Disparate Impact Discrimination:
The Limits of Litigation, the Possibilities for Internal Compliance

Melissa Hart[*]

Since the theory was first proposed by a group of creative litigators and adopted by the Supreme Court in *Griggs v. Duke Power Co.*,[1] disparate impact has been a flashpoint for the hopes and the anxieties of those struggling with the goal of equal employment opportunity. From the earliest days of Title VII's operation, it was evident that an antidiscrimination mandate could only possibly be effective if plaintiffs could challenge not just blatantly racist or sexist conduct but also practices and policies that may have been neutral in appearance but whose effects were anything but neutral. Thus, for advocates and activists seeking workplace change, disparate impact – which permits challenges to policies that, while facially neutral, place a disproportionate burden on members of a protected class – seemed to carry the potential for removing the "built in headwinds" that blocked progress for minorities and women.[2] The hope was that "the disparate impact theory would reach discrimination that was otherwise out of reach for claims of intentional discrimination."[3]

It remains a matter of considerable debate whether disparate impact has lived up to the aspirations of those who conceived it. And even among those who laud its early successes, there are many who question its potential as a litigation tool for the future. I suggest here that these skeptics are correct that disparate impact litigation is unlikely to play a vital role in the future of employment discrimination litigation. Furthermore, the

[*] Associate Professor, University of Colorado Law School.
[1] 401 U.S. 424 (1971).
[2] *Id.* at 432.
[3] Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 702 (2006).

bifurcation of antidiscrimination law in to two discrete theories – one addressed to intentional discrimination and one addressed to neutral policies with discriminatory effects – has had the negative consequence of moving much of the discrimination that actually occurs in the workplace outside of the effective reach of Title VII litigation. But the limits of litigation, however frustrating for potential plaintiffs, should not been seen as identical with the limits of the law. While litigation is essential for enforcement of legal mandates, voluntary compliance is similarly important. Disparate impact changed the contours of compliance and its influence continues to define "best practices" as many employers work towards Title VII's goal – "[t]he elimination of discrimination in the workplace."[4]

These remarks will touch on each of these aspects of disparate impact: its limitations as a litigation tool, the ways in which it is part of a larger problem in the way employment discrimination litigation has been framed by the courts, and its positive impact and potential for shaping compliance efforts.

1. The Limitations of Disparate Impact

Although *Griggs* has been heralded as one of the most important civil rights cases in United States legal history,[5] disparate impact theory has never lived up to its potential. In theory, it still could. Indeed, less than two years ago, the Supreme Court concluded that disparate impact claims were viable under the Age Discrimination in

[4] McKennon v. Nashville Banner Publishing Corp., 513 U.S. 352, 358 (1995); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).
[5] *See, e.g.*, Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOSTRA LAB. & EMP. L.J. 431, 433 (2005); Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 1-2 (1987).

Employment Act,[6] and thus certainly affirmed the viability of the theory more generally. But despite this recent affirmation, it is fair to say that disparate impact litigation is struggling for life.

Part of this struggle is simply a result of the very low success rate plaintiffs have in disparate impact challenges. In his recent article on disparate impact, employment scholar Michael Selmi presented the results of an empirical analysis of lower courts' handling of disparate impact cases that shows that plaintiffs fare very poorly with these claims. In the district courts, plaintiffs are successful in about 25 percent of disparate impact cases and in the courts of appeals, plaintiffs win about 19 percent of their disparate impact claims.[7] Moreover, among those cases, one third of appellate victories for plaintiffs, and one half of the district court victories also presented successful disparate treatment (or intentional discrimination) claims, raising a serious question about the significance of the impact claim to the outcome of the litigation.[8]

Independent of these statistical success rates, disparate impact claims have simply never made much headway beyond the context of the theory's initial conception – the written tests at issue in *Griggs* and other early objective standards. And because an employer justification – business necessity – is built into the theory, the number of workplace policies that can be successfully challenged under disparate impact is increasingly limited. While employers in the early days of Title VII might not have analyzed how their job requirements were tied to measuring job performance, employers

