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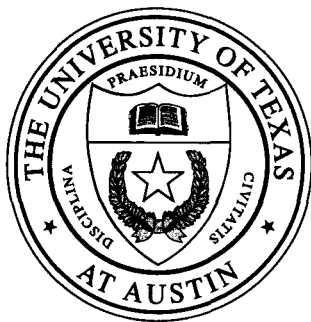
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Disparate Impact Is Not Unconstitutional  
*Michael Evan Gold*



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# Disparate Impact Is Not Unconstitutional

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I.	INTRODUCTION.....	171
II.	HISTORY OF THE TERM “DISCRIMINATION” .....	173
III.	TITLE VII.....	176
	A. Disparate Treatment.....	177
	B. Disparate Impact.....	178
IV.	THE PRIMA FACIE CASE OF DISPARATE IMPACT .....	179
	A. The Use of Proxies.....	179
	B. Statistical Theory .....	180
V.	DEFENSES .....	182
	A. Business Necessity.....	182
	B. Job Relatedness Disproves Adverse Effect.....	182
VI.	ANALYSIS OF JUSTICE SCALIA’S CONCURRING OPINION .....	184
VII.	CONCLUSION .....	186

## I. INTRODUCTION

Title VII of the Civil Rights Act of 1964<sup>1</sup> (“Title VII” or the “Act”) prohibits employers, employment agencies, and labor unions from discriminating against workers or denying them employment opportunities on the basis of race, color, religion, sex, or national origin.<sup>2</sup>

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<sup>1</sup> Pub. L. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C.A. § 2000e–2000e-17 (West 2006). References to section numbers in this essay pertain to this statute.

<sup>2</sup> 42 U.S.C.A. § 2000e-2 (West 2006).

The Act created the Equal Employment Opportunity Commission, which receives, investigates, and conciliates charges of discrimination and occasionally sues to enforce the Act.<sup>3</sup> Except where the context demands otherwise, I will use “employers” to stand for all of the agents who are prohibited from discriminating, “race” to stand for all of the prohibited bases of discrimination, “black applicants” to stand for all of the classes protected by the Act, “white applicants” to stand for all of the comparators to whom protected classes compare themselves, and “hiring” to stand for all of the employment contexts to which the Act applies.

In *Ricci v. DeStefano*,<sup>4</sup> the “New Haven Firefighters” case, white firefighters and one Hispanic firefighter sued the city of New Haven, Connecticut and city officials under Title VII. The plaintiffs claimed the city had committed intentional discrimination or disparate treatment<sup>5</sup> against them when the city disregarded the results of promotion examinations that had an adverse effect<sup>6</sup> on black and Hispanic applicants. The Supreme Court sustained the claim.<sup>7</sup>

In his concurring opinion, Justice Scalia invited attorneys in subsequent cases to consider arguing that the disparate impact theory of employment discrimination is unconstitutional.<sup>8</sup> He reasoned as follows:

- The Constitution prohibits the government from committing disparate treatment.
- Therefore, the government may not enact laws that require an employer to commit disparate treatment.<sup>9</sup>
- An employer who abandons a practice that has a disparate *impact* commits disparate *treatment* against the persons whom the practice favors because the employer seeks to increase the percentage of black applicants whom the practice favors.
- An employer who abandons a practice that has a disparate impact in order to avoid being sued by members of the class which the practice disfavors has been required by the

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<sup>3</sup> 42 U.S.C.A. § 2000e-4 (West 2006).

<sup>4</sup> 129 S. Ct. 2658 (2009).

<sup>5</sup> See text at nn.35–37 below.

<sup>6</sup> See *infra* notes 38–45 and accompanying text.

<sup>7</sup> *Ricci*, 129 S. Ct. 2658.

<sup>8</sup> “[I]t is clear that Title VII not only permits but affirmatively *requires* [remedial race-based actions] when a disparate-impact violation *would* otherwise result. But if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties — e.g., employers, whether private, State, or municipal — discriminate on the basis of race. Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decision making is . . . discriminatory.” *Ricci*, 129 S.Ct. at 2682 (Scalia, J., concurring) (citations omitted).

<sup>9</sup> *Id.*

government to commit disparate treatment.<sup>10</sup>

Disparate impact is thus unconstitutional in Justice Scalia's view,<sup>11</sup> but his reasoning reflects a misunderstanding of the theory of disparate impact and how it proves discrimination. When disparate impact is understood correctly, no constitutional issue arises.

