WAS THE DISPARATE IMPACT THEORY A MISTAKE?

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The disparate impact theory long has been viewed as one of the most important and controversial developments in antidiscrimination law. In this Article, Professor Selmi assesses the theory's legacy and challenges much of the conventional wisdom. Professor Selmi initially charts the development of the theory, including a close look at Griggs v. Duke Power Co. *and* Washington v. Davis, *to demonstrate that the theory arose to deal with specific instances of past discrimination rather than as a broad theory of equality. In the next section, Professor Selmi reviews the success of the theory in the courts through an empirical analysis and concludes that it has had a strikingly limited impact outside of the context of written employment tests and is, in fact, an extremely difficult theory on which to succeed. In the final section, Professor Selmi contends that whatever gains the disparate impact theory has produced likely could have been obtained through other means, particularly in large urban cities, and that the theory may have had the unintended effect of limiting our conception of intentional discrimination. Disparate impact theory always has been seen as beginning where intentional discrimination ends, and by pushing an expansive theory of impact, we were left with a truncated theory of intentional discrimination that continues to turn on animus and motive. Rather than a new legal theory of discrimination, Professor Selmi concludes, a greater societal commitment to remedying inequities was needed, as the ultimate mistake behind the disparate impact theory was the belief that legal theory could do the work that politics could not.*

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INTRODUCTION

Within antidiscrimination law, no theory has attracted more attention or controversy than the disparate impact theory, which allows proof of discrimination without the need to prove an intent to discriminate. The general outlines of the controversy are well known. In the 1971 landmark decision of *Griggs v. Duke Power Co.*,[1] the U.S. Supreme Court unanimously approved of the theory in the context of statutory employment discrimination claims.[2] Five years later in the equally momentous *Washington v. Davis*[3] the Court refused to extend the theory to constitutional claims, holding instead that intentional discrimination is required to establish a violation of the Equal Protection Clause.[4] Both of these cases involved written employment examinations, but advocates have sought to extend the theory to virtually every civil rights context under the perception that the disparate impact theory would reach discrimination that was otherwise out of reach for claims of intentional discrimination.[5] Just last term, the

1. 401 U.S. 424 (1971).
2. *Id.* at 436 (interpreting Title VII to include disparate impact cause of action).
3. 426 U.S. 229 (1976).
4. *Id.* at 239.
5. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that Title VI requires proof of intentional discrimination); Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (holding that § 1981 prohibiting discrimination in contracting only applies to claims of intentional discrimination); City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding that a voting

Supreme Court applied the cause of action to age discrimination claims, settling a longstanding dispute in the lower courts.[6]

Together *Griggs* and *Washington v. Davis* are widely seen as two of the most influential civil rights decisions ever issued. The *Griggs* decision has been universally hailed as the most important development in employment discrimination law.[7] Even critics concede its influence and have long suggested that the theory encourages employers to rely on quotas as a means of avoiding disparate impact lawsuits.[8] And when adverse Supreme Court decisions threatened to eviscerate the *Griggs* decision, Congress responded by passing the Civil Rights Act of 1991.[9]

The reaction to *Washington v. Davis* has been equally spirited, though in many respects the polar opposite of that for *Griggs*. Liberal academics have denounced the decision as unjustifiably limiting the scope of the Equal Protection Clause, and Charles Lawrence's renowned article that helped

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rights claim brought under the Fifteenth Amendment required proof of intentional discrimination). Before the Supreme Court issued its decision in *Sandoval*, there was some room for plaintiffs to pursue disparate impact claims under Title VI, a statute that requires nondiscrimination by federal contractors, pursuant to the regulations that were issued to implement the statute. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983).

6. Smith v. City of Jackson, 125 S. Ct. 1536 (2005). The battle over applying the disparate impact theory to age discrimination cases is discussed in Part II.B.2, *infra*.

7. *See, e.g.*, HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 383–86 (1990) (stating that *Griggs* "burst like a bombshell" and discussing its importance); Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 433 (2005) (labeling *Griggs* "[a]side from *Brown* . . . the single most influential civil rights case during the past forty years"); Alfred W. Blumrosen, *The Legacy of* Griggs: *Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 1–2 (1987) ("Few decisions in our time—perhaps only *Brown* v. *Board of Educ.*—have had such momentous social consequences [as *Griggs*].").

8. For example, Richard Epstein, a fierce critic of the theory, has called *Griggs* "the *first* and single most important Supreme Court decision under Title VII . . . ." RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 183 (1992). Professor Epstein discusses how the force of the disparate impact theory encourages employers to adopt "implicit quotas." *Id.* at 234–36; *see also* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 480 (2002) (claiming that disparate impact theory creates a "strong incentive to give preferential treatment to minorities"). Although the link to quotas has been a particular concern for conservative critics, the link has long been discussed in the context of the disparate impact theory. *See, e.g.*, Hugh Steven Wilson, *A Second Look at* Griggs v. Duke Power Company: *Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844, 873 (1972) (noting that "employers may use privately imposed quotas" to avoid disparate impact liability). For an incisive rebuttal to the quota argument, see Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487 (1996).

9. For a discussion of the importance of the disparate impact provisions to the Civil Rights Act of 1991, see Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 984–99 (1993).

spawn critical race theory was principally a critique of the Court's adoption of an intent standard.[10] In many quarters, constitutional law is still taught as if a different, more meaningful concept of equality would have emerged if only the Supreme Court had reached a different conclusion in *Davis*. Professor Reva Siegel is representative of this position when she writes that had the disparate impact theory been available, "equal protection litigation might [have] move[d] the nation closer to disestablishing historic patterns of race and gender stratification than current constitutional doctrines now do."[11]

One of the more interesting aspects of the disparate impact theory is that its mythology has arisen without any serious exploration of its reality. For example, in the last several years, scholars have offered numerous proposals to extend the disparate impact theory to cure all manner of social ills; extending the disparate impact doctrine has long been one of the primary obsessions of liberal academics and advocates alike.[12] Three prominent

10. *See* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) ("[R]equiring proof of intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works."). Several other critical scholars have staked their claims with critiques aimed at the intent requirement. *See, e.g.*, Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 968 (1993) ("[T]he *Davis* rule reflects a distinctively white way of thinking about race."); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978) (critiquing focus on intent as part of "perpetrator" perspective). Paul Brest, on the other hand, helped solidify his scholarly reputation with a modest defense of the intent principle. *See* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 19–22 (1976) (suggesting that racially disproportionate impact should not constitute unlawful discrimination).

11. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1145 (1997).

12. Just in the last few years, the following articles have appeared: Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397 (2002) (urging application of disparate impact theory to literacy tests); Carl H. Coleman, *The "Disparate Impact" Argument Reconsidered: Making Room for Justice in the Assisted Suicide Debate*, 30 J.L. MED. & ETHICS 17 (2002) (assisted suicide); Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L.J. 861 (2004) (discussing disparate impact theory as applied to a disabilities statute); Lara M. Gardner, *A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN'S L.J. 259 (2002) (discussing the applicability of the disparate impact model to prohibit discrimination against breastfeeding); Robert A. Kearney, *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 HOFSTRA LAB. & EMP. L.J. 185 (2003) (advocating creation of a disparate impact hostile environment claim); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 895–98 (2004) (arguing for use of disparate impact analysis to ferret out racial stigma); Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004) (exploring application of the theory to white male plaintiffs); Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283 (2003) (advocating use of disparate impact model for gender issues in the

employment discrimination scholars have recently called for a revival of the theory,[13] and several articles in leading law reviews have explored its ramifications.[14] Yet none of these articles comes to grips with a central facet of the theory: Outside of the original context in which the theory arose, namely written employment tests, the disparate impact theory has produced no substantial social change and there is no reason to think that extending the theory to other contexts would have produced meaningful reform. In other words, had *Washington v. Davis* been decided differently, the end results would have been pretty much the same. Even with written tests the theory did not achieve the expected reform, as the vast majority of tests continue to have significant adverse impact.[15]

As discussed below, the disparate impact theory arose initially to deal with specific practices, seniority systems and written tests, that were perpetuating past intentional discrimination.[16] Although courts have never restricted the theory to those particular contexts, the reality has been that the theory has proved an ill fit for any challenge other than to written examinations, the only category of claim for which legal standards have evolved to evaluate the permissibility of employment practices.[17] This latter point is important and too easily glossed over by both advocates and critics. While it is true that the disparate impact theory allows proof of discrimination without the need to prove intent, employers are allowed to justify their practices under a business necessity test. Because that test allows for

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virtual workplace); Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579 (2001) (book review) (arguing that disparate impact is the most appropriate theory for pay equity claims).

13. *See* Belton, *supra* note 7, at 469–72 (speculating on the possible future of the theory); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597 (2004) (emphasizing the potential of disparate impact theory); Charles Sullivan, Re-Reviving Disparate Impact 59 (unpublished manuscript, on file with author) ("The overall theme of this Article is that future development of the antidiscrimination project should focus far more on the disparate impact as a theory of liability than on disparate treatment.").

14. *See, e.g.*, Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001) (comparing the accommodation requirement under a disabilities statute to disparate impact theory); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494 (2003) (exploring the purpose and constitutionality of disparate impact theory).

15. *See* Paul R. Sackett et al., *High Stakes Testing in Employment, Credentialing, and Higher Education: Prospects in a Post-Affirmative-Action World*, 56 AM. PSYCHOLOGIST 302, 302 (2001) ("In education, employment, and credentialing contexts, test score distributions consistently reveal significant mean differences by race.").

16. The two most important formative cases both involved seniority issues. *See* Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). These cases are discussed in Part I.A, *infra*.

17. Written tests can be validated pursuant to professionally established guidelines. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (discussing guidelines). As discussed below, the guidelines are ill-suited for anything other than written examinations.

normative judgments regarding what practices are properly defined as discriminatory, courts readily accept most proffered justifications.[18]

A central reason for courts' general acceptance of justifications, I will suggest, is that courts never fully accepted the disparate impact theory as a legitimate definition of discrimination, or as a legitimate means of proving discrimination, and it was a mistake to think that they would. The disparate impact theory has often been justified based on the difficulty of proving intentional discrimination, particularly in cases where evidence of overt bias or animus is lacking.[19] Yet, there was no reason to believe that courts would be more willing to see discrimination through the lens of disparate impact theory when they were unable to do so even through the far more common mix of circumstantial evidence of intentional discrimination. Suggesting otherwise was like offering a pair of glasses to cure blindness, and the reality has been that disparate impact claims are more difficult—not easier—to prove than claims of intentional discrimination.

But to suggest that the disparate impact theory has produced less change than typically assumed is a far cry from demonstrating that the theory was a mistake. On this score, I will argue that the theory had the rather perverse effect of limiting our conception of intentional discrimination, which, in the end, may have hindered our efforts to eradicate discrimination more than it has plausibly helped. As a concept, the disparate impact theory begins where intentional discrimination ends, and seeking an expansive role for the disparate impact theory ultimately has left us with a truncated definition of intentional discrimination. The disparate impact theory has always been contrasted with racial animus and motive, and despite the familiar refrains regarding how discrimination has become more subtle over time, we continue to define intentional discrimination in the context of animus and consciously impermissible motives.[20] The disparate impact theory also has proven a poor vehicle for uncovering subtle discrimination while the intentional discrimination framework has remained seriously undeveloped, even though it likely

18. This issue is discussed in more detail in Part II.B, *infra*.

19. *See* Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 358 (1987) (suggesting that the Supreme Court established disparate impact theory in part based on the difficulty of proving intent); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987) (arguing that one justification for disparate impact theory is the difficulty of proving intent under disparate treatment models).

20. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1172 (1995) (noting that in pretext cases involving intentional discrimination, "liability is premised on the presence of conscious discriminatory animus"). I return to this theme in Part III.B.3, *infra*.

could have been expanded to include much of what the disparate impact theory ultimately captured, while also including more subtle discrimination.

Developing a more expansive concept of intent would have required a far stronger push to redefine intentional discrimination to encompass acts that were not tied to old-style discrimination, and it also would have required a greater societal commitment to remedying racial, gender and other disparities linked to what is often defined as societal discrimination. Ironically, the move to the disparate impact theory may have alleviated some of that perceived need as it sent a signal that intentional discrimination was largely a thing of the past. At the same time, it moved away from notions of fault or blame that were necessary to trigger greater social responsibility. With this framework in mind, it becomes easier to see how the theory was a mistake and, equally important, why it was premised on a deeply mistaken foundation.

This Article proceeds in three parts. Part I explores the neglected history of the disparate impact theory, its context, and its evolution in the Supreme Court culminating in *Washington v. Davis*, which I suggest was a poorly developed case for extending the theory because the plaintiffs never articulated a reason why the city of Washington, D.C. should have been held responsible for the disparate effects of its test under any theory of discrimination. Part II embarks on a different course, as it presents an empirical analysis of how the disparate impact theory has fared in both the appellate and district courts, and I conclude that the theory has had a strikingly limited impact. One of the more important findings of this case survey is that a substantial number of successful disparate impact cases also succeed under a theory of intentional discrimination, suggesting that the impact theory is often superfluous. I also argue that the theory has rarely been successfully stretched beyond the testing context. Part III lays out my argument for why the theory was ultimately a mistake by first demonstrating that even the benefits produced in the testing cases likely could have been procured either through a broader definition of intentional discrimination, one that was available at the time the disparate impact theory arose, or by ordinary politics. Following that discussion is an analysis of how the disparate impact theory significantly contributed to our limited understanding of intentional discrimination.

In addition to revealing the limits and restrictions of the disparate impact theory, another purpose of this Article is to help revive a more critical analysis within legal scholarship. The faith so many scholars and advocates have imbued in the disparate impact theory largely ignores much of what we have learned about the way in which the law works to preserve

social norms rather than to upend them. Taking seriously the disparate impact theory would have posed a substantial challenge to existing practices, which is precisely why the theory never has been taken particularly seriously by courts. But more than that, one lesson we ought to relearn is that we cannot expect the law to do the work that politics cannot.

I. THE ROAD TO *GRIGGS* AND BEYOND

The disparate impact theory is generally associated with the Supreme Court's decision in *Griggs v. Duke Power Co.*[21] Somewhat remarkably, *Griggs* was only the Supreme Court's second interpretation of the employment provisions of the Civil Rights Act of 1964 (Title VII), and that interpretation, like its first, appeared to greatly expand the scope of the statute.[22] At the same time, the theory did not arise spontaneously, and one of the least chronicled aspects of an otherwise heavily analyzed case is the origins of the disparate impact cause of action.[23] As discussed in detail below, two important cases, two influential law review articles, and a strategic decision by the Equal Employment Opportunity Commission (EEOC) all contributed to the creation of the theory, which the Court ultimately sanctioned in *Griggs*.

A. The Seniority Cases and the Origins of the Disparate Impact Theory

Much of the concern that gave rise to the disparate impact theory centered on the perpetuation of past lawful discrimination through what appeared to be neutral practices, initially seniority systems and later written tests that were imposed after Title VII became applicable. Prior to the passage of the Civil Rights Act of 1964, African Americans were widely segregated into undesirable positions that were located within different job progression lines from the white workers.[24] At the time, many seniority systems afforded seniority only within particular jobs. As a result, regardless

21. 401 U.S. 424 (1971).

22. Like *Griggs*, the Supreme Court's first Title VII decision offered a potentially broad interpretation of the statute by creating a "sex-plus" claim in which it was possible for plaintiffs to allege that a defendant discriminated against a subclass of women, in this case women with preschool age children. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). Not coincidentally, similar to *Griggs*, the sex-plus theory has been significantly limited and is now a marginal part of discrimination doctrine.

23. Professor Robert Belton, one of the lead attorneys in *Griggs*, recently offered his own retrospective, which accords with some of my own treatment though we part company over the theory's ultimate influence. *See* Belton, *supra* note 7, at 435–54.

24. *See* William B. Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOWARD L.J. 1 (1967) (describing seniority cases and systems).

of their seniority within a particular company, African Americans had to start at the bottom of the white job ladder in order to move into the more desirable positions.[25] Complicating matters further, many of the jobs at the bottom of the white progression paid less than the top black positions, and many black workers were reluctant to take a pay cut as a way of moving into the better jobs.[26]

In one of the most important early cases challenging the discriminatory effects of seniority systems, *Local 189, United Papermakers v. United States*,[27] Judge Wisdom framed the matter as

> how to reconcile equal employment opportunity *today* with seniority expectations based on *yesterday's* built-in racial discrimination. May an employer continue to award formerly "white jobs" on the basis of seniority attained in other formerly white jobs, or must the employer consider the employee's experience in formerly "Negro jobs" as an equivalent measure of seniority?[28]

As Judge Wisdom noted, unless service experience in the "Negro jobs" was applied to the now opened white jobs, senior African American employees would find themselves competing with whites for entry-level jobs, and it would be many years before they would be able to move up the ranks to better positions. If this were to occur, it would contravene the specific purpose of the Act.

There was, however, an important twist to the *Papermakers* case that reveals an underlying motive for the company's seniority system that could not be properly ascribed to unintentional discrimination, and also illustrates why many of the early cases were treated as forms of intentional discrimination. In the *Papermakers* case, the EEOC initially approved of the seniority system within job titles for future jobs, but the Department of Labor's Office of Federal Contract Compliance, reviewing companies that had federal contracts, objected to this arrangement as impermissibly perpetuating the effects of past discrimination.[29] As a condition of maintaining federal contracts, the Department of Labor required the company to combine an employee's time in job with his entire time at the company, and the company agreed to this arrangement.[30] The union that represented the

25. *See* Alfred W. Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268, 276–77 (1969).
26. *Id.*
27. 416 F.2d 980 (5th Cir. 1969).
28. *Id.* at 982–83.
29. *Id.* at 984–85.
30. *Id.* at 985.

white employees, however, refused to accept the proposal, and voted to strike once the company indicated that it planned to impose the new system unilaterally.[31] The Justice Department then filed suit to enjoin the strike, and perhaps for good measure staked out a third governmental position by seeking to enjoin the use of seniority altogether.[32]

The company, a codefendant in the Justice Department lawsuit, subsequently defended its seniority system by focusing narrowly on the absence of a present intent to discriminate. The company argued that it had ceased to discriminate once Title VII became effective and "[t]he fact that the system continues to prefer whites over previously hired Negroes in filling certain vacancies does not in itself show racial discrimination. That effect, the defendants argue[d, was] merely an ineradicable consequence of extinct racial discrimination."[33] As with the practices subsequently challenged in *Griggs*, no one asserted that the seniority system had been preserved with a specific, or primary, intent to discriminate against African American workers, and for this reason there did not appear to be intentional discrimination as traditionally defined, although later in the opinion the court suggested that such intent was present.[34] The nature of that intent, however, was tied to the central purpose of Title VII rather than to the motive of the actor. The purpose of the Act, the court noted, was to provide employment opportunities previously denied routinely and systematically to African Americans; allowing job seniority to determine employment opportunities would continue to "freeze" out the intended beneficiaries of the legislation, a fact the Supreme Court had previously recognized and sought to remedy in the voting rights context.[35] As Judge Wisdom explained, "It is not

31. *See id.* at 984–85.

32. *Id.* at 985. Toward the end of its opinion, the Fifth Circuit noted, "We cannot help sharing Crown Zellerbach's bewilderment at the twists and turns indulged in by government agencies in this case." *Id.* at 997.

33. *Id.* at 986.

34. *Id.* at 997 ("The requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them. Section 707(a) demands no more.").

35. *Id.* at 987–88, 990–91. With respect to voting rights, the notion of a "freeze out" had two meanings. On the one hand, entrenched past practices could freeze out African Americans, even if not implemented with a specific intent to do so. *See* Louisiana v. United States, 380 U.S. 145 (1965). Conversely, the Fifth Circuit developed what was known as a "freeze theory" as a remedy for voting rights violations. Under that theory, no new practices could be implemented because of their discriminatory effects, and courts froze the standards at a particular time as a way of avoiding new hurdles. *See* United States v. Duke, 332 F.2d 759 (5th Cir. 1964). In *Griggs*, the Supreme Court mentioned the concept, which was also discussed more extensively by the dissenting judge in the prior appellate decision. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent,

decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the *past* is to cut into the employees *present* right not to be discriminated against on the ground of race."[36] To the court, this was more than remedying the present effects of past discrimination; it was present discrimination that could be tolerated only through a legitimate justification. This is where the business necessity language entered the analysis: "When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, non-racial business purpose."[37]

The Fifth Circuit in *Papermakers* specifically referred to this business purpose as a "business necessity," a concept it borrowed from a pre–Title VII case involving dual seniority systems where the court had struggled with a similar issue. In *Whitfield v. United Steelworkers of America, Local 2708*,[38] the employer had maintained two racially separate job classifications but was required to merge them in light of Supreme Court precedent interpreting the National Labor Relations Act.[39] The two job lines, however, "were not so functionally related that experience at the top of the formerly black line could provide adequate training for the bottom jobs in the white line."[40] To comply with the Supreme Court mandate, and ensure that the employees would be qualified for the jobs, the company required black employees to take a qualifications test to move into the positions that formerly had been held exclusively by white employees, even though the incumbent white employees were not required to take the test. The Fifth Circuit upheld the requirement noting that "[s]uch a system was conceived out of business necessity, not out of racial discrimination. An employee without proper training and with no proof of potential ability to rise higher, cannot expect to start in the middle of the ladder, regardless of plant seniority."[41]

In contrast to the *Whitfield* case, the Fifth Circuit saw no business justification in *Papermakers* for allocating positions based on job rather than

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cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices."); Griggs v. Duke Power Co., 420 F.2d 1225, 1247 (4th Cir. 1970) (Sobeloff, C.J., concurring in part and dissenting in part) (discussing the freeze theory in voting rights).

36. *Papermakers*, 416 F.2d at 988.

37. *Id.* at 989.

38. 263 F.2d 546 (5th Cir. 1959), *cert. denied*, 360 U.S. 902 (1959).

39. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) (requiring certified unions to represent members of the bargaining unit on a nondiscriminatory basis).

40. *Papermakers*, 416 F.2d at 993.

41. *Id.* (quoting *Whitfield*, 263 F.2d at 550). Following *Papermakers*, the Fifth Circuit repudiated *Whitfield* as no longer defensible after Title VII. *See* Taylor v. Armco Steel Corp., 429 F.2d 498 (5th Cir. 1970).

plant seniority. In making this determination, the court focused exclusively on the qualifications necessary to perform the job while ignoring whatever morale issues might otherwise justify the policy. The court also specifically noted that only qualified individuals would be eligible for the positions regardless of seniority.[42] Equally important, without an adequate business justification, the court saw the perpetuation of past discrimination as a form of intentional ongoing discrimination: "When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes on-going discrimination, unless the incidents are limited to those that safety and efficiency require."[43]

Although the *Papermakers* case offers critical insight into the development of the disparate impact theory, it was not the sole source of the theory. As the case makes clear, the Fifth Circuit relied heavily on two articles published in the *Harvard Law Review*,[44] and a Virginia federal district court case that proved especially influential. In *Quarles v. Philip Morris, Inc.*,[45] the plaintiffs challenged a number of the defendant's employment practices at its Richmond, Virginia cigarette factory as intentionally discriminatory, relying primarily on statistical disparities in the hiring and promotion process to establish discriminatory intent. The plaintiffs lost those claims with little analysis by the district court and prevailed only on the wage claims of two African American employees.[46] In addition to challenging those employment practices, the plaintiffs also challenged the transfer and seniority provisions of the collective bargaining agreement as "intentional, unlawful employment practices."[47] The substance of this claim was effectively identical to that raised in the *Papermakers* case, but the analysis was subtly different, including a more detailed focus on how the maintenance of the seniority system was a form of intentional

42. As a defense to the policy, the employer offered an expert witness to testify about the effect the government's policy would have on the plant but, according to the court, his testimony centered on allowing unqualified individuals to bid on jobs or jump over jobs based on seniority. *Papermakers*, 416 F.2d at 989–90. It is worth noting that the company's defense was certainly weakened in that it was willing to go along with the policy but for the white union's opposition, and it appears that the union was seeking to protect its members. The company also seemed to go to substantial lengths to protect the interests of that union.

43. *Id.* at 994.

44. *See* George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969) and Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967). Cooper and Sobol were attorneys involved in the *Papermakers* case, as well as in *Washington v. Davis*, 426 U.S. 229 (1976), discussed *infra* Part I.D.

45. 279 F. Supp. 505 (E.D. Va. 1968).

46. *Id.* at 509–10.

