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SUBSTANCE AND PROCESS IN EMPLOYMENT DISCRIMINATION LAW: ONE VIEW OF THE SWAMP

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Professor Owen Fiss once observed, in perhaps the preeminent insight in the field of employment discrimination law, that there are two competing understandings of the meaning of discrimination: discrimination as unequal treatment and discrimination as unequal achievement (unequal result).[1] Fiss argued not only that there are distinct potential conceptions which may compete for the judicial imagination, but that the competition was being played out in the case law interpreting Title VII.[2] The central contentions of this article are that the competition continues unabated, that a judicial failure to choose between incongruous objectives in interpreting the statute has rendered the law of employment discrimination incoherent, and that the resulting unstable compromise is incapable of serving as a basis for reasoned decision.[3]

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1. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237-38 (1971).

2. *Id.* at 281-91. Professor Fiss nevertheless anticipated Griggs v. Duke Power Co., 401 U.S. 424 (1971)—the primary source of the equal achievement theme in Title VII law.

3. This is not a new charge, but is made here from a perspective distinct from that underlying criticism favoring the equal achievement objective or some variation of that objective. *See, e.g.* Bartholet, *Application of Title VII To Jobs In High Places*, 95 HARV. L. REV. 945 (1982); Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber*, 59 N.C.L. REV. 531 (1981); Belton, *Burdens*

The purpose of this article is nevertheless the drawing of a map which will provide both a summary of discordant themes and a proposed reconciliation. The article will proceed in three parts. First, a model conception of Title VII's disparate treatment prohibition will be postulated and deviations from that model necessitated by the imperfections of the adjudication process will be justified. The argument underlying this first inquiry will be that the disparate treatment model is a relatively coherent prohibition expressing known and well articulated policy. Second, Title VII's disparate impact prohibition will be examined both in light of the Supreme Court's most recent elaboration of the impact model in *Connecticut v. Teal*[4] and in terms of four substantial issues regarding the content and function of the model reflected in but not fully resolved by the *Teal* opinion. The argument underlying this second inquiry will be that the impact model has been and remains an incoherent prohibition because the Court has failed to choose between the diverse alternative functions which might be served by the model implicit in the court's formulations of the elements of the model. Third, an attempt will be made to propose both an explanation of those formulations and a scheme for resolving them. The argument will be that the disparate impact model, if viewed as an alternative to and as conceptually independent of the disparate treatment model, should be narrowly confined and that a variation of the disparate treatment model should be invoked as the controlling and limiting rationale in many contexts presently subject to argument from the disparate impact model.

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of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, 34 VAND. L. REV. 1205 (1981); Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Edwards, *Preferential Remedies and Affirmative Action in Employment in the Wake of Bakke*, 1979 WASH. U.L.Q. 113; Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1083-99, 1114-18 (1978). *Cf.* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977) (constitutional law level of analysis). For criticism of the disparate impact model, *see, e.g.*, Cox, *The Question of "Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 87 (1981); Lerner, *Employment Discrimination, Adverse Impact, Validity and Equality*, 1979 SUP. CT. REV. 17; Maltz, *Title VII and Upper Level Employment—A Response To Professor Bartholet*, 77 NW. U. L. REV. 776 (1983); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: Critical Analysis*, 59 NEB. L. REV. 345 (1980); Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980); Wilson, *A Second Look at Griggs v. Duke Power Co.: Ruminations on Job Testing, Discrimination and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972); Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979).

4. ___ U.S. ___, 102 S. Ct. 2525 (1982).

I. DISPARATE TREATMENT

A. *Disparate Treatment: A Model*

Disparate treatment is, in the words of the Supreme Court, "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin."[5] It is also the "type of discrimination" Congress most clearly had in mind when it enacted Title VII. Despite, however, its apparent simplicity and legislative pedigree, the disparate treatment theory has been abused in practice both by courts and commentators. The abuse has taken the form both of attempts at expanding the prohibition beyond its narrow scope[6] and attempts at restricting the prohibition in a fashion inconsistent with its fundamental meaning.[7]

What follows is a discussion of three elements of the theory of prohibition. Each is formulated as a statement of an essential component of the basic conception, and, because at least some are controversial, each statement should be understood as an argument about the character of a model conception. That model, it is hoped, will serve as a basis for later discussion here of disparate impact as an alternative theory of discrimination. Two preliminary observations about the model are warranted at the outset. First, the model contemplates a narrow prohibition of conduct on the part of an employer which treats an employee differently than the employee would be treated but for the employee's race. The justifications for a narrow prohibition are that it is consistent with the congressional conception of the conduct to be rendered illicit by Title VII[8] and that it is consistent

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5. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 355 n. 15 (1977).

6. *See, e.g.*, Burdine v. Texas Dept. Community Affairs, 608 F.2d 563 (5th Cir. 1979), *rev'd.*, 450 U.S. 248 (1981); Waters v. Furnco Constr. Co., 551 F.2d 1085 (7th Cir. 1977), *rev'd* 438 U.S. 567 (1978).

7. *See, e.g.*, General Electric Co. v. Gilbert, 429 U.S. 125, 133-35 (1976) (exclusion on basis of pregnancy is not exclusion on basis of gender); Wright v. Olin Corp, 697 F.2d 1172, 1183-86 (4th Cir. 1982) (exclusion of fertile women from toxic work environment is a gender neutral rule having a disparate impact on women).

8. *See* United Steelworkers v. Weber, 443 U.S. 193, 226-55 (1979) (Rehnquist, J. dissenting). Advocates of the disparate impact model have on occasion conceded that the disparate treatment model best captures both the ethical perspective and policy choice made by the Congress in 1964. *See, e.g.*, Belton, *Discrimination and Affirmative Action, supra* note 3, at 591; Fiss, *supra* note 1, at 297. Support for the impact model is therefore grounded upon the view that an ultimate objective of the legislation—increased participation in the economic pie for protected groups and most particularly for racial minorities—is achievable only through use of the broad remedies implicit in the impact model. Underlying such an argument is of course an expansive

with the view of those members of Congress whose support was essential to the passage of Title VII and whose support was conditioned upon the immunity of legitimate employer business interests from the prohibitions of Title VII.[9] Second, the model is to be understood as a relatively abstract conception of the meaning of the prohibition uncompromised by complexities and uncertainties generated by the process of enforcement. Departures from the model in the real world litigation process are departures potentially explicable as adjudicative approximations of the model.[10] Indeed, a fundamental point made by this article is that the practical needs of the litigation process should not be confused with the core meaning of the substantive prohibition; means to ends are not themselves ends.

(1) Motive or Intent?

The first element of the model is that a prohibition of disparate treatment is a prohibition of employer action motivated by an illicit basis for decision (race or sex).[11] The prohibitory provisions of Title

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view of the role of the judiciary in discovering and implementing the "spirit" of legislation, as distinguished both from the letter of legislation and the political compromise inherent in what may be termed the policies of legislation. *See* Fiss, *supra* note 1, at 297; Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after Brown v. Board of Education*, 41 U. CHI. L. REV. 742, 765-66 (1974); Neuborne, *Observation of Weber*, 54 N.Y.U.L. REV. 546, 544-565, 555 n.32 (1979). I have argued elsewhere that such a view is as illicit as 19th century literalism in its claim to judicial hegemony because it fails to distinguish between congressional ends and the judicial obligation to enforce the means chosen by Congress to achieve such ends. *See* Cox, *Judicial Role, supra* note 3, at 175-78; Cox, *Book Review*, 1983 UTAH L. REV. 453, 457-58.

9. *See* 42 U.S.C. § 2000e-2j (1976); United Steelworkers v. Weber, 443 U.S. 193, 206-07 (1979); note 24 *infra*. *But see* Belton, *Discrimination and Affirmative Action, supra* note 3, at 547-48; Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 38-40 (1977).

10. *See* text and notes 49-73 *infra*.

11. *Cf.* Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) (distinguishing motive and intent for purposes of equal protection analysis); City of Mobile v. Bolden, 446 U.S. 55 (1980) (same).

Critics of disparate treatment theory object to the model on three grounds. First, motive is not discoverable in the litigation process, particularly if defined as the rationale for or psychology of decision. *See, e.g.*, Fiss, *supra* note 1, at 297; Miller, *If "The Devil Himself Knows Not the Mind of Man", How Possibly Can Judges Know the Motivation of Legislators?* 15 SAN DIEGO L. REV. 1167 (1977). Second, motive inquiry is a conceptualistic excuse for judicial decision reached on other grounds, particularly when expressed in terms of legal causation. *Cf.* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968) (motive inquiry under the Labor Act); Green, *The Causal*

VII make it an unlawful employment practice to discriminate "because of" one or more of the illicit bases for decision proscribed.[12] That language has been properly interpreted in the context of disparate treatment cases to mean that the crux of the theory of liability is "intentional discrimination."[13] The difficulty is that "intent" is a notion with more than a single legal meaning.

For present purposes, there are two alternative meanings potentially applicable: one may be characterized as intending the consequences of one's action if those consequences are the natural, probable, foreseeable or inevitable consequences of the action,[14] or one may be

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Relation Issue in Negligence Law, 60 MICH. L. REV. 543 (1962) (criticizing legal cause in tort law). Last, requiring illicit motive as an essential element of the prohibition of discrimination renders the prohibition an inadequate means of furthering antidiscrimination policy. *See, e.g.*, Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 311-26 (1982); Fiss, *supra* note 1, at 298.

It is true both that illicit motive is difficult to discover (it must often be inferred from effects and circumstances) and that the language used to describe the inquiry is conceptualistic. As I have argued in another context, however, an illicit motive requirement is not merely conceptualism, it is an expression of a policy choice. *See generally* Cox, *A Reexamination of the Role of Employer Motive Under Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act*, 5 U. PUGET SOUND L. REV. 161 (1982). Criticisms from the charge of difficulty or the charge of conceptualism are in fact, then, criticisms from disagreement with that policy choice.

It should be noted, however, that advocates of motive inquiry are not of one mind regarding the scope of the prohibition implied by a motive requirement or, therefore, the policy expressed by the requirement. To the extent that an actor's impartiality obligation includes an obligation to take into account the effect of an action or the preexisting condition of those affected by an action, *see* Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 31-37 (1976), an affirmative obligation is imposed by motive inquiry. The disparate treatment model advocated in the text implies only a negative obligation. *See* Perry, *supra* note 3, at 553-57.

12. 42 U.S.C. §§ 2000e-2(a) (1976). Although Title VII includes prohibitions of discriminatory practices on the part of unions, employment agencies and some others, this article will concentrate on employer conduct. Moreover, although Title VII prohibits discrimination on bases other than race and sex, the article focuses on the latter bases for employer conduct. In general, the article's analysis is applicable to discrimination "because of " national origin as well as to discrimination "because of" race or gender. *But see* Espinoza v. Farah Mfg. Co. , 414 U.S 86 (1973).

13. Pullman-Standard v. Swint, ____ U.S. ____ 102 S. Ct. 1781 (1982); Texas Dept. Community Affairs v. Burdine, 450 U.S. 248 (1981). Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court has identified Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976), as the source of disparate treatment theory and Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1976) as the source of disparate impact theory. *See* Connecticut v. Teal, ____ U.S. ____, ____, 102 S. Ct. 2525, 2532 (1982); Nashville Gas Co. v. Satty, 434 U.S. 136, 141-43 (1977). General Electric Co. v. Gilbert, 429 U.S. 125, 137 (1976).

14. *See* Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 474-75 (1968).

characterized as intending consequences if one was motivated by a desire to bring them about.[15] To illustrate: An employer who adopts a high school diploma requirement as a prerequisite for employment may recognize that such a requirement will exclude more minority applicants from employment than white male applicants for employment. The employer may therefore be said to have intended to exclude minorities from employment in the sense that the foreseeable or inevitable consequence of adopting the requirement was the exclusion. The employer was not, however, motivated by a desire to exclude minorities unless the employer's reason for the diploma requirement was exclusion of minorities.[16] The employer's reason may well have been independent of exclusion—for example, a desire, however wrongheaded from the standpoint of the predictive capacity of a diploma, to utilize the diploma as a proxy for the ability of applicants to read and write in a job requiring reading and writing.

The distinction between these two understandings of the term "intent" is fundamental; confusing them is unfortunately common.[17]

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15. *See* Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

16. It has however been argued that an actor may not desire that harm be inflicted on, *e.g.*, a racial group, and simultaneously be indifferent to the harm inflicted on that group by a decision. Such "indifference" should, by the terms of that argument, be subject to prohibition. Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L. L. REV. 31 (1982). *See* Brest, *In Defense of the Antidiscrimination Principle*, *supra* note 11, at 14 (1976) (selective indifference). To the extent that what is meant by this argument is that race may motivate the selection of means to a legitimate end and that such a motivation is illicit, it is an argument consistent with the model proposed in the text. To the extent, however, that the argument imposes an obligation to refrain from indifference to the consequences of race-neutral decision on protected racial groups, it is inconsistent with the model. That inconsistency does not of course obviate the extreme difficulty inherent in determining by means of the litigation process whether an employer has been indifferent or "selectively indifferent" to consequences.

17. *See, e.g.*, Feeney v. Massachusetts, 451 F. Supp. 143 (D. Mass. 1978), *rev'd*, 442 U.S. 256 (1979); Blumrosen, *Duty of Fair Recruitment*, *supra* note 14, at 474-75.

It should be at the same time made clear that what is meant by the term "motive" in the text is not the decision maker's rationale for decision by reference to race but, rather, decision by reference to race. *But see* C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 18-22, 30-33 (1980) (apparently attempting a distinction between disparate treatment and "intent"). It does not matter for purposes of the model whether an employer utilizes a racial criterion because it will harm blacks or utilizes that criterion because it will benefit blacks; the employer is in both instances motivated by race. *But cf.* Fiss, *supra* note 1, at 297-98 (correctly identifying the proof problems inherent in establishing that a race-neutral employment criterion was chosen because of race and distinguishing motive from rationale, but apparently arguing that an inquiry into pretext is inherently an inquiry into the employer's rationale for decision and that any presumption of illicit motive derived from disparate consequences is fictional).

The source of the confusion is that foreseeable consequences are relevant evidence of motive: they generate an inference of motive.[18] As a matter, however, of the model, intentional discrimination is treatment of an employee or potential employee which is motivated by e.g., race. The reason that the model requires motive rather than intent should be clear. A prohibition of disparate treatment is in fundamental conception a prohibition only of the use of proscribed differences between persons as reasons for disparate treatment of those persons.[19] If the proscribed reason was in fact not the difference upon which the disparate treatment was based, the disparate treatment must in fact have been based on some other difference between the affected persons. So long as that other difference was not itself proscribed, there is no applicable prohibition.

A foreseeable or inevitable disparate consequence, although evidence of the use of a proscribed difference between persons as the reason for disparate treatment of those persons, is merely evidence. If the foreseeability or even the inevitability of consequences is permitted to satisfy the requirements of the disparate treatment model, the model risks the imposition of liability for conduct undertaken for reasons not proscribed. Indeed, the foreseeable or inevitable consequences understanding of intent renders disparate treatment a prohibition not of intentional discrimination but of disparate consequences *qua* disparate consequences. An employer cannot avoid liability except by means of avoiding the consequences which, under the foreseeable or inevitable test, automatically render the employer's conduct "intentional." When the foreseeability or inevitability of consequences is utilized as the conception controlling the meaning of intent rather than as an evidentiary device for reaching a motive conception of intent, foreseeability or inevitability becomes in fact a means of expressing a quite distinct model: the model of disparate impact.[20]

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18. *See, e.g.,* Furnco Const. Co. v. Waters, 438 U.S. 567, 580 (1978); Teamsters v. United States, 431 U.S. 324 (1977).

19. *Cf.* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 651, 655-57 (1975) (equal protection clause, to the extent that it embodies principle of treating alike persons similarly situated, requires a reference to values outside the clause to identify prohibited bases for distinction); Weston, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (principle of equality requires reference to external values). It is of course the case that the external value relied upon in giving content to an "equality" or "antidiscrimination" idea may be considerably broader than merely the notion that race or gender may not "cause" decision. The essential problem is determining the scope of what Professor Alexander has termed an obligation of impartiality. Alexander, *Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 941-42 n.56 (1978).

20. *See* Texas Dept. Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Furnco Const. Co. v. Waters, 438 U.S. 567, 577-78 (1978).

(2) "But For" or "In Part" As Tests of "Cause"

If disparate treatment requires proof of an illicit basis for employer decision as the motive for employer decision, it must be conceded that an employer may have "mixed motives." In the high school diploma example, the employer may have been motivated to impose the requirement both as a proxy for talents he viewed as useful to job performance and as a means of excluding minorities he knew to be disproportionately lacking diplomas. Indeed, the employer may have been motivated by the more subtle but no less illicit notion that persons in the minority group the employer wished to exclude lack the talents for the job performance he desired.

The problem of mixed motive may be characterized, conceptually, as a problem of causation: did an illicit basis for decision "cause" the employer's action? As so conceived, the model of disparate treatment requires a test of just how great a role an illicit basis for decision must play in the employer's decision before it may be said that the employer's treatment was prohibited.

There are, again, two possible understandings: (1) an illicit basis for decision may be said to have motivated decision or "caused" an employer's action if it was "a factor" in the employer's decision (if it caused the action "in part") or (2) an illicit basis for decision may be said to have motivated decision or caused action if it was a "but for" cause—that is, if it was a necessary condition. The model of disparate treatment requires, again conceptually, a necessary condition test.[21]

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21. *See* McDonald v. Sante Fe Trail Transportation Co., 427 U.S. 273, 282 n.10 (1976); Franks v. Bowman Transportation Co., 424 U.S. 747, 773 n.32 (1976); Lee v. Russell County Bd. Ed., 684 F.2d 769 (5th Cir. 1982); Goldman v. Sears, Roebuck Co., 607 F.2d 1014, 1019 (1st Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); Mack v. Cape Elizabeth Sch. Bd., 553 F.2d 720, 722 (1st Cir. 1977). *Cf.* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (unconstitutional motivation); Mt. Healthy City School Dist. Bd. Ed. v. Doyle, 429 U.S. 274 (1977) (discharge for unconstitutional reasons). *But see* Codd v. Velger, 429 U.S. 624, 630 (1977) (Brennan J. dissenting) (but for test at constitutional level of analysis is relevant to remedy); NLRB v. Transportation Management Corp., ___ U.S. ___, 51 USLW 4761 (1983) (but for test relevant to remedy under Labor Act); Bundy v. Jackson, 641 F.2d 934, 952 (D.C. Cir. 1981) (but for test relevant to remedy); Rodriguez v. Board of Ed., 620 F.2d 362, 367 (2d Cir. 1980) (same); Note, *Proof of Racially Discriminatory Purpose Under th Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy and Williamsburgh*, 12 HARV. C.R.C.L. L. REV. 725, 750-52 (1976) (same). The "but for" test is criticized in Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982) on policy grounds rather closer to those supporting the disparate impact model than the disparate treatment model.

Note that, although allocations of burdens of production or persuasion may alter the litigation risks encountered by the parties to litigation, they do not necessarily

The "a factor" or "in part" test of causation is inconsistent with the model because it contemplates a prohibition of any employer consideration of an illicit basis for decision and therefore contemplates a prohibition of treatment which would have occurred for licit reasons even if the illicit basis had never been considered.[22] Such a prohibition is a prohibition of evil thoughts: race or gender may not be considered by the employer, whatever the employer's ultimate use of that consideration. A prohibition of disparate treatment is, by contrast, a prohibition of employer conduct undertaken for illicit reasons.

The latter distinction may be clarified by reference to the distinction between intent as foreseeable consequence and intent as motive. An "in part" test of causation is the handmaiden of a foreseeability test of intent; if a consequence was the natural, probable, foreseeable or inevitable product of an action, the inference that the consequence was considered is irresistible. It is of course possible to suggest that a consequence may be considered and rejected as a reason for action, and, therefore, to suggest that the contemplated consequence was not "a cause" of the decision, but that possibility does not alter the congruity between foreseeable consequence and in part causation. A foreseeable consequences conception of intent mandates a prohibition of consequences: even where it is established and believed that an act was motivated by licit reasons, consequences establish intent and, therefore, liability. The same prohibition is mandated by an "in part" test of causation. If it is established that an illicit reason for employer action was a motivation for the action but that the action would have been undertaken for a licit reason even in the absence of the illicit reason, there is liability under the "in part" test. In short, the consequences of the action are prohibited despite the assumption that the consequences would have flowed from licit decision.

A necessary condition or "but for" test of causation is equally congruous with intent as motive. Motive is the appropriate understanding of illicit intent under the disparate treatment model because

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alter the underlying conception. If the employer has the burden to establish that a legitimate reason would have caused his decision even absent consideration of an illegitimate reason, the employer has a burden of disproving "but for" causation. Proof that a legitimate reason was a sufficient condition for an action precludes a conclusion that an illegitimate reason was a necessary condition for that action. *Cf.* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 29 (1978) (Stevens, J. dissenting) (when an employer proves a legitimate reason for an action, the employer simultaneously disproves illegitimate motivation).

22. *Cf.* N.L.R.B. v. Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981) (making this argument with respect to "discrimination" under the National Labor Relations Act), *cert. denied*, 102 S. Ct. 1612 (1982).

the model prohibits only action undertaken for illicit reasons; it does not preclude that same action undertaken for licit reasons. But for causation is the means by which that distinction may be made: action which would have been undertaken for licit reasons is not precluded.

This leaves of course the question why action undertaken for licit reasons is not precluded, for such an action may generate harm. In the context of Title VII, licitly motivated employer action may generate harm in the form of disparate consequences: a protected race or gender group may be excluded from participation in an employment opportunity or benefit (e.g. jobs) at a rate greater than the rate experienced by white males. There are nevertheless two possible lines of argument justifying a narrow prohibition merely of illicit motive.

First, it may be argued either conceptually or by virtue of legislative purpose that the character of the right conferred by a prohibition of discrimination is an individual right to freedom from action undertaken for group status reasons. Conversely, a prohibition of consequences and even of insufficiently justified consequences inherently recognizes and enforces a group right because the prohibition cannot be invoked absent proof of harm to the race or gender group protected by the prohibition.[23] As a matter of legislative purpose, this first justification of a narrow prohibition is consistent with the ethical conception dominating the Congress which enacted Title VII.[24] It is as a pragmatic matter, however, an arguably inadequate instrument for achieving the equality of economic opportunity viewed by that Congress as the ultimate objective of the legislation, and a focus upon the latter objective has constituted the judiciary's justification for creating the distinct disparate impact model.[25]

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23. *See* Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 HARV. J. ON LEGIS. 99 (1983); text accompanying note 99 *infra*.

24. *See e.g.*, 110 Cong. Rec. 7213 (1964) (Case-Clark memorandum); Wilson, *supra* note 3, at 852-58; Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113-19 (1971); Comment, *The Business Necessity Defense, supra* note 3, at 926-29.

25. *See* United Steelworkers v. Weber, 443 U.S. 193, 215 (1979) (Blackmun, J. concurring). In 1972, Congress amended Title VII but neither approved nor disapproved of impact doctrine by express enactment. The legislative history suggests a recognition of the inadequacy of the original conception which may be argued to constitute acquiesence in disparate impact doctrine. *See* Connecticut v. Teal, ___ U.S. ___, 102 S. Ct. 2525, 2531 n.8 (1982); Maltz, *Response, supra* note 3, at 783. *But cf.* Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977) (1972 legislative history cannot, absent formal enactment, be read to constitute approval of perpetuation of past discrimination theory). On the question of the propriety of treating congressional silence as approval, *see* Cox, *Judicial Role, supra* note 3, at 132-33. *But Cf.* Tribe, *Toward*

The second line of argument justifying a narrow prohibition merely of illicit motive is that such a prohibition preserves from regulatory scrutiny business interests independent of race or gender *qua* race or gender. The narrow prohibition in effect narrowly defines the employer's obligation of impartiality. The employer must refrain from partiality founded on the group status of employees or applicants for employment; the employer need not consider or weigh the effect of its business decisions upon race or gender groups.[26] A prohibition of unjustified consequences removes business discretion from the employer and places it in a regulatory authority (here, the courts) by authorizing a regulatory balancing of adverse consequences and concerns of economic efficiency.[27] Such an allocation of decision making authority is unjustified if one believes either that such regulation is generally undesirable or that Congress intended no such allocation—a belief at least supportable by references to the legislative history of Title VII.[28]

(3) Motive or Invidious Motive: The Threat Presented by the Model to Independent Values.

Ironically, a primary conceptual confusion in the history of judicial application of the disparate treatment model has arisen from efforts to restrict the scope of its operation. Despite the narrow character of the prohibition, its logic compels application in contexts in which it would threaten other values. There are two major examples: application of the prohibition to gender as an illicit basis for decision where taboos regarding sexual behavior would be thereby threatened[29]

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a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 IND. L. J., 515, 518 n.22, 530-31 (1982) (arguing that congressional silence sometimes may and sometimes may not be used as a datum in determining meaning).

26. *See* Texas Dept. Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Furnco Const. Co. v. Waters, 438 U.S. 567, 577-78 (1978).

27. *See* text and notes 224-55 *infra*.

28. *See* United Steelworkers v. Weber, 443 U.S. 193, 231-54 (1979) (Rehnquist, J. dissenting). *But see* Blumrosen, *The Group Interest Concept, supra* note 23. Although I agree with Professor Blumrosen's characterization of the impact model as creating a group right, I do not agree with his characterization of the legislative history of Title VII as contemplating such a right. It is clear that a congressional objective was to increase employment opportunities for protected groups; it is not clear that this objective was to be achieved by means of enforcing a group right to those opportunities. Indeed, it seems clear that a prohibition of group harm *qua* group harm was rejected as a means of achieving the objective. *See* 42 U.S.C. § 2000e-2(j) (1976). Congress prohibited illicitly motivated employment decisions. That such a prohibition may be an inadequate means of achieving the contemplated objective is not a legitimate reason for a judicial substitution of legislative ends for legislative means to those ends.

29. *See generally* Rutherglen, *Sexual Equality in Fringe Benefit Plans*, 65 VA. L. REV. 199 (1979).

and application of the prohibition to the problem of "reverse discrimination" where the judicially perceived ultimate objectives of Title VII would be thereby threatened.[30]

The model of disparate treatment requires application of the prohibition to any express classification on the basis of, e.g., race or sex, without regard to the reasons which might justify disparate treatment. In form, the question the disparate treatment prohibition asks of an employer's rule is whether the race or sex of an employee must be determined to apply the rule.[31] If an affirmative answer is given to that question, there is disparate treatment.

In practice, affirmative answers to the question have been occasionally thought inconvenient. Discrimination against homosexuals is not prohibited by Title VII[32] even though it is obvious that an employer rule against same sex sexual preference cannot be applied without determining the gender of the employee or applicant for employment against whom it is sought to be applied. A "benign" racial preference is not prohibited if it was adopted pursuant to an affirmative action plan[33] despite the fact that it is expressly a racial classification.

The disparate treatment model has been judicially circumvented in such inconvenient contexts by means of two alternative devices: a denial that disparate treatment has occurred[34] or a recognition of a "defense" to the prohibition in the form of a plea in justification.[35] The former device is a patent fiction inconsistent with the model.[36]

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30. *See generally* Cox, *supra* note 3.

31. *See* Los Angeles Dept Water & Power v. Manhart, 435 U.S. 702, 711 (1978). *Manhart* was recently reaffirmed in Arizona Governing Committee v. Norris, ___ U.S. ___, 51 U.S.L.W. 5243 (1983).

32. *See, e.g.,* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979); Smith v. Liberty Mutual Ins. Co., 569 F.2d 325 (5th Cir. 1978).

33. United Steelworkers v. Weber, 443 U.S. 193 (1979).

34. *See, e.g.,* General Electric Co. v. Gilbert, 429 U.S. 125, 133-35 (1976) (exclusion on basis of pregnancy is not exclusion on the basis of gender); Wright v. Olin Corp. 697 F.2d 1172 (4th Cir. 1982) (exclusion of fertile women from toxic work environment is a gender neutral rule). DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (relying on congressional intent); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (relying on mutability of characteristic banned by employer and notion that "fundamental right" must be invaded by employer).

35. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979); Dothard v. Rawlinson, 443 U.S. 321, 334-36 (1977) (BFOQ defense).

36. *See* Los Angeles Dept. Water & Power v. Manhart, 435 U.S. 702, 712-13 (1978); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). To the extent, however, that the device of denial is in fact advocacy of an equal achievement or group right conception of Title VII's purposes, it is less a fiction than a theory which denies the legitimacy of the treatment model (or, at least, severely restricts its scope of operation). *Compare* Kimball, *Reverse Sex Discrimina-*

The legitimacy of the latter device is a question which cannot be answered by the model except to the extent that the rationale of the model itself is relied upon as justification for a departure from it. For example, to the extent that sexual privacy is a value thought to justify an exception to the prohibition of disparate treatment,[37] the model cannot evaluate the validity of or weight to be assigned that external value. To the extent, however, that it is claimed that the logic or purposes underlying the model are not consistent with its application in a context in which the model would threaten sexual privacy, the model is itself the appropriate basis for evaluation of that claim.