[6] Smith v. City of Jackson, 544 U.S. 228 (2005).
[7] Selmi, *supra* note 3 at 738-40. This is lower than the plaintiff success rate of about 35 percent in employment discrimination cases more generally. *Id.* at 739-40.
[8] *Id.* at 740-41.

are now aware that employment tests must be validated as job related and justifiable as consistent with business necessity.[9]

More generally, the history of disparate impact reflects a deep judicial and public ambivalence about the theory. Even those moments of victory in the history of disparate impact law have lacked the glory of true wins. For example, though many scholars and advocates looked hopefully to the Civil Rights Act of 1991 as a revitalizing moment for the theory, its reality was very mixed. The 1991 law was passed in response to a series of 1989 Supreme Court interpretations of federal antidiscrimination laws. Among those Supreme Court cases, one of the most criticized was *Wards Cove Packing Co. v. Atonio*,[10] which was viewed by many as drastically redefining – or even, as Robert Belton has put it, "dismantling" – disparate impact.[11] *Wards Cove* held that a disparate impact plaintiff had to identify specifically which employer practice was causing the complained of effects, that the plaintiff, rather than the defendant, carried the ultimate burden of demonstrating that the practice was not a business necessity, and that any proposed alternative practice had to be equally as effective and no more costly.[12] In the 1991 Civil Rights Act, Congress largely retained the first of these requirements (with a hard-to-use caveat in circumstances where plaintiffs can show that employer practices cannot be separated for analysis).[13] The legislature did reverse the Court and return the burden of proving business necessity to the employer.[14] As to the standard for showing a less discriminatory alternative practice, Congress stated that the standard would be what it

[9] *See* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L. J. 597, 598-99 (2004).
[10] 490 U.S. 642 (1989).
[11] Belton, *supra* note 5, at 463-64.
[12] *Wards Cove*, 490 U.S. at 657-61.
[13] *See* 42 U.S.C. § 2000e-2(k)(1)(B)(i).
[14] 42 U.S.C. § 2000e-2(k)(1)(A)(i).

had been the day before Wards Cove was handed down.[15] Since there had been uncertainty in the courts as to the appropriate standard for a less discriminatory alternative prior to *Wards Cove*, this legislative decision simply left the previous uncertainty in place. So, while the 1991 Civil Rights Act was heralded as a victory for disparate impact plaintiffs,[16] the changes Congress made have had limited effect. Defendants retain the burden of showing business necessity, but it has not proven a difficult burden to meet. In the years since 1991, plaintiffs have been less successful in disparate impact claims than they were in years preceding the law's enactment.[17] Moreover, another provision of that Act – the addition of significant damages potential for claims of intentional discrimination – has made disparate impact a less attractive option for plaintiffs.[18]

Similarly, in what could have been a victory for plaintiffs, the Supreme Court held in *Watson v. Fort Worth Bank & Trust* that disparate impact could be applied to subjective hiring practices as well as to objective practices like the written tests at issue in *Griggs*.[19] At the same time, however, the Supreme Court began in *Watson* the limitation of the disparate impact theory that would lead to the decision in *Wards Cove*. Moreover, very few cases have successfully challenged subjective practices on the disparate impact theory in the lower courts. Indeed, courts have generally been extremely resistant to recognizing the application of subjective judgment as a "neutral" employer policy.[20] Thus, disparate impact remains primarily applicable to objective tests, and only

[15] 42 U.S.C. § 2000e-2(k)(1)(A)(ii) & (k)(1)(C).
[16] *See, e.g.* Belton, *supra* note 5, at 467-68.
[17] *See* Selmi, *supra* note 3, at 738-40.
[18] *See, e.g.* Shoben, *supra* note 9, at 598.
[19] 487 U.S. 977, 991 (1988).
[20] *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALABAMA L. REV. 741, 783-84 (2005).

successful in those very rare cases in which an employer uses an objective test for which it cannot offer a "business necessity" justification.

