

Towards a Unified Theory of the Law of Employment Discrimination†

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I. INTRODUCTION

It is a small world. Jooj Ellis and I were roommates in college. We went to different law schools, but have kept in touch with occasional visits and telephone calls on the holidays. After a few years of successful private practice, specializing in litigation, and several years as a law professor, Jooj became a United States District Judge. He continues to teach

occasionally.

Ruth Lorraine matriculated as an undergraduate in School of Industrial and Labor Relations at Cornell University, where I teach. She took two of my courses, Labor and Employment Law and Employment Discrimination Law. When she asked me to write a letter of recommendation to law school, I readily agreed because she had an unusually strong talent for analytical thinking. I like many of my students and I enjoy staying in contact with them; and so I extract, as consideration for a letter of recommendation, their promise to send me a letter some time during their first year of law school, telling me how things are going. Ms. Lorraine fulfilled her promise via e-mail, making it easy for me to reply; and we exchanged messages once or twice a year as she progressed through the curriculum.

As I expected, Ms. Lorraine earned respectable grades and wrote her way on to the law review. When she applied for clerkships, she asked permission to list me as a reference. I urged her to use a law school professor instead; but she said that I knew her better than most of her law professors, and so I agreed. It worked out well. One of the clerkships for which she applied was in Jooj's court. Naturally, he called me to discuss her application. I told the truth and nothing but the truth (though not the whole truth; Ms. Lorraine and I had shared some confidences, and not every true thing needs to be said), and she got the job.

Several months later, Jooj called me again. He had just certified a large class in an action against a chain of department stores under Title VII of the Civil Rights Act of 1964,¹ and he was considering whether to assign the case to Ms. Lorraine. On the one hand, he said, she was the junior clerk in the office. On the other hand, her work so far had been excellent, and she had taken my course in college. Did I think she could handle it? I must confess to a bit of manipulation. My research has concentrated on the law of employment discrimination law, and I am always interested in new cases; thus I said (and it was partly true) that I could provide a more informed opinion if I knew something about the case. Here are the facts as Jooj reported them:

The plaintiff was Herman Medina, an American citizen whose parents had lawfully immigrated from Mexico. The first claim in the complaint was on behalf of Mr. Medina as an individual. It alleged that on January 2, 1998 he applied for the job of clerk in the chain of department stores owned and operated by, and known as, the Retail Company. Although the position was available and he had several years of experience as a clerk, his application was rejected three days later, and the company continued accepting applications. He filed a

1. Pub. L. No. 88-352, §§ 701-716; 78 Stat. 241, 243-266 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1994)).

charge of national origin discrimination with the state fair employment practices agency on August 26, 1998 and with the Equal Employment Opportunity Commission (EEOC) on October 27, 1998. He requested and received a right-to-sue letter from the EEOC 180 days thereafter and filed suit in federal court within 90 days of receiving the letter.

The second claim of the complaint was on behalf of the class of Latino-Americans in the area who are interested in and qualified for the position of clerk with the Retail Company. After incorporating the facts pleaded in the first claim, the second claim alleged that 90 percent of the population of the city is Anglo and 10 percent is Latino, but only 7 percent of the company's clerks is Latino.

Neither claim averred malice. The prayer did not request punitive damages.

The answer filed by Retail Company admitted that 90 percent of the population of the city is Anglo and 10 percent, Latino; admitted that 7 percent of the company's clerks is Latino; denied the other allegations of the two claims; alleged, as to the first claim, that the company has no record of an application filed by the plaintiff; and alleged, as to the second claim, that 7 percent of the population living within 4 miles of company's stores is Latino.

Discovery revealed that 8,500 Anglos and 1,500 Latinos applied for jobs in 1998. The company hired 1,000 clerks in that year, of whom 880 were Anglos and 120 were Latinos.

An interesting case, I said, and, yes, I was sure Ms. Lorraine could handle it.

A few days later, Ms. Lorraine telephoned to thank me for my confidence in her. I said it was well deserved, and we fell to discussing the case. She told me about a long conversation she had just had with the judge. I was sorely tempted to offer my view of the case; but she did not ask for it, and I constrained myself to a question here and there about details. In the end, her discretion proved to be my gain: for over the course of the following weeks, she felt free to call me several more times, telling me about her conversations with Jooj. My guardian angel had prompted me to take notes from the start. As the reader is about to see, they became voluminous.

At the beginning of their discussions of the case, Jooj stated conventional interpretations of Title VII. Ms. Lorraine, approaching the law with a relatively fresh mind (five years had passed since she had taken my course), offered some innovative observations, some of which were more useful than others. By the end of their discussions, Ms. Lorraine had assimilated the conventional ideas and the best of her new insights into a theory. In brief, the theory is that disparate treatment and disparate impact are not distinct definitions of discrimination; rather, their elements are

identical except for intent.

In the following pages, I have attempted to reconstruct Ms. Lorraine's theory as it evolved during her work on Medina's case. For the sake of the reader, I have added headings and (I apologize; I am a thoroughly socialized academic) footnotes as well. I believe I have stated Ms. Lorraine's theory accurately; of course, any errors are my sole responsibility. I hope the reader will find the theory interesting.

II.

INDIVIDUAL DISPARATE TREATMENT

Ms. Lorraine had been clerking for Judge Ellis for several months, and they were at ease with one another. Thus she felt comfortable as she knocked on his door one afternoon. She heard his voice through the door.

JUDGE ELLIS: Come in.

The judge looked up as Ms. Lorraine entered, leaving the door slightly ajar as he had asked her to.

MS. LORRAINE: Judge, I have a few questions about the Medina case. Are you free?

As always, he spoke slowly, as though he were lecturing to a class or a jury.

JUDGE ELLIS: Yes. Sit down.

Ms. Lorraine walked to a dilapidated armchair in the corner of the judge's office. She sat down and laid her pen and notepad next to the lamp on the adjacent table.

JUDGE ELLIS: What's on your mind?

MS. LORRAINE: I want to talk to you about the *Medina* case. The complaint doesn't allege anything about a specific employment practice with an adverse effect, so I take it both claims are for disparate treatment.²

JUDGE ELLIS: That is reasonable.

MS. LORRAINE: So I'd like to talk to you about treatment discrimination. It might save me a week of reading cases.

2. See *id.* Section 703(k)(1) of Title VII of the Civil Rights Act of 1964 requires the plaintiff in a disparate impact action to identify a particular employment practice and to prove the practice has an adverse effect on a protected class. The section reads in relevant part:

(A) 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 the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity

A. Direct Evidence of Individual Disparate Treatment

JUDGE ELLIS: All right. I suppose an hour of my time is worth a week of yours. What in particular do you need to know?

MS. LORRAINE: I need to know about proof. I know intent is a crucial element of a treatment claim.³ I'd like to know the ways intent is proved.

JUDGE ELLIS: All right. Sometimes plaintiffs can produce direct evidence of state of mind. An example would be *Slack v. Havens*.⁴ Several women worked in a certain department of a plant. Most of them were black, but one was white. One day their supervisor—I believe his name was Pohasky—assigned the black women to heavy cleaning that was outside their job description, but he told the white woman to continue with her normal duties. He went as far as assigning a black female from another department to help with the heavy cleaning. When the blacks protested, he basically said that colored people are better at cleaning and they should stay in their place. That statement was direct evidence of his state of mind.

MS. LORRAINE: I can't imagine a case like that going to trial.

JUDGE ELLIS: Don't forget the employer can deny that the statements were made. Sometimes an employer admits the statements were made and asserts that they were so isolated and infrequent that they do not reveal the true reason for what happened to the plaintiff.

MS. LORRAINE: I don't imagine you see many statements like Pohasky's these days.

B. Circumstantial Evidence of Individual Disparate Treatment

1. Unequal Treatment

JUDGE ELLIS: More than you seem to believe, but you are generally correct. Most proof is circumstantial. The employer's reason may be established by inference. Of course, those actions are a little more complicated than in *Slack*, but the evidence can be compelling. For example, in *Santa Fe Trail*,⁵ a railroad accused one black and two white workers of stealing customers' property. The black was not discharged, but the whites were and they sued. Although the Court did not rule on this

3. The Supreme Court has defined disparate treatment as treating one worker less favorably than another because of the worker's race, gender, national origin, religion, etc. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

4. *Slack v. Havens*, *aff'd by, in part, cause remanded to, in part*, 11 Fair Empl. Prac. Cas. (BNA) 27 (9th Cir. 1975).

5. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

issue, from facts like these—the unequal treatment of similarly situated workers—an inference of an unlawful reason can arise. This kind of evidence is fairly common. You probably noticed that it was also part of *Slack*: black and white women were doing the same job, and only the blacks were assigned to heavy cleaning.

MS. LORRAINE: Isn't that where the term "disparate treatment" comes from?

JUDGE ELLIS: Is that what Professor Gold told you?

MS. LORRAINE: I think so.

JUDGE ELLIS: Well, he may have been right. Schlei and Grossman⁶ probably used that term because unequal or disparate treatment was originally the most common way of proving discrimination. The term might have been borrowed from a common way of proving discrimination under the Labor Act.⁷ Today "disparate treatment" is a term of art that refers to intentionally using race or sex as the basis for unfavorable treatment of a worker, regardless of how the employer's reason is proved.

MS. LORRAINE: How can an employer defend against cases like that? The facts seem to speak for themselves.

JUDGE ELLIS: Don't forget that the employer may attack the plaintiff's evidence. Suppose unequal treatment had not occurred. For example, suppose the railroad in *Santa Fe Trail* proved that all three employees actually were fired, but the black worker was reinstated the next day because he produced four credible witnesses who provided an alibi. If the whites did not know about the alibi, it would appear to them that they were treated unequally.

MS. LORRAINE: Couldn't the employer also deny the act was based on an illegal reason?

JUDGE ELLIS: That is a possibility.

MS. LORRAINE: But it wouldn't ever convince you, would it? The employer has such a strong incentive to lie.

JUDGE ELLIS: In general, you are correct. If the employer in *Santa Fe Trail* had said simply, "Race had nothing to do with it," I doubt any unbiased person would have believed it. However, as a rule, the employer not only denies having an unlawful reason, but also proffers a lawful one. Any reason not proscribed by Title VII will suffice.

Of course, I was not there, but, knowing Ms. Lorraine, I have no doubt that her eyes brightened at this point.

MS. LORRAINE: What if the railroad gave an illegitimate reason—

6. BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1 (1st ed. 1976).

7. National Labor Relations Act, 49 Stat. 449 (1935), as amended by and reenacted in Labor Management Relations Act, 61 Stat. 136 (1947) (hereinafter, Labor Act).

like the African-American kept his job because he bribed the personnel director?

JUDGE ELLIS: The employer should win.⁸ The only reasons that Title VII outlaws are race and sex.⁹ I recall an action in which an employer answered a charge of national origin discrimination by pleading that the plaintiff had been fired, not because he was Hispanic, but because he was agitating for a union. Naturally, the limitations period for an unfair labor practice charge had already expired.

MS. LORRAINE: What happened in that case?

JUDGE ELLIS: It was settled cheaply.

MS. LORRAINE: What if the employer says the plaintiff was qualified, but the other person was better qualified?

JUDGE ELLIS: Being the best qualified candidate is usually a selection criterion for any job. Choosing the best qualified person is surely a non-discriminatory reason.

MS. LORRAINE: What if the employer made a mistake—believed the plaintiff was not qualified when they really were?

JUDGE ELLIS: I might not credit a story like that; but if I did, the employer would win. Congress did not intend to outlaw accidents.¹⁰

MS. LORRAINE: What if the employer had a stupid reason like the plaintiff was a Virgo and the employer hated Virgos?

JUDGE ELLIS: Unfortunately for Virgos, the employer would win. Congress legislated equality, not rationality.

MS. LORRAINE: It doesn't seem fair to me for a person to lose a job because of something like that.

JUDGE ELLIS: Bear in mind that the statute pertains to race and sex discrimination, not to fairness in general. A Virgo of the other sex and any other race would also have been turned down.

8. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (employer would not commit disparate treatment under the Age Discrimination in Employment Act, 81 Stat. 602, by firing an older black worker because the worker is black. “The employee’s race is an improper reason, but it is improper under Title VII, not the ADEA”).

9. Judge Ellis uses the phrase “race and sex” and Ms. Lorraine uses the term “race and gender” to refer to all of the bases of discrimination forbidden by Title VII. Similarly, the examples used by Judge Ellis and Ms. Lorraine all pertain to discrimination by employers, though Section 703 prohibits discrimination by employment agencies and labor unions as well.

10. Senator Humphrey was one the two floor managers of the civil rights bill in 1964, 110 CONG. REC. 6812 (1964) (statement of Sen. Mansfield); *id.* at 9244 (statement of Sen. Jordan), and one of the authors and co-sponsors of the substitute bill which was enacted. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Comm. L. Rev. 437, 445 (1966). In explaining why the word “intentionally” was added to the relief section of Title VII, Senator Humphrey said, “Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. . . . The expressed requirement of intent is designed to make it wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders.” 110 CONG. REC. 12,723-23 (1964).

2. *The McDonnell Douglas Formula*

MS. LORRAINE: So there are two ways to prove intent—direct evidence and unequal treatment.

JUDGE ELLIS: A third way also exists, and it is probably the most commonly used: the *McDonnell Douglas*¹¹ formula. A *prima facie* case may be established by proof that the plaintiff belongs to a racial minority, the plaintiff applied and was qualified for a job for which the employer was seeking applicants, the plaintiff was rejected, and the employer continued seeking applicants.¹² In *McDonnell Douglas* itself, the employer was hiring machinists. The plaintiff was a qualified black machinist on layoff from the firm. When jobs opened, he applied; but he was rejected, and the employer continued accepting applications. This evidence created a rebuttable presumption that the employer refused to recall the plaintiff because of his race.

MS. LORRAINE: Can I ask you something about the formula? It doesn't seem fair to the employer. I don't think the formula is strong evidence of the employer's state of mind. I can probably think of a hundred non-discriminatory reasons why an employer might refuse to hire someone.

JUDGE ELLIS: What's your question?

MS. LORRAINE: Oh. I guess it was an observation.

JUDGE ELLIS: All right, but now I have a question for you. Can you give me three reasons why I am not the president of the United States?

MS. LORRAINE: I'm sorry?

JUDGE ELLIS: Can you give me three reasons why I am not the president of the United States? You may be frank.

MS. LORRAINE: Well, somebody else's got the job right now.

JUDGE ELLIS: You are correct; that is one reason. Can you think of another?

MS. LORRAINE: You like being a judge, don't you? I mean, maybe you're not interested in being president. You're not, are you?

JUDGE ELLIS: I am not. One more reason?

MS. LORRAINE: Have you ever been in politics?

JUDGE ELLIS: No.

Ms. Lorraine spoke with a touch of diffidence in her voice.

MS. LORRAINE: So maybe you're not really qualified. . .

JUDGE ELLIS: I am totally unqualified.

The judge looked at her silently. It was plain that he expected her to say something, but at the moment she did not know even what topic to

11. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

12. *See id.* at 802.

address. Eventually, he relented.

JUDGE ELLIS: You have just identified the three most common legitimate reasons that a worker does not get an employment opportunity: the worker is not qualified, the worker is not interested, and the opportunity is not available. A rebuttable presumption of intentional discrimination arises in a *McDonnell Douglas* action because the plaintiff's evidence rules out these three reasons.¹³

MS. LORRAINE: I don't see how that justifies a presumption of intentional discrimination. I think the next most likely reason is, the employer hired a more qualified person, or hired an equally qualified person before seeing the plaintiff's application, or didn't like the plaintiff as a person. But even if race is the next most likely reason, it's certainly not more likely than all the other reasons put together.

JUDGE ELLIS: You seem to be forgetting that the presumption is rebuttable. The employer is free to testify to a non-discriminatory reason. That is not a hard thing to do.

MS. LORRAINE: Didn't you just say the employer's testimony is unlikely to carry any weight because of the incentive to lie?

JUDGE ELLIS: Oh, no. We were discussing proving intent with evidence of unequal treatment, as in *Santa Fe Trail*; and I said that if the employer merely denies having an unlawful reason, the denial might not be convincing because of the incentive to lie. But I also said that an employer in this situation usually offers a non-discriminatory reason. The same thing is true in a *McDonnell Douglas* action. The mere denial of an unlawful reason would hardly suffice to rebut the presumption of intentional discrimination, but testimony to a non-discriminatory reason puts the employer's state of mind fairly in issue.

MS. LORRAINE: What if the employer's lying?

JUDGE ELLIS: The plaintiff is free to show the employer's reason is a pretext.

MS. LORRAINE: If it's a pretext, does the plaintiff win?

JUDGE ELLIS: Not necessarily. The Supreme Court held in *Hicks*¹⁴ that, although the pretextual reason might not have motivated the employer, another lawful reason might have: in which event, the employer would deserve to win.

MS. LORRAINE: But if the employer's reason's a lie, there's nothing to rebut the presumption of intentional discrimination.

JUDGE ELLIS: You are treating the presumption as though it were substantive. In fact, it is primarily procedural.¹⁵ The plaintiff has the

13. Furnco Constr. Co. v. Waters, 438 U.S. 567, 579-580 (1978).

14. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

15. See *id.* at 521.

burden of production on the facts of the *McDonnell Douglas* formula. If that burden is met, the burden of production shifts to the employer to offer evidence of a non-discriminatory reason. If that burden is met, the plaintiff may try to prove the employer's reason is pretextual. All along, the plaintiff carries the burden of *persuasion* on the elements of the claim itself, one of which is the employer's unlawful reason.¹⁶

MS. LORRAINE: How would you rule if the plaintiff proved the formula and the employer didn't offer a non-discriminatory reason?

JUDGE ELLIS: You realize, of course, that the employer may attack any part of the formula. For example, the employer may put in issue whether a job was available or whether the plaintiff applied—

MS. LORRAINE: Retail does that. It says it has no record of Medina's application.

JUDGE ELLIS: Correct. I believe your question assumes that the employer does not attack any part of the plaintiff's proof, or tries and fails to create an issue. In that event, if the employer also fails to offer a non-discriminatory reason, I would rule for the plaintiff.¹⁷

MS. LORRAINE: I still don't think the plaintiff should win that case. There're too many other perfectly good explanations why that plaintiff didn't get the job.

JUDGE ELLIS: You are not giving enough weight to the plaintiff's being a racial minority. You may well be correct if the plaintiff is white, but not if the plaintiff is black.

MS. LORRAINE: It's interesting the plaintiff has to be a person of color. I know people who argue there can't be racial discrimination against European Americans. They might be victimized by some other kind of discrimination, but it wouldn't be *racial* discrimination because racial discrimination is connected to prejudice and stereotypes and a history of oppression. The formula seems to agree.

JUDGE ELLIS: You might have something there if the plaintiff had to be black, but the formula may be used by women as well.¹⁸

Ms. Lorraine persisted with intensity.

MS. LORRAINE: It still makes sense. Women have been victimized by gender discrimination based on stereotypes and oppression a lot longer than African-Americans.

JUDGE ELLIS: The formula also makes sense for whites in an appropriate context. For example, suppose a white male is denied the job of disk jockey at station SOUL.

MS. LORRAINE: But the formula wouldn't work for a European-

16. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000).

17. *See Hicks*, 509 U.S. at 509.

18. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

American man applying for most jobs.

JUDGE ELLIS: You are correct. The formula usually does not make sense for a white male.

MS. LORRAINE: What about an Asian?

JUDGE ELLIS: It depends on the opportunity. I would hesitate to allow an Asian to invoke the formula for an entry-level engineering job, but I would not hesitate for a top-level management job in the firm.

MS. LORRAINE: What if a European-American man applies for a plain vanilla job like used car sales agent, and he sues because today's ideal employee gets the job?

JUDGE ELLIS: And who is today's ideal employee?

MS. LORRAINE: A one-armed African-American woman named Gonzalez.

JUDGE ELLIS: Do I detect a note of cynicism?

MS. LORRAINE: I guess it fell flat.

JUDGE ELLIS: Sharp of you to notice. As for your white man in the "vanilla job," the formula works in reverse discrimination cases.¹⁹ As I said, it makes sense for whites in an appropriate context.

Ms. Lorraine smiled.

MS. LORRAINE: You mean, it works when it works.

JUDGE ELLIS: I admit that I cannot formulate a statement that captures all of the situations in which the formula is appropriate, but I can do a little better than that. I believe this might capture most of the situations in which the formula makes sense: the formula is useful when the plaintiff belongs to a group which the employer's group has historically excluded from the opportunity in controversy in this part of the country.

MS. LORRAINE: So the plaintiff doesn't have to be a racial minority, but has to be, like, a minority for the job.

JUDGE ELLIS: That may be an easy way to remember it, but you are a little too far up the abstraction ladder. You omit history. We do not always discriminate against minorities. Sometimes we believe they are better for certain jobs, say, French chefs and black basketball players. But if we have historically excluded a group from the job in question, this fact suggests that the employer in the case at bar did the same thing. That the plaintiff in *McDonnell Douglas* belonged to a racial minority was an application of this principle to the specific facts of the case.

MS. LORRAINE: Do you take judicial notice of historical discrimination?