Judicial and academic arguments of the latter type have consistently focused upon the twin notions that disparate treatment in inconvenient contexts is not "invidiously motivated" and does not produce the stigmatic harm which it is the underlying objective of the prohibition to prevent.[38] Because these rationales for the model are inapplicable in such contexts, the model should be inapplicable. The model of disparate treatment advocated here rejects that argument for two reasons.

First, the argument assumes that it is within the judicial competence to detect "invidious" motive and stigmatic harm and to distinguish circumstances in which neither is present. That, it is submitted, is a delusion both because judicial competence in characterizing human pyschology is questionable and because invidiousness and stigma are legal constructs, not empirically demonstrable phenomena with precise meanings.[39] It is legitimate to conclude, even as a matter of fact finding, that race and gender, when used as grounds for decisions, often produce stigmatic harm—that the risk of such harm is

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tion: Manhart, 1979 A.B.F. RES. J. 83 (defending an analysis which focuses on the group, albeit on the special ground that actuarial issues are unique) *with* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980) (rejecting a focus on the group and defending a focus on the individual).

37. *See* Dothard v. Rawlinson, 443 U.S. 321, 346 n.5 (1977) (Marshall, J. dissenting); Sutton v. Nat'l Distiller Products Co., 445 F. Supp. 1319 (S.D. Ohio 1978); Fesel v. Masonic Home of Del., 16 E.P.D. Cases ¶ 8244 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (4th Cir. 1979).

38. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979); General Electric Co. v. Gilbert, 429 U.S. 125, 136 (1976); Smith v. Liberty Mutual Ins. Co., 569 F.2d 325 (5th Cir. 1978); Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975); Karst & Horwitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C-R. C.-L. L. REV. 7, 26 (1979); Karst, *Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5-11 (1977).

substantial. It is not legitimate to pretend that the judiciary is capable, as a matter of fact finding, of distinguishing between race or gender based decisions which will and race or gender based decisions which will not generate stigma. For example: it has been argued that a white male is not stigmatized with a badge of inferiority by reason of his disqualification for a benign racial preference favoring a minority.[40] If what is meant by that argument is a badge of inferior "merit" in the sense of competence or achievement or seniority, it is at least possible that the white male is not stigmatized (although the persons preferred by reason of race or sex may well be thought to be stigmatized in precisely this sense[41]). But the meaning assigned stigma by this interpretation is conspicuously artificial—there are other potential "badges of inferiority" with which the white male has been labeled; most obviously the badge of moral inferiority.[42] Examples of this difficulty in the context of gender discrimination are, moreover, legion. The case law is strewn with the wrecks of judicial perceptions, most particularly in contexts in which sexual behavior as well as gender was in issue, that stereotypical gender distinctions reflected acceptable, "non-invidious" understandings of the appropriate roles assigned males and females in American society.[43] Whatever may be one's

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39. *See* Cox, *supra* note 3, at 151-155; Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 CAL. L. REV. 171, 176-77 (1979); Posner, *The De Funis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 20; Van Alstyne, *Rites of Passage: Race, The Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 800-803 (1979); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-33 (1959).

40. *See* J. ELY, DEMOCRACY AND DISTRUST 170-71 (1980); Brest, *In Defense of the Antidiscrimination Principle, supra* note 11, at 16-17; Karst, *Equal Citizenship, supra* note 38, at 5-11.

41. *See* DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J. dissenting); Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147, 154-55.

42. *See* Fullilove v. Klutznick, 448 U.S. 448, 526, 532 (1980) (Stewart, J. dissenting); Cox, *supra* note 3, at 150 n.422.

43. *Compare* General Electric Co. v. Gilbert, 429 U.S. 125, 133-35 (1976) (decision on basis of pregnancy is not decision on basis of sex) *with* 42 U.S.C. § 2000e(k) (Supp. V 1981) (1978 amendment to Title VII defining "because of sex" as including "because of pregnancy") and *compare* Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969) ("sex plus" discrimination not prohibited) *with* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) ("sex plus" discrimination is prohibited) and *compare* Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084 (5th Cir. 1975) (differential grooming standards not discrimination on basis of sex) *with* Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982) (weight requirements are grooming rules within Title VII prohibitions where they impose a significantly greater burden of compliance on females); Carroll v. Talman Federal Savings & Loan Assoc., 604 F.2d 1028 (7th Cir. 1979) (some differential dress requirements constitute sex discrimination) and *compare* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir.) (discrimination on basis of sexual

view of the legitimacy of such role definitions and of their incorporation into the law of disparate treatment, the gender cases do not suggest a viable judicial track record in detecting invidious classification and distinguishing non-invidious classification.[44] The courts have been far more successful when they have justified disparate treatment in the gender context on the grounds that external values independent of the values supporting the disparate treatment prohibition outweigh application of the prohibition.[45]

Second, arguments about invidious motive or stigma defeat the primary justifications for a prohibition of disparate treatment by substituting the vagaries of judicial fact finding (or, at least, the pretense of such fact finding) for a relatively clear and uncontroversial standard. This is not an objection merely from judicial administration and efficiency or from the desirability of predictability of law. It is grounded as well upon central justifications for the disparate treatment prohibition: pedagogy and avoidance of uncertainty. By pedagogy is meant the role of law as moral teacher.[46] By uncertainty is meant the historical volatility of considerations of race or sex and their established capacity for generating self-deception in decision makers who employ such considerations.[47] The disparate treatment model is a prophylactic educator:[48] it makes unambiguous the proposi-

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preference not prohibited), *cert. denied*, 445 U.S. 943 (1979) *with* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (sexual harassment prohibited on theory harassment occurred on basis of sexual preference).

44. In this connection *compare* Rostker v. Goldberg, 453 U.S. 57, 101 S. Ct. 2646, 2655 (1981) (Congress did not act "unthinkingly" in excluding women from draft registration) *with id.* at 2662 (Marshall, J. dissenting) (legislation reflects "ancient canards about the appropriate role of women") *and compare* Califano v. Goldfarb, 430 U.S. 199, 206-07 (1977) (opinion of Brennan, J.) (statute unconstitutional because it reflects archaic and overbroad generalizations regarding sexual roles) *with id.* at 218 (Stevens, J. concurring) (classification not invidious because it does not imply inferiority); *id.* at 234-35 (Rehnquist, J. dissenting) (congressional reasons for enactment not invidious).

45. *But cf.* Freed & Polsby, *Privacy, Efficiency, And The Equality of Men and Women: A Revisionist View of Sex Discrimination In Employment*, 1981 A.B.F. RES. J. 585 (arguing that external values may outweigh presumptive illegality of explicit sex lines where individual's claim to individual treatment is "weak"). By more successful, I mean, however, that the courts have displayed great candor; I do not imply agreement with the results reached.

46. *See* Hughes v. Superior Court, 339 U.S. 460, 463-64 (1950); A. BICKEL, THE MORALITY OF CONSENT 133 (1975); Van Alstyne, *supra*, note 39, at 810.

47. *See* Fullilove v. Klutznick, 448 U.S 448, 431-32 (1980) (Stewart, J. dissenting); Van Alstyne, *supra*, note 39, at 803-08.

48. *See* Posner, *De Funis, supra* note 39, at 21-26. *Cf.* Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 382-91 (1981) (immutability, irrelevance and historical abuse make racial classifications suspect and require individualistic equal protection doctrine).

tion that race or gender is an unacceptable basis for decision. The model is also, however, a prophylactic guide to decision. It precludes, absent a conscious judicial choice (and hopefully an expressed choice) to abandon the model in favor of independent and compelling considerations, decisions tainted by historical conceptions of racial and sexual roles internalized by the judicial decision-maker.

B. Departures From The Disparate Treatment Model Nevertheless Consistent With The Model: Adjudicative Approximation of the Model

Judicial enforcement of any theoretical model is enforcement by means of a process with its own dynamic, and that dynamic will inevitably structure and by the structuring in degree alter the real world content of the model. The judicial process is a decision making process with an internal logic expressed by devices for ordering that process, and that logic is independent of the substantive law which forms the basis for decision. This is no less the case with the disparate treatment model; the model is filtered in litigation through process constructs (rules of evidence, burdens of production and persuasion, etcetera) which express both the logic and the limitations of the judicial process.

It is however crucial that the relationship between constructs of process and the theoretical model of substantive prohibition be understood. Constructs of process, although supported in theory by worthy values independent of the substantive law, are nonetheless merely the means by which the substantive law is enforced. Such constructs of process will inevitably alter in degree the meaning of the substantive model, but the objective underlying their application must be approximation of the substantive model.[49]

There are two process constructs of primary importance to an understanding of the judicial system's response to the disparate treatment model: (1) disparate consequences are evidence of motive;[50] (2) the employer, as defendant, has a burden of proof regarding its licit motive once the plaintiff has established a "prima facie case" and the employee or applicant for employment, as plaintiff, has a burden of

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49. *See generally, e.g.,* O. FISS & R. COVER, THE STRUCTURE OF PROCEDURE (1979); Ball, *The Moment of Truth: Probability Theory and Standards of Proof,* 14 VAND. L. REV. 807 (1961); Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability,* 2 J. LEG. STUD. 419 (1979); Fiss, *Forward: The Forms of Justice,* 93 HARV. L. REV. 1 (1979).

50. *See* Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

proof regarding the pretextual character of a claim to licit motive.[51] The importance of these constructs for present purposes is that each may be viewed as in degree serving to approximate the disparate treatment model, but that each, as a matter of emphasis and judgment, may be employed to defeat that model and to impose by approximation a quite distinct model of the substantive prohibition.

(1) Disparate Consequences As Evidence of Motive

The intuitive appeal of the use of consequences as evidence of illicit motive is the appeal of the natural, probable or foreseeable consequences understanding of the term "intent". Disparate consequences generate an inference of illicit motive[52] particularly when viewed from the uncontroversial premise that there remains extant racial and sexual prejudice in American society. For example, in a case involving an individual employment decision (the "individual disparate treatment" category of case), the hiring of a qualified white male applicant rather than equally qualified black and female applicants for a job is a consequence of the employment decision which may be legitimately viewed with some suspicion. The intuitive appeal of consequences in a case challenging an employer's employment system as discriminatory in the long-term (the "pattern and practice" or "systematic disparate treatment" category of case) is even more compelling.[53]

In a systematic disparate treatment case, proof sufficient to generate a prima facie case requiring employer rebuttal normally takes the form of a comparison of the racial or gender composition of the employer's workforce (or some relevant subset) with the racial or gender composition of an external population (or, again, some relevant subset).[54] The logic of that comparison is consistent with approximation of the disparate treatment model; absent illicit motive it is normally to be expected that a workforce drawn from a given population will roughly approximate the demographics of that population.[55] The process by which the parties to such a lawsuit progressively

51. *See* Texas Dept. Community Affairs v. Burdine, 450 U.S. 248 (1981).

52. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307 (1977); Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977).

53. *See* Teamsters v. United States 431 U.S. 324, 335 n.15 (1977).

54. Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

55. Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977). *Cf.* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977) (impact is evidence of motive for equal protection purposes); Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J. concurring) (same).

eliminate potential licit causes of any disparity in composition in an effort to verify the inference generated by that disparity confirms that consistency.[56]

There are nevertheless risks of inconsistency with approximation inherent in the use of the consequences as proof constructs. The sources of these risks are two. First, tests of statistical significance[57] are employed in systematic disparate treatment cases to, in effect, eliminate "chance" as a potential legitimate cause of a disparity between workforce and external population representation rates.[58] The value of the inference of illicit motive which may be derived from such a test is directly dependent upon the data used in calculation. Specifically, a failure to eliminate other potential causes of disparity (e.g., geographic proximity of the external population, pre-act discriminatory practices, a population with undisputed qualifications, and self-selection by potential employees) significantly distorts the viability of the inference and thereby imposes, *pro tanto*, an effective prohibition of consequences rather than motive.[59] More importantly, a test of statistical significance in this context is not a test of the probability that an employer engaged in disparate treatment.[60] The

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56. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 309-12 (1977); Teamsters v. United States, 431 U.S. 324, 358 (1977).

57. *See generally,* H. BLALOCK, JR., SOCIAL STATISTICS 105-222 (Rev. 2d ed. 1979); D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION, 287-328 (1980); L. Braun, *Statistics and the Law: Hypothesis Testing and Its Application to Title VII Cases*, 32 HASTINGS L.J. 59 (1980).

58. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 309 n.14, 311 n.17 (1977).

59. *See, e.g., id.* at 309; Coble v. Hot Springs Sch. Dist., 682 F.2d 721, 733 (8th Cir. 1982); Wilkins v. University of Houston, 654 F.2d 388, 408-409 (5th Cir. 1981); E.E.O.C. v. Radiator Specialty Co., 610 F.2d 178 (4th Cir. 1979); Detroit Police Officers Assoc. v. Young, 608 F.2d 671, 688 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1980); Williams v. Tallahassee Motors, Inc., 607 F.2d 689 692 (5th Cir.), *cert. denied,* 449 U.S. 858 (1979). *But cf.* Davis v. Califano, 613 F.2d 957, 967 (D.C. Cir. 1979) (for purposes of prima facie case, only minimum qualifications must be taken into account).

60. By probability, I mean a direct probability statement regarding the issue of disparate treatment (the probability that disparate treatment occurred is X) as distinguished from the indirect probability statements (the probability of the observed result given an hypothesis of random selection is X) utilized in hypothesis testing. *See, e.g.,* BALDUS & COLE, *supra* note 57, at 304; Braun, *Quantitative Analysis and the Law: Probability Theory as a Tool of Evidence in Criminal Trials*, 1982 UTAH L. REV. 41, 46-48, 63-65; Kaye, *The Laws of Probability and the Law of the Land*, 47 U. CHI. L. REV. 34, 41-42, 44 n.35, 51 n.57 (1979); Kaye, *The Paradox of the Gatecrasher and Other Stories*, 1979 ARIZ. ST. L.J. 101, 104-08. The former statement is an objective of Bayesian theory, the utility and value of which for legal purposes is much debated. *See* Brilmayer & Kornhauser, *Review: Quantitative Methods and Legal Decisions*, 46 U. CHI. L. REV. 116 (1978); Callen, *Notes on a Grand Illusion: Some Limits on the Use of Bayesian Theory in Evidence Law* 57 IND. L.J. 1 (1982); Finkelstein & Fairley, *A Bayesian Approach*

conclusion that there is less than a 1 in 20 chance[61] that an employer's workforce of the composition discovered would be expected in a normal distribution of workforces composed of randomly selected employees does not directly state the probability of disparate treatment. It states only the probability of observing the composition discovered if employees were selected without reference to race or gender and without reference to some race and gender neutral factor correlated with race or gender but not excluded as a cause of the data used in calculation of the probability.[62] The conclusion is merely a statement that at a .05 significance level,[63] randomness is, as a matter of the suppositions of the statistical methodology, rejected as a cause of a race or gender disparity in composition to the work force. The conclusion is evidence, not a compelled legal conclusion about the presence or absence of illicit motive.[64] Unfortunately, some courts

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to Identification Evidence, 83 HARV. L. REV. 489 (1970); Kaye, *The Laws of Probability, supra*; Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971); Tyree, *Proof and Probability in the Anglo-American Legal System*, 23 JURIMETRICS 89 (1982). *Cf.* L. COHEN, THE PROBABLE AND THE PROVEABLE (1977) (Generally distinguishing proof in law from mathematical theories of probability).

61. The selection of a significance level is a matter of judicial judgment; the .05 level is the social science convention. *See* E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633, 645-50 (4th Cir. 1983); BALDUS & COLE, *supra* note 57, at 318; Braun, *supra* note 57, at 70.

Note that there are a number of distinct tests of significance, the appropriate test is a matter of context. *Compare* Hazelwood School Dist. v. United States, 431 U.S. 324 (1977) (binomial test) *with* Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793 (1978) (test of the difference between independent proportions). *See generally* H. BLALOCK JR., SOCIAL STATISTICS 105-219 (Rev. 2d ed. 1979).

62. *See, e.g.*, BALDUS & COLE, *supra* note 57, at 303-04; Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 717 (1980).

63. *See* note 61 *supra*.

64. There are two senses in which a rejection of a null hypothesis at an established significance level may be confused with a burden of persuasion. First, although it has been argued that the preponderance of the evidence standard (is it more likely than not the defendant engaged in disparate treatment) is approximated by a significance level less stringent than .05, *See* E.E.O.C. v. American National Bank, 652 F.2d 1176, 1192 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 235 (1982), it is not the case that an .05 significance level (.95 confidence level) necessarily imposes a probability requirement in excess of a preponderance test. *See* Fisher, *supra* note 62, at 717. *But cf.* Dawson, *Are Statisticians Being Fair to Employment Discrimination Plaintiffs?*, 21 JURIMETRICS 1 (1980); Henkel & McKeown, *Unlawful Discrimination and Statistical Proof: An Analysis*, 22 JURIMETRICS 34 (1981) (treating significance level in terms of standards of persuasion but correctly recognizing that the conservatism of a .05 level may not be appropriate if imposed as a standard for establishing a plaintiff's prima facie case).

The conservatism reflected by a .05 significance level arises from the fact that such a test is applied in the present context on the plausible but by no means indisputable premise that a given workforce will reflect the racial composition of the

mistake satisfaction of a significance level for satisfaction of a stan-

community from which it is obtained if selection occurs without reference to race. The null hypothesis tested is that the composition of the employer's workforce is the product of random variation—"chance." Rejection of that null hypothesis at the .05 level (or at the 2 or 3 standard deviation level for large samples postulated in Hazelwood Sch. Dist. v. United States, 443 U.S. 299, 308 n.14, 311 n.17 (1977)) is rejection in the following form: there is less than a 1 in 20 chance of discovering a workforce of the race or gender composition discovered *if* the workforce was selected without reference to race or gender (or to some characteristic not controlled which is correlated with race or gender). Such a probability statement is not a statement that there is a .05 probability that the employer did not discriminate; nor is it a statement that there is a .95 probability that the employer did discriminate. *See* BLALOCK *supra* note 57, at 157-66. At most, the statement is a statement about the probability of discovering the evidence discovered if discrimination did not occur, and even this formulation is misleading because it implies a statement of causal relationship—a relationship not directly addressed by a test of statistical significance. *See* BALDUS & COLE, *supra* note 57, at 304 n.31; 320-21; Cohn, *Book Review*, 55 N.Y.U.L. REV. 1295, 1302-03 (1980).

The second sense in which rejection of a null hypothesis may be confused with satisfaction of a burden of persuasion is more complex. To the extent that a court broadly frames the null hypothesis tested as, *e.g.*, "the defendant did not engage in disparate treatment," it is possible to interpret a rejection of the null hypothesis at even a .05 or .01 level as amounting to a conclusion that the plaintiff has prevailed "by a preponderance of the evidence." Such an interpretation is supported by academic writing which emphasizes the notion that a court should establish the level of significance to be used on the basis of considerations similar to those supporting selection of a standard of persuasion—*e.g.*, allocation of risks of judicial error and the degree of toleration of error. *See, e.g.*, BALDUS & COLE, *supra* note 57, at 69-70; Dawson, *supra* at 2. There are two difficulties with conceiving of the rejection of a null hypothesis at some selected significance level as synonymous with a plaintiff's satisfaction of a burden of persuasion on the ultimate issue of disparate treatment.

First, the null hypothesis cannot accurately be so broadly stated. In a systematic disparate treatment case, a test of significance can only exclude random variation as an explanation of a workforce disparity; the viability of the inference that intentional discrimination caused the disparity arising from a rejection of chance as a cause is dependent upon whether other potential causes have also been eliminated. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.14, 311 n.17 (1977); BALDUS & COLE, *supra* note 57, at 292; D. BARNES, STATISTICS AS PROOF, FUNDAMENTALS OF QUANTITATIVE EVIDENCE 182, 229 (1982); Braun, *Quantitative Analysis, supra* note 60, at 63-65; Cohn, *Book Review, supra* note 64, at 1304-05; Smith & Abram, *Quantitative Analysis and Proof in Employment Discrimination*, 1981 U. ILL. L. REV. 33, 43.

Second, a finder of fact's evaluation of probabilities under a preponderance of the evidence standard must take into account all of the evidence, the credibility of evidence and the often conflicting inferences arising from evidence. *Cf.* United States v. Test, 550 F.2d 577, 584 (10th Cir. 1976) (statistical significance and quantitative significance are both relevant); BALDUS & COLE at 317-18 (practical and statistical significance should not be confused). A test of statistical significance does not tell us anything directly about causation (motive); it is merely evidence from which a trier of fact's degree of belief that illicit motive caused employer decisions may be increased. *Id.* at 320-21. *Cf.* Kaye, *Laws of Probability, supra* note 60, at 44 n.35, 47-53, 51 n.57 (distinguishing data regarding relative frequency from the question of the probability that some material conclusion is true). *But cf.* BALDUS & COLE at 317 n.48 (significance level is somewhat analogous to weight of burden of proof).

dard of persuasion and by so doing again generate, *pro tanto*, a prohibition of consequence.[65]

The second source of a risk of inconsistency with approximation is that a concentration upon consequences can distort analysis if it is not recognized that consequences are merely evidentiary means to proof of motive. The persuasiveness of the inference from consequence is a matter of judgment. To the extent that judgment is exercised within the conceptual structure of the disparate treatment model, one may disagree with the conclusion reached, but not with the legitimacy of judgment. It should nevertheless be apparent that it is possible to so emphasize consequences that decision is in fact reached within the conceptual structure of a quite distinct model. When that occurs—and it has repeatedly occurred in judicial decision making under the treatment model[66]—one may legitimately question the legitimacy of

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65. In E.E.O.C. v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), *cert. denied*, 103 S. Ct. 235 (1982) the court distinguished the use of a test of statistical significance (the *Hazelwood* 2 or 3 standard deviations rule) for purpose of establishing that chance did not produce challenged consequences (if standard deviations exceed 2 or 3, chance is eliminated as a potential cause of disparities) and the use of such a test to establish that chance did produce challenged consequences (if standard deviations are fewer than 2 or 3, consequences are attributable to random variation rather than illicit motive). *Id.* at 1192-93. To the extent that the bases for this distinction were that courts are obliged to derive conclusions from all of the evidence before them, that tests of significance are evidentiary tools rather than formulae for decision, and that the possibility that illicit motive caused consequences could not be eliminated merely because random variation remained a potential cause as well, the court's analysis seemed sound. *See* E.E.O.C. v. Federal Reserve Board of Richmond, 698 F.2d 633, 645-50 (4th Cir. 1983). To the extent, however, that the distinction was grounded on the propositions either that the defendant has a burden of persuasion on the question of establishing that random variation caused disparate consequences or that a plaintiff may exclude random variation as a potential cause of disparate consequences at a statistical significance level measured by a preponderance of the evidence standard, the court's analysis imposes substantial risks of liability for disparities rather than liability for illicitly motivated decision. American Nat'l Bank at 1218-20 (dissenting opinion). For a judicial analysis employing healthy levels of skepticism in this context *See* E.E.O.C. v. United Virginia Bank, 615 F.2d 147 (4th Cir. 1980).

66. *See, e.g.*, Teamsters v. United States, 431 U.S. 324, 337-40 (1977) (relying on general population statistics, a reliance explained in Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.13 (1977) on the theory that anyone can drive a truck).

On the dangers inherent in uncritical reliance on consequences generally *See* E.E.O.C. v. United Virginia Bank, 615 F.2d 147 (4th Cir. 1980) (all persons in general population are not qualified to be bank tellers); Lerner, *supra*, note 3, at 31-34 (all persons in general population are not qualified to drive trucks); Smith & Abram, *Quantitative Analysis and Proof of Employment Discrimination*, U. Ill. L. Rev. 33, 45-59 (1981). For cases involving problems of defining qualified labor pools for purposes of comparison, *see* DeMedina v. Reinhardt, 686 F.2d 997 (D.C. Cir. 1982); Croker v. Boeing Co., 437 F. Supp. 1138 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (3d. Cir. 1981).

decision, not because of the model in fact utilized is itself illegitimate, but because the decision maker is guilty either of confusion or dishonesty.

(2) The Employer's Burden

Once a plaintiff has established a prima facie case—that is, once he has established a set of facts giving rise to an inference of illicit motive—the employer is compelled to rebut that inference through evidence of a licit motive.[67] This process construct is again facially consistent with an effort to approximate the disparate treatment model. If the appropriate legal question is whether an illicit reason for the employer's action was a necessary cause of that action, proof of licit causes is both appropriate and justified by the process value (relative access to evidence) expressed by the construct.

There are, however, again risks of inconsistency with approximation. The first and most obvious of such risks is in the nature of the rebuttal burden. If the burden is a burden of persuasion, the risk of nonpersuasion has been allocated to the employer on the basis of proof of disparate or otherwise suspicious consequences. In degree the substantive prohibition therefore moves in the direction of a prohibition of consequences.[68] By imposing risks of judicial error (and, therefore, high litigation costs), an allocation of a burden of persuasion to employers penalizes failures to avoid the consequences which give rise to that burden. Such an allocation therefore operates less as a means of approximating a prohibition of illicit motive than as a means of approximating a prohibition of race or gender disparities in the results of an employment decision or process. The Supreme Court, recognizing this tendency, has imposed the lower litigation cost of a burden of production on the employer and therefore moved, again in degree, in the direction of approximation of the disparate treatment model.[69]

Risks of inconsistency generated by an allocation of a burden to the employer arise, however, not merely from the character of the

67. *See, e.g.,* Texas Dept. Community Affairs v. Burdine, 450 U.S. 248 (1981); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

68. *See* Texas Dept Community Affairs v. Burdine, 450 U.S. 248, 257 (1981); Furnco Const. Co. v. Waters, 438 U.S. 567, 577-58 (1978).

69. Texas Dept. Community Affairs v. Burdine, 450 U.S. 248 (1981). There remains some question, however, whether this allocation applies as well in systematic disparate treatment cases. *Compare* Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (*Burdine* applied in such a case) *with* Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 818 (5th Cir. 1982) (*Burdine* distinguished in such a case).

litigation burden imposed but also from the nature or quality of the licit reason the employer must establish in its effort to meet the burden. For example, an employer may claim that the reason for his selection of white applicants for employment rather than black applicants for employment (and, consequently, the reason for a disparity between the proportion of black employees in the employer's workforce and black employees in the population from which the workforce was selected) is that he requires five years experience in a relevant craft as a prerequisite for employment. Because other employers (or unions) discriminated in the past, few black persons in the population have such experience. The employer's reason is race neutral, but must the employer "prove" as well that job experience is a necessary quality for job performance or that some other requirement (a requirement which more black persons in the population could satisfy) would not satisfy its business interest in job performance?[70]

If such an additional burden is imposed on the employer, it can be argued that the burden is consistent with approximation of the disparate treatment model because questions of necessity and of "less burdensome alternative" are relevant to the issue of the credibility of the employer's claimed licit reason. Employment requirements (experience, education and testing requirements are examples) which generate disproportionate race or gender consequences may be explained either as proxies for desired race and sex neutral characteristics or as proxies for race or gender. The first explanation is that the proxy, although almost inevitably over- and under-inclusive (some applicants with less than five years' experience will be competent and some applicants with five years' experience will be incompetent) is justified by the employer's legitimate interest in reducing information costs.[71] The second explanation is that the employer, recognizing that a given requirement will have a disproportionate impact, adopted the requirement as a proxy for race or gender: the reason asserted is "pretextual."[72]

Necessity and less burdensome alternative are self-evidently relevant to the issue of credibilty—i.e., to the issue of pretext. If a requirement is unnecessary or if there is a readily available alternative

70. *See* Furnco Const. Co. v. Waters, 438 U.S. 567 (1978).

71. By legitimate interest I do not include the use of race or gender as a proxy for qualifications. Rather, I refer to race and gender neutral considerations correlated (even if imperfectly) with employee qualifications the use of which is motivated by a desire to avoid the costs imposed by individual assessment as well as identification of qualification.

72. *See* note 16 *supra.*

which would not generate disproportionate consequences, one is justified in entertaining an inference of illicit motive as necessary condition. The difficulty is that necessity and less burdensome alternative are also consistent with a prohibition of consequences. Necessity is in the eye of the beholder. A court employing such a notion risks imposing its view of necessity on an employer motivated solely by a perception of business needs. The costs or potential costs of other alternatives are both often not measurable or, if measurable, are equally in the eye of the beholder. A court which assesses the necessity of a race and gender neutral reason for disparate consequences or the advisability of alternative business practices moves in the direction of prohibiting consequences insufficiently justified on a scale of judicially perceived social or economical utility and therefore risks deviation from and even abandonment of the disparate treatment model.

