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Shifting Burdens of Proof Under Disparate Impact Analysis: Conflict and Problems of Characterization

I. INTRODUCTION

Disparate treatment and disparate impact are the two basic theories by which discrimination claims are pursued under Title VII of the Civil Rights Act of 1964. In essence, the disparate treatment theory provides a model for proving intentional discrimination, while the disparate impact theory is concerned with discriminatory effects, regardless of intent. Employment discrimination analysis focuses upon specific practices or criteria used by employers as a basis for employment decisions that inflict adverse effects upon individuals or disproportionately upon groups protected by the Act. These criteria are generally classified as being either objective (e.g., test scores, educational achievements and physical characteristics) or subjective (e.g., perceived abilities or personality characteristics and third-party references or recommendations).

The Supreme Court of the United States granted certiorari in Watson v. Fort Worth Bank & Trust to resolve a conflict in the circuits as to whether disparate impact analysis is properly applicable to subjective employment criteria. The decision of the Court was announced in a plurality opinion: the eight participating justices agreed that disparate impact analysis is applicable to subjec-


2. See, e.g., Strangers in Paradise, supra note 1, at 62. See also infra notes 8-32 and accompanying text for additional discussion of these two theories.

3. See, e.g., The Legacy of Griggs, supra note 1, at 17.


5. Id. at 2783. Clara Watson, a black employee of the defendant bank, on behalf of herself and others similarly situated, claimed unlawful racial discrimination by the bank in its hiring, promotion, and other employment practices. The district court divided the class, decertified the subclasses and dismissed Watson’s individual claims of discrimination. On review, the Court of Appeals for the Fifth Circuit held, among other things, that subjective or discretionary employment criteria must be analyzed under the disparate treatment rather than the disparate impact theory of discrimination. Id. at 2782-83.
tive criteria, but the consensus broke down when the plurality's discussion turned to the proper allocation of the burdens of proof, another issue over which the circuits were split.\(^6\) Because a majority were unable to agree upon whether the burden of persuasion or merely the burden of production shifts to the defendant after the plaintiff's prima facie case has been established, the conflict remains.\(^7\)

However, the *Watson* conflict over the proper evidentiary standards in disparate impact cases should be viewed as one of characterization rather than substantive disagreement. Depending on the particular facts of a disparate impact case, the defendant may bear an independent burden of persuasion as well as a burden of production after the plaintiff establishes a prima facie case. Therefore, *Watson* does not necessarily reflect or raise a true conflict over evidentiary standards, and the opinions of Justices O'Connor and Blackmun can be reconciled.

II. TWO THEORIES OF DISCRIMINATION: DISPARATE TREATMENT AND DISPARATE IMPACT

The disparate treatment and disparate impact theories of dis-

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6. *See, e.g.*, NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) (establishing a prima facie disparate impact case only shifts the burden of production); *see infra* notes 85-87 and accompanying text; Johnson v. Uncle Ben's, Inc., 657 F.2d 750 (5th Cir. 1981) (establishing prima facie disparate impact case shifts the burden of persuasion).

7. The judgment of the circuit court was vacated and the Supreme Court remanded the case for further proceedings consistent with its opinion. 108 S. Ct. at 2791. The plurality opinion, written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices White and Scalia, *id.* at 2782, first held "that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases," *id.* at 2787. The plurality then entered into a discussion of the evidentiary standards applicable to discrimination claims under Title VII and concluded that under disparate impact as well as disparate treatment analysis, the plaintiff bears the burden of persuasion at all times. *Id.* at 2787-90.

Justice Blackmun, joined by Justices Brennan and Marshall, wrote an opinion concurring in the judgment and the application of disparate impact analysis to subjective criteria as set forth in the plurality opinion, *id.* at 2791, but argued that the Court's previous decisions have clearly held that, under disparate impact analysis, the burden of persuasion shifts to the defendant after the plaintiff has established his prima facie case. *Id.* at 2792.

Justice Stevens, writing separately, concurred in the judgment and the applicability of disparate impact analysis to subjective criteria, but stated that he would "postpone any further discussion of the evidentiary standards set forth in our prior cases until after the District Court has made appropriate findings concerning this plaintiff's prima facie evidence of disparate impact and this defendant's explanation for its practice of giving supervisors discretion in making certain promotions." *Id.* at 2797.

Justice Kennedy did not participate in either the consideration of the case or in the decision. *Id.* at 2791.
Disparate Impact

Disparate discrimination were developed through caselaw as vehicles or models for pursuing claims of illegal discrimination under section 703(a) of Title VII. The Supreme Court has characterized the two theories as follows:

"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 differences in treatment . . .

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory . . . Either theory may, of course, be applied to a particular set of facts.

8. 42 U.S.C. § 2000e-2(a) (1982). Section 703(a) provides:
(a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

The leading case in the development of the disparate treatment model of discrimination is generally acknowledged to be McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See, e.g., Smith, Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs v. Burdine, 55 TEMP. L.Q. 372, 375 (1982) [hereinafter Smith]. Griggs v. Duke Power Co., 401 U.S. 424 (1971), is the seminal case in the development of the disparate impact theory. See, e.g., Strangers in Paradise, supra note 1, at 62; The Legacy of Griggs, supra note 1, at 3. However, it was not until Teamsters, in footnote 15, that the Court "crystallized" the distinction between the two approaches. See The Legacy of Griggs, supra note 1, at 3 n.13. See infra notes 11-17 and accompanying text for additional discussion of McDonnell Douglas and Griggs.

