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DISCRETIONARY DECISIONMAKING: THE APPLICATION OF TITLE VII'S DISPARATE IMPACT THEORY

Julia Lamber*

I. INTRODUCTION

For more than a decade courts and commentators have categorized allegations of discrimination under Title VII of the 1964 Civil Rights Act1 according to two analytical frameworks. The first of these, “disparate treatment” claims, involves allegations of intentional discrimination. Plaintiffs assert that considerations of race, gender, or some other statutorily impermissible factor influenced an adverse employment decision.2 Proof of impermissible motive is crucial but a court may infer this motive from differences in treatment. The other analytical framework, “disparate impact” claims, involves allegations of unintentional discrimination. Plaintiffs challenge facially benign employment policies that fall more harshly on minority group members than on others.3 Proof of impermissible motive is not essential but the defendant may avoid liability by proving that the challenged employment policy is central to its legitimate business interests.

In their traditional and classic forms these two analytical frameworks serve different purposes and seek to effectuate two different theoretical conceptions of equality. The disparate treatment theory reflects the equal treatment conception of equality: men and women, blacks and whites, are entitled to like treatment and considerations of

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For convenience this article uses the term “minority group” to identify any social or political minority—including women.

race or gender should not influence most employment decisions. In contrast, the disparate impact theory reflects an equal opportunity conception of equality. It imposes an affirmative duty on employers to heed the disproportionate consequences that occur in the workplace because structural, historical, or societal barriers have impeded equal achievement. This notion of equality also teaches that arbitrary or thoughtless employment policies can be just as harmful as intentional discrimination.\(^4\)

Each decision of the United States Supreme Court approving the disparate impact theory illustrates the analytical framework in its classic form. Each case involved a challenge to a clearly identified, objective employment policy (applied at a determinative point in the employment process) that was related causally to the observed adverse impact on minority group members.\(^5\) Although evidence of adverse impact is crucial to all discrimination claims, disparate impact claims are not always based on clearly identified, objective employment policies. Employers often use multiple selection criteria which may obscure the cause of the observed disparity in outcomes. Employers also choose employees on the basis of elusive or intangible qualities such as leadership ability, innovation, or ability to plan. In other situations the employment decision may be inherently and properly discretionary; the employer may not have any legitimately defensible, objective criterion to distinguish one applicant from others.

When minority group members fare poorly under such selection systems, plaintiffs usually allege intentional discrimination because of the

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5. In Griggs, the Court considered requirements that applicants possess a high school diploma and pass two standardized intelligence tests, which plaintiffs showed blacks failed at a disproportionately higher rate than whites. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court focused on the employer's burden of proof to justify the use of standardized intelligence tests, which plaintiffs showed had an adverse impact on blacks. Dothard v. Rawlinson, 433 U.S. 321 (1977), concerned Alabama's minimum height and weight requirement for prison guards that plaintiffs showed excluded nearly 41% of the women and virtually no men. In New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), the plaintiffs challenged the Transit Authority's policy of excluding participants in methadone maintenance programs from employment but were unsuccessful, in part because they failed to prove that the rule had an adverse impact on blacks and Hispanic job applicants at the Transit Authority. Finally, in Connecticut v. Teal, 457 U.S. 440 (1982), the Court rejected an employer's argument that the racially balanced results of its overall promotion process should excuse the need to justify the use of an aptitude test which blacks failed at a higher rate than whites.
possibility of bias in the subjective evaluations of candidates. Alternatively, plaintiffs may seek to challenge the selection system itself under the disparate impact theory. In a promotion challenge, for example, rather than alleging that disparate treatment was a factor in the evaluation, the plaintiff would allege that women and blacks are concentrated in the lower levels of the workforce and argue that the employer's policy of promotion from within does little to change this workforce distribution. Plaintiff then would point to the discretionary nature of initial placements and the promotion process as the cause of this adverse impact.

These situations raise the question whether the disparate impact framework can be used profitably to analyze such discretionary decisions or to challenge the way objective criteria are used. Specifically, does the disparate impact theory and its analytical framework apply beyond its original, but factually narrow, context? If so, what is the nature of the burden that the employer must bear to justify these challenged practices? Is the disparate impact theory inappropriate because plaintiffs are merely alleging a variation of the disparate treatment theory?

The casual observer might conclude that the disparate impact theory and its analytical framework are inappropriate because the use of discretion is so different from the specific employment policies considered by the Supreme Court in its previous Title VII cases. The reluctance of the lower federal courts to criticize discretionary employment systems substantiates this view. This casual observation, however, does not offer any conceptual justification for limiting the disparate impact theory or its analytical framework. Neither the theory itself nor *Griggs v. Duke Power Co.*, in which the Supreme Court first applied disparate impact analysis, suggests any such limitation.

Choosing the relevant analytical framework for discretion cases poses undesirable extremes. If disparate impact analysis is inappropriate, employers can avoid liability by putting all employment criteria in discretionary or subjective form, even when subjectivity is not otherwise desirable from the employer's point of view. On the other hand, the analytical framework of the disparate impact theory is not applied easily to cases of discretion because the defendant's burden of justification makes the notion of discretion nearly meaningless.

The lower federal courts disagree about disparate impact challenges
to employee selection systems. Some courts simply accept a plaintiff's attempt to fit the allegations of the case within the disparate impact model.9 Other courts reject the application of the model because discretion cases are factually unlike every case in which the Supreme Court has approved its application.10 Still other federal courts focus on the application of the disparate impact theory when the defendant attempts to rebut an allegation of intentional discrimination with a specific objective employment criterion as its nondiscriminatory explanation.11

None of the cases offers a conceptual framework to identify those factual situations in which disparate impact analysis is appropriate. The literature is similarly unrevealing.12 Nor do most commentators discuss how the disparate impact model might be adapted to address the different allegations in these cases.13 The resolution of this controversy is not merely a problem of developing appropriate statistical evidence or of assigning burdens of proof, although these are relevant, often difficult, and sometimes determinative matters. The controversy also raises fundamental questions about the conception of equality embodied in Title VII and the extent to which Title VII presumes a rational, objective world of employment decisionmaking.

This article addresses the underlying question in these cases—the extent to which courts should scrutinize the exercise of discretion that has an adverse impact on minority group members. Of course, discretion that merely masks discriminatory motivation is impermissible. Similarly,

11. Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied sub nom. Meese v. Segar, 105 S. Ct. 2357 (1985), discussed infra text accompanying notes 52-59. Cf. Webster v. Redmond, 599 F.2d 793, 802-03 (7th Cir. 1979) (employer's refusal to promote black plaintiff because of arrest does not establish either a disparate impact or disparate treatment claim because "arrest" was sufficient nondiscriminatory explanation under the disparate treatment theory but not an absolute disqualification necessary for the disparate impact theory).
13. Tepker, Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference, 16 U.C.D. L. REV. 1047, 1083-87 (1983) (arguing that courts should require employers to demonstrate a policy's effectiveness and validity with substantial evidence even though the employer lacks the data to establish its effectiveness in a particular case).
some exercises of discretion with an adverse impact are obviously permissible under Title VII.

This article contends that the disparate impact theory and its analytical framework should not be abandoned in discretion cases simply because these cases are different from typical disparate impact cases or because the disparate impact theory is difficult to apply. On the contrary, the disparate impact theory provides a useful way to ask the right questions about discretionary decisions. This article argues for a limited and principled deference to discretionary decisions. It concludes that courts should not review the intuition of employers who both knowingly exercise discretion and intentionally risk winning big in the marketplace if they are right and losing big if they are wrong. Such deference, however, involves an enormous risk because in exercising discretion employers tend to choose individuals most like themselves. In a world dominated by white males the risk is that employers will prefer white males over women and minority group members. Thus, exercises of discretion by employers other than those who play hunches for high stakes are not entitled to such deference.

Part II discusses early discretion cases and rejects the temptation to transform discretion cases into straightforward disparate treatment or disparate impact fact patterns. Part III presents four recent decisions from four courts of appeals that illustrate the various attempts to challenge discretionary decisionmaking under the disparate impact theory and the conflicting views of those courts. These inconsistent approaches suggest that existing theory is inadequate to resolve discretion cases.

Part IV reviews the problems of proving disparities through statistical evidence and of tracing the adverse effect to the challenged practice. It concludes that these comparison and causation issues are the source of dissatisfaction in some discretion cases under the disparate impact theory but that problems with comparison and causation should not prevent the courts from tackling the underlying issues. Finally, Part V asserts that courts must resolve discretion cases with an understanding of the different circumstances in which employers exercise discretion. The application of the disparate impact theory turns on such factors as the nature of the employer, the decision-making process, the definition of general standards, and the kind of job at issue. Arguing for a principled deference in appropriate situations, the article rejects certain prevailing views such as the utility of procedural reforms to control discretion.

II. IDENTIFYING DISCRETIONARY DECISIONMAKING

Discretion in employment decisions typically occurs in two forms. First, the employer may not have a specific employment practice that governs its decisionmaking. Second, the employer may have considerable flexibility in applying a certain policy. The essence of discretionary decisionmaking is that the employer need not distinguish one situation
from another or one job applicant from another.\textsuperscript{14} Decisionmaking may be discretionary because decisions are not routine or recurring, because meaningful differences are difficult or impossible to articulate, or because the employer may base a decision on any one of several competing factors. More starkly, no legitimately defensible, objective criterion may exist at all. A judicial unwillingness to require a decisionmaker to detail permissible differences does not mean, however, that an exercise of discretion based on race or gender is permissible. Discretionary decisions also are problematic because of the possibility of intentional discrimination and because the outcomes may appear to be unfair.

\textit{A. An Early Approach to Discretion}

An early decision of the Court of Appeals for the Fifth Circuit, \textit{Rowe v. General Motors},\textsuperscript{15} set the tone for much litigation concerning discretionary decisionmaking under Title VII. Although the court's theoretical analysis is relatively unsophisticated by today's standards, the factual context provides a classic illustration of discretionary decisionmaking attacked under Title VII. In \textit{Rowe}, employees challenged General Motors's system for determining which employees were suitable for transfer from hourly jobs to salaried positions. General Motors filled positions such as production-line supervisor or clerk from within the plant, but it had no systematic way to inform employees about either vacancies in the salaried positions or the necessary qualifications. Although any transfer or promotion required the approval of the management committee, an employee could initiate the process or the employee's immediate supervisor could recommend an employee for promotion. Under either method, a recommendation by the employee's immediate supervisor was essential. This recommendation was based in part on the supervisor's subjective appraisal of the employee's "ability, merit, and capabilities."\textsuperscript{16}

The court of appeals found this transfer or promotion system impermissible under Title VII and reversed the district court's decision to uphold the system. The appellate court faulted the system in several respects. First, one person's recommendation was indispensable to the process. Second, supervisors had no written guidelines for making their recommendations. Third, standards which GM said were important, such as experience, attendance, and medical or disciplinary records,\textsuperscript{17} were vague and subjective. Fourth, hourly employees were unaware about promotion opportunities or the qualifications necessary for the

\textsuperscript{14} In a sense, all decisions—from the pure hunch to the choice of using a clearly defined objective rule—involves discretion. The kinds of discretionary decisions that are controversial in terms of the disparate impact theory vary depending on how different the exercise of discretion is from the objective, identifiable rules found in \textit{Griggs} and its progeny. Although decisionmakers can rationalize some discretionary decisions, the point of discretion is to recognize that they do not need to try. This recognition, however, does not mean that a discretionary decision is arbitrary.

\textsuperscript{15} 457 F.2d 348 (5th Cir. 1972).

\textsuperscript{16} \textit{Id.} at 353.

\textsuperscript{17} \textit{Id.} at 353 nn.10, 11.
jobs. And fifth, the procedures provided no safeguards to avert the consideration of race, an impermissible factor in promotions.

Acknowledging GM's affirmative action efforts and the absence of discriminatory motivation, the court clearly considered the defendant's liability under the disparate impact theory. Nonetheless, the court did not specify what evidence showed a disparity in promotional opportunities; it simply noted that few blacks were promoted from hourly jobs to salaried positions. Nor did the court test the transfer or promotion system against the standard justification for disparate impact cases, although it noted "business necessity" as the appropriate justification. General Motors had argued that any disparity in promotions for blacks and whites was based on the fact that not as many blacks had the desired "experience." The court, however, failed to mention that requiring experience would be permissible only if the defendant proved experience was related to job performance.

The court's major objection was to the informal, unstructured system of promotions, not the promotion standards themselves. The court believed its job was to determine whether the employer's promotion or transfer system operated as a barrier against the movement of qualified workers from hourly jobs to salaried positions despite the employer's other affirmative "efforts and attitudes all should applaud." The court reasoned that procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the employee's immediate supervisor are a ready mechanism for discrimination against blacks "much of which can be covertly concealed and . . . not really known to management." Thus, although the court found no discriminatory motivation, either in the system or in its application, the court premised liability on the existence of the discretionary system because it could be a mechanism for intentional discrimination and because the outcomes of the promotions were so disparate.

B. Supreme Court's Views

The United States Supreme Court has considered the effects of discretionary decisionmaking, although not in response to a direct attack on the appropriateness of the disparate impact theory for analyzing an employer's use of discretion. In *Albemarle Paper Co. v. Moody,* plaintiffs alleged that the company's program of employment testing violated Title VII under the disparate impact theory. Albemarle required applicants for skilled jobs, including present employees who wanted to transfer, to pass two standardized tests that purportedly measured nonverbal intelli-

18. *Id.* at 357-58.
19. *Id.* at 358.
20. *Id.* at 356.
21. *Id.* at 359.
22. 422 U.S. 405 (1975).
gence and verbal ability. After the plaintiffs filed their lawsuit, Albemarle hired an industrial psychologist to study the job-relatedness of its testing program. The study compared test scores of current employees with supervisors' judgments of the employees' competence; it showed a statistically significant correlation between some of the jobs and some of the tests.

The Supreme Court found this validation effort "materially defective in several respects." The Court found several obvious difficulties, such as the use of the tests for all job groupings when the study showed significant correlations for only some. Even more problematic, neither the expert nor the employer specified job functions for any of the jobs in question; without such specification meaningful correlations between quality of performance on the job and quality of performance on the test are unlikely.

The Supreme Court also faulted the validation study for its reliance on subjective supervisor rankings to measure job performance. Acknowledging that supervisor rankings could be used to validate a test, the Court considered Albemarle's process too haphazard to be useful. Supervisors ranked employees under a vague and ambiguous standard. Although a job grouping contained a number of different jobs, supervisors determined which employees in each group did a "better job." The Court noted that it had no way of knowing what criteria of job performance the supervisors used, whether each of the supervisors used the same criteria, or whether any of the supervisors applied a "focused and stable body" of criteria of any kind.

Although the Court discussed supervisor rankings to clarify the standard of proof in validating pre-employment tests, its concern about supervisory judgments has broader implications. The Court concluded its discussion of subjective rankings with the following observation: "There is, in short, simply no way to determine whether the criteria actually considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify [this] testing system. . . ." Thus, the Court's primary objection to the use of supervisor rankings was its inability to evaluate what the employer had done under the appropriate justification standard for Title VII purposes. In Albemarle, this justification standard was whether the required tests were related to important elements of job-specific ability.

