Disparate Impact: Looking Past the Desert Palace Mirage

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DISPARATE IMPACT: LOOKING PAST THE DESERT PALACE MIRAGE

CHARLES A. SULLIVAN*

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INTRODUCTION

The state of employment discrimination practice can be easily summarized: plaintiffs are losing almost all of the cases they file except for a few isolated ones, most notably sexual harassment claims.\(^1\)

The state of employment discrimination scholarship can be easily summarized: discrimination is more pervasive than ever, but only when “discrimination” is defined in a way that few outside the legal academy are willing to accept.\(^2\)

The state of employment discrimination doctrine can be easily summarized: formal proof structures for individual cases of disparate treatment are being dismantled in favor of a “sufficient evidence” test that will accord judges and juries, who believe discrimination is largely a thing of the past, as much freedom as under prior doctrine to find against plaintiffs.\(^3\)

To be sure, some hyperbole exists in each of these statements, but each is largely true; indeed, with the exception of some unjustified optimism about *Desert Palace, Inc. v. Costa*\(^4\) ameliorating the *McDonnell Douglas* proof structures for individual disparate treatment cases,\(^5\) each statement is largely undisputed. Certainly, plaintiffs are increasingly unsuccessful in court,\(^6\) and recent scholarship argues that current approaches inadequately deal with the discrimination phenomenon.\(^7\)

This Article’s thesis is straightforward: the obsession of the legal academy and the plaintiffs’ bar with disparate treatment cases, to the wholesale exclusion of the disparate impact alternative, is largely responsible for the present crisis in the field.\(^8\) Disparate

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1. See infra text accompanying notes 121-24.
2. See infra text accompanying notes 31-59.
3. See infra text accompanying notes 60-116.
7. See infra text accompanying notes 31-59.
impact has its own problems, some severe, and this Article is not the first to call for the theory’s revival. But the disparate treatment paradigm’s profoundly unsatisfactory history should prompt a reconsideration of how much effort should be spent trying to salvage it. Indeed, Desert Palace’s chief danger is that it will revive interest in a failed paradigm. Rather than leading us out of the waste and into the promised land, Desert Palace may prove to be yet another mirage.

This Article proceeds as follows: Part I sketches an overview of disparate treatment, the dominant approach to discrimination under Title VII of the Civil Rights Act. With this structure in place, Part II then critiques the disparate treatment theory; in the process, Part II analyzes some of the major efforts to redefine the theory to make it more effective. Part III then reviews the admittedly checkered history of the disparate impact theory and Part IV details the criticisms leveled against the theory. Finally, Part V projects what might be a more hopeful future for disparate impact.

I. DEFINING AND PROVING DISPARATE TREATMENT DISCRIMINATION

One of the antidiscrimination project’s pervasive problems has been the continuing conflation of two separate tasks, that is, defining discrimination and proving its existence. These tasks are obviously intimately interrelated, but they are not identical. Needless to say, discrimination must be defined prior to any effort to prove its operation in given case.

A. Defining Disparate Treatment Discrimination

Because Title VII bars “discrimination” based on race, sex, national origin, and religion, the proscription’s reach depends on

9. See infra text accompanying notes 326-40.
11. Id. Although this Article focuses on race and sex discrimination, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000), bars discrimination on account of age for those forty and older, and the Americans with Disabilities Act, 42 U.S.C. § 12101 (2000), bars disability discrimination. These prohibited bases for decision are similar in some respects to race and gender discrimination but different in critical regards. See, e.g.,
what "discriminate" means. Early in its history, the Supreme Court adopted two definitions of the term. The first definition, disparate impact, was announced in *Griggs v. Duke Power Co.* and required neither proof of motive nor intent on the employer's behalf. Ironically, the second theory the Court recognized, disparate treatment, has come to dominate the cases and commentary.

As the Supreme Court described it in *International Brotherhood of Teamsters v. United States*,

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

Although this formulation is framed in terms of discriminatory "motive," the Court soon began speaking of discriminatory "intent." It has continued to use both terms as though they are interchangeable, although intent appears to be the preferred usage, except

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15. *Id.* at 335 n.15. The Court cited *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977), an equal protection case, thus suggesting the statutory and constitutional standards were the same. It continued: "Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Int'l Bhd. of Teamsters,* 431 U.S. at 335 n.15.
when "mixed motives" are concerned. To the extent a difference exists, "motive" is broader than "intent" because motives can include unconscious forces, while intent is more often used to describe an actor's conscious choices. The Supreme Court's failure to define what either term means, or, indeed to explain whether they are synonymous, is all the more surprising given the scholarly commen-

16. Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003), speaks of "mixed motives." See infra text accompanying notes 84-90; see also McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 359-60 (1995) (explaining that "mixed motives" analysis does not apply when the employer has no prior knowledge of employee wrongdoing); Hazen Paper Co. v. Biggins, 507 U.S. 604, 613 (1993) ("[I]nfering age motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present.").

17. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) ("In such 'disparate treatment' cases, ... the plaintiff is required to prove that the defendant had a discriminatory intent or motive."); Pullman-Standard v. Swint, 456 U.S. 273, 289-90 (1982) ("Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive.").

18. For example, the Oxford English Dictionary (OED) includes the following among the definitions of "motive": "A circumstance or external factor inducing a person to act in a certain way; a desire, emotion, reason, argument, etc., influencing or tending to influence a person's volition. Also: a contemplated end the desire for which influences or tends to influence a person's actions." OXFORD ENGLISH DICTIONARY 698 (1933). In describing "motivation," the OED also reports that psychology uses the term to include unconscious motives: "orig. Psychol. The (conscious or unconscious) stimulus for action towards a desired goal, esp. as resulting from psychological or social factors; the factors giving purpose or direction to human or animal behaviour ... the reason a person has for acting in a particular way, a motive." Id.

19. See, e.g., Mark S. Brodin, The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII, 62 N.C. L. REV. 943, 978-79 (1984) (footnotes omitted): The notion of intent as "motive" and "purpose" represents a rejection of the traditional view of intent that prevails in the tort area, in which the term generally is defined without regard to the actor's motive or underlying purpose, but is used merely to distinguish conduct that is deliberate and volitional from conduct that is accidental. Moreover, ... tort intent encompasses not only those consequences that the actor actually desired, but also those which a reasonable person would believe are substantially certain to follow from the act. Thus tort law has objectified the requisite state of mind for its intentional wrongs, permitting it to be inferred from the circumstances of the act and thus avoiding the subjective question of actual state of mind.

Professor Brodin uses the example of A voluntarily firing a gun at B; tort law would say A "intentionally" shot B; his underlying motive "would come into play only in certain limited circumstances, such as to establish the privilege of self-defense, or to determine whether punitive damages should be awarded. That A's act was volitional and likely to cause injury is all that is necessary to make this an 'intentional' tort." Id. at 979.
tary, which uniformly argues that motive is the more appropriate term, in part because it may include less conscious impulses.\textsuperscript{20}

The motive-intent question suggests that this "most easily understood type of discrimination"\textsuperscript{21} is not straightforward at all but rather requires clarification. The Court soon established that certain motivations, such as animus or disdain, were not essential to a violation: although sufficient, proof of such motives was not necessary for discrimination under Title VII because an employer discriminates within that statute's meaning if the employer intends to draw a distinction on prohibited grounds. Consequently, even admittedly rational, business-oriented judgments are discriminatory within the statute's meaning if the employer uses the race or gender criterion to make distinctions. Perhaps the most dramatic examples are the statute's condemnations of sex distinctions in fetal protection policies\textsuperscript{22} and employer pension plans,\textsuperscript{23} even if the distinctions were premised on what the Court views as real differences between the sexes.

This description, however, may suggest that the state of mind necessary for "discrimination" is really "intent" in the sense of conscious decision making, that is, a choice by a rational actor to use an individual's race or gender as a basis for allocating employment benefits or burdens. The "discrimination" Title VII addressed when first enacted often consisted of formal policies akin to those manifested in school segregation laws or at least conscious relegation of African Americans to inferior positions in employment

\textsuperscript{20} The most extended treatment of the question is D. Don Welch, \textit{Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent}, 60 S. CAL. L. REV. 733, 740 (1987), which traces the debate back at least as far as Owen M. Fiss, \textit{A Theory of Fair Employment Laws}, 38 U. CHI. L. REV. 235, 297 (1971). But others, both before and after, have also argued that "motive" is a better word than "intent" to describe the requisite causal mechanism implicated by the antidiscrimination laws. See, e.g., Brodin, \textit{supra} note 19; Mark C. Weber, \textit{Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Discrimination}, 68 N.C.L. REV. 495, 498 (1990) ("Ordinarily, intentions are immediate objectives, such as the intent to steal, whereas motives are more basic or underlying objectives, such as the motive to be wealthy.").


\textsuperscript{22} Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (treating employer policy as discriminatory because it differentiated between the sexes even though it was designed to protect fetuses carried by female employees).

\textsuperscript{23} City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 702 (1978) (holding that requiring females to contribute more to a pension system because of their longer life expectancies was illegal).
hierarchies. In *Griggs*, for example, Duke Power had an explicit policy, which it discontinued the day the 1964 Civil Rights Act became effective, segregating blacks in the lowest paid, most menial positions in the plant. 24 Similarly, women were also often explicitly treated differently than men. 25 Although Congress undoubtedly anticipated that the impulses that led to these policies would be manifested in more ad hoc employment decisions, this kind of conscious decision making was the primary evil the statute addressed. 26

In 1964, Congress recognized that discrimination is not always a conscious choice, 27 however, and the psychological impulses causing individuals to differentiate based on race have become far better understood in the forty years since the passage of Title VII. Relatively early in the statute's history, the notion of stereotyping was recognized, that is, the tendency to treat members of a class as having the perceived characteristics of a class. Stereotyping can be rational or irrational depending on the stereotype's accuracy in terms of actual group characteristics, 28 although even rational stereotyping is legally and morally problematic because it treats


25. The most overt example of formal policies with regard to women was help-wanted classified advertisements in newspapers, which were categorized as "Male Help Wanted" and "Female Help Wanted." See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 379 (1973).

26. See Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 67-68 (1972) ("Initially, the dominant if not exclusive definition of discrimination was based upon the evil-motive ... test.").

27. Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1192 (2003) (stating that Congress in the 1960s was "aware that discrimination was not always overt").

28. Use of accurate stereotypes has been described as statistical discrimination. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1622 (1991) ("A rational employer will discriminate, even if no relevant actor has any discriminatory animus, if the employer concludes that race is a useful proxy for job qualifications."). There has also been lively theoretical literature, regarding whether and how discrimination could survive in a competitive economy, originating with the work of Gary Becker, who posits an employer "taste for discrimination" that overcomes competitive pressures to hire minorities and women. GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 14 (2d ed. 1971); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 525-26 (2d ed. 1977) (exploring the economic ramifications of preferences for certain racial groups). But see Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1251 (2003) (doubting whether Becker's theory is empirically supported).
employees as members of a group rather than assessing their individual characteristics. Stereotyping can also be more or less conscious. Some stereotypes—women with preschool age children have worse attendance records than other workers because of their responsibilities, for instance—have been the basis of formal policies clearly driven by intent, however defined. The salient scholarly development during the last decade, however, has been exploring the extent to which such stereotyping operates below the conscious level. Although the phenomenon has been studied since at least the 1970s, recent research has revealed both how deep-rooted in cognitive structures attitudes regarding race and gender are and how sweepingly such influences can operate. Scholars, such as Linda Krieger, Tristin Green, Susan Sturm, and others, argue


32. See Tristin K. Green, Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003) [hereinafter Green, Workplace Dynamics] (“[B]oth conscious and unconscious bias operate at multiple levels of social interaction, often resulting in decreased opportunity for disfavored groups without producing a single, identifiable discriminatory decision or a perceptibly hostile work environment.”); Tristin K. Green, Work Culture and Discrimination, 93 CAL. L. REV. 623, 647 (2005) [hereinafter Green, Work Culture] (examining how “work cultures are likely to develop and persist along racial and gender lines” and exposing the harms that those cultures can impose on women and minorities).


that discrimination in the new millennium is both more pervasive and less conscious than the aversion Title VII originally targeted in 1964. This insight, though labeled differently, has been generally


Professor Kang describes the IAT as "the state-of-the-art measurement tool," and reports that functional magnetic resonance imaging tests reflect amygdala activation in test subjects that "is significantly correlated with participants' IAT scores." Kang, supra note 34, at 1509, 1511. According to Kang, this is significant largely because the amygdala "becomes active when it is exposed to stimuli with emotional significance." Id. at 1511.

Even assuming the IAT accurately identifies attitudes, however, proof that individuals have certain attitudes is not necessarily proof that real world decisions are influenced by those attitudes. For that, it is important to link "laboratory" proof such as the IAT to more real world experiments such as those reported in Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination 2-3 (MIT Dep't of Econ., Working Paper No. 03-22, 2003), available at http://ssrn.com/abstract_id=422902 (reporting that when identical resumes were sent to employers, those receiving more favorable treatment were those containing non-African American sounding names). See also Nilanjana Dasgupta, Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations, 17 SOC. JUST. RES. 143 (2004) (collecting research showing biased behavior in employment situations).

36. Marc R. Poirier, Is Cognitive Bias at Work a Dangerous Condition on Land?, 7 EMP. RTS. & EMP. POL'Y J. 459, 465-67 (2003), notes inconsistencies in the terms used in discussing cognitive bias and suggests a taxonomy. Although his classifications clarify a number of matters, some are problematic. For example, although Professor Poirier clearly does not intend this result, stating that "[i]nvidious intent or animus, when acted on, results in "intentional discrimination," id. at 467, may mislead by suggesting that "invidious"
accepted as playing a major role in present-day America,\textsuperscript{37} although a serious question remains about the extent to which "old-fashioned" animus continues to operate.\textsuperscript{38}

Whether these developments, which occurred long after Title VII was passed, will influence the interpretation of what it means to "discriminate" under the statute is unclear. When the Teamsters Court wrote about a "discriminatory motive" being necessary for disparate treatment discrimination,\textsuperscript{39} it probably meant conscious impulses of the actor. Nevertheless, the Court could easily bring unconscious discrimination within the disparate treatment model by looking to its own cases,\textsuperscript{40} stressing the word "motive," and focusing on the "because of" language in the statutory prohibition.\textsuperscript{41}

The shift in vocabulary from "motive" to "intent" in the wake of the 1991 Civil Rights Act, however, may not be accidental,\textsuperscript{42} and the Court might well draw the line at conscious conduct for a variety of reasons. One reason is simply intuition. As two commentators

motions are critical to finding discrimination, given the relatively uniform equation by cases and commentators of intentional discrimination with disparate treatment regardless of animus.

\textsuperscript{37} As Professor Krieger writes, "[t]hese subtle forms of bias, I suggest, represent today's most prevalent type of discrimination." Krieger, supra note 31, at 1164.

\textsuperscript{38} See Michael Selmi, Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms, 9 EMP. RTS. & EMP. POL'YJ. 1, 4 (2005) ("[T]here remains a significant amount of discrimination in the workplace that is not properly labeled as subtle but which involves the active and conscious exclusion of women from the workplace."). Indeed, Professor Selmi suggests that the instinctive reaction to treat instances of more conscious discrimination as aberrational may itself "reflect[] the very societal perception regarding the persistence of discrimination that these cases directly challenge. In other words, these cases appear aberrational not because they are but because they fail to comport with our image of the changed nature of discrimination." Id. at 25.

\textsuperscript{39} Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

\textsuperscript{40} Price Waterhouse v. Hopkins is replete with examples of stereotypical thinking by the defendant, but the Court did not focus on whether the stereotypes were conscious, unconscious, or somewhere in between. 490 U.S. 228, 235-36 (1989). In Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988), Justice O'Connor's opinion approving the application of disparate impact to subjective practices might suggest that disparate impact is necessary because disparate treatment is unavailable for unconscious bias. See infra text accompanying note 304.

\textsuperscript{41} See Krieger, supra note 31, at 1242 ("To establish liability for disparate treatment discrimination, a Title VII plaintiff would simply be required to prove that his group status played a role in causing the employer's action or decision. Causation would no longer be equated with intentionality.").

\textsuperscript{42} See infra text accompanying note 107.
pithily stated, “[u]nconscious intent seems oxymoronic.” Some commentators claim that unconscious discrimination should not be actionable because little can be done about it and/or efforts to change such deep-seated views are likely to be more costly than they are worth.

Still another way in which “the most easily understood” variety of discrimination is not so easily understood is the extent to which a factor the employer uses to differentiate among employees is deemed to be “racial” or “gender” in nature. Obviously, a sign that said “No Blacks Need Apply” would signal an intent to reject any member of that race. But requiring correct pronunciation, for example, is more ambiguously “racial,” even if “aks” would draw more criticism under such a policy than would “nucular.” This topic is sometimes denominated “trait” discrimination, and is related to, but distinct from, what “intent” means. In other words, the motive for the policy might reflect aversion to a group that the decision maker is not even aware, but it may also reflect an even more subtle kind of bias, such as a preference for traits more typical of whites or males. Trait discrimination, then, requires determining the extent

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44. See Amy L. Wax, Discrimination as Accident, 74 IND. L.J. 1129, 1132-33 (1999). But see Michael Selmi, Response to Professor Wax, Discrimination as Accident: Old Whine, New Bottle, 74 IND. L.J. 1233 (1999); White & Krieger, supra note 43, at 498-99 (“Title VII should be interpreted, and the Supreme Court's decisions can and should be read, as rejecting a requirement of conscious intent,” but “lower courts continue to search for conscious intent.”); Banaji, supra note 35, at 135 (stating that relatively minor variations in social situation can play an important role in implicit attitudes).
46. E.g., Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J. 365, 370 (exploring the "way in which a black woman's hair is related to the perpetuation of social, political, and economic domination of subordinated racial and gender groups"); Kimberly A. Yuracko, Trait Discrimination as Sex Discrimination: An Argument Against Neutrality, 83 TEX. L. REV. 167 passim (2004) (arguing for a response to trait discrimination reflecting Title VII's original focus on ending status-based hierarchy).
to which the antidiscrimination laws protect individuals from manifesting their "identity" in race- or gender-related ways.\(^47\)

By and large, the courts have been unsympathetic to attempts to expand the notion of race discrimination to encompass behaviors commonly associated with, but not inherent in, particular races. Similarly, whether a policy limiting the use of a foreign language is national origin discrimination has been recurrently debated, with the courts generally holding that limitations on employees speaking first languages, other than English, do not constitute such discrimination.\(^48\)

47. Devon Carbado and Mitu Gulati have devoted a series of articles to "identity," arguing that discrimination often is directed at those who "work" a black (or Asian) identity; in contrast, African American or Asian American individuals who signal adoption of "white" values and lifestyle are treated like whites. Devon W. Carbado & Mitu Gulati, The Fifth Black Woman, 11 J. CONTEMP. LEGAL ISSUES 701, 703 (2001) [hereinafter Carbado & Gulati, Black Woman (arguing that intersectionality theory does not capture discrimination based on how individuals "perform" their identity in the workplace); Devon W. Carbado & Mitu Gulati, Working Identity, 85 CORNELL L. REV. 1259, 1262 (2000) [hereinafter Carbado & Gulati, Working Identity] (stating "[b]ecause members of these groups are often likely to perceive themselves as subject to negative stereotypes, they are also likely to feel the need to do significant amounts of "extra" identity work to counter those stereotypes.... [T]hat extra work may not only result in significant opportunity costs, but may also entail a high level of risk."); Barbara J. Flagg, Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking, 104 YALE L.J. 2009, 2034 (1995) (asserting that the argument that race should not be implicated when an individual chooses not to conform to the dominant culture "is problematic because it reiterates the transparency error. Because it underestimates the centrality of race to personal identity for people who are not white, it incorrectly assumes that the identity costs of conformity to the norms of a white cultural setting for a black person are commensurate with the identity costs incurred by a white person required to conform in the same setting."); see also Kenji Yoshino, Covering, 111 YALE L.J. 769, 779 (2002) (arguing that by not protecting identity, the antidiscrimination laws have an "assimilationist bias" that tends to require groups protected by the statutes to engage in compulsory assimilation).

48. E.g., Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (upholding an English-only rule as applied to bilingual employees against challenges based on disparate impact and hostile work environment theory); Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980) (upholding rule requiring bilingual sales personnel to speak only English on the job). See generally Christopher David Ruiz Cameron, How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy, 85 CAL. L. REV. 1347, 1353-58 (1998) (arguing that the exclusion of English-only rules from the ambit of Title VII national origin discrimination results from jurisprudential prejudice and relegates Latinos to second-class legal status); Juan F. Perea, Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII, 35 WM. & MARY L. REV. 805, 808 (1994) ("[T]he 'national origin' term does not, and cannot, correctly encompass the protection of ethnic traits or ethnicity.").
Although some scholars call for legal sensitivity to these kinds of identity manifestations, other commentators respond that any effort in this direction risks racial or gender essentialism, that is, the notion that individuals are defined by the group to which they belong.

As suggested, the courts have not been clear in their rationalizations for refusing to extend the concept of discrimination to embrace traits and practices common to, but not inherent in, particular races, national origins, or genders. The law, of course, recognizes that discriminating against all members of a group is not necessary to violate the statute. In its first Title VII decision, *Phillips v. Martin Marietta Corp.*, the Supreme Court held that a policy against hiring women with preschool age children was sex discrimination, even though women were often hired. But *Martin Marietta*’s version of “sex plus” discrimination (sex plus another

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49. E.g., Perea, supra note 48.

