where the employer is not responsible for the lack of evidence by which to establish disparate impact at its workplace,[253] why should any individual adversely affected by a facially neutral criterion that tends to cause harm in the relevant labor market be unable to challenge the criterion because of lack of evidence[254] or because this application of the cri-

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248. *See supra* notes 213-216 and accompanying text; *cf.* Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749, 1762 n.44 (1990) (presumption that only those who satisfy the requirements are interested enough to apply undercuts disparate impact analysis).

Even where a criterion is interrelated with an admittedly meritorious qualification, it would be appropriate to use societal evidence to establish the disparate impact of the challenged criterion. For example, societal evidence, if available, could be used to prove the impact of requiring a certain score on the National Teachers Examination even where there is no dispute that employees must be certified teachers to be eligible for the job. *But cf.* Shoben, *supra* note 71, at 34-35 (requiring impact on group possessing other legitimate qualification). Rather than allow a court to determine the interrelationship between the challenged and unchallenged criteria, it would be more appropriate to find impact based on evidence from the broader population, because at the business-necessity stage the employer would be able to justify its challenged criterion using evidence from the valid criterion, if in fact an interrelationship exists. All independently required employment qualifications should be independently scrutinized to avoid validating one criterion merely by pointing to a related criterion.

249. *See supra* note 238.

250. *See* Blumrosen, *supra* note 45, at 92.

251. *See* Fudge v. City of Providence Fire Dep't, 766 F.2d 650, 657 n.7 (1st Cir. 1985); Welch, *supra* note 4, at 877.

252. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 673 n.20 (1989) (Stevens, J., dissenting).

253. *See, e.g.*, *Wards Cove*, 490 U.S. at 658 n.10 (seasonal employers exempted from recordkeeping); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.15 (1990) (employers must keep records only where employer's process results in impact at bottom line).

254. *See, e.g.*, Rule v. Local 396, Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers, 568 F.2d 558, 566 (8th Cir. 1977) (proof that high school or equivalency requirement for apprenticeship program had impact on blacks from census data from five-county area); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 949 (D. Neb. 1986) (proof that rule against pregnancy for single employees, previously applied in only three instances, discriminates against black females by relying on statistics from the county or

terion happened to result in no impact at the employer's workplace?[255] As a policy matter, equal employment opportunity is too important a goal to jeopardize on such grounds.[256] Allowing challenge based on evidence that an employer's facially neutral criterion has an impact on society helps eliminate "discriminat[ion] against any individual . . . because of such individual's race, color, religion, sex, or national origin."[257]

Moreover, an employer's criterion that disparately impacts on groups in society but not in the employer's workplace occurs only in the exceptional case where the employer's workforce is skewed: for example, either where the makeup of the employer's workforce based on race, color, religion, sex or national origin does not reflect the relevant labor market or where the members of the impacted group within the employer's workforce already resemble the group preferred by the criterion.[258] The sharpest example of this phenomenon would be where an employer purposefully restricted job opportunities to one protected group. In *Costa v. Markey*,[259] the municipality restricted certain police force positions to women. Applying a Fault Theory rationale, the court rejected a challenge that the municipality's minimum height requirement had an impact on women where the criterion was applied only to women.[260] Effects Theorists, on the other hand, would have found the criterion to be non-neutral based on sex, as demonstrated by societal data, and would have required that the preference be justified as a business necessity. Failure to justify the height requirement allowed an impermissible preference for those women who happened to be most like men, the

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state as a whole); Welch, *supra* note 4, at 868-69, 877 (process of separating impact issue from issue of adverse affect on parties before the court "provides a mechanism for considering . . . sample size and group results, while not losing sight of the majority's emphasis on the opportunity each individual is afforded in the employment setting"); *cf.* Maltz, *supra* note 15, at 348 (reliance on great disparities in general statistics justified because other evidence may not be available).

255. *See infra* notes 258-261 and accompanying text. Requiring scrutiny only where an employer's criterion results in impact at its workplace allows an employer to avoid responsibility for using an admittedly non-neutral standard whose disparate effect on their workforce is too inconsequential to establish disparate impact. *Cf.* Schultz, *supra* note 248, at 1824-39 (exploring role of workplace standards in shaping employee attitudes and choices about work).

256. *Cf.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 674 (1989) (Stevens, J., dissenting) ("a court should not strive for numerical exactitude at the expense of the needs of the particular case").

257. 42 U.S.C. 2000e-2(a) (1988).

258. Both situations raise concerns about the employer's commitment to equal employment opportunity.

259. 706 F.2d 1 (1st Cir. 1982), *reh'd en banc*, 706 F.2d 10 (1st Cir. 1983).

260. *See Costa*, 706 F.2d at 11-12; *see also* MacNamara v. Korean Air Lines, 863 F.2d 1135, 1148 (3d Cir. 1988) (rejecting disparate impact theory where applicable treaty allowed preference for native citizens), *cert. denied*, 110 S. Ct. 349 (1989); Rigler, *Connecticut v. Teal: The Supreme Court's Latest Exposition of Disparate Impact Analysis*, 59 Notre Dame L. Rev. 313, 324 (1984) ("one cannot argue that the height requirement in *Costa* was more beneficial to men than to women; rather, it was more beneficial to tall women"); Willborn, *supra* note 11, at 833-34 ("although use of the height requirement may have constituted statistical discrimination, it did not constitute sex discrimination").

traditional incumbents of the police force. Adopting the Effects Theory, which allows the use of societal evidence to prove impact, would extend Title VII protection under disparate impact doctrine regardless of whether an employer's application of the criterion harmed sufficient numbers of actual applicants or employees, thereby providing protection in even exceptional, and perhaps discriminatory,[261] circumstances.

c. *How Much Impact?*

Although both theories require evidence that the impact on protected groups be disproportionate,[262] the precise level of that impact is subject to debate.[263] Under the Effects Theory, discrimination occurs where the correlation between the facially neutral criterion and the protected characteristic is statistically significant. The Fault Theory requires a more substantial correlation.

The debate is complicated by the issue of where to measure the impact. Effects Theorists seek to prove that the challenged criterion has a disproportionate impact on the population in the relevant labor market.[264] Because there is usually no direct evidence of the impact of an employer's criterion on that population,[265] employees must resort to inferential proof based on the criterion's impact on only a sample population. To establish that the impact on a sample population is representative of the impact on a larger population, it is appropriate to evaluate the sample's statistical significance.[266] Thus, the Effects Theorists find discrimination

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261. *See, e.g.*, *Costa*, 706 F.2d at 11 (absent approval from Massachusetts Commission Against Discrimination, hiring from female-only list would be illegal).

262. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658 (1989) (Blackmun, J., concurring) ("significantly disparate impact"); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 & n.3 (1988) (plurality) ("sufficiently substantial"); Connecticut v. Teal, 457 U.S. 440, 443 & n.4, 446 (1982) ("significantly discriminatory impact" demonstrated by black-to-white pass rate of 68%); New York City Transit Auth. v. Beazer, 440 U.S. 568, 584-86 & n.30 (1979) ("denying . . . equal access to employment opportunities" not strongly evidenced where rule excluded between 40-50% black or Hispanic candidates compared with population of 36.3% blacks or Hispanics); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) ("significantly discriminatory pattern" demonstrated where criteria excluded 33.29% and 22.29% women compared with 1.28% and 2.35% men, respectively); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) ("significantly different"); Griggs v. Duke Power Co., 401 U.S. 424, 426, 430 & n.6 (1971) ("substantially higher rate" found with pass rates of 34% for whites compared with 12% for blacks and 58% for whites compared with 6% for blacks); *see also* City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 710-11 n.20 (1978) ("Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.").

263. *See Watson*, 487 U.S. at 994-95 & n.3 (plurality); M. Zimmer, C. Sullivan, & R. Richards, *supra* note 79, at 247-54.

264. *See supra* Section IIB2b.

265. *See* Cohn, *On the Use of Statistics in Employment Discrimination Cases*, 55 Ind. L.J. 493, 494 (1980).

266. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 598 n.3 (1979) (White, J., dissenting); Fudge v. City of Providence Fire Dep't, 766 F.2d 650, 657-58 (1st Cir. 1984); Boardman & Vining, *supra* note 239, at 204-05; Cox I, *supra* note 11, at 61; Cox II,

where the correlation between the facially neutral criterion and a prohibited factor is statistically significant.[267] As a rule of thumb,[268] courts might set the level of significance so that the probability of obtaining the same disproportionate results by chance alone is less than five percent.[269] In the unusual case, however, where there is evidence of impact on the entire population, the impact can be measured directly, without resort to statistical significance.[270] With such direct evidence of impact on the population in the relevant labor market, the Effects Theory would theoretically find discriminatory bias from *any* discrepancy,[271] without judging its magnitude.

By contrast, Fault Theorists, who are concerned only with a criterion's impact on actual applicants or otherwise qualified individuals,[272] find statistical techniques unnecessary where there is direct evidence of such im-

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supra note 11, at 773-74; Follett and Welch, *Testing for Discrimination in Employment Practices*, 46 Law & Contemp. Probs. 171, 174 (1983); Shoben, *supra* note 239, at 799-800.

267. *See Beazer*, 440 U.S. at 598 n.3 (White, J., dissenting); *Fudge*, 766 F.2d at 658-59 n.10; Contreras v. City of Los Angeles, 656 F.2d 1267, 1273-74 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); Black Law Enforcement Officers Ass'n v. City of Akron, 52 Empl. Prac. Dec. (CCH) ¶ 39,510, at 60,302-03 (N.D. Ohio 1989), *aff'd*, 920 F.2d 932 (6th Cir. 1990); Shoben, *supra* note 239, at 800.

268. *See, e.g.*, Shoben, *supra* note 37, at 241 n.130 ("Arguing in favor of specific significance levels is not meant to suggest that such levels should be used arbitrarily in all cases. A generally agreed upon guideline is desirable, however, for ease of administration and for consistency of application.").

