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COMMENT


Linda Lye†

Seven years after Congress legislatively overrode the Supreme Court's decision in Wards Cove Packing Co. v. Antonio, the doctrine of disparate impact discrimination under Title VII, and the business necessity defense in particular, lie shrouded in confusion. This comment proposes a new interpretation of the business necessity defense, as cryptically codified in the Civil Rights Act of 1991. Ms. Lye traces the history of disparate impact's evolution through the lens of "conviction bar" cases, in which employers refuse to hire all applicants with criminal conviction records. These cases reveal that every effort to define the business necessity standard implicates a prioritization of competing social and individual interests. Ms. Lye argues that, in light of this implicit prioritization, the business necessity standard should be stringently interpreted.

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I.

Introduction

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Griggs v. Duke Power Co.¹

Six years after the Civil Rights Act of 1964 took effect, the Supreme Court unleashed a powerful tool for remedying employment discrimination. In Griggs v. Duke Power Co., the Supreme Court expanded its interpretation of Title VII to proscribe facially neutral employment practices that exert a disparate impact on protected groups,² regardless of an employer's intent in adopting and implementing such practices.³ Unlike disparate treatment defendants, disparate impact defendants cannot defend by disavowing discriminatory intent. Instead, a disparate impact defendant must establish that a challenged practice is justified by a business necessity—i.e., that it constitutes a "demonstrably . . . reasonable measure of job performance."⁴ Thus, the Court in Griggs found that the defendant employer had violated Title VII where the employer's facially neutral selection criteria (performance on two professionally designed aptitude tests and completion of a high school education) served to exclude a protected group, yet failed to measure job performance.⁵

Lower courts soon extended disparate impact analysis to facially neutral selection criteria other than the educational and testing requirements at issue in Griggs. For example, in Green v. Missouri Pacific Railroad Co.,⁶ the Eighth Circuit struck down an employer's policy of refusing to consider for employment any person convicted of a crime other than a minor traffic offense. In Green, the plaintiff succeeded in establishing a prima facie case of disparate impact discrimination: relying on applicant flow statistics (i.e., comparisons of actual application and selection rates for the plaintiff's group and the comparison group), the plaintiff demonstrated that the employer's policy automatically excluded blacks at a rate two and half times that of whites.⁷ Proceeding to the second stage of the analysis articulated in Griggs, the court in Green then examined whether the defendant, Missouri

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². Title VII prohibits facially neutral employment practices that have a discriminatory effect on a group of individuals, where that group is defined by race, color, religion, sex or national origin. Thus, both whites and blacks are protected groups. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976). Although the term "group defined on the basis of an impermissible classification" would be more precise, I will use the term "protected group" for ease of expression.
³. See Griggs, 401 U.S. at 432.
⁴. Id. at 436.
⁵. See id. at 431-32.
⁶. 523 F.2d 1290, 1298-99 (8th Cir. 1975).
⁷. See id. at 1294-95.
Pacific, had established a business necessity for the conviction bar. Rejecting Missouri Pacific's arguments that its employment practice was justified by such business necessities as "fear of cargo theft," the Eighth Circuit instead focused on the failure of the blanket exclusion to measure an individual applicant's job performance. By recognizing a prima facie case upon a showing of a discriminatory impact—regardless of whether that discriminatory impact stemmed from deficient educational opportunities or the plaintiff's own prior unlawful conduct—and by construing the business necessity defense narrowly to pertain only to job performance, Green illustrated the power inherent in disparate impact analysis to achieve Congress' goal of removing "artificial, arbitrary and unnecessary barriers to employment."

In the years since Green, courts at all levels have balked at the invitation to unleash fully the power of disparate impact. Courts have exhibited particular resistance to proscribing the employer conduct at issue in Green. In EEOC v. Carolina Freight Carriers Corp., for example, the Equal Employment Opportunity Commission (EEOC) challenged, on behalf of Francisco Rios, the defendant's lifetime conviction bar. The defendant's conviction bar automatically excluded from consideration any job applicant with one or more felony, theft, or larceny convictions that resulted in an active prison or jail term, regardless of the date of conviction.

The court in Carolina Freight declined to hold that the plaintiff had established a prima facie case of disparate impact discrimination, despite its own finding that "Hispanics are convicted at a substantially higher rate than non-Hispanics and that an employment practice which disqualifies applicants because of a conviction for a theft crime resulting in a prison term adversely impacts Hispanics at a statistically significant rate exceeding that of non-Hispanics." Although the court dressed its reasoning in a criticism of the plaintiff's statistical analysis, taking issue for instance with the study's definition of the relevant labor market and sample size, the court exposed its palpable hostility to the plaintiff's claim: "If Hispanics do not wish to be discriminated against because they have been convicted of theft, then they should stop stealing." Presumably, disqualified applicants brought upon themselves their own exclusion from the jobs at issue and should thus obtain no relief under Title VII.

8. See id. at 1298.
11. Id. at 751. The plaintiff's statistical analysis compared actual employment figures with expected employment patterns based on external labor market information. The study found that the shortfalls in the expected number of Hispanics employed exceeded the 0.05 level of probability and were thus statistically significant. See id. at 744.
12. Id. at 753.
Although the court found that the plaintiff had failed to establish a prima facie case, it nevertheless proceeded to decide that the defendant had succeeded in establishing a business necessity defense.\(^\text{13}\) Finding that an employer had a legitimate interest in hiring only honest employees and reducing losses from employee theft, the court found that it was reasonable for an employer to predict an applicant's trustworthiness based upon his or her criminal history.\(^\text{14}\) The court discounted the significance of the fifteen years that had elapsed since Rios' conviction and his successful performance as a casual employee for four years, during which time the defendant had never suspected him of theft.\(^\text{15}\)

Unfortunately, Carolina Freight fairly well represents the current state of a plaintiff's (in)ability to obtain relief under a disparate impact theory of discrimination. Courts appear both reluctant to find a prima facie case and willing to grant a business necessity defense. What explains the current, impotent state of a doctrine which once demonstrated tremendous potential for eliminating artificial barriers to equal employment opportunity?

The evolution of disparate impact tells two intertwined tales of erosion and confusion. The courts significantly eroded the power of the doctrine by imposing rigorous requirements of proof in the plaintiff's prima facie case and by lessening the defendant's burden in establishing a business necessity. Exacerbating this erosion was the courts' own confusion over the purpose and the applicability of the doctrine, as well as specific elements of the doctrine, particularly the business necessity defense.

Almost two decades of erosion and confusion have significantly limited the potential of disparate impact to serve as a tool for identifying and remedying employment discrimination. In order to unleash its untapped potential, the doctrine requires a reinvigoration and clarification. In addition, of these two objectives, I propose to trace disparate impact's dual tales of erosion and confusion through two lenses: criminal history cases and the business necessity defense.

The criminal history cases represent an area in which the courts have both explored disparate impact's potential\(^\text{16}\) and severely curtailed its applicability.\(^\text{17}\) Moreover, the criminal history cases present precisely the type of functional inequity which, I will argue, disparate impact can effectively address.

The business necessity defense also presents a productive site of analysis. The courts have exhibited, perhaps understandably, particular confusion over this element of the doctrine. In addition, the business necessity standard constitutes the juncture at which competing interests are

\(^{13}\) See id. at 754.

\(^{14}\) See id. at 753.

\(^{15}\) See id. at 739, 752-53.

\(^{16}\) See, e.g., Green v. Missouri Pacific R.R. Co., 401 F.2d 1290 (8th Cir. 1975).

weighed—society's interest in prohibiting practices shown to have a discriminatory effect and an individual employer's interest in furthering important business goals. To the extent that the state of legal doctrine reflects social values, the stringency of the business necessity standard reveals social priorities: a looser standard reflects an increased tolerance for demonstrated discriminatory practices and an emphasis on individual entrepreneurial objectives. With the goal of reinvigorating the doctrine of disparate impact, I argue that courts should instead express social priorities through a stringent definition of business necessity, a definition that properly emphasizes the importance of prohibiting discriminatory practices.

II.
EVOLUTION OF THE DOCTRINE, PART I: SUPREME COURT DECISIONS FROM GRIGGS TO WARDS COVE

In the early years of disparate impact, from Griggs to Dothard v. Rawlinson, the Court shaped the doctrine into a powerful weapon for plaintiffs seeking relief from exclusionary employment practices. Although this period represents a significant strengthening of the doctrine, the Court also foreshadowed the confusion and apprehension that prompted its decision in Wards Cove Packing Co. v. Atonio, a decision which seriously undermined the vitality of disparate impact as a tool for remedying discrimination.


The Supreme Court in Griggs v. Duke Power Co. gave its blessing to disparate impact analysis, a legal theory which had been gaining increasing currency with the lower courts. In Griggs, the Court found an employer's use of facially neutral testing and educational requirements to violate Title VII, where none of the requirements had been shown to measure job performance.

The Court erected a two-part analysis: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

23. Id. at 431.
Thus, according to Griggs, a plaintiff could establish a prima facie case upon sufficient proof of the discriminatory effects of a facially neutral practice on a protected group. (In later cases, the Court would elaborate in much greater detail upon the sufficiency of that proof.) Once a plaintiff demonstrates a prima facie case, a court should find a violation of Title VII unless the defendant can establish a defense of business necessity.

1. The Business Necessity Defense

The Court sprinkled several articulations of the business necessity defense throughout its opinion in Griggs: A challenged employment practice must be "shown to be related to job performance,"24 have a "manifest relationship to the employment in question,"25 be "demonstrably a reasonable measure of job performance,"26 bear some "relationship to job-performance ability,"27 and/or "must measure the person for the job and not the person in the abstract."28

The Court clearly emphasized job performance: employment practices should measure an individual’s ability to perform the job in question, and an employment practice that measures job performance is job-related. However, the Court did not specify whether business necessity was established merely by a demonstration of job-relatedness or if it required some showing in addition to a demonstration of job-relatedness. Some courts have interpreted the business necessity standard to require selection criteria to predict or correlate with performance of job duties.29 Other courts, however, have construed the business necessity defense to include a heightened showing of essentiality—that the employer had a business purpose sufficiently compelling to override the demonstrated disparate impact and that the challenged practice effectively carried out that purpose.30

2. The Issues Motivating the Decision in Griggs

Griggs raised several significant issues which have both strengthened and haunted the doctrine of disparate impact throughout its evolution.

a. A Focus on Effect, Not Intent

The particular facts of Griggs facilitated the Court’s expansion of Title VII into the realm of facially neutral practices and its elimination of an intent requirement. Prior to the Civil Rights Act of 1964, the defendant employer had openly segregated its workforce into lower-paying jobs for

24. Id.
25. Id. at 432.
26. Id. at 436.
27. Id. at 431.
28. Id. at 436.
29. See, e.g., Contreras v. City of Los Angeles, 656 F.2d 1267, 1280 (9th Cir. 1981).
blacks and higher-paying jobs for whites. In the year that the Civil Rights Act took effect, the company abandoned its overt policy of segregation and instead instituted educational and testing prerequisites for placement in the higher-paying departments, which had functioned to maintain the segregation of the employer’s workforce.

Without much judicial overreaching, the Court could conclude comfortably that the neutral practices at issue were unlawful because “[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” Strict adherence to an intent requirement would have required the plaintiffs to prove that the education and testing requirements had been adopted with an intent to discriminate, a burden that would have been almost impossible to meet.

Of course, the Court never admitted that it adopted disparate impact analysis in order to lessen plaintiff’s burden. Instead, it relied on a functional analysis. In egregious cases, practices with a disparate impact alone would constitute unlawful behavior: “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.” Thus, the Court’s decision was likely facilitated by, but did not depend upon, the employer’s past overtly discriminatory acts.