Teamsters was a "pattern and practice" action brought under § 707(a) of Title VII, which provides:
(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States . . .

(c) Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the [Equal Employment Opportunity]
Although both individual and class actions may be brought under either the disparate treatment or the disparate impact theory, the allocation of the burdens of proof is not dependent upon whether the claim is made on behalf of an individual or a class. The methods of proof, however, may vary between individual and class actions under either theory.\(^1\)

Disparate treatment may be proved directly, by evidence of intentional discrimination, or indirectly, by evidence from which discriminatory intent may be inferred.\(^1\) In *McDonnell Douglas Corp. v. Green*,\(^2\) the Supreme Court set forth four elements required to indirectly establish a prima facie case of intentional discrimination:

\[(i) \text{that . . . [plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.}^1\]

The disparate impact theory had been previously announced by Commission.


In *Teamsters*, the government claimed that a nationwide motor carrier and the union had engaged in a systemwide pattern or practice of discrimination because of the operation of a seniority system which perpetuated past racial and ethnic discrimination. 431 U.S. at 328. In an opinion by Justice Stewart, joined by Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and Stevens, the Court held that the seniority system was bona fide and therefore protected under § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1982). 431 U.S. at 355-56. Justice Marshall, joined by Justice Brennan, filed a separate opinion stating his agreement with Justice Stewart's finding that the government had proved an unlawful pattern of discrimination and that the employees who had demonstrated that they were harmed were presumptively entitled to full relief. *Id.* at 377. Justice Marshall did not agree, however, that seniority systems which perpetuate discriminatory effects are protected by § 703(h). *Id.* at 394.

10. See, e.g., Smith, *supra* note 9, at 373 n.3.

11. See, e.g., 431 U.S. at 335 n.15, 429 n.44; Willborn, *supra* note 1, at 800; Nelson & Ward, *supra* note 9, at 302. See also *supra* text at note 9 and *infra* text at note 32.

12. 411 U.S. 792 (1973). *McDonnell Douglas* was an individual action brought by a black civil rights activist claiming that the defendant company had refused to rehire him because of his race and his participation in civil rights activities. *Id.* at 794-96. Justice Powell delivered the unanimous opinion of the the Court. *Id.* at 793.

13. *Id.* at 802. The Court noted that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to different factual situations." *Id.* at 802 n.13. See, e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (*McDonnell Douglas* prima facie case requirements adapted to a gender discrimination case).
the Supreme Court in *Griggs v. Duke Power Co.* The requirements for establishing a prima facie case under this theory are: (1) identification of a facially neutral criterion or practice; (2) an adverse employment decision resulting from the specified practice; and (3) a statistically significant, disproportionate impact of the adverse effect upon a protected group. Establishing a *McDonnell Douglas* prima facie case under the disparate treatment theory raises an inference of intentional discrimination, while under the disparate impact theory the prima facie case demonstrates discriminatory effects of a specified practice.

In *Texas Department of Community Affairs v. Burdine*, the Supreme Court clearly prescribed the allocation of the burdens of proof in disparate treatment cases. The Court began by reviewing the relevant part of its holding in *McDonnell Douglas*:

First, the plaintiff has the burden of proving by the preponderance of the

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14. 401 U.S. 424 (1971). *Griggs* was a class action suit brought by black employees of the defendant power company. The Court held that, unless justified by business necessity, a high school diploma requirement and the use of standardized intelligence tests to determine qualification for employment opportunities were prohibited by Title VII if the use of such criteria resulted in or perpetuated a significant discriminatory effect, regardless of motive or intent. *Id.* at 425-31. Chief Justice Burger delivered the opinion of the Court, which was unanimous except for Justice Brennan, who did not participate in either the consideration or the decision of the case. *Id.* at 425.

15. *Id.* at 431. The term "prima facie case" is not explicitly used in this opinion. The elements required to establish a prima facie case are implicit in that part of the opinion which states:

What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

... The Act prescribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.

*Id.* It must be noted that the term "statistical significance" refers to a rigorous mathematical concept involving a variety of distinct tests, and it is an important aspect of disparate impact analysis. See, e.g., Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 448-51 (1985) [hereinafter Gold]; *The Legacy of Griggs*, supra note 1, at 21-22; Willborn, *supra* note 1, at 822-23. See also EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (1988). The scope of this comment, however, does not require a definition of statistical significance, and none is attempted.

16. 450 U.S. at 254.

17. See, e.g., 401 U.S. at 432; Willborn, *supra* note 1, at 801; Smith, *supra* note 9, at 373 n.3; Nelson & Ward, *supra* note 9, at 306.