When plaintiffs use the disparate impact theory to attack discretion-

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23. Id. at 431. Because few blacks succeeded in their transfer or promotion efforts, the Court required the employer to show that the tests had "a manifest relationship to the employment in question." 422 U.S. at 425 (quoting Griggs, 401 U.S. at 432). In terms of the tests at issue, the Court stated that this burden would be met if the tests were "shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior'" which are relevant to the specific jobs in question. Id. at 431 (quoting 29 C.F.R. § 1607.4 (c)).

24. 422 U.S. at 432.

25. Id. at 433.

26. Id.
ary decisionmaking directly, a similar concern exists. If a plaintiff cannot determine what criteria an employer actually used in making various employment decisions, that employer might avoid an otherwise appropriate burden of justifying its criteria. For example, minority group members may be adversely affected even when an employer evaluates candidates without bias, if the evaluation taps characteristics that are related to race or gender. These differences in characteristics, if measured objectively, would trigger a demand for a job-related or business-necessity justification. The Court’s opinion in *Albemarle* does not require all evaluative criteria to be objective, but it illustrates another problem with discretionary decisions under Title VII.

The closest the Supreme Court has come to discussing the appropriateness of the disparate impact analytical framework for discretionary decisions is its opinion in *Furnco Construction Co. v. Waters*. Plaintiffs attacked the hiring system of Furnco, which did not maintain a permanent workforce but hired a superintendent for a specific job and delegated to him the task of finding a workforce. This superintendent hired persons he knew to be experienced or who others recommended to him as similarly qualified. He did not accept applications in advance and did not hire at the job site. Although twenty percent of the resulting workforce was black, the three black plaintiffs alleged that the superintendent’s failure to hire them was racially discriminatory in violation of Title VII under both the disparate impact and disparate treatment theories.

In rejecting the plaintiffs’ challenge, the Supreme Court analyzed the claim only under the disparate treatment theory. Unanimously, it held that although the plaintiffs had established a prima facie case of intentional discrimination the court of appeals had placed an inappropriate burden of proof on the employer for rebuttal. Subsequent judicial refinement of the disparate treatment analytical framework makes clear that this burden is merely one of going forward with sufficient evidence to dispel the adverse inference that arises from the plaintiff’s circumstantial evidence. The employer need not advance a business necessity,

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28. *Id.* at 575. The opinion is ambiguous about its relevance to the plaintiffs' disparate impact claim. Although the majority says that "those matters which are still preserved for review are best decided by the Court of Appeals in the first instance," 438 U.S. at 581 (emphasis added), Justice Marshall dissents from "the Court's apparent decision to foreclose on remand further litigation on the Griggs question of whether petitioner's hiring practices had a disparate impact." *Id.* at 583 (citation omitted). Arguably, the disparate impact claim was not properly before the Supreme Court. The district court held that the plaintiffs failed to state a cause of action under either theory, but the court of appeals considered only the disparate treatment claim because that was a sufficient basis for reversing the district court's judgment. Waters v. Furnco Constr., 551 F.2d 1085, 1088-90 (7th Cir. 1977). The subsequent decision of the court of appeals shed no light on the ambiguity because it did not discuss the issue. Waters v. Furnco Constr., 688 F.2d 39 (7th Cir. 1982).
29. Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981) (the defendant’s burden in rebutting a claim of individual disparate treatment is the burden of production, not persuasion). See also United States Postal Serv. v. Aikens, 460 U.S. 711 (1983) (plaintiff is not required to use direct evidence to establish prima facie case of intentional discrimination; courts should not use
merely a nondiscriminatory explanation for its refusal to hire the plaintiffs.

Although Furnco's specific holding is narrow and unexceptionable, language in the Court's opinion has implications for the broader question of the appropriateness of using the disparate impact analytical framework to challenge discretionary decisions. In agreeing with the court of appeals that the proper approach was the disparate treatment analytical framework, Justice Rehnquist noted that "[t]his case did not involve employment tests, which we dealt with in Griggs v. Duke Power Co., and in Albemarle Paper Co. v. Moody, or particularized requirements such as height and weight specifications considered in Dothard v. Rawlinson . . . ."30

The point of this footnote is unclear. The most obvious reading is that the Court was explaining why it did not consider the plaintiffs' disparate impact claim: the disparate impact analytical framework was inappropriate because the plaintiffs were not challenging a test or other "particularized" requirement. The practices that the plaintiffs challenged in Furnco, however, are like those that courts traditionally have analyzed within the disparate impact framework. The plaintiffs claimed, and the employer did not dispute, that the employment practice was not to take applications in advance, not to hire persons applying at the job site, and not to consider applicants unknown to the superintendent or his surrogate.31 Despite this apparent similarity, the Court did not explain why disparate impact analysis is so limited. Nor did it suggest any standard by which to predict which employment practices are sufficiently "particularized" to fit this suggested limitation.32

The employer clearly intended to raise this precise question. One of the three questions advanced in the employer's petition for certiorari asks "whether a hiring practice . . . may be found to be racially discriminatory . . . merely because it is subjective. . . ."33 The Court avoided the issue, stating only that the failure to adopt a system maximizing the hiring of minority applicants is an insufficient basis from which to infer intentional discrimination.34

30. 438 U.S. at 575 n.7 (citations omitted).
31. Id. at 583-84 (Marshall, J., concurring in part and dissenting in part). The plaintiffs also alleged that the "list" from which the superintendent hired included only white bricklayers with whom he had worked. Id. at 580 n.9.
32. Perhaps we should not make too much of footnote 7. Justice Rehnquist recently noted that, although he used to think footnotes in Supreme Court opinions were important, he no longer does. Jenkins, The Partisan: A Talk with Justice Rehnquist, N.Y. Times Magazine, Mar. 3, 1985, at 31.
33. 438 U.S. at 575 n.6.
34. Id. at 577-78. The Court also said that, in the absence of other evidence supporting a Title VII violation, a court could not impose what it thought was a more reasonable hiring system. Id. at 578.

Cooper, supra note 12, at 992, draws a different conclusion from Furnco: Because the Court did
C. Simple Solutions

These cases illustrate the kind of discretionary decisionmaking that plaintiffs have attacked under Title VII's disparate impact theory. Some cases question the application process—whether there is notice of openings, whether the employer takes applications, how the employer uses recommendations. Other cases attack the process of evaluating applicants. Courts may be tempted to resolve the question of whether the disparate impact analytical framework is applicable by categorizing the particular practices at issue. That is, the use of a standard paper and pencil test, if it has an adverse impact on minority group members, would be subject to disparate impact analysis because it is similar to those practices challenged in Griggs and its progeny. The use of an unstructured interview, which is neither scored nor standardized among applicants, would not be subject to the disparate impact analysis framework because it differs so from Griggs. In the latter situation no known or objective standard measures success, an adverse decision about the applicant cannot be pinpointed in time, and any observed disparity in the selection process might not result from a decision made in the interview.35

Under this view, consider an employment scheme in which the employer makes no formal announcement of openings and the individuals hear of the opening from friends or relatives presently employed. Whether this "word-of-mouth" hiring would be subject to the disparate impact analytical framework is unclear because one cannot decide easily whether such a scheme is more like the paper and pencil test in Griggs or an unstructured interview. Opinions will differ and the failure of footnote seven in Furnco to explain the distinction suggests that this line of analysis is unlikely to be productive.36 Moreover, reifying this distinction shifts attention away from the fundamental issue—the value and harm of discretionary employment decisions.

Courts and commentators have suggested that discretionary employment systems are more troubling for lower level jobs than for upper level jobs.37 Intuitively, the selection of a "management team" requires flexibility, judgment, and good luck. Discretion may be unnecessary to

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35. But see Shoben, The Use of Statistics to Prove Intentional Discrimination, 46 LAW & CONTEMP. PROBS. 221, 224 (1983) (arguing that interview can be broken down into component parts which employer can justify).


37. E.g., Shidaker v. Bolger, 593 F. Supp. 823, 834 (N.D. Ill. 1984) (the validity of subjective devices increases in direct proportion to the level of employment sought). See also B. SCHLEI & P. GROSSMAN, supra note 4, at 199-201; Cooper, supra note 12, at 982-84; Maltz, supra note 12, at 789-93; Waintroob, supra note 12, at 48-51; Comment, supra note 12, at 228-29. Cf. Bartholet, supra note 12, at 1006-07 (purely objective criteria are not necessarily good on the lower level and these criteria certainly do not make sense on the upper level).
fill lower level jobs. Title VII, however, does not distinguish between the level or the importance of the jobs in question. This proposed line of argument also is unsatisfactory because it does not address the legitimacy of discretion in a particular situation.

Finally, one must distinguish the appropriateness of the disparate impact theory to discretionary decisions from those situations in which an employer applies criteria, whether objective or not, unevenly on the basis of race or gender. For example, an employer may question whether a particular applicant has experience, how to define experience, or which of the applicant's prior activities count as experience. These questions often are problematic because the decision whether an applicant is qualified according to the employer's criteria, even when those criteria are legitimate, may place the employer's judgment in question. Although these issues raise difficulties, they differ fundamentally from the issue of whether discretionary decisionmaking can be the subject of a disparate impact challenge.

III. THE CASES

In the ten years following the Fifth Circuit's decision in Rowe v. General Motors, many lower federal courts retreated from Rowe's easy treatment of discretionary decisionmaking. In some cases the courts analyzed challenges to discretionary employment schemes only under the disparate treatment analytical framework. In many of these cases the courts refused to infer intentional discrimination on the part of the employer, finding plausible any explanation for the challenged selection system. In other cases the courts rejected challenges because plaintiffs' statistical evidence was insufficient to support the preliminary but basic fact that employment practices disproportionately affected minority group members. The Fifth Circuit's own opinion in Pouncy v. Prudential Insurance Co., however, ignited the recent debate over whether the disparate impact analysis applies to discretionary decisionmaking.

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38. Drawing a negative inference is legitimate because ADEA § 12(c)(1) illustrates that Congress does so explicitly (permitting compulsory retirement at age 65 for certain "bona fide executive or a high policymaking" employee). 29 U.S.C. § 631(c)(1) (1982).


42. 668 F.2d 795 (5th Cir. 1982).
A. Pouncy: Reviving the Controversy

In Pouncy, the plaintiff alleged that Prudential had discriminated against its black employees by systematically failing to promote them. Affirming the district court's decision in favor of the employer, the court of appeals concluded that the plaintiff's evidence, "mostly statistics, failed to show that Prudential's black employees were treated differently from white employees in terms of promotions, compensation, and in their use throughout Prudential's workforce." Not only did the court express concern about the quality of plaintiff's evidence, it also sharply limited the applicability of the disparate impact theory itself.

The plaintiff introduced four statistical comparisons to show that Prudential discriminated against black employees. First, he presented evidence showing that, for employees hired between 1973 and 1977, the mean weekly salary of white employees exceeded that of black employees hired in the same year. Second, he presented evidence showing that in each year, from 1973 to 1975, the percentage of blacks promoted to managerial and supervisory positions was less than the percentage of blacks in Prudential's workforce. Third, he demonstrated that before promotion to some jobs, black employees had a greater mean number of years of service with Prudential than did white employees. Finally, but most importantly, he introduced evidence showing that from 1973 to 1975 blacks were clustered in the lower levels of Prudential's workforce and underrepresented in upper levels when compared with their percentage in Prudential's workforce and with the workforce as a whole.

This over- and underrepresentation of blacks occurred although most jobs had no specific experience or educational requirements. Pouncy also argued that blacks remained at the lower levels, notwithstanding Prudential's policy of internal promotion, because of three employment practices: (1) Job vacancies were not posted or otherwise made known to employees; instead, supervisors selected the employees for promotion. (2) Prudential's "level system," through which clerical employees often were hired at entry level positions and subsequently promoted to better jobs, retained black employees at the lowest paying and least skilled jobs. (3) Prudential used subjective criteria to evaluate employee job performance and to determine promotions.

The district court in Pouncy found the plaintiff's statistics flawed. Therefore, the plaintiff had not shown the adverse impact necessary to support a disparate impact claim or to shift the burden of proof to the defendant. In contrast, the court of appeals found the plaintiff's theory

43. Id. at 798.
44. The court of appeals characterized Pouncy's challenge as an attempt to fit his proof into the disparate impact model by arguing that the three practices were responsible for the disparities shown. It is difficult, and perhaps unnecessary, to separate the three practices; the essence of Pouncy's challenge was the unstructured promotion process that left blacks clustered in the lower level jobs.
45. In each area of dispute, the district court accepted the employer's statistical analyses,
flawed. Stressing the limited nature of employment practices that a plaintiff may challenge under the disparate impact theory, the court stated that the theory was not "the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company’s employment practices."\footnote{6} According to the court, disparate impact analysis applies only to a specific procedure that a plaintiff can show has a causal connection to a class-based imbalance in the workforce. The court of appeals rejected the use of the disparate impact model, approved by other courts, to challenge multiple employment practices simultaneously. The court reasoned that because of its origins, the disparate impact theory is limited to overt, clearly identified, nondiscretionary selection criteria applied at a single point in a selection process.

Although the court of appeals might have affirmed the district court’s decision on the basis of the plaintiff’s inadequate statistical evidence, it did not. Instead, the court of appeals held that none of the three employment practices is "akin to the ‘facially neutral employment practices’ the disparate impact model was designed to test. Unlike educational requirements, aptitude tests, and the like, the practices identified by Pouncy are not selection procedures to which the disparate impact model traditionally has applied."\footnote{7}

The court also articulated a second basis for its decision: the plaintiff failed to show a causal connection between the challenged neutral practice and the racial imbalance in Prudential’s workforce. According to the court, even if plaintiff’s evidence were adequate, he did not show, and could not have shown, that “independent of other factors the employment practices he challenge[d] have caused the racial imbalance in Prudential’s work force.”\footnote{8} The court required the plaintiff to establish the causal connection so that the court could allocate fairly the parties’ respective burdens of proof at trial. The court further explained that if the plaintiff did not identify the specific employment practice responsible for the adverse impact, then the employer would be forced to justify all its requirements.

Thus, one question raised by Pouncy is whether the crux of the decision is simply the plaintiff’s failure to show a causal connection between the challenged practices and the evidence of adverse impact or the inap-
If the former, then much of what the court says about the limited nature of the disparate impact theory is dicta. At best, the factual context of the case limits the discussion: given the evidence available to the plaintiff, he could not prove an essential element of a disparate impact case—the adverse effect of a selection criterion. His evidence was faulty, not his theory.

If the plaintiff's failure to prove cause is the point of the court's decision, *Pouncy* still is an important case, but not because it limits the applicability of the disparate impact model. Instead, *Pouncy* raises two questions about permissible inferences and suitable comparisons in disparate impact cases. The first question is whether a court should infer that a connection probably exists between the three practices challenged and the clustering of black employees at the lower levels of the workforce. Such an inference would not necessarily require the defendant to justify each employment practice, because the employer could offer some other explanation for the apparent causal connection.