19. See *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 626 (1987) (a man alleged reverse discrimination when a woman was preferred over him pursuant to an affirmative action program; "This case also fits readily within the analytical framework set forth in *McDonnell Douglas v. Green*").

JUDGE ELLIS: No, it is more of an assumption.

MS. LORRAINE: Can it be rebutted?

JUDGE ELLIS: It can. The employer may introduce evidence that the generalization does not apply in this case, for example, that the employer has treated members of the plaintiff's group fairly. If it is convincing, the employer probably did not discriminate against the plaintiff.

MS. LORRAINE: So prejudice and stereotypes and oppression do play a role in the *prima facie* case.

JUDGE ELLIS: Yes and no: in the definition of discrimination, no; but in the *McDonnell Douglas* formula, yes.

MS. LORRAINE: I'm afraid I don't see the difference.

3. Two Senses of "Prima Facie Case"

JUDGE ELLIS: It may help you to bear in mind that the term "prima facie case" is used in two senses. It can mean *the elements of a claim*; I call this the prima facie case in the first sense. For example, the prima facie case in the first sense of battery is that the defendant inflicted an intentional, harmful or offensive physical contact on the plaintiff.²⁰ But the term "prima facie case" can also mean *the evidence that proves a claim* (or suffices to withstand a motion to dismiss); I call this the prima facie case in the second sense. For example, a prima facie case in the second sense of battery is established when the plaintiff testifies to being struck in the jaw by the defendant's fist after the defendant said, "You are so wicked that you deserve to suffer."

MS. LORRAINE: What's the difference?

JUDGE ELLIS: The difference is that the prima facie case in the first sense does not change; it is the same in all actions (unless the law changes, of course). But the prima facie case in the second sense varies across actions. The plaintiff's testimony that I just mentioned is only one way to prove a battery; endless numbers of other ways exist.

MS. LORRAINE: Like if the plaintiff had a letter from the defendant, saying, "I'd enjoy punching you in the nose more than anything in the world."

JUDGE ELLIS: Correct.

MS. LORRAINE: So the *McDonnell Douglas* formula is the prima facie-II, and the elements of the claim are the prima facie-I.

JUDGE ELLIS: Correct. Prejudice and stereotypes play a role in the formula, but not in the claim itself. If a white employer denies an employment opportunity to a white worker because of race, the worker has

20. See PROSSER ON TORTS, 32-36 (3rd ed. 1964).

a claim.²¹

MS. LORRAINE: So there're at least three *prima facie*-IIs of disparate treatment: direct evidence of intent, unequal treatment, and the *McDonnell Douglas* formula—

JUDGE ELLIS: For individual actions, that is correct.

MS. LORRAINE:—and what I want to know is, what's the *prima facie*-I?

C. A Conventional Statement of the *Prima Facie Case in the First Sense of Disparate Treatment*

JUDGE ELLIS: Good question. First, the employer is covered by the Act.

Ms. Lorraine picked up her notepad and pen. The judge spoke even more slowly than usual as she wrote.

JUDGE ELLIS: Second, the plaintiff is protected by the statute. The statute is aimed at employment discrimination: to be protected a person has to be able to do the work and be willing to accept the job if the employer offers it. Third, the employer has an employment opportunity available. Fourth, the employer denies the opportunity to the plaintiff, and, fifth, the employer's reason for the denial is race or sex.

MS. LORRAINE: What if the employer has more than one reason?

JUDGE ELLIS: If at least one of the reasons is proscribed, the act is unlawful;²² but if the employer can prove that the same action would have been taken in the absence of the proscribed reason, the court must withhold reinstatement and damages.²³

D. Defenses to Disparate Treatment

MS. LORRAINE: What are the defenses to disparate treatment?

JUDGE ELLIS: As I said, the employer may defend on the grounds that the opportunity was not available, or the plaintiff was not willing to accept it, or the plaintiff was not qualified for it, or the employer's reason for rejecting the plaintiff was not proscribed.

MS. LORRAINE: You said the employer could "defend," but the examples you gave don't seem like true defenses to me. In Civil Procedure Professor Airborne used to say—

JUDGE ELLIS: Professor who?

21. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-279 (1976) (Title VII protects whites as well as persons of color).

22. Title VII of the Civil Rights Act of 1964, § 703(m), Pub. L. No. 88-352, §§ 701-716; 78 Stat. 241, 243-266 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1994)).

23. See *id.* § 703(g)(2)(B).

MS. LORRAINE: Sorry. Ehrenberg. We called him “Airborne” because he always seemed to be up in the clouds. He always said it’s only a true defense if it admits the elements of the claim—like consent is a true defense to battery because the defendant admits having struck the plaintiff intentionally. He used to harp on that all the time.

JUDGE ELLIS: Or it was the only thing you understood.

MS. LORRAINE: Well. . .

JUDGE ELLIS: We professors stick together.

MS. LORRAINE: I guess so.

JUDGE ELLIS: But Professor Ehrenberg was right, and so are you. Most persons use the word “defenses,” as I just did, to refer to evidence that no opportunity was available, *et cetera*, and they are defenses in the ordinary English meaning of the word; but I agree that, in a strict sense, they are not. They are attempts to destroy an element of the *prima facie* case. Except for good-faith reliance on an opinion letter from the EEOC,²⁴ no true defense to disparate treatment exists.²⁵

MS. LORRAINE: What about seniority systems?

JUDGE ELLIS: Title VII specifically protects employment decisions based on a bona fide seniority or merit system, as well as compensation based on quality or quantity of production and different locations of work.²⁶ Clearly, these are not true defenses to disparate treatment. If an employer’s reason for promoting a white instead of a black, or paying the white more for the same work, is the white’s greater seniority or productivity, the reason is not race. Evidence that a decision is based on seniority or productivity rebuts the plaintiff’s proof of an unlawful reason.

MS. LORRAINE: The BFOQ²⁷ is a true defense, isn’t it?

JUDGE ELLIS: No. A bona fide occupational qualification is not a true defense because if being a certain sex, religion, or national origin is genuinely necessary to perform the job, a person who lacks that quality cannot not do the work: in which event, the person is not protected by the Act, and it is not discriminatory for an employer to refuse to hire the person. For example, being a female is a bona fide occupational qualification for the job of portraying Cleopatra.²⁸

24. See *id.* § 713(b).

25. Ms. Lorraine will persuade the judge to modify this statement. See *infra* Section V.B.2.

26. Title VII, *supra* note 22, § 703(h).

27. Title VII, *supra* note 22, § 703(e), relevantly states:

Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise. . . .

(emphasis added).

28. “Where it is necessary for the purpose of authenticity or genuineness, the [Equal Employment

MS. LORRAINE: What about RuPaul?²⁹

JUDGE ELLIS: Who?

MS. LORRAINE: It's not important. Please go on.

JUDGE ELLIS: That's all. If an employer establishes that a bona fide occupational qualification exists for a job, an element of the *prima facie* case is necessarily unproved.

MS. LORRAINE: The burden of proof's on the employer?

JUDGE ELLIS: Correct.

MS. LORRAINE: So the BFOQ is an affirmative defense, but not a true defense. Is that right?

JUDGE ELLIS: Correct.

MS. LORRAINE: But shouldn't the burden be on the plaintiff instead of the employer? A BFOQ is like a non-discriminatory reason; it puts qualifications in issue, which is an element of *prima facie*-I. If you can't make up your mind about whether there's a BFOQ for the job, shouldn't the plaintiff lose because you can't decide whether the plaintiff's qualified?

JUDGE ELLIS: You are right in theory. Perhaps we can justify placing the burden on the employer because of the number of persons excluded from the opportunity—not only this plaintiff, but everyone like the plaintiff, with no consideration of their individual differences; or perhaps the burden shifts because the employer has better access to the evidence.

MS. LORRAINE: Or because the employer made the decision and should be responsible for it.

JUDGE ELLIS: That, too.

*E. The Prima Facie Case in the First Sense of Disparate Treatment
Deduced from a Prima Facie Case in the Second Sense, namely, the
McDonnell Douglas Formula*

MS. LORRAINE: Is there a Supreme Court case I can read which discusses the elements of disparate treatment and the defenses?

JUDGE ELLIS: Not that I know of, but I believe the Court's allocation of the burdens of proof in *McDonnell Douglas* confirms my analysis. Normally, a plaintiff carries the burden of proof on the elements of the *prima facie* case in the first sense, and the defendant carries the burden on defenses; as a result, we can look at how the burdens were allocated in *McDonnell Douglas* and reason backwards to the *prima facie* case and defenses. Stated generally, and taking into account subsequent cases like

Opportunity] Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a) (2000).

29. RuPaul is a female impersonator.

Burdine and *Hicks*, the formula says that a rebuttable presumption of an unlawful reason arises from proof that the employer offered an employment opportunity; that the employer's group has historically discriminated against the plaintiff's group regarding this opportunity in this area; and that the plaintiff applied for the opportunity, was qualified for it, and was denied it. The Court held that the plaintiff has the burden of proving the facts in the formula. It includes direct evidence that an opportunity was available, that the plaintiff was qualified for it, and that the employer denied it to the plaintiff. The plaintiff's application tends to prove the plaintiff was willing to accept the opportunity. The plaintiff's interest and qualifications, together with historical discrimination, permit the inference that the employer's reason was race or sex. Do you see that the facts in the formula are probative of the elements of the claim of disparate treatment?

MS. LORRAINE: Yes. The formula is *prima facie-II*, and it proves the elements of *prima facie-I*.

JUDGE ELLIS: Good. Then, said the Court, the employer has the burden of offering admissible evidence of a non-discriminatory reason that explains the rejection of the plaintiff. This is a way of defending the action, but, as you noticed, it is not truly a defense for two reasons, one procedural and one substantive. The procedural reason is that, as I said before, the burden on the employer is a burden of production, not a burden of persuasion.³⁰ The burden of persuasion on the employer's reason, as well as on the other elements of the claim, rests on the plaintiff. The substantive reason is that a true defense admits (at least *arguendo*) the plaintiff's *prima facie* case, whereas the employer's evidence of a non-discriminatory reason admits nothing; indeed, it rebuts the inference of an unlawful reason that is permitted by the plaintiff's *prima facie* case. In other words, the employer puts in issue a material element of the plaintiff's case, namely, intent. The employer could do this just as well by attacking any other element of the plaintiff's case—qualifications, interest, or the availability of an opportunity.

F. A Mistaken Suggestion that Disparate Treatment Is Synonymous with Unequal Treatment (in Other Words, that Intent Is not an Element of Disparate Treatment) Leads to a Clearer Understanding of the Roles of Cause and Intent in Disparate Treatment

MS. LORRAINE: Judge, listening to you describe the way the *McDonnell Douglas* formula works, I think it actually proves unequal treatment, just like in *Slack* and *Santa Fe Trail*.

JUDGE ELLIS: How so?

30. Texas Dep't of Cnty. Affairs v. Burdine, 450 U.S. 248, 253-255 (1981).

MS. LORRAINE: In all of them, the person the plaintiff is being compared to . . . ah . . .

JUDGE ELLIS: The "comparator."

MS. LORRAINE: . . . the comparator is treated better than the plaintiff. In *Slack*, the European-American woman was treated better than the African-American women. In *Santa Fe Trail*, the African-American was treated better than the European-Americans. And in *McDonnell Douglas*, you don't need the inference of intent, which I think is dubious anyway; the evidence in the formula shows the European-American or the man who got the job was treated better than the plaintiff. So they all prove unequal treatment.

JUDGE ELLIS: The formula does not actually require evidence that the comparator was treated better than the plaintiff. The formula requires only that the job remained open.

MS. LORRAINE: But doesn't the formula imply a European-American man would not have been rejected?

JUDGE ELLIS: Perhaps, but suppose the employer proves that a member of the plaintiff's group subsequently got the job.

MS. LORRAINE: Something like that happened to a friend of mine after he graduated from college. He got this job as an administrative assistant. He was way overqualified for the job, but he took it because he needed money right away. Afterwards he found out another African-American man—he was African-American; they both were African-American. He—I mean, my friend . . . Let me start over. My friend, who is African-American, found out another African-American had been turned down for the same job a few weeks before my friend was hired. The other guy hadn't gone to college, but he had years of experience in the same kind of job with a company which had gone out of business. This other guy filed a discrimination charge, and my friend figured it was the reason he (my friend) got the job.

JUDGE ELLIS: Perhaps the employer believed your friend was better qualified.

MS. LORRAINE: Well, he was, but it wasn't necessary. That's the point. My friend said it was a pretty dumb job. He was a lot sharper than the European-Americans who worked there. What he figured was, for an African-American to get this job, he had to be twice as good as a European-American.

JUDGE ELLIS: So your point is that disparate treatment may be proved although a person of the same race or sex as the plaintiff gets the job because the employer might be holding people like the plaintiff to a higher standard.

MS. LORRAINE: Or might have hired the person as a defense against

a discrimination charge. But, with respect, Judge, I wasn't really talking about other evidence or who would eventually win the case. I was just saying the *McDonnell Douglas* formula seems to prove unequal treatment. The formula shows a woman or person of color was treated worse than a European-American man would've been.

JUDGE ELLIS: It is not be surprising that the various prima facie cases in the second sense of a claim have a great deal in common. Unequal treatment of workers is part of disparate treatment.

MS. LORRAINE: And aren't the ways of defending *Slack* and *Santa Fe Trail* cases also similar to the ways of defending *McDonnell Douglas* cases? The employer is always attacking the plaintiff's prima facie case, which always shows unequal treatment; if there's no unequal treatment, the plaintiff loses. For instance, the employer could have won *Slack* by proving the European-American woman wasn't able to do the heavy cleaning and the African-American women, including the one who was brought in from the other department, were . . . I don't know, maybe they were the least senior employees in the plant. And the employer could have won *Santa Fe Trail* by proving the African-American worker had an iron-clad alibi.

JUDGE ELLIS: You seem to want to take intent out of the prima facie case in the first sense of disparate treatment. Unequal treatment may be part of disparate treatment; but, as you yourself describe it, whether the plaintiff's rights were violated still depends on the employer's state of mind. If the employer could have won *Slack* by proving that Pohasky relieved the white employee of heavy cleaning because she could not do it, and if the employer could have won *Santa Fe Trail* by proving that the black thief had an alibi, the employer's reason would have been the controlling fact. And, of course, you must not forget the importance of racist remarks like Pohasky's, which go only to state of mind.

MS. LORRAINE: Judge, you just used the words "reason," "intent," and "state of mind." Do they all mean the same thing? Couldn't an employer have a legitimate reason but still be breaking the law, like he won't hire a woman for a job because he's afraid customers wouldn't deal with her? The employer's reason is okay—to make money—but the act is still illegal.

JUDGE ELLIS: I believe you are correct. I have been speaking carelessly. "State of mind" is altogether too general a term. "Motive"—and "reason" when it means motive—are also incorrect. Motive may be an important part of the prima facie case in the second sense, of course; a desire to harm the plaintiff's group easily leads to intentional discrimination. But motive is not an element of the claim itself. Pohasky's motive might have been benign; perhaps he felt that blacks are stronger than whites and less likely to be injured by heavy labor. We should go back to the statute, which outlaws discrimination "because of" race or sex.

Therefore, race or sex must be the cause, or one of the causes, of the employer's act. It can be the sole cause, as in the case of an employer who believes it is inappropriate for a female to hold a certain job; or it can be a but-for cause, as in the case of the employer who refused to hire women with pre-school-aged children;³¹ or, at least since 1991, it can be a partial cause.³²

MS. LORRAINE: What about intent?

JUDGE ELLIS: Of course. The employer must intend race or sex to be the cause. As a practical matter, this means that the employer must intentionally use race or sex as a selection criterion.

MS. LORRAINE: Is it always disparate treatment if race or gender is a selection criterion?

JUDGE ELLIS: I would say yes. When an employer explicitly uses race or sex as a selection criterion, the employer is surely aware of it and must be doing it intentionally. In other words, when the plaintiff's prima facie case in the second sense includes proof that a selection criterion was explicitly race or sex, the plaintiff has also established the elements of cause and intent in the prima facie case in the first sense.

MS. LORRAINE: Is the converse true?

JUDGE ELLIS: You mean, does disparate treatment always involve race or sex as a selection criterion?

Ms. Lorraine nodded. The judge pondered the question for a moment.

JUDGE ELLIS: The Court usually speaks of "employment practices," and that term could include more than selection criteria. But the cases have properly focused on selection criteria.

MS. LORRAINE: Why do you say "properly"?

JUDGE ELLIS: I can imagine an action that challenged an employment practice that was not a selection criterion; for example, suppose an employer decided where to locate, or re-locate, a business based on the ethnic composition of the labor force in the area. That is an employment practice, but I doubt that Title VII was intended—or ought—to reach that far.³³ To answer your former question, then, I believe that discrimination always involves race or gender as a selection criterion.

31. Phillips v. Martin Marietta, 400 U.S. 542 (1971) (per curiam).

32. Title VII of the Civil Rights Act of 1964, § 703(m), Pub. L. No. 88-352, §§ 701-716; 78 Stat. 241, 243-266 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1994)).

33. Cf. Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965) (it is not an unfair labor practice under the Labor Act, *supra* note 7, for an employer to close a plant out of union animus); First National Maintenance Corp. v. National Labor Relations Board, 452 U.S. 66 (1981) (an employer's decision to close part of a business is not a mandatory subject of bargaining under the Labor Act); Fibreboard Corp. v. National Labor Relations Board, 379 U.S. 203, 242 (1964) (Stewart, J., concurring) (in general, an employer's decision to contract out work is not a mandatory subject of bargaining under the Labor Act).

At this point, a troublesome idea entered Ms. Lorraine's mind.

MS. LORRAINE: Judge, I just had a disturbing thought. Medina's case is a class action. He wants to represent hundreds or maybe thousands of potential department store clerks. If he has to prove the *McDonnell Douglas* formula, or something like it, for every member of the class, the trial could take forever.

JUDGE ELLIS: Don't worry. The plaintiff's evidence will be statistical.

A worried expression crossed Ms. Lorraine's brow. She was about to put her feeling into words when the judge spoke.

JUDGE ELLIS: It's late. We can talk another time if you have more questions.

III.

STATISTICAL DISPARATE TREATMENT

The following afternoon, Judge Ellis held a settlement conference with the parties to the Medina case. When the conference was completed, he approached Ms. Lorraine's desk.

JUDGE ELLIS: What do you know of statistics?

MS. LORRAINE: I know nothing at all.

JUDGE ELLIS: Let's hope you know a little more than Socrates did. Come into my parlor.

He walked into his office and sat behind his desk. She settled into the armchair that she had occupied before.

JUDGE ELLIS: I believe you will find that you readily understand the basic ideas, and the refinements may be left to experts. Statistics can prove several of the elements of disparate treatment: that the plaintiffs were interested, that they were qualified, and that they were disproportionately denied employment opportunities; and this proof plus some conventional evidence allows an inference that the employer intended to disfavor the plaintiffs because of their race or sex.

MS. LORRAINE: Aren't statistics about groups? You know, like the average family has 2.4 children. Title VII protects individuals, doesn't it?³⁴

JUDGE ELLIS: You are right on both counts, but statistics can reveal that an employer has denied employment opportunities to interested and qualified individuals who have a characteristic in common.³⁵ Mr. Medina's

34. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).

35. In *Int'l Bhd. Of Teamsters v. United States*, the Supreme Court noted that statistics can be an important source of proof in employment discrimination cases, since

absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting

complaint mentions that 10 percent of this city is Hispanic. If Retail Company had hired clerks without respect to national origin, in the long run and other things being equal, 10 percent of the firm's clerks would be Hispanic. In fact, only 7 percent of the clerks is Hispanic. These facts will not establish liability under Title VII,³⁶ but they do suggest something is amiss.

MS. LORRAINE: That sounds like a quota to me.

JUDGE ELLIS: Not at all.³⁷ I forgot that you believe that you do not know anything of statistics. I will start with the example I use in my course at the law school on employment discrimination, which I wish you had taken.

MS. LORRAINE: I didn't take 'Disco Law' because I can't dance.

A. *Statistics Can Prove that Plaintiffs Were Interested in, Qualified for, and Denied an Employment Opportunity*

I. *Statistics Can Prove that a Cause Was Operating*

JUDGE ELLIS: Ouch! I hope my hypothetical is better than your pun. Suppose the Marx brothers are playing poker for money. Groucho shuffles the deck, deals, and wins the first hand with a royal flush. Groucho shuffles again, deals, and wins the second hand, also with a royal flush. Groucho shuffles a third time, deals, and once again wins with a royal flush. Harpo might commence to think along these lines: "A player might get a royal flush in three consecutive hands in an honest game, but this event happens by chance so rarely that it probably had a specific cause. I believe Groucho has been cheating . . . so I'll never speak to him again."

MS. LORRAINE: Is that where Harpo's shtick came from?

JUDGE ELLIS: You will have to ask him about that.

MS. LORRAINE: I think it's too late.