[Establishing a legal] regime of cultural rights calls upon the courts to engage in the essentialist endeavor of tracing the metes and bounds of a given identity group in order to determine which cultural traits are deserving of legal protection. Even if a court could resolve the conflicting claims over which traits are essential to a group’s identity—and even if a court could separate the empowering narratives of identity from those that are repressive—recognizing cultural rights would nonetheless solidify one version of the group’s identity over others and bolster the notion that groups have essences. And once the “truth” of each identity group is codified into the law, it would come to subtly shape the lives, both within and outside the group, of those persons the law purported to describe.


52. *Id.* at 544. At the time when plaintiff was denied employment because she had young children “70-75% of the applicants for the position she sought were women; [and] 75-80% of those hired for the position, assembly trainee, were women, hence no question of bias against women as such was presented.” *Id.* at 543; *see also* Carbado & Gulati, *Working Identity, supra* note 47, at 1298 n.106 (“Little hope exists, however, that the sex-plus category will be extended to cover anything but a narrow range of performances” because the courts have been hostile to extensions of the doctrine “to cover day-to-day performances of identity, like dress, appearance, and language.”). *See generally* Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337 (1999) (discussing “mother-discrimination” and hypothesizing that there are few cases because it is difficult for plaintiffs to win).
characteristic equals sex discrimination) reaches only cases in which all victims of a particular policy are of one sex, even though other members of the same sex are not victims. It does not reach the situation in which individuals of different protected groups share the trait in question, although the trait is more typical of one group.\footnote{This is, of course, a thumbnail description of disparate impact. See discussion \textit{infra} beginning at note 148.}

The Supreme Court most directly confronted this question in two cases that strongly suggest a narrow approach to trait discrimination. In \textit{Hazen Paper Co. v. Biggins},\footnote{507 U.S. 604 (1993).} the Court rejected the plaintiff's attempt to label the employer's reliance on his pension status as evidence of age discrimination. Although an "employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity," a decision that is "wholly motivated by factors other than age ... [is not subject to the Act because] the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is."\footnote{Id. at 611.} One wonders what the Court would do with an employer who refused to hire people with wrinkles or liver spots: is this age discrimination or merely a factor correlated with age? Similarly, in \textit{General Electric Co. v. Gilbert},\footnote{429 U.S. 125 (1977), \textit{superseded by statute}, Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076.} a decision later legislatively overruled, the Court refused to treat discrimination based on pregnancy as sex discrimination\footnote{Quoting from a prior Equal Protection case, the Court in \textit{Gilbert} wrote: "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." This language from \textit{Geduldig} leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability-benefits plan was not in itself discrimination based on sex. 429 U.S. at 135 (quoting \textit{Geduldig v. Aiello}, 417 U.S. 484, 496-97 n.20 (1974)) (citation omitted). \textit{Gilbert} is obviously in considerable tension with \textit{Martin Marietta} because it can be viewed as holding that sex-plus-pregnancy is not actionable.} despite the obvious fact that only women get pregnant. Both \textit{Biggins} and \textit{Gilbert} recognized
that the formal differentiating principle—pension status or pregnancy—would be actionable if it reflected intent to discriminate on the prohibited grounds of age or sex, but both cases rejected per se equating of the differentiating principle with the prohibited ground. Indeed, discrimination based on correlated traits was actionable only if it was a “pretext” for discrimination on the prohibited ground, or at least reflected a judgment by the employer to equate the differentiating principle with the prohibited grounds.

In sum, “the most easily understood” form of discrimination, disparate treatment, may not be so easily understood after all. What “intent” means and what constitutes a racial or gender criterion remain puzzling questions.

B. Proving Individual Disparate Treatment Discrimination

If discrimination, in the disparate treatment sense, means an employment action caused by “intent” to discriminate, the obvious question is how to prove that a particular action was so actuated. The continuing saga of disparate treatment proof structures has been retold numerous times, but warrants revisiting briefly given the potential changes in analyzing individual disparate impact cases signaled by the Supreme Court’s recent decision in Desert Palace, Inc. v. Costa.

The story commences with McDonnell Douglas v. Green, which established a three-step analytical structure for cases that later became known as “single motive” or “circumstantial” evidence cases. The first step requires the plaintiff to establish a prima facie case of discrimination, that is, to put on enough evidence to create a presumption that the employer discriminated. Once the prima

58. Id. at 135 (quoting Geduldig v. Aiello 417 U.S. 484, 497 (1974)) (“We recognized in Geduldig ... that the fact that there was no sex-based discrimination as such was not the end of the analysis, should it be shown ‘that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.’”).

59. Biggins, 507 U.S. 613 (“Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent ... but in the sense that the employer may suppose a correlation between the two factors and act accordingly.”) (citation omitted).

60. 539 U.S. 90 (2003) (adopting a plain-meaning approach to reading § 703(m) in disparate treatment cases); see discussion infra beginning at note 92.

61. 11 U.S. 792, 802-04 (1973).


Establishment of the prima facie case in effect creates a presumption that the
facie case is established, the employer, at the second step, has the burden of production to put into evidence a nondiscriminatory reason for the alleged discriminatory decision. Finally, the plaintiff has the opportunity in the third step to prove that the supposed reason was really a pretext for an underlying discriminatory motivation.

This analytical structure's significance has evolved over the years. The McDonnell Douglas Court noted that the prima facie case it detailed was only one way of stating such a case. Indeed, the famous four prongs of the prima facie case were tailored to the relatively unusual facts before the Court, namely an employer's refusal to rehire a qualified black former employee when the job in question remained vacant. Although the McDonnell Douglas Court explicitly recognized that its formulation of prima facie proof would need to be modified for other situations, lower courts have often

employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Id. The Court repeated this theme in St. Mary's Honor Center v. Hicks:

At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production—i.e., has failed to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law....


Professor Risinger believes it would be more accurate to describe this as a fixed standard of sufficiency rather than a "presumption." Under McDonnell Douglas, the prima facie case, if accepted by the factfinder, mandates judgment for the plaintiff if the defendant does not meet its burden of production. Thus, McDonnell Douglas, in essence, establishes that certain proof is sufficient for a judgment for plaintiff, whether or not the proof would require or even permit a finding of the underlying fact—that the defendant intended to discriminate.


64. The plaintiff must establish

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802 (footnote omitted).

65. Id. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every
disagreed about what evidence constitutes a prima facie case in other contexts. As since rationalized by the Court, the prima facie case requires merely that a minority member or woman has been denied an employment opportunity in circumstances where the most obvious innocent explanations, such as plaintiff's lack of qualifications or the absence of an opening, are inapplicable. As the Court explained in a later case, "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Therefore, the plaintiff at the prima facie stage need not negate all the possible or perhaps even all the probable legitimate reasons nor must the plaintiff adduce more "direct" evidence. In short, the first step of McDonnell Douglas, the prima facie case, has always required little proof.

The prima facie case's bare bones requirement may explain the Court's limited requirements for the second stage of the McDonnell Douglas analytical structure: once a plaintiff has made out a prima facie case, the defendant has only a burden of production to put into evidence a nondiscriminatory reason. This does not shift from the plaintiff the burden of persuasion as to the existence of discrimina-

respect to differing factual situations.

66. See generally Paris G. Filippatos & Sean Farhang, The Rights of Employees Subjected to Reductions in Force: A Critical Evaluation, 6 EMP. RTS. & EMP. POLY J. 263 (2002) (classifying court decisions treating reductions in force). Another arena in which this debate plays out is whether a plaintiff has to identify a white "comparator" or comparators who were treated better than plaintiff to make out a prima facie case. There is an emerging literature on who counts as a comparator, usually framed in terms of what employees are "similarly situated" to the plaintiff. See generally Ernest F. Lidge III, The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law, 67 Mo. L. REV. 831 (2002) (arguing that courts should not impose a similarly situated requirement). By definition, the more alike a putative comparator is to the plaintiff, except for race, the fewer nonracial reasons exist to explain a particular decision; but the point at which a co-worker is different enough from a plaintiff to cease to be a comparator will vary depending on perceptions of the relative likelihood of discrimination compared to other reasons for adverse actions.

67. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). The Court has not retreated from this view, although it is important more as a heuristic than as a litigation principle. Once the defendant has put in evidence of its nondiscriminatory reason, the "presumption" disappears. Hicks, 509 U.S. at 507. While the factfinder may still decide for plaintiff, it may do so because of inferences drawn from the evidence supporting the prima facie case and the implausibility of the defendant's nondiscriminatory reason, not because of any "presumption" (or fixed rule of sufficiency) that arises from that prima facie case.
tion. Only if the defendant fails to adduce any evidence does plaintiff necessarily win. The requirements the defendant must meet are thus minimal: first, the nondiscriminatory reason must be put into evidence and not just argued and second, the nondiscriminatory reason must not be too vague, as some courts have rejected nondiscriminatory reasons for vagueness.

All the work of McDonnell Douglas, therefore, falls on the third stage, the pretext stage, where the plaintiff bears the burden of persuasion in proving that the employer’s asserted nondiscriminatory reason is pretextual. Further, the plaintiff must not only prove that the supposed nondiscriminatory reason is a pretext but also that the true reason for the challenged decision is discrimination. In short, the plaintiff must persuade the factfinder that the challenged decision was the result of a discriminatory motivation. A plaintiff cannot merely prove that the defendant’s asserted nondiscriminatory reason is pretextual in the sense that it is untrue; rather a plaintiff must also persuade the factfinder that that reason is a pretext for discrimination. However, in Reeves v. Sanderson Plumbing Products, Inc., the Court made clear that the factfinder’s disbelief of the defendant’s asserted reason will usually be a sufficient basis for concluding that the defendant disguised a discriminatory motivation.

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68. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) ("The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.").

69. _Id._ at 255 n.9 ("An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.").

70. _E.g._, Patrick v. Ridge, 394 F.3d 311, 316-17 (5th Cir. 2004) (holding that an employer’s statement that the employee was not “sufficiently suited” was not specific enough to meet its burden of production); Iadimarco v. Runyon, 190 F.3d 151, 166-67 (3d Cir. 1999) (holding that an assertion that successful candidate was “the right person for the job” is “not a race-neutral explanation at all, and allowing it to suffice to rebut a prima facie case of discriminatory animus is tantamount to a judicial repeal of the very protections Congress intended under Title VII”)

71. _Hicks_, 509 U.S. at 515 ("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason.").


73. _Id._ at 148-49:

Whether judgment as a matter of law is appropriate in any particular case will
emphasis on considering all the evidence, including that supporting the prima facie case, was of great assistance to plaintiffs.\footnote{74}{Id. at 152 ("[T]he court disregarded critical evidence favorable to petitioner—namely, the evidence supporting petitioner’s prima facie case and undermining respondent’s nondiscriminatory explanation. The court also failed to draw all reasonable inferences in favor of petitioner." (citation omitted)). This validates commentators such as Professor Zimmer who had objected to the “slicing and dicing” approach that proof structures permitted, if not encouraged. Michael J. Zimmer, Slicing & Dicing Individual Disparate Treatment Law, 61 LA. L. REV. 577 (2001).}

The low threshold for the plaintiff’s prima facie case originally rested on the unremarkable proposition when the case was decided that employers frequently discriminated against blacks, women, or other minorities. Professor Deborah Calloway has labeled this the “basic assumption” underlying the proof structure, and she is certainly correct that this belief animated the original \textit{McDonnell Douglas} decision.\footnote{75}{See generally Deborah A. Calloway, St. Mary’s Honor Center v. Hicks: Questioning the Basic Assumption, 26 CONN. L. REV. 997, 997-98, 1007-08 (1994) (identifying the assumption of discrimination and concluding that the Court no longer “truly believe[s]” in that inference). Deborah Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 MICH. L. REV. 2229, 2260 (1995), questions whether the basic assumption was ever justifiable but does not question the accuracy of Professor Calloway’s description of the underlying rationale of the \textit{McDonnell Douglas} prima facie case.} Accordingly, a minority plaintiff was required to demonstrate only that the most common reasons for an employment decision were not applicable in the case. Once the plaintiff’s proof ruled out those common reasons, the factfinder could appropriately infer that race was the reason for the employer’s action. Indeed, should the factfinder believe plaintiff’s proof, the factfinder was \textit{required} to find discrimination, unless the employer put into evidence other “legitimate nondiscriminatory reasons” for its actions.\footnote{76}{McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).} But, should the defendant carry that burden of production, the defendant would prevail unless the plaintiff could establish that those other reasons were not the true reasons for the employer’s actions, and, by inference, that they were pretexts for the true race-related reason.
In most cases, however, the plaintiff's proof that the defendant's proffered reason was not the true reason is sufficient for, though does not require, the factfinder to draw the inference that the true reason was the plaintiff's race. This is true in part because the defendant's failure to put into evidence a credible nondiscriminatory reason may suggest that the real reason is discrimination. But it is also true in part because the continued prevalence of discrimination in our society suggests that, when other reasons are ruled out, prejudice is a natural inference, although not the only possible inference. Again, the basic assumption emerges. Professor Zimmer, therefore, describes the McDonnell Douglas approach as a process of elimination: as progressively more nondiscriminatory reasons are eliminated, discrimination becomes progressively more likely.

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77. Reeves, 530 U.S. at 147 (citation omitted) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

78. The Reeves Court stated:

In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt..." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Id. (citations omitted).

79. Indeed, in extreme cases it may not be even a permissible inference.

This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.

Id. at 148. This is the Court's strongest statement that the prima facie case does not always provide a sufficient basis to infer discrimination. It truly is merely a fixed rule of sufficiency. See supra note 67.

80. See Zimmer, supra note 5; see also Michael J. Zimmer, Leading by Example: An Holistic Approach to Individual Disparate Treatment Law, 11 KAN. J.L. & PUB. POL'Y 177, 177 (2001). This is a kind of Bayesian analysis. There are, of course, an infinite number of possible reasons for any given decision, but there are relatively few likely reasons. The McDonnell Douglas proof structure can be seen as requiring the plaintiff to rule out the most likely reasons as part of her prima facie case. Since these reasons are only a small subset of the possible reasons, although a larger subset of the possible likely reasons, the employer is required to put in evidence other reasons. If these are in turn ruled out, it may be fair to permit the trier of fact to conclude that the probability favors an impermissible reason. See generally D. Michael Risinger & Jeffrey L. Loop, Three Card Monte, Monty Hall, Modus
After 1989, the *McDonnell Douglas* proof structure was supplemented by what most courts and commentators viewed as a second method of proof in individual disparate treatment cases. *Price Waterhouse v. Hopkins*[^81] created a separate framework for analyzing individual disparate treatment cases based on so-called "direct" evidence of discrimination.[^82] In addition to the kind of circumstantial evidence long used in *McDonnell Douglas* cases, the plaintiff in *Price Waterhouse* introduced into evidence written evaluations and oral comments made in the partnership process, which suggested that the plaintiff's gender played a role in the decision to turn her down for a partnership in an accounting firm.[^83] The firm, however, denied basing its decision on plaintiff's sex, instead insisting she had been denied partnership because of her lack of interpersonal skills.[^84] The trial court credited both Hopkins's and the firm's explanation for her partnership denial; it found that the firm had relied upon both Hopkins's sex and her deficient interpersonal skills when denying her partnership.[^85]

The Supreme Court was thus confronted with a "mixed motive" case, one in which the challenged decision implicated both legitimate and discriminatory reasons. Justice Brennan, writing for a plurality of four, said that the plaintiff need only prove, by a preponderance of the evidence, that her gender played "a motivating part" in the challenged decision.[^86] Upon that showing, the burden of persuasion shifted to the defendant to try to avoid liability by proving as an affirmative defense that it would have made the same

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[^81]: 490 U.S. 228 (1989).
[^82]: Id. at 275 (O'Connor, J., concurring in the judgment).
[^83]: One partner described her as "macho," another said she "overcompensated for being a woman," and a third advised her to take "a course at charm school." Id. at 235. Further, the partner who had been on the committee making the decision and who was charged with telling her that her bid to be a partner had been put on hold counseled her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id.
[^84]: Id.
[^85]: Id. at 258.
[^86]: Id.
decision absent the discrimination. In a footnote, Justice Brennan suggested that this holding established an alternative to the *McDonnell Douglas* approach for individual disparate treatment cases.

To form a majority of the Court, however, Justice O'Connor's concurring opinion must be examined. Her approach differed from the plurality in two ways: First, she raised the bar by requiring the plaintiff to show that the impermissible factor, such as plaintiff's sex, was a "substantial" (rather than merely a "motivating") factor in the employer's decision. And, second, to trigger the *Price Waterhouse* method of analysis, she required plaintiffs to introduce "direct" evidence of discrimination. This "direct" evidence threshold suggested two separate paths for analyzing individual disparate treatment cases: the old *McDonnell Douglas* circumstantial evidence/single motive analysis and the new *Price Waterhouse* "direct" evidence/mixed motives analysis.

Congress modified *Price Waterhouse* in the Civil Rights Act of 1991 by adopting Justice Brennan's articulation of the plaintiff's burden in showing an impermissible factor influenced the challenged decision. Section 703(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was

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87. *Id.*

88. *Id.* at 247 n.12 ("Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a 'pretext' case or a 'mixed-motives' case from the beginning.... At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives.").

89. Justice White also concurred, but the narrowest holding of five members results from looking to Justice O'Connor's opinion. *Id.* at 258, 261; see *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that, when there is no opinion for a majority of the Court, the holding is to be ascertained by looking to the narrowest ground upon which five members agree). See generally Maxwell L. Stearns, *The Case for Including Marks v. United States in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 322 (2000) (analyzing the "narrowest grounds doctrine" in *Marks*).


91. *Id.* at 278.

92. Congress also made a second alteration in the *Price Waterhouse* approach. That case had held that defendant's proof that it would have made the same decision even if an illegitimate consideration had not been a factor would be a complete defense to liability. The new act, however, narrowed the effect of the defendant's "same decision" proof. It provided that a violation would occur whenever race (or other prohibited ground) was a motivating factor but that plaintiff's remedies would be limited if the factor did not change the outcome. 42 U.S.C. § 2000e-5(g)(2)(B) (2000).
a motivating factor for any employment practice, even though other factors also motivated the practice.\textsuperscript{93} Congress, however, did not explicitly address Justice O'Connor's "direct" evidence threshold for applying this method of analysis. Perhaps for that reason, and despite the incoherence of the notion,\textsuperscript{94} lower courts generally continued to require "direct evidence" to trigger the \textit{Price Waterhouse} analysis.\textsuperscript{95} This was true even though the amended statute specifies simply that proof of "a motivating factor" establishes defendant's liability, which is the core issue in all disparate treatment cases. Analytically, therefore, the first question in individual disparate treatment cases in most circuits was whether plaintiff had "direct" evidence of the employer's intent to discriminate. If the answer was yes, the \textit{Price Waterhouse} approach applied. If not, \textit{McDonnell Douglas} was the default analysis.\textsuperscript{96}

This dual approach lasted until the Supreme Court's 2003 decision in \textit{Desert Palace, Inc. v. Costa},\textsuperscript{97} which adopted a plain meaning approach urged by commentators such as Professor Zimmer.\textsuperscript{98} The Court read "a motivating factor" language in § 2000e-2(m) to mean that "[i]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice."'\textsuperscript{99} Direct evidence is no longer required.\textsuperscript{100}
The ramifications of Desert Palace are as yet unclear, but the broadest view is that the case collapsed all individual disparate treatment cases into a single analytical method, thereby effectively destroying McDonnell Douglas. The decision, however, can be read more narrowly. Because footnote one specifies that the Court was not deciding the effects of this decision "outside of the mixed-motive context,"1 McDonnell Douglas may continue to structure some cases, although its viability under Title VII is suspect.102

After Price Waterhouse and before Desert Palace, the distinction between Price Waterhouse and McDonnell Douglas cases had been framed in two ways. First, Price Waterhouse cases were "direct evidence" cases, while McDonnell Douglas applied to "circumstantial evidence" cases. Desert Palace explicitly erases this distinction since circumstantial evidence alone can prove liability using the "a motivating factor" standard of liability in § 703(m). Therefore, speaking of Price Waterhouse as "direct" evidence proof or of McDonnell Douglas as a "circumstantial" or "indirect" method of proof is no longer appropriate.

The second way of distinguishing the two methods of proof prior to Desert Palace was by viewing McDonnell Douglas as involving a "single motive" and Price Waterhouse as involving "mixed-motives." Getting to a single discriminatory motive by process of elimination

101. Id. at 94 n.1.
102. The circuit courts have not been ready to inter McDonnell Douglas, although they have not persuasively justified its survival. See, e.g., Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004).

Desert Palace, a decision in which the Supreme Court decided only a mixed motive jury instruction issue, is an inherently unreliable basis for district courts to begin ignoring this Circuit’s controlling summary judgment precedents. For concrete evidence confirming that Desert Palace did not forecast a sea change in the Court’s thinking, we need look no further than Raytheon Co. v. Hernandez, 540 U.S. 44 (2003), a post-Desert Palace decision in which the Court approved use of the McDonnell Douglas analysis at the summary judgment stage.

Id. (citations omitted). The Griffith court, however did not notice that Raytheon was brought under the Americans with Disabilities Act, which does not have a parallel to § 703(m). See Raytheon, 540 U.S. at 46. See also Cooper v. S. Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004). [T]he Desert Palace holding was expressly limited to the context of mixed-motive discrimination cases under 42 U.S.C. § 2000e-2(m).... Moreover, the fact that the Court did not even mention McDonnell Douglas in Desert Palace makes us even more reluctant to believe that Desert Palace should be understood to overrule that seminal precedent.