Of course, debate about the potential of disparate impact continues to occupy the pages of law reviews. Two recent articles by prominent employment discrimination scholars illustrate the widely divergent views of the theory. One, by Michael Selmi, asks the question "was the disparate impact theory a mistake?" and answers that question in the affirmative.[21] Selmi concludes that disparate impact law has had limited success, and that the development of disparate impact put boundaries around disparate treatment law that limited Title VII's effectiveness and took pressure off the need for political attention to the problems of pervasive workplace discrimination.[22] In contrast, Charles Sullivan recently argued that scholars and advocates should turn their attention away from disparate treatment arguments and look to disparate impact theory as holding the greatest potential for workplace change.[23] Even Sullivan, a relative optimist about the future of impact litigation, takes the view that the theory would require revision and revitalization.[24]

2. The Problem with Creating Categories of Discrimination

Proving discrimination, as many courts and commentators have recognized, is not always, or even often, an easy task. An extraordinary amount of time and energy has been devoted to the development of proof structures for Title VII litigation, and the consequence has often been more rather than less confusion. Another regrettable

[21] Selmi, *supra* note 3, at 701.
[22] *Id.* at 782.
[23] Charles Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2005).
[24] *Id.* at 984-93

consequence in many courts has been that the complications in proof structures have bled across into the substantive definitions of discrimination. As Charles Sullivan has cogently put it, "[o]ne of the antidiscrimination project's pervasive problems has been the continuing conflation of two separate tasks, that is, defining discrimination and proving its existence."[25]

This error has been most evident in the context of disparate treatment law, where debate continues about the difference between "single-motive" and "mixed-motive" cases and the appropriateness of employing different statutory and judicially created proof structures in particular contexts.[26] But the divide between disparate treatment and disparate impact law is another area in which concerns about how to prove the existence of discrimination have led to substantive developments that undercut the effectiveness of the law. The notion that employer policies and practices must be either intentional, and thus subject to disparate treatment analysis, or neutral, and thus subject to disparate impact analysis, reflects a flawed understanding of the way the world actually operates. More seriously, it risks placing a great deal of workplace conduct and policy outside the reach of antidiscrimination law.

When I teach *Griggs* to my employment discrimination class, it never takes more than a few minutes for a student to raise her or his hand and say "Doesn't it seem like what was actually going on here was intentional discrimination?" That instinct seems to me to be correct. In many disparate impact cases, the notion that the policy at issue is "neutral" is simply disingenuous. Certainly this was the case in early disparate impact litigation like *Griggs*. When employers faced with Title VII held on to seniority systems

[25] Sullivan, *supra* note 23, at 913.
[26] *See* Hart, *supra* note 20, at 758-66.

that preserved previously explicitly segregated lines of employment, or applied testing standards unrelated to the jobs at issue, but certain to make upward mobility impossible for African Americans educated in second-class schools, these decisions were discriminatory. The notion that the same supervisors who were intentionally discriminating in 1964 simply stopped doing so on the effective date of Title VII is contrary to anything we know about human behavior.

These cases may initially seem easy to cabin as representing the "present effects of past discrimination" that were common in the early days of Title VII. But even years later, when the Supreme Court considered the arrangements of the Alaskan fisheries in *Wards Cove*, the stark segregation of sleeping, eating and working arrangements, which Justice Stevens, dissenting in that case, accurately described as disturbingly like that of the plantation economy,[27] suggested something much different from "neutral" policies that simply happened to have racial effects. Moreover, many of the "neutral" policies that almost certainly have a negative effect on opportunities for women and minorities – policies like word-of-mouth hiring, nepotism, cronyism or any other employment practice that avoids public posting or advertising for positions – will consistently reinforce the existing representation in a workforce. The effects are easy to see, and employers are certainly aware of them. At what point does the use of these practices cease to be "neutral" and instead become intentional or at least negligent discrimination?