18. 450 U.S. 248 (1981). In *Burdine*, where an individual action was brought by a female employee claiming that her employment was terminated because of intentional gender discrimination, the Court systematically detailed the proper allocation of the burdens of proof in disparate treatment cases. *Id.* at 249-56. Justice Powell delivered the unanimous opinion of the Court. *Id.* at 249.
evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” [citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)] Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. at 804.19

Expressly holding that “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff,”20 the Burdine Court explained that establishing a prima facie case merely creates a rebuttable presumption of unlawful discrimination.21 The burden which shifts to the defendant at this point is the burden of producing sufficient evidence to rebut that presumption.22 If this burden is carried by the defendant, then the plaintiff bears the burden of persuading the court that the defendant’s explanation is either untrue or pretextual.23

Until Watson, however, the Supreme Court never attempted to definitively set forth a distinct system of allocating the burdens of proof under disparate impact analysis. In Griggs, after announcing the requirements for a prima facie case under disparate impact analysis, the Court merely stated that “Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.”24 This rather cryptic statement was expanded upon by the Court in Albemarle Paper Co. v. Moody,25 wherein it stated:

19. Id. at 252-53.
20. Id. at 253.
21. Id. at 254.
22. Id.
23. Id. at 255-56.
25. 422 U.S. 405 (1975). Albemarle Paper was a class action suit brought by black employees seeking injunctive relief and backpay on the basis of claims that the effects of past discriminatory practices were perpetuated by a “job seniority” system, and that the company’s testing program in its skilled lines of employment continued to have a disproportionate, adverse impact on blacks. Id. at 408-09. The decision of the Court clarified “the appropriate standard of proof for job relatedness,” and remanded the case for proceedings consistent with its opinion. Id. at 436. The opinion of the Court was delivered by Justice Stewart and was joined by Justices Douglas, Brennan, White, Marshall and Rehnquist. Id. at 407. Justices Marshall, Rehnquist and Blackmun filed concurring opinions; Chief Justice Burger filed an opinion in which he concurred in part and dissented in part. The concurring and dissenting opinions focused upon the backpay issue, the applicable EEOC Guidelines and the amount of deference which courts should afford them. Id. at 440-53. Justice Powell did not participate in either the consideration or the decision of the case. Id. at 436.
This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to 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." Id., at 801. Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. Id., at 804-805.26

Although the Albemarle Paper Court used the disparate treatment model for allocating the burdens of proof under disparate impact analysis, later, in Furnco Construction Co. v. Waters,27 Justice Marshall, in a separate opinion, stated: "Where the Title VII claim is that a facially neutral employment practice actually falls more harshly on one racial group, thus having a disparate impact on that group, our cases establish a different way of proving the claim."28 However, in Furnco, Justice Marshall did not expressly set forth a burden of proof allocation scheme comparable to, but distinct from, that established by Burdine for disparate treatment cases. Subsequent cases have provided no significant additional clarification.29

There is no indication in the cases or in Justice Blackmun's opinion in Watson that the initial burden of establishing a prima facie case of disparate impact is any different than that of disparate treatment.30 What is contested is the evidentiary weight car-

26. Id. at 425.
28. Id. at 583 (Marshall, J., concurring in part and dissenting in part) (citations omitted). In Furnco, three black bricklayers claimed discriminatory hiring practices under both disparate treatment and disparate impact theories. Id. at 569. The Court rejected disparate impact analysis in this case, id. at 567 & n.7, and agreed that although the plaintiffs had established a McDonnell Douglas prima facie case, id. at 575, they had not proved the ultimate fact of discriminatory intent, id. at 579. The court held that the defendant must be given the opportunity to justify the challenged practice by producing evidence of business necessity to rebut the inference of "discriminatory animus." Id. at 577-80. Justice Rehnquist, joined by Chief Justice Burger and Justices Stewart, White, Blackmun, Powell and Stevens, delivered the opinion of the Court. Id. at 568. Justice Marshall, joined by Justice Brennan, wrote separately to express concurrence with the majority's finding that the case had to be remanded for a determination of whether the defendant had rebutted the plaintiff's McDonnell Douglas prima facie case, id. at 582, but did not agree that the facts in the case could not support a finding of disparate impact under Griggs, id. at 583.
ried by the prima facie case of disparate impact once it has been established.\textsuperscript{31} As Justice Blackmun explained:

Unlike a claim of intentional discrimination, which the \textit{McDonnell Douglas} factors establish only by inference, the disparate impact caused by an employment practice is \textit{directly} established by the numerical disparity. . . . The plaintiff in such a case already has proved that the employment practice has an improper effect; it is up to the employer to prove that the discriminatory effect is justified.

Intertwined with the plurality’s suggestion that the defendant’s burden of establishing business necessity is merely one of production is the implication that the defendant may satisfy this burden simply by “producing evidence that its employment practices are based on legitimate business reasons.” \textit{Ante}, at 2790. . . . But again the plurality misses a key distinction: An employer accused of discriminating intentionally need only dispute that it had any such intent—which it can do by offering \textit{any} legitimate, nondiscriminatory justification. Such a justification is simply not enough to legitimate a practice that has the effect of excluding a protected class from job opportunities at a significantly disproportionate rate.\textsuperscript{33}

Therefore, the essence of the dispute is whether, once a prima facie case of disparate impact has been established, a defendant may merely rebut the plaintiff’s evidence or must affirmatively prove business necessity in order to avoid liability.