269. *See* Castaneda v. Partida, 430 U.S. 482, 497 n.17 (1977); Shoben, *supra* note 239, at 800; *cf.* Hazelwood School Dist. v. United States, 433 U.S. 299, 308-09 n. 14, 311 n.17 (1977) (discussing statistical techniques without requiring a precise probability level); Ottaviani v. State Univ. of N.Y. at New Paltz, 875 F.2d 365, 370-73 (2d Cir. 1989) (refusing to adopt rule of law setting levels of statistical significance for rebuttable presumption of disparate treatment discrimination), *cert. denied*, 110 S. Ct. 721 (1990); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 272-73 (N.D. Tex. 1980) (recognizing need for flexibility in adopting standard of significance); D. Baldus & J. Cole, *Statistical Proof of Discrimination* 291 (1980) (five percent rule used for non-judicial purposes); Follett and Welch, *supra* note 266, at 174 (five percent rule used by scientists). A higher level of statistical significance would carry "greater risks of conclusions of insignificant difference when treatment is truly disparate and smaller risks of convicting innocent parties". *Id.* at 175; *accord* Shoben, *supra* note 37, at 240-41; *cf.* Boardman & Vining, *supra* note 239, at 204-05 (magnitude of difference and probability that difference would occur by chance are related, but distinct concepts: "the larger the difference the lower the probability that it could have occurred by chance"); Kaye, *Statistical Significance and the Burden of Persuasion*, 46 Law & Contemp. Probs. 13, 13-14 (Autumn 1983) (statistical significance discusses probability of sample results occurring by chance which is related, but distinguishable, from confidence level that discrimination occurred).

270. *See* Shoben, *supra* note 239, at 798-99; *cf. Vuyanich*, 505 F. Supp. at 272 (noting debate on usefulness of statistical tests where data drawn from entire population); Cohn, *supra* note 265, at 494 (statistics drawn from sample can be used to raise inference regarding total population).

271. *See* Shoben, *supra* note 239, at 809-10; *cf.* Cox I, *supra* note 11, at 60 (requiring more substantial impact may more efficiently allocate judicial resources). *But see* Willborn, *supra* note 11, at 822-25 (above a certain threshold, any level of impact would require business necessity justification, which is tailored to level of impact).

272. *See supra* Section IIB2b.

pact.[273] In such a case, they require a "sufficiently substantial"[274] disparity. Where the evidence of impact comes from sample data, however, they would also require statistical significance.[275] Regardless of whether statistical significance is required, the Fault Theorists always demand "practical"[276] or "substantial"[277] impact. This greater impact is necessary to raise the inference that the employer used the criterion to distinguish between candidates based on their membership in protected groups.[278] As with the inference of discriminatory intent under disparate treatment discrimination,[279] evidence of disparate impact must be more dramatic to raise the inference of pretext/unreasonableness.[280] Additionally, this fault-based theory would hold employers responsible for only that impact about which they should have been aware.[281] Under the Fault Theory, statistically significant but less dramatic impact would not be judged sufficiently "substantial" to compel judicial scrutiny.

Although both theories find discrimination where the magnitude of the impact is high and neither find discrimination absent a statistically significant impact, they differ when there is moderate impact on protected

273. The debate over the relevant population for proving impact informs the debate over whether statistical techniques are useful. *See* Cox I, *supra* note 11, at 62. *Compare* Cohn, *supra* note 265, at 494-99 (statistical tests of significance irrelevant where impact data drawn from entire pool of test-takers); Cohn, *Statistical Laws and the Use of Statistics in Law: A Rejoinder to Professor Shoben*, 55 Ind. L.J. 537, 539-41 (1980) (test-takers constitute entire population of candidates) *with* Shoben, *supra* note 243, at 516-24 (test-takers are only sample of larger population including potential candidates).

274. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 (1988) (plurality).

275. *See* Cox II, *supra* note 11, at 773-74, 783-84 (statistical significance in this case used to eliminate chance, thereby undercutting inference of pretext).

276. *See* Bradley v. Pizzaco of Neb., Inc., 51 Empl. Prac. Dec. (CCH) ¶ 39,355, at 59,449, 59,452 (D. Neb. 1989), *aff'd in part, rev'd in part*, 55 Empl. Prac. Dec. (CCH) ¶ 40,565 (8th Cir. 1991).

277. *See* Thomas v. Metroflight, Inc., 814 F.2d 1506, 1510-11 n.4 (10th Cir. 1987).

278. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 & n.3 (1988) (plurality); Cox I, *supra* note 11, at 60-61; Rutherglen, *supra* note 36, at 1324.

279. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 & n.20 (1977) (overwhelming statistics of impact raises inference of discriminatory intent in disparate treatment case); Washington v. Davis, 426 U.S. 229, 241-42 (1976) ("total or seriously disproportionate" impact demonstrates discriminatory intent); Chamallas, *supra* note 59, at 321-22 & n.84 ("while a certain level of statistical proof of adverse impact in a disparate impact challenge may well satisfy plaintiff's burden of proving . . . unintentional discrimination, the same showing may not be strong enough to raise an inference of intentional discrimination"). *But cf.* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-12 (1977) (discussing statistical significance in disparate treatment case where issue is inference of discriminatory intent).

280. *But cf. Metroflight*, 814 F.2d at 1510-11 n.4 (adopting more rigorous standard for disparate impact than disparate treatment); Bradley v. Pizzaco of Neb., Inc., 51 Empl. Prac. Dec. (CCH) ¶ 39,355, at 59,452 (D. Neb. 1989) (consciously using standard from disparate treatment for disparate impact), *aff'd in part, rev'd in part*, 55 Empl. Prac. Dec. (CCH) ¶ 40,565 (8th Cir. 1991).

281. *See* Shoben, *supra* note 37, at 223, 242-44. Employers are already obligated to track the impact of their criteria. *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.15A(2)(a) (1990). It would not be much more burdensome also to require that they evaluate such impact for statistical significance.

groups. Practically, the distinction is even narrower because less dramatic impacts on smaller samples would not be statistically significant.[282] Thus, only the Effects Theorists would require judicial scrutiny for statistically significant impact on larger samples, while the Fault Theorists might judge that impact to "be so small that it is not practically significant from an economic, managerial, or legal point of view."[283]

There are two consequences of the Fault Theory's demanding a higher level of impact than statistical significance. Initially, requiring "economic" or "managerial" significance to establish legal significance accounts only for the employer's perspective. From the perspective of those excluded by the practice, necessarily large numbers of people,[284] the impact may not seem so small. Moreover, from society's perspective, practices that exclude large numbers of protected people ought to be justified. Although the employer could protect against liability by examining the impact of its selection criteria[285] and by justifying all criteria resulting in statistically significant impact, the excluded employees would have no protection against an interpretation of Title VII that ignored statistically significant but "not practically significant"[286] impacts.

Additionally, at what level would the impact be sufficient to require justification? The Equal Employment Opportunity Commission ("EEOC") provides one guideline:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact . . . .[287]

This standard has been criticized on statistical[288] and other grounds,[289]

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282. *See* Boardman & Vining, *supra* note 239, at 204-06.

283. Rutherglen, *supra* note 36, at 1323-24; *accord* Gold, *supra* note 19, at 450. Because the degree of magnitude of impact increases with the level of significance, *see* Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 271-72 (N.D. Tex. 1980), the dispute between the theories might be moderated by requiring a higher level of significance for cases of larger samples. *See* Shoben, *supra* note 37, at 241 & n.130; *supra* note 269.

284. *See supra* note 282 and accompanying text.

285. *Cf.* Shoben, *supra* note 37, at 243-44 (self-examination, as required by agency guidelines, heightens awareness of exclusionary patterns).

286. *See* Rutherglen, *supra* note 36, at 1323.

287. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1990).

288. The criticism arises because the standard (i) fails to account for differences in sample size, thereby finding adverse impact in small samples where the discrepancy is not statistically significant, and (ii) fails to find adverse impact in large samples where the discrepancy is statistically significant. *See* Boardman & Vining, *supra* note 239, at 212-16; Shoben, *supra* note 239, at 806-10. It has also been criticized for other technical reasons that point out its inflexibility. *See, e.g.*, Gold, *supra* note 19, at 447-48 (rule applicable only to pass rates); Shoben, *supra* note 239, at 810-11 (rule fails to account for magnitude of difference or to translate from pass rates to fail rates); *cf.* Fudge v. City of Providence Fire Dep't., 766 F.2d 650, 658-59 n.10 (1st Cir. 1984) (rejecting four-fifths rule where small sample size); Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981) (same), *cert. denied*, 455 U.S. 1021 (1982).

highlighting its arbitrariness.[290] In light of the difficulties encountered in setting a standard of substantiality, an alternative to rejecting statistical significance might be to leave the determination of substantiality to the courts' discretion.[291] That alternative, however, merely begs the question.

In contrast, the Effects Theory provides clearer guidance on the level of impact necessary to establish disparate impact discrimination: there must be either a statistically significant impact on a sample population or any impact on the entire population. Moreover, rather than adopt the Fault Theory and cut off judicial scrutiny by deciding that the impact is not sufficiently substantial despite its statistical significance, it would be more appropriate to adopt the impact standard of the Effects Theory and allow judicial scrutiny of the criterion. This is particularly desirable because the employer's concerns about the insubstantiality of the impact would be factored into the court's consideration of the availability of lesser impacting alternatives at the business necessity stage.[292]

d. *Bottom-Line Defense*

The two theories also disagree over whether proportional results at the bottom line of the selection process immunize from challenge the disparate impact caused by any one criterion considered alone.[293] Effects Theorists would find discrimination and demand proof of business necessity for each disparately impacting criterion in the selection process, regardless of whether the process results in proportionality. For example, in *Connecticut v. Teal*,[294] the Supreme Court found a prima facie case of disparate impact discrimination where the employer rejected employees who failed an examination that had a pass rate for African-Americans that was only sixty-eight percent of the pass rate for Euro-Americans, even though the employer ultimately promoted African-Americans at 170% of the promotion rate for Euro-Americans.[295] Although the bot-

289. The standard has also been criticized because it judges the impact only at the bottom line, *see* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4C (1990), and because it measures the impact only on actual applicants. *See* Boardman & Vining, *supra* note 239, at 211-12; Cohn, *supra* note 265, at 501-04; Shoben, *supra* note 71, at 29-32. To some extent these criticisms relate to the evidentiary debates discussed in Section IIB2b, *supra*, and Section IIB2d, *infra*.