47. *Id.* at 510.

discrimination. At one point, the court even equated the two: "The court finds that the defendants have intentionally engaged in unlawful employment practices by discriminating on the ground of race against Quarles, and other Negroes similarly situated. This discrimination, embedded in seniority and transfer provisions of collective bargaining agreements, adversely affects the conditions of employment and opportunities for advancement of the class."[48]

By the time of *Papermakers*, many scholars already were highlighting the importance of altering seniority systems to ensure that the purposes of Title VII were fulfilled. From *Quarles* and *Papermakers*, it seems clear that what has come to be defined as the disparate impact theory arose initially, and primarily, in the context of the discriminatory effects of seniority systems.[49] In its enforcement efforts, the United States also targeted unions' desire to preserve discriminatory seniority systems.[50] These seniority cases were distinctive in a number of important ways. For example, none of the courts specifically discussed a disparate impact theory, although they did discuss the discriminatory effects of what appeared to be a neutral seniority system—neutral in that it was not implemented with the explicit, or established, motive of excluding African Americans from desirable jobs. But as the discussions in both *Papermakers* and *Quarles* suggest, there was a significant question as to why job seniority was being preserved in these plants on the basis of what were now unlawful job distinctions. Moreover, the *Quarles* case specifically defined the continuance of the system as a form of intentional discrimination. The vast majority of seniority cases were also distinctive in that they involved employers that had previously discriminated

48. *Id.* at 519.

49. *See, e.g.*, Blumrosen, *supra* note 25, at 294 ("To require that Negro employees remain subordinate to white employees based on historic discrimination would constitute a deprivation of employment opportunity and an adverse effect on employment status because of race in violation of the statute."); Gould, *supra* note 24 (describing the way seniority systems preserved past intentional discrimination); William B. Gould, *Seniority and the Black Worker: Reflections on* Quarles *and Its Implications*, 47 TEX. L. REV. 1039 (1969). Gould observes:

> If Congress intended to bring into being an integrated work force, however, and not merely to create a paper plan meaningless to Negro workers, the only acceptable legislative intent on past discrimination is one that requires unions and employers to root out the past discrimination embodied in presently nondiscriminatory seniority arrangements so that black and white workers have equal job advancement rights.

Id. at 1042.

50. *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36, 416 F.2d 123 (8th Cir. 1969); United States v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968). The *Papermakers* case was also brought by the United States.

explicitly against their African American employees, so that the challenged systems perpetuated past intentional discrimination.[51]

B. Testing Cases and the EEOC

The disparate impact theory clearly took a different turn in the testing context, but it was a turn anticipated in the seniority cases and one based on similar concerns regarding the perpetuation of past lawful discrimination.[52] Given the vast inequities in school education systems among white and black schoolchildren, imposing written tests as a condition of employment predictably would have the effect of perpetuating segregated job classifications. Like the seniority cases, the testing cases arose principally among employers that had engaged in prior intentional discrimination. Although it may have been difficult to prove that an employer instituted a test with the specific motive to continue to segregate African Americans, it took no great leap of faith to understand that the testing requirement did just that. Indeed, Professor Alfred Blumrosen, an important scholar and partial architect of the disparate impact theory, argued that instituting tests or maintaining seniority systems that had the probable effect of excluding African Americans should be defined as intentional discrimination under basic tort law.[53] Ultimately, this was a road not taken, but it is important to emphasize that these cases could have been, and in some instances were, defined as involving intentional discrimination.[54]

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51. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) (invalidating a departmental seniority system based on prior discrimination); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970) (treating a no-transfer policy as akin to seniority as a means to perpetuate discrimination); United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970) (finding that seniority in segregated lines prevented transfers).

52. As was true with the seniority issue, one of the more influential articles was a student note. *See* Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691 (1968). Others likewise focused on the way tests had been introduced into the employment process. *See* Cooper & Sobol, *supra* note 44.

53. ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 176 (1971) ("I conclude that the intent requirement of Title VII is the intent requirement of a civil action in tort—that the defendant be aware of the consequences of his action which are reasonably certain to flow from his behavior.").

54. This issue is discussed in more detail in Part IV.A., *infra*. As one example, a Mississippi district court invalidated the use of Graduate Record Examinations (GRE) scores and a master's degree requirement for school teachers because of the expected effects of the policies. *See* Armstead v. Starkville Mun. Separate Sch. Dist., 325 F. Supp. 560 (N.D. Miss. 1971). The court noted, "Racial differentials like those above mentioned were expected by defendants when they adopted [the p]olicy," *id.* at 568, and went on, "[T]he court concludes that the School Board, in adopting the policy, knew or should have known that its implementation would bar more black than white teachers from reemployment and hiring by the district." *Id.* On appeal,

Despite the acknowledgements that both tests and the seniority systems perpetuated past intentional discrimination, courts were largely receptive to the employers' claims that they needed to ensure that the African American employees were qualified for the newly opened positions.[55] This contention was not easily dismissed given that African Americans had been denied the opportunity for training and advancement in the past. Not surprisingly, past intentional discrimination rendered many African Americans unqualified, or less qualified, for the jobs that were now open to them. Again, this is where the business necessity test came in—to ensure that employees were truly qualified for the positions they sought.[56] But this also clearly could be a pretext for frustrating the purposes of the statute: If employers' past discrimination could serve as a basis for denying new opportunities to African Americans, it would have taken many years for them to realize any gains in the workplace—just as was true with the seniority systems.

Although seniority systems and written tests were surely different, their similarities are more important to understanding the origins of the disparate impact theory and its ultimate limits. In both the seniority and the testing cases, the issue was the perpetuation of past intentional but lawful discrimination that would contravene the purposes of the legislation. As a result, the disparate impact theory was not seen initially as a broad alternative concept of discrimination, but rather, the cause of action originated to deal with specific issues involving past intentional discrimination.[57]

It was the EEOC, not the Courts, that conceived of the theory as a potential alternative approach to discrimination, and it did so in part for strategic considerations. According to Professor Blumrosen, who was a high-level EEOC official at the time, it quickly became clear that negotiations with employers would be smoother if they could move away from a focus on intentional discrimination, which carried with it an implicit label of blame

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the decision was upheld with respect to the GRE scores but not the master's degree requirement. *See* Armstead v. Starkville Mun. Separate Sch. Dist., 461 F.2d 276 (5th Cir. 1972).

55. Professor William Gould was critical of this aspect of the cases, and singled out the *Quarles* decision, otherwise commonly viewed as beneficial to plaintiffs, as more "harmful than helpful." Gould, *supra* note 49, at 1074.

56. *See* Local 189, United Papermakers v. United States, 416 F.2d 980, 990 (5th Cir. 1969) (emphasizing that "no employee would have a right to a job that he could not perform properly"); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 518 (E.D. Va. 1968) (noting that "[m]any Negroes, regardless of seniority, are not qualified for supervisory positions").

57. Ironically, the Supreme Court ultimately rejected the argument that seniority systems that perpetuated pre-Act discrimination violated Title VII. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

that employers were expected to resist.[58] To the EEOC, and to plaintiffs more generally, it mattered little how a particular act was defined so long as the power to remedy the effects was available. It was also conceivable that judges would be more receptive to a theory based on unintentional discrimination, whereas they might have been reluctant to identify employers as intentional discriminators with all that such a label was meant to convey. As discussed below, this strategic decision may have had an understandable appeal at the time, but it was based on a mistaken foundation because it required courts and employers to accept the disparate impact theory as embodying an identifiable form of discrimination. Yet, the farther removed one became from remedying the present effects of past intentional discrimination, the more difficult such acceptance became.

There is another aspect of the specific contexts in which the disparate impact theory arose that is worth highlighting. Seniority systems and employment tests were specific practices that were easy to identify and for which there was no difficult causal question; the adverse impact of these practices was clear and all that was at issue were the employers' attempts to justify the relevance, or legitimacy, of their practices. The employers' rationales were likewise relatively easy to define, and they were objective rather than subjective in nature. Employers should have been able to explain the importance of a seniority system based on job titles or the need for a particular employment test, and to the extent that any were unable to do so in the face of clear and substantial disparate impact, one might question the employer's motive in establishing or maintaining the practice.[59] As soon as one moved away from these contexts, however, it became far more difficult to establish causation or a clear business justification conducive to objective proof. The theory began to weaken and, ultimately, to dissolve.[60]

58. *See* ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 73 (1993) (discussing the Equal Employment Opportunity Commission (EEOC) position seeking to avoid moral blame). Professor Robert Belton has highlighted the role that the NAACP Legal Defense and Education Fund played in the early years of the theory. *See* Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 936 (1978).

59. *See, e.g.*, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1142 (1971) ("If [an employer] is fixing an irrelevant qualification which has a significant differential impact on black employment, he is discriminating on the basis of race."). This is similar to the point made many years ago by Professor George Rutherglen, and one with which I largely agree, although I will later suggest that the disparate impact theory was unnecessary to achieve this goal. *See* Rutherglen, *supra* note 19, at 1311 ("The theory of disparate impact only addresses the difficulty of proving pretextual discrimination and of using objective evidence more clearly and systematically."); discussion *infra* Part III.B.

60. There are other practices that courts typically treat as presumptively valid and therefore needing no justification, as discussed in more detail in the next section.

C. The *Griggs* Decision

At the time it arose, the *Griggs* case fit easily within the developing case law. However, it also offered a potentially more expansive theory of liability than the seniority cases because it was generally easier to confine the seniority cases to their particular context, while the testing cases could have had a broader application. Prior to the passage of Title VII, the Duke Power Company (Duke Power) had intentionally segregated its workforce, restricting its African American employees to generally undesirable jobs within the labor department, including primarily outdoor maintenance and janitorial work.[61] The highest pay within the labor department was lower than the starting pay in the other departments.[62] In 1955, the company imposed a high school degree requirement for initial assignment to any department other than the labor department, and after Title VII became applicable, the employer required those seeking employment or transfers also to pass two written examinations.[63] At the request of employees within the coal handling division, the employer subsequently allowed existing employees without high school degrees to transfer from the coal or labor departments by passing the two examinations.[64] For both the high school degree and testing requirements, the company exempted incumbent employees, all of whom were white.[65] Indeed, several of the white employees and five of the foremen did not have high school degrees, but they were all allowed to stay in their positions without taking the examinations.[66] This fact proved crucial to the appellate court, which found the company liable for intentional discrimination on this basis and required that the black employees hired before the high school degree requirement was instituted be provided with the same exemption as the white employees.[67] By the

61. *See* Griggs v. Duke Power Co., 420 F.2d 1225, 1227–29 (4th Cir. 1970) ("Until 1966, no Negro had ever held a position at [the plant] in any department other than the Labor Department.").

62. *Id.* at 1228. The labor department had a maximum wage of $1.565 per hour while the minimum wage in other departments in the plant was $1.705 with a maximum of $3.18 to $3.65 per hour. *Id.*

63. Griggs v. Duke Power Co., 401 U.S. 424, 427–28 (1971). Although the tests likely would have had their greatest impact at the hiring stage, the class in *Griggs* consisted of existing employees, and the question with respect to applicants was never addressed. It has been noted widely that the tests were instituted the day Title VII became effective, creating a presumption that they were instituted intentionally to disadvantage African Americans. The high school degree requirement, however, was instituted nearly ten years earlier and actually had a greater effect on the black employees, only one of whom had a high school degree.

64. *Id.* at 428.

65. *Id.* at 427–28.

66. Griggs v. Duke Power Co., 292 F. Supp. 243, 247 (M.D.N.C. 1968).

67. *Griggs*, 420 F.2d at 1231.

time the case reached the Supreme Court, only four of the original thirteen employees were seeking relief, and the defendants did not seek review from the appellate court's finding of intentional discrimination.

As was common at the time, Duke Power took no steps to determine whether the tests or the education requirement would actually ensure qualified employees but instead sought to justify the practices by asserting that the requirements would provide more educated—and by implication, better—employees.[68] Some of the briefs filed in the Supreme Court included sample questions from the tests, and there was no obvious connection between the questions and the jobs at issue.[69] The district court specifically noted that the test, widely used by employers at the time, was not job related in the sense that it would provide valuable information regarding the ability to perform job duties. That court nevertheless held that the employer's desire to upgrade the quality of its workforce was a valid business justification.[70] From the cases and the briefs, it did not appear that Duke Power ever administered the test, but the EEOC had documented that whites typically fared three times better than African Americans on one of the tests the company sought to implement.[71]

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68. *Griggs*, 401 U.S. at 431 (noting that both the tests and the high school degree requirement "were adopted . . . without meaningful study of their relationship to job-performance ability"). The court of appeals explained the company's justification as follows: "Duke claims that the policy was instituted because its business was becoming more complex, it had employees who were unable to grasp situations, to read, to reason, and who did not have an intelligence level high enough to enable them to progress upward through the company's line of advancement." *Griggs*, 420 F.2d at 1231.

69. The company used two commonly available tests, the Wonderlic Personnel Test and the Bennett Mechanical AA Test, and set the passing scores at the median for high school graduates. The questions included in the briefs included comparisons of proverbs, sentence comprehension, and definitions: "Does B.C. mean 'before Christ?'" These questions prompted the Steelworkers, which filed a brief in support of the petitioners, to conclude, "These questions *perhaps* might have utility on a law school aptitude exam. As a measure of ability to fill jobs in an industrial plant they are ludicrous." Brief for United Steelworkers of America, AFL-CIO as Amicus Curiae at 4, *Griggs*, 401 U.S. 424 (No. 70-124). In contrast, the employer highlighted some of what it deemed the more pertinent questions. In a footnote it asked:

> Does it take "formal schooling" or "cultural background" to know that November is the eleventh month of the year (Question No. 1 [Wonderlic]), or that chew is related to teeth as smell is to nose (Question No. 7) or that if 3 lemons sell at 15 cents, one and one-half dozen would cost 90 cents (Question No. 12)?

Brief for Respondent at 21 n.6, *Griggs*, 401 U.S. 424 (1971) (No. 70-124).

70. *Griggs*, 292 F. Supp. at 250 (noting that "[a] test which measures the level of general intelligence, but is unrelated to the job to be performed is just as reasonably a prerequisite to hiring or promotion as is a high school diploma").

71. In a footnote, the Court observed that in one case, 58 percent of whites passed the tests in question, while only 6 percent of blacks passed. *Griggs*, 401 U.S. at 430 n.6. The Court also noted that based on the 1960 census, within North Carolina, 34 percent of white males had completed high school compared to 12 percent of blacks. *Id.*

The company's explanation for the test, and its willingness to pay some of the education costs for those who sought to finish high school,[72] transformed the case, at least in the Supreme Court's eyes, from one of intentional discrimination to something different. There was no indication that the company adopted the requirements with the express purpose of confining African Americans to the labor department. At the same time, there was little question of what the effect of the requirements would be: to exclude the vast majority of African Americans and thereby to preserve the segregated job lines within the company. Importantly, all of the courts to analyze the issue accepted the company's stated explanation of a desire to upgrade the quality of its workforce at face value. This was true even though the test had not been shown to provide reliable information regarding the necessary skills for the positions, and even though the controversy over standardized tests was not a new one. The United States government had suspended the administration of a widely used occupational test in 1963 out of concern for its adverse effect on minorities; and in 1968 the NAACP called for a moratorium on standardized tests.[73] Thus, the Court in *Griggs* confronted the same question as the *Papermakers* case: Were ostensibly neutral practices that perpetuated intentional discrimination permissible under the new statute?

Many commentators have analyzed the Supreme Court's reasoning in *Griggs*,[74] but this Article focuses on those aspects of the case that best shed light on the theory's origins and future development. I have already noted

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72. *Id.* at 432 ("The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training.").

73. *See* Edmund W. Gordon & Tresmaine J. Rubain, *Bias and Alternatives in Psychological Testing*, 49 J. NEGRO EDUC. 350, 359 (1980) (noting that the NAACP and other organizations had called for a moratorium on standardized tests in 1968 due to their effect on minority test takers); Neil Lawler, *Developing New Employment Tests for Minorities*, PUBLIC ADMIN. REV., July–Aug. 1971, at 459, 460 (explaining that the U.S. Training and Employment Service determined in 1963 that the General Aptitude Test Battery (GATB) was inappropriate for use on minorities). One of the most important articles on discrimination in tests was also published at about this same time. *See* T. Anne Cleary, *Test Bias: Prediction of Grades of Negro and White Students in Integrated Colleges*, 5 J. EDUC. MEASUREMENT 115 (1968). It is worth reemphasizing that until the Civil Rights Act of 1964, lawful discrimination preempted many of these concerns.

74. *See, e.g.*, JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 412–20 (1994); Herbert N. Bernhardt, Griggs v. Duke Power Co.: *The Implications for Private and Public Employers*, 50 TEX. L. REV. 901 (1972); Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Mack A. Player, *Is* Griggs *Dead? Reflecting (Fearfully) on* Wards Cove Packing Co. v. Atonio, 17 FLA. ST. U. L. REV. 1 (1989); Hugh Steven Wilson, *A Second Look at* Griggs v. Duke Power Company: *Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972).

that Duke Power had a long history of segregated job lines and the results of its practices were highly predictable. An equally important aspect of the case was the historical timeframe in which it arose. By 1971, the Supreme Court had confronted many evasive state and private practices in voting, education, and, to a lesser extent, housing. The Court was well aware of the vast and persistent means by which civil rights mandates could be frustrated.[75] All of the briefs that were filed in support of the employees relied on those earlier cases to emphasize that unvalidated tests could readily be used to evade the purpose of Title VII.[76] While *Griggs* was the Court's first exploration of potentially evasive practices in the employment context, the Court's past experience undeniably influenced its perspective in interpreting Title VII. The Court referenced its decisions in the other contexts as support for invalidating the employer's practices.[77] Equally revealing, during the same

75. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating a city charter that had overridden fair housing ordinance); Green v. County Sch. Bd., 391 U.S. 430 (1968) (invalidating freedom of choice plans); Reitman v. Mulkey, 387 U.S. 369 (1967) (invalidating a state housing referendum designed to provide local control over fair housing); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (invalidating a state poll tax); Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (holding unconstitutional a county's decision to close the schools); Terry v. Adams, 345 U.S. 461 (1953) (holding unconstitutional the transfer of state primaries to a private discriminatory body); Smith v. Allwright, 321 U.S. 649 (1944) (holding unconstitutional a state democratic party's all-white primaries).

76. For example, petitioner Griggs argued:

> The use of tests and educational requirements is but one example of a new breed of racial discrimination. While outright and open exclusion of Negroes is passé, the use of various forms of neutral, objective criteria which systematically reduce Negro job opportunity are producing much the same result. As this Court has long recognized in other contexts of racial discrimination, those rules which are objective and neutral in form may well be racially discriminatory in substance and effect.

Brief for Petitioner at 25, *Griggs*, 401 U.S. 424 (No. 70-124). In support of its argument, the petitioner cited cases involving grandfather clauses, tuition grants, and gerrymandering. The United States, as amicus curiae, cited the grandfather clause and literacy test cases early in its brief. *See* Brief for the United States as Amicus Curiae at 12–13, *Griggs*, 401 U.S. 424 (No. 70-124); *see also* Brief of the Attorney General of the State of New York as Amicus Curiae in Support of Reversal at 9, *Griggs*, 401 U.S. 424 (No. 70-124) ("Duke's transfer requirements are analogous in their invidious effects upon Negroes to other practices in civil rights contexts which have been stricken down by the Courts."); Brief for United Steelworkers of America, AFL-CIO as Amicus Curiae, *supra* note 69, at 4 (noting that the lower court's interpretation would "cripple Title VII").

77. The Court cited the voting rights case *Gaston County v. United States*, 395 U.S. 285 (1969), explaining that "[t]here, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race." *Griggs*, 401 U.S. at 430. The dissenting opinion in the court of appeals was even more explicit in connecting the past civil rights cases to the employment setting, citing grandfather clauses, pupil transfer plans, and other cases to support its claim that "[o]vert bias, when prohibited, has ofttimes been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before." Griggs v. Duke Power Co., 420 F.2d 1225, 1238 (4th Cir. 1970) (Sobeloff, C.J., concurring in part and dissenting in part).

term that *Griggs* was decided, the Supreme Court also approved busing as a remedy for desegregation[78] and addressed the difficult question of defining legislative motive, a close cousin of intent, in the closing of swimming pools in Jackson, Mississippi.[79] In other words, while it was early in the development of the Court's employment discrimination doctrine, there was a substantial history that informed the Court's decision as to what kinds of practices were discriminatory. Importantly, to the extent that the Court had focused on the issue, the earlier civil rights cases were all decided under a theory of intentional discrimination.[80]

Placed in context, the Court's unanimous decision in *Griggs* was neither particularly difficult nor far reaching. Permitting the tests and degree requirement without any justification other than a vague desire to improve the quality of the workforce effectively would have preserved the segregated job lines that Title VII was intended to eradicate. Any similar practice likewise would have been insulated from challenge, and the Court was unlikely to turn its back on the purpose of Title VII in the first case it confronted on the merits of that statute. By the same measure, the Court avoided broad proclamations by offering a short and undertheorized decision that traversed a middle ground.[81] Rather than defining the employers' practices as intentional discrimination, the Court allowed employers to use selection methods despite their adverse impact so long as they were demonstrated to be job related.[82] The Chamber of Commerce had staked

78. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971).

79. Palmer v. Thompson, 403 U.S. 217 (1971). The *Palmer* case has always been a bit of a curiosity, and while arguably consistent with *Griggs* in avoiding a focus on legislative motive, it proved inconsistent with the Court's later determination that intent was a necessary element of equal protection claims. For an influential critique of the case, see Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Motive*, 1971 SUP. CT. REV. 95. It is worth noting that it would still be two years before the Court took up what would become the most common proof structure in employment discrimination cases involving claims of disparate treatment. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing a three-part proof structure to prove individual claims of intent).

80. This became clear in *Washington v. Davis*, where the Court held that intent was a requirement of the Equal Protection Clause. Many of the earlier cases—and all of the education cases—also were decided under that clause. *See* Washington v. Davis, 426 U.S. 229, 240–43 (1976).

81. This was a common feature of the Court's race discrimination cases at the time, where the Court wrote short, often unanimous, decisions to invalidate particular practices without developing a broader theory. *See* White v. Regester, 412 U.S. 755 (1973) (invalidating a multimember voting district based on the totality of the circumstances); Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating a housing ordinance because it burdened racial minorities). I have previously discussed these cases in Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 299–301 (1997).

82. *Griggs*, 401 U.S. at 431 ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.").

out a largely similar position in support of Duke Power. The disagreement between its position and the Court's was over whether the employer had a valid business justification for the challenged practices.[83] Thus *Griggs* is properly seen as a norms-reinforcing decision rather than a broad or different interpretation of equality that challenged the status quo.[84] The Court upheld an employer's right to establish efficient business practices even if that meant excluding African Americans and, later, women, but it required employers to come forward with some justification for doing so. At this point the Court had not yet established the governing standards for what those acceptable business justifications might be.[85]

Another important aspect of the *Griggs* case is that the proposition for which the case is now best known—proof of intent is not necessary to establish a violation under Title VII—was not a central part of the case. All three published opinions, and all of the briefs filed in the Supreme Court, included surprisingly little discussion regarding whether intent was a required element of proof. There was no discussion of the legislative history as it applied to the intent requirement. Rather, the Court extensively explored Title VII's legislative history to determine the meaning of § 703(h), the so-called Tower Amendment that insulated "professionally developed" tests from challenge.[86] The principal § 703(h) issue was whether professionally developed meant "job related" or simply "any test," irrespective of whether the test provided valuable information regarding

83. *See* Brief Amicus Curiae on Behalf of the Chamber of Commerce of the United States of America at 5, *Griggs*, 401 U.S. 424 (No. 70-124) (noting that a discriminatory "intent may exist, where . . . there is an absence of 'legitimate business needs' which justified the employer's utilization of such educational or test requirements" but questioning what a "legitimate business need" might constitute). Even the employer emphasized the validity of its justification rather than arguing that it did not need a justification. *See* Brief for Respondent, *supra* note 69, at 13–17.

84. One reason the Court may have staked out the middle ground was the presence of a deep irony lurking in the background of the case. Prior to the advent of written tests for the workplace, subjective employment practices were widely thought to be discriminatory, and objective practices were seen as a potential antidote. Several courts had, in fact, found subjective practices to be inherently discriminatory. *See* Albert J. Rosenthal, *Employment Discrimination and the Law*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 95 (1973) (discussing cases).

85. The Court provided substance to those standards several years later in the case of *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), discussed *infra* at notes 95–98.