\textbf{III. Analysis}

\textbf{A. Presumptions and Inferences}

Authorities are in general agreement that a presumption operates as a procedural mechanism for shifting the burden of proof.\textsuperscript{33} There is disagreement, however, as to whether a presumption, once raised, shifts the burden of persuasion or the burden of production.\textsuperscript{34} Two approaches to this problem have developed: the Thayer view takes the position that a presumption merely shifts the burden of production;\textsuperscript{35} the Morgan view holds that a presumption operates to shift the burden of persuasion.\textsuperscript{36} The Thayer view pre-

\begin{itemize}
  \item \textsuperscript{31} \textit{See supra} notes 6-7 and accompanying text.
  \item \textsuperscript{32} 108 S. Ct. at 2794.
  \item \textsuperscript{33} I J.B. \textit{Weinstein, \textit{Weinstein's Evidence} \textsuperscript{300[01], at 300-2 (1988) [hereinafter \textit{Weinstein}]. The term “presumption,” as used herein, refers to a rebuttable presumption, \textit{i.e.}, a procedural rule of law, rather than a conclusive presumption, which is a substantive rule of law. \textit{Id.}}}
  \item \textsuperscript{34} \textit{Id.}
  \item \textsuperscript{35} \textit{Thayer, A Preliminary Treatise on Evidence} 337 (1898), \textit{cited in \textit{Weinstein, supra} note 33, \textsuperscript{300[01], at 300-3 n.7.}}
  \item \textsuperscript{36} \textit{Weinstein, supra} note 33, \textsuperscript{300[01], at 300-5. “Morgan became the chief advocate of this view in a series of articles (see references to [Model Code of Evidence] Rules 301,}}
\end{itemize}
It was incorporated into the Federal Rules of Evidence and was adopted by the Burdine Court. The Morgan approach was endorsed by Professor McCormick and was the position initially taken by the American Law Institute when proposing the Model Code of Evidence. In Watson, the positions taken by Justices O'Connor and Blackmun adopt, respectively, the Thayer and Morgan approaches.

In Burdine, the allocation of the burdens of proof was a proper consideration for the Court because under disparate treatment analysis a McDonnell Douglas prima facie case raises an inference of discriminatory intent. Under disparate impact analysis, however, a prima facie case establishes the "functional equivalent" of discriminatory intent. Therefore, no presumption is raised by a prima facie case of disparate impact. Nevertheless, the position taken by Justice Blackmun in Watson assumes a burden shifting device adequate to impose a burden of persuasion upon the

302, 303), and in his capacity as reporter for the Model Code of Evidence. "Id. at 300-5 n.11.
37. Id.
38. Fed. R. Evid. 301.
40. Weinstein, supra note 33, ¶ 300[01], at 300-5 & n.11.
41. See supra note 7.
42. See supra text accompanying notes 11-13, 16, 32 and infra text accompanying notes 55-63.
44. The term "prima facie case" has been used in two different senses:
[T]he term "prima facie" is sometimes used as equivalent to the notion of a presumption, even in the strict sense of a ruling of the judge putting upon the opponent the duty of producing evidence. . . . [T]his usage of the term is less usual, and . . . ambiguous . . . .
. . . But the phrase "prima facie" is also, and clearly enough, found used in a very different sense, representing the stage . . . where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty . . . . This sufficiency of evidence to go to the jury (the significance of which is that the proponent is no longer liable to a nonsuit or to the direction of the verdict for the opponent) is also often referred to as a prima facie case.

The distinction between the two meanings of the term "prima facie case" reflects the conflict over the shifting burdens of proof in disparate impact analysis, but provides no illumination. Therefore, to avoid further confusion, except where it is said to raise a presumption, the term "prima facie case" will be used in this comment to indicate only a body of evidence sufficient to avoid a nonsuit or a directed verdict in favor of the opponent. Obviously, however, the authors of material quoted or cited may attach a different meaning to the term.
defendant. 45

Although the terms “inference” and “presumption” were not consistently used by the Court in its early Title VII opinions, a general pattern of their applicability in this context has evolved. 46 In Griggs, the Court made no explicit reference to a prima facie case and, consistent with the “functional equivalence” theory of disparate impact, it made no reference to a resultant inference or presumption. 47 The Griggs Court simply held that the employer bears the burden of showing a “manifest relationship” between a challenged employment practice and the job(s) in question. 48 Similarly, in McDonnell Douglas, although expressly announcing the required elements of a prima facie case, the Court stated, without overt acknowledgment of either an inference or a presumption, that once a prima facie case has been established, “[t]he burden must then shift to the employer to articulate some legitimate, non-discriminatory reason for the employee’s rejection.” 49 Furthermore, in Albemarle Paper, the Court reviewed its holding in Griggs regarding the allocation of the burdens of proof without express reference to the creation of either an inference or a presumption. 50

In Teamsters v. United States, 51 the Court declared:

This initial showing [of a prima facie case] justified the inference that the minority applicant was denied an employment opportunity for reasons prohibited by Title VII, and therefore shifted the burden to the employer to rebut that inference by offering some legitimate nondiscriminatory reason for the rejection. 52

And, in a footnote, the Teamsters Court characterized its opinion in Franks v. Bowman Transportation Co., 53 a Title VII “pattern and practice” case decided the previous year, as holding:

[Proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief [that] is consistent with the manner in

45. See supra note 7.
46. Properly speaking, an inference is a rule of logic or reason, while a presumption is a rule of law. Weinstein, supra note 33, ¶ 300[01], at 300-2.
47. See supra note 14.
49. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Court did state, however, that “on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.” Id. at 805.
52. Id. at 358 (emphasis added; citations omitted).
which presumptions are created generally. Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform to a party's superior access to the proof. See C. McCormick, Law of Evidence §§ 337, 343 (2d ed 1972); James, Burdens of Proof, 47 Va L Rev 51, 61 (1961).

In Furnco, the Court stated that a McDonnell Douglas prima facie case of disparate treatment "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Elaborating upon this statement, the Burdine Court held:

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

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.

