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Watson v. Ft. Worth Bank and Trust: The Changing Face of Disparate Impact

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WATSON V. FT. WORTH BANK AND TRUST: THE CHANGING FACE OF DISPARATE IMPACT

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I. INTRODUCTION.

Title VII of the Civil Rights Act of 1964[1] constitutes this country's first serious commitment to eradicating the enormous economic disadvantages caused by hundreds of years of racial and gender-related prejudice. In July 1989, Title VII will be 25 years old.[2] Its first 25 years have seen significant changes in the economic opportunities available to America's minorities and women. The most obvious forms of intentional discrimination are largely gone. In 1989 it is a rare employer who will admit racial or gender-related prejudice, even privately.[3] As a result, the percentages of mid-level jobs[4] held by minorities and women have greatly increased.[5] On Title VII's 25th Anniversary, there is much cause for celebration.

But there is also cause for concern. While members of once excluded groups have entered the mid-level workforce, most have not progressed to top-level positions.[6] Perhaps not surprisingly, the elimination of barriers to mid-level employment has spotlighted the unique barriers to equal employment in top-level jobs. Title VII's capacity to deal effectively with these barriers will be its major challenge for the next quarter-century. Its success will depend, in large part, on the vitality of the disparate impact proof model and its application to subjective employment criteria. This article will identify the battleground and ana-

* Res. Instr., New York University; B.A. 1970, Florida State University; J.D. 1976, University of Tennessee.

1. Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e to -2000e-17 (1982)). Title VII prohibits both public and private sector employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1982). It not only creates and empowers the Equal Employment Opportunity Commission to enforce its requirements, 42 U.S.C. §§ 2000e-4 to -5 (1982), but it also creates a private right of action by victims of discrimination against employers who have violated Title VII's prohibitions. 42 U.S.C. § 2000e-5(f)(1) (1982). *See* Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355, 359-60 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

2. The Civil Rights Act of 1964, 42 U.S.C. §§ 2000e (1982), took effect on July 2, 1964.

3. *See generally* Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Postal Service Board of Governors v. Aikens*, 70 CALIF. L. REV. 1201, 1202-03 (1982).

4. Categories such as "mid-level" or "top-level" jobs defy definition. For purposes of this article, "top-level" jobs will refer to the top third of an employer's work force using salary, responsibility, visibility, and prestige as criteria. "Mid-level" jobs will refer to the middle third of the work force, using the same criteria.

5. *See generally* Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L. J. 313, 336-39 (1984).

6. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982).

lyze the United States Supreme Court's struggle to define an impact proof model applicable to subjective criteria.

II. History of Title VII Proof Models for Individual Cases

Title VII's tools for dealing with prohibited discrimination are its proof models. Although proof models theoretically are designed merely to facilitate the orderly consideration of relevant proof,[7] they have significant substantive impact. They define the levels of necessary proof, utilize rebuttable presumptions, and explicitly interpret the substance of the statute.

In the early years of Title VII litigation, the courts developed two principal proof models[8] for establishing an individual Title VII cause of action: the disparate treatment model, and the disparate impact model.[9]

A. *Disparate Treatment Model*

The individual disparate treatment case is commonly considered the classic discrimination case.[10] Under this theory, the plaintiff proves that the employer has intentionally treated an employee less favorably based upon a protected characteristic such as race or sex.[11] The proof model for an individual disparate treatment case proceeds in 3 stages: (1) the plaintiff's *prima facie* case, (2) the defendant's claim of legitimate business reason, and (3) the plaintiff's proof that the defendant's "legitimate reason" was a mere pretext.

The first stage, the plaintiff's *prima facie* case, is so simple that it is often treated by stipulation. For instance, in a case alleging discriminatory hiring, the plaintiff need only prove:

> (i) that he belongs to a [protected group]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[12]

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7. International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

8. The theory of perpetuation of the effects of past discrimination is not discussed in this paper in light of its demise in *Teamsters*, *id.*. The proof model for failure to reasonably accommodate religious practices is also omitted as it has limited practical relevance to the issues discussed in this article.

9. In any given case, a plaintiff may proceed under both theories concurrently. *See, e.g.*, Wright v. National Archives and Records Serv., 609 F.2d 702, 710-11 (4th Cir. 1979) (en banc).

10. The Supreme Court first applied the disparate impact theory in Griggs v. Duke Power Co., 401 U.S. 424 (1971), two years before setting out the individual disparate treatment model in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

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

Teamsters, 431 U.S. at 335-36 n.15 (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 129 U.S. 252, 265-66 (1977)).

12. *McDonnell Douglas*, 411 U.S. at 802. *McDonnell Douglas* articulates the model in a

The *prima facie* case raises an inference of discrimination by ruling out the most common reasons for rejecting an applicant.[13] In the second stage of proof, in order to rebut this inference, the defendant need only articulate some legitimate, nondiscriminatory reason for plaintiff's rejection.[14] This is a burden of production only. The employer need only *present* some evidence of a legitimate reason; he need not *convince* the trier of fact that it was the real reason for the employment decision.[15] Thus, just as the plaintiff's *prima facie* task is relatively easy, the defendant's stage two task is also relatively easy.

The heart of the individual disparate treatment case—where most such cases are won or lost—is stage three. The plaintiff must prove, by a preponderance of the evidence, that the employer's articulated "legitimate reason" was a "mere pretext" for discrimination.[16] In other words, the plaintiff must prove that the defendant's true motive was based upon the plaintiff's membership in a protected group. Because of the subjective nature of intent, the increasing Title VII sophistication of employers, and the defendant's exclusive knowledge of its own motives, the plaintiff's burden at this stage of the disparate treatment case is quite difficult.

B. *Disparate Impact Model*

While the individual disparate treatment model can be effective in proving discrimination against a relatively unsophisticated employer whose articulated motives are both illicit and transparent, it does little to address the more subtle and invidious discrimination which results from "artificial, arbitrary, and unnecessary barriers"[17] to full employment. These barriers are facially neutral but discriminatory in effect. Title VII is, of course, intended to eliminate *all* unnecessary barriers to full employment.[18]

In order to address such facially neutral employment practices, the courts have applied the same sort of "disproportionate impact" analysis which had previously been applied to Fourteenth Amendment cases.[19] The Supreme Court first applied disparate impact analysis in a Title VII claim in the 1971 case of *Griggs v. Duke Power Co.*,[20] and more fully set out the elements of the proof model in *Albemarle Paper Co. v. Moody*.[21]

Like the disparate treatment model, the disparate impact case pro-

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hiring case. Comparable standards apply in promotion, firing, and conditions of employment cases.

13. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); *Teamsters*, 431 U.S. at 324.
14. *McDonnell Douglas*, 411 U.S. at 802.
15. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).
16. *McDonnell Douglas*, 411 U.S. at 807.
17. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
18. *Id.* at 431.
19. *See* Lau v. Nichols, 414 U.S. 563 (1974); Perkins v. Matthews, 400 U.S. 379 (1971); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).
20. 401 U.S. 424 (1971).
21. 422 U.S. 405 (1975).

ceeds in three stages; however, the first stage of an impact case is much more burdensome than its counterpart in a disparate treatment *prima facie* case. The plaintiff must demonstrate that a particular employment device has an adverse impact on a protected group in marked disproportion[22] to its impact on employees outside that group.[23] This *prima facie* case is almost entirely statistical. It often requires voluminous discovery, thorough and detailed analysis of the employer's total organization and operation, and expert testimony by statisticians, industrial psychologists, and personnel managers. The statistical comparisons must be valid in terms of significance (based on a sample large enough to yield reliable results),[24] scope (covering an appropriate category of employees),[25] and time (covering an appropriate length of time).[26]

Under the *Griggs/Albemarle* proof model, once a plaintiff has established a *prima facie* case of disparate impact, the burden of persuasion (not merely the burden of production) shifts to the defendant to establish the business necessity[27] of the questioned employment practice.[28] Like the plaintiff's initial task, this is usually a difficult undertaking. The employer must show that the employment device is manifestly job related or necessary to his valid business purpose, despite its disparate effect upon protected groups. The business necessity standard is usually considered a higher standard than the corresponding standard (the articulation of a legitimate non-discriminatory reason) in an individual disparate treatment case.[29]

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22. The Uniform Guidelines on Employee Selection Procedures have established a suggested benchmark of eighty percent. A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of adverse impact. 29 C.F.R. § 1607.4 (1986). While the "80% rule" is not a precise formula for determining adverse impact, it is a benchmark of prosecutorial discretion, Clady v. County of Los Angeles, 770 F.2d 1421 (9th Cir. 1985), and as part of the uniform guidelines, is entitled to great deference by courts. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

23. *Griggs*, 401 U.S. at 424.

24. *See, e.g.*, Kim v. Commandant, Defense Language Institute, 772 F.2d 521 (9th Cir. 1985); Soria v. Ozinga Bros., 704 F.2d 990 (7th Cir. 1983); Harper v. Trans World Airlines, Inc., 525 F.2d 409 (8th Cir. 1975).

25. *See, e.g.*, Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975).

26. *See, e.g.*, Capaci v. Katz & Besthoff, 711 F.2d 647 (5th Cir. 1983); Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.4, 1607.15 A(2) (1986).

27. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *Griggs*, 401 U.S. at 432. *But see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1328-29 (2d ed. 1983) [hereinafter SCHLEI & GROSSMAN].

28. Of course, the defendant may also dispute the plaintiff's statistical analysis on the impact issue. But the burden of persuasion on the impact issue does not shift, it remains with the plaintiff.

29. The Supreme Court has neither precisely defined "business necessity" nor compared it to "legitimate business reason." Most authorities, while recognizing the uncertainty, view "business necessity" as a higher standard. L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW 49-53 (2d. ed. 1988); SCHLEI & GROSSMAN, *supra* note 27, at 1328-30; Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. REV. 419 (1982); Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1298 (1987).

Once the defendant has established the necessity of the employment device, the plaintiff, in the third and final stage, must prove that there are other reasonable alternatives which would have less adverse impact.[30] This proof may take the form of evidence showing that there are reasonable alternatives to the particular skill or characteristic required, but more often the plaintiff will seek to prove that there are reasonable alternatives to the criteria used to measure the required skill. The difficulty of this proof stage will depend largely on the facts of each particular case and such factors as how much less discriminatory the alternative practice must be, how much and what kind of evidence will establish the impact level of the alternative practice, and how adequately the alternative practice must address the employer's needs.[31]

C. *Equal Employment in Top-level Jobs: Importance of Disparate Impact and Subjective Criteria*

Despite progress in equal opportunity for mid-level jobs, minorities and women will remain second class members of the workforce until equal opportunity is a reality in top-level jobs. But equal opportunity encounters unique barriers at top employment levels. Some of these barriers may not be directly related to *current* employment discrimination.[32] However, few would dispute that racial and gender-related discrimination is alive and well at the upper echelons of employment. And few would dispute that the higher the job level, the more subjective are the criteria for measuring potential for success. Therefore, it is evident that Title VII's treatment of subjective criteria will be crucial to the achievement of equal opportunity in top-level jobs.[33]

Further, a number of factors combine to make the disparate impact proof model the primary focus of the subjective criteria issue. First, the more subjective the criteria, the more difficult it is to prove intent. This is true not only from a purely evidentiary standpoint, but also because "intent" is often difficult to define,[34] particularly in the context of subjective criteria for top-level jobs.[35] The murky issues of intent will be

30. *Griggs*, 401 U.S. at 424.

31. In the pre-*Watson* cases, these issues are not resolved; nor does *Watson* shed much light in these areas. *See infra* section III (7).

32. For instance, successful applicants for top-level jobs usually need some combination of mid-level experience and/or particular skills and education. Regrettably, minorities and women are still not equally represented in this applicant pool. Undoubtedly the causes of this underrepresentation are varied and include time lag between increasing mid-level employment and readiness for promotion, economic and cultural vestiges of past discrimination, and personal lifestyle choices such as fulltime parenthood.

33. For the classic analysis of the relationship between disparate impact, subjective criteria, and top-level jobs, see Bartholet, *supra* note 6.

34. *See generally* Bartholet, *supra* notes 3 & 6; Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733 (1987).

35. For example, a university seeking to hire a dean would intentionally discriminate by not hiring a black applicant because he is black. But does the university *intentionally* discriminate on the basis of race by not hiring the black applicant because the search committee does not believe that the applicant possesses the cultural attributes which would enable him to persuade potential donors to contribute scholarship funds to the university?

affected by the importance of the employment position in question. The more crucial the job, the more fact finders will tend to give employers the benefit of the doubt on the question of intent. Thus, the disparate treatment model is less useful for analysis of subjective decision-making.

In addition, the recent limitations on the availability of class actions[36] have significantly reduced the viability of the pattern and practice suit;[37] and this is particularly true for top-level jobs which, by their nature are more distinctive and therefore less susceptible to class treatment. Finally, recent years have seen a significant de-emphasis on affirmative action as a concept, and a clear rejection of quotas as a "quick fix" for thorny Title VII problems.[38] The most appropriate remaining analytical approach, then, is disparate impact analysis.

Thus, the dissection and evaluation of subjective decision-making, especially in the context of the disparate impact proof model, will be a key component of Title VII's next frontier—equal opportunity for top-level jobs. The 1988 decision of *Watson v. Ft. Worth Bank and Trust*[39] was only the first step down a long and difficult road. As the next section will explain, much remains undecided.

III. *Watson v. Ft. Worth Bank and Trust*

A. *Pre-Watson Uncertainties*

Though the Supreme Court had never expressly limited disparate impact's application, the Court had never applied impact analysis to subjective decision-making. Prior Supreme Court disparate impact cases had dealt with objective devices such as the requirement of a high school diploma or an intelligence test,[40] a height-weight requirement,[41] or a written examination.[42] However, as plaintiffs searched for more effective ways to prove system wide discrimination, they sought to apply the disparate impact proof model to subjective employment practices such

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While it is certainly possible to analyze this issue in terms of intent, it is much more appropriately analyzed as a question of adverse impact and legitimate need for the criteria.

36. *See* General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147 (1982); East Texas Motor Freight Sys., Inc. v. Rodriquez, 431 U.S. 395 (1977); Redditt v. Mississippi Extended Care Centers, Inc., 718 F.2d 1381 (5th Cir. 1983); Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 Mich. L. Rev. 524 (1987).

37. The "pattern and practice suit" is the proof model for a Title VII disparate treatment class action. In a pattern and practice suit, the plaintiff must first show that disparate treatment is the defendant's standard operating procedure. Teamsters v. United States, 431 U.S. 324, 336 (1977). The defendant may then rebut the inference of discrimination created by the plaintiff's statistics by attacking the plaintiff's statistics themselves, by attacking the plaintiff's analysis of those statistics, or by offering an alternative statistical analysis. *Id.* at 339-40.

38. *See* Watson v. Ft. Worth Bank & Trust, 108 S. Ct. 2777 (1988); Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *Cf.* Connecticut v. Teal, 457 U.S. 440 (1982).