86. *See Griggs*, 401 U.S. at 433 ("The Company contends that its general intelligence tests are specifically permitted by § 703(h) of the Act. That section authorizes the use of 'any professionally developed ability test' that is not 'designed, intended, *or used* to discriminate because of race . . . .'"); Griggs v. Duke Power Co., 420 F.2d 1225, 1233 (4th Cir. 1970) ("Next, we consider the testing requirements to determine their validity and we conclude that they . . . are valid under § 703(h) . . . ."); Griggs v. Duke Power Co., 292 F. Supp. 243, 249–50 (M.D.N.C. 1968) (upholding tests as consistent with § 703(h)).

one's ability to perform a particular job.[87] To the extent that there was discussion regarding intent, particularly in the lower courts, unvalidated tests were equated with intentional discrimination.[88] This position was consistent with the state of the doctrine at the time, as courts were primarily seeking to determine what practices violated Title VII without thinking more broadly about an underlying theory. In the words of Robert Belton, one of the attorneys for Griggs, "It was all discrimination."[89]

This interpretation of *Griggs* was apparent from the reactions to the decision both within the media and among scholars. Immediately following the decision, the commentary focused almost exclusively on the requirements for validating written tests—and there was no indication that the case had spawned a new theory of liability.[90] Similarly, the vast majority of the cases that succeeded after *Griggs* followed the same pattern: Southern employers with a history of intentional discrimination utilizing unvalidated tests, most of which were implemented after the passage of Title VII, which had a clear and predictable exclusionary effect on black employees and

87. *See Griggs*, 401 U.S. at 433–34 (upholding EEOC's interpretation that § 703(h) permits only job related tests). The district court, on the other hand, concluded that the tests only had to be professionally developed: "A test which measures the level of general intelligence, but is unrelated to the job to be performed is just as reasonably a prerequisite to hiring or promotion as is a high school diploma." *Griggs*, 292 F. Supp. at 250. The district court saw no basis for challenging the high school degree requirement and, by analogy, upheld the testing requirement as well. *Id.*

88. The only substantial discussion of intent came from the dissenting judge in the court of appeals who wrote:

> Distilled to its essence, the underpinning upon which my brethren posit their argument is their expressed belief in the good faith of Duke Power. For them, the crucial inquiry is not whether the Company can establish business need, but whether it has a bad motive or has designed its tests with the conscious purpose to discriminate against blacks . . . . But this is no[ ] answer.
>
> A man who is turned down for a job does not care whether it was because the employer did not like his skin color or because, although the employer professed impartiality, procedures were used which had the effect of discriminating against the applicant's race.

Griggs, 420 F.2d at 1245–46 (Sobeloff, C.J., concurring in part and dissenting in part). Interestingly, his language parallels what came to be the dominant interpretation of the disparate impact provision.

89. Conversation with Robert Belton, Professor of Law, Vanderbilt Law School (Jan. 6, 2004).

90. *See* Bernhardt, *supra* note 74, at 918–20 (treating *Griggs* as a case about testing); Wilson, *supra* note 74 (discussing tests and suggesting that courts should be sensitive to costs in the business necessity calculation). For journalist reports, see Stanley Klein, *Job Testing Comes Under Fire: Too Many Disqualify Minority Applicants*, N.Y. TIMES, Sept. 19, 1971, at F5 (discussing the impact of the *Griggs* decision on employment testing); *Job Tests Held in Violation of Rights Act*, WASH. POST, Mar. 9, 1971, at A1.

applicants.[91] There were a number of exceptions to this rule that began to stretch the disparate impact theory into other areas, including height and weight requirements, which had an adverse impact against women and Latinos, and arrest records, which tended to have an adverse impact on blacks.[92] Importantly, even at this early juncture, when employers had legitimate justifications for their practices, courts did not hesitate to accept them.[93] Far more commonly, however, the challenged practices were imposed, as in *Griggs*, without any significant validation or justification.[94]

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91. *See, e.g.*, Payne v. Travenol Labs., 565 F.2d 895 (5th Cir. 1978) (invalidating the twelfth-grade education requirement of a Mississippi employer as not justified by business necessity); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976) (invalidating education and testing practices for an Alabama company with a history of discrimination); Rogers v. Int'l Paper Co., 510 F.2d 1340 (8th Cir. 1975) (sustaining a disparate impact challenge for failure to meet minimum validation standards for an Arkansas company where 1/160 supervisors were black), *vacated on other grounds*, 423 U.S. 809 (1975), *on remand*, 526 F.2d 722 (8th Cir. 1975); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (invalidating practices that perpetuated the effects of past intentional discrimination); Sims v. Sheet Metal Workers Int'l Ass'n, Local Union No. 65, 489 F.2d 1023 (6th Cir. 1973) (striking down a testing practice instituted after Title VII became law); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973) (holding that pre-Act discrimination rendered a seniority system discriminatory); United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972) (holding the defendant's past history of discrimination relevant to invalidating current seniority practices); Rowe v. Gen. Motors Corp., 457 F.2d 348, 356 (5th Cir. 1972) (invalidating promotion and transfer practices by an Atlanta plant with a history of discrimination where practices "froze" the status quo); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971) (invalidating seniority and transfer practices for a Jacksonville, Florida company with a history of exclusionary practices); Robinson v. Lorrillard Corp., 444 F.2d 791 (4th Cir. 1971) (invalidating a department seniority practice because of perpetuated discrimination).

92. *See* Smith v. Olin Chem. Corp., 535 F.2d 862 (5th Cir. 1976) (challenging a discharge for sickle cell anemia); Green v. Mo. Pacific R.R. Co., 523 F.2d 1290 (8th Cir. 1975) (invalidating an employer's practice of refusing to hire applicants with convictions other than minor traffic offenses as inconsistent with business necessity); Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974) (challenging a company policy discharging employees whose wages were garnished and remanding for determination of business necessity).

93. *See, e.g.*, White v. Carolina Paperboard Corp., 564 F.2d 1073 (4th Cir. 1977) (finding that an employer's practices satisfied the business necessity test because the jobs required special skills); Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977) (upholding a no-spouse rule as job related despite its adverse impact against women); Boyd v. Ozark Air Lines, Inc., 568 F.2d 50 (8th Cir. 1977) (upholding a pilot height requirement as relevant to operation within the cockpit); Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972) (police department tests); Spurlock v. United Airlines, Inc., 330 F. Supp. 228 (D. Colo. 1971) (upholding a college degree requirement as related to the training program).

94. *See* Walston v. County Sch. Bd., 492 F.2d 919 (4th Cir. 1974) (invalidating a teacher examination in a Virginia school district as part of a desegregation order); United States v. Ga. Power Co., 474 F.2d 906 (5th Cir. 1973) (invalidating tests that were implemented after the end of formal segregation and where no validation was attempted until after suit was filed); Young v. Edgcomb Steel Co., 363 F. Supp. 961 (M.D.N.C. 1973) (invalidating the use of the Wonderlic test as not validated), *aff'd in part, rev'd in part*, 499 F.2d 97 (4th Cir. 1974).

D. *Washington v. Davis* and the Turn to Intent

The question of employment testing returned to the Supreme Court just a few years later in a case that also arose from North Carolina and that involved the same test that was at issue in *Griggs*.[95] *Albemarle Paper*, now known primarily as one of the most frequently misspelled cases,[96] greatly expanded the requirements for validating written examinations, and, in many ways, was far more important than *Griggs* in defining the standards employers had to meet to comply with Title VII.[97] At the same time, *Albemarle Paper* was strictly a testing case insofar as the validation requirements it established were applicable only to written examinations.[98]

The real watershed case arrived the following year in *Washington v. Davis*,[99] a case that in many ways paralleled the issues raised in *Griggs*, but by a quirk of timing, was pursued as a constitutional rather than a statutory claim. *Davis* involved a challenge to a written test developed by the federal government for use by the civil service commission and administered by the Washington, D.C. Police Department. The test had a significant adverse impact on African Americans, who failed at a rate approximately four times higher than that for whites.[100] Despite the test's adverse impact, the Department had greater success in its actual hiring, in large part because in some years as many as 70 percent of its applicants were African American.[101] At the time the case reached the Supreme Court, nearly half of the new police recruits,

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95. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

96. For whatever reason, Albemarle is routinely spelled "Albermarle." Runner-up in the misspelling category is Atonio of the *Wards Cove* case, which spellcheckers frequently correct to "Antonio."

97. *Albemarle*, 422 U.S. at 427–36. Some commentators interpreted *Albemarle* as a serious restriction on employment testing. For a somewhat hyperbolic account, see James G. Johnson, Albemarle Paper Company v. Moody: *The Aftermath of* Griggs *and the Death of Employee Testing*, 27 HASTINGS L.J. 1239 (1976) (arguing that the EEOC standards relied on by the *Albemarle* Court were too stringent and unworkable).

98. The EEOC guidelines, adopted in *Albemarle*, established three means by which written tests could be validated, and those guidelines continue to focus exclusively on written examinations. *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (2004). Originally issued in 1966, the guidelines were last revised in 1978. For a thorough analysis of the guidelines and the different means of validation, see Gillespie v. Wisconsin, 771 F.2d 1035 (7th Cir. 1985).

99. 426 U.S. 229 (1976).

100. Between 1968 and 1971, 57 percent of black applicants failed the test while only 13 percent of whites failed. *See* Davis v. Washington, 512 F.2d 956, 958–59 (D.C. Cir. 1975).

101. Between 1968 and 1971, the pool fluctuated from a high of 70.3 percent black applicants (1969) to 52.1 percent (1970), with an overall percentage of 58.4 percent. Brief for Respondent at 5 n.8, Washington v. Davis, 426 U.S. 229 (1976) (No. 74-1492). During the same time period, 42.5 percent of the hires were black. *Id.*; *see also Davis*, 512 F.2d at 961 n.32.

and 35 percent of the entire force, were African Americans.[102] Foreshadowing a future debate, the Department defended its use of the test by arguing that its aggressive recruitment efforts had resulted in a police department that was representative of the relevant labor market, an issue the court of appeals rejected and the Supreme Court ignored.[103] It was also significant that at the time the case arose, police departments were a particular focus of integration efforts as a result of the Kerner Commission Report, issued after the 1968 riots that had ravaged many cities, including Washington, D.C.[104] One of the central conclusions of the Kerner Commission was that police departments required more minority members in order to more effectively police urban cities.[105] Adding to the complexity of the case, Washington, D.C. was a majority black city with a progressive black mayor, and the United States was a defendant in the case even while it was the chief enforcer of Title VII.[106]

The challenge in *Washington v. Davis* was filed in 1970, but because Title VII did not become applicable to public employers until 1972 the case was brought under the Constitution, and the plaintiffs sought to import the standards developed in *Griggs* into the Equal Protection Clause.[107] The idea of applying Title VII principles to the Equal Protection Clause may seem radical today. However, at the time, it was the prevailing judicial approach. Both of the lower courts had, in fact, applied the Title VII standards without significant analysis, as had been true of many lower courts, and the issue

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102. Brief for Respondent, *supra* note 101, at 22 n.29 (noting that 36.5 percent of the police force was black). The Supreme Court noted that "[s]ince August 1969, 44% of the new police force recruits had been black. . . ." *Davis*, 426 U.S. at 235. The court of appeals stated that 55 percent of all new officers reporting for the academy were black. *Davis*, 512 F.2d at 961 n.32.

103. *See* Brief for Petitioners at 14–18, *Davis*, 426 U.S. 229 (No. 74-1492) (arguing that the test did not have an adverse impact because the department's overall numbers were consistent with representation from the recruitment pool). This emphasis on the "bottom line" was subsequently rejected by the Supreme Court. *See* Connecticut v. Teal, 457 U.S. 440 (1982).

104. *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). The Kerner Commission Report has been the subject of extensive scholarly commentary. *See, e.g.*, John O. Calmore, *Spatial Equality and the* Kerner Commission Report*: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487 (1993).

105. *See* Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 690 (2004) (noting that the Kerner Commission "[R]eport urged more efforts to recruit more African Americans, and those officers 'should be so assigned as to ensure that the police department is fully and visibly integrated'"). The National Advisory Commission on Criminal Justice Standards and Goals issued a report in 1973 calling for explicit hiring goals and suggesting elimination of all entrance requirements other than those necessary to police work. *See id.* at 690–91.

106. For a discussion of Washington, D.C. and its politics at the time, see Philip G. Schrag, *By the People: The Political Dynamics of a Constitutional Convention*, 72 GEO. L.J. 819, 829–31 (1984).

107. *Davis*, 426 U.S. at 232–33, 236 n.6.

was barely addressed in the Supreme Court briefs.[108] Nevertheless, by 1976, the disparate impact theory had acquired a different meaning than originally articulated in *Griggs*, and the Supreme Court now faced a potentially far more expansive theory that could have prompted a significant amount of litigation and social restructuring. Many lower courts and some scholars had seized on the theory as a broad tool for social reform in housing, municipal services, and other areas.[109] Civil rights issues also had taken a different turn. The busing controversy had erupted throughout the country, and the images of the Boston melee were still fresh in everyone's mind.[110] And while the Court had approved busing as a desegregation remedy during the same term as its *Griggs* decision, *Washington v. Davis* followed shortly after the Court's decision in *Milliken v. Bradley* prohibiting desegregation efforts that crossed district lines, a decision many advocates viewed as effectively ending serious hope of meaningful desegregation.[111] Between *Griggs* and *Davis*, the Court also had its first taste of affirmative action, rejected a challenge to unequal funding of schools, addressed school desegregation in a Northern school system, and balanced seniority rights against the

108. The respondent's brief addressed the issue of the constitutional standard in a footnote. Brief for Respondent, *supra* note 101, at 23 n.35. Equal protection cases that applied the statutory standard included *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (holding that the Constitution requires no less than Title VII); *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972) (a challenge to a competitive examination for school supervisory positions); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971) (Minneapolis fire department challenge); *Harper v. Mayor of Baltimore*, 359 F. Supp. 1187 (D. Md. 1973) (§ 1981 and equal protection challenges to a fire department test), *modified and aff'd sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973); *Pennsylvania v. O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972) (challenge to a Philadelphia police test), *aff'd in part, vacated in part*, 473 F.3d 1029 (3d Cir. 1973); and *Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. Mass. 1969) (a constitutional challenge to the GATB test).

109. *See, e.g.*, Coal. for Educ. v. Bd. of Elections, 370 F. Supp. 42 (S.D.N.Y. 1974) (a voting rights challenge); Cuyahoga Metro. Hous. Auth. v. City of Cleveland, 342 F. Supp. 250 (N.D. Ohio 1972) (a challenge to a zoning requirement), *aff'd*, 474 F.2d 1102 (6th Cir. 1973); *see also* William Silverman, *Equal Protection, Economic Legislation, and Racial Discrimination*, 25 VAND. L. REV. 1183 (1972) (arguing that the disparate impact theory could invalidate minimum wage and usury laws and preferential licensing).

110. The riots that broke out over the school desegregation order requiring busing in Boston occurred in 1974–75. *See* U.S. COMM'N ON CIVIL RIGHTS, DESEGREGATING THE BOSTON PUBLIC SCHOOLS: A CRISIS IN CIVIC RESPONSIBILITY (1975). The episode has been chronicled wonderfully in *Eyes on the Prize: American's Civil Rights Years* (PBS television broadcast 1987) and in J. ANTHONY LUKAS, COMMON GROUND (1985).

111. *See* Milliken v. Bradley, 418 U.S. 717 (1974). The *Milliken* case has been widely denounced as one of the most restrictive cases involving school desegregation. *See, e.g.*, GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 10–11 (1996) (claiming that school desegregation "hit a stone wall" with *Milliken*); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1518 (2005) (noting that *Milliken* "effectively foreclosed the possibility of integrated schooling in the central cities").

antidiscrimination mandate, all of which may have awakened the Court to the complexities of equality under an expansive interpretation of the disparate impact theory.[112] Moreover, in the particular context of the *Davis* case, the constitutional question was wholly unnecessary, as any challenge to public employment practices could now be brought under Title VII. These factors surely contributed to the Court's decision to exclude effects claims from the scope of the Equal Protection Clause.

Although *Washington v. Davis* has been canonized for holding that intent is an element of the Fourteenth Amendment, the Court's discussion of the test, and the way that discussion diverged from its analysis in *Griggs*, is equally important to understanding the meaning of the disparate impact theory, and this point too often is missed by those who cling to the power of the theory. Central to the Court's holding was a normative judgment that the administration of the test challenged in *Davis* was not properly defined as discrimination—intentional or otherwise. In the last part of its opinion, the Court, in fact, upheld the test under the standards applicable to Title VII, and did so in a way that was remarkably different in tone and substance from the Court's earlier decision in *Griggs*.[113] Although the test at issue in *Davis* was similar to that in *Griggs* in its structure, primarily an SAT-style test, it had been created by the federal government and validated for use based on the Washington, D.C. Police Department's training program.[114] Moreover, although Washington, D.C. was nominally a Southern city, it was one without a deep history of civil rights resistance, and in light of the city's recruitment efforts and the presence of a black mayor, it would have

112. *See* Franks v. Bowman Transp. Co., Inc., 424 U.S. 747 (1976) (considering seniority rights issued under Title VII); DeFunis v. Odegaard, 416 U.S. 312 (1974) (dismissing an affirmative action case as moot); Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (discussing de facto and de jure discrimination in the Denver school system); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting an equal protection challenge to a state education funding system).

113. *See* Washington v. Davis, 426 U.S. 229, 249–50 (1976) (noting that the district court "assumed that Title VII standards were to control the case" and upholding the job-relatedness of the test).

114. *Id.* at 251 (noting that "[t]he District Court's . . . conclusion that Test 21 was in fact directly related to the requirements of the police training program was supported by a validation study, as well as by other evidence of record . . . ."). A copy of the test was attached as an appendix to the appellate court decision by the dissenting judge. *See* Davis v. Washington, 512 F.2d 956, 967 (D.C. Cir. 1975). There were eighty questions and a score of forty was necessary to pass. The test was designed to measure verbal ability, and most of the questions asked variations on reading comprehension or vocabulary. To give one example, Question Eighty asked: "The saying 'Anger dies quickly with a great man' means most nearly A) A good man is slow to anger. B) Nothing ruffles a good disposition. C) One can forgive but not forget. D) Strong passions cannot last. E) To continue to bear malice is petty." *Id.* at 976.

been difficult to suggest that the city was using the test with an intent to exclude African Americans from its force.[115] As a result, and in direct contrast to its analysis in *Griggs*, the Court did not see the administration of the test as discriminatory, specifically commenting: "[W]e have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory . . . simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups."[116] The Court concluded: "[I]t is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing."[117]

These statements were directly contrary to those made in *Griggs*. Although it might be tempting to see the distinction in the case as turning on the difference in jobs—police compared to power plant workers—there is little basis for this distinction in the case.[118] In *Davis*, there were no findings on the importance of the verbal abilities of police officers, nor was there any indication that this particular test sought the requisite verbal abilities necessary to read manuals or communicate effectively with the public, presumably the primary basis for the requirement. Rather, the test had been validated against a written examination administered at the end of the training academy, a process the appellate court had dismissed as demonstrating little more than a correlation between success on written examinations.[119] Whether the test had been properly validated was the

115. *Davis*, 426 U.S. at 235. The Court later referenced the Department's successful recruiting efforts in summarily rejecting an intentional discrimination allegation:

> [W]e think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race . . . .

Id. at 246. In their brief in the Supreme Court, the plaintiffs disputed the city's recruitment efforts, noting that the city's nationwide recruitment led to a sharp increase in white applicants. *See* Brief for Respondent, *supra* note 101, at 4–5. The district court, however, had concluded, "The Metropolitan Police Department is a model nationwide for its success in bridging racial barriers." Davis v. Washington, 348 F. Supp. 15, 18 (D.D.C. 1972).

116. *Davis*, 426 U.S. at 245.

117. *Id.* at 245–46.

118. For an interpretation that relies heavily on a distinction in the job duties, see Barbara Lerner, Washington v. Davis: *Quantity, Quality and Equality in Employment Testing*, 1976 SUP. CT. REV. 263, 279–82.

119. *See Davis*, 512 F.2d at 962–64. One problem with the validation effort is that the test administered at the end of the training program had not been shown to be related to the actual qualities of a successful police officer, and without more, there was a possibility that the test simply indicated which applicants performed well on written examinations.

primary issue raised in the Supreme Court briefs.[120] Moreover, some of the power plant jobs at issue in *Griggs* also involved potentially dangerous and complex work, and the employer had argued that its tests were necessary to ensure its employees had the ability to progress to those higher level jobs.[121] Rather than focusing on the distinction in job duties, something else appeared to have shifted on the Court, as within the Washington, D.C. police force, the Court did not see the use of the test as discriminatory.

The factual difference in the cases also highlights an important unasked question: Why should Washington, D.C. have been liable for administering the test? This is a question that has rarely been addressed by those advocating an expansion of disparate impact liability, but one that goes to the core of the theory while also exposing its limits. In *Griggs*, it was relatively easy to make the moral case for liability given the company's history of discrimination and the way the tests perpetuated that past discrimination without providing clear information relevant to the employer's business interests. But in *Davis*, the link was far less clear. The test at issue in *Davis* was used throughout the civil service system, and the city's recruitment efforts did not suggest a desire to exclude African Americans.[122] The success of the Department's hiring practices also made this a difficult case, because, for practical purposes, the plaintiffs were arguing that 70 percent of the new recruits should have been black rather than 50 percent. By any measure this was a difficult argument to sell.[123] As in *Griggs*, there was a high probability that the Department's test would have an adverse effect on black applicants, but there was also reason to believe the city would take steps to mitigate that harm. Just the opposite appeared true with Duke

120. The questions presented involved the test's adverse impact and whether the test had been properly validated. Testing organizations also weighed in on the case, whereas they were absent from *Griggs*. *See* Brief of American Society for Personnel Administration as Amicus Curiae, *Davis*, 426 U.S. 229 (No. 74-1492); Brief of the Executive Committee of the Division of Industrial Organizational Psychology (Division 14) of the American Psychological Ass'n as Amicus Curiae, *Davis*, 426 U.S. 229 (No. 74-1492); Brief of Educational Testing Service as Amicus Curiae, *Davis*, 426 U.S. 229 (No. 74-1492).

121. The Fourth Circuit explained: "Duke claims that the policy was instituted because its business was becoming more complex, it had employees who were unable to grasp situations, to read, to reason, and who did not have an intelligence level high enough to enable them to progress upward through the company's line of advancement." Griggs v. Duke Power Co., 420 F.2d 1225, 1231 (4th Cir. 1970).

122. *See* Lerner, *supra* note 118, at 271–72 (emphasizing the city's recruitment efforts).

123. The court of appeals signed on, however, noting specifically: "Although the Department, quite commendably, has succeeded in increasing the proportion of black officers through vigorous efforts, it is self-evident that use of selection procedures that do not have a disparate effect on blacks would have resulted in an even greater percentage of black officers than exists today." *Davis*, 512 F.2d at 961 (footnote omitted).

Power, which did not appear opposed to the results of its employment practices.[124] One might have advanced the theory articulated by Professor Blumrosen and others that liability should attach based on the torts standard of knowledge of the probable effects of the city's acts, but that would have been a significant expansion into a negligence theory of liability, an expansion rejected, at least implicitly, in *Griggs*.

Two other liability rationales were possible. Assuming the differential success rates on the test were attributable to the deficient education that Washington, D.C. provided to African Americans in its segregated schools, one might argue that the city was now required to take remedial steps so that its prior discrimination in the schools did not lead to a legacy of workplace discrimination in the future.[125] To my mind, this theory presents the strongest basis for holding the city liable, but it was not a theory advanced or even referenced by any of the parties that filed briefs in the case. One might also assert a more general theory independent of discrimination within the schools to suggest that the city had an obligation to remedy past discrimination that rendered African Americans less prepared for written tests. If developed, this theory would have imposed an affirmative action obligation on the city to remedy what has come to be defined as societal discrimination, and although also a solid basis for holding the city liable, this argument would have extended the disparate impact theory well past its moorings.[126] In the end, no adequate theory justifying liability against the city of Washington, D.C. was advanced; indeed, no theory was advanced at all. Instead, the parties focused on whether the Department had satisfied the statutory requirements of Title VII.[127]

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124. The city emphasized this point in its brief: "[I]t is indeed manifest that Test 21 does not operate to lock in a prior practice of discrimination, to freeze a racially unacceptable status quo, or to perpetuate or carry forward a racially tainted hiring practice of yesteryear." Brief for Petitioner, *supra* note 103, at 16. The brief also sought to distinguish the situation in *Griggs* by noting that Duke Power had instituted its test the day Title VII became applicable and did so without meaningful study. *Id.* at 17.

125. While the majority of black applicants were from Washington, D.C., many were from outside the city. In fact, one of the issues raised in the briefs involved what the proper labor market should be for comparison purposes. The city argued that it recruited primarily from a fifty-mile radius of the city, where the population of young black men was 36.5 percent, nearly exactly the percentage of black officers on the force. *See* Reply Brief of the United States at 4, Washington v. Davis, 426 U.S. 229 (1976) (No. 74-1492).

126. I have discussed the link between the disparate impact theory and societal discrimination previously. *See* Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575, 1601–03 (2002).