The second question is what comparison is appropriate to prove adverse impact. In a traditional disparate impact case, the plaintiff shows the comparative success or failure rate for blacks and whites, given a certain employment rule. For example, plaintiffs might challenge a nepotism rule: to be a member of a certain work group, one must be related to a present member of the group. The best evidence compares the percentage of blacks or women disqualified by the rule with the percentage of whites or men disqualified. Evidence that blacks or women are underrepresented in the particular workforce in question, while not irrelevant, is only indirect evidence of the rule's impact. Without the direct comparison of success or failure rates, evidence of underrepresentation requires the court to infer from the underrepresentation that the rule disadvantages blacks more than whites, or women more than men. Thus, *Pouncy*’s statistical showing that blacks were underrepresented in the workforce when compared to their percentages in the employer’s workforce and in the workforce as a whole was only indirect evidence of the effects of the challenged rule.\footnote{50}

If, however, the inappropriateness of the disparate impact theory

\footnote{49. Whatever the basis of the court's decision, its statement that traditional use of the disparate impact model does not allow plaintiffs to challenge multiple practices simultaneously is inaccurate. In *Griggs* the plaintiffs challenged the employer's requirements of both a high school diploma and passing scores on two standardized tests. The court in *Pouncy* probably wanted the plaintiff to isolate the effects of each requirement. The court made another technical mistake in assuming that the plaintiff could not isolate the effects of the three challenged practices. Although the facts in *Pouncy* may have precluded such a showing, the technical ability to do so exists. See, e.g., Campbell, supra note 45; Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980).

50. Such indirect evidence also was a problem in *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979). The next section discusses the statistical comparisons and causation issues in greater detail. See infra text accompanying notes 89-121.}
and its analytical framework required the court's decision, regardless of the statistical comparisons and the causal relationship, then the adequacy of the court's reasons for limiting the utility of the disparate impact theory becomes crucial.\textsuperscript{51} A recent decision of the United States Court of Appeals for the District of Columbia Circuit provides insights into both bases.

\textbf{B. Segar: Another View}

In \textit{Segar v. Smith},\textsuperscript{52} plaintiffs launched a wide-ranging attack against the federal Drug Enforcement Agency (DEA), alleging racial discrimination in salary, promotion, initial GS grade assignments, work assignments, supervisory evaluations, and disciplinary actions. Plaintiffs presented a range of statistical and anecdotal evidence to show that DEA paid blacks less than whites, that blacks were less likely than whites to be hired at GS-9 rather than at GS-7, and that blacks fared worse in work assignments, supervisory evaluations, discipline, and promotions. The defendant argued that plaintiffs' evidence was insufficient to support an inference of intentional discrimination by challenging the accuracy and significance of plaintiffs' statistical evidence. The defendant also argued that even if the court accepted the plaintiffs' statistical evidence, DEA had effectively rebutted the plaintiffs' showing of discrimination.

In affirming the district court's liability determination, the court of appeals understood the plaintiffs as proceeding under both the disparate treatment and the disparate impact theories. Plaintiffs alleged intentional racial discrimination in the employment system as a whole and challenged a number of DEA's specific employment practices such as initial grade assignments, work assignments, supervisory evaluations, discipline, and promotion decisions. The court of appeals recognized the different aims and proof sequences of the two models but also noted that each claim involved a showing of disparity between the minority and majority groups in an employer's workforce.\textsuperscript{53}

The DEA's defense in large measure stood or fell with its argument that the disparities plaintiffs sought to show were nonexistent. One aspect of DEA's argument, however, amounted to an effort to provide a legitimate, nondiscriminatory explanation for the purported disparity: DEA argued that a difference in prior law enforcement experience would account for any observed disparity in the opportunities available to black agents. According to this argument, black special agents appeared to do less well throughout DEA's employment system because they tended to

\textsuperscript{51} In Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 620 (5th Cir. 1983), a different panel of the Fifth Circuit followed \textit{Pouncy} but made plain that it did so reluctantly. In Page v. United States Indus., 726 F.2d 1038, 1045-46 (5th Cir. 1984), the Fifth Circuit appeared to retreat from its holding in \textit{Pouncy} (court can analyze plaintiff's claims of discrimination in promotion based on subjective evaluations under either model).

\textsuperscript{52} 738 F.2d 1249 (D.C. Cir. 1984).

\textsuperscript{53} \textit{Id.} at 1267.
start lower in that system as a result of their relative lack of more than one year prior law enforcement experience.54

The court of appeals was unconvinced that the defendant made a credible showing that the requirement of an additional year of law enforcement experience explained the disparity in opportunity for black agents. The court noted, however, that upon such a showing the court would have required the DEA to show the job-relatedness of such a requirement. This burden is appropriate, reasoned the court, because in offering this explanation the defendant put before the court all the elements of a traditional disparate impact claim: plaintiffs had shown disparity and defendant had pinpointed the facially neutral employment practice causing the disparity.55

In its analysis, the court of appeals expressly noted the reluctance of the Fifth Circuit in Pouncy to apply the disparate impact analysis in this kind of situation. According to the court in Segar, two concerns influenced this reluctance. First, the Pouncy court perceived as unfair the defendant’s dual burden of articulating which of its employment practices caused the adverse impact at issue and proving the business necessity of the practice. Second, the Fifth Circuit disliked the risk that an employer would be forced to justify the entire range of its employment practices when a plaintiff showed only that a disparity existed. The District of Columbia Court of Appeals found these concerns unpersuasive as well as inconsistent with the purposes of Title VII.

The court reasoned that the litigation context in which this issue arises makes the Fifth Circuit’s concerns irrelevant. Once a plaintiff establishes a prima facie case of intentional discrimination on the basis of statistical disparities, an employer advances some nondiscriminatory explanation for the disparity to avoid liability. One explanation an employer might offer is that a specific job qualification or performance measure caused the observed disparity. In Segar, for example, the DEA suggested that blacks do less well with the agency because of their lack of prior law enforcement experience. Such an argument may dispel an inference of intentional racial discrimination by suggesting the experience requirement, not racial discrimination, explains the disparity in employment. The argument also should trigger, however, a demand for justification of the previous experience requirement no less than if the plaintiff had challenged the requirement directly. This application of the disparate impact model does not place an additional burden on the employer; it simply describes one of several available methods for rebutting claims of intentional discrimination. The employer must justify the previous experience requirement because the employer relies on it to avoid the dispa-

54. Id. at 1273, 1274-77. The defendant made this argument in the context of an attack on the legal sufficiency of plaintiffs’ prima facie disparate treatment case but the court noted that the claim also is a possible nondiscriminatory explanation for the disparity and analyzed it as such.
55. Id. at 1270.
rate treatment claim. Under this application, the employer does not have to justify all its practices, as the Fifth Circuit worried. The employer justifies only the practice used to dispel the inference of intentional discrimination.

The District of Columbia Circuit found that this application of the disparate impact model effectuates the policies of Title VII because it allows challenges to subtle barriers to equal employment opportunity. By requiring the plaintiff to pinpoint the employment practice causing the disparity in all cases, courts would permit challenges only to those readily perceptible, obvious barriers. Subtle or unknown barriers would continue to work their discriminatory effects. Thus, when litigation of an intentional discrimination claim exposes employer-created barriers, stated the court, the policy of Title VII requires that employers justify such barriers.56

By affirming the district court's liability determination in its entirety, the court in Segar also approved a far-reaching aspect of the lower court's decision. The district court held not only that DEA had engaged in a pattern of intentional racial discrimination in its treatment of black special agents but also that DEA's initial grade assignments, work assignments, supervisory evaluations, imposition of discipline, and promotion process had a disparate impact on black agents.57 The court ordered validity studies "to implement effective, nondiscriminatory supervisory evaluation, discipline, and promotion systems..."58 Interestingly, DEA did not challenge the trial court's application of the disparate impact model to these employment practices.

Although the court of appeals upheld this controversial application of the disparate impact theory, it did not elaborate on its reasons for doing so. Nor did the court discuss the nature of the burden a defendant would have if it attempted to validate the challenged procedures. The court merely noted that the trial court had neither precluded elements of subjective decisionmaking in DEA's practices nor invalidated the propriety of the traits that DEA's current practices sought to measure. Instead, the court suggested that the validation studies would provide more specific guidance to decisionmakers and eliminate those elements of discretion that affect black agents adversely without any compensatory showing of business necessity.59

C. Griffin and Spaulding: Point Counterpoint

Subsequent decisions by other courts of appeals parallel either

56. Id. at 1270-72. This result also avoids judicial inefficiency. Once employees know that an employer uses a specific criterion which explains an already observed adverse impact, a subsequent lawsuit challenging the criterion directly surely will follow.
58. Id. at 715.
59. 738 F.2d at 1288 & n.34.
In many cases the opinions merely announce a view, without much elaboration. In contrast, two recent cases, *Griffin v. Carlin* and *Spaulding v. University of Washington*, provide a clear illustration of the split among the circuits and take opposite views on the method of analyzing the challenges to and the defenses of nonobjective employment criteria.

In *Griffin*, black employees and former employees challenged the United States Postal Service's promotion methods as well as the practice of "detailing" an employee into a higher level position that was vacant or temporarily unfilled. The district court dismissed plaintiffs' disparate impact claims because their pleadings failed to specify which employment practices would be challenged under this theory and because the plaintiffs could challenge only objective, facially neutral employment practices under a disparate impact theory. After trial, the court also held that plaintiffs had failed to prove intentional discrimination, finding plaintiffs' statistical evidence flawed and unpersuasive. The Court of Appeals for the Eleventh Circuit reversed.

The Jacksonville Post Office promotes persons to supervisory positions almost entirely from within its workforce. The promotion process had changed several times during the period covered by the lawsuit but getting on the "supervisory register" remained the key to promotion. By 1978, eligibility for the supervisory register depended on supervisory assessment and self-assessment but not on a written examination. Promotion advisory boards interviewed and recommended eligible candidates for promotion; the Postmaster made the final selection.

In addition to challenging the subjective judgments involved in getting on (and off) the supervisory register, plaintiffs claimed that the practice of "detailing" an employee to an open position and then relying on that experience when filling the position had a disparate impact on

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61. 755 F.2d 1516 (11th Cir. 1985).

62. 740 F.2d 686 (9th Cir. 1984).

63. In 1968, the Post Office used two written examinations, one for vehicle services and one for the post office branch. To be placed on the supervisory register and to be eligible for promotion, employees had to attain a particular score on the examination. The Postal Service placed the top 15% of the employees on the register in the "zone of consideration" and notified them of supervisory vacancies. In 1972, the Postal Service eliminated the zone of consideration standard; instead, supervisors evaluated and graded persons who had attained a passing score on the examination. Those persons receiving an "A" rating were eligible for immediate promotion. In 1976, the examination was eliminated; instead, employees were required to complete a training program as a precondition for promotion. In 1978, the Postal Service initiated the Profile Assessment System for Supervisors (PASS) which made eligibility for the supervisory register dependent on both supervisory assessment and self-assessment. 755 F.2d at 1520.
blacks. Plaintiffs argued that assignment to a detail increased an employee's chances for a permanent promotion and that blacks were underrepresented among those receiving detail assignments compared to their availability among eligible employees.

Plaintiffs' statistics showed that although thirty-five percent of the workforce was black, blacks held only five percent of all supervisory jobs in 1969 and only twenty-one percent in 1981. Plaintiffs' statistics also indicated that blacks were promoted to supervisory positions in numbers far lower than expected from 1964 through 1976. The key, argued the plaintiffs, was the underrepresentation of blacks on the supervisory registers. In 1977, for example, 1,590 workers comprised the entire craft workforce: 949 whites and 641 blacks. Of the 107 workers on the register, 81 were white and 26 were black. Thus, blacks constituted forty percent of the available pool but only twenty-four percent of the supervisory register. Stated differently, only four percent of blacks succeeded in getting on the register while eight and one-half percent of whites were successful. The government argued that the promotion process had no adverse impact. Under its view, the appropriate pool for supervisors, and thus the appropriate group for determining underrepresentation, was those individuals on the supervisory register. The district court adopted the government's approach and concluded that there was no evidence of adverse impact against blacks seeking supervisory positions.

On appeal, the Eleventh Circuit rejected the lower court's statistical comparisons. It reasoned that when promotions are made almost exclusively from the internal workforce and when the primary qualification for promotion is experience in the craft workforce, the appropriate comparison is to this larger workforce rather than to those on the supervisory register. The agency already had evaluated this latter group and that evaluation was part of the selection process the plaintiffs challenged. The court of appeals also rejected the trial court's conclusions about the detailing procedure because they were based on the same statistical assumption that black underrepresentation on the register explained why blacks were underrepresented in the detail positions.

The court of appeals then reversed the trial court's outright dismissal of the plaintiffs' disparate impact claims. Initially, the Eleventh Circuit read former Fifth Circuit precedents, which it concluded were binding, to allow plaintiffs' disparate impact challenges to the end result of multi-component selection processes and to subjective elements of those processes. The court then held that, even if these prior Fifth Cir-

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64. Id. at 1520-21 & n.3. Although the absolute difference is small, it is statistically significant. Different ways to present disparate impact evidence are discussed infra text accompanying notes 93-110 and note 99.
65. 755 F.2d at 1526.
66. Id. at 1528-29.
circuit cases were not binding, it would not follow the *Pouncy* decision of the current Fifth Circuit for three reasons.

First, the court noted that the Supreme Court has never differentiated between objective and subjective barriers when it discussed or applied the disparate impact theory. The Court's discussions, from *Griggs* to *Teal*, do not limit the theory or indicate that a plaintiff could not make a disparate impact challenge to a promotional system as a whole. The court of appeals noted that the Court spoke in terms of "practices" and "procedures," terms which encompass more than isolated, objective components of a process.68

Second, the court of appeals argued that limiting the disparate impact theory would encourage employers to use subjective rather than objective selection criteria. Instead of validating educational and other objective criteria, employers simply could take such criteria into account in subjective interviews or review-panel decisions. The court did not believe that Congress intended to encourage employers to use such devices as opposed to validated objective criteria.69

Third, the court noted that the Uniform Guidelines on Employee Selection Procedures interpret the disparate impact model to apply to all selection procedures.70 The Uniform Guidelines broadly define a selection procedure as "[a]ny measure, combination of measures, or procedure used as the basis for any employment decision."71 The Guidelines

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68. 755 F.2d at 1524.
69. Id. at 1525.
70. Id.
71. 29 C.F.R. § 1607.16(Q) (1985). The broad applicability of the guidelines is controversial but primarily in terms of whether employers must validate nonscored selection criteria. Compare Greenspan v. Automobile Club, 495 F. Supp. 1021, 1034 n.15 (E.D. Mich. 1980) (rejecting defendant's argument that validation is not required to justify prior experience requirement) with League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 900-02 (C.D. Cal. 1976) (rejecting plaintiff's argument that educational requirements must be validated according to EEOC guidelines). Compare Bartholet, supra note 12, at 989 (fundamental principles of validation apply to all selection procedures) with Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 39 (formal validation is not necessary to justify selection procedures in all cases). More recently the Seventh Circuit found that judicial and professional experience with educational requirements in law enforcement was sufficiently extensive to establish a presumption that a high school diploma is an appropriate requirement for a police officer or corrections officer and that the "exacting criteria" of the Uniform Guidelines apply more to tests than to educa-
give as examples formal or casual interviews and unscored application forms.

The Eleventh Circuit did not, however, illuminate the employer's burden of proof under the disparate impact theory for these allegations. Although the lower court had not considered the disparate impact claims and thus had not discussed the defendant's burden, some guidance would have been helpful for future cases. Such guidance is especially necessary because one of the reasons courts hesitate to apply the disparate impact theory to discretionary decisions is the fear of placing undue hardship on employers.

