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THE BUSINESS NECESSITY DEFENSE IN DISPARATE IMPACT DISCRIMINATION CASES

*Susan S. Grover**

I. INTRODUCTION

When an employer's facially neutral practice disproportionately harms minority or women workers, the workers may sue for disparate impact discrimination under Title VII.¹ An employer whose practice is found to have such an impact may avoid liability by proving that the challenged discriminatory practice is required by "business necessity."² Long the subject of case-law colloquy, the business necessity defense secured a statutory foundation in the 1991 Civil Rights Act.³ Although the new provision aspired to provide statutory guidelines for the business necessity defense,⁴ it ultimately left open precisely the questions that antecedent case law had failed to resolve. The overarching issue continues to be whether the term "necessity" in the business necessity defense literally requires that the discriminatory practice be essential to the continued viability of the business, or whether it requires something less.⁵ This Article argues for the former interpretation.

Those who argue that the defense requires a demonstration of something less than true necessity generally rely on one of two rationales. One rationale compares disparate impact analysis with

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¹ Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e-2(k)(1)(A)-(B) (Supp. V 1993); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (holding facially neutral practices having discriminatory effect violate Title VII).

² 42 U.S.C. §§ 2000e-2(k)(1)(A)-(B); *Griggs*, 401 U.S. at 436. "Business necessity" is here used as an umbrella term for an affirmative defense encompassing the concepts of both business necessity and job relatedness. See *infra* notes 35-39 and accompanying text (discussing relationship between business necessity and job relatedness concepts).

³ 42 U.S.C. §§ 2000e-2(k)(1)(A)-(B).

⁴ Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071, 1071 (1991).

⁵ I use "continued viability" to mean that relinquishing the discriminatory practice will compel the employer to cut back its business, resulting in employee layoffs.

the disparate treatment analysis applicable to cases of intentional discrimination.⁶ This argument focuses generally on perceived distinctions between the levels of culpability involved in the two types of cases and calls for a lighter defense burden in impact cases (where there is said to be less culpability) than the strict necessity usually required by the bona fide occupational qualification defense (BFOQ) available in treatment cases (where there is said to be greater culpability).

The other rationale relied on by those advocating a diminished showing of business necessity in impact cases focuses on the deliberative process. This argument contends that factfinders in impact cases should apply a balancing test in lieu of a strict necessity approach. Advocates of this methodology assert that balancing is the most effective way to safeguard the business-autonomy interests Congress recognized as important when it enacted Title VII.⁷

This Article explores the foundations of these two rationales. It challenges the distinctions that are assumed to exist between the level of culpability involved in impact cases and the level of culpability involved in treatment cases. It also questions the fairness of a balancing approach in lieu of a strict necessity requirement. The Article concludes that both rationales actually point more readily toward an absolute necessity requirement than toward a lighter defense burden.

⁶ Title VII has yielded two major theoretical frameworks for employment discrimination cases: disparate impact and disparate treatment. The Supreme Court has stated that these Title VII schemes, in addition to allocating burdens, "establish . . . an order for the presentation of proof" at trial. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2746 (1993).

With respect to relative strengths of the BFOQ and business necessity defenses, the Supreme Court's pre-1991 Act decision in *International Union, UAW v. Johnson Controls* actually included dictum which expressly stated that business necessity is more lenient than the BFOQ defense. 115 S. Ct. 1196, 1203 (1993). *Johnson Controls* reflected the same Supreme Court view of business necessity that was advanced in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and which was expressly legislatively overruled in the 1991 Civil Rights Act. See *infra* text accompanying note 22.

⁷ See, e.g., 110 CONG. REC. 7246-47 (1964) (stressing important business-autonomy interests that Title VII should not infringe upon).

II. THE BUSINESS NECESSITY DEFENSE

A. CASE LAW DEVELOPMENT OF DISPARATE IMPACT ANALYSIS

The Supreme Court first recognized the disparate impact theory and its business necessity defense in *Griggs v. Duke Power Co.*⁸ Prior to passage of the 1964 Civil Rights Act, the Duke Power Co. hired black workers in only one of its five departments—the “labor department.”⁹ After the 1964 Act forbade segregation in hiring, Duke Power adopted a facially neutral policy requiring applicants for work in the four “white” departments to have a high school diploma and satisfactory scores on both a standardized general intelligence test and an aptitude test.¹⁰ These requirements excluded black workers from the four departments at a far greater rate than they excluded whites.¹¹ A unanimous Supreme Court held that facially neutral practices with such disproportionate impacts on blacks violated Title VII unless justified.¹² To justify the practices, the Court required Duke Power to show both business necessity and job relatedness, apparently equating the two concepts: “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.”¹³

Many of the lower court cases following *Griggs* required that the challenged practice be *essential*, not just *efficacious*, to the defen-

⁸ 401 U.S. 424 (1971).

⁹ *Id.* at 427.

¹⁰ *Id.* at 427-28.

¹¹ *Id.* at 430. The high school diploma requirement, for example, would have excluded 88% of the state's black residents and only 66% of its white residents. The tests utilized by Duke Power had in another case been found to exclude blacks at a rate of 94% while whites were excluded at a rate of 42%. *Id.* at 430 n.6.

¹² *Id.* at 430. The Court found the practices “[froze] the status quo of prior discriminatory practices.” *Id.* Because the *Griggs* Court was looking at a perpetuation of pre-Act intentional discrimination, its language could be taken as indicative that impact analysis is appropriate only in cases involving otherwise unchallengeable intentional discrimination. In fact, *Griggs* has been taken more broadly to permit impact challenges where there is no hint of discriminatory motive. *E.g.*, *Connecticut v. Teal*, 457 U.S. 440 (1982); *New York Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

¹³ *Griggs*, 401 U.S. at 431. In *Griggs*, the Court found no business necessity at Duke Power with regard to an acceptable purpose (such as predicting successful performance in the jobs to be filled) because no proof existed that the challenged educational criteria were effective predictors. *Id.* at 431, 432 n.7, 436.

dant's business. "[The] doctrine of business necessity 'connotes an irresistible demand.' The system in question must not only *foster* safety and efficiency, but must be *essential* to that goal."¹⁴ Moreover, the Supreme Court's own decisions in *Albemarle Paper Co. v. Moody*¹⁵ and *Dothard v. Rawlinson*¹⁶ characterized the business necessity defense as a narrow one, requiring that the discriminatory practice be "necessary to safe and efficient job performance."¹⁷ "[T]he [concurrences and dissents in the] *Albemarle* and *Dothard* decisions[, however,] showed the beginnings of a breakdown of the consensus regarding . . . [the business necessity standard]."¹⁸

The Court's full retreat from *Griggs*'s strict business necessity

¹⁴ Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 343 (1987) (quoting *United States v. St. Louis-San Francisco Ry.*, 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973)); see also *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1295-98 (8th Cir. 1975) (supporting narrowly construed business necessity defense); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971) (same); Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376, 387 n.47 (1981) [hereinafter *Business Necessity*] (citing cases construing business necessity narrowly). But cf. Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1031 (1993) (arguing Court's post-*Griggs* decision in *Dothard*, 433 U.S. at 321, "did not require that the criterion be necessary for the business to survive or for the job to be done at all but rather that it be 'necessary' for the job to be done well").

¹⁵ 422 U.S. 405 (1975).

¹⁶ 433 U.S. 321 (1977).

¹⁷ *Id.* at 331 n.14; see also Pamela L. Perry, *Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination Under Title VII*, 12 INDUS. REL. L.J. 1, 11-17 (1990) (discussing Supreme Court development of business necessity doctrine).

¹⁸ Perry, *supra* note 17, at 15. This breakdown developed further in *New York Transit Auth. v. Beazer*, 440 U.S. 568 (1979). In *Beazer*, the Court found the plaintiff had failed to demonstrate a sufficient disparate impact in the employer's practice, but noted it would have allowed the business necessity defense if the employer showed merely that its "[legitimate] goals [would be] significantly served by[, even if they do not require[,]] the practice. *Id.* at 587 n.31. Arguably, the lighter burden proposed by the Court was a function of the safety purpose underlying the drug abuse-related practice challenged in *Beazer*.

Ironically, while the *Griggs* Court stated of the defense that "the touchstone is business necessity," in a subsequent decision, the Court repeated the "touchstone" language but altered the standard to lessen the burden on defendants. In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), the Court stated that "the touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

standard finally materialized in *Wards Cove Packing Co. v. Atonio*.¹⁹ In *Wards Cove*, the Court espoused in dictum a far lighter burden on the employer than it had applied in earlier impact cases.²⁰ Under *Wards Cove*, the challenged practice need not be " 'essential' or 'indispensable' to the employer's business for it to pass muster."²¹ This aspect of *Wards Cove* met with congressional disapproval. In the Civil Rights Act of 1991, Congress reinstated the stricter standard.²²

B. STATUTORY DEVELOPMENT OF DISPARATE IMPACT ANALYSIS: THE 1991 CIVIL RIGHTS ACT

The Civil Rights Act of 1991 provided the first express legislative authority for disparate impact analysis and its business necessity defense. The 1991 Act imposes on defendants the burden of proving "that the challenged practice is *job related for the position in question and consistent with business necessity*."²³ Even if the

¹⁹ 490 U.S. 662 (1989). The previous year, a plurality of the Court asserted the same position in *Watson*.

²⁰ In the pre-Act case of *International Union, U.A.W. v. Johnson Controls*, this lighter standard was expressly described as "more lenient for the employer than the statutory BFOQ defense." 111 S. Ct. 1196, 1203 (1991). On remand from the Supreme Court's *Wards Cove* decision, the Ninth Circuit distinguished the pre- and post-*Wards Cove* standards as follows:

The district court on remand found again that the employer's interest in saving money justified its failure to winterize all of the bunkhouses. Although economizing in this way may have been unnecessary to the canneries' success or survival, we cannot say that it fails to serve the legitimate goal of reducing operating costs.

Atonio v. Wards Cove Packing Co., 10 F.3d 1485, 1503 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 57 (1994).

²¹ *Wards Cove*, 490 U.S. at 659. The Court stated that "this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils." *Id.*

²² 42 U.S.C. 2000e-2 (Supp. V 1993).

²³ *Id.* § 2000e-2(k)(1)(A)(i) (emphasis added). The pertinent provisions of the 1991 Act provide:

An unlawful employment practice based on disparate impact is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described

defendant succeeds in making this showing, the Act still imposes liability if the plaintiff demonstrates the availability of a less discriminatory alternative business practice which the defendant refuses to adopt.²⁴

Although the 1991 Act purports not to alter the business necessity doctrine that pre-existed *Wards Cove*, the Act's language facially suggests three changes from earlier case law. First, Congress's conjoining of job relatedness and business necessity in the Act represents a departure from some earlier case law that allowed a defendant to prevail by showing *either* job relatedness or business necessity.²⁵ The language "consistent with business necessity," on the other hand, could be interpreted as weaker than its precursors, requiring something less than absolute "necessity." Finally, codification of the less-discriminatory alternative doctrine clarifies the allocation of proof burdens and suggests that necessary does indeed mean essential.

The only legislative history available to explain the meaning of the statutory terms is contained in an interpretive memorandum.²⁶ That memorandum provides that "the terms 'business

in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Id. § 2000e-2(k)(1)(A).

²⁴ *Id.* § 2000e-2(k)(1)(A)(ii). "The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'" *Id.* § 2000e-2(k)(1)(C).

One commentator has observed that the Act's language providing for establishment of a less-discriminatory alternative may be read as a potential substitute for the plaintiff's initial establishment of a practice's disparate impact. Alito, *supra* note 14, at 1016. While the language of the provision may be ambiguous, such a reading is illogical. It would not make sense for Congress to impose on courts the obligation of considering every less-discriminatory alternative without requiring the plaintiff to make some showing that the current practice has a discriminatory impact. *But see id.* at 1038 (stating such interpretation is consistent with logic and policy).

