Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach

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> The objective of Congress in the enactment of Title VII [of the Civil Rights Act of 1964] is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under 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.[1]

INTRODUCTION

Confusion. There is no better way to describe the current state of U.S. law regarding allegedly discriminatory workplace standards (e.g., height or weight requirements or drug use policies). These claims are often brought under a "disparate impact" theory of discrimination—where a facially neutral employment policy has the *effect* but not the *intent* of discriminating against a group of employees.[2] This theory has its origins in case law rather than statutes.[3] Indeed, it was first recognized as a viable approach by the Supreme Court in 1971.[4] As a result, the law developed on a case-by-case basis without a solid theoretical footing, leaving many questions for judges and litigators: How does disparate impact theory interact with claims of intentional discrimination ("disparate treatment")? How are remedies awarded under the two theories? Should disparate impact or disparate treatment analysis be applied when examining an employment standard? Must disparate impact and disparate treatment be specifically pled, and does failure to do so waive a plaintiff's rights to raise these arguments? Who bears the burden of proof? In patchwork-like fashion, courts have attempted to address these issues, often with conflicting results.[5]

Congress attempted to resolve many of these questions by enacting the Civil Rights Act of 1991 (CRA), which for the first time established a statutory

1. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (unanimous decision).

2. *See infra* text accompanying notes 17-20.

3. *See, e.g.*, EEOC v. Joe's Stone Crab, Inc. (*Joe's Stone Crab II*), 220 F.3d 1263, 1278 (11th Cir. 2000) (describing the history of this discrimination theory by stating that the "judicial doctrine of disparate impact was created in *Griggs* specifically to redress *facially-neutral* policies or practices which visited disproportionate effects on [protected] groups"); Robert A. Kearney, *The Coming Rise of Disparate Impact Theory*, 110 PENN ST. L. REV. 69, 69-70 (2005) (noting that the Supreme Court in *Griggs* read this theory into the statute, as "[t]he words 'disparate impact' appeared nowhere" in the text of Title VII). Indeed, it was not until "years later [that] Congress caught up by at least implicitly recognizing the disparate impact claim." Kearney, *supra*, at 70.

4. *See Griggs*, 401 U.S. at 424 (recognizing disparate impact as a theory of proving employment discrimination).

5. *See infra* Sections III.A-C (discussing various court opinions that blurred the line between intentional and unintentional discrimination when analyzing employment standard). *See generally* L. Camille Hébert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive* Wards Cove *and the Civil Rights Act of 1990?*, 32 B.C. L. REV. 1, 3-4 (1990) [hereinafter Hébert, *Redefining Burdens*] (discussing the "checkered history" of unintentional discrimination theory in the United States).

basis for disparate impact claims.[6] That legislation, however, created more questions than it answered. For example, the CRA did not clarify whether aggrieved individuals could bring disparate impact claims under the Age Discrimination in Employment Act (ADEA)[7]—a question that was not resolved until the recent Supreme Court decision in *Smith v. City of Jackson*.[8] Even *Smith* generated only a plurality opinion, with a fractured Court writing three separate opinions to resolve the issue.

The blurry legal landscape of disparate impact and disparate treatment in cases alleging discriminatory employment standards cries out for clarity.[9] Parties are unsure how to litigate their cases, and judges are uncertain how to decide them.[10] Yet what appears on its face as a practical problem is not, in practice, easy to resolve. The lack of a clear, uniform theoretical basis for disparate impact in the United States[11] has left courts confused and often unwilling to accept such claims. And because disparate treatment analysis has a similarly confused history, courts often misapply disparate impact and disparate treatment in the context of discriminatory workplace rules. Furthermore, because disparate impact is an American invention, it is difficult to look outside this country for guidance on how to resolve this confusion.[12] In fact, many other countries have relied on the U.S. approach when adopting disparate impact analyses.[13]

Fortunately, however, Canada has taken an innovative approach to the law of discriminatory workplace standards.[14] In 1999, the Canadian Supreme Court offered a new approach that merges disparate impact and disparate treatment analyses in *British Columbia (Public Service Employee Relations Commission)*

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6. *See* 42 U.S.C. § 2000e-2(k) (2000).

7. 29 U.S.C. §§ 621-634 (2000).

8. 544 U.S. 228 (2005).

9. *See* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 614 (2004) ("There have been a number of cases where plaintiffs have litigated a disparate impact theory and lost because of a theoretical confusion about the nature of this claim.").

10. *See id.* at 614-22 (discussing potential "pitfalls" that face the courts and litigants in disparate impact analysis).

11. *See, e.g.*, Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 964 (2005) [hereinafter Sullivan, *Disparate Impact*] ("[T]he rationale underpinning disparate impact theory has never been developed.").

12. *See* Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108, 109 (1998) ("The disparate impact theory of discrimination is an American innovation.").

13. *See id.* at 111 (noting that "the disparate impact theory of employment discrimination has survived very well in the international marketplace of ideas," that after *Griggs* "other common law countries" have adopted unintentional discrimination theory, and that "some jurisdictions have applied the concept more expansively than American law allows.").

14. *See* DOUGLAS G. GILBERT ET AL., CANADIAN LABOUR AND EMPLOYMENT LAW FOR THE U.S. PRACTITIONER 209-12 (2000) (describing the Canadian approach to unintentional (or adverse effect) discrimination). *See also* Hunter & Shoben, *supra* note 12, at 119-21 (discussing the Canadian approach to unintentional discrimination).

v. British Columbia Government and Service Employees' Union, known in the literature as *B.C. Firefighters*.[15] *B.C. Firefighters* offers a fresh perspective on allegedly discriminatory employment standards and workplace rules, applying a three-part test that collapses the traditional disparate impact and disparate treatment analyses into a single, unified approach.[16] The Canadian high court may not have gotten it exactly right. It will take a number of years to see how the court's decision is implemented in the lower courts, and whether litigants take advantage of this new, unified approach to discriminatory employment standards. Nonetheless, it offers a starting point for how to revitalize and clarify disparate impact law in the United States.

This Article critiques the current tendency of U.S. courts to treat disparate impact and disparate treatment claims as analytically distinct. This bifurcated approach creates numerous problems. Litigants and courts have great difficulty determining whether a particular employment standard is facially neutral, which has produced confusion regarding whether a disparate impact or disparate treatment theory should apply. Plaintiffs have lost viable claims of unintentional discrimination by failing to separately plead a disparate impact theory. Evidence for claims of disparate impact and disparate treatment discrimination is often considered separately even when it pertains to both claims. And defendants frequently are unsure how they will be required to defend.

This Article explains how and why these problems arose in U.S. case law and examines the Canadian approach to analyzing allegedly discriminatory employment standards. Borrowing from the Canadian model, this Article then proposes a unified three-part test that could be used to examine standards and rules in the United States—irrespective of whether such standards and rules are the result of intentional or unintentional discrimination. The Article applies this three-part test to the facts of a recent Eleventh Circuit case, and then lays out the implications and benefits of this approach. Finally, the Article explains how courts can apply this new, unified approach without amending statutes or upsetting existing case law. Rather, the proposed three-part test would operate similarly to unified approaches in other employment contexts.

I. Disparate Impact Theory Arises from the Ashes of Overt Discrimination

In theory, disparate impact is a straightforward concept: discrimination can occur when an employer implements a facially neutral policy or practice, for which the employer has no legitimate business justification, that ends up

15. (*B.C. Firefighters*), [1999] 3 S.C.R. 3 (Can.).

16. *See* GILBERT, *supra* note 14, at 209-12 (discussing how *B.C. Firefighters* changed Canadian disparate impact law); *infra* Part IV (discussing the *B.C. Firefighters* case).

disproportionately affecting a protected group.[17] Yet the history of disparate impact is a story of misapplication and misunderstanding.

The key to any disparate impact claim is that it does not require *intent*.[18] Thus, unlike disparate treatment discrimination, which occurs when an employer intentionally discriminates against one or more individuals, disparate impact discrimination can occur even when the employer has no animus.[19] For this reason, disparate impact has been likened to a negligence theory in claims of discrimination.[20]

For a variety of reasons, disparate impact claims are brought far less frequently than intentional disparate treatment discrimination claims.[21] To fully understand why, we have to start at the beginning. Disparate impact theory successfully debuted in *Griggs v. Duke Power Co.*, a unanimous 1971 Supreme Court decision.[22] Duke Power openly discriminated against African-American

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17. *See, e.g.*, Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?*, 81 NEB. L. REV. 1152, 1195-96 (2003) (noting that the Civil Rights Act of 1991 "provides that a plaintiff proves disparate impact discrimination by demonstrating that an employer 'uses a particular employment practice that causes a disparate impact' based on a trait protected by Title VII, if the employer is unable to demonstrate that the challenged practice is job-related and consistent with business necessity" (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000))). While disparate impact discrimination must occur against a *group* protected under either Title VII or the ADEA, an *individual* may bring a disparate impact claim under the Americans with Disabilities Act. *See* 42 U.S.C. § 12,112(b)(6) (2000).

18. *See, e.g.*, Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1428 (10th Cir. 1993) (noting that disparate impact discrimination is different from intentional discrimination theory because it "does not require proof of discriminatory motive or intent" and presumes that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination" (internal quotation marks omitted)); Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325, 372 (1996) (stating that evidence of a discriminatory purpose "is crucial for an intent-based model—but irrelevant for a disparate impact claim").

19. *See* Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 449 (1995) (stating that pursuant to *Griggs*, a litigant alleging disparate impact does not have to demonstrate that the defendant "was motivated by racial animus in its employment actions," and adding that a defendant "could be found to have violated Title VII, even in the absence of evidence of animus and unlawful motive").

20. *See* MICHAEL ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 339 (6th ed. 2003) ("[D]isparate impact can be considered a form of liability for negligence—an employer who does not intend to discriminate may nonetheless be liable for failing to exercise its duty of care toward protected group members."); Thomas Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1186 (2000) ("[O]ur mechanism for enforcing the disparate impact regulations should include some way to weed out the good disparity-causing decisions, which are like efficient negligence, from the bad ones, which are like willful and wanton negligence."). *But see* Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175, 219 (2001) (explaining that unlike negligence, for which due care can be cited as a defense, no amount of due care can be cited as a defense to a disparate impact claim).

21. *See* ZIMMER, *supra* note 20, at 322 (noting that the heated debate over disparate impact claims "may seem strange," because the theory is only implicated in "a small percentage of the total federal employment discrimination caseload" (citing John Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991))); Shoben, *supra* note 9, at 598-99 (setting forth reasons why disparate impact is an "underutilized" theory of discrimination, including the lack of damages, involvement in complex class litigation, "sophisticated" employer response to the theory, and the attack on this theory in the judiciary).

22. 401 U.S. 424 (1971).

employees prior to 1964.[23] After Congress enacted the Civil Rights Act of 1964, Duke Power put in place a standardized intelligence test and high school diploma requirement for new hires or employees transferring within the company.[24] Although these requirements were a rather obvious attempt to prevent African-American workers from advancing within the company,[25] the lower courts found that there was no racial purpose or invidious intent behind the requirements,[26] even while finding that the requirements were not necessary for successful job performance.[27]

Thus, the lower courts had tied the Supreme Court's hands on the issue of intent. The Supreme Court was not in a position to revisit the lower courts' factual determinations, particularly when there was no smoking gun demonstrating the company's true motivations.[28] The Court therefore fashioned a new form of relief, holding that an employer's facially neutral practices or policies could still be unlawful if they operated in a discriminatory manner.[29] Thus, the Court recognized a disparate impact theory, concluding (without citation) that Title VII prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[30] The key or "touchstone" to a disparate impact claim, the Court concluded, was a showing of business necessity.[31] If an employer could not show that its facially neutral policy was job-related and consistent with business necessity, its practice would be prohibited.[32]

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23. *Id.* at 428.

24. *Id.* at 427-28.

25. *See id.* at 430 (recognizing that the educational barriers African-Americans had faced in racial segregation would result in the disqualification of these individuals at higher rates than white employees).

26. *Id.* at 428.

27. *Id.* at 431-32.

28. *See generally* Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory To Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1144 (2002) (noting that some commentators have maintained that the Supreme Court in *Griggs* adopted disparate impact theory "as a means of smoking out pretext in the absence of any clear evidence of illicit motive").

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

30. *Id.* at 431.

31. *Id.*

32. *Id.* The Court was largely silent as to where in the statute it found a claim for disparate impact. At the beginning of its opinion, the Court cited section 703(a)(2) of Title VII, 42 U.S.C § 2000e-2 (2000), which provides that it shall be an unlawful employment practice "to limit, segregate, or classify . . . employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin." *Id.* at 426. This provision has widely been recognized as the statutory basis for disparate impact claims. *See In re* Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1310-11 n.9 (11th Cir. 1999); Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1069 n.21 (2005); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1892 n.23 (2004). The Court failed to explain, however, how a policy that was not implemented with any invidious intent or purpose could be said to have been put into place *because of* an employee's race, as required by the strict terms of the statute. *See* 42 U.S.C. § 2000e-2(a) (2000); *see also* George Luce, Comment, *Why Disparate Impact*

While *Griggs* may be seen as results-oriented, others argue that judicial intervention was necessary to address the widespread discrimination of that era.[33] Yet while the opinion continues to generate controversy, its holding unmistakably affirms the existence of disparate impact theory: an employer who implements a facially neutral policy that discriminates on the basis of a protected characteristic, and who fails to show that the policy was job-related and consistent with business necessity, violates Title VII.[34]

A. Wards Cove: *A Bump in the Road*

Because disparate impact is a creature of case law rather than statute, the Supreme Court has been able to chip away at its protections more easily when so inclined. In 1989, the Court dealt disparate impact a major blow in *Wards Cove Packing Co. v. Atonio*,[35] a 5-4 decision. In *Wards Cove*, a cannery facility operating in Alaska filled most of its higher-paying, non-cannery positions with white employees.[36] Justice White, writing for the majority, rejected the lower court's view that statistical evidence showing a high percentage of whites in non-cannery positions and a lower percentage of whites in cannery jobs was sufficient to prove a disparate impact claim.[37] Rather, the "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market."[38]

This holding, however, was not as important as the Court's instructions to the district court on how to proceed on remand. The Court's order dramatically altered plaintiffs' rights in disparate impact cases in three respects.[39] First,

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Claims Should Not Be Allowed Under the Federal Employer Provisions of the ADEA, 99 NW. U. L. REV. 437, 442 n.38 (2004).

33. *See, e.g.*, Robert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 225-26 (1990) ("Of the more than 100 employment discrimination cases decided by the Supreme Court since the passage of Title VII in 1964, [*Griggs*] has been the most important in eliminating employment discrimination. The *Griggs* vision of equality helped create a workplace far more egalitarian than ever existed in the pre-*Griggs* Era.").

34. *Griggs*, 401 U.S at 429-30.

35. 490 U.S. 642 (1989).

36. *Id.* at 647.

37. *Id.* at 650-52.

38. *Id.* at 650 (alterations in original) (internal quotation marks omitted). In setting forth the proper statistical approach in this case, the Court openly worried that a contrary approach would "inexorably lead to the use of numerical quotas in the workplace." *Id.* at 653. Whether disparate impact analysis leads to quotas in hiring has long been an issue for academic debate. *See, e.g.*, Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487 (1996); Andrew M. Dansicker, *A Sheep in Wolf's Clothing: Affirmative Action, Disparate Impact, Quotas and the Civil Rights Act*, 25 COLUM. J.L. & SOC. PROBS. 1 (1991); Peter Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043 (1993).

