DISPARATE IMPACT DISCRIMINATION: THE LIMITS OF LITIGATION, THE POSSIBILITIES FOR INTERNAL COMPLIANCE

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INTRODUCTION

Since the theory was first proposed by a group of creative litigators and adopted by the Supreme Court in *Griggs v. Duke Power Co.*,[1] disparate impact has been a flashpoint for the hopes and the anxieties of those struggling with the goal of equal employment opportunity. From the earliest days of the operation of Title VII of the Civil Rights Act of 1964,[2] it was evident that an antidiscrimination mandate would only be effective if plaintiffs were able to challenge not only blatantly racist or sexist conduct but also practices and policies that may be neutral in appearance but whose effects are anything but neutral. Disparate impact enables challenges to policies that, while facially neutral, place a disproportionate burden on members of a protected class, and thus the theory seemed to carry the potential for removing the "built-in headwinds" that blocked progress for minorities and women.[3] The hope was that "the disparate impact theory would reach discrimination that was otherwise out of reach for claims of intentional discrimination."[4]

It remains a matter of considerable debate whether disparate impact has lived up to the aspirations of those who conceived it. And even among those who laud its early successes, there are many who question its potential as a litigation tool for the future. The available evidence suggests that these skeptics are correct that disparate impact litigation is unlikely to play a vital role in the future of employment discrimination litigation. Furthermore, the bifurcation of antidiscrimination law into two discrete theories—one addressed to intentional discrimination and one addressed to neutral policies with discriminatory effects—has had negative consequences for employment discrimination litigation. But the limits of litigation, however frustrating for potential plaintiffs, should not be seen

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1. 401 U.S. 424 (1971).

2. 42 U.S.C. § 2000e to e-15 (2000).

3. *Griggs*, 401 U.S. at 432.

4. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 702 (2006).

as identical with the limits of the law. While litigation is essential for enforcement of legal mandates, voluntary compliance is similarly important. Disparate impact theory significantly changed the contours of compliance and its conceptual framework continues to influence "best practices" for the many employers who are themselves trying to further Title VII's goal—"[t]he elimination of discrimination in the workplace."[5]

One setting where both the limits of litigation and the potential for internal compliance are particularly apparent is the academic workplace. On the one hand, courts have taken an especially deferential approach to faculty hiring and promotion decisions, such that successful litigation challenges to tenure and other employment decisions are rare. At the same time, the interest in compliance in the university setting, together with the relatively strong worker voice in academic employment, create potential for regular examination and innovation in approaches to compliance with antidiscrimination goals.

This essay will consider the current state of the disparate impact theory from each of these angles. First, I will examine the limitations of disparate impact theory as a litigation tool. Second, I will consider how these limitations are part of a larger problem in the way employment discrimination litigation has been framed by the courts. Third, I will discuss the positive impact that disparate impact has had on compliance efforts and the significance of compliance as a tool in efforts to eliminate workplace discrimination. Here, I will focus particularly, though not exclusively, on the university setting. A number of scholars have concluded that success in furthering equality in campus employment is most likely to come through internal change. Thus, compliance options take on particular significance in the academic arena.

THE LIMITATIONS OF DISPARATE IMPACT

Griggs has been heralded as one of the most important civil rights cases in United States legal history.[6] In one of its first cases to interpret Title VII, the Supreme Court in *Griggs* accepted the idea that a facially neutral policy could violate federal law if its effects were discriminatory and the employer could not articulate a business necessity for the policy.[7] The case involved a challenge to the Duke Power Company's requirements that all employees in certain previously segregated lines of employment have the equivalent of a high school diploma and a satisfactory test result on a professionally prepared aptitude test.[8] The Court did not consider the evidence of intentional discriminatory treatment sufficient in the case as presented, but it concluded that "tests neutral on their face, and even

5. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)).

6. *See, e.g.*, Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 433 (2005); Alfred W. Blumrosen, *The Legacy of* Griggs*: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 1–2 (1987).

7. *Griggs*, 401 U.S. at 436.

8. *Id.* at 427–28.

neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[9]

While the Court's articulation of its new standard seemed to embrace an expansive view of discrimination and a commitment to its elimination, disparate impact has never really lived up to its potential. In theory, it still could. Indeed, less than two years ago, the Supreme Court concluded that disparate impact claims were viable under the Age Discrimination in Employment Act,[10] and thus certainly affirmed the viability of the theory more generally. But despite this recent affirmation, it is fair to say that disparate impact litigation is struggling for life.