127. Subsequently, in critiquing the Court's decision, a number of scholars provided strong rationales. *See* Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 51–52 (1977) (arguing that tests with disparate impact reinforce the "stigma of caste");

The Supreme Court, however, needed more than a statutory argument to impose liability in this particular circumstance, and I suggest below that one reason the disparate impact theory has failed to produce greater results is precisely because no argument was developed to explain why the theory was consistent with the commitment to equality—why Washington, D.C. should have been held liable for the discriminatory results of the test rather than whether proof of intent was necessary either under the Constitution or Title VII. This failure to develop a theory, grounded in continuing discrimination, helps explain more generally why antidiscrimination law has had such a limited scope.[128]

Any doubt that *Washington v. Davis* was a limitation on the disparate impact theory was soon put to rest in the cases that followed. In *Dothard v. Rawlinson*,[129] the Supreme Court permitted a disparate impact challenge, brought

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Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 558 (1977) ("The underlying cause of disproportionate racial impact, the especially disadvantaged social position of black Americans, is one for which American society and government bear a heavy moral responsibility."). In an earlier article, Owen Fiss had set forth a theory including disparate effects in his equal achievement perspective. *See* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

128. At least two other theories or arguments were available. Consistent with the doctrine developed in the *Albemarle Paper* case, the plaintiffs might have offered alternative selection devices that would satisfy the department's needs while having a less adverse impact. As the case proceeded, no alternative was offered, but a typical alternative would be to lower the cut-off score. When a reasonable alternative is offered, and the employer declines to adopt it, it seems reasonable to infer discrimination from its acts because there would no longer be any business justification. This is an inference that is now part of the formal proof structure arising from the Civil Rights Act of 1991.

The plaintiffs also might have sought to demonstrate that the test was culturally biased in that the test questions favored white applicants and were less likely to be familiar to black applicants. My sense is that this is the most common objection to written tests, but it turns out to be a difficult claim to establish. Depending on the test, it might be possible to show that certain test questions favor white applicants either due to cultural or educational differences, and that might have been true at the time. These claims, however, frequently run aground in professionally developed tests, particularly with more recent tests that are designed with an eye to avoiding cultural bias. A more difficult issue is that there is little empirical support for the notion that the tests underpredict the performance of minority candidates, which would be a strong sign of test bias. *See* Sackett et al., *supra* note 15, at 303 ("An extensive body of research in both the employment and education literatures has demonstrated that these tests generally do not exhibit predictive bias."). If the test were biased, one would expect African American employees to do better on the job than their test scores predict, but in most studies, the opposite has proved true. In the last decade, psychologist Claude Steele and others have developed a theory known as stereotype threat which suggests that a concern with confirming stereotypes leads minority students to underperform on certain examinations. *See, e.g.*, Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997); Claude M. Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44, 48. This is a complicated and controversial theory that has not yet been shown to apply outside of the academic context.

129. 433 U.S. 321 (1977).

by women, to height and weight requirements for correctional officer positions in a male prison.[130] Yet, while permitting the challenge, the Supreme Court also upheld the specific gender restrictions as a bona fide occupational qualification, negating the disparate impact finding and creating the curious result that what the employer was prohibited from doing indirectly it could accomplish directly.[131] Two years later the Court rejected a challenge to the New York City Transit Authority's policy of refusing to employ individuals who were receiving methadone treatment, which the plaintiffs alleged had a disparate impact against African Americans, who were disproportionately represented among the affected class.[132] In a cursory analysis, the Court accepted the agency's safety justification as satisfying the business necessity test.[133] Then in quick succession, the Supreme Court declined to extend the theory to contracting claims filed under the civil rights statute known as § 1981, voting rights under the Fifteenth Amendment, and a challenge to a road closing.[134] The only application of the theory the Court permitted was a complicated decision allowing disparate impact challenges under the regulations implementing Title VI, the governmental funding statute requiring nondiscrimination, even while holding that the statute itself only precluded intentional discrimination.[135]

By the end of the theory's first decade, the Court had rejected more challenges than it had accepted, and it had largely limited the theory to its origins—namely testing claims and perhaps some other objective procedures capable of formal validation. At this point, there was little reason to think the disparate impact theory would mark a radical doctrinal shift. A theory that burst onto the scene in 1971 ended its first decade with a whimper. As

130. *See id.*

131. *See id.* at 335 ("A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood.").

132. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979).

133. *Id.* at 587 n.31. The Court accepted the Transit Authority's policies that methadone was a narcotic that created many problems associated with other narcotics such as drowsiness and insomnia. *Id.* at 588 n.32.

134. *See* Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) (holding that § 1981 prohibiting discrimination in contracting only reaches intentional conduct); City of Memphis v. Greene, 451 U.S. 100 (1981) (rejecting an intentional discrimination challenge to a road closing in Memphis that adversely affected African Americans); City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding that the Fifteenth Amendment only precludes intentional discrimination).

135. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). The *Guardians* case is notoriously difficult, complicated by the various opinions issued in the case. In the way the claim unfolded, the case was primarily about the government's power to issue regulations proscribing disparate impact. The Supreme Court has since reversed that part of the *Guardians* decision. *See* Alexander v. Sandoval, 532 U.S. 275 (2001).

described in the next section, the two ensuing decades simply confirmed the theory's limited reach, even within employment discrimination, despite the theory's unmistakable allure among academics and advocates.

II. ASSESSING THE THEORY IN THE COURTS

To this point, I have focused on the origins of the disparate impact theory in its particular historical context, as well as the development of the theory in the Supreme Court. In this section, I shift focus to the way the theory has developed in the lower courts, including an empirical assessment of the success litigants have had under the theory. In addition to its extended reach, one of the central attractions to disparate impact claims is the perception that they are easier to prove than claims of intentional discrimination, given that intent is often difficult to establish through circumstantial evidence.[136] In reality, however, the opposite is true: Disparate impact claims are more difficult to prove than standard intentional discrimination claims. This is particularly significant given that employment discrimination claims themselves are notoriously difficult to prove.[137]

A. The Scope of the Study

As part of this project, I have reviewed all of the disparate impact cases from select years in both district courts and courts of appeals. As indicated in Table A, I reviewed all of the reported appellate cases for 1984–1985, 1994–1995, and 1999–2001 for a total of six years for which there were 130 reported cases. By reported cases, I mean those cases available on LEXIS/NEXIS, including unpublished decisions.[138] In addition, I have reviewed

136. *See* sources cited *supra* notes 10, 12.

137. This principle has been documented repeatedly. For an early articulation, see Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989) (establishing that employment discrimination cases have a success rate superior only to prisoner cases). *See also* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001) (exploring reasons for the difficulty of proving cases); sources cited *infra* notes 151–153.

138. After collecting the cases, I excluded from the counts those that may have stated a claim of disparate impact theory without any discussion or ruling, or where the theory was simply mentioned, or where they were purely procedural claims including class certification and remedial orders. There were a significant number of these cases, and it appears that many plaintiffs allege a disparate impact theory without ever attempting to develop the theory. The search was a basic one: date specified and "disparate impact" or "disparate w/1 impact" (there was no difference between the two). This search picked up a significant number of nonemployment cases that were also excluded from the analysis but which were reviewed to determine the effect the theory has had in other areas, such as housing or environmental claims.

all of the cases within the district courts for six years (1983, 1987, 1991, 1996, 1999, 2002), with a total of 171 reported cases. Combining both samples produces a total of 301 analyzed cases. In selecting the years to study, I sought to avoid substantial overlap, but I also wanted to capture trends that might have emerged over time, trends which turned out most apparent in the district court cases. I coded the cases based on the court's determination, whether the appellate court affirmed or reversed a judgment, either with respect to summary judgment or a trial, or reversed and remanded for further proceedings. In the district court, decisions on the merits were recorded for both trials and motions to dismiss, and when plaintiffs survived a motion for summary judgment (or a motion to dismiss) the case was categorized as a success for the plaintiff. I also noted the nature of the claim (for example, race, sex, or age) and sought to determine the basis for the challenge, whether, for example, it was a challenge to a test, a subjective employment practice, or some other practice.[139] Each of the cases was checked for subsequent history but that history itself did not affect the empirical analysis unless the case also appeared in one of the other years under review.[140]

In addition to this systematic study of cases, I analyzed various segments of cases that seemed potentially revealing. I reviewed all of the appellate court cases decided between *Griggs* and *Washington v. Davis*, as well as many of the district court cases decided during that period, and all cases that arose after the passage of the Civil Rights Act of 1991 that contained any substantial doctrinal discussion. The latter group included fewer than a dozen cases; one unmistakable trend is the waning importance of the disparate impact theory after the Civil Rights Act of 1991.[141] Undoubtedly, the addition of damages for intentional discrimination claims provided by the 1991 Act, while withholding them from disparate impact claims, has substantially altered the incentives for defining claims as intentional discrimination.[142] In addition, as discussed more fully below, I analyzed certain

139. In several instances, the plaintiff prevailed on one claim but lost on others. In those circumstances, of which there were very few, the case would be categorized as a win and a loss.

140. In other words, if a plaintiff succeeded in a district court case in 1991 but that case was later reversed in 1993 (a year not included in the study), that reversal would be noted, but the 1991 victory would be counted as a plaintiff's victory.

141. Ironically, the disparate impact theory was considered the most important and controversial provision of the Act. *See* Adam Clymer, *Senate Democrats Back a Compromise on Civil Rights Bill*, N.Y. TIMES, Oct. 26, 1991, at A1 (noting that the Administration and Congress "have fought over when businesses can impose hiring conditions that appear fair but discriminate in practice").

142. The Civil Rights Act of 1991 made damages available for claims of intentional discrimination, whereas prior to that Act only equitable relief was available. Damages, however, are not available for disparate impact claims. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981(a)

cases and areas that have received particular attention by scholars, including age discrimination cases and those involving subjective employment practices, pregnancy discrimination cases, and a set of cases involving men who wear beards. My goal was to offer a more detailed, but not fully exhaustive, portrait of how the disparate impact theory has fared in the courts.

Much of the empirical analysis that follows is based on cases that are available on the LEXIS/NEXIS database and therefore provides only a limited picture of the universe of cases. To the extent that it is a representative sample, relying on published cases can offer substantial insight into the structure of litigation.[143] This issue has been played out extensively in the literature. Recent years also have seen a substantial increase in studies evaluating published decisions.[144] Published decisions are even more likely to present a substantial picture of the litigation landscape for disparate impact claims than other kinds of cases because they are typically class actions, at least for most successful claims.[145] By their nature, class action claims have more at stake, not just in monetary terms but also in terms of

(2000). Many of the recent large class action claims have proceeded under an intentional discrimination theory, even though many of their core allegations sound in traditional disparate impact language.

143. It is frequently noted that only about 25 percent of cases are represented in published opinions. *See* Peter Siegelman & John J. Donohue, III, *Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133 (1990). This figure is now likely higher given that today more technically unpublished cases are available on electronic databases.

144. *See, e.g.*, Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471 (2005) (evaluating cases on removal standards); Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (analyzing published Americans with Disabilities Act (ADA) cases); Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548 (2001) (analyzing published sexual harassment cases); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003) (analyzing reported California employment law cases); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997) (reviewing published environmental cases to determine judicial voting patterns); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (analyzing cases where employers assert lack of interest as a defense to sex disparities); John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the* Cannon *Doctrine*, 84 B.U. L. REV. 445 (2004) (reviewing published decisions).

145. There are a surprising number of individual claims, almost all of which fail. In the context of this study, it is not particularly relevant if successful claims are overrepresented among published cases because that would simply bias the study in favor of the disparate impact theory, and mean that the strength of the theory would be overrepresented in the empirical study. Similarly, among the settled cases, it is only an issue if those cases differ substantially from the published cases, for example, if there is a higher percentage of strong plaintiff cases among the settled cases. Without some basis, there is no particular reason to believe that would be the case, and it is more likely that strong plaintiff and defendant cases are among the settled claims.

publicity and potential injunctive relief. The size of the cases, and the prospect of costly injunctive relief, suggest that these claims are likely to be litigated at some level rather than quickly settled, although the potential for adverse publicity might influence some companies to settle quickly.[146] And because so much is at stake, adverse decisions are more likely to be appealed than in a typical case.

A difference may exist between published and unpublished cases in the testing claims. Assuming that cases are settled in the shadow of the law,[147] employers may have settled testing cases more readily because the law was better established, somewhat favorable to plaintiffs, and potentially costly to litigate. Yet, as discussed more below, the published cases also demonstrate significant success for plaintiffs in the testing cases, so there is nothing necessarily lost by excluding unpublished cases.[148] At the same time, the success rate of nontesting cases is so low that it seems inconceivable that there is a substantial segment of such claims that defendants readily settle without litigating in a way that would produce an opinion available in an electronic database.[149] Finally, even if the data set is not fully representative of the universe of disparate impact claims, it remains a valuable comparative resource for understanding the power and limits of the theory. Within law, we too often focus on a very limited set of leading cases, such as the *Griggs* decision, which is sometimes the only disparate impact case taught in a course on employment law. This survey represents the most comprehensive overview of the theory.

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146. This is what arguably occurred in the race discrimination cases involving Texaco and Coca-Cola. Indeed, the case against Coca-Cola was settled without any substantial motions having been decided. In contrast, Home Depot, Denny's, and now Wal-Mart have all engaged in substantial litigation despite the adverse publicity. For a discussion of these cases, see Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003).

147. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (arguing that cases are settled within the shadows of existing law).

148. Conceivably, if there are a substantial number of unpublished but successful testing cases, the success rates of the empirical study could be skewed if those testing cases far outnumber unpublished unsuccessful disparate impact cases. However, as discussed in the text, because the success rate of other kinds of disparate impact claims is so low, the claims ought to offset one another so that the published cases reflect the broader class of claims.

149. As noted previously, cases might be settled for their nuisance value, particularly given that litigating adverse impact claims can be quite expensive. If this is true, it is difficult to see how this could be treated as a benefit, rather than an unintended consequence of the theory, as presumably no one but the most zealous plaintiff advocates would countenance the creation of a theory solely for the purpose of creating nuisance value.

B. The Success of the Disparate Impact Theory

1. Empirical Assessment

There were a total of 130 appellate cases analyzed in the manner described above, and plaintiffs prevailed in only 19.2 percent of the cases, and 60 percent of these cases (15 of 25) were remands rather than outright victories.[150] In contrast, the majority of the defendants' victories affirmed the granting of summary judgment motions (62 of the 105 determinations favorable to defendants, or 59 percent), and another 38 determinations (36.1 percent) preserved defendants' trial verdicts. The figures are even more dramatic when the years 1984–85 are excluded because those years accounted for 56 percent of the plaintiffs' successful claims (14 of 25). The success rates were substantially lower for 1994–95 and 1999–2001, during which time period only two successful trial verdicts were preserved on appeal.

TABLE A
DISPARATE IMPACT DETERMINATIONS
COURT OF APPEALS DECISIONS

	Plaintiff				*Defendant*				
	Aff	*Rev*	*Rem*	*Total*	*SJ*	*Trial*	*Rev*	*Rem*	*Total*
1984–85	5	3	6	14	12	20	3	0	35
1994–95	1	0	2	3	14	11	0	2	27
1999–01	1	0	7	8	36	7	0	0	43
Total	7	3	15	25	62	38	3	2	105

Source: Lexis/Nexis

Plaintiff's Success Rate:	
1984–85	28.5%
1994–95	10.0%
1999–01	15.6%
Total	19.2%

150. Because of the nature of this study, I will avoid providing citations to select cases, and where I provide citations, it will typically be for an entire category of claims, or to illustrate some particular proposition. One of the issues one becomes acutely aware of when conducting a study like this is that it is easy to find a single case to support a particular argument, as most lawyers readily know. In this study, however, I want to provide a more comprehensive picture rather than focusing on leading or illustrative cases.

The figures for the district court decisions are quite similar but have some important variations. There were 171 cases in the six analyzed years, and the plaintiffs' succeeded in 25.1 percent of the cases. As was true with the appellate court cases, a substantial number of what I define as successful claims involved surviving summary judgment, and restricting the cases to decisions on the merits lowers the success rate to 16.9 percent. Plaintiffs fared substantially better during 1983, a year that accounts for 27.9 percent of the successful cases, and 42.3 percent of the successful trial victories. Excluding 1983, the plaintiffs obtained only 15 outright victories, for a success rate on the merits of 13 percent (15 of 115).

TABLE B
DISPARATE IMPACT DETERMINATIONS
DISTRICT COURT DECISIONS

	Plaintiff			*Defendant*		
	Prevails	*Forward*	*Total*	*SJ*	*Trial*	*Total*
1983	11	1	12	3	10	13
1987	7	2	9	13	9	22
1991	4	6	10	20	5	25
1996	1	2	3	21	2	23
1999	1	4	5	18	1	19
2002	2	2	4	26	0	26
Total	26	17	43	101	27	128

Source: Lexis/Nexis

Plaintiff's Success Rate:	
1983	48.0%
1987	29.0%
1991	28.6%
1996	11.5%
1999	20.8%
2002	13.3%
Total	25.1%

Although the statistics are imperfect, they plainly reflect the difficulty of proving disparate impact cases. Numerous studies have shown that employment discrimination cases tend to have a success rate in federal court of approximately 35 percent, while civil cases more broadly tend to have success

rates that approximate 50 percent.[151] There are some variations within these studies, and I have not sought to determine whether the success rate of disparate impact cases is significantly lower statistically than employment discrimination cases more generally,[152] but no evidence seems to suggest that disparate impact claims are easier to prove than disparate treatment claims. Going behind the numbers also reveals the limits of the disparate impact theory, including providing insight into why so many of the cases fail.

The cases can generally be divided into three broad categories: (1) pure disparate impact claims; (2) mixed claims of disparate treatment and impact; and (3) add-on claims where the disparate impact claim is added on but never properly developed. Claims in this latter group never succeed, although there might be some litigation advantages to asserting a disparate impact claim, perhaps for its settlement value.[153] The second category of claim is more interesting. One important finding of this analysis is the high percentage of successful disparate impact cases that also succeed on disparate treatment theories. Among the successful appellate court cases, nearly one-third also succeeded on a disparate treatment claim, and one-half of the district court cases (21 of 43) included successful disparate treatment claims. The numbers were even higher during the early years. In 1983,

151. In a recent study, defendants obtained appellate reversals in nearly 44 percent of their employment discrimination appeals. *See* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 957. Plaintiffs also had an extremely low success rate following defendant trial verdicts. *Id.* (noting that plaintiffs succeeded in reversing only 6 percent of defendant trial victories); *see also* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (reviewing Administrative Office of Courts Case Data); Wendy Parker, *Lessons in Losing: Employment Discrimination Cases in Federal District Courts*, 81 NOTRE DAME L. REV. (forthcoming 2006) (analyzing case files for district courts).

152. Most of the studies involve diverse databases and thus limit the prospect of simple comparisons. I have not sought to determine whether a meta-analysis would be feasible. The success rates also vary by time and by the nature of the claim with some evidence that age discrimination plaintiffs fare better than other employment discrimination plaintiffs, while disability plaintiffs have frequently fared worse. *See* Colker, *supra* note 144, at 107–10 (demonstrating success rates as low as 5 percent for ADA plaintiffs in years following passage of the Act); George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 512 (1995) (documenting 47 percent defendant success rate in non–Age Discrimination in Employment Act (ADEA) cases but only 26.3 percent in ADEA cases, taking into account settlements).

153. A claim that never succeeds should have no settlement value or certainly nothing above a nuisance value. However, there does seem to be widespread misperception regarding the viability of disparate impact claims and this misperception may add some value to the claims. One might also suggest that these cases should be excluded from the empirical analysis, which would raise the overall success rates significantly. But it would also dampen the comparative effect because many disparate treatment claims have little merit, and those claims are part of the calculations in other studies. The analysis that follows focuses on substantive cases, and within those cases the success rate is still very low.

three-fourths (8 of 12) of successful disparate impact claims in the district courts also succeeded under a theory of disparate treatment. The high percentage of cases in 1983 supports the notion that the early cases were more closely associated with theories of intentional discrimination, which undoubtedly accounts for much of the early success.[154]

In the remaining category, pure claims, plaintiffs have achieved some success, although that success has clearly decreased over time, particularly after the mid-1980s. Many challenges to employment tests were successful in the 1970s, and like *Griggs*, these challenges typically involved defendants who had made little, or no, effort to validate the examinations at issue.[155] With time, these challenges have become increasingly difficult for plaintiffs as tests have become more sophisticated and professionally developed for their particular use, and as courts have become less concerned about the disparate impact of the tests. Courts appear far more willing to accept validation efforts today than they were a decade or two ago, and they are also far less likely to find that a test has adverse impact than they once were.[156] The latter finding is partly attributable to the change in the nature of the cases. Adverse impact was relatively easy to identify when the tests were administered with a large group of diverse applicants, such as with urban police departments, but it is far more difficult to establish with small

154. *See, e.g.*, Kilgo v. Bowman Transp., Inc., 570 F. Supp. 1509 (N.D. Ga. 1983) (holding that required truck driver experience had disparate impact on women in a company that had long excluded women), *aff'd*, 789 F.2d 859 (11th Cir. 1986) (finding the requirement was a pretext for discrimination); Veazie v. Greyhound Lines Inc., No. 72-2729, 1983 U.S. Dist. LEXIS 11889 (E.D. La. Nov. 8, 1983) (holding that a seniority system had its genesis in intentional discrimination); Catlett v. Mo. Highway & Transp. Comm'n, 589 F. Supp. 929 (W.D. Mo. 1983) (holding that word of mouth recruiting caused disparate impact on women and finding disparate treatment based in part on historical practices), *aff'd*, 828 F.2d 1260 (8th Cir. 1987) (focusing on the disparate treatment claim).

155. *See, e.g.*, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1372–73 (5th Cir. 1974) (enjoining the use of written employment tests until the employer made an effort to validate the tests with the EEOC); Walston v. County Sch. Bd., 492 F.2d 919 (4th Cir. 1974) (finding the cut-off score on a teacher test arbitrary and unvalidated); W. Addition Cmty. Org. v. Alioto, 360 F. Supp. 733 (N.D. Cal. 1973) (upholding the plaintiffs' successful challenge to a San Francisco Firefighters examination for which the defendants offered no validation study); Harper v. Mayor of Baltimore, 359 F. Supp. 1187 (D. Md. 1973) (holding that a firefighter examination was discriminatory when only "questionable" validation effort was offered), *modified and aff'd sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

156. *See, e.g.*, Allen v. City of Chicago, 351 F.3d 306 (7th Cir. 2003) (upholding a promotion test by rejecting the plaintiffs' alternative practice); Lanning v. Se. Pa. Transp. Auth., 308 F.3d 286 (3rd Cir. 2002) (upholding a physical agility examination); Firefighters' Inst. for Racial Equality v. City of St. Louis, 220 F.3d 898 (8th Cir. 2000) (upholding a fire department promotional exam despite disparate impact); Williams v. Ford Motor Co., 187 F.3d 533 (6th Cir. 1999) (granting summary judgment on validity grounds); *see* additional cases cited *infra* note 225.

numbers of applicants as increasingly occurs today.[157] In the early 1970s, many jurisdictions also decided not to defend the adverse impact of their tests, either because their validation efforts had been inadequate or for political reasons. As I will discuss below, many governmental entities appeared to have welcomed, at least to an extent, disparate impact challenges as a means to diversify their workforces.[158]

Looking solely at the cases with successful disparate impact claims provides additional support for the limitations of the theory. As noted previously, many successful disparate impact claims also succeeded under a disparate treatment approach, thus rendering the disparate impact theory largely superfluous. Another substantial set of cases involved remands for further determinations without any indication of what occurred on remand, although the most likely prospect is that the cases settled and could therefore be treated as successful cases for the plaintiffs. There were also a small set of successful district court cases reversed on appeal. At the same time, among the successful cases, there was a surprising dearth of testing cases in the later years, most likely for two reasons. A significant portion of testing cases may have been resolved along the way because the law was most settled on issues relating to testing and the standards for validation. For employers that had not done any validation, their likelihood of success in most jurisdictions was quite poor. As employers began to validate their examinations, these cases likely migrated from successful plaintiff cases to successful defendant cases, substantially restricting the prospect of prevailing.[159]

Outside of the testing cases, the successful cases are not easy to categorize and instead are best described as a miscellaneous set of cases. In the sample, there were successful challenges to various ranking systems, referral policies, and severance pay;[160] there were also several cases that mirrored

157. *See, e.g.*, Boyd v. Borg-Warner Protective Servs., Inc., No. 98-14072-CIV-Roettger, 1999 U.S. Dist. LEXIS 13974 (S.D. Fla. July 21, 1999) (holding that the plaintiffs failed to establish the disparate impact of a fitness test); Mems v. City of St. Paul, 73 F. Supp. 2d 1031 (D. Minn. 1999), *aff'd*, 224 F.3d 735 (8th Cir. 2000) (holding that statistical evidence based on a ten-person sample was insufficient to prove disparate impact).

158. *See infra* Part III.A.2.

159. Another reason the cases may have receded is that many of the initial cases were filed by the Department of Justice, which has since mostly abandoned testing cases for political reasons. Civil rights groups also brought many challenges in the early years, and those groups have significantly restricted their litigation over the last decade.