## II. HISTORY OF THE TERM "DISCRIMINATION"

In the first edition of their treatise *EMPLOYMENT DISCRIMINATION LAW*, Barbara Lindemann Schlei and Paul Grossman identified the two principal theories of discrimination under Title VII. They called one of these theories "disparate treatment," which refers to intentional discrimination. In a disparate treatment case, the evidence must show that an employer denied an employment opportunity to a black applicant and the employer's reason was race. The other theory Schlei and Grossman called "disparate impact," which refers to unintentional discrimination. In a disparate impact case, the evidence must show that an employment practice denied employment opportunities to black applicants as compared to white applicants, and the practice was not job related or a business necessity.<sup>12</sup> The Supreme Court adopted Schlei and Grossman's terminology in 1977<sup>13</sup> and has continued to use it as recently as 2009.<sup>14</sup>

Schlei and Grossman, like other authorities in the field, refer to disparate treatment and disparate impact as theories, not as distinct legal claims.<sup>15</sup> The legal theories of disparate treatment and disparate impact are not claims in and of themselves, but rather ways of proving a claim.<sup>16</sup> Justice Lewis F. Powell, Jr. held the same view.<sup>17</sup> In *Connecticut v. Teal*, he wrote:

while disparate-treatment cases focus on the way in which an individual has been treated, disparate-impact cases are concerned with the protected group. . . . The Court,

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> BARBARA LINDEMANN SCHLEI AND PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1–12 (1976).

<sup>13</sup> *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

<sup>14</sup> *See Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009).

<sup>15</sup> *See* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAL, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* 165 (2d ed. 2001).

<sup>16</sup> *See id.* (referring to disparate treatment and disparate impact as "mode[s] of proof" for a Title VII claim).

<sup>17</sup> *Connecticut v. Teal*, 457 U.S. 440, 458–59 (1982) (Powell, J. dissenting) (citation omitted) (italics in original).

disregarding the distinction drawn by our cases, repeatedly asserts that Title VII was designed to protect individual, not group, rights. . . . But this argument confuses the *aim* of Title VII with the legal theories through which its aims were intended to be vindicated. It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct methods of proof. In one set of cases—those involving direct proof of discriminatory intent—the plaintiff seeks to establish direct, intentional discrimination against him. . . . In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference*—by showing that an employer’s selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process’ “built-in headwinds.”<sup>18</sup>

A few years later, in *Watson v. Fort Worth Bank & Trust*, Justice Sandra Day O’Connor expressed the same view in a section of her opinion in which all other justices participating in the case joined or concurred:

Several of our decisions have dealt with the evidentiary standards that apply when an individual alleges that an employer has treated that particular person less favorably than others because of the plaintiff’s race, color, religion, sex, or national origin. In such “disparate treatment” cases . . . the plaintiff is required to prove that the defendant had a discriminatory intent or motive . . . .

In *Griggs v. Duke Power Co.* this Court held that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer has violated [Title VII]. . . . The factual issues and the character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination. The evidence in these “disparate impact” cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities.

The distinguishing features of the factual issues that typically dominate disparate impact cases do not imply that the ultimate legal issue is different than in cases where

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<sup>18</sup> *Id.* (italics in original; underline added).

disparate treatment analysis is used.<sup>19</sup>

I agree with Schlei and Grossman and Justices Powell and O'Connor that disparate treatment and disparate impact are ways of proving the same thing, namely, discrimination. The following questions arise: what is discrimination, and how is it proven by disparate treatment and disparate impact?

Because Congress did not define "to discriminate" in Title VII, we assume that this verb carries its ordinary English meaning in the statute.<sup>20</sup> The Oxford English Dictionary provides this etymology: Latin *discriminare* from *discrimen -minis* "distinction", from *discernere* DISCERN.<sup>21</sup> The root meaning of "to discriminate," therefore, is simply to distinguish, and so the verb was used for generations. In the early seventeenth century, "to discriminate" meant to make or constitute a difference in or between. George Grote, for example, wrote of "capacities which discriminate one individual from another."<sup>22</sup> The point of view of the verb at that time was objective, not subjective; the differences inhered in the objects being compared, not in the mind of the agent observing them. By the middle of the seventeenth century, however, use of the verb was becoming more subjective in viewpoint. At that time "to discriminate" meant to distinguish with the mind; perceive the difference between. Isaac Barrow wrote, "We take upon us . . . to discriminate the goats from the sheep."<sup>23</sup> Substantially the same meaning carried into the late eighteenth century, but by then "to discriminate" had become fully subjective, focusing only on the mind of the agent. Henry Thomas Buckle wrote, "It is by reason, and not by faith, that we must discriminate in religious matters . . ."<sup>24</sup> and the United States *Scientific American* stated, "A simple energy measurement serves [i.e., allows us] to discriminate between the two kinds of event."<sup>25</sup> The emotional significance of the verb appears to have been either neutral (as a synonym of "to distinguish") or positive (as in having discriminating taste).