²⁵ See *Business Necessity*, *supra* note 14, at 387 n.47 (providing relevant case law).

²⁶ Section 105(b) of the 1991 Act instructs courts to ignore any legislative history that purports to elucidate the business necessity defense, but permits reference to an accompanying "interpretive memorandum." Section 105 provides that

[n]o statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of the Act that relates to *Wards Cove* Business necessity/culmination/alternative business practice.

necessity' and 'job relatedness' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*.²⁷ Because the Court's decisions preceding *Wards Cove* were not consistent among themselves,²⁸ however, definitions for these seemingly straightforward statutory terms must be derived from the theoretical and policy underpinnings of the business necessity defense.²⁹ The memorandum does nothing to explain how "necessary" the practice must be or how the less-discriminatory-alternative concept interplays with other components of the defense. This Article examines the business necessity defense in order to aid the task of deriving such doctrine.

C. THE ELEMENTS OF DISPARATE IMPACT ANALYSIS

A disparate impact case begins with the plaintiff's establishment

Pub. L. No. 102-166, § 105(b), 105 Stat. 1075 (1991). What, exactly, the Act intended to codify is especially unclear in light of the Court's plurality decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). The Act purported to reinstate the law that existed prior to *Wards Cove*, but it may be "that *Wards Cove* simply created a clear majority for a position advocated by a plurality in *Watson*[:] [thus,] the question is whether the 1991 Act intend[ed] to overrule *Watson* as well as *Wards Cove*." Jerome M. Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 969 n.16 (1993).

²⁷ 137 CONG. REC. S15276 (daily ed. Oct. 25, 1991). However, the Bush Administration took the position that "[t]he bill embodies longstanding concepts of job-relatedness and business necessity and rejects proposed innovations. In short, it represents an affirmation of existing law, including *Wards Cove*." 137 CONG. REC. S15474 (daily ed. Oct. 30, 1991).

The language of the 1991 Act mirrors that found in the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(b)(6) (Supp. V 1993). Nevertheless, Congress's official legislative history to the 1991 Act forbade reliance on ADA legislative history, despite statements in the unofficial legislative history of the 1991 Act drawing upon the ADA for meaning. Alito, *supra* note 14, at 1024 n.54; see also Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 931 & n.48 (1993) (asserting Congress deliberately left open possibility that 1991 Act could be used to support same result achieved in *Wards Cove*).

²⁸ Compare *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (allowing defendant to meet business necessity defense by showing its legitimate goals were significantly served by challenged practice) with *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (requiring discriminatory practice to be necessary to job performance).

²⁹ But cf. Belton, *supra* note 27, at 930 (asserting plain meaning approach is supported by "built-in statutory legislative history" forbidding reliance on any legislative history other than interpretive memorandum).

of a statistical prima facie case.³⁰ At this initial stage, the plaintiff must prove that the challenged practice "select[s] applicants for hire or promotion in a . . . pattern significantly different from that of the pool of applicants."³¹ Once the plaintiff establishes a prima facie case, the employer either may disprove the existence of the alleged disparate impact by challenging the verity or significance of the plaintiff's statistics or may affirmatively prove that, despite the disparate impact, the practice is justified because it is "job related for the position in question and consistent with business necessity."³² Should the defendant succeed by establishing the latter defense, the plaintiff may nevertheless prevail by introducing evidence that there is a less-discriminatory alternative which the defendant cannot successfully rebut but refuses to adopt.³³

Application of these elements to particular facts requires clarification of three issues. One is the overarching *degree of need*

³⁰ In *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), Justice O'Connor, in a plurality opinion, stated that there is no hard and fast test for establishing the impact of a practice, but rather, courts must make this determination on a case-by-case basis. *Id.* at 995 n.3. Cf. *EEOC v. Steamship Clerks Union*, 48 F.3d 549, 604-06 (1st Cir. 1995).

³¹ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). In order to make this showing, the plaintiff must prove that (1) a discrete employer selection practice (or if no discrete practice is severable from the selection process, the process itself) (2) disproportionately excludes people of the plaintiff's class. Whether the degree of disproportion is adequate to constitute "impact" is determined on a case-by-case basis. *Watson*, 487 U.S. at 995 n.3. However, one type of practice that cannot be challenged based on its disproportionate impact is an employer's bona fide seniority system. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 349-50 (1977) (discussing Title VII's seniority-system exception). It is unclear whether an employee who is a member of the racial or gender (typically male) majority may utilize the disparate impact theory. *Perry*, *supra* note 17, at 10 n.33. But see *Craig v. Alabama State Univ.*, 804 F.2d 682, 688 (11th Cir. 1986) (recognizing impact claim for white male plaintiff); cf. *Sims v. Montgomery County Comm'n*, 890 F. Supp. 1530 (M.D. Ala. 1995) (apparently accepting that white males may mount disparate impact challenge).

³² 42 U.S.C. § 2000e-2(k)(1)(A) (Supp. V 1993); see *EEOC v. Steamship Clerks Union*, 48 F.3d 549, 604 (1st Cir. 1995). In *Watson*, a plurality of the Court concluded the defendant's burden at this stage was one of production rather than persuasion. Although the Court espoused this view the following year in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), Congress rejected it in the 1991 Act and established the defendant's burden as one of production *and* persuasion. 42 U.S.C. § 2000e(m).

³³ 42 U.S.C. § 2000e-2(k)(1)(A)(ii); see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1974). It is not clear whether a defendant can escape liability entirely by adopting such an alternative mid-way through the litigation. See Blumoff & Lewis, *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 43 (1990). Title VII provides additionally for other affirmative defenses not here relevant. See 42 U.S.C. §§ 2000e-2(h), 2000e-11.

issue that Part III of this Article addresses. The other two questions pertain to the relationship between business necessity and job-relatedness and the role of the less-discriminatory element of the defense.

1. *Business Necessity and Job-Relatedness.* The common and statutory law creating the business necessity defense has developed a two-part test, culminating in the language of the 1991 Act: "job related for the position in question and consistent with business necessity."³⁴ This duality raises the question of the relationship between business necessity and job relatedness.³⁵ The question consists of two sub-issues: first, whether employer practices can be defended as necessary to the business even though they are not job-related; and second, whether the business necessity defense can insulate practices that are job-related, even though the job itself is

³⁴ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

³⁵ Belton, *supra* note 27, at 931-32 (positing Court has not definitively answered question of whether terms "job related" and "business necessity" are alternative characterizations of same standard or are different standards); cf. Brodin, *supra* note 14, at 340 (noting in *Griggs*, "Court . . . left unexplained whether business necessity, described as the 'touchstone' of Title VII, is a separate form of justification, or merely another descriptive phrase for job relation" (citations omitted)). But see Alfred W. Blumrosen, *Society in Transition III: Justice O'Connor and the Destabilization of the Griggs Principle of Employment Discrimination*, 13 WOMEN'S RTS. L. REP. 53, 56 n.25 (1991) (asserting business necessity standard requires "rigorous review of employer practices, protecting only those [practices] with disparate impact which are objectively important[,] whereas job-relatedness standard 'accepts the existing order'"); Gary A. Moore & Michael K. Braswell, "Quotas" and the Codification of the Disparate Impact Theory: What did *Griggs* Really Say and Not Say?, 55 ALB. L. REV. 459, 481 (1991) (suggesting job-relatedness and business necessity are necessarily contradictory standards); Philip S. Runkel, Note, *The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity?*, 35 WM & MARY L. REV. 1177, 1185 (1994) (suggesting *Griggs* standard treats job-relatedness and business necessity as independently sufficient alternatives); Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 523 (arguing *Griggs* business necessity and job-relatedness language is contradictory).

An earlier version of the 1991 Act would have divided challenged practices into two categories: those pertaining to employee selection, which had to bear "a significant relationship to the successful performance of the job," and those not related to selection, which had to bear "a significant relationship to a manifest business objective of the employer." H.R. CONF. REP. NO. 856, 101st Cong., 2d Sess., 136 CONG. REC. H9552 (daily ed. Oct. 12, 1990).

Although Professor Belton argues against a two-step business necessity analysis, the strict, BFOQ-type standard he advocates in fact lends itself to the two steps in question—looking at the relationship between the requirement and the task to be performed; and looking at the relationship between the task to be performed and the ultimate purpose or nature of the business. See Belton, *supra* note 27, at 937 (discussing analytical steps of BFOQ).

not shown to be essential to the business.

The language and purpose of the 1991 Act suggest that job-relatedness and business-necessity are both required and should be treated as two facets of the same requirement. Supreme Court and congressional choice of conjunctive language to join the two elements counsels in favor of requiring that both elements be met if the two can logically work together. The two can work together. In fact, the business necessity analysis actually lends itself more readily to a dual requirement than to an either-or approach.

In order for the job-related requirement to constrain employers at all, it must incorporate a necessity requirement. Thus, the employer that demonstrates that a practice measures the ability to do particular tasks must also establish that the task in question is necessary to the ultimate business goal sought and that the ultimate goal is essential to the business.³⁶ If this interpretation were not imposed, employers would be able to prevail by submitting as evidence job definitions incorporating tasks for which the challenged practice accurately measured, even though performance of the tasks was not necessary to the business.

On the other hand, there cannot logically be a showing of business necessity without job-relatedness. In order to be "necessary," a practice must somehow measure the worker's ability to perform some function (broadly defined) that the employer wants done. Perhaps the employer defines the job to include the "task" or "function" of "contributing to the appearance of a well-educated work force." To create that appearance, then, is a "task" that the employer has assigned, just as much as a more mechanical function would be. In either case, the employer must demonstrate both that the practice accurately measures for the ability to create the desired appearance and that creation of that appearance is

³⁶ Cf. Belton, *supra* note 27, at 932 (positing "job-relatedness is simply one way an employer can prove business necessity"). But cf. Cynthia L. Alexander, Note, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595, 599 (1991) (suggesting Supreme Court has equated business necessity with job-relatedness and job-relatedness is established by showing practice is necessary to business). Professor Belton further argues that the unified business necessity/job-relatedness test established in *Griggs* was unnecessarily bifurcated by the 1991 Act's language, compelling an initial inquiry into job-relatedness followed by an inquiry into the necessity of the practice. Belton, *supra* note 27, at 936.

essential to the business.³⁷

2. *Less-Discriminatory Alternative.* The statutorily created role for the less-discriminatory alternative provides important information about the contours of the defense. The codification of the less-discriminatory alternative element confirms that the "necessity" required by the Act to establish the defense is true *necessity*, rather than mere efficacy. Under the terms of the 1991 Act, a practice cannot successfully be defended as "necessary" if a less-discriminatory alternative is available. Because the Act requires employers to adopt the least discriminatory alternative, the Act permits retention of only those practices that are *essential* to the business.³⁸

In addition, the codification clarifies the order of proof that applies in impact cases. It suggests that the defendant's burden is *not* initially to prove absolute necessity, but something less. Because the 1991 Act refers only to those less-discriminatory alternatives which the plaintiff introduces, the Act stops short of imposing on the defendant the burden of showing initially that all conceivable less discriminatory alternatives are unworkable.³⁹ The defendant should be put to the task of showing that such alternatives are unworkable and thus that the challenged practice is *essential* only after the plaintiff has introduced evidence of less-discriminatory alternatives. At the outset, then, the defendant must show simply that the practice significantly and efficiently achieves an essential goal.

Some courts and commentators would absolve the defendant of having to adopt less-discriminatory alternatives that are deemed

³⁷ Because any job may be defined in such a way that any desired employee ability or trait is incorporated into the job description, the element of job-relatedness should form a part of every business necessity analysis.

³⁸ The "less discriminatory alternative" language thus supports my contention that the business necessity defense requires the employer to show its practice is *essential*, rather than merely *effective*. However, the language lends support only at the choice-of-practice level of the business necessity analysis, and not at the necessity-of-the-goal level, which is a far more difficult issue. See *infra* notes 36-45 and accompanying text (discussing levels of business necessity analysis).