39. *See* ZIMMER, *supra* note 20, at 341 (summarizing how the decision "remodeled" the landscape of unintentional discrimination theory). It has even been argued that *Wards Cove* implicitly overruled *Griggs*. *See, e.g.*, Niall A. Paul, Wards Cove Packing Co. v. Atonio: *The Supreme Court's Disparate*

plaintiffs would have to identify the "specific or particular employment practice" that resulted in the disparate impact, rather than merely a generalized disparity in the workplace, as had previously been accepted.[40] Second, rather than having to show that its policy was job-related and consistent with business necessity, the defendant's policy justification would be subject to only a "reasoned review."[41] Finally, the burden of proof would "remain[] with the plaintiff *at all times*."[42] Even when the employer asserted its justification for the discriminatory policy,[43] its burden would only be one of production, not of persuasion.[44] While Supreme Court justices are normally collegial in their dissents, Justice Stevens, dissenting in *Wards Cove*, openly accused the majority of "judicial activism."[45] His criticism did not fall on deaf ears.[46] Instead, it sparked congressional action.

B. *The Civil Rights Act of 1991*

In 1991, less than two years after the Supreme Court decided *Wards Cove*, Congress enacted the CRA,[47] amending Title VII to more or less overturn *Wards Cove* and to return the law to the standards applied prior to the

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Treatment of the Disparate Impact Doctrine, 8 HOFSTRA LAB. L.J. 127, 129 (1990) ("*Wards Cove* has drastically changed, and perhaps eliminated, the viable disparate impact standard established by *Griggs*."). *But see* Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," A Codification of* Griggs, *A Partial Return to* Wards Cove, *or All of the Above?*, 43 CASE W. RES. L. REV. 287, 289 (1993) (disagreeing with the "many commentators [who] considered [*Wards Cove*] to be a substantial cutback on, if not an overruling of, the Court's 1971 decision in *Griggs*").

40. *Wards Cove*, 490 U.S. at 657.

41. *Id.* at 659.

42. *Id.* (citation omitted).

43. *Id.* at 659-60.

44. *Id.*

45. *Id.* at 663.

46. Indeed, this decision "surely unleashed" a "firestorm." Browne, *supra* note 39, at 290-91 ("The *New York Times* repeatedly referred to *Wards Cove* as 'overruling' the eighteen-year-old unanimous precedent of *Griggs*. The *Wards Cove* holding was called a 'startling turnabout' . . . [and] [r]eferences to *Dred Scott v. Sandford* and *Plessy v. Ferguson* abounded."); *see* Philip S. Runkel, Note, *The Civil Rights Act of 1991: A Continuation of the* Wards Cove *Standard of Business Necessity?*, 35 WM. & MARY L. REV. 1177, 1177 n.5 (1994) (noting concern in the civil rights community over *Wards Cove* and four other Supreme Court employment opinions, namely *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)); *see also* Michele Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035, 2035 n.1 (1992) (noting concern in Congress over the same decisions).

47. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.), amends certain provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000). A more immediate attempt to respond to *Wards Cove*—the Civil Rights Act of 1990, S. 2104, 101st Cong. (1990)—was passed by the House and Senate but was vetoed by President Bush. *See* Dansicker, *supra* note 38, at 2 (discussing the attempt to pass an earlier version of the CRA). The Senate was only one vote short of overriding the veto, and a compromise was later reached. *See generally* Estrin, *supra* note 46, at 2052-53 (discussing the history of the enactment of the CRA); Shoben, *supra* note 9, at 597 (noting the "heroic effort of Congress" at saving *Griggs* through the passage of the CRA).

decision.[48] Specifically, the CRA codified disparate impact in Title VII and set forth a three-part analysis for cases brought under this theory.[49] First, the plaintiff must allege that a facially neutral policy or practice has a discriminatory impact on a protected group.[50] This showing must identify the particular employment practice resulting in the impact, unless the policy or practice is "not capable of separation for analysis."[51] Second, the employer bears the burden of showing that its policy or practice is job-related and consistent with business necessity.[52] Finally, if the employer meets this burden, the employee can still show that there are alternative employment practices available that achieve the same business goals with less discriminatory impact.[53] For the first time, disparate impact had clear statutory backing. As discussed later, however, Congress would also codify different remedies for claims of intentional and unintentional discrimination—providing far more potential relief for victims of intentional discrimination.[54]

C. *The Lack of Solid Theoretical Basis*

Congress spoke clearly in the CRA, but did not necessarily clarify disparate impact theory. Congress's intention was to return disparate impact law to its pre-*Wards Cove* state,[55] leaving unresolved the theoretical confusion that had plagued disparate impact between *Griggs* and *Wards Cove*.[56] In *Griggs*, the

48. *See, e.g.*, Bradley v. Pizzaco of Nebraska, Inc., 7 F.3d 795, 797 (8th Cir. 1993) ("The 1991 Act expressly reinstated the law of 'business justification' as it existed before *Wards Cove* was decided."); Frazier v. Garrison I.S.D., 980 F.2d 1514, 1525 n.34 (5th Cir. 1993) (noting that the CRA "overruled the Court's distribution of burdens in *Wards Cove*"). As the Civil Rights Act of 1991 amended only Title VII, however, *Wards Cove* would likely still be good law as applied to other statutes, including the ADEA. *See* Smith v. City of Jackson, 544 U.S. 228, 238-58 (2005) (applying the more narrow *Wards Cove* approach to disparate impact law to the ADEA). And *Wards Cove* would likely still be good law to the extent that it is used for analysis of issues other than the burden of proof and business necessity, the specificity with which an employment practice must be alleged, or whether an alternative employment practice has been established.

49. 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

50. *Id.* § 2000e-2(k)(1)(A)(i).

51. *Id.* § 2000e-2(k)(1)(B)(i).

52. *Id.* § 2000e-2(k)(1)(A).

53. *Id.*

54. *Id.* § 2000e-5(g)(1) (providing for damages for disparate impact claims brought under Title VII); *see also* Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 600 (2001) (noting that "[t]he major practical distinction between the two theories is that" disparate treatment claims "are entitled to a jury trial and [the plaintiff] may seek compensatory and punitive damages," while "[d]isparate impact claims . . . are tried by the court and remedies are limited to equitable relief, including an amount for back pay"); Meghan E. Changelo, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 COLUM. J.L. & SOC. PROBS. 133, 138 (2003) (noting the kinds of damages available for prevailing litigants in a disparate impact discrimination claim).

55. Congress provided that the statute should be read "in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'" for claims of disparate impact. 42 U.S.C. § 2000e-2(k)(1)(C) (2000). *Wards Cove* was decided on June 5, 1989. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 642 (1989); *cf.* Frazier v. Garrison I.S.D., 980 F.2d 1514, 1525 (5th Cir. 1993) (noting the law's return to a pre-*Wards Cove* standard after the passage of the CRA).

56. *See generally* Sullivan, *Disparate Impact*, *supra* note 11, at 964 (discussing the lack of

Supreme Court seemed to develop this theory out of thin air in an effort to respond to a lower court finding that no intentional discrimination had occurred, but in circumstances in which there was still a strong sense that racism was involved. The Court struggled to ground its theory in the statute, largely avoiding the issue of how unintentional discrimination violates Title VII, which requires that an adverse employment action be taken "because of" an individual's race. The *Griggs* vision of disparate impact was expansive but not conclusive as to the theory's scope or foundation. In *Wards Cove*, the Court pared back on disparate impact theory by making it far easier for employers to demonstrate legitimate business justifications.[57] The Court in both cases was molding the theory to fit its view of what disparate impact *should* be.

Congress established statutory authority with the CRA but provided little guidance on how it believed the law should develop. In addition, with its decision to deny full remedies to disparate impact claims, Congress skewed the incentives of potential litigants in favor of intentional discrimination claims.[58] In short, the CRA did not clarify the law, and courts have continued to misapply disparate impact and disparate treatment theories.[59]

II. DISPARATE TREATMENT: A DISTINCT DOCTRINE WITH COMMON PROBLEMS

While Congress altered disparate impact analysis in 1991,[60] it kept intact the basic framework for determining whether a plaintiff had carried the burden of persuasion of showing *intentional* employment discrimination (i.e., disparate treatment) as set forth in the classic case of *McDonnell Douglas Corp. v. Green*.[61] Under that rubric, plaintiffs can establish a prima facie case of

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theoretical underpinning for the disparate impact theory).

57. 490 U.S. at 658-60.

58. *See supra* note 54 and accompanying text.

59. *See generally* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734 (2006) (providing an empirical study of lower court disparate impact decisions).

60. In addition to legislating disparate impact law, Congress responded in the Civil Rights Act of 1991 to another Supreme Court decision, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), by altering the way that intentional employment discrimination (i.e., disparate treatment) cases are analyzed when the employer has both a legitimate and discriminatory motivation for taking an adverse employment action. *See* Robert Belton, *Mixed-Motive Cases in Employment Discrimination: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 653-54 (2000).

61. 411 U.S. 792 (1973). This test for intentional discrimination has come under fire recently after the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (holding that direct evidence is not necessary to obtain a mixed-motive jury instruction). Some have even argued that the traditional *McDonnell Douglas* test for proving intentional discrimination through circumstantial evidence is defunct. *See, e.g.*, William R. Corbett, Case Note, McDonnell Douglas, *1973-2003, May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199 (2003). Nonetheless, courts—including the Supreme Court—have continued to apply the test even after *Desert Palace*. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44 (2003); Morris v. Emory Clinic, Inc., 402 F.3d 1076 (11th Cir. 2005). In *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004), however, the Fifth Circuit held that a modified approach—which integrates both traditional mixed-motive and circumstantial evidence models—should be used when evaluating claims of intentional discrimination. *See infra* notes 322-325 and accompanying text.

discrimination by demonstrating that they are members of a protected class, they are qualified for the position, that they suffered an adverse employment action, and that similarly situated employees were treated differently.[62] Once the prima facie case is established, the defendant carries a burden of production[63] (not persuasion—which remains with the plaintiff throughout)[64] to show that it had a legitimate nondiscriminatory reason for taking the adverse employment action.[65] If the defendant satisfies this burden of production, the plaintiff must show that the employer's stated reason for acting was simply a pretext for intentional discrimination.[66] This test, targeted at determining whether an employer *intentionally* discriminated, is a completely separate inquiry from disparate impact analysis.[67] And plaintiffs alleging disparate treatment are entitled to jury trials in which they can obtain compensatory and

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62. *McDonnell Douglas*, 411 U.S. at 802; *see also, e.g.*, Gu v. Boston Police Dep't, 312 F.3d 6 (1st Cir. 2002) (applying the *McDonnell Douglas* test); Lyons v. England, 307 F.3d 1092 (9th Cir. 2002) (same). Though the entire *McDonnell Douglas* test is a flexible approach toward showing discrimination, the fourth prong is particularly malleable to the facts of the particular case and can be satisfied when there is any other evidence giving rise to an inference of discrimination. *Compare* Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (noting that under *McDonnell Douglas*, plaintiffs must only show that they were subject to discrimination "by a preponderance of the evidence"), *with* Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997) ("If a plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate where no other evidence of discrimination is present." (emphasis omitted)). Indeed, *McDonnell Douglas* itself recognizes that the test it formulates should be flexibly applied. *See* 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

63. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (stating that under this burden of production, "[t]he burden . . . shifts to the defendant . . . to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason," and the defendant "need not persuade the court that it was actually motivated by the proffered reasons"). Indeed, the employer's articulated reason need not even be true—the employer need only assert some reason at this stage. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 521 (U.S. 1993) ("Undoubtedly some employers (or at least their employees) will be lying.").

64. *See Burdine*, 450 U.S. at 253 ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."); *Hicks*, 509 U.S. at 507 (similar).

65. *McDonnell Douglas*, 411 U.S. at 802 (noting that after the plaintiff establishes the prima facie case, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection").

66. *Id.* at 798 (stating that the "respondent should be given the opportunity to demonstrate that petitioner's reasons for refusing to rehire him were mere pretext").

67. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977) (discussing the difference between disparate treatment and disparate impact analysis); Chamallas, *supra* note 54, at 599-600 (noting that the significant "conceptual" difference between the two methods of proof "is that disparate treatment requires proof of discriminatory intent or motivation, while disparate impact reaches unintentional discrimination that stems from neutral policies or practices that have a disproportionate adverse effect"); Douglas Menikheim & Frederick R. Trelfa, Note, *Stepping out of the Courtroom and into the Personnel Department: An Analysis of Reasonable Accommodation and Disparate Impact in* Raytheon v. Hernandez, 22 HOFSTRA LAB. & EMP. L.J. 235, 246 (2004) (noting that disparate impact and disparate treatment are "separate and distinct"); Michael A. Middleton, *Challenging Discriminatory Guesswork: Does Impact Analysis Apply?*, 42 OKLA. L. REV. 187, 241 (1989) ("Disparate impact and disparate treatment are distinct theories, and each is equally a part of Title VII case law.").

punitive damages, unlike plaintiffs bringing disparate impact claims.[68] In other words, the two theories involve different analytical analyses and relief, and have never been combined as part of a uniform analysis.[69]

Nonetheless, the two share important similarities. When analyzing whether an employee was the victim of either intentional or unintentional discrimination, courts are asked to review much of the same evidence.[70] This is because there is a fine line between determining whether an employer *intended* to discriminate or whether the *consequences* of the employer's neutral actions were discriminatory. Indeed, the ultimate goal of both theories is the same: determining whether a particular plaintiff was disadvantaged because of that individual's membership in a protected category.[71] Thus, while disparate impact and disparate treatment are distinct legal theories, the divide is largely doctrinal.

These similarities have contributed to the debate and controversy about how disparate treatment theory should be analyzed and applied. For example, the courts are still struggling with how to analyze cases in which the alleged discrimination was a *motivating* factor in the employer's discrimination, but other legitimate reasons for the adverse employment decision exist.[72] And the Supreme Court has routinely revisited the plain terms of Title VII in the disparate treatment context, including the meaning of "because of sex" in the gender discrimination context,[73] the timing of when an unlawful employment practice actually occurs,[74] and the definition of a retaliatory adverse action.[75] Indeed, the Supreme Court has yet to resolve many basic issues related to intentional discrimination, including establishing a uniform standard for

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68. *See* 42 U.S.C. § 1981a(b)-(c) (2000) (providing for compensatory and punitive damages and a right to jury trial for intentional discrimination claims). Litigants who prevail on a disparate impact claim can obtain only limited relief, namely equitable relief (i.e., back pay and reinstatement) and attorney's fees. *See* 42 U.S.C. § 2000e-5(g)(1) (2000) (providing for damages for disparate impact claims under Title VII); Chamallas, *supra* note 54, at 600 (discussing the difference in damages between disparate treatment and disparate impact claims).

69. *See* Hébert, *Redefining Burdens*, *supra* note 5, at 8 (noting that "[t]he concept of discrimination" underlying disparate impact law is "quite different" from intentional discrimination theory).

70. *See generally* Finch v. Hercules, Inc., 865 F. Supp. 1104, 1122 (D. Del. 1994) ("[D]isparate impact cases employ a burden shifting analysis which is similar to that used in disparate treatment pretext cases and, like disparate treatment claims, can be used to challenge both objective and subjective employment practices.").