The sense in which "to discriminate" is most commonly used today first appeared in the late nineteenth century: to "make a distinction in the treatment of different categories of people or things, especially unjustly or prejudicially *against* people on grounds of race, colour, sex, social status, age, etc."<sup>26</sup> Mark Twain wrote of being "discriminated against on

<sup>19</sup> 487 U.S. 977, 985-987 (1988)(citations omitted) (underline added) (Justice Kennedy not participating).

<sup>20</sup> F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning.").

<sup>21</sup> THE CONCISE OXFORD DICTIONARY 386 (9th ed. 1995).

<sup>22</sup> GEORGE GROTE, FRAGMENTS ON ETHICAL SUBJECTS 59 (1876).

<sup>23</sup> ISAAC BARROW, *THE WORKS OF ISAAC BARROW* 219 (1845).

<sup>24</sup> HENRY BUCKLE, HISTORY OF CIVILIZATION IN ENGLAND 253 (1858).

<sup>25</sup> THE NEW SHORTER OXFORD ENGLISH DICTIONARY 689 (Thumb Index ed. 1993).

<sup>26</sup> *Ibid.*

account of my nationality”<sup>27</sup> in his non-fiction work, *A TRAMP ABROAD*. Fifty years later, Reinhold Niebuhr opined in his study on ethics and politics that “[e]ducational suffrage tests ... would discriminate in favor of the educated Negro against the servile, old-time Negro.”<sup>28</sup> The viewpoint remained subjective, but the connotation of the verb had become negative because the notion of unjust advantage had been added to the root meaning of “to distinguish.” Mark Twain was asserting that discrimination against Americans was unjust; Reinhold Niebuhr believed that all Negroes should be enfranchised.

Thus, the prevalent understanding of “to discriminate” in the United States in the twentieth century included a notion of an unjust disadvantage. This understanding was grounded on a strong sense of the basic equality of persons and an equally strong reaction to being the victim of an unjust distinction. When Congress enacted Title VII, a definition of “to discriminate” was no more necessary than a definition of other terms in the statute, such as “race” or “to segregate.” Americans understood then, as we do now, that to discriminate is to make an unjust distinction. This definition preserves the older sense of “to distinguish”—discrimination always involves a comparison—and adds the modern value judgment of injustice.<sup>29</sup>

Accordingly, to discriminate in Title VII meant, and continues to mean, “to distinguish unjustly.” In the context of employment, “to distinguish” means to grant an employment opportunity to one person and to deny it to another person. An employer can deny an employment opportunity to a worker in many ways that are unjust. The words “because of . . . race, color, religion, sex, or national origin”<sup>30</sup> in Title VII indicate that it applies only to these recognized bases of injustice. Therefore, under the Act “to discriminate . . . because of race” means to deny an employment opportunity to a worker on the basis of race.

### III. TITLE VII

Both disparate treatment and disparate impact are methods by which a plaintiff can prove that an employer unjustly distinguished in the award of employment opportunities. The injustice in both models of proof lies in the basis of the distinction, which is race. In disparate treatment, the basis of the distinction is race because race is the

<sup>27</sup> MARK TWAIN, *A TRAMP ABROAD* 172 (Harper 1879).

<sup>28</sup> REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* 80 (Scribner 2003).

<sup>29</sup> The popular understanding of “to discriminate” continues to change. I often hear younger persons make the verb transitive, and they sometimes omit the element of comparison, making the word into a synonym of “to disadvantage.” Thus, “He discriminated me” can mean simply “He treated me badly.” These changes, though increasingly common, are not yet standard.

<sup>30</sup> 42 U.S.C.A. § 2000e-2(a) (West 2006).

employer's conscious reason for the distinction.<sup>31</sup> In disparate impact, the basis of the distinction is also race, though race is not the employer's conscious reason for the distinction. Instead, the employer's reason for the distinction is an employment practice which the employer intends to serve a non-racial purpose.<sup>32</sup> The practice, however, does not serve its purpose. The practice serves only to distinguish between black and white applicants. Thus, the injustice of a practice with a disparate impact is that race is the actual basis for the distinction.