³⁹ See Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 319 (1993) (discussing EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1992) and arguing that requiring particularized validation studies from every employer as contemplated by Guidelines is counterproductive).

overly costly.⁴⁰ Although tenable at one time, this position currently poses problems.⁴¹ As explained in the next section, parallels between business necessity analysis and disparate treatment analysis demonstrate that the defenses available under the two schemes should be treated comparably. The Supreme Court's decision in *International Union, UAW v. Johnson Controls, Inc.* suggested, in the context of disparate treatment and its BFOQ defense, that the expense of eliminating a discriminatory practice must be ignored with the possible exception of where the expense would threaten the very survival of the defendant's business.⁴² If the BFOQ and business necessity defenses are comparable, then, at most only ruinous costs may be invoked in support of the business necessity defense as well.⁴³

⁴⁰ See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (plurality opinion) (permitting consideration of costs and other burdens of proposed less-discriminatory alternative practices in deciding whether such alternatives are "equally effective" as challenged practice in serving employer's legitimate business goals); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 114-15 (1974) [hereinafter Note, *A No-Alternative Approach*] (advocating "not insubstantial" test, requiring employers to adopt proposed alternative if cost difference between it and current discriminatory practice is "insubstantial"). But see Brodin, *supra* note 14, at 353-54 & n.203 (discussing cost-based defense when economic risks are at stake); Note, *The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation*, 106 HARV. L. REV. 1621, 1625-26 (1993) (contending that cost-based defenses should be rejected in disparate impact context).

⁴¹ It is frequently argued that employers will be caught in a quandary: facing liability for unlawful affirmative action if they adopt quotas, facing liability for unlawful impact discrimination if they do not. See, e.g., Moore & Braswell, *supra* note 35, at 470. Given Title VII's primary goal of ending discrimination against those who have historically been victims of discrimination, it is appropriate to construe the Act in a way that yields affirmative action liability, rather than impact liability if some type of liability cannot be avoided. See, e.g., Donald O. Johnson, *The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism*, 47 U. MIAMI L. REV. 469, 472-73 (1992) (discussing history of discrimination that Title VII was intended to end). The law should be interpreted in a way that will cause employers to err on the side of including traditionally excluded groups.

⁴² 499 U.S. 187, 210-11 (1991); see also EEOC: Policy Guide on Supreme Court's *Johnson Controls* Decision, 8 Lab. Rel. Rep. (BNA) 405:6941, 6943 n.7 (June 28, 1991) (suggesting *Johnson Controls* decided costs could not support BFOQ defense). But see MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 441-42 (3d ed. 1994) (noting Court in *Johnson Controls* reserved issue of whether "costs . . . so prohibitive as to threaten survival of the employer's business" might justify BFOQ).

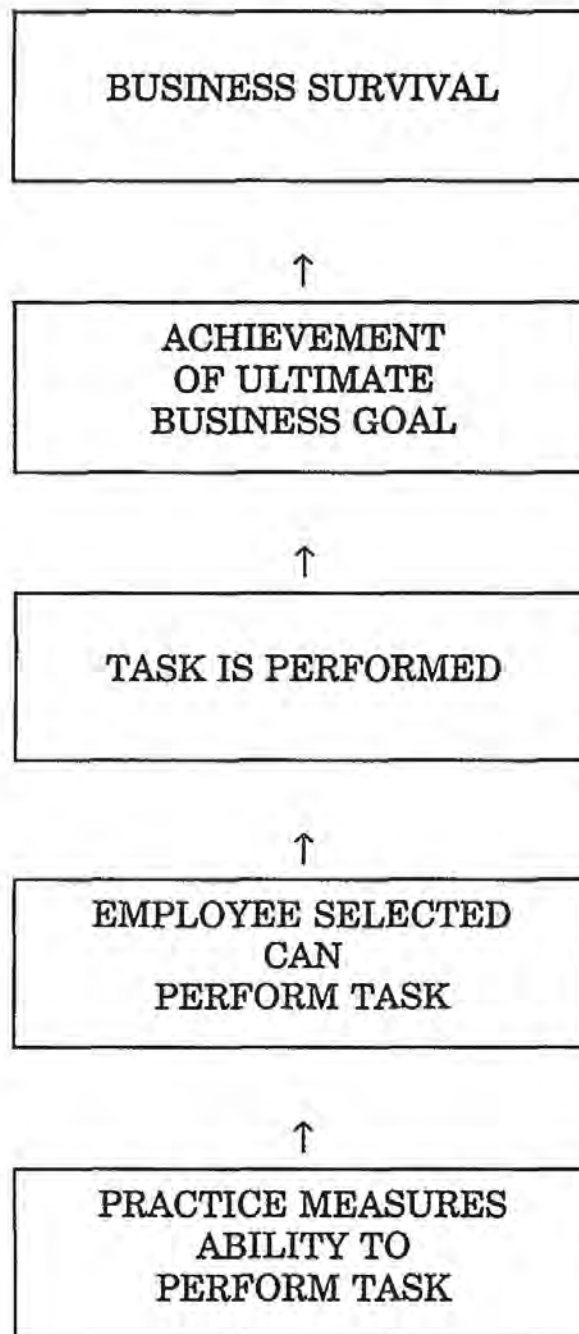
⁴³ See generally ZIMMER ET AL., *supra* note 42, at 440-42 (discussing role of cost justification in employer defenses); Brodin, *supra* note 14 (same).

3. *Summary of Business Necessity Analysis.* The elements an employer must demonstrate to establish the business necessity defense are:

- (1) the ultimate business goal which the employer seeks to achieve through the practice is essential to the business;⁴⁴
- (2) the tasks for which the practice measures ability are essential to achievement of that ultimate business goal;
- (3) workers selected for the positions in question must be able to perform the tasks; and
- (4) the practice selected is necessary to measure the ability to perform those tasks.

The analysis may be depicted as follows with each arrow indicating a point at which the employer must establish that the occurrence on the bottom is necessary to the occurrence immediately above:

⁴⁴ *But cf.* Marcus B. Chandler, Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911, 934 (1979) (arguing employer's good faith belief in need for its goal should establish adequacy of goal and only relation of practice to achievement of stated goal should be assessed).



Thus, depending on the vagaries of the particular case, the employer must show that the practice measures ability to perform a task, which measurement assures that employees selected will be capable of performing the task, which ability to perform assures

that the task will, indeed, be performed, and so on. These elements may be divided into two categories. At the top is the ultimate business goal asserted by the employer and the arrow connecting it with the business's survival. With respect to this element, this Article posits that achievement of the goal must be truly essential to the continued viability of the business rather than simply beneficial to the business. The second category of elements (represented by all other arrows in the chart) consists of all of the sub-elements pertaining to the challenged practice and the traits it seeks to measure. With respect to such intermediate goals and the relationships between the practice and these goals, this Article similarly advocates a strict necessity showing, but suggests that the defendant's un rebutted demonstration that the practice significantly and efficiently achieves the ultimate goal may create a presumption that the practice is essential to the goal's achievement. Only when the plaintiff introduces evidence of the availability of less-discriminatory alternatives, as described in the 1991 Act, must the defendant demonstrate why retaining the more discriminatory alternative is essential to the business.⁴⁵ If the defendant adopts the practice identified by the plaintiff as a less-discriminatory alternative, the defendant may avert liability under the terms of the 1991 Act.

III. WHY THE PRACTICE MUST BE CRUCIAL TO THE EMPLOYER'S BUSINESS

As stated above, arguments opposed to a strict necessity requirement rely on two rationales. One is that distinctions between disparate treatment cases and disparate impact cases warrant a lighter defense burden in the latter. The other is that a balancing test comports with the goals of Title VII better than a strict necessity test does. The remainder of the Article examines the assumptions underlying these two positions.

⁴⁵ But see Greenberger, *supra* note 39, at 320 (arguing employers should be required to show affirmatively that they have conducted survey of alternatives as part of business necessity proof); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1327 (1987).

A. IMPACT AND TREATMENT—ANALOGIES AND CONTRASTS

1. *Disparate Treatment Analysis.* Unlike disparate impact discrimination, which may result inadvertently from a seemingly benign practice, disparate treatment discrimination entails adverse employer decisionmaking actually motivated by an employee's membership in a Title VII-protected class.⁴⁶ For this reason, disparate treatment is often called "intentional" discrimination.⁴⁷ There are three types of disparate treatment cases: (1) individual inferential proof cases, using the burden-shifting scheme adopted in *McDonnell Douglas Corp. v. Green*;⁴⁸ (2) group (or systemic) inferential proof cases, using statistics to establish that the employer engages in a system-wide "pattern and practice" of discrimination;⁴⁹ and (3) direct evidence cases, in which an individual or group plaintiff establishes discriminatory intent through direct evidence, either in the form of an overt (admitted) discriminatory practice or through direct evidence regarding the defendant's motives or state of mind.⁵⁰

⁴⁶ See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (explaining differences between impact and treatment cases).

Title VII prohibits employers from discriminating based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (1988 & Supp. V 1993). While the business necessity defense is available in impact cases involving any of the five prohibited categories of discrimination, the BFOQ defense is *not* available in treatment cases involving race or color. *Id.* § 2000e-2(e)(1).

⁴⁷ See *infra* notes 60-70 and accompanying text (discussing meaning of intent and motive in Title VII context).

⁴⁸ 411 U.S. 792 (1973); see also *infra* note 52 (providing factors required to establish prima facie case).

⁴⁹ E.g., *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). In explaining why it is permissible to infer discriminatory intent based on statistical disparities, the *Teamsters* Court stated, "[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Id.* at 339-40 n.20. The disparity established by the plaintiff's statistics in a systemic treatment case is greater than that needed to establish discrimination in an impact case. *Id.* at 339 n.20.

⁵⁰ E.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); see *infra* notes 71-74 and accompanying text (discussing Court's treatment of employer's state-of-mind in *St. Mary's Honor Ctr. v. Hicks*). There is not a clear demarcation between direct evidence and "high quality circumstantial evidence." Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2321 n.290 (1995); Charles Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment After Title VII*, 56 BROOK.

In a direct-evidence treatment case, the ultimate issue of discrimination turns simply on whether the plaintiff's direct evidence of discrimination is more persuasive than the defendant's countervailing evidence. In an individual inferential case, by contrast, the Court has developed a burden-shifting scheme to assist the factfinder in resolving the ultimate issue of discrimination.⁵¹ In such cases, the *McDonnell Douglas* scheme requires the plaintiff to persuade the factfinder that four specific facts exist. Proof of these four facts creates a presumption of discrimination.⁵² A burden of production then shifts to the defendant to offer a legitimate nondiscriminatory explanation for its decision.⁵³ If the defendant meets its burden of production, the plaintiff may then submit evidence that the defendant's proffered reason is pretextual. The factfinder considers all of this evidence in deciding whether the plaintiff in an individual inferential case has proven the ultimate fact of discrimination. If a pattern-and-practice plaintiff, by contrast, mounts an adequately strong statistical case that his

L. REV. 1107, 1118-19 (1991).

⁵¹ "It is unrealistic . . . to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker . . ." *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (discussing plaintiff's difficulty in proving employer intent when challenging selection practice).

⁵² The four elements that comprise this "prima facie case" are as follows: (1) the plaintiff is a member of a Title VII-protected group; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, she was rejected; and (4) after her rejection, the position remained open and the employer continued to seek applicants from persons with the plaintiff's qualifications. *McDonnell Douglas*, 411 U.S. at 802. Of course, the specific facts falling within each of the elements will vary, depending on the circumstances of the plaintiff's case. *Id.*

The *Teamsters* Court further elucidated the nature of the prima facie case, explaining:

[T]he *McDonnell Douglas* formula does not require direct proof of discrimination, [but] it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

Teamsters, 431 U.S. at 358 n.44.

