Articles

Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking

Barbara J. Flagg†

I. INTRODUCTION

Goodson, Badwin & Indiff is a major accounting firm employing more than five hundred persons nationwide. Among its twenty black accountants is Yvonne Taylor, who at the time this story begins was thirty-one years old and poised to become the first black regional supervisor in the firm's history. Yvonne attended Princeton University and received an M.B.A. from the Kellogg Graduate School of Management at Northwestern University. While employed at Goodson, she was very successful in attracting new clients, especially from the black business community. In all other respects her performance at the firm was regarded as exemplary as well.

Yvonne always was comfortable conforming to the norms of the corporate culture at Goodson, and in fact has been comfortable with "white" norms since childhood.[1] Her manner of speech, dress, and hairstyle, as well as many of her attitudes and beliefs, fall well within the bounds of whites' cultural expectations. However, Yvonne may have adapted to the corporate culture *too*

† Associate Professor of Law, Washington University, St. Louis. I thank Susan Appleton, Martha Chamallas, Kathy Goldwasser, Pauline Kim, Ron Levin, and Karen Tokarz for constructive suggestions on earlier drafts of this Article, and I extend special thanks to my life partner, Dayna Deck.

1. Characterizing positive norms as "white" is problematic to the extent that it might imply that nonwhites necessarily do not share, or cannot conform to, those norms. *See* STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 29–45 (1991). However, I use "white" in a descriptive sense, to capture the reality that the norms in question are widely shared among white people. This requires generalization, of course; there is diversity among whites as well as among nonwhites.

well. It is common practice at Goodson to be less than absolutely precise in keeping records of one's billable hours. Instead, accountants generally estimate time spent on clients' accounts at the end of each day, and tend to err on the side of over- rather than underbilling. On the rare occasions this practice is discussed, it is explained in terms of the firm's prestige in the business community; the subtext is that clients should consider themselves fortunate to be associated with Goodson at all. Like other young accountants, Yvonne at first attempted to keep meticulous records, but she soon realized that others were surpassing her in billable hours without spending more time actually at work. Consequently, and consistent with her general pattern of conforming to prevailing norms, she gradually adopted the less precise method.

Under Goodson's promotion procedure, the decision whether to promote an accountant to regional supervisor rests on senior partners' evaluations of the candidate's accounting knowledge and skills and, to a lesser extent, on assessments of her interpersonal skills solicited from clients and from peers in the office in which she works. The reports on Yvonne's accounting skills were uniformly excellent. Comments from some peers had overtones of distance and mild distrust suggesting that they were somewhat uncomfortable with Yvonne as a black woman, but these comments fell far below the level necessary to raise serious doubts about her interpersonal skills. However, several of Yvonne's clients took the occasion to register complaints about possible overbilling. The firm launched an extensive investigation and eventually reached the conclusion that Yvonne had been careless in her recordkeeping and that therefore she should not be promoted at that time.[2] As a practical matter, this episode ended Yvonne's prospects for advancement at Goodson; the firm has an informal policy of not reconsidering an individual once she has been passed over for promotion.

Yvonne has a younger sister who, sometime during college, legally changed her name from Deborah Taylor to Keisha Akbar. As her decision to change her name suggests, Keisha places an emphasis on her African heritage that Yvonne does not,[3] and she has adopted speech and grooming patterns

2. A white male was promoted to regional supervisor in Yvonne's place. This accountant's recordkeeping practices were not investigated in the same manner as Yvonne's; had that investigation taken place, it would have uncovered practices functionally identical to hers. For similar stories of the differential application of legitimate employer expectations, see St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (finding that nonwhite corrections officer was victim of disparate treatment with regard to disciplinary actions taken against him); Hong v. Children's Memorial Hosp., 993 F.2d 1257 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1372 (1994) (concerning Korean-American female plaintiff's allegation of disparate treatment in performance evaluation and recordkeeping method for disciplinary actions); Cabiness v. YKK (USA), Inc., 859 F. Supp. 582 (M.D. Ga. 1994) (involving black female plaintiff's claim of disparate treatment in number and severity of reprimands). The Court also has recognized disparate treatment disadvantaging whites. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (regarding discharge of two white employees while black employee participating in misconduct was retained). Cases like *McDonald*, however, tell a different kind of story because whites are never the targets of societal subordination.

3. This is not to suggest that Yvonne denies her African heritage, but only that she interprets it

consistent with that cultural perspective.[4] Keisha majored in biology at Howard University, and after graduation went to work as the only black scientist at a small research firm dedicated to identifying and developing environmentally safe agricultural products for commercial uses. Like Yvonne, Keisha excelled at the technical aspects of her work, but she brought to it a much less assimilationist personal style. At first, her cultural differences had no particular impact on her job performance. This changed, however, when the once-small firm began to grow rapidly and reorganization into research divisions became necessary. For the most part, the firm planned to elevate each of the original members of the research team to positions as department heads, but Keisha was not asked to head a department because the individuals responsible for making that decision felt that she lacked the personal qualities that a successful manager needs. They saw Keisha as just too different from the researchers she would supervise to be able to communicate effectively with them. The firm articulated this reasoning by asserting a need for a department head who shared the perspectives and values of the employees under her direction.[5] When Keisha raised the possibility that her perceived differences might be race-dependent, the decisionmakers replied that they would apply the same conformity-related criteria to white candidates for the position of department head.[6]

Thus, in spite of the diametrically different cultural styles adopted by Yvonne and Keisha,[7] their stories have the same ending: Each encountered the glass ceiling at a relatively early stage of what should have been a very successful career.[8] A case can be made that both were disadvantaged because

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differently; she sees being black as congruent with many of the norms of the dominant culture. *See supra* note 1.

4. To elaborate a bit, Keisha often wears clothing that features African styles and materials, frequently braids her hair or wears it in a natural style, and at times speaks to other black employees in the dialect linguists designate "Black English," though she always uses "Standard English" when speaking with whites.

5. A principal reason for the decisionmakers' perception that Keisha's values were different from theirs was the fact that in lunchroom conversation she analyzed current events as instances of "racism" far more frequently than did her white coworkers.

6. For similar cases, see Lasso v. Woodmen of the World Life Ins. Co., 741 F.2d 1241, 1243 (10th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (reviewing trial court's finding that Hispanic male was passed over for state manager position because white male chosen "had more management experience and . . . his personality and leadership skills made him a more desirable choice than plaintiff"); Clay v. Hyatt Regency Hotel, 724 F.2d 721, 722 (8th Cir. 1984) (reviewing trial court's conclusion that assertive black male "would not fit into defendant's organization as well as other applicants would"); Leisner v. New York Tel. Co., 358 F. Supp. 359, 365 (S.D.N.Y. 1973) (approving employer's decision not to promote based on question, "Is this person going to be successful in our business?").

7. For discussions of differing cultural styles within the black community, see LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION (Gerald Early ed., 1993) (containing essays by black intellectuals and writers on black people's struggle between nationalistic and assimilationist models of collective identity); Jerome McCristal Culp, Jr., *The Michael Jackson Pill: Equality, Race, and Culture*, 92 MICH. L. REV. 2613 (1994) (imagining colloquies among professors, judges, and citizens of various political orientations on subject of fictional "Michael Jackson Pill," which would remove all "blackness" from black people).

8. For a discussion of the many difficulties faced by blacks in the corporate world, see GEORGE DAVIS & GLEGG WATSON, BLACK LIFE IN CORPORATE AMERICA: SWIMMING IN THE MAINSTREAM (1982).

of race.[9] Yvonne would argue that there is no nonracial element of her performance or her personal characteristics that could account for the way her recordkeeping practices were singled out for special scrutiny, and therefore that race is left as the most plausible explanation of the different treatment she received. Even if the basis for the special treatment was unconscious, this is a relatively easily understood form of discrimination: Yvonne's contention would be that she was treated differently from similarly situated others because of her race.

Keisha, on the other hand, arguably was given the same treatment that would have been afforded anyone who was perceived as unable or unwilling to fit smoothly into the corporate culture. Nevertheless, it can be argued that she too was disadvantaged because of her race, in that the personal characteristics that disqualified her from a management position intersect seamlessly with her self-definition as a black woman. I previously have characterized this form of discrimination as an outgrowth of the transparency phenomenon:

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9. Throughout this Article, I treat "race" as a relatively stable category, and as a construct with which the reader is familiar. I do so in large part because that approach seems consistent with the conceptual terrain of Title VII. Nevertheless, I find great explanatory power in the analysis of race as socially constructed. *See generally* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437 (1993).

It might be possible to categorize the discrimination experienced by Yvonne and Keisha as based on sex rather than race. I choose not to pursue that line of analysis in this Article because the impetus for this project is the transparency phenomenon—the invisibility of whiteness to whites. Although all dominant norms tend to take on the appearance of neutrality, maleness itself is not transparent in the same way whiteness is. I think it useful for legal analysis to begin to identify and examine the distinct social dynamics of different forms of discrimination.

One might inquire, then, why I do not approach Yvonne's and Keisha's experiences as instances of discrimination against *black women*. Indeed, I have discussed the possibility that the transparency phenomenon might be a form of marginalization that affects women of color more often than men of color. Barbara J. Flagg, *On Selecting Black Women as Paradigms for Race Discrimination Analyses*, 10 BERKELEY WOMEN'S L.J. 40 (1995). However, I think there are at present insufficient data on the transparency phenomenon to draw a firm conclusion on this point. Because I hope to tease out an avenue of relief that I find implicit in the statute as currently written, I set aside for now the additional doctrinal difficulties that arise at the intersection of Title VII's categories. For illuminating explorations of the theoretical and doctrinal dimensions of intersectionality, see Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367 (1992); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Deborah Waire Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN'S L.J. 136 (1990–91); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305 (1990); Cathy Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457 (1989); Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN'S L.J. 181 (1990–91); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775 (1991).

> White people externalize race. For most whites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times, to reflect on oneself (or other whites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive. Whites' "consciousness" of whiteness is predominantly *unconsciousness* of whiteness. We perceive and interact with other whites as individuals who have no significant racial characteristics. In the same vein, the white person is unlikely to see or describe himself in racial terms, perhaps in part because his white peers do not regard him as racially distinctive. Whiteness is a transparent quality when whites interact with whites in the absence of people of color. Whiteness attains opacity, becomes apparent to the white mind, only in relation to, and contrast with, the "color" of nonwhites.[10]

Just as whites tend to regard whiteness as racelessness, the transparency phenomenon also affects whites' decisionmaking; behaviors and characteristics associated with whites take on the same aura of race neutrality. Thus, white people frequently interpret norms adopted by a dominantly white culture as racially neutral, and so fail to recognize the ways in which those norms may be in fact covertly race-specific.[11] Keisha would argue that she was not promoted because her personal style was found wanting when measured against a norm that was in fact transparently "white."[12]

The manner in which both Yvonne and Keisha were treated violates the norm of colorblindness—the principle that race should not be taken into account in assessing the individual. In Yvonne's case, the claimed violation should be obvious; arguably she was treated differently from others solely because she is black. With regard to Keisha, the violation of the colorblindness norm takes the form of applying unconsciously white, and in that sense race-specific, criteria of decision. Thus, laws and policies designed to implement the

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10. Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970 (1993).

11. For a more complete exposition of the transparency thesis, see *id.* at 969–79.

12. Moreover, the criterion employed in Keisha's case was subjective. Some objective criteria of decision, such as scored tests or, in some contexts, educational requirements, also may be characterized as transparently white, but these are not the subject of this Article. The glass ceiling is maintained much more frequently through the use of subjective bases of decision.

The form of discrimination Keisha experienced also may be labeled institutional racism, defined as the maintenance of institutions that systematically advantage whites. *See* JAMES M. JONES, PREJUDICE AND RACISM 129–31 (1972). Treating an Afrocentric personal identity as a negative factor in the decision whether to promote an individual to a supervisory position systematically advantages whites as a group over blacks, even though there may be significant numbers of black persons like Yvonne who would not be adversely affected by the use of that criterion. It should be noted, however, that institutional racism may take conscious as well as unconscious forms; thus, the concept overlaps only partially with the notion of transparently white criteria of decision because the latter by definition are employed unconsciously.

Viewed from another angle, Keisha's case is an instance of cultural domination. *See* Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994). My approach to Keisha's story emphasizes the ways in which structural factors combine with the impulse toward cultural domination to produce adverse employment outcomes for nonwhites.

colorblindness principle ought equally to disapprove the outcomes in both sisters' cases.

Because these race-specific acts occurred in employment contexts, both Yvonne and Keisha would turn to Title VII for legal relief.[13] However, even though Title VII provides a cause of action for adverse employment decisions taken "because of" race,[14] Keisha and Yvonne would find themselves in quite different positions under existing judicial interpretations of that statute. Yvonne would have a relatively easy time framing a disparate treatment claim (though that is not to say that she necessarily would prevail), but as a practical matter Keisha would have difficulty getting beyond the initial pleading stage because the form of discrimination she encountered cannot easily be addressed under either the disparate treatment or the current disparate impact model.[15] This Article attempts to fill that gap by formulating alternative models for Title VII litigation that would give Keisha at least the same opportunity to advance an employment discrimination claim that Yvonne currently enjoys.[16]

From a more theoretical vantage point, Keisha's case raises the question whether transparently white decisionmaking falls within the category of race-specific employment practices proscribed by Title VII. While Title VII now applies to both public and private employers,[17] the focus of this Article is on the private sector. I have argued elsewhere that government has a special obligation not to participate in the maintenance of white supremacy.[18] However, the question whether private employers have a similar obligation raises a different constellation of issues concerning role and responsibility.

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13. Because hers is a claim of disparate treatment, Yvonne could also turn to § 1981, which does not require administrative proceedings. *See* 42 U.S.C. § 1981 (1988 & Supp. V 1993).