290. *See* Boardman & Vining, *supra* note 239, at 212; Gold, *supra* note 19, at 450. *But cf. supra* note 268 (setting level of significance requires flexibility).

291. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n.3 (1988) (plurality) (preferring case-by-case approach).

292. *See infra* Section IIB3a(iii); *cf.* Cox I, *supra* note 11, at 60 (substantiality of impact level creates balance between employees' equality interests and employers' efficiency interests).

293. This potential defense actually rebuts the disparate impact of the criterion, whereas the business necessity defense, *see infra* Section IIB3, does not rebut the disparate impact, but rather seeks to excuse it.

294. 457 U.S. 440 (1982).

295. *See id.* at 443 & n.4, 444-45 & n.6; *see also* League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 895 (C.D. Cal. 1976) ("employers should not be

tom-line promotions were favorable to African-Americans, the employer was nonetheless liable for discrimination because one criterion in the promotion process, the test, eliminated a disproportionate number of African-Americans.[296]

To ensure neutrality, the Effects Theory examines every criterion in a selection process. Indeed, when an overall selection process results in proportionality yet one criterion in the process adversely affects a particular group, there must be another criterion that favors that group.[297] Thus, proportional outcome in the face of one disparately impacting criterion would evidence a doubly non-neutral process, contrary to the goals of the Effects Theory.

The Fault Theorists, on the other hand, find no adverse impact where the employer's bottom-line selections result in no disparate impact. Using this approach, the *Teal* dissent disputed the finding of discrimination because there was no adverse impact on African-Americans at the point in the process where the promotions were made[298] and because there was no ultimate impact on the group of African-Americans as a whole.[299] Proponents of this theory argue that the determinative impact occurs at the bottom line because it is at that point that the harm—in *Teal*, the loss of promotion—actually occurred.[300] Moreover, they would measure the

relieved of the burden of defending [a] procedure [that adversely affects protected groups] merely because it did not constitute the entirety of the hiring process"); *cf.* New York City Transit Auth. v. Beazer, 440 U.S. 568, 584 n.25 (1979) (evaluating disparate impact discrimination notwithstanding more-than-proportional minority representation at the bottom line). *But see* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 571-72 & n.2 (1978) (hiring from list including predominant number of whites did not constitute disparate impact where overall hiring favored blacks); General Electric Co. v. Gilbert, 429 U.S. 125, 130, 138 (1976) (even though rule denying pregnant women benefits had impact against them, no disparate impact discrimination found because *total* disability package favored women); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 93 (1973) (employer defended disparate impact of no-alien rule by showing that persons employed were disproportionately of Mexican ancestry); *cf.* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4C (1990) (federal enforcement agencies will in the usual case exercise their administrative and prosecutorial discretion by not requiring employer to evaluate or validate individual components of its selection process, and by not taking enforcement action where employer has made proportional bottom-line selections).

296. The *Teal* Court explicitly rejected both the Fault Theory and its bottom-line defense to claims of disparate impact discrimination because focus on the bottom line "confuse[s] unlawful discrimination with discriminatory intent. . . . [And] resolution of the factual question of intent is not what is at issue in this [disparate impact] case." Connecticut v. Teal, 457 U.S. 440, 454 (1982); *accord* Cox II, *supra* note 11, at 793 & n. 135; Friedman, *supra* note 36, at 70.

297. *See infra* notes 314-320 and accompanying text (distinguishing this preference from affirmative action measures).

298. *See Teal*, 457 U.S. at 459 n.3 (Powell, J., dissenting); *see also* Massarsky v. General Motors Corp., 706 F.2d 111, 122 (3d Cir. 1983) (measuring disparate impact from among those laid off, obscured disparate impact at an earlier step in process—eligibility for lay-off); Arnold v. United States, 863 F.2d 994, 999 (D.C. Cir. 1988) (career path policy found generally to have no disparate impact, despite impact of one component part).

299. *See Teal*, 457 U.S. at 460 (Powell, J., dissenting).

300. *Cf.* EEOC v. Governor Mifflin School Dist., 623 F. Supp. 734, 744 (E.D. Pa. 1985)

impact on the protected group as a whole to demonstrate whether the employer has truly selected based on the facially neutral test, and not based on a prohibited factor.[301] Thus, they would argue that the determinative criterion was the test, not race, because the state promoted only candidates who passed the test, but selected African-American candidates from among those who passed the test at least in proportion to their numbers in the applicant pool.[302]

This focus on bottom-line selections would immunize a criterion, despite its impact, when the employer's ultimate selections did not result in adverse effect on the group. Based on that policy, the Fault Theorists would also immunize a particular non-pass/fail criterion that adversely impacts on a protected group[303] if *all* the non-pass/fail criteria *considered together* resulted in no impact.[304] The Fault Theory's emphasis on equality at the bottom-line, to the exclusion of equality within the process, fails to recognize the individual's Title VII right to equal consideration for employment opportunities.[305]

The Effects Theorists, on the other hand, recognize that a disparately impacting criterion constitutes an unequal barrier to promotion and would require the employer to justify it based solely on its disparate impact, regardless of whether that barrier's effect is reflected at the bottom-line. Similarly, a particular non-pass/fail criterion that disparately impacts on a protected group hinders group members' employment opportunities even if the criterion is not by itself determinative.[306] Only the

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(finding no disparate impact discrimination where older workers received smaller increases but also received the highest pay).

301. *See, e.g.*, Rutherglen, *supra* note 36, at 1337 ("An employer . . . engaged in pretextual discrimination would not use both a test with adverse impact and an affirmative action program that entirely compensated for the adverse impact"); *cf.* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978) (bottom-line proportionality undermines claims of intentional discrimination). *But cf.* Blumrosen, *supra* note 45, at 92 (judge impact for compensatory justice to previously oppressed groups at bottom line); Chamallas, *supra* note 59, at 344, 353-56 (evaluate group equal achievement goal of disparate impact at bottom line).

302. *Cf.* Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1253 (10th Cir. 1986) (absent impact at bottom line, impact on white males of height maximum "does not limit a male job applicant because of his sex, but because of his height").

303. *See* Connecticut v. Teal, 457 U.S. 440, 463-64 n.8 (1982) (Powell, J., dissenting).

304. *Cf. supra* Section IIB2b (Fault Theory would limit proof of criterion's impact to its impact on employer's actual workforce).

305. *See Teal*, 440 U.S. at 451.

306. *See* Palmer v. Baker, 905 F.2d 1544, 1547 (D.C. Cir. 1990); Wilmore v. City of Wilmington, 699 F.2d 667, 668 (3d Cir. 1983); *see also* Friedman, *supra* note 36, at 71-72 (advocating judicial scrutiny of disparately impacting "nonautomatic barriers only when such factors have a specifically calculable, nontrivial effect on the selection decision"); Chamallas, *supra* note 59, at 360 (concerns for judicial economy moderated by allowing challenge to "all significant components" of non-pass/fail barriers); Note, *Connecticut v. Teal: Extending Griggs Beyond the Bottom Line*, 44 U. Pitt. L. Rev. 751, 768-70 (1983) (describing competing arguments and concluding that "the greater the weight given to the factor or factors with a disparate impact, the greater the likelihood that *Teal* will be extended"); *cf.* Gilbert v. City of Little Rock, 722 F.2d 1390, 1396-98 (8th Cir. 1983) (recognizing that critical factor for promotion "was not to be placed on the list, but to be

Effects Theory ensures equality throughout the selection process, not just at its conclusion.

A second consequence of the Fault Theory's bottom-line approach is that it tends to group people based on their protected status, thus treating individuals in each group as if they were fungible.[307] However, the fact that the employer favors some members of a group provides no solace to a group member eliminated or penalized by a non-neutral criterion.[308] From the harmed individual's perspective, the process is discriminatory based on that individual's protected status.

Emphasis on the treatment of the group as a whole tends to deny Title VII protection to subgroups: a criterion may disparately impact on the protected group, but may ultimately harm only a subgroup.[309] In *Teal*, for example, the employer's bottom-line promotions ultimately excluded only the subgroup of African-Americans who failed the test.[310] From an

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placed at a high standing on the list," court remanded for evaluation of disparate impact from ranking, rather than pass/fail evaluation).

307. *See* Connecticut v. Teal, 457 U.S. 440, 458-59 (1982) (Powell, J., dissenting); *cf.* Blumrosen, *supra* note 45, at 89 (disparate impact discrimination is fundamentally a group right under causation theory); Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 Harv. J. on Legis. 99, 132-33 (1983) (same); Chamallas, *supra* note 59, at 317 (same).

308. *See Teal*, 457 U.S. at 455; Friedman, *supra* note 36, at 67-68; Shoben, *supra* note 71, at 30; *cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324, 341-42 (1977) (current non-discrimination does not remedy prior disparate treatment discrimination against different individuals).

309. *Cf.* Blumrosen, *The Concepts of Discrimination and the Teaching of Equal Employment Law*, Remarks to AALS 1986, at 6 (advocating group rights theory and rejecting disparate impact absent homogeneity of group); Blumrosen, *Interpreting the ADEA: Intent or Impact*, in *Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners* 68, 104-05 (M. Lake ed. 1982) (rejecting disparate impact analysis for ADEA because of diversity of interests within protected group).

310. *See Teal*, 457 U.S. at 443-44; Cox I, *supra* note 11, at 64-65, 71-72.

Query whether focusing on protected groups in their entirety, as espoused by the Fault Theory, would support the line of authority disallowing protection for members of subgroups composed of individuals within the intersection of two protected groups, such as the subgroup of black women, who belong to groups defined by race and by sex. *See* Robinson v. Adams, 830 F.2d 128, 131 (9th Cir. 1987); Degraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Mo. 1976); Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986); *cf.* Pime v. Loyola Univ. of Chicago, 803 F.2d 351, 354-55 (7th Cir. 1986) (Posner, J., concurring) (reserving tenure track positions for Jesuits, a subgroup of Catholics, was not religious discrimination because both non-Catholics and non-Jesuit Catholics would be similarly excluded); Lowe v. Commack Union Free School Dist., 886 F.2d 1364, 1372-74 (2d Cir. 1989) (no discrimination where the employer's hiring practices resulted in disproportionate exclusion of employees in the subgroup over the age of fifty, rather than disproportionate exclusion of individuals over forty, the group protected by the Age Discrimination in Employment Act), *cert. denied*, 110 S. Ct. 1470 (1990). An employer would defend a claim of disparate impact on such a subgroup by arguing that it did not cause impact against either protected group—blacks or women.