Id.
is the core of McDonnell Douglas, a process that leads the factfinder to view the case as an either/or proposition: either the defendant’s reason explains the decision or the plaintiff’s claim of discrimination explains it. This distinction, too, now seems untenable. In any discrimination case that gets to the jury, including a purely circumstantial evidence case, the jury can find the presence of both factors, rather than deciding that one party is entirely correct and the other wrong.103

Indeed, a decision that has generated substantial criticism from the plaintiff’s bar, St. Mary's Honor Center v. Hicks,104 necessarily points in this direction because it permits the factfinder to make any determination justified by the record.105 In Hicks itself, the factfinder concluded that personal animus, not discrimination, motivated the employer. But the Court’s approval of any finding supported by the record necessarily means that the factfinder could find that both impermissible and permissible reasons motivated the challenged decision, even though the parties each claim only one motivation (the plaintiff claiming a discriminatory motivation while the defendant claims a nondiscriminatory one).

In short, McDonnell Douglas may be either doctrinally or functionally dead,106 at least if either party raises the issue.


105. Hicks permitted the trial judge to disbelieve both the plaintiff’s claim of discrimination and the defendant’s asserted nondiscriminatory reason. Id. at 511. The court below had determined that personal animosity, not discrimination, explained the adverse decision, even though the individual defendant denied such animosity. Id. at 542 (Souter, J., dissenting). The Court thus partially based its judgment on a fact claimed by neither party. The narrow holding of Hicks was that disbelief of the supposed nondiscriminatory reason was not necessarily sufficient; the trier of fact had to find not merely that the defendant’s reason was pretextual but that it was a pretext for discrimination. But the broader holding of the case is that the trier of fact can make any determination justified by the record before it. It would necessarily follow that a jury could disbelieve both plaintiff’s claim that discrimination entirely explained the challenged decision and defendant’s claim that nondiscrimination entirely explained it.

106. Most commentators read Desert Palace as destroying McDonnell Douglas. E.g., Henry L. Chambers, Jr., The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases, 57 SMU L. REV. 83, 102-03 (2004) ("Over time, the formal distinctions among [the
Initially, commentators viewed this as beneficial to plaintiffs, but at least three potential downsides exist if Desert Palace becomes the uniform method for analyzing individual disparate treatment cases. First, although § 703(m) provides the "motivating factor" standard for liability, it is connected to the same decision defense in § 706(g)(2)(B). On the one hand, a jury finding that defendant discriminated may be unlikely to believe defendant's proof that it would have made the same decision even if it had not discriminated; on the other, a jury may be tempted to "split the baby," which would substantially limit plaintiff's remedies. Ironically, then, McDonnell Douglas may survive in cases in which a risk-preferring plaintiff and a risk-preferring defendant both choose not to invoke Desert Palace by not asking for the Desert Palace instruction but rather by placing all their eggs in the McDonnell Douglas either/or basket. 107

various tests] ... will likely fall with the result that the motivating-factor test will apply to all disparate treatment cases."); William R. Corbett, An Allegory of the Cave and the Desert Palace, 41 HOU.S. L. Rev. 1549, 1551-52 (2005) ("[T]here is no reason, other than nostalgia, to keep [McDonnell Douglas]. The more compelling reason to banish it, however, is that because of its long history of procedural significance, retaining it will cause confusion in cases and impede recognition of the uniform proof structure that necessarily follows from Desert Palace."); Kenneth R. Davis, Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law, 31 FLA. ST. U. L. Rev. 859, 861 (2004) ("[B]y gobbling up circumstantial cases, Desert Palace has left little for McDonnell Douglas."); Jeffrey A. Van Detta, "Le Roi Est Mort; Vive Le Roi!: An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a ‘Mixed-Motives’ Case, 52 DRAKE L. Rev. 71, 79 (2003) ("[S]ection 703(m) fundamentally changed the nature of all Title VII disparate treatment litigation," since "all of the controversies that McDonnell Douglas and its progeny generated are gone, and "the quiet little revolution started in Desert Palace will be one of the most significant advances for civil rights enforcement in the twenty-first century.").

107. Dean Steven Willborn, responding to an earlier version of this Article, questioned whether a court should instruct the jury contrary to the law, even if the parties did not object. Letter from Steven Willborn, Dean, Univ. of Neb., Lincoln, to Charles A. Sullivan (on file with author). Appellate courts are not generally supposed to consider issues not raised before the court below, and agreement by the parties on a jury instruction therefore would seem to deprive the courts of any power to review the matter. While there is a "plain error" rule, it seems largely confined to criminal cases, and some jurisdictions have explicitly rejected any such rule for civil suits. Barry A. Miller, Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard, 39 SAN DIEGO L. Rev. 1253, 1265 (2002). The critical question, thus, is likely to be whether the parties can persuade the trial court to give an instruction that they agree on. Because, by definition, there is not likely to be a viable appeal on this issue, this is a matter of district court discretion and is likely to depend on a number of factors, including the presence or absence of pattern jury instructions in the circuit and the judge's sense of whether giving the instructions sought by both parties will enhance the prospect of a definitive verdict.
Second, aside from its effect on proof structures, *Desert Palace* may lead to a renewed focus on the meaning of intent. Although the initial reaction to the case was to look to the adjectives—single vs. multiple—the decision may put the noun “motive” back on center stage. If courts define motive to embrace less conscious or even unconscious impulses and attitudes, the case may offer new opportunities for cognitive bias scholarship. On the other hand, conservative courts may seize this opportunity to define motive in terms of conscious decision making. Thus, *Desert Palace* seems to compel a shift from “intent” to “motive,” with uncertain consequences.

Third, the linchpin of *Desert Palace* is the undefined and perhaps incoherent concept of a “motivating factor.” Assuming one knows what “motive” means, when does it sufficiently constitute a “motivating factor” in an employer’s decision? The “same decision” defense necessarily means that a factor can be a motivating one even if not the challenged action’s but-for cause. But how much less than but-for can a factor be and still count as motivating? One possibility is that a motivating factor is one that would appear to the factfinder to be likely to make a difference in decisions of this sort (although the defendant may still avoid full remedies if it can establish that it did not in fact make such a difference). In any event, the lower courts have shown agility in avoiding the import of much clearer terms, and it may be that *Desert Palace* will founder on renewed attention to what it means to be a motivating factor.

Even if *McDonnell Douglas* is doctrinally no longer required, however, the case law applying it and its progeny will continue to be of some utility. A court need no longer ask whether the plaintiff has made out a “prima facie” case, whether the defendant has put into

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108. As should be apparent from the discussion above, see *supra* text beginning at note 73, the term originated in the plurality opinion in *Price Waterhouse*, where something might be a “factor” in a decision even though it made no difference in the actual decision. Of course, the plurality used the concept essentially for burden shifting and seemed to mean merely that a factor was motivating when it appeared likely to make a difference in a particular decision, leaving the defendant the ability to avoid liability by proving that the same decision would have been made had the factor not been present. But § 703(m) makes a motivating factor a basis for liability, not merely burden shifting, and therefore is less coherent. Since a motivating factor can be less than a but-for cause, room for both doctrinal adjustment here and for restrictive application of the concept, even without formally redefining it, obviously exists. See generally Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. (forthcoming 2006).
evidence a nondiscriminatory reason, nor whether the plaintiff has sufficient evidence to find the supposed nondiscriminatory reason to be pretextual. But courts will still have to decide whether sufficient evidence of a motivating discriminatory reason exists for a jury to find for the plaintiff. This decision includes whatever evidence the plaintiff adduces to exclude the applicability of nondiscriminatory reasons—whether those would have been the "most common" legitimate reasons that in the past were negated as part of plaintiff's prima facie case or the more specific reason articulated in defendant's case. Although a plaintiff will not need to exclude all potential nondiscriminatory reasons, she will have to cast sufficient doubt on innocent reasons to allow the jury to find in her favor by a preponderance of the evidence that an impermissible reason was a motivating factor.

In practice, one might expect to see courts continuing to use the McDonnell Douglas/Reeves structure as a way of articulating Desert Palace's more gestalt "sufficient evidence" approach. But a court that wished to save itself time by granting summary judgment to a defendant might easily summarize the evidence and conclude that it was not sufficient for a reasonable jury to find that a discriminatory intent motivated the challenged decision. Such a court nevertheless would be well advised to find "sufficient evidence" in a case such as Reeves, in which the Supreme Court held that proof of a prima facie case plus proof of pretext will generally be sufficient at least to allow the factfinder to decide whether discrimination occurred.

C. Proving Systemic Disparate Treatment Discrimination

Although most cases and commentary have focused on individual disparate treatment, its cousin, systemic disparate treatment, should be mentioned.109 This theory shares with individual dispa-

rate treatment the requirement of discriminatory intent but is predicated on yet another proof structure.\textsuperscript{110} Put most simply, systemic disparate treatment allows the factfinder to infer that a pattern of adverse outcomes resulted from a discriminatory motivation.\textsuperscript{111} For example, applications from whites and African Americans go into a hiring office in roughly equal proportions but whites obtain a much higher proportion of actual hires.\textsuperscript{112}

Systemic disparate treatment is sometimes confused with disparate impact because both typically require a showing of adverse impact on a protected group.\textsuperscript{113} That is, both theories rest on the fact that a particular group has fared worse than other groups in employment success. Disparate impact, however, rests on the inference that the disparity results from neutral policies that are both facially neutral and neutral in terms of the intent underlying their adoption.\textsuperscript{114} Systemic disparate treatment, by contrast, rests on the inference that the disparity results from “intentional” discrimination.\textsuperscript{115}

Systemic disparate treatment raises three major questions. The first is whether the data evidencing the plaintiff group’s lower success rates has successfully excluded other factors that explain the apparent discrepancies, such as nonracial or nongender factors. For example, the suspicion of intentional discrimination arising from far fewer blacks being hired from a pool of black and white applicants is appropriate only if the applicants are roughly equally qualified.

Even assuming the comparability of the two streams of applicants, disparate treatment presents a second problem because it requires another inference: that the adverse effects result from an intent to discriminate. If, for example, the lower success rate of African Americans is explained by their turning down job offers, a conclusion that the employer discriminated is unwarranted.\textsuperscript{116}

\textsuperscript{110} 1 \textit{SULLIVAN, ZIMMER & WHITE, supra note 109, § 3.01.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id. § 4.01.}
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} in \textit{EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988)}, the court accepted the employer’s explanation for startling statistical discrepancies in the number of women in better jobs as compared to their representation in lower-paid positions as resulting from women’s
Third, because systemic disparate treatment is simply a more generalized version of individual disparate treatment, similar problems of what constitutes impermissible intent will also arise in this context. For example, one might infer from data evidencing lower success rates of African Americans that a hiring office is knowingly disfavoring blacks, perhaps because of animus or stereotyped beliefs about black applicants. But another inference is that hiring office personnel are engaging in unconscious discrimination without being aware that they are applying heuristics that exclude African Americans. Depending on what counts as the requisite mental state, a systemic theory may or may not be established.

D. Summary

Disparate treatment doctrine, whether individual or systemic, relies ultimately on a finding of intent or motive to discriminate, and no consensus exists as to what those concepts embrace or, indeed, whether they are synonymous. Certain core conduct is clearly prohibited, namely conscious decision making to exclude members of particular races either because of animus or other reasons. But the extent to which less conscious influences count is unclear forty years after Title VII's passage, and equally unclear is when a trait will be viewed as sufficiently linked to race or sex to count as race or gender discrimination based on that trait.

See id. at 312-13, 319-22; cf. Scott A. Moss, Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law, 27 HARV. WOMEN'S L.J. 1, 1 (2004) (stating that women choosing jobs will prefer nondiscriminatory workplaces and rationally use diversity as a proxy of them; however, "[w]hen a preference for diversity is incorporated into standard labor-economic analyses, it generates a bleak prediction: women's preferences for diversity can yield enduring segregation, even in nondiscriminatory workplaces, and even as more women enter the labor force"). See generally Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749 (1990) (contending that courts have failed to recognize the role of employers in shaping women's work aspirations).
II. THE UNHAPPY PAST AND UNCERTAIN FUTURE OF DISPARATE TREATMENT

*Desert Palace* offers a splendid opportunity to reconsider the whole question of disparate treatment discrimination in an effort to define the proper role the two theories of liability—disparate treatment and disparate impact—will play. As discussed above, both the *McDonnell Douglas* and *Price Waterhouse* lines of authority, and the entire noble experiment of formal proof structures to decide individual disparate treatment cases, may have come to an end.\(^\text{117}\) In what I have described elsewhere as circling back to the obvious,\(^\text{118}\) *Desert Palace* announced that “a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’”\(^\text{119}\)

Whether the “sufficient evidence” approach will result in more verdicts for victims of racial or gender discrimination is unclear. Judges who are skeptical about the prevalence of discrimination in the workplace will continue to act as gatekeepers\(^\text{120}\) and determine whether a reasonable jury could find a motivating factor in the case before them. If the past provides any indication, the answer will usually be no. Perhaps even more alarming, those plaintiffs who get past the gatekeeper will meet juries reluctant to find discrimination.

A number of surveys reveal that the disparate treatment theory is not currently yielding many verdicts for plaintiffs.\(^\text{121}\) The pattern

\(^{117}\) See *supra* text accompanying notes 97-100.


\(^{120}\) Judges will make this determination at the summary judgment stage, and when motions for judgment as a matter of law are made after plaintiff’s case in chief is put on, at the close of all the evidence, and even after a jury verdict for plaintiff. Further, while not a formal decision point, judges’ views about the potential merits of a case are likely to shape settlement decisions at pretrial settlement conferences.

\(^{121}\) The following studies do not always make clear the theories at stake. However, since disparate impact claims have always represented a tiny fraction of all discrimination suits, see John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 (1991) (estimating that the “disparate impact doctrine generated only 101 additional cases in 1989,” less than 2% of the increase in judicial caseload as compared to 1970), the data are largely reflective of success of disparate
of judicial rulings against plaintiffs in dispositive motions is well documented: commentators have decried the use of summary judgment to dismiss claims of discrimination for more than a decade, and recent data confirm this. At one extreme, a new study shows only a two percent success rate for ADA cases, and although disability discrimination raises distinct issues, recent studies focusing on race and sex discrimination cases that go to trial have painted almost as bleak a picture: one study of traditional race and sex discrimination verdicts in California reported only about a sixteen percent plaintiff success rate in discharge cases brought by non-whites and a thirty-five percent success rate when women brought discharge cases. Given the number of claims dismissed

treatment claims. Certainly, there has been no dramatic upsurge of disparate impact case filings since the 1991 statute.


123. A 2003 annual survey by the American Bar Association found that of 304 ADA cases in the database,

213 resulted in employer wins; 6 in employee wins; and 85 in decisions in which the merits of the claim were not resolved. Of the 218 [sic] decisions that resolved the claim (and have not yet been changed on appeal), about 98 percent resulted in employer wins and 2 percent in employee wins.

Amy L. Allbright, 2003 Employment Decisions Under the ADA Title I—Survey Update, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 319 (2004). Since 1998, the percentage of employer wins has fluctuated from a low of 94.4% to a high of 97.3%, with a median of 95.7%. Id. at tbl.2.

124. See David Benjamin Oppenheimer, Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities, 37 U.C. DAVIS L. REV. 511, 517 (2003). The success rates of plaintiffs in sexual or racial harassment suits was higher. However, [in] the categories that describe the kind of case that many view as the quintessential employment discrimination claim, the claim that a woman was fired because of her sex, or an African American was fired because of his or her race, plaintiffs won just seven of the twenty-eight cases (25%). And at the intersection of race and sex, where race and gender were both reported, black women won only two of the twelve cases tried (17%), including one of the four termination cases (25%).
before trial, the antidiscrimination project as a whole may be in trouble, even if niches exist, such as sexual harassment cases, where plaintiffs do better.

Of course, the antidiscrimination project’s success cannot be measured solely in terms of favorable verdicts for plaintiffs. Plaintiffs often are successful in settlement agreements, and employers may be modifying their structures and practices to avoid potential liability even if not exposed to a high risk of liability. But success rates approaching zero are deeply problematic because, over the long run, they will tend to negatively influence both settlement outcomes and incentives to reexamine employment structures and practices.\(^\text{125}\) Admittedly, however, even low plaintiff success rates do

\(^{125}\) It may be argued that the more meritorious cases are settled prior to trial, but it is hard to understand why this should occur disproportionately with discrimination cases. See Selmi, supra note 124, at 560-61 (reporting that employment discrimination cases were much less successful than insurance cases in his sample, although only slightly less successful than personal injury cases, whether measured in terms of dispositive pretrial motions, success rates at jury trial, or success rates at bench trials).
not establish a problem of discrimination: if discrimination is uncommon in the United States, one would not anticipate many successful suits. Indeed, although other factors contribute to low plaintiff success, a core difficulty is that judges and juries believe that the antidiscrimination project is not a failure, but a success: plaintiffs prevail in few cases because judges and juries believe discrimination has largely been eradicated in our society.126

Certainly, a declining percentage of the population believes racial discrimination to be a serious national problem.127

Indeed, cognitive bias scholarship may unintentionally validate this perception. Although it demonstrates that discriminatory attitudes are pervasive, it does so by accepting the steep decline of the "old fashioned" discrimination that judges and juries envision. Indeed, the two views simply do not connect with each other. Judges and juries seem to think that little discrimination exists, defining discrimination to be animus or at least conscious decisions, while the scholars view discrimination as pervasive but largely because they define it as the natural effects of almost universally held cognitive biases.

To see this somewhat more clearly, one might try to diagram the varieties of disparate treatment—ranging from animus motivations, to rational motivations, to conscious stereotypes, to unconscious stereotypes. Such a diagram cannot capture other complexities of disparate treatment law, such as statutory exceptions128 and lower

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126. Oppenheimer, supra note 124, at 562-66.

127. See id. at 561-63 (reporting a variety of data from HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 156-57 tbl.3.4A (1997) (citing 1996 National Opinion Research Council poll), including that a majority of whites believe that "[i]nequality between blacks and whites was not the result of discrimination"); see also Howard Schuman & Maria Krysan, A Historical Note on Whites' Beliefs About Racial Inequality, 64 AM. SOC. REV. 847, 854 (1999) (documenting "the liberalization of the racial attitudes of white Americans").

128. For an introduction to coverage limitations, see 1 SULLIVAN, ZIMMER & WHITE, supra note 109, § 1.06. Even beyond such limitations, the statute contains several textual or court-devised exceptions from its mandates. Thus, Title VII explicitly permits disparate treatment (for sex, not race) when such treatment is pursuant to a "bona fide occupational qualification." 42 U.S.C. § 2000e-2(e) (2000); Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991) ("The BFOQ defense is written narrowly, and this Court has read it narrowly."). See generally 1 SULLIVAN, ZIMMER & WHITE, supra note 109, § 3.05 (discussing limitations of the BFOQ defense). Further, there are judicially created exceptions; for example, sex distinctions in dress and grooming codes are not discrimination within the meaning of the statute. E.g., Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (holding that
court decisions permitting employers to draw race and sex distinctions when a term or condition of employment is not involved. But Figure 1 does reflect increasingly expansive notions of "intent" or "motive" to discriminate, growing from the innermost and smallest circle representing disparate treatment motivated by animus to increasingly broader definitions that include statistical discrimination, then unconscious cognitive biases and still larger as the definition embraces workplace dynamics and cultures influenced by such cognitive biases.


129. E.g., Davis v. Town of Lake Park, 245 F.3d 1232, 1243 (11th Cir. 2001) ("A negative evaluation that otherwise would not be actionable will rarely, if ever, become actionable merely because the employee comes forward with evidence that his future prospects have been or will be hindered as a result."); see Rebecca Hanner White, De Minimis Discrimination, 47 Emory L.J. 1121, 1148, 1151 (1998) (criticizing these kinds of restrictions); see also Theresa M. Beiner, Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?, 37 B.C. L. Rev. 643, 645-46 (1996) (arguing that benefits such as golf games and lunches accorded to male employees but not to females, are terms and conditions of employment); Green, Workplace Dynamics, supra note 32, at 117 ("As hierarchies flatten, movement between institutions increases, and the employment relationship is redefined in terms of individual achievement over hierarchical advancement, employees will find it more difficult to satisfy [a material adverse action] requirement."); Ernest F. Lidge III, The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer's Action Was Materially Adverse or Ultimate, 47 U. Kan. L. Rev. 333, 334-35 (1999) (noting that, although the law forbids discrimination in terms, conditions, or privileges of employment, the employee may not be able to recover under these laws because of the materially adverse requirement).
Judges and juries, by and large, seem to view discriminatory intent as occupying the innermost ring, or at most, the inner two rings; various scholars would increasingly expand the notion of intent to reach less conscious and more systemic factors. For example, Professor Krieger calls for expanding disparate treatment by returning to the statutory text and focusing on whether different treatment results because of race or sex. She would interpret this language to focus on causation, not the causal mechanism. Under this view, “because of” might mean animus; it

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130. Title VII declares it an unlawful employment practice for an employer, inter alia, “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.” 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added).