160. *See* EEOC v. Steamship Clerks Union, Local 1066, 48 F.3d 594 (1st Cir. 1995), *cert. denied*, 516 U.S. 814 (1995) (invalidating a sponsorship requirement for a union with no minority members); Crawford v. W. Elec. Co., Inc., 745 F.2d 1373 (11th Cir. 1984) (invalidating a defendant-employer's index review system); Caviale v. Wisconsin, 744 F.2d 1289 (7th Cir. 1984) (invalidating participation in a career program as a prerequisite to promotion); Walker v. Jefferson County Home, 726 F.2d 1554 (11th Cir. 1984) (invalidating a requirement of prior supervisory experience).

some of the early claims involving patronage and degree requirements.[161] These cases, however, are isolated and no obvious pattern emerged. Novel claims were also few and far between, with the only distinctive claim involving a challenge brought by female police officers to a police department's choice of gun for its officers.[162] One area where the theory may have made a difference is with residency requirements; the established principle today is that residency requirements are permissible for employees so long as there is a reasonable move-in period, but they are impermissible for applicants, at least in a city where the population is homogeneous.[163] A surprising area within the sample involved several cases challenging English-only policies where the district court allowed the claims to survive summary judgment even though appellate courts have proved uniformly hostile to such claims.[164]

161. *See* Alexander v. Local 496, Laborers' Int'l Union, 177 F.3d 394 (6th Cir. 1999) (upholding a race discrimination claim against a union for failure to refer jobs); Nash v. Consol. City of Jacksonville, 763 F.2d 1393 (11th Cir. 1985) (reversing the district court in a testing claim for applying the wrong legal standard), *rev'd*, 905 F.2d 355 (11th Cir. 1990); Cooper v. Rosenberg, 694 F. Supp. 1377 (E.D. Mo. 1987) (involving patronage); Baranek v. Kelly, No. 85-0376-C, 1987 U.S. Dist. LEXIS 8338, at 17–20 (D. Mass. Sept. 9, 1987) (invalidating a bachelor's degree requirement that employer conceded had no business necessity).

162. *See* Pumphrey v. City of Coeur D'Alene, No. 92-36748, 1994 U.S. App. LEXIS 3892 (9th Cir. Feb. 24, 1994). Two other claims might also be considered novel. In *Murphy v. Derwinski*, 776 F. Supp. 1466 (D. Colo. 1991), the Veteran's Administration (VA) sought a Catholic chaplain, a position for which a woman applied. The district court found the VA's requirement that the chaplain have the church's endorsement as discriminatory under a disparate impact approach, and the Tenth Circuit affirmed. *See* Murphy v. Derwinski, 990 F.2d 540 (10th Cir. 1993). This seems an unusual case for the disparate impact theory, and the religious dimensions to the case also make it difficult to classify as a pure Title VII case. In another case, the plaintiff survived a motion to dismiss in her challenge to the employer's policy of refusing to grant a leave of absence for periods of incarceration. *See* Butler v. Elwyn Inst., 765 F. Supp. 243 (E.D. Pa. 1991).

163. Both the Department of Justice and the NAACP filed a series of challenges to municipal residency requirements, and when the cases were litigated, the plaintiffs typically prevailed. *See* Newark Branch, NAACP v. Township of Harrison, 940 F.2d 792 (3rd Cir. 1991) (invalidating a residency requirement); United States v. City of Warren, 759 F. Supp. 355 (E.D. Mich. 1991) (same). A recent case, however, has demonstrated that removing residency requirements does not necessarily increase the number of minority employees. The NAACP sued the city of Bayonne, arguing that its residency requirement was discriminatory, and the parties settled. During the course of the settlement, the City found that the number of minority employees actually decreased, most likely as a result of a civil service examination administered statewide. The Third Circuit subsequently upheld the city's determination to reimpose its residency requirement. *See* Newark Branch, NAACP v. City of Bayonne, 134 F.3d 113 (3rd Cir. 1998).

164. *See* EEOC v. Synchro-Start Products, Inc., 29 F. Supp. 2d 911 (N.D. Ill. 1999) (holding that an English-only policy survived the defendant's summary judgment motion); EEOC v. Premier Operator Servs., Inc., 75 F. Supp. 2d 550 (N.D. Tex. 1999) (finding a prima facie case of disparate impact and treatment for an English-only policy). In contrast, the courts of appeals have rejected the challenges that have come before them. *See* Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993); Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). An exception arose in the Ninth Circuit, which upheld a challenge to an English-only policy instituted by the Los Angeles

2. Subjective Employment Practices and Age Cases

For many years, advocates sought to extend the disparate impact theory to cases involving subjective employment practices and age discrimination, under the express idea that the theory would uncover more discrimination than could be rooted out by the more common intentional discrimination framework. In both instances, the efforts ultimately succeeded in that the Supreme Court extended the theory to such cases. However, these claims have been almost uniformly unsuccessful; indeed, successful claims are almost always pursued as claims of intentional discrimination. As a result, these two areas illustrate both the allure and the limits of the theory.

Subjective employment practices have long been the focus of discrimination claims, in large part because the discretion inherent in subjective practices can be a slippery vehicle for discrimination. These claims can be difficult to establish as intentional discrimination because they commonly rely on circumstantial evidence. In contrast, to the extent that subjective practices favor a preferred group, it might be possible to establish a significant disparate impact that would then require employers to justify those practices. In *Watson v. Fort Worth Bank and Trust*,[165] the Supreme Court ultimately recognized the utility of applying the disparate impact theory to subjective employment practices, but at the same time, the plurality opinion authored by Justice O'Connor expressed concern that employers might have difficulty justifying their practices under the business necessity test.[166] The case has been a mixed blessing for plaintiffs; the reality is that subjective employment practices are almost always more successful as intentional discrimination claims.

The reason has to do with the nature of subjective employment practices. There is nothing accidental about those practices; rather, employers use such practices and make such decisions intentionally, and I would add, consciously. Although it is true that intent can be difficult to prove, it is

Municipal Court. *See* Gutierrez v. Mun. Court, 861 F.2d 1187 (9th Cir. 1988). That case, however, was subsequently vacated as moot by the Supreme Court. *See* Mun. Court v. Gutierrez, 490 U.S. 1016 (1989). Depending on the rationale for the policy, English-only cases can be litigated as intentional discrimination cases, and as the appellate court cases demonstrate, when the employer has a reasonable justification, the policy is typically upheld.

165. 487 U.S. 977 (1988) (plurality opinion).

166. *Id.* While permitting disparate impact challenges to subjective employment practices, Justice O'Connor's plurality opinion likewise noted that the burden of proof remains with the plaintiff at all times, *id.* at 997, and further required the plaintiff to identify the specific employment practice causing the disparity. *Id.* at 996–97. In ratcheting up the proof standards, Justice O'Connor specifically noted the prospect that employers might "adopt surreptitious quota systems in order to ensure that no plaintiff can establish a statistical prima facie case." *Id.* at 992.

certainly not impossible, and often is easier to prove than through a theory of disparate impact. As Justice O'Connor hinted, there is no ready means to validate subjective employment practices under the disparate impact theory, leaving courts to apply their own normative judgments regarding whether the practices are discriminatory.[167] As discussed in more detail in the next section, the judicial inquiry turns on how the subjectivity is exercised, an inquiry that lends itself to a disparate treatment analysis. For example, if managers apply subjective criteria in a way that favors men over women, then there is likely something about the way the criteria are used that results in women being treated differently, and there is no reason to avail oneself of the disparate impact theory.[168] Under a disparate impact approach, the employer would have to justify its use of subjective practices, but short of requiring employers to prove that subjective practices are the best employment practice, a standard the Supreme Court long ago rejected,[169] there is no basis for evaluating subjective practices other than in how they are applied. An employer's differential treatment often will be the product of stereotyping rather than a demonstrable overt practice, but contrary to the view of some commentators,[170] stereotyping fits better

167. *Id.* at 991 (discussing the difficulty of validating subjective employment criteria such as "common sense, good judgment, originality, ambition, loyalty, and tact"). In his concurring opinion, Justice Blackmun referenced the possibility of validating subjective employment practices, based on an amicus submission by the American Psychological Association. *See id.* at 1007 n.5 (Blackmun, J., concurring). While this may be theoretically possible, it is not at all common and may be the product of a self-interested industry rather than something one might reasonably expect in a workplace. More commonly, subjective practices are validated by rendering them more objective. This process, however, is intended to severely limit discretion, which is quite different from validating a subjective process where discretion is at the core.

168. In a recent challenge to subjective promotion practices, the Eighth Circuit explained:

> It is difficult to understand this claim as one of disparate impact. Plaintiffs' claim as to the subjective decisionmaking process is not that this facially race-neutral process has an adverse impact on blacks and the process cannot be justified by business necessity. Rather, Plaintiffs claim the subjective decisionmaking resulted in blacks remaining in center-manager positions longer than whites before they were promoted to the division-manager level. We read Plaintiffs' argument as alleging disparate treatment through the subjective decisionmaking process; that is, that the subjective selection process provided the opportunity for UPS to choose not to promote some employees because they were black—to discriminate on account of race.

Morgan v. UPS, Inc., 380 F.3d 459, 465 n.2 (8th Cir. 2004), *cert. denied*, 125 S. Ct. 1933 (2005). The appellate court applied the disparate treatment model, rejected the plaintiffs' statistical analysis, and upheld the lower court's grant of summary judgment to defendants. *Id.* at 468–72.

169. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

170. In her plurality opinion, Justice O'Connor also noted the importance of the disparate impact theory for rooting out "subconscious stereotypes and prejudices . . . ." *Watson*, 487 U.S. at 990. As discussed below, many academics have suggested applying disparate impact theory, or a form of it, to capture stereotyping. *See, e.g.*, Jody D. Armour, *Race*

within an intentional discrimination framework than within the business necessity model applicable to impact claims. After all, there is no permissible business rationale for relying on negative stereotypes, and the most difficult part of the proof is establishing that stereotyping factored into the decisionmaking process. The disparate impact model has nothing to do with that proof, and if stereotyping can be proved, a finding of intentional discrimination should follow.[171]

The recent spate of class action cases confirms the propriety of challenging subjective practices as intentional discrimination. In the last decade, class action attorneys have filed suits against many large employers, including Wal-Mart and Home Depot, for using subjective employment practices that disadvantage women.[172] Although the cases frequently include allegations to support a disparate impact claim, the cases have all proceeded primarily as claims of intentional discrimination under the statistical pattern or practice theory, and in each instance, the plaintiffs have sought to prove intent through detailed statistical analyses.[173] To date, the cases have all settled, leaving little precedential trail. Yet, there is no question that the intentional discrimination framework can serve to challenge subjective employment practices, and there is very little to gain, and much to lose, by resorting to the disparate impact framework.[174]

The same proves true for age discrimination cases, though for somewhat different reasons. Prior to the Supreme Court's recent acceptance of the disparate impact theory under the age discrimination statute, a number of appellate courts had held that the theory was unavailable for age

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Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes, 46 STAN. L. REV. 781, 811–12 (1994) (calling for a new model directed at unconscious bias).

171. In the district court, Watson lost her disparate treatment claim. *See* Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 799 (5th Cir. 1986).

172. Sex discrimination lawsuits also have been filed against Costco and many grocers and securities firms. These claims are discussed in Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1 (2005).

173. *Id.* at 18.

174. Within the sample, I was able to identify two cases involving subjective practices that prevailed on an impact theory but not on an intentional discrimination cause of action. In *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301 (10th Cir. 1999), the court allowed a disparate impact challenge to the company's interview process to go forward while ruling against the plaintiff's treatment claim. The business necessity issue, however, was not addressed. *Id.* at 1315 n.10. And *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985), was principally a disparate impact case where the plaintiffs succeeded in their challenge to assignment and promotion policies, although it could also be read as a disparate treatment claim because the court moved between the two standards.

claims.[175] Although these courts typically applied some statutory analysis, their real concern was normative: Age claims might prove too disruptive to standard business practices, many of which frequently have a disparate effect on older workers. In these courts, age claims involving disparate impact theories were often seen as the discrimination equivalent of securities cases, where plaintiffs' attorneys are sometimes accused of filing suit any time there is a significant stock price drop. Age discrimination claims were perceived as routinely following mass layoffs or reductions in force, which frequently would adversely impact older workers who were often more expensive than their younger counterparts even when their experience and productivity were taken into account. As Judge Posner once noted, allowing disparate impact claims in these situations is highly problematic and might "as a practical matter forbid all firms to reduce wages or fringe benefits in periods of adversity."[176] Judge Posner's statement captures the prevailing sentiment that the disparate impact theory simply proved too much, unless the plaintiffs could show that older employees had been targeted because of their age rather than because of their expense.[177] Of course, if the plaintiffs could make that showing, they would succeed on an intentional discrimination claim.

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175. The cases are catalogued and discussed in Kenneth R. Davis, *Age Discrimination and Disparate Impact: A New Look at an Age-Old Problem*, 70 BROOK. L. REV. 361 (2004).

176. Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1164 (7th Cir. 1992). Judge Posner's influential opinion, in a case that challenged TWA's decision to cap vacation time as part of a bankruptcy proceeding, is worth quoting at length:

> There is something wrong with an interpretation of the Age Discrimination in Employment Act that forbids a bankrupt corporation to adopt a companywide policy of limiting paid vacations to 4 weeks a year and that would as a practical matter forbid all firms to reduce wages or fringe benefits in periods of adversity.

Id. Earlier in the opinion Judge Posner had noted:

> A company that for legitimate business reasons decides to cut wages across the board, or to cut out dental insurance, or to curtail the use of company cars is not required to conduct a study to determine the impact of the measure on employees grouped by age and if it is nonrandom to prove that the same amount of money could not have been saved in some different fashion.

Id. at 1163.

177. *See, e.g.*, Allen v. Diebold, Inc., 33 F.3d 674, 677 (6th Cir. 1994) ("The ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations."); Barnes v. GenCorp, Inc., 896 F.2d 1457, 1466–67 (6th Cir. 1990) (suggesting that in a reduction in force case plaintiffs must show they were singled out because of age). As an example of the road to which the disparate impact theory can lead, in *Stutts v. Sears, Roebuck and Co.*, 855 F. Supp. 1574 (N.D. Ala. 1994), the plaintiffs challenged a companywide compensation plan and proposed as an alternative an entirely different wage structure, much like a management consultant might do. The court rejected this effort. *Id.* at 1581.

The Supreme Court's recent decision in *Smith v. City of Jackson*[178] confirms the limited thrust of the disparate impact theory for age discrimination claims. In *Smith*, the Court upheld the applicability of the disparate impact theory to age discrimination claims largely borrowing from its prior cases, including *Watson*.[179] Yet, the Court also upheld the employer's practice of providing larger raises to younger employees to help retain them as a reasonable practice that satisfied the business necessity prong of the age discrimination inquiry.[180] This step was both illustrative and surprising for at least two reasons: It was issued by the liberal wing of the Court in an opinion authored by Justice Stevens, and the question of the reasonableness of the policy had not been briefed by any of the parties or addressed by the lower courts.[181] Rather, the Court summarily approved of the practice, removing any doubts that the disparate impact theory would prove anything but ephemeral under the age discrimination statute. Again, the empirical sample supports this idea because there were no successful age discrimination claims on the merits, and challenges to reductions in force have regularly been rejected.[182]

178. 125 S. Ct. 1536 (2005).

179. *See id.*

180. *Id.* at 1546. The age discrimination statute is structured differently from Title VII in that it allows employers to make decisions based on "reasonable factors other than age." 29 U.S.C. § 623(f)(1) (2000). The Supreme Court interpreted this provision as part of the employer's defense to a disparate impact inquiry and afforded what appears to be a lower threshold for the employer to meet. In the context of the age discrimination statute, an important unresolved question which goes to the core of class claims is whether it is permissible for employers to adopt cost saving measures that will have a greater effect on older workers, an inquiry that can be pursued under either an intent or impact framework. *Compare Allen*, 33 F.3d at 677 ("[P]laintiffs must allege that Diebold discriminated against them because they were old, not because they were expensive.") *with* Leftwich v. Harris-Stowe State Coll., 702 F.2d 686, 691–92 (8th Cir. 1983) (holding that a cost savings justification was insufficient). *See also* Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (holding that a plaintiff must show more than factors correlated with age to establish intentional discrimination).

181. The only surprise was that the Court upheld the theory with Justice Scalia deferring to the EEOC's regulations. *See Smith*, 125 S. Ct. at 1547 (Scalia, J., concurring in part and concurring in the judgment). Justices O'Connor, Kennedy, and Thomas concurred in the judgment but under the rationale that the disparate impact theory was not available under the ADEA. *Id.* at 1549 (O'Connor, J., concurring in the judgment).

182. For cases dismissing challenges to reductions in force, see Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999); Allen v. Entergy Corp., 181 F.3d 902 (8th Cir. 1999); Graffam v. Scott Paper Co., No. 95-1046, 1995 U.S. App. LEXIS 17120 (1st Cir. July 14, 1995); Cronin v. Aetna Life Ins. Co., 46 F.3d 196 (2d Cir. 1995); Armbruster v. Unisys Corp., No. 91-5948, 1996 U.S. Dist. LEXIS 1340 (E.D. Pa. Feb. 8, 1996). There were, however, several cases in which the plaintiffs survived summary judgment. *See* Arnett v. Cal. Pub. Employees Ret. Sys., 179 F.3d 690 (9th Cir. 1999) (permitting a challenge to pension benefits proceeds on both disparate treatment and impact theories), *vacated*, 528 U.S. 1111 (2000); Houghton v. SIPCO, Inc., 38 F.3d 953 (8th Cir. 1994) (reversing the district court for applying the wrong legal standard); Monroe v. United Air Lines, Inc.,

The pursuit of the disparate impact theory for subjective practices and age discrimination cases also reveals what is perhaps the most common mistake underlying the disparate impact theory. The expectation that these claims would be easier to establish than intentional discrimination claims rests entirely on the first part of the theory regarding the prima facie case of discrimination, but ignores the business necessity prong, which has always proved the greater hurdle.

3. Pregnant Women and Bearded Men

Scholars have highlighted two particular issues and associated cases to demonstrate the power of the disparate impact theory: cases involving claims brought by pregnant women and challenges to policies prohibiting employees from wearing beards. While these two particular issues are unrelated, I want to explore them together to illustrate how limited the theory is even when it proves successful, as well as the thin reeds on which the myth of the disparate impact theory persists.

Many scholars have advocated the use of the disparate impact theory to address workplace structures that disadvantage women, and they rely on a series of cases, mostly arising in the district courts, challenging various leave policies as disparately impacting women.[183] A leading case is *EEOC v. Warshawsky & Co.*, where the district court granted summary judgment for a plaintiff who challenged an employer's policy of prohibiting new employees from taking sick leave during the first year of employment, a policy the court found significantly disadvantaged pregnant women without an adequate employer

736 F.2d 394 (7th Cir. 1984) (noting that the plaintiffs survived summary judgment in a challenge to a sixty-year requirement for pilots on both disparate treatment and disparate impact); Camacho v. Sears Roebuck, 939 F. Supp. 113 (D.P.R. 1996) (allowing a salary structure challenge to go forward). I have opted not to provide numerical totals for age discrimination claims because a significant number of the cases were dismissed in light of circuit court determinations that the disparate impact theory was unavailable for age discrimination cases. Such determinations have now been reversed, but as evident in the *Smith* case, that does not mean the cases would have proved successful.

183. *See, e.g.*, Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 42 (1995) ("Disparate impact analysis can be used to resolve many of the accommodation problems faced by pregnant women."); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 84 (2005) (identifying the disparate impact theory as a "tool for transforming the workplace"); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 134–36 (2003) ("If, for example, an employer does not permit employees with medical needs to take leave, request light duty, take bathroom breaks, or work a flexible schedule, a pregnant woman may be able to challenge that policy on the ground that it has a disparate impact on women."). Admittedly, most of those who tout the disparate impact theory in the context of pregnancy-related claims acknowledge what Christine Jolls defines as "unrest, and even some outright conflict, in the case law." Jolls, *supra* note 14, at 663.

justification.[184] The Court of Appeals for the D.C. Circuit also invalidated a union policy that permitted a maximum of ten days of leave because of its adverse effect on pregnant women.[185] These cases, however, turn out to be rather isolated examples of success, and they are countered by a far larger array of unsuccessful cases. The Seventh Circuit, out of which the *Warshawsky* case arose, has in fact upheld restrictive leave policies instituted by other school districts, and specifically disclaimed any need to treat pregnancy differently from other disabilities.[186] Courts have also routinely denied challenges to part-time work, light duty requests, and disability policies when the requests were made to accommodate pregnancy,[187] and two appellate courts have questioned the application of the disparate impact theory to pregnancy claims at all.[188]

184. *See* EEOC v. Warshawsky & Co., 768 F. Supp. 647 (N.D. Ill. 1991). This case also can be seen as a form of intentional discrimination. The employer offered no meaningful justification for its policy, and the justifications it did offer easily could be satisfied from a more reasonable probationary policy of sixty or ninety days. *See id.* at 655.

185. Abraham v. Graphic Arts Int'l Union, 660 F.2d 811 (D.C. Cir. 1981). Another case frequently cited as an example of a successful disparate impact challenge is *Roberts v. U.S. Postmaster General*, 947 F. Supp. 282 (E.D. Tex. 1996), where a woman challenged the policy of prohibiting sick leave to care for an ill family member. Yet, the court in *Roberts* simply denied a motion to dismiss, *id.* at 289, hardly a sign of success. As far as I can determine, neither *Abraham* nor *Roberts* ever has been followed to invalidate a policy as inadequate for covering pregnancy, perhaps because employers are not required to provide any leave.

186. In *Maganuco v. Leyden Community High School District, 212*, 939 F.2d 440, 444 (7th Cir. 1991), the court explained: "The plain meaning of the [Pregnancy Discrimination Act], its legislative history, and the Supreme Court's subsequent discussions of the origins and purposes of the Act all suggest that its scope is limited to policies which impact or treat medical conditions relating to pregnancy and childbirth less favorably than other disabilities." In *Maganuco*, the court upheld a policy that prohibited taking leave immediately following a period of disability or sick leave. *See also* EEOC v. Elgin Teachers Ass'n, 27 F.3d 292 (7th Cir. 1994) (upholding leave policy that treated pregnant teachers in the same way as those who were not pregnant); United States v. Bd. of Educ., 983 F.2d 790 (7th Cir. 1993) (upholding the maternal leave policy on the disparate impact theory while invalidating a sick leave policy as intentional discrimination).

187. *See, e.g.*, Stout v. Baxter Healthcare Corp., No. 00-60542, 2002 US App. LEXIS 2573 (5th Cir. Feb. 19, 2002) (granting summary judgment for defendant in a pregnancy challenge to a sick leave policy); Spivey v. Beverly Enters., Inc., 196 F.3d 1309 (11th Cir. 1999) (finding that a pregnancy challenge to the practice of only allowing light duty to officers injured on the job failed for lack of disparate impact); Levin v. Delta Air Lines, Inc., 730 F.2d 994 (5th Cir. 1984) (upholding Delta's policy of shifting pregnant women to ground duty as a business necessity); Dimino v. New York City Transit Auth., 64 F. Supp. 2d 136 (E.D.N.Y. 1999) (holding disparate impact theory inappropriate to challenge disability policy as applied to pregnancy); Ilhardt v. Sara Lee Corp., No. 94-C-5034, 1996 U.S. Dist. LEXIS 13708 (N.D. Ill. Sept. 17, 1996), *aff'd*, 113 F.3d 1151 (7th Cir. 1997) (denying a disparate impact challenge of a pregnancy limitation on part time work); Urbano v. Cont'l Airlines, Inc., No. H-95-3508, 1996 U.S. Dist. LEXIS 20412 (S.D. Tex. Nov. 1, 1996), *aff'd*, 138 F.3d 204 (5th Cir. 1998) (rejecting a challenge to a policy on light duty).

188. *See* Rhett v. Carnegie Ctr. Assocs., 129 F.3d 290, 297 (3d Cir. 1997) ("The PDA [Pregnancy Discrimination Act] does not require an employer to grant maternity leave or to reinstate an employee after a maternity leave. The PDA merely requires that an employer treat a

Consistent with the argument I am developing in this Article, it is relatively easy to understand why the pregnancy cases typically fail under the disparate impact approach. If the disparate impact theory were applied with rigor to policies that adversely affect pregnant women or women with childrearing responsibilities, it could conceivably invalidate many central, and common, employment policies, including routine work hours, most leave policies, and mandatory overtime.[189] Although these policies almost certainly have a disparate impact, they are also subject to an employer's business rationale, and few courts appear willing to undo standard business practices without a far stronger statutory mandate. This was the central meaning of *Washington v. Davis*, which expressed a concern about the possibility of the disparate impact theory undoing too much of the status quo.[190] Neither the Pregnancy Discrimination Act[191] nor the Family Medical Leave Act[192] goes so far as to require disturbing core business practices as a means of eradicating the disadvantage women suffer as a result of their childbearing and childrearing responsibilities.