### A. Disparate Treatment

The elements of the disparate treatment model of proof are as follows:

- The employer is covered by Title VII;
- The employer offered a particular employment opportunity;
- The plaintiff was qualified for the opportunity;
- The plaintiff was willing to accept the opportunity;
- The employer denied the opportunity to the plaintiff; and
- The employer's reason for the denial was the plaintiff's race.<sup>33</sup>

The first five elements are normally proven with direct, conventional evidence. For example, the second element might be proven by evidence that the employer advertised for a mechanic, and the third element by evidence that the plaintiff had five years' experience as a mechanic. The last element can be proven with the same sort of evidence.<sup>34</sup> For example, the supervisor who decided which applicant to hire may have said the firm already had enough black mechanics. More often, however, the last element is proven by inference.<sup>35</sup> For example, the white applicants whom the employer hired for the job may have had less training and experience than the plaintiff. Although this evidence does not prove conclusively that the employer rejected the plaintiff because of race, the evidence is sufficiently suggestive of a racial motive to expect the employer to offer a non-discriminatory explanation for not hiring the black mechanic.

Typically, an employer defends against disparate treatment by

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<sup>31</sup> See Michael Evan Gold, *Towards a Unified Theory of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175, 218 (2001).

<sup>32</sup> *Id.* at 218–36.

<sup>33</sup> BLACK'S LAW DICTIONARY (9th ed. 2009); see GOLD, *supra* note 31 at 192.

<sup>34</sup> *Id.* at 181.

<sup>35</sup> See *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999) (“Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence.”).

attacking the proof of one or more elements of the prima facie case, for example, by disputing the plaintiff's qualifications or by identifying a non-discriminatory reason for denying the opportunity to the plaintiff. An employer may also raise two affirmative defenses: relying in good faith on an opinion letter from the Equal Employment Opportunity Commission,<sup>36</sup> or basing a decision on religion, sex, or national origin when that characteristic is a bona fide occupational qualification for the opportunity.<sup>37</sup>

The elements in the disparate treatment model of proof show that the employer has distinguished between a black and a white applicant in the award of an employment opportunity. The defenses are ways of negating this showing. Direct attack on one of the elements of the prima facie case would obviously serve this purpose. The affirmative defenses serve the same purpose. If the employer relied in good faith on an opinion letter from the Equal Employment Opportunity Commission, then the basis of the employer's act was the letter, not race. If the job required a worker to be a woman, then the basis of the employer's refusal to hire men was not their gender, but the requirements of the job.

Therefore, the elements of the disparate treatment model of proof and the defenses address whether or not the employer was guilty of discrimination as we normally use that word. An employer who disadvantages a worker because the worker is black unjustly distinguishes between black and white applicants in awarding employment opportunities.

## **B. Disparate Impact**

Disparate impact also shows that the employer was guilty of discrimination as we normally use the word. The elements of the disparate impact model of proof are as follows:

- The employer is covered by Title VII;
- The employer offered employment opportunities;
- The qualified labor pool is composed of this number of black applicants and that number of white applicants;
- The employer maintained an employment practice that had an adverse effect on black applicants as compared to white applicants in the qualified labor pool; and
- The practice was not job related.<sup>38</sup>

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<sup>36</sup> 42 U.S.C.A. § 2000e-12 (West 2006).

<sup>37</sup> 42 U.S.C.A. § 2000e-2 (West 2006).

<sup>38</sup> See *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274-5 (11th Cir. 2000) (outlining the elements of disparate impact in terms of gender discrimination); *New York City Transit Auth. V. Beazer*, 440 U.S. 568, 569 (1979) (outlining exception for "job related" criteria).

The first two elements are the same as in disparate treatment and can be proven with conventional evidence. The other elements require explanation.

The third element of disparate impact is the racial composition of the qualified labor pool.<sup>39</sup> The qualified labor pool is the group of workers who are willing and able to perform a job. I maintain that Title VII protects only workers in the qualified labor pool. However, if this proposition strikes the reader as too broad, I would be content with the alternative proposition that only workers in the qualified labor pool are entitled to relief under the Act. Congress did not intend to force an employer to offer a job to an unqualified worker or to pay damages to a worker who was unwilling to take the job.<sup>40</sup>

#### IV. THE PRIMA FACIE CASE OF DISPARATE IMPACT

It follows that evidence in a disparate impact case must pertain to the qualified labor pool, just as evidence in a disparate treatment case brought by an individual must pertain to a willing and able plaintiff. Plaintiffs in disparate impact cases rarely offer direct evidence of the qualified labor pool. Observing it for most jobs is impractical. Plaintiffs may know which skills a job requires, but lack the resources to obtain from all the workers in the job market reliable information regarding which skills they have and whether they would accept the job if it were offered to them.<sup>41</sup> Consequently, plaintiffs resort to proxies.