By way of further explanation, the Burdine Court stated that under the disparate treatment theory, a prima facie case, once established, becomes "a legally mandatory, rebuttable presumption;" and, relying upon common law tradition, Wigmore, the Federal Rules of Evidence, and James and Hazard, the Court adopted the position that "[t]he word 'presumption' properly used refers only to a device for allocating the production burden." Finally, the Burdine Court, adopting the Thayer view of presump-
tions, explained that when a defendant meets his burden of production, "the presumption drops from the case."63

Consequently, in Watson, the position taken by Justice O'Connor comports with the dominant body of authority regarding inferences and presumptions in that it does not involve a shifting burden of persuasion.64 Nevertheless, the position taken by Justice Blackmun65 represents the generally accepted view that the defendant does bear the burden of persuasion to prove business necessity after the plaintiff has established a prima facie case of disparate impact.66 However, if business necessity is viewed as an affirmative defense rather than rebuttal to a prima facie case of disparate impact, the need to explain a "shifting" burden of persuasion under disparate impact analysis is eliminated.

B. Business Necessity as Affirmative Defense

An affirmative defense is defined as "matter constituting a defense; new matter which, assuming the complaint to be true, constitutes a defense to it."67 In their general discussion of affirmative defenses, Wright and Miller state:

Rule 8(c) [of the Federal Rules of Civil Procedure] requires that a responsive pleading must set forth certain enumerated affirmative defenses and "any other matter constituting an avoidance or affirmative defense." This subdivision should be read in conjunction with, and distinguished from, Rule 8(b), which deals with denials or negative defenses.

Rule 8(c) is a lineal descendent of the common law plea in "confession and avoidance," which permitted a defendant who was willing to admit that plaintiff's declaration demonstrated a prima facie case to then go on and

63. Id. at 255 n.10 (citing J. Thayer, Preliminary Treatise on Evidence 346 (1898)). This theory is also known as the "bursting bubble" theory because it holds that a presumption is totally destroyed if successfully rebutted. See, e.g., Weinstein, supra note 33, ¶ 300[01].

64. See supra note 7 and text accompanying notes 35-45.

65. See supra note 7.

66. See, e.g., Rutherglen, supra note 29, at 1312 & n.63; The Legacy of Griggs, supra note 1, at 21-22.

67. Black's Law Dictionary 55 (5th ed. 1979). The word "defense," as a legal term of art originally referred only to the denial or contravention of a plaintiff's averments; it did not include attempts at justification or avoidance by the introduction of new matter. See 71 C.J.S. Pleadings § 140 (1951). Eventually, the term "defense" came to include justifications and avoidances, as well as denials. Still later, the term "defense" became primarily associated with attempts at justification or avoidance, and "denial" began to be used in place of "defense" to indicate contravention. Since attempts at justification and avoidance by introduction of new matter are also characterized as affirmative defenses, it is not inconsistent to refer to denials as negative defenses. See infra notes 89-118 and accompanying text for a discussion of business necessity as a negative defense.
allege additional new material that would defeat plaintiff's otherwise valid cause of action.\footnote{68}

Although not among the nineteen affirmative defenses enumerated in Federal Rule of Civil Procedure 8(c), business necessity can be "other matter constituting an avoidance"\footnote{69} under the rule. The following factors have been considered, in nondiversity cases, to determine what "other matters" must be pleaded affirmatively rather than by denial: (1) whether the matter arises from the plaintiff's allegations by logical inference; (2) policy considerations, including fairness, convenience to the parties, and elimination of the possibility of surprise; and (3) the probable existence of the matter to be asserted.\footnote{70}

The doctrine of business necessity, under the \textit{Griggs} line of cases, operates as an affirmative defense. The \textit{Griggs} Court, announcing the business necessity doctrine, stated:

\begin{quote}
What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

\ldots{} The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.\footnote{71}
\end{quote}

Later, in \textit{Dothard v. Rawlinson},\footnote{72} the Court added that "[i]f the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest.'"\footnote{73}

The application of the Wright and Miller criteria for determining when judicial creation of an affirmative defense is appropriate\footnote{74} to the business necessity doctrine as described by the Court, indicates that the doctrine can reasonably be characterized as an affirmative defense. First, business necessity is not a reasonable inference raised by a prima facie case of disparate impact. A facially neutral employment practice with a discriminatory impact may be used by an employer to mask discriminatory intent or it

\begin{footnotes}
\footnote{68}{5 C. \textsc{Wright} & A. \textsc{Miller}, \textit{Federal Practice and Procedure} § 1270, at 289 (1969) (quoting \textit{Fed. R. Civ. P. 8(c);} footnotes omitted) [hereinafter \textsc{Wright} \& \textsc{Miller}].}
\footnote{69}{\textit{Fed. R. Civ. P. 8(c).}}
\footnote{70}{\textsc{Wright} \& \textsc{Miller}, \textit{supra} note 68, § 1271, at 311-16.}
\footnote{71}{\textsc{Griggs} v. \textit{Duke Power Co.}, 401 U.S. 424, 431 (1971).}
\footnote{72}{433 U.S. 321 (1977).}
\footnote{73}{\textit{Id.} at 329 (quoting \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405, 425 (1975)).}
\footnote{74}{See \textit{supra} text accompanying note 70.}
\end{footnotes}
may "operate invidiously," contrary to any significant business purpose, with the employer unaware or unconcerned. Therefore, such a practice cannot be said to be logically related to business necessity.