[T]o ask whether an employer discriminated against an individual because of group status is seen as equivalent to asking whether a discriminatory purpose
might mean a conscious, if not malicious decision; it might mean unconscious cognitive biases. For such an approach, the critical point is difference in treatment, not the mechanism that caused the difference.\textsuperscript{132}

Other scholars agree that focusing on causation represents a step forward but doubt it will be sufficient.\textsuperscript{133} Taking a more systemic approach, Professor Tristin Green argues:

\begin{quote}
motivated the employer's decision. Under this equation of causation and intentionality, even discrimination that results from applying racial, ethnic, or gender stereotypes is understood as a product of discriminatory motivation. Indeed, evidence that a decisionmaker holds stereotypes is relevant in disparate treatment analysis because it presumably unmasks discriminatory intent. In the stories told by disparate treatment caselaw, there is no discrimination without an invidiously motivated actor. Every successful disparate treatment story needs a villain. \textit{Id.} But from the lens of social cognition theory, this is precisely backwards because cognitive biases in social judgment operate automatically and must be controlled, if at all, through subsequent "mental correction." Intergroup discrimination, or at least that variant which results from cognitive sources of bias, is automatic. It does not result from a motive or intent to discriminate; it is an unwelcome byproduct of otherwise adaptive cognitive processes. But, like many unwanted byproducts, it can be controlled, sometimes even eliminated, through careful process re-engineering. \textit{Id.}
\end{quote}

\textit{Professor Krieger argues for interpreting the Act "as requiring simply that a plaintiff demonstrate a causal connection between her group status and the employer's decision rather than as requiring proof of a particular kind of causation, namely specific intent to discriminate." \textit{Id.} at 1231.}

\textsuperscript{132} Although Krieger does not acknowledge it, a causation approach brings us very close to disparate impact—at least in concept, if not precisely as the legal theory has developed under Title VII. If, say, African Americans are not disadvantaged relative to whites, how could we ever say that they were being treated differently \textit{because of} their race? A pure causation model necessarily is a disparate impact model—not because the causative mechanism might not be conscious decisions or cognitive bias but because dispensing with intent necessarily requires a focus on effects.

\textsuperscript{133} Professor Green, however, doubts that reformulating disparate treatment to focus on causation, would, standing alone, sufficiently address discrimination in the modern workplace. Green, \textit{Workplace Dynamics, supra} note 32, at 127. Krieger's cognitive approach tends to reinforce a conception of discrimination as largely individualistic, as something that derives from individuals in isolation rather than from individuals in the context of organizational structure, dynamics, and group interaction.... Identification of ... more complex, institutionally enabled types of discrimination requires an openness to structural factors and sensitivity to patterns of social interaction that cannot be adequately explored under an individualistic conception of discrimination—even one that includes unconscious as well as conscious motivation.

\textit{Id.} at 127-28.
Regulation of some of the more complex, subtle forms of discrimination common in today's workplace requires a focus on the operation of discriminatory bias as influenced, enabled, and even encouraged by the structures, practices, and dynamics of the organizations and groups within which individuals work. Conceptualizing a form of discrimination in terms of discriminatory bias in workplace dynamics places much-needed emphasis on structural factors while making clear that both conscious and unconscious bias operate at multiple levels of social interaction, often resulting in decreased opportunity for disfavored groups without producing a single, identifiable discriminatory decision or a perceptibly hostile work environment.\footnote{134. \textit{Id.} at 92.}

Although a focus on structure might suggest disparate impact, Professor Green explicitly rejects that as the basis for her proposed structural approach,\footnote{135. \textit{Id.} at 138.} arguing instead for an expansion of disparate treatment liability.

Green correctly shifts to a structural focus. As traditionally conceived, systemic disparate treatment still relies on "motive" or "intent," but differences in proof of the systemic theory obviate some of the difficulties with determining what counts as discrimination. If the factfinder perceives a pattern of exclusion, it may well infer animus or statistical discrimination when in fact more subtle factors are at work. Further, the power of statistical proof might lead the factfinder to infer the requisite intent more readily in a systemic case than an individual case. That is to say, a pattern of conduct might seem more compelling proof of underlying bias than would a single case of unfair treatment of a particular individual. In the latter situation, the factfinder might more readily infer random unfairness, as opposed to racism or sexism, than it would when a stark pattern of race- or gender-slanted results obtains.

\textit{Id.}
In short, a systemic approach to disparate treatment may solve, or perhaps "avoid," some of the problems of individual disparate treatment. Thus, Professor Green's version of structural disparate treatment would supplement the traditional statistical proof of racially slanted outcomes that has characterized systemic disparate treatment cases with evidence that "both conscious and unconscious bias operate at multiple levels of social interaction." But her theory, precisely because it is pitched on disparate treatment, is open to the same foundational problem as individual disparate treatment: if "intent" does not include cognitive mistakes or extend to characteristics only correlated with the excluded groups, the employer may still avoid liability, even in a systemic case, by so persuading the factfinder. With cognitive biases on center stage, Green's and other disparate treatment structural theories will stand or fall on whether the Supreme Court is willing to define "intent" in terms of cognitive bias.

Indeed, Professor Green's approach poses yet another problem. By focusing on "decreased opportunity for disfavored groups without ... a single, identifiable discriminatory decision," she is seeking not merely to expand the definition of intent but also to widen current views of causation. Cognitive bias may be manifested in an atmosphere or series of individually unimportant decisions with cumulatively significant effects rather than in the single decision point. This not only expands "motivating factor" to or beyond any limits imagined in the cases but also cuts directly against the grain of the circuits that are increasingly using the notion of "adverse employment action" to declare many employment-related decisions beyond the reach of Title VII and the other antidiscrimination statutes.

136. Id. at 92.

137. Formally, it is the plaintiff who has the burden of persuasion as to the existence of the requisite intent in a systemic case as in a case of individual disparate treatment. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336, 360 (1977). If, however, the plaintiff's statistical and other proof is sufficiently strong, the employer will have a functional, if not formal, burden of establishing why such data could exist when no intentional discrimination was present. Id. at 357-60.

138. Green, Workplace Dynamics, supra note 32, at 92.

139. Id. at 116 (arguing that, while it might have been appropriate in the early years when firms were largely hierarchical and bureaucratic, focusing on "blatantly exclusionary individual decisions made at identifiable points on a hierarchical ladder" has become increasingly problematic as "governance structures of the workforce shift").

140. See supra note 128.
One may be skeptical of the success of either altering the definition of intent or expanding the reach of causation, but if the recommendations of scholars like Krieger and Green are accepted, reforming legal doctrine is merely the first step. Both theories require a new approach to the proof process, which presumably will begin with the *Desert Palace* "sufficient evidence" approach. But how either Krieger or Green would view *Desert Palace* is unclear. That decision seems helpful to the extent it abandons more structured methods of proof for a holistic assessment of the evidence in question, and therefore opens the way for more flexible proof. But both scholars should recognize that *Desert Palace* may not assist plaintiffs because its reformulation does not eliminate the underlying problem of when to infer discriminatory intent: it merely submerges it in the broader question of whether a case gets to the jury or whether a jury verdict for plaintiff will stand when a motion for judgment as a matter of law is made after the verdict is rendered.

Put another way, in an individual case, the courts will still have to decide whether a plaintiff's disproof of defendant's asserted nondiscriminatory reasons is sufficient, together with other evidence, to support a jury verdict for her. And in a systemic case, the court will have to determine whether employment structures enabled discriminatory bias or whether nondiscriminatory possibilities, such as women's lack of interest or job commitment, are better explanations. The reality will remain that judges' perceptions about the relative likelihood of discrimination will determine what cases get to the jury in the first place and what jury verdicts will be allowed to stand. And jury perceptions about the likelihood of discrimination, as opposed to an infinite range of other human motivations and influences, will determine the verdicts in those cases they do decide. This means that the new dispensation of "sufficient evidence" is less a panacea than an admission of failure of the proof structure system to come to grips with the fundamental problem.

And, of course, that fundamental problem is the viability of Professor Calloway's "basic assumption." At the least, to shift the present center of gravity towards that assumption, plaintiffs must

141. See infra note 147.
introduce evidence in disparate treatment cases about the prevalence of discrimination. Perhaps the most obvious use of such testimony is to remind or convince the jury that discrimination is still prevalent (at least given the particular employment context) and therefore, to convince jurors that discrimination in the case at hand is more likely than they might at first believe. More dramatically, the new cognitive bias scholarship suggests that plaintiffs must go much further to explain why discrimination is both prevalent and largely invisible. That is, they must deploy expert testimony to educate the jury about the continued operation of race animus, consciously held stereotypes, the more subtle operation results of racially slanted cognitive biases, and/or the effect of workplace dynamics and cultures in enabling these biases.

In short, whether Krieger's or Green's approach is followed, experts will not only need to remind or convince the factfinder that discrimination is still prevalent, but will also need to educate the factfinder that social science research suggests that all of us—judges and jurors included—may be biased without knowing it. If Professor Green's theory is adopted, experts will also have to testify about how such biases are enabled by workplace structures and that this is likely to happen without manifesting itself in any particular employment decision. Without such testimony, a jury might erroneously believe that a woman and/or minority would not be more likely than their white male counterparts to be disadvantaged in a particular employment context. Without such proof, the sufficient evidence test may result in outcomes as bad as or worse than those decried under the McDonnell Douglas proof structure.\(^{142}\)

One may be skeptical about the success of this enterprise on its own terms. Convincing a jury that everyone, including themselves, is prejudiced does not seem psychologically plausible in light of the deep commitment to egalitarian values that our society now embraces. But, even putting this foundational objection aside, the use of experts has its problems. The revolution in expert evidence \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\(^{143}\) triggered is beginning to manifest itself in the employment arena.\(^{144}\) One recent

\(^{142}\) See Selmi, \textit{supra} note 124.
\(^{144}\) Experts are typically used in employment discrimination cases for proof of damages, \textit{e.g.}, Tesser v. Bd. of Educ., 370 F.3d 314, 317-20 (2d Cir. 2004), and, where systemic claims
case overturned a jury verdict because the trial judge failed to make a Daubert determination on the record concerning plaintiff's witness who brought "specialized sociological knowledge ... of contemporary racism" into the courtroom.\footnote{Elsayed Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053, 1063-66 & n.9 (9th Cir. 2002) amended by 319 F.3d 1073 (9th Cir. 2003); see also Ray v. Miller Meester Adver. Inc., 664 N.W.2d 355, 365-66 (Minn. App. 2003) (holding that it was an abuse of discretion to admit a professor's testimony on gender stereotyping because "virtually all adults in our society know about gender stereotypes").} Although not formally addressing the testimony's admissibility, the court's action may well have revealed hostility to this expertise.\footnote{See Deborah Dyson, Comment, Expert Testimony and "Subtle Discrimination" in the Workplace: Do We Now Need a Weatherman to Know Which Way the Wind Blows?, 34 GOLDEN GATE U. L. REV. 37, 53-54 (2004) (finding that, although the court in Elsayed Mukhtar did not pass directly on the merits of the expert, the lower court's admission of his testimony was harmful error only if the testimony was inadmissible); see also John V. Jansonius & Andrew M. Gould, Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility, 50 BAYLOR L. REV. 267, 317-25 (1998) (discussing the implications of Daubert).} More generally, plaintiffs will have to establish both the disciplines at issue and the expertise of particular experts in those disciplines in the crucible of litigation. And, of course, one can anticipate employers presenting their own experts and the ensuing battle of experts, which has not always resulted in success for plaintiffs.\footnote{Perhaps the most famous case where expertise ricocheted against plaintiffs is EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988). See generally Thomas Haskell & Sanford Levinson, Academic Freedom and Expert Witnessing: Historians and the Sears Case, 66 TEX. L. REV. 1629 (1988) (describing the academic controversy arising from a feminist's role as an expert witness for Sears in a sex discrimination case). Sears successfully split a seam within feminist thinking by looking to "difference feminism" to bulwark its argument that apparently damning statistics about the absence of women in its higher-paid sales jobs was caused by its female employees' lack of interest in these positions. See Schultz, supra note 116, at 1752-53.}

are made, to show statistical correlations, \textit{e.g.}, Adams v. Ameritech Servs., Inc., 231 F.3d 414, 422-28 (7th Cir. 2000). Use of experts in stereotyping and cognitive deficiencies is comparatively new, although \textit{Price Waterhouse} itself involved such an expert. See generally Martha Chamallas, \textit{Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins}, 15 \textit{Vt. L. Rev.} 89 (1990) (discussing several Justices' displeasure with an expert witness's testimony based on social psychology research).
III. THE DISPARATE IMPACT ALTERNATIVE

A. Brief Overview

A short history of the disparate impact theory of discrimination begins with its creation in 1971 in the Title VII case of *Griggs v. Duke Power Co.* Its birth was scarcely auspicious because many viewed the theory as a transparent device to end-run a dubious lower court fact-finding of no intentional discrimination in the waning days of the Old South. Although the theory prospered for a time in Title VII cases, the Court soon disavowed the theory for discrimination cases brought under the Equal Protection Clause or under 42 U.S.C. § 1981, and in 1989 the Court finally eviscerated the theory even under Title VII in *Wards Cove Packing Co. v. Atonio.*

The story has a happy resolution, however, with Congress riding to the rescue. After failing in 1990 by one vote to override the first President Bush’s veto of an act whose centerpiece was restoration of disparate impact, Congress and the President reached an agreement on the Civil Rights Act of 1991. That statute amended Title VII to explicitly codify for the first time disparate impact as an unlawful employment practice and thus reinstate the theory to its rightful place as a centerpiece of the antidiscrimination project. As a final touch of irony, the coincidental birth of the *Griggs* theory in 1971 was matched by a *deus ex machina* in 1991—the Anita...

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Hill/Clarence Thomas confrontation that many credit as impelling the Bush administration to compromise on the 1991 Act.152

Somewhat surprisingly, the tale largely ends here. Given the two-year national debate about civil rights that generated enormous controversy in the national media and inside the Beltway, one might have expected an explosion of disparate impact cases after 1991. To the contrary, little development has occurred on this front, either in the Supreme Court153 or at the circuit level.154

B. From Griggs to the 1991 Civil Rights Act

Disparate impact has always been counterintuitive155 because it targets equal treatment, not merely different treatment, as discriminatory and does not require any racial motivation. At base, it defines “discrimination” differently than the term is normally used. Confusion over the theory has arisen more from this fact than from questions about how one proves that a challenged practice has a disparate impact.156

After describing disparate treatment as “the most easily understood” form of discrimination, the Court in International Brotherhood of Teamsters v. United States, went on to contrast it with disparate impact:


But for the “fortuity” of Nina Totenberg’s Anita Hill revelations, the bill would have remained mired in Congress. It was unstuck for equally image-laden reasons: the political fallout resulting from a temporarily more powerful image of women, sisters, daughters, mothers, and wives forced to endure sexual harassment in order to retain their jobs.

Id.

153. Disparate impact has reached the Supreme Court only in cases involving statutes other than Title VII. The first case involved the operation of the theory under the Americans with Disabilities Act. See Raytheon Co. v. Hernandez, 540 U.S. 44, 46 (2003). The second encounter resolved the long-simmering question of the viability of the theory under the Age Discrimination in Employment Act. See infra note 260.

154. See infra text accompanying note 233.

155. Fiss, supra note 20, at 299 (questioning why practices which we would now describe as disparate impact should be viewed as race discrimination within the meaning of the antidiscrimination laws when they are at most the functional equivalent of intentional racial discrimination).

156. See infra text accompanying note 263.
Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.\textsuperscript{157}

Disparate impact emerged in 1971 in \textit{Griggs v. Duke Power Co.}\textsuperscript{158} The facts of the case and the Court's approach to them demonstrate the theory in operation, but also may explain why the theory has not been widely deployed. Prior to Title VII, Duke Power had operated a facially discriminatory system of job segregation: black employees were restricted to the labor department, one of five departments in a power station. All employees entering the other departments were required to have high school diplomas, although African Americans entering the labor department were not. On the effective date of Title VII in 1965, the diploma requirement was extended to the labor department, and all individuals entering the formerly all-white departments were also required to pass two short-form, standardized tests. These prerequisites to positions in the formerly all-white departments operated to keep most present and future black employees concentrated in the labor department.

Neither the district court nor the Fourth Circuit found any intentional discrimination in the company's adoption of the test and diploma prerequisites. The district court found them rational management techniques for securing the best-qualified employees. The Fourth Circuit held that the requirements had been adopted for the legitimate business purpose of improving the general quality of employees and without an intention to discriminate against blacks. Thus, the lower courts upheld the test and diploma requirements despite any showing that a high school degree and scoring well on

\textsuperscript{157} Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (citations omitted). The Teamsters' scheme suggests that a combination of disparate treatment and disparate impact marks out all of the space needed to deal with discrimination: "Either theory may, of course, be applied to a particular set of facts." \textit{Id.} That is to say, any actionable employment practice or decision would seem to be challengeable under one or both theories. The suggestion may be that the converse is also true: if an action does not constitute disparate impact or disparate treatment, it does not violate the statute.

\textsuperscript{158} 401 U.S. 424 (1971).
the tests were related to good job performance. The Supreme Court disagreed, striking down the challenged test and diploma requirements and thereby establishing the rationale and fundamental structure of disparate impact discrimination.

According to the Court, Congress's objective in enacting Title VII was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.... The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.159

Applying this analysis, the Court found that the tests and the high school diploma requirement had a substantially greater impact on blacks than whites. Only twelve percent of blacks in North Carolina had high school diplomas, while thirty-four percent of whites had finished high school. Further, the challenged tests had a disparate impact on blacks because fifty-eight percent of whites passed the test nationally compared with only six percent of blacks.160 These statistics were sufficient to establish a prima facie case of disparate impact discrimination. The defendant's intent to discriminate was not an element of the prima facie case and, given the undisturbed findings below, could hardly be relevant.161

But a determination of disparate impact did not automatically result in liability. Instead, the Court held that an employer would

159. Id. at 429-31.
160. Id. at 430 n.6. These statistics were not focused on Duke Power's workforce or recruiting area.
161. Given the institution of the new requirements just as Title VII became effective, in a plant with a history of de jure discrimination, the Court may have been suspicious about the findings of the district court. As it would later announce in Anderson v. Bessemer City, 470 U.S. 564, 580 (1985), it was, nevertheless, bound by those findings under the clearly erroneous rule.
be permitted to justify its use of the challenged criteria, notwithstanding their impact. The employer's defense was formulated differently at different points in the opinion. Although the Court was not specific as to what would suffice, it was clear as to what would not: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures" with a disparate impact because "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." As to what would "redeem" such practices, Griggs sometimes spoke of justifying the challenged requirements as a "business necessity" and sometimes as being "job related." The Court tended to treat both formulations as synonymous, although they are linguistically different. In the case itself, "job relation" was the key: Duke Power had not established the defense because "neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used." Although the testing and diploma requirements had been adopted to generally improve the workforce's qualifications, Duke Power could not show that they were related to the performance of particular jobs at the plant.

162. Griggs, 401 U.S. at 432.
163. Id. at 431 ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). The discussion of "job relation" occurs in connection with the EEOC's regulations concerning tests, which required that a "professionally developed ability test" be one "which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs." Id. at 433 n.9 (quoting the EEOC Guidelines on Employment Testing Procedures).
164. Id. at 431.
165. Id. at 431-32. In addition to the job-related/business necessity defense, Title VII includes several statutory defenses to a disparate impact case. Section 703(h) specifies that it is unlawful "for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment" when it acts pursuant to a bona fide seniority, merit, or incentive system, so long as any differences "are not the result of an intention to discriminate." Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(h), 78 Stat. 241, 257 (1964) (codified as amended at 42 U.S.C. § 2000e-2(2000)). The provision also permits "an employer to give and to act upon the results of any professionally developed ability test," again provided the test "is not designed, intended or used to discriminate." Id. The Court has viewed the testing defense as an affirmative one: an employer must prove that its use of an employment test with a disparate impact has been validated in order to establish the defense. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 436 (1975) (noting that tests are authorized in limited circumstances, pending new validation efforts). In contrast, the seniority cases have
Although the stringency of the business-necessity/job-relation justification has been a matter of debate, *Griggs* was potentially a very radical opinion. Duke Power's policies were rationally related to its permissible goal of increased productivity: had this been a constitutional challenge to a public employer's use of such criteria, they would have passed with flying colors. Further, Duke Power was scarcely outside of the mainstream since many large employers used similar tests to select their workforces. Finally, the notion that better education might conduce to more efficiency in an increasingly complex world is scarcely counterintuitive in a society that tends to believe more is better when it comes to education. Nevertheless, *Griggs* demanded that, where the requisite disparate impact exists, some proof must also exist that the employer was not merely reasonable but also right in its policies.\(^6\)

The Court's subsequent decisions developed this theory. For example, *Albemarle Paper Co. v. Moody*\(^6\) set forth a three-step litigation structure, with plaintiff having the initial burden of establishing a prima facie case of impact and the defendant then having the burden of proving that a business necessity and/or job-related reason justified the practice. Even if the defendant carries his burden, liability could still be imposed if the plaintiff could prove that another practice, with less impact, could satisfy the

held that disparate impact is not available to challenge a seniority system; such practices can only be challenged under disparate treatment. *E.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 353-54 (1977) ("[A]n otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.").


166. *Griggs*, 401 U.S. at 431-32 (noting that the record indicated that those employees hired before the high school diploma and test requirements were imposed had performed satisfactorily and had made progress in the departments where those requirements had subsequently been imposed, thus debunking the notion that the requirements were necessary).

167. 422 U.S. 405 (1975).
employer's business needs. As discussed below, this structure came under attack later.

In *Dothard v. Rawlinson*, the employer's height and weight minima for prison guards eliminated most women from consideration, creating a barrier to women's employment opportunities that the Court held could be addressed through disparate impact. *Dothard* is significant because it cut disparate impact free from any necessity that the disparity's cause be traced either to de jure or more general societal discrimination, neither of which caused the exclusion of women in that case. And in *Connecticut v. Teal*, the Court emphasized that the very existence of a barrier to employment opportunities justified the use of disparate impact analysis: that minorities as a group were not excluded from the jobs in question was not a defense to a disparate impact claim if minorities were disproportionately excluded from the opportunity to compete for the jobs.

This approach to disparate impact analysis stayed more or less intact until 1988. In *Watson v. Fort Worth Bank & Trust*, the Court continued the expansive interpretation given disparate impact analysis by holding unanimously that it applied to subjective

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168. *Id.* at 425.
169. See infra text accompanying notes 178-82.

Ordinary disparate impact cases, then, view causation with blinders. The law treats the employer's criterion as the cause of a disparity, even though it may be only one of a wide array of factors necessary to produce the disparity.... The blinders necessarily mean that employers may be held legally responsible for impacts that are "caused" in substantial part by factors external to the employers.