##### A. The Use of Proxies

A proxy represents something else, which is called the universe. If the proxy represents the universe, we know that what is true of the proxy is true of the universe. Usually, the proxy is smaller than the universe. Consider a public opinion poll in which a thousand randomly selected persons constitute a proxy for the general population. Sometimes a proxy is larger than the universe. Suppose we are planning to build a new school, and we want to know how many lockers to place in the gymnasium. We cannot ask students who will attend the school whether they will participate in sports and need lockers, but we can look at numerous other schools, observe the percentage of students in those schools who use lockers in the gymnasium, and extrapolate for our

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<sup>39</sup> EEOC Compliance Manual §15-VI, 2006 WL 4673429.

<sup>40</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971); *See* 42 U.S.C.A. § 2000e-12 (West 2006).

<sup>41</sup> *See* *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1199 (10th Cir. 2006); *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir.) *aff'd per curiam*, 371 U.S. 37 (1962); WAYNE C. CURTIS, STATISTICAL CONCEPTS FOR ATTORNEYS: A REFERENCE GUIDE 91 (1983).

school. I will use the term “fair proxy” to refer to a proxy that accurately represents the relevant universe.

In employment discrimination cases, the relevant universe is the qualified labor pool. A common proxy is the applicant pool for the job. This proxy is fair in most cases because it captures interest well (applicants are willing to accept the job) and captures qualifications fairly well (workers usually do not apply for jobs which they are unable to perform), as courts have recognized for several decades.<sup>42</sup> More accurately, there is usually no reason to believe that any difference exists in the ability of black and white applicants to perform a job for which they have applied or in their willingness to accept the job. Another common proxy for the qualified labor pool is the general population, which is a fair proxy when the job is unskilled or the employer provides training in the necessary skills.<sup>43</sup>

A fair proxy allows us to learn the racial composition of the qualified labor pool. Knowing what percentage of these workers is white and what percentage is black lays the basis for the next element in a disparate impact case, namely, proof that a specific practice of the employer denies opportunities to proportionally more black than white applicants who are interested in and qualified for the job. I will say that such a practice has an “adverse effect” on black applicants.

## B. Statistical Theory

The archetypical disparate impact case involves a written test on which white applicants are more successful than black applicants. For example, suppose that 90% of white test takers and 75% of black test takers pass. The question is whether the test has an adverse effect on the latter. The persons who took the test are a fair proxy for the qualified labor pool. This proxy captures interest in the job because workers rarely expend the effort to take a test for a job they would not accept. We cannot know *a priori* how well this proxy captures ability, but we begin with the assumption, absent evidence to the contrary, that ability is distributed proportionally across racial groups. As a result, we expect that proportionally as many black as white applicants will pass the test.

Does the fact of a disparity between expectation and observation prove that the test has an adverse effect? The answer is no because a degree of randomness affects even a fair process. The true effect of a

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<sup>42</sup> “Where a validity study is conducted in which tests are administered to applicants... the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market.” *U.S. v. Georgia Power Co.*, 474 F.2d 906, 916 (1973).

<sup>43</sup> *See, e.g. Rutherford v. City of Cleveland*, 179 Fed App’x 366, 381–82 (6th Cir 2006); *see also CURTIS, supra* note 41 at 91.

test is its normal outcome over many administrations, not its effect in a single administration.<sup>44</sup> Typically, however, plaintiffs know only the result of a single administration of a test. Can a single administration prove anything? The answer is yes, thanks to statistical theory. If the outcome of a single trial is distant enough from the normal expectation (in other words, is unlikely to have occurred by chance), it is “statistically significant.” In plain English, the disparity is meaningful.<sup>45</sup> There is reason to believe that the outcome was not simply a random variation in a fair process, but rather was influenced by a specific cause.

This reasoning can be applied to our example of a written test upon which an employer makes hiring decisions. We begin with the expectation that equal percentages of black and white applicants will pass the test. We observe that 90% of white applicants but only 75% of black applicants pass. Our statistician informs us that this result is statistically significant and is unlikely to occur by chance. We conclude that the test has an adverse effect on black workers.

Proof that an employment practice has an adverse effect on black applicants completes the plaintiffs’ *prima facie* case of disparate impact. Yet a statistically significant disparity—an adverse effect—does not prove discrimination. We know that the disparity probably has a cause, but we do not know what the cause is.<sup>46</sup> In our example, if the cause were that the black applicants were less qualified for the job than the white applicants, the cause would be just; if the cause were the race of the applicants, the cause would be unjust. Accordingly, the next step in the disparate impact model of proof is to determine whether the cause of the disparity is just or unjust.