14. Title VII states in part:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1988).

15. These two models of Title VII liability, and their respective applications to Yvonne and Keisha, are described more fully in Part II of this Article. In brief, the disparate treatment model requires proof that one has been treated differently from similarly situated coworkers. In contrast, the disparate impact approach targets facially neutral employment practices.

16. Yvonne's chances of prevailing in her lawsuit will depend on technical issues of proof, including her luck in discovering evidence of different treatment. Keisha's difficulties under existing law are more conceptually daunting: In addition to the usual evidentiary problems, she confronts a series of doctrinal hurdles that combine to make it especially unlikely that she will prevail. *See infra* text accompanying notes 76–95.

17. Coverage was extended to state and federal employers in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2, 11, 86 Stat. 103, 103, 111 (codified at 42 U.S.C. §§ 2000e(a)–(b), 2000e-16). The legislative history of Title VII is recounted in George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

18. Flagg, *supra* note 10, at 992.

Thus, an examination of the fundamental policy regarding race discrimination embodied in Title VII is a necessary prerequisite to any proposal that would require judicial recognition of a new or amended approach to Title VII liability. I contend that judicial acceptance of a revised model of liability would be wholly consistent with current congressional policy regarding Title VII, as evidenced in the amendments to the statute adopted in the Civil Rights Act of 1991.[19]

I undertake this project of doctrinal construction with two objectives in view. First, I hope to make the case that in Title VII and its 1991 amendments there are conceptual strands that can be woven together to form a coherent theory of liability for transparently white subjective decisionmaking. In addition, I offer this analysis as an exercise in reflection—on the nature of the transparency phenomenon and the nature of doctrinal formation, reciprocally. Exploring transparency may tell us something about what race discrimination doctrine might become, and examining doctrinal possibilities may tell us something about who we want and choose to be.[20]

Part II explains in greater detail the existing disparate impact and disparate treatment theories of liability, and applies them to Yvonne's and Keisha's situations. I conclude that Keisha cannot, as a practical matter, succeed in a claim under existing judicial interpretations of the statute, and that the reasons this is so are linked to the nature of the transparency phenomenon. Part III then makes the case that Title VII, as amended in 1991, should be read in principle to reach transparently white decisionmaking. Accordingly, judicial formulation of a new doctrinal framework that would comfortably accommodate Keisha's claim is in order. Finally, Part IV sets forth two models of liability that would provide a remedy for transparently white decisionmaking, and compares their relative strengths and weaknesses.

II. EXISTING MODELS OF TITLE VII LIABILITY

The rule governing Title VII disparate treatment cases initially was set forth in *McDonnell Douglas Corp. v. Green*.[21] The plaintiff must establish a

19. Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2 (Supp. V 1993)). Title VII applies to discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1988), reproduced *supra* note 14. To whatever extent analogues of the transparency phenomenon occur in regard to the statutory characteristics other than race (such as sex or religion), and to whatever extent the requirements of this Article's doctrinal proposals can be satisfied in those contexts, the analysis herein applies to those other categories. One might find special congruence with regard to some forms of discrimination based on religion, for example, at least insofar as the proposals in this Article rest upon a notion of cultural accommodation.

20. This project resonates with other scholarship on race. Angela Harris recently has published an insightful account of Critical Race Theory that might help the reader locate this project in the context of that tradition. *See* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994).

21. 411 U.S. 792 (1973).

prima facie case of discrimination, at which point the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged adverse action.[22] The plaintiff then has an opportunity to demonstrate that the defendant's proffered reason is actually a pretext for discrimination;[23] the burden of proof on this issue is on the plaintiff.[24]

The plaintiff's prima facie case may be made

> by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[25]

The elements of the prima facie case may be modified to suit employment settings that differ from the facts of *McDonnell Douglas*.[26]

The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory explanation for the adverse employment action. This is only a burden of production, and not of proof; the burden of persuasion remains at all times with the plaintiff.[27] If such an explanation is advanced by the defendant, the plaintiff must prove that the proffered reason was not the real reason for the challenged action.[28] The plaintiff must demonstrate not only that the articulated reason is not credible, but that it is a pretext *for discrimination*. That is, the plaintiff must not only disprove the employer's legitimate, nondiscriminatory explanation, but also must show that race was the real reason for the adverse action.[29]

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22. *Id.* at 802–04. The plaintiff bears the risk of nonpersuasion with respect to the prima facie case and the issue of pretext. The defendant has the burden of producing a legitimate, nondiscriminatory explanation, but this is not a burden of persuasion. For more detailed explanation of the issues of proof, see Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981).

23. *McDonnell Douglas*, 411 U.S. at 802–05.

24. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). In addition, Title VII provides for a bona fide occupational qualification defense to some disparate treatment claims, but it is not available in race discrimination cases. *See* 42 U.S.C. § 2000e-2(e) (1988).

25. *McDonnell Douglas*, 411 U.S. at 802 (footnote omitted).

26. *Id.* at 802 n.13. In addition, there is the question whether plaintiff's prima facie case must show only that she met all known qualifications for the position at issue, or whether she must establish the probability that the challenged action was motivated by illicit intent. The former is the better view. *See* Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Postal Service Bd. of Governors v. Aikens, 70 CAL. L. REV. 1201 (1982) (arguing that "illicit intent" standard places inordinate burden on plaintiff and that "all known qualifications" standard brings more relevant information to light).

27. *Burdine*, 450 U.S. at 256.

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

29. *See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (stating that ultimate question for trier of fact is whether plaintiff has proved discrimination on basis of race). There are several forms of proof that might be advanced in support of a plaintiff's assertion that race was the real reason for an adverse decision. These include direct evidence, *see* Slack v. Havens, 522 F.2d 1091, 1092–93 (9th Cir.

The disparate treatment approach has at its core a concept of intentional discrimination, which I define to include any variety of consciously different treatment.[30] The centrality of the notion of intent might suggest that the disparate treatment plaintiff must prove the existence of a discriminatory motive, as if there were a mens rea component of a disparate treatment case.[31] However, the Supreme Court has stated that proof of discriminatory intent "can in some situations be inferred from the mere fact of differences in treatment."[32] This standard does not go far enough; proof of different treatment alone—unaided by the inference that different treatment implies discriminatory intent—should be sufficient to establish a violation because Title VII's proscription of actions taken "because of" race ought to extend to unconscious, as well as conscious, different treatment.[33] Though the Court has not clearly articulated the proposition that intent may be irrelevant in some disparate treatment cases, that inference seems unavoidable in light of *Price*

1975) (quoting supervisor's statements that "[c]olored people should stay in their places" and that "[c]olored people are hired to clean because they clean better"); Mayse v. Protective Agency, Inc., 772 F. Supp. 267, 269 (W.D.N.C. 1991) (quoting letter to employment agency that read, "we already have two blacks in this [o]ffice now so we would like for the additions not to be black"); statistical evidence, *see McDonnell Douglas*, 411 U.S. at 805; and comparative evidence, *see Burdine*, 450 U.S. at 254–56; McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282–83 (1976); *McDonnell Douglas*, 411 U.S. at 804–05. Of these, comparative evidence is most frequently employed; the plaintiff attempts to show that similarly situated coworkers of a different race received more favorable treatment. In response, the defendant may argue that there is insufficient evidence of different treatment, or that the comparison group was in fact not similarly situated. *See* BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1315 (2d ed. 1983).

30. Thus, as I use it, "intentional discrimination" is not limited to different treatment motivated by bias or hostility; it includes different treatment stemming from ostensibly benign purposes, so long as the actor is aware of the difference in treatment. In an early, influential article on the concept of disparate impact liability, Alfred Blumrosen distinguished discrimination "motivated by personal antipathy" from employers' treatment of minority employees "in a different and less favorable manner than similarly situated members of the majority group." Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 67 (1972). Blumrosen's second category only partially overlaps my concept of intentional discrimination, because his category excludes different treatment motivated by hostility, but apparently includes unconscious different treatment.

31. The mens rea requirement in criminal law *is* a requirement of conscious intent. *See, e.g.*, State v. Sikora, 210 A.2d 193, 203 (N.J. 1965) (implying that mens rea and conscious intent are linked). In constitutional disparate impact cases the Court has imposed an intent requirement that seems to be modeled on the criminal requirement of conscious intent. The operative constitutional rule is that a government action triggers strict scrutiny only if it was taken "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (footnote omitted). However, for an argument that the existing rule *does* reach unconscious discrimination, see David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

32. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citations omitted). Wendy Williams distinguishes "facial discrimination" and "pretext" cases; in the former instances,

> the existence of the requisite intent is apparent from the employer's act of classifying employees on a prohibited basis. Intent in the pretext cases is often more difficult to establish because the employer claims its act was neutral and the inference of intent often must be drawn from ambiguous circumstances.

Wendy W. Williams, *Firing the Woman To Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641, 669 n.176 (1981).

33. *See* Nadine Taub, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 397–407 (1980) (identifying unconscious different treatment based on stereotypical expectations and arguing that Title VII reaches it).

Waterhouse v. Hopkins.[34] In that case a plurality of the Court endorsed the district court's conclusion that decisions motivated by sex-role stereotyping constitute discrimination "because of" sex, and thus implied that sex-role stereotyping should be seen as a form of disparate treatment.[35]

If Yvonne wished to pursue a Title VII claim, she would frame it as a case of disparate treatment, arguing that similarly situated white accountants who followed the same practice of imprecise recordkeeping were not denied promotions because of it.[36] This would be a question of fact that would turn on evidentiary issues beyond the scope of this Article.[37] The significance of Yvonne's case for present purposes is that it fits easily within the conceptual framework of existing Title VII case law, and so she would have at least the opportunity to reach the factual question whether she was treated differently from similarly situated white accountants.[38]

Keisha's complaint is conceptually distinct from a disparate treatment claim, which centers on the notion that the employer treated the plaintiff differently from similarly situated others. In contrast to Yvonne's claim, Keisha would argue that though she was treated in the same manner as others, the standard applied to all employees is one that systematically advantages whites.[39] One might suppose, then, that her claim might be framed under the

34. 490 U.S. 228 (1989).

35. "[The district judge] held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping." *Id.* at 237 (plurality opinion); *see also* 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 5.4.1 (2d ed. 1988) (discussing various types of discriminatory intent). David Oppenheimer describes this notion as a sort of "constructive intent." David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 924 (1993).

36. Yvonne's case illustrates a common disparate treatment scenario, in which a legitimate criterion of selection is applied more stringently to outsiders such as women and members of racial minority groups. Of course, she would have a very difficult time if some whites who similarly inflated their billable hours also did not receive promotions. In any case, Yvonne would have to show that even proven differences in treatment occurred because of *race*. *See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (holding that burden of persuasion remains with employee despite rejection by trier of fact of employer's asserted legitimate, nondiscriminatory reason for challenged action).

In *St. Mary's Honor Center*, the Court held that in a disparate treatment case the trier of fact may settle on a nondiscriminatory explanation for a challenged action different from any proffered by the defendant, even if the plaintiff had no opportunity to discredit the explanation ultimately chosen. *See id.* at 2756. The recognition that any "legitimate, nondiscriminatory explanation" may in fact be transparently race-specific provides additional support for the dissenters' view that the range of nondiscriminatory explanations considered by the trier of fact should be limited to those put forward by the defendant. The plaintiff will be unable to show that an ostensibly neutral explanation was in fact race-specific if the purported explanation is not put "on the table" until after the trial.

37. *See supra* note 29.

38. The reality may be more complex than my hypothetical, which focuses on the comparison between Yvonne and Keisha, suggests. The perceptions of Yvonne's clients and colleagues that she inflated her billable hours may have been distorted; structuralists contend that misperception of tokens is not uncommon. *See* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 211, 230–37 (rev. ed. 1993). Moreover, the evidentiary foundation for a disparate treatment case is not always easy for a plaintiff to establish, because it requires showing that the individuals with whom the comparison is to be made were similar to plaintiff in *relevant* respects.

39. It should be noted that a claim similar to Keisha's could arise in the context of a disparate treatment dispute. Suppose that a plaintiff believed that she had been evaluated under a different standard than similarly situated coworkers, but the employer argued successfully that a facially neutral reason was

disparate impact theory of liability. However, a careful review of the requirements of a disparate impact claim reveals that Keisha would not be able to pursue a case under that approach, either.

In a Title VII disparate impact case, the plaintiff's prima facie case requires a showing that a facially neutral employment practice has a disproportionately adverse impact on a protected class. Once that threshold is reached, the burden of persuasion shifts to the employer to demonstrate that the challenged practice is job-related and justifiable as a matter of business necessity. Finally, the plaintiff has an opportunity to prove that there exists an alternative practice that would serve the employer's objectives equally well but have a less severe adverse effect.[40]

The disparate impact approach to Title VII liability has been deeply affected by the Civil Rights Act of 1991. First, the Act finally placed disparate impact analysis on a secure statutory foundation.[41] Second, Congress

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the real basis for the adverse decision. In principle, such a plaintiff then should be able to challenge this ostensibly neutral explanation as an instance of the transparency phenomenon.

It also might be possible to bring Keisha's case under the disparate treatment umbrella by analyzing it as an instance of racial stereotyping. Charles Lawrence has described the "cultural stereotype," which assumes that blacks are suited for some roles in society, such as musician or athlete, but not for others, such as doctor or lawyer (or research department supervisor). Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 343 (1987). Such biases might lead employers to perceive in employees only those attributes that are consistent with the operative stereotype. *See id.* However, transparency analysis approaches this phenomenon from a different angle and emphasizes the fact that the characteristics associated with stereotypically white roles themselves come to take on a suppressed white connotation. Thus, for example, "articulate" comes to mean the manner of speaking whites associate with white professionals. From a Title VII perspective, the "cultural stereotype" approach might fit more comfortably within the disparate treatment framework, as does the sex-role stereotyping at issue in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In contrast, the transparency analysis is more compatible with the disparate impact model, because it assumes that blacks and whites *are* different in some respects, and questions the application of the dominant group's norms to members of the subordinate group.