*Id.*

173. *Id.* at 448.

When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity "because of ... race, color, religion, sex, or national origin."

*Id.*

elements of an employer's selection procedures. However, a plurality sought a substantially narrower view of the theory that foreshadowed the following year's decision in *Wards Cove Packing Co. v. Atonio*, in which a majority of the Court radically restructured the doctrine.

In terms of its holding, *Wards Cove* addressed merely how a plaintiff proved a prima facie case by requiring the plaintiff to identify the qualified labor pool and the specific practice that caused the impact. To this point, *Wards Cove* refined, not redefined, disparate impact. But the Court went on to make major changes in disparate impact analysis. First, the majority determined that a burden of production, not persuasion, passed to the defendant once the plaintiff established a prima facie case of disparate impact. Second, the Court redefined business necessity by taking out "necessity" and replacing it with the notion of reasonable employer justification.

175. *Id.* at 991. The unanimous Court agreed with Justice O'Connor that "subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases." *Id.*

176. *Id.* at 987 (linking the disparate treatment and impact theories, Justice O'Connor stated that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination").


180. *Id.* at 657.

181. *Id.* at 644 ("To the extent that some of this Court's decisions speak of an employer's 'burden of proof' with respect to the business justification defense, they should be understood to mean an employer's burden of production, not persuasion.").

182. *Id.* at 659 (noting that rather than requiring the defendant to establish a business necessity for the challenged practice, the employer need only present evidence that the
In reaction to *Wards Cove* and other decisions issued during the 1988 Term of the Supreme Court, Congress passed, and President Bush signed, the Civil Rights Act of 1991.\(^{183}\) Declaring that *Wards Cove* had "weakened the scope and effectiveness of Federal civil rights protections," Congress codified the disparate impact theory although it made some adjustments in the process.\(^{184}\) Section 703 was amended by the addition of a new subsection (k), which declared disparate impact discrimination an "unlawful employment practice."\(^{185}\) Congress, however, provided that disparate impact claims are to be tried to the court, and also declared that compensatory and punitive damages were unavailable in disparate impact cases.\(^{186}\) Under disparate impact then, the available relief is backpay,\(^{187}\) an injunction requiring the practice to be eliminated,\(^{188}\) and attorneys' fees.\(^{189}\)

In codifying disparate impact, Congress both accepted and rejected portions of *Wards Cove*. Section 703(k)(1) requires a plaintiff to identify, as part of the prima facie case, "a particular employment practice" causing a disparate impact.\(^{190}\) However, it provides an escape hatch from this requirement: if the plaintiff can demonstrate that "the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice,"\(^{191}\) a

\[\text{Practice "serves, in a significant way, the legitimate employment goals of the employer".}\]


\(^{188}\) Id. § 13.07.

\(^{189}\) Id. § 13.15.


\(^{191}\) 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000). Where the plaintiff cannot separate the components of the employer's process for analysis, and proves disparate impact from the entire process, the defendant need not justify any part of the process that it can establish not to have an impact. "If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000). The word "demonstrate" seems to require this to be viewed as an affirmative defense, but that would seem to place the burden of persuasion on both parties—the plaintiff must demonstrate that a process cannot be separated for analysis but the defendant may demonstrate that part of it can be so separated.
potentially important provision.\textsuperscript{192} Thus, the statute essentially codifies \textit{Wards Cove}'s determination that impact claims generally may not be based on the "bottom line" results of an employer's hiring practices; rather, if possible, the plaintiff must identify the practices she claims are causing the impact.\textsuperscript{193}

The 1991 amendments squarely rejected other aspects of \textit{Wards Cove}, however. Once a plaintiff establishes disparate impact, she prevails if "the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."\textsuperscript{194} There are at least two significant

\begin{itemize}
  \item \textsuperscript{192} One might have thought this was implicit in \textit{Wards Cove}, but the Court in \textit{Smith v. City of Jackson}, 125 S. Ct. 1536 (2005), did not suggest any such limitation to the \textit{Wards Cove} approach, which continues to control in cases brought under the Age Discrimination in Employment Act. \textit{See} discussion \textit{infra} note 260 (comparing the Court's holding in \textit{Smith v. City of Jackson} with \textit{Wards Cove} as it applies to the ADEA).
  \item \textsuperscript{193} The Interpretive Memorandum, which is the "official" legislative history of the Act in this regard, § 105(b) of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981), addresses when components are capable of being separated for analysis: "When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in \textit{Dothard v. Rawlinson}, the particular, functionally-integrated practices may be analyzed as one employment practice." 137 \textsc{CONG. REC.} 28680 (daily ed. Oct. 25, 1991) (Interpretative Memorandum) (citation omitted); \textit{see} Paetzold & Willborn, \textit{supra} note 171, at 378-79 (questioning whether the Interpretive Memorandum does much more than "prevent the absurdity of having the plaintiff separate each employment-related test item for disparate impact analysis, because test items are viewed as components of the same test"); \textit{see also} Steven R. Greenberger, \textit{A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991}, 72 \textsc{OR. L. REV.} 253, 292-95 (1993) (detailing the legislative history of this provision).
\end{itemize}

\textit{The only way to fulfill both of the objectives of Title VII—the removal of artificial barriers to employment and the preservation of the legitimate prerogatives of the employer—is to interpret the amended Title VII as establishing different standards for different types of jobs. A more flexible standard of business necessity should be applied to qualifications for positions that, because of their difficulty, great responsibility, or special risks to the public, require skills or intangible qualities that cannot be measured empirically. In the vast majority of jobs where such qualifications are not necessary, the stricter standards of necessity should apply.}}
aspects to this language. First, the statute specifies that a burden of persuasion, not merely production, shifts to the defendant once plaintiff proves impact.\footnote{195} The statute thus rejected \textit{Wards Cove}'s dicta that the burden of persuasion does not shift from the plaintiff.

Second, in describing what the defendant must show to carry its burden of persuasion, Congress used the terms "job related" and "business necessity." By using these terms from \textit{Griggs}, not the watered-down language from \textit{Wards Cove}, Congress clearly revived the requirement of a close fit between the challenged practice and the employer's justification for using that practice.\footnote{196} Perhaps significantly, Congress used the terms conjunctively, thus suggesting that both job relation and business necessity were required.

Congress, however, declined to define those terms. Instead, the statute explicitly referred to an "Interpretive Memorandum" which was to serve as the exclusive source of legislative history when construing the statute.\footnote{197} That Interpretive Memorandum states laconically that "the terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in \textit{Griggs v. Duke Power Co.} and in the other Supreme Court decisions prior to \textit{Wards Cove Packing Co. v. Atonio}."\footnote{198} Because the Court's pre-\textit{Wards Cove} decisions send conflicting signals, this statement offers little guidance, leaving the scope of the defendant's burden open to question.

The 1991 Civil Rights Act also defined an "alternative employment practices" surrebuttal for plaintiffs. Although the possibility of a plaintiff responding to an employer's proof of business necessity by adducing evidence of a less discriminatory alternative can be traced back to \textit{Albemarle},\footnote{199} the 1991 amendments codified the possibility for the first time. The statute now provides that a

\footnotetext{195}{42 U.S.C. § 2000e(m) (2000) (defining "demonstrates" as "meet[ing] the burdens of production and persuasion").}

\footnotetext{196}{Although the terms "job related" and "business necessity" were found in \textit{Griggs}, the statutory language "job-related for the position in question and ... consistent with business necessity" was borrowed from the Americans with Disabilities Act, which had been enacted in 1990. 42 U.S.C. § 12112(b)(6) (2000).}


\footnotetext{198}{137 CONG. REC. 28680 (daily ed. Oct. 25, 1991) (Interpretive Memorandum) (citations omitted).}

\footnotetext{199}{See supra text accompanying notes 167-68.}
plaintiff may prevail in a disparate impact case by identifying an alternative employment practice that the defendant refuses to adopt. The meaning of this provision is unclear. Congress did not define “alternative employment practice” but instead said the law existing immediately before the Wards Cove decision should define the concept. However, Wards Cove first introduced the term “alternative employment practice,” although there are precursors in Albemarle’s reference to “other tests or selection devices without a similarly undesirable racial effect.” Compounding this interpretive problem is the question of what it means for an employer to “refuse” to adopt such an alternative. The suggestion might be that the employer is not liable unless it has considered the possibility and rejected it. Thus, precisely what a plaintiff must show to win a disparate impact claim using this route is unclear.

In sum, disparate impact theory remains a complicated and confusing doctrine. The statutory language is ambiguous on many points, and the lower courts have developed refinements to the doctrine, which will be explored later in this Article.

Further, the rationale underpinning disparate impact theory has never been fully developed. Indeed, a wide range of theoretical justifications exist that have more or less support in the cases. One obvious possibility, given Griggs’s factual context, is that disparate impact is merely a technique to reach defendants who are acting with discriminatory intent when proof sufficient to establish a disparate treatment case is lacking. The plurality opinion in Watson v. Fort Worth Bank & Trust may have embraced this view when it described disparate impact as being the “functional equiva-

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204. See Greenberger, supra note 193, at 292 (“On the whole, it is fair to say that, to a significant degree, the Act leaves disparate impact law in the state of confusion in which it has existed since its inception.”).
205. See infra text accompanying note 234.
207. See supra note 158.
The "functional equivalent" of intentional discrimination.\textsuperscript{209} \textit{Wards Cove} also seemed based on this premise.\textsuperscript{210} From a realist perspective, this is an appealing explanation of the theory's invention because it is scarcely the first time a court avoided "bad facts" by altering the law. Under this view, disparate impact theory would permit liability to be imposed in cases in which proof of intent is lacking but in which a strong suspicion of discriminatory intent exists. The problem, of course, is that this perspective does not offer any real constraints on the theory. After all, the courts could scarcely invoke disparate impact only when they suspected that a trial court's or jury's findings on the intent issue were incorrect.

A second rationale for disparate impact emerges from the \textit{Griggs} Court's reference to racial segregation in North Carolina, where Duke Power was located: "Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools ...."\textsuperscript{211} Such a view would justify and possibly limit disparate impact to those settings where prior de jure discrimination made it not "fair" to use a particular criterion. Although this seems like a particularly compelling justification for the theory, \textit{Dothard v. Rawlinson}\textsuperscript{212} established that the disparate impact was not confined to de jure segregation,\textsuperscript{213} nor was it limited to racial discrimination.\textsuperscript{214}

A somewhat more expansive version of this justification would look not to de jure discrimination that hampered the disfavored group from satisfying the particular criterion at issue, as in \textit{Griggs}, but rather would look to a history of discrimination and subordina-

\textsuperscript{209} Id. at 987.
\textsuperscript{210} The Court did not use the term "functional equivalent" when it reformulated business necessity as a burden of production, not persuasion, but its reformulation was in part because such a rule "conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." \textit{Wards Cove Packing Co. v. Atonio}, 490 U.S. 642, 660 (1989). This equation of disparate impact and treatment suggests adherence to the "functional equivalent" view.
\textsuperscript{212} 433 U.S. 321 (1977).
\textsuperscript{214} \textit{Rawlinson}, 433 U.S. at 328-29 (applying the theory to sex discrimination).
tion of the group in question. Thus, in *Dothard v. Rawlinson* no reason existed to believe that women's shorter stature and lower weight as compared to men were the result of de jure or even de facto societal discrimination. Nevertheless, women had a long history of legal and societal subordination in this country, which might justify removing unnecessary barriers to their advancement.

This suggests a final, even broader view of disparate impact—eliminating unnecessary obstacles to human advancement, without regard to whether the beneficiaries of such a policy have been victimized by discrimination. After all, an egalitarian society might well decide that obstacles to employment should be limited to those that are demonstrably conducive to employer productivity. The obvious problem with this sweeping approach is that it is completely untethered to the prohibition of discrimination that underlies Title VII. At its broadest, disparate impact would eliminate unnecessary obstacles only when they have disproportionate effects on racial groups or one of the sexes.

But perhaps identifying a rationale is unnecessary: Congress is empowered to adopt rules of law and is not constrained by any requirement of theoretic consistency. The new statute's formulation of disparate impact seems to cut it loose from whatever moorings it may have had as a means to address intentional, if

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The most straightforward argument favoring the disparate impact theory is that in Title VII Congress imposed a responsibility on employers to heed disproportionate outcomes for blacks and women, even when equal treatment causes these outcomes. This duty is based on a recognition that historical, social, and structural barriers can impede the achievement of minority group members.

216. Professor Lamber writes, “The most extreme view of the disparate impact definition is that its function is to ensure equal achievement for minority group members. This view recognizes a group right to a proportionate share of the economic pie.” *Id.* This view is extreme because, even in its most robust form, disparate impact will not guarantee such outcomes.

217. *See* Sullivan, *supra* note 148, at 1506 (discussing whether males and whites can invoke the theory).

218. For example, the Robinson-Patman Act is one of the antitrust laws, even though it is almost universally viewed as anticompetitive. *See* generally ROBERT H. BORK, *THE ANTITRUST PARADOX* 382-401 (1978).
concealed, discriminatory motive.\textsuperscript{219} Whether or not the impact theory is justified in whole or in part by the difficulty of proving the intent of "discreet discriminators," the theory stands on its own as a basis for liability. Congress's decision in 1991 to codify disparate impact and to distinguish impact claims from treatment claims in both the burdens of production and proof and in the remedies available means that disparate impact is not merely a surrogate proof method for intentional discrimination; instead, it can be used to challenge practices that disproportionally burden protected groups, whether or not an intent to discriminate is present. Needless to say, elimination of any intent requirement avoids the need to determine whether cognitive biases constitute "intent."

\textit{C. The Present Statutory Requisites}

In sum, Title VII now permits a plaintiff to establish disparate impact discrimination simply by showing that a "particular employer practice" has a disparate impact on a protected group. Even a plaintiff who cannot make that showing, can still establish the theory by showing that the employer's entire selection process has a disparate impact and that the components of that process cannot be separated by analysis. At that point, the employer has the burden of showing that business necessity and job relation justify the practice.\textsuperscript{220} Finally, plaintiff can prevail even when the defendant carries its burden of persuasion if the plaintiff can prove the alternative employment practice prong.

Compared to the enormous problems this Article has canvassed in both defining and proving "intent" in a disparate treatment case, disparate impact indeed appears like an oasis in the desert. Why, then, have so many sojourners passed it by? As addressed in Part IV, disparate impact has both downsides and difficulties, but claiming with a straight face that they are more imposing than those facing disparate treatment is difficult.

\textsuperscript{219} See George Rutherglen, \textit{Disparate Impact Under Title VII: An Objective Theory of Discrimination}, 73 VA. L. REV. 1297, 1297-99 (1987) (arguing that the only defensible basis for disparate impact under Title VII as it was originally enacted was to reach hidden intentional discrimination).

\textsuperscript{220} When a multicomponent process is at stake, the employer can avoid justifying any practice that it can show does not have a disparate impact. \textit{See supra} note 191.
IV. THE CRITICS OF DISPARATE IMPACT

Disparate impact has been in disrepute among scholars for some time. For example, two of the leading proponents of the cognitive bias approach to discrimination, Professors Linda Krieger and Tristin Green attempt to reform the disparate treatment theory as a means of implementing their theories, rather than reforming disparate impact.\(^{221}\) Indeed, Professor Krieger writes, without a hint of irony, that “[T]he disparate impact paradigm as currently constructed is an inappropriate analytical tool for addressing the intergroup biases inherent in subjective decisionmaking.”\(^{222}\) Although this is literally true, Professor Krieger’s article convincingly demonstrates that the disparate treatment paradigm “as currently constructed” is also an inappropriate analytical tool for dealing with these problems. In short, Krieger’s focus is misplaced: if one paradigm for reconstruction must be picked, repair work ought to focus on disparate treatment.

What then are the shortcomings of disparate impact? Some of its limitations are apparent: the lack of jury trial,\(^{223}\) limited remedies,\(^{224}\) and statutory exemptions for seniority systems and drug testing policies.\(^{225}\) Although these are authentic problems,\(^{226}\) they are not the reason why commentators have rejected disparate impact, nor can they entirely explain the paucity of suits filed under that theory,

\(^{221}\) In contrast, Professor Krieger’s criticisms are discussed beginning infra at note 227. Professor Green’s critique is discussed beginning infra at note 230. Professor Sturm seems less concerned with the precise meaning of discrimination than with the development of structures and processes to deal with it: “‘Legality’ emerges from an interactive process of information gathering, problem identification, remediation, and evaluation. Regulation fosters dynamic interactions that cut across established conceptual, professional, and organizational boundaries in reaction to observed problems.” Sturm, supra note 33, at 463.

\(^{222}\) Krieger, supra note 31, at 1231.


\(^{224}\) Id.


\(^{226}\) Professor Shoben writes that Griggs and disparate impact “remain largely untapped resources of enormous potential for plaintiffs.” Elaine W. Shoben, Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?, 42 BRANDEIS L.J. 597, 597 (2004). She views perhaps the most important reason “disparate impact litigation has been languishing is that its potential is not often appreciated by the practicing bar,” id. at 600, perhaps in large part because of the absence of compensatory or punitive damages for disparate impact claims.
especially because disparate impact could be deployed as an alternative theory of liability in what is primarily a disparate treatment case.

One set of objections is essentially formalistic. Professor Krieger views disparate impact as theoretically "the wrong tool to address subjective decisionmaking because it presupposes a significantly different type of bias from those at play in subjective practices cases. From a phenomenological standpoint, subjective practices discrimination is a disparate treatment problem, not a disparate impact problem, and it requires a disparate treatment solution." This is a puzzling statement: disparate impact presupposes a "different type of bias" than disparate treatment precisely because it does not require any bias at all, as that term is usually used. In any event, why Krieger believes that the "bias" of disparate impact does not embrace the bias of disparate treatment is unclear. This critique must be "phenomenological" because it cannot be doctrinal in view of Watson's holding that disparate impact is applicable to subjective practices. And one need not adopt Justice O'Connor's implication that disparate impact is designed to deal with hidden biases to recognize that, among other situations, the theory can be used when a hidden bias exists in the form of either a conscious but concealed bias or a purely unconscious bias.

A similar criticism can be directed against Professor Green. Her workplace dynamics approach "places much needed emphasis on structural factors" and therefore she acknowledges it shares some characteristics with disparate impact. Nevertheless, she turns

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227. Krieger, supra note 31, at 1231. For Professor Krieger's other criticisms, see infra note 294.
228. Krieger, supra note 31, at 1231. For Professor Krieger's other criticisms, see infra note 289.
229. See supra note 176 and accompanying text.
230. Green, Workplace Dynamics, supra note 32, at 92. In part this is because the dynamics she discusses often result in "decreased opportunity for disfavored groups without producing a single, identifiable discriminatory decision ...." Id.
231. Structural disparate treatment "draws from disparate impact theory its emphasis on systems and practices, while sharing with traditional disparate treatment theory its understanding of discrimination as a human problem and its aim of eradicating differences in treatment in the workplace." Id. at 145. Like disparate impact, structural disparate treatment would look to "[n]umerical disparities in outcome," but not (as in systemic disparate treatment) as evidence of purposeful discrimination, but rather "as a signal that discriminatory bias may be operating in workplace dynamics." Id. at 146. Plaintiffs might also
to disparate treatment to implement her concept: "despite its importance to the antidiscrimination project, disparate impact theory is also ill-suited to the task of combating the operation of discriminatory bias in the modern workplace." Her essential point is that the label "disparate treatment" is superior (and therefore reformulating disparate treatment doctrine is preferable to revising disparate impact) precisely because it brings home that the problem is bias, not negligence or accident. The problem, of course, is that this proves too much: the advantage of the bias-related label, and even its accuracy, depends on defining "bias" in a nonintuitive way. If, under Watson, disparate impact is capable of dealing with any set of workplace structures that result in disadvantages on race or gender grounds, the benefit of focusing on bias rather than effect is not apparent, at least if the moral power of attacking "bias" is increasingly attenuated as the term's definition is expanded.

A second level of concern may simply be a generalized fear that the courts will fashion doctrinal limitations on disparate impact that will eviscerate the theory. Given the history of disparate treatment, such apprehension is understandable, but, given that same history, it is not apparent why refashioning disparate treatment offers greater hope. For example, the judicial creation and expansion of the "adverse employment action" requirement for disparate treatment cases has resulted in hundreds of cases being dismissed. Although the lower courts have suggested some

look to "firsthand anecdotal testimony as well as ... testimony of social scientists, psychologists, or other experts to demonstrate that the employer's particular workplace environment facilitates the operation of discriminatory bias." Id.

232. Id. at 138.

233. Id. ("The operation of discriminatory bias, in contrast, whether cognitive or motivational, is a human problem, one that inheres in people, albeit in the larger social context in which they work."). While recognizing that disparate impact may apply to subjective employment criteria, the problem of workplace dynamics is less whether subjective criteria themselves are invalid than whether subjective decision making has a "tendency to enable, facilitate, or permit the operation of discriminatory bias." Id. at 142. This may be true, but it does not explain what makes such practices not suitable to disparate impact attack.

234. Other commentators also view disparate impact as too limited to address the phenomenon of cognitive bias but are no clearer as to why this should be so. E.g., Poirier, supra note 36, at 469 ("The current statutory law requires identification of a 'particular employment practice' causing disparate impact discrimination. It is not clear whether the common workplace interactions that lead to unreflective discrimination would ever fit that description.").

235. See 1 SULLIVAN, ZIMMER & WHITE, supra note 109, § 2.06.
limitations to disparate impact, none is nearly as well established as the adverse employment action requirement.