Those seeking protection as a subgroup composed of the intersection of two protected factors might avoid this dilemma by redefining that subgroup as a new protected group, thereby challenging employment criteria for its disparate impact on the newly defined protected group, black women. *See, e.g.*, *Robinson*, 830 F.2d at 134 (Pregerson, J., dis-

Effects Theory perspective, however, that subgroup would be entitled to Title VII protection against the employer's use of such a disparately impacting criterion.[311] Thus, absent business justification to support continued use of the test, the employer would be required to eliminate it and to reconsider the credentials of the excluded subgroup. Only by according subgroups protection will Title VII promote equality of employment opportunities without regard to each individual's protected status.[312]

Emphasis on group treatment may also camouflage an employer's preference for those members of the protected group who most resemble members of the preferred group. For example, using a criterion that prefers Euro-Americans to select among members of the disparately im-

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senting) (pursuant to *Teal*, there is disparate impact against subgroup of black males); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 944 n. 34, 949 (D. Neb. 1986) (disparate impact against black women allowed); *cf.* Jefferies v. Harris County Community Action Ass'n., 615 F.2d 1025, 1032 (5th Cir. 1980) (disparate treatment against black women cognizable under Title VII because absent "a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, we cannot condone a result which leaves black women without a viable Title VII remedy").

This "solution" raises the concern that disparate impact challenge based on a multitude of protected groups "governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box." *Degraffenreid*, 413 F. Supp. at 145 (disparate treatment case); *accord Lowe*, 886 F.2d at 1373; *Judge*, 649 F. Supp. at 780. *But see* Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 Yale L.J. 1457, 1477 n. 126 (1989) (challenges limited by the necessity of proving a statistically significant impact); *cf. supra* Sections IIB2b & IIB2c (discussing relevant populations and level of impact required for disparate impact discrimination). Such a concern prompted one court to limit the redefinition to groups composed of the intersection of only two protected categories. *See Judge*, 649 F. Supp. at 780; Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. Rev. 793, 805-07 (1980). *But see* Scarborough, *supra*, at 1471-73 (criticizing *Judge*).

311. *See* Connecticut v. Teal, 457 U.S. 440, 453-56 (1982); Colby v. J.C. Penney Co., 811 F.2d 1119, 1128 (7th Cir. 1987); EEOC v. Greyhound Lines, 635 F.2d 188, 196-97 (3d Cir. 1980) (Sloviter, J., dissenting); *cf.* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544-48 (1971) (Marshall, J., concurring) (where employer has hired men with pre-school age children, refusal to hire women with pre-school age children constituted sex discrimination under disparate treatment theory); Barnes v. GenCorp Inc., 896 F.2d 1457, 1466-67 (6th Cir.) (age subgroup statistics should raise inference of disparate treatment discrimination), *cert. denied*, 111 S. Ct. 211 (1990); McCorstin v. USX Corp., 621 F.2d 749, 754 (5th Cir. 1980) (allowing discrimination claim for subgroups within over-40 protected age group under disparate treatment theory); Moore v. Sears, Roebuck & Co., 464 F. Supp. 357, 366 (N.D. Ga. 1979) ("Because age is a relative rather than absolute status when taken as a basis for discrimination, it need not follow that all persons protected by the Act should be grouped together for purposes of delineating the extent of their protection.").

312. *See, e.g.*, *Robinson*, 830 F.2d at 134 (Pregerson, J., dissenting) (failure to employ a single black male "is strong evidence that defendants have discriminated against black males by creating an artificial barrier to their professional development, thereby frustrating Title VII's goals of achieving equality of opportunity"); Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) ("The duty not to discriminate is owed *each* minority employee, and discrimination against one of them is not excused by a showing the employer did not discriminate against all of them.").

pacted group—for example, African-Americans—tends to favor those African-Americans who possess at least one characteristic that is more prevalent among Euro-Americans than among African-Americans. Those African-Americans who are most like Euro-Americans will be preferred.[313] Likewise, those group members who are most different from the preferred group will be excluded from, or at least disadvantaged in, the workplace with no regard for whether their group-based differences are in fact incompatible with success in the workplace. Under the Effects Theory, however, both the underrepresented group members who meet the standard of the preferred group as well as those who do not are protected in their employment opportunities, unless their inability to meet the standard interferes too drastically with the employer's ability to run its business. That theory is more consistent with Title VII's antidiscrimination mandates, which require equal treatment for all individuals. In sum, only the Effects Theory promotes genuine, rather than formal or token, diversity in the workplace.

Fault Theorists warn that evaluating disparate impact on a criterion-by-criterion basis, rather than at the bottom line, will encourage quota selections.[314] It is the Fault Theory, however, not the Effects Theory, that actually promotes quotas.[315] Where a selection process contains a facially neutral factor that impacts on a particular group, the employer can avoid justifying the criterion under the Fault Theory by selecting among those who satisfy the criterion according to their protected status. This is essentially a form of quota selection.[316] But granting preferential treatment to individuals or groups to overcome an imbalance in the employer's workforce is explicitly prohibited by Title VII.[317] Even if Title VII did allow quota selections to remedy demonstrated disparate impact in a selection process, however, using quotas to select from among those who were already preferred by the adversely impacting criterion would logically exacerbate the discrimination. Quota selections would only *remedy* discrimination to the extent that employers used quotas to select from among those penalized by the impacting criterion.[318] The Fault

313. *See* Cox I, *supra* note 11, at 74-75 & nn.172-173.

314. *See Teal*, 457 U.S. at 463 (Powell, J., dissenting).

315. *See* Shoben, *supra* note 71, at 31-32; *cf.* Rutherglen, *supra* note 36, at 1337 ("As a limiting principle, *Teal* serves the salutary purpose of focusing the theory upon preventing pretextual discrimination, instead of encouraging preferential treatment.").

316. *See* Gold, *supra* note 19, at 460. Indeed, allowing an employer to defend either by justifying the impact as a business necessity or by engaging in proportional hiring among those who meet the employer's standards allows more discretion to the employer than compelling justification for each criterion shown to have a disparate impact. *See* Chamallas, *supra* note 59, at 379. Allowing deference to the employer's discretion to run its business is consistent with the Fault Theory. *See infra* notes 335-337 & 367 and accompanying text.

317. *See* 42 U.S.C. § 2000e-2(j) (1988).

318. *Cf.* Friedman, *supra* note 36, at 63, 71 (access theory requires employers affirmatively to aid members of previously discriminated groups to meet job qualifications).

Theory, however, only recognizes those already preferred by the criterion as eligible for selection.

Thus, the Fault Theory excuses a criterion that disparately impacts on a protected group when the employer also engages in quota selections from that group. Apparently, two wrongs do make a right.[319] The Effects Theorists reject such a proposition.[320]

3. Business Necessity Response

Until an employee establishes a prima facie case by showing that the employer's facially neutral criterion distinguishes between individuals based on a prohibited characteristic, the employer is not required to offer any explanation or justification for its use of the criterion. Under the Effects Theory, the exclusive focus of the prima facie case is the disparately impacting *consequences* of the employer's selection practices. Justification is necessary once the employee establishes that one or more of those practices creates a statistically significant barrier for members of a protected class.[321] Under the Fault Theory, by contrast, an employer is not required to justify a disparately impacting criterion unless the employee additionally proves that the employer used that criterion unreasonably.[322]

Wherever the business necessity response is required,[323] disparate impact doctrine requires that the court evaluate whether the criterion is sufficiently effective in achieving a business purpose to allow its continued use despite its impact on protected groups.[324] The two theories disa-

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319. Adverse impact on a protected group coupled with quota preference for that group, or adverse impact on a protected group coupled with preferential impact on that group.

320. Indeed, the *Teal* decision clarified that the Effects Theory is more concerned with neutrality in the selection process than with equal achievement by underrepresented groups. *Cf.* Blumrosen, *supra* note 45, at 103-07 (advocating causation theory); Chamallas, *supra* note 59, at 344, 353 (same). *But cf.* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.15A(2)(a) (1990) (if bottom-line selection results in no impact, an employer is not required to maintain records on impact of individual components and their validity).

321. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 678 n.29 (1989) (Stevens, J., dissenting); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1004 (1988) (Blackmun, J., concurring); Caldwell, *supra* note 64, at 590-91; *supra* Sections IIB1 and IIB2.

322. *See supra* Sections IIB1 and IIB2. *But cf.* Note, *supra* note 45, at 129 n.106 (decrying the circular reasoning that "[o]nly when the court employs a more exacting fit standard, which it will do only once it has already determined the presence of discriminatory intent, will it find impermissible legislative intent"); Ely, *The Centrality and Limits of Motivation Analysis*, 15 San Diego L. Rev. 1155, 1156-57 (1978) (suspect classification doctrine intended to *reveal* unconstitutional motivation).

323. *See supra* notes 172-173 & 292 and accompanying text; *supra* notes 188 & 248.

324. Notwithstanding the various debates on business necessity, there is no debate about the basic substantive standard for business necessity. *See Wards Cove*, 490 U.S. at 659-61; *id.* at 668-73 (Stevens, J., dissenting); The Civil Rights Act of 1991, H.R. 1, *supra* note 14, at §§ 3-4; *cf.* 42 U.S.C. § 2000e-2(e)(1) (1988) (BFOQ exception excuses only "bona fide occupational qualification[s] reasonably necessary to the normal operation of that particular business").

gree, however, on (i) the employer's evidentiary burden for proving business necessity, (ii) the standard of judicial scrutiny for business necessity and (iii) the employee's rebuttal burden. These evidentiary disputes over the business necessity response are currently being debated by the Supreme Court and Congress.[325]

a. *Evidentiary Disputes on Business Necessity*

i. Burden of Proof

Whereas the Fault Theorists require the employer to bear only the burden of production[326] to prove business necessity,[327] the Effects Theorists require the employer to bear the additional burden of persuasion.[328] The dispute arises not from any misunderstanding of usual evidentiary practices requiring the plaintiff to persuade on the violation of the law and the defendant to persuade on any excuses or justification,[329] but rather from the substantive debate on what constitutes a Title VII violation under the two theories.