There is another reason not to attempt to fit Keisha's claim into the disparate treatment mold. I mean to propose a framework that would permit employers to engage in some assimilationist workplace decisionmaking. Under a disparate impact–like approach, the question of justification can be pursued at the business necessity stage. However, no comparable justification is possible under the disparate treatment formula. Therefore, even taking into account the advantages a disparate treatment model might offer (such as the availability of parallel analyses under § 1981), I have chosen not to propose a remedial framework for Keisha's case that follows that conceptual outline.

For an approach that would, like Lawrence's, see Keisha's case as an instance of stereotyping, but that steps outside the disparate treatment framework, see Oppenheimer, *supra* note 35

40. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971)). Disparate impact, as well as disparate treatment, analysis may be used in cases involving subjective criteria of decision. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988); Rowe v. General Motors Corp., 457 F.2d 348, 358 (5th Cir. 1972); *see also* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 973–78 (1982) (discussing subjective selection systems); Alfred W. Blumrosen, *The Legacy of* Griggs*: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 17–40 (1987) (same); Julia Lamber, *Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869; Earl M. Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 NW. U. L. REV. 776 (1983) (arguing that Bartholet misconstrues law and ignores practical problems with her approach).

41. The 1991 Act added the following provision:

> An unlawful employment practice based on disparate impact is established under this title only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and

overruled some aspects of *Wards Cove Packing Co. v. Atonio*,[42] a 1989 case that provided a good part of the motivation for the 1991 Act.[43] In *Wards Cove*, the Supreme Court had announced a series of changes in disparate impact doctrine. Most notable among these pronouncements were a new rule that the issue of business necessity was not to be seen as an affirmative defense, but rather as part of the plaintiff's case,[44] and a redefinition of the concept of business necessity to become more a notion of reasonable justification than of *necessity*.[45] In the 1991 Act, Congress made it clear that the burden of persuasion on the question of business necessity rests on the

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> the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(A) (Supp. V 1993)). Subparagraph (C) provides: "The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'" 42 U.S.C. §2000e-2(k)(1)(C) (Supp. V 1993).

Prior to passage of the 1991 Act there was considerable debate among scholars as to whether the disparate impact theory of liability was authorized by the statute. *See, e.g.*, Blumrosen, *supra* note 30, at 69–70; George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1299–311 (1987).

42. 490 U.S. 642 (1989).

43. In § 2 of the Civil Rights Act of 1991, Congress set forth the factual findings that undergird the statute:

> (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;
>
> (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and
>
> (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Civil Rights Act of 1991, § 2, 105 Stat. at 1071. The purposes of the 1991 Act were:

> (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
>
> (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);
>
> (3) to confirm statutory authority and provide statutory guidance for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and
>
> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Id. § 3, 105 Stat. at 1071.

44. *Wards Cove*, 490 U.S. at 659–60 (holding that burden of persuasion is on plaintiff, while burden of production is on defendant). The *Wards Cove* pronouncement on the burden of proof was widely regarded as a departure from precedent. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (stating that plaintiff has opportunity to show existence of alternatives "[i]f the employer *proves* that the challenged requirements are job related" (emphasis added)); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) ("[i]f an employer does then meet the burden of *proving* . . ." (emphasis added)); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("[T]he employer [has] the burden of *showing* . . . a manifest relationship to the employment in question." (emphasis added)).

45. *Wards Cove*, 490 U.S. at 659. The Court also stated that disparate impact plaintiffs must identify the specific employment practice alleged to be the cause of a disparate effect, and that they may not challenge a multicomponent selection process as a whole. *Id.* at 657. Congress modified this rule only slightly in the 1991 Act, by providing that a plaintiff may challenge a multicomponent process if she can establish that its elements "are not capable of separation for analysis." 42 U.S.C. § 2000e-2(k)(1)(B)(i).

employer, rather than the plaintiff.[46] Moreover, the Act reinstated judicial interpretations of "consistent with business necessity" and "job relatedness" that predated *Wards Cove*.[47]

The first element of a disparate impact case is the requirement that the plaintiff prove that a particular employment practice actually has an adverse impact on a protected group.[48] The issues that may arise at this stage include the choice of comparison groups—e.g., general population versus qualified labor force[49]—the geographic region and time frame within which the comparison is made, the degree of disproportion between the compared groups, the accuracy of the relevant data, and the statistical methods employed to assess the significance of identified disparities.[50] One *Wards Cove* ruling left virtually untouched by the 1991 Act is the requirement that the plaintiff identify a particular employment practice (or inseparable cluster of practices) claimed to have caused the disparate effect.[51]

Once the plaintiff has established the existence of disparate effects, the burden of persuasion shifts to the defendant to show that the challenged practice is job-related and justified as a matter of business necessity.[52] The

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46. Section 105 of the 1991 Act provides that a violation is established if the complaining party "demonstrates" the existence of a disparate impact and the respondent "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Civil Rights Act of 1991, § 105(a), 105 Stat. at 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i)). According to § 104, "[t]he term 'demonstrates' means meets the burdens of production and persuasion." *Id.* § 104(m), 105 Stat. at 1074 (codified at 42 U.S.C. § 2000e(m)).

47. *See infra* note 59.

48. Though a disparate impact claim involves the effects of a challenged employment practice on a group, such a claim may be pursued by a single individual. *See* D. Don Welch, *Superficially Neutral Classifications: Extending Disparate Impact Theory to Individuals*, 63 N.C. L. REV. 849 (1985). As one would expect, class actions raise additional difficulties. *See, e.g.*, George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688 (1980).

49. *Wards Cove* rejected workforce stratification—overrepresentation of whites in higher job classifications and overrepresentation of nonwhites at lower levels—as a method of proving disparate impact. *Wards Cove*, 490 U.S. at 655. This aspect of *Wards Cove* was not affected by the 1991 Act.

50. *See* Elaine Shoben, *Defining the Relevant Population in Employment Discrimination Cases*, *in* STATISTICAL METHODS IN DISCRIMINATION LITIGATION 55 (D.H. Kaye & Mikel Aickin eds., 1986); Elaine W. Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977).

51. The statute provides:

> With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. V 1993)). There is an additional exception: "When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice." 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991). The recognition that some clusters of employment practices may not be "capable of separation for analysis" represents a minor modification of the *Wards Cove* position.

52. *See supra* note 41.

nature of this burden remains somewhat unclear. In the case that first set forth the disparate impact approach, *Griggs v. Duke Power Co.*,[53] the Court said that the defendant must show that a challenged practice has "a demonstrable relationship to successful performance of the jobs for which it [is] used."[54] This rather vague formulation leaves unresolved a number of important questions regarding the business necessity justification: the kind of purposes that suffice as justification, the kind of proof necessary to establish a relationship between the purpose and the challenged practice, the requisite strength of that connection, the importance of the employer's asserted purpose, and the relationship between the concepts of business necessity and job relatedness.[55] None of these issues has been definitively resolved by the Supreme Court. On the question of the degree to which a showing of *necessity* is required, for example, the Supreme Court's language has ranged from the assertion that a challenged practice "must be shown to be necessary to safe and efficient job performance"[56] to the much weaker requirement of a "manifest relationship to the employment in question,"[57] satisfied by defendant's showing that "goals [of safety and efficiency] are significantly served by—even if they do not require—[the defendant's] rule."[58] In the 1991 Civil Rights Act, Congress relied on pre–*Wards Cove* Supreme Court decisions to define the concepts of "consistent with business necessity" and "job-related" and thus preserved the ambiguity inherent in those opinions.[59]

Finally, even if the defendant succeeds in establishing business necessity, the plaintiff may prevail by demonstrating the existence of an alternative

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53. 401 U.S. 424 (1971).

54. *Id.* at 431. The *Griggs* Court said as well that "[t]he touchstone is business necessity." *Id.* The relation between the job relatedness and business necessity requirements remains unclear.

55. Julia Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII*, 1985 WIS. L. REV. 1, 34–35.

56. Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977).

57. New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979) (quoting *Griggs*, 401 U.S. at 424).

58. *Id.* (applying *Griggs* requirement of a "manifest relationship" in much less stringent manner); *see also* Pamela L. Perry, *Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination Under Title VII*, 12 INDUS. REL. L.J. 1, 11–28 (1990) (analyzing five post-*Griggs* Supreme Court cases that discuss definition of business necessity).

59. Congress accomplished this definitional task in an indirect manner. The 1991 Act limits the legislative history that may be relied upon in its interpretation: "No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice." Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075. In relevant part, the interpretive memorandum reads: "The terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991). Because it relies on prior Supreme Court opinions that are not wholly consistent with one another, this section of the Act is less than optimally clear. Another open question is whether this congressional pronouncement means to displace lower courts' interpretations of these two concepts.

selection criterion with no, or less severe, disparate effects, if the employer refuses to adopt the alternative practice.[60] It remains to be seen whether "refusing" to adopt an alternative criterion means only a failure to use it, or requires knowledge of its existence as well.[61]

Disparate impact theory has undergone several changes during the past few years. The language in *Griggs v. Duke Power Co.*[62] seemed to make it clear that discriminatory intent was not a necessary component of a Title VII disparate impact case.[63] However, the Court gradually moved toward the view that disparate impact was to be seen as nothing more than an indirect method of proving discriminatory intent. The Court began this drift in *Albemarle Paper Co. v. Moody*,[64] the first disparate impact case to reach the Court after *Griggs*. In *Albemarle*, the Court borrowed from the structure of disparate treatment analysis to establish a parallel framework for disparate impact cases. That is, under both theories there was to be a tripartite order of proof: The plaintiff would make out a prima facie case; the defendant would have an opportunity to provide a neutral explanation or justification; and the plaintiff would then attempt to discredit the neutral explanation or justification.[65] This structural symmetry laid the foundation for deeper theoretical convergence.

In discussing the third stage of analysis—the plaintiff's opportunity for rebuttal—the Court in *Albemarle* employed language that strongly suggested an intent-based interpretation of disparate impact liability:

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

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60. Until 1991, a plaintiff's introduction of an alternative selection criterion with a less discriminatory impact was seen as a way of rebutting the defendant's claim of business necessity. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), quoted *infra* at text accompanying note 66. However, the 1991 Act might be read to permit a plaintiff to circumvent the business necessity issue by introducing an alternative employment practice, and even to permit the plaintiff to proceed by bringing forward a less discriminatory alternative without first showing the existence of a disparate impact at all. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (Supp. V 1993), reproduced *supra* note 41. These readings of the Act will be explored further *infra* at text accompanying notes 172–74.

61. SULLIVAN ET AL., *supra* note 35, § 4.3.3 n.11 (2d ed. 1988 & Supp. 1992). In *Wards Cove*, the Court implied that the employer could escape liability by adopting a less discriminatory alternative *after* plaintiff established its existence at trial, assuming that plaintiff could show that the alternative would be equally effective as existing practices. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660–61 (1989). However, the 1991 Civil Rights Act restored the doctrine on alternatives to its pre-*Wards Cove* condition *See* 42 U.S.C. § 2000e-2(k)(1)(C), reproduced *supra* note 41.

62. 401 U.S. 424 (1971).

63. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. Martha Chamallas has traced pre-*Griggs* lower court treatment of the disparate impact approach. *See* Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 334–42 (1983).

64. 422 U.S. 405.

65. Belton, *supra* note 22, at 1235–36.

> and trustworthy workmanship." Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination.[66]

Similar "pretext" language appears in two of the other three leading Supreme Court disparate impact decisions.[67] The implication, of course, is that the plaintiff's ultimate objective in a disparate impact claim is to demonstrate that the defendant intentionally employed a facially neutral criterion of decision *because of* its discriminatory effects.[68]

This implication was strengthened by another post-*Griggs* change in the Court's position. For several years after *Griggs*, the Court seemed to adhere to the view that the defendant bears the burden of persuasion on the question of business necessity. However, in *Watson v. Fort Worth Bank & Trust*[69] a plurality of the Justices suggested that the burden of persuasion on this issue ought to rest with the plaintiff,[70] and in *Wards Cove* a majority of the Court took this position.[71] As Justice Stevens explained in dissent, the Court's former view that business necessity is an affirmative defense—with the burden of persuasion falling on the defendant—presupposes an understanding that disparate impact liability is not linked to motive or intent.[72] By implication, then, placing the burden of persuasion on the plaintiff signals rejection of that conception of disparate impact liability and indirectly confirms the view that disparate impact is no more than an indirect means of establishing discriminatory intent.[73] However, in the Civil Rights Act of 1991, Congress reallocated the burden of persuasion to the defendant on the issue of business

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66. 422 U.S. at 425 (citations omitted).

67. Connecticut v. Teal, 457 U.S. 440, 447 (1982) ("[Even if the defendant demonstrates job relatedness], the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination."); New York Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) ("The 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."). In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Court did not use "pretext" language and instead stated that "[i]f the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest in efficient and trustworthy workmanship.'" *Id.* at 329 (citation and internal quotation marks omitted).

68. Similar pretext language appears in Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 998 (1988) (plurality opinion), and commanded a majority in Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660–61 (1989).

69. 487 U.S. at 977.

70. *Id.* at 997.

71. *Wards Cove*, 490 U.S. at 659.

72. *Id.* at 670 (Stevens, J., dissenting).

73. *See* 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, 237–44 (1990); Paulette M. Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555, 558–62 (1985); Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1426–33 (1990); Hannah Arterian Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C. L. REV. 419 (1982); D. Marvin Jones, *No Time for Trumpets: Title VII, Equality, and the Fin de Siècle*, 92 MICH. L. REV. 2311, 2345–65 (1994). For an argument that disparate impact *should* be seen as no more than a method of proving pretext, see Rutherglen, *supra* note 41.

necessity, and in so doing made it clear that the disparate impact theory of liability is *not* tied to the notion of discriminatory intent.[74]

It should be apparent that Yvonne has no disparate impact claim; the essence of her complaint is that she was *treated differently* from other, similarly situated accountants. One might suppose, however, that Keisha would be able to pursue a Title VII claim under the disparate impact theory of liability, contending that she was disadvantaged by the use of a facially neutral criterion of decision that inevitably will have an adverse effect on blacks as a group.[75] This supposition might be correct in theory, but it would not be borne out in practice. Keisha would encounter several technical barriers that would, in practical effect, foreclose her claim.