For example, one circuit has held that the employer must affirmatively adopt the at-issue practice for the practice to qualify. In *EEOC v. Chicago Miniature Lamp Works*, the employer relied upon word-of-mouth recruiting for hiring. The court refused to permit the EEOC’s impact claim to proceed because the employees’ actions of referring their friends and relatives and not any employer policy caused the impact. For the court, “passive reliance” on employee action is not an employer policy for purposes of disparate impact analysis. This case’s authority, however, is dubious. Not only does it conflict with precedents from other circuits holding word-of-mouth recruitment subject to disparate impact analysis, but it was decided before the 1991 Amendments controlled, and the rendering court has suggested more recently that employer inaction can form the basis for an impact claim.

Another court-engrafted limitation has been described differently, being termed by some a “volitional exception” and by others a “personal preference” or voluntarism exception or as an employee duty to make reasonable efforts. Although the different formulations suggest different rationales and scopes, the core notion is that some employer requirements ought not to be subject to disparate impact analysis because employees or prospective employees can, more or less easily, conform their conduct to the requirement. The classic example is *Garcia v. Spun Steak Co.*, in

237. Id. at 305.
238. Id.
240. DeClue v. Cent. Ill. Light Co., 223 F.3d 434, 437 (7th Cir. 2000) (holding that employer’s failure to provide restroom facilities was not sexual harassment, but suggesting that plaintiff might have fared better had she asserted a disparate impact claim).
241. 1 SULLIVAN, ZIMMER & WHITE, supra note 109, § 4.02[C][2].
which the employer required its bilingual employees to speak only English on the job. Although the rule fell more harshly on employees of Mexican origin than others, the Ninth Circuit found it immune from disparate impact attack. Bilingual employees could comply with the rule and thus could avoid discipline.

A volitional exception is more or less problematic depending on what conduct is defined as volitional, but it is scarcely well established. Spun Steak’s authority is limited because it was not governed by the 1991 Amendments, but a post-Act decision, Lanning v. SEPTA, revived the notion. In that case, employment as a transit police officer was dependent upon each candidate running 1.5 miles within twelve minutes. The plaintiffs alleged that the requirement had a disparate impact on female applicants, and the employer responded that the run measured the minimum aerobic capacity necessary to perform a police officer’s job successfully. Ultimately, the Third Circuit upheld the policy, in part because nearly all women would be able to pass after only a moderate amount of training. The court did not think it unreasonable to expect women to train prior to applying; doing so, the court said, would demonstrate their commitment to the job. Obviously, this suggests some version of a volitional exception to disparate impact analysis.

A final possible exception to disparate impact is compensation and fringe benefits. In Los Angeles Department of Water and Power

246. Id. at 1488.
247. For example, a broad definition might even find requirements such as a high school diploma volitional, which Griggs clearly precludes. In any event, such an exception to disparate impact has been defended as consistent with the theory’s focus on employment opportunity: to the extent employees can relatively easily conform their conduct to the rule, there is no limitation on opportunities. But the contrary argument is that a work rule that disparately places at risk women or minority group members is a barrier to employment opportunities within the meaning of Connecticut v. Teal, even if not so high a barrier as other obstacles. See supra note 171 and accompanying text.
248. 308 F.3d 286 (3d Cir. 2002); see Sleiman, supra note 244 (arguing that disparate impact should be measured only with respect to those who made reasonable efforts to meet the employer’s criterion).
249. Id. at 288.
250. Id. at 291-92.
251. Id. at 287.
252. Id.
v. Manhart, females successfully challenged an employer's requirement that women contribute more than men to pensions because women as a group live longer than men. The employer's policy was struck down as facial discrimination; in the course of its opinion, however, the Court addressed the employer's argument that, if pension contributions were equalized, the system would disproportionately impact men because men as a group have shorter lives than women. In rejecting that argument, the Court suggested that that disparate impact analysis might not be applicable to fringe benefits. Manhart was decided before the 1991 Amendments and is, in any event, a cryptic opinion.

Along the same lines, however, the Seventh Circuit has held that disparate impact does not apply to fringe benefits. In Finnegan v. Trans World Airlines, Inc., the employer, faced with the need to cut its labor costs, capped vacations at four weeks; this policy

254. Id. at 723.
255. Id. at 716-17.
256. Id. at 710 n.20. This same passage might also (or instead) suggest that males could not invoke the theory. See Sullivan, supra note 148, at 1529.
257. Further, sex-based disparate impact claims involving compensation may require consideration of the Equal Pay Act's effect on Title VII. The Bennett Amendment, 42 U.S.C. § 2000e-2(h) (2003), permits an employer "to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions" of the Equal Pay Act. In County of Washington v. Gunther, 452 U.S. 161 (1981), the Supreme Court ruled that this language "suggests an intention to incorporate only the affirmative defenses of the Equal Pay Act into Title VII." Id. at 168. With regard to those defenses, the Court stated that the EPA "in essence 'authorizes' employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex, even though such differentiation might otherwise violate the Act. It is to these provisions, therefore, that the Bennett Amendment must refer." Id. at 169. Since such factors might (but for the Bennett Amendment) have a disparate impact and be actionable under Title VII, the Amendment can be read to bar disparate impact attacks on gender grounds with respect to compensation.
258. 967 F.2d 1161 (7th Cir. 1992); accord DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3d Cir. 1995). In DiBiase, the court, assuming arguendo a policy of offering enhanced benefits to laid-off workers in return for releases fell more harshly on older workers than younger workers, stated:
such a neutral policy—which does not rely on an invidious stereotype about older employees, which clearly is not motivated by a discriminatory impulse, and which could be demonstrated to have a disparate impact only by the use of an incredibly sophisticated statistical analysis—simply cannot be the basis of ADEA liability.

Id.
reduced the number of vacation weeks for which longer-service workers would be eligible, and therefore disproportionately impacted workers age forty and above.\textsuperscript{259} Nevertheless, assuming without deciding that the theory was available under the ADEA,\textsuperscript{260}

\textsuperscript{259} Finnegar, 967 F.2d at 1162.

\textsuperscript{260} The question of whether disparate impact is available under the ADEA was unresolved until the last Term, when the Supreme Court decided in \textit{Smith v. City of Jackson}, 125 S. Ct. 1536 (2005), that the theory may be invoked under the ADEA. The rationale for the Court's holding was that "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." \textit{City of Jackson}, 125 S. Ct. at 1541. Because disparate impact applied to Title VII cases under Griggs, it must also apply to ADEA cases.

\textit{City of Jackson}, however, made clear that the version of disparate impact applicable in age discrimination cases is that defined in \textit{Wards Cove Packing Co. v. Atonio}, 490 U.S. 642 (1989). As we have seen, \textit{Wards Cove} cut back substantially on the disparate impact theory under Title VII. \textit{See supra} text accompanying notes 177-82. Because \textit{Wards Cove} was framed as an interpretation of Title VII as it was originally enacted, the \textit{City of Jackson} Court's principle of parallel construction mandated that the ADEA incorporate the weak version of disparate impact articulated in \textit{Wards Cove}. The Civil Rights Act of 1991 codified and strengthened disparate impact under Title VII, but not the ADEA; thus, \textit{Wards Cove} continues to control ADEA cases.

Indeed, the ADEA has a provision, not found in Title VII, which the Court suggested may even further weaken disparate impact under the ADEA. The provision in question states that "[i]t shall not be unlawful for an employer ... to take any action otherwise prohibited ... where the differentiat[ion] is based on reasonable factors other than age [RFOA] ...." 29 U.S.C. § 623(f)(1) (2000). As interpreted by \textit{City of Jackson}, Congress's decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. To be sure, Congress recognized that this is not always the case and that society may perceive those differences to be larger or more consequential than they are in fact. As Secretary Wirtz noted in his report, however, "certain circumstances ... unquestionably affect older workers more strongly, as a group, than they do younger workers." DEPT. OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 11 (1965). Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. "Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII." \textit{City of Jackson}, 125 S. Ct. at 1545; accord DEPT. OF LABOR, supra, at 2, 5-6. "While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference." \textit{City of Jackson}, 125 S. Ct. at 1545.

Not surprisingly, given the double-dilution of disparate impact claims under the ADEA, \textit{City of Jackson} affirmed dismissal of the suit despite holding the disparate impact theory available. Plaintiffs had not identified "specific employment practices" causing the proven impact, as \textit{Wards Cove} required, \textit{id.}, and any disparate impact attributable to the City's decision to give raises based on seniority and rank was "unquestionably reasonable": the "decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a 'reasonable
the court found no case of disparate impact had been stated. The court pointed out that any change in compensation packages would impact older workers because "virtually all elements of a standard compensation package are positively correlated with age." Finnegan was cited in a concurring opinion the Supreme Court's recent decision in Smith v. City of Jackson, which, while upholding disparate impact under the ADEA, applied a very crabbed version of the theory. The citation of Finnegan, however, was directed to the proposition that adjustments in fringe benefits would likely have a disparate impact on older workers, thereby explaining why Congress chose to more permissively justify age-based disparate impact than other kinds of discrimination. The Court did not suggest that disparate impact was inapplicable to fringe benefit analysis, as had Finnegan.

In sum, the circuit courts have occasionally sought to limit the employment practices to which disparate impact applies. But the authority, even collectively, is not strong, and to the extent that City of Jackson rejects the most radical view, even less authoritative.

factor other than age' that responded to the City's legitimate goal of retaining police officers." Id. at 1546.

261. Finnegan, 967 F.2d at 1163 ("[T]his case makes no sense in disparate impact terms." (emphasis omitted)).

262. Id. at 1164.


264. See supra note 260.

265. The concurring opinion noted that the Department of Labor's report, see supra note 260, which was the basis of the ADEA, "concluded that—unlike the classifications protected by Title VII—there often is a correlation between an individual's age and her ability to perform a job." City of Jackson, 125 S. Ct. at 1555 (O'Connor, Kennedy & Thomas, JJ., concurring). The Justices attributed this to the general decline with age of physical and sometimes mental ability, as well as to advances in technology and education that "often leave older workers at a competitive disadvantage vis-à-vis younger workers." Id. The Justices continued:

Beyond these performance-affecting factors, there is also the fact that many employment benefits, such as salary, vacation time, and so forth, increase as an employee gains experience and seniority. See, e.g., Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1164 (C.A.7 1992) ("[V]irtually all elements of a standard compensation package are positively correlated with age"). Accordingly, many employer decisions that are intended to cut costs or respond to market forces will likely have a disproportionate effect on older workers. Given the myriad ways in which legitimate business practices can have a disparate impact on older workers, it is hardly surprising that Congress declined to subject employers to civil liability based solely on such effects.

Id.
What is clear, at least, is that judicial resistance in this area has yet to manifest itself as strongly as in the impressive doctrinal barriers the lower courts have historically erected to disparate treatment claims. Of course, that might be more for lack of opportunity than for lack of disposition, but we will see some reasons, somewhat counterintuitively, why the courts may be less hostile to challenges framed in disparate impact terms than they have been to disparate treatment attacks.

A third set of objections to using disparate impact is more focused, looking to limitations on the doctrine as it has been codified. Two arguments may be advanced. First, building on some of the cases this Article has mentioned, it is possible that “particular employment practices” do not reach most of the conduct of concern. A related, but distinct, argument is that identifying which “particular” practice, among many potentially contributing to “bad stats” at the bottom line, will often be difficult or impossible. Neither of these objections is unfounded, but both are overdrawn.

As for a “particular employment practice,” a key feature distinguishing disparate impact from disparate treatment claims is identifying a facially neutral employment practice that causes a disparate impact based on race, color, religion, sex, or national origin. Systemic disparate treatment claims can focus on the total results of an employer’s hiring practices and sometimes infer discriminatory purpose from “bad stats,” but § 703(k) is more limited with respect to disparate impact. As discussed above, it requires the plaintiff to “demonstrate that each particular challenged employment practice causes a disparate impact,” although it permits “the decisionmaking process [to] ... be analyzed as one employment practice” when the plaintiff can prove that “the elements of [an employer’s] ... decisionmaking process are not

266. A continuing instance is the requirement of an “adverse employment action.” See supra note 151. Another example was the “pretext plus” rule that emerged in the wake of Hicks, see Zimmer, supra note 74, and prospered in some circuits until it was finally dismantled by Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147-49 (2000).

267. Professor Green seems to recognize this possibility when she argues that her structural proposals, albeit labeled as disparate treatment, should be pursued by equitable relief rather than full legal damages. See Green, Work Culture, supra note 32, at 667.


In short, the plaintiff normally has the burden of identifying the specific practice she claims is posing a barrier to her group and then proving it does so.

Although most disparate impact cases have focused on selection devices or discrete policies, the statutory language is far broader and Watson approved an attack on a practice that amounted simply to the defendant's way of doing business. Admittedly, there are instances in which it is unclear what, if any, employer practice causes a particular bad bottom line. For example, in EEOC v. Joe's Stone Crab, there were almost no female waitstaff in a restaurant, despite the large number of waitresses in the local labor market. However, no significant difference existed between the number of females the employer hired and the number of females who sought positions at the restaurant's "roll calls" for new waiters. The Eleventh Circuit ultimately concluded that none of the challenged practices caused the discrepancy and therefore rejected the disparate impact claim. The absence of female applicants was apparently due to Joe's reputation for hiring only males, which was caused, at least in part by its "Old World" theme invoking images of male waiters in tuxedos. The reputation itself could not be a practice at all (although the employer might be responsible for the practices, if any, that gave rise to the reputation), and the EEOC never argued that the restaurant's theme had a disparate impact by perpetuating the reputation. This was perhaps because it viewed the theme as a business practice rather than as an employment practice, despite possible effects on employment, or perhaps because

271. E.g., Alexander v. Local 496, Laborers' Int'l Union of N. Am., 177 F.3d 394, 400 (6th Cir. 1999) (residency requirement); United States v. City of Warren, 138 F.3d 1083, 1088 (6th Cir. 1998) (residency requirement); EEOC v. S.S. Clerks Union Local 1066, 48 F.3d 594, 599 (1st Cir. 1995) (policy requiring sponsorship by existing member); Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1113 (11th Cir. 1993) (no-beard policy); Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 796 (8th Cir. 1993) (no-beard policy); Thomas v. Wash. County Sch. Bd., 915 F.2d 922, 924-25 (4th Cir. 1990) (nepotism); see also Lynch v. Freeman, 817 F.2d 380, 381 (6th Cir. 1987) (providing filthy restrooms).
272. 220 F.3d 1263 (11th Cir. 2000).
273. Id. at 1267, 1270-71.
274. Id. at 1270-71.
275. Id. at 1282.
276. Id. at 1282-83.
277. Id. at 1281-82.
retaining the theme might have been justifiable as a business necessity.\textsuperscript{278} Joe's Stone Crab illustrates that situations exist in which disparate impact will be of limited utility.\textsuperscript{279}

But it does not justify a broad skepticism about whether disparate impact will reach most practices affecting employment. Although there are decisions finding plaintiffs have failed to link a particular practice to a disparate impact, other cases have traced impact to particular practices.\textsuperscript{280} Contrary to some suggestions, there is no basis in the history of § 703(k) to permit “particular” to be used to narrow the application of disparate impact. As Professor Hébert argues,

\begin{quote}
[t]he broad statutory language, with the term “employment practice” modified only by the term “particular,” imposes no restriction on the type of practice that can be challenged under the disparate impact theory; the term “particular” appears only to impose a requirement that the practice alleged to cause the disproportionate negative effects on the protected group be identified with particularity. This interpretation of the statute is confirmed by the legislative history .... \textsuperscript{281}
\end{quote}

	extsuperscript{278} Nor did the EEOC attack the bottom line on the ground that the employer's hiring processes were not capable of separation for analysis, presumably because the hiring process per se was capable of being analyzed. The court noted:

During the post-charge period (from 1991 to 1995), many more women (in all, 22\% of the actual applicant pool) applied for food server positions. Of Joe's 88 new food server hires during this period, 19 were women. These post-charge figures translate into a female hiring percentage of 21.7\%—a percentage almost exactly proportional to the percentage of females in the actual applicant pool.\textsuperscript{279}

The court, however, remanded for a determination of whether the way the defendant implemented its “Old World” atmosphere constituted disparate treatment. The district court duly so found. EEOC v. Joe's Stone Crab, Inc., 136 F. Supp. 2d 1311, 1312 (S.D. Fla. 2001), aff'd in relevant part, 296 F.3d 1265 (11th Cir. 2002).

\textsuperscript{280} Compare Muñoz v. Orr, 200 F.3d 291, 304 (5th Cir. 2000) (holding that the plaintiffs did not present sufficient evidence to allow a court to draw conclusions about the separate components of defendant's hiring system), and Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1284 (5th Cir. 1994) (concluding plaintiffs had not traced a disparate impact to a specific policy or practice), with Green v. USX Corp., 896 F.2d 801, 805 (3d Cir. 1990) (“[T]he subjective interviews had a significantly disparate impact on blacks, as the percentage of successful black interviewees was significantly less than the overall percentage of successful interviewees.”). But see Anderson v. Westinghouse Savannah River Co., 406 F.2d 248 (4th Cir. 2005) (seeming to confuse disparate treatment with disparate impact in rejecting a challenge to certain subjective steps in a selection process).

\textsuperscript{281} L. Camille Hébert, The Disparate Impact of Sexual Harassment: Does Motive Matter?,

Likewise, Professor Michelle Travis argues that "particular employment practice" was not intended "to limit the types of workplace structures that would be subject to disparate impact challenge under *Griggs*, nor to exclude default organizational norms." Rather, "particular" was used to resolve the *Wards Cove* issue:

whether an employee could state a prima facie disparate impact case solely by identifying a statistical disparity between the percentage of the employer's workforce that was made up of members of a protected category and the percentage of that category in the relevant labor pool: the so-called "bottom line" approach.

Not only does § 703(k) require the plaintiff to identify the particular practice to be challenged, but it also requires her to "demonstrate that each particular challenged employment practice causes a disparate impact." The second objection then is that identifying "particular" causes of disparate impact may be impossible when an overall process is examined. This may explain in large part the skepticism about disparate impact by scholars such as Professor Green who believe that "both conscious and unconscious bias operate at multiple levels of social interaction, often resulting in decreased opportunity for disfavored groups without producing a single, identifiable discriminatory decision." In such a gestalt setting, can any single practice be identical that causes the untoward results?

Again, the objection is not completely unfounded. *Joe's Stone Crab* illustrates that employment practices may not cause an impact at all—any discrepancy in minority or female representation may be caused by other factors. But this critique also is overdrawn. The problem is largely a question of framing: the broader the practice is framed, the more likely it explains bottom line results. "Subjective"

283. Id.
hiring or promotion practices, for example, as in Watson, seem to cover a lot of ground. Further, the statute explicitly permits a “decisionmaking process [to] ... be analyzed as one employment practice” when the plaintiff can prove that “the elements of [an employer’s] ... decisionmaking process are not capable of separation for analysis.” In short, although the plaintiff “normally” has the burden of identifying the specific practice she claims causes the disparity she identifies, she need not do so if the employer’s process is not “capable” of being subdivided for such purposes. In Watson itself, for example, one wonders how the process could have been separated for analysis.

Further, not only have a number of courts found challenges to entire systems to be viable, but the litigation process would also


287. Presumably plaintiff could have shown bad bottom line results—proportionately fewer blacks in successively higher levels, although small numbers problems may have limited this to the first promotion. Alternatively, plaintiff could have looked at the applicants for promotion and shown that proportionately fewer black applicants were promoted.

288. E.g., Emanuel v. Marsh, 897 F.2d 1435, 1443 (8th Cir. 1990) (“By proving the existence of relevant statistical disparities within the Army's workplace and a causal connection between these disparities and the Army's use of subjective performance awards, Emanuel has established a prima facie case of disparate impact.”); Kozlowski v. Fry, 238 F. Supp. 2d 996, 1014 (N.D. Ill. 2002) (allowing challenge where plaintiffs argued that the entire decisionmaking process, including the interview process, 'must hire' list, and ... [employer's] alleged job posting failures, make a breakdown of the employment process into a specific process untenable); McClain v. Lufkin Indus., Inc., 187 F.R.D. 267, 281-82 (E.D. Tex. 1999) (certifying class action in part because of plaintiffs' claim that a subjective system of assigning job classifications to employees disadvantaged African Americans); Butler v. Home Depot Inc., No. C-94-4335 S1, C-95-2182 S1, 1997 U.S. Dist. LEXIS 16296, at *50 (N.D. Cal. Aug. 28, 1997) (finding plaintiffs made a prima facie showing of disparate impact with respect to the hiring, initial assignment, promotion, and compensation practices); Graffam v. Scott Paper Co., 870 F. Supp. 389, 395 (D. Me. 1994) (“[T]he Court is satisfied that in this case the entire subjective decisional process may be analyzed as one practice.”); Contardo v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 753 F. Supp. 406, 410-11 (D. Mass. 1990) (mixing disparate treatment and disparate impact theories to find a violation even when "the evidence adduced by the plaintiff admittedly does not furnish a quantum of data to support a true statistical analysis, ... [where there was] sufficient circumstantial evidence to warrant a finding that the plaintiff was the victim of sex discrimination in the course of her employment by the defendant," although that discrimination was "relatively covert, and habitual, even mindless, rather than pre-meditated"); see also Stender v. Lucky Stores, No. C-88-1467 MHP, 1992 U.S. Dist. LEXIS 12415, at *5-6 (N.D. Cal. July 14, 1992) (“Where the system of promotion is pervaded by a lack of uniform criteria, criteria that are subjective as well as variable, ... the court is not required to ‘pinpoint particular aspects of [the system]’ that were unfavorable to women.” (quoting Sept. 11, 1991 Order at 31)). But see Chavez v. Coors Brewing Co., No. 98-
seem to permit the plaintiff to claim that an entire process is
capable of separation, leaving the defendant to demonstrate the
contrary. If a defendant does so, it almost necessarily will have to
show which components have a disparate impact and which do not.
Indeed, the statute provides the defendant with an incentive to
establish that certain components have no impact because it
specifies that a defendant does not need to justify any such compo-
nents. This does not seem impossible. Professor Chamallas, for
example, calls for applying disparate impact to wage equity claims.
Although she recognizes the need to identify causes of disparate
impact in multicomponent systems, she is not pessimistic about the
ability of the courts to do so, especially in light of the statutory
exception for processes that are incapable of being separated for
analysis.