Second, the Griggs requirement that an employer show a "manifest relationship" between the job and the questioned employment practice establishes a policy that business necessity, like certain other defenses (fraud, statute of frauds, statute of limitations, etc.), "must be particularly alleged by the defendant," so as to give notice to the plaintiff and provide him the opportunity to gather rebuttal evidence. Also, since a plaintiff may rebut a showing of business necessity by demonstrating that the defendant's explanation is pretextual or that other less discriminatory options were available, the considerations of fairness, convenience to the parties, and elimination of surprise all support the characterization of business necessity as an affirmative defense.

Third, and finally, the widespread application of disparate impact analysis (as well as the fact that it was created at all) as a means for identifying situations in which employment practices unrelated to measuring job capability had a significantly disproportionate and adverse impact on protected groups indicates that business necessity is not a "probable" justification for employment practices having significant discriminatory effects.

Asserting that business necessity can operate as an affirmative defense is not a novel approach. Justice White, in Guardians Association v. Civil Service Commission, stated: "If the grantee can bear the burden of proving some 'business necessity' for practices that have discriminatory impact, it has a complete affirmative defense to claims of violation." Some commentators have also contended that business necessity is an affirmative defense in disparate impact cases. John F. Smith, III, for example, stated:

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75. See supra note 71 and accompanying text.
76. 401 U.S. at 432.
77. WRIGHT & MILLER, supra note 68, § 1271, at 313 (quoting CLARK, CODE PLEADING § 96, at 609-10 (2d ed. 1947)).
79. 463 U.S. 582 (1983). In Guardians, black and Hispanic police officers claimed disparate impact as a result of written examinations. The district court grant relief under both Title VII, 42 U.S.C. §§ 2000e—2000h-6 (1982), and Title VI, 42 U.S.C. §§ 2000d—2000d-7 (1982), of the Civil Rights Act of 1964. Id. at 584-88. Five separate opinions were filed in the Supreme Court's decision in the case, with Justice White announcing the judgment of the court. The controversy embodied in the separate opinions, however, focused on the Title VI aspect of the case. Id. at 584-645.
80. Id. at 598.
Although the proper allocation of burdens cannot be determined by arbitrarily labeling an issue as an affirmative defense, it is nonetheless important to inquire whether business necessity is basically in the nature of a contravention of plaintiff’s claim or in the nature of a defense of confession and avoidance. This leads to a crucial inquiry into whether business necessity is fundamentally different from the articulation of a legitimate, nondiscriminatory reason in disparate treatment cases. Smith compared the business necessity defense of disparate impact analysis with the defense options under disparate treatment analysis: contravention of the plaintiff’s allegations by “articulating a legitimate, nondiscriminatory reason” (denial); or justification by claiming a bona fide occupational qualification (affirmative defense). Smith concluded that “the business justification defense in disparate impact cases is analytically different from the ‘contravention’ of the inference of intent in disparate treatment cases,” and is, therefore, properly characterized as an affirmative defense. There is, however, authority contrary to the characterization of business necessity as an affirmative defense in disparate impact cases. The Third Circuit Court of Appeals, for example, in NAACP v. Medical Center, Inc., rejected the argument that “in countering a prima facie case of discriminatory impact, the defendant is presenting something in the nature of an affirmative defense . . . .” Seeking procedural symmetry between disparate treatment and disparate impact cases, and to prevent what the court perceived to be a heavier burden being placed on defendants claimed to have caused discriminatory effects than is placed on those al-

81. Smith, supra note 9, at 393 (footnote omitted).
82. Id. at 394. The bona fide occupational qualification (BFOQ) defense is set forth in § 703(e) of Title VII:
Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.
83. Id. at 405.
84. Id.
85. 657 F.2d 1322 (3d Cir. 1981) (a prima facie case of the disproportionate effect of the reorganization and relocation of medical center facilities did not shift the burden of persuasion to the defendant).
86. Id. at 1333.
leged to have intentionally discriminated, the court of appeals in *NAACP* rejected the characterization of business necessity as an affirmative defense in order to avoid placing a burden of persuasion on the defendant.\(^{87}\) However, these two aims could have been achieved by defining business necessity so that it could be characterized as either a denial, which would bear only the burden of producing sufficient evidence to avoid a directed verdict, or as an affirmative defense, which bears an independent burden of persuasion in the same manner as the bona fide occupational qualification defense in disparate treatment cases.\(^{88}\)

C. *Business Necessity as a Negative Defense*

The concept of business necessity can also be used as a negative defense to a prima facie case of disparate impact.\(^{89}\) Although apparently inconsistent with its characterization as an affirmative defense, a form of business necessity can be used alternatively, even in the same case, as a means of controverting the prima facie case.

Professor Michael Evan Gold made the following observation regarding a prima facie case of disparate impact:

[I]nstead of trying to delineate the available work force, adverse impact plaintiffs must rely on the concept of proxies. A proxy is a class of persons with two important characteristics: first, the proxy is reasonably representative of the real class in which we are interested; second, information we need about the real class can be obtained about the proxy. Thus, what can be proven to be true of the proxy is inferred to be true of the real class.\(^{90}\)

Once a prima facie case of disparate impact has been established, according to Gold, three courses of action are available to the defendant. First, the proxy nominated by the plaintiff can be challenged as unrepresentative of the actual class upon which the adverse impact is claimed, so that a better proxy would not show the alleged adverse impact.\(^{91}\) Second, the plaintiff's statistical analysis can be challenged as faulty, so that a better analytic method would not show the alleged adverse impact on the class nominated by the plaintiff.\(^{92}\) Third, the plaintiff can attempt to validate his selection

\(^{87}\) *Id.* at 1335-36.