JUDGE ELLIS: But not too late for his example to show you that, when a process is supposed to be random and we get a result that is unlikely to occur by chance, we assume that a cause is operating. Knowledge of the

and gross disparity between the composition of a work force and that of the general population thus may be significant

431 U.S. 324, 340 n.20 (1977). *See also Hazelwood School Dist. v. United States*, 433 U.S. 299, 307 (1977).

36. *See infra* Sections III.A.3 and III.C.

37. *See Teamsters*, 431 U.S. at 339 ("[T]he statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination").

background can often suggest a likely cause. Harpo's knowledge that Groucho was dealing and winning money suggests that Groucho was cheating.

2. *The Assumption of Equality: Races and Genders Are Similar for Purposes of Employment*

MS. LORRAINE: I understand about cards. It's a game of chance, and the results are supposed to be random. But hiring workers is not a random process. Employers carefully try to select the best qualified applicants. Profits depend on it.

JUDGE ELLIS: Correct, but if the assumption of equality is valid, hiring should be random with respect to race or sex.³⁸

MS. LORRAINE: The assumption of what?

JUDGE ELLIS: Equality. You have a little more to learn than I realized.

Judge Ellis sat back in his chair, then continued.

JUDGE ELLIS: All right. Tell me, what are the odds that the first card drawn from a shuffled fair deck will be a spade?

MS. LORRAINE: One in four.

JUDGE ELLIS: Or a heart or a diamond or a club?

MS. LORRAINE: The same.

JUDGE ELLIS: Correct. The suits are equal for this purpose. The assumption of equality is similar. We assume that, absent proof to the contrary, racial and sexual groups are similar for employment purposes. Blacks are inherently as capable of becoming rocket scientists as whites; females are inherently as capable of driving trucks as males, and so forth.

MS. LORRAINE: Do you think that's true? Human beings aren't like cards. Each of us is really different. Of course, cards are different, too. I mean . . .

JUDGE ELLIS: I know what you mean, and you are right concerning individuals, whether they be cards or persons. The queen of hearts is different from the deuce of spades. A white man may be better qualified for a job than a black woman is. But the assumption of equality, like statistics, applies to groups; and I believe it is true of groups, both of cards and of persons. No intrinsic distinction exists between the values of hearts and spades in a deck of cards; any differences are of our own making. The same is true of the two sexes and the various races with respect to employment. At least, that is the assumption with which we begin. I

38. See Michael Evan Gold, *Employment Discrimination and the Assumption of Equality*, in 2 NEW APPROACHES TO EMPLOYEE MANAGEMENT 1 (David M. Saunders ed., 1994).

believe this assumption is a very important part of the American creed. We believe not only that each individual should have the opportunity to succeed on one's merits, but also that ability is distributed more or less equally across groups. We are egalitarians as well as individualists.

MS. LORRAINE: Wouldn't our belief in individual opportunity be enough by itself to justify the assumption?

JUDGE ELLIS: Individual opportunity might suffice if all of our decisions were based on theories of right, but many of our decisions are based on considerations of social policy. Those decisions often utilize a utilitarian calculus, in which it is appropriate to ask whether money spent for one purpose would yield as great a benefit as money spent for another purpose. If we believed that one group were inferior to another—for example, if we believed that males make better truck drivers than females do, or that whites make better scientists than blacks do—we would be reluctant to provide equal educational and occupational opportunities to all groups in society or special help to disadvantaged groups. But we are committed to the belief, at least as a starting hypothesis, that ability is spread equally across groups. In consequence, if we observe proportionally fewer black than white rocket scientists, or fewer female than male truck drivers, we say the reason is in their environment, not in their genes.

MS. LORRAINE: Levis or Gap?

JUDGE ELLIS: Should I Guess?

MS. LORRAINE: But, seriously, that's no accident. Society has discriminated against women and people of color for hundreds of years. If it wasn't for our sorry history, there'd be a lot more African-American scientists and women truck drivers.

JUDGE ELLIS: I could not agree more, but Title VII does not make an employer liable for societal discrimination.

MS. LORRAINE: I can't say I like it, but I suppose you're right.

JUDGE ELLIS: Keep your politics separate from your law.

MS. LORRAINE: I hear that can't be done.

JUDGE ELLIS: Let's discuss that another day. Right now we are discussing the assumption of equality. Naturally, it may be rebutted in a given action; but it is the starting point, and I believe rightly so. I would not want to live in a society in which the initial assumption is that an individual is inferior because of belonging to a certain racial or sexual group.

MS. LORRAINE: I accept that, of course, but it's not clear to me what the assumption of equality has to do with statistical proof of employment discrimination.

JUDGE ELLIS: Bring to mind Mr. Medina's action again. What does the assumption tell you concerning Anglos' and Hispanics' qualifications

for the job?

MS. LORRAINE: They're equally qualified.

JUDGE ELLIS: Correct. Of course, many persons are not qualified at all, and, of those who are qualified, some are better qualified than others; but none of this matters. The assumption of equality tells us that qualifications are distributed more or less equally across the two groups. And in Mr. Medina's action, no reason exists to believe to the contrary. If the job called for specialized skills or training, like medical doctor, we might be unwilling to assume equality across the groups.³⁹ But for a job like retail clerk, the assumption makes sense.

MS. LORRAINE: And I suppose the same holds for interest.

JUDGE ELLIS: Correct—

The judge asked a leading question.

JUDGE ELLIS:—unless you believe that Hispanics are *more* interested in being clerks than Anglos are. What do you think?

MS. LORRAINE: You know, they might be. Wages are low at Retail, but the work is steady and they have good fringe benefits. What do you think?

JUDGE ELLIS: If I were prone to speculation, though I am not, I might add that an unskilled job like clerk is especially attractive to recent immigrants and persons with limited education.

MS. LORRAINE: So the assumption doesn't hold in Medina's case.

JUDGE ELLIS: This is only speculation; but even if it were true, Retail Company would be unwise to confirm it with evidence. The more Hispanics who are interested in being clerks, the greater their under-representation on the job.

MS. LORRAINE: I still think you are assuming hiring is a random process like a game of cards. I'll bet Retail does its level best to hire only the most persuasive, honest, and reliable applicants.

The judge leaned forward with a gleam in his eye.

JUDGE ELLIS: No doubt you are right, but think of football. We have two major teams in this area. Do you agree that which team a person roots for has nothing to do with how good a retail clerk he or she would make?

Ms. Lorraine suspected that she was being nudged down a slippery slope, and she answered somewhat reluctantly.

MS. LORRAINE: Yes.

39. In *Hazelwood*, for the job of public school teacher, the Court assumed that proportionally fewer blacks than whites held teaching credentials. Therefore, for example, if blacks comprised 20 percent of the population, the Court would not have expected that 20 percent of teachers would be black. Accordingly, in *Hazelwood* the proper comparison was not between blacks in the employer's work force and *all* blacks in the population, but between blacks in the employer's workforce and black *teachers* in the population. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 229, 308 (1977).

JUDGE ELLIS: Would you say that approximately equal numbers of persons root for each team?

MS. LORRAINE: More or less.

JUDGE ELLIS: So you would expect that approximately equal numbers of persons hired by Retail Company in a year would be fans of each team, correct?

MS. LORRAINE: I suppose so.

JUDGE ELLIS: Some, of course, would be indifferent to football, and some would change or abandon their loyalties after they were hired. But hiring should be random with respect to football loyalty. Hiring would *not* be random with respect to ability to sell merchandise, but you have agreed that no connection exists between ability to sell and which team one roots for—correct?

MS. LORRAINE: Yes.

JUDGE ELLIS: The same is true of national origin, isn't it? You do not believe that national origin is connected to ability to sell merchandise, do you?

Now Ms. Lorraine saw the bottom of the slope.

MS. LORRAINE: No. If I did, I'd have to reject the assumption of equality.

JUDGE ELLIS: Correct. And, therefore, although hiring is *not* random with respect to ability to perform the job, hiring *should* be random with respect to national origin.

3. Liability Can Be Based Only on Evidence Concerning the Actionable Period

MS. LORRAINE: I see that, but something is bothering me, Judge. A minute ago you said liability could not be based on the facts of Medina's complaint. Why is that?

JUDGE ELLIS: The statute of limitations.

MS. LORRAINE: Was the complaint untimely? I don't remember seeing that defense in the answer.

JUDGE ELLIS: No, the complaint was timely. The problem is the evidence.

MS. LORRAINE: The *evidence* is untimely?

JUDGE ELLIS: In a way, that is correct. Title VII's short limitations period means that liability may be based only on acts that occurred during the period starting 300 days before the charge was filed; I call this the "actionable period." Discrimination that occurred before the actionable

period may help explain ambiguous events within the actionable period,⁴⁰ but is not actionable itself.⁴¹

MS. LORRAINE: Judge, are individual cases similar in this regard?

JUDGE ELLIS: I am uncertain what you mean.

MS. LORRAINE: Could a plaintiff in an individual case put in evidence of discrimination outside the actionable period?

JUDGE ELLIS: Of course.

MS. LORRAINE: Could it be statistical evidence, or would it have to be about individuals because it's an individual case?

JUDGE ELLIS: Statistical evidence would normally be more helpful because it aggregates many individual incidents. A single discriminatory act outside the actionable period might reveal something, but several acts would be more informative.⁴²

MS. LORRAINE: I understand that, but I don't see how what you were saying about the actionable period connects to Medina's case.

JUDGE ELLIS: What comparison does the complaint draw?

MS. LORRAINE: It compares Latinos in the population to Latinos on the job. What's wrong with that?

JUDGE ELLIS: Do you believe all of Retail Company's clerks were hired in the actionable period?

MS. LORRAINE: No.

JUDGE ELLIS: Take the extreme case. Suppose no clerks were hired in the actionable period. What would that mean for Medina's action?

MS. LORRAINE: If nobody was hired inside the actionable period, he couldn't complain about hiring discrimination.

JUDGE ELLIS: Correct. Now suppose that Retail Company employs a total of 10,000 clerks, that only 10 of them are Hispanic, that all 10 Hispanics were hired during the actionable period, and that no one else was hired during the period. What would that mean for Medina's action?

MS. LORRAINE: He could hardly complain of discrimination if everyone hired during the actionable period was Latino.

40. *Id.* at 309 (evidence of discrimination prior to the actionable period "might in some circumstances support the inference that such discrimination continued" into the actionable period); *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977) (a discriminatory act prior to the actionable period "may constitute relevant background evidence in a proceeding in which the status of a . . . practice [within the actionable period] is at issue.").

41. See *Evans*, 431 U.S. at 558 ("A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed . . . merely an unfortunate event in history which has no present legal consequences.").

42. Cf. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 338 (1977) ("The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination."); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 303 (1977) (the government "adduced evidence of . . . specific instances of alleged discrimination against 55 unsuccessful Negro applicants.").

JUDGE ELLIS: Correct, but what would the statistics on the total stock of clerks look like?

MS. LORRAINE: It would look terrible for Retail.

JUDGE ELLIS: Correct. That is the problem with looking at stock figures; they are nearly always dominated by persons hired outside the actionable period. Comparing the stock of workers at a given point in time to the population or to the qualified labor pool might be helpful in structuring an affirmative action plan, but such a comparison is virtually never appropriate in determining whether actionable discrimination has occurred. What should the complaint have looked at?

MS. LORRAINE: Latinos hired in the actionable period.

JUDGE ELLIS: Correct. I call those "flow" figures.

MS. LORRAINE: Doesn't the answer make the same mistake?

JUDGE ELLIS: Correct. It compares the percentage of Hispanic clerks to the percentage of Hispanics living within 4 miles of the firm's stores.

MS. LORRAINE: This case isn't going anywhere!

JUDGE ELLIS: Not so fast. Mr. Medina learned in discovery the numbers of Anglos and Hispanics hired in 1998. That was within the actionable period.

4. Decisions Made During the Actionable Period Must Be Compared to Expectations Based on a Fair Proxy for the Qualified Labor Pool

MS. LORRAINE: Judge, I'm not seeing the forest for the trees. I understand what you said about statistics in the actionable period and the assumption of equality, but I'm not relating them to proof of discrimination.

JUDGE ELLIS: Recall that one element of the *prima facie* case in the first sense of disparate treatment is that the plaintiffs are qualified for an employment opportunity and they are willing to accept it. In other words, the plaintiffs must be in the qualified labor pool.

MS. LORRAINE: It's like *McDonnell Douglas* again, isn't it?

JUDGE ELLIS: In what sense?

MS. LORRAINE: Well, you said plaintiffs in *McDonnell Douglas* cases have to prove they are in the class protected by the Act. When they prove they applied and were qualified, don't they prove they are in what you just called the qualified labor pool?

JUDGE ELLIS: I believe that may be correct. Of course, the *prima facie* case of disparate treatment in the first sense is the same, whether it is proved on behalf of an individual plaintiff or a group. Your observation applies to the *prima facie* case in the second sense. The evidence that establishes discrimination against an individual is similar to the evidence

that establishes discrimination against a group—at least as far as qualifications and interest are concerned. Very good.

Ms. Lorraine's face warmed, and she grinned.

MS. LORRAINE: Thanks.

JUDGE ELLIS: To go back to your request, in order to understand statistical evidence, you have to understand the concept of proxies. You see, the qualified labor pool is not easily observable. It is a rare case in which a court has direct evidence of the qualified labor pool. For example, how could Mr. Medina obtain evidence about all the persons in this area who are qualified for and interested in being retail clerks in Retail Company's stores? The consequence is that we use proxies. A good proxy has two characteristics: it is reasonably similar to the real thing, and it is quantifiable. Similarity is the important one, but in practice, I suspect, quantifiability is the controlling one: plaintiffs find a proxy they can quantify, and then they argue it is similar to what they want to measure.

MS. LORRAINE: It sounds like the clown who drops something in the middle of the block and looks for it under the street lamp on the corner because the light is better there.

The judge nodded and wrinkled his brow over half a smile.

JUDGE ELLIS: All right. A familiar proxy is the sample of persons in a public opinion poll. The real thing is the population. As a practical matter, of course, we cannot ask the whole population what it thinks of an issue, but we can ask twelve or thirteen hundred persons. If they are properly selected, their replies will match fairly closely what the entire population would say. Proxies are used in a Title VII action because it is probably as impractical to count the qualified labor pool as it is to ask the entire population whether it approves of the president's foreign policy.

MS. LORRAINE: Title VII must make a lot of work for pollsters.

JUDGE ELLIS: No, polls are not used. I suppose they are too expensive. Other proxies—perhaps not as good as a poll, but cheaper—are used in Title VII actions. A common proxy is the population of the area. The population is a fair proxy as long as the assumption of equality holds. It does for some jobs, but not for others. Suppose the job is police officer, and blacks claim discrimination in hiring. Is it plausible that blacks and whites in the population are equally willing and able to be police officers?

MS. LORRAINE: Sure.

JUDGE ELLIS: Now suppose an employer of electrical engineers is accused of discrimination in hiring against blacks and females. Would the population be a good proxy in this action?

MS. LORRAINE: No because fewer African-Americans or women go to engineering school.

JUDGE ELLIS: Proportionally fewer, correct. Then what would be a

good proxy?

MS. LORRAINE: Recent graduates from engineering schools—assuming the job in question was an entry-level position. They wouldn't be a good proxy for a senior position.

JUDGE ELLIS: Very good. You know something concerning the work place.

MS. LORRAINE: Of course. I went to the ILR School.

JUDGE ELLIS: I wish every student would take a course in industrial relations. We all work, don't we? Well, can you think of an even better proxy?

Ms. Lorraine thought for a moment.

MS. LORRAINE: Yes, I can. I know most law firms recruit in certain schools; they don't try to recruit in every law school. The same is probably true of engineering firms. So a better proxy might be recent graduates from the schools where the firm usually recruits.

JUDGE ELLIS: Excellent. But suppose the firm does not actively recruit.

MS. LORRAINE: They probably get resumes by the handful in the mail. Some of my classmates sent out hundreds.

JUDGE ELLIS: And what is a resume?

MS. LORRAINE: Well, it's sort of the story of your life.

JUDGE ELLIS: No, I mean, what function does it serve?

MS. LORRAINE: It's supposed to seduce the reader into believing you're the next Clarence Darrow.

JUDGE ELLIS: Or Portia.

MS. LORRAINE: All right!

JUDGE ELLIS: But resumes are for professionals. How do persons seeking non-professional jobs get them? Think of Mr. Medina's action.

MS. LORRAINE: They go to the personnel office and file applications.

JUDGE ELLIS: Fenneman, give this woman 50 dollars!

MS. LORRAINE: What?

JUDGE ELLIS: You just said the magic word.

MS. LORRAINE: What did I say?

JUDGE ELLIS: "Application." One of the best proxies is the pool of applicants for a job. Do you see why?

MS. LORRAINE: Because applicants are interested.

JUDGE ELLIS: Precisely. It is a bit of a stretch to assume that all the various groups in society are equally interested in a given job, but applicants have proved their interest.

MS. LORRAINE: What about an employer who treats people of color

or women badly and gets a reputation for discrimination? A lot of people wouldn't bother to apply.

JUDGE ELLIS: In that event, the applicant pool would not be a good proxy for the qualified labor pool. The Supreme Court has recognized at least twice that discrimination can deter applications from workers who are interested in jobs.⁴³

MS. LORRAINE: What about the opposite problem? Applicants often go to several employers and sometimes turn down offers. I myself turned down a fat paycheck at a law firm to take this job.

JUDGE ELLIS: All my clerks remind me of that. To answer your question, the assumption of equality still applies. We start off with the assumption that proportionally as many plaintiffs in the applicant pool (or, for that matter, in any other proxy) are interested in the job as the comparators are. Of course, the assumption may be rebutted if, in a given action, reason exists to believe that the plaintiff's proxy overstates their interest.

MS. LORRAINE: Can you give me an example?

JUDGE ELLIS: It happened in *Hazelwood*. The proxy was not the applicant pool, but the idea is the same. The government sued a school district for discrimination against blacks in hiring. The district was in the County of St. Louis, and the government's proxy was the teachers in the county. A large disparity existed between the percentage of black teachers living in the county and the percentage of black teachers whom the district had hired after the statute took effect.⁴⁴ But the district maintained that the government's proxy overstated the interest of black teachers in its jobs. The district pointed out that the City of St. Louis was also located in the county, and the city had a vigorous affirmative action program that attracted black teachers to the city. As a result, the district argued, the government's proxy included many black teachers who had no interest in working in the district. The district proposed as a proxy the teachers living in the county *excluding* the city, arguing that this area more accurately reflected blacks' interest in the district.⁴⁵

MS. LORRAINE: What about qualifications? Can we generally assume that applicants are equally qualified?

JUDGE ELLIS: The assumption of equality is, in fact, stronger when the proxy is applicants because of self-selection. Most persons do not bother applying for jobs they know they will not get. Of course, some do, but this type of person is also probably distributed proportionally across groups. On the average, workers in the applicant pool are better qualified

43. See *Teamsters*, 431 U.S. at 365-367; see also *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977).

44. See *Hazelwood*, 433 U.S. at 310.

45. *Id.* at 310-311.

than workers in the population at large.

MS. LORRAINE: I'll buy that.

B. Application of the Theory of Statistical Evidence to Medina's Case

I. Choice of Proxy

JUDGE ELLIS: Can you apply these ideas to Mr. Medina's case?

MS. LORRAINE: Sure.

JUDGE ELLIS: All right. What proxy does Mr. Medina use in the complaint?

MS. LORRAINE: The population of the city. He alleges that ten percent of the city is Latino.

JUDGE ELLIS: Correct. What proxy does Retail Company use in the answer?

MS. LORRAINE: The population inside four miles of its stores, which is seven percent Latino.

JUDGE ELLIS: Correct. Now, which do you believe is the better proxy?

MS. LORRAINE: Let's see. Well, Retail's point is that people like to work near where they live. But many Latinos live in isolated areas and they're probably used to commuting a long way to work, so I don't think the population around Retail's stores is a good proxy.

JUDGE ELLIS: Can you think of another proxy?

MS. LORRAINE: Like you said, the applicant pool.

JUDGE ELLIS: Correct.

MS. LORRAINE: If Medina hadn't discovered the numbers in the applicant pool, would you throw the case out?

JUDGE ELLIS: Yes, but not for the reason you probably have in mind. The population of the city could be a fair proxy for the qualified labor pool for the job of clerk. The populations surrounding Retail Company's stores could also be a fair proxy. Although I am unsure which is better (I would need more evidence on that score), plainly I would not have dismissed the case for want of a fair proxy. But I would have dismissed the case because the other half of the comparison was unacceptable.

MS. LORRAINE: You mean the stock of clerks in the stores.

JUDGE ELLIS: Correct.

MS. LORRAINE: And what you would want are the numbers of clerks hired in the actionable period.

JUDGE ELLIS: Correct, and Mr. Medina learned them in discovery: 880 Anglos and 120 Hispanics were hired. Now, which party do you

believe these numbers favor?

Ms. Lorraine sank into thought.

JUDGE ELLIS: Remember, 8,500 Anglos and 1,500 Hispanics applied, and 880 Anglos and 120 Hispanics were hired.

MS. LORRAINE: Judge, doesn't this confirm what we were speculating about before? Latinos are only 10 percent of the population, but they're 15 percent of the applicant pool. This is one of those cases where the assumption of equality of interest is wrong, at least as applied to the population.

