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Hurdling New Procedural Guidelines in Disparate Impact Cases - Wards Cove Packing Co. v. Atonio

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HURDLING NEW PROCEDURAL GUIDELINES IN DISPARATE IMPACT CASES

Wards Cove Packing Co. v. Atonio,
109 S. Ct. 2115 (1989)

I. INTRODUCTION

Disparate impact plaintiffs face formidable evidentiary requirements after the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio.*[1] In confirming the application of subjective as well as objective employment criteria to disparate impact analysis,[2] the *Atonio* Court shifted the burden of proof used in such analysis. The plaintiff must now carry the ultimate burden of persuasion.[3] This note will explain the difference between the burden of production and the burden of persuasion and the Court's application of these burdens to disparate impact cases. This note will examine how the decision in *Atonio* has undermined the very purpose of Title VII and moved employment discrimination law a significant step backward.

II. FACTS

In 1974, respondents, Filipino and Alaska Native cannery workers at petitioners' Alaskan salmon canneries,[4] brought a class action under Title VII[5] alleging both disparate treatment and disparate impact theories of Title VII liability.[6] The petitioners were two companies that operate salmon canneries in "remote and widely separated areas of Alaska."[7] The canneries only operate during the summer months when the salmon runs occur and are closed, winterized, and vacated during the rest of the year.[8] Therefore, the workers who operate the cannery facilities are hired for only as long as there are salmon to can.[9] Since the operations are located in remote regions, cannery workers are housed and fed at the canneries.[10]

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1. 109 S. Ct. 2115 (1989).

2. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988). *Watson* was the first Supreme Court case to hold that disparate impact theory applies equally to "subjective" employment criteria as well as to "objective" employment criteria.

Cases prior to *Watson* followed the standard set forth by Griggs v. Duke Power Co., 401 U.S. 424 (1971), which was the first case to apply disparate impact analysis and limited its application to "objective" employment criteria. *See infra* notes 75-84 and accompanying text.

3. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).

4. *Id.* at 2119-20.

5. 42 U.S.C. § 2000e to 2000e-17 (1982).

6. *Atonio,* 109 S. Ct. at 2120. Plaintiffs may raise claims under Title VII using either the theory of disparate impact or disparate treatment, or both. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). For a discussion of the difference between these two theories, see also *infra* notes 97-101 and accompanying text.

7. *Atonio,* 109 S. Ct. at 2119.

8. *Id.*

9. *Id.*

10. *Id.*

The cannery companies employ workers to fill both unskilled positions and skilled positions.[11] The unskilled positions are the "cannery jobs" on the cannery lines, which are filled predominantly by Filipinos and Alaska Natives (of which the respondents are members).[12] Noncannery jobs are classified as skilled workers[13] and are filled with predominantly white workers.[14] These jobs pay more than the unskilled cannery worker jobs.[15]

Respondents alleged that a variety of petitioners' hiring and promotion practices[16] had prevented nonwhites, including themselves, from being employed as noncannery workers. They alleged that racial discrimination was the reason behind the "racial stratification" of the work force.[17] Since cannery workers and noncannery workers live and eat in separate facilities, respondents also complained that this practice was advanced for racial segregation.[18]

Respondents brought their claims under both disparate treatment and disparate impact theories. The United States District Court for the Western District of Washington rejected all of the disparate treatment claims. It also rejected the disparate impact claims; those that involved subjective criteria were not allowed under the interpretation of *Griggs v. Duke Power Co.*,[19] and those that involved objective criteria were rejected for failure of proof.[20]

On appeal, the Court of Appeals for the Ninth Circuit sitting as a panel affirmed the district court's decision.[21] The court held that subjective decision-making lent itself to far better scrutiny under a disparate treatment theory.[22] However, the court of appeals agreed to hear the case en banc[23] to settle the controversy of whether or not subjective as well as objective criteria could be used in a disparate impact case.[24] The en banc court vacated the panel's decision, reversed the district court's holding, and remanded the case to a panel for reconsideration in light of the

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11. *Id.*

12. *Id.* at 2119-20.

13. *Id.* at 2119. Noncannery jobs were described by the court of appeals as machinists, engineers, quality control personnel, crew to operate vessels, cooks, carpenters, store-keepers, bookkeepers, etc. *Id.* at 2119 n.3. *See also* Atonio v. Wards Cove Packing Co., 768 F.2d. 1120, 1123 (9th Cir. 1985).

14. *Atonio*, 109 S. Ct. at 2119.

15. *Id.* at 2119-20.

16. *Id.* at 2120. The hiring and promoting practices included:

> nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels [because the Filipinos were hired through a union, the Alaska Natives were hired locally since they reside in villages near the canneries, and the noncannery positions were hired from the cannery companies' Washington and Oregon offices], [and] a practice of not promoting from within . . . .

Id. at 2119-20.

17. *Id.* at 2120.

18. *Id.*

19. 401 U.S. 424 (1971).

20. *Atonio*, 109 S. Ct. at 2117.

21. Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (9th Cir. 1985).

22. *Id.* at 1133.

23. Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc).

24. *Id.*

new decision which held that disparate impact analysis could be applied to subjective employment criteria if the plaintiff proved that a causal connection existed.[25]

On remand,[26] the panel agreed that respondents had made a prima facie case in accordance with the en banc court's test.[27] The panel remanded the case again to the district court, instructing in detail how the disparate impact analysis was to be applied and stressing that it was the employer's burden to prove that any disparate impact caused was justified by business necessity.[28] The court maintained the shifting of the burden of persuasion in disparate impact cases and confirmed previous holdings that the ultimate burden of persuasion remains with the plaintiff only in disparate treatment cases.[29]

Since the court of appeals held that respondent had presented a prima facie case under the disparate impact theory, the petitioner sought review of that decision and certiorari was granted[30] by the Supreme Court in view of *Watson v. Fort Worth Bank & Trust Co.*,[31] a case in which the Supreme Court had recently wrestled with the proper application of burdens of proof using the disparate impact theory.[32] The majority decision of *Atonio* followed the plurality decision of the *Watson* Court and imposed new burdens of proof in disparate impact cases.

III. Background and History

A. Congressional Goals and Their Interpretations

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[33] Title VII attempts to provide employees a cause of action against employers who discriminate in their employment practices.[34]

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25. *Id.* at 1482, 1486. The Ninth Circuit relied on the EEOC guidelines, the language of Title VII, and the congressional intent behind Title VII to establish a test for a prima facie case. *Id.* at 1482-83. For discussion of this test, see *infra* notes 108-11 and accompanying text.

26. Atonio v. Wards Cove Packing Co., 827 F.2d 439 (9th Cir. 1987).

27. *Id.* at 441-42.

28. *Id.* at 442-43, 450.

29. *Id.* at 442. The Ninth Circuit drew the distinction between the burdens of persuasion in disparate impact and disparate treatment theories from Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

30. Atonio v. Wards Cove Packing Co., 487 U.S. 1232 (1988).

31. 487 U.S. 977.

32. *Watson* resulted in the Court's being evenly divided on several issues regarding the disparate impact theory.

33. 42 U.S.C. § 2000e to 2000e-17 (1982). Section 2000e-2(a) states:

> 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.

34. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

The employee's cause of action can be brought under two main theories:[35] disparate treatment[36] and disparate impact.[37] Using the disparate treatment theory, a plaintiff alleges that the employer has intentionally discriminated between members of different classes. The second theory, disparate impact, refers to the consequences of employment practices rather than the intent.

Although the language of Title VII contains numerous references to the term "discrimination," the statute does not define the word.[38] The Supreme Court has advanced these two theories and the methods of applying them as a means of interpreting the language of Title VII.

B. The 1964 Act

The legislative history of Title VII indicates that it was passed pursuant to the commerce clause of the Constitution.[39] Congress had two principal goals as the purpose of Title VII. The primary goal was to prohibit intentional discrimination,[40] but the underlying goal was to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."[41] However, the terms of Title VII are not limited to discrimination against members of the black race or of any particular race.[42] This goal of prohibiting intentional discrimination led to the disparate treatment theory.

Protecting the employer's rights to our free enterprise system while simultaneously eliminating discriminatory employment practices was one of Congress' main concerns.[43] Critics of Title VII were assured that the legislation would not place an intolerable burden on employers and would not require an employer to lower or change job qualifications.[44] However, no legislative history defines what kind of burden employers do have to carry as a result of Title VII's enactment. The

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35. Two other theories are perpetuation in the present of the effects of past discrimination and failure to make reasonable accommodation. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1286 n.1 (2d ed. 1983).

36. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

37. *See, e.g., Griggs*, 401 U.S. 424 (1971).

38. 42 U.S.C. § 2000e-2(a)-(c) (1982).

39. U.S. CONST. art. I, § 8, cl. 3. *See* 110 CONG. REC. 7202-12, 8453-56 (1964). The commerce clause origins are reflected in Title VII's definitions of "employer," "labor organization," "commerce," and "industry affecting commerce." B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 983 (2d ed. 1983).

40. *Teamsters*, 431 U.S. at 335 n.15 (" 'Disparate treatment' . . . is the most easily understood type of discrimination . . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.").

41. 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey).

42. *See supra* note 33 for text of § 2000e-2(a).

43. Contreras v. City of Los Angeles, 656 F.2d 1267, 1277-78 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1981).

44. *Id.* at 1278.

> Whatever its merits as a socially desirable objective, title VII would not require, and no court could read title VII as requiring, an employer to lower or change the occupational qualifications he sets for his employees . . . . Title VII says merely that a covered employer cannot refuse to hire someone simply because of his color . . . .

Id. (quoting 110 CONG. REC. 7246-47 (1964) (remarks of Senator Case)).

A covered employer is an employer with fifteen or more employees. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 5 (1987).

Supreme Court began its interpretation of this burden with *Griggs v. Duke Power Co.*[45] and its progeny.