First, the disparate impact plaintiff must have statistically significant evidence of racial imbalance in the workforce. In addition to the usual problems of choosing appropriate bases for comparison, Keisha's ability to make out a prima facie case would be impeded by the relatively small size of the workforce at her place of employment and the even smaller number of black persons employed there. Inferences based on small samples can be misleading because they may suggest short-term results that will not hold true over a longer period; or, to put it somewhat differently, the effect of a particular employment practice on two individuals may not look the same as the effect of that practice on two hundred persons. Courts, therefore, often are reluctant to accept statistical proof based on small samples.[76] The small sample size problem may be exacerbated by the EEOC's "four-fifths" rule, which states that a selection rate for members of a protected group that is less than eighty percent of the selection rate for the most successful group will be

74. The theory of disparate impact liability is elaborated further *infra* at notes 101–32 and accompanying text.

75. Throughout this hypothetical, I assume for the sake of argument that the criterion in question was applied evenhandedly, as well as being neutral on its face. The argument that the criterion inevitably would have a disparate effect turns on the claim that there are significant cultural differences between black people and white people.

76. For a much more sophisticated discussion of this problem, see DAVID C. BALDUS & JAMES W.L. COLE, STATISTICAL PROOF OF DISCRIMINATION § 9.1 (1980). Baldus and Cole suggest that statistical significance techniques can mitigate the difficulties associated with small sample size, at least in some instances, but also note that courts often are "preoccupied" with the small sample problem. *Id.* at 300 n.21. *see also* RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES 4-36 & n.114 (1994) (citations omitted). Examples of this phenomenon include Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 621 (1974) (stating that the trial court's concern regarding the "smallness of the sample presented by the 13-member Panel was . . . well founded"); Waisome v. Port Auth., 948 F.2d 1370, 1376–77 (2d Cir. 1991); Bryant v. Wainwright, 686 F.2d 1373, 1377 (11th Cir. 1982); Eubanks v. Pickens-Bond Constr. Co., 635 F.2d 1341, 1347–48 (8th Cir. 1980).

deemed evidence of an adverse impact.[77] Such a rule, of course, is highly unreliable as applied to small samples.[78]

Keisha might have been employed at a company large enough to provide a basis for the requisite statistical comparisons and so might evade the problem of small sample size. But even under these circumstances, she might confront a second hurdle, a variant of the "bottom line problem," if the company employed an adequate number of "Yvonnes" to counter her claim that blacks were underrepresented in the relevant employee pool. While this issue ought to be considered resolved by the Court's reasoning in *Connecticut v. Teal*,[79] Keisha's case requires application to a new context. *Teal* asked whether an employer could justify its use of a criterion that adversely impacted a racial group by pointing to the absence of disparate effects at the "bottom line"; the defendant argued that use of a criterion that overselected blacks at a later stage of a decisionmaking process should defeat a challenge to the use of a criterion that underselected blacks at an earlier stage, if the bottom-line results showed no racial disparity.[80] The Court rejected this line of argument, elevating the procedural rights of the individual over the group interest in ultimate outcomes.[81] By analogy, Keisha's individual right not to be disadvantaged by an unjustified criterion of decision that negatively affects black persons like her should not be undercut by the fact that the same criterion would not have a similar impact on people like Yvonne.

A third hurdle Keisha would have to surmount is some courts' indecision over the question whether the plaintiff must prove the existence of a disparate impact in the employer's workforce. In *EEOC v. Greyhound Lines, Inc.*,[82] the Third Circuit held that workforce statistics are a necessary element of a disparate impact claim.[83] However, in *Dothard v. Rawlinson* the Supreme

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77. The EEOC guidelines state:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

Equal Employment Opportunity Comm'n, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. pt. 1607.4(D) (1994).

78. *See* PAETZOLD & WILLBORN, *supra* note 76, at 5-10 to 5-11. These authors note that the problem of small sample size may be ameliorated by statistical significance techniques. *Id.* at 4-36 & n.115; *see also* 29 C.F.R. pt. 1607.4(D) ("Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and *are not statistically significant* . . . ." (emphasis added)).

79. 457 U.S. 440 (1982).

80. *Id.* at 442.

81. *Id.* at 453–54; *see also* Chamallas, *supra* note 63, at 383.

82. 635 F.2d 188 (3d Cir. 1980).

83. *Id.* at 192 ("[N]o violation of Title VII can be grounded on the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer's workforce."). *Greyhound Lines* involved a black male with the skin condition pseudofolliculitis barbae (PFB), which predominantly affects black men and is severe enough to prevent shaving in approximately half of the group affected. The plaintiff argued that Greyhound's policy of prohibiting beards for employees in public contact positions had a negative impact on black males. The Third Circuit concluded that the plaintiff had not demonstrated an actual disparate effect at the Philadelphia terminal where he was

Court appeared to accept proof of a disparate effect in the form of national statistics on the average height and weight of men and women;[84] the Court did not require a showing that the employer's height and weight requirements had a negative impact on the representation of women in the employer's workforce.[85] I believe the Court's view in *Dothard* is the correct one even under existing disparate impact analysis, with respect to immutable characteristics that one can expect to be evenly distributed in the general population.[86] However, in the case of characteristics that are perceived to be mutable and that are not evenly distributed, one has to acknowledge that there is some force to the argument that abandoning the workplace requirement could unfairly impose liability on an employer whose practices had not in fact created a racially imbalanced workforce.[87] Thus the workforce requirement cannot be dismissed lightly.

Once the plaintiff establishes the existence of a racially disproportionate distribution, she must prove causation; that is, she must identify a specific employment practice (or inseparable group of practices) responsible for the identified disparity and demonstrate a causal connection between the two.[88] Here, the subjective nature of the decision makes it unlikely that the transparency plaintiff will be able to identify the precise reasons for the adverse decision in her case, or to document the criteria employed in other cases in which candidates for promotion were successful.[89] Moreover, because

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employed. *Id.* at 191. The Eighth Circuit recently took the contrary view in another PFB case. Bradley v Pizzaco of Neb., Inc., 926 F.2d 714, 716 (8th Cir. 1991) ("General population statistics are highly significant where there is no reason to believe the disqualifying characteristic potential job applicants possess differs markedly from the national population.").

84. 433 U.S. 321 (1977).

85. *Id.* at 330–31; *see also* Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 701 (8th Cir. 1987) ("[B]ecause of the significantly higher fertility rate among black females, the rule banning single pregnancies would impact black women more harshly." (quoting Chambers v. Omaha Girls Club, Inc., 629 F. Supp. 925, 949 (D. Neb. 1986))).

These workforce cases also may implicate the "bottom line problem" discussed above. For example, in the *Greyhound* case the court concluded that because the percentage of black males employed at the Philadelphia terminal "exceeded substantially the comparable percentage of black males in the labor force and in the general population," an actual impact had not been shown. *Greyhound Lines*, 635 F.2d at 191. This approach ignores the rate at which black males with PFB were disqualified.

86. I have in mind here the height and weight requirements at issue in *Dothard*. Since women generally are shorter and weigh less than men, and since there is no reason to believe that these characteristics are linked to other, performance-related criteria, the Court was justified in not requiring the plaintiffs in that case to demonstrate an actual impact in the employer's workforce.

87. The example would be grooming standards. Suppose that an employer prohibited the wearing of "cornrows," and suppose that it could be established that such a requirement would have a negative impact on the class of black women generally. It would not follow that the employer's prohibition actually had a negative impact in *his* workplace, and so imposing liability for what merely *might* happen could be said to be unjust.

For an analysis critical of the distinction between mutable and immutable characteristics, see Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

88. This aspect of *Wards Cove* was left virtually unchanged by the 1991 Act; the relevant text is reproduced *supra* note 51.

89. *Cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 (1975) (discussing difficulty in identifying criteria actually used by supervisors in ranking employees subjectively).

of the inherent indeterminacy of subjective criteria, even if the plaintiff can *name* the criteria actually employed, she will have an extremely difficult time showing that those criteria *caused* the disparate impact in question.

A second aspect of the causation issue is the problem of choice.[90] Courts have frequently taken the view that a particular employment practice cannot be said to have a racially disproportionate effect if the disadvantaged employees could have chosen to conform their conduct to the employer's requirements.[91] The clearest instances of this reasoning can be found in the grooming and language cases. In *Rogers v. American Airlines*,[92] a black woman plaintiff whose hair was styled in "cornrows" challenged a prohibition against wearing braided hair on the job. The court refused to credit the policy's disproportionately negative impact on black women employees, and also expressed the view that the employer should not be held liable for the allegedly discriminatory decision because it resulted from the employee's own grooming choice.[93] For similar reasons, most cases considering English-only workplace rules have come down in favor of the employer.[94] Keisha's case might fall prey to the same rationale, as one can argue that the existence of women like Yvonne illuminates the contingent nature of the personal choices Keisha has made.[95]

None of these barriers is absolute; for each, it can be argued that a plaintiff like Keisha should be able to set forth a prima facie case under existing

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90. Martha Chamallas suggests that the problem of choice can be seen as an expression of a motivational perspective. *See* Chamallas, *supra* note 12, at 2372–75. Another aspect of choice is implicated in the "lack of interest" cases. *See* EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); *see also* Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

91. *See, e.g.*, Fagan v. National Cash Register Co., 481 F.2d 1115, 1125 (D.C. Cir. 1973); *see also* Peter B. Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 771 (1987) (noting that courts have held that "Title VII simply does not prohibit discrimination linked to mutable characteristics").

92. 527 F. Supp. 229 (S.D.N.Y. 1981).

93. *Id.* at 232. The court also argued that the prohibition did not create a hostile work environment, and characterized the plaintiff's interest in avoiding the discomfort of wearing a hairpiece during working hours as not "substantial." *Id.* at 233.

For an illuminating discussion of the significance of appearance standards and judicial analyses of them, see Katharine T. Bartlett, *Only Girls Wear Barettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994). An example of the prevailing analysis can be found in Craft v. Metromedia, Inc., 572 F. Supp. 868 (W.D. Mo. 1983), *modified*, 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986) (involving female television anchor demoted because of appearance).

94. *See* Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994); Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). *But see* Gutierrez v. Municipal Court, 838 F.2d 1031, 1039–40, 1045 (9th Cir. 1988) (affirming preliminary injunction against English-only rule in court offices), *vacated as moot*, 490 U.S. 1016 (1989).

95. Of course, to treat culture as a mutable characteristic is to beg the question of assimilation.

disparate impact analysis.[96] Nevertheless, the cumulative effect of these obstacles is significant. With respect to each of them except the documentation problem, courts *may* rule that Keisha cannot prevail regardless of the strength of the evidence she can produce. Since the plaintiff bears the burden of persuasion on each of these points, the likelihood that she will be able to establish a prima facie case diminishes exponentially with each addition to the list of problematic points of law.

It is important to recognize that these technical difficulties are not random or accidental; they are linked to the nature of Keisha's claim. Transparently white decisionmaking consists of the unconscious use of criteria of decision that are more strongly associated with whites than with nonwhites. This phenomenon is most likely to occur in settings where nonwhites are tokens; that is, where they represent a very small percentage of the workforce.[97] In a more diversified environment, it is much more likely that criteria of decision are conscious and perhaps contested.[98] The small sample size and workforce problems are likely to occur in those same settings in which transparently white decisionmaking is most likely to take place—i.e., workplaces with very few nonwhites.[99] In addition, the transparency phenomenon under consideration here involves subjective criteria of decision, which always raise the problems of documentation and choice. Thus, while these problems occur in a broader category of cases than those implicating transparency, they are inevitably present in any transparency case with which this Article is concerned.

Because the imposition of transparently white norms amounts to a requirement that nonwhite employees assimilate to whites' cultural expectations, another way to frame the fundamental issue raised by Keisha's case is to ask whether there ought to be a Title VII remedy for an employer's failure to create a culturally pluralistic workplace.[100] Attention to the

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96. For example, one could argue that proof of disparate impact in the employer's workforce is not a necessary element of plaintiff's claim. Such an argument would be based on *Dothard*, *see supra* note 84 and accompanying text, and on the language of § 703(a)(2) (employment practices proscribed if they "deprive or tend to deprive" individuals of equal opportunities), 42 U.S.C. § 2000e-2(a)(2) (1988), quoted *supra* note 14.

97. The term "token" describes the percentage of nonwhites in a particular workplace, not the employer's state of mind. *See* KANTER, *supra* note 38, at 206–12.

98. This argument assumes a racially diverse workplace that is not racially stratified. Pluralist norms are no more likely to appear in a stratified workplace than in one that is all-white or nearly all-white.

99. The "bottom line problem," however, seems to be independent of the number of nonwhites present in a given workplace.

100. "Cultural pluralism" refers to the value of permitting, and perhaps encouraging, racial and ethnic groups to retain significant portions of their group culture and identity, and of doing the same with respect to individuals for whom such aspects of identity are important. "Assimilationism" disfavors the retention of distinct racial or ethnic identities. *See* Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993, 994–96 (1991); Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525, 528–33 (1990); Kevin M. Fong, Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133, 136–37 (1978); *see also* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 156–91 (1990); John O. Calmore, *Critical Race Theory, Archie*

transparency phenomenon and the circumstances in which it is most likely to occur should guide formulation of an alternative conceptual framework in which Keisha would have a reasonable chance to succeed in a Title VII claim. Of course, there is an antecedent question to be considered—whether in principle Title VII can be read to provide an avenue of relief for those affected by the kind of discrimination Keisha encountered. It is worthwhile to attempt the task of formulating an order of proof that would accommodate her claim only if the statutory foundation is sound.