⁵³ By placing a burden of production on the defendant, the defendant is compelled to introduce evidence sufficient to permit an inference of the fact it is attempting to prove. This is a lesser burden than the burden of *persuasion*, which means that if the defendant fails to prove the existence of the fact at issue, the plaintiff immediately prevails.

group is underrepresented in the defendant's workplace, the defendant typically responds by challenging the statistics rather than by articulating a legitimate, nondiscriminatory reason.⁵⁴

Whether the fact of disparate treatment discrimination is established with direct or inferential evidence, the defendant is liable for that discrimination unless the defendant proves, by a preponderance of the evidence, the existence of facts supporting an affirmative defense.⁵⁵ For purposes of the present discussion, the only relevant treatment-based affirmative defense is the bona fide occupational qualification (BFOQ).⁵⁶ The BFOQ defense succeeds

⁵⁴ See *Teamsters*, 431 U.S. at 342 n.24 (holding general statements that defendant hired best-qualified applicants insufficient to rebut prima facie case of systemic discrimination); cf. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309 (1977) (noting defendant may also respond by showing that racial disparities revealed in plaintiff's statistics are result of discrimination occurring prior to enactment of Title VII). But see *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988) (holding defendant's informal evidence that women were less interested than men in holding certain sales positions was sufficient to rebut Agency's statistical prima facie case).

⁵⁵ This aspect of disparate treatment presents an anomaly. When an employer implements an overtly discriminatory practice, such as the open exclusion of all women, a BFOQ defense is readily available as a defense. However, when the employer, perhaps inadvertently, treats an employee adversely because of her sex, the BFOQ defense—though theoretically available—is unlikely to help the employer. This renders overt discrimination more easily defensible than negligent discrimination. Of course, if the plaintiff establishes in the course of an inferential case that the employer indeed did exclude her based on her sex, the employer can, in theory, invoke the BFOQ to argue that women cannot do the job.

The Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), suggested the availability of an additional affirmative defense. In *Price Waterhouse*, the Majority held that a defendant could avoid liability entirely by proving that legitimate reasons would have compelled the defendant to make the same adverse decision even in the absence of the discriminatory reason. *Id.* at 237. However, the 1991 Civil Rights Act eliminated the availability of this affirmative defense. Under the Act, the defendant's proof that it would have made the same decision absent its discrimination limits the remedies for which the defendant may be held liable, but does not serve as an absolute defense. 42 U.S.C. § 2000e-2(m) (Supp. V 1993).

⁵⁶ 42 U.S.C. § 2000e-2(e)(1) (1988 & Supp. V 1993). In fact, in the context of race discrimination, the BFOQ defense is not even available. Interestingly, prior to the Court's decision in *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991), some lower courts had suggested that the business necessity defense applied to both disparate impact and disparate treatment cases. *E.g.*, *Hayes v. Shelby Mem. Hosp.*, 726 F.2d 1543 (11th Cir. 1984); *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982).

Another affirmative defense to disparate treatment discrimination under Title VII is a bona fide affirmative action program. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (holding affirmative action program did not violate Title VII). Because this defense applies only where the employer's action is predicated on an express policy recognizing the existence of discrimination, it has no analog in the disparate impact context.

only when the employer establishes that "the essence of the business operation would be undermined by [not hiring members outside of the plaintiff's protected group]."⁵⁷ To establish this defense, the employer might prove, for example, (1) that only men can perform the central tasks of the job and (2) that the performance of the tasks which require a male-only workforce are crucial to the essence of the employer's business.⁵⁸ The BFOQ defense, then, is available only where an employer's business could not operate at all if it were forced to include the plaintiff's protected group.⁵⁹ In the BFOQ context, "necessary" means "essential."

The following chart sets forth a simplified synopsis of the various types of analysis used in Title VII cases to facilitate comparisons between them:

⁵⁷ *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

⁵⁸ To show that only people of one sex can do the job, the employer may show that there is "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [members of the excluded sex] would be unable to perform safely and efficiently the duties of the job involved." *Weeks v. Southern Bell Tel. & Tel.*, 408 F.2d 228, 235 (5th Cir. 1969).

Wilson v. Southwest Airlines, 517 F. Supp. 292 (N.D. Tex. 1981), demonstrates the meaning of "essence of the business." The *Wilson* court rejected a contention by the defendant airline that the essence of its business entailed using only female flight attendants who would appeal to male passengers, concluding instead that the essence of an airline's business is transporting passengers. *Id.* at 302.

⁵⁹ *Johnson Controls*, 499 U.S. at 210; see *supra* note 42. But see *id.* at 216-17 (White, J., concurring) (proposing lighter employer burden when asserting safety-based defense to treatment claim).

**DISPARATE IMPACT AND DISPARATE TREATMENT DISCRIMINATION:
STEPS IN THE ANALYSIS**

| STAGE IN ANALYSIS→ | PLAINTIFF'S PRIMA FACIE CASE | DEFENDANT'S REBUT-TAL | ADDITIONAL PROOF FROM PLAINTIFF ON QUESTION OF DISCRIMI-NATION | DEFENDANT'S AFFIRMA-TIVE DEFENSE—ONCE DISCRIMINATION IS PROVED | PLAINTIFF'S LAST WORD |
|---|---|--|--|---|--|
| TYPE OF CASE ↓ | | | | | |
| IMPACT | STATISTICS SHOWING FACIALLY NEUTRAL PRACTICE HAS DISPRO-PORTIONATE IMPACT | NO DISPARATE IMPACT (OVERCOME PLAIN-TIFF'S INFERENCE OF IMPACT BY CHALLENG-ING STATISTICS) | | PROVE: PRACTICE IS JOB RELATED AND CON-SISTENT WITH BUSI-NESS NECESSITY | LESS RESTRICTIVE ALTERNATIVES |
| SYSTEMIC TREATMENT INFERENTIAL | STATISTICS AND DI-RECT EVIDENCE CREAT-ING INFERENCE THAT DISCRIMINATION IS OC-CURRING SYSTEMATI-CALLY | OVERCOME INFERENCE OF DISCRIMINATION BY CHALLENGING STATIS-TICS | | PROVE: DISCRIMINATO-RY CHARACTERISTIC IS BFOQ | [PHASE TWO OF SUIT: INDIVIDUAL PLAINTIFF ESTABLISHES MEM-BERSHIP IN CLASS AND INDIVIDUAL HARM] |
| INDIVIDUAL TREAT-MENT: MCDONNELL DOUGLAS INFERENTIAL | PLAINTIFF, MEMBER OF PROTECTED GROUP, APPLIED FOR OPEN POSITION, WAS REJECT-ED, AND JOB STAYED OPEN | LEGITIMATE, NON-DIS-CRIMINATORY REASON (PRODUCTION BURDEN ONLY) | SHOW PRETEXT—PROVE THE ULTIMATE ISSUE OF MOTIVE | PROVE: DISCRIMINATO-RY CHARACTERISTIC IS BFOQ | |
| INDIVIDUAL TREATMENT: DIRECT | OVERTLY DISCRIMINA-TORY PRACTICE OR DIRECT EVIDENCE OF DISCRIMINATORY ANI-MUS | SHOW OVERTLY DIS-CRIMINATORY PRAC-TICE NOT IN EXISTENCE OR OVERCOME INFER-ENCE OF DISCRIMINA-TORY ANIMUS | | PROVE: DISCRIMINATO-RY CHARACTERISTIC IS BFOQ | |

2. *The Discriminator's State of Mind in Impact and Treatment Cases: No Rewards for Benign Intent.* Commentators have used the differences between impact and treatment analysis to support arguments that the stringent level of business need required to establish the BFOQ defense in disparate treatment cases is greater than the level of need required to establish the business necessity defense in impact cases. They argue that treatment defendants have discriminated "intentionally" and are therefore more culpable than impact defendants, who have merely employed facially neutral practices.⁶⁰ This distinction is not accurate.⁶¹ Disparate treatment does not necessarily entail any greater culpable intent than the typical impact case.⁶² If employer culpability is to be the measure, then the same strict necessity standard that controls in the BFOQ context should apply to the business necessity defense in impact cases as well.⁶³

⁶⁰ See, e.g., Perry, *supra* note 17, at 60-62 (noting disparate impact is viewed as less objectionable than disparate treatment; harm to employees resulting from impact is less wide spread than harm resulting from treatment; potential for harm to employers is greater if facially neutral policy is eliminated than if overtly discriminatory policy is eliminated; and for these reasons the BFOQ defense imposes stricter standard).

⁶¹ See Belton, *supra* note 27, at 938 (discussing close relationship between BFOQ and business necessity test and advocating that courts treat them similarly).

⁶² There are other problems with viewing discrimination liability from a culpability standpoint. There is a growing need to see employment discrimination law less as a system for catching "bad" decisionmakers and more as a system for encouraging decisionmakers, specifically those with the power to impose systemic changes, to think about how to create employment structures that will foster substantive equality. Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2398 (1994) (stating that employer would be held liable if it failed to guard against stereotyping); cf. Perry, *supra* note 17, at 57-60 & n.294 (asserting impact- and treatment-based discrimination are essentially indistinguishable); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (concluding discriminatory animus is unnecessary to establish liability in treatment-based claim). But see *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979) (holding Equal Protection Clause of Constitution imposes no liability unless purpose of discrimination is to harm women). An impact case is as likely to entail "intent" to discriminate as a treatment case; even the Court has recognized that impact analysis is sometimes used to "get at" intentional discrimination that can not be effectively proved through treatment analysis. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

⁶³ See Brodin, *supra* note 14, at 358 (noting *Griggs* recognized "employers can do as much harm to minorities and women by unintentional acts as they can by acts designed to discriminate Given the equation of purposeful discrimination and practices which are its functional equivalent, the affirmative defenses in both types of lawsuits should be substantially similar."); Perry, *supra* note 17, at 56 (arguing same standards should apply

Arguments to the contrary, predicated on the idea that the stricter standard is appropriate when a defendant is shown to have discriminated intentionally, misunderstand the concept of intent in Title VII doctrine. For purposes of Title VII, an employer intentionally discriminates when, for example, it treats a woman differently from how it would treat a similarly situated man.⁶⁴ "Intent to discriminate" will be found *even if* the employer is not aware that it is motivated by discrimination. The employer's discrimination (and perhaps some underlying prejudice against the protected group) may be entirely unconscious but is nevertheless deemed disparate treatment (that is, intentional) discrimination for Title VII purposes.⁶⁵ Title VII, then, requires neither that the employer intend to treat the employee differently because of her sex nor that the employer realize its decision was actually motivated by sex.⁶⁶

In reality, the distinctions in culpability drawn between the impact and treatment analyses have more to do with imprecise

in BFOQ and business necessity defenses). In fact, the EEOC and courts have stated that the BFOQ defense is available primarily in situations in which the defendant excludes a protected group because the defendant requires the physical or biological characteristics of the other group. See 29 C.F.R. § 1604 (1995) (outlining sex discrimination guidelines). Thus, for example, the BFOQ defense is available to an employer who excludes women if the employer's business is to maintain a sperm bank.

⁶⁴ The standard in treatment cases is simply whether the plaintiff would have received the same treatment had she been of a different race or sex. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 67, 69 (1972). This concept of discrimination, described as "equal protection" discrimination, permits the inference of an unlawful purpose or motive to be drawn from differential treatment. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977).

⁶⁵ As Professor Lawrence has noted:

Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.

Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987).