Under the Fault Theory, the prima facie case of disparate impact raises only the inference that the employer used its facially neutral criterion pretextually in violation of Title VII. The business necessity response rebuts that inference; its thrust is to establish the "innocence" of employer's use of the criterion. Thus, the employer bears only the burden of producing evidence to rebut the prima facie case,[330] while the employees retain the burden of persuasion to prove the Title VII violation—pretextual discrimination.

Under the Effects Theory, by contrast, the prima facie case of dispa-

325. *See infra* notes 327-328, 335, 347 & 351-355.

326. The burden of production requires that a party produce admissible evidence sufficient to raise a genuine question of fact as to the issue, whereas the burden of persuasion requires that the party persuade the fact finder on the issue. *See* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1216 (1981).

327. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659-60 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997-98 (1988) (plurality); New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Dothard v. Rawlinson, 433 U.S. 321, 339-40 (1977) (Rehnquist, J., concurring).

328. *See* The Civil Rights Act of 1991, H.R. 1, *supra* note 14, at §§ 3-4; *Wards Cove*, 490 U.S. at 668-72 (Stevens, J., dissenting); *Watson*, 487 U.S. at 1000-05 (Blackmun, J., concurring); Connecticut v. Teal, 457 U.S. 440, 446-47, 451 (1982); *Beazer*, 440 U.S. at 602 (White, J., dissenting); United States v. South Carolina, 445 F. Supp. 1094, 1111-12 (D.S.C. 1977) (three-judge district court decision), *aff'd mem.*, 434 U.S. 1026 (1978); *Dothard*, 433 U.S. at 329; Washington v. Davis, 426 U.S. 229, 247 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).

329. *See Wards Cove*, 490 U.S. at 669-70 (Stevens, J., dissenting).

330. *See* Gold, *supra* note 19, at 452-53, 593. The party seeking merely to rebut an inference of discrimination traditionally bears only the burden of production. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-58 & n.9 (1981); Cox II, *supra* note 11, at 785 ("borrowing the allocation of proof from disparate treatment precedent . . . reinforces the point that the plurality [in *Watson*] seeks to confine impact theory to a suspected disparate treatment theory").

rate impact *itself* establishes the Title VII violation. The business necessity response therefore seeks not to rebut that violation, but to excuse or justify it. It constitutes an affirmative defense to limit the employer's liability.[331] Thus, the employer bears the burden of persuasion on business necessity.[332]

ii. Standard of Scrutiny

At the business necessity stage, the court considers the employer's legitimate discretion to operate its business. Thus, there is no dispute over the substantive content of the business necessity response: the disparately impacting criterion must be shown to be effective in achieving the employer's legitimate business purpose.[333] There is dispute, however, on the standard of judicial scrutiny required for this business necessity response.

Under the Fault Theory, an employer need only offer evidence[334] that its use of the criterion was rationally related to accomplishing a reasonable business purpose.[335] Thus, courts have excused tests that disproportionately exclude members of a protected group based on evidence of the tests' positive correlation with training programs, without requiring further proof of any relationship between job training and job performance.[336] Under such a light standard, the employer seeks to undercut the

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331. *See* Blumrosen, *supra* note 45, at 80.

332. The party affirmatively defending against an established violation of law traditionally bears the burden of persuasion.

333. *See supra* note 324.

334. *See supra* Section IIB3a(i).

335. *See, e.g.,* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (criteria must "serve[] in a significant way, the legitimate employment goals of the employer"); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988) (plurality) (criterion must be "based on legitimate business reasons"); New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979) (Court excused blanket application of no-methadone rule even though only more specific application of the rule was found rational by the district court); Dothard v. Rawlinson, 433 U.S. 321, 339-40 (1977) (arguments of counsel, rather than evidence, might establish some correlation between criterion and job sufficient for business necessity) (Rehnquist, J., concurring); Washington v. Davis, 426 U.S. 229, 247, 250-52 (1976) (applying rational basis standard after articulating stricter standard); Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (pre-employment tests must be "fairly related to the job skills or work characteristics desired") (Blackmun, J., concurring); *cf.* United States v. South Carolina, 445 F. Supp. 1094, 1107-09 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978) (articulating rational basis standard but applying stricter standard).

336. *See, e.g., South Carolina*, 445 F. Supp. at 1112-13 (certifying teachers based on achieving a minimum score on the disparately impacting National Teacher's Examination was allowed because success on the exam correlated with mastery of teacher training programs); *cf. Washington*, 426 U.S. at 250-51 (positive correlation between city's qualifying test and training program test results served to justify the qualifying test).

This standard for business necessity has been questioned on two grounds. First, dissenting justices have questioned the sufficiency of the employer's purpose for using the disparately impacting criterion to predict or confirm mastery of job training, rather than job performance. *See* United States v. South Carolina, 434 U.S. 1026, 1027-28 (1978) (White, J., dissenting); *Washington*, 426 U.S. at 266-70 (Brennan, J., dissenting); *cf. Al-*

inference that the criterion was a pretext for discrimination based on the individual's protected status.[337] The focus of business necessity under this theory, like the focus during the prima facie case, is on the employer's unreasonableness or fault in using the criterion.

Under the Effects Theory, however, the employer must justify the criterion by a sufficiently compelling business purpose to overcome the discriminatory effects established by the prima facie case.[338] This is consistent with that theory's interpretation of business necessity as an affirmative defense.[339]

Ultimately, setting the appropriate balance between equal employment opportunity and business needs is a legislative judgment.[340] Although Congress did not adopt an explicit business necessity standard, it did create the bona fide occupational qualification (the "BFOQ")[341] exception as an affirmative defense to disparate treatment discrimination in some circumstances.[342] That exception may provide a model for calibrating Title VII's balance between equal employment opportunity and business needs for disparate impact discrimination.[343] The BFOQ excuses an employer from disparate treatment liability where its use of religion, sex or national origin actually "is a bona fide occupational qualification,"[344]

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bemarle Paper, 422 U.S. at 431 (employer must show relationship to important elements of job performance). These justices have also questioned the effectiveness of the criterion to achieve the employer's purpose where the evidence established only the correlation between the qualifying exam and training exams. *See South Carolina*, 434 U.S. at 1027-28 (White, J., dissenting); *Washington*, 426 U.S. at 270 (Brennan, J., dissenting).

337. *See* Cox I, *supra* note 11, at 96-97; Gold, *supra* note 19, at 589-93. *But see* Rutherglen, *supra* note 36, at 1320-26 (balancing impact against business needs uncovers pretextual discrimination); *cf.* Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio*, 17 Fla. St. U.L. Rev. 1, 42 ("The stronger the presumption of improper motive, the heavier the employer's burden to refute the presumption becomes.").

338. *See* Cox I, *supra* note 11, at 96-97.

339. *See supra* Section IIB3a(i).

340. *Cf.* Gold, *supra* note 19, at 457, 464 (recognizing difficulty in setting balance between business efficiency and equal employment opportunity). *But see* Willborn, *supra* note 11, at 824-25 (business necessity standard correlated to level of impact).

341. *See* 42 U.S.C. § 2000e-2(e)(1) (1988); *supra* note 127.

342. By its language, the BFOQ exception is limited in scope. It provides a defense to only those disparate treatment actions challenging an employer's practice of *hiring and employing* on the basis of *sex, religion or national origin*. It would not excuse an employer's disparate treatment for such other employer practices as discrimination in compensation, terms, conditions or privileges of employment; limiting, segregating or classifying employees or applicants; otherwise adversely affecting an employee's status as an employee, and perhaps discharge. Nor would it excuse an employer's disparate treatment based on race or color. *See* 42 U.S.C. § 2000e-2(a) (1988).

343. *See supra* Perry, *supra* note 77, *passim*.

344. *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 & n.5 (5th Cir. 1969) (employer must establish either "that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved" or in the case where "it is impossible or highly impractical to deal with women [or other protected groups] on an individualized basis," that the selection criterion is reasonable); Dothard v. Rawlinson, 433 U.S. 321, 335-36 (1977) (BFOQ established where female applicants' "very womanhood" directly reduced their ability to maintain order in a male, maximum-

and where its purpose for using those criteria is "reasonably necessary to the normal operation of that . . . business."[345] Thus, when the employer's cost of achieving equal employment opportunity burdens the essence of the business, equal employment opportunity must be subordinated.

Consistent with Congress' BFOQ standard, the Effects Theorists have settled on a balance between discriminatory effects and business needs that is even more conservative: they would excuse the use of a non-neutral criterion only where the criterion is necessary to the employer's business, as evidenced by a showing[346] that the criterion is substantially effective in achieving an important business purpose[347] that cannot be

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security prison where inmates were not classified or segregated by offense or level of dangerousness); *id.* at 343-46 (Marshall, J., dissenting) (adopting the majority's standard but challenging its use of gender stereotype as a substitute for factual support).

345. *See, e.g.*, Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971) (the airline failed to establish the BFOQ exception because even the proved inability of men to perform the non-mechanical functions of the flight cabin attendant job was merely "tangential" to the essence of the airline's business—the safe transportation of passengers); *Dothard*, 433 U.S. at 334-35 (BFOQ established to require male correctional officers for maximum-security male prisons because their ability to maintain order in the prisons was the "essence of a correctional officer's job" and was clearly essential to the functioning of the prison). Thus, the BFOQ defense requires "a business *necessity* test, not a business *convenience* test." *Diaz*, 442 F.2d at 388.

346. *See supra* Section IIB3a(i).