One means of reconciling the tension between the relevance of necessity to the issue of credibility and the risk of the imposition of a distinct substantive model is by the device of imposing the burden to establish pretext on the plaintiff: the plaintiff retains at all times the burden of persuasion; the employer satisfies its burden by establishing only a "legitimate nondiscriminatory reason", and the plaintiff has an opportunity to establish pretext. This, indeed, is the Supreme Court's reconciliation.[73] But that reconciliation is structural. It can order and channel judicial discretion and it places boundaries on that discretion, but sufficient discretion remains within those boundaries for judicial attempts at approximating models other than the disparate treatment model. An honest exercise of judgment within the boundaries of the model requires a judicial recognition that approximation of the disparate treatment model does not seek to balance business needs and undesirable disparities in the consequences of employment processes. Approximation seeks, rather, identification of illicit motive.

II. DISPARATE IMPACT: THE RECEIVED MODEL AND ITS INCOHERENCE

A. An Introduction to the Problem: Connecticut v. Teal

The disparate impact model of discrimination prohibition is easily stated: an employment criterion which adversely and disproportionately affects a protected class of employees or potential employees is unlawful under Title VII unless justified by "business necessity."[74]

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73. Texas Dept. Community Affairs v. Burdine, 450 U.S. 248 (1981).

74. *See, e.g.*, New York Transit Authority v. Beazer, 440 U.S. 568 (1979);

In conception, the model renders employer motive immaterial, for a facially race neutral and gender neutral criterion adopted for reasons wholly independent of race or gender may be rendered unlawful under the model if its impact is disproportionate. The prohibition, in short, is a prohibition of insufficiently justified disparate consequences.

Although easily stated, the model's function, the meaning of its elements and the relationship between its function and the meaning of its elements are in a state of near complete disarray. It is submitted in this section of this article that the model, at least as applied by the Supreme Court, is incoherent, and that its incoherence is traceable to the Court's failure to explain which of a number of plausible but largely inconsistent functions the model serves.

In outline form, the possibilities are the following: First, the model may be viewed as an equal achievement model; its function is to ensure proportionate distribution of economic resources among race and gender groups.[75] The right generated by such a function is a group right to a proportionate share of the economic pie.[76] Enforcement of such a right is by means of prohibiting employment criteria which fail to produce proportionate shares.[77]

Second, the model may be viewed as prohibiting a relatively narrow range of employment criteria which operate to give current effect to historical societal discrimination by barring from employment opportunity victims of that historical discrimination.[78] Such a prohibition has a quasi-compensatory function. It shifts the burden of historical discrimination to employers in the form of the costs imposed by the prohibition not for purposes of mandating equal achievement, but for purposes of partial redress.[79] The right implicit in such a func-

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Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

75. *See* Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C. CEN. L.J. 1 (1980); Blumrosen, *Strangers in Paradise, supra* note 3, at 103-04.

76. *See* Connecticut v. Teal, ___ U.S. ___, ___, 102 S. Ct. 2525, 2539 (1982) (Powell, J. dissenting); General Electric Co. v. Gilbert, 429 U.S. 125, 129 (1976).

77. *See* Weber v. Kaiser Aluminum & Chemical Corp., 563 F.2d 216, 227 (5th Cir. 1977) (Wisdom, J. dissenting), *rev'd*, 443 U.S. 193 (1979).

78. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971); "Basic intelligence must have the means of articulation to manifest itself fairly in the testing process. Because the are Negroes, petitioners have long received inferior education in segregated schools. . . ."

79. *See* Freeman, *supra* note 3, at 1095. *Cf.* Perry, *supra* note 3, at 561 (adverse impact theory at constitutional level distinguishable from affirmative action because of former requires only that government not exacerbate present effects of past discrimination).

tion is a group right, but is less a right to equal achievement than a right to competition for employment opportunity free of the disadvantages imposed by societal discrimination upon the exercise of opportunity. Group status is a proxy for victim status.

Third, and despite the conceptual irrelevance of motive, the model may be viewed as in fact a process construct designed to approximate a disparate treatment model by stating a proof scheme for attacks upon purportedly race and gender neutral criteria suspected in fact to be used by an employer as proxies for race or gender.[80] The right implicit in the third of these explanations is an individual right to employment decision free of considerations of group membership.

There are variations on each of these themes, but the foregoing states the general alternatives. Each theme is potentially present as an explanation of certain of the lines of cases purportedly decided within the impact model, and no one of the alternatives has been unambiguously adopted by the Court. The court's latest opportunity to clarify the scope and function of the impact model came in *Connecticut v. Teal*,[81] and that case illustrates both the alternatives and the ambiguity of the Court's emphasis upon one or another of the alternatives in particular cases decided under the impact model.

The employer in *Teal* utilized a passing score on a written examination as a first step in its selection process for employee promotion to supervisor. A failing score on the examination eliminated the candidate for promotion from further consideration, but a passing score placed a candidate on an eligibility list. Promotions were made from that list on the basis of considerations of relative advantage, specifically supervisory recommendations, seniority and past performance. The written examination had a disparate racial impact. The black pass rate was 68% of the white pass rate on the particular occasion on which the examination was administered to the plaintiffs in *Teal*.[82] However, the employer, apparently utilizing an affirmative action program,[83] selected candidates from the eligibility list in a manner which generated racial proportions. Approximately 15% of the initial (pre-

80. *See, e.g.*, Fiss, *supra*, note 1, at 297-98; Freeman, *supra* note 3, at 1094, 1116; 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, 443 (1982); Rothchild & Werden, *Title VII and the Use of Employment Tests: An Illustration of the Limits of the Judicial Process*, 11 J. LEGAL STUD. 261, 271-79 (1982); Rutherglen, *supra* note 29, at 234 n.146; Comment, *The Business Necessity Defense*, *supra* note 3.

81. ___ U.S. ___, 102 S. Ct. 2525 (1982).

82. *Id.* at 2529.

83. *Id.*

examination) applicants for promotion were black; approximately 24% of the candidates actually promoted were black.[84] In short, the employer utilized a race neutral criterion (the examination) which had a racially disproportionate impact upon an identifiable group of employees (applicants for promotion), but compensated for that impact by engaging in disparate racial treatment of promotion candidates on the eligibility list generated by the examination.

Black applicants for employment who received failing scores on the examination sued under the impact model. The employer defended on a "bottom line" result theory:[85] although the examination had a disparate impact, the promotion system did not have such an impact. It is important to recognize what was at stake in the employer's theory. There were two potential classes of plaintiffs in *Teal*. White employees who received passing scores on the examination and who were therefore named on the eligibility list but who were not selected by reason of their race could contend that the employer had engaged in disparate treatment. The employer's defense to such a contention would presumably be the affirmative action defense to disparate treatment liability recognized in *United Steelworkers v. Weber*.[86] The actual plaintiffs in *Teal* were, however, black employees who received failing scores on the examination, and those employees utilized an impact model theory. Because the employer's promotion system produced no "bottom line" racial disproportion, the plaintiffs were logically compelled to argue that the function of the impact model was not satisfied by racial proportion and, therefore, that the right recognized by the impact model is not (or at least is not merely) a right of racial groups to proportional representation in the workforce or a subcategory of the workforce. The employer, on the other hand, was compelled to argue either that the impact model is in fact a process construct for approximating the disparate treatment model[87] or that the right recognized by the impact model is only the right of racial groups to proportional shares of employment opportunities.[88]

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84. *Id.* at 2530.

85. The "bottom line" theory is derived from an E.E.O.C. guideline governing that agency's prosecutorial discretion. 29 CFR § 1607.40 (1978). Prior to *Teal* most courts of appeals had accepted bottom line results as a defense to impact model liability. *See, e.g.*, E.E.O.C. v. Greyhound Lines, 635 F.2d 188 (3rd Cir. 1980); E.E.O.C. v. Navajo Refining Co., 593 F.2d 988 (10th Cir. 1979); Smith v. Troyan 520 F.2d at 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); Kirkland v. New York State Dept. Correctional Services, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). *But see* Teal v. Connecticut, 645 F.2d 133 (2d Cir. 1981), *aff'd*, ___ U.S. ___ 102 S. Ct. 2525 (1982).

86. 443 U.S. 193 (1979).

87. *See* ___ U.S. at ___, 102 S. Ct. at 2535.

88. *Id.* at 2530-31.

A bare majority of the Supreme Court rejected bottom line results as a defense. The dissent embraced a group right to racial proportion as the function of the impact model, but did so for the apparent reason of easing the practical difficulties faced by employers in adhering to the impact model.[89] The majority's theory was that individual members of a racial minority have an individual right under Title VII to be free of "artificial, arbitrary and unnecessary" barriers to "employment opportunity."[90] Under this conception an individual black applicant's right to compete for opportunities free of such barriers is not satisfied by the fact that the racial group of which the applicant is a member is proportionately represented in the workforce. Nor, according to the majority, is the right satisfied if the employer has not utilized the barrier as a device for disparate treatment: The impact model is not a process construct for approximating disparate treatment, it is an independent substantive model.[91] The dissent's theory was that only groups have rights under the impact model and that those rights are satisfied if the employer's employment system viewed as a whole produces no disproportionate results.[92] According to the dissent, individual members of a protected race or gender group who are excluded from an employment opportunity by a race or gender neutral component of an employment system therefore have no cognizable complaint where the group itself achieves a proportionate share of the opportunity.[93]

The majority's theory points in the direction of confining the impact model to the elimination of objective and absolute barriers to employment—presumably barriers which perpetuate the effects of past societal discrimination.[94] Because the theory rejects racial proportion as a defense to impact model liability, it is conceptually inconsistent with equal achievement as the function of the impact model. It is, moreover, facially inconsistent with the case coming closest to adopting proportion as the function of the model, *United Steelworkers v.*

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89. *Id.* at 2539 (Powell, J. dissenting): "Our cases . . . have made clear that discriminatory impact claims cannot be based on how an individual is treated in isolation from the treatment of other members of the group. Such claims necessarily are based on whether the group fares less well than other groups under a policy, practice or test."

90. ___ U.S. at ___, 102 S. Ct. at 2534-35.

91. *Id.* at 2535.

92. *Id.* at 2538-39. (Powell, J. dissenting). *But see id.* at 2539-40.

93. *Id.* at 2539.

94. *See* ___ U.S. at ___, 102 S. Ct. at 2533: "The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria" (emphasis in original).

Weber.[95] The Court adopted a "voluntary affirmative action" defense to disparate treatment model liability in *Weber*: disparate treatment of whites does not subject an employer to liability if that treatment is the means by which an employer ensures that protected racial groups enjoy a proportionate share of employment opportunities. As employers risk liability under the impact model for insufficiently justified racial disproportion in the enjoyment of employment opportunities, and as *Weber* eliminated the chief obstacle to avoiding exposure to the impact model through use of racial preferences,[96] the affirmative action defense appeared clearly designed to implement an equal achievement objective. It is, however, the dissenting opinion in *Teal* which points in the direction of an equal achievement understanding of the impact model; the demands of the impact model are satisfied, according to the dissent, by proportionate results.[97]

But these impressions are merely facial impressions. The dissent's theory may be viewed as consistent with the view that the impact model is a process construct for a disparate treatment model: bottom line proportion vitiates any inference from the disparate racial consequence of the use of an employment test that the test was utilized for the purpose of bringing about those consequences.[98] There are, moreover, two aspects of the majority's opinion which undermine its theory and the direction suggested by that theory.

(1) Individuals and Groups

The majority's characterization of the right conferred by an anti-barrier view of the function of the impact model as an individual right is patently wrong. No individual has a right to be free of a barrier to employment under the impact model merely on the basis that the barrier is "artificial, arbitrary and unnecessary." Rather, the individual has a right under the model to freedom from such a barrier only upon a showing that the race or gender group in which he or she is a

95. 443 U.S. 193 (1979).

96. *See id.* at 209-11 (Blackmun, J. concurring).

97. ___ U.S. at ___, 102 S. Ct. at 2536-40 (Powell, J. dissenting).

98. *See id.* at 2537 (Powell, J. dissenting):

> In one set of cases—those including direct proof of discriminatory intent—the plaintiff seeks to establish direct, intentional discrimination against him. In that type case, the individual is at the forefront. . . . In disparate impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs (emphasis in original).

member is disproportionately excluded by the barrier.[99] The right is inherently a group right, for it attaches only by virtue of group harm. Upon the assumption that the majority's underlying rational was redress, individual membership in the group harmed generates a presumption of individual victimization.

It is nevertheless the case that the group right suggested by an anti-barrier conception of the impact model differs from the group right suggested by a proportional representation conception of that model. It differs because *if* minority group freedom from barriers of an "artificial, arbitrary and unnecessary" character is the sole right conferred by the impact model, the group right conferred by the model is merely a right to freedom from barriers of a particular variety—on a redress rationale, barriers identifiable with past societal discrimination.[100] Competition for scare employment opportunity may on this theory continue to occur following elimination of the barrier, and the legal system's regulation of that post-elimination competition is conducted without reference to how members of the minority group fare in the competition absent disparate treatment. A group right to proportion, by contrast, is a group right to "bottom line" proportion whether or not a barrier is present; the group has a right to freedom from competition whether or not competition is distorted by "artificial,

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99. *See, e.g.*, Connecticut v. Teal ___ U.S. ___, ___, 102 S. Ct. 2525, 2529 n.4 (1982) (evidence of impact); New York Transit Authority v. Beazer, 440 U.S. 568 (1978); Albemarle Paper Co. v. Moody, 442 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). The possibility that an individual plaintiff might use the disparate impact theory in an individual action does not alter this conclusion—the individual plaintiff establishes liability only if he establishes group harm. *See Wright v. Nat'l. Archives & Records Service*, 609 F.2d 702, 712-13 (4th Cir. 1979).

100. That the number of "barriers" subject to the impact model is so limited is suggested by the Court's treatment of attacks on subjective hiring or promotion systems under the disparate treatment model and its treatment of objective barriers—particularly tests—which "perpetuate" historical discrimination (particularly in education) under the impact model. *Compare* Furnco Const. Co. v. Waters, 438 U.S. 567 (1978) (treatment model); Teamsters v. United States, 431 U.S. 324 (1977) (treatment model) *with* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (impact model). *But see* Dothard v. Rawlinson, 433 U.S. 321 (1977) (application of impact model to criteria the operation of which was independent of historical discrimination); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (application of impact model to subjective criteria); Bartholet, *supra* note 3 (explaining cases on the theory courts have responded differently to employer decision making processes for blue collar jobs and white collar jobs). If subjective hiring systems are subject to the impact model, it may be for reasons quite distinct from the reasons supporting an application of the model to, *e.g.*, an intelligence test. The latter application is explicable on a redress or equal results rationale; the former application is explicable on the ground that subjectivism risks disparate treatment. *See* text and notes 294-325 *infra*.

arbitrary and unnecessary" devices which stack the deck against the minority. The presence of such barriers, and the disparate impact theory used as a basis for an attack on such barriers, are merely the legal excuse for generating the desired result.[101]

(2) Barriers to Opportunity

This distinction between the nature of the group rights conferred by the anti-barrier and proportion conceptions of the impact model is, however, viable as a distinction only if the right recognized by the court's anti-barrier theory is *solely* freedom from barriers. The second difficulty with the Court's theory in *Teal* is that there is no indication in the opinion that this is the case, and there is reason to believe it is not the case. *Teal* involved an employment examination, a criterion most ripe for an "artificial, arbitrary and unnecessary" characterization and a criterion which perpetuates discrimination in education.[102] But there is nothing in the majority's opinion in *Teal* from which a standard for determining either which employment criteria are subject to attack under the impact model or the appropriate test of "artificial, arbitrary or unnecessary" may be gleaned. To the extent that all criteria are subject to the model and to the extent that the employer's burden of justification is made very difficult, the narrowness of the group right conferred by the anti-barrier conception is illusory. The right becomes functionally the right to equal achievement purportedly rejected by the majority opinion.

As the dissent pointed out in *Teal*, the Court's rejection of bottom line balance forces employers to either eliminate barriers or to undertake the expensive (and dubious) task of justification.[103] If those alternatives were limited to barriers of an "artificial, arbitrary or unnecessary" character under a standard which provides some predictability regarding that characterization, this complaint would not, on anti-barrier premises, have merit. But the very absence of a standard of predictability generates risks of unpredicted exposure to liability. Assuming risk averse employers (an appropriate assumption given

101. The group right implications of the impact model, and the intimate relationship between the impact model and "affirmative action" programs clearly designed to achieve proportionate results are matters explored in Cox, *supra*, note 3, at 107-113. *See also* Weber v. Kaiser Aluminum & Chem. Co., 563 F.2d 216, 228-34 (5th Cir. 1977) (Wisdom, J. dissenting), *rev'd.*, 443 U.S. 193 (1979); Meltzer, *supra* note 3, at 426-37.

102. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981); Boston Chapter N.A.A.C.P. v. Beecher, 504 F.2d 1017 (1st Cir. 1974); *cert. denied*, 421 U.S. 910 (1975).

103. ___ U.S. at ___, 102 S. Ct. at 2540 (Powell, J. dissenting).

potential back pay exposure) the dissent's further contention—that employers will respond to *Teal* by both eliminating barriers and engaging in quota hiring so as to achieve "bottom line" proportion[104]—is not unwarranted.

In summary, then, the majority opinion's anti-barrier theory in *Teal* is inconsistent with the Court's implicit recognition of a group right to proportionate representation in the workforce in *United Steelworkers v. Weber*[105] only if *Teal* and *Weber* are compared at the level of theory. If they are compared instead from the perspective of function they yield a consistent judicial effort to ensure proportionate distribution of race and gender shares of employment opportunities.

The tension between the majority's individualistic rationale in *Teal* and the potential function of the result reached in *Teal* suggests that the impact model is incoherent. That suggestion is confirmed by the dissent, for the most striking feature of *Teal* is the fundamental difference in theoretical perceptions of the purpose served by the impact model articulated in the majority and dissenting opinions. That difference is reflected in each of four questions to be asked in the following subparts of this article: (1) With respect to whom must disparate impact be found? (2) What neutral criteria are subject to the model? (3) What form of disproportion is subject to the model? (4) What is the character of the "business necessity" which will preclude application of the model?

B. Impact on Whom?

(1) The Relevant Population Unit: The External Population Or The Population Actually Subjected to The Challenged Criterion?

The meaning of "impact" is unclear in part because there are conflicting versions in the cases of the relevant population with respect to which disproportion is to be determined.[106] More specifically, it is

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104. *Id.*

105. 433 U.S. 193 (1979). *See* Cox, *supra* note 3, at 139-44.

106. The best recent example of this confusion is Costa v. Markey, 706 F.2d 1 (1st Cir. 1983). The confusion is reflected, however, in Supreme Court opinions. *Compare* Dothard v. Rawlinson, 433 U.S. 321 (1977) (general population data indicating greater percentage of women than men in the general population would be excluded under challenged criterion); Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971) (general population data indicating that greater proportion of white males than black males in general population were qualified under the criterion challenged) *with* Connecticut v. Teal, ___ U.S. ___, 102, S. Ct. 2525, 2529 n.4 (1982) (applicant data in-

not clear whether protected race or gender populations viewed as a whole must be disproportionately affected by a challenged rule or practice or whether the group of employees or applicants for employment actually affected by the challenged rule or practice is the appropriate unit for making that determination. Confusion on this point is illustrated by *Dothard v. Rawlinson*.[107]

In *Dothard* the Supreme Court invalidated a state statute imposing minimum height and weight requirements for prison guards on the ground that the requirements disproportionately excluded women from such positions. The case was in short predicated expressly on the impact model.[108] The evidence of impact upon which the Court primarily relied was census data indicating that the combined requirements would disqualify 41.13% of the female and less than 1% of the male populations of the United States.[109] The unit of measurement was, in short, the female population viewed as a whole, at least where that population was assumed to possess undisputed qualifications (qualifications other than the challenged height and weight requirement) for the position in question. Justice White, in dissent, argued that this unit was inappropriate. Applicant flow data—the population unit consisting of applicants for the position of prison guard—was, in White's view, crucial.[110] The Court, in response to White's dissent, agreed that applicant data would be relevant, but argued both that it would be distorted by the deterrent effect of the challenged criterion upon applicants and that the employer had failed to present such data in rebuttal.[111]

There are a number of potential reasons for the use of an applicant pool as the appropriate unit for purposes of determining the question of disproportionate impact. First, if the relevant unit for that determination is the general population and impact on that popula-

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dicating disparity in selection and failure rates); New York Transit Authority v. Beazer, 440 U.S. 568, 585 (1979) (population data indicating that, of the group disqualified under challenged criterion, most were black or hispanic). To some extent, this conflict is a matter of the availability of data: the general population may not be qualified under employer criteria not challenged by a plaintiff or there may not be data available on the effect of a challenged criterion on any population other than actual applicants. The conflict may also reflect, however, a judicial failure to identify the relevant population unit for determining the impact question.

107. 433 U.S. 321 (1977). A second example is Costa v. Markey, 706 F.2d 1 (1st Cir. 1983).

108. 433 U.S. at 328-29.

109. *Id.* at 329-30.

110. *Id.* at 348. (White, J. dissenting).

111. 433 U.S. at 330-31.

tion is unknown, known disparate impact in an applicant pool may be used to infer disparate impact in the general population.[112] One difficulty with such an inference is that it treats the applicant pool as a "sample" from the external population.[113] It can be argued that it is not in fact a sample because applicants self-select employers—there is no known probability by which persons become part of the "sample."[114] This is not a viable explanation of Justice White's insistence on applicant data as relevant in *Dothard* because impact on the external population was known in *Dothard*.[115]

Second, if impact on the general population is known, but there are employment qualifications not disputed by the plaintiff and not possessed by all members of that general population, it can be argued that applicant data is the best source of information about impact on a general population possessing undisputed qualifications. The focus remains the question of impact on an external minority or female population viewed as a whole, because applicant data is used for the sole purpose of eliminating the influence of unchallenged, and therefore immaterial, employer requirements.[116] This potential explanation of Justice White's dissent, and of the Court's concession of relevance, is equally unhelpful: Justice White did not seriously contest (and the Court assumed) that the general population possessed undisputed qualifications.[117]

Third, applicant data may be used if it is necessary to exclude self-selection as a potential cause of disproportionate consequences: disparities may be caused by differences in the rates in which protected groups and white males apply for employment opportunities. It is clear that Justice White's dissent was predicated on that perceived necessity.[118] But the primary ground for exclusion of self-

112. *See* Shoben, *Differential Pass-Fail Rates in Employment Testing, supra* note 61; Shoben, *Disparate Impact Analysis, supra* note 9, at 8.

113. *See, e.g.*, Shoben, *Disparate Impact Analysis, supra* note 9, ate 8; Rothschild & Werden, *supra* note 80, at 274-75.

114. Cohn, *On The Use of Statistics in Employment Discrimination Cases,* 55 IND. L.J. 493 (1980); Cohn, *Statistical Laws and The Use of Statistics in Law: A Rejoinder to Professor Shoben,* 55 IND. L. J. 537 (1980). *But see* BALDUS & COLE, *supra* note 57, at 316-17; Shoben, *In Defense of Disparate Impact Analysis Under Title VII: A Reply to Dr. Cohn,* 55 IND. L. J. 515 (1980).

115. 433 U.S. at 329-30.

116. *See* Shoben, *Disparate Impact Analysis, supra* note 9, at 33-34. *Cf.* Hazelwood School Dist. v. United States, 433 U.S. 299, 310-11 (1977) (use of this technique for disparate treatment purposes).

117. *See* 433 U.S. at 348. (dissenting opinion)

118. *Id.*

selection is rebuttal of the inference of illicit motive arising from disparities in representation rates. To the extent that self-selection "caused" a disparity between a protected group's representation in a workforce and that group's representation in the general population or the external labor force, the inference of illicit motive arising from that disparity is dissipated.[119] If this is the reason for Justice White's concern for self-selection (and the Court's concession that applicant data was relevant), the real theory in *Dothard* was in illicit motive (disparate treatment model) theory, not an illicit consequences (impact model) theory. Indeed, Justice White's failure to distinguish systematic disparate treatment cases in his analysis of the applicant data question suggests that he may have been of the view that *Dothard* presented an issue of disparate treatment.[120]

Finally there is another and independent reason that applicant data might be used to exclude self-selection as a cause of disproportionate consequences. If the relevant population unit for purposes of determining impact is defined as only those persons actually interested in and available for the opportunity in question, the actual applicant pool satisfies that definition. The implications of such a view are, however, problematic.

If the appropriate unit for determining the impact question is the population viewed as a whole, the function of the disparate impact model may viably be said to be the elimination of barriers to employment for the ultimate purpose, presumably, of increasing minority and female participation in society's economic pie. There are but three requirements (ignoring defenses) under such a view for invalidating an employment criterion: a plaintiff with standing (e.g., an applicant for employment who meets procedural prerequisites to suit); proof of disparate impact on a racial minority or on women viewed as a whole; and the plaintiff's membership in the group impacted. The plaintiff's legal right to be free of the requirement is by virtue of the plaintiff's membership in the disproportionately affected race or gender group, and it is in this sense that such a right is a "group right". The right is the right of a racial minority or of females to be free of a barrier which adversely affects those groups; an individual has no right to be free of an employment requirement absent proof that the race or gender group to which he or she belongs has suffered disproportion. The implication of such a right for the function of the impact model is that the model is designed for purposes of

119. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 312 (1977).
120. *See* Dothard v. Rawlinson, 433 U.S. 321, 347-49 (1977) (White, J. dissenting).

social engineering. The plaintiff may have standing by virtue of his or her application, but the function of the plaintiff's lawsuit is the prospective elimination of a criterion which operates as a barrier to opportunity for the race or gender group in which he or she is a member.[121]

If, however, the relevant unit for purposes of determining impact is the actual applicant (or incumbent employee) group, the nature of the right defined by the impact model is altered. In the first place, the elimination of barriers to employment is made, as a practical matter, significantly more difficult. The actual applicant requirement ignores the deterrent effect of the challenged employment criterion on applications and attacks on the criteria must await the building of a record of impact upon actual applicants. More fundamentally, plaintiff must now establish standing, disproportionate impact on actual applicants who are members of a particular race or gender group, and membership in that group. The plaintiff's right to be free of the employment criterion in issue once these elements have been established remains a group right, for the plaintiff has no right absent proof of disparate exclusion of a protected group within the pool of applicants. But the group's right is rather different than the group's right where the minority or gender population as a whole is the appropriate unit for the impact determination. The right is no longer a race or gender group right to the elimination of unjustified barriers to *potential* applicants; rather, it is a right to the elimination of unjustified barriers to a race or gender subpopulation with immediate expectations in the employment opportunity in question.[122]

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121. *See* Costa v. Markey, 706 F.2d 1, 12-13, (1st Cir. 1983) (Bownes, J. dissenting). *Cf.* M. ZIMMER, C. SULLIVAN & R. RICHARDS, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION, 386-87 (1982) (interpreting continuing violation theory as means of permitting an attack upon a criterion having a disparate impact despite time barred harm suffered by particular plaintiff).

122. *See* Robinson v. City of Dallas, 514 F.2d 1271, 1273 (5th Cir. 1975). BALDUS & COLE, *supra* note 57, at 108 argue for a preference in favor of actual applicant data in disparate impact model cases on the ground that such data is "a proxy for the population that would have applied under conditions of normal labor supply." Such a view appears viable in a disparate treatment case because the issue in such a case is what was the employer's conduct. The view would moreover be viable in disparate impact cases if it is assumed that the group protected by the impact model is the group of minority or female applicants "under conditions of normal labor supply." What is not clear is why the impact model should be confined to that group. (Unless the impact model is an attempt at approximating the disparate treatment model). *See* Shoben, *Disparate Impact Analysis, supra* note 9, at 22-23, 29-29.

Lerner, *supra*, note 3, at 30-39 rejects the use of general population data and apparently supports use of a comparison of representation rates in the qualified labor force in a relevant geographical area with representation rates in a workforce as a

Under the applicant data requirement, the impact model is far closer to the traditional notion that an individual harmed by another has a right to redress than it is to the notion that barriers to minority or female employment are to be prospectively eliminated. The difficulty is that this right to redress remains a function of group membership, and the applicant data requirement has no apparent relationship to the group character of the right to redress.[123]

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measure of impact. But Lerner's analysis rejects the disparate impact/disparate treatment distinction, *Id.* at 29-30. That analysis may be viable if it is assumed that the function of Title VII is to require rational decision making on the part of employers, *see Id.* at 23, and if an obligation of rationality is viewed as an operative means of precluding employer action motivated by race or gender. But it is at best difficult to see why general population data is irrelevant if it is assumed that the courts are serious about focusing upon the differential effect of particular criterion upon protected groups. Note again, however, that general population data are not, under the latter assumption, an appropriate basis for decision if they do not account for undisputed qualifications. Moreover, the issue discussed in the text should be distinguished generally from the problem of identifying a relevant data base. For example, challenges to neutral promotion criteria may of necessity require a focus on encumbant employees where the criteria challenged (e.g. an experience with the employer requirement) is applied only to encumbant employees. Such a use of available data does not necessarily suggest, however, that the long-term impact on a protected population viewed writ large is not the subject of inquiry. *But see* Robinson v. City of Dallas, 514 F.2d 1271, 1273 (5th Cir. 1975).