Insofar as Title VII sets forth models for identifying and remedying discrimination, disparate impact under Griggs departs from disparate treatment in the way it identifies unlawful behavior. Disparate treatment analysis authorizes courts to provide relief upon the plaintiff’s demonstration of discriminatory intent, as set forth in the manner required by St. Mary’s Honor Center v. Hicks, Texas Dep’t of Community Affairs v. Burdine, and McDonnell Douglas Corp. v. Green. Disparate impact, by contrast, marks

32. See id. at 427-28.
33. Id. at 430.
34. Id. at 432.
35. St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This trilogy of cases sets forth the “burden-shifting” method of proof for disparate impact cases. The plaintiff carries the initial burden of establishing a prima facie case. A prima facie case is established upon proof that (1) the plaintiff is a member of a protected group, (2) the plaintiff applied and was qualified for a position for which the employer was seeking applicants, (3) the employer rejected the plaintiff, despite her qualifications, and (4) after the rejection the position remained open and the employer continued to seek applications or the employer hired someone outside plaintiff’s protected group. See McDonnell Douglas, 411 U.S. at 802. From the prima facie case, a rebuttable presumption of discrimination is inferred. Once the plaintiff establishes a prima facie case, then the defendant bears a burden of production to articulate a legitimate, non-discriminatory reason for the adverse employment decision. See Burdine, 450 U.S. at 254. If the defendant meets this burden of production, the plaintiff may still prevail if she proves by a preponderance of evidence that the defendant’s articulated reason was a mere pretext for discrimination. See id. at 253. However, the ultimate burden of persuasion remains at all times with
unlawful behavior not by its motivating intent, either past or present, but by its effects.

Griggs' elimination of the intent requirement signaled the sharp break of the model of disparate impact from the model of disparate treatment. Conceptual clarity requires that the two models be kept distinct. However, foreshadowing the Court's later conflation of the two doctrines, the specter of disparate treatment loomed over the birth of disparate impact with the Court's acknowledgment of, but not reliance upon, the defendant's (prior acts of) intentional discrimination.

b. Functional Inequities: The Uneven Playing Field

The Court in Griggs implicitly expressed a concern that individuals should not be penalized for starting at a lower point on an uneven playing field. Embedded within this implicit concern was, of course, a recognition that the playing field was not level at the start.

Disparate performance on the defendant company's tests, the Court stated, "would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in Gaston County v. United States." In a later opinion interpreting the Griggs decision, the Court announced that "Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."

Thus, applicants' poor performance on an employer's job selection criteria could be the result of forces beyond their control, for instance, structural inequities in society's allocation of opportunities and resources. The Griggs Court recognized that an applicant's inability to satisfy certain selection criteria might be determined in significant part by her membership in a protected group (and the burdens entailed by such membership), and not merely by her "qualifications" as a job candidate in a pure meritocracy. In holding that facially neutral selection criteria could violate Title VII, the Court acknowledged the existence of structural inequities, their causal role in determining applicants' abilities to perform under facially neutral criteria, and the need to account for these inequities when developing a strategy intended to root out employment discrimination. Griggs can thus be read

The “presumption” of discrimination raised by the prima facie case merely forces the defendant to articulate a legitimate non-discriminatory reason; rejection of that reason by the factfinder does not compel judgment for the plaintiff. See Hicks, 509 U.S. at 511.

38. Griggs, 401 U.S. at 430.
to require that the causes of plaintiffs' disparate performance under the challenged selection criteria be attributable to forces beyond their control—structural inequities, as in *Griggs*, or biological differences, as in *Dothard v. Rawlinson*.

However, *Griggs* should be construed more broadly. In *Griggs*, the Court specifically disavowed any interpretation of the Civil Rights Act of 1964 as providing compensatory relief for the victims of past discrimination. This disavowal undermines an interpretation of disparate impact as a tool for addressing structural inequities—i.e., inequities stemming from a structure of (residual) racism. Moreover, the inequities which resulted in plaintiffs' deficient performance on the challenged tests were not only "beyond their control," but they were also beyond the employer's control. The employer in *Griggs* had little power over the quality of public education. The fact that the employer had no control over the plaintiffs' educational opportunities implies that the Court was not concerned with "who" had "control" over the particular inequities which ultimately contributed to plaintiffs' disparate performance under the selection criteria. Read in this light, *Griggs* addresses functional inequities: it was enough for the Court that, for whatever reason, plaintiffs were unable to perform on the selection criteria at an equal level.

**B. Albemarle Paper Co. v. Moody**

In *Albemarle Paper Co. v. Moody*, the Court considerably strengthened the disparate impact plaintiff's hand with its elaboration of the requirements of the business necessity defense and the addition of a third step to *Griggs*’ two-part disparate impact analysis. The plaintiffs in *Albemarle* challenged criteria similar to those at issue in *Griggs*: possession of a high school diploma and satisfactory completion of two tests for placement with the employer in a skilled line of progression.

In setting forth the elements of proof and defense under disparate impact analysis, the Court added a surrebuttal to the framework articulated in *Griggs*:

If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy work-

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40. 422 U.S. 405 (1975).

41. The Court also clarified the availability of make-whole relief and injunctive relief. Remedies, however, are beyond the scope of this comment.

42. *Albemarle*, 422 U.S. at 410-11.
manship.' [citations omitted] Such a showing would be evidence that the
employer was using its tests merely as a 'pretext' for discrimination. Thus, according to Albemarle, a plaintiff could still prevail even if a defendant succeeded in establishing a business necessity defense.

However, the specters of disparate treatment and doctrinal confusion hovered over the Court's reasoning. The Court cited as authority for this new third prong of disparate impact analysis the landmark disparate treatment case of McDonnell Douglas. Thus, the Court's effort to align the two models, an effort that would ultimately culminate in Wards Cove Packing Co. v. Atonio, began in Albemarle, the Court's second look at disparate impact.

The Albemarle Court further confused the issue by using the language of "pretext"—language borrowed from disparate treatment analysis—in its opinion. In the disparate treatment context, "pretext" means pretext to intentional discrimination. But what would "pretext" mean in the disparate impact context, where the employer's intent in applying facially neutral practices is not at issue? Perhaps the Court sought surreptitiously, or at least carelessly, to import an intent requirement into disparate impact—an importation that would eliminate any meaningful distinction between the two models.

In addition to creating a surrebuttal, the Court established rigorous requirements of proof for an employer seeking to establish the job-relatedness of testing criteria and thus prove business necessity. The Court expressed approval of the EEOC Guidelines regarding the professional validation of employment tests:

The message of these Guidelines is the same as that of the Griggs case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'

Although the employer had hired an industrial psychologist to validate its testing requirements, the Court found these validation studies insufficient.

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43. Id. at 425.
44. See id.
46. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting 29 C.F.R. §1607.4(c)).
47. See id. The Court went on to establish several principles governing test validation, under which the defendant's study failed: (1) A test must be validated for every job for which it is used; a test validated for one job may not be used as a selection criterion for another job absent independent validation for that job or demonstration that the two jobs have 'no significant differences.' (2) The job performance which the test performance is validated to predict must be measured objectively, or at least according to some reliable measure. (3) Selection criteria cannot measure job performance of a job into which entering applicants may eventually be promoted, absent certain conditions. (4) Finally, the test must be differentially validated, i.e., it must examine the predictive validity of both the plaintiff's group and the comparison group. See id. at 431-35.
In his concurrence, Justice Blackmun articulated a concern that foreshadowed the Court’s later fear in *Wards Cove* of the consequences of a stringent business necessity standard: “I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII.”

Although *Albemarle* handed disparate impact plaintiffs significant doctrinal advantages—by allowing for a surrebuttal and imposing exacting demands on a defendant seeking to justify a test as job-related—it nevertheless took the first of several steps towards a confused conflation of disparate impact and disparate treatment.

**C. Dothard v. Rawlinson**

In *Dothard v. Rawlinson*, a woman who applied for a correctional counselor position with the Alabama prison system successfully challenged statutory height and weight requirements on disparate impact grounds. The Court’s pronouncements on a plaintiff’s burden in establishing a prima facie case, as well as its clarification of the business necessity standard, strengthened the position of disparate impact plaintiffs.

The plaintiff in *Dothard* relied on national statistics on the general population to demonstrate that the height and weight requirements would exclude 41.13% of 18- to 79-year-old women in the country, but only one percent of the respective male population. The Court held specifically that a plaintiff need not base a prima facie case on applicant flow statistics, but could instead rely on external data.

Upholding the lower court’s finding of a prima facie case of disparate impact, the Court proceeded to analyze the defendant’s proffered business necessity defense. Consistent with earlier decisions, the Court emphasized the requirement that challenged selection criteria actually predict job performance. The defendant argued that the height and weight “requirements . . . have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor.” However, the Court found that in the district court, “the appellants [defendants] produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good

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48. *Id.* at 449 (Blackmun J., concurring).
49. 433 U.S. 321 (1977). The case also involved a disparate treatment challenge to a regulation excluding women from contact positions in all-male prisons.
50. *See id.* at 332.
51. *See id.* at 329-30.
52. *See id.* at 330.
53. *Id.* at 331.
job performance." The Court indicated that a quality would be deemed "essential" to job performance if it were "necessary to safe and efficient job performance." The Court went on to state that "[i]f the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly." Because defendants failed to conduct such a test, they failed to satisfy the requirements of the business necessity defense.

Thus, the Court set forth a two-part test for business necessity. A defendant must first articulate a quality "essential to effective job performance" and then must prove that the challenged selection criteria directly measures the applicant's possession of that quality. Practices which measure safe and efficient job performance qualify as essential; however, the Court did not address, more generally, whether and to what degree a court should scrutinize the essentiality of a defendant's proffered "essential quality."

D. New York City Transit Authority v. Beazer

With New York City Transit Authority v. Beazer, the Court took a definitive step towards disparate impact's current state of erosion and confusion. The Court significantly eroded the vitality of the doctrine in the areas of the prima facie case and the business necessity standard, and it confused the doctrine with respect to the plaintiff's surrebuttal.

Beazer involved a challenge to the New York City Transit Authority's blanket exclusion of any individual using or possessing methadone from all employment, including those positions deemed "nonsafety-sensitive." The Court found that the plaintiffs failed to establish a prima facie violation of Title VII because the statistics on which they relied (to demonstrate the disparate exclusionary impact of the methadone bar) did not encompass the relevant labor market. Henceforward, the Court would require plaintiffs who did not use applicant flow data instead to tailor their statistical models to the narrow pool of qualified, likely applicants to the job in question.

54. Id.
55. Id. at 331-32 n.14.
56. Id. at 332.
57. Id. at 331.
58. Id. at 332.
60. See id. at 584-85. Perhaps relying on Dothard, the plaintiffs looked to general population statistics to demonstrate the exclusionary impact of the methadone policy. Specifically, they pointed to enrollment data of New York City public methadone maintenance programs: 63% to 65% of those enrolled were black or Hispanic. See id. at 585. The Court rejected these figures, however, as over- and under-inclusive, for failing to sort out those public methadone users who were either unqualified for a position with the Transit Authority or not in search of employment, and for failing to take into account the demographics of methadone users in private programs. See id. at 585-86. Later, the Court formally adopted the "relevant labor market" requirement for disparate impact cases in Wards Cove. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).
Although the Court found that the plaintiffs failed on the prima facie case, it briefly discussed the second stage of disparate impact analysis, strongly intimating that the defendant had succeeded in establishing a business necessity defense:

Respondents recognize, and the findings of the District Court establish, that TA's [Transit Authority's] legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and of a majority of all methadone users. The District Court also held that those goals require the exclusion of all methadone users from the 25% of its positions that are 'safety sensitive.' Finally, the District Court noted that those goals are significantly served by—even if they do not require—TA's rule as it applies to all methadone users including those who are seeking employment in nonsafety-sensitive positions. The record thus demonstrates that TA's rule bears a "manifest relationship to the employment in question." 61

With the dicta in this footnote, the Court signaled its imminent easing of the defendant's burden under the business necessity defense. While the Court in Dothard had appeared to require that a challenged practice directly measure a quality essential to job performance, the Court's Beazer footnote seemed to require only that a practice significantly serve a legitimate employment goal. 62 Seventy-five percent of the positions covered by the methadone exclusion were not deemed "safety-sensitive," and thus did not implicate the defendant's putatively legitimate goal of safety—and yet the Court nevertheless upheld the practice. 63 The Court thus provided a strong indication that the "significantly serves" requirement could be easily satisfied. With a single footnote, the Court appeared to have jettisoned whole-sale Albemarle's requirement that an employer demonstrate the validity of each selection criterion with respect to each job for which it selected.