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pregnant woman in the same fashion as any other temporarily disabled employee."). Courts generally agree that the disparate impact theory applies, but how the theory applies is a more difficult question. The PDA was added to Title VII to overturn the Supreme Court's determination in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and it generally defines sex discrimination to include pregnancy discrimination. But the second part of the Act mandates that pregnancy be afforded the same treatment as other comparable conditions in relation to one's ability to work. This same treatment aspect of the PDA would seem to preclude disparate impact challenges altogether, but that is not how the provision has been defined. *See also* Jolls, *supra* note 14, at 660 (suggesting that the PDA can be construed to require leave). *But see* Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994). The court held:

> The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars, . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work—to make it as easy, say, as it is for their spouses to continue working during pregnancy. Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees . . . .

Id. (citations omitted).

189. One scholar has advocated using the disparate impact theory to challenge these policies, and suggested consultants could testify about how the workplace could be restructured to accommodate work and family demands. *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 104–05 (2000).

190. 426 U.S. 229, 248 (1976). The Court noted:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id.

191. 42 U.S.C. § 2000e (2000).

192. 29 U.S.C. § 2601 (2000).

The other example frequently cited as a symbol of the reach of the disparate impact theory likewise turns up to be more aberrational than routine. In *Bradley v. Pizzaco of Nebraska, Inc.*,[193] the court of appeals invalidated the local Domino's Pizza's policy of requiring its drivers to be clean shaven because the policy had an adverse effect on African Americans, many of whom are afflicted with a skin condition that makes shaving difficult or impossible.[194] The employer sought to justify its policy based on customer preference, presenting a survey suggesting that up to 20 percent of its customers objected to men with beards.[195] Customer preference, as is well known, is the very kind of justification that courts are most reluctant to accept because it harkens to the pre–Civil Rights era when segregation was frequently justified in terms of customer demands.[196] Yet as in the pregnancy cases, unsuccessful cases outnumber the successful ones and there is no basis to conclude that the disparate impact theory has invalidated all no-beard policies.[197] After the passage of the American With Disabilities Act, which was not in effect at the time of the *Bradley* decision, these cases may now be best treated as involving disabilities rather than race discrimination.[198]

193. 7 F.3d 795 (8th Cir. 1993).

194. *Id.* An earlier decision cited the propriety of applying disparate impact theory. *See* Bradley v. Pizzaco of Neb., Inc., 939 F.2d 610 (8th Cir. 1991).

195. *Bradley*, 7 F.3d at 798 (noting that the company "cited a public opinion survey indicating that up to twenty percent of customers would 'have a negative reaction' to a delivery person wearing a beard").

196. In *Bradley*, the court concluded, "Customer preference, which is at best weakly shown by Domino's survey, is clearly not a colorable business justification defense in this case." *Id.* at 799. I cannot help noting that the Domino's policy has overtones of discrimination, even if that was not the intent. The way the case unfolded, it conveys an image of customers in fear of black men with beards, even though the survey focused on men with beards without the racial connection. I suspect, however, that the racial overtones, and the company's inability to come up with a more substantial justification, influenced the court's determination. However, courts have readily accepted a more substantial justification, such as safety in the case of firefighters. *See* Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993) (upholding a fire department's no-beard policy).

197. *See* EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980) (holding that the plaintiff failed to establish that the policy had a disparate impact); EEOC v. Sambo's of Ga., Inc., 530 F. Supp. 86 (N.D. Ga. 1981) (determining clean shavenness to be a bona fide occupational qualification for a restaurant manager in a religious challenge to a no-beard policy); Woods v. Safeway Stores, Inc., 420 F. Supp. 35 (E.D. Va. 1976) (accepting an employer's business justification tied to customer preference). Several courts have invalidated policies in situations similar to the *Bradley* case. *See* Richardson v. Quik Trip Corp., 591 F. Supp. 1151 (S.D. Iowa 1984) (invalidating a no-beard policy); EEOC v. Trailways, Inc., 530 F. Supp. 54 (D. Colo. 1981) (invalidating a no-beard policy for drivers).

198. Although there might be a question whether the skin condition rises to the level of a disability, the remedy in the cases is a typical disability remedy, namely accommodating individuals who are unable to shave. *See* Jolls, *supra* note 14, at 653–56 (equating the case with disability accommodation). Pursuant to the disabilities statute mandate, many employers are now

I do not mean to suggest that the cases just discussed were rightly decided as a matter of policy or law. On the contrary, the disparate impact theory could have provided protection for older employees during reductions in the workforce; it could have provided protection to women seeking to balance the demands of work and family; it could have aided those with beards; and it could have reached discrimination embedded in subjective employment practices. In some cases, the theory did accomplish these objectives, but on a broader scale the theory satisfied none of those goals for predictable reasons. The disparate impact theory was a judicial creation built on a slippery foundation that, in its business necessity prong, required a normative judgment that challenged practices were discriminatory. In other words, a normative judgment that employers should be required to retain older workers even if that will lead to significant loss of efficiency and higher costs; that employers ought to make accommodations for women in order to ease their burdens despite whatever costs might ensue; and that subjective practices are a foundation for discrimination. Just as was true in *Washington v. Davis*, without a theory to explain why these practices ought to be impermissible or why the outcomes should be defined as the product of discrimination rather than simply why the practices might have satisfied the doctrine, courts have been quick to approve common business practices despite their disparate impact. In all, outside of the testing cases, there has been no area where the disparate impact theory has proved transformative or even particularly successful. As discussed in the next section, the hope academics place in the disparate impact theory is based on a fundamental misunderstanding of the nature of the theory, one that largely explains its limited success.

III. ASSESSING THE EFFECT OF THE DISPARATE IMPACT THEORY

By now, it should be clear that the disparate impact theory has produced limited results in the courts and has rarely been successfully extended beyond the testing context. Yet, as noted in the introduction, this does not necessarily establish that the theory was a mistake; rather, it only shows that the theory has been less transformative than many scholars and advocates assume. Equally important, it also substantiates my earlier claim that had the Supreme Court ruled differently in *Washington v. Davis*, the results

voluntarily accommodating those who suffer from pseudofolliculitis barbae (PFB), and one court has also required an accommodation for religious reasons to avoid a free exercise violation. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999), *cert. denied*, 528 U.S. 817 (1999).

would have been nearly identical, at least in the courts. A number of scholars recently have suggested that social change can occur even in the face of significant legal defeats, as the cases can prod employers to make changes and increase awareness among the public and employers, while providing a tool for personnel departments to alter employment structures they find problematic. For example, Michael McCann has shown that the comparable worth movement produced significant change in certain locales despite near unanimous defeat in the courts, as the legal cases were used to help mobilize effective political action.[199] It is quite possible that the disparate impact theory had a similar indirect effect on workplace equality; if so, that effect ought to be considered when calculating the gains produced by the theory, in this instance, outside of the courts. In addition, there is little question that the disparate impact theory proved successful in challenges to written tests at least through the early 1980s, and those successes are also an important legacy of the theory.

Measured against these gains, we have the limitations of the theory, including the possibility, explored below, that the disparate impact theory effectively precluded the development of a more robust theory of intentional discrimination—a theory that might have been more effective in addressing structural discrimination. Not only might a broader definition of intent have emerged over time, but it is possible that the gains of the disparate impact theory, particularly in its most successful early years, could have been achieved through claims of intentional discrimination. As discussed earlier, many impact claims also proceed as intent cases, and even no-beard policies could be challenged under a theory of intentional discrimination. Although an employer with a no-beard policy may not have an intent to exclude African Americans at the time the policy is instituted, once he learns of the potential exclusion there is no hiding from an intentional act. At that point, refusing to change the policy or to accommodate an individual who cannot shave could easily evolve into a case of disparate treatment. From that perspective, the employer's business rationale for the policy would be transformed from part of the disparate impact inquiry into a form of pretext, and sticking with the no-beard example, an employer's assertion of customer preference as a justification for the policy is likely to be treated as

199. *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994). McCann documents several places where change that initially was sought through litigation was instituted politically, but it is also important to note that the comparable worth movement produced significant change in only a few jurisdictions, typically quite progressive ones with specific political incentives.

insubstantial under either test.[200] This does not necessarily mean that all such cases will succeed under an intent framework, only that the cases would not invariably fare worse under that model. Accordingly, I argue that an expanded definition of intentional discrimination could have accomplished nearly all that the disparate impact theory did while also reaching forms of subtle or unconscious discrimination that today frequently elude judicial recognition.

Working to expand the definition of intent also may have changed public discourse regarding the continuing effects of discrimination. It seems bewildering to think that the disparate impact theory was created in 1971, in part because there was a sense that intentional, or blatant, discrimination had receded and a new theory was necessary to capture more subtle claims.[201] Yet, in the early 1970s and well beyond, there was still plenty of familiar intentional discrimination at work, discrimination that may have changed in form but that was no less intentional however that term was defined. Nevertheless, once the disparate impact theory emerged on the scene, our notion of intent stagnated because disparate impact seemed available to do the necessary work of rooting out discrimination. Ultimately, we were left with an underdeveloped concept of the most important kind of discrimination, intentional discrimination, while possessing a well-defined but relatively low-utility theory of disparate impact.

A. The Gains of the Disparate Impact Theory

The disparate impact theory has had its greatest success in the area of testing, but even within this limited context there are many reasons to be circumspect of the theory's ultimate impact. Most importantly, although challenges to written tests produced temporary reform through remedial preferential hiring, they have failed to produce tests without disparate impact, which was presumably the larger original goal. Most written examinations today continue to have substantial disparate impact; what has changed is that the tests are better constructed, in the sense that they are harder to challenge in court because they have been properly validated, but

200. To the extent they have been raised, customer preference defenses generally arise in the disparate treatment context as part of an inquiry into whether an explicit policy can be justified as a bona fide occupational qualification because employers seeking to satisfy customer preference will usually do so through an explicit policy. *See, e.g.*, Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (rejecting the airline's policy of only hiring women as flight attendants).

201. *See, e.g.*, GRAHAM, *supra* note 7, at 383–89 (discussing justifications for the theory); Rosenthal, *supra* note 84, at 94 (same).

not better in the more important sense of being better predictors of performance.[202] The ability to predict success in employment, or academic potential, has not improved much in the last thirty years as most written tests have the same modest ability to predict performance today as they did at the time of the *Griggs* case.[203] And despite the many challenges to written tests, testing is more prevalent today, not less.[204]

In addition to the limited reform of testing the cases ultimately brought, most of the claims filed in the early 1970s were successful in substantial part because so many of the tests were instituted without any validation effort by employers with a history of discrimination. Many of the early lawsuits were filed against police and fire departments—long bastions of white men—that relied on various civil service examinations to hire their members.[205] Successful lawsuits against private employers were almost

202. A recent article noted, "[W]hen CATs [cognitive ability tests] are used for selection, either as part of a test battery or as the sole predictor, they virtually guarantee adverse impact against Blacks." Greg A. Chung-Yan & Steven F. Cronshaw, *A Critical Re-examination and Analysis of Cognitive Ability Tests Using the Thorndike Model of Fairness*, 75 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 489, 490 (2002); *see also* David Autor & David Scarborough, *Will Job Testing Harm Minority Workers?* (Mass. Inst. of Tech., Dep't of Econ., Working Paper No. 04-29, 2004), *available at* http://ssrn.com/abstract=580941 (finding, in a study of a large company, that the test had adverse impact but did not reduce levels of hiring among minorities); Sackett et al., *supra* note 15, at 304–12 (discussing the persistence of adverse impact in tests). A number of years ago, I attended a conference on testing where there was a presentation on the California Bar Association, which had recently restructured its test to reduce its adverse impact. What they found, however, was what they considered a better test had virtually the exact same adverse impact. While there may be value in creating better tests, that is not typically the purpose of the challenges to examinations.

203. *See* PETER SACKS, STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT 167–99 (1999) (discussing the limits of employment testing); Sackett et al., *supra* note 15, at 308–10 (discussing correlations on performance tests); Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1265 (1995) (discussing the limited correlation between employment tests and performance). An important study of the effect of affirmative action in the workplace found some evidence of lower educational attainments among minority employees but no evidence of lower productivity, suggesting a weak correlation between educational attainment and productivity in the workplaces studied. *See* Harry Holzer & David Neumark, *Are Affirmative Action Hires Less Qualified? Evidence From Employer-Employee Data on New Hires*, 17 J. LAB. ECON. 534 (1999).

204. *See, e.g.*, Susan J. Stabile, *The Use of Personality Tests as a Hiring Tool: Is the Benefit Worth the Cost?*, 4 U. PA. J. LAB. & EMP. L. 279, 281 (2002) (noting an increase in personality tests since the federal ban on polygraph testing); Rod Kurtz, *Testing, Testing . . .*, INC., June 2004, at 35, 36 (noting that the use of employment tests has increased 15 percent each of the last three years); Nancy Syverson, *Industrial Psychology at Work*, INDUS. MAINT. & PLANT OPERATION, Apr. 10, 2001, at 16, 17 (discussing the rise in personality testing).

205. Some of the early cases involving police departments include *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974); *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 354 F. Supp. 778 (D. Conn. 1973), *aff'd in part, rev'd in part*, 482 F.2d 1333 (2d Cir. 1973); *United States v. City of Chicago*, 385 F. Supp. 543 (N.D. Ill. 1974); and *Officers for Justice v. Civil Service Commission*, 371 F. Supp. 1328 (N.D. Cal. 1973). Influential fire department cases

all filed against Southern employers with a history of segregated employment.[206] In these instances, the disparate impact theory was likely unnecessary to establish liability and to render institutional reform. With few exceptions, these cases could have proceeded under a theory of intentional discrimination.

Even so, the testing cases were a success in the immediate sense that many employers were required to provide remedial relief to a class of employees. Moreover, other employers likely preferred to administer a bit of affirmative action rather than to validate their examinations. Indeed, this has long been the pattern among public employers. Public pressure to diversify police and fire departments, especially in large metropolitan areas where many of the testing cases arose, would likely have produced similar results even without the pressure of these cases.[207]

1. Testing Cases as Intentional Discrimination Claims

Although written tests now form the paradigmatic disparate impact claim, many of those cases could have proceeded under a theory of intentional discrimination, and as noted earlier, some of the early cases were based on just such a theory.[208] In many early cases, courts found that the use of written examinations perpetuated past discrimination in a predictable manner and those two facts were frequently sufficient to classify the cases as involving intentional discrimination, with present discrimination embodied in the apparent desire to preserve past segregation practices.[209] This was

include *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973) and *Harper v. Mayor of Baltimore*, 359 F. Supp. 1187 (D. Md. 1973), *modified and aff'd sub. nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

206. *See, e.g.*, Parham v. Sw. Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970) (finding present discrimination tied to past practices); Young v. Edgcomb Steel Co., 363 F. Supp. 961 (M.D.N.C. 1973) (upholding a challenge to the Wonderlic test). There were obviously exceptions, but the vast majority of claims targeted Southern employers and unions. *But see* Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973) (upholding a challenge to written examinations against a nonsouthern employer).

207. *See* discussion *infra* Part IV.A.2.

208. Recall that both the *Papermakers* and *Quarles* cases, discussed in Part I.A *supra*, were framed as intentional discrimination claims.

209. In *Hicks v. Crown Zellerbach Corp.*, the district court defined intent in the literal sense that the employer meant to do what it did. 319 F. Supp. 314, 320 (E.D. La. 1970). This was in connection with a challenge to a written examination for which the employer "engaged in no significant study to support its testing program . . . ." *Id.* at 319. In another case involving a policy that prohibited hiring individuals who had been arrested, the court explained:

> An intent to discriminate is not required to be shown so long as the discrimination shown is not accidental or inadvertent. The intentional use of a policy which in fact

also true in *Griggs*, and at this point in the development of employment discrimination doctrine, courts were not focused on the distinction between intent and effects, certainly not to the same extent as after the Court created that distinction.

The business necessity test also lent itself to an interpretation of intentional discrimination. If the employer was able to explain the need for its test—if it was able to explain why police officers should have knowledge of Shakespeare's plays as some of the tests required[210]—it could meet the standard for establishing that the test was intended to serve a legitimate business purpose and therefore was nondiscriminatory even under an intentional discrimination standard. To the extent the employer was unable to explain its need for the test, and at a minimum should have known that the test would disqualify or disadvantage African Americans, it was reasonable to infer an intent to discriminate. After all, the employer had been stripped of its primary defenses—that it either did not know the test would have an adverse impact or that the test was necessary to ensure qualified employees. Alternatively, an employer might claim that the test was the least expensive means of screening applicants, in which case the cost issue would be weighed against the demand for equal treatment. Accordingly, the question would be: Is it a form of intentional discrimination for the employer to choose an inexpensive, but not very useful, means of screening applicants if that means, and is known to mean, that African Americans will largely be excluded from employment opportunities?[211] Again, no leap is necessary to label such conduct a form of intentional discrimination.

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discriminates between applicants of different races and can reasonably be seen so to discriminate, is interdicted by the statute, unless the employer can show a business necessity for it.

Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 402–03 (C.D. Cal. 1970) (invalidating the policy where the plaintiff had been arrested fourteen times without conviction, thirteen of them before 1959); *see also* United States v. Dillon Supply Co., 429 F.2d 800, 804 (4th Cir. 1970) ("Present policies and practices which are discriminatory or which, no matter how neutral in appearance, perpetuate the effects of past discrimination are unlawful and should be immediately enjoined."); Easley v. Anheuser-Busch, Inc., 572 F. Supp. 402, 414 (E.D. Mo. 1983) ("Plaintiffs . . . were rejected because of their failure to pass defendant's discriminatory pre-employment test. Because the test was instituted with knowledge of its adverse impact, and since the test clearly is not valid, it cannot provide a legitimate defense."), *aff'd in part, rev'd in part*, 758 F.2d 251 (8th Cir. 1985).

210. Shortly after *Griggs*, the New York Times described a test used to select steamfitters that asked such things as "the relationship between Shakespeare and 'Othello,' Dante and the 'Inferno'" and noted further, "The aspiring steamfitter also finds himself asked to associate Dali with painting." Klein, *supra* note 90.

211. In the context of Title VII, the Supreme Court has generally refused to acknowledge cost justifications as a legitimate employment justification. *See* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). In *Wards Cove Packing Co. v. Atonio*, the Supreme Court suggested that cost could be a factor in determining the viability of alternative employment practices, but this is an issue that has largely been neglected subsequently. 490 U.S. 642, 661 (1989) (noting that in

In *Personnel Administrator v. Feeney*,[212] the Supreme Court held subsequent to *Griggs* that knowledge of probable results was insufficient to establish a claim of intentional discrimination under the Equal Protection Clause,[213] and that restrictive definition might have forestalled efforts to treat testing claims under a theory of intentional discrimination. The Court's *Feeney* decision, however, was rendered in the context of existing law, which at that point defined the predictable, but not necessarily intentional, results of employment actions as a form of unintentional discrimination. Had the disparate impact theory been unavailable, and had the testing cases evolved as part of the doctrine of intentional discrimination, the Court may have been more attuned to the elasticity of the concept of intent and may have been willing to conceive of a broader definition of intent than the test it adopted in *Feeney*.

In any event, the *Feeney* case fits the argument developed above, in that it was difficult for the Court to identify the challenged policy as discriminatory. *Feeney* involved a challenge by women to Massachusetts's state policy of providing a preference to veterans for civil service positions, a preference that resulted in a substantial boost for male applicants.[214] Although women had been discriminated against in the military, that discrimination had been sanctioned politically and judicially, and it would have been a significant stretch for the Court to define the civil service preference as discriminatory.[215] Instead, the Court saw the preference as providing a benefit for military service much like a military pension, and even under a disparate impact framework, the Court would have upheld the

assessing alternative practices "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant" (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 988 (1988))). The Civil Rights Act of 1991 seemingly put the issue to rest, and it has not arisen in the more recent cases.

212. 442 U.S. 256 (1979).

213. *Id.* at 279 ("'Discriminatory purposes' . . . implies more than intent as volition or intent as awareness of consequences.").

214. *Id.* at 259. The Massachusetts policy was defined as an "absolute" preference because qualified veterans were provided an absolute preference over nonveterans, thus ensuring they would obtain positions unless they were competing against other veterans. *Id.* at 261–63.

215. Several years earlier the Supreme Court upheld differential promotion times because of the "demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service." Schlesinger v. Ballard, 419 U.S. 498, 508 (1975). Two years after *Feeney*, the Court upheld the male-only draft. *See* Rostker v. Goldberg, 453 U.S. 57 (1981).

practice as consistent with business necessity.[216] Similarly, in this particular case, a broader definition of intent would not have altered the result.[217]

It should be clear from this discussion of *Feeney* that when I suggest that the testing cases could have proceeded under a theory of intentional discrimination, I am relying on a different definition of intent than what was ultimately developed in the Supreme Court. Here it is important to emphasize that the way the doctrine of intent evolved was not a necessary or foreordained development, and was a direct product of the division of discrimination into intentional and nonintentional classifications. The only way the situation with the early employment tests could not be defined as intentional discrimination is if intent is defined narrowly to ask whether the employer chose the test with the explicit motive of excluding African Americans. Yet there is little basis for equating intent and motive, as, within the law, motive and intent are distinctly different—though frequently overlapping—concepts, and the Supreme Court has typically not linked the two.[218] What this analysis suggests is that the disparate impact theory was borne out of a strikingly limited definition of intent, one that turned on proof of animus or motive.

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216. The Supreme Court began its analysis by stating: "The Federal Government and virtually all of the States grant some sort of hiring preference to veterans." *Feeney*, 442 U.S. at 261 (footnote omitted). Noting that the preference dated to 1884, the Court explained that it was "a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations." *Id.* at 265 (footnote omitted).

217. If the Court had applied the business necessity test strenuously, it is certainly possible that it would have invalidated the practice because there was no obvious or even articulable business justification for the preference. If anything, a veteran's preference might have led the state to hire lesser qualified individuals. By the same measure, the Court likely would have found the state's interest at stake—rewarding veterans for their service and encouraging others to serve—as sufficiently important and connected to state employment that the practice would have been upheld, particularly because no ready alternative was apparent other than a different form of preference. Thus, the case might have been more like *Beazer*, where the Court found the practice "assuredly" job related based on "legitimate employment goals of safety and efficiency" and therefore permitted exclusion of methadone users from some public transit employment. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979).

218. As Professor Rutherglen has pointed out, the best example is found in affirmative action cases, which typically do not involve any animus or illicit motive. *See* George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 125 (1995) ("If anything plainly falls under the description of intentional discrimination, it is affirmative action."); *see also* UAW v. Johnson Controls, Inc. 499 U.S. 187 (1991) (invalidating a fetal protection policy despite the employer's lack of animus); Palmore v. Sidoti, 466 U.S. 429 (1984) (invalidating a Florida statute designed to protect children from private racial bias); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (invalidating the use of sex-based pension plans under Title VII). The Supreme Court has also not sought to determine whether a defendant was "consciously aware" of his or her motive, but instead has typically defined discrimination on a causal model related to disparate treatment. *See* Miller-El v. Dretke, 125 S. Ct. 2317 (2005) (finding discrimination in a jury selection process based on cumulative circumstantial evidence).

To be sure, the testing cases now form an awkward fit within our construct of intentional discrimination, but the reason it is difficult to see the use of objective tests as involving claims of intentional discrimination is that the idea is now so foreign to us. For the last thirty years, testing claims have proceeded under the disparate impact theory, and in many ways they are now defined as the opposite of intent. Had the disparate impact theory been unavailable, the early testing claims would have readily fit within a more elastic definition of intent, and it likewise seems inconceivable that courts would not have found a means to invalidate tests that failed to provide useful information regarding employees' productivity while excluding large numbers of minority applicants. Like any cultural practice, legal concepts acquire meaning that, with time, appears to have been inevitable, even when we know that the concept was the product of choice and historical context.[219] Our definition of intentional discrimination today is invariably linked to the emergent definition of unintentional discrimination and without the latter, the former may have been very different from what we now have.

The real question is not whether the early cases would have fit within a broader definition of intentional discrimination but whether testing claims would still have been treated as involving intentional discrimination as the cases moved farther away from the era of segregation. On this point, one is left with little more than speculation, but it seems that two possibilities were likely. It is certainly possible that once testing claims were defined within our concept of intentional discrimination, courts would have continued to treat them as such. This would be especially true if employers were afforded the opportunity to justify their employment practice under a form of the business necessity test. This idea may seem counterintuitive because the business necessity test developed as part of the disparate impact model, and I am now discussing how the law may have developed if there had been no disparate impact model. What I mean to suggest is something slightly different, however, namely that the way in which the disparate impact model developed around the testing cases is properly defined as consistent with a claim of intentional discrimination. If the testing claims had been adjudicated under a disparate treatment framework, a form of the business necessity defense still would have been available, but it would have been treated as part of the employer's legitimate nondiscriminatory

219. *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 78–84 (2003) (discussing the meaning and importance of cultural practices).

reason under a pretext model of proof.[220] In practical terms the employer would argue that it did not exclude African Americans because of their race, but because they were not qualified in ways measured by the examination. This would then be justified by the information the examination was providing.