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<sup>44</sup> This point can be understood intuitively. Imagine that someone tosses a coin 100 times and records the outcome, then conducts 999 more such trials, records the results, and averages them. We would expect that the average outcome over the 1,000 trials would be very close to 50% heads and 50% tails. We would not, however, expect the outcome of every individual trial to have the same distribution. Similarly, although we would expect that equal percentages of black and white test takers would pass a fair test that is administered 1,000 times, we should not expect the pass rates on any given administration of the test to be equal.

<sup>45</sup> This point can also be understood intuitively. Suppose *A* offers to make a bet with *B*. One of them will toss a coin one hundred times. *A* will win ten dollars for each result of heads in excess of fifty; *B* will win ten dollars for each result of tails in excess of fifty. *B* accepts the bet. The outcome is sixty-five heads and thirty-five tails, and *B* loses one hundred fifty dollars. *B* might well think, “Sixty-five, thirty-five is a very unusual result. There is a big disparity between what I expected, which was fifty-fifty or something close to it, and what occurred. Something strange happened.”

<sup>46</sup> Think again of *A*’s bet with *B*. If *B* supplied the coin and did the tossing, *B* would have no good reason to think that the cause of the disparity was suspicious. But if *A* supplied the coin, *B* might suspect that the coin was loaded; or if *A* did the tossing, *B* might suspect that *A* knew a trick for tossing heads.

## V. DEFENSES

### A. Business Necessity

The principal defense in the disparate impact model of proof is known as “business necessity.”<sup>47</sup> The employer can vindicate an employment practice that has an adverse effect on black applicants by proving that the practice is “job related and consistent with business necessity.”<sup>48</sup> “Business necessity” is a term of art. It means that the employer must prove not that the practice is essential to the business, but only that the practice truly serves a non-racial business purpose. A practice is job related if it distinguishes workers who are qualified for a job from workers who are not qualified for it. A job-related practice serves a non-racial business purpose.

As a matter of procedure, business necessity is an affirmative defense. As a matter of substance, however, an employer’s failure to prove business necessity completes the plaintiffs’ prima facie case of discrimination. The plaintiffs’ proof that a practice has an adverse effect does not establish discrimination. The element of injustice has not been proven. A disparity, however large and however significant, can have a just or an unjust cause. A just cause is a practice which distinguishes on the basis of genuine qualifications for the job, and something else causes proportionally fewer black applicants to be qualified. An unjust cause is a practice which distinguishes on some basis other than qualifications, and race causes the adverse effect.

### B. Job Relatedness Disproves Adverse Effect

If the employer proves that a practice is job related, the evidence demonstrates that the workers who are rejected by the practice are unqualified. Therefore, proof that a practice with an adverse effect on black applicants is job related establishes that the cause of the disparity is just. The cause is black applicants’ comparative lack of qualifications. If the employer fails to prove the practice is job related, we are left with an employment practice that has an adverse effect and is not job related. Such a practice distinguishes among applicants on some basis other than qualifications. As far as the evidence demonstrates, the black applicants

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<sup>47</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.”); see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (once plaintiff has made a prima facie case of discrimination, burden “must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”).

<sup>48</sup> 42 U.S.C.A. § 2000e-2 (West 2006).

who are rejected are as qualified as the white applicants who are selected. Nonetheless, although a practice that is not job related selects among applicants at random with respect to qualifications, the practice does not select at random with respect to race. That the disparity is statistically significant means that the practice consistently favors white applicants over black applicants. That is, the practice selects on the basis of race and, therefore, race is the cause of the disparity.

Consider another typical case, one involving an unscored objective selection criterion. Suppose an employer requires that all assembly line workers hold a high school degree. Because proportionally more white than black applicants complete high school,<sup>49</sup> the plaintiffs prove that this criterion has an adverse effect on black applicants. The burden then shifts to the employer to prove the criterion is job related or “valid.” Proof of validity may not be based on intuition or common sense; a rigorous validation study must be conducted. Suppose our employer’s study shows that the criterion predicts success on the job, that is, that workers who hold degrees perform the job better than workers who lack degrees. The employer proves that the criterion is job related. Workers who lack degrees are unqualified, and the disparity is caused by black applicants’ comparative lack of qualifications. Thus, an employer who hires on the results of a valid selection criterion distinguishes among applicants based on their qualifications, not their race. It may be that fewer black applicants than we might expect or desire are qualified, but an employer has every right to hire based on qualifications.