C. The 1972 Amendments

The Supreme Court in *Griggs* established that a disparate impact caused by objective employment criteria was violative of Title VII.[46] The Court interpreted Congress' intent as placing upon the employers the burden of showing a "business necessity" for the employment practice.[47]

Congress amended Title VII in 1972[48] and allowed the courts to continue to enforce Title VII through private suits or through suits by the EEOC.[49] Congress, thereby, endorsed present court-made interpretations of Title VII.

D. The Disparate Treatment Theory

The two theories of discrimination discussed thus far, disparate treatment and disparate impact, analyze different types of evidence, and hence, the courts have established different prima facie cases and burdens of proof for their interpretation of each theory.

Disparate treatment is the more easily understood type of discrimination.[50] "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[51] The first case to set out the order and allocation of the disparate treatment theory was *McDonnell Douglas Corp. v. Green.*[52] The case involved a black mechanic who was laid off in the course of a general work force reduction.[53] The plaintiff-mechanic had participated in an illegal protest, consisting of a civil rights "stall-in" trespass, against alleged racially discriminatory practices of the defendant employer.[54] The employer publicly advertised for qualified mechanics about three weeks following the plaintiff's activities.[55] The plaintiff applied for reemployment but was rejected by the employer on the grounds of plaintiff's participation in the illegal conduct.[56] Plaintiff brought suit after the EEOC failed to conciliate the action.[57] The Supreme

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45. 401 U.S. 424 (1971).

46. *Id.* The objective criteria consisted of requirement of a high school diploma and satisfactory scores on two aptitude tests.

47. *Id.* at 431-32. However, no such burden is found in the language of Title VII.

48. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

49. The amendment also provided for a broader definition of religion and extended Title VII to federal and state employees. *Id.*

50. *Teamsters*, 431 U.S. at 335 n.15.

51. *Id.*

52. 411 U.S. 792 (1973).

53. *Id.* at 794.

54. *Id.* at 794-95.

55. *Id.* at 796.

56. *Id.*

57. *Id.* at 796-97.

Court granted certiorari[58] and in its decision set forth three standards for establishing a disparate treatment case.[59]

First, the plaintiff must establish a prima facie case which includes showing: (1) that plaintiff is a member of a protected group; (2) that plaintiff applied and was qualified for the position; (3) that he was rejected; and (4) that the position remained open, and the employer continued to seek applicants.[60] The second part of the *McDonnell Douglas* standard is that the defendant must "articulate some legitimate, nondiscriminatory reason" for his employment practice.[61] This, in effect, shifts the burden of production to the employer. Exactly what this "articulation" must consist of was set forth in subsequent cases.[62] Finally, *McDonnell Douglas* stated that the plaintiff must then show that the reason for the practice was a mere pretext for the discrimination.[63] Therefore, the burden of production shifts back to the plaintiff. It is important to note that the burden of persuasion always remains with the plaintiff, and this has been one of the distinguishing features between disparate treatment and disparate impact cases. The Court in *McDonnell Douglas*, however, used the term "burden" without reference to either production or persuasion, as did the Court in a subsequent case, *Furnco Construction Corp. v. Waters*.[64]

Texas Department of Community Affairs v. Burdine clarified the burdens in disparate treatment cases.[65] In *Burdine* a female employee alleged sex discrimination as the reason she had been denied a promotion and subsequently fired.[66] The promotion had gone to a man who, according to the plaintiff, was no better qualified than she.[67] The Supreme Court reversed the Fifth Circuit's holding that a Title VII defendant bears the burden of proving by a preponderance of the evidence that nondiscriminatory reasons for the employment action existed.[68] Instead, the Court held that the plaintiff must establish a prima facie case to create a "presumption" of employment discrimination.[69] A presumption is not evidence, but a procedural device which shifts the burden of production to the other party.[70] This burden is shifted to the employer in the second step of the *McDonnell Douglas* standards; he need only produce enough evidence to rebut the presumption by

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58. McDonnell Douglas Corp. v. Green, 409 U.S. 1036 (1972).

59. *McDonnell Douglas*, 411 U.S. at 798. Since facts vary in Title VII cases, the Court said that the formula is not always applicable. *Id.* at 802 n.13.

60. *Id.* at 802.

61. *Id.*

62. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), and its progeny. *See infra* notes 63-71 and accompanying text.

63. *McDonnell Douglas*, 411 U.S. at 804.

64. 438 U.S. 567 (1978). In *Furnco* the employer articulated that his reason for rejecting three qualified minority applicants was that he would not consider applicants who were unknown to the job superintendent, and these applicants were walk-ons. The Supreme Court held that this was a legitimate reason for a hiring decision because it inferred the applicants were rejected because they were walk-ons and not because they were black.

65. *Burdine*, 450 U.S. 248 (1981).

66. *Id.* at 250-51.

67. *Id.* at 251.

68. *Id.* at 252.

69. *Id.* at 254-55.

70. C. MCCORMICK, EVIDENCE § 342 (E. Cleary, 3d ed. 1984).

raising a genuine issue of fact as to whether he discriminated against the plaintiff.[71] To satisfy this burden, the defendant must produce "clear and reasonably specific" evidence.[72] Since the *Burdine* Court clarified that the ultimate burden of persuasion remains with the plaintiff,[73] she must follow the final step and show by a preponderance of the evidence that the reason offered by the defendant was mere pretext.

The effect of *Burdine* was to reduce the evidentiary burden on defendants in disparate treatment cases, thereby making the alternative theory of disparate impact comparatively more attractive to plaintiffs.

E. The Disparate Impact Theory

The difference in approaching a case from either the disparate treatment or disparate impact theories is important because of the consequences which flow from this choice. Prior to *Atonio,* disparate impact provided an easier prima facie case for the plaintiff than did disparate treatment; and once disparate impact was shown, the burden shifted to the employer to justify his employment practices as a "business necessity."[74] Disparate impact does not require proof of discriminatory intent as does disparate treatment,[75] and once statistical proof of discrimination is shown, courts are more likely to find that the defendant-employer discriminated (as opposed to the disparate treatment prima facie case). In disparate treatment the plaintiff has the burden of persuasion at all times, and the defendant can justify his actions if he has a "legitimate business reason" which is a less oppressive burden than providing a "business necessity."[76]

The seminal case for the disparate impact theory is *Griggs v. Duke Power Co.*[77] In *Griggs* the Supreme Court extended Title VII to facially neutral employment practices which result in an adverse impact on persons of a particular race, national origin, sex, or religion.[78] The employer, Duke Power Company, required that applicants have a high school diploma or pass two standardized general intelligence tests as a condition of employment.[79] The plaintiffs, a group of black applicants, brought the action claiming that these requirements had a discriminatory effect because they excluded more blacks than whites and an employee could perform the job without either of the criteria.[80] The plaintiffs could not establish a prima facie case under the disparate treatment theory[81] because they were not

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71. *Burdine,* 450 U.S. at 254.

72. *Id.* at 258.

73. *Id.* at 253.

74. *Griggs,* 401 U.S. at 431.

75. *See, e.g.,* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

76. *See* Player, *Defining "Legitimacy" in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis,* 36 MERCER L. REV. 855, 866-67 (1985).

77. 401 U.S. 424 (1971).

78. *Id.*

79. *Id.* at 426-28.

80. *Id.*

81. *See supra* notes 58-59 and accompanying text.

"qualified" for the job.[82] The Supreme Court held that when a plaintiff can identify a facially neutral selection criteria or practice and can show that the challenged criteria or practice has a disproportionately adverse impact on the protected class of which he is a member, the plaintiff has established a prima facie case under what is termed "disparate impact."[83]

A three-part order and allocation of proof was established to bring a claim under this theory. The plaintiff has the burden of proof to set out a prima facie case and generally does so with statistical evidence.[84] Once established, the defendant may rebut the plaintiff's evidence by challenging the statistics. If the plaintiff fails to establish a prima facie case, the burden of persuasion shifts to the defendant to prove that the criteria or practice is job-related or justified by some business necessity.[85] The Court stated, "[t]he 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."[86] However, the Court did not define "job-related" or "business necessity." These terms were defined by *Albemarle Paper Co. v. Moody.*[87]

The *Albemarle Paper Co.* case set the standard for job-relatedness and established the third step of the tripartite analysis. If the job-relatedness or business necessity[88] is shown, the plaintiff has an opportunity to surrebut the defendant's proof. He must show that the employer could have used an alternative test or selection device with a lesser discriminatory impact.[89] It is this step that has caused a split of decisions[90] regarding which party has the burden of proof; the *Albemarle* Court did not clarify what burdens were carried by which party.[91]

The *Albemarle* Court also concentrated on establishing what was meant by the term "job-relatedness." To interpret the defendant's rebuttable evidence, the Court looked at EEOC guidelines' interpretation as the *Griggs* Court had so done in in-

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82. *Albemarle*, 401 U.S. at 434. Plaintiffs were not "qualified" under the disparate treatment theory because they did not meet the employer's job requirements. *Id.* at 426-28.

83. *Id.* at 430-32. *See also* Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

84. In *Griggs* the plaintiff compared the 34% white males who had diplomas with the 12% black males who had diplomas in the state. *Griggs*, 401 U.S. at 430 n.6.

Plaintiffs also introduced an EEOC study which showed that when a similar test was administered at another location, 58% whites passed and only 6% blacks passed. *Id.*

85. *Id.* at 431.

86. *Id.* Of course, disparate impact does not refer only to Negroes. *See supra* note 41 and accompanying text.

87. 422 U.S. 405 (1975).

88. *Id.* at 426-30.

89. *Id.* at 425, 436.

90. The *Albemarle* Court relied on standards set by the Uniform Guidelines on Employee Selection Procedures of the EEOC, the Departments of Justice and Labor and the Civil Service Commission. *See* 29 C.F.R. § 1607 (1978).

The Court was urged to "adopt a single governing formulation" concerning business necessity and job-relatedness in the Brief for the United States as Amicus Curiae Supporting Petitioners at 23, Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (No. 87-1387).