Part of this struggle is simply a result of the very low success rate plaintiffs have in disparate impact challenges. In his recent article on disparate impact, Michael Selmi presented the results of an empirical analysis of lower courts' handling of disparate impact cases that shows that plaintiffs have fared very poorly with these claims.[11] In the district courts, plaintiffs are successful in about 25 percent of disparate impact cases; in the courts of appeals, plaintiffs fare even worse, winning about 19 percent of the time on their disparate impact arguments.[12] Moreover, among those cases, one third of appellate victories for plaintiffs and one half of the district court victories also presented successful disparate treatment claims involving intentional discrimination, raising a serious question about the significance of the disparate impact claim to the outcome of the litigation.[13]

The reasons for these numbers are varied. Defendant employers have become more sophisticated in the kinds of workplace tests they adopt, so most tests that might cause some impact can nonetheless survive a challenge because they can be justified by business necessity.[14] While employers in the early days of Title VII might not have analyzed how their job requirements were tied to measuring job performance, employers are now aware that employment tests must be validated as job related and justifiable as consistent with business necessity.[15] Selmi's study also concludes that courts are less likely to find a disparate impact at all than they were in the immediate aftermath of Title VII's enactment.[16] And independent of these fairly low statistical success rates, disparate impact claims have simply never made much headway beyond the context of the theory's initial conception—the written tests at issue in *Griggs* and other early objective standards.[17]

More generally, the history of disparate impact law reflects a deep judicial and

9. *Id.* at 430.

10. Smith v. City of Jackson, 544 U.S. 228 (2005).

11. Selmi, *supra* note 4, at 738–43.

12. *Id.* at 738–40. This is lower than the plaintiff success rate of about 35 percent in employment discrimination cases more generally. *Id.* at 739–40.

13. *Id.* at 740–41.

14. *Id.* at 741.

15. *See* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 598–99 (2004). The fact that employers do this more careful evaluation is unquestionably one of the successes of *Griggs*. But it also creates limitations on the theory's future significance.

16. Selmi, *supra* note 4, at 741.

17. *Id.* at 749–53.

public ambivalence about the theory. Even those moments of victory in the history of disparate impact law have lacked the glory of true wins. For example, though many scholars and advocates looked hopefully to the Civil Rights Act of 1991 as a revitalizing moment for the theory, its reality was very mixed. The 1991 law was passed in response to a series of 1989 Supreme Court interpretations of federal antidiscrimination laws.[18] Among those Supreme Court cases, one of the most criticized was *Wards Cove Packing Company v. Atonio*,[19] which was viewed by many as drastically redefining—or even, as Robert Belton has put it, "dismantling"—disparate impact.[20] *Wards Cove* held that a disparate impact plaintiff had to identify specifically which employer practice was causing the complained of effects, that the plaintiff, rather than the defendant, carried the ultimate burden of demonstrating that the practice was not a business necessity, and that any proposed alternative practice had to be equally as effective and no more costly.[21] In the wake of this decision, there was a widespread call for a legislative fix to the Court's narrowing redefinition of standards for litigating disparate impact claims.

The legislature did indeed respond to *Wards Cove* with legislation, but its response was hardly a radical one. In the 1991 Civil Rights Act, Congress largely retained the first of the Court's requirements, obliging disparate impact plaintiffs in most instances to identify the challenged practices specifically.[22] The new law included a rarely applicable exception for circumstances where plaintiffs can show that employer practices cannot be separated for purposes of analyzing their impact.[23] The legislature did reverse the Court and return the burden of proving business necessity to the employer.[24] As to the standard for showing a less discriminatory alternative practice, Congress stated that the standard would be what it had been the day before *Wards Cove* was handed down.[25] Since there had been uncertainty in the courts as to the appropriate standard for a less discriminatory alternative prior to *Wards Cove*, this legislative action effectively reinstated the previous uncertainty. Further, the 1991 Act made clear that a plaintiff can succeed in disparate impact litigation only if she shows not simply that a less discriminatory alternative practice exists, but also that the employer "refuses to adopt such alternative employment practice."[26]

So, while the 1991 Civil Rights Act was heralded as a victory for disparate impact plaintiffs,[27] the changes Congress made have had limited effect.

18. *See* 42 U.S.C. § 1981 note (2000) (Purposes of 1991 Amendment) (listing as a purpose of the Act "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination").