71. *See generally* Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1470-71, 1494-96, 1547-48 (2005) (discussing that the determination of "causation" forms basis for both disparate impact and treatment claims).

72. *Compare* Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004) (modifying the *McDonnell Douglas* test and adopting an integrated approach including motivating factor analysis), *with* Griffith v. Des Moines, 387 F.3d 733, 735-36 (8th Cir. 2004) (refusing to modify the *McDonnell Douglas* analysis).

73. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

74. National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

75. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006).

coworker harassment or determining the meaning of "adverse action" in the non-retaliation context. Most importantly, however, like disparate impact, courts continue to confuse disparate treatment theory in cases alleging discriminatory employment standards.[76] Clarifying the courts' approach to such cases therefore must begin by disentangling disparate impact and disparate treatment.

III. COURTS CONFUSE THE DISPARATE IMPACT/DISPARATE TREATMENT DISTINCTION

The Supreme Court's decisions in *Griggs* and *Wards Cove*, and Congress's enactment of the CRA, left disparate impact law in a state of disrepair.[77] Courts and litigants were unclear when this theory should be pursued and how broadly it applied. And plaintiffs faced an endless stream of questions: What does it take for an employer to establish the business necessity defense? Must disparate impact be specifically set forth in the complaint? How is the theory intertwined with disparate treatment analysis when the plaintiff alleges both intentional and unintentional discrimination?

A. Joe's Stone Crab: *The Eleventh Circuit Confuses Legal Theories*

No case better demonstrates this confusion than *EEOC v. Joe's Stone Crab, Inc.*[78] In that case the defendant, a fourth-generation seafood restaurant in Miami Beach, employed approximately seventy food servers.[79] Between 1986 and 1990, the company hired 108 food servers—all of whom were male. The defendant hired nineteen women between 1991 and 1995 after the EEOC filed a discrimination charge.[80] The company hired new food servers by conducting a "roll call" each year in which applicants completed a written application and interview. After successfully completing a training program, the applicants could be hired permanently. The company relied on its maître d' to do the hiring on the basis of four subjective criteria: appearance, articulation, attitude, and experience. Upper management did not oversee the maître d's hiring decisions and the company had no verbal or written hiring policy.[81]

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76. *See infra* Part III (discussing various court analyses of cases involving discriminatory employment standards).

77. *See, e.g.*, Runkel, *supra* note 46, at 1207 ("[The CRA's business necessity standard] is clearly ambiguous and will cause extreme confusion in its application. Such confusion already exists and eventually will prompt review by the Supreme Court."); Sullivan, *Disparate Impact*, *supra* note 11, at 964 ("[D]isparate impact theory remains a complicated and confusing doctrine.").

78. 220 F.3d 1263 (11th Cir. 2000).

79. *Id.* at 1268.

80. *Id.* at 1267.

81. *Id.* at 1269. After the EEOC filed its charge, the company altered its hiring practices. Rather than leaving the hiring decisions to the maître d', three members of management conducted the interviews. Additionally, the applicants were required to take a "tray test" which consisted of carrying a

The company attempted to explain its lack of female food servers by noting that it maintained an "Old World" European ambience of "fine dining" in which men perform the highest level of service.[82] Indeed, the company "sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu."[83] While the company employed almost exclusively male servers, no more than two or three women per year had applied for the position.[84] The Eleventh Circuit summarized the district court's conclusion that the company's "public reputation for not hiring women encouraged women to self-select out of the hiring process—thereby skewing the applicant flow."[85] The district court thus discarded the applicant pool data as unreliable and considered the testimony of an EEOC economist for expert data. The EEOC expert testified that 44.1% of the qualified labor pool consisted of women—a number that the district court refined down to 31.9% using an alternative methodology.[86] In considering this statistical evidence, the district court concluded that the company's practice had a discriminatory impact, but that the company had not intentionally discriminated.

On review, the Eleventh Circuit Court of Appeals wrestled with what it considered to be a "paradigmatic 'hard' case."[87] While noting the "legally-cognizable statistical disparity"[88] in the company's hiring practices, the court indicated that to prove disparate impact, "the EEOC still was required to show a causal link between some *facially-neutral* employment practice of [the company] and the statistical disparity."[89] Thus, the EEOC needed to demonstrate that a neutral policy or practice was creating the disparity. This showing was critical to "avoid the potential conflation" of intentional and disparate impact claims.[90] The court concluded that the EEOC had not identified a facially neutral policy that was causing the impact, and therefore its disparate impact claim failed.[91]

Yet while the court determined that there was no disparate impact in the case, it made the surprising decision that there was sufficient evidence for an

loaded serving tray. *Id.*

82. *Id.* at 1269-70.

83. *Id.* at 1270.

84. *Id.* at 1270-71. After the charge was filed, 21.7% of servers the company hired were women, which was roughly proportionate to the number of women in the applicant pool. *Id.* at 1271.

85. *Id.*

86. *Id.* at 1272.

87. *Id.* at 1267.

88. *Id.* at 1277.

89. *Id.* at 1278.

90. *Id.*

91. *Id.* The court criticized the lower court for identifying the company's "reputation" in discriminating against women as the practice resulting in the disparate impact. This, the court concluded, was not enough to bring such a claim. *Id.* at 1278-80.

intentional disparate treatment discrimination claim to go forward.[92] The court noted that there was evidence in the record that the company "gave silent approbation" to the idea that male servers were preferable to females; that the company attempted to "emulate Old World traditions" by using male servers; and that a former maître d' had testified that working at the company was "a male server type of job."[93] These findings did not "mesh easily" with disparate impact analysis because they suggested that there was nothing neutral about the company's policy; rather, they indicate that the company was intentionally attempting to discriminate.[94] The evidence thus suggested that the company's practices were "resulting in the deliberate and systematic exclusion of women as food servers."[95]

The court therefore remanded the case to the district court to "reconsider its factual findings and conclusions of law" on the claim of intentional discrimination.[96] Judge Hull, concurring and dissenting in part, disagreed with the majority's rejection of the disparate impact claim.[97] Judge Hull enumerated four facially neutral policies identified by the district court that could have provided the basis for a disparate impact claim: (1) a lack of any rules to follow in hiring; (2) the use of "subjective intuition" in hiring; (3) management's observation of the process but failure to provide input; and (4) the failure of management to provide any "oversight" or "standardization" of the hiring process.[98] Additionally, the use of "word-of-mouth" hiring and the company's conduct caused females to refrain from "making the futile gesture" of applying for a position. Judge Hull believed that these policies were facially neutral and that they "caused the gender disparity in [the company's] serving staff."[99] At a minimum, Judge Hull believed that the district court's liability finding should simply be affirmed on the basis of disparate treatment, rather than remanding the case as the majority concluded was appropriate.[100]

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92. *Id.* at 1281.

93. *Id.*

94. *Id.* at 1282.

95. *Id.* The court summarized the difference between disparate impact and disparate treatment in the case as follows:

> At bottom then, this case really centers around the theory that women refrained from making the 'futile gesture' . . . of applying to Joe's when they knew that Joe's only hired men as food servers. If Joe's reputation came from anything causally attributable to the restaurant, it emanated from Joe's own purportedly discriminatory hiring practices, *not* from the specific facially neutral practices identified by the district court.

Id.

96. *Id.* at 1283.

97. *Id.* at 1288 (Hull, J., dissenting in part).

98. *Id.* at 1290.

99. *Id.* at 1293.

100. *Id.* at 1294. On remand, the district court found that the defendant had "engaged in intentional disparate treatment sex discrimination" and ordered injunctive and monetary relief for those women that had been discriminated against. EEOC v. Joe's Stone Crab, Inc. (*Joe's Stone Crab III*), 136 F. Supp. 2d 1311, 1313 (S.D. Fla. 2001). The case was appealed again, and the Eleventh Circuit "affirm[ed] the

Judge Hull and the district court made a persuasive argument: it is hard to imagine that no facially neutral policy at work here resulted in the company's hiring *zero* women for a number of years, regardless of how the exact hiring practice is characterized.[101] This conclusion is strengthened by the fact that the Supreme Court had previously recognized that subjective hiring practices, in addition to objective ones, can form the basis of a disparate impact claim.[102] Indeed, the majority opinion assumes that it must rigidly choose between disparate impact or disparate treatment theory. There is nothing in the statute requiring a litigant to proceed only under one theory; rather, parties routinely advance both theories as bases for discrimination.[103] There can be little question here that *some* form of discrimination occurred, regardless of whether that discrimination falls under the disparate treatment or disparate impact rubric. On the other hand, had Judge Hull's opinion prevailed, the plaintiff in this case would have been left to pursue only those limited remedies available to disparate impact litigants and would have been unable to obtain compensatory or punitive damages.[104]

Obviously, the outcome of this "paradigmatic 'hard' case"[105] can be debated. But the outcome is less important than the legal confusion the case illustrates. The EEOC filed its complaint in *Joe's Stone Crab* in 1993.[106] Seven years later, a federal appellate court was still divided as to what theory of discrimination should have been alleged in that complaint and whether the discriminatory practice at issue involved a facially neutral policy. Even after remand, the issue remained unsettled, and the appellate court again reversed a portion of the district court's entry of judgment on behalf of four of the claimants on a disparate treatment theory.

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district court's judgment as to [one woman and] . . . reverse[d] th[e] judgment as to [two other women]." EEOC v. Joe's Stone Crabs, Inc. (*Joe's Stone Crab IV*), 296 F.3d 1265, 1276 (11th Cir. 2002). The court also vacated the judgment of another woman involved in the case for reconsideration of the amount of damages. *Id.* at 1276-77. Both parties petitioned the Eleventh Circuit for rehearing, which was denied. *See* EEOC v. Joe's Stone Crabs, Inc. (*Joe's Stone Crab V*), 55 F. App'x 904 (11th Cir. 2002). The company also petitioned for certiorari to the Supreme Court, but this was also denied. Joe's Stone Crab, Inc. v. EEOC (*Joe's Stone Crab VI*), 539 U.S. 941 (2003).

101. The CRA made clear that a precise policy need not be alleged when the policy or practice is "not capable of separation for analysis." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000).

102. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) ("We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices.").

103. *See, e.g.*, Llamas v. Butte Cmty. Coll. Dist., 238 F.3d 1123, 1126 (9th Cir. 2001) (acknowledging the plaintiff's allegation of both disparate impact and disparate treatment discrimination); Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1314 (11th Cir. 1999) (same); Anderson v. Zubieta, 180 F.3d 329, 334 (D.C. Cir. 1999) (same).

104. *See supra* note 54 (discussing relief available in disparate treatment and disparate impact cases).

105. *Joe's Stone Crab II*, 220 F.3d 1263, 1267.

106. *See* Complaint, EEOC v. Joe's Stone Crab, Inc. (*Joe's Stone Crab I*), 969 F. Supp. 727 (S.D. Fla. 1997) (No. 93-1082-CIV).

Practitioners in the Eleventh Circuit with clients they believe have been discriminated against by an employer standard or workplace rule must be left scratching their heads. Should they try to allege and prove both disparate impact and disparate treatment, for fear of having one of the theories rejected by the district court? Can they just allege discrimination broadly in the complaint and then proceed under disparate impact or disparate treatment (or both) when the evidence becomes clearer during discovery? How specifically must they identify the exact policy that they believe is resulting in the disparate impact?

B. *The Supreme Court Also Confuses Theories*

The Eleventh Circuit is not alone. Indeed, the Supreme Court had clouded the issue long before, blurring the line between disparate treatment and disparate impact. For example, in *Albermarle Paper Co. v. Moody*,[107] the Court considered whether a company's facially neutral employment test had a discriminatory impact against individuals on the basis of race—a question very similar to the one faced by the Court in *Griggs*.[108] In analyzing this disparate impact case, however, the Court relied on disparate treatment terminology.[109] Indeed, in setting forth the prima facie case for disparate impact, the Court cited *McDonnell Douglas*, the seminal case on disparate treatment analysis.[110] And the Court indicated that if a plaintiff were able to undermine the employer's rationale that the tests were job-related, it would be evidence of *pretext*.[111] By intermixing the disparate treatment and disparate impact terminology, and blurring the analytical distinction between the two theories, the Court only added to the confusion about how to proceed in cases presenting an alleged discriminatory employment policy.[112]

Shortly after its decision in *Albermarle*, the Court once again blurred the distinction between disparate impact and disparate treatment. In *New York City Transit Authority v. Beazer*, the Court considered whether an employer's facially neutral policy of not hiring employees who had used narcotic drugs had a discriminatory impact on black and Hispanic individuals.[113] The Court rejected the plaintiff's disparate impact claim because the company had a job-related reason for implementing the rule which had the "legitimate employment

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107. 422 U.S. 405 (1975).

108. *See id.* at 425.

109. *See id.*

110. *Id.* at 409.

111. *Id.* at 425.

112. *See* Hébert, *Redefining Burdens*, *supra* note 5, at 53 (discussing the *Albermarle* decision and noting that "[t]here is some support in the Supreme Court's disparate impact cases for the position that discriminatory intent is not entirely irrelevant to the disparate impact theory").

113. 440 U.S. 568, 571-72, 578 (1979).

goals of safety and efficiency."[114] However, in rejecting this disparate impact claim, the Court further 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."[115] The Court therefore suggested that a showing of pretext—a requirement normally reserved only for disparate treatment cases—was necessary to undermine an employer's showing of business necessity in a disparate impact case.[116] The Court again blurred the line between disparate impact and disparate treatment.

Even after the CRA, the Supreme Court continued to confuse the distinction between these legal theories. In *Hazen Paper Co. v. Biggins*, the Court considered whether intentional discrimination existed when the employer terminated employees a few weeks before the ten-year benchmark required by the company to vest in its pension plan.[117] The Court determined that "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age-based.'"[118] The Court remanded the case to the district court to determine whether there was sufficient evidence—aside from the termination of employees close to vesting—that would support an intentional discrimination claim.[119]

But what about disparate impact? Couldn't a facially neutral policy that resulted in the termination of employees before vesting in their pension plans have a disparate impact against older employees? In discussing this issue, the Court noted that it had "never decided" whether this theory is even available under the ADEA.[120] The Court then cursorily dismissed the issue in this particular case, as this theory of discrimination was not specifically alleged by the plaintiff.[121] Rather, the plaintiff had alleged only intentional discrimination.[122]

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114. *Id.* at 587 n.31.

115. *Id.* at 587 (emphasis added).

116. *See* Hébert, *Redefining Burdens*, *supra* note 5, at 56 (discussing *Beazer* and noting that the Court's decision "suggests that the plaintiff's rebuttal burden [in disparate impact cases] of establishing a less discriminatory alternative is really about discriminatory intent").

117. 507 U.S. 604 (1993).

118. *Id.* at 611.

119. *Id.* at 612-14.

120. *Id.* at 610. This brief statement regarding the viability of a disparate impact ADEA claim altered the legal landscape. Prior to this cursory remark by the Supreme Court, the lower courts uniformly recognized that disparate impact claims could be brought pursuant to the ADEA. *See* Smith v. City of Jackson, 544 U.S. 228, 236-37 (2005) ("[F]or over two decades after our decision in *Griggs*, the Courts of Appeal uniformly interpreted the ADEA as authorizing recovery on a 'disparate-impact' theory in appropriate cases. It was only after our decision in *Hazen Paper* that some of those courts concluded that the ADEA did not authorize a disparate-impact theory of liability." (citation omitted)). As the Supreme Court mentioned, "Tectonic plates shifted when the Court decided *Hazen Paper*." *Id.* at 238 (alterations omitted) (quoting Mullin v. Raytheon Co., 164 F.3d 696, 700 (1st Cir. 1999)).