An employer also might be charged with intentional discrimination to the extent it declined to adopt a less discriminatory alternative without a nondiscriminatory justification for doing so. This is how the law is now structured as a result of the Civil Rights Act of 1991.[221] In many ways the lesser discriminatory alternative inquiry is a means of proving pretext because at the point the alternative is proposed the employer is aware of the discriminatory effects of its practices and has the opportunity to remedy them without a loss of efficiency. Declining to adopt the proposed alternative without an adequate justification should be considered pretextual and proof of intentional discrimination.[222]

Another possibility is that as the testing cases became farther removed from the era of intentionally segregated schools, courts would have retreated from analyzing them under an intentional discrimination framework. Another way of getting at this question is to ask how important the emphasis on the inferior education of African Americans was to the *Griggs* decision.[223] If it was important, as I believe it was, then courts may have altered their analysis once educational inequities were no longer seen as the source of the continuing disparities to the same extent as was apparent at the time of *Griggs*.[224] Without this foundation, it may have been more

220. Developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the pretext model is the primary means to prove intent through circumstantial evidence. The model is designed to demonstrate that the employer's asserted rationale for an employment decision is a pretext for discrimination. *See also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

221. *See* 42 U.S.C. § 2000e-2(k) (2000). In the context of written examinations, a frequently proposed lesser discriminatory alternative is to change the scoring method, either to a pass/fail system or to a lower cut-off score. Even though the concept of a lesser discriminatory alternative arose in *Albemarle Paper*, relatively few cases have explored the concept. *See, e.g.*, Bryant v. City of Chicago, 200 F.3d 1092, 1094–95, 1102 (7th Cir. 2000) (accepting the plaintiff's suggestion of combining rank order promotions with "merit" promotions as a less discriminatory alternative).

222. *See* Smith v. Xerox Corp., 196 F.3d 358, 365 (2d Cir. 1999) (noting in the context of alternative practices that "[e]ven if the employer successfully defends the business necessity of the practice, the plaintiff may still prevail if she can show that the employer's proffered explanation was merely a pretext for discrimination").

223. 401 U.S. 424, 430 (1971) ("Because they are Negroes, petitioners have long received inferior education in segregated schools . . . .").

224. This is arguably what has happened in the education cases, particularly among the conservative members on the Court who have a difficult time assigning current educational disparities to unlawful discrimination. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 506 (1992)

difficult to cast the testing cases as claims of intentional discrimination, and in suggesting that the disparate impact theory may have been a mistake, it is important to acknowledge the possibility that many testing claims would not have succeeded under an intentional discrimination framework. Nevertheless, accepting my analysis above, most testing cases could have proceeded as claims of intentional discrimination through at least the mid-1980s, and it is only in the latter time period when the testing cases would have been in jeopardy. As documented earlier, there have been remarkably fewer testing cases in the last fifteen years, and courts increasingly have accepted employer justifications for their practices.[225] This may be attributable to the increasingly conservative nature of the judiciary, but it also may be the result of a conviction that the disparate impact model had outlasted its purpose.

2. Politics and the Disparate Impact Theory

Not only could many of the testing cases have succeeded under a broader definition of intent, but social and political pressures would likely have produced a similar demand for change. The largest segment of testing cases involved public employers, primarily in large metropolitan areas, including police and fire departments.[226] Many of these cases were successful, but in most jurisdictions comparable political pressure would have likely served the same function.

(Scalia, J., concurring) ("At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools."). For a discussion of the Court's more recent education doctrine, see Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157 (2000).

225. *See* cases cited *supra* notes 156–157; *see also* Allen v. City of Chicago, 351 F.3d 306, 316 (7th Cir. 2003) (finding that the plaintiffs conceded the validity of an assessment center, but rejecting a proposed alternative as equally valid); Lanning v. Se. Pa. Transp. Auth., 308 F.3d 286 (3d Cir. 2002) (finding a physical agility test valid under the business necessity test); Bew v. City of Chicago, 252 F.3d 891 (7th Cir. 2001), *cert. denied*, 534 U.S. 1020 (2001) (upholding a police certification examination); Ass'n of Mexican-Am. Educators v. California, 231 F.3d 572 (9th Cir. 2000) (en banc) (upholding a teacher certification test under the business necessity test); Hearn v. City of Jackson, 340 F. Supp. 2d 728 (S.D. Miss. 2003), *aff'd*, 110 F. App'x 424 (5th Cir. 2004) (determining a police test to be content valid). The successful challenges to tests tended to involve validating cut-off scores, as opposed to the underlying test itself. *See* Isabel v. City of Memphis, 404 F.3d 404 (6th Cir. 2005) (holding a cut-off score on a police lieutenant test not properly validated); Green v. Town of Hamden, 73 F. Supp. 2d 192 (D. Conn. 1999) (granting a preliminary injunction because the employer offered no justification for a specific cut-off score); United States v. Delaware, No. 01-020-KAJ, 2004 U.S. Dist. LEXIS 4560 (D. Del. Mar 22, 2004) (finding a cut-off score set improperly high); *see also* Johnson v. City of Memphis, 355 F. Supp. 2d 911 (W.D. Tenn. 2005) (finding that the city offered no proof the test was job related).

226. A survey of testing cases found that police and fire departments were the most prominent defendants, with three times as many lawsuits filed against public than private employers. *See* Paul Burstein & Susan Pitchford, *Social-Scientific and Legal Challenges to Education*

Black mayors ascended to power in the 1970s, at about the time the lawsuits were filed, and immediately began to alter city hiring practices. For example, during Maynard Jackson's first two terms as mayor in Atlanta, the percentage of African American municipal employees doubled, and nearly three-quarters of the city's new police recruits were African Americans.[227] Other cities experienced comparably rapid integration in municipal employment, including Detroit and Chicago, where longstanding discrimination lawsuits have helped alter the makeup of the police and fire departments in a manner consistent with the political agenda within those cities.[228] The political interests of the city bureaucracies also prompted many cities to allow the consent decrees that emerged from litigation to stay in place far longer than was typically necessary to remedy the underlying discrimination. In the last few years, the Boston police and fire departments were ordered to dissolve remedial hiring plans that had been in place for thirty years. Both departments had allowed the decrees to persist even after the original remedial goals had been obtained.[229] Chicago likewise continues to rely on its consent decree to maintain diversity in its departments.[230]

The experience in Washington, D.C. illustrates how committed departments were able to integrate their municipal workforces even absent

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and Test Requirements in Employment, 37 SOC. PROBS. 243, 250–51 (1990). The authors also noted that when defendants offered validation efforts, the tests typically were upheld. *Id.* at 252–53.

227. Ronald H. Bayor, *African-American Mayors and Governance in Atlanta*, *in* AFRICAN-AMERICAN MAYORS: RACE, POLITICS, AND THE AMERICAN CITY 178, 181–83 (David R. Colburn & Jeffrey S. Adler eds., 2001).

228. The efforts to diversify police and fire departments have generated an enormous amount of litigation, most of it filed by disgruntled white employees. *See* Petit v. City of Chicago, 352 F.3d 1111 (7th Cir. 2003) (upholding a promotional plan in the police department); Reynolds v. City of Chicago, 296 F.3d 524 (7th Cir. 2002) (upholding police promotions in part as a means to satisfy the department's operational needs); McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir. 1998) (upholding fire department promotions); Billish v. City of Chicago, 989 F.2d 890 (7th Cir. 1993) (en banc) (allowing the plaintiff's challenge of a scoring plan to reduce scoring disparities to survive summary judgment motion). Detroit was ordered to end its one-for-one hiring scheme in 1993, almost nineteen years after it commenced. *See* Detroit Police Officers Ass'n v. Young, 989 F.2d 225 (6th Cir. 1993). Consistent with his own political goals, and aided by the presence of the consent decree, Mayor Coleman Young produced significant change throughout city government. *See* Jeffrey S. Adler, *Introduction*, *in* AFRICAN-AMERICAN MAYORS, *supra* note 227, at 1, 14 ("During Coleman Young's first four years in office . . . the proportion of administrative positions held by African Americans in Detroit increased by 94 percent."). When Tom Bradley became Mayor of Los Angeles, his first Executive Order, issued immediately after his swearing in, created an affirmative action plan, and the presence of minority officers doubled during his regime. *See* Heather R. Parker, *Tom Bradley and the Politics of Race*, *in* AFRICAN-AMERICAN MAYORS, *supra* note 227, at 153, 161–63.

229. *See* Quinn v. City of Boston, 325 F.3d 18 (1st Cir. 2003) (fire department decree); Deleo v. City of Boston, No. 03-12538-PBS, 2004 U.S. Dist. LEXIS 24034 (D. Mass. Nov. 23, 2004) (police department decree).

230. *See, e.g.*, *Reynolds*, 296 F.3d. at 530–31.

a successful legal challenge. After the challenge to the hiring test failed in *Washington v. Davis*, the city voluntarily opted to implement affirmative action measures to remedy the examination's disparate effects, which, under civil service rules, continued to be administered citywide. White firefighters filed suit to block those efforts, and based on the failed challenge in *Davis*, the D.C. Circuit Court of Appeals invalidated the affirmative action plan because there was no legal need to remedy the effects of what had been determined to be a valid examination.[231] Without the original challenge, the administration may have had alternative means to implement voluntary affirmative action. In any event, the city's affirmative action program was in place for a decade, and for many years now the city has had a black police chief and black officers comprise two-thirds of the force.[232] In most metropolitan areas, the substantial political pressure to diversify the police force, and to a lesser extent, fire departments, would likely have achieved much of the changes the testing challenges produced.[233]

Where the testing challenges may have helped is in providing a means to avoid strict civil service rules that otherwise may have frustrated affirmative action measures, although during this period many jurisdictions altered their civil service rules to allow for greater diversity.[234] The lawsuits also provided a vehicle for resisting white union opposition to integrating the departments, and in both respects, the testing challenges may have been important procedural devices to achieve desired political goals. This is consistent with the story that has emerged from the law and society scholarship focusing on how personnel departments frequently seize on legal rules to

231. *See* Hammon v. Barry, 813 F.2d 412 (D.C. Cir. 1987), *reh'g denied*, 826 F.2d 73 (D.C. Cir. 1987), *vacated*, 841 F.2d 426 (D.C. Cir. 1988). Although the case itself involved firefighters, the test at issue was the same test employed in *Washington v. Davis*, and it appeared that the affirmative action policy applied citywide. *Hammon*, 813 F.2d. at 417.

232. *See* Petula Dvorak et al., *Ramsey's No. 2 Is Ranked No. 1 in Unpopularity*, WASH. POST, Jan. 29, 2001, at A1 (noting that police chief "Ramsey and about 65 percent of the force are black"). In the late 1980s, 53 percent of the force was black. Jacqueline Trescott, *The Mayor's Forceful Critic*, WASH. POST, Mar. 7, 1989, at D1. In 1973, the Washington, D.C. Police Department also became the first police department to give women the same duties as men. *See* Brian Reilly, *Women Make a Place in Man's World of Policing*, WASH. TIMES, Aug. 8, 1994, at C10.

233. A study of forty-six metropolitan police departments found that the presence of a black mayor was the most significant variable associated with black individuals among sworn police officers. *See* William G. Lewis, *Toward Representative Bureaucracy: Blacks in City Police Organizations, 1975–1985*, 49 PUB. ADMIN. REV. 257, 262 (1989). The study also concluded that a black mayor was significantly more important than the existence of a consent decree. *Id.*

234. *See* RUFUS P. BROWNING ET AL., PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS 174 (1984) ("Many cities changed final selection rules to reduce the weight given to test results and to make it easier for affirmative action objectives to affect the final hiring decision.").

serve their own institutional goals. In addition to the work of Michael McCann noted earlier, Lauren Edelman and Frank Dobbin have documented the ways in which personnel officers have manipulated the law, often by exaggerating its mandate to serve their own goals of restructuring discriminatory hierarchies while carving out a distinct role for personnel departments in managing the law.[235] This was true, Dobbin suggests, with sexual harassment policies, and Lauren Edelman has demonstrated how personnel officers frequently inflate the risk of constructive discharge lawsuits to institute due process measures in the workplace.[236]

Here, too, the disparate impact theory may have proved a useful conduit to integrate workplaces independent of the success of the legal claims. Even so, the disparate impact theory was merely a piece of a more complicated, and multifaceted, push for diversity, and its role seems to have been at most a supporting one. Personnel journals did not trumpet the importance of validated tests or other practices, nor did they discuss the power of the disparate impact theory in contexts outside of testing.[237] Lauren Edelman and others have emphasized the importance of Executive Order 11246 and the accompanying affirmative action mandate on federal contractors as playing a central role in moving organizations towards embracing

235. Lauren Edelman writes: "[B]ecause of normative pressure from their legal environments, organizations do not simply ignore or circumvent weak law, but rather construct compliance in a way that, at least in part, fits their interests." Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1541 (1992) [hereinafter Edelman, *Legal Ambiguity and Symbolic Structures*]. Elsewhere she has termed her model a "legal environment theory" which she defines as: "[T]he legal environment theory posits an important *indirect* effect of law on organizations: law creates, and helps to constitute, a normative environment to which organizations must adapt." Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1402 (1990).

236. *See* Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992) (documenting the inflated threat of constructive discharge law advanced by personnel officers); Frank Dobbin & Erin Kelly, How to Stop Harassment: A Tale of Two Professions, A Tale of Two Sectors (unpublished manuscript, on file with the author).

237. In their work, both Dobbin and Edelman review personnel journals to identify trends relevant to professionals. *See* Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999); Dobbin & Kelly, *supra* note 236, at 13–16. I have reviewed the Social Sciences Index and Human Resources Abstracts, as well as several personnel journals and conducted many online searches, finding only a small sample of articles discussing testing. *See also* David E. Robertson, *Update on Testing and Equal Opportunity*, 56 PERSONNEL J. 144 (1977); David E. Robertson, *Employment Testing and Discrimination*, 54 PERSONNEL J. 18 (1975) (four page article); Cary D. Thorp, Jr., *Fair Employment Practices: The Compliance Jungle*, 52 PERSONNEL J. 642 (1973) (one of eight pages involves testing but not validation). There is also a related symposium on affirmative action in 34 PUB. ADMIN. REV. 234 (1974).

affirmative action goals.[238] Furthermore, in his recent history of civil rights statutes, John Skretny consigns *Griggs* and the disparate impact theory to a supporting role.[239] This is not to say that the disparate impact theory played no role in diversifying workplaces, only that it was part of a larger confluence of events that came together in the 1970s.[240] As such, the limited gains produced by the theory may have been achieved even without the background threat of disparate impact lawsuits, especially if the threat of such suits had been replaced with the potentially greater threat of intentional discrimination lawsuits. As discussed below, intentional discrimination lawsuits carry stronger moral authority and would have generated more intense social and political pressure to eliminate workplace inequalities.[241]

B. The Mistake in the Disparate Impact Theory

This returns us to the failings of the disparate impact theory, which is not just a failing to produce more substantial results, but also a failing of our understanding of how the law so often tracks and preserves the status quo. The central mistake behind the disparate impact theory was a belief that

238. *See* Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 235, at 1542–43 (discussing the role Executive Order 11246 played in creating institutional structures to manage equal employment law). Executive Order 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), which requires affirmative measures from federal contractors, has been the focus of a number of studies by economists, most of whom have concluded that it contributed significantly to employment gains for African Americans and women in the 1970s, despite rather lax enforcement efforts. *See, e.g.*, James J. Heckman & Kenneth I. Wolpin, *Does the Contract Compliance Program Work? An Analysis of Chicago Data*, 29 INDUS. & LAB. REL. REV. 544 (1976); Jonathan S. Leonard, *The Impact of Affirmative Action on Employment*, 2 J. LAB. ECON. 439 (1984); Jonathan S. Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, 4 J. ECON. PERSP. 47 (1990).

239. *See* JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA 166–71 (1996). In his more recent work, Professor Skrentny mentioned the theory only in passing. *See* JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 126 (2002) (noting that the EEOC had created a definition of discrimination that did not depend on intent).

240. This is consistent with the conclusion of Paul Burstein and Mark Evan Edwards, who found that court litigation was one factor in contributing to the improvement in the earnings of African American men during the 1970s. *See* Paul Burstein & Mark Evan Edwards, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 LAW & SOC'Y REV. 79 (1994).

241. The disparate impact theory might have also helped shift social norms through what is sometimes defined as the expressive function of the law, in which the law operates, in part, by the statements it makes. *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). But for that to have been the case, the disparate impact theory would have had to, at a minimum, reach the public either through employers or a broader group. There is no reason to believe the disparate impact theory has become part of our social culture, and in fact, our continuing division over affirmative action where substantial majorities of the population deride a cultural emphasis on equal results.

the law could do the work of social change when, in fact, much of the battle to remedy discrimination was lost when we moved away from the focus on intent. Rather than a new theory of discrimination, what was needed was a more expansive definition of intent—one that would have highlighted the reality that discrimination was a present experience rather than one of the distant past. The disparate impact theory sent the opposite message, and once the theory was carved out, the push to expand the scope of the disparate impact cause of action came at the expense of a theory of intent. The fault behind the disparate impact theory can perhaps best be exposed by evaluating its various justifications.

1. The Disparate Impact Theory Is Easier to Prove

The principal justification for the disparate impact theory has always been the difficulty of proving intentional discrimination, which necessarily implies that the disparate impact theory can be easier to establish.[242] Yet, the notion that disparate impact theory would alleviate some of the proof difficulties that arise with disparate treatment claims ignores the very reason why intentional discrimination is so difficult to prove. Intentional discrimination is difficult to prove not because the evidence of intent is lacking, but because the evidence that exists, chiefly circumstantial in nature, is inconsistent with our societal vision of discrimination. Absent the smoking gun, racial epithets, or other explicit exclusionary practices, it has been, and remains, hard to convince courts that intentional discrimination exists. It was, and is, difficult to get courts to draw the necessary inference of discrimination.[243] This is not a problem that is resolved by a turn to the disparate impact theory; if anything, the disparate impact theory compounds the problem, and there was never any reason to believe it would be easier for courts to make an inference of discrimination once they were told that intent was an unnecessary element of proof. In other words, if intentional discrimination is difficult to prove with existing circumstantial evidence, labeling unintended adverse effects as discrimination would prove a far more difficult proposition for society to embrace.

242. Generally this claim is implicit, but some have stated more clearly that disparate impact claims are easier to prove. *See, e.g.*, Blumrosen, *supra* note 7, at 21 ("Disparate impact is easier to establish than disparate treatment.").

243. *See* Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2418 (2003) (book review) ("The simple truth is that once Bull Connor and Lester Maddox are gone, once angry parents are not screaming, 'Two, four, six, eight, we don't want to integrate,' and once spittle isn't running down the faces of civil rights protesters, it is hard to say precisely what discrimination means.").

To illustrate this point, let me return to the *Watson* case. The district court ruled against Ms. Watson's intentional discrimination claim even though she had been passed over for promotion four times, and in each instance those promotions went to white individuals, some with less work experience.[244] In addition, one of the managers had stated that the teller position "was a big responsibility with 'a lot of money . . . for blacks to have to count.'"[245] A court that does not see discrimination amidst such circumstantial evidence would have an equally hard time identifying discrimination based on adverse effects that were, by definition, unintentional. Even if a statistical disparate impact could be shown, the court would likely accept the employer's practices as justified, just as it found the employer's practice nondiscriminatory.

At this point, one might wonder: Doesn't the doctrine make a difference? Presumably one of the reasons the disparate impact theory has been so attractive to those who have sought to extend its reach is because the doctrine is perceived as establishing a test that is easier for plaintiffs to satisfy. There are several problems with this presumption. First, only the initial part of the disparate impact theory—namely establishing a statistically significant impact—arguably can be considered an easier step to meet, and only in those circumstances in which there is a sufficiently large and diverse population that is affected by the challenged practice. The business necessity part of the test has never been especially easy for plaintiffs to satisfy, and without the established standards that govern testing claims, the judicial determination is almost entirely subjective in nature, leaving courts to make normative judgments regarding the merits of the challenged practice. As discussed above, courts routinely defer to employer practices in making those judgments, as we would expect, because courts typically are reluctant to identify ambiguous behavior as discriminatory. That is true whether or not intent is a required element of proof.

Consider some of the leading contemporary controversies and whether they lend themselves to objective determinations. Are so many African Americans in prison because they commit too much crime or because the criminal justice system treats them unfairly and discriminatorily? Are women failing to achieve greater success in the workplace because they prefer childrearing, or are employers treating them differently, offering fewer opportunities, and perhaps creating conditions that make nonmarket

244. *See* Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 799 (5th Cir. 1986) (discussing promotions and noting that one of those selected had significantly less experience).

245. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988).

work particularly appealing? Are African Americans pulled over in their cars so frequently because of racial stereotypes or bias, or because of particular traffic patterns? When we observe various racial disparities from high unemployment rates to differential test scores, or when we see no women infiltrating traditionally male jobs, how do we know whether societal pressure, discrimination, cultural factors, or some combination best explains the landscape that we observe? And if the observed disparities are not the product of employer discrimination, why should they be held liable for those disparities?

One's answer to all of these questions is not likely to turn on whether strict scrutiny or a rational basis review is applied—or whether a theory of intent or impact is used. One's answer will depend on how much discrimination he or she sees in the world, how one interprets ambiguous acts that are subject to varying interpretations. To move courts to see more discrimination would take much more than a new theory or label; it would require persuading them that discrimination explains the observed disparities—but this is precisely the kind of judicial discussion we so rarely have experienced.[246]

I do not mean to suggest that the doctrine never makes a difference, and certainly in the disparate impact context the doctrine did make a difference in the testing cases. But even that exception held true for only a limited time. As employers became more sophisticated in their tests, and as the cases moved farther away from the era of overt discrimination, even the testing cases began to fail because it became more difficult for courts to interpret the practices as discriminatory.[247] More to the point, for the disparate impact theory to have been accepted as a legitimate form of discrimination, it would have been necessary to develop a justification consistent with our commitment to racial equality. As noted, no such justification was advanced in the seminal cases of *Griggs* and *Washington v. Davis*. The parties instead focused too closely on the doctrinal development under the

246. Two recent cases in other contexts illustrate the importance of the persistence of discrimination, and also suggest how the Supreme Court identifies discrimination among complicated circumstantial evidence. Last term, the Court found that a death row inmate had established discrimination in his jury selection, reversing a determination by the lower court and reviewing the record with substantial care. Miller-El v. Dretke, 125 S. Ct. 2317 (2005). Similarly, in what was the final chapter in a lengthy voting rights dispute, the Supreme Court found that an unusually shaped district had been drawn for predominantly political rather than racial reasons, and again reviewed the evidence with great care to determine the nondiscriminatory rationale. *See* Easley v. Cromartie, 532 U.S. 234 (2001). Both cases were decided by closely divided courts, with Justice Thomas issuing vigorous dissenting opinions in both.

247. *See* cases cited *supra* note 225.

mistaken belief that the doctrine could produce results independent of our social and political commitments. Yet, the problem with antidiscrimination law has not been in the doctrine but in our limited commitment to remedying racial and gender inequities. One way we have solidified that limited commitment is by seeing less discrimination, not more, and in the courts this tendency has often manifested itself by attributing racial and gender inequities to societal discrimination, a term the Supreme Court has used to define discrimination for which no one is held responsible.[248] Here, too, we can identify another difficulty with the disparate impact theory—it sees more discrimination, not less. Unless there is a focus on intentional discrimination, the disparate impact theory appears to seek to remedy societal discrimination, which runs up against the Supreme Court's consistent reluctance to permit, let alone require, efforts designed to tackle societal discrimination.[249]

Although this is not the place for an extended discussion, the difficulty I have identified with the disparate impact theory, namely the absence of a justification grounded in a theory of discrimination, may also explain why the disability statute has been interpreted in a similarly restricted fashion. Like the disparate impact theory, the Americans With Disabilities Act arose without a significant justification grounded in a theory of discrimination, and was in many respects a statute with a principal concern of transferring social welfare responsibilities from the federal government to private employers.[250] Although the statute had little public opposition and broad political

248. The question of societal discrimination typically arises in the affirmative action context where the Court has rejected a desire to remedy societal discrimination as a justification for governmental affirmative action. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (plurality opinion) ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification."), and *id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment) ("'[S]ocietal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.").

249. *See, e.g.*, Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth Century Race Law*, 88 CAL. L. REV. 1923, 2013 (2000) ("The Court has been adamant . . . that the remedy of mere 'societal discrimination' is not a compelling state interest that justifies voluntary affirmative action programs."). Although the concept of societal discrimination has been most prominent in affirmative action cases, a similar concern regarding liability and responsibility runs throughout the disparate impact theory. *See* Selmi, *supra* note 126, at 1600–01.