In fact, the proof structure in a disparate impact case itself demonstrates the difficulty of separating this theory from intentional discrimination. In an impact case, a plaintiff first identifies a policy that has a disproportionate negative impact on a protected

[27] *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 663 n.4 (1989)(Stevens, J., dissenting).

class of employees.[28] The defendant must then demonstrate that the test is job related and consistent with business necessity.[29] If the defendant makes that showing, the plaintiffs may still prevail if they can identify an alternative practice that is as effective for the employer's business needs but would have a less discriminatory impact on the protected class and if the employer refuses to adopt that alternative practice.[30] For a plaintiff to prevail then, the court must conclude either that the defendant had no business justification for the practice or that the same business need could have been met with a less discriminatory alternative practice. If an employer maintains a policy under either of these circumstances, the neutrality of that policy is at best suspect.

And yet, despite the blurred line between policies that are "neutral" and those that are not, courts maintain the legal separation with little or no flexibility. Only a few years ago, the Supreme Court reversed a lower court finding of discrimination on the grounds that the court of appeals had impermissibly applied disparate impact standards in a disparate treatment case.[31] Given this continued dichotomy, it seems entirely possible that some kinds of employer practices will fall between these doctrinal cracks and will, despite their disparate impact on protected classes of workers, escape legal challenge. Thus, for example, in a number of cases challenging an employer's reliance on excessive, unguided subjectivity in decisionmaking, courts have been unwilling to view the practice as either neutral or intentionally discriminatory and have rejected challenges as inappropriate under either theory. Similarly, word-of-mouth hiring policies have struck some courts as neutral, others as intentional, and still others as impossible to categorize.

[28] 42 U.S.C. § 2000e-2(k)(1)(A)(i).
[29] *Id.*
[30] 42 U.S.C. § 2000e-2(K)(1)(A)(ii).
[31] Raytheon v. Hernandez, 540 U.S. 44, 520-21 (2003).

These are precisely the kinds of employer practices that are most likely to freeze existing patterns of representation in the workforce and to block meaningful access for women and minority candidates. To the extent that current legal doctrine allows these and similar practices to escape challenge, it presents a limit to the utility of litigation as a tool for change.

3. The Possibilities of Compliance and the Continuing Importance of Impact

I want to shift the focus of the discussion from litigation strategy to strategies and goals for compliance. Of course, litigation is absolutely essential because discrimination is prevalent and destructive and litigation should provide remedies for acts of discrimination that do occur. Litigation also provides the best incentive to employers to take action to avoid future discrimination. And many employers are working hard not to discriminate. So it is important to ask what the different legal standards mean to those employers. What do the available theories under Title VII tell us about the purpose of this antidiscrimination law and the obligations it imposes? After all, the remedial aspects of the statutes are intended to spur employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination.[32]

This focus on compliance is part of a larger scholarly trend that acknowledges the role that well-intentioned employers, among others, must play in giving true meaning and life to civil rights laws.[33] As Susan Sturm, whose work has been central in turning

[32] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976).
[33] *See, e.g.*, Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2006 UTAH L. REV. --, [5]

attention to the role that non-litigation enforcement mechanisms play in achieving workplace equality, recently wrote, "[t]hose on the front line must figure out how to achieve inclusive institutions when the problems causing racial and gender under-participation are structural, and they must do this under conditions of considerable legal ambiguity."[34] With a growing recognition that litigation must be only one part of a broader agenda for changing workplace dynamics, many scholars and advocates are turning their eye to internal mechanisms for accountability and change.

The academic work that has focused attention on employment in higher education – and in particular on the presence of women and minorities in the faculty ranks – has generally concluded that in this field, as much if not more than in others, the best chance for real change will come from within. As Martha West (who has done some of the most detailed and sustained research into representation of women in the academy) said over a decade ago, "[t]o make real progress against discrimination, we must pursue change within the universities themselves."[35] Courts have taken such an extremely deferential approach to academic hiring decisions that litigation is unlikely to force reforms in areas where they are needed. There is, however, some evidence that internal compliance mechanisms can lead to substantive reform and a more inclusive academic workplace.

It may be in this context that *Griggs* and the disparate impact theory will ultimately be recognized as most important. In the wake of *Griggs*, many employers either chose or were forced to eliminate testing that was unrelated to job performance. Perhaps even more significantly, as both critics and proponents have recognized, the

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(forthcoming); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J. L. & GENDER 247, 249 (2006).