More ambiguous in implication, however, was the Court's use of the term "legitimate employment goals of safety and efficiency." 64 Certainly, common usage would indicate that "legitimate" denotes a looser standard than "essential." 65 With a deft sleight of pen, the Beazer Court borrowed Dothard's language on safety and efficiency but shifted the focus away from the narrow requirement of job performance and instead to the more amorphous category of employment goals—a sleight which could potentially eliminate job performance from the analysis entirely. As discussed above, the Court in Beazer upheld use of the practice, on safety grounds, for

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61. Beazer, 440 U.S. at 587 n.31 (emphasis added).
63. Beazer, 440 U.S. at 587 n.31.
64. Id.
65. "Essential" means "basic or indispensable," AMERICAN HERITAGE DICTIONARY 448 (10th ed. 1981), whereas "legitimate" means "in accordance with traditional or established patterns." Id. at 747.
both safety-sensitive and nonsafety-sensitive positions.\textsuperscript{66} Thus, the goal was considered "legitimate," even though it bore little relationship to performance of seventy-five percent of the jobs in question. Did this imply—borrowing from the facts of \textit{Griggs}—that an employer could justify use of an educational requirement by merely proffering the employment goal of having an educated workforce, even where education level was unrelated to the performance of a significant portion of the jobs in question?

This unhappy prospect notwithstanding, this part of the \textit{Beazer} opinion left open several questions. What—beyond safety and efficiency—would actually constitute legitimate employment goals? What criteria should a court use in evaluating the "legitimacy" of a proffered "employment goal"? And how rigorously should a court conduct that evaluation? The Court later answered some of these questions, though not in the plaintiff's favor.\textsuperscript{67}

Moving on to the third prong of disparate impact analysis, the \textit{Beazer} Court took its next step towards the conflation of the disparate impact and disparate treatment models. After concluding its discussion of business necessity, the Court stated that "[t]he District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination."\textsuperscript{68} This comment magnified the confusion, first made apparent in \textit{Albemarle} and now firmly incorporated into Court-announced doctrine, that the third stage of disparate impact analysis implicated an intent requirement. With the third stage of both models thus rendered parallel, the logical next step was to shape the remaining two stages of disparate impact in the figure of disparate treatment.

\textbf{E. Connecticut v. Teal}

Although the plaintiff prevailed in \textit{Connecticut v. Teal},\textsuperscript{69} the decision was at best an ambiguous victory for disparate impact plaintiffs generally. In \textit{Teal}, the plaintiffs challenged the defendant's requirement that, in order to be considered for promotion, candidates had to pass an exam that excluded blacks at a disproportionate rate yet was not job-related.\textsuperscript{70} The Court rejected a "bottom line" defense—in which the defendant pointed to the overall result of the promotional process—as a means of either attacking the plaintiff's prima facie case or defending against it.\textsuperscript{71}

The decision boded ominously for two reasons. First, the Court's decision focused on discrete components of the decisional process. As a conse-

\begin{itemize}
  \item \textsuperscript{66} \textit{Beazer}, 440 U.S. at 591-94.
  \item \textsuperscript{67} See \textit{Wards Cove Packing Company v. Antonio}, 490 U.S. 642 (1989) and discussion \textit{infra} Part II.F.
  \item \textsuperscript{68} \textit{Beazer}, 440 U.S. at 587.
  \item \textsuperscript{69} \textit{457 U.S. 440 (1982)}.
  \item \textsuperscript{70} See id. at 444.
  \item \textsuperscript{71} See id. at 442.
\end{itemize}
quence, the plaintiffs in this case succeeded in establishing a prima facie case even though members of their group, African Americans, were not adversely affected as a group by the ultimate outcome of the promotional process. 72 Nevertheless, allowing plaintiffs to enjoin specific elements of a decisional process could logically lead to a requirement that plaintiffs identify with specificity the element of a challenged decisional process causing an alleged disparate impact. And so the Court later would conclude in *Wards Cove.* 73

Second, the Court’s decision focused on individual treatment. The Court rejected the bottom line defense because “[t]he principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.” 74 The Court went on to conclude that the fact relevant to the analysis of whether unlawful discrimination occurred was the manner in which the employer treated the individual plaintiffs, not the protected group of which they were members. 75

This conclusion, however, confused the distinction between disparate impact and disparate treatment analysis. As laid out in *Griggs,* disparate impact constitutes one of two models under Title VII for identifying and remediying unlawful discriminatory behavior. 76 Disparate impact looks to the effects of employer conduct on a protected group in order to identify unlawful discrimination. 77 In contrast, disparate treatment looks to the treatment of an individual or group of individuals (and asks such questions as whether the treatment was motivated by discriminatory intent) in order to make the identification.

Nevertheless, both models require that discriminatory behavior, once identified, be remedied with individualized treatment. By this I do not mean simply that relief is awarded to individual plaintiffs. What I do mean is that Title VII, as interpreted by the Court, envisions a remedy in which an employer is required to evaluate an individual as an individual. Group characteristics that do not bear directly on that particular individual’s ability to perform the job in question must be removed from consideration. Thus, the Court in *Griggs* demanded that employment practices “measure the person for the job and not the person in the abstract.” 78 Like disparate treat-

72. Although only 54.17% of blacks passed the exam, as compared with 79.54% of whites and 74.77% of the overall pool, 11 of the 46 candidates eventually promoted were black (with the remaining 35 candidates white). *Id.* at 443-44.


75. *Id.* at 455.


77. Obviously, an employer who has maltreated a group as a whole will also necessarily have mistreated individuals who belong to that group. My point, however, is that the question, under disparate impact, of whether discrimination has occurred does not turn on the maltreatment of the individual.

78. *Griggs,* 401 U.S. at 436.
ment, disparate impact requires individualized treatment as a remedy for unlawful discrimination.

Nevertheless, disparate impact, as distinct from disparate treatment, does not focus on individual treatment—on how an employer has treated a single individual—in order to determine whether unlawful conduct has occurred. By looking to the treatment of individuals in the course of its disparate impact analysis, the Court in Teal triggered a further confusion of the two doctrines. 79

F. Watson v. Fort Worth Bank and Trust

In Watson v. Fort Worth Bank and Trust, 80 the plurality took the penultimate step towards the erosion and confusion of disparate impact, the step that led directly to the majority opinion in Wards Cove. In Watson, the plaintiff, a black woman, challenged her employer’s subjective evaluation process under which she was repeatedly denied promotions ultimately given to white candidates. In its opinion, the majority recognized that disparate impact analysis may be applied to subjective or discretionary employment practices. 81

In so concluding, the Court strongly reaffirmed the functional analysis lying at the heart of Griggs:

[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination. . . . Perhaps the most obvious examples of such functional equivalence have been found where facially neutral job requirements necessarily operated to perpetuate the effects of intentional discrimination that occurred before Title VII was enacted . . . . [However, w]e have not limited [disparate impact analysis] to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination. 82

Excluding subjective practices from disparate impact analysis, the Court reasoned, would effectively eviscerate disparate impact entirely. 83 The logic of a functional analysis did not permit categorical exemptions of certain employment practices, but instead demanded an extension to all practices exerting a discriminatory impact.

79. I do not mean to argue that the plaintiffs in this case did not suffer from unlawful discriminatory practices. The Court could have reached the same result merely by recognizing, which it did, that discrete elements of a decisional process constitute actionable employment practices. The Court should not have gone on to shift the focus of disparate impact analysis away from group effects. The dissent correctly pointed to this confusion on the part of the majority: “There can be no violation of Title VII on the basis of disparate impact in the absence of disparate impact on a group.” Teal, 457 U.S. at 459, 463 (Powell, J., dissenting). Ironically, two members of the dissent, Rehnquist and O’Connor, would later sign the majority opinion in Wards Cove which consummated this confusion.

81. See id. at 990.
83. See id. at 990.
The plurality opinion recognized the potential force of an unencumbered functional analysis, anticipating "expensive litigation and potentially catastrophic [employer] liability" and predicting cost-avoidance measures such as quotas. Consequently, the plurality sought to limit disparate impact analysis by (1) increasing the plaintiff's burden in the prima facie case by adding an identification and causation showing (i.e., requiring the plaintiff to identify a specific employment practice and prove that it caused the disparate impact); (2) reducing the defendant's procedural burden in the business necessity standard from one of persuasion to one of production; and (3) reducing the defendant's substantive burden in the business necessity standard, requiring the defendant merely to show that the challenged "employment practices are based on legitimate business reasons." In this manner, the plurality in rhetoric remained true to the expansive logic of Griggs' functional analysis, yet in practice it imposed severe constraints on the doctrine's reach.

G. Wards Cove Packing Co. v. Atonio

The Supreme Court's era of confusion about and erosion of the doctrine of disparate impact culminated with its decision in Wards Cove Packing Co. v. Atonio. The case, reminiscent of Griggs, involved a workforce almost entirely segregated into lower-paying jobs, which were occupied predominantly by non-white workers, and higher-paying jobs, which were occupied predominantly by white workers. The Court significantly raised the prima facie hurdle by requiring a plaintiff to (1) demonstrate disparity by using data on the relevant labor market, (2) identify a specific employment practice alleged to cause the disparity and (3) prove causation. In the Court's view, rigorous requirements governing the establishment of a prima facie case were necessary, or else employers would adopt quotas as defensive measures against the anticipated flurry of disparate impact litigation. The Court then went on to discuss the second stage of disparate

84. Id. at 993.
85. Id. at 994, 998. The Court cited no authority for the procedural reduction of the defendant's burden and cited the dicta from the Beazer footnote—regarding employment practices that "significantly served" "legitimate employment goals"—to support the substantive reduction. Watson, 487 U.S. at 998 (citing New York Transit Authority v. Beazer, 490 U.S. 568, 587 n. 31 (1979)).
87. This figure will be very difficult for the plaintiff to ascertain and easy for the defendant to attack as overinclusive (for taking into account individuals who would not be otherwise qualified for the job in question) or underinclusive (for failing to encompass all otherwise qualified individuals). Like the Beazer Court, the Wards Cove Court rejected the baseline against which the plaintiffs sought to demonstrate a discriminatory effect. Specifically, the Court required the plaintiffs to compare the employer's actual workforce with the relevant labor market, not with other segments of the employer's workforce. See Wards Cove, 490 U.S. at 650-51, 653-55.
88. See id. at 657.
89. See id. at 656.
90. See id. at 652.
impact analysis, the newly-named "business justification" standard. Thus, a majority of the Court adopted all of the doctrinal constraints that had been advocated by the Watson plurality.

Disparate impact had never exorcized the specter of disparate treatment. Over the years, the Court had attempted to align the two models—partly due to its genuine confusion over the distinction between the two doctrines, as in Teal, and partly as a conscious effort, as in Albemarle. The logic of that attempted alignment took full shape with the Court's reallocation of burdens in Wards Cove. Citing a key disparate treatment case, the Court explicitly sought to conform the second stage of disparate impact analysis with the second stage of disparate treatment analysis. The defendant's burden was reduced to one only of production, and the ultimate burden of persuasion remained, at all times, with the disparate impact plaintiff.

The Court also modified the substantive requirements of an employer's defense. Conceding that there was a lack of clarity in the doctrine, the Court went on to reframe the issue at this stage of the analysis as "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."

Adopting the language of its footnote in Beazer, the Wards Cove Court eliminated any ambiguity that had earlier obtained regarding the level of scrutiny with which a court would review the legitimacy of an employer's proffered goals. The Court made clear that the standard was not stringent: a court should engage only in "a reasoned review of the employer's justification for his use of the challenged practice.... There is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." There is also no mention of job performance in the Court's opinion.

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91. See id. at 658. The Court seemed to indicate that what had previously been stages two (business necessity) and three (alternative practices) now melded into a two-tier "business justification" standard. See id. Later in the opinion, however, the Court seemed to indicate that the alternative practices prong remained a surrebuttal, i.e., a third stage of the analysis. See id. at 660. Nevertheless, the distinction between a three stage analysis and a two stage analysis with a two-tier second stage becomes functionally meaningless in light of the Court's reallocation of burdens, that is, its assignment to the plaintiff—throughout the analysis—of the ultimate burden of persuasion. Because the alternative practices prong of disparate impact analysis is beyond the scope of this paper, I note only that a conflation of the business necessity and alternative practices showings provides further indication of the Court's tremendous confusion over the doctrine.

92. See supra notes 67-77 and accompanying text.

93. See supra notes 41-44 and accompanying text. The distinction between conscious and confused efforts is not so clear. I would argue that the Court's conscious efforts were also confused.