250. Although there were a number of diverse motives for the statute, the transferring of responsibilities was a primary one, as was a desire to overcome stereotypes regarding the abilities of those with disabilities. For a discussion of the welfare reform link, see Samuel R. Bagenstos, *The Americans With Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003). *See also* Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (discussing the history of the disability movement and purposes behind the statute).

support, the public support was thin, particularly when it came to protecting individuals without what are sometimes defined as core disabilities—those individuals, who for example, have bad eyesight, are allergic to perfume, or suffer from work-related injuries like carpal tunnel syndrome.[251] Without a reason to treat these cases as involving discrimination, courts, especially the Supreme Court, have been rather quick to dismiss the cases. For their part, rather than offering an underlying theory of disability, plaintiffs have sought to define disability by pointing to the statutory language. But, as has been true in so many of the cases we have explored, courts need more than a statutory explanation or definition, particularly when that statute allows discretion for normative judgments. At the same time, courts have been far more protective of individuals with serious disabilities.[252]

In contrast, the testing cases fit our conception of discrimination because there is a basic element of unfairness in the use of unvalidated examinations to exclude African Americans or others. When a test has not been properly validated, or even more clearly when an employer has not made any efforts at validation, the employer has no reason to believe its test is providing valuable information. As the petitioners noted in *Griggs*, "The only thing that Duke [Power] could have known for certain about its tests was that they had a highly adverse impact on black workers."[253] In other words, this is the very definition of arbitrariness and unfairness, and that is one reason why the testing cases have gained acceptance when no other area has.[254]

In lieu of the disparate impact theory, what was needed was a broad social movement designed to delineate the many ways in which intentional discrimination—defined so as not to be limited to animus-based discrimination—continues to influence life choices for so many individuals,

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251. *See* Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002) (defining disability to make cases of carpal tunnel syndrome extremely difficult); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (holding, in a case of two women with poor eyesight, that defining disability takes into account mitigating measures). For one of the perfume cases, see Keck v. N.Y. State Office of Alcoholism & Substance Abuse Servs., 10 F. Supp. 2d 194 (N.D.N.Y. 1998) (granting the defendant's motion for summary judgment on a perfume allergy claim).

252. *See* Bragdon v. Abbott, 524 U.S. 624 (1998) (holding that an asymptomatic HIV-positive individual was covered by the statute). For a related argument, see Samuel Issacharoff & Justin Nelson, *Discrimination With a Difference: Can Employment Discrimination Law Accommodate the Americans With Disabilities Act?*, 79 N.C. L. REV. 307, 311 (2001).

253. Brief for Petitioner, *supra* note 76, at 48.

254. *See* Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1247 (1991) ("[T]he use of low-validity tests in a setting in which blacks do much worse on tests generates unacceptable levels of false negatives among minority group applicants, preventing far too many capable applicants from getting jobs at which they would actually succeed.").

particularly minorities and women. Without a sense that discrimination was pervasive, it was simply too difficult for courts to see discrimination other than in the obvious.

2. The Law Should Move Away From a Focus on Blame

In addition to the idea that disparate impact discrimination would be easier to prove than intentional discrimination, a related justification for the theory was that it would be important, and in some respects strategically advantageous, to move away from a theory of liability that was tied to moral blame. As noted previously, there was some sense that moving away from intent and blame—the two were intertwined—might make it easier to resolve cases voluntarily because the defendant would not be labeled as a discriminating entity. Some scholars have also sought to focus on remedial aspects of employment discrimination independent of the blameworthiness of the particular conduct,[255] and some of that desire is present in the current focus on institutional discrimination. From this perspective, the argument is that the employer has not necessarily intended the consequences of its action, but it nevertheless would be socially desirable to remedy them as a way of reducing the observed disparities. Susan Sturm has recently made such an argument in the context of Home Depot's practices that caused significant statistical disparities in women's assignments.[256] The recent focus in the literature on what is generally defined as subtle discrimination also typically divorces remedial necessity from the moral blameworthiness of the conduct.[257]

Just as was true with the argument that the disparate impact theory would be easier to prove, the desire to avoid blameworthiness misunderstood the crucial role blame plays in fostering a willingness to remedy discrimination. Without an element of blameworthiness, there is no basis on which to require remedial action. Even in the educational setting, where blame is perhaps easiest to assess, once the Supreme Court moved away from an immediate locus of blame, it had an increasingly difficult time

255. This argument has been developed most extensively by David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993). *See also* Flagg, *supra* note 10, at 988–89 (arguing that we should avoid the issue of blaming in antidiscrimination law). While I share the goal of Professors Oppenheimer and Flagg, and would readily sign on to the liability regime they propose, I think they are overly optimistic regarding the ability of courts to make inferences of discrimination without a connection to blameworthiness.

256. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 509–19 (2001).

257. *See* discussion *infra* Part III.B.3.

assigning liability or requiring remedial action.[258] The key then was not to abandon blameworthiness but to expand its core, and that could only be done within the confines of a theory of intentional discrimination because, as noted above, the two concepts—intent and blame—go hand in hand and both needed to be expanded. For example, in the case of Home Depot, or more recently Wal-Mart, we ought to consider the employer blameworthy for the results of its employment practices, none of which were accidental or unintentional in any sense of the word. The employers were surely aware of the patterns their practices produced; anyone who walked into a Home Depot or Wal-Mart would find women working the cash registers rather than in the manager's office.[259] The employer might offer defenses to the allegations, likely focusing on the particular interests of women, but those are defenses to allegations of intentional discrimination, not defenses that require the disparate impact edifice, and not defenses that render discrimination impossibly elusive as is so often claimed in the recent literature on structural discrimination.[260] What is at stake in these cases is convincing courts that women did not choose their fate, and that discrimination did. Moving away from notions of blame may help produce voluntary settlements, but in the context of litigation it likely only bolsters the defendant's claims that the observed patterns are not the product of unlawful discrimination.

The turn away from blame was even more problematic in that it implied that intentional discrimination was a thing of the past. As early as in the briefs filed in the *Griggs* case, advocates asserted that blatant abuses had

258. The most obvious example involved Detroit's effort to implement a desegregation plan that would reach into the surrounding suburbs where many whites had moved. But because the Court did not identify any party responsible for the residential patterns, and did not see any discrimination in the way the district lines were drawn, it invalidated the plan. *See* Milliken v. Bradley, 418 U.S. 717 (1974).

259. The cases against Home Depot and Wal-Mart allege that women are relegated to positions, such as working the cash registers, that typically do not lead to promotional opportunities. A similar series of cases against grocery stores likewise alleged that women were predominantly assigned to positions as cashiers or in the delicatessen, while men tended to work in the meat and produce departments where management opportunities arose. For a discussion of these cases, see Selmi, *supra* note 172, at 18–23. For a recent account of the allegations against Wal-Mart, see LIZA FEATHERSTONE, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART (2004).

260. In an influential article, Ian F. Haney López has profiled the grand jury selection process in the 1960s as an example of what he calls institutional racism. Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000). As he explains, local judges at the time selected grand jurors and did so based on their own personal contacts, a process that led to overwhelmingly white juries. This seems an unusual example because even though the judges may not have expressed any conscious animus, the process should have been subject to a statistical challenge relating to intentional discrimination. This is another example of an author equating intent, and blameworthy conduct, with animus.

receded, subtly equating intent with those blatant abuses.[261] As noted previously, this was a strategic move unique to the employment discrimination field; in other areas, the subtle ways in which intentional discrimination manifested itself were treated as forms of intentional discrimination, at least into the early 1970s.[262] Yet, at about that time, something changed dramatically, symbolized by the move to diversity within affirmative action, a move that quickly became disengaged from intentional discrimination. As we saw in the recent affirmative action case involving the University of Michigan Law School, the move to diversity has been a way to preserve the status quo with some modest tinkering, and it has also been a way for us to view discrimination as increasingly a past phenomenon.[263] Consistent with the desire to shed moral blameworthiness, affirmative action has generally been a voluntary act and one that is neither tied to blame nor to discrimination.

Finally, we lose something important when we take discrimination out of the picture. Without discrimination, remedying observed disparities is dependent on the good faith of employers interested in diversity or, alternatively, discrimination becomes just another tort free of the moral baggage that attaches to claims of discrimination. Discrimination, however, is not just another tort—it is not accidental, something to be limited or insured against. Discrimination, even in its less blatant forms, is a potent evil, one that has deep historical and societal roots that we should strive to overcome rather than to absorb into the fabric of society. That is one reason why it is important to preserve an element of blame and to expand the scope of blameworthy conduct; otherwise we might find our will to remedy discrimination limited by our perception that discrimination is no longer a central social problem.

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261. *See* Brief for Petitioner, *supra* note 76, at 25 (noting that "outright and open exclusion of Negroes is passé").

262. *See* cases *supra* note 75.

263. *See* Grutter v. Bollinger, 539 U.S. 306 (2003). A number of scholars recently have commented on the resonance between the Supreme Court's decision and public opinion. For example, Jack Balkin has written:

> When large corporations inform the Court that affirmative action is necessary for competitiveness in global capitalism, and when members of the military insist that affirmative action is necessary for national security, it is clear that race conscious affirmative action in education is no radical nostrum of the left but is thoroughly and utterly mainstream.

Jack M. Balkin, Plessy, Brown, *and* Grutter: *A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1719 (2005). Professor Toni Massaro adds: "[T]he Court juggled complex doctrinal and practical concerns and sought to create as little disruption as possible. It deferred to educator, military, and business leaders' opinions about real-world consequences." Toni M. Massaro, *Constitutional Law as "Normal Science,"* 21 CONST. COMMENT. 547, 550 (2004).

3. The Limitations of Intent

I have already suggested some of the ways the creation of the disparate impact theory contributed to a limited definition of intentional discrimination, and in this final section I expand that argument to demonstrate what might have been lost in the pursuit of a theory designed to avoid an inquiry into intent. Recall that the disparate impact theory arrived first in the development of employment discrimination, with the *McDonnell-Douglas* disparate treatment framework following two years later. From the beginning of the doctrinal development, there was a push to expand the disparate impact theory to cover most routine claims of discrimination. Yet, the effort to expand the theory led to judicial neglect of the disparate treatment theory, and also created the false impression that disparate treatment equaled animus. Two cases, one that followed shortly after the Supreme Court's decision in *Washington v. Davis* and another more recent case, illustrate the connection between an expansive interpretation of the impact theory and a limited theory of intent.

In *Furnco Construction Corp. v. Waters*,[264] the plaintiffs challenged the employer's practice of only hiring those familiar to the project manager, or who were recommended by current employees, rather than through a formal application procedure or among those who appeared for work at the jobsite.[265] This practice resulted in a disproportionately white workforce, and the plaintiffs challenged the practice under both intentional and impact theories, urging that the employer's practice be subjected to business necessity scrutiny. The court of appeals applied a disparate impact analysis, holding for the plaintiffs and imposing a particularly restrictive interpretation of the business necessity test that required the employer to establish that its practice was the best means of hiring new employees.[266] Although this determination may seem extreme, it was a natural extension of the disparate impact theory into subjective employment practices because it would be difficult for a court to assess the necessity of the employer's practices without some anchor like a best practice theory. The standard adopted by the court was more onerous than what the Supreme Court had previously established and was likely to tolerate. Accordingly, the Supreme Court reversed the appellate court, categorically rejecting the requirement that an

264. 438 U.S. 567 (1978).

265. *Id.* at 570.

266. Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1089–90 (7th Cir. 1977). It would probably be most accurate to describe the appellate court's determination as a hybrid because it applied a business necessity standard to hold the employer liable for disparate treatment. *Id.* at 1090.

employer must justify its practice as the best available, and further holding that the disparate impact theory was an inappropriate model for the case.[267] In the Court's eyes, this was a straightforward intentional discrimination case; there was nothing unintentional about the practice or its effects, with the ultimate question being whether such a policy was permissible—whether there was some nondiscriminatory reason for proceeding in the employer's chosen manner. Ultimately, this was not a question that required the disparate impact framework, and in fact, moving into that framework suggested that the employer did not intend its practices and perhaps was even unaware of its results. But the employer was fully aware that its workforce was predominantly white, and it knew that its practice led to that result (what else could have?), and that should have been enough to treat the case as involving intentional discrimination. That does not resolve the question of whether relying on referrals or personal knowledge was discriminatory; it only suggests that the disparate impact theory was unnecessary to adjudicate the case. Indeed, the disparate impact theory would have been necessary only if, by intent, one meant racial animus.

A more recent case demonstrates that the confusion over the meaning of intentional discrimination is not a relic of the past. Joe's Stone Crab is a restaurant and institution in Miami Beach, and one of the highest grossing restaurants in the country, even though it is only open for nine months out of the year. Historically, all of Joe's waiters were men, and other than for a short period during World War II, that had always been true. The EEOC filed a sex discrimination lawsuit against Joe's, and for reasons that were never explained pursued the case as a disparate impact claim, despite the fact that it was neither a mystery nor an accident why Joe's only had male waiters.[268] Until some time in the 1980s, and often well beyond, nearly all fine dining establishments employed male waiters as part of their cultivated atmosphere.[269] Again, the only reason the disparate impact theory might have been used in this context is because the owner, who was a woman, had

267. *Furnco*, 438 U.S. at 571. In dissent, Justices Marshall and Brennan argued that the case should have been remanded for further development of the disparate impact claim. *Id.* at 583–84 (Marshall, J., concurring in part and dissenting in part).

268. *See* EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263 (11th Cir. 2000) (rejecting the disparate impact approach of the district court).

269. A newspaper report noted that in 1990, in three of Chicago's fanciest restaurants there were no women on the waitstaff. One industry analyst explained, "It has been customary throughout the years for fine dining establishments to hire only males. Waiters seem to be the preference of the elite in fine dining operations." Nina Burleigh, *Discriminating Taste Is Taken to Court*, CHI. TRIB., May 20, 1990, at C2; *see also* David Neumark et al., *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q.J. ECON. 915 (1996) (documenting discrimination in Philadelphia fine restaurants based on resumes).

never proclaimed in so many words that she refused to hire women or that she thought women were incompetent to perform the work.[270] Such a limited definition of intent could only have arisen in the context of the availability of a disparate impact theory. Ultimately, the appellate court corrected the error,[271] but the case exemplifies the way in which our definition of intent has been unnecessarily circumscribed through the misuse of the impact framework.[272]

This limited definition of intent is not confined to a few aberrational cases but runs throughout the scholarly literature as well, and has become particularly prominent in the recent focus on what is described as unconscious or subtle discrimination. Inspired by the work of Charles Lawrence and Linda Hamilton Krieger importing the insights of social psychology into law, many scholars have sought to explain the ways in which contemporary discrimination has become more subtle over time and is often unconscious in the sense that the individual may be unaware of his or her own motives for the underlying actions.[273] Subtle discrimination often is equated with institutional or structural discrimination, and it also can be the product of cumulative acts that individually might be relatively innocuous but together produce substantial disadvantages for women and minorities.[274] Because subtle discrimination is not fueled by a conscious motive or any

270. *Joe's Stone Crab*, 220 F.3d at 1263. A maitre d', with hiring authority, did testify that the positions were "male server" type of jobs, and there was other evidence that readily supported a theory of intentional discrimination. *Id.* at 1270.

271. *Id.* at 1283 (noting that the case appeared to be one of "intentional sex discrimination" and remanding for further findings). In so doing, the court specifically noted that the lower court had erroneously applied a definition of intent that required "animus" or "malice." *Id.* at 1283–84.

272. An even more curious application of the theory arose in the Seventh Circuit where the court applied a disparate impact theory to a fetal protection policy that, on its face, excluded fertile women from employment opportunities in a battery-making facility. *See* UAW v. Johnson Controls, Inc., 886 F.2d 871, 886 (7th Cir. 1989) (en banc). The Seventh Circuit was following the lead of two other circuits. *Id.* at 884–85. The Supreme Court unanimously reversed this determination, holding that the policy should have been subjected to scrutiny as facially discriminatory. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).

273. The seminal articles in the law review literature are those by Lawrence, *supra* note 10, and Krieger, *supra* note 20. Both of these articles explore the subtle operation of discrimination in contemporary culture with a particular emphasis on race discrimination, and both articles suggest that the intentional discrimination framework is inadequate to address discrimination that is often the product of what the authors describe as unconscious motives. For other recent work on subtle discrimination, see Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001); Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529 (2003). The literature is nicely summarized in Moran, *supra* note 243, at 2391–400.

274. For important works on structural or institutional discrimination, see VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN (1998); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996).

express animus, there has been a struggle in the literature to determine whether existing proof structures can accommodate the changed nature of discrimination, and some scholars have proposed new proof structures that typically fuse elements of intent and impact.[275]

As is true with claims of intent more generally, the idea that the existing disparate treatment framework is inadequate to remedy subtle discrimination turns on both a limited definition of intent and a mistaken belief in the power of legal models or doctrine. The first point is easier to establish than the second. In most of the literature, the most common form of subtle discrimination involves stereotyping, where women, African Americans, the aged, or the disabled are treated differently because of perceptions regarding their abilities or interests.[276] These stereotypes are not conscious in the sense that the actors express a belief in the differential abilities—and if one were asked, they would almost certainly deny any such belief. But their actions indicate otherwise, and African Americans may be consigned to different jobs, or afforded different opportunities, because of underlying stereotypes regarding their abilities. Women are subjected to similar disadvantages although often the underlying reasons may be different, and some of those reasons may involve conscious beliefs regarding women's attachment to the labor force due to their likely primary responsibility for childrearing. In these cases it may be tempting to reach for the disparate impact model because there often will be a statistically significant disparity traceable to a particular practice, or practices. Yet such a move would be entirely unnecessary and in many respects a serious mistake. The Supreme Court has expressly defined stereotyping as a form of intentional discrimination,[277] and cases involving stereotyping or other forms of subtle discrimination are properly defined as involving intentional discrimination, so long as intent does not equate to animus. Class action claims of structural discrimination are readily adjudicated under the pattern or practice framework, perhaps the most underdeveloped theory in employment discrimination law.[278] The pattern or practice theory relies on statistics to

275. *See* Green, *supra* note 274, at 149–52 (proposing a structural model); Krieger, *supra* note 20, at 1242–47 (advocating a mixed motives framework); Oppenheimer, *supra* note 255, at 915–17 (proposing a negligence standard).

276. *See, e.g.*, VALIAN, *supra* note 274, at 103–44; Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459 (2003).

277. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

278. Two cases, both decided in 1977, remain the leading cases on pattern or practice claims. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). A subsequent case discussed the kinds of statistical proof relevant to proving the claims. *See* Bazemore v. Friday, 478 U.S. 385 (1986).

prove intentional discrimination similar to how the disparate impact theory relies on statistics to establish a prima facie case of discrimination. The difference arises in the defendants' rebuttal. In a pattern or practice case, the defendant seeks to explain why the statistics are not the product of discrimination, why, for example, they might be the product of different qualifications or interests, and this debate allows courts to understand how discrimination continues to pervade the workplace.[279] Yet, it seems plain that the underdevelopment of the theory is a side effect of the disparate impact theory.

I am not implying that stereotyping or subtle discrimination is easy to prove under an intentional discrimination framework because it is not. But the disparate impact theory does not ease that burden. The real difficulty with proving subtle discrimination is convincing courts, and I would suggest, our society, that subtle discrimination exists and that employers ought to be responsible for remedying that discrimination. In a recent article, Professor Sam Bagenstos raised precisely this question, noting that there exists no societal consensus regarding an employer's responsibility for remedying subtle discrimination, and I would add that we have no consensus that subtle discrimination permeates the workplace.[280] No legal doctrine is going to create that consensus. What is necessary is a broader social movement that seeks to explain how pervasive discrimination remains, and how discrimination continues to disadvantage women and minorities, the disabled, and the aged—how discrimination has in fact become more subtle but no less intentional or free from legal liability. Successful social movements typically depend on both political and legal action, but the disparate impact theory always has been a peculiarly legal theory, and is not well known outside of law.[281] Public opinion was never mobilized, and over the last

279. The notorious case involving Sears is a classic example of a failed pattern or practice case, one that has doomed such claims in the eyes of many scholars. *See* Green, *supra* note 274, at 122–24. In *EEOC v. Sears, Roebuck and Co.*, 839 F.2d 302 (7th Cir. 1988), the district court accepted the employer's explanation that women were less interested in commissioned sales to explain the lack of women in those positions. While this case should have come out differently, moving to a disparate impact model would not have convinced the district court judge that the disparities were the product of anything other than women's interests. This case involved a failure to convince the judge, who may not have been open to convincing, that discrimination was responsible, rather than a failure of the theory more generally.

280. *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. (forthcoming 2006) (manuscript at 45–47), *available at* http://ssrn.com/abstract=701265.

281. In her recent article discussing social movements and affirmative action, Professor Tomiko Brown-Nagin makes the point that it is necessary to target public opinion in mobilizing for change. *See* Brown-Nagin, *supra* note 111, at 1516. She notes how the intervenors' position emphasizing the continuing effects of discrimination as a justification for discrimination never captured the public support that the diversity rationale garnered. *Id.*

thirty years, we have never had a sustained public debate regarding the persistence of discrimination or society's responsibility for the racial and gender disparities we observe. In contrast, two areas where public debates have arisen, sexual harassment law following the hearings of Justice Clarence Thomas and the citizenship of gay and lesbian individuals, have evolved significantly.[282] Seeking to create a different theory of equality solely through a legal doctrine, one that was in tension with our societal commitments and the interests of elites, was a doomed project. And in some ironic sense, the move to the disparate impact theory perhaps allowed the Supreme Court to see less discrimination, and to remain confined to a conception of intentional discrimination that turned on outdated notions of motive and intent.

My argument that the presence of the disparate impact theory may have stunted the evolution of a more robust definition of intentional discrimination raises the question of why the Supreme Court would have been receptive to a more expansive definition of intent when it had such a crabbed view of the disparate impact theory. There is obviously no way of knowing for sure, but as I have discussed earlier, intent is a central aspect of our conception of discrimination, and indeed, the idea of intent pervades many aspects of the law. In other areas, such as criminal law, constitutional torts, and even torts itself, courts have been receptive to varying, and often more expansive, interpretations of intent. In contrast, the impact theory remains isolated within antidiscrimination law. For these reasons, had disparate impact claims been recast as claims of intent in the early years, it seems quite likely that the Supreme Court may have been willing to conceive of the concept of intent in a different light—one that was not tied to issues of animus.

The disparate impact theory obviously did not cause our limited vision of discrimination, but it was symptomatic of that limited imagination, and, more importantly, of our limited desire to remedy discrimination. Ultimately the disparate impact theory had it all backwards: The theory could only have succeeded in a society that was committed to eradicating the deep effects of discrimination—subtle, intentional, societal, however defined—and yet, that sort of society would, just as clearly, not have needed the disparate impact theory, as there would have been a collective will bent on doing the work otherwise delegated to courts. Perhaps the ultimate

282. See *Lawrence v. Texas*, 539 U.S. 558 (2003), which prohibits the criminalization of homosexual sodomy, thus repudiating *Bowers v. Hardwick*, 478 U.S. 186 (1986). On sexual harassment law, progressive feminist scholars have begun to argue that the doctrine has gone too far in seeking to eliminate harassment. *See, e.g.*, Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

mistake of the disparate impact theory was a belief that our society and courts were better than they are, and that the law alone could create a theory of discrimination and equality without broader social support.

CONCLUSION

Let me now return to the question posed at the outset, namely whether the disparate impact theory was a mistake. This is not an easy question to answer, and it might be best to break it down into various parts. Certainly there can be little question that the disparate impact theory has produced limited meaningful change, and that a broader definition of intent could have served virtually the same purpose. If Congress had the will, the testing claims also could have been addressed through legislation dictating the kinds of examinations that were permissible, or the kinds of justifications that were acceptable. With that in mind, if nothing else, perhaps this Article will lead to a ceasefire on proposals to extend the disparate impact theory into other areas.

I think it is also clear that the disparate impact theory was based on two critical mistakes—that the theory would be easier to prove and that it was possible to redefine discrimination purely through legal doctrine. At bottom, that is what the theory sought to do—redefine our concept of discrimination to focus on unequal results. As we know from our lengthy battle over affirmative action, there is no widespread public support for defining equality or discrimination in terms of results or achievements. The creation of the disparate impact theory also has contributed to a stiflingly limited view of intentional discrimination, one that even today is tied to animus and conscious motives, and one that leaves us awash in racial and gender inequities but without any clear sense of responsibility or liability for those inequities. By itself, a broader judicial definition of intent would not have led to less inequality, but it may have opened our eyes to the persistence of discrimination in a way that the disparate impact theory could not. So in the end I conclude that the disparate impact theory was a mistake, which leaves the question of whether it is now too late to turn back.