In contrast to the Eleventh Circuit's approval of using the disparate impact theory to challenge discretionary decisions, the Court of Appeals for the Ninth Circuit rejected disparate impact analysis in Spaulding v. University of Washington. Although the facts in Spaulding suggest a comparable worth claim, the court explicitly discussed whether the disparate impact theory applies beyond its original context.

Plaintiffs, present and past faculty members of the School of Nursing, challenged the university's compensation practices, arguing that the policy of setting wages according to market prices for jobs in the discipline adversely affected members of the nursing school faculty. Plaintiffs' evidence showed that the university paid members of the nursing faculty less than some male faculty members in other fields. The plaintiffs did not, however, compare the effect of the policy on female as opposed to male faculty members. Affirming the district court's dismissal of the plaintiffs' claims on all theories, the court of appeals held "where plaintiffs' sex-discrimination claim is a wide-ranging claim of wage disparity between only comparable jobs, the law does not go so far as to allow a prima facie case to be constructed by showing disparate impact."  

Comparable worth cases raise two questions in terms of the disparate impact theory. The first is unique to wage claims under Title VII and involves the relationship between the disparate impact theory and the fourth affirmative defense under the Equal Pay Act, which authorizes

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72. 740 F.2d 686 (9th Cir. 1984).
73. Id. at 706. Although the court clearly treated the plaintiffs' case as raising a comparable worth claim ("We confront then the difficult question whether the disparate impact model is available to plaintiffs who . . . make a broad ranging sex-based claim of wage discrimination, based on comparable worth." Id. at 705), the plaintiffs repeatedly disclaimed having presented any comparable worth theory. Id. at 710 (Schroeder, J., concurring).
pay differentials between men and women if "based on any other factor other than sex."74 In County of Washington v. Gunther,75 the Supreme Court held that Title VII wage claims did not require a showing of unequal pay for substantially equal work. Nevertheless, the Court explicitly refused to decide how Title VII plaintiffs should structure gender-based wage discrimination claims to accommodate the fourth affirmative defense of the Equal Pay Act.76 This question is now the focus of debate in the lower federal courts and the literature. In short, the issue is whether the Court's recognition of intentional discrimination in Gunther signals the outer limits of Title VII liability for gender-based wage discrimination claims.77

The second question raised by comparable worth cases is not peculiar to wage claims and involves the applicability of the disparate impact theory more generally. The court in Spaulding said "[t]he case before us simply does not fit into the disparate impact model."78 The four concerns underlying this rejection echo the Fifth Circuit's fears as expressed in Pouncy. First, the plaintiffs' claim is unlike those to which courts have applied the disparate impact theory in the past. When plaintiffs use the disparate impact model in cases not involving clearly delineated neutral policies of employers, the court said, the model becomes too vague to apply.79

74. 29 U.S.C. § 206(d)(1) (1982). The statute also permits employers to pay unequal wages for similar work if the pay differentials are based on 1) a seniority system, 2) a merit system, or 3) a system which measures earnings by quantity or quality of production. Because Title VII also allows pay differentials on the basis of these factors, 42 U.S.C. § 2000e-2(h) (1982), these exceptions do not present the same potential for inconsistent regulation.


76. 452 U.S. at 171 ("[W]e do not decide in this case how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act").

Spaulding, brought in 1974 and tried in 1977, suffered in part from the confusion the Court resolved in Gunther concerning whether Title VII plaintiffs must satisfy the equal work provisions of the Equal Pay Act to bring a sex-based wage claim under Title VII. Because of this doctrinal confusion, plaintiffs had not tailored their evidence to support a bare comparable worth claim based on the disparate impact theory.

77. Stated differently, the issue is whether plaintiffs can establish a prima facie case of wage discrimination under the disparate impact theory by alleging simply that women in predominantly female jobs are paid lower wages than males in predominantly male jobs when the jobs, although dissimilar, are of equal worth to the employer. Compare Power v. Barry County, 539 F. Supp. 721 (E.D. Mich. 1982) (no) with American Fed'n of State, County, & Mun. Employees v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983) (yes), rev'd, 770 F.2d 1401 (9th Cir. 1985). See also State Employees Ass'n v. Connecticut, 31 Fair Empl. Prac. Cas. (BNA) 191, 193 (D. Conn. 1983) (denied defendant's motion to dismiss because the plaintiffs claimed intentional wage discrimination and did not rely solely on disparate impact comparable worth theory, implying that in the absence of a showing of intent, the court would have dismissed the case). The theory of comparable worth has been the subject of lively debate. See, e.g., M. Gold, A DIALOGUE ON COMPARABLE WORTH (1983); COMPARABLE WORTH: ISSUES AND ALTERNATIVES (E. Livernash ed. 1980); WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE (D. Treiman & H. Hartmann eds. 1981); Levit & Mahoney, supra note 36; Comment, Comparable Worth, Disparate Impact, and the Market Rate Salary Problem: A Legal Analysis and Statistical Application, 71 CALIF. L. REV. 730 (1983).

78. 740 F.2d at 707.

79. Id. at 708.
Second, the court understood the disparate impact theory as merely a proxy for intentional discrimination claims. According to the court, the theory exists as a form of pretext analysis to handle specific employment practices not obviously job-related, such as intelligence tests, mandatory maternity leaves, and reference to arrest records. What matters is the substance of the employer's acts and whether those neutral acts are a non-job-related pretext to shield an invidious judgment.

Third, the court was concerned with the plaintiffs' failure to establish a causal connection between the observed adverse impact and the challenged policy. The court began its disparate impact analysis by saying that plaintiffs must prove the discriminatory impact at issue, not merely circumstances raising an inference of adverse impact. The plaintiffs claimed to have pinpointed the facially neutral policy causing the adverse impact but the court found that they had not.

Finally, the court reasoned that market forces constrain every employer in setting labor costs, so the employer's reliance on the market does not qualify as a facially neutral policy under the disparate impact theory. Market prices are inherently job-related, the court remarked, although the market may embody social judgments about the worth of some jobs. Because employers accept the market as a given fact, they do not have any meaningful "policy" about it in terms of Title VII. Moreover, by allowing plaintiffs to use "reliance on the market" as a facially neutral policy, courts would subject employers to liability for pay disparities about which employers have not made an independent judgment.

The plaintiffs also asserted that the university's "discretionary budgetary policies" based on subjective considerations supported the disparate impact analysis. The court rejected that claim too, stating that "the lack of well-defined criteria as facilitating wage discrimination is a claim better presented under the disparate treatment model."

D. The Need for a Theory

These four decisions illustrate plaintiffs' various attempts to challenge discretionary decisions under the disparate impact theory as well as the conflicting views of the courts of appeals. They do not compel support for any particular view. The decisions hint at the underlying issues but do not focus on them in any systematic way. Some decisions appear

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80. Id. at 707, 708.
81. Id. at 705. Whether plaintiffs must satisfy the causation requirement with direct evidence is discussed infra text accompanying notes 112-20.
82. Id. at 708. According to the court, not only did the plaintiffs fail to pinpoint a policy having a discriminatory impact, the court emphasized that such a practice is not the sort of policy subject to disparate impact analysis.
83. Id.
84. Id.
85. Id. at 709.
to be foregone conclusions. Others raise issues, such as the defendant's burden of proof, but fail to address how the typical burden of justification applies to discretionary decisions. The inconsistent approaches suggest that existing theory is inadequate to resolve the problems of discretionary decisionmaking.

An expanded theory would encompass the common but difficult allegations in this area. Consider, for example, an employer who chooses higher level employees from those performing lower level jobs in its workforce. For many reasons, women are concentrated in the lower-level jobs while supervisors are predominantly men. The employer bases promotions on supervisor selection and evaluation. After a number of years under this scheme, women are not promoted in large numbers to higher level jobs; they remain concentrated in the lower levels of the workforce. Or, consider the practice of categorizing jobs as either "classified" or "exempt." Exempt employees are typically those filling jobs with unique or unstandardized requirements while those in "classified" jobs are subject to more regulations in terms of maximum hours, overtime, or other workplace restrictions. The employer's categorization of jobs may have an adverse impact on the salaries of female employees. In most situations, classifying jobs as "exempt" means that the employer has a wider range of discretion to establish salaries. Here, the challenged practice is clearly different from such well-defined, objective employment practices as personnel tests or minimum physical requirements. This difference, however, may not necessarily require a different analysis. Still, if the disparate impact theory and its analytical framework apply how does the employer justify the classification scheme?

In other situations supervisors may have nearly total control of the process. Supervisors might determine on an ad hoc basis the selection criteria for a particular job to be filled by internal promotion. Even when a separate committee reviews, ranks, and forwards the names of individuals found to be "highly qualified," the process can have an adverse impact on minority group members or women if the employer's notion of "desirable traits" is based on the model of a white, male employee. Similarly, employers may release employees for "poor workmanship" or

86. See Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980) (in the context of class action certification, court noted that the "commonality" requirement was more difficult to meet for plaintiffs attacking subjectively based pay and promotion systems).

87. See Heagney v. University of Wash., 642 F.2d 1157, 1163 (9th Cir. 1981) (disparate impact analysis inappropriate because challenged practice was so different from those challenged in Griggs and its progeny).

“insubordination.” Subjective judgments on what constitutes “poor workmanship” may have an adverse impact on women or blacks. The unarticulated factors used to decide the required quality of the work or the level of behavior may touch characteristics that correlate with gender and would, if objectively stated, demand a justification.

IV. STATISTICS AND CAUSAL RELATIONSHIPS

The controversy over the appropriateness of the disparate impact theory to challenge discretionary decisionmaking may result from the problem of proving statistical disparities or of tracing the observed disparity to the challenged employment practice. That is, courts may be reluctant to use the disparate impact analytical framework because of these issues rather than because of any limitation within the disparate impact theory itself. Moreover, the statistics and causation issues are interrelated: without the appropriate statistical comparisons plaintiffs may be unable to prove a causal connection.

Defendants can attack any disparate impact claim by denying that the challenged practice has a meaningful adverse impact on the minority group in question. Defendants either challenge the accuracy or significance of the plaintiffs’ statistical evidence or argue that the challenged employment practice does not cause the observed adverse impact. The issue, on which the plaintiff has the burden of proof, is whether the disproportionate results in the instant case will exist when additional decisions are made over the long run. For example, if an employer selects one black and three whites from a pool of five blacks and five whites, the question is whether similar results will occur over the long run when the same process is applied to additional candidates.

This part of the article reviews how plaintiffs use statistics and establish causation in typical disparate impact cases. It then looks at discretionary cases to demonstrate the similarity of issues and the differences in evidence and arguments. It concludes that the statistics and causation issues are the source of dissatisfaction in some judicial decisions about discretion but that, if properly understood, these issues should not prevent courts from applying the disparate impact theory to discretionary decisions.

89. Defendants also can attack disparate impact claims by admitting the existence of the disparity and the causal effect but then attempting to justify the use of the selection criterion. This defense is discussed infra text accompanying notes 171-81.
90. D. BALDUS & J. COLE, supra note 12, at 48. Because the plaintiff has the burden of proof to show that the employment practice has a substantial adverse effect, the consequence of the employer negating the impact is to prevent the plaintiff from making its prima facie case. In contrast, defendant has the burden of persuasion on the justification issue.
91. The plaintiff has the burden of discounting the probability that an observed adverse impact was a “chance” result, rather than a consequence of a race- or gender-sensitive selection criterion. Id. A related issue is whether the plaintiff has used the appropriate comparison group to establish a disparity. See infra text accompanying notes 93-99.
A. Understanding Adverse Impact in Typical Disparate Impact Cases

Evidence of substantial adverse impact is essential to all disparate impact claims.\textsuperscript{92} Observers of Title VII litigation recognize that various statistical comparisons can show disparate impact. Although some commentators summarize the variations differently, two basic comparisons exist.\textsuperscript{93} First, statistics may compare the percentage of minority group members disqualified by an employment requirement with the percentage of majority group members also rejected on that basis. This article terms such comparisons “comparative” statistics. Within this comparison, evidence might show how the system actually operates, by using actual applicants, or how the system would operate if applied to a population of potential applicants. For example, in \textit{Connecticut v. Teal},\textsuperscript{94} the plaintiffs alleged that the written test for promotion to welfare supervisor had a disparate impact on black applicants. The plaintiffs introduced actual applicant data showing that fifty-four percent of blacks passed the test compared to eighty percent of whites.\textsuperscript{95} In \textit{Griggs v. Duke Power Co.}, the Court relied on more general population data to conclude that the employer’s requirement of a high school diploma had a greater effect on blacks than whites.\textsuperscript{96}

\textsuperscript{92} How much disproportionality constitutes a prima facie case is unclear. See D. BALDUS & J. COLE, supra note 12, at 47-50; B. SCHLEI & P. GROSSMAN, supra note 4, at 1368-75. C. SULLIVAN, M. ZIMMER & R. RICHARDS, supra note 4, at 46-51. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1985), establish a “four-fifths rule” of thumb: “A selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.” Id. at 1607.4(D).

Plaintiffs also use evidence of adverse impact in many disparate treatment claims. Because of the need to infer discriminatory motive from the disparity, such claims typically require greater disproportionality for a prima facie case than do disparate impact claims. See C. SULLIVAN, M. ZIMMER & R. RICHARDS, supra note 4, at 21-23. See also infra note 102.

\textsuperscript{93} See, e.g., Shoben, \textit{Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII}, 56 TEX. L. REV. 1, 6-9 (1977) (three distinct methods of proving impact); Note, Rebutting the Griggs Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives, 1981 U. ILL. L. REV. 181, 189-91 (discussing three types of statistical comparisons that can be sufficient to establish substantial disparity). The primary difference is when actual applicants, rather than some proxy of applicants, constitute a separate comparison. See infra notes 96, 98. The text uses only two comparisons because the point is to illustrate the nature and the direction of the comparisons and not to resolve the issue of actual or proxy applicant pools, which arises in both kinds of comparisons. On the latter issue, see D. BALDUS & J. COLE, supra note 12, at 101-41; Lamber, Reskin & Dworkin, supra note 45, at 585-87.

\textsuperscript{94} 457 U.S. 440 (1982).

\textsuperscript{95} 457 U.S. at 443 n.4.

\textsuperscript{96} 401 U.S. 424, 430 n.6 (1971). The Court relied on census data that showed 34% of whites but only 12% of blacks had high school diplomas in North Carolina, the general population from which Duke Power hired. Similarly, in Dothard v. Rawlinson, 433 U.S. 321 (1977), the plaintiff used national population data to show that a height and weight minimum disqualified 41% of the women and less than one percent of the men. This evidence was not limited to Alabama because the court found no reason to believe that the physical characteristics of Alabama men and women differed markedly from those of the national population. Id. at 329-30.

For Shoben, the comparison suggested in the text is two different comparisons, one based on population data and one based on actual applicants.
Second, statistics may compare the percentage of minority group members in the defendant's workforce with the percentage of minority group members in the community from which the employer hires. This article terms such comparisons "representation" statistics. Within this type of statistical comparison, the evidence might show that blacks are underrepresented in the employer's workforce compared to the racial composition of the relevant labor market or compared to a more general population. For example, in Hazelwood School District v. United States, the plaintiff alleged that blacks were underrepresented as teachers in the Hazelwood school district compared to the racial composition of teachers in the relevant labor market. In Teamsters v. United States, the Court relied on more general population data to conclude that blacks and Hispanics were underrepresented as over-the-road truck drivers.