[34] Sturm, *supra* note 33, at 249.

[35] Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 70 (1994).

disparate impact theory opened the door for affirmative action policies.[36] Disparate impact theory "recognizes the role that institutional choices, even those that are neutral in design and in application, can play in perpetuating stratification in the workplace."[37] By focusing attention on the discriminatory effect that institutional structures can have, and shifting the focus from individual animus, impact theory opens the door for structural change.

The best hope for employment equality lies in this kind of structural change and the institutional commitment it requires. The kinds of internal compliance mechanisms most likely to foster a more inclusive workplace are, in many instances, focused on identifying and altering some of the very policies that disparate impact litigation could, in theory, target. For example, experts recommend the employers make a careful examination of recruitment procedures to prevent screening women and minority candidates out of the applicant pool;[38] require written performance evaluations with specific examples to minimize the operation of stereotyping;[39] and advertise or post all positions and promotions, instead of relying on tap-on-the-shoulder or other informal mechanisms.[40] Each of these recommendations targets a policy or practice that, while appearing neutral, in fact operates as a "built-in headwind" to progress for women and minorities in the workplace.

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[36] *See, e.g.*, Belton, *supra* note 5, at 469; Blumrosen, *supra* note 5, at 4-7; Richard A. Epstein, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 234-36 (1992).
[37] Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.-R.-C.-L. L. REV. 91, 137 (2003).
[38] West, *supra* note 35, at 157.
[39] *See* Jocelyn Larkin & Christine E. Webber, *Challenging Subjective Criteria in Employment Class Actions*, ABA Section of Litigation Annual Conference 2005.
[40] *See* William T. Bielby, *Can I Get a Witness?: Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 377 (2003).

In addition to monitoring these kinds of practices, internal employer efforts to ensure employment equality can and should include systemic reform efforts. As the federal Glass Ceiling Commission noted in 1995, the most successful programs for increasing the representation of women and minorities in the workplace – and particularly in the higher ranks – involve strong central commitment and clear channels of accountability.[41] Diversity must become a core institutional value if it is to be an institutional reality. In a recent article, Professor Sturm described the transformation wrought at the University of Michigan through efforts by "university change agents" working together with the National Science Foundation (NSF) through an ADVANCE Institutional Transformation Award. Through this grant, the University of Michigan successfully removed a number of barriers to women's full "inclusion and advancement" in science and engineering departments at the school.[42] The process of reaching the measurable outcomes that this program achieved was one of program-wide exploration and conversation, which actively involved leaders within the University community in a careful evaluation of the impediments to advancement and the potential for removing those impediments.[43] Ultimately, if internal compliance efforts are to achieve some part of what litigation has not yet done, they will require this kind of commitment and cooperation. As Sturm put it in describing the Michigan program, "[w]orkplace equality is achieved by connecting inclusiveness to core institutional values and practices. This is a process of ongoing institutional change. It involves identifying the barriers to full participation and the pivot points for removing those barriers and increasing

[41] *Good For Business: Making Full Use of the Nation's Human Capital, A Fact-Finding Report of the Federal Glass Ceiling Commission* (March 1995).
[42] Sturm, *supra* note 33, at 252-53.
[43] *Id.* at 287-300.

participation."[44] These kinds of efforts require active, conscious movement toward a more inclusive workplace.

Those who conceived the disparate impact theory understood decades ago that equal employment opportunity for minorities and women could not be achieved through litigation targeting only the individual, intentional acts of discrimination that were the most obvious impediments to full participation. Deeper barriers existed then, and continue to exist today. The question of how best to unsettle the institutional structures that limit opportunities for women and minorities at work remains a subject of debate. Litigation must play a role in this effort, as the threat of liability remains the greatest impetus for change. Disparate impact claims will no doubt continue to be part of the litigation picture. But internal employer efforts at institutional transformation may hold out greater potential for the kinds of structural change that the disparate impact theory has helped to reveal as necessary to true employment equality.

[44] *Id.* at 249.