121. *Hazen Paper*, 507 U.S. at 610.

122. *Id.*

Ten years later the Supreme Court reaffirmed in *Raytheon Co. v. Hernandez* that a plaintiff must specifically allege disparate impact or risk foregoing such a claim.[123] In *Raytheon*, the Court considered whether a missile defense company violated the Americans with Disabilities Act when it refused to rehire an employee who had been terminated for failing the company's drug test.[124] Though addressing the employee's disparate treatment claim, the Court declined to analyze the plaintiff's disparate impact claim, which he had not asserted in a timely manner.[125] The Court went on to criticize the lower court's analysis "[t]o the extent that [the lower court] strayed from [its] task by considering not only discriminatory intent but also discriminatory impact."[126]

Hazen Paper and *Raytheon* strongly suggest, then, that a litigant must specifically set forth a disparate impact theory or else this theory will be considered waived.[127] Yet they offer little justification for why plaintiffs should not simply be permitted to assert that they were adversely affected by a discriminatory policy, and then let the courts decide whether either intentional discrimination or disparate impact has occurred. The majority in *Joe's Stone Crab* certainly had no problem switching between the theories of disparate impact and disparate treatment.[128]

Regardless, these cases provide excellent examples of how an individual who may have been discriminated against by an employer's facially neutral policy can fall through the cracks and walk away with nothing. Perhaps we can simply blame poor lawyering, but the courts consistently appear to be drawing artificial distinctions between categories of discrimination that, at their core, amount to the same thing.

C. Smith v. City of Jackson: *A Missed Opportunity for Clarification*

Hazen Paper, *Joe's Stone Crab*, *Albermarle Paper*, *Beazer*, and *Raytheon* are all examples of how difficult it is for courts to distinguish between disparate treatment and disparate impact theories in cases involving workplace standards and rules. The Supreme Court recently had a significant opportunity to clarify the approach to allegedly discriminatory employment standards in *Smith v. City*

123. 540 U.S. 44 (2003); *see* Christine Neylon O'Brien & Jonathan Jo Darrow, *The Question Remains After* Raytheon Co. v. Hernandez*: Whether No-Rehire Rules Disparately Impact Alcoholics and Former Drug Abusers*, 7 U. PA. J. LAB. & EMP. L. 157, 162 (2004) ("In *Raytheon*, because of what was essentially a procedural error on the plaintiff's part . . . the issue of whether [the employer's] rule had a disparate impact upon members of the plaintiff's protected class went unanswered by the Supreme Court.").

124. *Raytheon*, 540 U.S. at 46-47.

125. *Id.* at 49-50.

126. *Id.* at 55.

127. *Id.* Nothing in *Hazen Paper* answers the question of when in the pleadings the theory must be asserted by the plaintiff. The two most likely times to raise this theory would be either in the complaint or in defense of a summary judgment motion by the defendant.

128. *See supra* Section III.A (setting forth the Eleventh Circuit's analysis of the case).

of Jackson, a case that presented the issue of whether disparate impact is available in cases of age discrimination.[129] Unfortunately, the Court only further confused the application of disparate impact theory.

In *Smith*, police and safety officers that worked for the city of Jackson, Mississippi, brought an action under the ADEA alleging that they were discriminated against by a policy that gave preference to younger workers.[130] Under the city's pay plan, officers with less than five years of employment were given proportionately larger pay increases than workers with more seniority.[131] Most of the workers over the age of forty—and therefore covered by the ADEA—had more than five years of tenure with the city.[132] A group of older workers filed suit against this policy, alleging both disparate treatment and disparate impact discrimination.[133]

The district court granted summary judgment to the city, dismissing both claims.[134] The Court of Appeals for the Fifth Circuit reversed the dismissal of the disparate treatment claim, holding that the district court should have permitted additional discovery.[135] However, the Court affirmed the grant of summary judgment to the officers' disparate impact claim.[136] The panel majority (over a strong dissent) rejected this claim on the basis that such a claim was unavailable under the ADEA.[137] The officers petitioned for certiorari, and the Supreme Court granted review.[138]

Justice Stevens, writing for a plurality of the Court, analyzed the ADEA's text and the EEOC regulations and determined that "it was error for the Court of Appeals to hold that the disparate-impact theory of liability is categorically unavailable under the ADEA."[139] Yet the Court did not stop with this holding. Rather, it went on to discuss how the theory is "narrower" under the ADEA than under Title VII.[140] In this regard, the Court noted that while Title VII was amended by the Civil Rights Act of 1991, the ADEA was not similarly

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129. 544 U.S. 228, 232-56 (2005). Prior to *Smith*, the circuits were split as to whether the disparate impact theory was available under the ADEA. *See, e.g.*, Kenneth R. Davis, *Age Discrimination and Disparate Impact: A New Look at an Age-Old Problem*, 70 BROOK. L. REV. 361, 372 n.68 (2004) (summarizing the positions of the appellate courts on the issue of whether disparate impact exists for age claims).

130. *Smith*, 544 U.S. at 230.

131. *Id.* at 231.

132. *See id.* The ADEA specifically provides protection to those who are forty or older. 29 U.S.C. § 631(a) (2000) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.").

133. *Smith*, 544 U.S. at 231.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 232.

138. *Id.*

139. *Id.* at 240.

140. *Id.*

amended.[141] Thus, the Court concluded that the more narrow *Wards Cove* approach to disparate impact law applied to the ADEA.[142] Applying this holding to the facts of the *Smith* case, the Court held that the plaintiffs had not properly alleged the specific employment practice that was resulting in the disparate impact.[143] Thus, while the Supreme Court recognized that disparate impact is a viable (though extremely limited) theory under the ADEA, it affirmed the lower court's holding against the officers.[144]

This holding was criticized from both sides by other members of the Court. In a strongly worded concurring opinion, Justice O'Connor (joined by Justices Kennedy and Thomas) argued that Congress never intended the ADEA to contain a disparate impact provision.[145] In a separate concurrence, Justice Scalia argued that this was "an absolutely classic case for deference" to the EEOC's regulations, and the Commission's "reasonable view" that disparate impact claims are viable under the Age act therefore should control.[146]

The *Smith* decision marks a new height of uncertainty and confusion in disparate impact law, as well as its erosion to near nonexistence.[147] *Smith*'s holding that there are completely different approaches to disparate impact under Title VII and the ADEA[148] reinforces that, more than 30 years after *Griggs*, the Supreme Court cannot resolve how this theory should be applied.

D. *The Current State of Disparate Impact/Disparate Treatment Law*

We have come a long way since the Supreme Court's promise in *Griggs* that "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."[149] The courts' varied approaches to cases alleging discriminatory employment standards have become unworkable.[150] They have produced a quilt-like theory of discrimination that provides no real explanation for the difference between disparate impact and disparate treatment. More troubling, the quilt is not yet

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141. *Id.*

142. *Id.*

143. *Id.* at 241. Additionally, the employer's reason for implementing a pay structure that gave less experienced workers larger percentage pay increases—remaining competitive in the market for junior officers—was based on a reasonable factor other than age. *Id.*

144. *Id.* at 243.

145. *Id.* at 248 (O'Connor, J., concurring in the judgment).

146. *Id.* at 243-45 (Scalia, J., concurring in the judgment).

147. The question of whether disparate impact theory should be applied differently in Title VII and ADEA cases is beyond the scope of this Article.

148. *Smith*, 544 U.S. at 243 (discussing different tests for disparate impact under the ADEA and Title VII).

149. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

150. *See generally* Shoben, *supra* note 9, at 599 (discussing the "attack in some judicial quarters" on unintentional discrimination theory).

complete, leaving litigants to wonder how best to prosecute their cases.

Suppose a plaintiff's attorney today receives a phone call from a female nurse who applied to work at a psychiatric hospital. The nurse believes that she was not hired because she is only five foot two inches tall. Though there is no written policy, the hospital seems to hire only nurses that are at least five foot ten and one hundred and forty pounds. None of the twenty nurses on staff are of a smaller size, and in fact none are female. There is additional evidence that the prospective nurse was rejected by the hiring committee because the committee members were persuaded by the hospital administrator's comment that "this job is just too demanding and dangerous for someone of her stature."

These facts present the plaintiff's attorney with a number of questions. Is the woman being discriminated against because of her sex? This certainly appears to be the case, though it is questionable whether intentional discrimination is taking place, as the employer seems to be acting solely because of safety concerns. Should the woman allege a claim of intentional discrimination? It is unclear whether discovery might ultimately reveal that the committee members or hospital administrator were motivated by the applicant's sex. Is there a facially neutral policy at work that has a disparate impact on women? There appears to be an unwritten policy of only hiring those individuals who are large enough to control the patients, but as in *Joe's Stone Crab*, it might be difficult to articulate precisely what the "policy" was.[151] What would be required to prove this case of discrimination? It is likely that such proof would require extensive statistical analysis showing that the practice in place had a discriminatory impact on women and that less discriminatory practices existed.[152] The attorney would be keenly aware that such expert statistical analysis would be time-consuming and very costly.[153] And unless discovery produced evidence of intentional discrimination, the woman would have to pursue a disparate impact claim in which she would be ineligible for

151. The employer could have chosen a "custom" or "policy" that had less impact on women and more directly targeted the requirement at issue—strength. By implementing a strength test, rather than a size and weight requirement, the employer could have more effectively achieved its business purpose. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977) (holding that a height and weight requirement for prison guards had a disparate impact on women and that the same business purpose could be achieved through a strength test).

152. It is also unclear exactly what level of statistical showing is required to establish a disparate impact. *See* Smith v. Xerox Corp., 196 F.3d 358, 365 (2d Cir. 1999) ("[N]o bright line rules exist to guide courts [in disparate impact cases] in deciding whether plaintiffs' statistics raise an inference of discrimination . . . ."); Menikheim & Trelfa, *supra* note 67, at 255 (discussing the statistical requirement of establishing a disparate impact claim); *see also* Shoben, *supra* note 9, at 598 (noting that disparate impact claims rely on a class-based theory and "are difficult, if not impossible, for private plaintiffs" to litigate unless they can attain significant damages).

153. *See* Sullivan, *Disparate Impact*, *supra* note 11, at 993 (explaining that "[l]itigating under the disparate impact model will necessarily require expert testimony," which is costly). *See generally* Michael K. Braswell et al., *Disparate Impact Theory in the Aftermath of* Wards Cove Packing Co. v. Atonio*: Burdens of Proof, Statistical Evidence, and Affirmative Action*, 54 ALB. L. REV. 1 (1989) (discussing the expense of using expert statistical data in disparate impact cases).

compensatory or punitive damages.[154] Without evidence of intent, the best the woman could hope for is equitable relief—potential instatement into the position and back pay. With the high cost and confusing nature of litigating such a case, and with so little potential payoff, the attorney is unlikely to take on this matter.

Even when a claim seems viable, attorneys are left with a difficult roadmap. Must the attorney pursue the disparate impact claim alone, and then later assert an intentional discrimination claim if evidence supporting such a claim presents itself during discovery—or should both claims be asserted initially in an abundance of caution? Must the disparate impact and disparate treatment claims be litigated separately, or can the theories be pursued jointly for purposes of discovery and the pleadings? What is the burden of proof for establishing a disparate impact claim, and how specifically must the attorney demonstrate that the employment practice at issue is actually causing the disparate impact? Is expensive statistical analysis the only way of achieving this form of proof?[155]

Most plaintiff's attorneys that practice employment discrimination law have likely encountered these questions, which explains in large part why so few disparate impact claims are ever even filed.[156]

IV. THE CANADIAN APPROACH

In *Griggs*, the United States became the first country to formally recognize disparate impact as a theory of discrimination.[157] Many other countries have borrowed from the United States and have adopted various theories of discrimination that do not require a showing of intent.[158] Indeed, numerous countries have applied a far broader theory of disparate impact than originally adopted in the United States.[159] While other countries have expanded the reach of disparate impact law, courts in the United States have continued to chip away at its protections.[160]

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154. *See supra* note 54 and accompanying text.

155. *See, e.g.*, Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1314 (11th Cir. 1999) (rejecting a disparate impact claim on the basis of pregnancy when no statistical evidence was offered).

156. *See supra* note 21 (explaining that more disparate treatment cases are brought than cases alleging disparate impact).

157. *See* Hunter & Shoben, *supra* note 12, at 109-10, 112-15 (discussing the origins of disparate impact law in the United States).

158. *See id.* at 115-24 (discussing the recognition of non-intentional discrimination as a viable theory in various countries).

159. *See id.* at 108 (noting that "the American interpretation and application of the [disparate impact] theory are more restrictive than those of other nations").

160. *See id.* at 108, 128-31 (outlining recent trends in American disparate impact law). Indeed, one might argue that disparate impact law in this country was at its most expansive immediately after the *Griggs* decision. Since *Griggs*, and certainly after *Wards Cove*, the case law has tended to restrict coverage in a variety of ways. Thus, for example, the Court in *Smith v. City of Jackson* greatly limited the rights of a plaintiff in an age discrimination case to bring a viable claim for disparate impact

Canada has implemented a particularly innovative approach to analyzing workplace rules. This approach provides a useful lens through which to view the confusion in the United States, and contemplate potential solutions. As a geographical neighbor to the United States, Canada has developed a legal analysis for employment claims that is very similar to the one in this country.[161] Yet in general, Canada has displayed a willingness to take progressive stances on employment discrimination issues that would be considered controversial in the United States and other countries.[162] Thus, Canada's willingness to push the legal limits in a progressive direction provides a valuable example for American scholars and practitioners—a roadmap of sorts for moving U.S. law in that direction when appropriate.

Prior to 1985, Canada recognized only intentional discrimination as actionable under the law—similar to the pre-*Griggs* state of U.S. law.[163] Then the Canadian Supreme Court released an opinion in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.* (known in the literature as *O'Malley*),[164] recognizing that intent is not necessary for a viable claim of discrimination. In *O'Malley*, the court considered whether an employer had discriminated against a Seventh-Day Adventist by requiring her to assume part-time status when it was informed that she could not work on Saturdays.[165] The employee, a salesperson in a women's wear department, "had accepted as a condition of employment" that she would work on Saturdays prior to her religious conversion.[166] Other employees were also required to work on Saturdays, and

discrimination. *See supra* Section III.C; *see also* Laya Sleiman, *A Duty To Make Reasonable Efforts and a Defense of the Disparate Impact Doctrine in Employment Discrimination Law*, 72 FORDHAM L. REV. 2677, 2684 (2004) (noting that subsequent to *Griggs* but before *Wards Cove*, unintentional discrimination theory "continued to develop and became an important tool for fighting employment discrimination").

161. *See, e.g., B.C. Firefighters*, [1999] 3 S.C.R. 3, 15-17 (Can.) (outlining the conventional approach to employment discrimination claims in Canada). *See generally* Leslie Goldstein, *Constitutionalism and Policies Toward Women: Canada and the United States*, 4 INT'L J. CONST. L. 294, 301-03 (2006) (noting the similarity in employment discrimination policies between the United States and Canada, particularly as concerning women).