19. 490 U.S. 642 (1989).

20. Belton, *supra* note 6, at 463–64.

21. *Wards Cove*, 490 U.S. at 657–61.

22. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000).

23. *Id.*

24. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

25. 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii), (k)(1)(C) (2000).

26. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2000).

27. *See, e.g.*, Belton, *supra* note 6, at 467–68.

Defendants retain the burden of showing business necessity, but this has not proven to be a difficult burden to meet. The exception to the requirement that a challenged practice be identified specifically has been applied extremely rarely. And the "less discriminatory alternative practice" standard is basically insurmountable. In the years since 1991, plaintiffs have been less successful in disparate impact claims than they were in years preceding the law's enactment.[28] Moreover, another provision of that Act—the addition of compensatory and punitive damages potential exclusively for claims of intentional discrimination—has made disparate impact a less attractive option for plaintiffs.[29]

The Supreme Court's decision in *Watson v. Fort Worth Bank & Trust*[30] offers another example of a legal event that could have been a victory for disparate impact plaintiffs, but that ultimately offered little to celebrate. In *Watson*, the Court held that disparate impact analysis could be applied to subjective hiring practices as well as to objective practices like the written tests at issue in *Griggs*.[31] At the same time, however, Justice Sandra Day O'Connor's plurality opinion suggested that a plaintiff's burden to prove disparate impact claims should be significant, while a defendant should have the legal tools to fairly easily defend against these claims.[32] Thus, the Supreme Court began in *Watson* the limitation of the disparate impact theory that would lead to the decision in *Wards Cove*. Moreover, very few cases have successfully challenged subjective practices on the disparate impact theory in the lower courts. Indeed, despite *Watson*, courts have generally been extremely resistant to recognizing the application of subjective judgment as a "neutral" employer policy.[33] For the moment at least, as a practical matter, disparate impact remains primarily applicable to objective tests, and only successful in those very rare cases in which an employer uses an objective test for which it cannot come up with a "business necessity" justification.

THE PROBLEM WITH CREATING CATEGORIES OF DISCRIMINATION

Proving discrimination is not always, or even often, an easy task. An extraordinary amount of time and energy has been devoted to the development of proof structures for Title VII litigation, and the consequence has often been more rather than less confusion. Regrettably these complications in proof structures have bled across into the substantive definitions of discrimination. As Charles Sullivan has cogently put it, "[o]ne of the antidiscrimination project's pervasive problems has been the continuing conflation of two separate tasks, that is, defining discrimination and proving its existence."[34]

28. *See* Selmi, *supra* note 4, at 738–40.

29. *See, e.g.*, Shoben, *supra* note 15, at 598.

30. 487 U.S. 977 (1988).

31. *Id.* at 991.

32. *Id.* at 993–99.

33. *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 783–84 (2005).

34. Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 913 (2005).

This error has been most evident in the context of disparate treatment law, where debate continues about the difference between "single-motive" and "mixed-motive" cases and the appropriateness of employing different statutory and judicially created proof structures in particular contexts.[35] But the divide between disparate treatment and disparate impact law is another area in which concerns about how to prove the existence of discrimination have led to substantive developments that undercut the effectiveness of the law. The notion that employer policies and practices must be either intentional, and thus subject to disparate treatment analysis, or neutral, and thus subject to disparate impact analysis, reflects a flawed understanding of the way the world actually operates. More seriously, it risks placing a great deal of workplace conduct and policy outside the reach of antidiscrimination law.

When I teach *Griggs* to my employment discrimination class, it never takes more than a few minutes for a student to raise her or his hand and say, "Doesn't it seem like what was actually going on here was intentional discrimination?" That instinct seems to me to be correct, and it is an instinct shared by many. As one court has expressed it, "[i]n essence, disparate impact theory is a doctrinal surrogate for eliminating unprovable acts of intentional discrimination hidden behind facially-neutral policies or practices."[36] And even the Supreme Court, in famously declining to extend the disparate impact theory to challenges under the Equal Protection Clause, observed that "[n]ecessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[37]

In fact, in many disparate impact cases, the notion that the policy at issue is "neutral" is simply disingenuous. Certainly this was the case in early disparate impact litigation like *Griggs*. When employers faced with Title VII held on to seniority systems that preserved previously explicitly segregated lines of employment,[38] or applied testing standards unrelated to the jobs at issue but certain to make upward mobility impossible for African-Americans educated in second-class schools,[39] these decisions were discriminatory. The notion that the same supervisors who were intentionally discriminating in 1964 simply stopped doing so on the effective date of Title VII is contrary to anything sociologists and psychologists have taught about human behavior.