94. See Wards Cove, 490 U.S. at 659-60 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)).

95. See id. at 659.

96. Id.


98. Wards Cove, 490 U.S. at 659.
The Court thereby left open the possibility that an employer could adopt a practice which functioned to exclude applicants for reasons entirely unrelated to their job performance, as long as the practice served an employment goal, the legitimacy of which a court would review only deferentially. Consistent with the clarification that there was no requirement (read: consistent with the elimination) of a showing of essentiality, the Court renamed the employer’s business necessity defense “the business justification” defense.99

The Court did not articulate any criteria by which to determine if a challenged practice is “significantly serving” a legitimate employment goal. The overall thrust of the opinion towards lightening the defendant’s burden, however, implied a low threshold.

And so, with its opinion in Wards Cove, the Court brought to a close two intertwined, eighteen-year-old tales of confusion and erosion in the evolution of disparate impact doctrine.

H. The Legislative Reaction: The Civil Rights Act of 1991

Wards Cove provoked a strong reaction from Congress. Shortly after the Court issued its decision, Senator Kennedy introduced an amendment to Title VII “to restore and strengthen civil rights laws that ban discrimination in employment.”100 The legislative debate proved contentious, but after almost two years of political wrangling and compromise, the Civil Rights Act of 1991101 (hereinafter “1991 Act”) finally emerged.102

Although the 1991 Act recaptured some of the territory eroded by Wards Cove, it also contributed significantly to doctrinal confusion. The 1991 Act restored the allocation of burdens that had existed prior to Wards Cove: the defendant’s burden at the second stage was restored to one of persuasion, not merely production.103 But the substance of that second stage burden remained ambiguous. The Act requires an employer “to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity.”104

In order to exclude from the official legislative history the extensive controversy surrounding the proposed definition of the business necessity standard, the Act provided that “[n]o statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 . . .

99. Id.
104. Id.
shall be considered legislative history of, or relied upon in any way as legis-
Lative history in construing or applying, any provision of this Act that re-
lates to Wards Cove—Business necessity . . . . "\textsuperscript{105} However, this succinct
and unhelpful interpretive memorandum hardly eliminates any ambiguity; it
merely states that "[t]he terms 'business necessity' and 'job-related' are in-
tended to reflect the concepts enunciated" in Griggs and other pre-Wards
Cove decisions. In essence, the 1991 Act codified the confusion which for-
merly prevailed.\textsuperscript{106}

### III.

**Evolution of the Doctrine, Part II: Erosion of Disparate Impact in Lower Court Opinions in the Criminal History Cases**

During this same period of Supreme Court and Congressional confu-
sion and erosion of disparate impact, the criminal history cases—cases
challenging exclusions of applicants with prior criminal convictions—re-
count a similar story, particularly with respect to the tale of erosion. After a
brief initial flourish, in which the lower courts and the EEOC broadened the
application of Griggs and explored the potential of disparate impact analy-
sis, courts then sharply limited plaintiffs' ability to challenge criminal con-
viction bars on disparate impact grounds.

#### A. The Initial Flourish

At first, the lower courts and the EEOC embraced disparate impact
analysis. They expanded its application beyond the educational and testing
criteria at issue in Griggs, beyond situations in which a neutral practice
perpetuated the effects of a defendant's own past discrimination, and be-
yond situations in which applicants' poor performances on selection criteria
were attributable to forces entirely "beyond their control."

1. **Green v. Missouri Pacific Railroad Co.**

Relying on Griggs' functional analysis, the Eighth Circuit in Green v.
Missouri Pacific Railroad Co.\textsuperscript{107} found that a blanket exclusion of all job
applicants with conviction records violated Title VII. The plaintiff, Buck
Green, an African American man, had been convicted of resisting the draft
three years before his application to the defendant employer, Missouri Pa-
cific Railroad. Missouri Pacific followed an absolute practice of refusing to
consider for employment any applicant who had ever been convicted of a

\textsuperscript{105} See id. § 105(b).

\textsuperscript{106} See discussion infra Part IV for a discussion of the consequences of this confusion.

\textsuperscript{107} 523 F.2d 1290, 1295 (8th Cir. 1975).
crime other than a minor traffic offense; thus, it automatically disqualified Green's application.\textsuperscript{108}

Noting expert testimony regarding disparate conviction rates of whites and blacks in the general population, the court relied primarily on two years of applicant flow statistics. The conviction bar automatically excluded 5.3\% of the 3282 black applicants to Missouri Pacific, but only 2.23\% of the 5206 white applicants.\textsuperscript{109} Evidence that the black rejection rate was two and one-half times that of whites satisfied the court that the plaintiff had demonstrated a prima facie case of disparate impact discrimination.\textsuperscript{110}

The court next found that the defendant had failed to establish a business necessity defense. First, the conviction bar failed to measure applicants' ability to perform the job.\textsuperscript{111} But what seemed more objectionable to the court was the broad sweep of Missouri Pacific's blanket policy. Citing the defendant's own expert, an industrial psychologist, the court indicated a strong preference for individualized hiring decisions:

MoPac's witness . . . testified that not every ex-offender will be a poor employee and that it would be preferable for a company to consider ex-offenders on an individual basis. He further acknowledged that an employment practice which excludes ex-offenders accentuates recidivism. Although the reasons MoPac advances for its absolute bar\textsuperscript{112} can serve as relevant considerations in making individual hiring decisions, they in no way justify an absolute policy which sweeps so broadly.\textsuperscript{113}

A more tailored approach, the court suggested, would evaluate such factors as the nature and seriousness of the crime in relation to the job in question, the circumstances under which the crime was committed, the time elapsed since the conviction, and the applicant's effort and success at rehabilitation.\textsuperscript{114}

In evaluating Missouri Pacific's arguments, the court exposed the competing interests necessarily at stake whenever a court evaluates a defendant's claim of business necessity. This stage of a court's analysis is reached only after a plaintiff satisfactorily demonstrates a prima facie case. By legal standards, discrimination is then recognized as having occurred. Nevertheless, the business necessity defense allows a defendant to continue employment practices, demonstrated to have a discriminatory effect, upon

\textsuperscript{108} See id. at 1292-93.
\textsuperscript{109} See id. at 1294-95.
\textsuperscript{110} See id. at 1295.
\textsuperscript{111} See id. at 1296.
\textsuperscript{112} The defendant claimed that the following business necessities supported the conviction bar: "1) fear of cargo theft, 2) handling company funds, 3) bonding qualifications, 4) possible impeachment of an employee as a witness, 5) possible liability for hiring persons with known violent tendencies, 6) employment disruption caused by recidivism, and 7) alleged lack of moral character of persons with convictions." Id. at 1298.
\textsuperscript{113} Id.
\textsuperscript{114} See id. at 1297.
proof of a business necessity. Thus, individual entrepreneurial interests can override society’s interests in eliminating discriminatory practices.

In declining to grant Missouri Pacific a business necessity defense, the Court prioritized large social concerns—redressing a long history of racial discrimination and rehabilitating former felons by facilitating their reintegration into society and the economy—over individual business necessity:

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.115

Green is also significant for its implicit adoption of the functional inequity interpretation of Griggs.116 The Griggs Court specifically identified deficient educational opportunities, beyond the control of the plaintiffs, as a cause of their poor performance on the challenged tests.117 Griggs could thus be read narrowly to prohibit facially neutral selection criteria that exert a disparate impact only when that disparity is caused118 by forces beyond the plaintiff’s control—such as structural inequities regarding the allocation of public resources for education.119

This interpretation would import into disparate impact analysis the question of why a disparity exists. Griggs should not be read to pose such a question. Griggs sought to eliminate the effects of functional inequities between groups and to level the playing field whenever protected groups, for whatever reason—structural inequities, biological differences, or personal backgrounds—performed at disparate rates under facially neutral selection criteria.

Green adopted this second, broader interpretation, for it did not matter if the plaintiff’s ability to meet the selection criteria was within his control. Presumably, Green’s failure to meet the selection criteria was caused by a force directly within his control—specifically, his decision three years ear-

115. Id. at 1298.
116. See generally supra notes 34-37 and accompanying text.
118. I use the term “cause” here in a different sense from the Supreme Court’s usage in Wards Cove. By “cause,” I mean the factors—societal, biological or personal—contributing to disparate performance between protected groups under the defendant’s facially neutral selection criteria. The causation requirement of Wards Cove, by contrast, refers to the requirement that the plaintiff demonstrate the particular challenged practice resulted in adverse employment decisions to the protected group of which the plaintiff is a member. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989).
119. This interpretation would be consistent with the Supreme Court’s dicta in McDonnell Douglas Corp. v Green, 411 U.S. 792, 806 (1973) (“Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.”).
lier to resist the draft. Of course, scholars have filled libraries exploring the extent to which a "decision" to engage in criminal conduct is a freely made decision or instead the result of a complex interaction of biological, psychological, sociological, and/or socioeconomic forces. But regardless of the "cause" of criminal conduct, Green did not rest on an inquiry into the causes of the plaintiff's inability to satisfy the selection criteria or the more global causes of the challenged policy's disparate impact. The relevant inquiry, then, is not why but whether the alleged disparity exists.

Green illustrates the strength of disparate impact to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." In permitting disparate impact challenges by convicted felons, Green affirmed Griggs' commitment to equalizing the disparate effects of functional inequities between groups. Green also made explicit the balancing of social and individual interests inherent in the business necessity standard.

2. EEOC Decisions

EEOC decisions in the late 1970s and early 1980s adopted Green and found probable cause to believe that racial discrimination in violation of Title VII had occurred when an employer automatically rejected applicants with one or more criminal convictions. In order to establish a defense of business necessity, the EEOC required an employer to "demonstrate that the nature of a particular criminal conviction disqualifies the individual job applicant from performing the particular job in an acceptable, business-like manner."

Thus, an employer could only base an employment decision on conviction history if the conviction were job-related, that is, if it predicted job performance. Whether conviction history would be found by the EEOC to predict job performance would in turn be evaluated in light of the following factors: (1) number, nature and circumstances surrounding the.

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121. Griggs, 401 U.S. at 431.

122. See, e.g., 26 Fair. Empl. Prac. Cas. (BNA) 1805 (Aug. 26, 1980) ("Blacks are convicted at a rate significantly in excess of their percentage in the population. Thus, an employment practice of disqualifying persons from consideration for employment because of their conviction records can be expected to have a disproportionate adverse impact upon Blacks and would therefore be unlawful under Title VII in the absence of a justified business necessity.").

123. Id.
conviction(s); (2) recency of the conviction; (3) employment history before and after the conviction; and (4) efforts at rehabilitation.\textsuperscript{124}

The EEOC decisions are significant in three respects. First, they place special emphasis on the first of the four factors: the job-connectedness of the conviction.\textsuperscript{125} Only if the conviction directly implicated conduct that the applicant would have to perform on the job in question, or if the conviction was based on conduct that had occurred in the workplace, did the EEOC find the conviction sufficiently job-connected to be predictive of job performance. For instance, conviction for assault with a deadly weapon could not be used to disqualify the applicant where the offense “occurred outside the workplace, did not involve any fellow employees and was unrelated to Charging Party’s job or any pressures resulting from the job.”\textsuperscript{126} Similarly, conviction for possession of an unregistered firearm was not job-connected where the conduct occurred outside the workplace and the individual’s discipline-free employment history indicated no “tendency toward violent conduct which might disrupt the workplace or endanger other employees.”\textsuperscript{127}

The decisions are also noteworthy for their emphasis on a holistic, individualized evaluation of applicants. They leaned heavily against absolute conviction bars which foreclosed particularized consideration of each individual applicant. Some consideration of a conviction would be found appropriate, but only if the employer took into account the overall balance of the four factors. No single factor was determinative of a conviction’s job-relatedness. For example, the EEOC found unjustified the exclusion of an applicant convicted of a job-connected conviction, where the employer failed to consider the applicant’s “positive rehabilitation efforts” in the six years that had elapsed since the unlawful conduct.\textsuperscript{128}

\textsuperscript{124} See, e.g., 26 Fair Empl. Prac. Cas. (BNA) 1799, 1800 (Aug. 8, 1980); 26 Fair Empl. Prac. Cas. (BNA) 1755, 1757 (June 8, 1978). These factors echo the tailored approach implicitly approved by Green. See Green v. Missouri Pacific Railroad Co., 523 F.2d 1290, 1297 (8th Cir. 1975). A number of courts expressed implicit approval of the EEOC decisions and thus upheld tailored conviction bars which took into account factors similar to those set forth by the EEOC. See, e.g., Hill v. United States Postal Serv., 522 F. Supp. 1283, 1301 (S.D.N.Y. 1981) (upholding policy that considered, but did not automatically disqualify, applicants convicted of felonies or serious misdemeanors); Richardson v. Hotel Corp. of America, 332 F. Supp. 519, 521 (E.D. La. 1971) (finding that a “past criminal record affords no basis to predict that a given person will commit a future crime” but that “[i]t is reasonable for management of a hotel to require that persons employed in positions where they have access to valuable property of others have a record reasonably free from convictions for serious property related crimes”).