347. *See, e.g.*, The Civil Rights Act of 1991, H.R. 1, *supra* note 14, at § 3 ("The term 'required by business necessity' means—(A) in the case of employment practices involving selection (such as hiring . . .), the practice . . . must bear a significant relationship to successful performance of the job; or (B) in the case of employment practices that do not involve selection, the practice . . must bear a significant relationship to a significant business objective of the employer"); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 671 (1989) (Stevens, J., dissenting) (business necessity standard is substantial burden to meet); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1005-10 (1988) (Blackmun, J., concurring) (criteria must be "necessary to fulfill legitimate business requirement"); Connecticut v. Teal, 457 U.S. 440, 446-47, 451 (1982) (disparately impacting examination must be justified by proof that it measures "skills related to effective performance" needed for job at issue); New York City Transit Auth. v. Beazer, 440 U.S. 568, 602 (1979) (White, J., dissenting) (business necessity requires proof that criterion "results in a higher quality labor force, [and] that such a labor force is necessary"); United States v. South Carolina, 434 U.S. 1026, 1027-28 (1978) (White, J., dissenting) (relationship to training, rather than job performance, insufficient for business necessity); *Dothard*, 433 U.S. at 329, 331 n.14 (business necessity requires employer to prove the criteria are "necessary to safe and efficient job performance"); Washington v. Davis, 426 U.S. 229, 264-69 (1976) (Brennan, J., dissenting) (business necessity requires proof of job relationship); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) ("discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated' ") (quoting 29 C.F.R. § 1607.4 (1990)); Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) (to establish business necessity, company must show that its criteria "had a manifest relationship to the employment in question" or bore "a demonstrable relationship to successful performance of the jobs for which they were used"). Just as the issue of disparate impact discrimination focuses on the criterion itself—"Is it neutral?"—the business necessity response also focuses on the criterion—"Is it necessary?" *But see* Willborn, *supra* note 11, at 824-

accomplished by a lesser-impacting alternative criterion.[348] For example, tests that exclude a disproportionate number of protected group members would only be excused based on professionally acceptable evidence of the test's ability to predict successful job performance.[349]

iii. Lesser Impacting Alternatives

Employees may counter a successful business necessity response by showing that an alternative criterion with less impact would also accomplish the employer's business purpose.[350] Previous distinctions between the two theories on the business necessity response inform their different approaches to an appropriate rebuttal standard.

To rebut business necessity under the Fault Theory, the employees must establish that the employer used the disparately impacting criterion, rather than an alternative resulting in less impact, as a pretext for intentional discrimination.[351] The lesser-impacting alternative must be equally effective and no more costly in accomplishing the business purpose.[352] Otherwise, the cost and effectiveness differentials would reason-

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25 (correlate business necessity standard to level of impact to identify standards that are insufficiently productive to overcome their disparate impact).

348. *See infra* Section IIB3a(iii).

349. *See Albemarle Paper*, 422 U.S. at 431; Gillespie v. State of Wisconsin, 771 F.2d 1035, 1043-45 (7th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986); Contreras v. City of Los Angeles, 656 F.2d 1267, 1280-85 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

350. *See* Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1263 n.10 (6th Cir. 1981); *cf.* Walker v. Jefferson County Home, 726 F.2d 1554, 1559 (11th Cir. 1984) ("Because the Home failed to establish job-relatedness, we need not examine alternatives or pretext.").

351. *See, e.g.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989) (refusal to use a lesser impacting alternative "belie[s] a claim by petitioners that their incumbent practices are being employed for non-discriminatory reasons"); New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) ("express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (alternatives "would be evidence that the employer was using its tests merely as a 'pretext' for discrimination"); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 264-65 (N.D. Tex. 1980) (failure to use equally effective alternative with lesser impact suggests pretext); Friedman, *supra* note 59, at 14-15 ("If an alternative . . . is both efficient and less discriminatory, the . . . failure to adopt it probably was motivated by a desire to retain the discriminatory aspect of the original requirement."); 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, 424-25 (1982) (interpreting *Beazer* to limit use of alternatives proof to establishing intent); Maltz, *supra* note 15, at 352 & n.38 (same); Rutherglen, *supra* note 36, at 1327 (employer's proof of no alternatives would overcome suggestion of pretext); *cf.* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 988 (1988) (alternatives would *also* be relevant as "functional equivalent[s] of a pretext for" intentional discrimination); Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII*, 1985 Wis. L. Rev. 1, 6 (one use of alternatives is to raise issue of intent).

352. *See Wards Cove*, 490 U.S. at 661; *Watson*, 487 U.S. at 998 (plurality); United States v. South Carolina, 445 F. Supp 1094, 1115-16 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978); *cf. Beazer*, 440 U.S. at 590 & n.33 (recognizing proof of alternative to chal-

ably justify using the challenged criterion. Moreover, because demonstrating pretext is the essence of a Title VII violation to the Fault Theorists, the employees would bear the burden of persuasion on the rebuttal issue.[353]

In order to rebut business necessity under the Effects Theory, however, the employees must produce evidence challenging the assertion that the employer needed to use this criterion, rather than a lesser impacting alternative, to accomplish its business purpose.[354] Evidence that the lesser impacting alternative was less effective or more costly would balance into the evaluation of whether the employer's use of the disparately impacting alternative was justified in light of its greater discriminatory effects.[355] Because the employer is ultimately responsible for proving the affirmative defense of business necessity, the employees bear only the burden of production to rebut the employer's proof of business necessity.[356]

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lenge rationality of disparately impacting no-methadone rule under Constitution; but requiring proof that alternative works "as cheaply and effectively").

353. *See Watson*, 487 U.S. at 998 (plurality); *id.* at 1006 (Blackmun, J., concurring); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); *Albemarle Paper*, 422 U.S. at 425.

354. *See Watson*, 487 U.S. at 1006 (Blackmun, J., concurring); *see also Dothard*, 433 U.S. at 332 (lesser impacting alternative of testing strength directly undercut business necessity of challenged height and weight standards); Blake v. City of Los Angeles, 595 F.2d 1367, 1383 (9th Cir. 1979) ("So long as non-discriminatory alternatives serve the legitimate interests of the police in safe and efficient job performance, police departments cannot pursue policies that require the use of selection standards that are themselves prima facie violations of Title VII."); Robinson v. Lorillard Corp., 444 F.2d 791, 798 & n.7, 799-800 (4th Cir. 1971) ("[A] practice is hardly 'necessary' if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory."); The Civil Rights Act of 1991, H.R. 1, *supra* note 14, at § 4 ("except that an employment practice . . . demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice . . with less disparate impact would serve the respondent as well"); Bartholet, *supra* note 69, at 1023-26 (requiring adoption of lesser impacting alternatives despite validity of employer's criterion); Caldwell, *supra* note 64, at 601 (employees may prove "reasonable alternatives to the challenged practice without putting the defendant's state of mind in issue"); Taub & Williams, *supra* note 70, at 843 (alternatives are useful both to explore lesser impacting options and to "expose and help overcome the possibly unconsciously-made, yet biased assumptions that underlie exclusionary practices"); *cf. Beazer*, 440 U.S. at 590 & n.33 (using alternatives to challenge rationality of disparately impacting methadone rule under Constitution); *Dothard*, 433 U.S. at 339-40 (Rehnquist, J., concurring in part) (alternative of requiring appearance of strength rather than actual strength might have been found a business necessity); Lamber, *supra* note 351, at 6-7 (stating several uses of alternative proof).

355. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1006 (1988) (Blackmun, J., concurring); *see also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 602 (1979) (White, J., dissenting) (cost of alternative must be "prohibitive"); Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 709 (8th Cir. 1987) ("[a]dministrative inconvenience is not a sufficient justification for not utilizing these less discriminatory alternatives"); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 993-94 (5th Cir. 1982) (inconvenience of finding temporary replacement insufficient to reject leave of absence alternative, rather than termination, notwithstanding business necessity of fetal vulnerability rule).

356. *Cf.* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (employer bears only burden of production to rebut inference of disparate treatment; employees bear burden of persuasion on issue of intent); Uniform Guidelines on Employee

b. *Consequences of the Business Necessity Distinctions*

Whereas the Fault Theory permits an employer to use a disparately impacting criterion unless there is no rational business purpose to support it, the Effects Theory permits its use only if such use is necessary for the business. More than any other difference between the two theories, this dispute over the evidentiary contours of the business necessity response highlights the limitations of the Fault Theory in accomplishing Title VII's objectives.

To successfully establish discrimination under the Fault Theory, employees must prove that the employer's articulated purpose is illegitimate or that the criterion is unrelated to achieving that purpose.[357] Although in that instance the inference of pretextual discrimination is properly reasserted, the Fault Theory's acceptance of a rational business purpose as a business necessity that undercuts pretext is based on a false premise.[358] Even explicit use of prohibited factors can be supported by rational business purposes.[359] For example, in *City of Los Angeles*

Selection Procedures, 29 C.F.R. § 1607.3B (1990) (employer must use reasonable efforts to explore alternatives).

357. By this lenient standard, courts have found discrimination and rejected employers' business necessity defense only in extreme cases. *See, e.g.*, Green v. USX Corp., 896 F.2d 801, 805 (3d Cir.) (finding unreasonable employer's bald assertion that its subjective evaluation process enabled company to identify the "best qualified" candidates for unskilled positions), *cert. denied*, 111 S. Ct. 53 (1990); Nash v. City of Jacksonville, 837 F.2d 1534, 1537 (11th Cir. 1988) (evidence that qualified city employees drafted test was legally insufficient to establish business necessity, particularly where drafter admitted he did not evaluate exam as it related to job performance), *vacated and remanded*, 490 U.S. 1103 (1989), *reinstated*, 905 F.2d 355 (11th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3562 (1991); Sledge v. J.P. Stevens & Co., 52 Empl. Prac. Dec. (CCH) ¶ 39,537, at 60,499 (E.D.N.C. 1989) (rejecting as unreasonable conclusory assertion that subjective assessments were rationally related to hiring best qualified candidates); Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 825 (M.D. Ala. 1989) ("A court should find a test invalid only if the evidence reflects that the test falls so far below acceptable and reasonable minimum standards that the test could not be reasonably understood to do what it purports to do," as was the case at bar); EEOC v. Andrew Corp., 51 Empl. Prac. Dec. (CCH) ¶ 39,364, at 59,541-42 (N.D. Ill. 1989) (word-of-mouth recruiting from exclusively white clerical staff was not justified by cost or "inevitability," particularly where employer encouraged such recruiting and where employer affirmatively advertised in newspapers aimed at white markets, ignoring newspapers aimed at black markets). Indeed, the Seventh Circuit twice remanded cases for the lower court to redetermine business necessity based on a record virtually devoid of any rational business justification for the disparately impacting criterion. *See, e.g.*, Evans v. City of Evanston, 881 F.2d 382, 384-85 (7th Cir. 1989) (lower court found city's effort to justify cut-off point as "feeble," "consist[ing] of little more than testimony that one standard deviation above the mean is a frequent cut-off point on tests"); Allen v. Seidman, 881 F.2d 375, 380-81 (7th Cir. 1989) (evidence demonstrated that employer was reckless, even irrational, in using exclusionary test).