91. *See* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1208-09 (1981).

terpreting the plaintiff's prima facie case.[92] The Court remarked that these guidelines constituted the administrative interpretation of the enforcing agency and were therefore "entitled to great deference."[93] "[D]iscriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which compromise or are relevant to the job or jobs for which candidates are being evaluated.' "[94]

F. Application of the Two Theories

As thus far illustrated, significant distinctions as well as theoretical underpinnings existed between disparate treatment and disparate impact. Many factual situations, however, permit the application of both theories.[95] The most common circumstance in which a plaintiff may wish to use both theories is when he or she alleges class-wide discrimination resulting from a combination of employment practices which includes some subjective, as well as objective, decision-making. If the court refused to apply the disparate impact analysis in such a case, the employer might prevail; however, if the disparate impact theory is utilized, the employee might be the victor.[96]

Although the theory of disparate impact appears most commonly in class actions,[97] it can also be used by individual plaintiffs, as it was in *Connecticut v. Teal*.[98] As *Teal* held, individual plaintiffs are entitled to relief if they prove they are the victims of discriminatory employment practices, regardless of the preferential treatment of other members of the same group. But the disparate treatment theory has remained the usual method of proving individual claims. Since it requires proof of the employer's intent to discriminate[99] and, prior to *Watson v. Fort Worth Bank & Trust Co.* at the Supreme Court level, objective employment criteria,[100] disparate treatment has been a much more difficult theory for the plaintiff.

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92. *Albemarle*, 422 U.S. at 428-36; *see Griggs*, 401 U.S. at 433-36; *see also supra* note 82.

93. *Albemarle*, 422 U.S. at 431.

94. *Id.* at 431 (quoting 29 C.F.R. § 1607.4(c) (1974)).

However, Chief Justice Burger, in his dissent, thought these guidelines should not be given such "great deference" because job-relatedness and validation tests were not supported by the language of Title VII. *Albemarle*, 422 U.S. at 451-53.

The fact that most employment tests were not scientifically valid had become widely known after the EEOC had promulgated its second set of guidelines in 1970 which followed the consensus among psychological experts that validity of most tests was difficult to establish. 35 Fed. Reg. 12,333 (1970).

95. *Teamsters*, 431 U.S. at 335-36 n.15.

96. Prior to Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), the Supreme Court had remained silent as to the application of the adverse impact model to subjective criteria. The circuit courts had become evenly divided on the issue.

97. The disparate treatment case is individualized, making it more difficult to maintain a class action under it than under the *Griggs*-type analysis. This is particularly true since General Tel. Co. v. Falcon, 457 U.S. 147 (1982) narrowed the application of FED R. CIV. P. 23 in discrimination cases. *See also* Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 COLUM. HUM. RTS. L. REV. 1 (1987).

98. 457 U.S. 440, 442 n.2. (1982). *See also* Welch, *Superficially Neutral Classifications: Extending Disparate Impact Theory to Individuals*, 63 N.C.L. REV. 849 (1985) (suggesting a new framework for applying the disparate impact theory to individuals).

99. *Teamsters*, 431 U.S. at 335 n.15.

100. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

The initial prima facie showing in both the pattern and practice[101] disparate treatment case and the disparate impact case involves similar proof of disparity. Both must show statistical evidence; in the latter, it is the only method of establishing the requisite disparity although a lesser amount of disparity is required than in the former.[102] Insufficient statistical disparity or use of an improper statistical method is a defense for employers in both pattern and practice disparate treatment cases and disparate impact cases.[103] The significant differences between the two theories have been the burden placed on the defendant in rebutting the plaintiff's prima facie case and the application of objective and subjective criteria.

G. Criteria

1. Pre-*Watson* and -*Atonio* – Split Circuit Decisions

A defendant may support his case with different types of criteria such as scored tests for intelligence, achievement, reading, writing, etc., or non-scored criteria such as educational achievement, work experience, and license requirements. Such criteria are objective criteria.[104] A defendant may also have relied on subjective criteria such as judgment of the applicant's ability to get along, his ability as a team player, maturity, self-reliance, and leadership ability. Until recently the Supreme Court has given little guidance on how the lower courts should apply objective and subjective criteria to disparate impact analysis.

Prior to *Atonio,* the circuits agreed that the disparate impact theory may be properly applied to discrimination based on objective criteria because these fall within the parameter of the *Griggs* Court's "facially neutral practices."[105] The lower courts disagreed, however, as to whether subjective criteria may be deemed

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101. Pattern and practice cases are broadly construed by the Justice Department as meaning that the discriminatory acts were something other than isolated, peculiar, or accidental events.

102. *See, e.g.*, B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1324 (2d ed. 1983) ("Unlike the disparate treatment case, under the adverse impact theory 'proof of discriminatory motive . . . is not required.' The focus is thus on the consequences of the selection criteria or other practice. Since the focus is on consequences, statistical evidence is paramount." (footnote omitted)).

103. *See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1268 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1115 (1985).

104. See B. SCHLEI & P. GROSSMAN, *supra* note 35, at 80-81, 162-90 for a discussion of objective criteria.

105. *Teal,* 457 U.S. at 443; *Albemarle Paper,* 422 U.S. at 427; *Griggs,* 401 U.S. at 429 (all involving "general intelligence or aptitude tests"); Dothard v. Rawlinson, 433 U.S. 321, 323-24 (1977) (involving a height and weight cutoff).

facially neutral and therefore be applied to this theory.[106] The Supreme Court in *Griggs* did not distinguish between objective and subjective impact analysis.

However, the language of the Uniform Guidelines apply to *any* selection procedure used as a basis for making employment decisions, thereby appearing to apply to both objective and subjective criteria.[107] A court's refusal to apply the disparate impact theory to subjective criteria eliminates this method of analysis for a large category of jobs because the selection criteria for most supervisory and professional jobs are in part discretionary. Therefore, "[e]xclusion of such subjective practices from the reach of the disparate impact model of analysis is likely to encourage employers to use subjective, rather than objective, selection criteria."[108]

2. The *Atonio* Decision in the Lower Federal Courts

The district court in *Atonio v. Wards Cove Packing Co.*[109] declined to apply the disparate impact theory to the plaintiffs' allegations of employment discrimination because the plaintiffs had alleged subjective criteria such as nepotism, word-of-mouth recruitment, rehire policies, and lack of objective job qualifications. On appeal a three-judge panel affirmed the district court's decision; however, the court of appeals granted review en banc and reversed the district court holding.[110] After a consideration of legislative intent, the Ninth Circuit majority declared that disparate impact analysis was applicable to subjective criteria.[111] The court also considered the statutory language of Title VII and stated that Title VII prohibits

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106. The Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits had allowed such actions. Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1478, 1480, 1489 n.2 (9th Cir. 1987); Regner v. City of Chicago, 789 F.2d 534, 537 (7th Cir. 1986); Griffin v. Carlin, 755 F.2d 1516, 1523-25 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249, 1266 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); Rowe v. Cleveland Pneumatic Co., Numerical Control, 690 F.2d 88, 92 (6th Cir. 1982).

The Fourth Circuit had not allowed subjective criteria to be applied. EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 639 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984).

The Fifth, Eighth, and Tenth Circuits were split in their decisions concerning the application of subjective criteria. *Compare* Page v. U.S. Indus., Inc., 726 F.2d 1038, 1045-46 (5th Cir. 1984) *and* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 221 (5th Cir. 1974) (allowing suit using subjective criteria) *with* Cunningham v. Housing Auth. of City of Opelousas, 764 F.2d 1097, 1099 (5th Cir. 1985) (barring suit using subjective criteria) *and* Vuyanich v. Republic Nat'l Bank of Dallas, 723 F.2d 1195, 1202 (5th Cir. 1984).

Compare EEOC v. Rath Packing Co., 787 F.2d 218, 318 (8th Cir. 1986) (allowing suit using subjective criteria) *with* Talley v. United States Postal Serv., 720 F.2d 505, 507 (8th Cir. 1983) (barring suit using subjective criteria).

Compare Lasso v. Woodmen of World Life Ins. Co., 741 F.2d 1241, 1244 (10th Cir. 1984) (allowing suit using subjective criteria) *with* Mortensen v. Callaway, 672 F.2d 824, 829 (10th Cir. 1982) (barring suit using subjective criteria).

107. 29 C.F.R. § 1607.2(c) (1985).

108. Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985). The *Griffin* court held that disparate impact analysis could be applied to the final results of the defendants' subjective, multi-component promotion process. *Id.*

109. 34 Empl. Prac. Dec. (CCH) ¶ 34,437 (W.D. Wash. 1983).

110. *Atonio*, 768 F.2d 1120, 1133 (9th Cir. 1985), *withdrawn*, 787 F.2d 462 (9th Cir. 1985), *decided en banc*, 810 F.2d 1477 (9th Cir. 1987).

111. *Atonio*, 810 F.2d at 1482-83. The court cited H.R. REP. No. 238, 92d Cong., 1st Sess. 19, 24, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2164; S. REP. No. 415, 92d Cong., 1st Sess. 1, 14-15 (1971); 118 CONG. REC. 7166, 7564 (1972).

"all forms of employment discrimination . . . without reference to either objective or subjective practices."[112] The underlying rationale of the court's analysis was that most, if not all, employment criteria must "necessarily have both subjective and objective elements."[113]

3. *Watson v. Fort Worth Bank & Trust*

The Supreme Court granted certiorari to *Watson v. Fort Worth Bank & Trust* on the limited question of whether the disparate impact theory applies to subjective criteria.[114] The case involved a black woman who had unsuccessfully applied four times for promotions to supervisory positions, each time losing out to a white employee.[115] The bank had relied on the discretion of its white supervisors to hire and promote employees.[116] Holding that the plaintiff had not met her burden of proof under the disparate treatment theory as set forth in *McDonnell Douglas and Burdine*, the district court dismissed the case.[117] On appeal the circuit court rejected plaintiff's contention that the district court had erred in failing to apply the disparate impact analysis to her claim and held that a Title VII challenge to subjective criteria could only be analyzed under the disparate treatment theory.[118]

The Supreme Court held that, in principal, the disparate impact theory applies as much to subjective criteria as it does to objective criteria.[119] The Court recognized this extension as a necessary consequence of *Griggs* because "a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices."[120] The Court acknowledged plaintiff's argument that if disparate impact "is confined to objective tests employers will be able to substitute subjective criteria having substantially identical effects, and *Griggs* will become a dead letter."[121] Had the Court stopped with this conclusion, the future viability of *Griggs* would have been assured.