39. 108 S. Ct. 2777 (1988).

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

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

42. Connecticut v. Teal, 457 U.S. 440 (1982).

as subjective evaluation systems or hiring or promotion interviews.[43] Defendants argued that disparate impact analysis was inappropriate in the context of a subjective system for a variety of reasons,[44] and soon the circuit courts were widely split, some even vacillating internally.[45] The District of Columbia Circuit and the First, Second, Third, Sixth, Seventh and Eleventh circuits concluded that application of disparate impact analysis to subjective criteria is appropriate.[46] The Fourth, Fifth, Eighth, Ninth and Tenth circuits held that disparate impact analysis does not apply to employment decisions based on subjective criteria;[47] yet, each of these five circuits has applied impact analysis to subjective decisions in other cases.[48] The Supreme Court undertook to resolve the issue of whether disparate impact could be applied to subjective employment decisions when it granted certiorari in *Watson v. Fort Worth Bank*

43. *Infra* note 46.

44. *Infra* notes 46-47.

45. *Infra* notes 46-47.

46. Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) (promotion practice with subjective standards subject to disparate evaluations); Robinson v. Polaroid Corp., 732 F.2d 1010 (1st Cir. 1984) (layoff selection guidelines, including subjective evaluations of employees' knowledge, past performance, and future potential, evaluated for disparate impact); Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984) (tenure decision involving subjective peer evaluations upheld under disparate impact analysis); Coser v. Moore, 739 F.2d 746 (2d Cir. 1984) (prior experience requirements held to be job related, justifying disparate impact on women professors and classified staff); Wilmore v. City of Wilmington, 699 F.2d 667 (3rd Cir. 1983) (fire department promotions system, incorporating subjective evaluations, found to be disparate impact on racial minorities); Rowe v. Cleveland Pneumatic Co., Numerical Control Inc., 690 F.2d 88 (6th Cir. 1982) (rehire system giving plant foremen unrestricted discretion not sufficiently job related to justify adverse impact); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) (subjective requirements including good character, moral conduct and lack of dissolute habits held to violate Title VII due to disparate impact on blacks), *cert. denied*, 434 U.S. 875 (1977); Green v. United States Steel Corp., 570 F. Supp. 254 (E.D. Pa. 1983) (extended *Wilmore*, holding that an unguided subjective hiring process, depending on interviewer's "gut-level reaction" to individual applicants, requires a more specific explanation to rebut *prima facie* showing of disparate impact than the defendant's stated reason that he was seeking the best qualified people).

47. Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982) (disparate impact model only applies to specific procedures, usually a criterion for hiring); Mortensen v. Callaway, 672 F.2d 822, 823-24 (10th Cir. 1982) (subjective system where numerous factors were combined to evaluate chemists for supervisory positions did not constitute neutral employment practice amenable to disparate impact analysis); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981) (subjective decision-making system, such as supervisory evaluation of work quality, not the type of practice that can form the foundation of disparate impact case); Heagney v. University of Wash., 642 F.2d 1157, 1163 (9th Cir. 1981) (disparate treatment model appropriate where gist of plaintiff's claim is use of subjective or ill-defined criteria).

48. Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985) (United States Post Office promotion system, based on subjective prior "detailing" to upgraded jobs, subject to disparate impact analysis); Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983) (promotion system including oral interview and subjective performance appraisal invalidated due to disparate impact), *cert. denied*, 466 U.S. 972 (1984); Hung Ping Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982) (predominately subjective promotion selection system should be evaluated under disparate impact theory); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) (seniority system limiting promotion to employees with experience in certain, typically all-white departments, violated Title VII under disparate impact model), *cert. dismissed*, 404 U.S. 1006 (1971). Even the Fifth Circuit has approved the use of disparate impact for a subjective selection system. Page v. United States Indus. Inc., 726 F.2d 1038, 1046 (5th Cir. 1984).

and Trust.[49]

B. *Watson's History*

In 1973, Clara Watson was hired by Fort Worth Bank and Trust (the "bank") as a proof operator. During the next seven years Watson was promoted several times and by January 1980, she held the position of commercial teller.[50] During 1980 Watson applied, and was rejected, for four promotions. On each occasion Watson's objective qualifications were similar to those of the successful white applicants.[51]

The bank employed some eighty people in the Ft. Worth area. In 1973, when Watson was hired, there were only four other black employees. Two printed checks in the basement, one was a kitchen worker, and the other was a porter. The bank had never had a black supervisor, let alone a director or officer. Statistics showing hiring, salary, promotion rates, and evaluation results showed marked disparities between blacks and whites.[52]

Regarding the positions sought by Watson in 1980, the bank had no objective procedure for evaluating applicants, nor had there been any attempt to identify the training, experience, and skills required for any of the four positions. Each hiring decision was made by the manager who would supervise the open position. After an interview, the manager would simply make an intuitive decision from among the applicants, by considering whatever subjective criteria that manager believed to be relevant.[53]

After her fourth rejection, Watson exhausted her administrative remedies and filed suit. She alleged that the bank had discriminated against her and against similarly situated persons on the basis of race, in contravention of Title VII.[54]

The trial court initially certified the class under Federal Rule 23, but decertified the class after trial because of lack of commonality and numerosity. On the merits of Watson's individual claims, the trial court refused to apply the disparate impact proof model to the subjective system. Using the individual disparate treatment model, the trial court found that Watson had established a *prima facie* claim of discrimination, but had failed to establish pretext.[55]

Watson appealed to the Fifth Circuit, arguing that the disparate impact model should have been applied to her claims. Adhering to its recent precedent of *Pouncy v. Prudential Insurance Co.*[56] and its progeny, the Fifth Circuit affirmed the trial court's ruling on the disparate impact is-

49. 108 S. Ct. 2777 (1988).
50. Watson v. Fort Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986).
51. *Id.*
52. *Id.* at 808.
53. 108 S. Ct. at 2782.
54. *Id.*
55. *Id.* at 2783.
56. 668 F.2d 795 (5th Cir. 1982).

sue.[57] The Supreme Court granted certiorari on the disparate impact issue alone,[58] and on June 29, 1988 the Court handed down a decision which extended the disparate impact model to subjective practices. The decision, however, left considerable doubt as to what disparate impact now means.

C. *The Watson Opinion*

1. Overview of Opinion

Watson was heard by only eight Justices, but it produced three opinions. They concur only insofar as they reaffirm the disparate impact model and uphold its application to subjective criteria cases.