JUDGE ELLIS: You imply a belief that the applicant pool is superior as a proxy to the general population and the specific populations surrounding Retail Company's stores. Without making up our minds before the trial, let's assume you are correct. And now the question is, whom do the numbers favor?

2. A Statistically Significant Disparity Shows That a Cause Was Operating

MS. LORRAINE: Well, if, as you said, national origin and hiring are unrelated, that means Retail should've hired equal numbers of Anglos and Latinos.

JUDGE ELLIS: Proportional, not equal. Many more Anglos applied.

MS. LORRAINE: Right.

JUDGE ELLIS: And what numbers would you expect under non-discriminatory hiring?

MS. LORRAINE: Eight-five percent Anglos and 15 percent Latinos.⁴⁶

JUDGE ELLIS: Correct, and with 1,000 new clerks hired, that translates into 850 Anglos and 150 Hispanics.

MS. LORRAINE: What were the actual numbers—880 Anglos and 120 Latinos? That's pretty close.

JUDGE ELLIS: Not really. In statistics, the larger the sample gets, the more significant an apparently small disparity becomes. Think of tossing a coin. If you tossed it 10 times, you would not be surprised if you got only 4 heads; and if you tossed it 100 times and got 40, or let's say 45, heads, you still should not be surprised. Those results are not statistically significant; they could easily occur by chance in a perfectly fair process. But if you tossed it 1,000 times and got only 450 heads, you would know something was very likely at work to cause the disparity between what you expected (approximately 500 heads) and what you actually got. In other words, that

46. Anglos were $(8,500 \div 10,000 =)$ 85 percent of the applicant pool, and Latinos were $(1,500 \div 10,000 =)$ 15 percent.

result would be statistically significant; it is probably not the result of chance. The same thing is true of an employer. If Retail Company had hired only 10 applicants, and all were Anglos, those statistics would not convince me that something specific caused the absence of Hispanics. It could easily have been a random variation in a non-discriminatory process. If the firm had hired 100 applicants, and 12 were Hispanics instead of the 15 we would expect, that disparity still would not convince me that the low number of Hispanics had a specific cause. But when you get up to 1,000 persons hired, a disparity as small as 25 or 30 means something.

MS. LORRAINE: What does it mean?

JUDGE ELLIS: In this example, it means that hiring 120 or fewer Hispanics in 1998 was unlikely to occur by chance under non-discriminatory hiring.

MS. LORRAINE: Can you explain that a little more?

JUDGE ELLIS: Think of Groucho again. Statistics can tell you the odds that Harpo would deal himself royal flushes in three consecutive hands in a fair game. What would you say they are, one in a billion?

MS. LORRAINE: Or a zillion.

JUDGE ELLIS: Something like that.⁴⁷ Statistics can also tell you the odds that 120 or fewer Hispanics would have been hired in 1998. The odds turn out to be less than 1 in 200.⁴⁸

47. The probability of drawing a royal flush in a fair game is $1 \div 649,739$. LES KRANTZ, WHAT THE ODDS ARE: A TO Z GUIDE ON EVERYTHING YOU HOPED OR FEARED COULD HAPPEN 213 (1992). The probability of drawing a royal flush in three consecutive hands in a fair game is $((1 \div 649,739)^3 = .000000000000000000000000000000003375$.

48. The Supreme Court in *Hazelwood* stated, "A precise method for measuring the significance of such statistical disparities was explained in *Castaneda v. Partida*, 430 U.S. 482, 496-497 (1977). It involves calculation of the 'standard deviation' as a measure of predicted fluctuations from the expected value of a sample . . ." 433 U.S. 299, 308-309 (1977). The Court in *Castaneda* held:

The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample . . . times the probability of selecting a Mexican-American . . . times the probability of selecting a non-Mexican-American . . . As a general rule for such large samples, if the difference between the value and the observed number is greater than two or three standard deviations, then the hypothesis . . . would be suspect.

430 U.S. at 496-497.

This method may be applied to the facts in the text. The standard deviation is the square root of the probability of hiring an Anglo in a non-discriminatory process ($= .85$ because Anglos were 85 percent of applicants) times the probability of hiring a Latino in a non-discriminatory process ($= .15$ because Latinos were 15 percent of applicants) times the number of hiring decisions (1,000). The square root of $(.85)(.15)(1,000)$ is approximately 11.3. If national origin had no effect on hiring, we would expect that Anglos and Latinos would have been hired in proportion to their representations in the population; therefore, the expected value of new Latino hires is $(.15 \times 1,000 =) 150$. In fact, 120 Latinos were hired. This result is approximately $(150 - 120 = 30; 30 \div 11.3 \approx) 2.6$ standard deviations below the expected value. The probability of a result that is 2.6 or more standard deviations below an expected value may be determined from standard probability tables; that probability is approximately 0.005 or one in 200. See SIR RONALD A. FISHER & FRANK YATES, STATISTICAL TABLES 59 (4th ed. 1953).

MS. LORRAINE: What exactly does that prove?

JUDGE ELLIS: It eliminates the null hypothesis, which is that no cause was operating. In other words, the disparity was not just a random variation. As I said earlier, statistics can show that a cause of some sort was probably at work, and that cause was the reason that the employer hired proportionally more Anglos and fewer Hispanics than expected.

C. Proof of Disparate Treatment by Statistics Is Surprisingly Similar to the McDonnell Douglas Formula

MS. LORRAINE: So then a rebuttable presumption arises that Retail intentionally refused to hire Hispanics because of their national origin.

JUDGE ELLIS: Why do you say that?

MS. LORRAINE: Isn't that what you mean? Didn't you say before that statistics can prove the plaintiffs were interested and qualified and the employer denied them a job? Doesn't that give rise to a rebuttable presumption of intentional discrimination?

JUDGE ELLIS: I said that statistics can show that a cause is at work, but nothing more. Statistics alone cannot prove intent. They can establish that a disparity is so unlikely to occur by chance in a fair process that the disparity probably has a cause, but they cannot identify the cause.

MS. LORRAINE: But isn't it just like *McDonnell Douglas*? You rule out the most common legal reasons, and the illegal one is left. In *McDonnell Douglas*, the plaintiff proved he was qualified, he applied, he was rejected, and the job was available. Because he was African-American, a rebuttable presumption arose that race was the reason he didn't get the job. The statistics do the same things in Medina's case. The assumption of equality tells us that the plaintiffs were as qualified as the Anglos and as interested, but we know that Anglos got 30 more jobs than they should have. In fact, I think the presumption is a lot more justified in statistical cases because the proof is much more powerful. I don't suppose anyone can say what the odds are that race or gender had nothing to do with the rejection of a single qualified person for a vacant job. But in a statistical cases, the odds are 100 or 200 to 1 against the disparity occurring by chance in a fair selection process. If a presumption of intentional discrimination arises in individual cases, a fortiori the presumption arises in statistical cases.

The judge leaned back in his chair and reflected a moment on what Ms. Lorraine had just said.

JUDGE ELLIS: It's strange: I have never realized before that statistical proof in a disparate treatment action follows the *McDonnell Douglas* model. I have believed for a long time that the elements of the prima facie case of disparate treatment in the first sense are the same, whether it is

established by conventional or statistical proof, but I have not thought of *McDonnell Douglas* in this context. However, I am unwilling to say that statistical evidence by itself can create a presumption of intent.

MS. LORRAINE: Why is that, Judge? If people of color are ready, willing, and able to accept a job, and they never get it, what other possible explanation could there be?

JUDGE ELLIS: If we could be certain of what you say, I might agree with you. In fact, however, we never have an accurate count. A proxy is nearly always a loose approximation of the qualified labor pool. Obviously, the population is an imperfect reflection of the persons who are actually willing and able to be police officers or clerks in a store. In *Hazelwood*, the teachers in the county, or even the county minus the city, were at best a rough estimate of the teachers willing and able to fill specific jobs in a specific district.

MS. LORRAINE: I thought teachers in the city or the county, or wherever, were a pretty good proxy. They were all qualified, weren't they?

JUDGE ELLIS: Would an English teacher have been qualified for an opening in the social studies department? Would a gym teacher have been prepared to teach chemistry?

MS. LORRAINE: But what about the assumption of equality? Do you think African-Americans prefer certain specialties and European-Americans prefer others?

JUDGE ELLIS: A fair point. Blacks and whites might prefer different specialties, but I should not assume that; I would need evidence to conclude otherwise. But I will stand by my point: a proxy, especially the entire population of an area, is a loose approximation of the qualified labor pool. Perhaps a better example is the *Teamsters* case. Do you recall it?

MS. LORRAINE: More or less.

JUDGE ELLIS: I have had enough clerks to know what that means. The government sued a trucking firm on behalf of blacks and Hispanics. The proxy was the population of the cities in which the firm's terminals were located. The statistics showed that although blacks were a large fraction of the populations of those cities, they held virtually none of the best-paying driving jobs.⁴⁹ You must agree that the population is a very loose approximation of the qualified labor pool for any job, even one that requires comparatively little training.

MS. LORRAINE: If an employer doesn't hire *any* people of color, how could it be anything but intentional discrimination?

JUDGE ELLIS: I know how strong the temptation is to infer intent straightforwardly. Common errors are common because they are so tempting.

49. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 337 (1977).

The “ineluctable zero”⁵⁰ can make us sure the disparity did not occur by chance, but that is all it can properly do.

MS. LORRAINE: I still don’t get it, Judge. The plaintiff in a *McDonnell Douglas* case proves he was qualified and interested, an opportunity was available, and he was rejected; and that plus a background of historical discrimination creates a rebuttable presumption of intentional discrimination. The plaintiff in a statistical case proves the exact same things for the group, but a presumption does not arise. What’s the difference?

JUDGE ELLIS: The distinction between *McDonnell Douglas* actions and statistical treatment actions is the quality of the proof. In an individual action, we can be reasonably certain that this particular plaintiff is qualified for the job and interested in it, so we can have confidence that the most common legitimate reasons that this person might have been denied the opportunity have been ruled out. In a statistical action, due to the looseness of proxies, we can rarely if ever reach the same degree of certainty regarding the qualifications and interest of the plaintiffs’ group. Our confidence that a disparity exists cannot be as strong, nor can we be as certain that the legitimate explanations have been ruled out. As a result, we judges are reluctant to rest a presumption, even a rebuttable one, on a proxy, a statistical disparity, and historical discrimination.

MS. LORRAINE: What if it’s a very good proxy, like applicants; and the disparity is very significant, so you know a cause is operating?

JUDGE ELLIS: That is all I know. I do not know what the cause is. As you argued the other day concerning the *McDonnell Douglas* formula, many legitimate causes exist.

MS. LORRAINE: What more would you want?

JUDGE ELLIS: Evidence about this employer.

MS. LORRAINE: What did the government have in *Teamsters* and *Hazelwood*?

JUDGE ELLIS: In addition to the statistics in *Teamsters*, the government proved that blacks and Hispanics were lied to concerning job vacancies; their applications were ignored; and they were told there would likely be trouble with whites if minorities got the jobs.⁵¹ This conventional evidence of the employer’s state of mind demonstrated the cause of the statistical disparity. The government introduced the same kind of evidence in *Hazelwood*: the school district told blacks no vacancies existed, and then hired whites; the district refused to interview black applicants with advanced degrees and experience, and then hired whites with less education and experience; the district did not recruit at predominantly black colleges;

50. *Id.* at 342 (quoting *United States v. T.I.M.E.-D.C.*, 517 F.2d 299, 315 (5th Cir. 1975)).

51. See *Teamsters*, 431 U.S. at 338.

and in the past the district had openly refused to hire blacks, had required applicants to declare their race, and had placed an advertisement that said "whites only."⁵² Again, conventional evidence of intent was a major element of the government's case.

MS. LORRAINE: So the statistics, both inside and outside the actionable period, plus the historical evidence plus the conventional evidence about this employer create a rebuttable presumption. Is that right?

JUDGE ELLIS: Correct.

MS. LORRAINE: Then I was right. Statistical disparate treatment cases are like *McDonnell Douglas* cases.

JUDGE ELLIS: The prima facie cases in the first sense are the same. The evidence, that is, the prima facie cases in the second sense, differs somewhat—

The judge conceded the point.

JUDGE ELLIS:—but less than I formerly believed.

Ms. Lorraine savored the moment briefly, then continued.

MS. LORRAINE: I have another question. If the employers in these cases were motivated by race, why did any people of color get hired?

JUDGE ELLIS: You are assuming the employers had only one reason for their acts. I find it rare in life that persons act from only one reason. Sometimes we do, of course. The desire to exclude blacks and Hispanics was probably the single reason at work in *Teamsters*; it surely would explain the zero. But we are complex creatures, and we often have many things in mind when we act. The law does not pretend that we are simpler than we are. Take Retail Company—no, I should not say Retail Company itself; I do not want to pre-judge the action—but an employer *like* Retail Company might be prejudiced against Hispanics and try to hire as few as possible without being obvious. As your college friend suggested, an employer might believe that Hispanics are not generally as qualified as others and hold Hispanics to a higher standard, with the result that proportionally fewer get hired. An employer might believe that customers would accept only a certain number of Hispanic clerks and, therefore, impose a quota on them. Or several persons might be involved in hiring, and only some of them act from an unlawful reason.

52. United States v. Hazelwood Sch. Dist., 534 F.2d 805, 811, 814 (8th Cir. 1976), vacated and remanded, 433 U.S. 299 (1977).

D. *Defenses in Statistical Disparate Treatment Cases*

I. *Three Strategies of Defense*

MS. LORRAINE: Can you discuss how employers defend statistical disparate treatment cases?

JUDGE ELLIS: In basically the same way as they defend an action based on traditional evidence: because of the paucity of true defenses to disparate treatment, whether it is proved by conventional evidence or by statistics, the employer has to attack an element of the *prima facie* case. Three strategies are available. One is to show the plaintiff's numbers are wrong.

MS. LORRAINE: Does that happen often? Wouldn't the plaintiffs get their numbers from the employer through discovery?

JUDGE ELLIS: Not always; and, when plaintiffs do, they might not ask the right questions. For example, suppose that Retail Company had promoted some Hispanics from maintenance jobs to clerks in 1998. It might be that if these promotions were added to new hires, the apparent disparity in 1998 would disappear. But if in discovery Mr. Medina had inquired only concerning newly hired clerks and had not mentioned promotions, and if the firm (as defendants are wont to do) had supplied no more information than necessary to answer the interrogatory, Mr. Medina's numbers would have been misleading. Or suppose the firm had offered jobs to proportionally as many Hispanics as Anglos, but for some reason proportionally more Hispanics turned them down. If Mr. Medina had not inquired concerning offers, again his numbers would have been misleading.

MS. LORRAINE: What are the other two defense strategies?

JUDGE ELLIS: Another is to challenge the plaintiff's statistical method. Then the action becomes a war of experts.

MS. LORRAINE: Is that common?

JUDGE ELLIS: Too common for my taste. Or, of course, the employer may attack the plaintiff's proxy, as in *Hazelwood*.

MS. LORRAINE: Could an employer attack the proxy by proving everyone in the plaintiff's group was unqualified? What if Retail tried to show every rejected Latino was unqualified? Wouldn't that be a good way to demolish Medina's proxy?

JUDGE ELLIS: Theoretically, that is correct. It would convert a statistical action into a series of *McDonnell Douglas* actions. As you have pointed out, the two kinds of action are highly similar. I can tell you, however, that I would do my level best to make the parties settle before taking that kind of evidence. I might even decertify the class. I surely would not relish making decisions, or reviewing a master's decisions, on

the qualifications of each of the 1,500 Hispanic applicants in 1998, not to mention the 8,500 Anglos.

MS. LORRAINE: But what if an employer did it? What if Retail proved each of the 1,380 rejected Latino applicants was deaf, mute, blind, and addle-brained.

JUDGE ELLIS: Leaving aside the ADA?⁵³

MS. LORRAINE: And couldn't sell a snow shoe in Alaska.

JUDGE ELLIS: I have never heard of it, and, given attorney's fees, it might cost more to defend the action that way than to lose it; but I guess it is theoretically possible. It would mean that no one in the plaintiff's group was qualified or injured. It is actually an attack on the plaintiff's proxy.

MS. LORRAINE: Wouldn't it also prove that the assumption of equality is false?

JUDGE ELLIS: It would be falsified in this action. I would not be willing to generalize concerning other actions and to challenge the assumption itself.

MS. LORRAINE: You said there were three defensive strategies, but isn't there a fourth? Couldn't the employer use non-statistical evidence to rebut the presumption of intent?

JUDGE ELLIS: Such as?

MS. LORRAINE: I don't imagine witnesses testifying to their lack of prejudice would have much of an effect.

JUDGE ELLIS: Not in the face of a statistically significant disparity.⁵⁴

MS. LORRAINE: It would be genuinely direct evidence of intent.

JUDGE ELLIS: But hardly disinterested evidence. If it does not work in an individual action like *Santa Fe Trail*, a fortiori it does not work in a statistical action.

MS. LORRAINE: What about minority employees testifying that they're treated fairly?

JUDGE ELLIS: I would not count that for much. The employees' immediate supervisors might be fair persons, but someone else who is responsible for hiring could be prejudiced. Besides, I might doubt the employees' probity; they might be afraid to say anything else.

53. The Americans with Disabilities Act, Pub. L. 101-336, 42 U.S.C. §§ 12101-12213.

54. See *Teamsters*, 431 U.S. at 342 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)) ("The company's evidence . . . consisted mainly of general statements that it hired only the best qualified applicants. But 'affirmations of good faith in making individual selections are insufficient to dispel a *prima facie* case of systematic exclusion'.").

2. *An Affirmative Action Plan Is Not a Defense to Statistical Proof of Disparate Treatment*

MS. LORRAINE: What if the employer had an affirmative action program?

JUDGE ELLIS: It might help in an individual action, but not when the plaintiffs' proof is statistical. If affirmative action is effective, it should increase the number of the plaintiff's group in the employer's work force. Yet the statistics show the group is under-represented. Without the affirmative action, the group would have been more under-represented.

MS. LORRAINE: But at least the employer's trying.

JUDGE ELLIS: Some agents of the employer are trying. Others, apparently, are working at cross purposes.

MS. LORRAINE: So there's not much an employer can do to counteract the presumption of intent.

3. *Revealing the Selection Criterion*

JUDGE ELLIS: The employer could open the black box.

MS. LORRAINE: The what?

JUDGE ELLIS: The black box. Think of a flow chart.

The judge drew a diagram in the air with his hands.

JUDGE ELLIS: The input into the box is the qualified labor pool. The output is workers hired in the actionable period. The plaintiffs' evidence shows their share of the output is less than their share of the input. Obviously, something is going on within the box.

MS. LORRAINE: The employer is deciding who to hire and who to reject.

JUDGE ELLIS: Whom.

MS. LORRAINE: I'm sorry?

JUDGE ELLIS: The word is "whom." *Whom* to hire and *whom* to reject.

MS. LORRAINE: Does it matter?

JUDGE ELLIS: It does in my opinions. The point is that the plaintiffs' evidence tells us nothing concerning the decision-making process. I call it a black box for that reason. Something goes into it—the qualified labor pool. Something comes out of it—new hires. We do not know precisely what happens within; however, we do know that a cause of some sort is disadvantaging the plaintiffs, and we have reason to infer that the cause is intentional discrimination. But the employer knows. An employer who keeps the box closed runs the risk of being found guilty of intentional discrimination.

MS. LORRAINE: You mean, if the employer doesn't knock out any of the plaintiff's evidence, the rebuttable presumption survives.

JUDGE ELLIS: Correct.

MS. LORRAINE: So if the employer's got a non-discriminatory reason operating inside the box, there's every reason to put it into evidence.

JUDGE ELLIS: What did you say?

MS. LORRAINE: I said, "if the employer's got a non-discriminatory reason" —

JUDGE ELLIS: That's very interesting.

MS. LORRAINE: It is?

JUDGE ELLIS: You used the terminology from the *McDonnell Douglas* formula.

MS. LORRAINE: Yes.

JUDGE ELLIS: And it fits. I had not thought of that. The non-discriminatory reason as well as the rebuttable presumption apply both to individual actions and to statistical disparate treatment actions. The formula has broader application than I realized even a moment ago.

Ms. Lorraine was rightfully pleased with herself.

MS. LORRAINE: Can you give me an example of a non-discriminatory reason that might operate inside the box?

JUDGE ELLIS: A scored test. A height or weight requirement.

MS. LORRAINE: And that turns the case into disparate impact.

JUDGE ELLIS: Correct. Which reminds me. At the settlement conference this afternoon, Retail Company's attorney said something about a character test designed to screen out dishonest applicants. I believe you should read up on disparate impact.

The judge began to write on a legal pad.

JUDGE ELLIS: Here's a list of cases that will get you started.

He glanced at the clock on his desk.

JUDGE ELLIS: I know it is late, but I hope you can read them tonight.

MS. LORRAINE: Can I ask you one more question now?

JUDGE ELLIS: If it is a short one.

MS. LORRAINE: Who was Fenneman?

JUDGE ELLIS: Groucho's announcer.