However, the Court, in a multi-faceted opinion of partial concurrences, examined the evidentiary standards in order to apply the disparate impact theory to subjective criteria.

H. Evidentiary Guidelines

To establish a prima facie case under the disparate treatment theory, a plaintiff need only demonstrate that "she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of

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112. *Atonio*, 810 F.2d at 1482 (citing 42 U.S.C. § 2000e-2(a)(2) (1982)).
113. 810 F.2d at 1485.
114. 487 U.S. 977 (1988).
115. *Id.* at 982.
116. *Id.*
117. *Id.* at 983-84.
118. *Id.* at 984.
119. *Id.* at 999.
120. *Id.* at 990.
121. *Id.* at 989.

unlawful discrimination."[122] Once the plaintiff has done so, the burden of production shifts to the defendant, who must articulate a legitimate, nondiscriminatory reason for rejecting the plaintiff.[123] If the defendant meets this burden of production, the burden shifts back to the plaintiff to prove the defendant's reason was pretextual.[124] So, the ultimate burden of persuasion remains with the plaintiff throughout the proceedings.[125]

The plurality[126] in *Watson* merged the disparate impact analysis allocation of proof with the disparate treatment analysis. They did not feel that the evidentiary standards articulated in prior cases were suitable for the analysis using subjective employment criteria and, therefore, suggested new evidentiary guidelines.[127] These consisted of requiring the plaintiff to identify the specific practice being challenged in order to make a prima facie case, requiring that the burden of proof remain with the plaintiff at all times and not requiring the employer to demonstrate, in rebuttal, that the challenged practice is necessary to job performance as long as it is "normal and legitimate."[128] The *Watson* plurality, therefore, lessened the burdens placed upon the defendant and increased the ones placed upon the plaintiff.

The plaintiff's burdens are increased, first of all, by the demand that he identify the specific challenged practice, show the statistical disparities, and prove causation to set out his prima facie case.[129] The plaintiff "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[130] The Court acknowledged that it may be more difficult for the plaintiff to isolate and identify the specific employment practice when dealing with subjective criteria but emphasized that the plaintiff was responsible for carrying this burden.[131] The Court imposed this additional burden in response to concerns that employers would face an impossible task of rebutting a prima facie case based on mere statistical evidence using the *Griggs* rebuttal of "business necessity."[132] The Court feared that employers would be forced either to abandon their

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122. *Burdine*, 450 U.S. at 253.

123. *Id.*

124. *McDonnell Douglas*, 411 U.S. at 804.

125. *Burdine*, 450 U.S. at 253.

126. Justice O'Connor wrote the opinion of the Court. She was joined by Chief Justice Rehnquist and Justices White and Scalia in Parts II-C and II-D of the opinion to produce the plurality opinion concerning the evidentiary guidelines. Justice Kennedy took no part in the consideration or decision of this case. Justices Stevens and Blackmun, concurring in the judgment, wrote separate opinions regarding the evidentiary guidelines. Justices Brennan and Marshall joined Justice Blackmun.

127. *Watson*, 487 U.S. at 993-99. Justice O'Connor stated: "[W]e 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." *Id.* at 994.

128. *Id.* at 991-99.

129. *Id.* at 994-95.

130. *Id.* at 994.

131. *Id.*

132. *Id.* at 991-92.

subjective selection practices or to establish numerical quotas to validate their subjective practices.[133]

The second step in the disparate impact analysis, suggested by the *Watson* plurality again increased the plaintiff's burdens while decreasing those of the defendant. Although the Court recognized that the *Griggs* formulation provides that the employer has the burden of showing a "business necessity" or "job-relatedness" as his defense, the Court stated that "such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant."[134] To the contrary, the plurality stated that "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."[135] Thus, the defendant has only a burden of production; the burden of persuasion never shifts from the plaintiff. Once the defendant has met its burden of production, the plaintiff must show that an alternative selection device existed.[136] The requisite showing for rebuttal – the demonstration of "job necessity" – is lowered; a defendant need only show that the employment criteria is based on normal and legitimate business practices. This standard is more reflective of the disparate treatment analysis than traditional disparate impact analysis of *Griggs*, *Teal*, and *Dothard v. Rawlinson*.[137] This standard lowers the evidentiary burden for employers so they can avoid a "mandatory quota-based system."[138] The plurality explained its reasoning by stating: "[T]he high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment."[139]

Justices Stevens and Blackmun wrote separate opinions, each concurring in the judgment, but disagreeing with these "fresh" evidentiary guidelines.[140] Blackmun's concurrence pointed out that the evidentiary standards suggested by the plurality depart significantly from prior disparate impact analysis and instead conform more with prior disparate treatment analysis.[141] He stated that the new standards, in fact, contradicted the allocations of burdens set forth by the *Dothard* and *Albemarle* decisions since in these prior cases the defendant was given the burden of persuasion, not mere production, in rebuttal.[142] He also stated that lessening the burden on the employer would "disserve Title VII's goal of eradicating discrimination in employment."[143]

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133. *Id. See also* Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 88 (1988).

134. *Watson*, 487 U.S. at 997.

135. *Id.*

136. *Id.* at 998 (citing *Albemarle*, 422 U.S. at 425).

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

138. However, the *Griggs* Court had rejected a similar argument. *Griggs*, 401 U.S. at 434, 436.

139. *Watson*, 487 U.S. at 999.

140. *Id.* at 994. Justice Blackmun was joined by Justices Brennan and Marshall.

141. *Id.* at 1001-02.

142. *Id.* at 1001.

143. *Id.* at 1009.

Justice Stevens concurred with the judgment but stated that the imposition of new evidentiary standards should be postponed until the district court reviewed the case on remand.[144] He agreed with Justice Blackmun's articulation that these new standards were not necessary to decide the issue before the Court on certiorari.[145] He did concur with the plurality's proposal that formal validation studies should not be a necessity for an employer to justify subjective criteria.[146] *Watson* left the issue with a trifurcated view and no binding precedent for courts to follow for applying evidentiary guidelines to subjective criteria. It also paved the way for the appeal of *Atonio v. Wards Cove Packing Co.*

IV. INSTANT CASE

The Supreme Court granted certiorari to *Wards Cove Packing Co. v. Atonio*[147] to address the disputed questions concerning the application of Title VII's disparate impact theory of liability which were left unanswered in the *Watson* decision.[148]

The Court first considered whether or not the respondent had made out a prima facie case of disparate impact.[149] Reversing the court of appeals' ruling that a comparison between the percentage of *cannery* workers who are nonwhite and the percentage of *noncannery* workers who are nonwhite made out a case of disparate impact, the Court remanded the case to the district court to resolve whether a prima facie case was established on some basis other than racial disparity.[150] The Court held that no prima facie case had been made upon the presentation of statistical data which merely showed a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in noncannery jobs because the "proper comparison [must be] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market."[151] The Court would also allow such measures indicating the racial composition of "otherwise-qualified applicants" for at-issue jobs.[152] But the Court ruled that respondents had not reflected "the pool of *qualified* job applicants" or the "*qualified* population in the labor force" in their comparison and that the comparison offered was "nonsensical."[153] "If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment prac-

144. *Id.* at 1011 (Stevens, J., concurring in part and concurring in the judgment).

145. *Id.* at 1000-01.

146. *Id.* at 1011.

147. 109 S. Ct. 2115 (1989).

148. *Id.* at 2121.

149. *Id.*

150. *Id.* at 2123-24.

151. *Id.* at 2121 (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977)).

152. 109 S. Ct. at 2121 (citing New York City Transit Auth. v. Beazer, 440 U.S. 568, 585 (1979)). *See also id.* n.6 (citing Dothard v. Rawlinson, 433 U.S. at 329-30; Teamsters v. United States, 431 U.S. at 340 n.20).

153. 109 S. Ct. at 2122.

tices cannot be said to have had a 'disparate impact' on nonwhites."[154] The converse theory, stated the Court, would mean that any employer who had a segment of his work force racially imbalanced for any reason could be charged under Title VII and forced to defend the "business necessity" of his employment practices.[155] The Court feared this would leave employers with no choice but to adopt racial quotas and reiterated that such a practice was repugnant to the legislative intent of Title VII.[156]

The Court went on to address two other challenges that petitioners had made to the circuit court's decision. First, it addressed the "causation" question in a disparate impact case and extended the holding of *Watson's* plurality of placing a greater burden on the plaintiff. Second, the Court addressed the "business justification" rebuttal of the defendant and the "alternative selection device" surrebuttal available to the plaintiff and again upheld the *Watson* plurality, announcing a lesser burden for defendants and a greater burden for plaintiffs.[157]

In addressing the causation factor in plaintiff's prima facie case, the Court repeated *Watson's* holding that the plaintiff must isolate and identify the specific challenged employment practice, especially in subjective criteria cases.[158] The Court compared the impropriety of an employer's demonstrating "bottom line" racial balance as a defense with a plaintiff's making out a prima facie case by showing racial imbalance in the workforce "at the bottom line."[159] Therefore, even on remand, respondents would have to show that the disparity complained of is the result of one of the challenged employment practices, "specifically showing that each challenged practice" significantly impacts employment opportunities for whites and nonwhites.[160] The Court has, therefore, placed an additional burden on a plaintiff's prima facie case.

In addressing the business justification factor, the Court agreed with the *Watson* plurality holding that the employer carries only the burden of producing evidence of a business justification and that the burden of persuasion remains with the plaintiff.[161] The Court announced that the Ninth Circuit's interpretation that the burden of persuasion shifted to the defendant was an erroneous interpretation and quoted *Watson* as its source that the burden remains with the plaintiff at all times.[162] The Court's reasoning behind this interpretation was that such a ruling conforms not only with the usual rules of evidence but also to the disparate treat-

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154. *Id.* The Court did point out that "the analysis would be different if the dearth of qualified nonwhite applicants was due to practices on petitioner's part which – expressly or implicitly – deterred minority group members from applying for noncannery posititions." *Id.* at 2122 n.7.