The plurality opinion, written by Justice O'Connor, did not expressly overturn any part of *Griggs* or other previously controlling disparate impact authorities. On the contrary, Justice O'Connor opined that "[o]ur previous decisions offer guidance . . . ."[59] She did not characterize her articulation as a modification even to adapt the old standards to a new context, but rather as "a fresh and somewhat closer examination of the constraints that operate to keep [disparate impact] analysis within its proper bounds."[60] Justice O'Connor's use of the present tense suggests that she considered the constraints she was articulating to be already in place, and that she considered her opinion to be an examination rather than an expansion of them. She also stated that the point of this articulation was "to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized."[61] The express intent of the opinion was not to impose new standards, but to demonstrate why the old standards are adequate to protect the legitimate interests of employers, without forcing them to use quotas or preferential treatment. The problem is that the language Justice O'Connor employed to articulate the evidentiary burdens of the parties sometimes varied from the terminology previously used in the impact precedents and can be read as an attempt to redefine the proof model. This redefinition came over the objection of the three Justice concurrence, and over Justice Stevens' opinion that the elements of the proof model were not at issue in the case.[62] The core problem of the case is how to resolve these contradictions in a reasoned and judicially sound manner. The ultimate fate of the new definition, if indeed the plurality opinion is a new definition, must await the next disparate impact case to be heard by a full Court.[63]

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57. Watson v. Fort Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986).
58. 107 S. Ct. 3227 (1987).
59. 108 S. Ct. at 2788.
60. *Id.*
61. *Id.*
62. Justice Stevens' opinion thus calls into question the precedential value of the plurality's new standards since they may be considered dicta. There is further question as to the precedential value of a plurality opinion.
63. For some of the issues raised by *Watson*, the wait may not be long. On June 30, 1988, the Supreme Court granted certiorari in Atonio v. Ward's Cove Packing Co., 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) In *Atonio*, the Court will

Though the Court was sympathetic to the Bank's argument that the application of disparate impact analysis might force employers using subjective criteria to secretly utilize quotas in order to insure against disparate impact, all eight Justices agreed that application of disparate impact analysis to subjective decision-making was essential to the vitality of Title VII.[64] Justice O'Connor observed that to hold otherwise would largely nullify the disparate impact proof model even where objective criteria were used. She wrote, "[s]o long as an employer refrained from making standardized criteria absolutely determinative, it would remain free to give such tests almost as much weight as it chose without risking a disparate impact challenge."[65] The Court implicitly recognized that society's interests in rational and fair economic decision-making, and in equal employment opportunity would be undermined by a Title VII policy which tended to shield subjective employment practices from liability exposure, while subjecting genuinely objective practices to close legal scrutiny. Justice O'Connor further noted that there is no analytical impediment to the application of impact analysis to subjective criteria, since both objective and subjective criteria constitute "a facially neutral practice, adopted without discriminatory intent, [but which] may have effects that are indistinguishable from intentionally discriminatory practices."[66] Both from the standpoints of sound policy and conceptual coherence, subjective criteria cases must be subject to disparate impact analysis.

The four-Justice plurality recognized an employer's need for the flexibility of subjective decision-making, even in the face of a statistically disparate impact on a protected class, where the subjective practice has a rational and legitimate basis. The plurality was also concerned that defense of a disparate impact claim challenging a subjective employment device would be unduly expensive and difficult, and that the extension

consider (1) the probative effect of statistical evidence regarding jobs not at issue, (2) the placement of the burden of proof, and (3) the application of disparate impact analysis to a system wide challenge of an employer's personnel practices.

64. 108 S. Ct. 2786-87.

65. *Id.* at 2786.

66. *Id.* The conceptual framework of the application of disparate impact to subjective decision-making has been the subject of much commentary. *See, e.g.*, D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION 22-26 (Supp. 1984); SCHLEI & GROSSMAN, *supra* note 27, at 191-205, 1288; Bartholet, *supra* note 6; Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. DAVIS L. REV. 975, 991-95 (1983); Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 NW. U.L. REV. 776 (1983); Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737 (1976); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45 (1979); Comment, *Subjective Employment Criteria and the Future of Title VII in Professional Jobs*, 54 U. DET. J. URB. L. 165 (1976); Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614 (1973). Nor is Justice O'Connor's conclusion completely self-evident. There are fundamental differences between a subjective selection device and an objective device, particularly for purposes of disparate impact analysis. The disparate impact model analyzes the specific selection device for discriminatory effect. In the context of an objective device, this sort of analysis is conceptually simple, because the device is the same whether applied by a single supervisor or by a number of supervisors. Not so with a subjective device. As a matter of fact, one could say that a subjective device applied by five different supervisors is actually five different selection devices, despite the fact that they are all described by the same words.

of disparate impact analysis to subjective decision-making would result in the use of "surreptitious quota systems"[67] in order to insure impact-free statistics.[68] To extend the disparate impact proof model to subjective practices without forcing employers to use quotas, the plurality "re-examined" the proof model in some depth. Whether the plurality appreciably weakened the model is not a question subject to simple resolution. It is necessary to look closely at each element of the "re-examined" proof model. It appears that some change in the model was intended. Some changes may prove more cosmetic than substantive, and some changes await clarification. The effect of most will depend on case-by-case implementation by trial courts.

The O'Connor opinion first addressed the plaintiff's *prima facie* case. The plurality expressly required the plaintiff to identify the employment practice which is alleged to be discriminatory, and emphasized that the plaintiff must prove the causal link between the challenged practice and the disparate impact. Second, the plurality re-articulated the employer's response necessary to counter such a *prima facie* case. The traditional "business necessity" test was, however, clouded by language suggesting that the employer need only show that the challenged practice is justified by "legitimate business reasons." The plurality expressly held that the use of the challenged employment practice need not be defended with formal validation studies. Moreover, the defendant's burden on those elements may have been reduced to a mere burden of production and not of persuasion. Finally, the plurality opinion offered no guidance as to just what a plaintiff must show in order to establish that an employer's legitimate interests would be adequately served by an alternative, non-discriminatory practice.

Justice Blackmun's opinion, in which Justices Brennan and Marshall joined, squarely rejected the new articulation of the impact proof model. They adhered to the precedent of *Griggs*[69] and *Albemarle*[70] as the definitive statements of the elements of a disparate impact case. This concurring opinion particularly stressed that the defendant's rebuttal burden is one of persuasion rather than production of evidence, and criticized any attempt by the plurality to relax the standards for validation of subjective criteria.

Justice Stevens also declined to endorse the plurality's new articula-

67. 108 S. Ct. at 2787.

68. The possibility that a more stringent disparate impact proof model will significantly reduce the surreptitious use of quotas is questionable. While tougher proof standards will increase the difficulty of a disparate impact plaintiff's case, it is far from obvious that new standards will significantly reduce the number of claims brought. Faced with the necessity to defend, few employers would significantly weaken their defense efforts based upon the assessment that their ultimate odds of success are better. This is particularly true since the new standards themselves are subjective and few employers will be certain enough of the outcome at trial to risk the high consequences of losing an impact case. It will still be less expensive and more effective to insure that the prima facie statistical case can not be made.

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

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

tion of the proof model. He argued that discussion of "evidentiary standards" should await another day when those issues are before the Court. Essentially, this concurring opinion is significant in two respects. First, it deprived the O'Connor opinion of majority status. Second, it underlined the fact that the plurality opinion may be viewed as dicta to the extent that it rearticulated, if not redefined, the elements of the proof model.[71]

2. The Identification Requirement

The plurality noted that the plaintiff must identify the objectionable employment practice as an element of the *prima facie* case.[72] While this element may not have been so clearly articulated in *Griggs*,[73] and *Albemarle*[74] the requirement of identification of an objectionable employment practice was, at least implicitly, an element of a disparate impact case before *Watson*.[75] However, it is not entirely clear how specific the *Watson* plurality requires the plaintiff to be, and the degree of specificity is crucial at the point of proving the causal link between the practice and the disparate impact.[76]

It is here that we must be most precise in defining and using terminology. Assume a multi-component hiring procedure which combines: (1) a degree requirement, (2) a check of references, and (3) an interview. The interviews are conducted by a single decision-maker who subjectively measures the applicant using a list of criteria such as ability to communicate, leadership, ability to relate well with others, professional appearance, and attitude. There is a system for recording the interviewer's subjective assessments by ranking on a scale of one to six. A formula assigning relative weight for each component then guides the final decision. The decision is still substantially the result of subjective judgments, but the decision-making process is fairly well documented.