III. TITLE VII AND TRANSPARENTLY WHITE DECISIONMAKING

Title VII prohibits "discrimination," but the statute leaves obscure the precise meaning of that term. Its possible meanings are most easily explored via a corollary—the concept of equality.[101] I argue in this Part that Title VII, as amended by the Civil Rights Act of 1991, is no longer susceptible to what might be characterized as extreme "right-wing" and "left-wing" interpretations that rest respectively on symmetry-based and distributive conceptions of equality. By placing the disparate impact approach on a statutory foundation distinct from disparate treatment analysis, the 1991 Act implicitly ratified an equality principle that is more expansive than the notion of symmetrical treatment. At the same time, another provision added by the 1991 Act, which prohibits the use of race-normed employment tests, underscores Congress' long-standing rejection of a purely distributive conception of equality.[102] This stance can be traced back to § 703(j) of the 1964 Act, which insulated employers from liability for failure to maintain a racially balanced workplace.[103] Thus, the theoretical underpinnings of disparate impact liability

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Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World, 65 S. CAL. L. REV. 2129, 2130–32 (1992); Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371 (1992); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043, 1062–70 (1988); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 291–99.

I assume, for the sake of discussion, that cultural pluralism can be pursued in an integrated society; I take no position on the virtues of cultural separatism. For a thoughtful comment on the question of separatism, see Gary Peller, *Notes Toward a Postmodern Nationalism*, 1992 U. ILL. L. REV. 1095.

101. That is, I understand "discrimination" as the failure to act in a manner consistent with workplace equality; the various senses of "discrimination" therefore correspond to the various senses of "equality" described in this Article.

102. Section 106 provides:

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 106, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(l) (Supp. V 1993)).

103. Section 703(j) of the 1964 Act reads:

> Nothing contained in this subchapter shall be construed to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex,

must be found in the area between these two extremes—a region frequently described as implicating an "equal opportunity" notion of equality.[104]

However, the concept of equal employment opportunity is itself subject to two interpretations, one pluralist and the other assimilationist. While the statute does not directly indicate which of these is the intended conception of equal opportunity, the general objectives of race neutrality and remedial redistribution that permeate the statutory scheme do provide indirect guidance. I argue that a pluralist understanding of equal opportunity more fully implements the underlying policies of Title VII than does the alternative, an assimilationist interpretation of equal opportunity. Finally, I locate these interpretive arguments on a general map of theories of statutory interpretation.

As noted earlier, the disparate impact approach to Title VII liability was created through judicial interpretation in *Griggs v. Duke Power Co.*[105] The Court laid the theoretical foundation for this new approach as follows: "The objective of Congress in the enactment of Title VII . . . 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."[106] The Court later captured this general notion of equal opportunity in the image of "'built-in headwinds' for minority groups."[107] Later doctrinal shifts that blurred the line between disparate impact analysis and proof of discriminatory intent may be understood as an attempt to rescind *Griggs*' opportunity-oriented theory in favor of a symmetry-based conception of equality. According to the latter, discrimination occurs if, and only if, some employees are treated *differently* from others because of race.[108] Under this view, disparate impact analysis would be seen as an evidentiary mechanism

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or national origin of the individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1988). This provision was modified in very minor respects in 1972.

104. For explorations of conceptions of equality in general, see Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971); Frank Michelman, *The Meanings of Legal Equality*, HARV. BLACKLETTER J., Spring 1986, at 24. Discussion aimed more directly at Title VII can be found in Robert Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C. L. REV. 531, 539–41 (1981); Chamallas, *supra* note 63, at 316–17; Paul N. Cox, *The Future of the Disparate Impact Theory of Employment Discrimination After* Watson v. Fort Worth Bank, 1988 B.Y.U. L. REV. 753, 754–65; Jones, *supra* note 73, at 2321–34; D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 VAND. L. REV. 349 (1992).

105. 401 U.S. 424 (1971).

106. *Id.* at 429–30.

107. *Id.* at 432 ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

108. More precisely, the Court increasingly seemed to regard disparate impact as an indirect means of proving discriminatory intent. *See supra* notes 62–73 and accompanying text. Intentional differential treatment is at the core of the symmetry-based notion of disparate treatment discrimination.

designed to ferret out covert disparate treatment, including the pretextual use of facially neutral proxies for race. However, the purely symmetry-based interpretation of Title VII has been rendered implausible[109] by Congress' clear endorsement of disparate impact as a distinct theory of liability, its finding that the *Wards Cove* decision "weakened the scope and effectiveness of Federal civil rights protections,"[110] and its concomitant rejection of the *Wards Cove* dicta regarding the business necessity defense.[111]

At the opposite extreme, it is evident that Congress never has endorsed a purely distributive conception of equality in the workplace.[112] The original version of Title VII contained a provision protecting employers from liability for failure to achieve racial balance in the workplace, and to date it has not been modified in any significant way.[113] The existence of this provision may account for what has been described as the Court's compromise in *Griggs*: The plaintiff may make out a prima facie case of discrimination by demonstrating a racial imbalance, but the employer may show that the imbalance is justified by proving that the criterion responsible for the disparate effect is related to job performance.[114] On a purely distributive conception of equality, of course, no such justification would be permitted. Moreover, the 1991 Act's prohibition against race-norming standardized tests strengthens the conclusion that undiluted distributive equality is not the objective at which the statute aims.[115]

The foundation of the disparate impact approach, then, is neither the concept of symmetrical treatment nor a theory of distributive justice; it can be found instead in the notion of equal access.[116] An employment practice that has an adverse impact on members of minority groups and that is unrelated to job requirements or business necessity creates an unnecessary barrier for

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109. This assumes that the symmetry-based interpretation was plausible at one time. My own view is that it was, in the abstract, a defensible position, but it never was plausible to suggest that *Griggs* did not rest on an equal-opportunity conception, as did Justice O'Connor in her plurality opinion in Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997–98 (1988) (plurality opinion).

110. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1071, 1071, reproduced *supra* note 43.

111. *See supra* notes 42–47 and accompanying text.

112. *See* Chamallas, *supra* note 63, at 333.

113. *See* 42 U.S.C. § 2000e-2(j) (1988), reproduced *supra* note 103.

114. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). This formulation leaves unclear the relationship between business necessity and job relatedness.

115. Race norming would promote distributive equality by ensuring that a standardized test would not have a disparate impact on the basis of race.

116. *See generally* Joel Wm. Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 TEX. L. REV. 41 (1986) (identifying two "traditional" principles of equality, process symmetry and outcome proportionality, and then arguing for third principle called "access" principle). I understand Friedman's "access principle" as a rough equivalent to the equal-opportunity conception set forth here. I disagree, however, with Friedman's assessment that recognition of this principle was unusual in 1986.

members of those groups.[117] This equal-*opportunity* conception of equality differs from the equality-as-symmetry approach in that it recognizes that same treatment may not always remove race-specific barriers to achievement, and it diverges from the distributive conception of equality by ratifying disparate outcomes if they are the result of a process necessary to the maintenance of business operations.[118] Like the other two equality principles, however, the notion of equal opportunity is consistent with Title VII's proscription of employment practices that adversely affect individuals "because of" race.

The proposition that an opportunity-oriented principle of equality best explains the disparate impact theory of liability does not resolve the question whether Title VII ought to be read to provide a remedy for an employer's failure to take cultural diversity into account in making employment decisions. Equal opportunity might be understood as no more than the right of a nonwhite employee to play on an existing field, so that Keisha would have no cognizable complaint as long as she had the opportunity to conform to prevailing norms at her workplace.[119] On the other hand, one might interpret equal opportunity as requiring alteration of the playing field itself in order to accommodate equally able players with diverse playing styles. On this interpretation, Keisha could argue that her employer should attempt to modify the workplace environment to conform to some degree to her cultural style, rather than placing the onus of adaptation on Keisha.[120]

Of course, Congress has not explicitly stated which of these conceptions of equal employment opportunity is the correct interpretation of Title VII. However, consideration of two commonly recognized objectives of Title VII supports the conclusion that the pluralist interpretation is superior to the assimilationist approach. First, adopting the assimilationist interpretation—that equality means only an equal opportunity to compete on a preexisting field—fails to capture Title VII's general goal of eliminating race as a factor in employment. Second, the pluralist conception of equal opportunity, which would require that the field be altered in order to accommodate cultural differences, is more fully aligned with the remedial goals of Title VII than is the assimilationist interpretation.

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117. *See* Connecticut v. Teal, 457 U.S. 440, 448 (1982).

118. The opportunity-based conception of equality is similar to the distributive conception in two additional respects: Both focus on the group rather than the individual, and are more likely than the equality-as-symmetry approach to countenance race-conscious remedies.

119. This stance implicates the problem of immutable characteristics; conformity is expected only if it is perceived to be within the individual's control. *See supra* notes 90–95 and accompanying text.

120. For statutes with a more obviously accommodationist approach, consider the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6, and the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327. Within the confines of Title VII, cases involving discrimination on the basis of religion reflect accommodationist values. *See, e.g.*, Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); Equal Employment Opportunity Comm'n, Guidelines on Discrimination Because of Religion, 29 C.F.R. pt. 1605 (1994).

Under the assimilationist conception of equal employment opportunity, Keisha would be required to conform to the prevailing cultural norms in her dominantly white workplace at least to the extent that those norms implicate characteristics within her control. For example, grooming is generally thought to be a matter of personal choice, and to the extent that it is, each employee has an equal opportunity to conform to an employer's grooming code, regardless of race.[121] The decisionmakers in Keisha's case could argue that she had been afforded an equal opportunity to conform to analogous, but more subtle, cultural norms.[122]

This assimilationist position rests on a false dichotomy between race and individual choice. For Keisha, the two are inextricably intertwined because the aspects of personal identity implicated in the decision not to promote her are race-dependent.[123] Thus the "choice" with which she is faced is in effect a choice to retain her racial identity as she understands it, or to renounce it. She would describe herself as having to shed or disavow crucial facets of blackness, if she wants to get ahead in her place of employment.[124]

One might well argue in response, as could Keisha's supervisors, that even if Keisha *experiences* her personal qualities as linked with her race, in reality she has not been denied employment opportunity on the basis of race because she had the same chance as any white candidate to conform or be denied advancement. One cannot measure the subjective discomfort entailed by such a choice, the argument would go, and in any event subjective experience should not be relevant. Individuals must make all sorts of choices in life, including the choice whether to "fit in" to a particular environment. So long as the same demands are placed on all employees regardless of race, the argument continues, one should not say that race is a factor in a decision adversely affecting the individual who chooses not to conform.[125]

The foregoing argument is problematic because it reiterates the transparency error. Because it underestimates the centrality of race to personal identity for people who are not white, it incorrectly assumes that the identity costs of conformity to the norms of a white cultural setting for a black person are commensurate with the identity costs incurred by a white person required to conform in the same setting.

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121. *See, e.g.*, Rogers v. American Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding employer's prohibition of braided hairstyles). For a more doctrinally focused discussion of this question, see *supra* notes 90–95 and accompanying text.

122. Of course, this conception of equal opportunity would accommodate disparate impact claims challenging criteria of decision that incorporate personal characteristics not within the individual's control. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (identifying disparate impact of minimum height and weight requirements as sex discrimination).

123. *See* Caldwell, *supra* note 9, at 383–85.

124. I reiterate that Yvonne also understands herself as black, though she has a cultural style different from Keisha's.

125. Even among its proponents, this argument applies only where the employer's demands do not unnecessarily require conformity with respect to matters beyond the individual's control.

Racial identity is not a central life experience for most white people, because it does not have to be.[126] Like members of any socially dominant group, white people have the option to set aside consciousness of the characteristic that defines the dominant class—in this case, race. Thus whiteness is experienced as racelessness, and personal identity is conceived in a race-neutral manner. However, race plays quite a different role in the lives of people of color in this society. It is, again as a consequence of existing social structures that define and give meaning to racial identity, a central facet of life. One black feminist, bell hooks, describes her experience of race:

> I often begin courses which focus on African-American literature, and sometimes specifically black women writers, with a declaration by Paulo Freire which had a profound liberatory effect on my thinking: "We cannot enter the struggle as objects in order to later become subjects." This statement compels reflection on how the dominated, the oppressed, the exploited make ourselves subject. How do we create an oppositional worldview, a consciousness, an identity, a standpoint that exists not only as that struggle which also opposes dehumanization but as that movement which enables creative, expansive self-actualization? Opposition is not enough. In that vacant space after one has resisted there is still the necessity to become—to make oneself anew. Resistance is that struggle we can most easily grasp. Even the most subjected person has moments of rage and resentment so intense that they respond, they act against. There is an inner uprising that leads to rebellion, however short-lived. It may be only momentary but it takes place. That space within oneself where resistance is possible remains. It is different then to talk about becoming subjects. That process emerges as one comes to understand how structures of domination work in one's own life, as one develops critical thinking and critical consciousness, as one invents new, alternative habits of being, and resists from that marginal space of difference inwardly defined.[127]

Thus, Keisha's employer is simply wrong in thinking that its conformity requirement is race-neutral; the standard places quite a different burden on nonwhites than it does on white employees. Moreover, this difference is not subjective, but structural. The social significance of race—the existence of a racial hierarchy—guarantees that race will intrude on the self-consciousness of nonwhites to an extent that most whites never will experience.[128] Thus the

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126. Clearly, there are some exceptions to this generalization, the most notorious of which are white supremacists. I regard them as outsiders to the mainstream of white experience.

127. BELL HOOKS, *The Politics of Radical Black Subjectivity*, *in* YEARNING: RACE, GENDER, AND CULTURAL POLITICS 15, 15 (1990). Keisha's Afrocentric personal style may be seen as a move toward becoming "subject" in bell hooks' sense.