\(^{89}\) *See supra* note 67. See also *Smith*, *supra* note 9, at 393.


\(^{91}\) *Id.* at 436.

\(^{92}\) *Id.*
criterion by demonstrating its job relatedness.\textsuperscript{93}

Professor Gold further asserted that all three options constitute denials or methods of controverting the plaintiff's prima facie case, rather than defenses of an affirmative nature. While the first two are obviously so, the third is also a denial, according to Gold, because it is actually the same as the first.\textsuperscript{94} Professor Gold reasoned as follows:

An employer is allowed to use a valid selection criterion, despite its adverse impact, because the criterion distinguishes qualified from unqualified persons. Therefore, proof that a selection criterion is valid is proof that persons who do not satisfy the criterion are not members of the available work force. It follows that, when an employer validates a selection criterion, he proves that the persons whom the criterion excludes are unqualified and, consequently, any adverse impact on them is legally irrelevant. Because these persons were included in the plaintiff's proxy, the employer has proved that his proxy (generated by a valid selection criterion) more accurately represents the available work force. Thus, validation of a selection criterion is not a defense to discrimination, but an attack on a key element of the prima facie case.\textsuperscript{95}

This analysis led Gold to the conclusion that the defense to a prima facie case of disparate impact is \textit{limited} to rebuttal.\textsuperscript{96} However, one need not accept this conclusion in order to accept job relatedness (business necessity) as a potential negative defense \textit{as well as} an affirmative defense to a prima facie case of disparate impact.

A different basis for characterizing business necessity as a negative defense can be constructed through acceptance of an alternative rationale for disparate impact analysis. Professor Willborn has identified four basic theories or rationales for the disparate impact model\textsuperscript{97} of discrimination: (1) the intent theory; (2) the past discrimination theory; (3) the functional equivalence theory; and (4) the economic theories.\textsuperscript{98} The intent theory views evidence of discriminatory effect as evidence of discriminatory intent.\textsuperscript{99} Under the past discrimination theory, discriminatory effects result from neutral criteria because the criteria operate to preserve the effects of

\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.} at 436-37 (footnote omitted).
\textsuperscript{96} \textit{Id.} at 438-39.
\textsuperscript{97} Willborn uses the word "model," in this context, to refer only to the legal elements of a Title VII claim. Willborn, \textit{supra} note 1, at 800 n.2.
\textsuperscript{98} \textit{Id.} at 804.
\textsuperscript{99} \textit{Id.}
past discriminatory practices. The functional equivalence theory treats neutral criteria resulting in discriminatory effects as the functional equivalent of intentional discrimination. Finally, the economic theories explain the disparate impact model through labor market analysis.

Willborn reviewed and analyzed each of the rationales, and, except for one of the economic theories, the statistical discrimination model, he found them inadequate. The intent theory fails, ultimately, because it does not comport with the holdings of Griggs and Albemarle Paper. The past discrimination theory “does not explain all the current uses of the disparate impact model and presents equity problems between perpetuators of discrimination and discriminators in the past and between nonvictim beneficiaries and nonbeneficiaries.” The functional equivalence theory is inadequate, according to Willborn, because it disregards the history of discriminatory practice and, consequently, can be unfairly narrow in application.

Economic analysis of discriminatory effects upon the labor market has resulted in two market analysis theories of disparate impact. The first is the Becker model, which “focuses on the consequences of nonproductivity-based preferences.” The second is the statistical theory of discrimination, which “focuses on the imperfections in the flow of market information.” Willborn proposed that the statistical discrimination theory provides the best explanation and model for the application of disparate impact analysis.

Willborn criticized the Becker model for providing no “guidance in the . . . situation in which a criterion is neither wholly unre-
lated to productivity nor closely related to productivity,"\textsuperscript{111} which occurs more frequently than situations in which employment practices have no productivity basis.\textsuperscript{112} Furthermore, Becker's theory does not explain why market competition has not eliminated those enterprises which base employment decisions on the personal biases of the employer rather than on productivity concerns.\textsuperscript{113}

The statistical discrimination theory, however, "assumes that employers lack sufficient information to evaluate at a reasonably low cost the productivity potentials of workers. . . . [and] substitute readily available proxies such as race, sex, education, or experience for precise, but costly, productivity information."\textsuperscript{114} Under this theory, the use of proxies having a significant adverse impact on a protected group would be prohibited unless the relationship between the proxy and productivity were sufficiently close:\textsuperscript{115}

\begin{quotation}
[T]he statistical discrimination theory balances the degree of disparate impact against the degree of correlation between the employment criterion and job performance. Under this model, if the degree of disparate impact is low, then the required correlation between the employment criterion and job performance also is low. Similarly, if the degree of disparate impact is high, the correlation between the employment criterion and job performance must be high.\textsuperscript{116}
\end{quotation}

Willborn describes the relationship between traditional disparate impact analysis and the business necessity doctrine as follows:

Under the traditional disparate impact model, business necessity involves an inquiry separate from the inquiry into disparate impact. A sufficient disparate impact must first be shown and then a separate inquiry must be made to determine if business necessity justifies use of the criterion. Each determination has its own separate standards.\textsuperscript{117}

Under the statistical discrimination theory, however, "business necessity and disparate impact are intimately connected . . . [t]he two elements are used in tandem to isolate those instances of statistical discrimination that are impermissible."\textsuperscript{118} Consequently, under the statistical discrimination theory, evidence of business necessity is used to controvert evidence introduced to establish a

\begin{footnotes}
\textsuperscript{111} Id. at 817.
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 817-18.
\textsuperscript{114} Id. at 818 (footnotes omitted).
\textsuperscript{115} Id. at 822.
\textsuperscript{116} Id. at 825.
\textsuperscript{117} Id. at 822.
\textsuperscript{118} Id. at 824.
\end{footnotes}
prima facie case under disparate impact analysis.