In such a case, the *Watson* plurality would certainly require a plaintiff to do more than show that overall hiring statistics are disparate. The plaintiff would be able to, and therefore would be expected to, for example, assess whether the degree requirement itself had an adverse impact,

71. *See also supra* note 58.

72. 108 S. Ct. at 2788.

73. *Griggs*, 401 U.S. at 424.

74. *Albemarle*, 422 U.S. at 405.

75. All prior cases in which the Supreme Court applied disparate impact analysis have focused on specific components of a selection device. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982) (written examination as a screening device for promotion); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (exclusion of methadone users); Dothard v. Rawlinson, 433 U.S. 321 (1977); *Albemarle*, 422 U.S. at 405 (a pre-employment test).

76. The Court requires only identification of the "practice," and does not specify that the criterion must be isolated. The Court supported the identification requirement on the authority of *Teal*, which involved a two-step selection process. In that case, the first screening had an adverse impact, but the second step compensated for the adverse impact. The Court applied impact analysis separately to the first step. So in such a system, it is clearly important to focus on a rationally separate and discrete step in the total process. Beyond that, the *Watson* opinion does not say how specific the identification must be.

since that impact is amenable to objective measurement.[77] The plaintiff would be able to identify, and therefore would be expected to identify, which of the three components adversely impacted a protected group, since the final formula assigning numerical values and weights to each component would allow that impact to be tracked. The plaintiff could theoretically even assess the impact of each subjective criterion, if the subjective assessment of each were separately ranked. However, if the criteria were not separately ranked, a plaintiff could not identify which criteria had adverse impact.[78] If the relative weight of each component practice (degree requirement, reference check, and interview) is not identified, a plaintiff could not identify which component had adverse impact. The difficulty is evident. An employer could insulate a selection procedure from disparate impact challenge by making the procedure completely subjective[79] or simply by refraining from memorializing the decision-making process by ranking the subjective judgments and weighting the components. Certainly this method of preventing a disparate impact challenge would be far easier than using quotas and therefore, a far more real danger to the ultimate viability of the proof model.

The degree of specificity possible will vary widely from case to case. In a two-step selection device, it is certainly possible to identify the objectionable step.[80] In a case involving multiple subjective criteria, the plaintiff could never prove which subjective criterion was associated in the employer's mind with a Title VII protected group unless the practice included sufficient ranking and record-keeping procedures. In such a case, it would certainly be inappropriate to require the plaintiff to identify which criterion produced the disparate impact.

Such a construction would sound the death knell of impact analysis in the subjective criteria context, which the Court recognizes would effectively end the efficacy of impact analysis in the objective criteria context as well.[81] This is precisely what the *Watson* decision refused to allow, so the requirement of specific identification must be circumscribed with an appropriate rule of reason, to accomplish the primary goal of the decision—the preservation of a viable disparate impact model.

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77. A degree requirement is analogous to the test requirement in *Teal, id.* Where either criteria is an absolute requirement, its impact can be assessed. Where either is simply a factor to be considered along with other criteria, its impact can not be assessed absent a ranking system or formula which prescribes and memorializes the decision-making process.

78. Ironically, that is particularly true where subjective criteria are involved, as the Court has recognized that it is subconscious stereotyping that causes such subjective criteria to produce unlawful disparate impact. *Watson*, 108 S. Ct. at 2786. The plaintiff cannot reasonably be required to identify which subjective criteria are associated in the employer's mind with an unfair stereotype. The only way to prove such an association would be if the same decision-maker evaluated the employment pool multiple times, excluding one criteria each time in order to produce a statistical basis for analysis.

79. *I.e.*, by simply using an intuitive decision-making procedure, relying totally on unbridled discretion.

80. *See Teal, supra* note 75.

81. *Watson*, 108 S. Ct. at 2786.

The best reading appears to be that the degree of required specificity must be determined on a case by case basis, depending primarily on how specific it is possible to be. It is never sufficient for the plaintiff to merely allege a statistical imbalance in the employer's workforce.[82] The plaintiff must make some showing that the defendant's practices have caused this imbalance,[83] and the identification of the offending practice will be more or less specific depending on the nature of the challenged practice. The identified practice will often be the inverse of the alternative practice which the plaintiff must offer in stage three of the case. A plaintiff proposing a set of objective criteria in stage three would argue in stage one that the failure to circumscribe employment decisions with such criteria is the offending practice. A plaintiff who accepts the need for subjective criteria for the job involved might argue that appropriate training of the decision-maker would avoid disparate impact, so the failure to provide such training would be the offending practice. Similarly, a plaintiff might challenge the employer's failure to screen its decision-maker for racial or sexual bias, or for the failure to require an independent review of subjective decisions as a guard against illicit bias. These examples demonstrate that a reasoned construction of the identification requirement will not prove an undue burden for plaintiffs. Even in those cases where the offensiveness of the practice is cloaked in the practice's amorphous character, the burden is really no greater than what has always been imposed by stage three of the proof model—proof of the existence of non-discriminatory alternatives.

3. The Causation Requirement

The plurality stated that plaintiffs must prove a causal link between the challenged practice and the disparate impact.[84] At first glance, this might seem to be a difficult burden in the context of subjective practices. However, the plurality explained that such proof is largely a matter of showing a statistical disparity "sufficiently substantial . . . [to] raise such an inference of causation."[85] The Court elaborated on this element of proof by reiterating the well-established principles governing the statistical analysis of the case. "[S]mall or incomplete data sets and inadequate statistical techniques" will not prove causation. Statistics must be based on the applicant pool exclusive of applicants lacking minimal job qualifications.[86] The plurality was articulating in terms of causation the same requirements which earlier opinions have articulated in terms of defining a disparate impact.[87]

The more significant question relates to the degree to which plain-

82. *Id.* at 2788.
83. *See infra* Part III(3).
84. *Watson*, 108 S. Ct. at 2788-89.
85. *Id.* at 2789.
86. *Id.* at 2790.
87. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (insufficiency of statistics to show impact of exclusion of methadone users); Dothard v. Rawlinson, 433 U.S. 321 (1977) (sufficiency of statistics to show impact of height/weight requirement).

tiffs must, for purposes of a *prima facie* case, prove the lack of other causes for the statistical imbalance. The plurality was clearly concerned that:

> It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.[88]

The *Watson* plurality thus emphasized that the disparate impact proof model does not require an employer to prove causes for statistical imbalance other than the challenged employment practice.

It is important to note that the *Griggs/Albemarle* articulation has never required an employer to prove the lack of causation. When defendants have offered causation proof, it has always been as rebuttal to the plaintiff's causation proof in the *prima facie* case. The burden of proof on causation has never shifted to the Title VII defendant.

The *Watson* plurality opinion may stand for the proposition that, where a plaintiff's statistical analysis of the impact of the challenged practice is not otherwise sufficient to prove causation, a plaintiff may be required to disprove other possible causes. However Justice O'Connor's primary point on causation is simply that the burden of proof does not shift to the defendant, but remains with the plaintiff through all stages of the proof model.[89]

Therefore, the plurality's discussion of causation did not create a new standard. Rather, the opinion emphasized that statistical proof must be sufficient to show causation, and that the employer is never required to shoulder the burden of proof on causation. Both principles were already a part of the pre-*Watson* model.

4. Legitimate Business Reasons

In order to rebut a *prima facie* case of disparate impact, an employer has traditionally been required to defend the challenged practice by a showing of "a manifest relationship to the employment in question"[90] or a "genuine business need."[91] The *Watson* plurality referred approvingly to the *Griggs/Albemarle* "business necessity or job relatedness" defense[92] as one of the constraints on disparate impact, which insures that employers will not have to use quotas or preferential treatment.[93]

88. *Watson*, 108 S. Ct. at 2787 (citation omitted).