In a world of complete information plaintiffs would be able to compute each type of comparison and the use of one rather than the other should not matter. Given the necessary data, the plaintiffs in Griggs...
could have computed the overrepresentation of blacks among those without high school diplomas. Litigants, however, rarely have complete information. Moreover, these two comparisons reflect differences between the two theories of discrimination under Title VII: comparative statistics express the basis of the disparate impact theory and representation statistics form the essence of intentional, but covert, discrimination claims.

In *Griggs* the Court defined disparate impact claims in terms of the adverse impact of an employment practice that the defendants could not justify. The Court said that Congress had "directed the thrust of the Act to the consequences of employment practices, not simply the motivation." Applying this standard, the court of appeals in *Pouncy* said that "[a] prima facie case [under the disparate impact theory] is shown by identification of a neutral employment practice coupled with proof of its discriminatory impact on the employer's workforce."

The comparative statistics outlined above, which compare the success or failure rate for blacks and whites, show this impact directly.

The other statistical comparison, representation statistics, most often supports the inference of intentional discrimination. The Supreme Court's acceptance of the probability theory to support Title VII claims gives this comparison probative value. In *Teamsters* the Court said that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

<table>
<thead>
<tr>
<th>Pool</th>
<th>Black</th>
<th>White</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Selected/on register</td>
<td>26</td>
<td>81</td>
<td>107</td>
</tr>
<tr>
<td>Not Selected/not on register</td>
<td>615</td>
<td>868</td>
<td>1483</td>
</tr>
<tr>
<td>Total/craft labor force</td>
<td>641</td>
<td>949</td>
<td>1590</td>
</tr>
</tbody>
</table>

Comparison 1: The success rate for blacks [26/641 = 4%] compared to the success rate for whites [81/949 = 8.5%]. Comparison 2: The percentage of those successful who are black [26/107 = 24%] compared to the percentage of those available for selection who are black [641/1590 = 40%].

100. 401 U.S. 424, 432 (1971).
101. 668 F.2d at 800.

In a truly random process, such as jury panel selection, this use of the probability theory is straightforward. One compares the racial composition of the jury panel actually selected with the racial composition of those eligible. If this comparison shows that blacks are underrepresented and the actual outcome would rarely occur if the process were random, then the comparison provides persuasive evidence that the process in fact was not random. Although no one expects employment decisions to be random, nondiscriminatory decisions should generate, over the long run, random results with respect to race or gender when these characteristics are irrelevant. Thus, evidence of long-standing and gross disparity between the composition of a workforce and that of the general population or labor market can be important because, given the evidence of availability, the courts are willing to infer, absent rebuttal, that race or gender is the basis of the employment decision. For a more general discussion, see M. Finkelstein, *Quantitative Methods in Law* (1978); Smith & Abram, *Quantitative Analysis and Proof of Employment Discrimination*, 1981 U. ILL. L. REV. 33 (1981); Sugrue & Fairley, *A Case of Unexamined Assumptions: The Use and Misuse of Castaneda/Hazelwood in Discrimination Litigation*, 24 B.C.L. REV. 925 (1983); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975).
In the ordinary disparate impact case, comparative statistics make sense because they satisfy the causation requirement of Title VII. The key questions in a challenge to an obvious, automatically applied, objective criterion are whether applying the criterion falls more harshly on blacks than whites, or on women than men, and whether the criterion is justified despite its adverse impact. Because comparative statistics pinpoint an employment practice and illustrate its adverse consequences on majority and minority group members, the evidence links the employment practice with group status by specifying what would happen to applicants or potential applicants under each criterion. For example, in *Dothard v. Rawlinson*, the plaintiffs challenged a height and weight minimum for prison guards and showed that the rule would disqualify forty-one percent of the women and almost none of the men. And in *Teal*, the plaintiffs showed that a written test for welfare supervisors disqualified forty-six percent of the black applicants but only twenty percent of the white applicants.

If the plaintiffs in *Dothard* or *Teal* had been able to show only that women or blacks were underrepresented as prison guards or welfare supervisors relative to their proportion in the labor market, then the evidence would not have established the causal connection between this underrepresentation and the challenged rule. Similarly, if the plaintiffs had attacked another practice, such as hiring from selected schools or promoting on the basis of productivity, evidence of the adverse effect of the height and weight rule or written test would not have established

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103. Title VII prohibits discrimination with respect to terms, conditions, and privileges of employment because of race or gender. 42 U.S.C. § 2000e-2(a)(1) (1982). Further, an employer cannot deprive (or tend to deprive) an individual of employment opportunities because of an individual's race or gender. Id. at § 2000e-2(a)(2). Thus, the plaintiff must establish a connection between race or gender and the adverse action challenged. An employment practice that is merely unusual or arbitrary is insufficient for a Title VII claim. See also New York City Transit Auth. v. Beazer, 440 U.S. 568, 598 n.3 (1979) (White, J., dissenting) (“The failure to hire is not "because of" race, color, religion, sex, or national origin if the adverse relationship of the challenged practice to one of those factors is purely a matter of chance—a statistical coincidence”). In *Teal*, Justice Powell confused the need to show that a practice actually excludes individuals defined in terms of their group status with the need to measure that impact at a particular point in the selection process. In defending the bottom line principle, he said that there “can be no violation of Title VII on the basis of discriminatory impact in the absence of disparate impact on a group.” 457 U.S. at 459. Although Powell correctly states the disparate impact theory, his statement does not resolve the question at issue there, which is when to measure that impact.


105. 457 U.S. at 443 n.4. To complete the causation statement, one also needs to know that failing the test excluded the applicants from further consideration. Similarly, in *Beazer*, the plaintiffs claimed that the Transit Authority's rule against hiring people who were in methadone maintenance programs adversely affected blacks and Hispanics because they were overrepresented in such programs. The best approach would have compared the proportion of blacks, Hispanics, and whites disqualified by the rule (a comparative statistic). Instead, the plaintiffs' evidence compared the proportion of blacks and Hispanics in such programs with their proportion in the relevant labor market (a representation statistic). Because the plaintiffs were challenging the adverse effect of the Transit Authority's no-drug rule, this evidence provided only indirect support. As Justice White pointed out in dissent, however, the Court could have inferred the impact of the rule from this evidence. 440 U.S. at 598-602 (White, J., dissenting). See also infra text accompanying notes 112-15.
the causal connection.\textsuperscript{107}

Although deciding on the correct statistical evidence can be technical and complicated,\textsuperscript{108} causation is not ordinarily a problem in typical disparate impact cases. When causation is a problem, the issue is whether an uncontroverted employment practice or the chance selection of an atypical sample caused the observed disparity in results rather than the challenged practice. Under the first alternative, an employer argues that other considerations, rather than the challenged requirement, caused the observed impact.\textsuperscript{109} Under the second alternative, an employer argues that random factors unrelated to race or gender produced the disparity. For example, fifty whites and fifty blacks comprise an employer's universe of test takers and forty whites and twenty blacks pass the test. The plaintiff will claim that the test is sensitive to some characteristic of the candidates that correlates with race. The employer will argue that the observed results are unlikely to occur over the long run when additional candidates take the same test.\textsuperscript{110}

B. Meaningful Adverse Impact in Discretion Cases

Statistical evidence in discretion cases does not always resemble that found in typical disparate impact cases because plaintiffs do not challenge an obvious, automatically applied employment criterion. Thus, they cannot directly measure the criterion's impact on minority group members to demonstrate a causal connection between the criterion and group status. Plaintiffs might not use comparative statistics common to disparate impact cases but may rely on representation statistics to show the under- and overrepresentation of minority group members.

Consider, as the court of appeals did, the statistical evidence in \textit{Pouncy} in terms of the typical disparate impact case.\textsuperscript{111} Comparative statistics formed some of the evidence and the plaintiff challenged specific

\textsuperscript{107} Of course, if the other practice had an adverse impact the defendant would need to justify it.

\textsuperscript{108} See \textit{supra} notes 92-98.

\textsuperscript{109} A typical assertion is that blacks and women have not applied for certain jobs, accounting for their lower numbers. Applicant pool data, however, is sometimes skewed. See \textit{International Bhd. of Teamsters v. United States}, 431 U.S. 324, 365-67 (1977); D. BALDUS & J. COLE, \textit{supra} note 12, at 103-14.

\textsuperscript{110} See, \textit{e.g.}, \textit{Lee v. City of Richmond}, 456 F. Supp. 756, 771 (E.D. Va. 1978) (disparate impact claim failed because the number of test takers was too small to conclude that the test was sensitive to race); \textit{Washington v. Davis}, 426 U.S. 229, 255 (1976) (Stevens, J., concurring) ("The applicants for employment in the District of Columbia Police Department represent such a small fraction of the total number of persons who have taken the test that their experience is of minimal probative value in assessing the neutrality of the test itself."). See also D. BALDUS & J. COLE, \textit{supra} note 12, at 288-328 (tests of statistical significance helpful in assessing arguments about chance).

Evidence about the long-run effect is especially important when the selection criterion in question involves \textit{performance} rather than some race- or gender-linked attribute (where the effect is fairly predictable) and the statistical evidence is based on only a sample of the potentially affected population. Lamber, Reskin & Dworkin, \textit{supra} note 45, at 585-90.

\textsuperscript{111} 668 F.2d at 801, 802-04 (although the court apparently did not accept the plaintiff's statistics as accurately reflecting the condition of black employees in the company's workforce).
rules, but his evidence did not measure the impact of the rules he challenged. Although each statistical comparison could have been relevant to his claim, the plaintiff made little effort to explain the relationship of the comparisons to the rules. For example, representation statistics showed that blacks received promotions at a rate lower than their proportion in the employer's workforce and that blacks were overrepresented in the lower levels and underrepresented in the upper levels of the workforce. These comparisons certainly are related to the effect of promotion standards but they do not measure directly the impact of the promotion system. Comparative statistics showed that the mean salary of blacks was less than the mean salary of whites and that blacks had more years of service before promotion than whites. These comparisons better express the claim of disparate impact, but they are not obviously related to the specific rules the plaintiff challenged.

A different view of *Pouncy*, however, is possible. Pouncy argued that subjective evaluations were the reason blacks had been relatively unsuccessful in receiving promotions for which they were eligible. Although Pouncy did not establish a direct causal link between the subjective evaluations and the evidence of adverse impact, his evidence does suggest that some component of the promotion scheme touches characteristics that are related to race, which, if stated objectively, would require justification.

Some courts and commentators argue that the disparate impact theory is inappropriate here because it applies only when plaintiffs can show that a specific procedure caused a class-based adverse impact. Although this argument accurately describes typical disparate impact cases, it is not the only way to show discrimination on the basis of race or gender. The procedural issue is whether Pouncy established a prima facie case under the disparate impact theory. The doctrinal issue is whether he established that an employment practice has a long-run racial adverse effect. These issues are the same in both typical disparate impact cases and discretion cases but the evidence and arguments may differ.

The first problem under this view of *Pouncy* is the circumstantial nature of Pouncy's adverse impact evidence. By showing that the promotion evaluations harm proportionately more blacks than whites, Pouncy's evidence implied that these evaluations discriminatorily affected promotions. The evidence was circumstantial because Pouncy had evidence only of the system's impact generally and not of the particular factors that might be related to race. Although typical disparate im-

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112. *Id.* at 800.

113. For example, if an employer hires on the basis of an unstructured interview, the plaintiff would show the racial composition of those interviewed and the racial composition of those hired. In effect, the interview as a whole is the challenged employment practice, because the plaintiff does not know what specific parts of the interview triggered the adverse effect. Characterizing the interview as the employment practice is not, however, a complete solution to the issues of discretionary decisionmaking in terms of the disparate impact theory, *see supra* text accompanying notes 35-36.
impact cases often have direct evidence showing the effects of the challenged objective rule, circumstantial evidence is sufficient. Courts must draw an inference from the circumstantial evidence, however, and perhaps courts' reluctance to do so explains why plaintiffs lose on this issue. Another explanation is that courts confuse the utility of an identifiable rule or criterion with the nature of the impact evidence. In Pouncy, for example, the court stated that without an identifiable rule the plaintiff could not show a causal connection between the promotion process and the observed adverse impact.\textsuperscript{114} Although the plaintiff could not show causation directly, the question should have been whether his circumstantial evidence showed causation indirectly.\textsuperscript{115}

The second problem under this view of Pouncy is that random factors may produce short-run results suggesting racial impact which would not continue over the long run. Although this issue also arises in typical disparate impact cases, the subjective nature of the decision-making process makes the problem more acute in discretion cases. Intuitive or unconscious preferences of individual decisionmakers often affect discretionary decisions and the impact of such preferences may be unknown or unmeasurable.\textsuperscript{116} When these intangible influences produce disparate results in the short run, litigants must determine their long-run effects on majority and minority group members.

For example, five women and five men with similar formal qualifications apply for four positions as administrative assistants. The employer selects one woman and three men. Given the small number of decisions, a court would find it difficult to conclude that the subjective and impressionistic factors will favor males over the long run. With a larger sample, however, the likelihood of such disparate results may be small enough for a court to reject the hypothesis that chance caused the disparity.\textsuperscript{117}

Although challenging the interview may be sufficient for the plaintiff’s prima facie case, the question remains how to scrutinize those decisions reached in interviews.

\textsuperscript{114} 668 F.2d at 801.

\textsuperscript{115} The circumstantial evidence also supports the disparate treatment claim that Pouncy made. \textit{Pouncy}, 668 F.2d at 802-04. Evidence is circumstantial in a disparate treatment case because the ultimate factual issue is the employer’s intention. Given the technical and somewhat controversial nature of statistical evidence, plaintiffs in situations like \textit{Pouncy} should make clear the purpose of their statistical evidence and argue directly the reasonableness of drawing an inference from it, as they commonly do in disparate treatment cases. See, e.g., Payne v. Travenol Labs., 673 F.2d 798, 826-27 (5th Cir. 1982); Sledge v. J. P. Stevens, 585 F.2d 625, 634-36 (4th Cir. 1978), \textit{cert. denied}, 440 U.S. 981 (1979). See also Shoben, \textit{supra} note 35, at 239-44 (the role of statistics in proving intentional discrimination to challenge subjective interviews).

The text’s suggestion about inferring disparate impact is reasonable for much the same reason that courts allow a plaintiff to proceed on a similar basis in disparate treatment claims. In systemic disparate treatment cases, plaintiffs sometimes cannot describe an accurate comparison population because they lack data. Some courts accept the plaintiff’s assumption that the qualifications, or lack of them, are distributed equally among majority and minority group members. D. BALDUS & J. COLE, \textit{supra} note 12, at 194-97, 75-81 (Supp. 1984). In discretion cases, it also is reasonable to assume that the unknown or unarticulated qualities that discretionary decisions reflect are distributed evenly among minority and majority group members. \textit{Id.} at 24-26.

\textsuperscript{116} D. BALDUS & J. COLE, \textit{supra} note 12, at 24 n.27, 299.