155. *Id.*

156. *Id.* (citing *Watson*, 487 U.S. at 988 n.2 (plurality opinion); *Albemarle*, 422 U.S. at 449).

157. *Atonio*, 109 S. Ct. at 2124-27.

158. *Id.* at 2124.

159. *Id.*

160. *Id.* at 2125.

161. *Id.* at 2126.

162. *Id.*

ment rule.[163] Although the Court acknowledged that earlier Supreme Court cases could be read as suggesting this shift in the persuasion burden, it stated that such interpretation was a misunderstanding of the Court's intent.[164]

In conclusion, the Court explained the *Atonio* decision in terms of *Watson*. Respondents may still be able to prevail on remand, the Court stated, if they persuade the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]" or if they demonstrate that the selection devices were just a "pretext" for discrimination.[165] A shift in burden would not occur because the plaintiff would always bear the burden of persuasion. The Court continued to favor the defendant with its closing statement: "Courts are generally less competent than employers, to restructure business practices; consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit."[166]

Justice Stevens wrote the dissent.[167] He felt the majority had turned a "blind eye" to the very meaning and purpose of Title VII by rejecting "a longstanding rule of law."[168] He also considered the majority's opinion as underestimating the probative value of the respondent's statistical data presenting a racially stratified work force.[169] Because he perceived no urgency to decide the disputed evidentiary standards at an interlocutory stage of the case, he stated that the Court should have denied certiorari until the district court had made the additional findings directed by the circuit court.[170]

Stevens focused on the *Griggs* decision and the congressional intent behind Title VII. He explained the development of Title VII jurisprudence because he thought the majority's "facile treatment of settled law necessitate[d] such a primer."[171] Citing Justice Burger's landmark opinion in *Griggs*, Stevens explained the origin of the disparate impact theory, expounding on the lawfulness of an exclusionary selection method if it serves a valid business purpose.[172] He quoted the *Griggs* Court: "Because Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation[,] . . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."[173] Stevens emphasized that Congress has declined to limit the reach of the disparate impact theory and admonished the

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163. *Id.* (citing FED. R. EVID. 301; *Burdine*, 450 U.S. at 256-58).
164. *Atonio*, 109 S. Ct. at 2126.
165. *Id.*
166. *Id.* at 2127 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 568 (1978)).
167. Justice Stevens was joined by Justices Brennan, Marshall, and Blackmun.
168. *Atonio*, 109 S. Ct. at 2127.
169. *Id.*
170. *Id.* at 2127 n.3.
171. *Id.* at 2128.
172. *Id.* at 2128-29.
173. *Id.* at 2129 (quoting *Griggs*, 401 U.S. at 432).

majority for so doing;[174] instead of limiting the application, Stevens pointed out that Congress has extended the theory's use.[175]

In his historical narration, Stevens explained why the *Griggs* analysis was inappropriate for a claim of intentional discrimination and, therefore, why the theory of disparate treatment was outlined differently in the cases of *McDonnell Douglas, Burdine,* and *Teamsters.*[176]

Since decisions of the Supreme Court and other federal courts have repeatedly recognized the differences between the applications of the two theories, Stevens argued that the majority has unnecessarily blurred that distinction.[177] He gave a lesson on burdens of proof exemplified by Wigmore, Wright and Graham, the Second Restatement of Torts, and the Federal Rules of Civil Procedure.[178] These sources explain, Stevens stated, that if the plaintiff proves the existence of his prima facie case, the defendant can only escape liability by an affirmative defense, after which the plaintiff is accorded a chance to refute the offered defenses.[179] In Stevens' opinion, in the disparate impact case, as in the ordinary civil trial, "although the burden of producing evidence shifts between the plaintiff and the defendant, the burden of *proving* either proposition remains throughout on the party *asserting* it."[180] Stevens stated that the disparate treatment case is inapposite to the disparate impact analysis because in a disparate treatment case there is no discrimination without the employer's intent.[181] Stevens concluded from this that "the employee *retains* the burden of proving the existence of intent at all times."[182]

The Stevens' dissent contrasted the two theories and concluded that the employer's business justification is an affirmative defense[183] and should therefore be a "weighty" burden.[184] Consequently, he expressed astonishment that the majority should lessen the "touchstone" of business necessity set forth by the *Griggs* prog-

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174. *Id.* at 2129.

175. *Atonio,* 109 S. Ct. at 2128 n.9.

Voting Rights Act Amendments of 1982, Pub. L. 97-205. 96 Stat. 131, 134, as amended, codified at 42 U.S.C. Sections 1973, 1973b (1982 ed. and Supp. V). Legislative reports leading to 1972 amendments to Title VII also envice support for disparate impact analysis. H.R. REP. No. 92-238, pp. 8, 20-22 (1971); S.REP.No. 92-415, p.5, and n.1 (1971); *accord* Connecticut v. Teal, 457 U.S. 440, 447, n.8, 102 S. Ct. 2525, 2531, n.8, 73 L. Ed.2d 130 (1982). Moreover, the theory is employed to enforce fair housing and age discrimination statutes. *See* Note, *Business Necessity in Title VII: Importing an Employment Discrimination Doctrine into the Fair Housing Act,* 54 FORD. L. REV. 563 (1986); Note, *Disparate Impact Analysis and the Age of Discrimination in Employment Act,* 68 MINN. L. REV. 1038 (1984).

Id.

176. *Atonio,* 109 S. Ct. at 2129-30. *See also supra* notes 49-71 and accompanying text.

177. *Id.* at 2130-36.

178. *Id. See, e.g.,* 9 J. WIGMORE, EVIDENCE §§ 2485-98 (J. Chadbourn rev. 1981); 21 C. WRIGHT & K. GRAHM, FEDERAL PRACTICE AND PROCEDURE § 5122 (1977); FED. R. CIV. PROC. 8(c); 2 RESTATEMENT (SECOND) OF TORTS §§ 328A, 433B, 454-61, 463-67 (1965).

179. *Atonio,* 109 S. Ct. at 2130-31.

180. *Id.* at 2131 (emphasis added).

181. *Id.*

182. *Id.* (emphasis added).

183. *Id. See also* n.17 (quoting FED. R. CIV. PRO. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense.")).

184. *Atonio,* 109 S. Ct. at 2132.

eny to a nonrequirement that the challenged practice even be "essential."[185] Stevens expressed his belief that the *Griggs* opinion was a correct interpretation of the legislative intent behind Title VII but stated that he would not reject the precedent of consistent interpretation of the statute even if he were not so convinced.[186]

Also disturbed by the majority's redefinition of the plaintiff's prima facie burdens, Stevens voiced his opinion that the additional requirement of isolation and identification of a specific employment practice is unwarranted.[187] He agreed that a causal link is a necessary element but noted that the specific act need not constitute the sole cause of the discrimination.[188] He also maintained that a review of statistical evidence should not demand numerical exactitude in all cases.[189] He admonished the Court for discounting the difficulty that the causation requirement will create for plaintiffs, especially in litigation such as the one at bar.[190] In *Atonio* the employers did not preserve their statistical personnel records because they were not obligated to do so since "seasonal" jobs are exempt from certain record-keeping requirements.[191] In Stevens' opinion the employer's statistical evidence used for rebuttal was ineffectual due to its insufficiency respecting the relevant labor market for noncannery jobs, and the respondent-employee's evidence of racial stratification was, therefore, probative.[192] He concluded by saying that on remand the district court should consider the employee's evidence as "a significant element of [his] prima facie case."[193]

Justice Blackmun wrote an additional dissent.[194] Concurring with all of Stevens' findings, Blackmun added his dissatisfaction with the majority's holding which he deemed harsh and disabling to parties in these employees' positions.[195] He responded to the Court's holding as "essentially immuniz[ing]" the discriminatory practices of the salmon industry, which he and Stevens believed resembles a "plantation economy,"[196] from attack under a Title VII disparate impact analysis.[197]

V. ANALYSIS

The Supreme Court in *Atonio* sought to avoid the murky objective/subjective dichotomy by adopting the *Watson* plurality's extension of subjective criteria to the disparate impact analysis. The Court imposed new evidentiary guidelines as a

185. *Id.*

186. *Id.*

187. *Id.* at 2132-36.

188. *Id.* at 2132-33.

189. *Id.* at 2133 (citing *New York Transit Authority,* 440 U.S. at 584-86; *Dothard,* 433 U.S. at 329-30; *Albemarle,* 422 U.S. at 425; *Griggs,* 401 U.S. at 426, 430 n.6).

190. *Atonio,* 109 S. Ct. at 2133.

191. *Id.* at 2125 n.10; *id.* at 2133 n.20.

192. *Id.* at 2134-36. To reach his conclusion, Stevens coupled respondent's evidence that employees are recruited for at-issue jobs from outside the workforce, that availability of these at-issue jobs is conducted by word of mouth, that nepotistic hiring exists, and that separate housing and mess halls exist. *Id.* at 2135.

193. *Id.* at 2135-36.

194. Justice Blackmun was joined in his views by Justices Brennan and Marshall.

195. *Id.* at 2136.

196. *Id.*; *see also id.* at 2127 n.4.

197. *Id.* at 2136.

result of the *Watson* Court's assumption that application of the *Griggs* standard to subjective criteria would inevitably lead to quota-based hiring.[198] This assumption is problematic and leads to an unnecessary rejection of precedent. In addition, the new guidelines will apply not only to subjective employment criteria but to objective employment criteria as well. These unprecedented evidentiary guidelines are inconsistent with the very purpose of Title VII.