162. *See, e.g.*, Timothy Furrow, *Canada Challenged as Human Rights Leader: The Human Rights Committee's Decision in* Waldman, 11 TRANSNAT'L L. & CONTEMP. PROBS. 225, 248 (2001) (noting Canada's "displayed commitment to civil rights" and the "willingness to move forward as a progressive nation and a world civil rights role model"); Rachel Yuen, *Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Québec*, 38 CORNELL INT'L L.J. 625, 641-42 (2005) (discussing Québec's new law against psychological harassment in the workplace, a theory not recognized in the United States).

163. *See* Hunter & Shoben, *supra* note 12, at 119 (discussing the origin of unintentional discrimination theory in Canada).

164. (*O'Malley*), [1985] 2 S.C.R. 536. The court released another opinion concurrently that also recognized unintentional employment discrimination. K.S. Bhinder v. Canadian Nat'l Ry. Co., [1985] 2 S.C.R. 561, 567 (agreeing that "the definitions of discriminatory practices in the *Canadian Human Rights Act*, ss. 7 and 10, extend to both unintentional and adverse effect discrimination"); *see* Hunter & Shoben, *supra* note 12, at 119 (discussing these two cases).

165. *O'Malley*, [1985] 2 S.C.R. at 539-41.

166. *Id.* at 540.

there was no intentional discrimination found.[167]

In considering whether the employee could proceed without any showing of intent, the court held that an intent requirement would create "a virtually insuperable barrier" for litigants.[168] Citing to the U.S. Supreme Court decision in *Griggs*, the Canadian court concluded that "motive would be easy to cloak in the formulation of rules which, though imposing equal standards, could create . . . injustice and discrimination by the equal treatment of those who are unequal."[169] The court went on to distinguish between non-intentional (or what it called "adverse effect") and intentional (or what it called "direct") discrimination.[170] The court stated that

> Where direct discrimination is shown, the employer must justify the rule . . . or it is struck down. Where there is adverse effect discrimination . . . the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group. . . In such case there is no question of justification raised because the rule, if rationally connected to the employment, needs no justification; what is required is some measure of accommodation [up to the point of undue hardship].[171]

Thus, the court determined that adverse effect discrimination was a viable theory in Canada, and distinguished both the showing required to establish this form of discrimination and the relief available with the theory of direct discrimination.[172] In applying its new rule to the facts of the case, the court determined that the employer had not demonstrated that an undue hardship would be created by accommodating the employee's religious beliefs, and ordered the employer to compensate the employee for the difference between her part-time wages and what she would have earned as a full-time worker.[173]

Though the Canadian court had recognized adverse effect discrimination with this decision, it also clearly created a distinction between the analysis of intentional and non-intentional discrimination cases—similar to the current state of U.S. law.[174] Approximately fourteen years later, the Canadian court would do away with this distinction in the context of discriminatory

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167. *Id.*

168. *Id.* at 549. The court noted that "[i]n any society, the rights of one will inevitably come into conflict with the rights of others. It is obvious then that all rights must be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others." *Id.* at 554.

169. *Id.* at 549.

170. *Id.* at 551, 555.

171. *Id.* at 555.

172. *Id. See* Kathleen E. Mahoney, *The Constitutional Law of Equality in Canada*, 44 ME. L. REV. 229, 239-40 (1992) (noting that the *O'Malley* court extended employment discrimination coverage to "unintended effects of neutral practices"). The Canadian court further discussed the applicable burdens of proof, noting that the employee had the burden of establishing a prima facie case in an adverse effect claim. *O'Malley*, [1985] 2 S.C.R. at 555. When the "offending rule is rationally connected to the performance of the job," the defendant must demonstrate that it "has taken such reasonable steps toward accommodation of the employee's position as are open to him without undue hardship." *Id.*

173. *O'Malley*, [1985] 2 S.C.R. at 560.

174. *Id.* at 555.

employment standards or workplace rules.

A. *The* B.C. Firefighters *Case*

In 1999, the Canadian Supreme Court heard the case of Tawney Meiorin, a female forest fighter who had been performing her job for three years for the British Columbia Ministry of Forests at a "satisfactory" level.[175] Then, the government implemented, for safety reasons, a physical fitness test that was created to determine the fitness of forest firefighters, including their aerobic capacity.[176] The test measured the firefighters' "maximal oxygen uptake," which reflects the level at which the individual can "take in oxygen, transport it to the muscles, and use it to produce energy."[177]

Part of the test specifically designed to calculate aerobic capacity required that the firefighter be able to run a specified distance in eleven minutes.[178] Meiorin failed this test on four different occasions, as she was unable to complete the run in a time faster than eleven minutes and 49.4 seconds.[179] Because she could not successfully complete this test, Meiorin was laid off.[180] Meiorin's union filed a grievance in this matter, and the issue proceeded to arbitration.[181] The arbitrator concluded that, because of their physiological differences, women generally have a lower aerobic capacity than men, and men are more easily able to increase their capacity than women.[182] Additionally, the evidence indicated that while approximately two-thirds of the men passed the aerobic capacity tests, only one-third of the women applicants passed the tests.[183] There was also no evidence that the required aerobic capacity was actually necessary to successful performance as a forest firefighter.[184] Thus, the arbitrator concluded that Meiorin had been subjected to adverse effect discrimination because the aerobic capacity test had "a disproportionately negative effect on women as a group."[185] The arbitrator therefore ordered that Meiorin be reinstated as a firefighter, and that she receive her lost back pay and benefits.[186]

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175. *B.C. Firefighters*, [1999] 3 S.C.R. 3, 9-10. As a forest firefighter, the plaintiff would "attack and suppress forest fires while they were small and could be contained." *Id.* at 10.

176. *Id.* at 11.

177. *Id.* at 10-11. In addition to aerobic capacity, the tests had various other components, including a maximum weight restriction, an "upright rowing" examination, and a pump and hose carrying test. *Id.* There does not appear to be any dispute that Meiorin passed these tests.

178. *Id.* at 12.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 13.

185. *Id.*

186. *Id.*

The appellate court reviewing the decision concluded that it is permissible for an employer to implement an employment standard that is "*necessary* to the safe and efficient performance of the work and is applied through individualized testing."[187] Because the court believed that the government's "aerobic standard" for firefighters "was necessary to the safe and efficient performance of the work," it overturned the arbitrator's decision and dismissed the matter.[188] The appellate court warned that if it permitted the arbitrator's ruling to stand, it would be endorsing "reverse discrimination" by requiring men to achieve at a higher level than women in the same employment position.[189]

The Canadian Supreme Court began its review by setting forth the relevant statutory provisions. The British Columbia Human Rights Code, paragraph 13, states that "[a] person must not . . . discriminate against a person regarding employment or any term or condition of employment because of [a protected characteristic],"[190] unless such discrimination is "based on a bona fide occupational requirement" (the BFOR defense).[191] The supreme court also set forth the "conventional approach" for applying this statutory standard to the facts of the case.[192] This bifurcated approach involves determining whether the alleged illegal employment standard is "discriminatory on its face," thereby constituting "direct discrimination," or whether it is "facially neutral," which would give rise to an "adverse effect" claim.[193]

When the litigant has established a prima facie case of direct discrimination, the "burden shifts to the employer" to establish the BFOR defense.[194] This defense can be established by demonstrating: (1) that "the standard was imposed honestly and in good faith and was not designed to undermine the objectives" of the statute; and (2) that "the standard is reasonably necessary to the safe and efficient performance of the work and does not place an unreasonable burden" on individuals.[195]

Yet when the litigant has established a prima facie case of adverse effect discrimination, the BFOR claim cannot be used to escape liability. In these

187. *Id.*

188. *Id.* at 13-15.

189. *Id.* at 13.

190. The Human Rights Code includes "race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person" as protected characteristics. *Id.* at 14 (citing R.S.B.C. 1996, c.210, para. 13). Thus, the Human Rights Code is much broader than Title VII of the Civil Rights Act of 1964, which covers only race, color, religion, sex, and national origin. *See* 42 U.S.C. § 2000e-2(a) (2000).

191. *B.C. Firefighters*, [1999] 3 S.C.R. at 14 (citing R.S.B.C 1996, c.210, para. 13).

192. *Id.* at 15.

193. *Id.*

194. *Id.* at 15-16.

195. *Id.* at 16. The court acknowledged that this defense "is difficult for an employer to justify . . . where individual testing of the capabilities of the employee or applicant is a reasonable alternative." *Id.*

cases, the employer can prevail by establishing: (1) "a rational connection between the job and the particular standard"; and (2) that it cannot further accommodate the claimant without incurring undue hardship.[196]

In this particular case, the supreme court noted the tension between the arbitrator's decision and the court of appeals' ruling. While the arbitrator determined that the employment standard was neutral and had "adversely affected" Meiorin, the court of appeals "did not distinguish between direct and adverse effect discrimination," and held only that it is not improper to use this type of test when the standard is "demonstrated to be necessary to the safe and efficient performance of the work."[197] Applying the "conventional analysis," the supreme court agreed with the arbitrator, noting that a "*prima facie* adverse effect discrimination" claim had been established by Meiorin, and the employer had failed to establish accommodation "to the point of undue hardship."[198]

Yet more importantly than this determination, the supreme court explained that the "divergent approaches [to analyzing employment discrimination claims]. . . suggest a more profound difficulty with the conventional test itself," indicating that it needed a new test.[199] Indeed, the court acknowledged that "the complexity and unnecessary artificiality" of the traditional model of discrimination analysis in Canada "attest to the desirability of now simplifying the guidelines that structure the interpretation of human rights legislation."[200] The court then set forth numerous reasons why a new test should be adopted that avoided the distinction between intentional and unintentional discrimination in the context of discriminatory employment standards.[201] Many of these reasons directly relate to the current confused state of the law in the United States.

First, the supreme court determined that the "distinction" that exists between direct discrimination and adverse effect discrimination is artificial.[202] Thus, attempting to distinguish between "a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify, simply because there are few cases that can be so neatly characterized."[203] Such a distinction is "unrealistic" in that an employer who intends to discriminate would be unlikely to establish an employment standard that is openly discriminatory when the same result "could be easily realized by

196. *Id.* at 16.

197. *Id.* at 17.

198. *Id.*

199. *Id.* at 17-18.

200. *Id.* at 18.

201. *Id.* at 17-18.

202. *Id.* at 18-19. The court noted that other courts have called the distinction "chimerical" and that it is "perverse to have a threshold classification that is so malleable." *Id.* at 19 (*citing* Canadian Civil Liberties Ass'n v. Toronto Dominion Bank, [1998] 4 F.C. 205, 265 (Fed. Ct.)).

203. *Id.* at 18.

couching it in neutral language."[204] Thus, "[t]he [current] bifurcated analysis gives employers with a discriminatory intention and the forethought to draft the rule in neutral language an underserved cloak of legitimacy."[205]

In addition, the court postulated that there really is no practical reason to draw a distinction between employer defenses in an adverse effect and direct case of discrimination.[206] In reality, "there may be little difference between the two defences," and the current bifurcated analysis forces litigants and courts "to frame their arguments and decisions within the confines of definitions that are themselves blurred."[207]

The court also noted that the relief available to a successful litigant unnecessarily depends upon whether they have proceeded under the intentional or non-intentional method of proof.[208] Thus, an intentionally discriminatory standard that cannot be justified by a BFOR is "struck down in its entirety," while a facially neutral rule that impacts only one individual will remain in effect while that individual is accommodated up to the point of undue hardship.[209] The court was troubled by this differing relief because the original classification is "tenuous" and "the effect of a discriminatory standard does not substantially change depending on how it is expressed."[210] And the court advised that the bifurcation of intentional and adverse effect discrimination may result in "legitimiz[ing] systemic discrimination."[211] In this regard, the court noted that when a policy is considered "neutral" and subject to adverse effect analysis, the "legitimacy" of the standard is not brought into question.[212]

Finally, the court also suggested that the bifurcated approach of separating adverse effect and intentional discrimination as applied to employment standards "may compromise both the broad purposes and the specific terms of the [Human Rights] Code."[213] As the court points out, the Code does not distinguish between types of discrimination, and "there is no statutory imperative" to treat "different categories of discrimination" differently and to "provide different remedies for their respective breaches."[214]

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204. *Id.* at 29.

205. *Id.*

206. *Id.* at 23-24.

207. *Id.*

208. *Id.* at 20-21.

209. *Id.* at 20.

210. *Id.* (citing M.C. Crane, Case Comment, *Human Rights, Bona Fide Occupational Requirements and the Duty To Accommodate: Semantics or Substance?*, 4 CAN. LAB. & EMP. L.J. 209, 226-29 (1996)). The court noted that "[i]t is difficult to justify conferring more or less protection on a claimant and others who share his or her characteristics, depending only on how the discriminatory rule is phrased." *Id.*

211. *Id.* at 24-27.

212. *Id.* at 25.

213. *Id.* at 27-28.

214. *Id.* at 28. Though emphasizing that different forms of discrimination should not be treated differently, and setting forth the purposes of the Human Rights Code, the court does not identify exactly

Beyond identifying the problems with a bifurcated model, the court also summarized the benefits of moving toward a "unified" approach in analyzing employment standards, noting that it would: (1) avoid the difficulty of distinguishing between intentional and unintentional discrimination; (2) "accommodate [workers] as much as reasonably possible" when an employment standard is created; and (3) take a "strict approach" when analyzing whether an exception should be permitted—though "permitting exemptions where they are reasonably necessary."[215] In place of the bifurcated analysis under the traditional approach, the court set forth a new unified three-part test for analyzing employment standards after a plaintiff has made a prima facie showing. The test requires:

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
> (3) that the standard is reasonably necessary to accomplish that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without undue hardship.[216]

The court also discussed how each step of the analysis should be applied. It is important to note initially, however, that after the plaintiff establishes a prima facie case,[217] the employer carries the burden of persuasion at each stage of analysis. It is therefore up to the employer to justify the validity of its workplace standard.[218] The first step of the new approach involves assessing whether the employer has satisfied its burden of showing that "the general purpose of the impugned standard . . . is rationally connected to the performance of the job."[219] The court emphasized that at this stage of the analysis, the focus should be on the "general purpose" of the standard, rather than the validity of the standard itself.[220] This distinction is significant because if the employer fails to demonstrate a "rational relationship" with "the general purpose of the standard and the tasks properly required of the employee," there would be "no need" to evaluate the validity of the actual employment standard.[221]

The second step of the court's new approach requires that the employer

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how this bifurcated approach is inconsistent with section 3 of the Code. *Id.* at 27-28.

215. *Id.* at 30-31.

216. *Id.* at 31-32. The court emphasized that this new analysis "is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer." *Id.* at 33.

217. *See id. at* 39 (applying this new analysis to the facts of Meiorin's testing).

218. *See generally id.* at 32-38.

219. *Id.* at 33-34. This analysis focuses on the "objective requirements of the job." *Id.* at 34.

220. *Id.* at 34.

221. *Id.*

show that the employment standard was implemented "with an honest and good faith belief that it was necessary" to achieve its goal, without the "intention of discriminating against the claimant."[222] This step analyzes the "subjective" component of the employer's intent and whether the employer had any "discriminatory animus" in developing the standard.[223] At this step, the focus "shifts" away from the "general purpose of the standard" and examines "the particular standard itself."[224]

During the final step of the supreme court's new analysis, the employer must show that its proposed employment standard is "reasonably necessary" to "accomplish its purpose."[225] In this regard, the employer is required to demonstrate that "it cannot accommodate the claimant . . . without experiencing undue hardship."[226] The court noted that "relevant factors" to consider in assessing whether undue hardship has been established by the employer include the "financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees."[227] It cautioned lower courts to be "sensitive to the various ways" in which an employee can be accommodated, and it emphasized that a person's individual "skills, capabilities and potential contributions" should "be respected as much as possible."[228]

The supreme court also outlined several useful questions that courts should ask during the analysis of an employment standard,[229] which are helpful not only to courts and tribunals but also to employers developing employment standards:

> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
> (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
> (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or

222. *Id.*

223. *Id.* at 34-35.