\textsuperscript{117} Under statistical decision theory, one never can reject a hypothesis with certainty. Statisti-
Exercises of discretion may have long-run impact on the basis of race or gender for at least two reasons. First, the early Title VII cases demonstrate how discretionary or subjective decisions are likely environments for acts of intentional discrimination. Given the lack of procedures or agreed-upon qualities, the opportunity for individual bias is clear. Second, and more importantly for litigation under the disparate impact theory, even when employers are unbiased in their employment decisions, discretion can mask reliance on employee characteristics that if known would call for justification.

The argument that discretion may have long-run racial or gender effect is consistent with the order and allocation of proof in more typical Title VII cases. In United States Postal Service v. Aikens the Supreme Court admonished the lower courts not to let the preliminary issues of the plaintiff's prima facie case and the defendant's rebuttal overshadow the ultimate factual question of whether the employer discriminated against the plaintiff in violation of Title VII. Similarly, in Connecticut v. Teal, the Court directed lower courts to look behind the end results of the selection process at issue. Here, the question is whether to scrutinize discretionary decisions and, if so, how. The problems of establishing a prima facie case should be no greater in these cases than in other areas of Title VII litigation.

Because discriminatory factors may influence or explain discretionary decisions and because the policy of Title VII is to eliminate artificial barriers to employment opportunity, the lack of direct evidence in discretion cases should not immunize these cases from disparate impact chal-

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118. See, e.g., Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1012 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981) (although subjective word-of-mouth hiring methods are suspect because they tend to mask racial bias, courts may uphold them despite apparent favoritism of whites over blacks if employers prove the methods are necessary to ensure that the safest and most competent workers are hired). See also Barnett v. W.T. Grant Co., 518 F.2d 543, 549 (4th Cir. 1975).

119. 460 U.S. 711, 715-16 (1983) (the fact that Aikens involved a claim of intentional discrimination is not significant for the argument made in the text).

120. The Supreme Court rejected the employer's argument that the results of the entire process, reflecting no adverse impact on blacks, precluded the plaintiffs from establishing a prima facie case or, alternatively, provided a defense. 457 U.S. at 447 n.7. The Court said that a nondiscriminatory bottom line did not excuse the employer from its duty to justify the selection criterion with an adverse impact. The Court, however, did not discuss whether plaintiffs could use the bottom line principle aggressively in disparate impact cases. For example, in discretion cases plaintiffs might rely on the results of the entire process when direct proof of the source of the observed adverse impact is unavailable. Any argument that Teal should apply to plaintiffs and thus require direct proof of the causal connection between the challenged employment practice and the observed impact is based on an uncritical appeal of mutuality and courts should reject the argument.
DISCRETIONARY DECISIONMAKING

challenges under Title VII. As Justice Frankfurter said in another context, the law "nullifies sophisticated as well as simple-minded modes of discrimination." This article now addresses the application of the disparate impact theory to discretionary decisionmaking and the differences in discretion cases that require different solutions.

V. APPLICATION OF THE DISPARATE IMPACT THEORY TO DISCRETIONARY DECISIONS

The question remains how to analyze discretionary decisionmaking. The answer lies in the policies underlying the disparate impact definition of discrimination under Title VII and in whether discretionary decisionmaking exceeds the limits of the definition's theoretical underpinnings.

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

Other purposes of Title VII that support the disparate impact definition of discrimination are to acknowledge the present effects of past discrimination, to avoid the difficulties of proving impermissible motivation, and to recognize that employers' uses of arbitrary or thoughtless employment criteria may be just as harmful as intentional discrimination. The most extreme view of the disparate impact definition is that its function is to ensure equal achievement for minority group members. This view recognizes a group right to a proportionate share of the economic pie.

123. See, e.g., Belton, Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber, 59 N.C.L. Rev. 531, 541 (1981); Brest, supra note 4, at 26-52; Chamallas, supra note 4, at 334-44; Perry, supra note 4, at 555-61.
124. See, e.g., Bartholet, supra note 12, at 1026-27; Blumrosen, The 'Bottom Line' After Connecticut v. Teal, 8 Employee Rel. L.J. 572, 574-75 (1983); cf. Comment, The Business Necessity Defense to Disparate-Impact Liability Under Title VII, 46 U. Chi. L. Rev. 911, 921-25 (1979) (arguing that, because this is the function, courts should reject the theory or apply it in very limited situations). See also Chamallas, supra note 4, at 365-70 (criticizing Court's rejection of the bottom line principle in Connecticut v. Teal, 457 U.S. 440 (1982), because disparate impact theory should focus on group rights).

The corollary to Teal provides for an individual chance to that proportionate share. A contrary view of the disparate impact theory—that it is merely a proxy for intentional discrimination—argues
No doubt, the disparate impact definition of discrimination embodied in Title VII remains controversial because there is no consensus on which of these ideas reflects the intent of Congress. Legislative history supports each view. Each idea can explain certain lines of cases and various ideas combine in each of the Supreme Court’s disparate impact decisions.

What is clear is that the Supreme Court steadfastly defines discrimination to include employers’ neutral policies not intended or consciously used to discriminate, and to recognize an employer’s right to promulgate policies regardless of their incidental racial or gender effects if the policies truly are directed to central business or governmental concerns. By defining disparate impact claims in terms of the employer’s interests as well as the effect of selection criteria on minority group members, the Supreme Court’s decisions suggest that Title VII requires a balancing of those often incompatible interests. Although a balancing test always is subject to misuse or misunderstanding, a statute addressing nondiscrimination in employment almost compels balancing because of the interdependent nature of the many legitimate interests involved. Stated broadly, the ideal balance in disparate impact claims minimizes interference with legitimate business prerogatives and maximizes the employment opportunities of minority group members. The need for and the nature of this accommodation help to resolve some issues concerning the application of the disparate impact theory to discretionary decisionmaking.

A. Initial Barriers Rejected

First, courts should not reject absolutely the disparate impact theory as a challenge to discretionary decisions. The view that the theory is inapplicable to discretionary decisions relies upon the fact that discretion differs from the specific practices considered in the Supreme Court’s disparate impact decisions. This view implies that all cases for which the disparate impact theory is appropriate are alike. Fundamental factual differences, however, distinguish even typical disparate impact cases and the courts’ failure to recognize these differences risks inadequate or superficial resolution to complex policy questions. Similarly, discretion-
ary acts differ. The argument that courts should not scrutinize some discretionary decisions does not mean that all discretionary acts should be immune from challenges under Title VII's disparate impact theory. Moreover, the Supreme Court consistently has used terms such as "practices," "policies," and "barriers" in discussing and applying the disparate impact theory. It never has differentiated between objective and nonobjective barriers to employment opportunity. Only the curious footnote in *Furnco Construction Company v. Waters* implies that the Court might do so.

In addition, the disparate impact theory and its analytical framework clearly are appropriate when plaintiffs allege intentional discrimination based upon gross statistical disparities which the employer rebuts by identifying a specific practice to explain the disparity. As the court of appeals concluded in *Segar*, a court should consider the facts then before it in terms of the disparate impact theory. A contrary action would exalt the form of the cause of action over the substance of the complaint.

Rejection of the disparate impact theory under facts similar to those of *Segar* would make the "disparate treatment" and "disparate impact" labels more important than the accommodation of interests required by Title VII. An analysis that applies the disparate impact theory to

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**Nonstatistical Evidence in Disparate Impact Cases Under Title VII**, 1985 Wisc. L. Rev. 1, 42-59 (arguing that the significance of alternative employee selection criteria differs depending on the kind of selection criterion challenged and the employer's reason for using it).

128. *Griggs*, 401 U.S. at 430 ("practices, procedures, or tests"); *id.* at 432 ("any given requirement"); *Dothard*, 433 U.S. at 328 ("artificial barrier to equal employment opportunity that Title VII forbids"); *Beazer*, 440 U.S. at 584 ("an employment practice has the effect of denying . . . equal access to employment opportunities"); *Teal*, 457 U.S. at 448 ("non-job-related barriers"). *See also* Levitt & Mahoney, *supra* note 36, at 120 n.147.

129. 438 U.S. 567, 575 n.7 (1978), discussed *supra* text accompanying notes 27-34.

To engage in such speculation one also must consider the Court's most recent opinion in *Teal*, which can be read to say that the disparate impact theory is appropriate for challenging discretionary decisionmaking. In rejecting Connecticut's argument that a nondiscriminatory bottom line precluded plaintiffs from establishing a prima facie case, the Court relied in part on the legislative history of the 1972 amendments to Title VII. The Court noted that the committee reports in both houses relied on a report of the United States Commission on Civil Rights which concluded that state and local government employees faced serious barriers to equal opportunity. 457 U.S. at 449 n.10 (citing H.R. Rep. No. 92-238, 92d Cong., 1st Sess. at 17 (1971)); S. Rep. No. 92-415, 92d Cong., 1st Sess. at 10 (1971); 118 Cong. Rec. 1815-19 (1972)). One of the three barriers the Court cited was promotions made on the basis of "criteria unrelated to job performance and on discriminatory supervisory ratings." *Id.* at 449 n.10 (citing U.S. COMM'N ON CIVIL RIGHTS, FOR ALL THE PEOPLE . . . BY ALL THE PEOPLE—A REPORT ON EQUAL OPPORTUNITY IN STATE AND LOCAL GOVERNMENT EMPLOYMENT 119 (1969)).

130. 738 F.2d at 1270-72, discussed *supra* text accompanying notes 52-59.

131. The label or category the parties place on the action should not be the sole determinant of the court's analysis. Although disparate treatment and disparate impact clearly serve different purposes and effectuate different conceptions of equality, some commentators have argued that the two models do not differ in application. *See* Furnish, *supra* note 4, at 442 (distinction between disparate treatment and disparate impact is not as great as the underlying theories suggest). Two improper arguments assert the theories are the same. One assumes that disparate impact is merely a proxy for intentional discrimination. The Supreme Court's most recent disparate impact decision, Connecticut v. *Teal*, 457 U.S. 440, 454 (1982), makes clear that disparate impact analysis is not simply a proxy for intentional discrimination because no one suggested any intentional discrimination against blacks. The second argument confuses adverse impact as evidence, which courts use to support an
these facts also illustrates why the probability assumption for intentional discrimination claims is not unduly harsh. As noted above, the Supreme Court said that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." A typical explanation is that a specific employment criterion excludes more minority group members than majority group members. Although this explanation may rebut the inference of intentional discrimination, the identified criterion is not necessarily permissible if it is unrelated to job performance or other legitimate business considerations. Moreover, the application of the disparate impact theory in these factual situations avoids judicial inefficiency. Once employees or applicants know that an employer uses a specific criterion that explains an already-observed adverse impact, a subsequent lawsuit challenging it directly surely will follow.

Finally, the disparate impact theory and its analytical framework should apply even if the plaintiff does not have direct evidence to establish a causal connection between the employment practice challenged and the observed adverse impact. The arguments advanced in Part IV suggest that the plaintiff's inability to present direct evidence of causation should not immunize discretionary decisions from disparate impact challenges. The question at the preliminary stage of litigation is whether the plaintiff has established meaningful adverse impact. The keys to deciding this question are the strength of the plaintiff's statistical evidence and the likelihood that an apparent adverse impact reflects the true picture. By focusing on the plaintiff's failure to challenge an identifiable rule, courts confuse the form of the evidence with its purpose.

B. Distinguishing Among Claims of Discretion

In other cases, the application of the disparate impact theory and the appropriate balance of interests is not as easy to determine. Exercises of discretion can account for the best and the worst employment decisions. Some of the world's greatest decisions cannot be rationalized yet

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Inference of intentional discrimination in disparate treatment cases, with adverse impact as a theory of liability. For an illustration, see Teal, 457 U.S. at 458-59 & n.3 (Powell, J., dissenting). The one valid reason to conclude that the theories are, if not the same, at least similar is Justice Stevens' point in Washington v. Davis, 426 U.S. 229, 252-56 (1976) (Stevens, J., concurring), in which the Court held that evidence of disproportionate failure rates alone did not establish a prima facie case of discrimination under the Constitution. Justice Stevens points out that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of [Washington v. Davis] might assume." Id. at 254. When the distinction would be helpful in resolving hard cases, it often is difficult to distinguish impact as evidence and impact as a separate theory. An equally good reason exists to maintain the differences: The disparate treatment theory is premised on fault; the disparate impact theory seeks changes in the structure of the workplace as a way to achieve equal employment opportunity.

some of the world's greatest hunches have been disastrous. In contrast, decisions based on objective factors often are compromises or, worse, are simply mediocre. Thus, it would be a mistake for employers to use only objective employment criteria and a bigger mistake to read Title VII to require that they do so. Similarly, courts should not interpret Title VII to encourage employers to claim the protective coloration of subjective factors.

An accommodation of interests under Title VII's disparate impact theory must reflect the different circumstances in which employers exercise discretion. Consider the employer who plays a hunch with the knowledge that he will win big in the marketplace if he is right and lose big if he is wrong. He plays a hunch because neither he nor anyone else knows what factors or characteristics predict success or how important a particular characteristic is. This lack of knowledge suggests that courts will gain little from scrutinizing this employer's judgment. Now, consider the employer who has nothing to lose if she is wrong (or to gain if right) but who nonetheless makes subjective decisions to protect her decision-making process from judicial scrutiny. Piercing the discretionary veil is appropriate but distinguishing such an employer from an employer with a legitimate claim to discretion is another matter. The four factors which follow are relevant to making such distinctions and thereby suggest the appropriate accommodation under Title VII's disparate impact theory.

1. Public v. Private

One factor is the difference between public and private employers. When Congress amended Title VII in 1972 to extend its protections to public-sector employees, courts and litigants faced the question of what standard to apply. The prevailing view is that public and private employers are subject to the same standards under Title VII. The ab-

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133. Cf. United States v. Jacksonville Terminal Co., 451 F.2d 418, 453 (5th Cir. 1971) (the Act imposes on employers an affirmative duty to devise and implement objective criteria for choosing among applicants for promotion or transfer); Russell v. American Tobacco Co., 374 F. Supp. 286, 289 (M.D.N.C. 1973) aff'd, 528 F.2d 357 (4th Cir. 1975) (the lack of objective guidelines and written criteria are some indicia of discrimination); Cox, supra note 4, at 112 n.314 ("[a] finding of liability under the [disparate] impact model implies an obligation to substitute objective criteria").

134. For a general discussion of the public/private distinction, see A Symposium: The Public/Private Distinction, 130 U. PA. L. REV. 1289-1608 (1982). Although the weight once accorded the distinction is lessening, some distinct treatment along public/private lines seems destined to continue as long as other features of law and government remain. See Stone, Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?, 130 U. PA. L. REV. 1441, 1506-09 (1982). The text offers "market forces" as a principle to consider in resolving one narrow class of cases.


136. Dothard, 433 U.S. at 331 n.14 (Congress expressly indicated the intent that courts apply the same Title VII principles to governmental and private employers alike); Jacobs, A Constitutional Route to Discriminatory Impact Statutory Liability for State and Local Government Employers: All
sence of market forces in the public sector suggests, however, that discretionary acts by public employers are not entitled to the same deference that private employers enjoy.