\textsuperscript{125} The EEOC actually uses the term “job-related” to describe the inquiry under this factor. In order to avoid confusion with the term “job-related” (meaning predictive of job performance) as it is used more generally in the context of disparate impact, I instead use the term “job-connected.” Thus, an employer’s decision to exclude an applicant based on a conviction is justified if it is job-related, that is, if it is predictive of job performance. The first of four factors to be considered in determining whether a conviction is job-related (i.e., predictive) is the degree of the conviction’s job-connectedness.

\textsuperscript{126} 26 Fair Empl. Prac. Cas. (BNA) 1797, 1798 (Aug. 1, 1980).
\textsuperscript{127} 26 Fair Empl. Prac. Cas. (BNA) 1792, 1793 (Aug. 1, 1980).
\textsuperscript{128} 26 Fair Empl. Prac. Cas. (BNA) 1799, 1800 (Aug. 8, 1980).
Finally, the EEOC decisions, like the court in *Green*, evinced a concern about the policy implications of excessive deference to an employer’s stated business necessities; consequently, employer arguments were closely scrutinized. These policy considerations were manifest in the EEOC’s heavy emphasis on an applicant’s rehabilitation: “This factor is particularly crucial to the employment decision since an individual who has paid his debt to society must be able to earn a living if he is to be able to avoid further offenses.” Furthermore, like the Court in *Green*, the EEOC made explicit the competing interests implicated by the business necessity standard. According to the EEOC, social interests in rewarding rehabilitation of felons and preventing recidivism outweighed individual entrepreneurial interests.

Given these policy concerns, the EEOC expressed skepticism towards overbroad speculation that individuals always present the threat of recommitting the offenses for which they were convicted. For example, while finding unjustified a blanket exclusion of convicted murderers, the EEOC rejected the employer’s argument that such applicants may respond poorly to workplace pressures and thus present a danger to the employer and other employees:

The crime was a single violent act, wholly inconsistent with the Charging Party’s actions before and after it occurred. Further, the evidence . . . indicates that the Charging Party has paid his debt to society and has made a successful attempt to re-establish himself as a useful member of society. Should this single violent act of Charging Party, even given the terrible consequences of it, be used to deny him gainful employment because of conjecture that he may lose control anew and injure a co-worker, virtually no job would be beyond denial to him.

3. Psychological Research Supporting the Green/EEOC Approach

Psychological research substantiates the EEOC’s skepticism of sweeping generalizations regarding the predictive value of criminal convictions. As an initial matter, the EEOC forced a conceptual clarification of what, precisely, was sought to be predicted from the prior conviction. The EEOC emphasized that a conviction should be used only to the extent that it predicts the applicant’s ability to perform the job in an acceptable, business-like manner. This prediction is conceptually distinct from, though obviously at times overlapping with, a prediction regarding an individual’s propensity to commit another criminal offense. For instance, illegal drug use while not on the job may have no bearing whatsoever on an individual’s job performance. In such a circumstance, the validity of a conviction to predict a future offense is unrelated to its validity for predicting job performance.

129. 26 Fair Empl. Prac. Cas. (BNA) 1755, 1757 (June 8, 1978).
131. Id. at 1801.
In many circumstances, however, these two predictions overlap. Consistent with Dothard, an ability to perform the job in a safe and efficient manner is essential to an individual's overall ability to perform the job in question. Thus, an individual's propensity to commit dangerous acts while on the job will bear directly on job performance. The tailored evaluation required by the four EEOC factors presents an individualized, factsensitive, structured evaluation of the significance of a prior conviction. This approach parallels efforts by researchers of recidivism to develop predictive models. Both the EEOC framework and recidivism research share an unwillingness to make overbroad generalizations from isolated information.

It is probabilistically illogical to assume that someone once convicted will automatically commit another offense. For instance, assuming a recidivism base rate (the recidivism rate of an overall group) of fifty percent, an absolute conviction bar would result in a false positive rate of fifty percent; in other words, it would exclude the fifty percent of applicants who would not have ultimately re-offended. The lower the base rate, the higher the false positive rate generated by an absolute exclusion. Because recidivism rates are generally below fifty percent, absolute conviction bars will usually result in false positives which exceed the 50% level. The low predictive value of recidivism base rates thus justifies the hostility of the EEOC framework to absolute conviction bars.

Recognizing the predictive limitations of base rates, particularly low base rates, recidivism research has sought to develop more accurate predictive instruments that can minimize false positives. Purely subjective, unstructured evaluative processes yield poor predictions of recidivism; the predictive systems that provide more accurate results evaluate objective

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133. The SACRAMENTO BEE recently compiled state recidivism rates across the country. Information was available from 39 states. Only three states had rates above 50% (California, 57%; Nevada, 57%; and Kansas, 55%). Rates for all 39 states ranged from 57% to 10.6%, with the top half ranging from 57% to 37% and the bottom half ranging from 35% to 10.6%. These data are far from perfect, however, as the recidivism rates measured disparate periods. Some state data covered only the period of the parole term, while others measured between one and five years. See Andy Furillo, A Nation on Parole and the Worst Recidivism, SACRAMENTO BEE, Nov. 16, 1997, at 16.

134. Reliance on base rates alone, when they are low, results in high false positives. As one researcher commented, "[t]he prediction of violent recidivism is . . . difficult partly because of the low base rates for violence. Typically, the base rates are less than 10%, placing extraordinary demands on risk instruments striving for acceptable predictive accuracy. Knowing this base rate, we may predict all offenders to be potentially violent but this would give a false positive rate of about 90% and a very expensive correctional policy. Or, we may predict that no one would be violent and be correct 90% of the time but we would miss 10% of the offenders who subsequently behave violently. Clearly, neither alternative is acceptable." James Bonta et al., Prediction of Recidivism Among Federally Sentenced Offenders: A Re-Validation of the SIR Scale, CANADIAN J. OF CRIMINOLOGY, Jan. 1, 1996, available in 1996 WL 13065835.
data describing the individual and her background.\textsuperscript{135} But this research—which demonstrates that some prediction is possible\textsuperscript{136}—offers a strong note of caution against overbroad generalizations from limited information. First, all of these models rely on a broad array of personal information to develop a holistic portrait of individual subjects.\textsuperscript{137} Second, much of this research relies on specific kinds of prior conduct in order to predict specific kinds of future conduct; it does not rely simply on the existence of some generalized past bad act to predict some generalized future bad act.\textsuperscript{138}

Thus, the approach taken by recidivism research demonstrates the reasonableness of the EEOC framework. The research manifests a strong resistance to sweeping predictions. Like the EEOC framework, these predictive systems rely on far more information than the mere existence of a single conviction.

During the initial flourish, Green and the EEOC decisions anticipated the use of such complex predictive systems and thus demonstrated the power of disparate impact analysis to minimize the effects of functional

\begin{enumerate}
\item \textsuperscript{135} See, e.g., \textit{id.}; \textsc{John Monahan}, \textit{The Clinical Prediction of Violent Behavior: Crime and Delinquency Issues} (1981); Stephen D. Gottfredson, \textit{Prediction and Classification: Criminal Justice Decision Making}, \textit{9 Crime and Just.: A Rev. of Res.} 21, 35 (1987) ("In virtually every decision-making situation for which the issue has been studied, it has been found that statistically developed prediction devices outperform human judgments . . . ."); Robert Menzies et al., \textit{The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence}, \textit{18 Law and Hum. Behav.} 1 (1994).

\item \textsuperscript{136} Such predictions still exhibit limited accuracy. One research team, enthusiastically commenting on the "progress in the prediction of violent re-offending . . . .", noted the success of another group, which achieved "false positives as low as 39%." Bonta et. al., \textit{supra} note 132 (emphasis added).

\item \textsuperscript{137} The Statistical Information on Recidivism (SIR) scale weighs 15 variables, including age at admission into prison, current offense, escape history, etc. \textit{See} Bonta et. al., \textit{supra} note 132. The Lifestyle Criminality Screening Form (LCSF) valuates 14 items, such as marital background, tattoos, history of drug/alcohol abuse, etc. \textit{See} Glenn D. Walters et al., \textit{The Lifestyle Criminality Screening Form: Preliminary Data}, \textit{18 Crim. Just. and Behav.} 406, 412-13 (1991). Another study seeking to predict violent behavior found that 21 variables were significant to the prediction. These variables included crowded living conditions, violent family member, and history of suicide attempts. \textit{See} Steven C. Norton, \textit{ Predictor Variables of Violent Behavior}, \textit{6 Am. J. of Forensic Psychol.} 53, 59-60 (1988). Other predictive models which take into account extensive information about the subjects under study are the Psychopathy Checklist-\textit{Revised} (PCL-R), \textit{see} Ralph C. Serin, \textit{Violent Recidivism in Criminal Psychopaths}, \textit{20 Law & Hum. Behav.} 207 (1996), and the Level of Service Inventory-\textit{Revised} (LSI-R), \textit{see} generally Douglas Arthur Andrews & James Bonta, \textit{Manual for the Level of Service Inventory—Revised} (1995).

\item \textsuperscript{138} For instance, one research team demonstrated that the predictive validity of particular factors varied depending on the conduct sought to be predicted. The categories of predicted conduct were as specific as violent and non-violent, sexual, and non-sexual, and, within the category of sexual offenses, acts against adults and acts against children. \textit{See} R. Karl Hanson et al., \textit{A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism}, \textit{32 J. of Res. in Crime and Delinq.} 325, 334-36 (1995). For other predictive studies that focus on specific kinds of prior conduct, \textit{see} e.g., Gordon C. Nagayama Hall, \textit{Criminal Behavior as a Function of Clinical and Actuarial Variables in a Sexual Offender Population}, \textit{56 J. of Consulting and Clinical Psychol.} 773 (1988) and Gordon C. Nagayama Hall & William C. Proctor, \textit{Criminological Predictors of Recidivism in a Sexual Offender Population}, \textit{55 J. of Consulting and Clinical Psychol.} 111 (1987).
\end{enumerate}
inequities. Moreover, they exposed, and prioritized, the social interests at stake in the analysis of an employer's proffered business necessity.

B. Eroding Disparate Impact

Since that initial flourish, however, many courts have manifested great reluctance to weigh these social interests in the same way. Instead, many courts have tended to reject disparate impact challenges to conviction bars. More generally, the conviction cases demonstrate the typical and increasing number of obstacles that thwart the path of disparate impact plaintiffs. Many plaintiffs fail to meet the rigorous requirements of the prima facie showing. Those few plaintiffs able to pass the first stage of analysis frequently face courts postured very deferentially towards employer arguments of business necessity.

I. Difficulties in the Prima Facie Case

A plaintiff seeking to establish a prima facie case of disparate impact must demonstrate disparity, identify a specific employment practice which allegedly caused the disparity, and prove causation. The first and third elements pose particular problems for plaintiffs seeking to challenge conviction bars.

a. The Impossible Statistical Showing of Disparity

As Wards Cove made clear, a plaintiff is required to demonstrate disparity by pointing to, if not applicant flow statistics, at least the relevant labor market. Cases as early as Beazer indicated that courts should scrutinize plaintiffs' statistics for under- or over-inclusivity. The ideal fact situation present in Green, in which a disparity could be demonstrated from applicant flow data, is rare. Thus plaintiffs in the conviction cases tend to rely on external labor market information to generate expected outcomes. However, courts frequently subject these data to stringent review, and often ultimately reject them.

In EEOC v. Carolina Freight Carriers Corp., the EEOC undertook a large statistical study to demonstrate the disparate impact of the defendant's lifetime bar on applicants with felony, theft or larceny convictions. The EEOC sued on behalf of Francisco Rios, a Hispanic man with two fifteen and sixteen-year-old property-related convictions. Inadvertently

140. I do not mean to imply that the identification requirement does not pose problems for disparate impact plaintiffs generally. However, since this discussion covers only plaintiffs who challenge conviction bars, they have necessarily already identified a specific employment practice and thus satisfy the second element without difficulty.
141. See Wards Cove, 490 U.S. at 650-51.
overlooking Rios' convictions, Carolina Freight had hired Rios as a casual employee. He worked in this capacity for four years, during which time he was considered a good employee and was never suspected of theft. Rios then applied for full-time, regular employment. Upon review of his personnel file, the company discovered the convictions, denied the application for regular employment, and terminated his casual employment.