Now suppose the reverse: the employer fails to prove that holding a degree is job related. The selection criterion is not valid. It does not distinguish between qualified and unqualified workers, and those who lack a degree are as likely to succeed on the job as those who hold a degree. Yet because some applicants satisfy the criterion and some do not, the criterion distinguishes among them on *some* basis. What is the basis? The plaintiffs have proven that the criterion has a statistically significant adverse effect on black applicants. Therefore, the criterion *distinguishes on the basis of race*, favoring white over black applicants. Accordingly, an employer who hires on the basis of an invalid unscored objective selection criterion that has an adverse effect distinguishes among workers based on their race, not their qualifications.<sup>50</sup>

It should be clear now that disparate impact does not merely “smoke out” intentional discrimination, as some have contended.<sup>51</sup> Disparate impact proves an injustice that is independent of an employer’s intent.

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<sup>49</sup> NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., DUB NO. NCES 2010-028, THE CONDITION OF EDUCATION 2010, Indicator 18 (2010).

<sup>50</sup> Another defense to disparate impact is possible—an employer may prove good-faith reliance on an opinion letter from the Equal Employment Opportunity Commission. An employer is justified in relying on advice from the agency responsible for the protection of workers from discrimination.

<sup>51</sup> 129 S.Ct. 2658 at 2682 (Scalia, J., concurring), citing Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 494 at 498-499, 520-521 (2003.)

Let us use the term “disparate impact” to refer to an employment practice that has an adverse effect on black applicants and is not job related. The prima facie case of and defense to disparate impact, taken together, show whether an employer is guilty of discrimination as we normally use that word. An employer who uses a practice with a disparate impact on black applicants unjustly distinguishes between black and white applicants in awarding employment opportunities.

## VI. ANALYSIS OF JUSTICE SCALIA’S CONCURRING OPINION

With the foregoing in the reader’s mind, I will now demonstrate that Justice Scalia was mistaken and that disparate impact is not unconstitutional. He suggested that disparate impact is unconstitutional because the act of abandoning an employment practice with a disparate *impact* is an act of disparate *treatment*. Justice Scalia’s thought is that the motivation for abandoning the practice is to increase the number of black applicants whom the practice favors. In truth, however, the motivation for the act is that the practice is irrational and unjust.

The suggestion of unconstitutionality grew out of the facts of the *New Haven Firefighters* case.<sup>52</sup> The city of New Haven, Connecticut decided which firefighters to promote to lieutenant and captain by means of written and oral examinations<sup>53</sup> that ranked the candidates by their scores.<sup>54</sup> Under the rule of three, each vacancy was to be filled by one of the top three scorers on the examinations.<sup>55</sup> The city administered the examinations in 2003 and observed that they had an adverse effect on African-American and Hispanic candidates; the rate at which these groups passed the examinations was less than 80% of the rate at which white applicants passed.<sup>56</sup> The city did not conduct a validation study to determine whether the examinations accurately predicted success on the

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<sup>52</sup> Ricci v. DeStefano, 129 S.Ct. 2658 (2009).

<sup>53</sup> *Id.* at 2665.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> The examination for captain was completed by twenty-five white, eight black, and eight Hispanic candidates. Of these, sixteen white, three black, and three Hispanic applicants passed. Thus, 64% of white candidates passed the examinations for captain, but only 38% of black and Hispanic applicants were successful. For the position of lieutenant, forty-three white, nineteen black, and fifteen Hispanic applicants completed the examinations; twenty-five white, six black, and three Hispanic candidates passed. Thus, 58% of white applicants passed the examinations for lieutenant, but only 32% of black and 20% of Hispanic applicants were successful. Based on these numbers, the Court wrote, “The racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact discrimination.” *Id.* at 2677. The Court reached this conclusion by using the “eighty percent rule,” under which a practice has an adverse effect if black applicants’ rate of success on the practice is less than 80% of white applicants’ rate of success. *Id.* at 2666. The Court appears to have adopted the eighty percent rule as the standard for determining whether an employment practice has an adverse effect. The rule, however, is irrational and should be abandoned in favor of statistical analysis. See GOLD, *supra* note 31 at 222–23 (2001).

job.<sup>57</sup> Instead, fearing lawsuits from minority candidates who had not passed, the city “threw out the examinations.”<sup>58</sup> White applicants who would have been promoted based on the examinations then filed suit. The Supreme Court held that the city intentionally discriminated against the white applicants in violation of Title VII.<sup>59</sup> In the majority opinion, Justice Kennedy wrote that a practice with a disparate impact could cause an employer to commit disparate treatment,<sup>60</sup> and for this reason, Justice Scalia, concurring, suggested that disparate impact may be unconstitutional.<sup>61</sup>