1109, 1999 U.S. App. LEXIS 5300 at *10 (10th Cir. Mar. 25, 1999) (rejecting disparate impact
attack because plaintiff failed to identify any particular aspect of the selection process that
had a disparate impact on Hispanics).

289. Alternatively, the plaintiff might run a regression analysis of, say, successful and
unsuccessful candidates for promotion in order to determine what factors predict success. In
that sense, a plaintiff may be able to "separate for analysis" various factors. Defendant would
then have a few choices, none attractive. First, defendant could accept the regression, leaving
the plaintiff to prove the disparate impact of one or more components. Second, the defendant
could attack the regression but not offer a counter analysis, which would amount to admitting
that the process is not capable of being separated for analysis. Third, the defendant could offer
a competing regression, but in so doing it would identify components the plaintiff could then
focus on.

(reviewing ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY:
COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA (1999)).

The critical question boils down to whether the courts will regard an employer's
wage policy as "one employment practice" for purposes of pay equity litigation
and relieve plaintiffs of the particularity requirement. Although this question
turns on whether the court concludes that the "elements of an [employer's]
decisionmaking process cannot be separated for analysis," it is likely that in
making this technical determination the court will consider the fairness of
imposing evidentiary burdens on the respective parties....

In support of disparate impact theory, plaintiffs could argue that it is
practically impossible for them to pinpoint the cause of the wage disparity and
that it makes sense to require the employer to prove that its compensation
policies are indeed market based. Such an assignment of the burden of proof
would encourage employers to acquire and maintain market-oriented data on
compensation and might have the salutary effect of checking the tendency to
overvalue some predominantly male jobs.

Id.
Still another set of objections revolves around what might be called "the class problem." This has two aspects. First, disparate impact is conceived of as class-based litigation, typically pursued either in formal class actions or by the EEOC in pattern and practice cases.\textsuperscript{292} When a single plaintiff considers challenging what appears to be an ad hoc decision, her attorney probably rarely thinks of raising a disparate impact claim,\textsuperscript{293} and when the attorney does consider the disparate impact alternative, she may be daunted by the costs of the proof process\textsuperscript{294} and by the procedural barriers to filing a class action.\textsuperscript{295}

This Article will return to the proof problem in the final section because plaintiff's proof of impact and defendant's business necessity response are the core questions in reviving disparate

\textsuperscript{292} Shoben, \textit{supra} note 226, at 598 (describing disparate impact as "inherently a class-based theory"). She goes on to argue that "class actions are difficult, if not impossible, for private plaintiffs to undertake unless they involve the possibility of very large damage awards." \textit{Id.}

\textsuperscript{293} Professor Shoben believes that "perhaps [the] most important [] reason that disparate impact litigation has been languishing is that its potential is not often appreciated by the practicing bar," \textit{id.} at 600, although she also identifies other causes for the relative neglect of the theory, including the absence of compensatory or punitive damages for disparate impact claims, resources problems with class actions, employer elimination of the most easily targeted policies, and restrictions on the theory developing in the circuit courts. \textit{Id.} at 598-99.

\textsuperscript{294} Professor Krieger has "practical" and "political" arguments against disparate impact, in addition to her theoretical one, see \textit{supra} text accompanying note 227, but the political one collapses into the practical one. Practically, impact theory lacks the empirical tools that can be effectively applied to complex, subjective situations. Politically, "it is only disparate impact's grounding in empiricism which provides its political legitimacy as a civil rights theory in the face of competing normative claims," so the absence of empirical tools is politically problematic. Krieger, \textit{supra} note 31, at 1231. Krieger's argument about empiricism is built almost entirely on her assessment of the difficulty of applying test validation procedures to subjective decision making. \textit{See id.} at 1232. Because such validation is impossible or prohibitively expensive

\begin{quote}
if a court applies disparate impact theory in subjective practices cases, one of two undesirable outcomes will necessarily result: either the validation requirement will be weakened or eliminated entirely, as already appears to be occurring, or its imposition will place severe and ultimately unworkable burdens on small and medium-sized employers.
\end{quote}

\textit{Id.} Although she recognizes that less empirical approaches are possible, she criticizes them as not "a politically viable alternative to validation." \textit{Id.} at 1236; \textit{see infra} text accompanying notes 343-46.

\textsuperscript{295} \textit{See generally} 1 \textsc{Sullivan, Zimmer \\& White}, \textit{supra} note 109, § 12.18 (discussing requirements under Federal Rule of Civil Procedure 23 for filing a class action lawsuit, as well as problems for class actions filed under Title VII of the ADA).
impact, but we may put to one side the procedural class action question. Disparate impact theory may be used by a plaintiff in an individual suit, although of course a plaintiff's attorney might want to consider whether the advantages of framing the claim as a class action outweigh the disadvantages. Although some circuits have suggested that systemic disparate treatment challenges can be mounted only in the context of a private class action or a government pattern or practice case, no such authority exists for disparate impact. Indeed, individuals have raised numerous disparate impact claims without the umbrella of a class action.

A final, and troubling, objection to a more robust use of disparate impact is simply that the theory forfeits the moral high ground that validates the core disparate treatment prohibition, that is, that such a turn renders Title VII merely another regulatory regime.

296. See infra text accompanying notes 340-43.

297. E.g., Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 759-62 (4th Cir. 1998), vacated on other grounds, 527 U.S. 1031 (1999) (reasoning that the only authorization for pattern or practice suits was § 707 of Title VII, 42 U.S.C. § 2000e-6, which authorizes such suits only by the government). While the court recognized that International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), extended this principle to class actions, it did not believe that individual suits could properly challenge discrimination other than through the individual disparate treatment paradigm. Lowery, 158 F.3d at 759-62. Other cases, both before and after Lowery, have made similar statements, typically with very limited analysis. See, e.g., Bacon v. Honda of Am. Mfg., Inc., 370 F.3d 565, 576 (6th Cir. 2004); Celestine v. Petroleos de Venez. SA, 266 F.3d 343, 555-56 (5th Cir. 2001); Babrocky v. Jewel Food Co., 773 F.2d 857, 866-67 n.6 (7th Cir. 1985). But see Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1559 (11th Cir. 1986). See generally David J. Bross, Note, The Use of Pattern-and-Practice by Individuals in Non-class Claims, 28 NOVA L. REV. 795 (2004) (discussing the split among the circuit courts on the question of whether evidence of pattern-and-practice discrimination can be used to shift the burden of proof in individual lawsuits and agreeing with the minority view in favor of such a rule).

298. See, e.g., Connecticut v. Teal, 457 U.S. 440 (1982) (not a class action); Robinson v. Polaroid Corp., 732 F.2d 1010, 1016 (1st Cir. 1984) (quoting Cox v. Yellow Freight Sys., Inc., 646 F.2d 444, 451 (10th Cir. 1981)) (stating that although an individual is entitled to bring a disparate impact claim, plaintiff must show that he has been injured by the challenged practice).

299. I thank Professor Lillquist for this insight. This criticism grows stronger as any definition of discrimination expands beyond animus. Thus, as scholarship seeks to expand the concept of (or proof requisites for) discrimination, concerns about legitimacy increase. See, e.g., Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 987 (1993) ("[W]hites share no apparent consensus concerning the morality of unconscious race discrimination .... The message that unconscious discrimination, if it exists, is not (very) blameworthy makes less likely that whites will cease to deny the existence of unconscious discrimination.").

300. In a somewhat different setting, the legitimacy debate has played out at length.
rather than the strong moral beacon it has been since its enactment. The moral heights may already have been eroded, however, by cognitive bias scholarship's identification of the central problem of present-day discrimination as cognitive bias operating through workplace dynamics and cultures. This Article does not claim, as others have, that cognitive bias is irremediable; rather, this Article's point is simply that holding someone morally responsible for conduct of which they are not even aware is difficult. The new scholarship has made discrimination more pervasive but less evil.

V. REVIVING DISPARATE IMPACT

In short, this Article recommends a return to, and revival of, the disparate impact theory. As Professor Krieger suggests, disparate impact "as currently constructed" may not be adequate to the task, but disparate impact holds a much brighter promise than does

301. Such an approach, however, has its advantages. See Poirier, supra note 36, at 464 (discussing the advantages of using a negligence model to hold employers liable for the "dangerous condition" of cognitive bias in the workplace).

302. See Wax, supra note 44, at 1132-33.

either the current disparate treatment regime or various proposals for expansion along the disparate treatment axis. In any event, from the point of view of precedent, disparate impact is barely constructed at all—the Supreme Court has yet to address the theory under the 1991 amendments, and its encounter with § 703(m) in Desert Palace suggests a willingness to renounce old positions when confronted with a relatively clear congressional command. Convincing the Court to apply the statute's language despite a few restrictive circuit court decisions, may be easier than persuading the Court to reconsider, and radically expand, “intent” to discriminate.

With this introduction, this Article's proposal is simple, and has largely been foreshadowed in the previous discussion: apply disparate impact as the language of Title VII provides. The theory is, unfortunately, a victim of its own origins, which evoke objective polices, such as a test or height and weight requirements, that sweep over large numbers of employees and disproportionately exclude certain groups. And although this remains a significant area of operation for the theory, a more significant potential use, recognized by a unanimous Court in Watson v. Fort Worth Bank & Trust, is to analyze “subjective or discretionary employment practices.”

Indeed, the facts of Watson suggest the theory's potential sweep. Clara Watson did not challenge a formal policy of subjective decisionmaking; rather, her attack was simply on the way things were done at her place of employment. She had been denied promotion on four occasions in an unstructured employment setting in which all supervisors and her successful competitors were white. Although evidence of more conscious stereotyping existed,

304. See supra text accompanying notes 97-100.
305. See supra text accompanying notes 234-45.
306. 487 U.S. 977 (1988); see supra note 175.
308. Id. at 982. Clara Watson was hired as a proof operator in August 1973 and promoted to drive-in teller in early 1976. Id. There her progress stalled:

In February 1980, she sought to become supervisor of the tellers in the main lobby; a white male, however, was selected for this job. Watson then sought a position as supervisor of the drive-in bank, but this position was given to a white female. In February 1981, after Watson had served for about a year as a commercial teller in the Bank's main lobby, and informally as assistant to the supervisor of tellers, the man holding that position was promoted. Watson
such a workplace had a strong potential for the kind of less conscious, more subtle bias that has been explored by the new scholarship. Despite writing before much of the new learning, Justice O'Connor's opinion recognized as much: "It does not follow ... that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain."[309] Very pointedly, she went on: "In this case, ... petitioner was apparently told ... that the teller position was a big responsibility with 'a lot of money ... for blacks to have to count.' Such remarks may not prove discriminatory intent, but they ... suggest a lingering form of the problem that Title VII was enacted to combat."[310]

Thus, Watson envisions using disparate impact to subject such employment practices to scrutiny. Although Justice O'Connor wrote for a plurality that would have counterbalanced the sweeping extension of disparate impact to subjective practices by simultaneously reducing the level of scrutiny and shifting the burden of persuasion,[311] all nine Justices on the Court joined in this passage about using disparate impact to deal with both hidden intentional discrimination and "subconscious stereotypes and prejudices."[312]

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applied for the vacancy, but the white female who was the supervisor of the drive-in bank was selected instead. Watson then applied for the vacancy created at the drive-in; a white male was selected for that job.

_Id._ As described by the Court, the bank had only 80 employees and no "precise and formal criteria for evaluating candidates" for the positions in question. _Id._ "It relied instead on the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled. All the supervisors involved in denying Watson the four promotions at issue were white." _Id._

309. _Id._ at 990.

310. _Id._ (citation omitted). The opinion went on:

If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. In both circumstances, the employer's practices may be said to "adversely affect [an individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin."

_Id._ at 990-91.

311. _Id._ at 991-99; _see also supra_ text accompanying note 176.

312. _Watson_, 487 U.S. at 990.
And, of course, the 1991 Civil Rights Act, by essentially codifying disparate impact as it existed prior to \textit{Wards Cove}, necessarily wrote into the statute books the extension of the theory to subjective practices\footnote{A more detailed discussion of the extent to which the 1991 Act codified the disparate impact theory is found in Sullivan, \textit{supra} note 148, at 1520-22.} while rejecting \textit{Wards Cove}'s revision of \textit{Griggs}.ootnote{See \textit{supra} text accompanying note 196.} From the plurality's view in \textit{Watson}, the result is the worst of all worlds: a sweeping and demanding theory of disparate impact.

But from the perspective of plaintiffs and most commentators, this is a consummation devoutly to be wished. The common ground of the cognitive bias scholarship, and much of the old concern with the "basic assumption" underlying \textit{McDonnell Douglas}, is that women and racial minorities get the short end of the stick in a wide range of workplaces. Although the precise causal mechanisms are contested, disparate impact analysis focuses on this reality and asks the employer to justify it by its business needs.

Because \textit{Watson} could certainly have been framed as a disparate treatment case, it necessarily implies that a wide variety of claims now prosecuted under the disparate treatment paradigm could be reframed as disparate impact challenges. Professor Shoben so argues, citing \textit{Furnco Construction Corp. v. Waters}\footnote{438 U.S. 567 (1978).} as "[p]erhaps the most prominent case to have missed an opportunity to use disparate impact."\footnote{Shoben, \textit{supra} note 226, at 607.} \textit{Furnco} was a "cronyism" case,\footnote{Id. at 611. See generally Ann C. McGinley, \textit{The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII}, 39 \textit{ARIZ. L. REV.} 1003 (1997) (analyzing the current framework for examining race-based and race-neutral decision making in employment contexts, and arguing that the cronyism defense has emerged as a result of recent Supreme Court decisions that narrowed unnecessarily the requirement of intent under Title VII).} that is, the supervisor hired workers he knew, and those workers happened to be white. Professor Shoben could also have cited the personal animosity cases in which the court concludes that personal animosity and not discrimination motivated the decisionmaker.\footnote{See Derum & Engle, \textit{supra} note 27, at 1180-82 (arguing that courts increasingly view interpersonal problems as a result of personal animosity, and that such a presumption, "bespeaks both a judicial inability, or at least refusal, to attend to unconscious bias and an ideological commitment to employment at will").}
St. Mary's Honor Center v. Hicks is paradigmatic of such cases. In that case, the supervisor fired plaintiff because he did not like him, that is, the district court found that the supervisor fired a worker he disliked who happened to be black. In both Furnco and Hicks, plaintiffs lost because the reason for the employer's decision, however unfair, was not "racial." Neither favoring friends or acquaintances who happen to be white nor disliking individuals who happen to be black is disparate treatment discrimination.

Both cases could be recast as disparate impact claims, with plaintiffs arguing that the employer's policy of allowing its agents to make decisions on grounds other than merit will have a disparity of impact on African Americans. In Furnco, the "particular employment practice" would have been instructing the foreman to choose workers from among those he knew; in Hicks, it would have been allowing supervisors to discharge individuals for reasons of personal animosity, rather than reasons related to job performance. So framed, both situations involve "particular employment practices" subject to disparate impact attack. If an impact were shown, a defendant would be likely to prove a business necessity for permitting determinations to be made without regard to merit.

Of course, to invoke § 703(k), a plaintiff must prove that such policies have a disparate impact. Professor Shoben is probably correct that, in Furnco, traditional statistical proof could have shown that allowing a white foreman to choose from among individuals he had worked with in a highly exclusionary industry would have a disproportionate, adverse effect on blacks. Hicks is more difficult to cast as a disparate impact case because the plaintiff would have had to prove that allowing supervisors to fire people they disliked would result in disproportionately more

320. Id. at 508.
321. This is true even if, for example, the employer could demonstrate some search cost savings in allowing a supervisor to choose workers he knows. Unless those costs were significant, which seems unlikely, they should not rise to business necessity. But cf. EEOC v. Consol. Serv. Sys., 989 F.2d 233, 236 (7th Cir. 1993) (commenting that not only is word of mouth hiring a cheap method of recruiting, but it may be highly effective in obtaining a good workforce in part because "an applicant referred by an existing employee is likely to get a franker, more accurate, more relevant picture of working conditions than if he learns about the job from an employment agency, a newspaper ad, or a hiring supervisor," thus increasing the probability of a good match).
322. Shoben, supra note 226, at 609-10.
African Americans being discharged. Some would argue that such proof will often be impossible. There are two responses. First, from the traditional statistical perspective, impact might not be provable if "the numbers" are too small to draw statistical conclusions. But the difficulty of proving the impact of employment practices is sometimes misunderstood. In Watson, for example, the defendant had only eighty employees. A showing of impact in that case would have had to rest on relatively small numbers if focused on only the employer itself. The history of disparate impact, however, suggests that such a focus is not necessary. Griggs itself did not look to the effect of the employer's test and high school diploma requirement on Duke Power's present employees or applicants.

Second, nothing in the statutory language requires that a plaintiff use a particular kind of proof to establish disparate impact. Although disparate impact has been traditionally established by statistical proof of the effect of employer policies on either the employer's own workforce, as in Teal, or some proxy workforce, as in Dothard, expert testimony coming out of the new cognitive bias scholarship could establish the likelihood of such an impact. That

323. Hicks actually raises another question—the possibility of using both disparate treatment and disparate impact in tandem. The employer did not claim to have a policy permitting personal animosity; indeed, the supervisor denied such animosity. Plaintiff attempted to prove disparate treatment, but the trial judge found mere personal animosity (despite the supervisor's denial) and not racial motivation. Under Hicks itself, this put paid to the disparate treatment claim. But had plaintiff raised the disparate impact theory as an alternative theory of liability, presumably the judge would have had to go on to decide whether permitting personal animosity discharges was a particular employment practice with a disparate impact on African Americans.

324. See Flagg, supra note 47, at 2025.

Inferences based on small samples can be misleading because they may suggest short-term results that will not hold true over a longer period; or, to put it somewhat differently, the effect of a particular employment practice on two individuals may not look the same as the effect of that practice on two hundred persons.

Id.

325. See Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971); see also Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (holding that use of "generalized national statistics" was sufficient to support a finding that Alabama's height and weight requirements had a disparate effect on women, as "[t]here is no requirement ... that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants").

326. Professor Shoben, supra note 226, at 606, notes that some disparate impact cases have been proven entirely without regard to statistics. As an example, she cites Garcia v. Woman's Hospital of Texas, 97 F.3d 810 (5th Cir. 1996), where the Fifth Circuit held that accepting the testimony of its plaintiff's proposed expert witness "that no pregnant woman would be advised
is, after all, its raison d'etre. Although it has been noted that using expert witnesses to prove cognitive biases and workplace dynamics raises its own challenges, these are no greater in the disparate impact context than in the disparate treatment context. Indeed, the problems may be considerably fewer for disparate impact for three reasons. First, the expertise seems more directed at the theory of disparate impact—broad tendencies, not individual decisions—and therefore seems more apposite. Second, judges may be more disposed to admit such evidence in bench trials than in jury trials. Finally, admitting such testimony becomes easier when the result is not to automatically impose liability but to move the analysis to the question of whether such processes are justified despite the proven tendency.

Although Furnco and Hicks each involved a single decision, each seems to be a plausible candidate for disparate impact analysis. Of course, if the decision in question is truly anomalous—with the vast majority of decisions being made on the merits—a disparate impact will not exist. Indeed, the cases of discrimination that will evade review under this approach are mainly ad hoc and isolated instances involving employers who otherwise have “good stats.” Because individual disparate treatment remains available to challenge the rogue supervisor in an otherwise responsive employer, such a result does not leave the plaintiff any worse off than under the disparate treatment theory.
Other scholars have suggested different ways to frame workplace structures to invoke disparate impact. Professor Michelle Travis argues that disparate impact might allow challenges to telecommuting, which she documents as increasing gender inequality in the workplace rather than, as many hoped, freeing women to combine family and profession more easily. Seeking to exploit "antidiscrimination law's untapped transformative potential," Professor Travis urges applying disparate impact, either by challenging two-tier structures of telecommuting that favor higher level workers, who are mostly male, and exploit lower level workers, who are mostly female, or by showing that "employers treat telecommuters worse than non-telecommuters who are performing impact being available to whites and males. See generally Sullivan, supra note 148 (discussing this question and the evolution of the law over time). While that remains true, the cognitive biases approach to disparate impact will for the most part be available only to women and minorities, although whites and males might be able to apply these theories to nontraditional settings.

331. See Michelle A. Travis, Equality in the Virtual Workplace, 24 BERKELEY J. EMP. & LAB. L. 283, 288 (2003); see also Selmi, supra note 38, at 31 (discussing, while not using the term "disparate impact," how women's childcare commitments result in a "blurring of lines as to what constitutes discrimination," as neutral institutional structures such as demanding work hours or inefficient employment practices that rely on outdated modes of operation are seen as the source of persistent inequalities).

332. Professor Travis argues:

[T]elecommuting appears to be magnifying the existing gender segregation and hierarchy in the paid labor market because employers have developed two distinct types of telecommuting arrangements that affect men and women differently. For the predominantly male population of high-level professionals, employers use telecommuting as a benefit that gives workers increased choice, flexibility, and autonomy. In contrast, for the predominantly female population of low-level clerical workers, employers use telecommuting to increase managerial control and reduce costs, resulting in decreased pay, benefits, autonomy, job security, and advancement opportunities.