89. It is also important not to confuse the plurality's discussion of causation with the issue of proper allocation of burden of proof on job relatedness. *Infra* at Part III(5).

90. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

91. *Griggs*, 401 U.S. at 432; *Albemarle*, 422 U.S. at 434.

92. The two terms have traditionally been used interchangeably. Connecticut v. Teal, 457 U.S. 440, 446 (1982); *Griggs*, 401 U.S. at 432; SCHLEI & GROSSMAN, supra note 27, at 1329-30.

93. *Watson*, 108 S. Ct. at 2791.

Hence, it would appear that the "business necessity" standard of justification was reaffirmed.[94]

But the viability of that standard was then called into question within the same paragraph by the plurality's odd use of disparate treatment language to introduce its discussion of stage three:

> [W]hen the defendant has met its burden of producing evidence that its employment practices are based on *legitimate business reasons* . . . .[95]

The term "legitimate business reasons" was not defined or explained in the opinion. Nor was the phrase supported by a citation to precedent which would clarify its meaning in this context. This language, taken at face value, might indicate a lowering of the traditional "business necessity" standard.[96] However, a better reading is that the plurality was not really deviating from the pre-*Watson* standard. If "legitimate business reasons" were construed as a lower standard, the opinion would be incoherent, as it also affirmed the "business necessity standard." In the sentence preceding the "legitimate business reasons" clause, the plurality expressly reaffirmed the more specific articulation of this burden. The term "legitimate business reasons" was used only in an introductory clause for another element of the proof model. The standard which the court clearly articulated for stage two is "manifest job relatedness," citing *Griggs* with approval.[97] So the plurality opinion should not be read as diminishing this burden.

5. Burden Of Production

The same subordinate clause which introduced the "legitimate business reasons" terminology also spoke of the defendant as having a "burden of producing evidence" to rebut the *prima facie* case. At this stage of the case, the pre-*Watson* proof model required the defendant to *prove* manifest job relatedness—not merely to produce evidence.[98] The issue is whether the plurality was actually purporting to modify this standard to a mere burden of production. In disparate treatment cases, which use the "legitimate business reasons" language, the employer does has only a burden of production, so there is some reason to believe

94. In the specific context of subjective criteria, the use of such criteria will usually be justifiable for those upper echelon positions from which women and minorities are still being excluded. *Id.* However, the plaintiff may effectively challenge the manner in which such criteria are measured. For example, it might be argued that some "subjective" traits are actually measurable by psychological testing, that training of the decision-maker could minimize the unfair stereotyping which causes disparate impact, that screening of decision-makers to avoid illicit bias could lessen disparate impact, or that independent review of employment decisions could counteract the effect of such bias. Cases challenging subjective decision-making *per se* will be viable only for those jobs where objective performance tests are feasible. Most subjective practice cases will turn on the employment procedures rather than the criteria being used.

95. *Id.* at 2790 (emphasis added).

96. *See supra* note 29.

97. *Watson*, 108 S. Ct. at 2790.

98. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

that the *Watson* plurality articulated a new and lowered standard for disparate impact.

However, there are also reasons to conclude that the defendant's burden is still the same. The plurality never suggested that it was changing the burden, but purported to be articulating well-settled standards. The sentence containing the "burden of production" language cited with approval *Albemarle Paper Co.* which holds that the employer has the burden of *proving* job relatedness.[99] The previous sentence stated that "an employer has the burden of showing that any given requirement must have a manifest relationship to the employment in question," citing *Griggs* which also places such a burden of proof on the defendant.[100]

The better reading is that the *Watson* plurality acknowledged that the defendant has this burden of proof, and merely stressed that the burden of proving the fact that discrimination (that is, disparate impact) has been caused by a particular practice never shifts. The plurality opinion states:

> Although we have said that an employer has "the burden of showing that any given requirement must have a manifest relationship to the employment in question," . . . such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.[101]

The issue on which the burden of proof remains with the plaintiff is the causation issue. This does not deviate from settled precedent, and does not necessitate lessening the defendant's burden on the issue of job relatedness.

The plurality articulated no intent to change the burden and offered no articulated reason for varying from that burden in subjective practice cases. In fact, the Court observed that the employer will often find it easier in the context of subjective practices to show job relatedness than in the context of objective practices.[102] So the extension of the proof model to subjective cases provides no reason to lighten the job relatedness burden.

Moreover, the plurality's passing use of the word "producing" does not rise to the level of a coherently defined burden of production. True burdens of production should state the quantum of evidence to be produced, since those quanta may be of varying degrees. A party may face a burden to produce a scintilla of evidence, significant evidence, substantial evidence, or any other quantum the court may prescribe. If the *Watson* language prescribed a burden of production, it created a problem for lower courts by failing to prescribe the quantum of evidence required.

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99. *Albemarle*, 422 U.S. at 425.
100. *Griggs*, 401 U.S. at 432.
101. *Watson*, 108 S. Ct. at 2790 (quoting from *Griggs*, 401 U.S. at 432).
102. *Id.* at 2791.

Still, footnote two of Justice O'Connor's opinion implied that the plurality intended to change some of the evidentiary standards. The plurality stated that "each verbal formulation used in prior opinions to describe the evidentiary standards" in disparate impact cases may not "automatically apply" in light of *Watson*. The difference between "business necessity" and "legitimate business reasons" may be a mere difference in verbal formulation. However, the difference between a burden of proof and burden of production is certainly more than a mere difference in "verbal formulation." Considering the case as a whole, the better view is that the employer still has the burden of proof on the issue of job relatedness. However, the opinion is far from clear, and one would hope that the Court will resolve this issue at its earliest opportunity.[103]

6. Validation Studies

In addition to raising questions as to the quantum of evidence required to rebut a *prima facie* impact case, the plurality opinion left open the question of the kind of evidence which the employer must produce. The job relatedness of most objective criteria is measurable by validation studies. However, the Bank in *Watson* contended that subjective practices are not amenable to such validation studies. The plurality opinion was again somewhat inconsistent in its discussion of this issue. It began by noting that "[s]tandardized tests and criteria, like those at issue in our previous disparate impact cases, can often be justified through formal 'validation studies,' which seek to determine whether discrete selection criteria predict actual on-the-job performance."[104] Yet the plurality went on to acknowledge the employer's concern that the defense of subjective criteria with formal validation studies would often be impossible, or at least so expensive as to be impracticable. The plurality responded to this concern by stating that formal validation studies have never been absolutely required, even in the objective practice context.[105] In terms of the subjective cases, the opinion proceeded:

> In the context of subjective or discretionary employment decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a "manifest relationship to the employment in question." It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing.[106]

Thus, the plurality opinion resolved the defendant's concern that formal validation studies would be unduly expensive by clarifying that such vali-

103. It is possible that the Court will resolve this issue more clearly in Atonio v. Ward's Cove Packing Co., 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988), during the Spring term of 1989. However, the employers in *Atonio* have not directly argued that a Title VII defendant does not have the burden of proof on job relatedness. *Atonio* may turn instead on the lower court's ruling as to a shifting of burden of proof on causation.

104. *Watson*, 108 S. Ct. at 2787.

105. *Id.* at 2790-91.