128. I emphasize that I'm generalizing, but I do not claim that *all* whites fit the description in the text, nor do I claim that all black people regard race as central to self-identity in the ways Keisha and Yvonne do. On the dangers, and necessity, of essentialism, see ELIZABETH V. SPELMAN, INESSENTIAL WOMAN:

hypothetical white candidate for promotion is unlikely to experience as race-dependent the personal attributes called into question by her employer's workplace conformity rule. Even if she does experience these attributes as associated with race, they are not likely to be *for that reason* central to her self-definition. For Keisha, on the other hand, conformity is excruciatingly difficult precisely *because* it calls her *racial* identity into question.

Once one sees that race is inevitably implicated in matters of "personal choice," it becomes apparent that the assimilationist interpretation does not truly reflect a conception of race-neutral employment opportunity. Under the assimilationist interpretation, the mandate of equality is satisfied in Keisha's case because she could, in theory, conform to the employer's expectations, even though doing so necessarily would levy costs on her that are inseparably linked to her race. The pluralist conception of equal opportunity embodies a more thoroughgoing notion of race neutrality. This interpretation of equality would not hold the requirements of equal opportunity to be satisfied unless the employer at least explored ways of accommodating diverse, race-dependent means of achieving legitimate business objectives. Thus only the pluralist interpretation of equal opportunity can capture fully the vision of a workplace in which race does not matter—in Title VII's language, a workplace in which the individual is not disadvantaged "because of" race.

Of course, Title VII's vision of race neutrality is closely tied to the redistributive objective of improving the relative economic position of blacks and other racial minorities.[129] However, redistribution is not an end in itself; it is desirable because of a history of intentional discrimination and societal deprivation.[130] Thus, to the extent that Title VII aims at redistribution at all, it does so because of a remedial objective. Here too, the pluralist interpretation of equal opportunity emerges as a clearer expression of the Act's generic goals than does the assimilationist approach.

One consequence of two centuries of discrimination and disadvantage is that whites hold a disproportionate share of business ownership and decisionmaking power within corporate structures.[131] The assimilationist conception of equal employment opportunity does not address this persistent

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PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988).

129. Belton, *supra* note 104, at 541; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113 (1971).

130. *See* Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 557–58 (1977) (identifying government's remedial obligations arising from historical injustices). Redistribution as an end in itself would conflict with capitalist values. *See* Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1031–35 (1989) (discussing tension between affirmative action's methods and "anti-redistributionist" ideology that is prevalent in United States).

131. As of 1991, 13% of white households but only 4% of black households held a financial interest in a business or profession; the median value of such assets was $10,352 for whites and $3444 for blacks. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at 482 (1994). With regard to decisionmaking power, see *infra* note 189.

inequality, because it deems "equal" the opportunity to compete on this existing, though white-dominated, field. The pluralist interpretation of equality is a much more effective remedial tool because it requires an employer to restructure the workplace in ways that mitigate the effects of preexisting white dominance.

In sum, the two objectives of Title VII that often are perceived to conflict in the area of race-conscious "affirmative action"[132] converge with regard to the concept of equal employment opportunity. Both race neutrality and remedial redistribution are more completely realized by interpreting equal employment opportunity in the pluralist, rather than assimilationist, sense. It seems fair, then, to conclude that fashioning a framework for assessing liability that would effectively accommodate Keisha's claim is consistent with Title VII as written.

It might be objected that this analysis rests on contested assumptions regarding appropriate principles of statutory construction. One might argue that asking the judiciary to implement the proposal set forth in this Article is tantamount to asking the courts to repeat a crucial error embodied in *Griggs* itself—the error of judicial policymaking.[133] Of course, at the other extreme, proponents of a liberal approach to statutory construction advocate judicial interpretations that effectuate what they conceive to be the larger purposes of a particular enactment, and so have hailed *Griggs* as an exemplar of statutory construction.[134] Nevertheless, the conservative critique has some bite, especially as applied to judicial implementation of a relatively new conception of equality.[135]

Putting to one side the fine points of statutory construction, there is a significant difference between the present situation and that obtaining at the time of *Griggs*: Title VII, as amended in 1991, now clearly authorizes the disparate impact theory of liability. The statute's history and structure also

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132. Belton, *supra* note 104, at 539–41, 560–68.

133. The essentials of the classic debate regarding the creation of the disparate impact doctrine in *Griggs* appear in Michael Evan Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985); Katherine J. Thomson, *The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold*, 8 INDUS. REL. L.J. 105 (1986); Michael Evan Gold, *Reply to Thomson*, 8 INDUS. REL. L.J. 117 (1986); and Alfred W. Blumrosen, Griggs *Was Correctly Decided—A Response to Gold*, 8 INDUS. REL. L.J. 443 (1986). Other perspectives on the issue can be found in Caldwell, *supra* note 73, at 579–83 (justifying disparate impact as means of promoting productive efficiency); Earl M. Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 NEB. L. REV. 345 (1980) (criticizing extension of Title VII principles to other areas, such as Vocational Rehabilitation Act); and Rutherglen, *supra* note 41, at 1299–311 (arguing that disparate impact is best understood as means of proving pretext).

134. *See, e.g.*, Blumrosen, *supra* note 30, at 73 (arguing that "Title VII was intended as a serious response to a major social problem" and therefore that "liberal" interpretation aimed at making Title VII an effective response to that problem is in order).

135. *See* Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 7–9 (1988) (describing centrality of legislative supremacy principle).

make it clear that disparate impact liability cannot be premised on either a purely symmetrical or a purely distributive conception of equality; the sole plausible candidate to fill the gap is a notion of equal opportunity. Thus, the current statute is unclear on only one point relevant to the present question—whether equal opportunity should be understood in a pluralist or an assimilationist sense.

Moreover, Title VII addresses an area in which the legislature seems to have invited a degree of judicial "activism." Though disapproving *Wards Cove*, the 1991 Act relies on other judicial interpretations of Title VII,[136] suggesting that on balance the legislature remains content to allow the judiciary to fill in gaps in the legislative scheme.[137] The proposed interpretation of the Act—that Title VII should be read to incorporate a pluralist notion of equal opportunity—would constitute just such an interstitial enterprise, if undertaken by a court. Moreover, this interstitial interpretation does not rest on open-ended considerations of sound public policy, but on the generic policies underlying the Act itself. The proposed pluralist interpretation of equal employment opportunity, then, ought to be seen as an exercise in mainstream statutory interpretation.[138]

IV. NEW MODELS OF LIABILITY

This Part explores two models of liability that might be used to implement Title VII's proscription of employment decisions taken "because of" race. Each approach implements the statute's goals more effectively than the existing disparate impact model, as applied to transparently white subjective decisionmaking. The foreseeable impact model parallels the structure of current disparate impact analysis, but substitutes proof of foreseeable effects for the current requirement that the plaintiff establish the existence of an actual disparate effect.[139] The second model, labeled the alternatives approach, takes the structural context of employer decisionmaking as its point of departure.

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136. *See supra* notes 41, 59.

137. Given the alarm sounded by the congressional findings that serve as a preamble to the 1991 Act, one might have expected the legislature to codify all the employment discrimination principles it considered important. *See supra* note 43.

138. The interpretive strategy employed here most closely resembles that proposed by Hart and Sacks. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–80 (William N. Eskridge & Philip P. Frickey eds., 1994). The reader may see some irony in my reliance on Hart and Sacks, as I have recently criticized the process approach as applied to constitutional race discrimination law. *See* Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935 (1994). My purpose in citing Hart and Sacks is merely to show that my proposed interpretation of Title VII *could* be defended on the basis of a mainstream approach to statutory construction, such as that of Hart and Sacks.

139. Though I use the term "foreseeable," I do not intend any reference to the concept of the reasonable person. Section A of Part IV of this Article sets forth objective conditions that define "foreseeable impact."

After describing these two models, this Part concludes with a comparison of their relative merits and disadvantages.

A. *The Foreseeable Impact Model*

The foreseeable impact model tracks traditional disparate impact analysis, but institutes modifications at appropriate points in the analytic structure in order to accommodate the unique features of Keisha's transparency claim. In particular, this approach adopts a new method of establishing the existence of a disparate effect and emphasizes the problem of assimilationism through its analyses of the employer's business necessity defense and the plaintiff's presentation of less discriminatory alternatives.

The first stage of a disparate impact case is the plaintiff's proof that an identified criterion of decision (or set of criteria, if the components are inseparable[140]) had a statistically significant differential impact on the racial composition of the workforce at her place of employment. As described above, under existing disparate impact analysis Keisha would encounter (at least) five distinct difficulties in setting forth her prima facie case.[141] In combination, these doctrinal hurdles present a formidable obstacle to the success of any transparency claim.[142] Current doctrine's focus on actual effects can render it a very effective tool for addressing many forms of discrimination.[143] However, Keisha's case calls for an emphasis on foreseeable, rather than actual, disproportionate effects. The essence of her claim is that the application of culturally white norms *necessarily* operates to the disadvantage of nonwhites, given the existing social construction of race and concomitant racial hierarchy. One has only to understand the racial structure of American society to be able to conclude that employing criteria of decision formulated against the background of white paradigms will have an inevitable and negative impact on the employment prospects of nonwhites as a group.[144]

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140. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. V 1993), reproduced *supra* note 51.

141. *See supra* notes 76–95 and accompanying text.

142. In these doctrinal areas the existing rules, or tendencies, carry a connotation of individual responsibility that is reminiscent of the "intent" model of liability. That is, one has the sense that the courts want to be shown that a *particular* employer's *particular* criterion of selection is *the* cause of a demonstrated disparate effect. One has to wonder whether Congress' clear endorsement of disparate impact liability as a distinct approach might encourage the courts to move toward a more distribution-oriented concept of discrimination. (This redistributive movement would be limited, of course, by the possibility that uneven outcomes might be justified as a matter of business necessity.) In any case, it is this constellation of requirements centering on actual disparate effects and tight lines of causation that makes existing disparate impact analysis an unsatisfactory approach as applied to Keisha's case.

143. For example, the existence of an actual disparate distribution could be the consequence of factors as diverse as the employer's use of culturally biased, objective criteria, the differential availability of opportunities beyond the employer's control, or difficult-to-prove different treatment without discriminatory intent, stereotyping, or covert hostility.

144. This insight depends on the recognition that race matters to individual identity and experience. For an argument that race is central to the self-identity of nonwhites, see *supra* text accompanying notes 126–27. The transparency thesis argues that race matters as well to whites' self-identity, even though white

The next question, then, is how one might structure proof of foreseeable disparate effects. From the perspective of the transparency phenomenon, the problem in Keisha's case is the application of norms whose content is in some sense white-specific;[145] it follows that conformity to those norms is inherently more problematic for her than for a white person.[146] The difficulty, of course, is to distinguish facially neutral criteria of decision that are in fact white-specific from those that are genuinely race-neutral.[147] I have identified elsewhere the factors that might enable one to make this differentiation.[148] In outline, they are (1) that the criterion be associated with whites to a greater extent than with nonwhites and (2) that it be favorably regarded by whites.[149]

The first requirement, that a facially neutral criterion be associated more closely with whites than with other racial groups if it is to be considered white-specific, is a broad requirement that implicates a wide range of characteristics that might be distributed unevenly across races. It includes criteria that are biological in origin,[150] but extends equally to characteristics that are associated with whites as a consequence of the existing social hierarchy of race, as well as to differences that are more purely cultural in origin.[151] The requirement is easily satisfied; one need only show that the criterion of decision in question is one that occurs more frequently among whites than among other racial groups.

The second requirement, that the criterion at issue be one that is favorably regarded by whites, is directed more toward the transparency thesis than at the notion of white specificity per se.[152] Because transparency analysis targets

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people tend to experience whiteness as racelessness. *See* Flagg, *supra* note 10, at 969–73.

145. The analysis here assumes that the particular criterion employed by an employer can be shown to have white-specific content. My earlier argument that imposing a conformity requirement is race-specific, *see supra* text accompanying notes 121–28, approaches the problem at a greater level of generality. It implies that *all* conformity requirements formulated and applied by whites are white-specific, because of the role race plays in personal identity for whites and nonwhites, respectively. The analysis in this Part should be interpreted to apply to the earlier form of race specificity as well.

146. Throughout, this analysis assumes the current social construction of race. *See* Haney López, *supra* note 9.

147. This requirement applies only if the new rule is similar in structure to the existing disparate impact model. I explore a different approach in Section B of Part IV.

148. Flagg, *supra* note 138, at 969–73.

149. More precisely, the *norm underlying* a judgment must be associated with whites and positively regarded; in some instances the label ascribed to the individual who is being evaluated carries negative import, as when a black woman is labeled "hostile." *See* Flagg, *supra* note 10, at 974–76.

150. For example, blond hair and blue eyes are physical characteristics differentially distributed across races. As Ian Haney López has noted, even these characteristics are socially constructed. *See* Haney López, *supra* note 9, at 10–16 (noting that association of physical characteristics with particular races is in large part socially defined).

151. In an earlier article I described a black woman named C.W., who had been denied supervisory positions at a bank because she was less assertive than supervisors were expected to be. This characteristic might be the result of adaptation to racial hierarchy, or it might be simply a matter of cultural style. *See* Flagg, *supra* note 138, at 971–72.

152. As I use the terms, "white specificity" refers to the statistical association of a particular facially race-neutral characteristic with white people; "transparency" refers to the phenomenon of being unaware

the unconscious use of white-specific criteria to disadvantage nonwhites, it would not make sense to be concerned with characteristics that are associated with white people but viewed negatively.[153] The same consideration applies to the foreseeable impact analysis under development here, because the plaintiff in a foreseeable impact case would of course be required to show a *negative* impact on nonwhites.