224. *Id.* at 35.

225. *Id.*

226. *Id.* The court emphasized that "'the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test.'" *Id.* (quoting Renaud v. Cent. Okanagan Sch. Dist. No. 23, [1992] 2 S.C.R. 970, 984 (Can.)).

227. *Id.* at 36. The court explained that "considerations 'should be applied with common sense and flexibility in the context of the factual situation presented in each case.'" *Id.* (quoting Chambly v. Bergevin, [1994] 2 S.C.R. 525, 546 (Can.)).

228. *Id.* Thus, "[a]part from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases." *Id.*

229. *Id.* at 36-37.

individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?[230]

In analyzing Meiorin's discrimination claim, the supreme court noted that Meiorin had established her prima facie case by showing that females are disproportionately disadvantaged by their employer's aerobic employment standard.[231] The court then proceeded to analyze the employment standard under its new three-part test. The court concluded that the employer had satisfied the first two prongs of the test.[232] Thus, the employer's "general purpose" of implementing the standard to determine which persons can "perform the job of a forest firefighter safely and efficiently" was "rationally connect[ed]" to the "strenuous tasks" of the job.[233] And the evidence suggested that the employer "acted honestly and in a good faith belief" that implementing the standard was necessary to determine which individuals could "perform the job safely and efficiently."[234] Thus, there was no discriminatory animus present in this case.[235]

However, the employer failed the third prong of the test. The court noted that there was no showing that the time requirement imposed on completing the running test was the minimal time "necessary for the safe and efficient performance of the task."[236] And the record was unclear as to whether males and females needed "the same minimum level of aerobic capacity to perform" the job "safely and efficiently."[237] Thus, the employer was unable to establish that "the purpose for which it introduced the aerobic standard would be compromised to the point of undue hardship if a different standard were used."[238] Concluding that the employer had failed to meet its burden in

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230. *Id.* The court further advised that "it may often be useful as a practical matter to consider separately, first, the *procedure*, if any, which was adopted to assess the issue of accommodation and, second, the *substantive content* of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard." *Id.* at 37.

231. *Id.* at 39. The court essentially accepted the facts in this regard as found by the arbitrator below. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 39-40.

235. *Id.* Indeed, "one of the reasons the [employer] retained [researchers] was that it sought to identify non-discriminatory standards." *Id.* at 40.

236. *Id.* at 41.

237. *Id.* In this regard, the researcher's reports "failed to distinguish the female test subjects from the male test subjects" and did not "analyse separately the aerobic performance of the male and female." *Id.*

238. *Id.* at 43. The court thus rejected the employer's undue hardship argument that this particular standard was important to insure the "safety of the individual firefighter, the other members of the crew, and the public at large." *Id.* at 42. The court also rejected the appellate court's contention that the

justifying this discriminatory standard, the court reinstituted the arbitrator's decision, thereby "reinstating Ms. Meiorin to her former position and compensating her for lost wages and benefits."[239]

B. *Lessons from* B.C. Firefighters

In distinguishing between adverse effect and direct discrimination as applied to employment standards, Canada faced an analytical problem similar to that facing the United States today. The court in *B.C. Firefighters* recognized that this distinction created numerous problems not only for litigants but for courts as well.[240] The Canadian Supreme Court's new, unified approach to these problems collapsed the adverse effect and direct discrimination tests into a single legal framework that could be used to examine employment standards irrespective of employer intent.[241] And in collapsing the tests for intentional and unintentional discrimination, the court collapsed the remedies as well.[242]

The primary benefit of the Canadian approach is its simplicity. Canada's approach provides a streamlined analysis to cases involving an allegedly discriminatory workplace rule that takes the guesswork out of litigating and deciding these cases.[243] At the same time, this approach does not sacrifice the basic tenets of intentional and unintentional discrimination claims—allowing both theories to proceed in a unified manner.

Though it is too soon to tell what the effects of the *B.C. Firefighters* decision will be, early results suggest that the new test is having a positive impact on the legal landscape.[244] For example, in *Imperial Oil Ltd. v. Entrop*,[245]

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employer should prevail because "Ms. Meiorin was tested individually." *Id.* at 44.

239. *Id.* at 45. The supreme court rejected the appellate court's argument that allowing Ms. Meorin to prevail in this case would result in reverse discrimination. *Id.* at 44. The court noted that "the essence of equality is to be treated according to one's own merit, capabilities and circumstances. True equality requires that differences be accommodated. . . . A different aerobic standard capable of identifying women who could perform the job safely and efficiently therefore does not necessarily imply discrimination against men." *Id.*

240. *Id.* at 17-30. *See, e.g.*, *id.* at 19 ("Given the vague boundaries of the categories, an adjudicator may unconsciously tend to classify the impugned standard in a way that fits the remedy he or she is contemplating . . . .").

241. *Id.* at 30-38.

242. *Id.* at 30-31, 50-68.

243. *See generally* Irene Christie & Gita Anand, *Canadian Legal Regulation of Disclosure of Information About Employees or Prospective Employees to Employers or Prospective Employers*, 21 COMP. LAB. L. & POL'Y J. 683, 696 (2000) (stating that the *B.C. Firefighters* decision led to "[t]he unification of the previously distinct approach between direct and indirect discrimination" and "was rationalized by the Court on the basis that such a distinction led to inconsistent results and was difficult to apply in the day-to-day running of a workplace").

244. Shortly after the *B.C. Firefighters* decision, the Canadian Supreme Court faced a similar issue that arose in the disability context. In *Grismer v. British Columbia Council of Human Rights*, [1999] 3 S.C.R. 868, the Canadian court considered whether a general policy of barring those who suffered from homonymous hemianopia (and an accompanying lack of peripheral vision) from obtaining drivers' licenses was discriminatory. *Id.* at 872. In applying the test formulated in *B.C. Firefighters*, *id.* at 883-94, the court held that Mr. Grismer should have been given an individualized "opportunity to prove

the Ontario Court of Appeal considered whether Imperial Oil discriminated against Martin Entrop, an employee who worked in a safety-sensitive job, on the basis of his handicap when the company reassigned him to another position after learning of his prior alcoholism.[246] Though Entrop had not had a drink in seven years, the company's comprehensive and rigid drug and alcohol policy (instituted after the Exxon Valdez incident) required that he be reassigned.[247]

In analyzing the case, the court of appeal applied the test set forth in the "ground-breaking" *B.C. Firefighters* decision[248] to determine whether the "mandatory disclosure, reassignment, and reinstatement" requirements of the policy were permissible.[249] The court held that Entrop had established a prima facie case of discrimination, and that the company had demonstrated that the policy was established "honestly and in good faith" and was "rationally connected to . . . the work done by Imperial Oil employees in safety-sensitive jobs."[250] However, the court concluded that the company had failed the third prong of the test, because the provisions were not "reasonably necessary" to achieve the company's goals.[251] This was because the required disclosure of prior addiction was "unreasonable"; the mandatory reassignment of prior users did not permit "individual" accommodation; the required "two years' rehabilitation followed by five years' abstinence" requirement of the policy for past addicts did not "accommodate differences" up to the point of "undue hardship"; and the requirements for reinstatement were too severe.[252]

Entrop is an excellent example of the simplicity of the *B.C. Firefighters*' approach. It could be argued that, in responding to the Exxon Valdez incident, the drug and alcohol policy was targeted (at least in part) at those who had a history of drug and alcohol abuse. It could also be maintained that the policy was neutral on its face and attempted only to reveal those who would pose a hazard in working in a safety-sensitive position. The analysis set forth in the *B.C. Firefighters* case allowed the court to avoid making this distinction

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whether or not he could drive safely," *id.* at 892-93. The Superintendent of Motor Vehicles therefore erred in applying a "blanket policy" of rejecting outright those who suffered from Mr. Grismer's condition. *Id.* at 892.

245. [2000] 50 O.R.3d 18 (Can.).

246. *Id.* at ¶2.

247. *Id.* at ¶11.

248. *Id.* at ¶72.

249. *Id.* at ¶119.

250. *Id.* Indeed, the court noted that "[a] workforce unimpaired by alcohol or drugs" is "essential to" the job. *Id.*

251. *Id.*

252. *Id.* at ¶124. In addition to finding these requirements problematic, the court also extensively addressed whether other provisions of the company's drug and alcohol policy were permissible under the *B.C. Firefighters* decision. *Id.* at ¶¶ 119-22; *see also* L. Frank Molnar, Drug and Alcohol Testing in the Workplace 5 (May 2, 2003), http://www.piass.org/files/2003/2003_T_Frank_Molnar.pdf (discussing the *Entrop* decision); Alberta Human Rights & Citizenship Comm'n, Drug and Alcohol Testing (Aug. 2004), http://www.albertahumanrights.ab.ca/publications/Information_Sheets/Text/Info_Drug_Testing.asp (discussing drug and alcohol testing requirements after *Entrop*).

between intentional and unintentional discrimination and permitted the case to proceed under the unified approach—allowing the court to determine the viability of the drug and alcohol policy broadly and as applied to the plaintiff.[253]

V. A UNIFIED APPROACH TO DISPARATE IMPACT AND DISPARATE TREATMENT CLAIMS IN THE UNITED STATES

Many of the difficulties that the *B.C. Firefighters* court identified as problems with distinguishing between intentional and unintentional discrimination in that country also exist in the United States as the direct result of the similar artificial distinction between these two discrimination theories.[254] Like Canada's "conventional analysis," under the U.S. approach it is unclear whether the courts should examine employment standards under the intentional or disparate impact model, what evidence is necessary to establish the claim, or what defenses are available to the employer.[255] Similarly, the current analytical models for claims of discrimination in the United States are in direct conflict with the purposes behind the enactment of our civil rights statutes.[256]

As in Canada, the courts in this country have the ability to resolve the uncertainty inherent in employment discrimination law by creating a new, unified approach to cases involving alleged discriminatory employment standards or workplace rules—irrespective of intent.[257] This new approach would not require Congress to amend Title VII, nor would it force courts to overturn existing case law. Rather, courts simply need a fresh perspective—a willingness to consider all alleged discriminatory employment standards under

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253. Canada's unified test for intentional and unintentional discrimination is not the only example of the country's progressive approach to employment discrimination cases. In June 2004, Québec recognized psychological harassment as a form of discrimination under its labor legislation, thus making it the first North American jurisdiction to afford this form of protection to its employees. *See* Yuen, *supra* note 162, at 641-46 (discussing new legislation in Québec prohibiting this form of harassment).

254. *See B.C. Firefighters*, [1999] 3 S.C.R. 3, 18-19 (Can.) (setting forth an example of how easily the lines between intentional and unintentional discrimination can be blurred); Paetzold & Willborn, *supra* note 18, at 328 n.6 (noting that "[t]he courts' fuzzy vision of the disparate impact model" becomes particularly clear "when they are unable to distinguish disparate impact and systemic disparate treatment cases").

255. *Compare B.C. Firefighters*, [1999] 3 S.C.R. at 18-24, *with supra* Section III.D (discussing problems that exist in the United States as a result of the distinction between intentional discrimination and disparate impact).

256. *Compare B.C. Firefighters*, [1999] 3 S.C.R. at 24-25, *with supra* Sections III.B-D (discussing how courts have chipped away at the protections found in *Griggs* and how disparate impact under the ADEA is a toothless theory of discrimination).

257. *See* Steven Mark Tapper, Note, *Building on* MacNamara v. Korean Air Lines*: Extending Title VII Disparate Impact Liability to Foreign Employers Operating Under Treaties of Friendship, Commerce, and Navigation*, 24 VAND. J. TRANSNAT'L L. 757, 785-86 (1991) (noting the common threads between disparate impact and disparate treatment discrimination and adding that "[a]ll successful employment discrimination claims require a nexus between the plaintiff's Title VII claim and the defendant's employment policies").

the same analytical model.[258] There are undoubtedly many ways for courts to unify their approach to disparate impact and disparate treatment. Yet many would either require amending statutes or move us away from *Griggs* by further foreclosing judicial relief for victims of unintentional discrimination. Borrowing from Canada's effort at collapsing its bifurcated model into a single test, I propose a streamlined three-part approach to examining employment standards and workplace rules in this country that is not only immediately achievable but would represent a step toward making the promise of *Griggs* real in the United States.

Initially, the plaintiff would have the burden of demonstrating a prima facie case of discrimination. The plaintiff could do this by showing that the employment standard is adversely affecting him individually or as part of a larger group based on a protected characteristic.[259] At this stage, the plaintiff would likely establish the prima facie case through traditional disparate impact analysis, or through whatever other evidence was sufficient to give rise to an inference of discrimination.[260] The plaintiff could also introduce evidence that the employment standard was put in place to *intentionally* discriminate, though no such showing would be required to proceed in the case. The plaintiff would likely show intentional discrimination through the classic *McDonnell Douglas* test, keeping in mind the flexible nature of this inquiry.[261]

Once the plaintiff had established a prima facie case demonstrating that the employment standard was discriminatory, the employer would then have the burden of showing that the policy was job-related and consistent with business

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258. *See generally* Michael Evan Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 BERKELEY J. EMP. & LAB. L. 1, 73 (2004) (noting that "[t]he only difference" that exists between intentional and unintentional discrimination "is the way in which causation is proved"); James P. Ratz, Case Note, *Requiring Discriminatory Intent and Relevant Statistical Evidence in Title VII Cases*: Equal Employment Opportunity Commission v. Chicago Miniature Lamp Works, 16 HAMLINE L. REV. 1003, 1024 (1993) ("A unified theory requiring discriminatory intent as an essential element of the plaintiffs' prima facie case would simplify discrimination litigation.")

259. For a claim of disparate impact to proceed under Title VII, however, the plaintiff would have to demonstrate that the policy has a discriminatory effect upon a protected group. *See* Pacheco v. Mineta, 448 F.3d 783, 787 (5th Cir. 2006) ("Disparate impact . . . addresses employment practices or policies that are facially neutral in their treatment of these protected groups, but, in fact, have a disproportionately adverse effect on such a protected group." (citing Herbert v. Monsanto, 682 F.2d 1111, 1116 (5th Cir. 1982))). If the plaintiff attempts to show intentional discrimination, no showing of the standard's impact upon a larger group would be required. Additionally, the Americans with Disabilities Act permits claims of individual disparate impact. *See* 42 U.S.C. § 12,112(b)(6) (2000). To the extent that this model would be used for disability claims, then, the analysis would look to the impact upon "an individual with a disability or a class of individuals with disabilities." *Id.*

260. Pursuant to the Civil Rights Act of 1991, the plaintiff would have the burden of demonstrating that a facially neutral policy or practice has a disparate impact on a protected group. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

261. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973) (recognizing that a flexible approach to the determination of whether the prima facie case has been satisfied will be necessary because of the "differing factual situations"); *supra* note 62 (discussing the flexibility of the *McDonnell Douglas* test).

necessity. This showing would be the same as required by the Civil Rights Act of 1991 and the relevant case law.[262] At this stage, the employer could also rebut any evidence of intent introduced by the plaintiff—though such a showing would not be required by the employer. More likely than not, the evidence used to establish that the employment standard was job-related and consistent with business necessity would also be used to rebut the plaintiff's showing of intentional discrimination.[263] The standard used to determine whether the defendant adequately rebutted the plaintiff's showing of intentional discrimination would be the same as in any case of intentional discrimination—whether the employer carried its burden of production to demonstrate that it had a legitimate nondiscriminatory reason for implementing the employment standard.[264]

If the employer satisfies that burden, the plaintiff would have an opportunity in a final stage of the process to show that there is an alternative employment practice available with less discriminatory impact than the employment standard offered by the employer. This stage would be no different than the showing currently required by the Civil Rights Act of 1991 and the relevant case law.[265] Additionally, the plaintiff would have the opportunity to show that intentional discrimination is present by demonstrating that the employer's legitimate nondiscriminatory reason for implementing the employment standard was pretextual. This analysis would proceed under the standards established by the *McDonnell Douglas* case law.[266]

In summary, the three-part approach to analyzing alleged discriminatory employment standards would proceed as follows:

1. The plaintiff would have the burden of demonstrating that the standard had a

262. *See supra* text accompanying note 52.