MS. LORRAINE: He was?

JUDGE ELLIS: You bet your life.

He ripped off a sheet of paper and handed it to her. She mumbled under her breath as the judge prepared to leave for the day.

MS. LORRAINE: Another night at the opera.

IV.
DISPARATE IMPACT

Judge Ellis entered his chambers early the next morning and approached Ms. Lorraine's desk.

JUDGE ELLIS: I am surprised to see you here.

A note of concern entered his voice.

JUDGE ELLIS: I hope you did not—

MS. LORRAINE: No, I read the cases you told me to last night and then went home; and then I got to thinking about how treatment is proved with statistics, and all of the sudden I couldn't distinguish treatment from impact. I came in early this morning to try and sort out the theories.

The judge beckoned with a tilt of his head and a wave of his hand. Ms. Lorraine followed him into his office and reclaimed the armchair.

JUDGE ELLIS: So you believe that proving disparate impact and proving disparate treatment with statistics are similar.

Ms. Lorraine nodded.

JUDGE ELLIS: I happen to agree.

Ms. Lorraine was taken aback.

MS. LORRAINE: You do?

JUDGE ELLIS: I do.

MS. LORRAINE: Why?

JUDGE ELLIS: First I would like to hear what you have to say.

A. The Rationales for Disparate Treatment and Disparate Impact Are the Same: They Give Members of a Protected Class a Lesser Chance Than Their Comparators to Benefit from an Employment Opportunity

MS. LORRAINE: Judge, I'd like to begin with the rationales. If we know the purpose, we know a lot about the rule; and if the rationales behind the treatment and impact theories are the same, the rules might be the same.

JUDGE ELLIS: Surely if the rationales are different, the rules are likely to differ. What do you believe the rationales are?

MS. LORRAINE: The rationale for treatment's obvious enough. It's just wrong to deny someone a chance to get a job, or give them a lesser chance to get it, because of their race or gender. All of us are intrinsically valuable. How much melanin or how many X chromosomes someone has, has nothing to do with how good a person they are or how good an employee they'll make.

JUDGE ELLIS: "We hold these truths to be self evident, that all men are created equal"

MS. LORRAINE: And "endowed by their Creator with certain unalienable rights"

JUDGE ELLIS: What about disparate impact?

MS. LORRAINE: I've thought of three possibilities. I remember Professor Gold mentioned in class that the Supremes more or less invented the impact theory in the *Griggs* case,⁵⁵ and the question is, why did they do it? I mean, they could've as easily gone the other way by stressing an employer's right to run a business without the government second-guessing decisions made in good faith. Maybe they were trying to get at intentional discrimination that employers cover up. What the employer did in *Griggs* was so suspicious: the aptitude test was implemented on the very day Title VII took effect.⁵⁶

JUDGE ELLIS: The problem with that argument is that, by assumption, we have no proof of intent. How may we say an employer is trying to cover up something that we have no proof ever existed?

MS. LORRAINE: But, Judge, you know it happens. There's a lot of discrimination out there, and it's incredibly hard to prove.

JUDGE ELLIS: I might agree that more discrimination occurs than is remedied in court, but I can only decide cases that come before me. In truth, you are suggesting that rule of law number 2 may properly be designed to capture parties who conceal their violations of rule of law number one. That would be acceptable only if everyone who breaks law two also breaks law 1. If some parties break only law 2, it requires its own rationale. I know of no evidence that every employer who commits disparate impact does so deliberately, and therefore I believe disparate impact needs its own justification.

MS. LORRAINE: The second possibility is that impact is a kind of negligent discrimination.

JUDGE ELLIS: Not really. It is true that, in both disparate impact and negligence, an unintended injury occurs. However, although due care is a defense to negligence, all the care in the world is not a defense to disparate impact. What is your third possibility?

Ms. Lorraine seemed to be searching for the right words.

JUDGE ELLIS: How would you explain it to your mother? She is not a lawyer, is she?

MS. LORRAINE: No. She's an investment banker.

JUDGE ELLIS: Good. How would you explain to her what was wrong with the employers' practices in the disparate impact cases that you have read?

MS. LORRAINE: What seems wrong to me is the employers didn't

55. See 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, 466-578 (1985) [hereinafter *Griggs' Folly*].

56. *Griggs v. Duke Power Co.*, 401 U.S. 424, 427 (1971).

give the plaintiffs an equal chance to get the jobs. In *Griggs*, the employer required applicants to have a high school diploma, which only 12 percent of African-American men had as compared to 34 percent of European-American men. The employer also required applicants to pass an aptitude test, which only 6 percent of African-Americans passed as compared to 58 percent of European-Americans.⁵⁷ In *Dothard*, the employer required prison guards to be at least 5 feet 2—

JUDGE ELLIS:—“Eyes of blue” —

MS. LORRAINE: And 120 pounds. Almost all men were physically big enough, but nearly half of women weren’t.⁵⁸

JUDGE ELLIS: If you add that having a diploma, passing the test, and meeting the height and weight minima were not necessary to do the jobs, you are exactly right. This is probably what the Court meant when it spoke of removing unnecessary barriers⁵⁹ and eliminating built-in headwinds.⁶⁰ In disparate impact actions, the employer’s selection criteria have the specific effect of reducing the chances of blacks as compared to whites, or females as compared to males, to benefit from employment opportunities. Giving white males a better chance than other workers is simply unjust.

MS. LORRAINE: It sounds like you’re talking about groups again—“reducing the chances of blacks as compared to whites . . . or females as compared to males.” Impact seems to be about group rights, not individual rights.

JUDGE ELLIS: No. Disparate impact, like disparate treatment, is about individual rights. Each black in *Griggs* received a lesser chance to get the employment opportunity than each white received; each female in *Dothard* received a lesser chance than each male received. It is as though two distinguishable groups of persons were shooting craps at the same table, and the house gave the groups different dice. Group 1’s dice were fair. Group 2’s dice were loaded so they lost more often. Of course, some members of group 1 also lost, and some members of group 2 did win; but more members of group 2 lost than group 1. Wouldn’t you agree that the house treated each member of group 2 unfairly?

MS. LORRAINE: So the difference between treatment and impact is only a matter of degrees of chance?

JUDGE ELLIS: That is true if you are thinking about the reasons for liability. However, if you are thinking about the nature of the injury, for the individual female or minority who loses an opportunity, the economic effect is the same, whether the employer intended it or not. Of course, the

57. *Id.* at 427.

58. *Dothard v. Rawlinson*, 433 U.S. 321, 323, 329 (1977).

59. See *Griggs*, 401 U.S. at 429.

60. See *id.* at 432.

emotional effect varies; intentional discrimination is worse in that regard.

MS. LORRAINE: Discrimination law reminds me of my ethics course in college. Some philosophers—they're called consequentialists, I believe—maintain only effects are morally significant, whereas other philosophers—the non-consequentialists—argue both intentions and effects are morally significant;⁶¹ but almost no one (except maybe Kant⁶²) asserts effects don't matter at all. I've always thought both intent and effects are morally relevant, and it looks like Congress agrees. After all, Title VII is about justice on the job.

JUDGE ELLIS: Many of us want to judge our own acts by our intentions and others' acts by their effects.⁶³ I agree with you. Both matter.

MS. LORRAINE: So it looks like the rationales for treatment and impact are identical, and that means there's a good chance the theories are the same as well.

JUDGE ELLIS: Regarding the economic effects, you are correct. Regarding the emotional effects, there is a difference. Now I would like to hear your thoughts about the theories.

B. The Proof of Disparate Impact, Like the Proof of Disparate Treatment, Includes a Proxy, the Assumption of Equality, a Significant Disparity (Which Proves a Cause Was Operating), and Identification of the Cause

MS. LORRAINE: Okay, I'll try, though I don't think I've thought it through completely. It all got started last night when you talked about the black box. Even if the employer doesn't open the box, the plaintiffs' evidence in a statistical treatment case is still very much like the evidence in an impact case. The first thing they do is choose a proxy. For example, in

61. See Onora O'Neill, *Duty and Obligation*, in *ENCYCLOPEDIA OF ETHICS* 273, 274 (Lawrence C. Becker and Charlotte B. Becker eds., 1992).

62. Immanuel Kant, *Metaphysical Foundations of Morals*, in *THE PHILOSOPHY OF KANT* 140-141 (Carl J. Friedrich ed., Random House 1949):

Nothing can possibly be conceived in the world, or even out of it, which can be called good without qualification, except a GOOD WILL A good will is good not because of what it performs or effects, nor by its aptness for attaining some proposed end, but simply by virtue of the volition; that is, it is good in itself and when considered by itself is to be esteemed much higher than all that it can bring about in pursuing any inclination, nay even in pursuing the sum total of all inclinations. . . . Its usefulness or fruitlessness can neither add to nor detract anything from this value.

But cf. Herman A. Brautigam, *Kant, Immanuel*, in *ENCYCLOPEDIA OF MORALS* 267, 269 (Vergilius Ferm ed., Philosophical Library 1956):

Kant is often mistakenly interpreted as saying that morality is not concerned with consequences; his point, however, is merely that intended consequences, 'some proposed end,' being relative cannot be the criterion of an absolutely good will. The criterion of a will that is to be esteemed as good in itself is that the actions to which it leads are done *from duty*. Actions of this sort alone have moral worth.

63. Cf. Sydney J. Harris, *Winners and Losers* 93, quoted in *ETHICS FOR FUNDRAISERS* 46 (Albert Anderson ed., 1996).

Griggs, the proxy for the diploma requirement was the male population of the state, and the proxy for the aptitude test was the people who took it. In *Dothard*, the proxy for the height and weight requirements was the whole population. If the proxy is fair, the assumption of equality kicks in, and we assume that members of the plaintiff's group in the proxy are as willing and able to do the job as the comparators are.

JUDGE ELLIS: In other words, the plaintiffs' group is in the class protected by the Act.

MS. LORRAINE: Right, just like *McDonnell Douglas*. This step is sort of automatic, isn't it? I mean, if you had reason to think the plaintiffs' people weren't as willing and able as the comparators, you'd reject the proxy.

JUDGE ELLIS: That is interesting. The assumption of equality is incorporated into the definition of proxy. I had not thought of that.

Ms. Lorraine suppressed a smile and continued.

MS. LORRAINE: Then the plaintiff shows an adverse effect. In *Griggs*, three times as many European-Americans as African-Americans had diplomas, and ten times as many European-Americans passed the test. In *Dothard*, about twice as many men were big enough.

JUDGE ELLIS: Correct.

MS. LORRAINE: An adverse effect's the same thing as a disparity, isn't it?

JUDGE ELLIS: Correct.

MS. LORRAINE: I think I have a problem here, though. You told me the standard in statistical treatment cases is whether the disparity is statistically significant, but in impact cases the standard is the 80 percent rule.⁶⁴

JUDGE ELLIS: I maintain that statistical disparate treatment and disparate impact actions should use the same standard for determining whether plaintiffs have proved a disparity. In both types of action, the plaintiffs' numbers, on their face, show that the plaintiffs' group has been disadvantaged vis-à-vis another group; and in both types of action, we have to ask the same question of those numbers: are they a random variation in a fair process, or are they so unlikely to occur by chance that we may be confident that the disadvantage to the plaintiff's group has a cause?

64. “[A] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the [selection] rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact. . . .” Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. pt. 1607 § 1607.4D (1981). (Under the 80 percent rule, if 20 percent of women applicants and 50 percent of men applicants satisfy a certain selection criterion, the criterion has an adverse effect because the selection rate for women is only $(20 \div 50 =)$ two-fifths or 40 percent of the selection rate for men).

MS. LORRAINE: But what about the *Teal* case?⁶⁵

JUDGE ELLIS: It is not contra. The Court did not hold that the 80 percent rule is appropriate. The parties agreed it was, and, therefore, it was not an issue in the case. The Court merely stated the parties' agreement.⁶⁶ But if the Court had adopted the 80 percent rule, it would have been a mistake because it does not reveal whether a given observation is likely to have occurred by chance. Perhaps with small sets of data, it is an approximate measure of statistical significance; but with larger sets of data, it is inaccurate. Do you want me to illustrate this for you?⁶⁷

MS. LORRAINE: No, I'll trust you, but I have a question. What if you saw a small disparity which was statistically significant?

JUDGE ELLIS: If a disparity is statistically significant, it is real. It might seem small as a matter of proportion, but your common sense is misleading you.⁶⁸ I believe that any statistically significant disparity probably has a cause and, therefore, is legally significant.

MS. LORRAINE: All right, so now we've got a significant disparity, and that means it probably had a cause. In treatment, the plaintiffs try to prove the cause was race or gender as the explicit selection criterion. In impact, they try to prove the cause of the disparity was a selection criterion that is neutral on its face.

65. Connecticut v. *Teal*, 457 U.S. 440 (1982).

66. *Id.* at 443.

67. Example with a small set of data: An employer wants to hire 100 new workers; 100 men and 100 women apply, and the employer hires 45 women and 55 men. The 80 percent rule asks, is the success rate of the affected class (women) at least 80 percent of the success rate of the comparators (men)? The rule is satisfied in this example because women's success rate is $(45 \div 100 =) 45$ percent, men's success rate is $(55 \div 100 =) 55$ percent, and 45 is $(45 \div 55 =) .82$ percent of 55. Testing for statistical significance according to the method in *Castaneda v. Partida*, 430 U.S. 482 (1977), the probability of selecting a man in a sex-neutral process is $(100 \text{ men} \div 200 \text{ applicants} =) .5$; the probability of selecting a woman in a neutral process is the same. The number of decisions (persons hired) is 100. Therefore, the standard deviation is $\sqrt{(.5)(.5)(100)} = 5$. Thus, the result of 45 women is $(50 - 45 = 5)$ one standard deviation below the expected result of 50; this result is not statistically significant because it could easily occur by chance in a selection process in which sex plays no role.

Example with a large set of data: Same as above with numbers larger by a factor of ten: 1,000 men and 1,000 women apply, and the employer hires 450 women and 550 men. Applying the 80 percent rule yields the same result as above; adding a zero to the numbers does not change the proportions $(450 \div 1,000 = 45$ percent; $550 \div 1,000 = 55$ percent; $45 \div 55 = .82$ percent). The test for statistical significance, however, comes out very differently. The probabilities of hiring men and women are the same as above $(1,000 \div 2,000 = .5)$, but the number of decisions is much larger (1,000). The square root of $(.5)(.5)1,000$ is approximately 16. The result of 450 women is $(500 - 450 = 50; 50 \div 16 \approx) .3$ more than 3 standard deviations below the expected result of 500; this result is statistically significant because it is unlikely to occur by chance in a selection process in which sex plays no role.

68. Suppose 10,000 men and 10,000 women apply for 10,000 jobs, and 4,800 women and 5,200 men are hired. Women get only 200 out of 10,000 fewer jobs than one would expect in a sex-neutral selection process, and this result is merely $(200 \div 5,000 =) 4$ percent less than the expected result of 5,000 jobs; but this result is $(\sqrt{(.5)(.5)10,000} = 50; 200 \div 50 =) 4$ standard deviations below the expected value.

JUDGE ELLIS: That is interesting, especially the last point. I am used to saying, "The plaintiffs identify a selection criterion and show it has an adverse effect." Reversing that as you just did—the plaintiffs show the adverse effect and then prove its cause was the selection criterion—does not change the analysis substantively, but it does reveal the similarity of the proofs of disparate impact and statistical disparate treatment.

C. The Defense to Disparate Impact Is Similar to the Defense to Disparate Treatment

1. Job Relatedness Is Similar to a Bona Fide Occupational Qualification: Both Are Attacks on the Same Element of the Prima Facie Case, Namely, the Qualifications of the Plaintiffs' Group

MS. LORRAINE: The defenses are equally similar because they knock out an element of the prima facie case. In treatment cases, the BFOQ proves the plaintiff's group can't do the job, like a man playing Cleopatra. In impact cases, job relatedness also proves the plaintiffs aren't qualified.

JUDGE ELLIS: Out of the mouths of babes! I had not previously realized the similarity of the bona fide occupational qualification and job relatedness. It is amazing what fresh eyes can see.

This time Ms. Lorraine did smile.

MS. LORRAINE: Thanks, but I have to admit something. I know Professor Gold's article says job relatedness proves the plaintiffs aren't qualified,⁶⁹ but, honestly, I don't totally understand why.

JUDGE ELLIS: I believe I can explain it to you, and I believe you will like the explanation because it fortifies your idea about the similarity of statistical disparate treatment and disparate impact. The analysis has two parts. The first part is easy enough. In both kinds of action, the employer may challenge the plaintiffs' proxy, numbers, or statistical methods.

MS. LORRAINE: How can the employer challenge the proxy in an impact case? Isn't it always the group the selection criterion operates on? For instance, in *Griggs* the diploma requirement operated on the population, which was the proxy, and the test operated on test takers, who were the proxy.

JUDGE ELLIS: Yes, but suppose the plaintiffs prove that a test has an adverse effect in a given year, and then the employer shows that, over a five-year period, the test does not have an adverse effect. The employer would be arguing that test takers over five years are a better proxy than test takers in one year.

69. *Griggs' Folly*, *supra* note 55, at 437.

MS. LORRAINE: Okay. And I imagine the plaintiff's numbers or statistical methods could be wrong; and if they are, the prima facie case fails. But job relatedness is an affirmative defense in impact cases, and I don't see how it affects the prima facie case.

JUDGE ELLIS: That is the second part of the analysis, and it is a little harder. Tell me what you know concerning the defense of job relatedness.

MS. LORRAINE: The employer can prove a selection criterion which has an adverse effect is job related or . . . I forget the word.

JUDGE ELLIS: "Valid."

MS. LORRAINE: Right. Validity's a true defense, isn't it? It concedes the criterion has an adverse effect on the plaintiffs and provides a justification.

JUDGE ELLIS: Not at all. Although the burden of proof is on the employer, job relatedness actually undermines the prima facie case by establishing a new proxy that is better than the plaintiff's proxy and shows the plaintiff's group was not injured.

Ms. Lorraine looked as though the judge had just read a passage from Finnegans Wake.

JUDGE ELLIS: The idea is not hard to grasp once you think of it correctly. Tell me, what is the essential feature of a job-related selection criterion?

MS. LORRAINE: It tells the employer which people are qualified and which aren't.

JUDGE ELLIS: And isn't that half the definition of the qualified labor pool?

MS. LORRAINE: Well, yes, but . . .

JUDGE ELLIS: Recall *Dothard*. Suppose that Alabama validated its criteria, in other words, proved that guards who were at least 5 feet 2 and 120 pounds performed better on the job than smaller guards. By proving that the height and weight minima were job related, Alabama would have rebutted the assumption of equality and convinced us that the one percent of males and the 41 percent of females who did not satisfy these criteria were unqualified. Naturally, if they were unqualified, they were not in the qualified labor pool.

MS. LORRAINE: But how do valid criteria establish a new proxy? What would the new proxy have been in *Dothard*?

JUDGE ELLIS: The persons who satisfy valid criteria are the new proxy. In *Dothard*, if the criteria had been valid, the new proxy would have been males and females standing at least 5 feet 2 and weighing at least 120 pounds.

MS. LORRAINE: But not everyone in this group would've really been qualified.

JUDGE ELLIS: Probably not, but that is true of any proxy. I doubt the employer hired every applicant over 5 feet 2 and 120 pounds; Alabama surely used further selection criteria to hire guards. But every qualified person would have met the height and weight minima. And the new proxy, identified by the height and weight criteria, would have been superior to the plaintiff's proxy because the plaintiff's included persons now known to be unqualified, namely, those under 5 feet 2 and 120 pounds. The question would then have become whether the employer treated the individuals in the new proxy fairly.

MS. LORRAINE: I think I'm getting the idea.

Ever the teacher, the judge reinforced the point.

JUDGE ELLIS: In *Griggs*, the plaintiffs' proxy regarding the diploma requirement was the male population of the state. The assumption of equality told us that black and white males were equally qualified for the jobs. Now suppose the employer proved the diploma requirement was job related. This proof would have convinced us that the assumption of equality was false in this action; only those holding diplomas—34 percent of whites and 12 percent of blacks—were in fact qualified.

MS. LORRAINE: I think I've got the picture now.

The judge challenged Ms. Lorraine.

JUDGE ELLIS: Let's see you apply this reasoning to the aptitude test in *Griggs*.

MS. LORRAINE: The plaintiff's proxy was people who took the test. That's a good proxy because it captures interest. The assumption of equality tells us European-Americans and African-Americans in the proxy were equally qualified, so equal percentages of them should have passed the test. On this assumption, the test had an adverse effect on the plaintiff's group because 58 percent of European-Americans who took the test passed it, while only 6 percent of African-Americans who took it passed. But if the test was job related, that means people who passed the test were qualified and people who flunked it weren't. So the test, if valid, created a new proxy, which was better than the plaintiff's proxy because the plaintiff's proxy contained people who flunked the test and weren't qualified, whereas the new proxy contained only people who passed. The question would then've been whether Duke Power Company discriminated against people of color who passed the test.

JUDGE ELLIS: Correct.