106. *Id.* at 2791.

dation studies are not always required. Beyond that, however, the plurality opinion gave the lower courts little guidance as to what kinds of evidence may be adequate to validate employment practices. The plurality recognized the availability of formal validation studies to measure the job relatedness of a practice. It implicitly recognized and affirmed the use of such validation studies in appropriate contexts, citing *Albemarle Paper Co.* with approval.[107] It is clear that such evidence is still appropriate. On the other hand, the plurality contemplated that some subjective practices (or at least some subjective criteria) will be so manifestly job related that job relatedness is "self-evident."[108] This implies that little or no evidence will be needed to justify the employer's practice.[109] In the absence of more specific guidance from the Court, it seems that the lower courts are left to resolve on a case-by-case basis the questions of the degree and manner of proof required to establish manifest job relatedness.[110]

The plurality has not so much articulated a new standard governing the kind of evidence required for the rebuttal case as it has recited the flexibility of the pre-*Watson* standard, and extended that flexibility even further in light of the extension of the proof model into new and even more varied employment practices. Some practices, and particularly some criteria, may be easily justified without formal validation studies, but some subjective practices may be subject to more scientific validation procedures.[111] The plurality decision could be read as holding that scientific proof is not required even when available.[112] However, it is not reasonable to construe the plurality opinion as relieving defendants of the responsibility to produce whatever evidence of job relatedness is reasonably available and probative.

7. Alternative Practices

If the employer succeeds in validating its employment practice, the

107. *Id.* at 2787.

108. *Id.* at 2791.

109. The kind of practice falling between these two ends of the continuum, and the kind of evidence required to validate such a practice is an open question.

110. Lower courts will need to consider the specific practice which is being challenged in deciding the kind of evidence which will defend it. While certain subjective criteria may be self-evidently and manifestly related to a managerial job, the method of measuring the employee against that criteria may be the subject of challenge. The Court has given no guidance as to what kind of evidence will be required to validate the application aspect of the practice, as distinguished from the criteria aspect. Since the criteria aspect will ordinarily be so easy for the employer to defend, it is likely that most of these cases will focus on the application aspect.

111. *Watson*, 108 S. Ct. at 2795. The brief of the American Psychological Association, submitted as *amicus curiae* in *Watson*, sets out methods for what it calls "scientific validation" of subjective devices such as job interviews. Brief of American Psychological Ass'n at 4-22, Watson v. Ft. Worth Bank & Trust, 108 S. Ct. 2777 (1988) (No. 86-6139). *See also* Bartholet, *supra* note 6, at 987-88.

112. Such a reading of *Watson* would have little practical effect if the defendant's burden on the issue of job relatedness remains one of persuasion. If the plaintiff produces competent scientific evidence of invalidity of a practice, the defendant will probably need competent scientific evidence to counter it, even in the absence of a rigid rule requiring formal validation as an element of the rebuttal case.

burden falls on the plaintiff to offer a non-discriminatory alternative practice which the employer could have used. The questions unanswered by the *Watson* plurality opinion are: (a) how much less discriminatory must the alternative practice be, (b) what kind of evidence will support that practice, in light of the fact that the practice was not used and both the employer's practice and the suggested alternative will often be at least partly subjective, and (c) how adequately must the alternative practice address the employer's legitimate business interests?

As for the degree to which the alternative practice must diminish the disparate impact, the Court was silent. Presumably, this issue is left to be resolved on the same case-by-case basis which the plurality has prescribed for evaluating the disparity of impact in the *prima facie* case.[113] With regard to the nature of proof on this inherently speculative question, the only way to preserve the validity of the impact model is to allow the plaintiff a good deal of latitude. The plaintiff challenging a subjective practice will usually be challenging the procedure rather than the criteria,[114] and the plaintiff will usually be forced to rely, in stage three, on expert testimony that certain types of procedures usually have less adverse impact than the procedures used by the defendant. Of course, the defendant will seek to produce opposing expert testimony. However, all of this evidence will, of necessity, be relatively speculative.

The issue on which the language of the plurality opinion is most confusing is that of how adequate the alternative practice must be from the standpoint of the employer's legitimate interest. Initially, the plurality stated, "the plaintiff must show that other tests or selection devices, without a similarly undesirable racial effect, *would also serve* the employer's legitimate interest in efficient and trustworthy workmanship."[115]

However, in the next sentence the plurality recited factors pertinent to "determining whether [the alternative practice] *would be equally as effective* as the challenged practice in serving the employer's legitimate business goals."[116] While this language could be read as a holding that even a *de minimis* difference in cost, convenience, or efficiency could justify a severely discriminatory practice notwithstanding the availability of substantially adequate and non-discriminatory alternatives, this reading is certainly not a reasoned approach. Proof of equal effectiveness, if strictly and narrowly construed, would rarely be possible. Further, this reading of *Watson* would elevate the most trivial interest of the employer above the plaintiff's and society's interests in equal employment oppor-

113. *Watson*, 108 S. Ct. at 2788.

114. *See supra* Part III(5).

115. *Watson*, 108 S. Ct. 2790 (emphasis added) (citing with approval *Albemarle*, 422 U.S. at 425).

116. *Id.* (emphasis added). The next sentence states that those factors would be pertinent to determining whether the challenged practice is "*the functional equivalent of pretext* for discriminatory treatment." *Id.* The standard and function of stage three is further complicated by this disparate treatment language, again blurring the two models and harkening back to intent. *See infra* note 135.

tunity, and that cannot be the intent of a decision extending the disparate impact model beyond its prior scope. Nor does the plurality opinion state that strict equality of effectiveness is the test. Rather the *Albemarle Paper Co.* standard is affirmed.

The question must remain one of reasonableness. Such factors as the cost, convenience, and efficiency of the competing practices must be balanced against the difference in the degree of disparate impact affected by the competing practices in order to determine whether the use of the challenged practice was discriminatory.[117]

D. *Precedential Value and Scope of Application of the New Disparate Impact Articulation*

The fact that *Watson* is a plurality decision calls into question its precedential value.[118] It is well settled that affirmances by an equally divided Court do not bind lower courts as to principles of law.[119] But the precedential value of decisions where no single rationale is embraced by a majority of the Court presents a more difficult issue. The "holding" of the Court, in such cases, is defined as "the position taken by those members who concurred in the judgment on the narrowest grounds."[120] Just what constitutes the "narrowest grounds" is unclear. Some have suggested that the narrowest opinion is that which, because it does not enunciate broad rules of law, renders the decision applicable to the fewest number of cases.[121] Under this definition, Justice Stevens' concurrence in *Watson* would be the holding of the case since he postpones the enunciation of evidentiary standards for another day. Another approach is to view the narrowest opinion as the one which departs least from the status quo.[122] Under this standard, the opinion of Justice Blackmun could be considered the holding, since it merely repeats the evidentiary standards in earlier disparate impact cases.

Not only is the precedential value of the plurality unclear, but the scope of its application is also unclear. The opinion avoided the issue as to whether its redefinition of disparate impact was intended to apply only to subjective criteria cases, or to all cases of facially neutral employment practices.

The express reason for the rearticulation was clearly occasioned by

117. This notion of balancing has not been explicitly discussed by the Court, but it has sometimes been implicit in earlier opinions. *See* Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (balancing strength of evidence on business necessity with consequences of incorrect decision).

118. Further, the plurality's discussion of the evidentiary standards applicable to disparate impact analysis is dicta.

119. *See, e.g.*, United States v. Pink, 315 U.S. 203 (1942); Hertz v. Woodman, 218 U.S. 205 (1910).

120. Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976). *See also* Marks v. United States, 430 U.S. 193 (1977).

121. Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763 (1980).