IV. CONCLUSION

The proper allocation of the burdens of proof in disparate treatment cases has been clearly set forth in the *McDonnell Douglas-Burdine* line of cases. The ultimate fact to be proven in a disparate treatment case is intentional discrimination. Proof can be made in either of two ways: by offering evidence of intentional discrimination or by establishing a *McDonnell Douglas* prima facie case, which creates an inference of discriminatory intent. Under either alternative, however, the defendant has the option of introducing sufficient evidence to rebut the plaintiff's showing of discriminatory intent (or the inference of such) or to establish an affirmative defense, such as a bona fide occupational qualification. In the face of either a direct showing of discriminatory intent or a *McDonnell Douglas* prima facie case, the defendant's burden is merely to introduce sufficient rebuttal evidence to prevent the plaintiff from meeting her evidentiary burden. In order to establish an affirmative defense in a disparate treatment case, as in any other case, the defendant must meet an independently established standard of proof.

The ultimate fact to be proven in a disparate impact case is the unjustifiable, statistically significant, disproportionate, adverse effect upon a particular group. The plaintiff's prima facie case is established with evidence of discriminatory impact and it establishes the functional equivalent of discriminatory intent. A prima facie case under disparate impact analysis does not raise a presumption of discriminatory intent; it is evidence of the ultimate fact to be proved. Therefore, there is no actual shifting of the burden of persuasion in disparate impact cases; the plaintiff must initially meet the burden of production and, ultimately, the burden of persuasion in establishing her prima facie case. If the defendant cannot produce sufficient evidence to undercut the plaintiff's proffered evidence, so as to prevent the plaintiff from meeting her evidentiary burden, the defendant's only remaining option to avoid liability is to justify the discriminatory impact by proving an affirmative

119. See supra notes 11-13, 18-23 and accompanying text.
120. See supra notes 19-22, 49, 51-62, 82, 88 and accompanying text.
121. See supra notes 20-23, 56 and accompanying text.
122. See supra note 88 and accompanying text.
123. See supra notes 17, 32, 42-48, 75, 105 and accompanying text.
defense. Business necessity, under the disparate impact theory, is properly characterized as an affirmative defense and, as such, is subject to an independent standard of proof. In disparate impact cases, therefore, the burden of persuasion does not “shift” to prove business necessity.

Insofar as evidence of business necessity is introduced as a factor to define the class of potential beneficiaries of an employment practice, it is properly characterized as evidence offered to rebut the plaintiff’s prima facie case. As such, the weight of the evidence need only be sufficient to prevent the plaintiff from meeting her evidentiary standard. And, in disparate impact cases, the usual rule regarding the shifting burden of production applies: once a prima facie case is established, the burden of production shifts to the defendant to offer sufficient evidence to avoid a directed verdict and to prevent the plaintiff from meeting her burden of persuasion.

Therefore, the apparent conflict between the opinions of Justices O’Connor and Blackmun in the *Watson* case can be reconciled. Justice O’Connor’s argument that the burden of production shifts to the defendant to prove business necessity after a prima facie case has been established properly refers to the defendant’s evidentiary burden when using business necessity as rebuttal evidence. Justice Blackmun’s argument that the burden of persuasion shifts to the defendant to prove business necessity is consistent with previous caselaw, as well as Justice O’Connor’s opinion, when business necessity is used as an affirmative defense in disparate impact cases. As such, however, the burden on the defendant is not actually shifted from the plaintiff, but is independently established.

Consequently, the Supreme Court should expressly characterize “business necessity,” under the disparate impact theory of discrimination, as having two distinct meanings: an evidentiary factor used to controvert a plaintiff’s prima facie case and, alternatively, an affirmative defense available to a defendant for avoiding liability for proven discriminatory effects. This recommendation is

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124. See supra notes 15, 67-88 and accompanying text.
125. See supra notes 89-118 and accompanying text.
126. It should be noted that, as a practical matter, issues involving “business necessity” as a negative defense offered in rebuttal to a prima facie case of disparate impact will frequently be resolved at the final pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure. Conversation with Bruce Bagin, J.D., Pittsburgh, Pennsylvania (Mar. 29, 1989).
based upon more than a mere desire for semantical housecleaning. It arises out of a need to eliminate the possibility that either of two improper inferences may be drawn from the conflicting Watson opinions: (1) that evidence of business necessity offered in justification of an established adverse impact, rather than in rebuttal, need only meet a sufficiency standard; or (2) that what is in fact rebuttal evidence, even if characterized as "business necessity," must necessarily meet more than a sufficiency standard in order to rebut the plaintiff's prima facie case.

The split in the circuits over the allocation of the burdens of proof under disparate impact analysis can be resolved without substantial change in existing law. It can be accomplished simply, by the proposed clarification of the business necessity doctrine.

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