358. *See, e.g.*, Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 264-65 (N.D. Tex. 1980) (rational business factors can be used pretextually where the employer either (i) places heavier emphasis on factor than productivity concerns requires or (ii) uses a more impacting alternative); *supra* notes 53-54 and accompanying text.

359. *See* Section 703(e)(1) of Title VII, 42 U.S.C. § 2000e-2(e)(1) (1988); *supra* notes 344-345.

Department of Water and Power v. Manhart,[360] the City explicitly required women to make larger contributions than men to the pension fund[361] to achieve its rational business purpose of accounting for the fact that the cost for the average female retiree exceeds that of the average male retiree.[362] Moreover, in *Diaz v. Pan American World Airways, Inc.*,[363] the airline excluded men from its flight attendant positions because its passengers "overwhelmingly preferred to be served by female stewardesses."[364] These rational explanations failed, not as a factual matter but as a matter of law, to excuse the disparate treatment discrimination at issue in *Manhart* and *Diaz*.[365] Consequently, allowing such rational explanations to excuse disparate impact discrimination as a matter of law falls short of even the limited goals of the Fault Theory: it protects some pretextual or explicit use of prohibited criteria.[366]

Only when the employer's use of a disparately impacting criterion is not even in *its* interests will the employer be required to change its practices under that theory. Therefore, the balance between discretion for business and equal employment opportunity drastically favors business.[367]

Under the Effects Theory, by contrast, the employer bears more responsibility for changing workplace standards that are proved to be nonneutral and unnecessary. Forbidding unnecessary disparately impacting criteria is not overinclusive of the theory's goals. Rather, because of the business necessity defense, it is underinclusive: only *unnecessary* nonneutral criteria are forbidden.[368]

Fault Theorists support their more lenient standard of scrutiny by arguing that it reduces the incentive for employers to avoid their justification obligation by resorting to quota selections.[369] Indeed, President Bush's opposition to the Civil Rights Act of 1990 was prompted in part

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360. 435 U.S. 702 (1978).

361. Women's larger contribution for the same benefits resulted in discrimination in women's pay. *See id.* at 705.

362. *See id.* at 708-09. Moreover, the city could not judge at the funding stage which women would outlive which men. *See id.*

363. 442 F.2d 385 (5th Cir. 1971).

364. *Id.* at 387.

365. See City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978); *Diaz*, 442 F.2d at 389.

366. *See* Bartholet, *supra* note 69, at 991-96; Rutherglen, *supra* note 36, at 1310-11; Willborn, *supra* note 11, at 818-21.

367. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993 (1988) (plurality) ("We do not believe that disparate impact theory need have any chilling effect on legitimate business practices.").

368. The business necessity defense, therefore, provides limits for the Effects Theory. *See supra* note 81. *But cf.* Friedman, *supra* note 36, at 68 (business necessity allows employers to use criteria that deny access).

369. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659-60 (1989); *Watson*, 487 U.S. at 991-94 & n.2, 998-99 (plurality); Connecticut v. Teal, 457 U.S. 440, 463 (1982) (Powell, J., dissenting); Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in judgment); Gold, *supra* note 19, at 457-63; Rutherglen, *supra* note 36, at 1313-16, 1326-27.

by concern with quota selections.[370]

The charge that a more searching standard of business necessity will result in quotas, however, is unwarranted. As an initial matter, although the Effects Theory's standard of scrutiny for business necessity justification is heavier than that of the Fault Theory,[371] it is lighter than the well-accepted BFOQ justification under disparate treatment doctrine.[372] Moreover, an employer raises doubt as to the necessity of its job prerequisites by selecting lower-ranked individuals from underrepresented groups rather than justifying the merits of the criteria. In that circumstance, it would be more consistent with Title VII to encourage the employer to forego use of the disparately impacting criteria to which it is so tenuously committed.

On a more concrete level, this specter of quotas has proved illusory. Although the Effects Theorists' standard had been the law of business necessity for almost two decades prior to *Wards Cove*, employers did not resort to quotas.[373] In actuality, an employer exposes itself to more liability by engaging in preferential treatment of protected group members to overcome the exclusionary impact of its criterion. Once the employer's actions are detected, the employer would still be required to justify its disparately impacting criterion[374] and it might also be subject to

370. *Civil Rights Act Wins House and Senate Approval*, 396 Lab. L. Rpts. (CCH) ¶ 3 (August 7, 1990); *see supra* note 14.

The 102d Congress has introduced the Civil Rights Act of 1991, a bill containing pertinent language that is identical to that vetoed by President Bush. *See* H.R. 1, *supra* note 14, at §§ 3-4.

371. *See supra* Section IIB3a(ii).

372. *See supra* notes 341-345 and accompanying text.

Similarly, to avoid liability under the Fault Theory of disparate impact, the employer must articulate a rational business purpose, whereas to avoid liability in pretextual disparate treatment cases, the employer must only articulate a non-discriminatory reason, regardless of its rationality. *Compare supra* note 335 and accompanying text (employer's criterion must be rational to justify use of disparately impacting criterion) *with* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (employer's explanation must be non-discriminatory, i.e. not based on race, color, religion, sex or national origin, to undercut inference of subjective intent). *Cf.* Irchirl v. Sears, Roebuck & Co., 50 Empl. Prac. Dec. (CCH) ¶ 38,941, at 57,070, 57,071 (S.D. Tex. 1989) ("Title VII does not protect employees from the arbitrary employment policies and practices of their employer, only their discriminatory application or impact"); Manuel v. WSBT, Inc., 706 F. Supp. 654, 661 (N.D. Ind. 1988) ("[t]hat an employer's personnel decision was ill-informed or mistaken does not establish that it was a pretext for discrimination"); Dadino v. Delaware River Port Auth., 703 F. Supp. 331, 349 (D.N.J. 1988) (existence of confession undercuts subjective intent); Grimes v. District of Columbia, 630 F. Supp. 1065, 1070 (D.D.C. 1986) (clerical error undercuts subjective intent), *vac. on other grounds*, 836 F.2d 647, 650 (D.C. Cir. 1988).

373. Since 1965, the unemployment rate for people of color was consistently almost double the overall average rate whereas the white unemployment rate was consistently below the overall average rate. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. 2340, *Handbook of Labor Statistics* Table 26 (1989). For example, during 1988 the overall unemployment rate for all civilian workers was 5.5%, for black workers 11.7%, for Hispanic workers 8.2% and for white workers 4.7%. *See id.*

374. *See* Connecticut v. Teal, 457 U.S. 440, 451 (1982); *supra* Section IIB2d.

liability for reverse discrimination.[375] Finally, when molding the contours of disparate impact doctrine, giving too much consideration to whether those regulated will be encouraged to circumvent their obligations seems an inappropriate policy.[376]

Requiring thorough scrutiny of an employer's disparately impacting qualifications is justified[377] to avoid allowing facially benign differences to achieve social significance unrelated to their merits. Differences between protected groups are not the problem; society's use of those differences is.[378] For example, that women are, on average, shorter than men prevents them from reaching the instrument panel on airplanes only because those airplanes were designed to accommodate the measurements of the average Euro-American man.[379] Similarly, where effective job performance is defined in terms of current performance[380] or in terms of stereotyped characteristics,[381] then it is the status quo or stereotypes rather than true business needs that purport to justify continued exclusion of protected groups.[382] In the airplane design example, employees could rebut the necessity of the height requirement by suggesting adjustable seats[383] as a more neutral alternative to accomplish the employer's

375. *See* Johnson v. Transportation Agency, 480 U.S. 616, 640-42 (1987) (voluntary preferential treatment permitted only when restrictions on its purpose and means are strictly followed); United Steelworkers v. Weber, 443 U.S. 193, 208-09 (1979) (same); Shoben, *supra* note 37, at 241-42 (same).

376. Indeed, the most effective way to discourage employers from resorting to quota selections would be to repeal Title VII.

377. *Cf.* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 903 (7th Cir. 1989) (Posner, C.J., dissenting) (disparate treatment case) ("If the defense of bona fide occupational qualification were broadly construed—for example, to excuse all sex discrimination that the employer could show was cost-justified—very little sex discrimination in employment . . . would be forbidden. Title VII's reach would be shortened drastically."), *rev'd on other grounds*, 59 U.S.L.W. 4209 (1991).

378. *See* Littleton, *supra* note 83, at 1284-85; Segal, *supra* note 36, at 129-30; *cf.* Williams, *supra* note 71, at 357 ("The focus in the pregnancy debate, as with men and women or blacks and whites, should be on whether the differences should be deemed relevant in the context of particular employment rules.").

379. *See* Boyd v. Ozark Air Lines, 419 F. Supp. 1061 (E.D. Mo. 1976); Taub, *supra* note 73, at 1694 (citing C. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 181-82 (1979)); Taub & Williams, *supra* note 70, at 839; Note, *Getting Women Work that Isn't Women's Work: Challenging Gender Bias in the Workplace under Title VII*, 97 Yale L.J. 1397, 1398-99 (1987); *cf.* Note, *supra* note 84, at 494-99 (BFOQ in Dothard v. Rawlinson, 433 U.S. 321 (1977), justified by illegal conditions at prison; gender-based extension of time for promotion justified based on gender-based combat exclusion in Schlesinger v. Ballard, 419 U.S. 498 (1975); upholding jury system requiring men to opt out but allowing women to volunteer based on stereotyped notion of women's role in the home in Hoyt v. Florida, 368 U.S. 57 (1961)).

380. *See* Bartholet, *supra* note 69, at 1008-23; Note, *supra* note 379, at 1398-99.

381. *See* Cox II, *supra* note 11, at 777-78 (using example where aggressiveness is linked to leadership in the employer's understanding of the job at issue, thereby requiring aggressiveness as qualification for effective job performance).

382. *See* Littleton, *supra* note 83, at 1306-08 (feminists criticize tendency to locate the difference in women, rather than in the institution).