⁶⁶ *Lukens Steel*, 482 U.S. at 669. *But see Feeney*, 442 U.S. at 278-79 (requiring initial finding of intent to harm protected group in order to establish equal protection violation).

language used in discussions of the treatment doctrine than with any true differences between the two approaches.⁶⁷ What courts actually require in Title VII disparate treatment cases is not properly denominated "intent" at all, but is instead "motive." "Motive," as Professor Don Welch explains, "is the underlying [possibly unconscious] cause or reason moving an agent to action . . . , [whereas] [i]ntent is the *conscious* purpose with which one acts to effect a desired goal or result."⁶⁸

Professor Welch demonstrates that courts and commentators have confused the concepts of intent and motive in the Title VII context. He confirms that the actual test applied in Title VII disparate treatment cases has been a test of motive, although it has been called one of intent.⁶⁹ Because the "intent" requirement in disparate treatment cases does not necessarily entail culpability at all, it does not serve as a means for distinguishing between treatment-based and impact-based discrimination.⁷⁰

⁶⁷ Cf. Michael J. Zimmer, *Teamsters: Redefinition and Retrenchment of Concepts of Discrimination*, 30 N.Y.U. CONF. ON LAB. 51 (1977) (asserting Title VII equal-treatment analysis does not involve question of intent).

⁶⁸ D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733, 738 (1987) (emphasis added). Professor Welch further notes:

Motive is a causal concept. It comes into play when a concern exists that decisions were made "because of" or "on the grounds of" certain factors. Motive addresses reasons for actions, realities that shape and influence actions, regardless of whether the actor is fully aware of these realities. Intent, on the other hand, is a state of awareness concept. An actor's intent speaks to the purpose that is being consciously pursued—the goals one has in mind as choices are being made.

Id. at 739.

⁶⁹ *Id.* at 763-72. Welch further asserts that a test of motive, rather than one of intent, is appropriate in the Title VII context. *Id.* at 775-78. The 1991 Act has confirmed this view in the mixed-motives context, stating that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (Supp. V 1993).

⁷⁰ Both systemic disparate treatment and disparate impact are based on a statistical demonstration of discrimination. Arguably, though, courts require statistical *significance* to establish a prima facie case of systemic disparate treatment, but not establish a prima facie case of disparate impact. *Compare* *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977) (stressing, in systemic disparate treatment case, the importance of statistical analysis in Title VII cases) *with* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (O'Connor, J., concurring) (stating, in disparate-impact case, that no particular test of statistical significance is required in Title VII cases). This difference may

The Supreme Court's decision in *St. Mary's Honor Center v. Hicks*⁷¹ potentially increases the amount of evidence a plaintiff must introduce on the question of motive, but does nothing to diminish the claim that treatment may be established without a showing of conscious intent. In *Hicks*, the Court rejected the view that a disparate treatment plaintiff who proves that the defendant's proffered reason is not the true reason for the defendant's action automatically prevails.⁷² Thus, the *Hicks* decision permits, but does not require, the factfinder to conclude that the lying defendant has discriminated.⁷³ Although for some plaintiffs *Hicks* increases the difficulty of establishing motive, it does not alter, or in any way add to, the definition of discrimination. Discrimination continues to be defined as differential treatment based on membership in a protected class.⁷⁴ If employer consciousness of the reasons for its treatment was not a requirement before *Hicks*, neither is it a requirement afterwards.

3. *Disparities in Remedies Available for Impact and Treatment Cases.* Linda Hamilton Krieger carries Welch's intent/motive distinction one step further.⁷⁵ She suggests that, because the levels of culpability in impact and treatment cases are often indistinguishable, the remedies available in the two types of cases

create the impression that treatment cases involve greater culpability, but this is not necessarily correct. Cf. *Thomas v. Metroflight*, 814 F.2d 1506, 1510-11 n.4 (10th Cir. 1987) (requiring plaintiff to show statistical significance in order to establish prima facie impact case). Even if the prima facie systemic-treatment case requires statistical significance and the prima facie impact case does not, the fact remains that any employer "intent" to discriminate that can be inferred from the plaintiff's systemic-treatment case may well be an intent unknown to the defendant, which is to say the defendant lacks motive.

⁷¹ 113 S. Ct. 2742 (1993).

⁷² *Id.* at 2751 ("[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.").

⁷³ Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 998 (1994); Malamud, *supra* note 50, at 2254.

⁷⁴ 42 U.S.C. § 2000e-2(a) (1988); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987); see also ZIMMER ET AL., *supra* note 42, at 110 (noting Court's decisions suggest it does not believe most discrimination is animus-based).

⁷⁵ Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

should be the same.⁷⁶

Such a conflation of the two types of cases for remedial purposes would represent a change of direction from the 1991 Act, which added levels to the remedial hierarchy to include additional compensation for willful offenses. The current structure appears as follows:

Disparate Impact: equitable relief, including non-compensatory monetary damages;⁷⁷

Disparate Treatment (non-willful): equitable relief and compensatory damages;

Disparate Treatment (willful): equitable relief and compensatory damages;

Disparate Treatment (malicious or reckless disregard of rights): equitable relief, compensatory damages, and punitive damages.⁷⁸

Professor Robert Belton apparently would agree with Krieger. In response to the distinctions drawn by the 1991 Act, Professor Robert Belton has stated:

The exclusion of disparate impact . . . claims [from those for which compensatory and punitive damages are available] has the effect of creating first- and second-class cases of unlawful discrimination. Even

⁷⁶ *Id.* at 1243. Krieger would bifurcate the remedy scheme at a different point than that chosen by Congress. Although Krieger argues that similarities in the level of culpability between impact and systemic-treatment cases call for a reduction of systemic-treatment remedies, it may be more logical to *increase* the remedies available to impact plaintiffs. See *infra* note 80 and accompanying text (explaining that given purposes of Title VII, defendant in impact case should not be faced with less-drastic remedies).

⁷⁷ Back pay, for example, is available in disparate impact cases. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Green v. USX Corp.*, 843 F.2d 1511 (3d. Cir. 1988), *cert. granted and judgment vacated*, 109 S. Ct. 3151 (1989).

⁷⁸ The 1991 Civil Rights Act adds compensatory and punitive damages to the equitable relief Title VII has always allowed. 42 U.S.C. § 1981a(b) (Supp. V 1993). Compensatory damages are available only in cases of intentional (that is, disparate treatment) discrimination. *Id.* Moreover, punitive damages are restricted to disparate treatment cases in which the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id.*

though [their] exclusion was deemed necessary to reach a compromise bill, there is no principled basis on which to distinguish disparate impact . . . and disparate treatment cases when a plaintiff has proven that she has been the victim of unlawful discrimination. . . . The unfairness [of this distinction] is underscored by the fact that Congress has not made the same distinction between disparate impact and disparate treatment in cases not involving employment.⁷⁹

Although both Krieger and Belton both suggest that similarities between treatment and impact warrant conflation of the remedies for the two, Krieger's rationale could actually support the conclusion that the impact defendant should bear a lighter justification burden than the treatment defendant. Krieger advocates proportionality between the level of culpability and the scope of the remedy available in Title VII cases. If, as this Article contends, there should also be proportionality between the level of culpability and the degree of need required to justify the employer's action, then there must also be a correlation between the scope of the remedy available under Title VII and the level of need required to justify the practice. The gap which the 1991 Act created between remedies available in treatment and those available in impact cases could be argued to indicate congressional perception of differences in culpability levels between the two types of cases, which could then be argued to call for requiring different levels of justification in the two types of cases. In fact, however, the 1991 Act's bifurcation of remedies actually weighs in favor of strengthening the business necessity defense, bringing it *more* in line with the level of business exigency required by the BFOQ defense. In treatment cases, courts may rely on the specter of compensatory and punitive damages to assure that the defendants will be motivated to defend their actions. Because a losing defendant in an impact case faces considerably less-drastic remedies than a comparable defendant in a treatment case, the proof structure itself must be relied upon more heavily to assure the defendant is forced to defend the

⁷⁹ Belton, *supra* note 27, at 948-49.

practice.⁸⁰

4. *Confusion of Business Necessity with the Legitimate, Nondiscriminatory Reason in Treatment Cases.* Just as some arguments for requiring a lighter demonstration of business necessity have rested on perceived differences between impact and treatment cases, other arguments have turned on perceived similarities between the two. Beginning early in the development of the disparate impact doctrine, and culminating in the *Wards Cove* case, some judges have analogized the business necessity defense not to the BFOQ, but to the legitimate, nondiscriminatory reason phase of treatment cases.⁸¹ The confusion centered on two issues. The first issue was whether the defendant's burden in establishing business necessity was one of production comparable to the articulation or production of a legitimate, nondiscriminatory reason in the disparate treatment context.⁸² This issue was resolved by the 1991 Act, which established that the employer's business-necessity burden is one of persuasion.⁸³ The second issue, not resolved by the 1991 Act, concerns whether any distinction exists between the content of a qualifying successful legitimate, nondiscriminatory reason and the content of a business necessity defense.⁸⁴ Purporting to apply the "business necessity" standard,

⁸⁰ Such reliance is consistent with the twofold purpose of the Title VII remedial scheme: (1) "to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination"; and (2) compensation for injuries. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

⁸¹ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 662, 659 (1989) (employer carries burden of producing evidence of a business justification). *Dothard v. Rawlinson*, 433 U.S. 321, 339-40 (1977) (Rehnquist, J., concurring) (describing impact defendant's burden as one of production and citing *McDonnell Douglas*). But see Note, *A No-Alternative Approach*, *supra* note 40, at 109 (describing defendant's burden as one of persuasion).

⁸² See Malamud, *supra* note 73, at 2264-66 (discussing Court's efforts to prevent stricter business necessity defense from being incorporated into *McDonnell Douglas* concept of legitimate, nondiscriminatory reason).

⁸³ 42 U.S.C. § 2000e(m) (Supp. V 1993).

⁸⁴ See, e.g., *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 570-71 (1978) (holding treatment analysis relied on necessity of defendant's practice of not hiring people who, like plaintiff, applied at work site); cf. *Chandler*, *supra* note 44, at 934 (asserting courts should accept any good-faith business justification employers offer); *Johnson*, *supra* note 41, at 495 (stating that effectiveness of placing burden of persuasion on defendant will turn on how "necessity" is defined, as the 1991 Act leaves this open).

some courts have accepted from impact defendants any "reasonable" business justification for practices, just as they would have from a treatment defendant, rather than requiring a showing of real need for the practice.⁸⁵

Differences between the postures of the treatment defendant and the impact defendant render comparisons between legitimate nondiscriminatory reasons and business necessity inapposite. The legitimate nondiscriminatory reason requirement asks the defendant to *state the reason* why the defendant took the actions of which the plaintiffs complain. In the impact case, by contrast, by the time business necessity is at issue, everyone is already fully aware of the *reason* why the defendant took the actions of which plaintiffs complain. The defendant took those actions because of the facially neutral practice, a practice we may assume for present purposes entails no discriminatory motive and thus would easily qualify as a legitimate nondiscriminatory reason in a treatment case. What the defendant must show is *need* for the practice.

In looking at the issue of need for the practice, some courts—again—have sought a mere business justification for the practice, again frequently referring to the legitimate nondiscriminatory reason context.⁸⁶ Yet, to permit the employer to prevail simply by proving that it had legitimate, nondiscriminatory reason for adopting the practice is to change impact analysis into a search for intent to discriminate. Again, impact analysis *assumes* the

⁸⁵ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) ("The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice.").

⁸⁶ *EEOC v. Steamship Clerks Union*, 48 F.3d 549, 607 (1st Cir. 1995); *Graffam v. Scott Paper Co.*, 870 F. Supp. 389, 398 (D. Me. 1994), *aff'd*, 60 F.3d 809 (1st Cir. 1995). A recent example of an age discrimination impact court apparently applying the *McDonnell Douglas* legitimate nondiscriminatory reason standard to an impact case is *Graffam*, 870 F. Supp. at 389. In *Graffam*, the district court treated the impact inquiry as a search for intent to discriminate. 870 F. Supp. at 398. It thus permitted the defendant to justify, in part, by demonstrating that there were legitimate nondiscriminatory reasons for the decisions against the individual members of the group impacted. *Id.* at 400, 405. Although disparate impact analysis is often employed in ADEA cases, the 1991 Act's modifications of the doctrine apparently do not extend to ADEA cases. See Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093, 1099, 1150 (1993); see also Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WISC. L. REV. 507.

employer adopted the practice for legitimate nondiscriminatory business reason. The impact inquiry does not ask whether the employer had a legitimate reason for adopting the practice, but asks how dire the employer's need for the practice is.