A. The Fear of Quota-based Hiring

During the eighteen years since *Griggs* was decided, the principle behind disparate impact has increasingly been extended to employment practices based on subjective criteria, rather than on objective criteria such as diploma requirements and scored achievement tests.[199] Prior to the Supreme Court precedent set by *Watson* and *Atonio,* some employers had abandoned the use of objective criteria in favor of use of subjective criteria in order to avoid the disparate impact theory. Some may have combined objective criteria results with subjective judgments, thereby including minorities in jobs from which they would otherwise be excluded.[200] Lower courts, previously lacking direction from the Supreme Court, have categorized employment practices as either objective or subjective in deciding the applicability of the disparate impact analysis.[201] By allowing subjective criteria in the impact theory, the Supreme Court has put a halt to intentional utilization of subjective criteria to avoid litigation and to continuation of discreet discrimination. As a result of the Supreme Court's decision in *Atonio,* lower courts will no longer have to decide if an employment practice should be deemed objective or subjective and can focus on whether or not the impact is a consequence of a "facially neutral practice."[202]

Yet, the *Atonio* Court did not consider that the precedential evidentiary standards would protect employers against an adoption of racial quotas when applied to disparate impact created by these practices. Instead, it feared the case would be too difficult to defend. Citing *Watson* and *Albemarle,* the *Atonio* Court announced that a quota system of employment selection is against Title VII's legislative intent.[203] However, in *Griggs,* the Court had already considered this very concern and had explained how the very purpose of Title VII would not allow a quota system to develop; it found that "Title VII expressly protects the employer's right to insist that any prospective applicant [nonwhite] or white, *must meet the applicable*

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198. *Id.* at 2122. "The only practicable option for many employers will be to adopt racial quotas, insuring that no portion of his work force deviates in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII." *Id.* (citing *Watson,* 109 S. Ct. at 2788).

199. *See* Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments,* 63 CHI.-KENT L. REV. 1, 17 (1987).

200. *Id. See also id.* at 17 n.86 (citing Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.6 (1986); Affirmative Action Guidelines, 29 C.F.R. § 1608.4(c)(1) (1986) (recognizing this approach as an alternative to validation)).

201. *See supra* note 104.

202. *Griggs,* 401 U.S. at 430-32.

203. *Atonio,* 109 S. Ct. at 2122. In fact, this had been one of the major fears of employers when Title VII was first under consideration. *See supra* notes 40-41 and accompanying text.

job qualifications. Indeed, the very purpose of [T]itle VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[204] Despite congressional assurances, an amendment was added to make certain that "job-related" tests would be permitted.[205] Therefore, if employers are honestly using "job-related" tests, they need not be concerned about a quota system imposition. A congressional mandate against a quota system is not inconsistent with *Griggs* to the extent that the case and its progeny should be overruled. As one commentator has suggested, the *Griggs* objective was to further "merit-based" hiring and promotion through the development of a crucible which accurately demonstrated job performance, not to promote a preferential quota system.[206] Much of the disagreement between the Justices in the *Atonio* decision over the new evidentiary standards stems from an intrinsic conflict in their theories of Title VII.

Behind the majority's concern over quotas and preferential treatment is the aspiration that Title VII is advancing employment on the basis of merit alone. This theory[207] is reflected in the Court's extension of the disparate impact analysis to subjective criteria. But since the Court views the employer as the best judge of how to measure merit, it does not want employers to discard practices that the employer considers valid indicators of job performance. Evidentiary standards that would cause the employer to choose practices that would favor minorities would be in opposition to this merit principle. This would, of course, be against the congressional mandate of Title VII.

The dissent, however, seems to base its aspiration of Title VII as extinguishing discriminatory selection practices that came before its codification. *Griggs* supported this theory when the Court declared that "facially neutral practices" may violate Title VII "if they operate to 'freeze' the status quo of prior discriminatory employment practices."[208] Therefore, the dissenters would uphold the legacy of *Griggs*.

B. The Purposes of Evidentiary Burdens

The dissent also justifies its position through a reflection on common-law pleading principles. Two distinct interpretations of the term "burden of proof"[209] exist: a burden of production and a burden of persuasion.[210] In discussions of disparate impact, early Supreme Court decisions, such as *Dothard* and *Albemarle*, did not clarify which burden was allocated when they discussed disparate impact.[211] The burden of production begins with the plaintiff bringing the case; to bring a

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204. *Griggs*, 401 U.S. at 434 (citing 110 CONG. REC. 7247 (1964)).

205. The amendment is codified at 110 CONG. REC. 13492 (1964). *See Griggs*, 401 U.S. at 436 n.12.

206. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 991 (1982). For a discussion of the merit principle in antidiscrimination law, see Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

207. *See* Fiss, *supra* note 206.

208. *Griggs*, 401 U.S. at 430.

209. *Atonio*, 109 S. Ct. at 2131-32.

210. C. MCCORMICK, EVIDENCE § 336, at 947 (3d ed. 1984).

211. *Dothard*, 433 U.S. at 329; *Albemarle*, 422 U.S. at 425. *See Griggs*, 401 U.S. at 432.

prima facie case, the plaintiff must produce evidence to support his pleading.[212] The evidence must be sufficient to overcome a directed verdict in favor of the defendant.[213] A prima facie case may be interpreted as sufficient evidence to shift the burden of production.[214] As Justice Stevens pointed out: "In the ordinary civil trial, the plaintiff bears the burden of persuading the trier of fact that the defendant has harmed her."[215] Once the plaintiff has been discharged of this initial task, the burden of production shifts to the adverse party.[216] The defendant can then confront the plaintiff's evidence as insufficient or erroneous. But if the plaintiff proves the existence of the alleged wrong, the defendant must use an affirmative defense and persuade the factfinder that his practice was justified or excusable.[217] Therefore, the party pleading the existence of a fact initially bears the burdens of both production and persuasion,[218] but if the defendant initiates an affirmative defense, thereby remitting his own facts, he has assumed not only the burden of producing those facts, but of persuading the factfinder that they are true.[219]

> In general, he who seeks to move a court in his favor, whether as an original plaintiff whose facts are merely denied, or as a defendant, who, in admitting his adversary's contention and setting up an affirmative defense . . . must satisfy the court of the truth and adequacy of . . . his claim.[220]

The burden of production may shift from party to party, but the burden of persuasion remains with the party asserting the fact.[221]

In a traditional disparate impact case, the plaintiff bears the initial burden of production and persuasion that an employment practice has had a significant, adverse effect on an identifiable class. If he does furnish proof of disparate impact, the defendant's justification becomes an affirmative defense. He should then assume both the burden of production of evidence to justify the practice and also the burden of persuasion to defend the practice.

The majority has relieved the defendant of this burden of persuasion even though he is clearly promoting an affirmative defense. Such a holding goes against

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212. C. MCCORMICK, *supra* note 210, § 338, at 952-53.

213. *Id.* at 953.

214. *Id.* at 965 n.4.

215. *Atonio*, 109 S. Ct. at 2131 (citing 2 RESTATEMENT (SECOND) OF TORTS § 328A, 433B (1965)).

216. C. MCCORMICK, *supra* note 210, § 336, at 947.

217. *Id. See* Atonio, 109 S. Ct. at 2131 (Stevens, J., dissenting). *See also* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 335-89 (1898) (quoting Caldwell v. New Jersey S.B. Co., 47 N.Y. 282, 290 (1872)) (" 'The burden of maintaining the affirmative of the issue, and, properly speaking, the burden of proof, remained upon the plaintiff throughout the trial; but the burden of necessity was cast upon the defendant, to relieve itself from the presumption of negligence raised by the plaintiff's evidence.' ") J. THAYER, *supra*, at 357.

218. C. MCCORMICK, *supra* note 210, § 337, at 951 (E. Cleary 3d ed. 1984).

219. *See Atonio*, 109 S. Ct. at 2131 n.17. Justice Stevens cites FED. R. CIV. PROC. 8(c) and J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 368-69 to support such an analysis. He quotes Thayer as saying:

> An admission may, of course, end the controversy; but such an admission may be, and yet not end it; and if that be so, it is because the party making the admission sets up something that avoids the apparent effect of it . . . . When this happens, the party defending becomes, in so far, the *actor* or plaintiff . . . .

J. THAYER, *supra* note 217, at 368-69.

220. J. THAYER, *supra* note 217, at 369.

221. *See Atonio*, 109 S. Ct. at 2131 (Stevens, J., dissenting).

common-law pleading and allocations of proof. The Court blurs the distinction between disparate treatment and disparate impact, but a significant difference in the pleadings requisite for each should exist. In a disparate treatment case, the plaintiff must produce and persuade the existence of intent. This is not a part of the disparate impact case. Since the initial assertion of facts to prove intent is with the plaintiff, he never relinquishes the burden of persuasion that intent existed. The defendant may follow the *McDonnell/Burdine* formula to refute the evidence, but this would not be an assumption of the burden of persuasion.[222] With respect to the employer's response, the Court has diluted the evidentiary standards created by the Court in prior cases of disparate impact.

C. Statistical Proof of Disparity – the Plaintiff's Burden

A substantial issue in a disparate impact case has always been whether the plaintiff can establish that selection criteria had an adverse impact on the protected class. This proof has traditionally been accomplished by statistically comparing the protected class with the majority class. For example, the *Griggs* Court determined from statistical evidence that 58% of white applicants and 6% of black applicants had passed the prescribed intelligence tests.[223] Based upon this data, a prima facie case was established.[224]

This burden placed upon the plaintiff to produce statistical data has never been a trivial burden. Relevant geographical area, time periods, statistical disparity, and statistical sample size have all played a part in developing evidence that could show a significant disparity.[225] A plaintiff could not merely depend upon general population data because "when special qualifications are required to fill particular jobs, comparisons to the general population . . . may have little probative value."[226] Therefore, the disparate impact plaintiff needs statistics that reflect the protected persons in the labor market. But because all qualified people for a given job may not be interested in that job, figures may be exaggerated and a defendant could be successful in demanding ameliorated statistics.[227] A plaintiff must acquire actual or qualified flow data to put together his offense. He must assimilate work force data, and this data may be unreliable if the employer has historically unlawfully discriminated.[228] The plaintiff will have difficulty in statistically proving disparate impact if there are few protected class members within the relevant

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222. *Id.*

223. *Griggs*, 401 U.S. at 430 n.6.

224. *See Dothard*, 433 U.S. at 321 (other selection criteria can also determine an adverse effect, such as height and weight requirements).