383. *Cf.* Littleton, *supra* note 83, at 1314 (adjustable podiums); Williams, *supra* note 71, at 374-80 (evaluating costs of restructuring).

interest in safe and effective job performance.[384] Requiring the employer to demonstrate its criteria to be substantially more effective than alternatives in achieving genuine business needs, rather than requiring mere articulation of rational business reasons for the criteria, more readily exposes the unwarranted bias. Only when equal employment opportunity is given priority over business convenience,[385] which in many cases masks discriminatory bias, will America's promise of equal employment opportunity extend to all capable participants, even those who are different.

Adopting the Effects Theory's business necessity standard, rather than the Fault Theory's standard, would require an employer to abandon its selection criterion only when the criterion is found to be merely rationally effective, but not substantially effective, in achieving the employer's purpose or when the employer's purpose is found to be only rationally related, but not important, to the business. Both the cost of foregoing this margin of productivity and the marginal cost of justifying the criterion at this higher level are justified. Indeed, if it did not accord priority to equal employment opportunity over business concerns, Title VII would fail in its objective of changing the status quo to equalize employment opportunities for previously underrepresented groups excluded by both purposeful and institutional discrimination.[386]

4. Summary

As this Article has demonstrated, the Fault Theory focuses on employer fault throughout the entire disparate impact case. This emphasis has serious ramifications. Its fundamental drawback is that it evaluates discrimination solely from the perspective of the employer—ignoring the perspectives of the employee/applicant and society[387]—thus diverting attention from the harmful effects of disparately impacting criteria.[388] Moreover, it singles out for prohibition only a limited form of discriminatory conduct from the more expansive, and indistinguishable, range of discrimination.[389] Equally important, the Fault Theory equates fault

384. *See* Taub & Williams, *supra* note 70, at 843; *cf.* Ross v. Buckeye Cellulose Corp., 733 F. Supp. 344, 362-63 (M.D. Ga. 1989) (no injunctive relief and liability limited where employer already implemented a lesser impacting system).

385. *Cf.* Littleton, *supra* note 83, at 1301-02 (recognizing need for radical challenge to male bias in institutions).

386. *See supra* notes 123-128 and accompanying text; Perry, *supra* note 77, at Section IIC3.

387. *See* D. Bell, *supra* note 85, at 659; Freedman, *supra* note 83, at 965-68; Freeman, *supra* note 71, at 1075; Minow, *supra* note 144, at 76-82; Segal, *supra* note 36, at 139-40; Taub & Williams, *supra* note 70, at 838 n.52.

388. Those harms are felt by both the immediate victims of discrimination, the groups victimized and society. Those harms include not just lack of money, power and dignity for those excluded, but also decreased efficiency from preferential distribution of human talent and decreased creativity from the failure to respect diverse perspectives. *See* Minow, *supra* note 144, at 77 (goal is equal respect, not sympathy or empathy).

389. *See, e.g.*, D. Bell, *supra* note 85, at 659 (Under fault-based theories, "[a]cts of

with responsibility.[390] Not only does this legitimize the status quo,[391] but it immunizes those with the power and the obligation under Title VII to substitute equality for that discriminatory status quo.[392]

The Effects Theory's emphasis, on the other hand, more appropriately addresses Title VII's concerns.[393] Throughout the prima facie case of disparate impact, the focus remains on the criterion's disparate impact

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discrimination are not deemed a social phenomenon, [rather they are defined to include] only the misguided conduct of misguided individuals whose bad acts prevent the system of equality of opportunity from distributing the rewards of life to the deserving, and depriving only those who lack sufficient merit."); Freeman, *supra* note 71, at 1103 (defining discrimination as the "occasional aberrational practice" while ignoring "racial powerlessness, poverty, and unemployment"); Lawrence, *supra* note 41, at 328, 356-61 (recognizing discrimination to include all actions "to which the culture attaches racial significance"); Friedman, *supra* note 36, at 57 ("emphasis on fault" does not redress employer's use of facially neutral devices that result in discriminatory effects attributable to historical discrimination); Friedman, *supra* note 59, at 22 ("But this postulate incorrectly assumes that the discriminatory consequences of a facially neutral practice are less offensive that discrimination generated by a hostile motive. Equally undesirable societal costs result from both intentional and unintentional discrimination. Whatever the cause, differential treatment, and the diminished contact among the races that it engenders, reinforces prejudices and stereotypes, creates feelings of inferiority and superiority, deprives individuals of important benefits, perpetuates fear and hostility, and impedes understanding and cooperation.")

390. *See, e.g.*, Lawrence, *supra* note 41, at 325-26 ("Understanding the cultural source of our racism obviates the need for fault, as traditionally conceived, without denying our collective responsibility for racism's eradication."); Freeman, *supra* note 71, at 1055 ("The fault concept gives rise to a complacency about one's own moral status; it creates a class of 'innocents' who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations."); Friedman, *supra* note 36, at 55 ("To . . . immunize employers on the basis of individual blamelessness from any responsibility for changing the status quo, would have fatally impaired the effort at breaking this cycle of disadvantage."); D. Bell, *supra* note 85, at 657 ("President Johnson suggested that the priority in the effort to eliminate the effects of racism should be placed on providing remediation, not determining responsibility. This was the thrust of cases like *Brown* and *Griggs*, but more recent cases such as Washington v. Davis, . . . have reversed the remediation-responsibility concerns."); Hochschild, *Equal Opportunity and the Estranged Poor*, 501 Annals 150 (Jan. 1989) ("Political choices ranging from slavery to a preference for unemployment over inflation in the context of a particular ideological framework helped to create a group of people with no resources, no skills, and no faith.").

391. *See, e.g.*, Freeman, *supra* note 85, at 110 ("what would be in the interest of the ruling classes would be to 'bourgeoisify' a sufficient number of minority people in order to transform them into active, visible legitimators of the underlying and basically unchanged social structure"); Freeman, *supra* note 71, at 1113-14 (to the extent some minorities succeed, it will shift the blame for continued minority underrepresentation from discrimination to the victims).

392. *See, e.g.*, Minow, *supra* note 144, at 77 ("We can and should confront our involvement in and responsibility for what happens when we act in a reality we did not invent but still have latitude to discredit or affirm."); Finley, *supra* note 83, at 1171 ("I choose the term 'responsibility' because the fact of interconnection between people and between various aspects of our lives such as work and home give each of us a measure of responsibility for how our actions or failures to act affect others."); *see also* Littleton, *supra* note 83, at 1317-18 ("[A] few men who are at or near the top of intersecting hierarchies of sex, race, and class. . . [have] the power to set the terms by which all forms of human activity are given social meaning and social value.").

393. *See supra* notes 123-128 and accompanying text.

because evaluating a criterion's disproportionate effects most objectively identifies group-based barriers to employment opportunities. Moreover, by shifting the focus at the business necessity stage to the employer's business justification for the criterion, the Effects Theory attempts to effect the remedial purpose of Title VII while respecting legitimate business prerogatives.

The full impact of the distinctions between the Fault and the Effects Theories has been obscured by the state of the law under Title VII. Current disparate impact doctrine includes evidentiary choices consistent with both theories. The Appendix summarizes the evidentiary contours of both theories and the current state of the law regarding those contours under Title VII.

CONCLUSION

The time has come to articulate a complete theory of disparate impact discrimination. Regardless of whether Congress reverses the Supreme Court's recent rulings, some fundamental evidentiary issues remain to be resolved. To achieve a coherent Title VII theory of disparate impact discrimination it will be necessary both to resolve these remaining issues and to conform inconsistent evidentiary rulings to one theory of discrimination. This will necessarily require a choice between the two competing theories.

The substantive distinction between the Fault and Effects Theories is that the Fault Theory allows the employer to use disparately impacting criteria absent employer fault, whereas the Effects Theory prohibits the employer from using disparately impacting criteria unless demanded by its business. As this Article has demonstrated, the consequences of that distinction are enormous.

The goals and evidentiary contours of the Fault Theory[394] reveal it to require little change in the nation's workplace standards. The theory presumes the nondiscriminatory nature of all workplace standards, except those few that are proved to be explicitly or pretextually based on race, color, religion, sex or national origin. Consequently, the makeup of the workforce will not be significantly altered, either in terms of participation by underrepresented groups or in terms of the perspectives of those group members allowed to participate. Without significant institutional changes, only the individuals from underrepresented groups who most resemble those who have already succeeded under the status quo will achieve equal employment opportunities.

The goals and evidentiary contours of the Effects Theory,[395] by contrast, indicate that it would expose discrimination in many more facially neutral workplace standards. It would ensure that those standards either accommodate the perspectives of all workers, not just Euro-American

394. *See supra* Section II.
395. *See id.*

males, or be truly job-related. As a consequence, meritocracy will become more of a reality and real diversity, not just formal or token diversity, will be a possibility in the nation's workplace.

Absent Congressional mandate compelling adoption of the more restricted Fault Theory, the Effects Theory should be adopted because it fulfills the goal of equal employment opportunity in a manner more consistent with Congress' mandates in Title VII.

APPENDIX
SUMMARY OF COMPARISON OF EVIDENTIARY ISSUES

Evidentiary Issues

Fault Theory

Effects Theory

1. Facially Neutral Criterion
a. Subjective Criteria
Disparate Impact Not Applicable

DISPARATE IMPACT APPLICABLE
b. The Control Element
Employer Must Control, Employee Cannot Have Control
Control not Determinative

2. Proving Disparate Impact
a. Causation of Impact

ISOLATE TO SINGLE CRITERION
One or More of Employer's Criteria
b. Impact on Whom?

Applicants or Otherwise Qualified Individuals
Individuals in Labor Market
c. How Much impact?

Statistically Significant Plus Practical or Dramatic Impact
Statistically Significant Impact
d. Bottom-Line Defense

Undercuts Impact of Criterion
IMPACT OF CRITERION NOT EXCUSED

3. Business Necessity Justification
a. Burden of Proof

EMPLOYER MUST ONLY PRODUCE EVIDENCE
Employer Must Persuade
b. Standard of Review

RATIONAL BASIS SCRUTINY

Mid-level Scrutiny

c. Rebuttal
EMPLOYEE MUST PERSUADE WITH EQUAL ALTERNATIVES
Employee Must Only Produce Evidence of Comparable Alternatives

*BOLD type indicates Supreme Court authority. *Italicized* type indicates proposed Congressional action.