Moreover, the 1991 Act's confirmation that the defendant in an impact case has a burden of persuasion rather than merely a burden of production further signifies that such a defendant should likewise be required to show that its practice is a true business necessity. Professor Hannah Furnish has explained the distinction in meaning between establishment of a *prima facie* case in each of the types of claims.⁸⁷ At this stage of a treatment case, the plaintiff has merely raised a presumption of discrimination, which the defendant may rebut by merely producing evidence of a legitimate, nondiscriminatory reason.⁸⁸ In contrast, once a *prima facie* case of impact is established, the existence of discrimination is considered proven and the defendant must therefore establish an affirmative defense to avoid liability.⁸⁹ Once discrimination has been *established* as a factual matter, the remedial purposes of Title VII demand that the defendant establish actual necessity, whether the context be treatment or impact.⁹⁰ The 1991 Act's confirmation that the impact defendant must bear a burden of persuasion, rather than production, supports the conclusion that the fact of discrimination has at this juncture been established, calling for the defendant to establish true necessity to justify the practice.

⁸⁷ Hannah A. Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C. L. REV. 419, 440-44 (1982). Her position that the defendant's burden in establishing business necessity is one of persuasion became law in the 1991 Act.

⁸⁸ In fact, the burden imposed on the defendant at this stage in a treatment case is so minimal that its reason need not even be lawful (as long as the statute violated is one other than that under which the claim was brought). *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1707 (1993).

⁸⁹ *Griggs* established that impact-based discrimination is no less discrimination than treatment-based discrimination. "[Title VII requires] the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁹⁰ *But see* Brodin, *supra* note 14, at 343 n.138 (suggesting mere business reason defense would be more appropriate when defendant must negate discriminatory intent, rather than when issue is "whether the exclusionary effect of a practice can be tolerated because the practice produces a more productive workforce").

B. THE PROBLEMS WITH BALANCING

1. *The Types of Balancing.* As an alternative to requiring employers to show absolute necessity for a challenged practice, some commentators have advocated a balancing approach to the business necessity defense.⁹¹ Balancing approaches fall into two categories. In the first, a court assesses whether the gain the defendant derives from the discriminatory practice is sufficient to outweigh the loss of employment opportunity the practice inflicts on the plaintiff class.⁹² Such a "sliding-scale" balancing approach enables "courts to correlate the likely harm to equal employment opportunities with the employer's justification burden on a case-by-case basis."⁹³

For example, suppose a plaintiff has succeeded in establishing a *prima facie* case of impact discrimination. She has demonstrated that her employer's discriminatory practice excludes women at a rate significantly greater than the rate at which it excludes men; thus, she has met whatever impact test the court deems applicable.⁹⁴ At this juncture, advocates of interest balancing would require additional scrutiny of the plaintiff's case before any burden is imposed on the defendant. Such scrutiny might reveal, for example, that the plaintiff's case is relatively weak in not identifying which part of the defendant's indivisible hiring process has caused the impact or in not demonstrating that the impact affects

⁹¹ *E.g.*, Moore & Braswell, *supra* note 35, at 492. Such commentators recognize that the present system does not involve balancing. *E.g.*, *id.* Under current doctrine, a plaintiff's statistical showing either establishes or fails to establish a *prima facie* case of disparate impact. Once established, the burden falls on the defendant to demonstrate business necessity. At present, business necessity is a unitary standard and does not take into consideration the extent of the impact the plaintiff has established. *Id.*; see also *infra* notes 101-102 and accompanying text (discussing type-one balancing further).

⁹² See, *e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.) (holding business purpose must be sufficiently compelling to override any racial impact), *cert. dismissed*, 404 U.S. 1006 (1971); Neely v. Grenada, 438 F. Supp. 390, 407 (N.D. Miss. 1977) (same).

⁹³ Moore & Braswell, *supra* note 35, at 492. *But cf.* Note, *A No-Alternative Approach*, *supra* note 40, at 116 (rejecting balancing approach as allowing employer increases in safety or efficiency to be "balanced away").

⁹⁴ The EEOC Guidelines, for example, provide for a four-fifths rule to establish disparate impact. See 29 C.F.R. § 1607.4(D) (1995) (establishing minority-group selection rate less than four-fifths of selection rate for majority group is evidence of adverse impact).

a large number of minority or female workers.⁹⁵ Even though the law recognizes the practice as discriminatory enough to establish the fact of discriminatory impact, the relative weakness of the plaintiff's case would, under a balancing approach, lessen the degree of business need the defendant must show for the practice.

The second type of balancing disregards the plaintiff's case entirely once it is made, looking instead at the relationship between the employer's practice and its ultimate goal. Under this approach, the greater the importance of the goal the employer seeks to achieve through use of the practice, the lower the level of correlation required between the practice and the goal.⁹⁶ This type of balancing focuses on whether an employer's strong demonstration of its ultimate goal offsets a weak demonstration of the practice's efficacy.⁹⁷

The second type of balancing is exemplified by *Spurlock v. United*

⁹⁵ Moore & Braswell, *supra* note 35, at 492. Note, however, that Title VII does not mandate the drawing of an adverse inference from the plaintiff's failure to identify the specific impacting practice when the process cannot be subdivided. In fact, the 1991 Act specifically authorizes judicial analysis in this circumstance. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. V 1993). There is dispute about whether Title VII rights should be deemed "group rights" or "individual rights." See, e.g., Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 567 (1991) (advocating individual-rights approach); Julia Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869, 900-09 (same); William B. Reynolds, *An Equal Opportunity Scorecard*, 21 GA. L. REV. 1007, 1030 (1987) (same); see also Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 310 n.22 (1983). Balancing is inconsistent with an individual-rights approach because balancing would permit employers to escape liability by showing that the number of women or minorities harmed by a practice is relatively low, regardless of the extent of harm inflicted on those persons. See *Connecticut v. Teal*, 457 U.S. 440, 452-56 (1982) (rejecting notion that employer could insulate itself from Title VII liability by hiring enough minorities to reach non-discriminatory "bottom line"); cf. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885 (1995) (stating federal employment-discrimination policy objectives are "furthered when even a single employee establishes that an employer has discriminated against him or her").

⁹⁶ See, e.g., *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1263 (6th Cir. 1981) (permitting lesser showing of manifest relationship between practice and goal because goal was one of safety); *Spurlock v. United Airlines*, 475 F.2d 216 (10th Cir. 1973) (holding employer's burden to demonstrate job-relatedness of employment criteria varies with skills required for job and consequences of hiring unqualified people).

⁹⁷ See *infra* notes 137-138 and accompanying text (discussing this second type of balancing further).

Airlines.⁹⁸ In *Spurlock*, an airline imposed as minimum qualifications for its flight officers 500 hours of flight time and a college degree.⁹⁹ A black applicant who had accumulated 204 hours of flight time and two years of college challenged the qualifications for their disparate impact on blacks. The court established a "sliding scale" of business necessity, imposing on the defendant a lighter burden to demonstrate business necessity when "the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great."¹⁰⁰ The court, in effect, permitted the importance of the employer's goal to compensate for weaknesses in the means used to achieve it.

2. *Balancing Employee Harm Against Employer Harm*

a. *Theoretical Rationales for Imposing a Per Se Test*. Several commentators have argued that courts should adopt a balancing test that would weigh the degree of impact on the protected group against the degree of employer need for the practice.¹⁰¹ Advo-

⁹⁸ 475 F.2d 216 (10th Cir. 1973); see also *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979) (noting where ultimate goal was passenger safety, business necessity defense required that criterion significantly serve, though not necessarily be required by, that goal).

⁹⁹ *Spurlock*, 475 F.2d at 219.

¹⁰⁰ *Id.* As one study of employment discrimination law states:

The analysis in *Spurlock* could lead to the ironic situation that the higher the level of the job, the less the burden on the employer to show that the qualifications are actually related to the ability to perform that job. . . . [However,] the *Spurlock* approach has been narrowly limited to jobs involving high risk to life and limb.

CHARLES A. SULLIVAN ET AL., *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* 57 (1980).

¹⁰¹ E.g., Moore & Braswell, *supra* note 35, at 491 (asserting where "degree of disparate impact is not devastating and precision of plaintiff's evidence is obscured by the inability to isolate the impact separately," employer's justification burden should be lighter); Mack A. Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio: Burdens of Proof, Statistical Evidence, and Affirmative Action*, 17 FLA. ST. U. L. REV. 1, 36-44 (1989); Rutherglen, *supra* note 45, at 1327; Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799, 825 (1985).

Moore and Braswell posit the case in which an employer uses a subjective decisionmaking process with a discriminatory impact and in which the "degree of impact is not devastating" and the "precision of plaintiff's evidence is obscured by the inability to isolate the impact separately by practice." Moore & Braswell, *supra* note 35, at 491. In this case, they argue, the employer should have to show merely "the existence and consistent use of job-related [i.e., not absolutely necessary to the business] guidelines for [its] discretionary performance appraisals, and an overall relationship between the promotion system and legitimate employment goals. . . . In each instance, the magnitude of the potentially troublesome

cates of such balancing suggest that this approach would successfully account for Congress's concern with reconciling the employee's interest in equal opportunity and the employer's interest in preserving business autonomy.¹⁰²

In the business necessity context, a hard and fast "rules" approach is preferable to such sliding scale balancing.¹⁰³ A rules or "classificatory" approach¹⁰⁴ inquires first whether the effect of the defendant's practice may properly be classified as "disparately impacting a protected group." If so, then a straightforward application of the rule requiring absolute business necessity resolves the case.

The rules approach does not ignore congressional concern for business autonomy. Rather, it is itself the product of a balance already struck by Congress.¹⁰⁵ The task of the courts is to apply the resulting rule. The preference for a per se rule in the business necessity context finds support in the reasoning that generally underlies choices between rules and balancing and specifically in

'business necessity' defense would vary with the size and demonstrability of the disparate impact." *Id.* at 492.

¹⁰² Moore & Braswell, *supra* note 35, at 485; cf. Chandler, *supra* note 44, at 922 (positing purpose of business necessity defense is to protect goals of economic efficiency and entrepreneurial freedom). *But see* Note, *A No-Alternative Approach*, *supra* note 40, at 116 (rejecting balancing approach as permitting employer increases in efficiency and safety to be offset by correspondingly larger impact on plaintiff group). Similarly, some who assert that impact analysis is in reality a way of redressing covert intentional discrimination likewise argue for a sliding scale of burden on the defendant. The greater the impact, the greater the likelihood that intent is at work; therefore, the burden should be greater on the defendant to show that its practice is effective in meeting its business goal. Perry, *supra* note 17, at 26 n.128.

¹⁰³ Professor Sullivan has distinguished balancing tests from a rules-oriented or "categorization" approach. Balancing, she notes, "explicitly considers all relevant factors with an eye to the underlying purposes or background principles or policies at stake." Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 60 (1992). Professor Sullivan explains that a balancing test equates with the concept of standard-based decisionmaking, whereas a classificatory or "categorical" approach equates with a rules approach. *Id.* at 60.

¹⁰⁴ The term "classificatory" derived from discussions of the rules-versus-balancing approach in the first amendment context. Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842, 844 (1969) [hereinafter Note, *Civil Disabilities*] (discussing Professor Emerson's description of "classificatory approach").