225. For an excellent discussion of these criteria, see Corbett, *Proving and Defending Employment Discrimination Claims*, 47 MONT. L. REV. 217, 240-47 (1986).

226. *Hazelwood*, 422 U.S. at 308 n.13.

227. Corbett, *supra* note 225.

228. *Id.* at 241-42.

geographical area.[229] The plaintiff will have to meet the statute of limitations for his statistical comparisons.[230]

Thus, before the *Atonio* Court's added burdens, the plaintiff already had numerous obstacles to overcome in merely producing statistical evidence. Even if the plaintiff demonstrates a statistical disparity using the appropriate comparisons, the relevant geographical area, and within the correct time period, he still must establish that his data is significant. Courts have recognized a number of tests for determining this significance,[231] and the plaintiff must pass the utilized test to meet his prima facie case. "Gross" disparity[232] may be found without statistical tests, but in recent years courts have required more sophisticated statistical methods and statistical significance.[233]

Even in cases where the plaintiff can acquire data from the employer, assimilating the data into significant statistical form is quite burdensome. But in cases such as *Atonio,* where the employer did not even preserve such data, the burden is overwhelming. It is, in fact, almost impossible. The *Atonio* Court played down this difficulty, stating that plaintiffs can use the "liberal discovery rules" to obtain statistical personnel records from the employer.[234] But this is not possible if such records are non-existent. Even when such records exist, flow data and work force data may be unreliable. As Justice Stevens aptly stated, the "additional proof requirement is unwarranted."[235]

Courts have always required a causation factor to establish that a defendant is liable[236] but have not required that the challenged act be the "sole or primary" cause.[237] Since the alleged "act" may be a cumulation of numerous employment practices, a plaintiff should not be required to isolate and identify[238] the specific employment practices responsible for the disparity and then produce significant statistical evidence to justify causation.

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229. *See Hazelwood,* 433 U.S. 299 (The Court found that the greater the number of protected class people within the geographic area, the easier it is to prove adverse impact.).

230. *See* 42 U.S.C. § 706(e) (A charge must be filed with EEOC within 60 days of the alleged discriminatory action absent a state statute to the contrary.).

231. One test was set out by *Albemarle,* 422 U.S. at 430-31, 437, and Contreras v. City of Los Angeles, 656 F.2d 1267, 1273 n.3 (9th Cir. 1981), *cert. denied,* 455 U.S. 1021 (1982) (finding that a 0.05 level of statistical significance establishes a prima facie case, meaning a 95% assurance that discrimination was the cause of the disparity). Another test applied was set out by *Hazelwood,* 433 U.S. at 309-11 and nn.14 and 17 (using a two to three standard deviations test). The EEOC has suggested a "rule of thumb" test, in which plaintiff must show that the selection rate for the protected class is less than four-fifths or 80%. 29 C.F.R. § 1607.4(d) (1981).

For a discussion on the application of these tests to determine relevant statistical disparity, see Corbett, *supra* note 225, at 245-46.

232. *See Dothard,* 433 U.S. at 330 n.12; *Hazelwood,* 433 U.S. at 307; *Teamsters,* 431 U.S. at 339-40 n.20.

233. Corbett, *supra* note 225, at 247.

234. *Atonio,* 109 S. Ct. at 2125.

235. *Id.* at 2132.

236. *See* 2 RESTATEMENT (SECOND) OF TORTS § 430 (1965).

237. *Atonio,* 109 S. Ct. at 2132; 2 RESTATEMENT (SECOND) OF TORTS § 431-433 (1965). *Cf.* Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

238. *Atonio,* 109 S. Ct. at 2124 (quoting *Watson,* 487 U.S. at 994).

D. The Defendant's New Burden of "Proving"

Prior to *Atonio*, disparate impact analysis has differed from disparate treatment analysis because of the defendant's burden of proving "business necessity"[239] or "job-related[ness]."[240] Proving this business necessity has generally required the employer to justify the use of the challenged criteria as "necessary to safe and efficient job performance"[241] or to exhibit a significant correlation between the important elements of job performance and the criteria in question.[242] The *Atonio* discussion of evidentiary standards in disparate impact analysis borrows important disparate treatment language in a way which calls into question the ability of disparate impact to remain disassociated from discriminatory intent.

Prior to *Watson* and *Atonio*, the Court had contrasted the two doctrines. In *Dothard v. Rawlinson*[243] the Court noted that a claim of discrimination against women resulting from the employer's use of a height and weight requirement need not assert any discriminatory motive. In *Connecticut v. Teal*[244] the Court held that a written test could constitute discrimination against blacks even though the state had used an affirmative action program in the selection process to offset the effects of the test. The *Atonio* Court now de-emphasizes the distinctions between disparate treatment and disparate impact.

The Court's reiteration of the *Watson* statement that 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"[245] resembles a disparate treatment analysis more than in any prior disparate impact case. It is reminiscent of the language in *Burdine* and *McDonnell Douglas* which, in characterizing the employer's burden as one of "production," required the employer to articulate "a legitimate, nondiscriminatory reason" for rejecting the plaintiff.[246]

Although such a retreat from distinguishing the two theories may shorten the reach of disparate impact, disparate impact had overcome disparate treatment's more limited reach. As Justice Blackmun stated in *Watson*, prior cases suggested that, whereas statistical proof of minority underachievement in disparate treatment analysis created no more than an inference of an employer's discriminatory intent, statistical proof in disparate impact cases directly established that the employer's practices produced effects forbidden by Title VII.[247] Therefore, the blurring of the two theories implicitly undermines the view that Title VII prohibits any selection devices affecting groups differently unless such a difference can be justified in such a way as to merit difference among applicants, regardless of intent or

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239. *Griggs*, 401 U.S. at 431.
240. *Id.* at 436.
241. *Dothard*, 433 U.S. at 332 n.14.
242. *Albemarle*, 422 U.S. at 431.
243. 433 U.S. 321 (1977).
244. 457 U.S. 440 (1982).
245. *Atonio*, 109 at 2126 (quoting *Watson*, 487 U.S. at 997).
246. *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 802.
247. *See Watson*, 487 U.S. at 1003-04 (Blackmun, J., concurring in part and concurring in the judgment).

nonintent on the employer's part.[248] An unjustified disparate impact is forbidden by Title VII; disparate treatment creates an inference of discrimination. To rebut a forbidden practice should require an affirmative defense and a shift in the burden of persuasion; to rebut an inference should only require meeting the burden of production. The new evidentiary guidelines are inconsistent with the purpose of Title VII.

E. Upholding the Purpose of Title VII

The legislative endorsement of *Griggs* in the 1972 amendments to Title VII proved that Congress intended to eradicate discriminatory impact in hiring and promotion.[249] "Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs."[250] The *Atonio* Court followed the *Watson* rationale that forcing employers to validate subjective criteria would place an impossible burden upon them. Even if subjective criteria are difficult to validate, such difficulty would not lessen an employer's burden of proof under the historical impact theory. As *Griggs* exemplified, validating objective criteria is also difficult. However, *Griggs* emphasized that the intent behind Title VII was expressly to protect an employer's right to insist that employees meet qualifications if those qualifications "measure the person for the job and not the person in the abstract."[251]

In *Watson* the American Psychological Association submitted an amicus brief to show that subjective criteria can be validated in ways similar to those used for validating objective criteria.[252] Other methods of validation, such as nationwide studies, expert testimony, or prior success of such criteria, could be used.[253] Continuing to require validation of criteria would force employers to revise questionable criteria and further the goal of Title VII.

These new guidelines were not necessary to relieve employers of any difficulty in rebutting subjective criteria and are even more unnecessary when applied to objective criteria. The *Atonio* Court, however, extended these new guidelines to both.

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248. *See* Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 SUP. CT. REV. 17, 22 ("The 'baby' in *Griggs* is the principle that unjustified discriminatory impact is unlawful, even in the absence of disparate treatment and/or discriminatory intent.").

249. *See* S. REP. No. 415, 92d Cong., 1st Sess. 5 n.1 (1971); H.R. REP.No. 238, 92d Cong., 1st Sess. 8 (1971). *See also Teal*, 457 U.S. at 447 n.8.

250. *Teal*, 457 U.S. at 447 n.8. (quoting S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971)).

251. *Griggs*, 401 U.S. at 436.

252. *Watson*, 487 U.S. 1007 n.5.

253. *Id.* at 1007.

F. Case Law Subsequent to Atonio

Since the *Atonio* decision, several federal courts have applied their interpretation of *Atonio* in ruling on disparate impact cases.[254] Certiorari has been granted by the Supreme Court on cases for further consideration in light of *Atonio*.[255] The courts are still differentiating between disparate treatment and disparate impact,[256] although some disparate treatment cases are quoting the *Atonio* decision unnecessarily.[257]

The Second Circuit used the *Atonio* and *Watson* standards to rule that statistical evidence concerning a hiring practice as a whole did not meet the now-required prima facie burden of isolating and identifying the specific employment practice.[258] The Fourth Circuit has also found for the employer when plaintiffs failed to prove a prima facie case under *Atonio* standards[259] and when the employer showed some valid employment goal from his practice.[260] The Sixth Circuit has ruled for the employer when the plaintiff did set out a prima facie case because the employer "satisfied the burden of showing the employment practices in this case were based upon a legitimate business reason."[261] The Seventh Circuit has used the more lenient "business justification" defense versus the prior "business necessity" defense to vacate and remand cases to the district court in favor of the defendant even though plaintiffs had shown prima facie cases.[262] There is no doubt that the *Atonio* decision has changed the outcome of disparate impact cases.

G. Legislation Subsequent to Atonio

Members of Congress have recognized the need to overrule the *Atonio* decision. The Fair Employment Reinstatement Act[263] was introduced as a bill on June 23,

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254. A non-exhaustive list includes: Lowe v. Commack Union Free School Dist., 886 F.2d 1364 (2d Cir. 1989); International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 887 (7th Cir. 1989); International Union, UAW v. State of Mich., 886 F.2d 766, 770 n.5 (6th Cir. 1989); Williams v. Giant Eagle Markets, Inc., 883 F.2d 1184, 1192 (3d Cir. 1989); Rendon v. AT&T Technologies, 883 F.2d 388, 390 n.1 (5th Cir. 1989); Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908, 912 (4th Cir. 1989); Evans v. City of Evanston, 881 F.2d 382 (7th Cir. 1989); Allen v. Seidmon, 881 F.2d 375 (7th Cir. 1989); Gagné v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 313 (6th Cir. 1989).