States continually, but so far unsuccessfully, have argued for a more deferential standard of review. They base their argument on federalism and a limited view of congressional power under section 5 of the fourteenth amendment. Specifically, states have argued that the disparate impact theory should not apply to them because it prohibits discrimination beyond the scope of the fourteenth amendment's equal protection clause. Alternatively, states argue that the federal courts should be more deferential in evaluating both state employment practices and the justifications for those practices if they have an adverse impact.

Although the Supreme Court has applied the disparate impact theory in three cases involving public employer defendants, it has declined to rule directly on the states' challenges. In *Dothard*, however, the Court noted that Congress intended the same Title VII principles to apply to governmental and private employers alike.

In contrast to both the states' arguments and the prevailing view, public employers should be held to a higher standard when they exercise discretion. The federalism argument is not insignificant, but the Constitution already regulates public employers in various facets of their employment operations. These restraints on permissible behavior are inapplicable to employers in the private sector. Accordingly, private


137. *Dothard*, 433 U.S. at 323 n.1; *Beazer*, 440 U.S. at 583 n.23, 584 n.25; Jacobs, supra note 136, at 321-23. See also *Hazelwood School Dist. v. United States*, 433 U.S. 299, 306 n.12 (1977), in which the defendant questioned Congress' "authority under Section 5 of the Fourteenth Amendment to prohibit by Title VII . . . employment practices of an agency of a state government in the absence of proof that the agency purposely discriminated against applicants on the basis of race." *Hazelwood*, however, did not present the issue because the plaintiff's theory was intentional discrimination.

138. *Dothard*, 433 U.S. at 331 n.14. States also have challenged Title VII backpay and attorneys' fees awards against state employers under the eleventh amendment, which bars certain private suits against states in federal court. The Supreme Court upheld the constitutionality of the 1972 amendments in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Treating the 1972 amendments as an exercise of congressional power under section five of the fourteenth amendment, the Court held that Congress could abrogate the states' eleventh amendment immunity and authorize private Title VII suits against state employers. Although the Court's interpretation of the eleventh amendment continues to evolve, the conclusion in *Bitzer* retains vitality. See generally Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv. L. Rev. 61 (1984).


140. 433 U.S. at 331 n.14.


142. This is simply what "state action" means. See, e.g., Van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3 (1961) (discussion of the fourteenth amendment's state action requirement in the
employers enjoy greater discretion to structure their policies and to decide which interests to advance in the workplace. The desire of Congress for like treatment of public and private employers is not frustrated by taking real differences into account in particular situations. Indeed, balancing interests under the disparate impact theory requires such distinctions. For example, without adopting a different standard of review under Title VII, a court should recognize that a public employer's interests extend beyond profit-maximizing motives to intangible concerns such as promoting a sense of political community. In doing so, a court could find permissible a justification that it might not allow in the private sector. Similarly, in reviewing challenges to discretionary decisionmaking, courts should consider the absence of market forces which, in the private sector, minimize the risks of poor judgment. If private sector employers often misplay hunches, their businesses soon will end. If a public employer often misplays hunches, no one may context of racial discrimination). The state action requirement is not without its own philosophical controversies. See L. Tribe, American Constitutional Law 1147-74 (1978); Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296 (1982); Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 S. Cal. L. Rev. 208 (1957).

143. See Maltz, supra note 12, at 789-92. Indeed, one might argue that discrimination by the state is more offensive than discrimination by private employers. But in Washington v. Davis, 426 U.S. 229 (1976), holding that evidence of disproportionate failure rates alone did not establish a prima facie case of discrimination under the Constitution, the Court rejected the argument that "equal protection" means the government has a responsibility to eliminate racially disproportionate outcomes that occur under equal treatment. For detailed discussion and criticism of the intent requirement, see Binion, "Intent" and Equal Protection: A Reconsideration, 1983 Sup. Ct. Rev. 397; Brest, supra note 4; Perry, supra note 4; Note, Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney, 79 Colum. L. Rev. 1376 (1979).

The extent to which Congress can impose more stringent standards on states raises the scope of congressional power under section five of the fourteenth amendment, a controversial subject. Clearly Congress can go beyond section one of the fourteenth amendment. See generally Katzenbach v. Morgan, 384 U.S. 641, 648-51 (1966), in which the Court held that Congress' power under section five to enact legislation is not limited to situations where state law has been adjudged to violate the provisions of section one of the fourteenth amendment. Instead, section five is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the fourteenth amendment. How much more power Congress has under this section is unclear. For example, in Oregon v. Mitchell, 400 U.S. 112 (1970), the Court held that Congress could enfranchise 18- to 21-year-olds in national elections (four justices concluding that section five gave Congress the power to do so) but Congress could not interfere, under section five of the fourteenth amendment, with the age for voters set by the states for state and local elections. The Court also reaffirmed Congress' authority under section two of the fifteenth amendment to ban literacy tests even though the Court previously had upheld a literacy requirement against a claim that it was invalid under the fifteenth amendment. Id. at 231-36 (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding a more limited statute) and Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959) (literacy test does not violate fifteenth amendment)). In Pennhurst State School v. Halderman, 451 U.S. 1, 16 n.12 (1981), the Court avoided the issue of whether Congress had the power under section five to create the right to treatment in the least restrictive setting for institutionalized mentally retarded individuals by concluding that the statute created no rights whatsoever.

144. Lamber, supra note 127, at 40 n.154.

145. This statement is true unless the market is biased. For a general discussion of economic theory and discrimination, see G. Becker, Economics of Discrimination (2d ed. 1971); Arrow, The Theory of Discrimination, in Discrimination in Labor Markets (O. Ashenfelter & A. Rees
notice.

2. De Facto Rules and Protective Hierarchies

A second factor that determines the applicability of the disparate impact theory to discretion cases is the decision-making process of a particular business. Although an infinite variety of decision-making structures exist, one may identify decisions made within a hierarchy of authority with stated principles to guide the employer's exercise of discretion. Courts and commentators often suggest such levels of review and guidelines to control discretion in order to save subjective systems, but decisions that employers reach within a "bureaucratic" environment are fatally flawed and courts should give them less deference.146

This process is different from the case of an employer who plays a hunch for high stakes in two ways. First, the process often becomes rule-bound. Decisionmakers lose sight of the discretionary nature of their decisions and in their minds play no hunch or exercise no discretion. Second, the hierarchy of authority insulates the various decisionmakers. Individual decisionmakers do not feel (or in fact are not) responsible for their decisions. Thus, they lose sight of the high stakes at risk with a discretionary decision.147

Consider the promotion process from associate professor to professor at a major university.148 Promotion, in contrast to tenure, recognizes

146. Although bureaucracy suggests governments, private employers, especially not-for-profit institutions or regulated industries, can operate within similar environments, the absence of a financial bottom line may encourage the structured decisionmaking as a substitute for market forces. For examples of cases in which courts have suggested specific guidelines to control discretion, advertisements of job openings, and addition of decisionmakers and layers of review to cure unlawful discretionary systems, see Hamilton v. General Motors Corp., 606 F.2d 576 (5th Cir. 1979), cert. denied, 447 U.S. 907 (1980); Webster v. Redmond, 599 F.2d 793 (7th Cir. 1979), cert. denied, 444 U.S. 1039 (1980); Frink v. United States Navy, 16 Fair Empl. Prac. Cas. (BNA) 67, 70-71 (E.D. Pa. 1977); Miller v. Continental Can Co., 13 Fair Empl. Prac. Cas. (BNA) 1585, 1602-03 (S.D. Ga. 1976). Cf. Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972) (no safeguards in procedures designed to avert discriminatory practices as factor to consider in finding Title VII violation). Commentators echo this advice. B. SCHLEI & P. GROSSMAN, supra note 4, at 201-05; Stacy, supra note 12, at 750-52; Waintroob, supra note 12, at 51-56, 119. Cf. Bartholet, supra note 12, at 1006-08 (procedural reforms may be the first step but some reforms also may interfere with effective decisionmaking).

147. These two consequences are intertwined. Rule-applying also insulates the decisionmaker because it is easier than making a discretionary judgment. Layers of authority obscure the discretionary nature of the decision because the internal review suggests that each decisionmaker can explain a decision and that others can substantively review the decision.

148. Although the university promotion process may appear idiosyncratic, it is not. Promotion often means a new or different job, for example, moving from assembly line worker to foreman; some promotions, however, simply reward past performance by increased pay or status without different job responsibilities. In the civil service, for example, promotion from a GS-11 to GS-12 means a difference in pay and some increased responsibility, but the essence of the job usually stays the same. Similarly, in upper level management, a manager's promotion may mean that she is now a corporate officer and has more independence but continues to do the same job. The same is true in universities where a full professor's daily life may be the same as an assistant professor's but he has more freedom, independence, or authority. Even if university promotion is idiosyncratic, the application of
past achievement and signifies confidence that the individual is capable of greater responsibilities and accomplishment. The university assesses the individual in terms of teaching, research, and service. It usually promotes an individual when he or she has demonstrated a level of competence or distinction appropriate to the proposed rank in one area of endeavor; failure to promote may be based on unsatisfactory performance in other areas. When teaching is the primary criterion for promotion, the candidate must demonstrate an extraordinary ability to stimulate in students a genuine desire for scholarly work and to direct the research of advanced students. If research is the primary criterion, the candidate must show a continued growth in scholarship and a national reputation as a first-class productive scholar.149

Whether an individual has achieved such distinction necessarily involves a discretionary judgment. The standards cannot be measured easily by objective criteria. Moreover, the pool of associate professors considered for promotion may come from many different disciplines. The process is competitive in a sense, but there may be no fixed number of promotions available.

Over the years universities have adopted various procedural reforms to expose the process to internal review, including the development of guidelines to control the discretion of individuals and the addition of layers of decisionmaking and internal appeals.150 The decision-making process may include a department committee, the department faculty, the department chairperson, a faculty committee at the school level, the dean of the school, another committee at the university level, and finally one or two academic administrators leading to a recommendation to the

Title VII to academic institutions has received sufficient attention in the literature and the courts to warrant the example. See, e.g., Cooper, supra note 12; Divine, Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion, 5 J.L. & EDUC. 429 (1976); Vladeck & Young, Sex Discrimination in Higher Education: It's Not Academic, 4 WOMEN'S RTS. L. REP. 59 (1978); Wagner, Tenure and Promotion in Higher Education in Light of Washington v. Davis, 24 WAYNE L. REV. 95 (1977).

149. Although the articulation of the standard may vary among institutions, the standard given in the text is commonplace. See, e.g., Sweeney v. Board of Trustees, 604 F.2d 106 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980); Cooper, supra note 12, at 981 n.29; Divine, supra note 148, at 436-39 (in the context of hiring); Yurko, Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation, 60 B.U.L. REV. 473, 475-82 (1980).

board of trustees or regents. Individual units may supplement general university standards, both in substance and in procedures, taking into account differences in disciplines and missions.

In addition, objective measures of "excellence" are commonplace, despite the subjective nature of promotions decisions. Perhaps an associate professor must be in rank for four years, even though the achievement on which promotion is based may happen in two years. A professor must publish three books to establish a national reputation as a first-class scholar, even though the first book won a national prize. Four letters of outside support are insufficient to establish a national reputation, even if each letter proclaims the excellent reputation.

Objective measures and internal review of decisions have their advantages. Objective measures can aptly describe individual cases. Quantifiable standards can reduce uncertainty, thereby lessening tension for individual faculty members. By specifying factors that define excellence and reviewing lower-level decisions, universities can control individual exercises of discretion and help to eliminate decisions based only on personalities or politics. Although the transformation of a discretionary process into an objective one within a hierarchy of authority thus may seem more just, this sense of fairness comes at a price.

The virtue of discretionary decisionmaking can be realized only if the decisionmaker knowingly exercises discretion. Appellate review generally follows the same principle: a reviewing court will remand a lower court's decision if the lower court erroneously thought it was bound by a rule but in fact should have exercised discretion.151 Decisions based on objective standards within a hierarchy of authority are easier than exercising discretion; thus decisionmakers may not pay sufficient attention to what is or should be a subjective judgment. The standards combine with the multi-level decision process to insulate the individual decisionmaker, who risks little in making a decision. Application of the disparate impact theory under these circumstances does not intrude on the decision-making process. Courts have little reason to defer to a discretionary decision that the individual decisionmakers, who have nothing to lose, do not take seriously. Moreover, courts have no reason to defer to what could be a discretionary decision if the institution has not in fact exercised any discretion.

3. Measurement Bias

A third consideration which determines the applicability of the disparate impact theory to discretionary decisions is the risk of bias in the

151. See Compton v. Luckenbach Overseas Corp., 425 F.2d 1130, 1133 (2d Cir. 1970) (defendant argued that trial court erroneously thought it was powerless to weigh evidence on motion for a new trial but court of appeals held that the lower court made clear its awareness of the full extent of its discretionary power); Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYR. L. REV. 635, 666 (1971) (when a trial judge is called upon to exercise discretion he is bound to do so and may not abdicate his duty by pretending his hands are tied by a rule of law).
measurement or definition of general standards. This risk may arise in two ways. First, an employer determines wages or promotions on a discretionary or subjective basis but the plaintiff alleges that certain factors are determinative. For example, an employer may say that a salary is negotiable depending on education and experience but the plaintiff shows that “past salary” is the determinative factor. Second, the employer acknowledges that certain factors play a determinative role in setting salaries or obtaining promotions but measures these factors subjectively. The employer may base salaries on effort or responsibility but the plaintiff shows that the employer’s expectations about these factors reflect predominantly male jobs.152

A court’s application of the disparate impact theory to these situations should be straightforward. Plaintiffs can identify a neutral rule that is related causally to the observed adverse impact. The fact that the employer does not state the operative factors in objective terms or that the employer exercises unbiased discretion should not obscure the essential elements of the disparate impact theory.

An example from the comparable worth debate illustrates the point. Proponents of comparable worth assert that employers pay women engaged in historically female work artificially depressed wages relative to what those wages would be if white males performed the jobs. Comparable worth proponents contend that employers undervalue the jobs because the work has been and continues to be done primarily by women. They argue that different and dissimilar jobs should command the same wages if the jobs are of equivalent worth to the employer, according to various neutral definitions.153 Opponents of comparable worth maintain that individual choice segregates occupations and that employers assign wages according to the marketplace. Moreover, opponents argue that the comparable value of dissimilar jobs is indeterminant. The comparison is, in their view, like comparing the work of poets and plumbers.154

Job evaluation systems in some form nearly always are part of this debate. These systems can be useful to identify wage discrimination as

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152. This factor follows from the second. In both situations the employer asserts discretion as the basis of its decision but the plaintiff alleges that certain policies or rules are determinative. The second factor concerns the transformation of a discretionary process into a rule-bound process as well as the protection of individual decisionmakers by the levels of review. Here, the concern is the nature of the standards themselves.


well as to define a remedy. The several kinds of systems share one basic feature. In each job evaluation system, analysts determine the "compensable factors" in the wage system such as effort, skill, and responsibility.\textsuperscript{155}

The problem with these systems, however, is their potential sex bias because the compensable factors may be oriented toward predominantly male jobs. For example, analysts may measure effort in terms of strength rather than fatigue so that predominantly male blue-collar jobs score higher than predominantly female clerical jobs even if the male and female jobs are equally fatiguing for the average worker. A manual skills factor may stress the ability to handle tools rather than manual dexterity, effectively down-grading fine assembly work that women usually perform. Analysts may define responsibility in terms of supervision or budgetary control, rather than in terms of organizational ability.\textsuperscript{156} The subjective nature of job analysis and evaluation is another source of potential bias. Evaluators may underestimate what women do and overestimate the importance of what men do.\textsuperscript{157}

Similarly, potential bias exists when an employer defines the worth of jobs or the standard for promotions in male terms. An employer clearly has discretion to determine the compensable factors in a wage or promotion system; the application of these standards also may properly involve discretion. These discretionary judgments, however, may touch characteristics that relate to race or gender. If the employer states these characteristics in objective terms, the disparate impact theory surely applies. Once the plaintiff identifies the characteristics, the court should allow the plaintiff to challenge the choice of factors and their measurement under the disparate impact theory.\textsuperscript{158}

4. Discretion in the Job

A fourth factor courts should weigh in determining whether the disparate impact theory applies to discretionary decisionmaking is the nature of the job. Some commentators and courts have suggested that subjective decisions are more appropriate for upper level jobs than for lower level jobs.\textsuperscript{159} Although they acknowledge the difficulty of drawing


\textsuperscript{156} D. TREIMAN, supra note 155, at 32-33.