The EEOC generated several estimates of expected employment patterns, all of which demonstrated statistically significant shortfalls in the defendant's actual employment figures—two exceeded the .05 level of probability and one exceeded the .01 level. The court nevertheless declined to find a disparity. Despite the study's assertions to the contrary, the court found that the sample size was too small. The court further found that the projections over-represented the number of qualified Hispanics by inappropriately including a neighboring county with a high Hispanic population and using an overinclusive job category to develop an estimate of qualified applicants.

The Supreme Court has so refined the demonstration of disparity as to force plaintiffs to mount virtually impossible statistical showings—impossible because, in practice, plaintiffs frequently lack access to the requisite data, expertise, or both, and because a plaintiff's definition of the relevant labor market can almost always be criticized as under- and/or over-inclusive. Furthermore, Carolina Freight demonstrates that the rare plaintiff who succeeds in mounting such a study must still reckon with a withering review of all the assumptions and data upon which the complex study relies.

b. Elusive Proof of Causation

In addition to the difficulty of showing a disparity, plaintiffs challenging conviction bars also face courts skeptical of their evidence and theories of causation. Instead, courts are willing to accept alternative explanations for the causes of any adverse impact.

Courts frequently accept employer arguments that the plaintiff was rejected (or dismissed), not for the conviction, but for having failed to disclose the conviction on an employment application. A silent recognition

144. See id. at 739-42.
145. See id. at 737-42.
146. See id. at 743-46.
147. See id. at 751.
by the court and the defendant hovers over each of these cases—that a blanket exclusion based on prior convictions would violate Title VII. Yet, in a fashion that hints at problems of after-acquired evidence, the employer defends on the ground that it did not reject/dismiss the applicant because it discovered (to shock and horror) that the applicant/employee was convicted of a criminal offense; rather, it based the adverse employment decision on the employee’s/applicant’s misconduct in committing resumé fraud. Thus, plaintiffs frequently fail to prove that employers’ hostility to convictions caused the adverse employment action at all.

More problematically, some courts misapprehend the nature of the causation that is required to be proved. Green, the wellspring of the conviction cases, demonstrates the power of disparate impact to minimize the discriminatory effects of functional inequities between groups—functional inequities which result in disparate performance under facially neutral selection criteria. Yet some courts engage in precisely the inquiry which Green’s interpretation of Griggs rendered irrelevant—an inquiry into whether that functional inequity was “within the control” of the plaintiff and the members of her group.

The court in Carolina Freight, after rejecting the plaintiff’s statistical showing of disparity, went on to attack the plaintiff’s prima facie case on the element of causation:

Obviously, a rule refusing honest employment to convicted applicants is going to have a disparate impact upon thieves. That some of these thieves are going to be Hispanic is immaterial. That apparently a higher percentage of Hispanics are convicted of crimes than that of the “White” population may prove a number of things such as: (1) Hispanics are not very good at stealing, (2) Whites are better thieves than Hispanics, (3) none of the above, (4) all of the above . . . . If Hispanics do not wish to be discriminated against because they have been convicted of theft, then they should stop stealing.150

Rather than focusing on a functional analysis, the court engaged in an inquiry into fault—presumably, Hispanics, having brought their predicament upon themselves, should not seek relief from the federal courts.

2. Deference in the Business Necessity Standard

Courts have further eroded disparate impact in the second stage of analysis. Particularly after Wards Cove, the courts have exhibited great deference towards employers’ arguments of business necessity.

The business necessity standard, before Wards Cove, required an employer to prove that the challenged practice was job-related, i.e., it constituted a valid means of measuring an applicant’s ability to perform the

job.\footnote{151} Courts applying this standard, however, proved eager to lighten the defendant’s burden.

For example, in \textit{Davis v. City of Dallas},\footnote{152} the court developed a sliding scale under which employers hiring for jobs involving a high degree of “risk . . . and public responsibility” were exempted from strict validation requirements. Among the challenged practices at issue in \textit{Davis} was a requirement that applicants for the position of police officer have no history of recent or excessive marijuana use. Justifying this practice, the defendant offered evidence from a professor of psychology that the practice would predict an applicant’s propensity to use marijuana in the future as well as her willingness to enforce the law as it related to marijuana.\footnote{153} Nevertheless, the defense conceded “that it would be impossible to quantify” either the propensity to violate or the willingness to enforce drug laws in the future.\footnote{154} Because of the sliding scale and its suspension of a strict validation requirement for this type of a position, however, the court accepted this argument as a sufficient showing of job-relatedness.\footnote{155}

This particular decision hardly represents an egregious case of the erosion of disparate impact. Nevertheless, it foreshadows courts’ later amenability, especially after \textit{Wards Cove}, to employer arguments which rest on assumptions about the predictive value of prior unlawful conduct—assumptions which infuse prior convictions with magical powers to predict recidivism, dishonesty and untrustworthiness. These assumptions, which defendants neither seek to buttress with empirical research nor which courts even question, are precisely the assumptions which serve to place “every individual convicted of any offense . . . in the permanent ranks of the unemployed.”\footnote{156}

After \textit{Wards Cove}, a defendant faced the minimal requirement of producing evidence that a challenged practice served “in a significant way, the legitimate employment goals of the employer.”\footnote{157} Assuming, but not deciding, that a plaintiff had demonstrated a prima facie case, the court in \textit{Williams v. Scott}\footnote{158} granted an employer’s business justification for an absolute conviction bar.\footnote{159} Applying the deferential standard of review encouraged by \textit{Wards Cove}, the \textit{Williams} court found that:

\begin{quote}
[B]oth intuitively and as a matter of law it is obvious that an employment policy that bars the hiring of ex-felons . . . does not violate Title VII . . . .
\end{quote}

\footnote{152} \textit{777 F.2d} 205, 217 (5th Cir. 1985).
\footnote{153} \textit{See id.} at 224.
\footnote{154} \textit{Id.} at 224-25.
\footnote{155} \textit{Id.} at 226.
\footnote{156} \textit{Green v. Missouri Pacific R.R. Co.}, 523 F.2d 1290, 1298 (8th Cir. 1975).
\footnote{158} No. 92 C 5747, 1992 WL 229849 (N.D. Ill. Sept. 9, 1992).
\footnote{159} \textit{See id.} at *2.
[I]t can certainly be viewed rationally by Carson Pirie as serving a legitimate business purpose of minimizing the perceived risk of employee dishonesty.\textsuperscript{160}

Certainly, \textit{Albemarle}'s validation requirements had receded into distant memory by the time a court could intuitively uphold practices based on a perceived risk. The \textit{Williams} court made no inquiry into the nature or recency of the conviction, or even into whether the conviction actually reflected upon the applicant's dishonesty. Without acknowledging the necessary balancing of underlying, competing interests, the court implicitly prioritized an employer's desire to minimize a perceived risk over society's desire to eliminate employment practices with discriminatory effects.

The court in \textit{Carolina Freight} adopted analogous reasoning. The defendant in this case proffered the employment goal of minimizing losses from employee theft. The court found it "exceedingly reasonable for an employer to rely upon an applicant's past criminal history in predicting trustworthiness," a quality relevant to the employer's goal of minimizing theft.\textsuperscript{161} In stark contrast to the individualized decision-making required by the Eighth Circuit in \textit{Green} and advocated by the EEOC decisions, the court in \textit{Carolina Freight} did not question the assumption that two fifteen and sixteen-year-old convictions carried more predictive weight than Rios' four years of honest, satisfactory work for the defendant and his clean conviction record during that fifteen-year interlude.

During the initial flourish, the conviction cases illustrated the power of disparate impact to minimize the discriminatory effects of the functional inequities which obtain between protected groups. At the same time, these early cases exposed the balancing test which inheres in the business necessity standard. The particular outcomes in those cases prioritize social goals—such as the elimination of discriminatory practices—over individual entrepreneurial objectives. The later cases, however, exemplify the typical, and all too numerous, obstructions to a successful disparate impact claim—obstructions which eroded the power of the doctrine to remove "artificial, arbitrary, and unnecessary barriers to employment,"\textsuperscript{162} and which silently readjusted the scales in the business necessity balancing test.

\begin{itemize}
\item \textsuperscript{160} \textit{Id.} at *1-2 (emphasis added).
\item \textsuperscript{161} EEOC v. Carolina Freight Carriers Corp., 723 F. Supp 734, 753 (S.D. Fla. 1989).
\end{itemize}

Expressing strong dissatisfaction with the Supreme Court's decision in Wards Cove, Congress, through the Civil Rights Act of 1991, sought to restore the status quo ante with respect to the business necessity standard. The 1991 Act made clear that the pre-Wards Cove allocation of burdens once again applied: the defendant bears the burden of persuasion in the second stage of the analysis.

However, Congress spoke much less clearly in its definition of the substance of that burden. In order to reconcile divergent policy objectives, Congress adopted ambiguous language: a defendant must prove that a "challenged practice is job-related for the position in question and consistent with business necessity." Congress expressed the intent to restore the business necessity standard as defined in Griggs and its pre-Wards Cove progeny; yet given the confused state of the doctrine before Wards Cove, this statement of legislative intent hardly dispelled ambiguity.

Not surprisingly, the lower courts have had difficulty defining the current (or pre-Wards Cove) business necessity standard. A review of all published decisions from 1991 through November 1997, when this Comment was written, shows that four articulations of the standard, varying in stringency, have emerged.

163. See supra notes 98-103 and accompanying text.
165. See Note, supra note 100, at 901 ("The participants in the debate considered this language to be vital, because it significantly shifted the likelihood of success in litigation and implicated two competing policy goals. One side concentrated on eradicating discrimination, while the other stressed the economic viability of small businesses."). I resist characterizing these two positions as mutually exclusive in substance. I take this characterization as a description of opposing rhetorical positions.
A. Necessity Really Means Necessity

In one of the more stringent articulations of the business necessity standard, the court in *Nash v. Consolidated City of Jacksonville* returned to *Griggs'* focus on prediction of job performance. Additionally, the court stated that "[t]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve. . . ." The court thus appeared to require two showings: both a valid prediction of job performance and a compelling business purpose (that is effectively carried out by the challenged practice).

The plaintiff in *Nash* was an African American man who challenged a fire department's promotional exam and the department's "rule of one," under which the top-ranked examinee received the promotion to captain. Finding that the plaintiff had successfully established a prima facie case, the court went on to discuss business necessity. The court returned to *Albemarle's* validation requirement. In contrast to the deferential review conducted by some courts (both before and after *Wards Cove*), the *Nash* court stated that "[t]he business necessity doctrine is very narrow. . . . An employer does not meet its burden of establishing the job relatedness of a test by merely showing a rational basis for the test." This strict standard notwithstanding, the defendant, pointing to a content validation study, succeeded in establishing business necessity. Evaluating expert testimony from plaintiff's and defendant's industrial psychologists, the court found that the employment practice "was an objective way for the City to obtain top-notch captains."

The court failed to clarify, however, the relationship between the job performance and compelling business purpose requirements. Evaluating the evidence, the court concluded that the challenged practice validly predicted job performance. But did the court assume, without analysis, that obtaining top-notch captains was a compelling business purpose? If so, *Nash* can be read to require both predictive validity and compelling business purpose. Or did the court instead understand the compelling business purpose requirement to be satisfied whenever a selection criterion is proven to predict job performance? In such a case, job performance would always qualify as the employer's compelling business purpose, and predictive va-
lidity would automatically satisfy the requirement that a practice "effectively carry out the business purpose it is alleged to serve." Nash left unclear whether an employer is required to prove only that a practice validly predicts job performance, or whether an employer is also required to demonstrate that the practice effectively carries out a compelling business purpose.

B. Demonstrably Necessary to Meet an Important Business Goal

In Fitzpatrick v. City of Atlanta, the Eleventh Circuit announced a two-part test for business necessity: a challenged practice must [1] be demonstrably "necessary to meeting a goal that, [2] as a matter of law, qualifies as an important business goal for Title VII purposes." The case involved a challenge by African American men to the fire department’s requirement that all male firefighters be completely clean-shaven. The plaintiffs suffered from a condition known as pseudofolliculitis barbae (PFB), which was recognized to afflict African Americans at a disproportionately high rate and which made shaving extremely difficult. Unable to shave clean, the plaintiffs were barred from firefighting duty.