255. USX Corp. v. G. Green, 109 S. Ct. 3151 (1989); Consolidated City of Jacksonville, Duval County, Florida, 109 S. Ct. 3151 (1989).

256. For example, see Rendon v. AT&T Technologies, 883 F.2d at 390 n.1 ("[T]his is a disparate treatment case, not affected by the *Wards Cove* decision . . . .").

257. Williams v. Giant Eagle Mkts., Inc., 883 F.2d at 1192 (recognizing that changes have been evidenced in Title VII cases but quoting *Atonio* to support the finding that "no shadow has been cast on the *McDonnell Douglas/Burdine* allocation of burdens" in disparate treatment); Gagné v. Northwestern Nat'l Ins. Co., 881 F.2d at 313 (unnecessarily citing *Atonio* to delegate burdens of proof in disparate treatment cases); Rendon v. AT&T Technologies, 883 F.2d at 390 n.1. ("Although the district court used some language from disparate impact cases, the record in its entirety demonstrates that the parties tried this case as a disparate treatment action and the parties on appeal briefed this case according to the relevant disparate treatment precedents.").

258. Lowe v. Commack Union Free School Dist., 886 F.2d 1364 (2d Cir. 1989).

259. *Mallory*, 882 F.2d at 912.

260. *Id.*

261. *International Union, UAW*, 886 F.2d at 770 (citing *Atonio* for the proposition that defendants have the burden of producing evidence of a business justification, but plaintiffs still have the burden of proof).

262. Evans v. City of Evanston, 881 F.2d 382 (7th Cir. 1989); Allen v. Seidmon, 881 F.2d 375 (7th Cir. 1989).

263. S. 1261, 101st Cong., 1st Sess. 2 (1989).

1989.[264] Under this act, an employer would be required to prove a business justification for an allegedly discriminatory employment practice in a disparate impact case. The employer would also have to show that the employment practice resulted in the disparate impact. This act would return disparate impact analysis to the *Griggs* approach of the employer's showing "business necessity" which has been followed in "hundreds of lower court decisions."[265]

In remarks on the Senate floor, Senator Metzenbaum, who introduced the bill, asked, "How can we expect a plaintiff—an individual employee or job applicant—to be able to prove there is no business justification for a particular practice?"[266] He also stated: "It is the employer, not the individual worker, who knows why the practice was adopted. In addition, anyone who has ever been in a courtroom knows that it is virtually impossible for a party to prove the negative."[267] A number of civil rights groups have expressed support for the bill, including the NAACP Legal Defense Fund, the Lawyers' Committee for Civil Rights Under Law, the American Civil Liberties Union, and the National Women's Law Center.[268]

Comprehensive legislation in the form of an omnibus civil rights reform bill was also introduced in Congress in 1990 to amend Title VII of the 1964 Civil Rights Act.[269] A companion Senate bill was introduced by the Labor and Human Resources Committee Chairman, Edward Kennedy.[270] This bill addressed the Supreme Court ruling in *Wards Cove Packing Co. v. Atonio* as well as other employment decisions handed down by the Court in 1989.[271] Section 4 of the proposed bill would have added to section 703 of the 1964 Civil Rights Act a subsection which would make unlawful an employment practice that results in a disparate impact on a protected group if the respondent cannot meet both the burdens of production and persuasion and thereby prove that the practice is required by business necessity. The bill did not address the heightened statistical standards adopted in *Atonio*, however.[272]

Although he claimed to deeply regret doing so, President Bush vetoed the Civil Rights Act of 1990 on October 22, 1990.[273] Congress was unable to override the

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264. Sen. Howard M. Metzenbaum from Ohio introduced the bill. Other original co-sponsors include Sens. James A. Jeffords (Vermont), Brock Adams (Washington), Christopher J. Dodd (Connecticut), Albert Gore, Jr. (Tennessee), Mark O. Hatfield (Oregon), Edward M. Kennedy (Massachusetts), Frank R. Lautenberg (New Jersey), Spark M. Matsunaga (Hawaii), Barbara A. Mikulski (Maryland), Claiborne Pell (Rhode Island), and Paul Simon (Illinois).

265. *Metzenbaum Seeks Reversal of Wards Cove*, 131 LAB. REL. REP. 309 (1989).

266. *Id.*

267. *Id.*

268. *Id.* at 310.

269. *See Civil Rights Reform Bill Introduced*, 133 LAB. REL. REP. (BNA) 177 (1990).

270. The proposed Civil Rights Act of 1990 was introduced in both houses of Congress on February 7, 1990, as H.R. 4000 and S. 2104.

271. The bill is a comprehensive piece of legislation that goes far beyond addressing Wards Cove Packing v. Atonio, 109 S. Ct. 2115 (1989), Martin v. Wilks, 109 S. Ct. 2180 (1989), Patterson v. McLean Credit, 109 S. Ct. 2363 (1989), Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989), and Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). *See Civil Rights Reform Bill Introduced*, 133 LAB. REL. REP. (BNA) 177-78 (1990).

272. *See Analysis*, 133 LAB. REL. REP. (BNA) 200-01 (1990).

273. S. 2104.

veto despite wide support for the measure to do so.[274] Although the President favored several of the bill's provisions, his main objection to the legislation was its treatment of disparate impact litigation because of his belief that it would make it difficult for employers to defend against legitimate job practices.[275] He felt that employers "would be driven to adopt quotas in order to avoid liability"[276] and that "S. 2104 engages in a sweeping rewrite of two decades of Supreme Court jurisprudence."[277]

Senator Kennedy responded to President Bush's quota argument by saying that it was "a transparent smokescreen for the Administration's anticivil rights position"[278] and insisted that the bill was merely seeking to restore the *Griggs* rule of law.[279] As Kennedy pointed out, the rule of *Griggs* was the law from 1971 to 1989 and throughout those eighteen years there is no evidence that employers felt obliged to resort to quotas.[280]

When the first session of Congress convened on Thursday, January 3, 1991, the first bill to be introduced was the Civil Rights Act of 1991.[281] The legislation contains essentially the same language as the Civil Rights Act of 1990, although additional language was placed in the bill to alleviate fear that it would cause employers to impose the workplace quotas that President Bush believed would result.[282] The Bush administration is expected to package its civil rights legislation in the spring of 1991[283] but it seems unlikely this new bill will be included.

VI. CONCLUSION

The Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*[284] modified the ground rules that most lower courts had been following in disparate impact cases. Prior to *Atonio*, courts usually followed a pattern which provided that, if a Title VII plaintiff established a prima facie case of disparate impact through showing by a reasonable statistical test that employment practices used for hiring or promotion were disproportionately excluding members of a protected group, the burden of proof shifted to the employer defendant to persuade that the practice was

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274. President Bush's veto was sustained by a 66-34 vote taken in the Senate on October 24; no override vote was taken by the House. *See Civil Rights Act of 1990 Is Defeated*, Lab. L. Rep. (CCH) No. 343, at 1 (Nov. 5, 1990).

275. *See Civil Rights Act of 1990 Is Defeated*, Lab. L. Rep. (CCH) No. 343, at 1 (Nov. 5, 1990).

276. *Id.* President Bush stated, "Among other things, the Plaintiff often need not even show that any of the employer's practices caused a significant statistical disparity. In other cases, the employer's defense is confined to an unduly narrow definition of 'business necessity that is significantly more restrictive than that established by the Supreme Court in *Griggs* and in two decades of subsequent decisions." *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id. See also supra* notes 199-208 and accompanying text for a discussion of the fear of quota-based hiring.

281. H. R. 1.

282. The 1991 bill specifically states that it shall not be construed to "require or encourage" the adoption of quotas. *See Civil Rights Bill Is Back Before Congress*, Lab. L. Rep. (CCH) No. 359, at 1 (January 22, 1991).

283. *See While Administration Prepares Civil Rights Package*, Lab. L. Rep. (CCH) No. 366, at 2 (Feb. 18, 1991).

284. 109 S. Ct. 2115 (1989).

a business necessity. *Atonio* changed this burden of persuasion and returned it to the plaintiff, hence leaving only the burden of production on the employer. *Atonio* also diluted the "necessity" in the "business necessity" defense to a degree that requires the practice merely to serve the legitimate goals of the employer; the "business necessity" no longer requires a showing of necessity and is no longer an affirmative defense. If the plaintiff can propose an alternative selection device, *Atonio* dictates that courts should proceed with care before mandating that an employer adopt such a device, thereby empowering the employer even further.

By so protecting the employer, the *Atonio* Court has undermined the purpose of Title VII—that of protecting the employee. *Atonio* may have rendered Title VII powerless to protect employees who have suffered due to an employer's use of subjective selection criteria which can now be defended by a mere legitimate business reason. Practices based on principles of racial stratification and segregation are "essentially immunize[d]"[285] from attack under a disparate impact analysis. This writer must agree with Justice Blackmun's concern that the majority in *Atonio* has forgotten that race discrimination against non-whites is now, or even that it once was, a problem in our society.[286] To deny this problem is to deny the very facts of the *Atonio* case. This decision has given Title VII plaintiffs major steps backward in their fight against discrimination. Congressional endorsement of *Griggs* and its progeny had led courts to apply a fairly consistent interpretation of disparate impact analysis, and it is unwarranted that the Supreme Court should nonchalantly state that those cases have consistently misinterpreted the employer's burden of proof. If the legislative intent of Title VII truly is to prevent discrimination, Congress must convince President Bush of the need to pass the proposed legislation to overrule *Atonio* and return disparate impact to its previous analysis.

Shirley Terry Kennedy

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285. *Id.* at 2136 (Blackmun, J. dissenting).
286. *Id.*