Travis, supra note 331, at 285 (footnote omitted).

333. Id. at 288. Professor Travis finds expansion of disparate impact theory to restructure the workplace more politically viable than seeking to require employers to "accommodate" caregiving along the lines of the ADA's requirement of accommodation of disabilities. Id. at 324-28; see also Nadine Taub, The Relevance of Disparate Impact Analysis in Reaching for Gender Equality, 6 SETON HALL CONST. L.J. 941, 949 (1996) ("Furthermore, because the remedies for norms and standards reflecting society's male tilt are thoughtful efforts at truly neutral policies and practices and not efforts at accommodating or compensating one sex only, ... [the disparate impact] approach does not run the risk of reinforcing or reintroducing stereotypes.").

334. Travis, supra note 331, at 343.
the same job." These practices affect "women disproportionately because women make up the majority of telecommuters in non-professional jobs."

Still other commentators argue for analyzing sexual harassment at least in part under the disparate impact model, for recasting

335. Id. at 344.

336. Id. Professor Travis stresses that "[b]ecause disparate impact theory eliminates the underlying practice, rather than merely granting individual exceptions, it can result in broader changes" while allowing "members of the majority group who do not fit the majority norms—e.g., male workers who have or who want to have significant caregiving responsibilities—to benefit." Id. at 330. That disparate impact will necessarily benefit all groups, not merely the race or gender raising the challenge, seems correct. But see Jolls, supra note 11, at 655 (examining disparate impact challenges to no-beard rules on the grounds that black males are more likely to be medically restricted in shaving than are white males). Professor Jolls finds that the typical remedy is to require "employers to exempt black men who are unable to shave from rules prohibiting beards. Thus, quite directly in these cases, disparate impact liability requires employers to incur special costs in response to the distinctive needs (measured against existing market structures) of a particular group of employees." Id. (footnote omitted) Jolls's analysis, however, is flawed. While a court might rightly limit the relief ordered to the violation shown, it would be a foolhardy employer who would refuse to exempt a white male with a comparable skin condition from the no-beard rule. Such conduct might not be contempt of the court order, but it would almost certainly be actionable disparate treatment of the white male on racial grounds. See Stewart J. Schwab & Steven L. Willborn, Reasonable Accommodation of Workplace Disabilities, 44 WM. & MARY L. REV. 1197, 1238 (2003) (disagreeing with Jolls's conclusions and noting that "[t]he standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody, not just the protected group").

337. See, e.g., Hébert, supra note 281, at 345-46 (arguing that in those harassment cases where there is no intent to discriminate on the basis of sex and no different treatment, "disparate impact might appropriately be used to challenge the sexually harassing behavior"); Kelly Cahill Timmons, Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?, 81 NEB. L. REV. 1152, 1155 (2003) ("[N]on-targeted sexual conduct in the workplace should be actionable only if the conduct's disproportionate impact on women is great."); see also Charles R. Callelos, Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the "Reasonable Person," 58 OHIO ST. L.J. 1217, 1249-50 (1997) (concluding that, while applying disparate impact to pure speech "raises more serious First Amendment concerns than does liability for [targeted] harassing speech, ... the main obstacle to relief ought to be in establishing the disparate impact as a factual matter rather than in confirming disparate impact analysis as a generally available theory of relief" (footnote omitted)); Robert A. Kearney, The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads, 20 HOFSTRA LAB. & EMP. L.J. 185, 224-25 (2003) (suggesting that, if one assumes that sexual speech impacts women more than men, "[a] better argument (though ultimately not persuasive ...) ... [is] that traditional disparate impact analysis provides the better basis for a plaintiff's claim"). But see Steven L. Willborn, Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law, 7 WM. & MARY BILL RTS. J. 677, 688 n.45 (1999) ("The disparate impact model is generally inapplicable in harassment cases.").
disparate impact theory in light of the language of the 1991 Civil Rights Act,\textsuperscript{338} or for using disparate impact to challenge discrimination against certain cultural practices to avoid essentializing them.\textsuperscript{339} Each of these arguments is worth taking seriously in an effort to revive the theory.

Of course, turning to disparate impact will impose higher costs on plaintiffs than current disparate treatment litigation, which some commentators view as a serious problem with expanding the theory.\textsuperscript{340} Litigating under the disparate impact model will necessarily require expert testimony, whether of the traditional statistical kind or of cognitive biases. But this objection is no greater than for those who would deploy cognitive bias expertise in pursuit of the disparate treatment mirage.

The final problem for disparate impact may largely explain why litigators and commentators have shied away from the theory: section 703(k) explicitly allows a defendant to justify disparities of impact. From a plaintiff's perspective, once she establishes disparate treatment, the case is largely over. Though the defendant might theoretically establish a defense to liability,\textsuperscript{341} this is not a realistic risk in most cases. More likely, the employer might establish the "same decision" limitation on remedies, but the plaintiff will still obtain attorneys fees and an injunction.\textsuperscript{342} In contrast, a disparate impact plaintiff can prevail in showing a particular employment practice has the requisite impact and still lose when the defendant carries its burden as to business necessity and job relation. Obviously, the more plausibly justifiable the employer's implicated

\textsuperscript{338} E.g., Zimmer, \textit{supra} note 200, at 473 (noting that since the amended statute does not require any showing of group impact for its alternative practices prong, its plain language permits an individual to establish a disparate impact claim "simply by proving: (1) that the employer took adverse action against the plaintiff based on an 'employment practice,' (2) that an alternative practice exists that serves the employer's interests yet would not adversely affect the plaintiff; and (3) that the employer refuses to adopt the better alternative").

\textsuperscript{339} E.g., Roberto J. Gonzalez, \textit{supra} note 50, at 2221 ("The disparate impact approach to workplace assimilation is preferable ... because it does not demand that plaintiffs produce a narrative of racial essence in order to obtain protection."); see also Yuracko, \textit{supra} note 50 (arguing that Title VII should prohibit irrational trait discrimination whenever it adversely impacts members of a traditionally disadvantaged racial or ethnic group, in part to avoid essentialism).


\textsuperscript{341} See \textit{supra} note 127.

\textsuperscript{342} See \textit{supra} notes 107-08 and accompanying text.
practices, the more likely the plaintiff would prefer a disparate treatment attack.

Beyond this practical problem, some commentators find the business necessity defense the main theoretical reason to avoid disparate impact. For example, Professor Krieger sees a no-win forced choice: either requiring businesses, especially small businesses, to conduct expensive validation studies to establish business necessity or watering down the defendant's burden of proof to the point of meaninglessness. "Either the [disparate impact] model will be relegated to a narrowing range of cases, as already appears to be occurring, or its application will place severe and ultimately unworkable burdens on employers in the fastest-growing and most promising segments of the national labor market." 343 Professor Krieger is correct that formal validation, as it is employed in disparate impact cases challenging testing regimes, will not be required across the spectrum of disparate impact cases. Since Griggs, testing has been subjected to much more onerous and empirical requirements than have other practices subject to disparate impact analysis. 344 But many cases have always approached business necessity from a more qualitative, less empirical, perspective. 345

Professor Krieger fears that this latter path leads to Wards Cove—if not to the shift of the burden of persuasion at least to the more relaxed notion of whether the practice is in fact necessary. 346 Her fears are not unwarranted, and this Article does not propose a solution as to precisely what should count as proving business necessity when testing validation is not invoked. But the new vision with which Professor Krieger's scholarship is concerned necessarily requires much more of a balancing of discriminatory forces with

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344. See generally 1 SULLIVAN, ZIMMER & WHITE, supra note 109, § 4.05 (discussing employee testing and issues of proof related to employment tests).
345. See, e.g., Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1118 (11th Cir. 1993) (holding that defendant carries its defense when it shows that "the practice or action is necessary to meeting a goal that, as a matter of law, qualifies as an important business goal for Title VII purposes"); see also Smith v. City of Des Moines, 99 F.3d 1466, 1471, 1473 (8th Cir. 1996) (holding that city did not discriminate against plaintiff by requiring plaintiff to pass a physical fitness test). See generally 1 SULLIVAN, ZIMMER & WHITE, supra note 109, § 4.03[c] (discussing job relatedness and business necessity defenses).
business needs than was true when discrimination meant animus and no need existed to tolerate such motivations at play in our society. Professor Green, for example, recognizes that the workplace cultures that enable bias also serve important functions for both employers and employees and should be tamed, not dictated by the law.\footnote{See Green, Workplace Dynamics, supra note 32, at 108 (discussing the role of subjectivity and discretion in certain workplaces).} Similarly, Professor Sturm resists flat prohibitions in favor of more nuanced development in the workplace.\footnote{See Sturm, supra note 33, at 522 (discussing the relationship between judicial norms and workplace-generated approaches).} Precisely such an approach is permitted by a more flexible business necessity doctrine in service to the disparate impact model.

In short, this Article argues that the dilution of business necessity, which Krieger fears, may in fact be the way out of the desert. Both Professors Green and Sturm argue for an approach that balances discriminatory impulses against employer needs, in large part because of the lack of clarity on how employers can deal effectively with cognitive biases enabled through workplace dynamics and cultures.\footnote{This at least in part underlies Professor Green's opposition to disparate impact: that doctrine tends to "a dichotomous decision. Either the job requirement or employment practice that has an adverse impact can be justified in terms of business necessity ... or the job requirement cannot be so justified, and thus its use amounts to unlawful discrimination ...." Green, Workplace Dynamics, supra note 32, at 143. Rather than dealing with the problem along dichotomous lines, "we need to begin exploring the ways in which employers can be held accountable for managing diversity within modern structures and practices to minimize the operation of discriminatory bias." Id.} But the difficulties of dealing with such biases do not change by describing them as problems of disparate treatment or disparate impact, and disparate impact offers an opportunity to explicitly weigh the necessity of current practices that are shown to enable bias.

This "structural turn" has generated pointed criticism by Professor Bagenstos. Although he recognizes an appeal in the predicates of the new scholarship, he argues that it does not offer a normative explanation about why unconscious bias should be actionable,\footnote{Bagenstos, supra note 8 (manuscript at 53) ("If antidiscrimination law is to respond to such bias effectively, the concept of wrongful discrimination must expand to embrace not simply the deviant acts of especially immoral people but the everyday actions of virtually all of us.").} nor a clear answer to "what's an employer to do" in
light of the new scholarship. Although most of his criticism is aimed at those scholars who attempt to refashion disparate treatment, those who look to disparate impact, as this Article does, are subject to similar criticism.

The criticism that cognitive bias scholarship does not provide a normative justification for expanding the definition of discrimination to include unconscious motivations is puzzling. The basic normative justification is the same as for any discrimination—to prevent both the unfairness and the economic costs of individuals being judged based on characteristics that should be irrelevant to productivity, even if the “judging” is unconscious. Cognitive bias is as normatively objectionable when it results in discriminatory employment decisions as when it results in erroneous criminal convictions. It may be, of course, that neither the courts nor the public accept the scholarship, but this is a question of the public acceptance of the theory, not a normative one. In this regard, increasing recognition of cognitive bias in a wide range of human activities should pave the way for greater judicial acceptance.

351. Id. at 45 (arguing that the absence of a definition of what counts as unlawful discrimination or as to when an employer has done enough to counteract it “render[s] almost nonsensical the job that participants in the structural turn would impose on the judiciary”).

352. Id. at 56 (stating that the proposal presented in this Article “seems to me entirely too optimistic” in light of the lack of success of the theory since the 1991 Civil Rights Act).


Attorneys, like everyone else, are susceptible to cognitive biases. There are well-established patterns of poor probabilistic judgment, for example, that likely affect attorneys who handle lots of cases. Lawyers, like others, devise heuristics for quick judgments that will sometimes conflict with default rules and empirically grounded probabilities about risks. “Belief perseverance” and “confirmatory biases” are also common; once we form hypotheses or explanations about how things work, those understandings are hard to revise—we tend to ignore or downplay contradictory evidence and misread information as supportive of the initial idea. Related to this is widespread “optimistic bias,” which describes the tendency of people to think they are better than average at many tasks, or that future events are likely to turn out better than actuarial probabilities predict. This can lead lawyers to assume their practice of quick file review with little investigation results in few errors, on the assumption that a veteran’s insights compensate for time-consuming diligence.

Id.

Although he does not frame it this way, Professor Bagenstos’s normative critique is closer to the mark in suggesting that structural scholars, this Article’s author included, have no answer to the question, how much discrimination is too much? Whether aimed at the disparate treatment advocates, such as Sturm and Green, or at disparate impact proponents, it is a fair criticism. Our approaches would both permit much discrimination (whether defined in terms of cognitive bias or adverse impact) to continue while simply trying to deal with those manifestations that can be managed by employers.

Although it is tempting to answer the criticism simply by responding that the alternatives proposed are the best of a bad lot, Professor Bagenstos’s question deserves a better response. That answer is simply that cost-benefit analysis, which is common to the structural theories, is the only way to begin addressing a deep-rooted problem and thereby continue the process of “debiasing” the workplace. The legal system certainly has no lack of ad hoc balancing methods, often camouflaged under the term “reasonable.” Thus, “reasonableness” often serves in torts for a kind of cost-benefit analysis, which is informed by what is technologically possible at the current time, not what is currently done. In antitrust, the “rule of reason” for a restraint of trade is a label pasted on what is often a rough-and-ready balancing of pro- and anticompetitive tendencies in a given area.

In the discrimination arena, this balancing will be done in terms of business necessity, and most likely in terms of whether the employer is dealing as effectively as possible with the phenomenon in light of the currently available alternatives. Although critics such as Professor Bagenstos are correct that sometimes this yields hard cases, there will also be easy ones: it would be hard for the employ-

355. See The T. J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (“Indeed, in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices .... [T]here are precautions so imperative that even their universal disregard will not excuse their omission.”). See generally Robert A. Prentice & Jonathan J. Koehler, A Normality Bias in Legal Decision Making, 88 CORNELL L. REV. 583 (2003) (exploring the cognitive bias in favor of the “normal”).

356. See generally Fred S. McChesney, Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law, 52 EMORY L.J. 1401, 1405 (2003) (describing the efforts of courts to create a single analytic rule to balance pro- and anticompetitive factors).
ers in *Furnco* and *Hicks* to defend slapdash practices of hiring and discharge.\(^3\)

Is there any reason to believe judges are prepared to engage in this exercise in any meaningful way? Much of this Article has been premised on the notion that federal judges are hostile to discrimination claims, thus making disparate treatment a pretty dry hole. Although one might suspect a similar antipathy toward expanding disparate impact, at least some reasons exist to believe that this approach may be more palatable.

First, the fact that disparate impact is not an absolute prohibition but a balancing of adverse effect and business justifications makes it a more attractive avenue in the present political climate than disparate treatment. Second, because juries are not involved, judges keep control of the process which should assuage their fears of jury irrationality. Third, to find disparate treatment in any given case, judges essentially have to label the employer as a racist or a sexist, or allow a jury to do so. To find disparate impact, judges need to merely find that the employer was, in effect, careless. Fourth, disparate treatment requires federal judges to suspend their intuition that discrimination, as they define it, is uncommon; disparate impact merely requires them to engage in a kind of technical regulation of workplace practices. Finally, disparate impact allows a more nuanced judicial control over remedies than does disparate treatment. Although a verdict of disparate treatment discrimination results in compensatory and punitive damages against the employer (unless, as Professor Green argues, a new remedial scheme is simultaneously created as a compliment to new liability regimes)\(^3\)\(^6\) disparate impact offers only backpay, which may

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357. This is not to say that word-of-mouth hiring, a version of which was involved in *Furnco*, see supra notes 315-17 and accompanying text, could never be justified as business necessity. But even Judge Posner's paean to this practice in *EEOC v. Consolidated Service Systems*, 989 F.2d 233, 235-36 (7th Cir. 1993), was uttered in trying to explain why the practice did not demonstrate intent to discriminate.

358. See Green, *Workplace Dynamics*, supra note 32, at 150. Professor Green writes that her approach

\[\text{would recognize that there may be some real limits on the ability of employers to control for individual bias. The goal would be to create incentives for problem solving within institutions without delegitimizing the task by holding employers liable for forms of discrimination over which they have no realistic means of control.}\]

*Id.; see also* Green, *Work Culture*, *supra* note 32, at 625-26 (arguing for an employer obligation*
be limited by the judge's equitable discretion. Similarly, equitable relief may be tailored to the violation found, taking into account the practicalities of the employer's situation.

This approach means that the courts will not use disparate impact to transform the workplace as Professor Travis urges, arguing that the "full-time face-time norm" for most businesses is the product of history rather than necessity. Although recognizing the limited success of efforts to use disparate impact to change workplace rules that adversely impact women because of family responsibilities, despite a long history of scholars calling for precisely such an approach, she argues:

Under the transformative approach, judges would distinguish a job's actual required tasks from the malleable organizational norms governing the when, where, and how of task performance, and they would treat the latter as particular practices regarding the former. When women challenge an exclusionary default structure, such as the full-time face-time norm, this approach would characterize the default workplace structure as a proper subject for disparate impact review.... This approach would force employers to demonstrate a business justification in order to

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to address discriminatory effects of workplace cultures but not necessarily to require any change in them).

359. 2 SULLIVAN, ZIMMER & WHITE, supra note 109, § 13.09.
360. Travis, supra note 282, at 10 ("[F]ull-time face-time has become not just the way that successful companies currently are designed, but also the way that they should and must be designed."); see also Chamallas, supra note 291, at 596.

The authors effectively challenge the image of employers as passively paying the going rate for labor, much like stock investors pay the current price for shares of stock. Instead, the image that emerges from the case studies is of employers ruled as much by the pay bureaucracies within their own organizations, as by outside forces.

Id.

resist workplace restructuring and retain an exclusionary workplace norm.\textsuperscript{362}

Although Professor Travis believes this approach is well-grounded in Title VII's language, few courts have so read the statute because most frame the full-time face-time norm as part of the job itself, not as a "practice" for organizing work. Such courts "are ignoring the transformative and integrationist potential that Congress implicitly endorsed when courts interpret the 'particular employment practice' language to exclude structural and organizational aspects of the workplace that act as 'barriers' and 'built-in-headwinds' for women with caregiving responsibilities."\textsuperscript{363}

Although the transformative view is the ideal, the perfect may be the enemy of the possible in the world of antidiscrimination law. Courts are more likely to take small steps in dealing with the very real problems that Professor Travis addresses if a less transformative model is adopted.

\textbf{CONCLUSION}

Surprising unanimity exists among the commentators that the law is far behind the times with respect to workplace discrimination. Traditional doctrines result in relatively few verdicts for plaintiffs, despite strong reason to believe that discrimination is pervasive. Although some dispute exists about the extent that discrimination has changed dramatically in kind from animus to cognitive bias, near unanimity exists that current doctrines do not adequately address either old- or new-fashioned discrimination. The division of opinion, therefore, lies less with the problem than with the solution. Departing from current approaches that try to redesign the disparate treatment paradigm, this Article argues for renewed interest in disparate impact.

Under such an approach, many of the problems sketched above disappear. First, consider unconscious discrimination. To the extent that this mechanism disadvantages particular employees, one should expect, say, to see fewer women in higher positions. A

\textsuperscript{362} Travis, \textit{supra} note 282, at 39.
\textsuperscript{363} \textit{Id.} at 79.
plaintiff challenging such a scenario would not have to prove that any particular individual discriminated against her—she would simply have to show that women were disproportionately underrepresented at higher levels in the company and, if possible, demonstrate what practice(s) caused this result. Whether the ultimate cause was animus, rational discrimination, conscious or unconscious stereotyping, workplace dynamics, or workplace culture would not matter, or at least it would not matter if the results could be attributed to employer action. Similarly, the question of whether certain traits were "racial" or "gender" traits would tend to disappear. To the extent that a certain trait or practice was more prevalent in one race or sex, relying on that trait would result in discrimination "because of" the prohibited ground. There would be no need to essentialize a race or gender in terms of such traits; at most, there would be a requirement to identify a correlation between race or gender and the absence of employment opportunities. From this perspective, Title VII becomes a risk-allocation statute. Women, for example, are at greater risk of having fewer employment opportunities than men. The risk might arise from male hostility, from rational discrimination, or from cognitive processing schemas. It might also arise from ways in which women actually differ from men at this point in history such that using certain criteria for decisionmaking enhances the risk of lost opportunities. The employer's responsibility under Title VII is to minimize that risk to the maximum extent consistent with its business interests.

This Article does not pretend that this perspective accurately reflects the law as it now exists, nor that the perspective is without its difficulties. The chief disadvantage is to cut Title VII loose from its moral moorings—it becomes another regulatory mechanism for the workplace rather than the moral imperative it now represents. And I do not claim that this approach is entirely new. Professor David Oppenheimer analyzed discrimination as negligence more than a decade ago, and there are those who have argued for a

364. See supra text accompanying notes 49-50.

Whenever an employer fails to act to prevent discrimination which it knows, or should know, is occurring, which it expects to occur, or which it should expect to
regulatory approach to the problem.\textsuperscript{366} This Article's argument is more limited and indeed, more doctrinal. Given the demands of the new learning, this Article asks how current doctrine can best accommodate the necessary changes. This Article's answer departs radically from many prior perspectives, almost all of which either seek to expand the individual disparate treatment paradigm or call for legislative solutions that are unlikely to be adopted. Although courts may be unwilling to adopt this Article's proposals, the expansion of disparate impact is the more likely route to reform in part because it hews more closely to the statutory text and in part because it requires less unsettling of embedded expectations.

\textit{Id.} 366. \textit{E.g.}, Poirier, supra note 36 (arguing for using a type of negligence model to combat workplace discrimination).