Assuming, without deciding, that the plaintiffs had established a prima facie case, the court analyzed the defendant’s business necessity defense. The department justified the requirement on the grounds of worker safety. Firefighters are at times required to wear self-contained breathing apparati ("SCBA") on the job. The defendant argued that facial hair disrupted the sealing surface of the SCBA. In support of its argument that an improper seal posed a threat to worker safety, the defendant relied on expert testimony and recommendations of three national organizations which set occupational safety and health standards. The Eleventh Circuit first found that the goal of ensuring worker safety was important as a matter of law for Title VII purposes and found that, based on the evidence, the

178. Id. at 1545.
179. 2 F.3d 1112 (11th Cir. 1993). The lower court entered defendant’s motion for summary judgment one day before the Civil Rights Act of 1991 was signed. Uncertain whether Wards Cove or the Act controlled (the Supreme Court did not speak on the retroactivity of the 1991 Act until Landgraf v. U.S.I. Film Produc., 511 U.S. 244 (1994)), the Eleventh Circuit applied the Act because it provided the standard most favorable to the non-moving party.
180. Fitzpatrick, 2 F.3d at 1118-19. See also Banks v. City of Albany, 953 F. Supp. 28, 35 (N.D.N.Y. 1997) (adopting almost identical language: "the defendant must show that the challenged action is demonstrably necessary to meet an important business goal for Title VII purposes.").
181. See Fitzpatrick, 2 F.3d at 1114.
182. See id. at 1119-20.
183. See id. at 1119.
184. See id. at 1114.
185. See id. at 1119.
186. See id. at 1119-20.
defendant succeeded in proving that the challenged practice was demonstrably necessary to meeting that goal.187

Under Fitzpatrick, the business necessity analysis consists of a two-part inquiry. A court must first determine, as a matter of law, whether the employer has identified an important business goal. The court must then answer a question of fact: Is the challenged practice demonstrably necessary to meeting that goal? In Fitzpatrick, the Eleventh Circuit made it clear that worker safety constitutes an important business goal, but the court articulated no general criteria for evaluating the "importance" of a defendant's proffered business goal.

C. Reasonably Necessary to Achieve an Important Business Objective

In Donnelly v. Rhode Island Bd. of Governors for Higher Education,188 the district court articulated a standard very similar to that adopted in Fitzpatrick: the defendant must show that "the challenged practice is reasonably necessary to achieve an important business objective."189 In Donnelly, the plaintiffs, female faculty members, challenged the defendant's salary scale that established minimum salaries by department. Plaintiffs pointed to evidence which indicated a high concentration of women in the lower-paying departments.190 Although the court found no prima facie case,191 it nevertheless went on to hold that the defendant would have satisfied the business necessity standard.

The district court grappled extensively with the language of the 1991 Act. It was particularly perplexed with the term "consistent with business necessity":

Two things are consistent with one another if they are in harmony as opposed to being in conflict. Merriam-Webster's Collegiate Dictionary 274 (10th ed. 1993). On the other hand, something is a necessity if it is required or compelled. Id. at 776. Since §2000e-2(k)(1)A(i) uses these terms conjunctively, it is not clear whether Congress intended the standard to be that adherence to the challenged practice is required to conduct the employer's business; that the practice is closely related to a legitimate business purpose; or something in between.192

Legislative history, contained in the interpretive memorandum, provided little guidance for resolving this ambiguity. While the memorandum reflected an intent to restore the pre-Wards Cove standard, that standard was, of course, hopelessly muddled.

187. See id.
188. 929 F. Supp. 583 (D.R.I. 1996), aff'd, 110 F.3d 2 (1st Cir. 1997).
189. Id. at 593.
190. Id. at 587-88.
191. See id. at 591-92. The court found that the plaintiffs failed to demonstrate either disparity (they did not compare the appropriate groups) or causation. See id.
192. Id. at 593.
Contrary to the explicit command of the memorandum, the court looked elsewhere in the legislative history. The court concluded that the 1991 Act was forged by compromise between stakeholders committed to restoring a stringent standard and those adamantly opposed to doing so. Noting that the 1991 Act did not muster the necessary votes until the language “required by business necessity” was relaxed to “consistent with business necessity,” the court concluded that “Congress meant to require something less than a showing of indispensability.” The appropriate inquiry, it determined, would be whether a practice is reasonably necessary to achieve an important business objective. Although the court’s reasoning appears sound, it engaged in precisely the historical investigation prohibited by the interpretive memorandum.

Even setting aside the problematic foundation for this test, Donnelly shares the same shortcoming as Fitzpatrick. The Donnelly court opined that the defendant had identified the requisite “important business goal” for maintaining three tiers of salaries, rather than a single tier which would encompass all departments. The salaries in the highest paid departments reflected “market” rates for those fields; thus a single tier could only be obtained by raising salaries in the other departments if the university were to remain competitive for attracting top faculty. The court decided that the defendant would derive no “discernible benefit... from the additional expenditure [of approximately $4.5 million per year]. The net result of this approach would be merely to increase the amount spent for faculty services that could otherwise be obtained at a lower cost.” Thus, cost avoidance, at least when not offset by some “discernible benefit,” constitutes an important business goal. But, like Fitzpatrick, Donnelly sets forth no criteria for evaluating a business goal’s “importance.”

Perhaps these two flaws—forbidden inquiry into legislative history and undefined standards—explain why the First Circuit, though affirming the district court’s decision in Donnelly, disavowed the lower court’s discussion of the business necessity standard.

D. Manifest Relationship and Legitimate Employment Goals

The court in Stender v. Lucky Stores, Inc. adopted language which appears to marry Griggs and Wards Cove in a conjunctive test. The Stender
court interpreted the 1991 Act first to require "an employer . . . to show that its selection criteria bear 'a manifest relationship to the employment in question.'" [citing Griggs] The employer must also demonstrate that the employment practice significantly serves legitimate employment goals. The employer is not required to show that those employment goals 'require' the employment practice."199 Curiously, when later restating the "legitimate employment goals" language, the court cited Wards Cove.200

The 1991 Act requires the defendant to show both that the practice is "job-related" and "consistent with business necessity."201 Presumably then, Stender's conjunctive standard is an interpretation of the statute's conjunctive standard. The 1991 Act's interpretive memorandum clearly justifies the court's use of the Griggs manifest relationship language to interpret the job-relatedness requirement. But why, in light of the interpretive memorandum, did the Court use the language of Wards Cove to interpret "consistent with business necessity"?

The 1991 Act, with its cryptic statement of legislative intent, merely codified the confusion which prevailed before Wards Cove. Perhaps not surprisingly, the courts have since struggled to define and apply the ambiguous business necessity standard. Their interpretations of the standard have, in turn, been ambiguous, as well as inconsistent, difficult to apply, and unjustified in light of legislative history.

V. REINVIGORATION AND CLARIFICATION

Unless disparate impact's tales of erosion and confusion are brought to a conclusion, the doctrine will soon lack any meaningful ability to root out discriminatory practices. Given the extent to which the courts' erosion of the doctrine stemmed from their own confusion, at least some reinvigoration will follow from clarification.

A. Disparate Impact's Distinct Doctrinal Identity

Disparate impact should be freed of any confusion with disparate treatment. Congress, through the 1991 Act, began to reassert disparate impact's distinct doctrinal identity by restoring its allocation of burdens and thus reversing the Supreme Court's efforts to align the two models of proof.

A more fundamental point, however, requires clarification. The two models present distinct modes of analysis for identifying unlawful discrimination. Over the years, however, the courts have obfuscated the unique concerns which inhere in disparate impact analysis. Disparate impact's

199. Id. at 321-22 (emphasis added) (citing New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979)).
200. See id. at 335.
strength derives precisely from its functional analysis. To lose sight of this analysis is to lose sight of disparate impact's constituent inquiry. The relevant question in the prima facie case is whether discriminatory effects exist—whether functional inequities lead to disparate group performance under facially neutral selection criteria. This inquiry does not, and should not, implicate an inquiry into the nature or source of the functional inequities which contributed to the existence of the discriminatory effects, an inquiry Green rejected and Carolina Freight adopted.

B. Clarification of the Business Necessity Standard

The doctrine requires further clarification with respect to the business necessity standard, including a clarification of both the underlying interests at stake and the content of the standard itself.

1. Balancing Social and Entrepreneurial Interests

As Green and the EEOC decisions made explicit, the business necessity standard represents a balancing test. The social interests of eliminating practices with proven discriminatory effects sit on one side of the scale, and the entrepreneurial interests of controlling the composition of the workforce are on the other. The criminal history cases encompass the additional social interest of rewarding rehabilitation and preventing those once convicted of an unlawful act from entering "the permanent ranks of the unemployed." The more stringent the standard, the more heavily the scales tip in favor of social interests.

In light of the particular outcomes in the early criminal history cases, the Eighth Circuit and the EEOC chose to prioritize the social interests over the entrepreneurial ones. The later cases clearly made the opposite choice. By exposing the business necessity analysis as a balancing test, the early cases force us to recognize the symbolic and policy implications of granting a particular employer a defense and of defining the standard so loosely that employers can easily prevail. Any effort to clarify the definition of the content of the business necessity standard must be cognizant of these considerations.

2. The Content of the Standard

The language of the 1991 Act defining the business necessity defense defies easy interpretation. The 1991 Act requires that an employer prove that a challenged practice "is job-related for the position in question and consistent with business necessity." The first element of this defense

204. Green, 523 F.2d at 1298.
presents no significant controversy. Under well-established Supreme Court precedent, an employment practice is job related if it predicts an individual’s ability to perform the job in question. The meaning of “consistent with business necessity,” however, presents more of an interpretive challenge. The precise manner in which the two elements interrelate is also unclear.

As the district court in Donnelly pointed out, the terms “consistent with” and “business necessity” make for an odd juxtaposition. Consistency indicates something less than a showing of indispensability which necessity would otherwise imply. Thus, this second element would seem to require a showing by the employer that the challenged practice serves in some fashion an important, though perhaps not essential, business goal.

But how do these two required elements relate to each other? Is the employer’s important business goal understood to be an individual’s job performance? If so, then proof of a practice’s predictive validity would also constitute proof that the practice serves the important business goal.

This interpretation, which takes satisfactory job performance to be the employer’s business goal, would collapse the statute’s two-part test into a one-part test. The inquiry into job-relatedness (whether a practice measures an applicant’s ability to perform the job) would map directly onto the inquiry into consistency with business necessity (whether a practice serves in some manner an important business goal). Because the statute clearly erects a conjunctive test, business goals must refer to something independent of job performance. At the same time, precisely because the test is conjunctive, the business goals must relate in some fashion to job performance.

The two elements of this conjunctive test can be brought together. I propose the following interpretation: an employer must demonstrate that a challenged practice is a reasonable predictor of effective performance of job duties, which are duties defined in light of the employer’s important business goals. Under this standard, an employer could not define the duties

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206. See Rosemary Alito, Disparate Impact Discrimination Under the 1991 Civil Rights Act, 45 Rutgers L. Rev. 1011, 1026 (1993) (“Thus, in Griggs, the employer’s defense consisted simply of proving that the requirements were job-related, in the sense of measuring or predicting performance.”); Merrick Rossein, Disparate Impact Theory After the Civil Rights Act of 1991: Restoring the Job Performance Standard, 429 PLI/Ltr 155, 187-88 (1992) (“In Dohard as in Albermarle, ‘job related’ and ‘job performance’ were used virtually interchangeably.”).


208. The court in Donnelly sought to buttress this same conclusion with an inquiry into legislative history. Id. at 589. I believe that this conclusion can be reached solely by reference to the language of the statute, and thus without the inquiry forbidden by the interpretive memorandum.

209. This interpretation of the business necessity standard echoes, admittedly, of the bona fide occupational qualification defense (“BFOQ”), available to employers in disparate treatment suits. The BFOQ consists of a two-part test, requiring an employer to prove that a facially discriminatory requirement bears on an employee’s job performance and that the performance involves the essence of the
of the job to encompass tasks utterly irrelevant to the overall mission of the business and then exclude job candidates based on their inability to perform those peripheral duties. By requiring the job duties—the performance of which the challenged practice must measure—to be defined in light of important business goals, this interpretation gives meaning to the statute’s requirement of consistency with business necessity.