123. This point may be illustrated by considering two hypotheticals: Suppose that it is known that an employment criterion has a disproportionate impact on a minority race within the general population and that there are no undisputed qualifications which would threaten that assumption. Suppose further that the applicant data for an employer who utilizes the criterion discloses no such impact. Under these facts, the employer's data suggests either that only members of the impacted group who are unlike their fellow members (in that they satisfy the criterion) are interested in the employment in question or that random variation—"chance"—explains the employer's experience. Could an applicant for employment who both failed to meet the criterion and is a member of the racial minority impacted writ large successfully seek elimination of the employer's requirement? Justice White's apparent answer (and the *Dothard* Court's apparent answer if it could be shown that no deterrence of applicants occurred) would be in the negative. If the appropriate answer is negative, the impact model is not effectively eliminating barriers to potential applicants, for it grants a right to freedom from such barriers only upon proof of actual harm to a limited number of persons disproportionately foreclosed in fact from an employment opportunity. Nor, if the appropriate answer is negative, is the right conferred by the model a group right to proportionate shares—there is no right unless a subpopulation of a protected race or gender group (actual applicants who are members of that group) is disproportionately excluded. *See* Costa v. Markey, 706 F.2d 1, 10-12 (1st Cir. 1983).

Suppose, instead, that it is known that the criterion has no disproportionate impact within the external population possessing undisputed qualifications, but there is evidence that a particular employer's use of the criterion has resulted in a disproportionate impact upon actual minority applicants — suppose, in short, random variation produces a "sample" in which disproportion has occurred in fact. May a rejected minority

(2) The Problem of "Significant" or "Substantial" Impact

The Supreme Court has variously characterized the impact required by the disparate impact model as "significant impact"[124] or "substantial impact."[125] The EEOC, in establishing a standard for the exercise of its enforcement discretion, adopted a "4/5 rule of thumb" arguably expressive of the significance or substantiality notions: an employee selection criterion has an adverse impact on a minority if the minority (or female) pass rate is less than 80% of the white male pass rate.[126] Some courts of appeals have adopted the 4/5 rule as a rule of substantive, prima facie liability.[127]

The significance or substantiality notion, whether or not arbitrarily expressed by an 80% standard, has three potential alternative meanings, no one of which has been authoritatively selected as the appropriate meaning and each of which has distinct implications for the substantive content of the impact model.[128]

(a) Substantiality as Quantitatively Unacceptable Disparity

It is possible that the substantiality or significance notion is a reference to quantitatively substantial disparity: disparities are tolerable unless the disparities (the difference between white male and minority or female success or failure under a challenged rule or practice) exceeds some quantitative standard.[129] The 4/5 rule may be viewed as suggesting such a standard with respect to selection rate

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applicant seek elimination of the criterion? If the appropriate answer under the impact model is affirmative, a prospective remedy precluding use of the criterion has no intelligible relationship to a policy of eliminating barriers to employment opportunities which disproportionately affect minorities: there is no such barrier. Nor, if the answer is affirmative, is a focus upon applicant data consistent with a proportional shares conception of the right conferred by the model: The group, by hypothesis, has a proportional share.

124. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

125. Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971).

126. 29 CFR § 1607.4(D) (1981).

127. *See, e.g.*, Teal v. Connecticut, 645 F.2d 133 (2d Cir. 1981), *aff'd*, ___ U.S. ___, 102 S. Ct. 2525 (1982); Firefighters Institute for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir.), *cert. denied*, 452 U.S. 938 (1980) Jackson v. Nassau Co. Civil Serv. Comm'n., 424 F. Supp. 1162 (E.D.N.Y. 1976).

128. Calculation of a "disparity" is of course a function of the character of the comparison made. *See* text and note 176 *infra*.

129. *See, e.g.*, Rivera v. City of Wichita Falls, 665 F.2d 531, 545 n.22 (5th Cir. 1982); Moore v. Southwestern Bell Tel. Co., 593 F.2d 607 (5th Cir. 1979). *Cf.* United States v. Test, 550 F.2d 577, 589 (10th Cir. 1976) (distinguishing practical and statistical significance in jury context); Chicano Police Officer's Ass'n v. Stover, 526 F.2d 431, 439 (10th Cir. 1975) (same), *vacated on other grounds*, 426 U.S. 944 (1976).

comparisons in applicant data. A similar quantitative notion is also possible, however, in the evaluation of impact if impact on the external population is the relevant focus. A known disparate impact on an external population may be viewed as insufficient if the disproportionate disqualification of the general minority population is not excessive (e.g., if 21% of the white population would be disqualified and 22% of the black population would be disqualified).

What are the implications of a quantitative measure of tolerable disparity? Such a conception of substantiality or significance would appear to serve one or more of three functions. First, and by analogy to the purpose served by the EEOC's "rule of thumb", a quantitative measure might serve to allocate judicial resources so as to force a detailed judicial inquiry into employer justification only in cases of egregious impact: absent quantitatively unacceptable disparity, there is no prima facie case.

Second, a quantitative measure may be viewed as serving as a rough basis for engaging in a balancing test.[130] That is, if the impact model is designed to in effect force a greater protected group participation in society's economic pie, but to limit that objective to instances in which economic efficiency (and, therefore, the size of the pie) will not be seriously threatened, the model may be characterized as a framework within which a court balances the participation objective against the efficiency objective. On that premise, a quantitative measure of disparity provides some sense of the importance of the participation objective in the balance. It informs the court (somewhat arbitrarily) about the degree to which the participation objective is threatened by an employer's pursuit of efficiency.

Third, a disparity in success or failure rates under a challenged neutral criterion may be viewed as a measure of the similarity of exclusion from an employment opportunity under such a criterion to exclusion under an explicit race or gender criterion. A significant quantitative disparity establishes a greater probability of protected group exclusion under a neutral criterion than white male exclusion under that criterion. That greater probability of exclusion is arguably analagous to the certainty or near certainty of exclusion where employment decisions are motivated by race or gender.[131] If the function of

130. Strict versions of the business necessity defense are framed explicitly in terms of balancing disparate impact against the employer interests furthered by a challenged rule, practice or criterion. *See, e.g.*, Robinson v. Lorrillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971).

131. *See* Fiss, *supra* note 1, at 301-02; note 169 and text and notes 301-17 *infra*.

the impact model is to approximate a disparate treatment prohibition, a quantitatively significant disparity may give rise to an inference of illicit motive. If the function of the impact model is a form of redress, a quantitatively significant disparity may serve as a proxy for victimization; where disparities in current success are large, it might be inferred that they are attributable to past discrimination.

(b) Significance As Statistical Significance

A second possible explanation of the substantiality or significance test is that it serves to eliminate the possibility that disparate impact in applicant data is the product of random variation.[132] Both the 4/5 rule of thumb (very roughly and often inaccurately) and more sophisticated techniques (more precisely but not without theoretical objection) may be viewed, then, as attempting to determine whether the neutral criterion used by the employer could be expected to have a disparate impact on the general population. To the extent that only applicant data are available, statistical significance projects anticipated exclusion of the protected minority or gender group viewed as a whole and therefore serves as a substitute for the known data regarding that exclusion in a case such as *Dothard*.[133]

The statistical significance explanation is consistent with the view that the impact model creates a group right enjoyed by a protected group viewed as a whole. Statistical significance establishes that a challenged rule or practice has a disparate effect within the general population; if statistical significance is required, a disparate impact on actual applicants gives rise to liability only were that disparate impact reflects a projected disparate impact on protected groups in the general population.[134]

Proof of statistical significance establishes, then, that the pro-

132. *See, e.g.,* New York Transit Authority v. Beazer, 440 U.S. 568, 598 n.3 (1979) (White, J. dissenting); Adams v. Reed, 567 F.2d 1283, 1287 (5th Cir. 1978); Watkins v. Scott Paper Co., 530 F.2d 1159, 1186 (5th Cir.), *cert. denied,* 429 U.S. 861 (1976); Rich v. Martin Marietta Corp. 467 F. Supp. 587 (D. Colo. 1980).

133. *See* BALDUS & COLE, *supra* note 57, at 290: Shoben *Statistical Proof, supra* note 61, at 798; Shoben, *Disparate Impact Analysis, supra* note 9, at 8.

134. *See* Bauer v. Bailar, 647 F.2d 1037, 1043 (10th Cir. 1981); Wright v. Nat'l Archives & Records Service, 609 F.2d 702, 712-13 (4th Cir. 1979); Donnell v. General Motors Corp., 576 F.2d 1291, 1296-98 (8th Cir. 1978); Payne v. Travenol Laboratories, Inc., 565 F.2d 895 (5th Cir.), *cert. denied,* 439 U.S. 835 (1978). *See also* Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 612 (9th Cir. 1982) (dissenting opinion). *But see* Costa v. Markey, 706 F.2d 1, 10-12 (1st Cir. 1983). *Cf.* Robinson v. City of Dallas, 514 F.2d 1271, 1273 (5th Cir. 1971) (rule applicable only to employees must be analyzed using employees rather than general population as data base).

tected group viewed as a whole is disproportionately denied access to an employment opportunity. The probability or improbability that members of the protected group will become actual applicants for employment is immaterial, for it is the protected group's right to be free from a "barrier to opportunity", not an actual applicant's right to that freedom, which is crucial.[135] It should be apparent, however, that the statistical significance explanation is not a viable explanation if impact on the external population of potential applicants or employees is not the impact model's target. If actual applicants or employees are the persons with rights to freedom from disparate impact, a conclusion that they are equally victims of chance should be immaterial.[136]

(c) Substantiality or Significance As Quantitatively Unacceptable Impact Upon the Protected Group Considered As A Whole

Although it does not appear to constitute an alternative to the foregoing explanations there is another quantitative explanation of the substantiality or significance element of the impact model which may be both independent of and a requirement in addition to quantitative disparity and statistical significance. That element is not quantity of disparity, but quantity of exclusion from an employment opportunity of a protected race or gender group viewed as a whole.[137]

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135. *Compare* Cohn, *On the Use of Statistics In Employment Discrimination Cases*, 55 IND. L. J. 493, 497 (1980) (applicants are not a sample from a population because there is no known probability by which members of the population became applicants); Lerner, *supra* note 3, at 26 (use of general population data ignores problems of self-selection and undisputed qualifications) *with* Shoben, *In Defense of Disparate Impact Analysis Under Title VII: A Reply to Dr. Cohn*, 55 IND. L. J. 515, 527 (1980) ("The relevant legal question . . . is whether the test has the effect of disproportionately excluding one group for whatever reason ").

136. *See* the discussion of Justice White's dissent in *Dothard* at text and notes 106-23 *supra*.

137. This distinction may be illustrated by a hypothetical. Assume that a challenged criterion excludes a subpopulation of 40,000 persons, 63% (26,200) of whom are black. If the external workforce of the three million persons is 20% (600,000) black, the disparate effect of the challenged criterion on that workforce is arguably de minimus: 600,000 minus 26,200 (96%) of potential black applicants would succeed under the criterion and 2,400,000 minus 13,800 (99.99%) of potential white applicants would succeed under the criterion. *See* Moore v. Southwestern Bell Tel. Co., 593 F.2d 607 (5th Cir. 1979).

To compare the 63% representation rate (in the excluded subpopulation) with the 20% representation rate in the external workforce, *see* New York Transit Authority v. Beazer, 440 U.S. 568, 598 (1979) (White, J. dissenting), is not to provide information about either the comparative rate of white and black exclusion or the comparative rate of white and black inclusion under the criterion if the relevant population unit

That is, there may be, at least as a threshold matter of the applicability of the impact model, a distinction between disproportionate exclusion of a protected race or gender group (to which the model is applicable) and exclusion of a subpopulation disproportionately composed of a protected race or gender group (to which the model is arguably inapplicable).[138]

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for the impact determination is the protected group viewed writ large.

Judicial use of a black or female representation rate in a subpopulation of persons *qualified* under a challenged criterion should be distinguished from the use of such a representation rate in a subpopulation of persons *disqualified* by a challenged criterion. For example, in Chrisner v. Complete Auto Transit, Inc. 645 F.2d 1251 (6th Cir. 1981) a two year experience requirement for truck driver positions was challenged on the theory that the requirement had a disparate impact on women. The evidence of disparate impact relied upon was data indicating that only 5% of all truck drivers (a proxy population for persons who would satisfy the experience requirement) were women. The court's focus was therefore on the gender composition of a subpopulation, but a subpopulation of *qualified* persons. Although the challenged experience requirement may not have generated a "substantial" *disparity* in the general population (both most men and most women would be disqualified under the criterion), it did generate a substantial disparity within the subpopulation *and* a substantial exclusionary effect on women in the general population.

138. *But cf.* Rivera v. City of Wichita Falls, 665 F.2d 531, 535 n.5 (5th Cir. 1982) (greater quantitative impact required in disparate treatment cases than in disparate impact cases).

The postulated distinction in the text here is not merely the distinction between a focus upon fail rates and a focus upon pass rates; it is a distinction, rather, between a focus upon the effect of a criterion on a protected group viewed as a whole and a focus upon the effect of a criterion on some subset of that group. Green v. Missouri Pacific R.R. Co., 523 F.2d 1290 (8th Cir. 1975) may illustrate this point. The challenged criterion in that case was an employer rule precluding employment of persons convicted of any crime. The court relied upon two measures of impact: (1) Applicant data indicating that 5.3 per cent of black applicants and 2.23 per cent of white applicants were excluded under the criterion, a disparity expressed by the court as a rejection rate for black applicants 2.5 times the rejection rate for white applicants. *Id.* at 1295. (2) An expert's testimony that between 36.9 and 78.1 per cent of all black persons in urban areas would incur a conviction in their lifetimes whereas 11.6 to 16.8 per cent of white persons would incur a conviction. *Id.* at 1294.

The first measure of impact focuses upon degree of disparity and may be criticized on the ground that, although a 2.5 to 1 rejection rate appears large, the same statistics produce a 97.7 to 94.6 (1.03 to 1) selection rate. The second measure of impact, if believed, discloses both a substantial disparity and that the employer's criterion had the potential of excluding a quantitatively substantial portion of the black population. The court in *Green* rejected the district court's theory that the representation rate of excluded black applicants (a percentage of the total applicant pool) was small in comparison to the representation rate of blacks in the metropolitan population on the ground that the issue was "not whether the individuals actually suffering from a discriminatory practice are statistically large in number." 523 F.2d at 1295. That rejection would appear to constitute a rejection of the notion expressed in the text here that there must be disproportionate exclusion of a protected race or gender group viewed writ large.

It is obvious that if the subpopulation excluded by a criterion is large and if the subpopulation's composition is dramatically disproportionate, exclusion of the subpopulation may have the effect of substantially excluding the protected group. But exclusion under a challenged criterion of quantitatively small subpopulations need not have this effect. It is possible for a neutral criterion to exclude some subpopulation mostly or even overwhelmingly composed of members of a protected group and to simultaneously have no or very little disparate impact on the protected group viewed as a whole. A variation of the proposed distinction is the argument postulated by the "bottom line" balance theory that inclusion of a protected race or gender group viewed as a whole (the group has received a proportionate share of a relevant opportunity or benefit conferred by an employer) obviates the issue of the simultaneous exclusion of a subset of the protected group (a challenged criterion operates to exclude a group predominantly or exclusively composed of females or of members of a racial minority).[139]

If, however, the court's myopic reliance on rejection rates (and failure to consider selection rates) renders its finding of a substantial disparity questionable, the remaining basis for its decision—evidence that the challenged criterion would exclude a substantial percentage of the urban black population—is precisely that "individuals actually suffering from a discriminatory practice are statistically large in number."

139. *See* Costa v. Markey, 706 F.2d 1 (1st. Cir. 1983); EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980). The bottom line balance defense was rejected by the Supreme Court in Connecticut v. Teal, ___ U.S. ___, 102 S. Ct. 2525 (1982), but *Greyhound* is useful as an example of the postulated distinction. That case included a challenge to a facially race neutral employer rule precluding the wearing of beards by male employees. The rule had a "disparate impact" on the black male population viewed writ large because a substantial member of black males suffer from a skin disease unique to blacks rendering shaving medically inadvisable. However, the employer employed blacks in numbers in excess of their representation in the external labor force. The Third Circuit reversed a lower court judgment in favor of the plaintiff in *Greyhound* on two grounds: (1) the "bottom line" defense (blacks as a group were proportionately included in the employer's workforce) and (2) the plaintiff had failed to establish "causation" because no comparative evidence regarding the effect of the no beards rule on whites had been proffered. In form, the later ground for decision is failure to establish disparity. The difficulty with that rationale is that it imposes on the plaintiff an obligation to negate hypothetical causes despite the fact that the evidence in *Greyhound* suggested that blacks suffer from the disease in question at a far greater rate than whites. *See* 635 F.2d at 199 (dissenting opinion). In substance, however, the Third Circuit's causation theory constituted a refusal to focus upon exclusion of a subpopulation within the black population (those black males suffering from the condition in question) where there was no exclusion of the black population viewed writ large (blacks were proportionately included in the workforce).

Note, however, that proportional inclusion of the protected group may merely be *evidence* that the group writ large has not been excluded. It is at least possible that a challenged criterion will have no disparate impact on the protected group viewed

There appears to be no dispute on the Supreme Court that disproportionate exclusion of a protected race or gender group viewed as a whole falls within the scope of the impact model. There has, however, been a continuing dispute on the Court over the applicability of the model to exclusion of a subpopulation disproportionately composed of a protected race or gender group. The Court concluded that the latter form of exclusion falls outside the scope of the model in *General Electric Co. v. Gilbert*[140] and may be viewed as reaching the same conclusion in *New York Transit Authority v. Beazer*.[141] It came, however, to an arguably contrary conclusion in *Connecticut v. Teal*.[142]

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writ large in a case in which there is a current disproportion in the enjoyment of an employment opportunity. On this theory, however, it may be that the employer's no-beard rule had a disparate impact on the black population viewed writ large. The plaintiff contended in *Greyhound* that ¼ of black males who shave have a sufficiently severe case of the disease in issue to make the wearing of beards medically advisable. In short, the fact of current proportion in *Greyhound* would not obviate the possibility of long-term disparate impact on the writ large black population, it was merely evidence of that possibility. *See* note 166 *infra*.

140. 429 U.S. 125 (1976).

141. 440 U.S. 568 (1979).

142. ___ U.S. ___, 102 S. Ct. 2525 (1982).

Despite *Teal*, it may be possible to explain the Court's rejection of the perpetuation of past discrimination theory in Teamsters v. United States, 431 U.S. 324 (1977) and United Air Lines, Inc., v. Evans, 431 U.S. 553 (1977) in terms analagous to these postulated in the text. Prior to *Teamsters* and *Evans*, seniority rules could be attacked on the theory that they operated to perpetuate the effects of pre-Act or pre-filing period disparate treatment. *See* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). Although the perpetuation theory was obviously a device by which otherwise time-barred disparate treatment could be remedied, it was in form a disparate impact theory: incumbant employees who were members of protected groups were adversely and disproportionately affected by the operation of race neutral seniority rules because they were the victims of the hiring or job assignment discrimination perpetuated by such neutral rules. Although *Teamsters* and *Evans* were decided on the basis of Sections 703h and 706e, 42 U.S.C. §§ 2000e-2(h) and 2000e-5(e) (1976), the groups benefitting from the perpetuation theories were small subpopulations of protected race or gender groups—incumbant minority and female employees. A race and gender neutral seniority system has, absent current hiring or job assignment discrimination, no long-term disparate impact on the protected group viewed writ large; it merely has an impact on a subpopulation of incumbant employees composed of the victims of past hiring or job assignment discrimination. From the perspective of a view of the impact model which emphasizes redress (the elimination of barriers to opportunity which give effect to past discrimination), the abrogation of perpetuation theory would be anathema. *See* Teamsters v. United States, 431 U.S. 324, 377-94 (1977) (Marshall, J. dissenting); United Air Lines, Inc. v. Evans, 431 U.S. 553, 561-62 (1977) (Marshall, J. dissenting). From the perspective, however, of a view of the impact model which conceives of its function as equal achievement for protected groups viewed writ large, a neutral seniority rule presents no threat to the long-term realization of that objective. Although the seniority principle places minorities and women at a *current* com-

General Electric Co. v. Gilbert

In *Gilbert*, the Court concluded that exclusion of pregnancy from a disability program providing sickness and accident benefits did not have a disproportionate impact on women despite the fact that an excluded subpopulation—pregnant persons—consisted entirely of women.[143] That conclusion was grounded on the plaintiff's failure to prove that women as a group received a lesser actuarial return from the disability program than men as a group.[144] *Gilbert* may therefore be read as limiting the impact model to neutral criteria which exclude women as a group from a proportionate share of employment benefits. The exclusion of a subpopulation disproportionately composed of women (in *Gilbert*, a subpopulation of "pregnant persons" entirely composed of women) is not within the scope of the model because the exclusion of that subpopulation did not have the effect of disproportionately excluding women viewed as a whole.

Analysis of *Gilbert* is of course complicated by the fact that the Court rejected both a disparate treatment and disparate impact attack on the employer's exclusion of pregnancy from its disability program.[145] The Court's rejection of the disparate treatment attack was grounded upon the fiction[146] that pregnancy is not synonymous with gender. That rejection is inconsistent with the disparate treatment model earlier advocated here[147] because it was a rejection of the individual right recognized and prophylactically preserved by that model. Individuals have rights to freedom from race or gender motivated decision even where protected race and gender groups are

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petitive disadvantage in the competition for scare jobs because these groups are most likely to be junior in seniority or to be composed of prospective rather than incumbant employees, that disadvantage is imposed, as well, by a rule of incumbancy (incumbant employees are preferred over prospective employees for positions as employees). *Cf.* Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (rejecting "freedom now" and adopting "rightful place" view of appropriate remedies). The seniority principle produces no disparate impact on the protected group viewed writ large in the long term absent current hiring or job assignment discrimination. *See* note 166 *infra*.

143. General Electric Co. v. Gilbert, 429 U.S. 125, 137-39 (1976).

144. "As there is no proof that the [insurance] package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits. . . ." *Id.* at 138. *See* Nashville Gas Co. v. Satty, 434 U.S. 136, 144 (1977).

145. 429 U.S. at 133-136.

146. "By definition [the employer's] rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male", 429 U.S. at 161-62 (Stevens, J. dissenting).

147. *See* text and notes 5-48 *supra*.

treated equally under an employer rule motivated by race or gender.[148] The Court's rejection of the disparate treatment attack and its disparate impact model analysis in *Gilbert* are, however, fully consistent with an equal achievement rationale for the impact model: the demands of the impact model are satisfied where protected groups viewed as a whole receive, in the long run, proportional results.[149]

New York Transit Authority v. Beazer

In *Beazer* the plaintiff's challenge to an employer's rule precluding employment of drug users was narrowed, by the time the case reached the Supreme Court, to a challenge to the rule to the extent that it precluded employment of persons who had been engaged in a methadone maintenance program for in excess of one year and who sought employment in positions not involving a risk to public safety.[150] The evidence of disparate impact upon which the plaintiffs primarily relied was that 63% of the persons in a relevant geographical area engaged in a public methadone maintenance program were black or hispanic.[151] The Supreme Court concluded that this evidence was an inadequate demonstration of impact for three reasons: (1) the data was general population rather than applicant data;[152] (2) the data did not include the racial and ethnic composition of persons in private methadone programs;[153] and (3) the data failed to indicate the racial and ethnic composition of the group consisting of persons on methadone maintenance for over one year.[154]

There are a number of difficulties with the Court's analysis. Its strict insistence on applicant data[155] was inconsistent with its pronouncement in *Dothard* that general population data is sufficient for a prima facie case.[156] The Court's concern with the racial and ethnic

148. *See* Los Angeles Dept. Water & Power v. Manhart, 435 U.S. 702 (1978); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

149. *See* General Electric Co. v. Gilbert, 429 U.S. 125, 138 (1976): "We need not disturb the findings of the District Court to note that neither is their a finding, nor was there any evidence which would support a finding, that the financial benefits of the plan worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." (quoting from Gedulig v. Aiello, 417 U.S. 484, 496 (1974)).

150. New York Transit Authority v. Beazer, 440 U.S. 568, 585-86 (1979).

151. *Id.* at 585.

152. *Id.* at 585-86 and n.29.

153. *Id.* at 586.

154. *Id.* at 585-86.

155. [T]he District Court noted that about 63% of the persons in New York City receiving methadone maintenance in public programs—*i.e.*, 63% of the 65% of all New York City methadone users who are in such

composition of private methadone maintenance programs displays a hypertechnicality inconsistent with its related view of the plaintiff's burden in prior cases. Finally, the Court's insistence on applicant data was grounded in part on the proposition that methadone users may have found employment with other employers.[157] That ground for decision in effect adopts Justice White's dissenting view of the importance of self-selection in *Dothard*.[158] The fact of employment with other employers suggests nothing about whether a given employer's rule excluding methadone users constitutes a disproportionate bar to black or hispanic employment.

There is, however, an explanation of the result in *Beazer* independent of the Court's explanation of that result. The plaintiff's evidence was that 63% of persons on public methadone programs in a particular

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> programs—are black or Hispanic. We do not know, however, how many of these persons ever worked or sought to work for TA. This statistic therefore reveals little if anything about the racial composition of the class of TA job applicants and employees receiving methadone treatment. More particularly, it tells us nothing about the class of otherwise-qualified applicants and employees who have participated in methadone maintenance programs for over a year—the only class improperly excluded by TA's policy under the District Court's analysis. The record demonstrates, in fact, that the figure is virtually irrelevant because a substantial portion of the persons included in it are either unqualified for other reasons—such as the illicit use of drugs and alcohol—or have received successful assistance in finding jobs with employers other than TA. 440 U.S. at 585-86.

Notice that the Court's concern with undisputed qualifications (persons who have participated in a program for over one year) appears partially independent of its insistence on applicant data. The Court criticizes the district court's statistic both because it "tells us nothing about the racial composition of the class of TA job applicants and employees" *and* because "it tells us nothing about the class of otherwise-qualified *applicants and employees*" (emphasis supplied).

156. The Court explained this conflict as follows:

> Although "a statistical showing of disproportionate impact [need not] always be based on an analysis of the characteristics of actual applicants," *Dothard v. Rawlinson*, 433 U.S. 321, 330, "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants" undermines the significance of such figures. *Teamsters v. United States, supra*, at 340 n.20.

440 U.S. at 586 n.29. *Beazer* is effectively criticized on this point in Friedman, *The Burger Court and The Prima Facie Case In Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 48-52 (1979).

157. 440 U.S. at 586.

158. *See* text and notes 118-23 *supra*. *But cf.* New York Transit Authority v. Beazer, 440 U.S. 568, 598 (1979) (White, J. dissenting): "In a disparate impact hiring case such as this, the plaintiff must show that the challenged practice excludes members of a protected group in numbers disproportionate to their incidence in the pool of potential employees."

geographical locale were black or hispanic. There is no indication that the total number of black and hispanic persons on such a program constituted a "significant or substantial" percentage of the black and hispanic populations of that locale.[159] In *Griggs*[160] and in *Dothard*[161] significant portions of the black and female populations were excluded by the challenged employer rule. In *Beazer*, only that portion of the black and hispanic population engaged in a methadone maintenance program were excluded. It is, in short, possible to explain the result in *Beazer* on the ground that the employer's anti-drug rule had no disparate impact upon the minority population viewed as a whole.[162] The disparity generated by the rule was disparity within a subpopulation, and that disparity, at least as a matter of reasonable speculation, did not have the effect of thereby excluding significant portions of the minority population from employment with the defendant.

Connecticut v. Teal

Recall that in *Connecticut v. Teal*[163] the Court concluded that an employer's use of an employment test, success on which was a prerequisite to promotion, was subject to the impact model even where the minority group disproportionately excluded by the test was nevertheless promoted in proportion to its representation in the pre-test applicant pool.[164] If the impact of the employer's promotion test in

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159. According to the District Court's opinion in *Beazer*, "there are approximately 75,000 persons under methadone maintenance treatment in the United States, of which about 40,000 are in New York City." Beazer v. New York Transit Authority, 339 F. Supp. 1032, 1040 (S.D.N.Y. 1975), *aff'd in part*, 558 F.2d 97 (2d Cir. 1977), *rev'd*, 440 U.S. 568 (1978).

160. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

161. Dothard v. Rawlinson, 433 U.S. 321 (1977).

162. However, the closest the Court came to such a rationale was in a footnote explaining its insistence on data regarding the racial and ethnic composition of private methadone programs in terms of quantity of disparity:

> If all of the participants in private clinics are white, for example, then only about 40% of all methadone users would be black or Hispanic—compared to the 36.3% of the total population of New York City that was black or Hispanic as of the 1970 census. Assuming instead that the percentage of those minorities in the private programs duplicates their percentage of the population of New York City, the figures would still only show that 50% of all methadone users are black or Hispanic compared to 36.3% of the population in the metropolitan area.

440 U.S. at 586 n.30. *See also Id.* at 584 n.25: "the percentage of blacks and hispanics in [the employer's] workforce is well over twice that of the percentage in the work force in the New York Metropolitan area."

163. ___ U.S. ___, 102 S. Ct. 2525 (1982).

164. *See* text and notes 82-85 *supra*.

Teal is viewed as the equivalent of the employer's benefit system in *Gilbert*, neither system generated disproportionate race or gender shares: under both systems, the employer's exclusion of a subpopulation composed primarily or exclusively of a protected race or gender group did not operate to disproportionately exclude the protected race or gender group viewed as a whole. Yet the Court concluded that the right created by the impact model was satisfied in *Gilbert* and was not satisfied in *Teal*.[165]

One possible basis for reconciling *Gilbert* and *Teal* is to argue that the employment test at issue in *Teal* did operate to disproportionately exclude the protected race group viewed as a whole. If the focus of analysis is confined to the test, there was a substantial disparate impact on that group. That argument merely raises, however, a second inconsistency: the Court was willing to test the benefit system at issue in *Gilbert* as a whole by refusing to focus on the impact produced by a single aspect of that system (the pregnancy exclusion), but the Court declined to treat the promotion system at issue in *Teal* as a whole and focused instead on a single aspect of that system (the employment test).[166]

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165. It is arguably possible to distinguish *Gilbert* and *Teal* on the theory that *Gilbert* involved a benefit scheme and *Teal* involved a promotional opportunity. *See* Nashville Gas Co. v. Satty, 434 U.S. 136, 144-45 (1977). Upon the assumption, however, that the impact model applies to compensation and benefit programs, there was "bottom line" equality of results in both cases. In *Teal* the challenged employment test had a projected disparate impact on the black population of otherwise qualified potential applicants viewed writ large if the 4/5 "rule of thumb" relied upon to establish impact is viewed as a rough measure of statistical significance. *See* Connecticut v. Teal, ___ U.S. ___, ___, 102 S. Ct. 2525, 2529 n.4 (1982); text and notes 133-36 *supra*. However, the promotion system at issue in *Teal* allocated promotions in proportion to the racial composition of the external workforce. In *Gilbert* the pregnancy exclusion had a projected disparate impact on females viewed writ large because it excluded from disability coverage a risk of pregnancy incurred only by females while including medical risks incurred only by males. *See* General Electric Co. v. Gilbert, 429 U.S. 125, 162 n.5 (Stevens, J. dissenting). However, the disability plan at issue in *Gilbert* allocated value proportionately because the actuarial value of the plan to men and women was assumed to be equal. *Id.* at 138.

166. It may however be possible to reconcile *Gilbert* and *Teal* on the theory that the Court was concerned in *Teal* with the long-term or projected impact of the employment test there in issue on the protected group viewed writ large. *See* Costa v. Markey, 706 F.2d 1, 12-13 (1st Cir. 1983) (Bownes, J. dissenting). In *Gilbert* the Court assumed that the aggregate actuarial value of the risk protection afforded by the employer's disability plan for women as a group was proportionate in the long run. General Electric Co. v. Gilbert, 429 U.S. 125, 138 (1976). In short, the Court's focus in *Gilbert* was not on the actual value of benefits currently received by women as a group but, rather, upon the projected, long-term effect of the plan upon women as a group. *See* Nashville Gas Co. v. Satty, 434 U.S. 136, 144 (1977); note 144 *supra*.

In *Teal*, the Court relied upon selection rate disparities in applicant data in

What policy might justify the Court's rationale in *Teal*? The majority opinion in *Teal* argues that the impact model is applicable to the exclusion of individuals because the model's function is the elimination of "unnecessary barriers to opportunity."[167] As previously pointed out here, however, the required element of disparate race or gender exclusion precludes the Court's statement that the right to freedom from barriers is individual: the impact model is not applicable to the exclusion of any individual absent proof of disparate race or gender exclusion, and this is the case even where a challenged criterion excludes merely a subpopulation.[168] It is nevertheless arguable that evils targeted by the impact model where the protected group viewed as a whole is excluded are in degree present where a subpopulation disproportionately composed of a protected group is excluded.

At least where disparities are large, disparate exclusion under a race and gender neutral criterion of a protected group viewed as a whole may in a loose sense be viewed as functionally similar[169] to exclusion motivated by race or gender. An express race or gender

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finding impact. ___ U.S. at ___, 102 S. Ct. at 2529 n.4. But that reliance, if viewed from the perspective of statistical significance, may be characterized as focused upon the probable long-term impact of the use of the test on the protected racial group viewed writ large. Although the employer's promotion system viewed as a whole produced no actual disparity in promotion opportunities currently enjoyed by the group viewed writ large, the most significant criterion used in that system would, over time, generate such a disparity. On these premises both *Gilbert* and *Teal* may be explained on the ground that the "bottom line" proportion which is relevant is bottom line proportion in the projected effect of an employer rule upon protected groups viewed writ large; current effect on members of those groups who actually encounter the rule is immaterial except as evidence of writ large exclusion. *Cf.* Gordon v. Continental Airlines, Inc., 692 F.2d 602, 612 (9th Cir. 1982) (Farris, J. dissenting) (where challenged criterion applies only to female employees and excludes only a subset of females as a group, impact theory is inapplicable; *Teal* is distinguishable because the test there in issue had a disparate impact on one of two racial groups).

167. ___ U.S. ___, 102 S. Ct. 2525, 2534-35 (1982).

168. *See* text and notes 99-101 *supra*.

169. *Compare* Perry, *supra* note 3, at 551-53 (pretextual use of neutral criterion as functional disparate treatment at constitutional level of analysis) *with* Fiss, *supra* note 1, at 299 (use of neutral criterion is functional equivalent of use of race where the criterion is more likely to deny opportunity to blacks than whites and where quality measured by the criterion is unrelated to productivity). Professor Perry's use of functional equivalence is grounded on an illicit motive theory: the employer utilizes the challenged criterion for a purpose of excluding a protected group. Professor Fiss rejects the motive theory and utilizes functional equivalence to mean the concurrence of the reasons he identifies for a disparate treatment prohibition: the irrelevance of race to productivity and the immutability of race. *See* Fiss, *supra* note 1, at 301-02. There is a third possible use of functional equivalence. Professor Brest, arguing at a constitutional level, postulates that a judicial effort to prohibit a race-neutral rule which perpetuates past disparate treatment may be sufficiently tied to the "anti-discriminatory principle" to permit its legitimacy within his illicit motive model of

criterion renders it certain that the disfavored race or gender group will be excluded by the criterion from an employment opportunity and certain that the favored race or gender group will be included under the criterion. Use of a race and gender neutral criterion having a disparate impact on a protected race or gender group viewed as a whole renders exclusion of the protected race or gender group more likely than exclusion of the race or gender group favored by the criterion.

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equal protection. *See* Brest, *supra* note 11, at 35. And Professor Perry argues that the latter prohibition is the proper role for disparate impact theory at a constitutional level: government has an obligation not to exacerbate the effects of its past illicit conduct. Perry at 557.

Professor Fiss originally explained the functional equivalence notion on the grounds that a neutral criterion generating a disparate impact is like disparate treatment where (1) the disparity of impact is such that the criterion is more likely to exclude members of a protected group than, *e.g.*, white males (2) those excluded by the criterion have no control over the possession of the quality measured by the criterion and (3) the criterion is unrelated to productivity. Fiss at 299. Likelihood of exclusion is like the certainty of exclusion under an explicit race or gender criterion. Absence of personal control is like the immutability of race. And absence of personal control may be established where past discrimination (*e.g.*, discrimination in education) has precluded acquisition of the quality measured by a challenged criterion. *Id.* (It might also be established where the criterion measures innate characteristics. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); EEOC v. Greyhound Lines, 635 F.2d 188 (3d Cir. 1980)). The absence of a rational link between the quality measured by a criterion and productivity is like the absence of a relationship between race and productivity. Fiss, *supra* note 1, at 299-304.

One commentator has treated the Fiss theory as a disparate treatment theory. Comment, *Business Necessity, supra* note 3. There is much in Professor Fiss' argument to support that treatment, but there are difficulties with functional equivalence which place it somewhere between a disparate treatment theory and an equal achievement theory and impose rather substantial risks of the latter.

First, it is not apparent that the "unfairness" of basing employment decisions on characteristics over which individuals lack control is "like" the unfairness of basing employment decisions on race or gender. Title VII was designed to preclude the latter form of unfairness, but there are a number of its provisions, designed to preserve employer discretion, which clearly tolerate unfairness of the sort contemplated by the Fiss theory. *See, e.g.*, 42 U.S.C. §§ 2000e-2(h), 2000e-3(j) (1976).

Second, the notion that past discrimination may have generated the unfairness of lack of personal control more clearly serves as a basis for implying a causal link between exclusion under a challenged criterion and race or gender than it does to identify the ethical underpinnings of the disparate treatment prohibition. *See* Brest, *supra* note 11, at 31-34. The difficulty with that link, as Professor Fiss has recognized, is that it produces rather substantial evidentiary difficulties only ignored by a presumption that present exclusion is the product of past discrimination. *See* Fiss, *supra* note 1, at 301-04; Fiss, *Second Decade, supra* note 8, at 770; Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 144-46 (1976).

Third, the unfairness notion in the theory is a notion about unfairness to individuals: it is unfair that an individual is excluded for reasons over which the individ-

Absent use of a race and gender neutral criterion as a pretext for disparate treatment, the correlation between exclusion under the neutral criterion and race or gender does not necessarily suggest that race or gender motivated the employer's decision to exclude, but it may suggest that historical conditions (e.g. discrimination in education) themselves correlated with race or gender "caused" exclusion.[170]

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ual has no control. But the means by which judicial analysis proceeds under the theory is a focus upon groups: disparate impact is a group measure of the likelihood of exclusion and past discrimination is an explanation of disparate impact on the group. *See* Brest, *supra* note 11, at 32-33. Individual victimization must be presumed from group status under the analysis, and that presumption moves the theory clearly in the direction not of disparate treatment prohibition, but of a prohibition of group harm. *See generally* Fiss, *Groups and the Equal Protection Clause, supra.*

To the extent that an employer may relatively easily justify an employment practice as reasonably related to some business interest, these difficulties tend to disappear. *See* Fiss, *supra* note 1, at 299, 301-02. (challenged criterion shown to be related to productivity precludes functional equivalence). To that extent, the theory would seem a rather close approximation of a disparate treatment prohibition. *See* Comment, *Business Necessity, supra* note 3, at 924-25. To the extent, however, that a substantial burden of justification is imposed, these difficulties arise with a vengeance: the theory moves in the direction of a prohibition of disparate consequences. *See* Fiss, *supra* note 1, at 300; text and notes 253-61 *infra.* Specifically, to the extent that the business necessity defense is made difficult to establish and the notion that neutral criteria perpetrate past discrimination is emphasized, the theory of functional equivalence moves from an approximated disparate treatment theory to a redress of past harm or equal achievement theory. And this appears in fact to have occurred in the case law. *Compare* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (in which the Court, in an opinion written by Chief Justice Burger, employs an analysis similar to Professor Fiss' functional equivalence argument) *with* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (in which the Court adopted a strict test of job relatedness in an opinion from which Chief Justice Burger dissented).

By "functional similarity" as used in the text here, I mean a variation on the elements of functional equivalence postulated by Professor Fiss. There is functional similarity if there is a correlation between race and a challenged criterion sufficiently strong to conclude that a substantially greater proportion of the members of a protected group will be excluded under the criterion than white males and if there is some reason to suppose that the challenged criterion measures a quality or attribute so related to gender or race by reason of historical discrimination or innate characteristics that the criterion challenged may be fairly characterized as operating to identify race or gender. I do not therefore rely on the fairness or unfairness of making attributes over which a person has no or little control a reason for precluding imperfect exclusion of a protected race or gender group. Nor do I at this point rely upon the irrelevance of the quality measured by a challenged criterion to productivity. *See* text and notes 294-325 *infra.* Functional similarity therefore leaves open the question of the *reason* for the disparate impact prohibition. The legal rationale for precluding imperfect exclusion may be approximated disparate treatment, may be redress or may be equal achievement.

170. By correlation, I mean degree or quality of relationship between variables—here between exclusion under a criterion and race or gender. In the case

Indeed, the Supreme Court's opinion in *Griggs v. Duke Power Co.*, the case in which the Court first adopted the impact model, relies on the notion that some race-neutral criteria give present effect to past societal discrimination.[171] Exclusion under a neutral rule or criterion may be viewed, then, as functionally similar to illicitly motivated exclusion because (1) the greater likelihood of protected group exclusion than white male exclusion under a neutral rule may approximate the high rate of protected group exclusion under a race or gender criterion and (2) the quality or credential measured by the neutral criterion may for historical reasons or for reasons of innate characteristics[172] be so related to race or gender that the criterion may be characterized as identifying race or gender.[173]

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of an express race or gender criterion, the correlation between exclusion and race or gender is perfect. In the case of a race or gender neutral criterion, the correlation between exclusion and race or gender is imperfect. Correlation is not, however, causation. *See* Brilmayer, Laycock & Sullivan, *The Efficient Use of Group Average as Nondiscrimination: A Rejoinder To Professor Benston*, 50 U. CHI. L. REV. 222, 224-35 (1983).

171. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971). *But see* Dothard v. Rawlinson, 433 U.S. 321 (1977) (applying impact theory to physical requirements which cannot be said to have measured qualities related to past discrimination). It is possible to reconcile these cases on the theory that both deficiencies in qualifications attributed to past discrimination and physical requirements, like the immutable characteristic of race, are matters over which the person measured by a criterion has no control. *See* Fiss, *supra* note 1, at 299. It is however not clear why the question of personal control over qualifications may be said to be the subject matter regulated by Title VII.

172. Although innate or biological conditions correlated with protected group status are more likely in the gender context, *see* Dothard v. Rawlinson, 433 U.S. 321 (1977), they are occasionally possible in the racial context. *See* EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980).

173. *Teal* is also explicable, however, in terms of a disparate treatment theory. If one assumes that a function of the disparate impact model is approximation of a disparate treatment prohibition, one may explain the judicial distaste for employment tests on the theory that such tests reflect cultural biases and are therefore possibly used to identify the objects of those biases. To put the argument in extreme form: if one assumes that employment tests are suspect on disparate treatment principles because they reflect white assumptions about concepts of merit, black persons who are successful under an employment test are rendered "most white" and black persons who are unsuccessful are rendered "most black" (in the sense that failure under the test may confirm both the cultural assumptions of the test and the racial assumptions of the test giver). It is at least possible, then, that *Teal* is explicable on a "race plus" disparate treatment theory: the mere fact that blacks were promoted in proportion to their representation in the external population does not preclude the possibility that exclusion of a subpopulation disproportionately composed of blacks was illicitly motivated.

This characterization relies, however, on an assumption of test bias. If that assumption is inaccurate, the original reason for racial disparities in test performance postulated in *Griggs*—discrimination in education—would require the redress rationale

Functional similarity is arguably not present where a criterion includes the protected group viewed as a whole and excludes a quantitatively small subpopulation disproportionately composed of the protected group. Although the correlation between exclusion under a challenged criterion and race or gender in the subpopulation exclusion may be high, and although a greater probability of protected group than white male exclusion is established by substantial disparities in the composition of the subpopulation, the historical, social or biological conditions which explain the relationship between race or gender and exclusion are themselves correlated with only a relatively small portion of the protected race or gender group. Moreover, to the extent that the impact model is justified as a remedy for past historical discrimination—as in effect shifting the burden of that discrimination from the protected group to the employer—it is at least less clear in the subpopulation exclusion case than in the group viewed whole exclusion case that it is the burden of past discrimination which has been shifted. The absence of a disparate impact on the protected group viewed as a whole is at least evidence that the subpopulation excluded by a challenged criterion lacks the characteristics demanded by the criterion for historical reasons independent of at least overt discrimination.

It may, however, be argued on remedial premises that the most severe harm inflicted by historical discrimination befalls subpopulations: subgroups within the protected race or gender group bear the brunt of the effects of historical discrimination and are therefore the most deserving beneficiaries of a burden shifting remedy. It is this line of argument which appears to be the most persuasive explanation of the majority opinion in *Teal*. On the assumptions that deficiencies in test performance are attributable to educational deprivations and that educational deprivations are highly correlated with race, a bottom line defense of the character proposed in *Teal* would permit exclusion of precisely those segments of a protected race or gender group most likely to be noncompetitive in the labor market due to the effects of historical discrimination in education. And the defense would result in the inclusion of those members of the protected group least affected by those historical conditions.

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argued in the text as an explanation of judicial hostility to testing. *See* COMMITTEE ON ABILITY TESTING, ASSEMBLY OF BEHAVIORAL SCIENCES, NATIONAL RESEARCH COUNCIL, ABILITY TESTING: USES, CONSEQUENCES, AND CONTROVERSIES, PART I: REPORT OF THE COMMITTEE 136-49 (A. Wigdor & W. Garner eds. 1982); Lerner, *supra* note 3, at 41-45. *But see generally* Haney, *Employment Tests and Employment Discrimination: A Dissenting Psychological Opinion*, 5 IND. REL. L.J. 1 (1982).

To the extent that reliance is placed on historical discrimination, this explanation of the right to freedom from barriers to opportunity invokes a compensatory rationale for the function of the impact model. That is, there is a group right to freedom from disparate exclusion not because there is a group right to equal achievement, but because there is a group right to partial redress—redress at least in the sense of a right to freedom from the effects of past wrongs.[174] It is important to recognize, however, that such a redress rationale relies upon rather broad definitions of both discrimination and victimization. In effect, a redress rationale utilizes membership in a subpopulation (e.g. a subpopulation of persons with low scores on the test at issue in *Teal* or a subpopulation composed of persons addicted to drugs in *Beazer*) as a proxy for identifying victims of discrimination on the premise that past societal discrimination "caused" membership in the subpopulation. Such an assumption is of course overbroad: causes distinct from past discrimination presumably also contributed to membership in the subpopulation; it is otherwise difficult to explain white male membership in the subpopulation.[175]

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174. *Cf.* Gaston County v. United States, 395 U.S. 285 (1969) (literacy test for voting registration may not be used where segregated education system had provided inferior education for blacks as test would perpetuate past discrimination) The theory that the present effects of past discrimination should be remedied under the impact model and that such an application is at least connected to the principle of antidiscrimination underlying motive inquiry for equal protection purposes is explored in Brest, *supra* note 11, at 31-53. *See also* Perry, *supra* note 3, at 557-60.

175. Despite the overbreadth of the assumption, the form of subpopulation exclusion evident in *Teal* may be characterized as similar to "sex plus" discrimination. In the "sex plus" cases, the employer bases an action on the concurrence both of gender and some gender neutral reason for the action; a subgroup composed exclusively of, *e.g.*, women is therefore treated differently than both men and most women. The rationale for applying the disparate treatment model to "sex plus" discrimination is that it is not possible to assume that "sex plus" classifications are not infected with the evils at which the disparate treatment prohibition is targeted. *See* text and notes 38-48 *supra*.

Teal did not involve an express racial classification even in the form of a "race plus" classification expressly excluding only a subgroup of a racial group. It therefore did not appear to involve the evils which the disparate treatment model is targeted. However, the employment system at issue in *Teal* included within a promotion opportunity a protected group viewed writ large by hiring or promoting those members of the group who possessed qualifications approximating the qualifications disproportionately possessed by whites and excluded a subpopulation disproportionately composed of those members of the protected racial group most likely to have suffered from the deficiencies in educational opportunity reflected in poor test performance. Upon the assumption that the impact model's function is a form of limited redress, the fact that the group viewed writ large enjoyed a proportional share of promotions under the promotional system at issue in *Teal* did not satisfy that redress function. On a redress rationale, it is not possible to assume that the perpetuation of past discrimination evil targeted by the impact model is obviated by equality of results.

C. *Measures of Impact: The Jursidictions of the Disparate Treatment and Disparate Impact Models*

(1) Alternative Uses of Selection and Representation Rates

Although disparate impact has most often been established by comparing white male with minority or female pass or fail (selection) rates under a challenged neutral rule or practice,[176] it has also been established or corroborated by comparing minority or female representation rates in a pre-criterion population or pool of applicants with minority or female representation rates in a workforce or post-criterion pool of applicants.[177]

The "disparate impact" measured by a disparity in selection rates or rejection rates under a challenged criterion is the comparative im-

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176. *See, e.g.,* Connecticut v. Teal, ___ U.S. ___, ___, 102 S. Ct. 2525, 2529 n.4 (1982) (applicant data); Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971) (general population data); 29 CFR § 1607.4 (1981) (Uniform Guidelines on Employee Selection Procedures) (applicant data).

By selection or rejection rates I mean a comparative measure of selection or rejection under a challenged criterion of a protected group on the one hand and whites or males on the other. Such a measure relies either upon population data or upon applicant data and may take the form of a comparison of protected group and white male representation rates in some external population. If, for example, the employer utilizes a high school diploma requirement and it is known that 34% of white males in a relevant geographical area and 12% of black males in that area have completed high school, white males have a (projected) 34% success rate and black males have a (projected) 12% success rate. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971). *See also* Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981) (female representation rate in subpopulation of persons qualified under challenged criterion). If it is known only that 48 black applicants and 259 white applicants took a challenged employment test and that 26 blacks and 206 whites passed the test, the black success rate was 54% and the white success rate was 80%. *See* Connecticut v. Teal, ___ U.S. ___, ___ n.4, 102 S. Ct. 2525, 2529 n.4 (1982).

In a case involving exclusion of a subpopulation, rejection or selection rates are apt to be misleading. If, for example, some challenged criterion excludes a subpopulation the composition of which is 30% white and 70% black, it cannot be said that the black rejection rate is 70%; rather, the black representation rate in the excluded subpopulation is 70%. *See* note 177 *infra.*

177. *See, e.g.,* Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir. 1982); Fisher v. Proctor Gamble Mfg. Co., 613 F.2d 527 (5th Cir. 1980), *cert. denied,* 449 U.S. 1115 (1981); Green v. Missouri-Pac. Rd. Co., 523 F.2d 1290 (8th Cir. 1975).

By representation rates, I mean the percentage of some population which is minority or female. A comparison of a protected group representation rate in an excluded subpopulation with the protected group representation rate in the general population or external workforce is not the comparison discussed in the text. *See* New York Transit Authority v. Beazer, 440 U.S. 568, 586 n.30 (1978); note 137 *supra.* Rather, the concern here is with a comparison of a protected group's representation rate in an employer's workforce or some subset of that workforce with the group's representation rate in the general population or external workforce.

pact of the challenged criterion on white males and the protected race or gender group in issue. A comparison of a minority representation rate in an external population or an applicant pool with a minority representation rate in a workforce or in a post-selection pool measures, however, a distinct disparity: the disparity between the race or gender composition of a pre-selection population with the race or gender composition of a post-selection (or post-criterion) population. That disparity says nothing about disparity of success under a challenged employer criterion except by means of corroborative inference.[178] The use of such a comparison under an impact model suggests a function for the model quite distinct from determining the impact of a challenged criterion. To the extent that the function of the impact model is to ensure proportionate minority representation in a workforce (to penalize results inconsistent with an equal achievement objective) the most direct means of accomplishing that purpose is to impose liability (at least prima facie) for disproportionate representation. It is therefore possible to view evidence of disparity in representation rates purportedly used by a court as a process construct for analyzing an issue of disparate exclusion under a challenged criterion as in fact a surreptitious use of representation rates to impose liability for an employer's failure to satisfy an equal achievement mandate.[179]

The difficulty with the use of representation rates for the purpose of achieving the latter objective is that it would directly contravene Section 703(j) of Title VII—a provision precluding liability for a disparity between a protected group's representation in the general population and its representation in a workforce.[180] Judicial

178. *See* 3 LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 74.41 (1982).

179. *See, e.g., Id.*; Meltzer, *supra* note 3, at 426. *Cf.* Blumrosen, *Bottom Line Concept, supra* note 75, at 6, 18 (bottom line balance in representation rates as a "carrot" and *Griggs* as a "stick" in influencing employer behavior). *But see* Lerner, *supra* note 3, at 28; Shoben, *Disparate Impact Analysis, supra* note 9, at 37-44.

180. 29 USC § 2000 -2(j) (1976)

> (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or na-

use of selection rates under the impact model circumvents Section 703(j) on the theory that selection rates measure only the disparate effects of a challenged criterion on protected race or gender groups.[181] Liability is therefore imposed for reasons of disparate impact on applicants or potential applicants for employment, not for the disproportion which will result from that disparate impact. It is of course apparent that the practical effect of the elimination of a criterion generating a disparate impact will be proportionate inclusion, but the theory of liability nevertheless remains arguably distinct from a theory predicating liability merely on disproportion. And the Court's rejection in *Connecticut v. Teal* of representation rate comparisons as an appropriate measure of disparity for purposes of the impact model confirms that distinction.[182]

However, the primary use made of a comparison of minority representation rates by the Supreme Court has been in the context of the disparate treatment model. A large disparity between the minority representation rate in a population with undisputed qualifications and the minority representation rate in a workforce generates an inference of employer selection motivated by minority status.[183] The use of representation rates under the disparate treatment model therefore circumvents Section 703(j) on the theory that evidence of representation rate disparities generates an inference of illicit motive.[184]

Some commentators have treated that reliance as an evolutionary

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tional origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Professor Shoben argues that representation rate comparisons are merely used to create an inference of discriminatory exclusion and do not therefore contravene Section 703(j). Shoben, *Disparate Impact Analysis, supra* note 9, at 39. If what is meant is an inference of illicit motive, Professor Shoben's conclusion is at least arguably viable. If what is meant is instead that an inference of "unfairness" is generated by disparity in representation rates, Section 703(j) would seem to have been designed to preclude judicial reliance on such an inference. The point of the statute was to preclude liability for "unfairness" where "unfairness" is defined as an employer's failure to achieve equal or proportionate race or gender shares.

181. *See* note 180 *supra.*

By disparate effect on the protected group, I mean disparate exclusion of the protected group viewed as a whole. This is the case both where general population data establishes that effect and where applicant data is used to infer that effect. *See* note 176 *supra.*

182. *See* Connecticut v. Teal, ___ U.S. ___, ___, 102 S. Ct. 2525, 2532-33 (1982).

183. Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977); Teamsters v. United States, 431 U.S. 324 (1977).

184. Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

development within the impact model: the employment systems themselves may be viewed as having had a disparate impact.[185] To the extent that such an impact may not be rebutted by a showing of reasons for the impact independent of race or gender—that is, to the extent that a business necessity rather than an "articulation" of credible legitimate reasons is required of an employer—such a treatment would seem accurate. But the Court itself has treated such cases as conceptually distinct from the impact model.[186] The Court's objective has, at least as a matter of its rhetoric, been the discovery of illicit motive rather than the prohibition of disproportionate consequences. And to the extent that the lower federal courts in good faith adhere to disparate treatment as the conceptual model under which systematic impact evidence is evaluated, they may be properly characterized as attempting to approximate in the litigation process the disparate treatment model.[187] To that extent they may also be viewed as precluding the application of a disparate impact model to systematic impact. The employment system as a whole is arguably not a criterion subject to attack under the impact model.[188]

The implication of this recitation for the function of the impact model are two. First, if the Court's systematic disparate treatment cases are in fact impact model cases, it may be inferred that the function of the impact model is to penalize employer failures to attain an equal achievement objective. Where a disparity between the minority representation rate in a workforce and minority representation rate

185. *See, e.g.*, Furnish, *supra* note 80, at 442-44; Lerner, *supra* note 3, at 30-39; Shoben, *Disparate Impact Analysis supra* note 9, at 9-36.

186. *See* Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

187. *See* text and notes 49-73 *supra*. There is nevertheless a substantial risk that a court's manipulation of the burden of production in a systematic disparate treatment case will render the theory employed in such a case closer to the impact model than the the treatment model. *See* Gay v. Waiters and Dairy Lunchmen's Union, 489 F. Supp. 282, 307, 313 n.41 (N.D. Cal. 1980) *aff'd* 694 F.2d 531 (9th Cir. 1983).