¹⁰⁵ Chandler, *supra* note 44, at 922 (asserting the "degree of protection [the business necessity] defense provides depends on weight given to competing goals—a legislative value judgment").

the Title VII context.¹⁰⁶

Most importantly, the employment discrimination arena is inappropriate for balancing because of the danger that decision-maker bias may affect the outcome.¹⁰⁷ Professor Frederick Schauer has explained how the potential for bias counsels against utilization of balancing tests:

We understand that any decision-making procedure will make errors. When rule-based decision-making is in place, the most noteworthy error is the failure on some number of occasions to make the best or optimal decision in the particular case. But when particularistic [e.g., balancing] decision-making prevails, the most noteworthy errors will be those in which misguided decision-makers—whether biased,

¹⁰⁶ FREDERICK SCHAUER, *PLAYING BY THE RULES—A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 151-52 (1991); Duncan M. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 26-30 (1987); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989); Sullivan, *supra* note 103, at 60. *But see* Note, *Civil Disabilities*, *supra* note 104, at 846 n.16 (noting application of balancing in context of indirect speech regulation-based discrimination). In addition to the danger decisionmaker bias poses to application of a business necessity balancing test, theorists offer another rationale that tends to call for a *per se* rule in the business necessity determination. A *per se* rule better addresses the goal of instilling vigilance in potential parties to avoid precisely the problem that gave rise to the suit. *See* Rose, *supra*, at 591 (asserting use of rules in lieu of standards causes people to guard against problems sued upon by rendering actors extra vigilant). According to Professor Louis Kaplow, the advantage of rules in affecting parties' primary behavior (such as the behavior that ultimately results in the lawsuit) is that people who know what the law is will conform to it, and people are more likely to know what the law is when rules are applied because it is less expensive to learn the content of rules than of standards. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 564 (1992).

¹⁰⁷ *See* Maria L. Marcus, *Wanted: A Federal Standard for Evaluating the Adequate State Forum*, 50 MD. L. REV. 131, 205 n.368 (1991) (noting tendency of courts applying balancing approach to assign heavy weight to whatever interest defendant proffers, thereby defeating plaintiff's claim); Scalia, *supra* note 106, at 1179-80 (arguing that rules approach more effective than balancing approach in providing "check upon arbitrary judges"); Sullivan, *supra* note 103, at 65 (describing Justice Scalia's arguments in favor of rules and noting "[b]alancing tests permit the expression of 'political or policy preferences.'"). *But see* Note, *Civil Disabilities*, *supra* note 104, at 846 n.16 (noting courts' application of balancing where speech regulation discriminated indirectly, but not where regulation discriminated intentionally).

ignorant, incompetent, or simply confused—will make decidedly non-optimal decisions. In attempting to design a decision-making procedure, we assess as best we can the expected frequency and consequences of these two types of errors. When the result of that assessment is a preference for rules, there is implicit in the preference a judgement that the errors that might be made by misguided decision-makers are more serious or more likely than the rule-based errors that come from a built-in failure to reach the very best decision in every case.¹⁰⁸

Professor Sullivan has also identified the potential for bias as a reason for avoiding balancing tests: If “rules are fairer than standards [because] rules require decisionmakers to act consistently, treating like cases alike, [then] rules reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties’ particular attractive or unattractive qualities into the decisionmaking calculus.”¹⁰⁹

Similarly, Professor Kennedy has identified the “social virtues of [rules in lieu of standards] to [include] the restraint on official arbitrariness.”¹¹⁰ In describing what he calls “the social science

¹⁰⁸ SCHAUER, *supra* note 106, at 154. Moreover, where there is reason to distrust a set of decisionmakers with certain kinds of decisions, “the problems of inflexibility that rules pose are less prevalent than problems that too much discretion will yield.” *Id.* at 152. *But cf. id.* at 153 (explaining that “the choice of rule-based decision-making ordinarily entails disabling wise and sensitive decision-makers from making the best decisions in order to disable incompetent or simply wicked decision-makers from making wrong decisions”).

¹⁰⁹ Sullivan, *supra* note 103, at 62. Professor Tribe likewise notes that judicial decisions are a function of the characteristics of the people elevated to judgeships. Lawrence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 593-99 n.37 (1985).

¹¹⁰ Kennedy, *supra* note 106, at 1688. Kennedy defines “official arbitrariness” as “the sub rosa use of criteria of decision that are inappropriate in view of the underlying purposes of the rule, . . . rang[ing] from corruption to political bias.” *Id.* He argues that a person’s consideration of the desired outcome in choosing whether a rule or standard should govern a particular situation does not fully explain the selection of one over the other. *Id.* at 1710. Rather, such a choice additionally is founded on the view of the world held by the selector: generally, the altruist chooses principles and the individualist chooses rules. *Id.* Kennedy cautions, however, that adoption of rules rather than standards imposes a different sort of arbitrariness on judicial decisionmaking: over- and underinclusiveness at the margins or borders of the rules’ coverage. *Id.* at 1689.

approach" to lawmakers' decisions to adopt rules in lieu of standards, Kennedy explains that rules are chosen when there is concern that the person charged with implementing the rule will be unsympathetic to the policies underlying the rule.¹¹¹ If in Title VII cases there is an unusual danger that courts will place too much importance on the employer's profit motive and too little importance on the plaintiff's right to equal opportunity, then "formally realizable general rules . . . would function much better than standards to force the [court] to put the [legislator's] view of the issue into practice."¹¹²

Even if it is correct that balancing is inappropriate in situations posing an unusual danger of bias, what is it about employment discrimination that increases the likelihood of decisionmaker bias? Why is bias more likely to taint balancing in the employment discrimination context than it is in, say, torts suits? Ideally, judges who (at least at the federal level) are carefully screened by both the executive and the legislative branches¹¹³ either are not prejudiced or can rise above their prejudices.¹¹⁴

¹¹¹ *Id.* at 1706. Kennedy draws a parallel between rules and individualism (Ralph Waldo Emerson's doctrine of self-reliance) and between standards and altruism. *Id.* at 1713-1778. Still, Kennedy notes that an altruistic judge may do well to apply a strict rule when doing so protects the most vulnerable classes of people from exploitation. *Id.* at 1777.

¹¹² *Id.* at 1706. To advocate a per se business necessity rule in impact cases does not state any general position on the overall efficacy of rules over standards. Professor Kennedy further notes:

In assessing a proposal to change a regime of rules to standards, or vice versa, we should ignore all claims about the intrinsic merits of formal positions and demand an accounting of effects. What is the substantive objective? How does the choice of form affect the likelihood of embodying the objective in law?

Id. at 1709. Professor Schauer notes that those favoring rules rather than more flexible decisionmaking tend to envision a decision as being made in a vacuum. They "take the dampening of variance as a good to be pursued in its own right, and see rules as instruments of that dampening process. SCHAUER, *supra* note 106, at 155.

¹¹³ As a rule, juries are available in disparate treatment cases, but not disparate impact cases. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73 (1991) (allowing juries in cases seeking compensatory and punitive damages but allowing such damages only in intentional cases). Although the facts in impact cases are determined by judges, not juries, the same confidence seemingly could be placed in jurors as well, given that voir dire should eliminate prospective jurors possessing bias against the group in question.

¹¹⁴ See SCHAUER, *supra* note 106, at 137 (noting that balancing yields more just decisions than strict rules when decisionmaker is just).

Regardless of the caliber and good faith of decisionmakers, problems of bias are likely to occur whenever matters focus on race, sex, or other bases of discrimination. According to Professor Minow, the potential for bias in cases involving "difference," whether racial, sexual, or some other form of difference, heightens the significance of "tension between formal, predictable rules and individualized judgments under discretionary standards."¹¹⁵ Racial and sexual bias is too firmly rooted in both the conscious and subconscious mind of this country and its judiciary to permit a cavalier dismissal of the prospect that it plays a role in judicial decisionmaking in discrimination cases.¹¹⁶

Legal and social norms have eliminated the most visible manifestations of prejudice, creating the misleading appearance that we have cured ourselves of prejudice altogether.¹¹⁷ In reality, prejudice has merely "gone underground." We may or may not be conscious of it, but prejudice remains a strong, motivating force in the citizens and judiciary of this country.

¹¹⁵ Minow, *supra* note 106, at 26. Thus, imposition of a strict rule rather than a balancing test addresses the perceived need to "exclud[e] from the calculus of decision specific factors likely to be misapplied by some class of decision-makers, substituting cruder but less likely to be abused factors." SCHAUER, *supra* note 106, at 151-52.

¹¹⁶ See Elaine Golin, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532, 1545 (1995) (discussing bias in courts); Lawrence, *supra* note 64, at 322-23 (discussing "ingrained" nature of racism in our culture); Girardeau A. Spann, *Simple Justice*, 73 GEO. L.J. 1041, 1073-1080 (1985) (same); cf. Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1260 (1986) (noting special judicial bias in gender cases); John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 741 (1977) (same).

Precisely because we so abhor our prejudice, we are likely to suppress our knowledge of it in order to avoid the pain of knowing about it. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 357 (1958); KENNETH B. CLARK, *PREJUDICE AND YOUR CHILD* 78 (1963); JOSEPH JASTROW, *FREUD: HIS DREAM AND SEX THEORIES* 12 (1948); see also Susan L. McCain, Note, *Sex Discrimination in the Voir Dire Process: The Rights of Prospective Female Jurors*, 58 S. CAL. L. REV. 1225, 1251 (1985) (discussing prejudice in jury selection).

¹¹⁷ See Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 45-48 (1994) (explaining covert nature of bias in courts).

That unconscious prejudice is rampant in this country is exemplified by the results of a 1994 housing segregation study reported in the *American Sociological Review*.¹¹⁸ That study identified

a gap between attitude and behavior among whites in this country. [The study concluded that] most whites today endorse the principle of equal opportunities for blacks in the housing market, but [the researchers'] analysis of 232 metropolitan areas "suggests that most whites are uncomfortable when numerous blacks enter their neighborhoods."¹¹⁹

Because we are not on guard against unacknowledged prejudice, it poses a far more ominous threat to fair decisionmaking than articulated, challengeable prejudice. Our prejudice is rendered more invidious by its subconsciousness.¹²⁰

b. The General Rejection of Balancing in Title VII Adjudica-

¹¹⁸ Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23 (Feb. 1994).

¹¹⁹ Ann Seng, *Voice of the People: Little Progress in Race Relations*, CHI. TRIB., Dec. 8, 1995, at 28 (citations omitted); see also CLARK, *supra* note 116, at 35 (noting people's behavior reflected more prejudice than their self-reports).

¹²⁰ See CLARK, *supra* note 116, at 70, 72 (positing that prejudiced individuals show less self-insight than non-prejudiced individuals and that people with "acceptable" levels of prejudice, although outraged by open, bigoted behavior, usually respond passively and silently in its face). It is argued that balancing "[satisfies] a civic republican commitment to 'resolving normative disputes by conversation, a communicative practice of open and intelligible reason-giving.'" Sullivan, *supra* note 103, at 68 (quoting Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986)). Civic republicans argue that a balancing test

compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them—more particularized and more rational at least than the familiar parade of . . . absolutes. . . . [T]his approach should make it more difficult for judges to rest on their predispositions without ever subjecting them to the test of reason. It should make their accounts more rationally auditable.

Id. (quoting Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825-26 (1962)). To the extent balancing tests require decision-makers to reveal the ideas leading to their decisions, this is true. However, when an unusually strong subconscious bias exists against the parties having the least power to begin with, full and open reason-giving is defeated. The bias is present, but surely not articulated.

tion. Consistent with the above rationale, most Title VII decision-making has eschewed a balancing approach in favor of a rules approach. For example, once the fact of disparate treatment is found and no defense can be established, liability is certain. No consideration is given to the strength of the plaintiff's established case in deciding whether the defendant has established its defense. No balancing of harms occurs.¹²¹ Rather, Title VII directs courts, for the most part, to find facts to which law can then be applied. The suggestion, then, that business necessity should be the subject of balancing by the factfinder proposes an exception to Title VII's general mandate.