2. Plaintiffs' Proof of an Alternative Selection Criterion, Which Is at Least as Job Related as the Employer's Criterion and Has a Lesser Adverse Effect, Shows the Employer's Criterion Selects on the Basis of Race or Gender

Flushed with success, Ms. Lorraine continued.

MS. LORRAINE: What about *Albemarle*?⁷⁰ It says if the employer's selection criterion is job related, the plaintiffs can still win the case by proving the existence of another criterion which is also job related but doesn't have an adverse effect on their group. Is that just another proxy?

JUDGE ELLIS: Yes. Suppose the aptitude test in *Griggs* had been valid. If 100 blacks and 100 whites took the test, 58 whites and 6 blacks passed; and that means . . .

The judge reached for his calculator.

JUDGE ELLIS: . . . that (58 plus 6 equals 64; 6 divided by 64 equals) 9 percent of the individuals in the proxy created by the test would have been black and 91 percent would have been white. Now suppose either that everyone who passed the test was hired or that 9 percent of the new hires were black and 91 percent were white. (I am ruling out the possibility that a second criterion, applied after the aptitude test, had an adverse effect.) Duke Power Company would have proved that the qualified labor pool was nine percent black and that 9 percent of new hires was also black, so the plaintiff's group was not injured. Now suppose that the plaintiffs came up with an alternative selection criterion, such as a different aptitude test, and it had the dual virtue of being job related and more favorable to blacks. Let's say that half the persons who passed this test were black and half were white. On these facts, the plaintiffs would have re-established injury to their group. Being valid, their proxy—persons who passed the alternative test—would have been as good as the proxy generated by employer's test; and whereas only nine percent of the persons in the employer's proxy was black, 50 percent of the persons in the plaintiff's proxy was black.

MS. LORRAINE: What if the employer's criterion is more valid than the plaintiff's? Are there degrees of job relatedness?

JUDGE ELLIS: Yes, validity comes in degrees. Some tests have more predictive power than others. If the employer's criterion is a better predictor of success on the job than the plaintiff's alternative criterion, the employer has no obligation to forsake efficiency.⁷¹

70. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

71. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989) ("Any alternative practice which [plaintiffs] offer up . . . must be equally effective as [the employer's] chosen hiring procedures in achieving [the employer's] legitimate employment goals. Moreover, '[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice. . . .' *Watson v. Fort Worth Bank & Trust*, 470 U.S. 977,

MS. LORRAINE: Judge, something seems wrong here. I mean, plaintiffs can win a case with the *Albemarle* maneuver—

JUDGE ELLIS: Which is?

MS. LORRAINE: Proof of a selection criterion with a lesser adverse effect than the employer's. But *Furnco*⁷² says just the opposite.

JUDGE ELLIS: How so?

MS. LORRAINE: Well, you remember, the employer only hired workers who he personally knew were qualified or were recommended to him; people who applied at the gate of the project were never hired. The Court of Appeals held this discriminated against African-Americans because the employer could've hired more of them by taking applications at the gate and checking on their references,⁷³ but the Supremes reversed. They said an employer doesn't have to maximize hiring minorities.⁷⁴ Isn't that inconsistent with *Albemarle*?

JUDGE ELLIS: Is my recollection correct that *Furnco* raised both disparate treatment and disparate impact claims?

MS. LORRAINE: Yes.

JUDGE ELLIS: And which one are you describing?

MS. LORRAINE: Treatment.

JUDGE ELLIS: But *Albemarle* was a disparate impact case.

MS. LORRAINE: Right, but why should an employer have to maximize hiring minorities in impact cases but not in treatment cases?

JUDGE ELLIS: I would not say the employer has to maximize minority hiring in a disparate impact action; I would say the employer has to avoid discrimination. This is like any other disparate impact action. The typical one involves a comparison of criterion A, which has an adverse effect and is not job related, with criterion B, which is random selection from the qualified labor pool. In the *Albemarle* example, criteria A and B are equally good predictors of success on the job, but A excludes more blacks or women than B does. In each instance, race or sex is the cause of the difference.

3. Seniority And Other True Defenses to Disparate Impact

MS. LORRAINE: All right, Judge, but what about seniority systems? The adverse effect of layoffs and recalls based on seniority is, like, so severe on newly hired women and people of color. I know seniority is

998 (O'Connor, J.)").

72. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 572 (1978).

73. *Id.* at 574 (citing *Waters v. Furnco*, 551 F.2d 1085, 1088 (7th Cir. 1977)).

74. See *Furnco*, 438 U.S. at 577-578.

protected by the Act, but how does it fit in your analysis?

JUDGE ELLIS: Seniority is a selection criterion. In a disparate treatment action, a bona fide seniority system is a defense because it is not race or sex. In a disparate impact action, a seniority system is conclusively presumed to be job related.

MS. LORRAINE: So there is a true defense to discrimination!

JUDGE ELLIS: To disparate impact, you are correct; and, of course, this would apply as well to the other exceptions in section 703(h).⁷⁵

4. A Selection Criterion Must Be Job Related in Order to Serve as a Defense in a Disparate Impact Case, but in a Disparate Treatment Case a Selection Criterion May Be a Defense Regardless of Whether It Is Job Related

Feeling confident now, Ms. Lorraine pursued her notion of the similarity of disparate treatment and disparate impact.

MS. LORRAINE: You just made me think of something. When you mentioned how seniority works in treatment and impact cases, it occurred to me the defense to impact, as well as the prima facie case, follows the *McDonnell Douglas* model.

JUDGE ELLIS: Would you care to elaborate on that?

MS. LORRAINE: Sure. In an impact case, if a test is job related, it's a legal qualification for the job. In a treatment case, a non-discriminatory reason is also a legal qualification for the job.

JUDGE ELLIS: The word "qualification" is ambiguous; it may mean a skill that is necessary to perform the job, or it may mean a prerequisite that must be satisfied to be hired for the job. In an ideal world, necessary skills and prerequisites would be identical; in our imperfect world, some necessary skills are not prerequisites for getting a job, and some prerequisites for getting a job are not necessary skills. Let's use "selection criterion" to refer to a prerequisite for getting the job, and save "qualification" to mean a necessary skill. I believe you are speaking of selection criteria.

MS. LORRAINE: Isn't a job-related test a real qualification?

JUDGE ELLIS: Only if the job calls for taking tests. The employer in *Griggs* did not care whether employees had a high school diploma or passed an aptitude test. What the employer cared about was whether employees had the ability to perform certain tasks, and the diploma and the

75. Section 703(h) of Title VII of the Civil Rights Act of 1964, 78 Stat. 241, 243-246 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1994)) also mentions bona fide merit and piece rate systems of compensation and different locations of work.

aptitude test were supposed to measure this ability. They were selection criteria for the job; performing the tasks was the qualification.

MS. LORRAINE: Couldn't a test also be a qualification? Suppose the job calls for typing 60 words a minute, and the test measures how fast you type.

JUDGE ELLIS: I am sure many tests of typing speed exist; and even if only one test existed, it would be administered under varying conditions, all of which differ from actual conditions on the job. Passing any particular test of typing speed is still only a selection criterion.

MS. LORRAINE: Okay, so I should've said, in an impact case, if a test is job related, it's a legal selection criterion for the job.

JUDGE ELLIS: Correct.

MS. LORRAINE: And the same thing is true of treatment cases. A non-discriminatory reason is a legal selection criterion for a job.

JUDGE ELLIS: Correct.

MS. LORRAINE: And, therefore, the defenses to treatment and impact cases are the same.

JUDGE ELLIS: Incorrect. The selection criterion must be job related in a disparate impact action, but need not be in a disparate treatment action. An employer may win a disparate treatment action with evidence of any criterion that is not outlawed by Title VII. Whether or not it measures a true qualification for the job, a lawful criterion opens the black box and rebuts the inference arising from the formula that the employer's reason was unlawful. But in a disparate impact action, the employer's criterion has to be job related; it must measure a true qualification. Also, the burden of proof is on the plaintiff in disparate treatment to prove the criterion is unlawful, whereas in disparate impact the burden of proof is on the employer to prove the criterion is job related.

5. The "Bottom-Line" Defense Fails Because an Employer May Not Rely on an Alternative Proxy Unless It Pertains to the Same Employment Opportunity Which the Plaintiffs Claim They Were Denied

MS. LORRAINE: I want to think about that, Judge,⁷⁶ but now I have a question about the defense. I'm wondering if there isn't another way employers could defend an impact case. If plaintiffs can prove another valid criterion exists and has less of an adverse effect, and that amounts to proving another proxy, why can't the employer prove another proxy, like the population or the applicant pool?

76. See Ms. Lorraine's further thoughts on this matter at *infra* Section V.B.

JUDGE ELLIS: The employer may,⁷⁷ but only if the new proxy pertains to the same employment opportunity which the plaintiffs assert they were denied. Let's review the process from the beginning. The plaintiffs prove that a certain selection criterion operates to deny them an employment opportunity. The employer proves that the criterion is valid with respect to that opportunity (which, as I have said, amounts to substituting a better proxy for the plaintiff's proxy). If the plaintiffs prove the existence of an alternative valid criterion with a lesser adverse effect on their group, the alternative criterion and the proxy it creates will also pertain to the opportunity which the plaintiffs assert they were denied.

In short, up to this point, all of the proof in the action is focused on the same employment opportunity. The employer may present still another proxy only if it pertains to the opportunity at issue in the action. In other words, proxies are connected to opportunities. This is important because the Supreme Court held in *Teal* that plaintiffs are entitled to identify the opportunity they were denied. In that case, promotion from case worker to supervisor was the result of a two-step process. First, case workers had to pass a test, and, second, those who passed were evaluated on their past work performance as well as supervisors' recommendations and seniority. The plaintiffs were blacks who proved that the test in the first step had an adverse effect on them.⁷⁸ The employer's defense was not that the test was job related, but that the overall process did not have an adverse effect on blacks because at the "bottom line"—that is, after the second step—proportionally more blacks than whites who entered the process were promoted.⁷⁹ The Court held for the plaintiffs, I think correctly.

MS. LORRAINE: Don't you always think correctly?

JUDGE ELLIS: You do not have to listen to me that closely.

MS. LORRAINE: It matters in my opinion.

The judge chuckled and resumed.

JUDGE ELLIS: The plaintiffs were complaining that they were discriminated against in the opportunity to pass the test. Title VII protects against discriminatory denial of employment opportunities, and getting to the second step of the promotion process was an opportunity. The appropriate proxy for the opportunity to pass the test was obviously case workers who took the test. The appropriate point to measure whether the plaintiffs were denied this opportunity was, just as obviously, the result of the test. The bottom-line evidence may have proved that the plaintiffs were not denied the opportunity *to be promoted*, but that evidence could not

77. For example, test takers over a five-year period may be a better proxy than text takers in one year or in a single sitting.

78. Connecticut v. Teal, 457 U.S. 440, 443 (1982).

79. *Id.* at 444.

prove the plaintiffs were not denied the opportunity *to pass the test*. The Court's holding means that plaintiffs are entitled to identify an opportunity and prove they were denied it, and the employer may not prevail by proving that the plaintiffs were not discriminated against with respect to some other opportunity.

MS. LORRAINE: Couldn't the Supremes have said the employment opportunity was getting the job?

JUDGE ELLIS: I admit the Court had a choice, but I believe it made the right one. The statute speaks of "employment opportunities,"⁸⁰ not "jobs." Employment opportunities include things like pensions, working conditions, and passing tests.

MS. LORRAINE: What if, instead of the bottom line, the employer had compared the percentage of African-American supervisors to the percentage of African-Americans in the population of the town or to the percentage of African-Americans employed as case workers in the department?

JUDGE ELLIS: Neither of those proxies would have told us whether the *test* discriminated against blacks.

MS. LORRAINE: What if the employer proved the case workers who were promoted were in fact the best qualified ones?

JUDGE ELLIS: Only one way exists for the employer to do that, and you know what it is.

MS. LORRAINE: A job-related selection criterion.

JUDGE ELLIS: Correct.

MS. LORRAINE: And if the employer had a job-related criterion other than the test, the question would've been why the employer wasn't using it.

JUDGE ELLIS: Correct.

6. Plaintiffs May Not Attack the Combined Effect of Selection Criteria Because Liability Would Be Based Only on an Imbalance Between the Proxy and the Employer's Work Force

MS. LORRAINE: I just thought of something else. Remember when we were talking about proof in statistical treatment cases, and I asked you, if the employer was discriminating against Latinos, how any of them got hired—and you said one reason might be that some agents of the employer

80. Section 703(a)(2) of Title VII of the Civil Rights Act of 1964, 78 Stat. 241, 243-246 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1994)) makes it an unlawful employment practice for an employer "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" (emphasis added).

were discriminating, and others weren't? Well, couldn't something like that happen in an impact case? Couldn't several criteria be operating to cause an adverse effect?

JUDGE ELLIS: Yes. The Court dealt with that question in *Wards Cove*.⁸¹ The plaintiffs alleged that several criteria, such as nepotism and preference for former employees, combined to favor the comparators. The Court held that plaintiffs may not aggregate selection criteria; the adverse effect of each criterion has to be proved separately,⁸² and the 1991 amendment codified this holding.⁸³

MS. LORRAINE: Why did the Court do that? It seems pretty hard on plaintiffs.

JUDGE ELLIS: The Court said that if the employer may not defend at the bottom line, it would be unfair to let the plaintiff attack at the bottom line.⁸⁴

MS. LORRAINE: They're not comparable, are they? I mean, plaintiffs are entitled to name the opportunity they were denied. If they attack step 1 of a selection process, the employer can't defend at the bottom line because it pertains to a different employment opportunity. But why can't the plaintiffs identify getting hired at the bottom line as the opportunity they were denied?

JUDGE ELLIS: I believe the Court was concerned that aggregation of selection criteria would run afoul of section 703(j).⁸⁵ The plaintiffs'

81. *Wards Cove v. Atonio*, 490 U.S. 642 (1989).

82. *Id.* at 656-657.

83. Section 105(a), adding subsection (k)(1)(A)(i) to Section 703 of Title VII. This subsection also provides that, if several criteria cannot be separated for analysis, they may be treated as a single criterion.

84. See *Wards Cove*, 490 U.S. at 656-657:

Just as an employer cannot escape liability under Title VII by demonstrating that, "at the bottom line," his work force is racially balanced (where particular hiring practices may operate to deprive minorities of employment opportunities) [citing *Teal*, 457 U.S. at 450], a Title VII plaintiff does not make out a case of disparate impact simply by showing that, "at the bottom line," there is racial *imbalance* in the work force.

85. In holding in *Wards Cove* that Title VII plaintiffs may not aggregate selection criteria, the Court said that Justice O'Connor, writing for the plurality in *Watson V. Fort Work Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J.), had stated the law correctly. *Wards Cove* at 656. The Court in *Wards Cove* quoted a passage from Justice O'Connor's opinion that specifically addressed this issue.

The main issue in *Watson*, however, was not aggregation of selection criteria, but whether disparate impact analysis could be applied to subjective selection criteria. The Court had previously applied disparate impact analysis to objective selection criteria such as scored tests, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and height and weight requirements, *Dothard v. Rawlinson*, 433 U.S. 321 (1977). *Watson* held that subjective selection criteria were also amenable to disparate impact analysis. *Watson* at 989-991. Nevertheless, Justice O'Connor in *Watson* was sensitive to the risk that, due to the difficulty of validating selection criteria, allowing disparate impact analysis of subjective criteria might mean that "employers' only alternative will be to adopt surreptitious quota systems in order to ensure that no plaintiff can establish a prima facie case." *Watson* at 992. Justice O'Connor continued:

Congress has specifically provided that employers are not required to avoid "disparate impact"

evidence would consist of little more than a disparity between their representation in the proxy and their under-representation at the bottom line.

MS. LORRAINE: They'd also have to identify the offending selection criteria.

JUDGE ELLIS: Correct, but there would be no proof of a causal connection between the criteria and the under-representation. It would be as though the plaintiff in a statistical treatment action failed to present evidence that the employer intentionally used race or sex as the selection criterion. As the Court said, such a disparity could be the result of a "myriad of innocent causes."⁸⁶

MS. LORRAINE: Yes, I see that. It's what I was saying before. In both treatment and impact, the plaintiffs have to identify the selection criterion and prove it caused the disparity.

D. Race or Gender Is the Cause of the Plaintiffs' Disadvantage in Both Disparate Treatment and Disparate Impact

JUDGE ELLIS: That is correct, and it brings up a point I meant to raise a while ago. While discussing the *prima facie* case, you omitted causation. Race or sex must be the cause of the disparity. For all the similarities you have pointed out between disparate treatment and disparate impact, intent distinguishes them. In the former, whether individual or statistical, race or

as such:

Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the {race or gender} of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any {race or gender} employed by any employer . . . in comparison with the total number or percentage of persons of such {race or gender} in any community . . . or other area, or in the available work force in any community . . . or other area. Title VII, § 703(j), 42 U.S.C. § 2000e-2(j).

Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986), and it has long been recognized that legal rules leaving any class of employers with "little choice" but to adopt such measures would be "far from the intent of Title VII." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in judgment). Respondent and the United States are thus correct when they argue that extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today.

Id. Thus, the reason the plurality in *Watson* desired a rule against the aggregation of selection criteria was the fear that aggregation would lead to quotas. The same reason most likely motivated the majority in *Wards Cove* to adopt the rule against aggregation.

86. *Wards Cove*, 490 U.S. at 657 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988)).

sex is the cause because the employer intentionally uses it to disadvantage the plaintiffs.⁸⁷ In the latter, intent plays no role;⁸⁸ the plaintiffs are disadvantaged by an employment practice that the employer uses in good faith, and the selection criterion is the cause of their injury.

MS. LORRAINE: But, Judge, don't race or gender have to be the cause in either theory under the wording of Title VII?⁸⁹

JUDGE ELLIS: Correct.

MS. LORRAINE: As you just said, it's obviously the cause in treatment cases. As for impact cases, I am afraid Professor Gold didn't get it right back in 1985.⁹⁰ Well, he was right about Congress originally intending to outlaw only treatment discrimination, but what he didn't understand is, race or gender's really the cause in impact discrimination, too. Race or gender is the cause *in fact* of the plaintiff's injury. If the employer's selection criterion isn't job related, it doesn't select qualified workers. That means it's random with respect to qualifications (or maybe it selects unqualified workers!), but it's not random with respect of race or gender. It favors one group over another. And that means race or gender's the cause of the injury because the criterion selects on the basis of race or sex. A selection criterion that has an adverse effect and isn't job related is functionally equivalent to race or gender as a selection criterion. But if the criterion is job related, it selects on the basis of qualifications. The plaintiff is rejected, not because of race or gender, but because of lack of qualifications.

JUDGE ELLIS: That is an interesting piece of analysis, and I am inclined to believe that it is correct. But it remains that intentionally using race or gender as a selection criterion differs from unintentionally using them.

The telephone rang. The judge answered it. Ms. Lorraine started to leave when the judge covered the mouthpiece.

JUDGE ELLIS: Wait. This is about Mr. Medina's case.

The judge talked a while, then hung up.

87. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977).

88. See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

89. Sec. 703(a) of Title VII of the Civil Rights Act of 1964 states that it shall be an unlawful employment practice for an employer:

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

(emphasis added).

90. See *Griggs' Folly*, *supra* note 55, at 511-513.

JUDGE ELLIS: The parties have submitted the case to me. They have stipulated to all the facts in the complaint, the answer, and discovery, and they will be filing briefs within five days. I need a memorandum.

MS. LORRAINE: What happened to the honesty test?

JUDGE ELLIS: A red herring. How soon can you get started on the memorandum?

MS. LORRAINE: Right away.

V.

LORRAINE AND ELLIS'S THEORY

Two weeks passed. Ms. Lorraine had been reading the briefs, re-reading cases, and thinking about the legal definitions of employment discrimination as she worked on the memorandum Judge Ellis had requested. She was troubled and excited by the conclusion she had reached, and she put her head in the judge's office late in the afternoon.

MS. LORRAINE: Judge, I've been working on the memo in Medina's case, and I have some questions. Are you free for a few minutes?

JUDGE ELLIS: Yes. Come in.

He waved at her chair.

JUDGE ELLIS: What's on your mind?

MS. LORRAINE: I've been thinking about the theories, and I think we've got too many of them.

JUDGE ELLIS: Ockham's Razor, eh?

MS. LORRAINE: I beg your pardon?

JUDGE ELLIS: "Entities are not to be multiplied beyond necessity."⁹¹

MS. LORRAINE: Exactly.

JUDGE ELLIS: Which one can we do without?

MS. LORRAINE: Both.

The judge raised his eyebrows dramatically.

JUDGE ELLIS: Oh?

A. *Unequal Treatment Is the Basic Definition of Discrimination*

MS. LORRAINE: We only need one theory, but it's not exactly treatment or impact. I think you called it unequal treatment.

JUDGE ELLIS: Tell me more about my theory.

MS. LORRAINE: Title VII outlaws unequal treatment because of race or gender. Not all unequal treatment's intentional. Sometimes an employer treats people unequally but doesn't mean to. Other times an employer has

91. ANTHONY FLEW, A DICTIONARY OF PHILOSOPHY 253 (2nd rev. ed. 1979).

the specific intent to do it. Both kinds of unequal treatment are undesirable and illegal, but intentional unequal treatment is worse and needs a stronger remedy.