Thus the first stage of a foreseeable impact claim would require the plaintiff to demonstrate only that an unfavorable employment decision was based on lack of a characteristic more frequently possessed by whites than by nonwhites; it would follow without further proof that use of that criterion would have a negative impact on the employment prospects of nonwhites as a group.[154] Keisha, then, would only have to show that her employer's conformity requirement implicitly incorporated characteristics more often found in whites than in nonwhites. This approach to disparate impact cases would circumvent most of the difficulties described earlier in this Article. It would avoid all of the problems associated with the current requirement that a disparate impact plaintiff prove actual disparate effects.[155] In addition, it would mitigate the problems of causation and choice. Though the issue of documentation would remain, a plaintiff in Keisha's position would be able to proceed solely on the basis of the criterion offered by her employer to explain the adverse action taken against her; she would not have to make comparisons either with actual decisions or with the criteria applied to other employees. Similarly, the problem of choice would be diminished. A showing that nonwhites as a group are less likely than whites to possess the desired characteristic would tend to divert attention from the individual to the differential distribution itself. That is, the assumption that the plaintiff's personal attributes are a product of individual choice could be supplanted, at least in part, by attention to the societal structures that constrain and condition individual will.[156]

The foreseeable impact framework would retain business necessity as an affirmative defense, and thus would place the burden of persuasion on the employer to show job relatedness and business necessity.[157] Because the

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of whiteness.

153. There may be *no* white-specific negative characteristics. Qualities that occur more frequently in whites may take on positive connotations for that reason alone.

154. Of course, the business necessity defense is still available. *See infra* notes 157–59 and accompanying text.

155. These are the problems of small sample size, bottom-line impact, and workforce statistics. *See supra* notes 76–87 and accompanying text.

156. *See* Haney López, *supra* note 9, at 46–53.

157. *See supra* note 41. The plaintiff would have an opportunity to rebut defendant's claim of business necessity by introducing an alternative practice that would have a less discriminatory impact. However, the 1991 Act may be read to permit a plaintiff to circumvent the business necessity issue by proposing an alternative criterion of decision that would not have an adverse disparate effect. *See infra* notes 172–74 and accompanying text. On this reading, a violation would be established if the foreseeable impact plaintiff set forth an acceptable alternative and the employer refused to adopt it.

focus here is the problem of assimilationism, this defense should be interpreted narrowly to exclude justifications that reproduce assimilation in another form. In Keisha's case, for example, the employer should not be able to prevail on the basis of an argument that a homogeneous workforce is inherently a more productive one. On the other hand, this proposal does not rule out assimilationist defenses altogether. The focus of this Article is the application of Title VII to private employers, and I do not assume that there is a statute-wide obligation to pursue pluralist objectives or to employ pluralist means of attaining permissible goals.[158] However, the boundary between what constitutes permissible assimilationism and what does not is difficult to define in the abstract. A good starting point might be the proposition that an employer may require assimilation only when necessary to preserve the *essence* of the business.[159]

A foreseeable impact analysis would raise issues not implicated by the current actual impact approach. Some of these would be familiar, in the sense that similar questions arise in other legal contexts. For example, the foreseeable impact plaintiff would be required to show that the characteristic, or norm, that is the basis for an adverse decision is white-specific in the sense described above; she would have to introduce admissible evidence of differential distribution on a society-wide basis.[160] That would almost certainly require sociological evidence,[161] which would raise the evidentiary issues generally presented by the introduction of expert testimony.[162]

Some of the issues presented by the foreseeable impact framework, however, would be unique to this analysis. For example, a defendant might challenge the plaintiff's claim of differential distribution on the basis of race by introducing evidence of a differential distribution among subgroups of nonwhites, accompanied by a showing that the characteristic in question occurs in the plaintiff's subgroup with approximately the same frequency it does among whites. In turn, this argument would, or ought to, raise the question whether the subgroupings chosen by the defendant exist because of

158. I have argued elsewhere that the government *does* have a general obligation to pursue pluralism. *See* Flagg, *supra* note 10, at 991–92.

159. That is, the analysis of necessity should conform more to the tone of Dothard v. Rawlinson, 433 U.S. 321, 322 n.14 (1977) (holding that challenged practice "must be shown to be necessary to safe and efficient job performance"), than to New York City Transit Authority v. Beazer, 440 U.S. 568, 587 n.31 (1979) (holding business necessity requirement satisfied by showing that "goals [of safety and efficiency] are significantly served by—even if they do not require—[the defendant's] rule"). *See supra* notes 56–58 and accompanying text.

160. Thus, the foreseeable impact plaintiff has to depend on the existence of relevant sociological studies. This is analogous to Yvonne's dependence on the availability of evidence of different treatment, which can be difficult to obtain. The paper trail present in Ann Hopkins' case, for example, may have been unusual. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 232–35 (1989).

161. Other evidentiary problems may arise. For example, different types of evidence would be needed in cases involving physical characteristics. Moreover, some social questions might be solved with other techniques, such as polling, which raise problems of their own.

162. These include the questions whether the issue requires expert testimony, whether the proposed witness is a qualified expert, and the soundness of the theory upon which the expert witness relies.

assimilationist pressures. When that is the case, the subgrouping approach ought to be disapproved as a means of defending against the plaintiff's proof of society-wide differential distribution because it functions to reinstate assimilationism.[163]

Nevertheless, one might conclude that the issues presented by a foreseeable impact approach, formidable as they appear at first, are in reality no less manageable than the statistical issues that have to be resolved under current actual impact doctrine.[164] Surely the courts' demonstrated ability to negotiate the hypertechnical terrain of statistical proof counsels that one ought not reject prematurely the possibility of developing a workable framework for foreseeable impact cases.

However, there is a deeper flaw in the foreseeable impact approach, one that is not as amenable to practical resolution as the technical matters just described may be. This difficulty lies in the fact that the foreseeable impact model posits differences between whites as a group and nonwhites as a group. Even if the proposition that there are such racial differences turns out to be descriptively accurate with respect to one or more challenged criteria of decision, relying on this difference model as the foundation for legal analysis may be normatively problematic in two respects. For some, the ascription of racial difference would be inconsistent with the norm of colorblindness. From this perspective, it would be undesirable, and perhaps necessarily unworkable, to anchor a legal doctrine on a premise so at odds with the fundamental, if aspirational, values of society.[165] For others, the ascription of difference might not be troubling in itself, but predictable social processes virtually would assure that attributes associated with whites would be seen as the norm, and that attributes associated with nonwhites would be perceived as deviant.[166] For these critics, this aspect of the foreseeable impact approach treads too closely to a connotation of inherent inferiority to be normatively acceptable.

I believe that these disturbing normative implications arise because the foreseeable impact approach treats white specificity as an issue of fact, in the sense that a particular criterion of decision either is white-specific, or it is not; in turn, that question depends on the existence *vel non* of some "real

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163. For example, Keisha's employers might argue that their "conformity" requirement would not disadvantage black scientists, even though it would have a differential impact on the black population generally. They would claim that black people who are trained as scientists are as likely as whites to possess the cultural characteristics they seek. However, this argument simply overlooks the assimilationist pressures on blacks who choose to enter scientific (and other professional) fields.

164. *See supra* notes 49–50 and accompanying text.

165. "'[T]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'" City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (quoting ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975)). Justice Kennedy expressed a similar view: "The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Id.* at 518 (Kennedy, J., concurring).

166. This aspect of difference is thoroughly explored in MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 173–224 (1990).

difference" between racial groups.[167] I think, however, that it is much more accurate a description of social dynamics to characterize a conclusion regarding white specificity as contextual and therefore contingent. That is, it is not the criterion in the abstract that is white-specific, but the criterion in the context of its usage.[168] This insight suggests another statutory avenue for implementing liability for transparently white decisionmaking—one that focuses on context rather than content.

B. *The Alternatives Model*

This model departs from the existing disparate impact framework in favor of an approach that more directly captures the structural nature of the discrimination Keisha experienced. In outline, analysis of a nonwhite plaintiff's claim regarding an adverse employment decision would proceed as follows. The plaintiff's first step would be to analyze the racial structure of her workplace.[169] A showing that the plaintiff's place of employment is predominantly white, or structured in such a way that whites predominate in positions of authority, would trigger a presumption that the adverse action rested on white-specific criteria of decision. However, that showing alone would not shift the burden of persuasion to the defendant. The employer would have to articulate the criterion employed in reaching the challenged decision, and the objectives served by it, but the plaintiff would bear the burden of proposing an alternative criterion that would serve the employer's objective equally well, and in a manner satisfactory to the plaintiff.[170] Finally, the defendant would have an opportunity to persuade the court that adopting the proposed alternative would require unreasonable measures.[171]

Like the foreseeable impact approach, the alternatives model is grounded in the disparate impact provision of the Civil Rights Act of 1991. That provision is structured in this way: A disparate impact violation is established only if (i) the plaintiff demonstrates the existence of a disparate impact and the

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167. It is difficult to say whether the prospect of identifying physical or socially constructed differences is more troubling. For an example of how easily those two categories are conflated, see Michael M. v. Superior Court, 450 U.S. 464, 473 (1981) (plurality opinion) (noting that "risk of pregnancy itself constitutes a substantial deterrence [against sexual intercourse] to young females" and that "[n]o similar *natural* sanctions deter males" (emphasis added)).

168. *See* Flagg, *supra* note 10, at 977.

169. Like the foreseeable effects approach, this model would apply to a white plaintiff in any situation in which nonwhites predominate *and* have final authority over the management of the business, because by its terms Title VII applies to any discrimination because of *race*. However, I think it exceptionally rare for whites to find themselves in the position just described. *But see* Ray v. University of Ark., 868 F. Supp. 1104 (E.D. Ark. 1994) (involving claim by sole white officer on campus police force of University of Arkansas at Pine Bluff).

170. Placing the obligation of formulating a pluralist alternative on the plaintiff is designed to ensure meaningful accommodation of cultural differences and to give the outsider authority to determine what constitutes a satisfactory accommodation.

171. This is similar to the notion of "undue hardship" under the Americans with Disabilities Act, but it puts less emphasis on financial costs. *See* 42 U.S.C. § 12111(10) (Supp. IV 1992).

employer fails to demonstrate job relatedness and business necessity; *or* (ii) the plaintiff demonstrates the existence of an alternative practice and the employer refuses to adopt it.[172] There are three possible interpretations of this structure. Upon plaintiff's demonstration of disparate impact, interpretation (A) understands the plaintiff's proof of less discriminatory alternatives to come into play only if the defendant establishes business necessity, while interpretation (B) permits the plaintiff to move directly from impact to consideration of alternatives, and thus to circumvent the business necessity stage.[173] Finally, interpretation (C) sees the Act as stating that proof of a disparate impact is not necessary when the plaintiff can demonstrate the availability of an alternative practice. Of course, interpretation (C) is what the statute *says*. However, the 1991 Act also adopts pre–*Wards Cove* precedents in regard to the meaning of "alternative employment practice."[174] Because those precedents all involve cases in which the existence of a disparate impact was regarded as a prerequisite for consideration of the alternatives issue, it must be concluded that the 1991 Act did not intend to create structure (C).

The alternatives approach follows interpretation (B), and wholly discards the question of business necessity, substituting an inquiry into the existence of less assimilationist alternatives to a challenged business practice. Moreover, this approach infers the existence of a disparate impact from the confluence of two lines of reasoning. First, there is a structural analysis: Norms formulated in a dominantly white workplace are presumed to be white-specific and thus to have an adverse effect on nonwhites. Second, this model requires the plaintiff to formulate an alternative that will not disadvantage nonwhites at all, or one that will not disadvantage them as severely as the employer's challenged practice. The plaintiff will be able to do so only if the challenged criterion has *some* disparate effect. Thus, under the alternatives model disparate impact is not abandoned, but inferred.

The alternatives model mirrors the institutional nature of some forms of race discrimination. Keisha's claim, for example, is structural in the sense that it is the consequence of a particular workforce composition and the nature of white race consciousness.[175] Therefore, it seems only natural to construct a doctrinal framework that reflects the structural character of this theory of liability, and thus disavow the intent-like connotations of the existing disparate

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172. *See supra* note 41.

173. In general, interpretation (B) would *permit* consideration of the business necessity issue in appropriate cases; interpretation (A) would *require* consideration of that issue. One could argue that because the statute uses "or," (B) is the better interpretation. However, the foreseeable impact model follows interpretation (A). *See supra* note 157.

174. 42 U.S.C. § 2000e-2(k)(1)(C) (Supp. V 1993), reproduced *supra* note 41.

175. In a workforce that is predominantly white, the tendency of whites to be unaware of the whiteness of facially neutral criteria is exacerbated; in effect, certain structures inevitably produce cultural dominance. However, I agree with the many theorists who maintain that cultural dominance is a powerful force with or without structural reinforcement. *See, e.g.*, DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); Culp, *supra* note 7.

impact approach.[176] The alternatives model permits the plaintiff who has been disadvantaged by institutionally race-specific features of the workplace to rely on general knowledge about this form of race specificity, and to proceed directly to the exploration of more inclusive employment practices.

The first issue to be addressed under the alternatives model is whether the nonwhite plaintiff's workplace is predominantly white. Such workplaces fall into three categories. First, any circumstance in which nonwhites constitute less than roughly fifteen percent of the workforce should qualify for this characterization.[177] In addition, any workplace that is racially stratified, with whites occupying all or nearly all of the upper-level positions, should be considered a predominantly white workplace. Finally, there may be some instances in which a significant percentage of ostensibly managerial positions are occupied by nonwhites, but in which whites wield most or all of the ultimate policymaking authority; these too should be identified as predominantly white workplaces.[178]

The second component of the alternatives model is the plaintiff's obligation to formulate more racially inclusive means of accomplishing the employer's stated objectives.[179] Of course, there must be some constraints on the range of permissible objectives, or the approach will have no impact at all on assimilationist employment practices. The scope of permissible objectives should be broad enough to include legitimate financial motives, but narrow enough to exclude matters of taste that are unnecessary for the attainment of those financial goals.[180] Moreover, the preferences of customers and clients that implicate the categories protected by Title VII should not be invoked at this stage, even if those preferences indirectly affect financial outcomes.[181]

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176. *See supra* note 142.