188. *See* Pouncy v. Prudential Ins. Co., 668 F.2d 795, 801 (5th Cir. 1982) (impact theory not applicable to system as a whole) Rivera v. City of Wichita Falls, 665 F.2d 531, 538-39 (5th Cir. 1982) (where elements of a selection process may be isolated, employer is not required to validate entire process as a whole); C. SULLIVAN M. ZIMMER & R. RICHARDS, *supra* note 17, at 32. *Compare* Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) (impact theory not applicable to subjective criteria) Taylor v. Teletype Corp., 648 F.2d 1129, 1132 n.6 (8th Cir. 1981) (same), *cert. denied*, 102 S. Ct. 515 (1982) *with, e.g.*, Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir. 1982) (impact theory applied to subjective criteria), *cert. denied*, 103 S. Ct. 161 (1983); Williams v. Colorado Springs Sch. Dist. No. 1, 641 f.2d 835 (10th Cir. 1981) (same); Kinsey v. First Regional Securities, Inc., 557 F.2d 830 (D.C. Cir 1977) (same); Steward v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976), *cert. denied*, 457 F.2d 348 (5th Cir. 1972) (same).

in an external population is prima facie illicit and where it is made difficult or impossible for an employer to rebut that prima facie assumption, the objective is presumably forced proportion in the workforce. Second, if, however, the Court's invocation of the disparate treatment model as an explanation of its reliance on representation rates is taken at face value, it may be inferred that the impact model is not concerned with disproportionate representation of minorities or women in a workforce because it is on that assumption made inapplicable to systematic impact. If the latter is the case, the function of the impact model is not equal achievement *per se*. It is, rather, the elimination of barriers to employment of a limited (albeit inadequately identified)[189] character—perhaps barriers of a character satisfying what was earlier suggested here as the redress function explanation of the majority opinion in *Teal*.[190] The difficulty with this last explanation of the impact model is of course the difficulty with *Teal* itself. So long as the character of the barriers subject to the impact model remains undefined and unlimited, the distinction between an anti-barrier conception of the model and an equal achievement conception of the model is illusory.[191]

(2) The Disparate Impact - Disparate Treatment Interface

There is a further reason for suggesting that the distinction between the anti-barrier and equal achievement conceptions of the func-

189. The Court, or perhaps more accurately, Justice Rehnquist writing for the Court, has attempted on two occasions to identify the "barriers" subject to the impact model. *See* Furnco Const. Co. v. Waters 438 U.S. 567, 575 n.7 (1978) (tests and particularized requirements are subject to the model); Nashville Gas Co. v. Satty 434 U.S. 136 144-45 (1977) (compensation and benefits not subject to the model). The difficulties are that it is less than clear that a majority of the Court would accept Justice Rehnquist's views and it is not apparent that there is any consistent theme to these efforts. To the extent that only "objective" criteria are subject to the model, subjective decision making processes are nevertheless subject to attack on a systematic disparate treatment theory. *See* Teamsters v. United States 431 U.S. 324 (1977).

The dilemma presented by the problem of subjective hiring or promotion is that objective criteria (such as tests or experience requirements) arguably eliminate the possibility of bias inherent in subjective decision making. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J. concurring). Objective criteria often produce, however, disparate impact. If, as Justice Rehnquist suggested in *Furnco*, only "objective" criteria are subject to the impact model, some rationale other than the mere desire to limit the scope of the impact model is required. If, however, the impact model is applicable to subjective criteria, it may be for reasons distinct from the reasons which may be assigned for the application of the model to objective criteria. *See* text and notes 294-325 *infra*.

190. *See* text and notes 163-74 *supra*.

191. *See* text and notes 101-74 *supra*.

tion of the impact model postulated in *Teal* is illusory. The primary defense to a systematic disparate treatment allegation resting on disparities in representation rates is proof that a race or gender neutral criterion used by the employer explains those disparities.[192] Such a "defense" simultaneously rebuts the inference of illicit motive arising from consequences and establishes a prima facie case of impact model liability.[193] To the extent that the scope of the impact model remains undefined, this relationship between impact and treatment theories clearly suggests that litigation averse employers have but one recourse: proportional hiring and promotion from applicant pools.[194]

Elimination of objective and impersonal barriers of the character at issue in *Teal* results, in effect, in adoption of subjective and individual employer decision-making processes as substitutes for the objective barrier.[195] Such a result is consistent with at least one strong and recurring theme in the impact model: a preference for employer decision on the basis of individual characteristics and a distaste for group measures of desired characteristics even where those measures are race and gender neutral.[196] In the words of the Court in *Griggs*, the model requires that the employer "measure the person for the job and not the person in the abstract. . . ."[197] The risk attacked by such a legal assault upon group measures of desired characteristics is presumably the risk of over- and underinclusiveness: individuals are not measured by individual characteristics relevant to their performance as individuals, but by proxy characteristics shared with a group and imperfectly relevant to individual performance. A policy

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192. *See generally*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1979).

193. *See* SULLIVAN, ZIMMER & RICHARDS *supra* note 17, at 32. *Cf.* Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982) (analyzing subjective criteria under both disparate impact and disparate treatment theories); Williams v. Colorado Springs Sch. Dist. No. 11 (10th Cir. 1981) (same); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 718 n.7 (7th Cir. 1969) (invalidating practice on disparate treatment grounds and postulating an impact analysis of possible substitutes for the practice).

194. *See* Connecticut v. Teal, ___ U.S. ___, ___, 102 S. Ct. 2525, 2539-40 (1982) (Powell, J. dissenting).

195. *Id.*

196. *Compare* Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J. concurring) (objective criteria may be desirable as means of avoiding risks of disparate treatment inherent in subjective judgment) *with* Dothard, v. Rawlinson, 433 U.S. 321 332 (1977) (objective barriers which measure applicants "in the abstract" are not job related). *Cf.* Cleveland Bd. Educ. v. LaFleur, 414 U.S. 632 (1974) (governmental employer's rule requiring pregnancy leave creates an "irrebutable presumption" violative of due process). *But see* New York Transit Authority v. Beazer, 440 U.S. 568, 592 n.38 (1979) (rejecting irrebutable presumption attack on narcotics rule).

197. 401 U.S. at 436.

disfavoring over- and underinclusive measurement operates to force employers to abandon impersonal decision making, and by so doing, to force adoption of the sort of personal and subjective decision making processes susceptible to disparate treatment attack.[198] And to the extent that strong inferences of illicit motive are derived from the disproportionate consequences of such a decision making process, the effect of *Teal* is to require what the dissent in *Teal* suggested: employer decision making designed to produce proportion.[199]

D. Business Necessity: Essentiality or Reasonableness?

In *Griggs v. Duke Power Co.*,[200] the Court employed three phrases in describing the employer's defense to disparate impact: "business necessity",[201] a "manifest relationship" between the criterion generating impact and a business need,[202] and the "job relatedness" of the criterion imposed.[203] *Albemarle Paper Co. v. Moody*[204] repeated this language in the context of a challenged intelligence test as the criterion generating impact, and applied the strict and quasi-"scientific" requirements of the industrial psychologists as the standard under which the defense was to be met.[205] In *Dothard v. Rawlinson*,[206] the Court emphasized necessity and rejected the defense where the criterion, although a

198. If the impact model applies to subjective hiring criteria, an attack on an impact theory is also possible. *See* note 188 *supra*. Some courts appear to apply a disparate impact analysis to subjective criteria within the framework of what purports to be a disparate treatment case. *See* Valentino v. U.S. Postal Service, 674 F.2d 56, 71 n.30 (D.C. Cir. 1982) (*Potentially* tainted independent variable subject to subjective bias may not be included in multiple regression analysis); James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978) (independent variables generating disparate impact may not be included in multiple regression study where not shown to be job related). *See generally* Cox, *Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther*, 22 DUQ. L. REV. 65 (1983).

199. ___ U.S. ___, ___, 102 S. Ct. 2525, 2540 (Powell, J. dissenting).

200. 401 U.S. 424 (1971).

201. *Id.* at 431.

202. *Id.* at 432.

203. *Id.* at 431.

204. 422 U.S. 405 (1975).

205. *Id.* at 425. The Court's decision in *Albemarle* was based on the 1970 version of the EEOC's selection procedure guidelines. 35 Fed. Reg. 12,333 (1970). The 1978 guidelines, 29 CFR § 1607 (1980), are in some respects less stringent than the 1970 guidelines, but remain so strict as to make compliance difficult and perhaps in some instances impossible. *See* Guardians Assoc. v. Civil Service Comm'n, 630 F.2d 79, 89-91 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981). *See generally* Booth & Mackey, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121 (1980); Lerner, *supra* note 3; Rothschild & Werden, *supra* note 80.

206. 433 U.S. 321 (1977).

rough proxy for the quality the employer could legitimately seek in employees, was an over- and underinclusive predictor of that quality and where alternative measures of the quality with less impact were available.[207]

There was in these cases, then, a clear indication that the defense would be difficult to establish. Both *Griggs* and *Albemarle* relied heavily upon the EEOC guidelines on employee selection procedures—guidelines which imposed a burden of justification widely believed to be impossible, as a practical matter, to satisfy.[208] Here, too, however, the Court has not been consistent. In *Washington v. Davis*[209] the Court, applying Title VII standards to a statutory claim not brought under Title VII, declined to follow the EEOC's guidelines and applied a "usefulness" test;[210] business "necessity" was apparently a matter of whether the criterion in issue had a reasonable relationship to the job in issue. And in *New York Transit Authority v. Beazer*,[211] the Court interpreted *Grigg*'s reference to "manifest relationship" to mean that a criterion which "significantly serves" an employer's legitimate interests satisfies the defense even where the criterion was conceded to be an overinclusive proxy for those interests[212]—an apparent contradiction of the Court's methodology in *Dothard*.

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207. *Id.* at 331-32:

> [A]ppellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance. Indeed, they failed to offer evidence of any kind of specific justification of the statutory standards. If the job-related, quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test ... that measures strength directly.

208. *See* note 205 *supra*.

209. 426 U.S. 229 (1976).

210. *Id.* at 250-51:

> The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands, and attempting to impart a modicum of required skills seems conceded. It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen.

But see Nat'l Educ. Ass'n v. South Carolina, 434 U.S. 1026, 1027-28 (White, J. dissenting).

211. 440 U.S. 568 (1978).

212. *Id.* at 587 n.31:

> Respondents recognize, and the findings of the District Court establish, that TA's legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of a majority of all methadone users. The District Court also held that those goals require the exclusion of all methadone users from the 25% of its positions that are "safety sensitive." Finally, the

The lower courts have not been immune to similar inconsistencies. Race and sex neutral criteria are sometimes tested under a reasonableness standard,[213] sometimes tested under a strict (if not impossible) standard of essentiality,[214] sometimes tested (whether or not they are employment tests) under the validation standards of the EEOC guidelines,[215] and sometimes tested under a standard which rejects the absolute authority of those guidelines.[216] Some commentators have detected trends in these cases. It is said that an employment test may be subjected to a higher burden of justification than other criteria,[217] that criteria imposed for technical, managerial and professional positions are subject to a lower burden of justification than criteria imposed for blue collar positions,[218] and that criteria for jobs which entail responsibilities affecting important competing social values

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District Court noted that those goals are significantly served by—even if they do not require—TA's rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions. . . . The record thus demonstrates that TA's rule bears a "manifest relationship to the employment in question."

213. *See, e.g.,* Yuhas v. Libbey-Owens Ford Co., 562 F.2d 496 (7th Cir. 1977), *cert. denied,* 435 U.S. 934 (1978); Spurlock v. United Airlines, Inc. 475 F.2d 216 (10th Cir. 1972). *Cf.* Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981) (insisting on job relatedness as established by professional standards of validation, but rejecting an additional "necessity" requirement), *cert. denied,* 102 S. Ct. 1719 (1982).

214. *See, e.g.,* Weber v. Kaiser Aluminum & Chem. Co., 563 F.2d 216, 232 (5th Cir.) (Wisdom, J. dissenting), *rev'd, sub. nom.,* United Steelworkers v. Weber, 443 U.S. 193 (1979); Blake v. City of Los Angeles, 595 F.2d 1367, 1377 (9th Cir. 1979), *cert. denied,* 446 U.S. 928 (1980); Green v. Missouri Pacific Rd., 523 F.2d 1290, 1298 (8th Cir. 1975); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); Robinson v. Lorrillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

215. *See, e.g.,* Parson v. Kaiser Alum. & Chem. Co., 575 F.2d 1374, 1388-89 (5th Cir. 1978), *cert. denied,* 441 U.S. 968 (1979); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 511-12 (8th Cir.), *cert. denied,* 434 U.S. 819 (1977); Watkins v. Scott Paper Co., 530 F.2d 1159, 1181-82 (5th Cir.), *cert. denied,* 429 U.S. 861 (1976); Kaplan v. Theatrical & Stage Employees, 525 F.2d 1354, 1358 (9th Cir. 1975).

216. *See* Guardians Assoc. v. Civil Service Comm'n, 630 F.2d 79 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981).

217. *See* Lerner, *supra* note 3, at 37. It is possible to view the question of "job relatedness" as the standard applicable to the Section 703(h), 42 U.S.C. § 2000e-2(h) "testing defense" to impact model liability and the "necessity" question the standard applicable to the general defense to impact model liability. *But see* American Tobacco Co. v. Patterson ___ U.S. ___, ___, 102 S. Ct. 1534, 1548 (1982) (Stevens, J. dissenting). The fundamental notion underlying the job relatedness test—relevance— is, however, the notion underlying statements of the defense in cases not involving challenges to tests. *See, e.g.,* Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir.), *cert. denied,* 429 U.S. 861 (1976); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

218. Bartholet, *supra* note 3.

or policies (most particularly public safety) are subjected to a limited burden of justification.[219] Each of these explanations has merit; none provides a satisfactory explanation of the function of the business necessity defense.

Judicial confusion regarding the business necessity defense is arguably traceable to two underlying difficulties: a failure to clarify the standard under which necessity is to be measured and a failure to clarify which of a number of alternative functions the defense is to serve. The failure to clarify the legal standard and the failure to clarify function are, moreover, potentially related.

(1) Employer Interests Underlying the Use of Neutral Criteria

Employers may adopt a race and gender neutral employment criterion for one or both of two reasons. The criterion may be used to identify skills, knowledge, abilities or other traits thought necessary or useful to job performance in a particular job or the criterion may be used as a device to limit costs—including both the costs of poor job performance and the costs imposed by individual assessments of projected job performance.[220] These reasons are obviously not mutually exclusive motivations for the adoption of a criterion, but the reasons will be treated for present purposes as distinct. The employer interest underlying the use of a criterion for a purpose of identifying skills, abilities or knowledge is an interest in ensuring, through accurate prediction, satisfactory job performance. That interest is of course also an interest in avoiding the costs of poor job performance, but is here distinguished from those costs. The employer's interest in the use of a criterion known to be an imperfect predictor of performance is also cost avoidance: the device eliminates the costs imposed by more individualized and direct assessments of prospective job performance.[221]

An example may illustrate this distinction. Assume a case in which an employer conducts a training program for a job. The training program itself both serves to provide the prospective employee

219. *See* SULLIVAN ZIMMER & RICHARDS, *supra* note 17, at 57.

220. *See, e.g.*, Fiss, *supra* note 1, at 301; Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis* 59 NEB. L. REV. 345, 353-55 (1980) Rothschild & Werden, *supra* note 80, at 271-72; Comment, *Business Necessity, supra* note 3, at 918-20.

221. *Cf.* Crockett v. Green, 388 F. Supp. 912 (E.D. Wis. 1975) (experience requirement invalidated where employer had alternative of developing and validating a practical performance examination—a selection device the cost of which would presumably exceed the use of years of experience as a proxy for projected performance), *aff'd*, 534 F.2d 715 (7th Cir. 1976).

with skills and knowledge necessary for satisfactory job performance and to provide the employer with relatively direct measures of prospective job performance. Success or failure in training is a relatively direct means of predicting success or failure on the job if the training entails the acquisition and use of skills and knowledge used in the job. The training program therefore serves the employer's interest in job performance, its interest in predicting job performance, and its interest in avoiding the costs imposed by poor performance. The training program generates, however, its own costs.

Assume instead that the employer abandons its training programs and substitutes a college degree requirement both to predict adequate performance on the job and as a proxy for the skills and knowledge necessary for satisfactory job performance. The employer's interest in prediction and performance is satisfied to the extent that a college degree is an accurate predictor and proxy and the employer has avoided the costs of poor performance to the same extent. The employer has, moreover, eliminated the presumably greater costs of training. Whether the change from a training program to a college degree requirement results in a net gain is dependent upon whether the potentially greater poor performance costs generated by use of the college degree (an arguably poorer predictor and proxy) and the potentially greater wage costs potentially associated with a college degree outweigh the training costs avoided by the college degree requirement.

An employer criterion used to predict job performance will inevitably be both an over- and underinclusive predictor of the skill or ability predicted: the criterion is a proxy for the desired trait rather than a measure of the trait itself. And the over- and underinclusive character of a criterion used to predict job performance is inevitable whatever the character of the criterion. Even a relatively direct measure of projected job performance (a typing test given prospective typists or a probationary employment period in which a new employee is evaluated on the job) is over- and underinclusive with respect to future job performance, for some prospective employees who fail to satisfy such a criterion would develop necessary skills and abilities and some who satisfy the criterion will be poor performers. It is presumably the case, however, that the more indirect the measure of projected job performance, the greater the risk of over- and underinclusive prediction. And this risk would seem to be greater where the criterion used is both objective and absolute.[222]

222. *Cf.* Furnco Const. Co. v. Waters 438 U.S. 567, 575 n.7 (1978) (impact theory

Although objective and absolute criteria present the greatest risks of over- and underinclusive error in the prediction of individual job performance, they serve the employer's interest in cost avoidance: the employer, by utilizing such criteria, need not incur the costs of individual assessment. Over- and underinclusive error generates, of course, its own costs, for the employer will incur the cost of poor performance by some individuals who satisfied the criterion and will incur the cost of lost good performance by some persons who failed to satisfy the criterion. In making the decision to utilize such criteria, the employer presumably weighs the costs of individual assessment against the costs of imperfect prediction in light of the peculiar circumstances which confront him.[223] So long, however, as the criterion used has some tendency to accurately predict good job performance on average and for the group of candidates for an employment opportunity, the costs of more direct and more individual assessment may well exceed the costs imposed by prediction errors in individual cases.

(2) Distinct Aspects of the Business Necessity Defense: Relevance and Necessity

When the employer must by reason of the disparate impact generated by its use of a race and gender neutral criterion, justify that use, it may be required to demonstrate either that the criterion is justified by the employer's interest in predicting performance or is justified by the employer's interest in cost avoidance.[224] The most

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applies to tests and "particularized requirements").

By "objective", I mean a criterion which may be applied to identify traits, talents or characteristics without the intrusion of the employer's discretion. The risk of under- or overinclusiveness is substantial in the use of such a criterion because it often requires some degree of generalization about the relationship between performance on the criterion and job performance.

By absolute criterion I mean that unsatisfactory performance under the criterion precludes further consideration. A criterion of "relative advantage or disadvantage", by contrast, is but one of a number of criteria under which assessments are made. *See* BALDUS & COLE, *supra* note 57, at 182-84.

The risk run by subjective and relative criteria is, of course, the intrusion of bias. To the extent that the impact model has been applied to such criteria, the rationale has often been the elimination of that risk. *See, e.g.*, Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1018-19 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

223. *See* United States v. South Carolina, 445 F. Supp. 1094, 1115 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978). It is of course also possible that the employer makes no such rational decision; the employer may operate instead from inertia. *See* Rothschild & Werden, *supra* note 80, at 271-72.

224. *See* United States v. South Carolina, 445 F. Supp. 1094, 1115-15 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978). In Los Angeles Dept. Water & Power v. Manhart,

common statements of the business necessity defense suggest that only the former interest is of concern.[225] In fact, however, the courts appear to have assessed both interests.[226]

The Supreme Court has used two phrases to describe the employer's burden once disparate impact has been established: the employer must establish "business necessity"[227] or "job relatedness."[228] The job relatedness notion, at least in its pristine form, requires that the skill, ability or trait measured or predicted by a challenged criterion (most particularly a challenged employment test) be in fact relevant to job performance.[229] Traits perceived as generally meritorious, e.g. intelligence, generally fail to satisfy the test of relevance because it is difficult to demonstrate that satisfactory performance in the specific job in questions is related to such traits.[230]

Confusion is introduced when it is asserted that the skill, ability or trait the employer seeks is not "necessary" to the job in issue. Such an assertion may mean that the relevance of the skill, ability

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435 U.S. 702, 717 (1978) the Court appears to have rejected a "cost defense." *Manhart* was, however, a disparate treatment case. If "necessity" is a requirement in addition to "job relatedness", *see* note 226 *infra*, cost, even if analyzed in general terms and without reference to actual dollar cost, is precisely what is assessed in impact model cases. *See* EEOC Dec. No. 72-0708, 4 Fair Empl. Prac. Cas. 437, 438 (1971) (balance of cost of alternative practices against degree of impact).

225. *See, e.g.,* Connecticut v. Teal ___ U.S. ___, ___, 102 S. Ct. 2525, 2531 (1982) (manifest relationship test); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (same); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (same).

226. *See, e.g.,* United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) (practice must both directly foster safety and efficiency and be essential to such goals); Robinson v. Lorrillard Corp., 444 F.2d 791, 798 (4th Cir.) (business purpose must outweigh racial impact and there must be no acceptable alternative), *cert. dismissed*, 404 U.S. 1006 (1971). In New York Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979) the court upheld an over- and underinclusive employer rule on the ground that it "significantly served" the employer's interests in safety and efficiency. The Court's language in part adopts a reasonable relevance test, but the relaxed standard imposed by the language also implicitly adopts a reasonable necessity test: the employer rule served as a reasonable proxy for identifying employees or potential employees presenting threats to its interests even if an imperfect proxy.

The tests in these cases are distinct, but the focus in each is upon more than the relationship between a criterion and business purpose. *See* Contreras v. City of Los Angeles, 565 F.2d 1267 (9th Cir. 1981) (distinguishing job relatedness from necessity and opting for relatedness as the appropriate test), *cert. denied*, 102 S. Ct. 1719 (1982).

227. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

228. *Id.* at 432-33.

229. *See* 29 CFR §§ 1607.5, 1607.14 (1981). *But cf Id.* § 1607.3(B) (employer should consider alternatives with lesser impact where "appropriate"); *Id.* § 1607.7(B)(3) (fairness studies).

230. *See Id.* § 1607.14.

or trait to the job cannot be established. But it may also mean that, although the skill, ability or trait is relevant, the employer's interest in job performance is satisfied even if the employee lacks the trait (e.g. the skill, ability or trait is a minor aspect of the job) or the costs of ignoring the skill, ability or trait in the hiring or promotion decision are not excessive (e.g., the cost of utilizing a training program to ensure adequate performance is not excessive). This latter possibility will be termed there the "necessity" aspect of the business necessity defense. A judicial inquiry into the necessity of a criterion is an inquiry into the costs which would be imposed by elimination of the criterion.[231] Such an inquiry might include assessment both of the selection costs imposed by alternative criteria and the poor performance costs imposed by prohibition of a challenged criterion. It is in effect an inquiry in the quality of the employer interests furthered by a challenged criterion. For example, avoidance of poor performance costs entailing safety risks might be viewed as necessary, but avoidance of poor performance cost entailing mere financial risks might be viewed as unnecessary.[232]

The distinction between an inquiry into relevance and an inquiry into necessity is illustrated by the problem of alternative criteria.[233]

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231. The Fourth Circuit in Robinson v. Lorrillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) set forth a three prong test of business necessity:

> the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

The second of these prongs appears to state a relevance requirement. The first prong states a necessity requirement, the third prong appears to state both: there must be no alternative which is both "acceptable" and equally effective. The *Lorrillard* standard was adopted by a number of lower federal courts prior to the Supreme Court's decision in New York Transit Authority v. Beazer, 440 U.S. 568 (1979). *See, e.g.,* Green v. Missouri Pac. Rd., 523 F.2d 1290 (8th Cir. 1975); Rodriquez v. East Tex. Motor Freight, 505 F.2d 40 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395 (1977); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

232. *See* Kinsey v. First Regional Securities, Inc., 557 F.2d 830, 837 (D.C. Cir. 1977).

233. In Albemarle Paper Co. v. Moody, 442 U.S. 405, 425 (1975) the Supreme Court treated the question of alternatives as an issue of pretext and allocated a burden of rebuttal on that issue to the plaintiff if the defendant establishes a business necessity defense. In Dothard v. Rawlinson, 433 U.S. 321, 332 (1977) the Court considered the question of alternatives as part of its discussion of the defense. A number of lower courts continue to treat the question of alternatives as part of the necessity prong of the employer's defense despite *Albemarle. See, e.g.,* Harless v. Duck, 619 F.2d 611,

An employer's failure to utilize an alternative criterion which would better predict an ability or trait assumed to be relevant to job performance and which would generate less disparate impact undermines an employer's claim that its interest in job performance justifies use of the challenged criterion. The failure to use a more relevant criterion may therefore be viewed as proof of the irrelevance of a challenged criterion to job performance. But the employer may have an alternative explanation of its choice of the challenged criterion: the alternative may be more expensive. To the extent that a court focuses only on the question of relevance, it has ignored the employer's interest in cost avoidance.[234]

Both the job relatedness question and the necessity question are potentially subject to evaluation under distinct standards of proof. Job relatedness might be evaluated under a standard of reasonable relevance[235] or might be evaluated under a validation standard requiring a high degree of correlation between the quality measured by a challenged criterion and job performance.[236] A reasonableness standard permits, in effect, reasonable levels of over- and underinclusive measurement; a validation standard requires, in effect, no or very little over- or underinclusive measurement. The latter standard therefore disregards costs of assessment or selection and focuses exclusively upon the question of accurate prediction. Ironically, however, a valida-

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617 (6th Cir.) *cert. denied* 449 U.S. 872 (1980); Parson v. Kaiser Alum. & Chem. Corp., 575 F.2d 1374, 1389 (5th Cir. 1978) *cert. denied* 441 U.S. 968 (1979).

234. *Cf.* United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) (there must be no reasonably available alternative). Note that this language may mean either that there is no feasible alternative which would serve the employer's interest in prediction (relevance) or that there is no feasible alternative which would not impose excessive costs in pursuing the employer's interest in prediction. *See*, 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).

235. *See* Washington v. Davis, 426 U.S. 229, 252 (1976).

236. *See* Albemarle Paper Co. v. Moody 422 U.S. 405, 425 (1975); Robinson v. Lorrillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 106 (1971); 29 CFR § 1607.5, 1607.14 (1981). Under the EEOC's guidelines, a selection criterion may be validated by means of content, criterion or construct validity studies. Content validity does not require proof of statistical correlation, but is both dispreferred under the guidelines and nevertheless subject to a more rigorous analysis than mere reasonableness. *See* Guardians Assoc. v. Civil Service Commission, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981). By "high degree of correlation", I mean proof, even if not by means of statistical correlation, of a high quality of relationship between a challenged criterion or practice and job performance. My non-technical use of the term "correlation" would therefore include a requirement of strict compliance with content validity and any requirement imposing strict standards of relevance in contexts not subject to formal validation.

tion standard may have the effect of disregarding costs of poor performance as well. To the extent that it discourages attempts at predicting performance by imposing high compliance costs (costs of justification in litigation or threatened litigation), its consequence is the use of job performance itself as an assessment or selection device—hiring or promotion occurs without an attempt at prediction.[237]

Similarly, the necessity question might be evaluated under a standard of reasonable necessity[238] or might be evaluated under a standard of essentiality.[239] A reasonableness standard of necessity is in effect a verification device—it seeks to verify the presence of a business interest and the employer's assessment in fact of that interest. An essentiality standard is a valuation device—it requires that an identified business interest satisfy a predetermined level of high valuation.

The job relatedness and necessity aspects of the business necessity defense are interrelated. A reasonableness test of job relatedness implicitly considers cost avoidance interests either by considering them directly or because the choice of a reasonableness standard implies an antecedent assessment of the necessity of the cost avoidance interests furthered by the criterion evaluated.[240] A validation standard of job relatedness implicitly assumes an antecedent conclusion that the employer's interest in avoiding assessment costs is non-essential and that the employer's interest in avoiding poor performance costs will be treated as essential only if the criterion challenged and used to further that interest does so with high degrees of accuracy.[241]

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237. *See* United Steelworkers v. Weber, 443 U.S. 193, 210-12 (1979) (Blackmun, J. concurring); Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 228-29 (5th Cir. 1977) (Wisdom, J. dissenting), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

238. *See* New York Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1260-61 (6th Cir. 1981) note 226 *supra.*

239. *See, e.g.,* Dothard v. Rawlinson, 443 U.S. 321, 332 (1971); Jackson v. Seaboard Coast Line RR Co., 678 F.2d 992, 1016 (11th Cir. 1982); Parsons v. Kaiser Alum. & Chem. Corp., 575 F.2d 1374, 1389 (5th Cir. 1978), *cert. denied,* 441 U.S. 968 (1979); United States v. Bethlehem Steel Corp. 446, F.2d 652, 662 (2d Cir. 1971) Robinson v. Lorillard Corp. 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

240. *See* Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (safety costs are a factor considered in balancing impact and business interests; reasonableness test of relevance adopted).