JUDGE ELLIS: How does your theory square with the 1991 amendment?⁹²

MS. LORRAINE: The 1991 amendments envision two theories of discrimination, which are called intentional discrimination and disparate impact. I think what the statute calls "disparate impact" is really the *prima facie-II* of unequal treatment, and what it calls "intentional discrimination" is the *prima facie-II* of intentional unequal treatment.

The judge reclined in his chair, resting his elbows on its arms and his chin on his fingertips.

JUDGE ELLIS: Tell me more about it.

MS. LORRAINE: If we want to get the theory straight, I believe we should concentrate on what the evidence actually proves—you know, the same way you deduced the *prima facie-I* of disparate treatment from the *prima facie-II* in *McDonnell Douglas*; and the evidence always proves the employer gave the plaintiff a lesser chance to get the opportunity by using race or gender as the selection criterion. Sometimes it was intentional and sometimes it wasn't.

JUDGE ELLIS: Does your theory apply to all types of cases?

MS. LORRAINE: Yes.

JUDGE ELLIS: Individual and group?

MS. LORRAINE: Yes.

JUDGE ELLIS: Statistical disparate treatment and disparate impact?

MS. LORRAINE: Yes.

JUDGE ELLIS: Go on.

1. *The Prima Facie Case in the First Sense of Unequal Treatment (Simpliciter)*

Ms. Lorraine referred to a piece of paper and gave a copy to the judge.

MS. LORRAINE: Unequal treatment consists of five elements:

Element 1: The employer is covered by the Title VII.

Element 2: The employer offered certain employment opportunities.

Element 3: The plaintiff is protected by Title VII, which means the plaintiff is willing and able to benefit from the opportunities in question.

Element 4: The employer afforded the plaintiff a lesser chance than the comparators to benefit from the employment opportunities in question.

92. P.L. 102-166, section 102, 42 U.S.C. § 1981(a) and (b).

Element 5: The cause of the plaintiff's lesser chance was race or gender."

JUDGE ELLIS: I take it that you have described the prima facie case of unequal treatment in the first sense.

MS. LORRAINE: Right.

2. *Disparate Impact Is the Prima Facie Case in the Second Sense of Unequal Treatment (Simpliciter)*

JUDGE ELLIS: Now explain the prima facie case of unequal treatment in the second sense.

MS. LORRAINE: I'll begin with disparate impact, which proves nothing but unequal treatment. Element one's a gimmie, isn't it?

JUDGE ELLIS: No need for a Mulligan here.⁹³

MS. LORRAINE: Okay, so the evidence of impact is, first, the plaintiff proposes a fair proxy for the qualified labor pool. Then the assumption of equality tells us the percentages of the plaintiffs' group and the comparators in the proxy are the same as the percentages of those groups in the qualified labor pool. This proves element 3—the plaintiffs are in the group protected by the Act.

JUDGE ELLIS: Correct.

MS. LORRAINE: Next, the plaintiffs prove a statistically significant disparity, which shows the employer had jobs (element 2) and gave the comparators a better chance than the plaintiffs' group to get them (element 3). Okay?

JUDGE ELLIS: So far, so good.

MS. LORRAINE: Now the plaintiffs have to prove element 5, which is race or gender was the cause of what happened. They do this in impact by identifying the selection criterion the employer used. It was not race or gender *on its face*, so, in order to prove it *was* race or gender, the plaintiffs have to show it *operates* like race or gender. Which they have already done: if the plaintiffs' proxy's fair, and if the selection criterion disqualifies disproportionate numbers of the plaintiffs' group, this creates a rebuttable presumption the selection criterion's not job related and, therefore, it's race or gender.

JUDGE ELLIS: Because . . .

MS. LORRAINE: Because a truly job related selection criterion would select proportionately from the qualified labor pool. As long as we believe

93. A "gimmie" is the term in golf for a putt that is not attempted, though a stroke is added to the golfer's score, because the ball lies so close to the hole that the putt could not be missed. A "Mulligan" is the term for a shot that is replayed, but no additional stroke is recorded, by the grace of one's companions.

the plaintiffs' proxy's fair, any selection criterion with an adverse effect is not job related.

The judge thought for a moment.

JUDGE ELLIS: For two reasons I believe you have gone too far. The first is the looseness of proxies, which applies here as well as in statistical disparate treatment actions. The second reason is the nature of selection criteria. Jobs require many skills, but any given selection criterion is unlikely to measure more than a small fraction of those skills. A secretary not only types, but also makes appointments, conveys and receives messages, proof-reads manuscripts, prepares vouchers, and so forth. A typing test measures only one of these skills—

MS. LORRAINE: But a necessary one.

JUDGE ELLIS: Yes, and that is the reason that a typing test is appropriate. In a sense, the test rules out one cause of certain failure on the job, but the test is a far cry from actually predicting success.

MS. LORRAINE: I understand, but I don't see why this undermines my point that a selection criterion with an adverse effect on a fair proxy can't be job related.

JUDGE ELLIS: The reason is that the criterion might be measuring an altogether different skill from the one on which the proxy is based. This seems fairly likely when the proxy is the population or even the pool of applicants, but let me illustrate my point with a particularly good proxy. Suppose an employer hiring secretaries gives all applicants a valid typing test. Persons who pass the test constitute a fine proxy. Surely we know that anyone who cannot pass the test is unqualified. But so many applicants pass the typing test that the employer uses an additional selection criterion, say, an arithmetic test because of all the accounting forms that have to be completed. Assume this was before computers and spread sheets.

MS. LORRAINE: This was before calculators!

JUDGE ELLIS: Touche. What would be a better example?

MS. LORRAINE: Maybe a structured, scored interview.

JUDGE ELLIS: Perfect. Everyone who passes the typing test is interviewed, and some satisfactory typists pass the interview and others fail it. And this means that the interview could be job related and yet appear to have an adverse effect on even an excellent proxy.

MS. LORRAINE: But, Judge, what about the assumption of equality? Shouldn't we assume plaintiffs and comparators who pass the typing test will pass the interview in equal—I mean, proportionate—numbers?

JUDGE ELLIS: That is correct.

MS. LORRAINE: And isn't that enough to shift the burden to the employer to prove a selection criterion with an adverse effect on a fair proxy is valid?

JUDGE ELLIS: It is enough.

MS. LORRAINE: Then what did I say wrong?

JUDGE ELLIS: I understood you to be making the stronger claim that a selection criterion with an adverse effect on a fair proxy cannot be job related.

MS. LORRAINE: I suppose I was.

JUDGE ELLIS: Mind you, I believe your claim would be correct if we had the true qualified labor pool, rather than a proxy for it. If everyone in the pool is equally willing and able to do the job, no criterion with an adverse effect on the pool could be job related. But in this world we see proxies.

MS. LORRAINE: But even with proxies, the burden still shifts to the employer, which is the same thing as a rebuttable presumption, isn't it?

JUDGE ELLIS: For practical purposes, you are correct.

Ms. Lorraine was relieved, and she thought to herself, sometimes this man is a little too picky.

MS. LORRAINE: Now the employer can attack the plaintiff's prima facie case. One way to do that is to prove the selection criterion's job related. If it is, the cause of the plaintiffs' lesser chance was their lack of qualifications, not race or gender. At the same time, a job-related selection criterion proves the plaintiffs' proxy's not fair because it includes unqualified persons.

JUDGE ELLIS: I believe your explanation is correct.

B. Intentional Unequal Treatment is Unequal Treatment Simpliciter Plus Intent

MS. LORRAINE: I think it's also a correct explanation of disparate treatment cases except for the element of intent. Disparate treatment is nothing more than proof of unequal treatment which the employer is aware of and therefore intends.

JUDGE ELLIS: This should be interesting. Proceed.

1. Disparate Treatment is the Prima Facie Case in the Second Sense of Intentional Unequal Treatment

a. Individual Disparate Treatment

MS. LORRAINE: The prima facie-I of intentional unequal treatment is the same as basic unequal treatment except intentional unequal treatment has a sixth element all its own, which is intent. Let me start with individual cases. First, the plaintiff shows they were qualified and they applied. This

proves element 3 of unequal treatment: the plaintiff is in the group protected by the Act.

JUDGE ELLIS: Correct.

MS. LORRAINE: Then the plaintiff proves a job was available and the employer denied it to them. This proves elements 2 and 4 of unequal treatment.

JUDGE ELLIS: Correct.

MS. LORRAINE: If the plaintiff has direct evidence the employer used race or gender as the selection criterion—for instance, an incriminating statement or document, like when Pohasky said colored people clean better—obviously race or gender was the cause of the plaintiff's lesser chance, and element 5 of unequal treatment is established.

JUDGE ELLIS: Correct.

MS. LORRAINE: Of course, if the employer deliberately used race or gender as a selection criterion, the employer was aware of it; and this supplies element 6, intent.

For a moment the judge studied the paper Ms. Lorraine had handed him, and then he looked at her.

JUDGE ELLIS: Where is intent in the *prima facie* case of unequal treatment?

MS. LORRAINE: Intent's not part of unequal treatment. When the plaintiff proves intent on top of unequal treatment, it's intentional unequal treatment and they get compensatories.⁹⁴

JUDGE ELLIS: I see. Well, I believe you would be wiser to differentiate your terminology. You might speak of "unequal treatment simpliciter" when intent is not present and "intentional unequal treatment" when intent is present—if this captures what you mean.

MS. LORRAINE: It does, yes.

JUDGE ELLIS: All right. Is that all?

MS. LORRAINE: Oh, no. I haven't said anything about circumstantial evidence yet. If the plaintiff can't find a smoking gun of a selection criterion, they can use circumstantial evidence. Sometimes they can prove the employer treated indistinguishable people differently. For example, the European-American woman was relieved of heavy cleaning in *Slack*, and the African-American employee was not fired in *Santa Fe Trail*. If the only difference between two people is their race or gender, and an employer knows it and treats the historical victim worse than the comparator, race or gender was probably the cause of the unequal treatment and the employer had to be aware of it. This is evidence of unequal treatment and intent.

94. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C.A., 16 U.S.C.A., 29 U.S.C.A., and 42 U.S.C.A.).

JUDGE ELLIS: The historical victim was apparently treated better, not worse, in Santa Fe Trail.

MS. LORRAINE: Yes, but those were the days of heavy affirmative action. In that specific context, African-Americans were favored over European-Americans.

JUDGE ELLIS: Good enough. Context matters.

MS. LORRAINE: Another kind of circumstantial evidence is for the plaintiff to show the employer's prejudiced, like with racial or gender slurs. A prejudiced employer's likely to act out that feeling. Something bad happened to the plaintiff, or something good didn't happen; and the employer's prejudice was the cause. It's best if the plaintiff has evidence about this specific employer, like Pohasky saying colored people should stay in their place. If the plaintiff doesn't have this kind of evidence, they can rely on historical discrimination against their group in this area for this job—which is how the *McDonnell Douglas* formula works; we assume this employer behaved like everyone else. This takes care of element 5 of unequal treatment simpliciter, which is cause, as well as element 6, which is intent.

JUDGE ELLIS: It does, but it raises a question. I am having trouble separating the evidence that proves intent from the evidence that proves causation. You argue that direct or circumstantial evidence can prove the nature of the selection criterion. If the plaintiff produces direct evidence (say, a quota), the conclusion would be inescapable that the employer intended to use the criterion to discriminate. But the circumstantial evidence you mentioned, as in *McDonnell Douglas* and *Santa Fe Trail*, also seems to go to the employer's state of mind, not to the nature of the selection criterion.

MS. LORRAINE: I agree with what you said about direct evidence. Proof the selection criterion is explicitly race or gender also proves the employer knows it; so that's automatically intentional unequal treatment. I think I also agree with you about circumstantial evidence. Without direct evidence, we have to infer the selection criterion. Circumstantial evidence of prejudice against the plaintiff's group, on top of evidence of unequal treatment, creates the inference the selection criterion was race or gender. I'm still convinced the elements of cause and intent are distinct, but it's true the same evidence proves them both.

JUDGE ELLIS: If causation and intent are distinct, you should be able to name at least one instance of intentional unequal treatment in which proof of the nature of the criterion is not bound up with proof of intent.

MS. LORRAINE: Isn't it enough to know the lines run in opposite directions? Direct evidence the selection criterion was race or gender can prove intent, whereas circumstantial evidence of intent can prove the selection criterion was race or gender.

JUDGE ELLIS: Either way, you cannot prove one without proving the other.

MS. LORRAINE: Why does it matter for them to be separable?

JUDGE ELLIS: Your theory maintains that unequal treatment *simpliciter* has five elements, and a sixth element, intent, is necessary for intentional unequal treatment. Race or sex as the cause of the unequal treatment is common to both kinds of claim. Is that correct?

MS. LORRAINE: Yes.

Ms. Lorraine felt a touch of dread.

JUDGE ELLIS: However, if causation and intent are inseparable in intentional unequal treatment actions, then causation in unequal treatment *simpliciter*, which does not include intent, would be different from causation in *intentional* unequal treatment, which does include intent. And if causation is different in the two claims, it is not true that intentional unequal treatment is merely unequal treatment *simpliciter* plus intent.

Ms. Lorraine said a hasty prayer to her muse and stalled for time. Thalia intercepted the prayer. She loves a prank and inspired in Ms. Lorraine a problematic idea.

MS. LORRAINE: So I need to find at least one case of intentional unequal treatment where proof of the selection criterion is entirely separate from proof of intent.

JUDGE ELLIS: Yes.

MS. LORRAINE: What about the *Albemarle* maneuver?⁹⁵

JUDGE ELLIS: Where is the proof of intent?

MS. LORRAINE: Intent begins when the employer learns their selection criterion has a bigger adverse effect than the plaintiffs'.

JUDGE ELLIS: How would an employer know that before a trial?

MS. LORRAINE: From the pleadings? During discovery? The plaintiffs have to notify the employer of the alternative selection criterion at some point before the trial.

JUDGE ELLIS: Yes, but the evidence would probably be contested. An employer acting in the best of faith might well hesitate before switching to an adversary's idea of a valid selection criterion.

MS. LORRAINE: But suppose the plaintiffs confronted the employer before the trial, in fact, before the lawsuit was filed. Suppose the plaintiffs gave the employer iron-clad proof that the alternative selection criterion was as valid as the employer's and had a lesser adverse effect, and the employer still refused to switch.

JUDGE ELLIS: And you believe that this case would distinguish causation and intent?

95. See *supra* Section IV.C.2.

MS. LORRAINE: Sure. The existence of the alternative selection criterion proves unequal treatment of the plaintiffs' group, and the employer's refusal to switch to the alternative after becoming aware of it proves intent to discriminate.

JUDGE ELLIS: I might be inclined to agree with you but for the 1991 amendment. It specifically classifies this case as disparate impact,⁹⁶ which you are calling unequal treatment simpliciter.

MS. LORRAINE: It does?

JUDGE ELLIS: Yes.

MS. LORRAINE: It shouldn't.

JUDGE ELLIS: Why not? Put yourself in an employer's position. You have a valid selection criterion. Some employees suggest that you switch to an alternative criterion which, they assert, is equally valid and has a lesser adverse effect on their class. Is it reasonable to require you to abandon your valid criterion, based on some workers' assertion, on pain of being held liable for intentional discrimination?

MS. LORRAINE: I did say the plaintiffs gave the employer iron-clad proof.

JUDGE ELLIS: You did, but the validity of a selection criterion is a technical question, and even reasonable experts can differ. And don't forget that this employer is one of the good guys because he or she has gone to the trouble and expense of validating the original selection criterion.

Ms. Lorraine was about to abandon hope, but Calliope came to the rescue.

MS. LORRAINE: What about the case you mentioned a moment ago? The selection criterion has an adverse effect and it's not job related—and the employer knew it all along. That's separate proof of intent, isn't it?

JUDGE ELLIS: Yes. I believe it is.

Ms. Lorraine felt triumphant.

MS. LORRAINE: All right!

JUDGE ELLIS: You are not out of the woods yet. I want to return to an objection I raised the last time we talked.

MS. LORRAINE: So you're satisfied my theory explains the prima facie cases?

JUDGE ELLIS: Perhaps, but I still have two problems with the defenses. As I mentioned before, in disparate impact (or unequal treatment simpliciter) the selection criterion must be job related in order to serve as a defense, whereas in disparate treatment (or intentional unequal treatment) any reason that is not discriminatory on its face or pretextual suffices to defend. Also, in disparate impact the burden of proving job relatedness is

96. Section 703(k)(1)(A)(ii) of the Civil Rights Act of 1991.

on the employer, whereas in disparate treatment the burden is on the plaintiff to prove the employer's reason is race or sex. Don't these points demonstrate that disparate treatment and disparate impact are different?

MS. LORRAINE: I've been thinking about what you said, but I still think these two defenses are really the same. They look different because they respond to different prima facie-II's; but they attack the same element in the prima facie-I, which is cause, and they undermine the same step in both prima facie-II's, which is the selection criterion was race or gender.

JUDGE ELLIS: That was a bit abstract. Would you mind coming down to earth a little?

MS. LORRAINE: Sure. The elements of cause in unequal treatment simpliciter and in intentional unequal treatment are the same: race or gender has to be the cause of the plaintiff's injury. Logically, the defense on this point is also the same: something else is the cause. It doesn't matter what the cause is, as long as it's not race or gender. But even though the prima facie-I's are same, the prima facie-II's are different. They do have one thing in common: they both try to prove cause by showing the employer's selection criterion is race or gender. But they try to prove this in different ways. Treatment uses evidence the selection criterion was race or gender on its face; impact uses evidence the selection criterion is race or gender in disguise.

It stands to reason if the prima facie-II's are different, the rebuttals are different as well. When the plaintiff tries to prove the selection criterion is race or gender on its face, the natural rebuttal is evidence the criterion was anything else, like, "I didn't hire you because you are a Virgo." This defense doesn't have to go the extra mile of showing the criterion's job related because any criterion that's non-discriminatory on its face is good enough. When the plaintiff tries to prove the selection criterion is race or gender in disguise (it's neutral on its face, but it operates *as if* it was race or gender), the natural rebuttal is proof the criterion does not operate like race or gender—it's job related and selects on the basis of qualifications. Proving the criterion is not race or gender on its face won't help do this and, besides, we already know it. So in both treatment and impact, the defense is the selection criterion is not race or gender, but there are different ways to prove it.

JUDGE ELLIS: It is a little odd that a plaintiff can prove both causation and intent with simple testimony that the selection criterion was race or sex, and the employer can rebut causation and intent with equally simple testimony that the selection criterion was anything else; but a plaintiff who wants to prove *only* causation needs an expert to advance sophisticated statistical evidence, and the employer needs to rebut it with another expert's even more sophisticated evidence on job relatedness.

MS. LORRAINE: It all goes to show it's easier to kill two birds with

one stone than to chase a bird in the bush.

The judge grimaced.

JUDGE ELLIS: And how does your theory explain my procedural objection?

MS. LORRAINE: Not so well. Job relatedness and non-discriminatory reasons are not true defenses; they are attacks on elements of the prima facie case. Although the employer should have the burden of putting the element in issue, the ultimate burden of persuasion ought to be on the plaintiff to establish the element is true. Individual treatment cases work this way, but I have to concede impact cases don't.

JUDGE ELLIS: This is not a serious weakness in your theory now that I understand it. Affirmative defenses are not always true defenses, as job relatedness and the bona fide occupational qualification illustrate. Practical reasons sometimes motivate us to shift the burden of proof from where theory indicates. In this instance, the Supreme Court got the theory right—eventually. At first, the Court put the burden of proving job relatedness on the employer.⁹⁷ Eighteen years later, the Court corrected itself and put the burden on the plaintiff,⁹⁸ where, as you say, theory dictates the burden belongs. Then Congress shifted the burden back to the employer.⁹⁹ Congress, of course, is less sensitive to theory than the courts are. What motivated Congress is not entirely clear. One reason is probably historical: everyone was used to having the burden on the employer, and the Court did not provide a good reason for the shift.¹⁰⁰ Another reason was probably practical. It is not uncommon even for courts to allocate the burden of proof for practical, rather than theoretical, reasons. In this instance, placing the burden of proving job relatedness on the employer makes sense because

97. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

98. *Wards Cove v. Antonio*, 490 U.S. 642, 659 (1989).

99. Section 703(k)(1)(A)(i) of the Civil Rights Act of 1991.

100. The Court was right for the wrong reasons. It wrote, "This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts . . . and more specifically, it conforms to the rule in disparate treatment cases . . ." *See Wards Cove*, 490 U.S. at 659-660. However, disparate treatment and disparate impact were understood as distinct theories, *see id.*, 490 U.S. at 670 (Stevens, J., dissenting), and nothing indicates the Court believed otherwise; yet the Court gave no reason for treating them the same. As for the usual rule for allocating burdens, job relatedness or business necessity was understood as an affirmative defense to disparate impact, *id.*, and the burden of persuasion for affirmative defenses uniformly falls on defendants. The majority acknowledged that its earlier decisions could be read to place the burden of proving of job relatedness on the employer, *id.* at 660, but asserted that they should be understood as referring to the employer's burden of production, not persuasion. But to the extent that precedent provides a reason for a rule based simply on past practice, precedent favored leaving the burden on the employer. *See id.* at 670 (Stevens, J., dissenting); see also BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 75, 132-133 (1st ed., 1976); BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1328-1329 (2nd ed., 1983); ROBERT J. RABIN, EILEEN SILVERSTEIN, & GEORGE SCHATZKI, LABOR AND EMPLOYMENT LAW 126 (1988); MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 356 (1988).

the employer has better access to the information and more resources to devote to this purpose.