In the few Title VII cases where courts have purported to balance interests, such balancing essentially masked what turned out to be straightforward decisions for employers. Perhaps the best example is Title VII's requirement that an employer reasonably accommodate practices required by a worker's sincerely held religious beliefs.¹²² In *Trans World Airlines v. Hardison*,¹²³ the Supreme Court created a balancing test for determining whether an employer had met its duty to accommodate its employee's religious practices. The Court appears to have relied, at least in part, on the fact that religious practitioners are physically capable of modifying their practices.¹²⁴ The Court concluded the employer had adequately accommodated Hardison's religious practices when adopting a more accommodating practice would have "assure[d] Hardison . . . of getting the days off necessary for *strict observance* of [his] religion, but . . . only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends."¹²⁵

¹²¹ Balancing of evidence occurs in the process of factfinding, which is different from determining the ultimate outcome of a case by balancing plaintiff's harm with defendant's harm. In the latter, the ultimate issue is not whether unlawful discrimination has occurred, but instead it is who would suffer the most from an adverse decision.

¹²² See 29 C.F.R. § 1605.2(C)(2)(ii) (1995) (providing employer must offer accommodation not causing undue hardship on employer that least disadvantages the worker); see also Sara L. Silbiger, Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World Airlines v. Hardison*, 53 FORDHAM L. REV. 839, 857-861 (1985) (discussing Title VII's religion-accommodation requirements); Note, *Accommodation of an Employee's Religious Practice Under Title VII*, 1976 U. ILL. L. F. 867, 871 (suggesting duty to accommodate religious practice imposes balancing test).

¹²³ 432 U.S. 63 (1977).

¹²⁴ *Id.* at 74.

¹²⁵ *Id.* at 81 (emphasis added).

Although Title VII's use of "reasonableness" language in the religious accommodation context supports a balancing test and although the accommodation test is often described as balancing,¹²⁶ the *Hardison* Court in fact imposed a per se rule, albeit one so *de minimis* as to require almost no showing by the employer at all.¹²⁷ Once a worker has established that an employment practice interfered with his sincerely-held religious practices, the employer is required merely to show that any alternative practice accommodating the worker would have involved some cost to the employer.¹²⁸ Regardless of the extent of interference with the plaintiff's religious practices, the *de minimis* burden on the employer remains the same.¹²⁹ It is not a balancing test at all.¹³⁰ In effect, the decision to apply a balancing test in the Title VII context is akin to the decision to apply rational-basis scrutiny in the equal protection context: The case is decided in selection of the standard rather than in its application. It is a defendant-favoring mechanism.

If balancing is fraught with bias potential generally in Title VII cases, it is especially problematic in the business necessity context. In matters of business judgment, courts are likely to afford particular deference to the employer.¹³¹ When the court assesses not the importance of the practice but the importance ascribed to it by the employer, the test becomes one of good faith—the same test rejected in *Griggs*.¹³² Deference to employers' business

¹²⁶ See *supra* note 122 (citing supporting sources).

¹²⁷ The actual reason why the religion test must not heavily consider the worker's interest in her religious practice is to avoid judicial entanglement in religion. Silbiger, *supra* note 122, at 857 n.136.

¹²⁸ *Id.* at 847.

¹²⁹ *Id.* at 857 n.136.

¹³⁰ Cf. Frederick M. Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 145 (positing courts' attempts to balance extent of governmental burden on religion cannot accurately quantify religious experience because such experience is not reducible to rational terms).

¹³¹ See Brodin, *supra* note 14, at 364-65 (arguing courts are ill-equipped to conduct cost-benefit analysis of business practices).

¹³² Courts' increased deference to an employer's judgment on business efficacy of a practice as the employer's business goal increases in importance is reminiscent of the mentality that, in times of crisis, human rights must give way when something else very important is at stake. See Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 957 (1982) (noting at upper levels of employment, "where courts feel that the quality of performance really matters, they may be reluctant to interfere

judgment destroys the impact concept entirely,¹³³ for the idea of impact analysis is that good faith is no defense to a neutral practice with discriminatory impact.¹³⁴

Balancing tests, moreover, invite deference to the party whose situation most closely approximates that of the judge.¹³⁵ Judges, who often share the perspective of the employer more than that of the employee, are likely to find the employer's actions acceptable as long as they are not too far removed from what the judge himself would do in comparable circumstances.¹³⁶ Such deference verges on creating a standard of reasonableness or rationality. Yet, one cannot ask simply whether the employer was being rational; ongoing businesses do not stay profitable by making irrational decisions.

3. *Balancing the Importance of An Employer's Goal Against the Efficacy of Its Practice.* In the second type of balancing, courts impose on the employer a lesser burden because the employer's goal is deemed especially important. For example, courts are willing to assume the need for safety.¹³⁷ The fact that an employer's safety

with traditional selection means").

¹³³ See Bartholet, *supra* note 132, at 1026 ("[P]utting the stamp of judicial approval on racially exclusionary systems is seriously unjust if in fact the 'finding' that the systems are job related is based simply on judges' views that systems with which they are personally familiar make sense.").

¹³⁴ *Id.* But cf. Rutherglen, *supra* note 45, at 1320 ("[T]aken together, the plaintiff's evidence of adverse impact and the defendant's evidence of business justification must reveal a significant risk that the disputed employment practice could be used as a pretext for discrimination.").

¹³⁵ Cf. *International Union, UAW v. Johnson Controls*, 499 U.S. 187, 201 (1991) (noting in BFOQ context inappropriateness of accepting employer's decision of what makes candidates qualified).

¹³⁶ See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1552 (1983) (stating antidiscrimination laws, by suggesting that instances of discrimination are irrational and capricious departures from normal objective operation of markets, disguise systemic nature of bias in favor of dominant [i.e., white male] workers); see also Barbara A. Hocking, *Is the Reasonable Man the Right Man for the Job?*, 17 ADEL. L. REV. 79, 86 (1995) (arguing "it is implicit within an organizational structure that like will recruit and promote like, that difference is disadvantage"); Margaret Thornton, *Hegemonic Masculinity and the Academy*, 17 INT'L J. SOC. L. 115, 122 (1989) (positing "homogeneity is a central value of any organizational culture since it is conducive to the maintenance of bureaucratic control and efficiency").

¹³⁷ See generally *Spurlock v. United Airlines*, 475 F.2d 216 (10th Cir. 1973) (permitting business necessity defense where employer could not establish direct relationship between requirement of minimum flight time and training success).

motif justifies deference to its need for the ultimate safety goal, however, does not justify deference to the means chosen by the employer to achieve safety when that means is discriminatory.¹³⁸ Courts do not owe employers deference on the choice of means, even if deference is owed on the choice of ends.

Moreover, the same reasons not to give deference to employer judgment generally, as described above, apply with equal force in the choice of means. The problem with deferring to an employer's business judgment about what practices it may utilize is that management decisions to employ particular hiring criteria are the products of a subconscious point of view that envisions a workplace full of people like the manager.¹³⁹ The manager may not deliberately choose a criterion excluding people dissimilar to himself, but when the manager envisions the type of worker the criterion aims to select, he imagines a person like himself.¹⁴⁰ Thus, the manager charged with assessing the efficacy of a practice may not adequately guard against his own subconscious expectations of the people to be selected and against the disparate impact the selecting

Not all safety goals may be assumed to qualify as proper business purposes. In the disparate treatment context, for example, the Court held that the goal of protecting workers' fetuses was not within the essence of battery manufacturing and therefore was not a BFOQ. *International Union, UAW v. Johnson Controls*, 499 U.S. 187, 205-06 (1991).

¹³⁸ See *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119 n.6 (11th Cir. 1993) (holding employer invoking safety defense must nevertheless establish necessity and does not receive absolute court deference); Jeffrey D. Kirtner, Note, *English-Only Rules and the Role of Perspective in Title VII Claims*, 73 TEX. L. REV. 871, 913-14 (1995) (discussing limits on use of safety-based business necessity defense).

¹³⁹ Barbara J. Flagg, "Was Blind But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970 (1993); see also DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 140-61 (1987) (suggesting white-dominated workplace that admits minorities will halt such admissions to maintain white dominance); Bartholet, *supra* note 132, at 1026 (asserting system has failed to consider alternative methods of selection due to tendency of those who are "in" to perpetuate systems that got them there); Minow, *supra* note 106, at 13 ("By granting discretion to . . . private decisionmakers, . . . judges . . . allow[] those decisionmakers to give significance to differences."). If courts "cede discretion to other decisionmakers[,] . . . [they allow] the decisionmaker with the discretion to take difference into account in an impermissible manner." *Id.* at 26. Professor Minow discussed the tension among the Supreme Court Justices during the 1986 Term, between those wanting to preserve the discretion of decisionmakers and those wanting to avoid the discrimination resulting when decisionmakers are given unchecked discretion. *Id. passim*.

¹⁴⁰ Chamallas, *supra* note 62, at 2392.

criterion may yield.¹⁴¹

In fact, cultural-domination theorists argue that as soon as women or minorities begin to satisfy a requirement that had heretofore excluded them (for example, admission to law school), the organization *subconsciously* responds by adopting a different standard, precisely to keep the number of women or minorities at a level low enough to maintain white-male dominance within the organization.¹⁴² Thus, deference to the defendant's business judgment in this context threatens the integrity of decisionmaking. Deferring to the defendant's business judgment "leaves intact the very managerial prerogative which has built the discriminatory base."¹⁴³

IV. CONCLUSION

The 1991 Act's codification of the disparate impact doctrine has opened the door for long needed clarification and strengthening of the business necessity defense. That defense should require an employer to prove that its discriminatory practice is essential to its continued operation. Under the structure created by the 1991 Act,

¹⁴¹ Professor Chamallas explains that a "focus on the inadequacy of the excluded group" has created a tendency not to scrutinize the criteria that have excluded them. *Id.* at 2372. This focus on the victim's shortcomings rather than on the criteria that exclude the victims allows "existing organizations [and] professions" to continue to exclude such victims without challenge. *Id.* at 2374. "In [this] motivational account, responsibility lies with the individual worker; the employer is required only to measure or judge each worker evenhandedly using conventional standards." *Id.* at 2377.

¹⁴² *E.g., id.* at 2387.

¹⁴³ Hocking, *supra* note 136, at 83; see also Chandler, *supra* note 44, at 934 (arguing *Griggs* simply prevents employers from using *non-economic* criteria—criteria unrelated to job performance—that decrease minority opportunities).

Mountain Side Mobile Estates Partnership v. HUD, 56 F.3d 1243 (10th Cir. 1995), illustrates this point. In *Mountain Side*, a Title VIII case applying a business necessity test identical to that of Title VII, the defendant argued that inherent limitations on the park's sewer system required it to impose the three-person-per-unit policy challenged as discriminatory against families with children. Although a study commissioned by the defendant itself contradicted the sewer system-based argument, the Tenth Circuit accepted the defendant's additional, unsupported arguments pertaining to "quality of life" and found that business necessity was established. *Id.* at 1256. The holding seems particularly troubling because the defendant had adopted the policy at the exact time that the Fair Housing Act, 42 U.S.C. § 3601 (1988), rendered discrimination against families with young children unlawful. *Id.* at 1246.

an employer must prove that the goal it seeks to achieve through the practice is crucial to its continued viability and, in turn, that the practice selected is crucial to the achievement of that goal. The employer may meet the second part of this test by producing evidence that the practice significantly and efficiently achieves the goal and by rebutting the plaintiff's evidence of the availability of a less-discriminatory alternative.

Moreover, requiring an employer to prove a strict level of need for its discriminatory practice comports with the proof structure in impact cases contemplated by the 1991 Civil Rights Act. Parallels between the analytical structure of disparate impact cases and disparate treatment cases demonstrate that the stringent BFOQ-defense standard applied in treatment cases is equally appropriate in impact cases. Alternatives to this standard thwart the objectives of Title VII by disproportionately favoring defendants.