I believe the Court was right in holding against the city for discarding the results of the examinations. The city did not know that they had a disparate impact. The city knew only that they had an adverse effect on black and Hispanic applicants. But, as I demonstrated above, adverse effect is only one element of the disparate impact model of proving discrimination. The other element is the lack of job relatedness, and of this element the city was ignorant. Because the city did not conduct a validation study to determine whether the examinations predicted success on the job,<sup>62</sup> the examinations might have been valid and the candidates with the highest scores might have been well qualified for the job. Alternatively, the examinations might have been invalid and revealed nothing about the candidates’ qualifications. Consequently, the city decided to ignore the results of the examinations simply because not enough black and Hispanic applicants passed. Thus, the city distinguished among workers on the basis of race and thereby discriminated against them in violation of Title VII.<sup>63</sup>

Justice Scalia was as wrong as the Court’s holding was right. He suggested that requiring employers to abandon a policy with a disparate impact requires employers to discriminate on the basis of race.<sup>64</sup> To see the error of Justice Scalia’s suggestion, let us consider the case of an employer who abandons a practice that has an adverse effect and is not

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<sup>57</sup> *Ricci* 129 S. Ct at 2667–68.

<sup>58</sup> *Id.* at 2664.

<sup>59</sup> *Id.* at 2681, 2664–65.

<sup>60</sup> *Id.* at 2674, 2681.

<sup>61</sup> *Id.* at 2682.

<sup>62</sup> *Ricci*, 129 S. Ct. at 2667–68.

<sup>63</sup> The Court’s standard of decision was that “race-based action like the City’s in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.” *Id.* at 2664. I believe that the standard which I implicitly advocate in the text—that a practice with an adverse effect may be abandoned only if the practice is not job related—would satisfy the Court’s standard. If a practice truly has a disparate impact, the employer can certainly demonstrate “a strong basis in evidence . . . that it would have been liable” for discrimination. *Id.* My standard might even be more rigorous than the Court’s, for a strong basis in evidence might be something less than full-fledged proof of disparate impact.

I disagree, however, with the Court’s characterization of the employer’s action in such a case as “race-based.” As I argue in the following text, abandoning a practice that has a disparate impact is not a race-based action. Rather, abandoning the practice is a non-discriminatory step that rationally serves the legitimate interests of the employer’s business.

<sup>64</sup> *Id.* at 2682.

job related, that is, a practice that has a disparate impact. Let us change one fact of the *New Haven Firefighters* case so that it exemplifies this situation which Justice Scalia contemplated. Suppose that after noticing that the promotion examinations had an adverse effect on black and Hispanic applicants, the city had commissioned a validation study which revealed that the examinations were not job related. In this event, the city would have known that the examinations had a disparate impact. Contrary to Justice Scalia's contention, the city would have had lawful reasons to ignore the results of the examinations; indeed, *the city would have had a legal duty to ignore the results.*

The city would have known that the examinations did not serve their purpose. They did not select qualified lieutenants and captains. Instead, they selected randomly with respect to qualifications. Promoting on the basis of such examinations would have been irrational and perhaps a violation of due process.

The city would also have known that the examinations in fact selected candidates on the basis of race. One of the goals of Title VII is to lead employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."<sup>65</sup> Thus, Justice Scalia's contention is 180 degrees off the mark. To act on the results of examinations with the knowledge that they do not identify qualified candidates, but do select on the basis of race, is surely to commit disparate treatment.

## VII. CONCLUSION

Thus, the decision to ignore the result of an examination, or to abandon any other practice with a disparate impact, is fully justified. The motivation for the decision is not race, but the flaws of the practice.<sup>66</sup> Therefore, the act of abandoning a practice with a disparate impact is not disparate treatment, the government does not require an employer to commit disparate treatment, and disparate impact is not unconstitutional.

I will conclude by moving the analysis to a higher level of abstraction, but of course reaching the same conclusion. Disparate treatment and disparate impact are models of proof of discrimination. Each in its own way proves the same thing—that an employer unjustly distinguishes between black and white applicants in awarding

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<sup>65</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (citation omitted).

<sup>66</sup> One can imagine a case in which an employer abandons a practice with a disparate impact, not because the practice is irrational and discriminatory, but because the employer desires to increase the number of black applicants for the job. Such a case would be simple disparate treatment and would pose no threat to the theory of disparate impact.

employment opportunities. An employer who abandons a practice that is unjust because it is unjust ceases to discriminate. Ceasing to discriminate in order to obey the law cannot be discriminatory.