263. *See generally* Frank Lopez, Note, *Using the Fair Housing Act To Combat Predatory Lending*, 6 GEO. J. ON POVERTY L. & POL'Y 73, 103-04 (1999) (noting the "myriad interpretations of 'business necessity'" including a "legitimate, nondiscriminatory rationale" (citation and internal quotation marks omitted)).

264. *See supra* note 65 and accompanying text (explaining the *McDonnell Douglas* test, whereby after the prima facie case is established, the employer must articulate a legitimate, nondiscriminatory reason for its action).

265. *See supra* text accompanying note 53. The third stage of the Canadian model, which requires the employer to show that it cannot accommodate the individual employee up to the point of undue hardship, would involve a fundamental change to U.S. law, which could be achieved only through congressional action. A more modest change to bring U.S. law more in line with Canada's would be to require that the employer—rather than the plaintiff—carry the burden of demonstrating that any suggested alternative employment practice cannot be reasonably implemented. Indeed, once the employee has established a prima facie case of demonstrating that the employment standard is discriminatory, it seems curious that the employee would additionally carry the burden of showing that there are other practices available with less impact that can be implemented by the employer. Moreover, the employer (who is far more aware of its policies and business goals) would be in a far better position to make this showing than the plaintiff. Nonetheless, from a practical standpoint, the burden of persuasion on this question is probably not overly important as both sides would likely introduce the same evidence irrespective of which side carried the burden of proof.

266. *See supra* notes 61-69 and accompanying text (discussing the *McDonnell Douglas* test).

discriminatory impact. The plaintiff could also attempt to show that the employer *intended* to discriminate with the employment standard.

2. The burden would shift to the employer to demonstrate that its proposed standard was job-related and consistent with business necessity. The employer would also have the opportunity to rebut any showing of intent by the plaintiff. The burden of persuasion would still remain with the plaintiff on the issue of intent.
3. The plaintiff would have the opportunity to demonstrate that there are alternative employment practices available with less discriminatory impact. The plaintiff could also attempt to show that the employer's legitimate nondiscriminatory reason for implementing the policy was pretextual.

This new approach would also unify the damages analysis, without completely unifying the remedies available for disparate impact and disparate treatment claims. The Canadian Supreme Court in *B.C. Firefighters* went all the way, unifying remedies under both analyses.[267] And certainly one can make an argument for that approach in the United States. Allowing plaintiffs alleging disparate impact discrimination to seek compensatory and punitive damages would not only streamline the judicial process, but it would balance out the incentives for plaintiffs considering whether to bring a disparate impact or a disparate treatment claim.[268] It would also, as a practical matter, require Congress to amend Title VII. Thus, while unifying remedies may be something to consider in the United States, my approach focuses on simplifying the damages analysis for courts.

Under my approach, the trier of fact would essentially be responsible for resolving two broad questions, though there could be many factual issues for the jury to resolve if a case proceeded to trial. First, the trier of fact would have to determine whether the employer's employment policy violated the implicated statute. Second, the trier of fact would decide whether the violation was *intentional*. If the jury found a violation of the statute[269] that was unintentional, damages would be left for the judge, as they would be equitable in nature, including back pay, injunctive relief, and attorney's fees.[270] If the violation was intentional, then the jury would further be asked to determine what damages were appropriate (including compensatory and punitive damages), as in any other case of intentional discrimination.[271] To the extent that there was an issue of fact concerning only whether an unintentional

267. *See supra* Section IV.A.

268. At the same time, a unification of remedies (to provide potential compensatory and punitive damages in disparate impact claims) would disadvantage employers by providing additional relief to employees even when the employer has not enacted an *intentionally* discriminatory policy.

269. Obviously, if the jury found that no violation had occurred, the case would be dismissed.

270. *See* 42 U.S.C. § 2000e-5(g)(1) (2000) (providing for damages for disparate impact claims under Title VII). The district court judge would be free to send the relief issue to the jury and to consider it as an advisory verdict.

271. *See* 42 U.S.C. § 1981a(b)-(c) (2000) (providing for compensatory and punitive damages and right to jury trial for intentional discrimination claims).

violation had occurred, the district court could resolve the case, as plaintiffs are not entitled to jury trials in cases alleging only disparate impact.[272] A district court would be free, however, to empanel a jury to render an advisory verdict on either the disparate impact or disparate treatment claims, if it was uncertain whether to permit either claim to proceed.[273] The use of advisory juries would not lead to any significant increase in the number of juries empanelled, given that so few employment claims even survive summary judgment,[274] and that this would be a tool to be used *at the discretion* of the court.[275] Nonetheless, even assuming that an increased use of juries resulted from this proposed model, by obtaining an advisory verdict, the court could prevent the need for the case to be retried later on any issue that was reversed on appeal.

Thus, under the unified approach, the damages available would be the same as they currently are under the law—full relief available for intentional violations and equitable relief for "neutral policies" with a discriminatory impact.[276] The difference, however, would be that the damages issue would be resolved as part of a single process, rather than completely separated out during the analysis.

Thus, the proposed three-part approach collapsing intentional discrimination and disparate impact claims in cases alleging an improper employment standard would not involve a departure from prior case law or the statutory text. Rather, all that would be required to implement this streamlined approach would be a willingness on the part of the courts to simplify their analysis in these types of cases. Or, in the alternative, Congress could require this type of analysis by statutory mandate. Congress could even clarify the analysis even further—for example, by amending the ADEA to follow this three-part approach and provide similar remedies.[277]

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272. *See, e.g.*, Garcia v. Women's Hosp. of Tex., 143 F.3d 227, 230 n.1 (5th Cir. 1998) (noting that jury trials are proper only in cases alleging disparate treatment, and not in cases alleging only disparate impact).

273. *See* FED. R. CIV. P. 39(c). *See generally* Dilley v. Supervalu, Inc., 296 F.3d 958, 965-66 (10th Cir. 2002) (discussing the district court's use of an advisory verdict for the equitable determination of damages). By obtaining an advisory verdict, the court could prevent the need for the case to be retried later on any issue that was reversed on appeal.

274. *See* Selmi, *supra* note 59, at 707 (noting that disparate impact claims have had "strikingly limited impact"); *see also* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1875 n.46 (2004) (discussing the rise in the use of summary judgment).

275. Indeed, a district court would only use the advisory jury in cases that were "close calls," which would likely be in relatively few cases.

276. *Compare* 42 U.S.C. § 2000e-5(g)(1) (2000) (setting forth damages available in disparate impact claims) *with* 42 U.S.C. § 1981a(b)-(c) (2000) (providing jury trial and additional relief of compensatory and punitive damages in disparate treatment claims).

277. Under the current statutory text and the Supreme Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), an alleged discriminatory employment standard brought pursuant to the ADEA would require an analysis slightly modified from the proposed uniform approach. Step one of the test would proceed largely the same, though the employment standard would have to be alleged with specificity. *See id.* at 240 (applying the *Wards Cove* standard to an age-related disparate impact claim).

It is also important to note that this proposed model would not alter classic disparate treatment cases involving an adverse employment action or a hostile work environment when a discriminatory employment policy had not been alleged.[278] Thus, in traditional hiring, firing, or coworker/supervisor harassment cases alleging that a particular individual (or class of individuals) was discriminated against because of a protected characteristic (and not because of an employment policy), the analysis would proceed as it always has in the past. To the extent that the line is blurred as to whether the particular adverse employment action was the result of an employment standard, the case could be argued and considered under both the traditional model and the proposed uniform approach.[279]

A. *Implications of the Recommended Model*

While this unified approach does not require a change to statutes or case law, it would produce a number of benefits. First, there would be no question as to how to allege a particular case of discrimination. Thus, plaintiffs would not plead themselves out of court simply by asserting the wrong theory of discrimination, as was the case in *Raytheon v. Hernandez* and *Hazen Paper*.[280] Rather, because a court would routinely analyze an employment standard under a unified approach to both intentional and unintentional discrimination, it would prevent legitimate cases of discrimination from falling through the cracks on technical grounds.[281] In this regard, the unified approach would also

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Step two, however, would additionally ask whether the employment standard was based on a reasonable factor other than age (as well as providing the employer with the opportunity to rebut any showing of intent). *See id.* at 241 (holding that a policy that allegedly created disparate impact on the basis of age did not violate the statute because it was "based on reasonable factors other than age"). Step three would proceed the same as under the proposed unified model. However, pursuant to the Court's decision in *Wards Cove*, the burden of persuasion as to any non-intentional claims would remain with the plaintiff throughout all stages, and an analysis of the employer's business justification would only be subject to a "reasoned review." *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). Congressional action to alter the statute so that age claims could be analyzed under the proposed unified approach (and to provide similar damages, which are currently different from Title VII) would be preferable and consistent with the purpose of the ADEA. *See generally Smith*, 544 U.S. at 233-43 (discussing the purposes of the ADEA).

278. The courts routinely consider "straight-up" disparate treatment cases in which no discriminatory policy has been alleged. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (discussing the standards applicable to claims of sexual harassment); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) (same); Johnson v. Ready-Mixed Concrete Co., 424 F.3d 806 (8th Cir. 2005) (considering the plaintiff's allegation that his employer terminated him because of his race); Bio v. Fed. Express Corp., 424 F.3d 593 (7th Cir. 2005) (same). *But see generally* Kearney, *supra* note 3, at 69-73 (discussing the possible application of disparate impact law to sexual harassment claims).

279. Because the proposed unified approach encompasses the traditional analysis of both a disparate impact and a disparate treatment claim, the court should come to the same result if it properly applied both analyses.

280. *See supra* notes 117-128 and accompanying text (discussing how plaintiffs abandoned disparate impact claims by failing to properly plead them).

281. *See generally*, O'Brien & Darrow, *supra* note 123, at 162 (noting that the Supreme Court in *Raytheon* did not address the plaintiff's disparate impact claim "because of what was essentially a

significantly benefit courts because they would no longer have to guess which standard to apply.[282]

One concern, however, might be that the unified approach would lead to an influx of frivolous employee claims. Certainly it may encourage marginally more employees to pursue claims, but it is unlikely to lead to a significant increase because there are still many procedural hurdles that a plaintiff must overcome to proceed in alleging a discrimination claim. The approach is not necessarily designed to make plaintiffs more likely to prevail in alleging discriminatory workplace standards. Rather, the approach aims to reduce the likelihood that an otherwise meritorious claim will be dismissed for procedural reasons, or because courts or litigants are confused about how to analyze the case.

Second, as discussed above, this approach consolidates the damages analysis in employment discrimination claims.[283] Because only equitable relief is available in unintentional discrimination cases—while legal remedies can be obtained when intentional discrimination is present—this unified approach avoids the complexity of deciding these relief issues separately. Rather, the appropriate relief (whether equitable or otherwise) will be determined at the same stage of the analysis for both intentional and unintentional discrimination claims. Indeed, in certain cases in which an appellate court would disagree with the district court as to whether intentional discrimination was even present, an advisory jury verdict on damages could prevent the matter from having to be retried.[284]

Third, litigants would no longer be confused about what type of evidence to introduce. Rather, litigants would present all available evidence—including statistical evidence on disparate impact (if available) and circumstantial or direct evidence of intentional discrimination—eliminating the need for plaintiffs, defendants, and courts to guess about what may eventually be relevant.[285] This would also prevent an employer from failing to produce certain evidence simply because the plaintiff had not alleged a particular theory

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procedural error on the plaintiff's part").

282. The Supreme Court has even recognized the overlap and similarity between disparate impact and disparate treatment. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Either theory [disparate impact or disparate treatment] may, of course, be applied to a particular set of facts."); Tapper, *supra* note 257, at 786 (same); *see also* L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 348-49 (2005) (noting that the Supreme Court has "blurr[ed] these fundamental distinctions" between disparate impact and disparate treatment law).

283. *See supra* note 276 and accompanying text (discussing how the unified approach would streamline the damages analysis).

284. *See supra* note 273 and accompanying text (discussing the potential use of advisory jury verdicts in employment discrimination cases).

285. *See supra* notes 92-100 and accompanying text (discussing how the majority and the dissent in *Joe's Stone Crab II* viewed similar evidence differently).

of discrimination early in the litigation.[286] It could be argued that the introduction of this evidence will clutter the courts with needless documents to review. However, discovery is largely a function to be performed by the parties. Thus, much of the burden will remain with the plaintiff to review the evidence and to provide the court with a concise summary of how this evidence fits into the theory of the case. As the Seventh Circuit has succinctly stated, "[j]udges are not like pigs, hunting for truffles buried in briefs."[287] Additionally, strict discovery schedules imposed by the district court would prevent the discovery process from dragging on endlessly.[288]

Fourth, this approach would benefit the employer by providing a uniform approach to defending the case. The employer would no longer have to speculate as to what defenses to assert in responding to an inartfully pled complaint. Rather, in all cases alleging a discriminatory employment policy, a defendant would simply set forth how the standard is job-related and consistent with business necessity, in addition to asserting its legitimate nondiscriminatory reason for taking an adverse action against the plaintiff. One might argue that the current level of confusion surrounding employment standards actually benefits employers, as it has helped prevent plaintiffs from successfully navigating this complex area of the law. While some employers may face higher costs in the short term, all parties should benefit in the long term as greater certainty in the legal process leads to reduced litigation costs.[289]

Fifth, in those difficult cases in which the line between disparate treatment and disparate impact discrimination is blurred, the combined approach would keep the focus on the ultimate question of whether discrimination occurred, rather than on the more abstract issue of whether a facially neutral policy is involved.[290] Under the traditional model, courts can get buried beneath the question of the neutrality of a policy in attempting to decide whether to analyze the claim pursuant to intentional or unintentional discrimination[291]—a question

286. *See supra* notes 117-128 and accompanying text (discussing how the procedural misstep of failing to assert a disparate impact claim early in the case prevented the plaintiffs from pursuing this theory in *Hazen Paper* and *Raytheon*); *see also infra* notes 319-321 (noting the benefits of Justice O'Connor's unified approach to mixed-motive cases in *Price Waterhouse*).

287. United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

288. There may be a concern that individual plaintiffs would become overwhelmed with documents from the defense under the proposed model. However, this potential problem could largely be controlled through the careful use of interrogatories and requests for the production of documents by the plaintiff. As the individual plaintiff significantly controls what information is solicited, it would be incumbent upon the plaintiff to target the discovery of only relevant information.