MS. LORRAINE: Isn't there a moral reason as well? An employer shouldn't use a selection criterion that could have an adverse effect without first being sure it's job related. A responsible employer would validate the criterion long before it's challenged, so proving it's job related would hardly be a burden at all for a decent outfit.

JUDGE ELLIS: That is possible. At any rate, for the purpose of your theory, nothing in the legislative history of the 1991 amendment suggests that Congress re-allocated the burden of proof because the Court misunderstood the theory of the statute.¹⁰¹

MS. LORRAINE: So I'm still in the game.

JUDGE ELLIS: For the time being. Now let's see how your theory applies to statistical disparate treatment actions.

b. Statistical Disparate Treatment

MS. LORRAINE: All right. The evidence the plaintiffs are in the class protected by the Act is absolutely identical to disparate impact: the plaintiffs propose a proxy; the assumption of equality kicks in; and we know the percentages of the plaintiffs' group and the comparators in the qualified labor pool.

JUDGE ELLIS: That is correct.

MS. LORRAINE: The evidence jobs are available and the employer denied them to the plaintiffs' group is also identical to disparate impact. A statistically significant disparity shows a cause of some sort gave the comparators a better chance than the plaintiffs to get the jobs, but doesn't identify the cause. Do you agree so far?

JUDGE ELLIS: I believe I taught that to you.

MS. LORRAINE: Now the plaintiffs have to prove the cause was race

101. Cf. *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). This saga began with *Geduldig v. Aiello*, 417 U.S. 484 (1974), in which the State of California operated a disability insurance plan for workers who suffered non-occupational injuries. The plan did not provide benefits for disability resulting from pregnancy. In response to a claim brought by women under the Equal Protection Clause of the federal Constitution, the Court held that the plan did not discriminate on the basis of sex because the plan divided "potential recipients into two groups — pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes," *id.* at 496 n.20, and "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-497. In *General Electric v. Gilbert*, 429 U.S. 125 (1976), a private employer operated a plan similar to California's, and female employees challenged it under Title VII. The Court rejected the challenge, adopting the reasoning of *Aiello*. *Id.* at 133-135. Congress responded by enacting the Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076. In *Newport News*, the Court held that this statute not only overruled the outcome of *Gilbert*, but also disapproved of its reasoning. See *Newport News*, 462 U.S. at 678-681.

or gender and the employer knew it. This proof is pretty much the same as in individual treatment cases. Plaintiffs can use direct evidence if they have it, like in *Teamsters* when the employer told people of color hiring them'd cause trouble with European-American, and in *Hazelwood* with the "whites only" ads. This evidence was like Pohasky's remarks in *Slack*. Most of the time, though, the plaintiffs rely on circumstantial evidence. The employers in *Teamsters* and *Hazelwood* treated legally indistinguishable people differently. Both lied to people of color about job vacancies after the law changed. The trucking company was a plantation with people of color in the low-status jobs. The school district recruited at European-American, but not at African-American colleges, and refused to interview African-Americans with advanced degrees and then hired European-Americans with lesser credentials. This was like the evidence in *Santa Fe Trail* that the European-Americans were fired but their African-American accomplice wasn't.

There was also evidence of historical discrimination in *Teamsters* and *Hazelwood*. The period was the '60s and early '70s, when racial discrimination was widespread. A lot of the truck terminals were in the South, where racial discrimination was the norm; and many of the routes went through the South. The school district was located in a former slave state. Plus there was proof—conventional and statistical proof—of discrimination outside the actionable period. Both employers had openly refused to hire people of color before the law required it. This was like the *McDonnell Douglas* formula, which requires historical discrimination against the plaintiff's group. Historical evidence may not justify a *McDonnell Douglas* inference in a statistical case because of the looseness of proxies, but it can provide a background that explains ambiguities. Evidence like this makes race or gender the most likely candidate as the selection criterion in a statistical disparate treatment case exactly like it does in an individual disparate treatment case.

2. *Affirmative Action Is a True Defense to Intentional Unequal Treatment*

JUDGE ELLIS: What does your theory say of affirmative action? It is lawful, yet the selection criterion is explicitly race or gender.

MS. LORRAINE: I know you said a letter from the EEOC was the only true defense to disparate treatment,¹⁰² but, with respect, Judge, I think you should have included affirmative action that satisfies the standards in the *Weber* case.¹⁰³ I admit my theory doesn't account for it, but I also think the holding was wrong. I agree with Chief Justice Burger, which I don't

102. See *supra* Section II.D.

103. United Steelworkers of Am. v. Weber, 443 U.S. 193, 208-209 (1979).

often do. If I was in Congress, I would've voted to amend Title VII to permit affirmative action,¹⁰⁴ but if I was on the Court, I would've respected the legislative history. Congress was dead set against reverse discrimination.¹⁰⁵

C. Malicious Unequal Treatment is Intentional Unequal Treatment Plus Malice

JUDGE ELLIS: I would like you to go over your understanding of intent again.

MS. LORRAINE: Intent under Title VII is when the employer knows race or gender is the cause for denying an individual an employment opportunity.

JUDGE ELLIS: And that includes knowledge that a selection criterion has an adverse effect and is not job related?

MS. LORRAINE: Yes.

JUDGE ELLIS: Suppose an employer knows of the adverse effect and does not determine whether or not the criterion is job related?

MS. LORRAINE: I'd call that reckless disregard of the plaintiffs' rights.

JUDGE ELLIS: Under your theory, then, intent under Title VII is not necessarily the desire to inflict a legal injury on the plaintiff because of race or gender. Is that correct?

JUDGE ELLIS: Right. Isn't that more like motive? I think a desire like that would probably constitute malice, which is an additional element. It goes on top of intent and would justify punitive¹⁰⁶. I haven't thought much about this, Judge, because it's not part of Medina's case, but I remember you mentioned an employer whose customers force him to hire only men for a job. He has no malice against women, but he does intend to discriminate them. And a misogynist could grudgingly put women in jobs they're qualified for, secretly desiring them to fail; he's full of malice towards women, but he wouldn't be guilty of discrimination because he intends to treat them the same as men.

JUDGE ELLIS: Does any authority support your definition of intent?

MS. LORRAINE: I think so. In the *Manhart* case, the employer's pension fund paid equal monthly benefits to men and women comparators after they retired; but while they worked, the employer required the woman to contribute more money to the fund than her comparator because she was

104. Cf. *Weber*, 443 U.S. at 216 (Burger, C.J., dissenting).

105. Cf. *Weber*, 443 U.S. at 219 (Rehnquist, J., dissenting).

106. Pub. L. 102-166, § 102, 42 U.S.C. § 1981(b)(1).

likely to outlive him.¹⁰⁷ A big part of the defense was that it wasn't discrimination because the average woman collected more in benefits than her comparator;¹⁰⁸ she paid in more and took out more. The employer really believed they were treating women and men equally, but the women won the case. Only they didn't get their money back.¹⁰⁹ The Supremes gave two reasons for denying restitution. One was equitable: they were afraid of depleting pension funds' assets, which would jeopardize the funds' ability to meet their obligations to retirees.¹¹⁰ But the other reason (it was actually the first one they mentioned) was the administrators of the plan were conscientious and believed their practice was legal.¹¹¹ This is important because the Supremes said it was a treatment, not an impact, case,¹¹² and they were right because the employer knowingly used gender as the selection criterion to decide how much a worker contributed to the pension plan. But even though their intent was illegal, the employer had no desire to harm women; they really believed they were treating women fairly. So we have the precedent of non-malicious but intentional discrimination. It's just like your employer whose customers force him to hire only men.

JUDGE ELLIS: Your theory says that back pay is appropriate for unequal treatment simpliciter; that back pay plus compensatory damages are appropriate for intentional but non-malicious unequal treatment; and that back pay, compensatory damages, and punitive damages are appropriate for malicious intentional unequal treatment. *Manhart* falls in the second category. In order for it to support your theory, shouldn't the women have received restitution of their excess contributions?

MS. LORRAINE: I don't think my theory has to explain the remedy in *Manhart*, partly because of the equitable consideration about depleting pension funds' assets and partly because Title VII didn't allow compensatories and punitives back then, so the Supremes weren't thinking about all the varieties of relief. But I still think the case is good authority for my theory because it distinguishes between malicious and non-malicious intentional discrimination.

D. What the Theory Contributes

JUDGE ELLIS: What do you believe your theory contributes?

MS. LORRAINE: It states the *prima facie*-I's of unequal treatment

107. Los Angeles, Dep't of Water and Power v. *Manhart*, 435 U.S. 702, 704-705 (1978).

108. *Id.* at 706.

109. *See id.* at 723.

110. *See id.* at 721-723.

111. *See id.* at 720.

112. *See id.* at 716.

simpliciter and intentional unequal treatment and shows how much they overlap; only intent distinguishes them. My theory also shows disparate treatment and disparate impact are really about proof; they are *prima facie-II*'s, not *prima facie-I*'s, and they are similar to each other in several ways. Disparate impact proves unequal treatment. Disparate treatment proves unequal treatment plus intent. Now courts won't have to worry anymore about which theory to apply to a case. It's always unequal treatment simpliciter unless the plaintiff alleges intent.

JUDGE ELLIS: All this has been interesting, but does your theory have anything to do with liability or damages in Mr. Medina's case? And, now that I think of it, when can I expect your memorandum?

MS. LORRAINE: I'm re-reading the briefs now. I'll have the memo in a couple of days.

VI. MS. LORRAINE'S MEMORANDUM

To: Judge Ellis
 From: Ruth Lorraine
 Date: April 13, 2000
 Re: *Medina v. Retail Company*

I. The Law

A. Unequal Treatment Simpliciter

1. The Prima Facie Case

a. *Prima Facie-I*

The prima facie case in the first sense (elements of the claim) of unequal treatment simpliciter consists of the following material or ultimate facts:

- 1) The employer was covered by Title VII (the Act).
 - 2) The employer offered certain employment opportunities.
 - 3) The plaintiffs' group is protected by the Act (the plaintiffs were in the qualified labor pool for the opportunities in question), which means
 - a) the plaintiffs were qualified for the opportunities, and
 - b) the plaintiffs were willing to accept the opportunities.
 - 4) The employer afforded members of the plaintiff group a lesser chance than the comparators to benefit from the employment opportunities in question.
 - 5) The cause of the plaintiffs' lesser chance was their race or gender.
- Proof of these ultimate facts establishes the plaintiffs' right to back pay. (This memorandum does not address injunctive relief.)

b. *Prima Facie-II (aka Disparate Impact)*

The evidentiary facts which constitute the usual *prima facie* case in the second sense (proof of the elements of the claim) of unequal treatment *simpliciter*, and the elements of the claim which these facts prove, are as follows:

- 1) Direct evidence proves the employer was covered by the Act.
- 2) A fair proxy for the qualified labor pool for the opportunity in question, augmented by the assumption of equality, establishes the plaintiffs are qualified for the opportunity and willing to accept it and, therefore, are protected by the Act.
- 3) A statistically significant disparity between the percentages of plaintiffs who are in the proxy and who receive the opportunity shows the employer afforded the plaintiffs a lesser chance to benefit from the opportunity than the comparators were afforded. This evidence demonstrates that a cause of some sort is working to disadvantage the plaintiffs, but does not prove the cause is race or gender.
- 4) Proof that the employer used a certain selection criterion (not race or gender on its face) to award the opportunities, and that the criterion caused the disparity (had an adverse effect on the plaintiffs' group in the proxy), creates a rebuttable presumption that the criterion is not job related. If the presumption is not rebutted, race or gender was the operative selection criterion, and the cause of the plaintiffs' lesser chance, because a selection criterion that has an adverse effect and is not job related distinguishes among workers, not on the basis of qualifications, but on the basis of race or gender.

2. The Defense

The true defenses to unequal treatment *simpliciter* are reliance on an opinion letter from the EEOC; bona fide seniority, merit, or piece rate systems; and location of work. Employers may also defend unequal treatment cases by attacking the *prima facie* case. They may challenge the plaintiffs' numbers or statistical methods, or may argue the plaintiffs' proxy is not a fair representation of the qualified labor pool. Employers may also carry the burden of persuasion that the selection criterion is job related, which shows it selects qualified workers. This proof rebuts the presumption that the selection criterion was race or gender and shows the criterion was really qualifications for the job.

B. Intentional Unequal Treatment

1. The Prima Facie Case

a. *Prima Facie-I*

The *prima facie* case in the first sense (elements of the claim) of intentional discrimination consists of the following material or ultimate facts:

- 1-5) Same as 1-5 of unequal treatment simpliciter.
- 6) The employer intended to give individuals of the plaintiff's race or gender a lesser chance than the comparators to benefit from the opportunity.

Proof of ultimate facts 1-6 establishes the plaintiff's claims for back pay and, if proved, compensatory damages. (This memorandum does not address injunctive relief.)

b. *Prima Facie-II (aka disparate treatment)*

- 1) Intentional Unequal Treatment of an Individual

The evidentiary facts which constitute the usual prima facie case in the second sense (proof of the elements of the claim) of intentional unequal treatment of an individual, and the elements of the claim which these facts prove, are as follows:

a) Direct evidence proves that the employer was covered by the Act and offered a certain employment opportunity, that the plaintiff was qualified for the opportunity, and that the employer afforded the plaintiff a lesser chance to benefit from the opportunity than the comparator (usually, the plaintiff did not get the job and the comparator did). The plaintiff's willingness to accept the job can be proved by direct testimony or by circumstantial evidence per *McDonnell Douglas* that the job remained open.

b) A plaintiff seeks to prove the two remaining elements of the claim of intentional discrimination against an individual with evidence the employer's selection criterion was explicitly race or gender. Direct evidence, such as an incriminating statement or document, leaves no doubt race or gender disadvantaged the plaintiff and the employer intended this result. Circumstantial evidence commonly takes one of three forms, all variations on the same theme: (i) the employer's prejudice against the plaintiff's group, e.g., racial or gender slurs (*Slack*); (ii) historical discrimination by the employer's group against the plaintiff's group for this opportunity in this area (*McDonnell Douglas*), which is another way to show prejudice; or (iii) the employer's unexplained differential treatment of the plaintiff (or other members of the plaintiff's group) and legally indistinguishable comparator(s) (*Santa Fe Trail*), which also suggests prejudice. Circumstantial evidence of these sorts, added to proof the plaintiff was qualified, applied, and was rejected for an available opportunity, creates a rebuttable presumption the employer used race or gender as a selection criterion.

- 2) Intentional Unequal Treatment of Many Individuals (Statistical Disparate Treatment)

The evidentiary facts which constitute the usual prima facie case in the second sense (proof of the elements of the claim) of intentional unequal treatment of many individuals, and the elements of the claim which these facts prove, are as follows:

- a-c) Same as I.A.1.b.1)-3) above.
- d) Same as I.B.1.b.1).b) above except that historical discrimination can serve only to explain ambiguity.

2. The Defense

The true defenses to intentional discrimination are affirmative action meeting the Weber standards and reliance on an opinion letter from the EEOC. Employers may also defend by attacking the elements of the *prima facie* case. Thus, in an individual case, an employer may challenge whether the plaintiff applied, was qualified (which includes whether a bona fide occupational qualification exists for the job), etc. In a statistical case, the employer may attack the plaintiffs' proxy, numbers, or statistical methods. In individual or statistical cases, if the plaintiffs have offered direct evidence that the selection criterion was race or gender, the employer may rebut it with evidence of a non-discriminatory criterion. If the plaintiffs have offered circumstantial evidence such as prejudice or differential treatment of legally indistinguishable comparators—whether the evidence is individual or statistical and whether it occurred inside or outside the actionable period—the employer may offer counter-evidence, e.g. fair treatment of the plaintiffs' group.

C. Malicious Unequal Treatment

A seventh element, malice, added to the six elements of intentional unequal treatment, can justify punitive damages, but they are beyond the scope of this memorandum because they are not requested in Medina's case.

II. Medina's Case

The parties have stipulated to the truth of all the facts alleged in the complaint and answer and produced in discovery. They have filed briefs, which have been carefully considered.

A. The Individual Claim

1. The Facts

Medina is a Latino-American. He applied for the job of clerk at Retail, an employer covered by Title VII. He was qualified. He was rejected. Retail continued accepting applications.

2. Analysis

These facts satisfy the McDonnell Douglas formula. Together with our knowledge of historical discrimination in this area against Latinos, they imply Retail was prejudiced against Latinos and knowingly used national origin as the selection criterion to reject his application. This gives rise to a rebuttable presumption Retail intentionally denied Medina the job because of his national origin. Retail has not presented a non-discriminatory reason

to explain Medina's rejection or otherwise challenged the *prima facie* case. It follows Medina has proved Retail intentionally discriminated him, and he is entitled to back pay and compensatory damages. He has not claimed punitive damages.

B. The Class Claim

1. The Facts

Inside the actionable period, 8,500 Anglos and 1,500 Latinos applied for jobs as clerks, and 880 Anglos and 120 Latinos were hired. Applicants are a fair proxy for the qualified labor pool. The disparity between the expected number of Latinos hired (150) and the actual number is statistically significant.

2. Analysis

The facts do not show unequal treatment *simpliciter* because Retail's selection criterion has not been identified. Section 703(k) specifies that causation in an unequal treatment case can be established only by identifying a selection criterion and proving it caused the disparity. The reason for this is, because of the looseness of proxies, a disparity might be illusory or might be explained by legitimate causes. (If the criterion and its effect had been proved, the criterion would be presumed to be national origin unless Retail carried the burden of proving the criterion is job related.)

Nonetheless, the facts might prove intentional discrimination against Latinos. Elements 1-4 of the claim are easily found: Retail is covered by the Act; applicants being a fair proxy, Latino applicants were qualified for the jobs and willing to accept them; jobs were available; and Latinos had a lesser chance of being hired. The disparity is statistically significant, so we know a cause of some sort was operating. Was it national origin?

There is no direct evidence that Retail intentionally gave Latinos a lesser chance of being hired. Circumstantial proof exists, however.

There has indisputably been historical discrimination against Latinos in this area. Because of the looseness of proxies, this fact, even added to those above, does not prove Retail intended to disadvantage Latinos, though historical discrimination does provide relevant background information. But an important fact, albeit arising largely outside the actionable period, pertains specifically to Retail: only 7 percent of all of its clerks are Latino whereas the population of this city is 10 percent Latino. One would expect, in its many stores and over the many years it has been in business, Retail's clerks would be proportionate to the population. I feel this long-term disparity, added to historical discrimination against Latinos in this area and the statistical evidence inside the actionable period of the plaintiffs' qualifications, interest, etc., creates a rebuttable presumption that Retail intentionally used national origin as a selection criterion. Accordingly,

following the *McDonnell Douglas* model, which applies to statistical as well as individual cases, the burden of production has shifted to Retail to present evidence of a non-discriminatory reason or otherwise put an element of the *prima facie* case in issue.

Retail has not offered a non-discriminatory reason. (If it had, it probably would have been a selection criterion, and this would have become a case of unequal treatment simpliciter). Instead, Retail points out that its clerks wish to live near the stores in which they work. Most clerks live inside four miles of their stores, and the population of those areas is 7 percent Latino. Retail's brief argues these facts rebut Medina's proof of intentional discrimination outside the actionable period. If so, Medina's only evidence of intent would be historical discrimination in this area against Latinos, and that would not carry the load. But I think these facts do more than Retail's lawyer realizes. Retail is really using the population inside 4 miles of their stores as a proxy for the qualified labor pool. If this proxy is superior to Medina's, his case would collapse. Indeed, Retail would look terrific. The proxy would be 7 percent Latino, and new hires during the actionable period would be $(120 \div 1,000) = 12$ percent Latino. Whose proxy is better?

The parties have not addressed this issue in their briefs, but we can easily imagine what they would argue. Medina would say Latinos are such a small fraction of all clerks that their willingness to commute long distances to work for Retail is masked; that even if every Latino lives far from the store in which they work, it would still be true that most clerks live inside 4 miles of their stores. In other words, Medina would argue it is unproven Latino clerks live near the stores they work in. Retail would rejoinder that Medina could have discovered and proved where the Latino applicants and clerks live. Medina would retort that many clerks might have moved close to their stores after being hired.

I would be inclined to ask the parties for more facts and arguments. Can you do that after the case has been submitted? If not, and you are limited to the facts now in the record, liability on the class claims turns on which is the better proxy, applicants during the actionable period or the population of the area in which most present clerks live. I have already expressed my opinion on this issue¹¹³—but of course you are the judge.

113. See *supra* Section III.B.1.