177. Through empirical research, Kanter identified this percentage as the upper boundary of "skewed groups," in which the dynamics of tokenism—including heightened visibility, contrast, and stereotyping—appear. *See* KANTER, *supra* note 38, at 206–42. Though Kanter's principal focus was on (white) women's fortunes in the workplace, she regarded her theory as applicable to racial tokenism as well. *Id.* at 207. For an application of the structuralist analysis to the *Price Waterhouse* case, see Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of* Price Waterhouse v. Hopkins, 15 VT. L. REV. 89 (1990).

178. Whites never should assume that nonwhites' participation in or acquiescence to a white-dominated decisionmaking process "neutralizes" the whiteness of the norms being applied. Assimilation to whites' standards can take place for many reasons, as Yvonne's story illustrates; it can be a strategy for success as well as survival. Whether or not one regards such choices as "free" given the conditions of white supremacy in which they are made, they *are* choices made under conditions of society-wide white domination.

179. Courts generally are reluctant to tell employers how to restructure the workplace. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.").

180. This analysis is very similar to what would take place at the business necessity stage under the foreseeable impact model.

181. Just as customer preference is not a bona fide occupational qualification under disparate treatment analysis, it should not satisfy the business necessity requirement. *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981).

Finally, at the heart of the alternatives model, there is the question of what sort of alternatives the transparency plaintiff might put forward. Because the focus of this model is institutional discrimination, the range of alternatives available to the plaintiff should not be limited to alternative criteria of decision and, of course, the nature of an appropriate alternative will be highly case-specific. In Keisha's case, the problem is a white-specific vision of the characteristics needed in a scientific department head. In this sort of case, diversity training for white employees who are to be under Keisha's supervision, combined with clear indications of the firm's support for her, may be enough to solve the problem from her perspective.[182] To reduce the problem of white specificity in the future, the company also might provide diversity training for the individuals who were the decisionmakers in Keisha's case.[183] In other cases, more drastic measures, such as restructuring chains of command, or reallocating decisionmaking authority, might be in order.[184]

Under the alternatives model, the employer could defend by arguing that adopting a proposed alternative would not be reasonable. Thus the alternatives model would resolve the ultimate question of the extent to which an assimilationist workplace is permissible under an analysis very similar to established concepts of reasonable accommodation, rather than business necessity.[185] As with the foreseeable impact model, however, the line in question is very difficult to draw in the abstract.[186]

Like the foreseeable impact approach, the alternatives framework implicates some concepts that are relatively unfamiliar in legal analysis.[187] Indeed, the approach is founded on the unusual proposition that norms developed in predominantly white settings are presumptively white-specific. On the other hand, the alternatives model presents fewer technical problems than the foreseeable impact framework. Moreover, on one level it is less normatively problematic. It represents a direct, structural response to a structural problem, and adheres to the skepticism preferred by transparency

182. Similarly, additional corporate support might have averted the harm and ensuing litigation in Thomas v. Digital Equip. Corp., 880 F.2d 1486 (1st Cir. 1989) (involving defendant firm that facilitated complaints by Indian male plaintiff's subordinates and failed to take remedial steps when work relationship suffered from complaints), and Lopez v. Schwan's Sales Enter., Inc., 845 F. Supp. 1440 (D. Kan. 1994) (concerning Mexican-American salesman who received numerous customer complaints, arguably because of cultural style).

183. Other possible alternatives are explored in Alfred W. Blumrosen, *The 1989 Supreme Court Rulings Concerning Employment Discrimination and Affirmative Action: A Minefield for Employers and a Gold Mine for Their Lawyers*, 15 EMPLOYEE REL. L.J. 175, 178 (1989) (discussing approach used in Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1980)); Ruth Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination*, 19 U.C. DAVIS L. REV. 761 (1986) (discussing rank-order selection devices).

184. The 1991 Act leaves untouched Title VII precedent regarding "affirmative action."

185. *See supra* note 120.

186. *See supra* notes 157–59 and accompanying text.

187. That is, the unfamiliarity arises from the method of establishing disparate effects; the accommodationist aspect of this model is relatively familiar.

theory.[188] Thus, if one accepts the premises of the transparency phenomenon, the alternatives analysis would appear to be the most natural doctrinal framework for implementing a remedy.

The weakness of the alternatives model lies in its substitution of skepticism for a fact-oriented approach to the question of disparate effects. For those inclined to regard the question of white specificity as a resolvable question of fact, the alternatives approach may seem overinclusive.[189] It threatens to impose liability, through the presumption of race specificity, on employers whose criteria of decision are not in fact race-specific. This result seems inconsistent with the notion that Title VII aims to preserve a realm of autonomy for private employers.

C. *Comparing the Foreseeable Impact and Alternatives Models*

The approaches examined here differ in two respects. First, they diverge with regard to the way "disparate impact"—the employer's use of white-specific criteria—may be established. The foreseeable impact model focuses on the content of challenged criteria of decision and treats the existence *vel non* of white specificity as a resolvable question of fact. The alternatives model emphasizes the context in which a challenged decision is made and views decisionmaking in a predominantly white environment with skepticism. Accordingly, this model *presumes* the race specificity of decisionmaking in such an environment. This presumption is merely a trigger for further analysis, however; the alternatives model is agnostic on the question whether there *are* in fact any facially race-neutral criteria of decision in a predominantly white decisionmaking context.[190]

The two models also differ regarding the framework in which the issue of justification is to be resolved. Under the foreseeable impact model, this question arises under the heading of the business necessity defense or, if the

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188. *See* Flagg, *supra* note 10, at 976–79.

189. At the same time, from the perspective of those who are skeptical about race neutrality, the foreseeable impact model appears potentially underinclusive. That approach requires proof that a particular criterion of decision is in fact race-specific, and so depends in part on extralegal contingencies, such as the availability of relevant sociological data. In at least some instances, foreseeable impact analysis would not reach the ultimate question whether a particular employer may operate an assimilationist workplace, though the alternatives approach would do so in the same fact scenario.

On the other hand, the alternatives model also may have some practical limitations. Imagine a white-dominated workplace in which a substantial number of "Yvonnes" occupy significant decisionmaking positions. In this situation, because the structural predicates that trigger further analysis are not met, the alternatives model may fail to provide an avenue of relief, though the foreseeable impact model would do so. However, I think this scenario highly unlikely. For example, in a recent study of interpersonal interactions in corporate settings, the unit under examination was a manager/professional subordinate dyad. The study compared white/white, white/black, and black/black dyads; the number of black/white dyads in the corporations studied was too small to be significant. *See* WILLIAM R. SPIVEY, CORPORATE AMERICA IN BLACK AND WHITE (1993).

190. *See* Flagg, *supra* note 10, at 976–78. It follows that the alternatives model also is agnostic on the question of "real differences" between racial groups.

employer makes the case that the assimilationist practice is a matter of business necessity, the plaintiff may propose an alternative that is not assimilationist but serves the employer's legitimate business objectives equally well. At bottom, these analyses turn on the question of the extent to which assimilation ought to be considered a matter of business necessity.[191] Under the alternatives model, the plaintiff proposes alternative business practices without first confronting the question of business necessity.[192] This model supplants the concept of business necessity with a notion of reasonable accommodation.[193] Ultimately, however, each of these analytic schemes recognizes that in the realm of employment decisionmaking, criteria of selection that require assimilation to white-specific norms constitute "built-in headwinds" for nonwhite employees, and thus violate Title VII's proscription of employment actions taken "because of" race.[194] Because this fundamental statutory objective must inform each model, and because the same notion of assimilation animates both approaches, one should not anticipate different final outcomes due to differences in the way the two doctrines are framed.

The foreseeable impact model embodies a categorical approach to the problem of transparently white subjective decisionmaking with regard to both stages of the analysis—the questions of disparate impact and business necessity.[195] This categorical style is attractive because it is conceptually familiar. It is a common form of legal analysis, and in the context of Title VII may gain some credibility because its structure parallels existing disparate impact doctrine. On the other hand, the weakness of the categorical approach is the way it implicitly categorizes groups as well as criteria of decision. Proof that a particular criterion of decision is in fact associated more closely with whites than with other racial groups seems inevitably to require a showing that the groups differ from one another in relevant respects, and that showing in turn may implicate connotations of inferiority.[196]

In contrast to this categorical style, the alternatives model reflects a skeptical and accommodationist attitude. It presumes the existence of racially

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191. *See supra* notes 157–59 and accompanying text.

192. The two models may differ in important respects even should they overlap, as would be the case if a plaintiff proceeding under the foreseeable impact model were to persuade a court to adopt the interpretation of the 1991 Act that would allow her to circumvent the business necessity question. *See supra* note 157. Under these circumstances, the foreseeable impact model may differ from the alternatives approach in the nature of the alternatives that the plaintiff may put forward. For example, under the foreseeable impact model Keisha would be limited at the alternatives stage to proposing criteria of selection for department heads that would have a less severe impact than the ones the employer actually used. In contrast, under the alternatives model she would be able to propose even far-ranging alterations in the employer's business structure.

193. The employer may defend by showing that adoption of the plaintiff's alternative would be unreasonably burdensome.

194. *See supra* note 107 and accompanying text.

195. That is, the decisionmaker must decide whether there *is* or *is not* a foreseeable impact, and whether a proven assimilationist practice *is* or *is not* justified as a matter of business necessity.

196. *See supra* notes 165–66 and accompanying text.

disparate effects when certain structural conditions are met, and it imposes a requirement of reasonable accommodation that does not require categorical evaluation of what is or is not a matter of business necessity. The skeptical aspect of the alternatives model is relatively unfamiliar as a style of legal analysis,[197] though it does have the virtue of responding in a fairly direct way to the transparency phenomenon.[198]

The principal advantage of the foreseeable impact model is that it does a better job of preserving employer autonomy than does the alternatives model. The latter appears to require (possibly radical) restructuring of any white-dominated workplace whenever a nonwhite employee is added to the workforce. Because it is the workplace structure that triggers analysis of assimilationism, any nonwhite employee has the power to present alternative ways of doing things to which the employer must respond.[199] This relatively radical consequence may be mitigated somewhat by the fact that it is the plaintiff, rather than the employer, who must formulate the alternatives to be put on the table for consideration, but in the end every white employer in a predominantly white workplace would be forced to take seriously nonwhite employees' proposals for change.[200] Because the foreseeable impact model does not allow the plaintiff to rely on a structural analysis of the workplace, but rather requires her to demonstrate the existence of foreseeable disparate effects, it does not intrude as deeply into employer prerogatives. Those attracted to the view that it is important to maintain a realm of private autonomy relatively insulated from public intrusion may favor the foreseeable impact approach because it does not threaten potentially overinclusive imposition of liability, as does the alternatives model.[201]

On the other hand, the alternatives model also has its strengths. It does not carry the troubling moral implications of the foreseeable impact model's ascription of racial difference. Moreover, the alternatives approach avoids an institutional difficulty presented by the foreseeable impact model. Even if one overcomes one's resistance to the proposition that there are cultural differences tied to race that ought to be taken into account under Title VII, as I believe

197. It is unusual in that it presumes the existence of a material fact—regarding the race-specific nature of a challenged criterion of decision—from the *context* in which the decision was made.

198. I have argued elsewhere that skepticism is the most appropriate response to the transparency phenomenon. *See* Flagg, *supra* note 10, at 976–79.

199. However, the alternatives model does not implement a purely distributive conception of equality. Once a workplace has been redesigned in a pluralist manner, applicants and employees would not be able to formulate less assimilationist employment practices because the workplace would no longer be (transparently) white. Put simply, a pluralist workplace is one in which qualified persons like Keisha, whose personal style differs significantly from whites' cultural expectations, have significant decisionmaking and policymaking authority, including authority over whites.

200. Ideally, this process should take place in a framework of communication and experimentation rather than litigation, but the ultimate effect is the same in either case—the nonwhite employee's proposal gains a force it does not currently have.

201. Under the alternatives approach, liability may be imposed in some instances in which there is not in fact any disparate effect, even as measured by the foreseeable effects standard. *See supra* note 189.

should be done, it is another matter to expect courts to resolve cases on the basis of a factual finding that such differences exist. Those who are especially concerned about either the moral or institutional problems of the foreseeable impact model may prefer the alternatives model. In sum, the two approaches present a normative dilemma: Should one prefer an approach that preserves a realm of decisionmaking autonomy for private employers, at the cost of institutionalizing the idea that there are significant cultural differences between the races, or should one opt for an approach that avoids the ascription of difference, at the cost of greater intrusion on employer prerogatives? My own conclusion is that institutional racism[202] cannot be eliminated if the private sector is permitted to persist in excluding nonwhites from positions of power and authority; thus measures that "intrude" into the realm of "the private" are necessary if there is to be meaningful racial redistribution. From this perspective, then, the threatening countenance of the alternatives model may be the face of moral necessity. I leave it to the reader, however, to consider the question for herself.

V. CONCLUSION

Keisha confronts a form of race discrimination that is as pervasive as it is painful: the expectation that she must conform to norms that challenge her racial sense of self if she is to succeed in her chosen career. I have argued in this Article that though existing judicial interpretations of Title VII are not adequate to respond effectively to Keisha's case, the statute itself, as amended in 1991 and read in light of its underlying objectives, *is* broad enough to encompass her claim. The challenge, then, is to formulate a doctrinal framework tailored to the task at hand but acceptable in light of other widely held normative expectations. I have set forth two possible models of Title VII liability that would accommodate Keisha's claim, in the hope that they will generate further exploration of possible doctrinal responses to institutional racism.

202. *See supra* note 12 and accompanying text.