122. *Id.* at 764.

the application of disparate impact analysis to subjective employment practices. Justice O'Connor stated in footnote two:

> [W]e believe that this step [of extension to subjective employment practices] requires us to provide the lower courts with appropriate evidentiary guidelines, as we have previously done for disparate treatment cases. Moreover, we do not believe that each verbal formulation used in prior opinions to describe the evidentiary standards in disparate impact cases is automatically applicable in light of today's decision. . . . This congressional mandate [against preferential treatment and quotas] requires in our view that a decision to extend the reach of disparate impact theory be accompanied by safeguards against the result that Congress clearly said it did not intend.[123]

This language emphasizes that the evidentiary guidelines are intended to minimize the risk that extension of the proof model to subjective practice cases would force employers using subjective practices to adopt secret quotas. The use of the word "automatically" indicates that the pre-*Watson* evidentiary standards may still be viable in some cases, but may not apply in others. Thus, the pre-*Watson* standards may still apply in the objective criteria context but not in the subjective criteria context.

Justice O'Connor also introduced the rearticulation by stating:

> We recognize, however, that today's extension of that theory into the context of subjective selection practices could increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment. Because Congress has so clearly and emphatically expressed its intent that Title VII not lead to this result, we think it imperative to explain in some detail why the evidentiary standards that apply *in these cases* should serve as adequate safeguards against the danger that Congress recognized.[124]

The antecedent to "these cases" may well be "subjective selection procedures," another indication that the new standards are required only because of the particular dangers of application to subjective criteria.[125]

It is noteworthy that Justice Blackmun's concurring opinion seems to understand the plurality's new articulation of the evidentiary standards as applying only to subjective employment practices. He stated:

> In so doing, [extending disparate impact analysis to subjective practices] the plurality projects an application of disparate impact analysis to subjective employment practices that I find to be inconsistent with the proper evidentiary standards and with the central purpose of Title VII.[126]

He then went on to call for the traditional statement of disparate impact

123. *Watson*, 108 S. Ct. at 2788 n.2.

124. *Id.* at 2788 (emphasis added) (citation omitted).

125. The ambiguity as to the scope of the applicability of the *Watson* standard is noted in Note, *The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 308, 316 (1988).

126. *Watson*, 108 S. Ct. at 2792 (Blackmun, J., concurring).

evidentiary standards to subjective criteria cases.[127] Even more intriguing is Justice O'Connor's citation to Justice Blackmun's concurrence:

> Moreover, we do not believe that each verbal formulation used in prior opinions to describe the evidentiary standards in disparate impact cases is automatically applicable in light of today's decision. Cf. *post*, at 2791, (Blackmun, J., concurring in part and concurring in judgment).[128]

Justice O'Connor's use of the signal "Cf," generally used to introduce authority which is sufficiently similar to the author's proposition that the cited authority lends support to the author's proposition, may indicate agreement between the plurality and Justice Blackmun's concurrence on the question of the scope of application of the plurality's standards.

Finally, the specific changes in the evidentiary standards appear to be adaptations designed to address the unique problems presented by subjective employment practices, and seem to be unwarranted in the context of objective practices. The Court recognized that objective criteria can be evaluated by formal validation studies. However, subjective criteria may not be so scientifically verifiable. Hence, the Court re-articulated and arguably relaxed the validation element of the defendant's rebuttal case.[129] This relaxation is clearly intended for subjective criteria cases, and the Court's recognition of the availability of better evidence regarding objective criteria belies any claim that these new evidentiary standards are meant to apply in the objective criteria context. Also, the plurality expressly required that in cases of mixed subjective and objective criteria, the specific objectionable practice must be isolated.[130] The Court did not explain this particular need for specific identification,[131] but it may be surmised that the need to isolate the specific component is especially necessary in this context because somewhat different evidentiary standards will apply to different practices depending on whether they are subjective or objective.

Yet, there are also indications that the new standards are applicable to all disparate impact cases. The Court recognized that subjective and objective practices are conceptually similar in that they are facially neutral but may adversely impact a protected class.[132] And the plurality's discussion of the newly articulated standards referred to "the standards of proof in disparate impact cases," without limiting the scope of this phrase to subjective practices.[133] The practical difficulties of distinguishing between subjective and objective criteria (particularly in a multi-component system) and applying two different versions of the proof model may simply be unworkable.

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127. *Id.* at 2792-97.
128. *Id.* at 2788 n.2.
129. *Id.* at 2790.
130. *Id.* at 2788.
131. *Watson* was not a case of mixed subjective and objective criteria. It challenged only subjective criteria.
132. *Watson*, 108 S. Ct. at 2786.
133. *Id.* at 2791.

In the final analysis, it is most likely that the Court has simply not decided which, if any, of the newly articulated standards will apply to all disparate impact cases. And if the plurality is itself divided, or at least undecided, on the application of its own new standards, this is perhaps the clearest indication that the Court is in disarray in its approach to disparate impact.

IV. CONCLUSION

The split of the *Watson* court and the importance of the *Watson* issues virtually ensure that the Court will have another occasion to deal with the disparate impact of subjective criteria.[134] One would hope that the Court will take the opportunity to deal with the problems raised by *Watson's* approach and clarify its ambiguities. The Court should clarify the following issues: (1) that while a plaintiff must specifically identify the challenged practice, the entire procedure can be challenged if the effects of its component parts cannot be separately analyzed; (2) whether the defendant's burden is one of persuasion or production, and if production, what quantity of evidence is required; (3) that while validation studies are not always required, they are the preferred evidence and should be produced where the challenged practice is amenable to validation study at reasonable cost; (4) that in stage three, the adequacy of an alternate practice is determined by balancing the degree of lessened impact of the alternative procedure with the degree to which the alternative procedure would also serve the employer's legitimate needs; and (5) that the plaintiff need not prove that the alternative procedure would serve the employer equally as well as the challenged procedure, so long as it would serve reasonably well.

Until the Court addresses these areas, the language of the plurality opinion will almost certainly invite inconsistent results in the lower courts. The three-Justice concurring opinion authored by Justice Blackmun pinpointed the source of the confusion, as the plurality frequently affirmed traditional impact standards, then elaborated on those standards using language drawn from disparate treatment cases.[135] Reconciling these inconsistencies will be a challenging task for the lower courts. The key to sound interpretation of this plurality opinion is to look beyond a superficial reading of any single phrase, especially one which is contradicted by another phrase or by the plurality's favorable

134. Atonio v. Ward's Cove Packing Co., 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988) now pending before the Court, provides one such opportunity. However, if the Court confines itself to the issues directly presented, many of the issues raised by *Watson* will remain open.

135. *Watson*, 108 S. Ct. at 2791-93. It is argued in Note, *Title VII - Disparate Impact Challenges to Subjective Employment Decisions*, 102 HARV. L. REV. 308, 317-20 (1988), that the plurality is attempting to reframe its basic doctrine of disparate impact analysis; i.e., viewing disparate impact as evidence of invidious intent rather than as a prohibited effect without regard to intent. There are hints to that effect in the plurality decision. However, the language of the plurality and its comprehensive rationale are simply too contradictory and ambiguous to support a conclusion that *Watson* has so fundamentally altered disparate impact doctrine.

citation of traditional impact cases, to consider the chief object of the opinion. The plurality is preserving and extending the impact model. Reading in evidentiary standards which would effectively eviscerate the model is not consistent with preserving it. However, standards which are reasonable for objective practices, but impracticable for subjective practices, may need to be relaxed. The plurality has not specifically defined how this tailoring of the impact model is to be done. That task now falls to the lower courts, guided by reason and a recognition of the continuing importance of equal employment opportunity.