The inquiry would thus involve three questions: (1) does the challenged practice reasonably predict an applicant’s ability to perform a job duty? (2) has the employer identified an important business goal? and (3) does the job duty effectively further that goal?

The first of these three questions raises its own set of questions. How effectively must the challenged practice predict job-performance? With a great certainty, requiring validation by scientifically acceptable methods? Or with little assurance, such that intuition and unspoken assumption would suffice?

The court in Carolina Freight, for instance, permitted the defendant to further its business goal of minimizing financial losses from employee theft by refusing to hire individuals with prior convictions. The court assumed that the prior conviction reflected upon the individual’s honesty. This assumption ignored the over- and under-inclusivity of the selection method. Not all people with convictions are dishonest. Not all dishonest people have convictions. Any tailoring of this selection criterion to predict job performance was, at best, loose.

In the context of criminal conviction bars, this inquiry should be analyzed within the EEOC framework. The EEOC permitted an employer to base an employment decision on a criminal conviction only where the conviction predicted the individual’s job performance. The EEOC evaluated the predictiveness of the conviction in light of four factors: (1) number, nature and circumstances surrounding the conviction(s); (2) time elapsed since conviction; (3) employment history before and after the conviction; and (4) efforts at rehabilitation. These criteria require a rational, considered evaluation of both the significance of a criminal conviction and the unique situation of the individual. In Griggs-like fashion, they measure the person for the job, not the person in the abstract. They also strike a compromise in the business necessity balancing test.

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210. See International Union, United Auto., Aerospace & Agric. Implement Workers of America v. Johnson Controls, 499 U.S. 187, 203 (1991). I wish specifically to avoid any direct attempt to merge the business necessity defense into the BFOQ. This would merely exacerbate the conflation of disparate treatment and disparate impact which I resist throughout this Comment.

Conviction and incarceration rates across the country reflect enormous racial disparities. Twelve states and the District of Columbia incarcerate African Americans at a rate ten times that of whites and racial disparities in incarceration rates increased in thirty-eight states and the District of Columbia over the period 1988 to 1994.212 In California, four out of ten black men in their twenties are either imprisoned, on probation, or on parole. The comparable ratio for Latinos is one in ten. For whites, it is one in twenty.213

Application of the EEOC criteria and elimination of absolute conviction bars would prevent individuals who suffer from functional inequities from being relegated automatically to the permanent ranks of the unemployed. At the same time, they would still afford employers the necessary discretion to shape their workforce, so long as such discretion is exercised in a rational manner.

The second part of the inquiry—how a court should evaluate the import of a business goal—is, admittedly, a difficult question to answer. Case law indicates that safety and efficiency,214 as well as perhaps cost savings,215 would qualify, but the cases leave open the question of what else to include in this category. As discussed above, the juxtaposition of the term "consistent with" against "business necessity" implies the tempering of any "essentiality" or "indispensability" requirement.216 At the same time, the 1991 Act’s repudiation of Wards Cove indicates that the business goal must be more than simply "legitimate." Requiring that the goal promote the overall mission of the business would, I believe, capture this nebulous in-between zone.

The third part of this inquiry—whether the job duty measured by the challenged practice effectively furthers the important business goal—also resists facile analysis. How close a nexus must exist between job duty and business goal? Must the job duty be strictly necessary, or merely rationally related, to accomplishment of the business goal? Again, the 1991 Act’s


213. These data come from a report prepared by the Center on Juvenile and Criminal Justice in San Francisco, CA. See Pat Murkland, Justice Isn’t Colorblind, Report Claims, PRESS-ENTERPRISE, Feb. 13, 1996, at Al. Obviously, in order to mount the requisite prima facie case, a plaintiff would have to demonstrate the disparity created by a conviction bar through production of more specific information on the relevant labor market.


216. Also, the third part of the disparate impact analysis affords the plaintiff a surrebuttal where she can prove the existence of an "alternative employment practice" that would accomplish the same goal without the discriminatory effect. See Civil Rights Act of 1991, § 105(a) (codified as amended at 42 U.S.C. §2000e-2(k)). If the defendant were required to prove in the second stage that an employment practice were indispensable, then conceptually no alternative employment practice could exist and the plaintiff would always lose the surrebuttal.
rejection of the deferential *Wards Cove* standard and its qualification of otherwise stringent language from *Griggs* indicates that Congress intended to avoid any extreme approach. The appropriate resolution lies in the middling grey: job duties must be substantially related to achievement of a business goal.

This amorphous interpretation of the last two of these three inquiries recognizes the need for individualized balancing. Exposing the business necessity analysis as a balancing test between competing social and entrepreneurial interests forces us, and the courts, to recognize the stakes of the decision. Cognizant of those interests, I believe that a more stringent interpretation of the business necessity standard is required in order to affirm a social commitment to the elimination of discriminatory practices. We can move towards such stringency by rejecting employment practices that do not predict performance of job duties, by rejecting employment goals that do not promote the overall mission of the business, and by rejecting employment practices that are at best loosely tailored to those goals.

Twenty-six years after the birth of disparate impact, the doctrine lies in need of clarification and reinvigoration. Clarification of the doctrine's distinct identity would return the inquiry to its functional focus. Clarification of the business necessity standard would reveal its inherent symbolic and policy implications, and these implications must inform any attempt at interpretation and definition. In order to properly prioritize social interests, the business necessity standard must be stringently interpreted. An employer should be required to prove that a challenged practice is a reasonable predictor of effective performance of job duties, and in turn these duties must be defined in light of the employer's important business goals. This interpretation makes sense of the statute's ambiguous language without unduly disadvantaging entrepreneurs who seek to shape their workforce through rational, considered evaluation of individual applicants.

VI.

THE PARADE OF HORRIBLES

The Supreme Court placed limits on disparate impact because of expressed apprehension about the consequences of a too-powerful doctrine.217 Presumably, these same concerns—as well as others not articulated by the Court—would attach to efforts to reinvigorate the doctrine, particularly with respect to conviction bars. I believe, however, that these concerns are misplaced.

217. *See supra* Part II.B-G.
A. Quotas

As early as Albemarle, at least one justice expressed the concern that a stringent business necessity standard would lead to quotas. The quota concern took full shape in Wards Cove. Rejecting a disparity showing which compared different segments of the employer's workforce, the Court in Wards Cove stated its fear that

The Court of Appeals' theory, at the very least, would mean that any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other options thereof; this is a result that Congress expressly rejected in drafting Title VII.

According to the Court's logic, employers would resort to quotas as a prophylactic against the dreaded hailing into court. It follows, therefore, that if employers were not constantly haled into court, they would not adopt quotas. As a consequence, this quota concern does not militate against a stringent business necessity standard. The narrowness of the employer's defense in no way affects the plaintiff's prima facie burden. Because the rigors of the prima facie case keep the floodgates of litigation closed, the quota concern lacks foundation. The Watson plurality conceded as much: "the 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." But even if the burdens of the prima facie case were relaxed, the Court's behavioral assumption rests on empirically questionable terrain.

B. Employer Liability for Tort Claims of Negligent Hiring

A stringent business necessity standard that limits employers' use of conviction bars raises another, more specific, concern—employer exposure to tort liability. Presumably, my proposed interpretation of the business necessity standard and its application to criminal conviction bars would actually encourage employers (under threat of incurring Title VII liability) to hire ex-felons otherwise suitable for the position in question. But to the

221. "Professor Harold Lewis, who represented management in employment and labor matters for five years as an attorney at Simpson, Thatcher and Bartlett, stated at New York University's 44th National Conference on Labor that the argument on whether the legislation encourages quotas is a political one and that he saw no evidence that employers resorted to quota hiring to avoid lawsuits." Rossein, supra note 192, at 163 n.24 (quoting EMPLOYEE REL. WKLY., 667-68 (June 17, 1991)).
extent that such hiring occurs and such employees then commit violent or
dangerous acts while employed, employers may be exposed to potential tort
liability under a theory of negligent hiring. Obviously, employers should
not be forced to choose between Title VII liability and tort liability. The
threat of this conundrum, however, is not great.

As an initial matter, the potential for employer tort liability only arises
if we assume that an employee who has once been convicted will actually
commit dangerous or violent acts during the course of employment. Empir-
ical research undermines the strength of this assumption.

Assuming, however, that the employee does commit an on-the-job tor-
tious act, an employer who suspends a conviction bar because of Title VII
is nevertheless unlikely to incur negligent hiring liability for that act. Neg-
ligent hiring consists of the basic elements of any negligence tort. In order
to establish liability, a plaintiff must prove that (1) the employer owed a
duty of reasonable care to the plaintiff; (2) the employer breached that duty
in hiring the employee; and (3) the breach proximately caused harm to the
plaintiff.

The tort of negligent hiring addresses virtually the opposite problem
posed by absolute conviction bars. The tort imposes liability, not on em-
ployers who exclude individuals from their workforce in reliance on exten-
sive inquiries into long-forgotten acts, but on employers who
indiscriminately hire employees with only a cursory review into back-
ground and qualifications. Given the nature of proof required to establish a
tort of negligent hiring, employers who replace their absolute conviction
bars with the tailored approach set forth by the EEOC would not, by hy-
pothesis, incur liability. Specifically, plaintiffs will be unable to prove that
these employers breached any duty.

In order to establish breach of duty, a plaintiff must prove that (1) the
employer failed to make an appropriate investigation; (2) the investigation
"would have revealed the unsuitability of the employee for the particular
duty to be performed or for employment in general;" and (3) the employer

222. Employers may also be sued for negligent retention. The issues raised by negligent hiring and
negligent retention are parallel; they merely cover different employment decisions. See generally
Rosanne Lienhard, Negligent Retention of Employees: An Expanding Doctrine, 63 DEF. COUNS. J. 389
(1996) (discussing twin torts of negligent hiring and retention). Although I use the term "negligent
hiring," this discussion applies equally to negligent retention.

Employers in this situation may also be sued under a theory of respondeat superior, which creates
liability in an employer for the tortious acts of her employee if those acts are committed within the scope
of employment. But because intentional torts are generally considered outside the scope of employment,
respondeat superior suits should not pose a problem for employers who hire individuals with conviction
records. See Rodolfo A. Camacho, How to Avoid Negligent Hiring Litigation, 14 WHITTIER L. REV.
787, 792 (1993).

223. See supra notes 130-136 and accompanying text.

224. See Stephen F. Befort, Pre-Employment Screening and Investigation: Navigating Between a
Rock and a Hard Place, 14 HOFSTRA LAB. L.J. 365, 376 (1997).
unreasonably hired the individual given the information she knew or should have known from the investigation. 225

A more stringent business necessity standard would not force an employer to hire every applicant with a conviction record. Rather, it would permit reliance on an applicant’s conviction record only under the framework set forth by the EEOC. Such an employer would not have been negligent in the hiring process. First, this employer would have made the required investigation. Second, the investigation into conviction record and subsequent evaluation of that record under the EEOC criteria would have led to a determination of the applicant’s suitability for that position. And, finally, these criteria provide the very standards which help employers make reasonable hiring decisions. Therefore, the prohibition of absolute conviction bars, based on a more stringent business necessity standard, should not result in increased employer liability for negligent hiring.

VII.
CONCLUSION

Disparate impact’s evolution is, in large measure, a tale of erosion and confusion, particularly with regard to the business necessity standard. The criminal history cases provide a useful lens through which to examine the doctrine’s evolution. The early cases demonstrate the strength of the doctrine to eliminate the discriminatory effects of functional inequities between groups. The later cases, specifically, the difficulties with which plaintiffs all too frequently met, typify the ways in which the doctrine has been eroded. More recently, the cases interpreting the post-1991 Act business necessity standard illustrate the extensive confusion shrouding the disparate impact model.

To a significant degree, clarification of the doctrine can provide for its reinvigoration. By asserting its distinct doctrinal identity, disparate impact can reclaim its greatest strength: reliance on a functional analysis to identify unlawful discrimination. Clarification of the business necessity standard also provides an opportunity to reinvigorate the doctrine. But every effort to define the business necessity standard, as the conviction cases challenge us to recognize, implicates a prioritization of competing interests—the societal interests in eliminating employment practices with proven discriminatory effects and the entrepreneurial interests in controlling the composition of the workforce. The standard, therefore, demands stringent interpretation.

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225. Id. at 377.