241. *See* Comment, *Business Necessity, supra* note 3, at 91. A number of commentators have pointed out the high cost of strict validation and the deterrent effect of strict validation on the continued use of selection criteria. *See, e.g.,* Belton, *Discrimina-*

Job relatedness was the stated concern in cases, such as *Griggs*[242] and *Albemarle*,[243] in which general intelligence tests were the criteria in issue. What appears to have impressed the Court in *Griggs* was the problem of relevance: an intelligence test measures general qualities not demonstrably related, even under a standard of reasonable relationship, to the tasks performed in the jobs there in issue. However, the Supreme Court's adoption of the standards of the EEOC guidelines on selection procedures in *Albemarle* suggests a distinct concern. As the standard of relevance becomes progressively higher, the employer's interest in cost avoidance is progressively discounted.[244] It is discounted for two reasons. First to the extent that a relevance inquiry focuses only upon the question of the relationship between the quality measured by a challenged criterion and job performance, it ignores the question of the costs which would be imposed by alternative criteria. Second, to the extent that a relevance inquiry requires a high correlation between the quality measured by a challenged criterion and job performance it ignores the question of the nature and level of employer costs. A criterion which has some tendency to predict performance but fails to satisfy a correlation requirement may both avoid some costs of poor performance and avoid the costs which would be imposed by available alternatives. These costs may be substantial, but a validation standard is not satisfied.

That the employer's interests in cost avoidance are ignored under such a standard does not necessarily suggest, however, that they have not been considered. The decision to apply such a standard itself reflects a balance under which those interests have been consciously or unconsciously discounted: the employer's cost avoidance interests served by its challenged criterion do not outweigh the disparate effect generated by the criterion.[245] Such a balancing analysis reflects

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tion and Affirmative Action, supra note 3, at 551-52; Freeman, *supra* note 3, at 1099 (1978); Gwartney, Asher, Haworth & Haworth, *Statistics, The Law and Title VII: An Economists View*, 54 NOTRE DAME LAW 633, 643 (1979); Lerner, *supra* note 3, at 18 n.6, 27; Meltzer, *supra* note 3, at 434.

242. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

243. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

244. A strict standard of relevance which fails to consider issues of "necessity" would impose the greatest burden on employers of any potential interpretation of the defense. *See* Johnson v. Pike Corporation of America, 332 F. Supp. 390 (C.D. Cal. 1971) (refusing to consider question of administrative costs). *Pike* is criticized in Wilson, *supra* note 3, at 850-51. But a strict standard of relevance in combination with an essentiality test of necessity accomplishes approximately the same result.

245. A number of courts have been rather explicit in advocating a balancing test. *See, e.g.*, Townsend v. Nassau County Medical Center, 558 F.2d 117, 120 (2d Cir. 1977), *cert. denied*, F.2d 216, 219 (19th Cir. 1972); Robinson v Lorrillard Corp., 444 F.2d

a policy not merely of relevance, but of precluding disparate impact not outweighed by compelling interests in efficiency.[246] The Court's opinion in *Dothard v. Rawlinson*,[247] reflects this later policy rather directly. The Court there invalidated a height and weight requirement on the grounds both that the requirement was an over- and underinclusive measure of "strength" and that a less burdensome alternative[248] (direct tests of strength) could be developed. The potential cost of such a development (and of the validation of such a test when developed) were ignored in the Court's opinion.

The Court's opinions in *New York Transit Authority v. Beazer*,[249] and *Washington v. Davis*[250] adopt, however, a reasonableness test of relevance reflecting a distinct balance. A judicial insistence merely upon a reasonable relationship between applicant or employee success on a challenged criterion and the employer interests furthered by the criterion assumes, absent pretextual use of the criterion,[251] that the employer's balancing of costs of assessment and costs of imperfect prediction is to be judicially respected.[252] Thus, the Court concluded in *Beazer* that an employer's drug use rule, a rule conceded to be overinclusive when applied to methadone users,[253] "significantly served" employer interests even though those interests did not "require" application of the rule to methadone use.[254] That conclusion grants substantial discretion to utilize rough proxy criteria despite their overinclusive character and despite the potential availability of more perfect alternatives.[255]

791, 798 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1972). Note that the balancing test in this context entails a balancing of the effect of a challenged practice on protected groups against the employer interests served by the practice. It is therefore to be distinguished from judicial tolerance, under relaxed views of the business necessity defense, of an employer's balancing of its conflicting interests. *See* United States v. South Carolina, 445 F. Supp. 1094, 1115 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978).

246. *See* Comment, *Business Necessity, supra* note 3, at 912.

247. 433 U.S. 321 (1977).

248. *But compare Id.* at 332 (less burdensome alternative analysis) *with* Albemarle Paper Co. v. Moody 422 U.S. 405, 425 (1975) (burden of establishing less burdensome alternative is on the plaintiff and is a matter of "pretext").*See* note 233 *supra.*

249. 440 U.S. 568 (1979).

250. 426 U.S. 229 (1976).

251. *See* New York Transit Authority v. Beazer, 440 U.S. 568, 587 (1979).

252. *See* United States v. South Carolina, 445 F. Supp. 1094, 1115 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978) Comment, *Business Necessity, supra* note 3, at 928-30 933-34.

253. *See* New York Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979).

254. *Id.*

255. *See* Note, *Rebutting the Griggs Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 U. ILL. L. REV. 181, 207-10.

The Court has not, then, been consistent in selecting either a standard of relevance or a standard of necessity. The standard of relevance is on occasion reasonable relevance and on occasion a standard of validation; the standard of necessity is occasionally reasonableness and occasionally essentiality. A possible explanation of judicial inconsistency in selecting a standards of relevance and necessity may be found in the potentially distinct functions served by the business necessity defense.

(3) Alternative Functions of the Business Necessity Defense

A standard of reasonable relevance or reasonable necessity assumes the primacy of an employer's balancing of costs which underlies the employer's use of a criterion having disproportionate consequences. A judicial inquiry into reasonableness is functionally an inquiry into the credibility of that balance. A conclusion that a criterion is not reasonably relevant to job performance or is not reasonably necessary is a conclusion that the employer's claimed reasons for the use of the criterion are not believed.[256]

If, however, higher standards for judging the relevance and necessity issues are invoked, a distinct function of the business necessity defense is implied. As the standards of relevance and a necessity imposed by a court become progressively higher, the employer's cost balance is treated with progressively less deference and the impact model becomes progressively closer to a functional prohibition of disparate consequences. A validation requirement adds the costs of validation to the costs of assessment imposed by the use of a criterion and therefore discourages that use. To the extent that assessment costs and validation costs are ignored by a singular focus on validation, employer interests independent of race or gender are ignored. To the extent that a validation requirement imposes a relevance standard difficult or impossible to satisfy in practice, the job relatedness defense—and, therefore, employer efforts to achieve relevance—become meaningless alternatives.[257] In short, a high standard of relevance discourages use of neutral criteria generating disparate impact and very high standards of relevance render the business necessity defense an exercise in futility. Similarly, when the standard for judging "necessity" is set at a level of essentiality, the

256. *See* Comment, *Business Necessity, supra* note 3, at 933-34. *See also* Fiss, *supra* note 1, at 296-304; Rutherglenn, *supra* note 29, at 233-34 ns. 144, 146.

257. *See* Comment, *Business Necessity, supra* note 3, at 918-20. *See also* Belton, *Discrimination and Affirmative Action, supra* note 3, at 551-52; Fiss, *supra* note 1, at 300-02; Meltzer, *supra* note 3, at 426, 434; Rutherglen, *supra* note 29, at 234 n.146.

extreme difficulty encountered in attempting to satisfy the standard discourages the effort and renders the effort futile in any case not presenting compelling employer interests. High standards of relevance and necessity in effect reflect a judicial balancing of a policy disfavoring disparate consequences against employer business interests.

There are, then, two distinct and partially inconsistent functions potentially served by the impact model implicit in distinct versions of the business necessity defense. First, if the defense is a defense of reasonable relevance, the impact model is merely a proof scheme for adjudicating an implicit allegation of illicit motive: disproportionate impact generates an inference of illicit motive; a neutral criterion is an employer's articulated claim of licit motive; the irrelevance of the criterion to job performance renders the claim of licit motive incredible. The proof scheme seeks an approximation of a disparate treatment model by allocating a greater risk of adjudicative error to the employer where the employer's conduct is facially race and gender neutral but suspected of being pretextual. Second, if the defense is a defense of validation and of essentiality, the impact model is a prohibition of disproportionate consequences, or, at least, of disproportionate consequences not outweighed by compelling considerations of economic efficiency: disparate impact is presumptively illicit; employer costs may be asserted as justification for impact; the court is to weigh impact against cost under a standard which requires, in effect, a compelling interest in cost avoidance. The ultimate objective of the first of these possibilities is adjudicatory approximation of a disparate treatment model. The ultimate objective of the second of these possibilities is either the shifting of the burden of historical deprivations to the employer or the banning of disparate consequences.

Both the dynamics of the group right to equal achievement suggested by *General Electric Co. v. Gilbert*[258] and by the dissent in *Connecticut v. Teal*[259] and the dynamics of a subgroup right to redress for the effects of past harm suggested by the majority opinion in *Teal*[260] confirm this taxonomy. From the perspective of either right, it is difficult to see why even reasonable necessity or reasonable relevance should be permitted to defeat their enforcement. At least in instances where (1) training is an alternative to prediction as a means of achieving satisfactory job performance, (2) the characteristic predicted by

258. 429 U.S. 125 (1976).
259. ___ U.S. ___, ___, 102 S. Ct. 2525, 2536-40 (1982) (Powell, J. dissenting).
260. *See* text and notes 169-74 *supra*.

a challenged criterion is susceptible to acquisition over time, or (3) the absence of the characteristic predicted by the criterion will affect job performance but will not impose unmanageable costs, elimination of a criterion which is a reasonable predictor of job performance accomplishes precisely what such rights seek to accomplish: proportional results or a shifting of the costs of past deprivations from the protected group to the employer.

To the extent that the impact model is justified as a remedy for past societal discrimination—as in effect shifting the burden of that discrimination to the employer—the business necessity defense expressed as an essentially standard operates to impose costs on the employer which may roughly approximate current remedial expense and to diffuse those costs through the employer by imposing them on society. If a business necessity defense is to be recognized as a justification for denial of a group right to redress in any given case, the rationale is presumably not that costs should not be reallocated but that a reallocation of costs should not so threaten economic efficiency that application of the model places the employer's business at risk. On these premises, the relevant employer interest to be balanced against the group right to proportional shares is not the employer's interest in accurately predicting job performance. The relevant employer interest is, rather, an economic survival interest—an interest to be recognized only where a prohibition of disparate consequences threatens a practice, criterion or rule essential to efficiency.[261]

The Court's strict application of the business necessity defense in *Albemarle* would therefore appear explicable in terms of an assumption that a group right to proportional inclusion in a relevant opportunity or benefit or a group right to redress is the function of the impact model. Relaxed applications of the business necessity test in *Washington v. Davis*, and in *Beazer* are explicable on the ground that pretextual disparate treatment was the target of the Court's inquiry in these cases. If these functional explanations are assumed, there remains, however, a recurring difficulty: when is a group right to equal achievement or to redress invocable and when is an approximation of disparate treatment model invocable?

261. *See* United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971): "Necessity connotes an irresistable demand. . . . [A challenged criterion] must not only directly foster safety and efficiency of a plant, but also be essential to those goals."

III. RECONCILING THE DISPARATE IMPACT MODEL: A PROPOSED ANALYSIS

The foregoing analysis may be summarized as making four points. First, Supreme Court decisions under the impact model may be characterized either as (1) seeking to enforce a group right to equal achievement or (2) as seeking to enforce a right to compensatory redress for the victims of past societal discrimination under a broad definition of both victimization and discrimination, or (3) as using a correlation between exclusion under the challenged criterion and race or gender as evidence of the pretextual use of the criterion (i.e., as evidence of illicit motive).

Second, the Court's opinion in *Connecticut v. Teal* renders exclusion of a subpopulation predominantly composed of a protected race or gender group subject to the model, but utilizes a rationale which denies that the impact model's function is to enforce a group right to equal achievement. If taken at face value, that rationale implies that the function of the model is to partially redress past harm by precluding exclusion of persons likely to be the victims of societal discrimination.

Third, and despite the Court's rationale in *Teal*, there is nothing in the *Teal* opinion's narrow holding which precludes use of the model for an equal achievement objective. Although *Teal* eliminates one employer incentive for complying with an equal achievement conception of equality (the bottom line defense), exclusion of the protected group viewed as a whole remains a ground for liability following *Teal*. To the extent that all objective criteria remain subject to the threat of that liability, and to the extent that an employer must establish essentiality as the sole defense to that threat, the threat forces adoption of subjective and personal employment systems themselves subject to disparate treatment attack if they produce disparate consequences. The most economically feasible means of avoiding liability under such a scenario may therefore be that suggested by the *Teal* dissent: quota hiring.

Fourth, to the extent that the business necessity defense imposes a mere reasonable relevance requirement, it implicitly renders the impact model a process construct for approximating a disparate treatment model. To the extent, however, that the defense imposes an exacting correlation or an economic essentiality requirement, it implicitly renders the impact model either an equal achievement model or a redress of past harm model. The conflicting views expressed in the Court's opinions on the question of the character of the burden im-

posed on employers by the necessity defense render either interpretation plausible.

What is interesting in these points is the potential combinations of alternative conceptions of impact on the one hand and alternative conceptions of business necessity on the other which may be postulated from them. The possibilities appear as follows: (1) if *Teal* is read as rejecting equal achievement as the impact model's objective and is combined with a relevance test of business necessity, it suggests a process construct for reaching a disparate treatment model of sex and race discrimination; (2) if *Teal* is read as rejecting equal achievement and is combined with an essentiality test of business necessity, it suggests a redress function for the impact model—redress both of past harm inflicted writ large and of past harm most felt by subpopulations; (3) if *Teal* is read as rejecting merely the equal achievement defense to the impact model without thereby undermining proportional results as an objective of the model and is combined with an essentiality test of business necessity, it remains partially consistent with a group right to equal achievement conception of the impact model.

It should be apparent that all three of these possibilities cannot always coexist. If equal achievement is the objective, the presence or absence of even approximated disparate treatment or of victims requiring redress is immaterial. Although equal achievement may constitute both the ultimate objective and probable consequence of application of either a redress or an approximated disparate treatment version of the impact model, a disciplined judicial adherence to either of the latter versions necessarily implies that there will be cases in which neither version is applicable but in which an equal achievement version would be applicable. There will, in short, be cases which should be decided in different ways under different versions of the model—*Connecticut v. Teal* is such a case.

It is however possible to view the impact model as not a single model but as three distinct models applicable to distinct circumstances: equal achievement is sometimes the objective; redress is sometimes the objective and approximation of disparate treatment is sometimes the objective. The obvious difficulty with this possibility is in determining the jurisdiction of each model. When, for example, is approximation of disparate treatment an appropriate basis for decision and redress not an appropriate basis for decision? In the remainder of this paper it will nevertheless be argued that the impact model should be viewed as three models applicable in distinct circumstances and that these distinct circumstances are discoverable.

A. Equal Achievement: An Objective Rather Than Reason For Liability

The Supreme Court, in *Connecticut v. Teal*[262] purported to reject a group right to equal achievement as the theory underlying the impact model.[263] It has previously been argued here that this rejection cannot be taken at face value because the *Teal* holding does not preclude judicial enforcement of such a theory.[264] It is nevertheless submitted that the Court should be taken at its word at least to the degree that equal achievement is not a permissible independent reason for imposing liability either by means of an express judicial reliance upon such a ground for decision or by means of a surreptitious manipulation of alternative grounds for decision. This submission is potentially naive. The impact model has been used to satisfy equal achievement objectives,[265] that is the source of the dissent's implicit claim in *Teal* that a group right to equal achievement is the model's objective.[266] The submission is nevertheless supported by two arguments.

First, there were two congressional purposes underlying the enactment of Title VII: the ultimate purpose of improving the economic condition of groups protected under the statute (and most particularly blacks) and the mediating purpose of precluding the use of group status as a reason for employment decisions. The latter purpose is best captured (if not exclusively captured) by the disparate treatment model. Although the Court has in the past mistaken the ultimate congressional purpose for the mediating congressional purpose by ignoring the distinction between the ends sought by Congress and the means chosen by Congress to achieve those ends,[267] the fact remains that an ultimate objective merely informs interpretation of interim objectives. It cannot be substituted for mediating objectives without upsetting the political compromise upon which the means chosen by

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262. ___ U.S. ___, 102 S. Ct. 2525 (1982).

263. *See* text and notes 90-101 *supra.*

264. *See* text and notes 102-04 *supra.*

265. *See generally* Blumrosen, *Bottom Line, supra* note 75. Cases in which courts have ordered quota hiring or promotion relief are clear but not exclusive illustrations. *See, e.g.,* Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1982), *cert. denied,* 102 S. Ct. 1611 (1982); United States v. City of Chicago, 549 F.2d 415 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977).

266. *See* ___ U.S. at ___, 102 S. Ct. at 2539 (Powell, J. dissenting):

> [Discriminatory impact claims cannot be based on how an individual is treated in isolation from the treatment of other members of the group. Such claims necessarily are based on whether the group fares less will than other groups under a policy, practice or test.

267. *See* Cox, *Judicial Role, supra* note 3, at 175-78.

Congress was based. Equal achievement might constitute the ultimate Congressional objective in enacting Title VII, and enforcement of that objective directly by means of the impact model may well constitute the most effective means by which that objective may be achieved, but such an enforcement mechanism was clearly not the means chosen by Congress.[268]

Second, Section 703j[269] of Title VII constitutes both an express repudiation of liability merely for disproportionate consequences as the means by which an ultimate objective of equal achievement is to be realized and a cautionary guidepost for assessing the discipline with which courts enforce the mediating objectives of the statute. It is quite possible to distinguish the Section 703j prohibition of liability for disparities in representation rates on the theories that representation rates are used merely as evidence of illicit motive or that an illicit barrier to opportunity rather than disproportion is the reason for liability.[270] And the effort to distinguish the prohibition on such grounds is legitimate if the reason is in fact a theory of liability meaningfully independent of liability for disproportion. It is however not legitimate to circumvent the policy judgment expressed in the prohibition by imposing liability for reasons of disproportion—or for the reason that an equal achievement objective will be better achieved—under circumstances in which liability would not be imposed for reasons independent of equal achievement. On these premises, the impact model is not properly an equal achievement model; it is a means to the ultimate end of equal achievement, but is a means not applicable in circumstances where equal achievement is the rationale for its application.

B. Redress: When Does A Neutral Criterion Perpetuate Past Harm?

If the prior explanation of *Teal* postulated here[271]—that it adopts a redress explanation of the impact model—is assumed, the remaining question under such a view of the model is when is redress an appropriate rationale for employer liability. Two bases for developing an answer to that question are the notion of redress itself and the Court's emphasis in *Teal* upon the notion that the model targets "barriers to opportunity."

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268. *See, e.g.,* United Steelworkers v. Weber, 443 U.S. 193, 231-52 (1979) (Rehnquist, J. dissenting); Fiss, *supra* note 1, at 297; Meltzer, *supra* note 3, at 423-34; Wilson *supra* note 3, at 852-58; Comment, *Business Necessity, supra* note 3, at 926-28.

269. 42 U.S.C § 2000e-2(j) (1976), quoted at note 180 *supra.*

270. *See* text and notes 181-87 *supra.*

271. *See* text and notes 163-75 xIsupra.

It is apparent that redress does not mean full compensation for past harm. There is compensation under the model only in the sense that an employer is not permitted to exercise the freedom of business decision otherwise permissible under the statute where an exercise of that freedom would give effect to past harm. The protected group is compensated by a grant of freedom from a "barrier" the operation of which is permissible absent an assumption (grounded in part upon disparity) that the group has been victimized. Notice, however, that the underlying assumption is victimization: group membership or status is a proxy for victim status. Such an assumption is clearly overinclusive if redress is appropriate only for members of the race or gender group disadvantaged by past societal discrimination,[272] and although it may be argued that all members of the group are the victims of past discrimination, it cannot be viably argued that all members of the group suffer from the disadvantage made relevant by the challenged employer rule or practice. *Teal* itself illustrates this point: The employer's hiring system operated to grant opportunity only to those members of the protected racial group least likely to be suffering from the disadvantage made relevant by the challenged employment test in *Teal*.[273]

Despite the overinclusive character of the victimization assumption, that assumption is arguably warranted where statistically significant and quantitatively substantial disparities in race or gender success or failure rates occur (i.e., where there is disproportionate exclusion of the protected group viewed as a whole) *and* where the rule or practice in issue measures a characteristic itself the product of benefits disproportionately granted by society on the basis of race or gender. The paradigm cases of the latter basis for a victimization assumption are intelligence tests and education requirements—both criteria measure characteristics which a court, as a matter of judicial notice,[274] may view as the products of educational benefits disproportionately withheld from some racial minorities. The former basis for the assumption is the inference derived from statistically significant and quantitatively substantial disparities that the protected group is

272. *See* Brest, *The Antidiscrimination Principle, supra* note 11, at 32-33.

273. *See* text accompanying notes 173-74 *supra*.

274. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971): "Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools. . . ." *Griggs* roots may be found in the perpetuation of past discrimination cases. *See, e.g.*, Gaston County v. United States, 395 U.S. 285 (1969); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

suffering from a disadvantage not suffered by the group favored by the challenged rule or practice. Because forced elimination of a barrier to opportunity satisfying these criteria relieves those members of the protected group most likely to suffer from the handicap identified by such a barrier, the group is at least arguably a reasonable proxy for victimization.

Three points should nevertheless be noticed about this scheme. First, both disparate exclusion and a reasonable basis for a judicial assumption that disparate exclusion is the product of group status based maldistribution of societal resources are required for invocation of a redress model. When both elements are present, group status is a reasonable proxy for a victimization assumption.[275] It is, however, not a reasonable proxy where either element is missing. For example, the facts of *Dothard v. Rawlinson* would not satisfy the redress model: height and weight requirements cannot be identified with characteristics dependent upon past distributions of societal resources. Similarly, disparate impact attacks upon subjective criteria or "word of mouth" recruiting in hiring or promotion systems[276] are not viably explained within a redress model. There is no reasonable basis for an assumption that such criteria give effect to handicaps generated by past societal discrimination even if they may be said to give effect to past employer discrimination.[277]

Second, if a reasonable basis for a judicial assumption that ex-

275. The long judicial experience with school desegregation provides at least an arguable basis for such notice. The viability of judicial notice of claimed causal links between past discrimination and criteria which purport to measure qualities or traits the acquisition of which is not clearly a function of educational experience is substantially more problematic. *But see* United Steelworkers v. Weber, 443 U.S. 193, 198 n.1 (1979).

276. *See, e.g.*, Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); Crawford v. Western Elec. Co., 614 F.2d 1300 (5th Cir. 1980); Lang v. Sapp, 502 F.2d 34 (5th Cir. 1974); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

277. It is of course possible that such practices may perpetuate the effects of past disparate treatment on the part of the employer in question. *See* Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1018 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) If an employer's past discrimination produced an all-white workforce and if current recruitment is word of mouth, it is likely that the all-white character of the workforce will be perpetuated. The irony is that in instances in which an employer engaged in past disparate treatment so that the factual basis for a redress rationale is most clearly present, application of that rationale would conflict with two statutory policies designed to protect employers: a policy of repose and a policy that the legislation is not retroactive. *See* text and note 315 *infra*.

clusion is the product of a status based maldistribution of resources is warranted, exclusion of a subpopulation disproportionately composed of a protected group should satisfy the redress model only where the subpopulation excluded is reasonably identifiable with protected race or gender group status. *Teal* therefore satisfies the requirements of the redress model. Long-standing judicial assumptions about the historical sources of disparate racial success on "pencil and paper" tests were available,[278] the test challenged in *Teal*, when viewed independently, operated to exclude the protected group viewed as a whole and the subpopulation excluded by the employer's promotion system viewed as a whole was arguably disproportionately composed of those members of the protected racial group suffering from the effects of those historical sources of disparity.[279] The members of the protected racial group included by the operation of the employer's promotion system were those members most like their white counterparts in the sense that they did not exhibit the educational handicap which would preclude success on the employment test challenged in *Teal*. *General Electric Co. v. Gilbert*[280] would, by contrast, not satisfy these requirements. Pregnancy is not a condition reasonably attributable to historical discrimination even though it is a condition precisely identifiable with gender group status.

New York Transit Authority v. Beazer[281] presents a more difficult case. It can be argued that drug addition is the product of systematic misallocations of resources and should therefore not operate to handicap the most obvious victims of those misallocations. It is nevertheless possible to distinguish *Beazer* from *Teal* and to therefore exclude *Beazer* from the redress model on the ground that drug addiction is not a condition reasonably identifiable with societal discrimination. Although a number of social ills are disproportionately suffered by protected groups and although such disproportion may be viewed as the historical legacy of societal discrimination[283] the causes of such

278. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

279. *See* text accompanying notes 173-74 *supra*. There is of course a bootstrap quality about this assertion: Failure under the test is used to identify those most likely to fail the test. The link is provided by the assumption that education affects test performance.

280. 429 U.S. 125 (1975).

281. 440 U.S. 568 (1979).

282. *See generally,* D. BELL, RACE, RACISM AND AMERICAN LAW, 589-601, 656-65 (2d ed. 1980); Freeman, *supra* note 3; Note, *Bakke and Weber: The Concept of Societal Discrimination*, 11 Loyola U. Chi. L.J. 297 (1980).

283. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1979); Lerner, *supra*, note 3, at 41. *Cf. Id.* at 37, (suggesting that Justice Rehnquist, in Furnco Const. Co.

conditions are diffuse and complex. The group status based causes of educational deprivations[283] and, in some contexts, conditions like the absence of specialized work experience[284] are, by contrast, relatively identifiable. If the underlying theory of the redress model is that "unnecessary barriers" to protected group participation in employment opportunities are "like" race or gender barriers to employment opportunities,[285] some causal link between race and gender and a challenged barrier is essential. Mere disparity in results fails to supply that link because it establishes only a greater probability of exclusion for the protected group; it does not establish that exclusion occurred "because of"[286] race or gender.[287] A societal discrimination hypothesis, despite its overbreadth provides a status based explanation of current disparities arguably sufficient to supply the necessary causal link.[288] But the hypothesis is not justified absent some credible

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v. Waters, 438 U.S. 567, 575 n.7 (1978), postulated a double standard requiring formal validation for tests but not for non-test selection criteria—a double standard arguably consistent with the argument made in the text for the premises underlying a redress model).

284. *See* United Steelworkers v. Weber, 443 U.S. 193, 198 n.1 (1979) (taking judicial notice of historical segregation in craft unions which precluded acquisition by blacks of craft skills and work experience).

285. *Cf.* Fiss, *supra* note 1, at 299 (advocating functional equivalence theory discussed *supra* note 169). Note, however, that the redress theory postulated in the text is distinguishable from Professor Fiss' theory because it does not rely on the irrelevance of a challenged "barrier" to productivity. Irrelevance would establish a closer relationship to disparate treatment theory, but strict judicial applications of the business necessity defense, particularly in the context of testing and educational requirements, cannot be explained on mere irrelevance grounds. *See generally* Comment, *Business Necessity, supra* note 3.

286. *See* 42 USC § 2000e-2(a)(2) (1976):

> (a) It shall be an unlawful employment practice for an employer—
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.

(emphasis supplied).

287. *See* Brest, *The Antidiscrimination Principle, supra* note 11, at 31-34. *Cf.* Fiss, *supra* note 1, at 103 (court must distinguish between past discrimination which relieves the individual from responsibility for his disqualification from past wrongs "that are an inevitable part of the socialization or development process.")

288. *See* Brest, *The Antidiscrimination Principle, supra* note 11, at 32; Fiss, *Antidiscrimination Law, supra* note 8, at 770; Fiss, *Groups and the Equal Protection Clause, supra* note 169, at 145-46.

It is true, as Professor Fiss argues in the cited works, that there is an element of fiction present in use of the past discrimination theory to supply the necessary causal linkage; because a true finding of past discrimination would require extensive

ground, such as a history of pervasive discrimination in education, for adopting the hypothesis.[289]

Exclusion from an opportunity under a race and gender neutral rule or practice does not, absent pretext, constitute exclusion motivated by race or gender, but it may arguably be said to constitute exclusion "because of" race or gender where the rule or practice operates to give effect to handicaps themselves the product of ascertainable past discrimination. The predicate for such a characterization is, however, some credible assurance that it is identifiable past discrimination which has caused the conditions which give rise to exclusion. The clearest cases in which the redress model is potentially applicable are cases in which there is disparate exclusion of the protected race or gender group viewed as a whole. In such cases, a statistically significant and quantitatively significant disparity standing alone does not satisfy the redress model—if it did, the model would in fact operate as an equal achievement model.[290] If, however, such a disparity is combined with a reasonably based assumption that past discrimination is responsible for the disparity, it may be inferred that the rule or practice generating the disparity is operating to identify victims of that discrimination.