\textsuperscript{157} Id. at 43-46.

\textsuperscript{158} The issue is similar to the one in Segar, discussed supra text accompanying notes 52-59. The difference is that in Segar the plaintiff alleged intentional discrimination which the defendant attempted to rebut with a nondiscriminatory explanation which in turn raised the disparate impact issue. Here, the plaintiff alleges disparate impact, arguing that the employer has not discriminated intentionally but rather has used a neutral factor with an adverse impact on blacks or women.

\textsuperscript{159} See supra note 37.
such a line, these discussions rely on the socioeconomic status of the job. In contrast, the distinction advanced here is whether the job itself involves the exercise of considerable discretion. As with the other factors suggested above, the difference between this view and the more typical one is a matter of degree and perception. Upper level employees are likely to enjoy discretion as part of their jobs while lower level employees are not. The relationship, however, is not absolute nor is the distinction sufficiently accurate. For example, police officers, especially those on the patrol beat, may have low socioeconomic status by some measures but society vests them with considerable discretion by authorizing them to carry and use firearms.

An employer's use of discretion in selecting an employee who will exercise discretion is legitimate. This view is supported by the Supreme Court's recent decisions on aliens and the restrictions that states may impose on their employment.

Starting from the general proposition that a court may sustain a state law that discriminates on the basis of alienage only when the law can withstand strict scrutiny, the Supreme Court has developed the "political function" exception. This exception applies to laws that exclude aliens from positions intimately related to the process of democratic self-government. The rationale behind the political function exception is that some public positions are so closely connected with the formulation and implementation of self-government that the states may reasonably exclude from those positions persons outside the political community, including persons who have not become part of the process of democratic self-determination.

The Court has held that states can require police officers, public school teachers, and probation officers to be citizens. They cannot, however, require lawyers, civil engineers, or notaries public to be cit-

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160. Bartholet, supra note 12, at 948 n.2, uses upper level jobs to include "middle and upper management jobs, professional positions, and other jobs requiring advanced educational degrees." Lower level jobs include "blue collar jobs, including supervisory jobs and highly skilled craft jobs," and "white collar jobs with limited status and power."

Cooper, supra note 12, at 982, says that courts scrupulously scrutinize lower-level criteria. The ease with which employers escape liability suggests, however, that the scrutiny is not so close. See Note, supra note 126, at 404.

161. Such jobs also are likely to have hard-to-define responsibilities. If pressed, however, the employer usually can describe good job performance. More difficult problems include articulating the qualities required to do a good job and identifying those individuals who possess the elusive qualities.

162. They are not part of the process because they do not have the right to vote. See Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982).

163. Foley v. Connelie, 435 U.S. 291, 297-300 (1978) (state may require police officers to be citizens because they have authority to exercise an almost infinite variety of discretionary powers); Ambach v. Norwich, 441 U.S. 68, 78-81 (1979) (public school teachers must be citizens because they possess a high degree of responsibility and discretion in the fulfillment of basic governmental obligations); Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (probation officers must be citizens because they routinely exercise discretionary power that places them in direct authority over other individuals).
The difference, according to the Court, is whether "the officeholder would necessarily exercise broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population—power of the sort that a self-governing community could properly entrust only to full-fledged members of that community."\textsuperscript{165}

The Court's decisions about aliens and its political function exception provide a useful way to consider how the nature of the job affects discretionary decisions. Employees who themselves exercise discretion occupy a place in the employer's business similar to those employees who fit within the political function exception. Instead of democratic self-government, the essential interest of the employer is the ability to control and direct its business. The choice of those who exercise the employer's discretion is central and fundamental to this aspect of an employer's autonomy.\textsuperscript{166}

If discretion is legitimate in the selection of employees who have discretion, the question remains whether courts should scrutinize this exercise in some way. In the alien cases, for example, the Court does not apply the political function exception if it concludes that the statute is over- or underinclusive in its restrictions on aliens.\textsuperscript{167} Similarly, a court should scrutinize the employer's claim that particular employees have discretion as well as the scope and magnitude of the claimed discretion. The fundamental nature of these positions suggests that few employees would fall within that sphere.\textsuperscript{168} If a court concludes that discretion is appropriate in selecting the employee, however, then any further scrutiny is troubling. The problem is that no one knows exactly what characteristics make for success or how important a particular characteristic is. Given the general lack of knowledge in this situation, courts have little reason to override an employer's hunch in a particular case.

This conclusion is disturbing for the very reason that discretion is appropriate. Social science literature suggests that in exercising discre-
tion employers tend to choose individuals most like themselves. Because most employers choosing employees with discretion are white males, the risk is that employers will prefer white males over women and other minority group members.

This preference stems from the notion that women and minority group members are too unpredictable in the way they would exercise discretion. This notion is not universally shared and most people do not define themselves solely in terms of race or gender. Other characteristics such as work habits, education, or background may be more important to this discretionary judgment. Nonetheless, no one should underestimate the nature of the risk.

These four factors illustrate the value and harm of discretionary decisions. Drawn from the different circumstances in which employers exercise discretion, these factors reflect the need for courts to evaluate the employer's sincerity in claiming discretion. The application of the disparate impact theory to discretionary decisionmaking is appropriate and does not exceed the definition's theoretical underpinnings. Some cases vary only slightly from the classic disparate impact model, such as when the plaintiff shows bias in the employer's measurement of discretionary standards. In other cases the disparate impact theory tests the legitimacy of claimed discretion.

C. Defendant's Burden of Proof

If the disparate impact theory applies to discretionary decisionmaking, the remaining question concerns the defendant's burden of proof. Some commentators merely assert that courts should evaluate acts of discretion by the same standard as classic disparate impact cases but without explaining how the standard would apply. Other commentators argue that it is impossible to justify discretionary decisions and conclude that the disparate impact theory therefore is inappropriate. Although courts may find it difficult to apply the typical defense burden to discretion cases, the burden of proof should be the same in both kinds of

170. Id. at 54-55.
171. See, e.g., Stacy, supra note 12, at 748 ("both test and other selection techniques require the same degree of validation for demonstrating job-relatedness"); Waintroob, supra note 12, at 117-18 (business necessity defense may be of little help to employers whose subjective practices have a discriminatory impact). But see Tepker, supra note 13, at 1085-87 (employer should present substantial evidence that the standards are designed to achieve an important educational objective and should be required to demonstrate with substantial evidence a policy's effectiveness and validity that the employer, acting in good faith, believed).
172. See, e.g., B. Schleif & P. Grossman, supra note 4, at 1289 (the three-stage adverse impact model is inapplicable to "excessive subjectivity" case because plaintiffs do not challenge a specific employment criteria which the employer can, in turn, establish is job-related); Cooper, supra note 12, at 992 (courts are afraid to impose validation requirements because empirical justification eludes subjective standards); Maltz, supra note 12, at 789-92 (validation imposes unnecessary and unrealistic burdens on employer autonomy).
Employers attack disparate impact claims in two ways. First, as discussed in Part IV, the employer may deny that a practice has a meaningful adverse impact on the minority group in question by challenging the accuracy or significance of the plaintiff's statistical evidence. Second, the employer may concede the disparity but seek to justify the use of the employment practice. In the latter situation, an employer claims either "job-relatedness" or "business necessity." An employer makes a job-relatedness argument when she says, for example, that performance on a written test predicts performance on a particular job. An employer makes a business necessity argument when he justifies an employment practice with reasons unrelated to job performance. For example, a city might argue that its residency rule advances a sense of political community. Thus, the nature of an acceptable justification depends on the kind of practice challenged and the employer's reasons for using that practice. Although the specific arguments change, in each case the employer has the burden of persuasion and must show that the employment practice furthers an important business interest.

The defendant's burden of proof also varies in discretion cases. Some discretion cases merely involve traditional application of the disparate impact theory. For example, when a plaintiff shows that an employer is not making a discretionary decision, although purporting to do so, the employer must justify the criteria actually used. Similarly, if the plaintiff shows that certain characteristics, although stated in subjective terms, have an adverse impact, then the employer must justify their use. In these cases the employer may argue either job-relatedness or business necessity depending on the actual practice and the employer's rationale.

173. For a general discussion of the defendant's burden of proof in typical disparate impact cases, a burden which is not uncontroversial, see Furnish, supra note 4, at 425-40; Lamber, supra note 127, at 34-41; Comment, supra note 124; Note, supra note 126, at 392-97, 404-15.

174. Courts and litigants commonly use the terms "job-relatedness" and "business necessity," which are useful ways to present and to analyze evidence. Nevertheless, one should not reify the difference. See Lamber, supra note 127, at 38 n.152. In choosing an employee who will exercise discretionary judgments, for example, the employer could say that the need to trust in those discretionary judgments is related to job performance. The employer also could argue that the need for an employee whose discretionary judgments are trustworthy is a business necessity. The statement in the text presents the issue more generally: is the practice substantially related to an important business interest? The first part tests the fit between the challenged practice and the employer's interest; the second part tests the importance of the employer's goal.

175. This situation would be a likely outcome with de facto rules and protective hierarchies (factor two), supra text accompanying notes 146-51.

176. This situation would be a likely outcome with the third factor, measurement bias, supra text accompanying notes 152-58. See also Shoben, supra note 35, at 223-24, discussing how litigants can break down some interviews and treat them like typical disparate impact cases.

177. Consider, for example, an employer with discretion to determine the compensable factors in a wage system and to apply those standards. The employer may compensate "effort" more than education and define effort in terms of strength. If a plaintiff shows this definition has an adverse impact on women, the employer must justify the principle of defining effort by strength. The employer would argue job-relatedness or business necessity depending on whether this reward structure
In most cases, however, the employer will not attempt to justify a discretionary decision with a job-relatedness argument. If an employer is unsure what characteristics predict success or how important a particular characteristic is, the employer is unlikely to show the necessary connection between those unarticulated qualities and job performance. The employer is more likely to attempt to justify using discretion in business necessity terms. Consider the case for the greatest deference: the employer who plays a hunch for high stakes. The nature of the hunch and the lack of consensus about the relevant characteristics suggest only one question—is discretion appropriate?

Supreme Court decisions involving employment practices unrelated to job performance suggest some limit on the kinds of reasons that can justify such practices with an adverse impact. Properly understood, the business necessity standard accommodates the conflicting interests of the employer and employee. The employer must demonstrate that discretion serves legitimate business needs. This standard requires the employer to prove more than that discretion is common or superficially rational; the employer must show the need for and importance of discretion. The plaintiff can challenge the employer's claim in two ways, drawing on the four factors discussed above. First, the plaintiff can argue that discretion is not substantially related to the employer's goals. For example, the plaintiff may show that discretion does not accomplish what the employer intends by demonstrating that the employer would better further its purpose in other ways. Second, the plaintiff can argue that discretion is not sufficiently important to the employer because of the nature of the job, the kind of employer, or the realities of the decision. Encourages employees to do better work or whether it rewards strength for other business reasons, such as ability to recruit. In either case, the essential question is the importance of measuring the existence of an admittedly proper trait (effort) in a certain way (strength). This question is the second part of the justification test, see supra note 174.

178. The failure to establish a connection is not because such a connection is technically impossible or because validation techniques do not apply; here, a lack of necessary information causes the failure. See Bartholet, supra note 12, at 986. Moreover, validation in its technical sense is not the question; instead, the question is whether a relationship exists between the challenged criterion and the employer's goal. Lamber, supra note 127, at 46 n.173.

179. Although the Court has not addressed the issue directly, several decisions suggest some limitation on the scope of a justification unrelated to job performance. In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), the Court considered an employer's policy of denying accumulated seniority to employees returning to work from mandatory maternity leaves. Justice Rehnquist, writing for the Court, stated that "the application of Title VII is not violated. . ." Nevertheless, "since there was no proof of any business necessity adduced with respect to the policies in question," id. at 143, the Court did not analyze the scope of the defense. See also International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (collectively bargained seniority system that perpetuated past discrimination against blacks and Hispanics); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (exclusion of pregnancy disabilities from an employer's disability insurance program). Because the decisions rest on other issues, the Court did not consider the nature of the defendant's justification burden. See also Williams, supra note 122, at 689-93.

180. See, e.g., Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1016 (2d Cir. 1980) (question is whether discretion is necessary).
sion-making process. If the court finds that discretion is appropriate, the employer should have no further burden. Some might argue that such an employer should have the minimal burden of articulating the basis of its discretion. To avoid a charge of intentional discrimination, the employer will probably attempt to do so. But in cases of pure hunch, the employer may have nothing to say.

VI. CONCLUSION

This article’s suggestion that the disparate impact theory and its analytical framework are appropriate for analyzing discretionary decisions under Title VII does not require employers to abandon discretion. Nor do the policies of Title VII require automatic judicial approval of all such decisions. Once it is clear that the disparate impact theory simply triggers limited judicial scrutiny, not automatic abolition or approval, the major reason for immunizing discretion disappears.

The application of the disparate impact theory to discretionary decisions is different from those situations that the Supreme Court has considered. The analytical framework for typical disparate impact cases, familiar to lower courts and litigants, does not always work the same way in challenges to discretionary decisions. The disparate impact theory and its analytical framework, however, are useful ways to ask the right questions. Because an employer’s exercise of discretion poses risks to the employment opportunities of women and other minority group members, courts should be cautious about foregoing their scrutiny. The key to a limited and principled deference to discretionary decisions is a proper understanding of the nature of discretion and the employer’s sincerity in using it compared to its limitations for women and other minorities. These are not simple solutions. But discrimination and discretion are not simple problems.

181. Most of the literature concerns the possibility and desirability of validating subjective criteria and thus focuses on the first question. See, e.g., supra notes 171-72. More likely, however, the plaintiff will challenge the appropriateness of the discretion.

182. A plaintiff can maintain other challenges to the employer’s action. The plaintiff can allege intentional discrimination, especially if a sufficient number of decisions show a pattern raising an inference of gender discrimination. The plaintiff also can argue that certain factors are determinative, even though the employer claims that they are not.

183. The point is similar to that in Ely, Legislative and Administration Motivation in Constitutional Law, 79 Yale L.J. 1205, 1207 (1970) (inquiry into legislative motivation does not make motive dispositive).