289. *See* Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 662 ("The more certain the law—the less the variance in expected outcomes—the more likely the parties will predict the same outcome from litigation, and the less likely that litigation will occur because of differences in predicted outcomes.").

290. Under this approach, there would be no need for the litigants to debate whether a "policy" is even at issue in the case. To the extent that there is any ambiguity or dispute over whether a policy is involved, there would be no harm in using the proposed model to analyze the claim.

291. *See, e.g.*, Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030 (9th Cir. 2002) (analyzing

that inherently turns on the social context of the policy at issue and the alleged biases of the employer. The unified approach combines these two theories as part of a single analysis and therefore permits the court to avoid making this very difficult inquiry.[292]

This model also fits nicely with the recent proposal by Professor Charles Sullivan that an expanded use of disparate impact theory would assist employees in prevailing in cases of employment discrimination.[293] By incorporating both the disparate impact and disparate treatment theories into a single uniform approach, the use of disparate impact by plaintiffs would undoubtedly increase—at least with respect to claims of discriminatory workplace policies. Moreover, Michael Selmi has recently pointed out the many shortcomings of disparate impact theory and that "a broader definition of intent" would have "served virtually the same purpose" as the disparate impact doctrine.[294] By combining disparate treatment and disparate impact as part of the same analysis, however, there would be a "focus on intent"[295] in all cases of discriminatory workplace standards, and the courts would be forced to examine the employer's motivation for implementing any workplace rule.[296]

Finally, this combined approach to disparate impact and disparate treatment claims would further the purposes of employment law and the related statutes in the United States.[297] This approach would eliminate any legitimization of discrimination (whereby an employer can characterize a discriminatory employment standard as "neutral") by combining the analysis to consider intent in all cases.[298] And assuring that cases are not dismissed because of the litigants' failure to allege a particular theory of discrimination will further the

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whether drug policy resulted in disparate treatment by using disparate impact analysis), *rev'd sub nom* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (analyzing whether the same drug policy resulted in disparate treatment discrimination by considering neutrality of policy).

292. *See infra* Section V.B (discussing application of combined approach to Eleventh Circuit decision in *Joe's Stone Crab II*, which focused on issue of a policy's neutrality).

293. *See* Sullivan, *Disparate Impact*, *supra* note 11, at 984-95 ("[T]his Article recommends a return to, and revival of, the disparate impact theory.").

294. Selmi, *supra* note 59, at 782.

295. *Id.* at 767-68.

296. *See* Foster, *supra* note 71, at 1547 ("It is time to move beyond the debate in antidiscrimination scholarship over the wisdom of a discriminatory intent versus a disparate impact test."). Foster notes that "causation . . . is at the heart of evidentiary structures in both intent and impact actions," and that the "reigning distinction between intentional and disparate impact discrimination" has "obscured" the causation inquiry. *Id.* at 1471. The model proposed in this Article thus attempts to answer Foster's call for "fundamental reform, both in the way that we perceive antidiscrimination jurisprudence and in the types of solutions we seek for its sustainability in the face of evolving patterns of discrimination." *Id.* at 1548.

297. *See generally* Rebecca S. Giltner, *Justifying the Disparate Impact Standard Under a Theory of Equal Citizenship*, 10 MICH. J. RACE & L. 427, 429 (2005) (arguing that "advocates should affirmatively support the disparate impact standard in a manner that both reflects the social reality of institutionalized racial disparities and promotes the disparate impact standard's great moral promise of equality of citizenship").

298. *See B.C. Firefighters*, [1999] 3 S.C.R. 3, 4-5 (Can.) (discussing how the characterization of an employment policy as neutral can result in the legitimization of discrimination).

purposes of the employment discrimination statutes.[299] This unified approach does not take discrimination law beyond what the Supreme Court envisioned in *McDonnell Douglas* or *Griggs*. Rather, the approach recaptures the original spirit of these earlier cases, helping to ensure the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[300]

Perhaps all of these benefits can be summarized in a single word: simplicity. The theories of disparate treatment discrimination and disparate impact discrimination have likely remained separate for the past four decades because the theories developed at different times and by different methods. The disparate treatment standard arose as a direct result of the enactment of the Civil Rights Act of 1964.[301] Disparate impact, however, became a relevant standard through Supreme Court case law in *Griggs* seven years later.[302] These theories of discrimination also remained separate in Canada for approximately fourteen years before the Canadian Supreme Court collapsed the two to streamline its process.[303] There is no reason that the United States should not follow Canada's lead and simplify our process as well.[304]

B. *Applying the Recommended Model*

Having now laid out the contours of my approach, it is instructive to apply it to *Joe's Stone Crab*—the "paradigmatic 'hard' case" that the Eleventh Circuit considered and which resulted in a split panel decision, multiple appeals, and over a decade of litigation.[305] Under my new approach, the plaintiff initially would have demonstrated that the company's hiring policy had a disparate impact on women by establishing that the restaurant hired no female servers between 1986 and 1990, while hiring 108 male food servers

299. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 262 (2005) (noting that reasoning of *Griggs* was targeted at furthering "Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination.") (O'Connor, J., concurring); Henry P. Ting, Note, *Who's the Boss?: Personal Liability Under Title VII and the ADEA*, 5 CORNELL J.L. & PUB. POL'Y 515, 518-20 (1996) (discussing purposes behind Title VII and ADEA).

300. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1970).

301. Pub. L. No. 88-352, 78 Stat. 241, 253-266 (1964) (codified as amended at 42 U.S.C. § 2000e to 2000e-17 (2000)). The classic analysis of whether disparate treatment is established through circumstantial evidence was later set forth by the Supreme Court in *McDonnell Douglas v. Green*. *See* 411 U.S. 792 (1973).

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

303. *See supra* Section IV.A (discussing the rise of adverse effect theory as a result of the Canadian Supreme Court's 1985 *O'Malley* decision and the collapse of intentional and non-intentional discrimination tests as a result of the *B.C. Firefighters* decision).

304. *See generally* Ratz, *supra* note 258, at 1024 (noting that "a unified theory [of discrimination law] makes complete sense").

305. *Joe's Stone Crab II*, 220 F.3d 1263, 1267 (11th Cir. 2000); *see supra* Section III.A (discussing the facts of the case and the district and appellate courts' analysis).

during this same period.[306] The plaintiff would also have introduced evidence directly relating to this policy, including the subjective hiring practices of the maître d' which focused on the appearance, articulation, attitude, and experience of potential servers.[307] The plaintiff could also have attempted to establish a prima facie case of intentional discrimination. Under the traditional *McDonnell Douglas* framework for establishing intent, the female applicants would thus have been able to demonstrate that they applied for the serving positions, were qualified to perform the job, were not hired, and were treated differently from those men who applied and were subsequently hired.[308]

Next, the burden would have shifted to the employer to establish that the hiring policy was job-related and consistent with business necessity. The defendant would likely have asserted its justification that, in the tradition of "Old World" European fine dining, men performed the highest level of service.[309] Thus, the company's policy was simply attempting to emulate this tradition "by creating an ambience in which tuxedo-clad men served its distinctive menu."[310] The employer could also have rebutted the plaintiffs' evidence of intentional discrimination by arguing that the company never *intended* to discriminate through its policy; rather, its attempt to perpetuate an "Old World" atmosphere at the restaurant was a legitimate nondiscriminatory reason that was part of its business model and unfortunately resulted in no women being hired as servers.[311] Despite its policy, however, the company would have argued that it never had any animus toward women, and, perhaps, hired women for different positions within the company.

Finally, the plaintiff would have had the opportunity to establish that there were alternative practices available that would not have discriminated against them as a group but which would also have achieved the purpose of establishing an "Old World" atmosphere at the restaurant. Numerous practices could be formulated to satisfy this burden, including that the restaurant's décor alone could have evoked this time period, or that the female servers could have closely emulated the appearance and attitude of the male servers. The plaintiffs would also have had the opportunity to establish that the company's legitimate

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306. *See Joe's Stone Crab II*, 220 F.3d at 1267.

307. *See id.* at 1269.

308. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Those applicants that were dissuaded from applying because they knew it was the company's policy not to hire women would properly be able to allege an intentional discrimination claim as well. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365-66 (1977) ("If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices—by his consistent discriminatory treatment of actual applicants . . . .").

309. *See Joe's Stone Crab II*, 220 F.3d at 1270.

310. *Id.* at 1270 (citing *Joe's Stone Crab I*, 969 F. Supp. 727, 732 (S.D. Fla. 1997)).

311. *Id.*

nondiscriminatory reason for implementing its policy was mere pretext. Pretext could have been shown by highlighting that not a single woman was hired as a server during this four year period, and that the company's asserted reason that women simply did not fit its business model was intentionally discriminatory on its face.

Once the parties set forth these arguments, the court could have considered the matter and determined whether there was sufficient evidence for the case to proceed to trial.[312] The ultimate outcome of this case could have been debated. The matter would likely have turned on the second stage of the analysis—whether the employer's reliance on achieving an "Old World" atmosphere at the restaurant was sufficient to establish business necessity and rebut intent. However, more important than the result is the streamlined approach set forth above that allows the court and litigants to consider both disparate impact and disparate treatment factors simultaneously. Rather than considering the disparate treatment and disparate impact claims separately, as the Eleventh Circuit did,[313] the district and appellate courts would have heard all elements of both approaches as part of a single claim. This would have saved judicial and litigant resources and would have eliminated the need for the courts to engage in extended debate about whether the plaintiff should have alleged disparate impact or disparate treatment—seven years after the complaint had been filed.

Moreover, under the traditional approach, the primary question that the court had to answer in this case was whether the employer's attempt at creating an "Old World" atmosphere was a gender *neutral* policy.[314] In attempting to answer this question, the majority found that the policy was not neutral, as there was evidence in the record that the restaurant "gave silent approbation" to the idea that male servers were preferable to females; that the company attempted to "emulate Old World traditions" by using male servers; and that a former maître d' had testified that working at the company was "a male server type of job."[315] The dissent disagreed, enumerating four facially neutral policies that it believed resulted in no women servers being hired by the company.[316] As evidenced by this case, whether a particular policy is facially neutral is difficult—if not impossible—for a court to decide. In essence, the answer to this question lies within the confines of social history and the alleged

312. What damages were available in the case would turn on which claims were permitted to proceed to trial and what conclusions were reached by the finder of fact. *See supra* note 276 and accompanying text (discussing the application of damages under the unified approach). Again, however, this approach would permit the consideration of damages as a single, rather than separate, part of the process. *Id.*

313. *See supra* notes 87-96 and accompanying text (discussing the Eleventh Circuit's analysis of the claims).

314. *See Joe's Stone Crab II*, 220 F.3d at 1281.

315. *Id.*

316. *Id.* at 1290 (Hull, J., dissenting in part); *see supra* notes 97-100 and accompanying text (discussing the reasoning of the dissent).

unconscious stereotypes of the employer. Under a unified approach, the neutrality of the policy is irrelevant, as the court considers all of the evidence at the same time in deciding whether either intentional or unintentional discrimination has occurred. Thus, under the modified approach, the Eleventh Circuit would have turned its focus away from an examination of the neutrality of the policy and would have determined instead whether the policy was justified and whether the employer intended to discriminate.[317] These are routine inquiries that courts make all the time, and they would be far simpler to resolve than the Eleventh Circuit's arguably irrelevant debate over the policy's neutrality.[318]

C. *Similar Approaches in Employment Discrimination Law*

My suggested analytical approach is not entirely new to employment discrimination law. Indeed, Justice O'Connor suggested a similar "unified" approach in her concurring opinion in *Price Waterhouse v. Hopkins* for deciding whether to proceed under a circumstantial or direct evidence analysis in mixed-motive cases that allege both a legitimate and an illegitimate reason for the termination.[319] Justice O'Connor recommended that after the plaintiff and defendant have submitted their evidence, "the court should determine whether the *McDonnell Douglas* [circumstantial evidence] or *Price Waterhouse* [direct evidence] framework properly applies to the evidence before it."[320] Justice O'Connor saw the benefit, in the mixed-motive context, of permitting all parties to submit their evidence prior to the court determining which theory of discrimination to apply.[321]

More recently, in *Rachid v. Jack in the Box, Inc.*,[322] the Fifth Circuit considered how the Supreme Court's decision in *Desert Palace, Inc. v. Costa*

317. There may indeed be scenarios, however, in which the policy at issue is plainly discriminatory on its face. In these scenarios, the proposed model could be circumvented, and the inquiry could proceed directly to the issue of whether the employer can offer a valid defense to the policy. *See, e.g.*, Int'l Union v. Johnson Controls, 499 U.S. 187 (1991).

318. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (analyzing the employer's business justification for a height and weight requirement for prison guards); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (analyzing whether intentional discrimination occurred). Indeed, the Eleventh Circuit may have been incorrect in focusing so intently on the question of whether the policy was neutral, and should have affirmed the district court's finding of disparate impact in the case as well as remanding on the issue of whether intentional discrimination had occurred.

319. 490 U.S. 228, 277-79 (1989) (O'Connor, J., concurring).

320. *Id.* at 278. Justice O'Connor explained the benefit of this uniform approach to mixed-motive cases, stating that "[i]f the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination. In my view, such a system is both fair and workable, and it calibrates the evidentiary requirements demanded of the parties to the goals behind the statute itself." *Id.* at 278-79.

321. *Id.*

322. 376 F.3d 305 (5th Cir. 2004).

would affect the courts' analysis of mixed-motive discrimination cases.[323] The Court found that after *Desert Palace*, there has been "a merging of the *McDonnell Douglas* and *Price Waterhouse* approaches" which should now be analyzed pursuant to an "integrated approach."[324] The Fifth Circuit also saw the benefit of merging two separate theories of discrimination that had developed in the case law.[325]

VI. CONCLUSION

The theories of disparate impact and disparate treatment in employment discrimination cases have developed separately for the past thirty-five years in the United States. The Supreme Court of Canada, which faced a similar bifurcation in the law, collapsed these two theories into a uniform analysis, with promising initial results. The United States should consider adopting a similar approach to allegedly discriminatory employment standards and workplace rules. My proposed approach would not require Congress or the courts to overturn existing case law. It would only require open-minded courts to alter their approach to these cases. Because "[e]verything should be made as simple as possible, but not simpler,"[326] the benefits in the United States of this streamlined approach could be significant. The Canadian courts have already proceeded down this path of simplicity, and the United States should follow.

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323. 539 U.S. 90 (2003). In *Desert Palace*, the Supreme Court held that direct evidence is not required to attain a mixed-motive jury instruction. *Id.* at 101. Rather, "[i]n order to obtain [a mixed-motive jury instruction] . . . a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Id.* (internal quotation marks omitted).

324. *Rachid*, 376 F.3d at 312. Pursuant to this unified approach,

> the plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic (mixed-motive[s] alternative). . . . If a plaintiff demonstrates that age was a motivating factor in the employment decision, it then falls to the defendant to prove that the same adverse employment decision would have been made regardless of discriminatory animus. If the employer fails to carry this burden, plaintiff prevails.

Id. (citations and internal quotation marks omitted).

325. *Id.*

326. THE NEW INTERNATIONAL DICTIONARY OF QUOTATIONS 281 (Margaret Miner & Hugh Rawson eds., 1986) (quoting Albert Einstein).