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judicial inquiry and fact finding, presumptions are invoked instead. A presumptions technique, again as Professor Fiss suggests, points in the direction of a judicial concern not with the fact of a "violation", but with "results." The analysis in the text, on the assumption that equal achievement for groups is not a legitimate characterization of the policies and purposes underlying the legislation, nevertheless seeks to move back in the direction of a focus on violation by confining the scope of the presumptions utilized.

Freeman, *supra* note 3, at 1093-98 argues that *Griggs* is explicable from a "perpetrator" perspective if viewed as relying on past discrimination and that a past discrimination rationale would require invalidation of all tests and education requirements, but further argues that the business necessity test, if it permits employer justification, "severs" impact theory from a past discrimination rationale. Notice that, if it is not as a practical matter possible to establish business necessity in the case of educational requirements and tests, the result contemplated by Freeman's characterization of a past discrimination rationale—invalidation—is achieved.

289. A past discrimination rationale may explain the judiciary's tendency, described in Bartholet, *supra* note 3, to impose a highly relaxed version of the impact model in cases involving "jobs in high places." To the extent that such jobs are available only to persons with advanced credentials (*e.g.*, technical or advanced degree credentials) access to such jobs is extremely limited even among white males. The hypothesis of, *e.g.*, past discrimination in education might be viewed as sufficiently attenuated for such credentials that the remedial model appears inapplicable. *See* Townsend v. Nassau County Medical Center, 558 F.2d 117, 120 (2d Cir. 1977) *cert. denied*, 434 U.S. 1015 (1978).

290. *See* text and note 288 *supra*.

Exclusion of a subpopulation disproportionately composed of members of a protected group—the exclusion, for example, in *Beazer*—provides a less reliable basis for concluding that a challenged rule or practice operates to identify victims because, although subpopulation membership may undoubtedly be partially attributable to past discrimination, the relationship between subpopulation membership and group status based past wrongs is problematic. There is in a subpopulation exclusion case no quantitatively substantial exclusion of the protected group,[291] and exclusion of the protected group is an element of the basis for assuming that status based misallocations of societal resources—past discrimination—is responsible for current exclusion under a challenged rule or practice.[292] This is not, however, always the case. The fact of "bottom line" equality in the actual distribution of employment opportunities in *Teal* did not obviate the possibility that the test there in issue was identifying victims of past discrimination. And it is apparent that the subpopulation excluded in *Gilbert* is identifiable with gender status (albeit for reasons quite distinct from past discrimination). The factual predicates for an assumption that drug addiction is the product of societal discrimination were not, however, sufficient in *Beazer* to warrant a conclusion that the challenged rule in that case operated to identify victims of such discrimination.

The final point to be made about the redress model is that, once the predicates to its application are satisfied, an essentiality test of justification is warranted. As previously pointed out here, a redress objective assumes that the burdens of past discrimination are to be reallocated to the employer in the form of the costs of accommodating the employment system to that objective. There is no warrant for imposing the lesser burden of reasonable relevance in a redress model case because the issue in such a case is not whether a challenged rule or practice is utilized by an employer for reasons of race or gender. The issue, rather, is whether the rule or practice operates to identify race or gender by reason of handicaps imposed by past discrimination. And cases in which very high burdens of justification are imposed on employers tend to substantiate this contention. It is most often in cases of the use of tests and educational criteria that quasi scientific validation requirements which approach essentiality in operation are imposed.[293]

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291. *See* text and notes 173-74 *supra.*

292. *See* note 288 *supra.*

293. *Compare, e.g.,* Johnson v. Uncle Ben's Inc., 628 F.2d 419 (5th Cir. 1980) (education requirements must comply with EEOC guidelines), *vacated on other grounds,*

C. *Approximation of a Disparate Treatment Prohibition: A Residual Category*

It was argued in the immediately preceding subsection of this paper that neither *Dothard v. Rawlinson*,[294] *General Electric Co. v. Gilbert*,[295] nor cases involving subjective evaluation systems or "word of mouth" recruiting systems[296] satisfy the redress model. That assertion does not, however, preclude application of a third and distinct conception of the impact model, for such cases may be explained on the grounds that each involve either clear disparate treatment, suspected disparate treatment or a substantial risk of disparate treatment. A function potentially served by the impact model is approximation of a disparate treatment model. The justification for such an approximation is the difficulty of establishing illicit motive—and most particularly the pretextual use of a race and gender neutral employment criterion—in the litigation process. But an approximation function implies that the impact model will take on a character distinct from that which identifies it when used to further either a policy of equal achievement or a policy of partial redress.

Gilbert is a case of clear disparate treatment on a "sex plus" discrimination theory.[297] The Court's treatment of that case on an impact theory is explicable either as adopting equal achievement as the function of the impact model (women viewed writ large obtained a proportional share of benefits)[298] or as adopting approximation of disparate treatment as the function of the model on the assumption that sex plus disparate treatment is not subject to the disparate treatment prohibition.

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451 U.S. 902 (1981) Scott v. Anniston, 597 F.2d 897 (5th Cir.) (validation standard applied to test), *cert. denied*, 446 U.S. 917 (1979); United States v. Chicago 573 F.2d 416 (7th Cir. 1978) (tests should be validated under EEOC guidelines) *with, e.g.*, Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251 (6th Cir. 1981) (experience and training prerequisites to employment substantially promote employer's interests); deLaurier v. San Diego Unified Sch. Dist., 558 F.2d 674 (9th Cir. 1978) (mandatory pregnancy leave rule attacked on impact theory upheld on relaxed version of necessity defense). *See* Lerner, *supra* note 3, at 37. *But see, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (relaxed standard applied to an employment test); Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 1617 (1982) (applying relatively relaxed standard in employment examination case); Williams v. Colorado Springs Sch. Dist. #11, 641 F.2d 835 (10th Cir. 1981) (applying essentiality language to subjective criteria under impact model); Harless v. Duck, 619 F.2d 611 (6th Cir.) (applying essentiality standard to physical ability test), *cert. denied*, 449 U.S. 872 (1980).

294. 433 U.S. 321 (1977).

295. 429 U.S. 175 (1976).

296. *See* note 277 *supra*.

297. *See* text and notes 145-49 *supra*.

298. *See* text and notes 143-45 *supra*.

Dothard was arguably a case of suspected disparate treatment. The facially gender neutral criterion in issue (height and weight requirements) operated to exclude a substantial percentage of the female population and only a very small percentage of the male population, an exclusion generating at least an inference of illicit motive. In addition to that challenged criterion, other of the defendant's express policies of disparate treatment were challenged in *Dothard*—policies which may be said to corroborate the inference generated by disparate consequences. The defendant's justification for its height and weight requirements—that they served as proxies for "strength"—may be characterized both as a generalization and as a gender-related stereotype. Finally, the Court's treatment of that justification was structured as a pretext inquiry: the defendant had alternative means of testing for strength short of a generalization which substantially excluded women. It is of course true that the Court framed its inquiry as an impact model inquiry under which "motive" was said to be immaterial, but it cannot be said that height and weight requirements operate to perpetuate past discrimination (the rationale for the redress model) or, if *Teal* is taken seriously, that equal achievement was the Court's objective. It is therefore submitted that the appropriate explanation of *Dothard* is that the Court suspected disparate treatment even if it could point to no direct evidence of disparate treatment.

The difficulty with a suspected disparate treatment rationale as an explanation of *Dothard* is, however, that it postulates a suspicion rather than a finding of illicit motive. It therefore fails to provide a basis for distinguishing application of the formal disparate treatment model: if liability may be imposed on the basis of suspicion, what justifies retention of a disparate treatment model under which a plaintiff must prove illicit motive? A similar difficulty is presented by disparate impact model attacks on subjective hiring or promotion criteria and word of mouth recruiting practices. A number of courts have treated such practices as race and gender neutral criteria subject to the impact model.[299] The central concern in such cases appears to have been the risk of disparate treatment inherent in such systems; they may be used to engage in disparate treatment.[300] And evidence of the disparate consequences of such criteria generates an inference of illicit motive which confirms such a risk.

A potential reconciliation of the difficulty presented by suspected disparate treatment is the theory, offered by Professor Fiss, that race-

299. *See* notes 188, 198 *supra*.

300. *See* Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

neutral criteria amounting to the "functional equivalent" of racial criteria are prohibited under Title VII.[301] A race neutral criterion is the functional equivalent of a racial criterion where (1) a protected racial group is more likely to be excluded under the criterion than whites (a fact established by disparate impact), (2) the criterion does not measure qualities subject to individual control and (3) the qualities so measured are not related to productivity.[302] The functional equivalence rationale postulates criteria which operate to identify race even if their use cannot be shown to have been motivated by race. It is therefore similar to the redress model earlier postulated here[303] with one important exception. Under the redress model, current disparate impact and a reasonable basis for concluding that past discrimination is responsible for that current disparity serve to establish the causal link between race and a challenged criterion warranting a finding that exclusion occurs "because of" race. Under the functional equivalence rationale, disparity, absence of personal control and absence of a relationship between performance under a challenged criterion and productivity serve as the causal link warranting that finding.[304]

The redress model disposes of the third of the elements of the functional equivalence rationale because cases in which strict essentiality and validation versions of the business necessity defense are applied cannot be accommodated by the functional equivalence theory;[305] a mere reasonable relationship between performance under a challenged criterion and productivity will not satisfy strict versions of the defense.[306] The policy justification for the redress model is limited redress: "barriers" to current opportunity are illicit if they perpetuate past discrimination. By the terms of that policy, strict ver-

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301. Fiss, *supra* note 1, at 298-304. *See* note 169 *supra.*

302. Fiss, *supra* note 1, at 299.

303. *See* text and notes 271-93 *supra.*

304. In Professor Fiss' theory, past discrimination satisfies the control element of the causal link. Fiss, *supra* note 1, at 302-03.

305. It is possible to argue that Washington v. Davis, 426 U.S. 229 (1976) and New York Transit Authority v. Beazer, 440 U.S. 568 (1979) overrule strict versions of the business necessity defense. It seems to me unlikely that this is the case with respect to employment tests, educational requirements and experience requirements, at least where such criteria are applied to "lower level" jobs not involving duties related to public safety. *See generally* Bartholet, *supra* note 3. But the distinctions proposed in the text would confine the strict business necessity defense along lines somewhat similar to those suggested by Justice Rehnquist writing for the Court in Furnco Const. Co. v. Waters, 438 U.S. 567, 575 n.7 (1978).

306. *See* text and notes 224-55 *supra.*

sions of the business necessity test are warranted.[307] If, however, the policy justification for the functional equivalence rationale is viewed as approximating in the litigation process a disparate treatment prohibition so as to reach suspected but unproven disparate treatment,[308] both a distinct view of the business necessity test and a distinct impact model are warranted.

On these premises, both *Dothard* and the "subjective criteria" and "word of mouth" recruiting cases may be explained on grounds independent of the redress model. The height and weight requirement at issue in *Dothard* operated to identify immutable physical characteristics highly correlated with gender. It is true that the Court employed an apparently strict version of the business necessity defense in *Dothard*,[309] but its discussion of the defense was framed in terms of an inquiry into pretext and emphasized the employer's failure to produce any evidence justifying its criteria[310]—a failure Justice Rehnquist in a concurring opinion viewed as rendering the employer's case insufficient even under a disparate treatment model standard.[311]

Subjective employment criteria and word of mouth recruiting efforts are practices with elements in common with the physical requirements challenged in *Dothard*. Where an existing work force is

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307. *See* text and accompanying notes 292-93 *supra*.

308. *Cf.* Comment, *Business Necessity*, *supra* note 3 (advocating a relaxed view of the business necessity defense on the basis of an interpretation of the functional equivalence rationale which renders it a disparate treatment theory). Professor Fiss would apparently not agree that his theory seeks to approximate a prohibition of illicit motive. *See* Fiss, *supra* note 1, at 297-98.

309. "If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly," 433 U.S. at 332.

310. "[T]he appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance. Indeed, they failed to offer evidence of any kind in specific justification of the statutory standards."
433 U.S. at 331.

311. Appellants, in order to rebut the prima facie case under the statute, had the burden placed on them to advance job-related reasons for the qualification. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This burden could be shouldered by offering evidence or by making legal arguments not dependent on any new evidence. The District Court was confronted, however, with only one suggested job-related reason for the qualification—that of strength. Appellants argued only the job-relatedness of actual physical strength; they did not urge that an equally job-related qualifications for prison guards is the *appearance* of strength.
433 U.S. at 339 (Rehnquist, J. concurring).

predominantly white, recruitment of new employees through contacts with existing employees is likely to perpetuate the current composition of that work force.[312] Such recruitment practices may be characterized as operating to identify race because they are limited to existing social and familial relationships of white employees and because they often generate a disparate impact.[313] Subjective criteria may not be said to clearly or inevitably operate to identify race or gender in the obvious way that the "objective" physical requirement at issue in *Dothard* identified gender. But subjective standards present substantial risks of the paradigm instances in which characteristics beyond personal control and unrelated to productivity are used as a basis for an employment decision: risks of race or gender motivated decision.[314]

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312. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 427 (8th Cir. 1970).

313. *See* Teamsters v. United States, 431 U.S. 324, 329 n.32 (1977).

314. *See* Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972). Judicial analysis of subjective standards sometimes follows an impact model scheme and sometimes follows a disparate treatment model scheme. *See, e.g.,* Furnco Const. Co. v. Waters, 438 U.S. 567 (1978); Robbins v. White-Wilson Medical Clinic, Inc., 660 F.2d 1064 (5th Cir. 1981), *vacated on other grounds*, 102 S. Ct. 2229 (1982); Crawford v. Western Electric Co., 614 F.2d 1300 (5th Cir. 1980). To the extent, however, that judicial reliance is placed on the *risk* of discrimination rather than upon a finding of illicit motive, it is apparent that some version of the impact model is utilized. *See* Bartholet, *supra* note 3, at 1006-08. *See also* Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982) (applying both theories to subjective criteria); Williams v. Colorado Springs Sch. Dist. No. 11, 641 F.2d 835 (10th Cir. 1981) (same). A disparate impact model challenge to subjective criteria attacks the employer's *use* of such criteria. A finding of liability under the impact model implies an obligation to substitute objective criteria or, at least, criteria which will produce no disparate impact. To the extent that a court declines to consider the use of subjective criteria a "legitimate nondiscriminatory reason" for an employment decision in cases involving a disparate treatment theory because such criteria generate disparities or risk disparate treatment, *see* James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), it is in fact imposing an impact model theory. To the extent that a court in a treatment case rejects an employer's general claim that subjective criteria explain a decision on the ground that the claim is not sufficiently specific to constitute a "legitimate nondiscriminatory reason" for the decision or on the ground that the claim lacks credibility, it is legitimately operating under a disparate treatment model. Although these distinctions are real, they obviously become blurred in practice. *See* Robbins v. White-Wilson Medical Center, Inc., 660 F.2d 1064, 1067 (5th Cir. 1982) (the more subjective a decision making process, the more difficult it is to satisfy the disparate treatment theory rebuttal burden), *vacated on other grounds*, 102 S. Ct. 2229 (1982). The chief consequences of selecting between the disparate treatment and disparate impact theories in this context is therefore the distinct allocation of risk of nonpersuasion (and, therefore, of judicial error) and distinct content of the matters to be established in rebuttal under the theories. *See* Williams v. Colorado Springs Sch. Dist. No. 11, 641 F.2d 835 (10th Cir. 1981); Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burden of Proof and Substantive Standards Following Texas Department of Community Affairs v. Burdine*, 55 TEMPLE U. L. Q. 372, 394 (1982).

Neither subjective standards nor informal recruiting efforts may be said, however, to perpetuate past discrimination within the meaning of the redress model. It is true that limited recruiting may tend to perpetuate the employer's past disparate treatment if the employer's white male workforce is the product of disparate treatment, but the impact model is applicable only where there is a "present violation" of Title VII. If there is no present violation, the model seeks to remedy past harm in violation of the principles both that the Act is not retroactive and that satisfying statutory filing periods is a prerequisite to suit.[315] If a "barrier to opportunity" is a present violation, it is presumably because it operates in a manner at least similar to the paradigm case of a present violation: current exclusion from employment opportunity for reasons of race or gender.[316] The redress model circumvents the retroactivity difficulty by imposing an affirmative remedial obligation on employers (by means of strict versions of the business necessity defense) and by treating breaches of that duty as present violations.

Such a treatment is perhaps warranted despite the problem of retroactivity where clear societal discrimination has rendered use of a criterion giving present effect to that discrimination tantamount to the use of race or gender. The prospective character of the legislation and statutory filing periods protect employers from stale claims of employer misconduct; they do not necessarily immunize employers from a policy treating them as vehicles for the shifting of the burdens generated by societal misconduct. But a policy of shifting the burdens imposed by societal discrimination is not available as a rationale in the cases of subjective employment decision or internal recruiting practices. The link between race or gender and such practices is not supplied by handicaps society has imposed on the basis of race or gender, it is supplied by a perceived *risk* of current misuse on the basis of race or gender. Subjective criteria and recruitment methods which perpetuate a white male workforce may be said to operate in a fashion functionally similar to race or gender based decision if they appear,

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315. *See* Delaware State College v. Ricks, 449 U.S. 250 (1980); United Airlines v. Evans, 431 U.S. 553 (1977); Teamsters v. United States, 431 U.S. 324 (1977). Although findings that an employer once engaged in disparate treatment and that its present race and gender neutral practices perpetuate that past discrimination provide a basis for application of a redress rationale, the noted policies are designed specifically to limit an employer's exposure to liability; the policies trump the redress model.

316. *Cf.* Guardians Assoc. v. Civil Service Comm., 633 F.2d 232, 253 (2d Cir. 1980), *aff'd on other grounds*, ___ U.S. ___, 51 U.S.L.W. 5105 (1983) distinguishing merit from seniority system on the theory that a seniority system perpetuates the effects of the past discrimination on the part of an employer and a merit system operates as present discriminatory practice).

in the circumstances of individual cases, to present substantial risks of current disparate treatment and if these risks appear confirmed by disparate consequences.

Disparate consequences confirm risks of disparate treatment if they are plausibly consistent with an inference of disparate treatment. Disparate exclusion of a protected group viewed as a whole will often give rise to such a plausible inference. Exclusion of a subpopulation disproportionately composed of a protected group may in some instances give rise to such an inference—particularly, as in *Gilbert*, where "sex plus" disparate treatment is suspected. But exclusion of a subpopulation defined by a race or gender neutral criterion will most often not generate a plausible inference of disparate treatment. However ignoble the motivation for exclusion of a subpopulation, that motivation will seldom be related to protected group status. *Beazer* is an example. The anti-drug use rule at issue in that case excluded a subpopulation of drug users and may have been motivated by unwarranted generalizations about such persons, but the fact that the subpopulation was disproportionately composed of protected groups did not in that case give rise to a plausible inference that protected group status motivated the rule.[317]

Furnco Construction Co. v. Waters[318] illustrates the points made here. The employer in that case utilized both a subjective and limited recruitment scheme and a past experience with the employer scheme in selecting employees. That system was attacked on both disparate treatment and disparate impact theories, but there was "bottom line" proportion in the employer's workforce—the hiring system had not produced disparate representation rates.[319] The Supreme Court treated the case as presenting only a disparate treatment issue despite the plaintiffs' impact model claim.[320]

Upon the assumption that *Furnco* is not an equal achievement case (that the employer's "bottom line balance" does not imply that the impact model was satisfied by equal achievement), the Court's insistence upon treating the case within the traditional disparate treatment model was appropriate because the risk presented by subjective evaluation and limited recruiting did not materialize. "Bottom line

317. Another example of a case in which subpopulation exclusion gives rise to no plausible inference of prohibited disparate treatment is EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3rd Cir. 1980) discussed at note 139 *supra*.

318. 438 U.S. 567 (1978).

319. *See id.* at 583-84 (Marshall, J. concurring and dissenting).

320. *Id.*

balance" in *Furnco* eliminated the possibility of an inference of illicit motive from disparate consequences: there were no such consequences. Use of the suspected disparate treatment version of the impact model was therefore inappropriate despite the risks inherent in the employer's hiring methodology. The only remaining issue was individual disparate treatment to be resolved within the boundaries of the traditional disparate treatment model.

If the foregoing explanations of *Dothard*, *Gilbert*, *Beazer* and *Furnco* are assumed, the disparate impact model is at least often not what it purports to be. It is not in such cases a prohibition of unjustified consequences but a means of approximating a disparate treatment model. It is moreover submitted that in any case which does not satisfy the redress conception of the impact model, approximation is the sole remaining justification for invoking the impact model label. If approximation is the sole remaining justification, judicial utilization of the model in circumstances not warranting redress should be undertaken with the limited objective of approximation firmly in view; approximation, as *Furnco* implies, should not be permitted to serve as a facade for equal achievement.[321]

The difficulty with the approximation model remains, however, that of determining when approximation is a legitimate substitute for direct invocation of the formal disparate treatment model. Approx-

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321. "The Court of Appeals, as we read its opinion, thought Furnco's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants. We think the imposition of the second requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII." 438 U.S. at 576-77, (treating the case, however, under a formal disparate treatment model theory). *Cf.* American Tobacco Co. v. Patterson, ___ U.S. ___, ___, 102 S. Ct. 1534, 1548 (1982) (Stevens, J. dissenting):

> The Court's strained reading of the statute may be based on an assumption that if the *Griggs* standard were applied to the adoption of a post-Act seniority system, most post-Act systems would be unlawful since it is virtually impossible to establish a seniority system whose classification of employees will not have a disparate impact on members of some race or sex. Under *Griggs*, however, illegality does not follow automatically from a disparate impact. If the initiation of a new seniority system—or the modification of an existing system—is substantially related to a valid business purpose, the system is lawful.

But for the provisions of Section 703(h) of Title VII, 42 USC § 200e-2(h) (1976), mandating application of the formal disparate treatment model to the operation of such systems, *See* Teamsters v. United States, 431 U.S. 324 (1977), such systems in some circumstances may be viewed as operating to identify race in a fashion arguably within both the redress and functional equivalence rationales.

imation implies both that the burdens of proof normally mandated under the treatment model may be modified to ease the plaintiffs task and, therefore, that a greater risk of adjudicative error is allocated to the employer. The choice between an approximation model and a pure disparate treatment model is therefore largely a decision whether the greater risk of adjudicative error should be allocated to the plaintiff or the defendant.[322]

The allocation question is informed, however, by the distinct nature of the problem confronting the court in a case in which approximation is invoked as a theory. An approximation case is essentially a disparate treatment case in which the plaintiff has relied upon disparate consequences and circumstances suggesting a substantial risk of disparate treatment and in which the employer's articulated non-discriminatory reason for a disparate result is a race and gender neutral criterion challenged as pretextual. The pure disparate treatment model allocates the burden of persuasion regarding that issue to the plaintiff. The impact model as approximated disparate treatment model arguably allocates at least the initial burden of persuasion on the pretext issue to the employer in the form of the business necessity defense: a non-discriminatory reason (neutral criterion) must

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322. *Compare* Texas Dept. Community Affairs v. Burdine, 450 U.S. 248 (1981) (disparate treatment) *with* Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) (disparate impact). There is a split in authority over the question whether *Burdine's* allocation of the burden of persuasion applies in disparate impact model cases. *Compare* Johnson v. Uncle Ben's Inc., 657 F.2d 750, 753 (5th Cir. 1981) *with* Croker v. Boeing Co., 662 F.2d 975, 991 (3rd. Cir. 1981).

Whether or not the burden of persuasion regarding even a relaxed version of the business necessity defense is on the employer, there is a distinction between the matter to be established by the employer in a disparate treatment case and the matter to be established by the employer in a disparate impact case. The employer's burden in a treatment case is to produce evidence of a "legitimate non-discriminatory reason" for its action. *See* Texas Dept. Community Affairs v. Burdine, 450 U.S. 248, 358-59 (1981). The employer's burden under a relaxed version of the business necessity test is to establish that a neutral criterion "significantly serves" its legitimate interests. *See* New York Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979). *But see* Furnish, *supra* note 80, at 444 (postulating a convergence in the disparate treatment and impact theories and in the defendant's burden under these theories).

It is of course apparent that the distinction between these burdens breaks down in practice: it is in the employer's interest in a disparate treatment case to not only establish a reason independent of race or gender for its action, but also to establish the credibility of that reason by establishing the substantiality of the interests furthered by that reason. *See* Robbins v. White-Wilson Medical Clinic, Inc., 660 F.2d 1064, 1067 (5th Cir. 1981), *vacated on other grounds*, 102 S. Ct. 2229 (1982). But this degree of convergence under the suspected disparate treatment version of the impact model should not be surprising; the function of that model is approximating disparate treatment.

not only be "articulated," it must be justified in the sense that it must be job-related. Reasonable relevance is on an approximation premise the appropriate standard for the defense because irrelevance generates a strong inference of pretext. Once relevance is established and that inference therefore eliminated, it is the plaintiff's burden to establish pretext despite relevance.[323]

The justification for allocating a burden of establishing relevance—and therefore a greater risk of adjudicative error—to the defendant in these circumstances is that the inference of illicit motive which arises from proof of disparate consequences is much stronger in a case in which a criterion is shown to have generated disparate group consequences than in an individual disparate treatment case.[324] It is true that the criterion which generates group consequences is facially race and gender neutral. However, the facts that there are disparate group consequences and that the criterion gives rise to substantial risks of disparate treatment or operates in effect to identify race or gender status largely eliminate the strong possibility of legitimate idiosyncratic reasons for employer action which weakens the inference of illicit motive in an individual disparate treatment case. The inference of illicit motive is strongest in a systematic disparate treatment case in which the employer can point to no race and gender neutral criterion or must rely upon protestations of good faith in the operation of a subjective system as explanations of disparate group consequences.[325]

It must be emphasized, however, that the burden on an employer to establish relevance cannot, on an approximation rationale, become a burden of establishing essentiality without risking an equal achievement objective. The function of a business necessity "defense" on approximation premises is analysis of a pretext issue. The appropriate standard for assessing relevance for purposes of satisfying that function is a reasonableness standard, not a validation standard.[326]

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323. *See* Dothard v. Rawlinson, 433 U.S. 321, 339 (1977) (Rehnquist, J. concurring); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

324. *See* Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1015 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

325. *See* Teamsters v. United States, 431 U.S. 324 (1977).

326. The affirmative obligation imposed on employers under the redress model (or under an equal achievement model) implicit in strict versions of the business necessity defense is reduced or eliminated if the model employed is an approximation of disparate treatment model. The employer's obligation under an approximation model is negative: race or gender may not motivate decision. The greater burden of proof imposed on the employer by a relaxed version of the business necessity defense is a modification of that negative obligation necessitated by the limitations of process.

CONCLUSION

The fundamental difficulty inherent in the history of the judicial application of the impact model has been that its function has been ambiguous. Until *Connecticut v. Teal*, it appeared, despite the "barrier to opportunity" and "perpetuation of past discrimination" rationales judicially employed to explain the model, that its function was in fact to enforce an equal achievement objective through a threat of liability for failures to satisfy that objective. In form, the model precluded unjustified use of neutral criteria with disparate impact; in operation, the model often precluded any employment decision which failed to result in proportionate hiring or promotion. The Court's rationale in *Teal* is inconsistent with an equal achievement objective even if its holding permits continued judicial pursuit of that objective.

It remains to be seen whether the Court will refine the impact model in a fashion which renders equal achievement merely an ultimate objective of Title VII or will continue to tolerate the ambiguity which permits employer failure to satisfy an equal achievement objective to be utilized as an independent basis for liability. This article has proposed an explanation of the impact model which treats it as three models—one rejected as an illegitimate understanding of its function and two proposed as tolerably legitimate understandings if properly confined. The basic contentions of that proposal are, in summary, as follows. First, the disparate treatment model should be viewed as the paradigm conception of Title VII's prohibitions. Second, departures from that conception for purposes of accommodating the limitations of the litigation process are permissible if undertaken for the purpose of approximating that conception. Third, a departure from the conception to accommodate exclusion from employment opportunity reasonably attributable to past societal discrimination within the meaning of the redress model here postulated permits accommodation of cases employing strict versions of the business necessity defense and is arguably justified on a remedial rationale if confined to criteria which give current effect to known instances of societal discrimination. Fourth, a departure from strict adherence to the disparate treatment model by means of allocating a greater risk of adjudicative error to employers is legitimate if the departure is undertaken for the limited purpose of identifying pretextual use of facially race and gender neutral criteria and is confined to that purpose.