These cases may initially seem easy to cabin as representing the "present effects of past discrimination" that were common in the early days of Title VII.[40] But even years later, when the Supreme Court considered the arrangements of Alaskan fisheries in *Wards Cove*, the stark segregation of sleeping, eating and working

35. *See* Hart, *supra* note 33, at 758–66.

36. EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir. 2000).

37. Washington v. Davis, 426 U.S. 229, 242 (1976).

38. *See, e.g.*, Local 189, United Papermakers v. United States, 416 F.2d 980, 982–83 (5th Cir. 1969).

39. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 427–28 (1971).

40. *See, e.g.*, Belton, *supra* note 6, at 443–45 (discussing the relationship between the development of disparate impact theory and the notion of "present effects of past discrimination").

arrangements—which Justice Stevens, dissenting in that case, accurately described as disturbingly like that of the plantation economy[41]—suggested something much different from "neutral" policies that simply happened to have racial effects. Moreover, many of the "neutral" policies that almost certainly have a negative effect on opportunities for women and minorities—policies like word-of-mouth hiring, nepotism, cronyism or any other employment practice that avoids public posting or advertising for positions—will consistently reinforce the existing representation in a workforce. The effects are easy to see, and employers are certainly aware of them. At what point does the use of these practices cease to be "neutral" and instead become intentional discrimination?

The difficulties with separating disparate impact from disparate treatment are perhaps most famously exemplified in the strange history of *EEOC v. Joe's Stone Crab, Inc.*, an Eleventh Circuit case that was seen as a disparate impact case by the district court, but reversed on those grounds and remanded for consideration as a disparate treatment case by the court of appeals.[42] Joe's Stone Crab is a Miami Beach restaurant that had a long history of hiring almost exclusively male food servers.[43] The restaurant hired its new food servers annually through a "roll call" that included both an application and an interview process.[44] Almost no female food servers appeared at the annual roll call, and local food service employees testified that the restaurant had a well-known reputation for hiring only men as servers.[45] The restaurant's maitre d' was responsible for hiring servers, and the maitre d' responsible for hiring during most of the years involved in the litigation explained that he relied on his "gut feeling," taking account of applicants' appearance, articulation, attitude and experience.[46] The company had no written or verbal hiring policy, and the decisions of the maitre d' were not reviewed by anyone else in the company. There was no formal restaurant policy mandating the hiring of male servers, but testimony suggested a general acceptance of this result and the district court summarized the evidence as demonstrating that Joe's "sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu."[47]

Reviewing this evidence, the district court found that it was insufficient to make out a disparate treatment claim, but that on these facts the EEOC could challenge Joe's facially neutral policy of "undirected and undisciplined delegation of hiring authority to subordinate staff."[48] The Eleventh Circuit took an entirely different view. The appellate court saw no causal link between a facially neutral policy and the disparately low numbers of women in the ranks of food servers. Instead, the court opined that the factual findings "suggest that Joe's hiring system was not in

41. *See Wards Cove*, 490 U.S. at 663 n.4 (1989) (Stevens, J., dissenting).

42. *See* EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir. 2000); EEOC v. Joe's Stone Crab, Inc., 969 F. Supp.727 (S.D. Fla. 1997).

43. *Joe's Stone Crab*, 969 F. Supp. at 731–33.

44. *Id.* at 733.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 738.

practice *facially-neutral*, but rather was *facially-discriminatory* on the basis of gender."[49] The divergent views of these two courts reviewing the same factual record reflect the significant overlap between disparate impact and disparate treatment in employment discrimination law.

In fact, the proof structure in a disparate impact case itself demonstrates the difficulty of separating this theory from intentional discrimination. In an impact case, a plaintiff first identifies a policy that has a disproportionate negative impact on a protected class of employees.[50] The defendant must then demonstrate that the test is job related and consistent with business necessity.[51] If the defendant makes that showing, the plaintiff may still prevail if he can identify an alternative practice that is as effective for the employer's business needs but would have a less discriminatory impact on the protected class and if the employer refuses to adopt that alternative practice.[52] For a plaintiff to prevail then, the court must conclude either that the defendant had no business justification for the practice or that the same business need could have been met with a less discriminatory alternative practice. If an employer maintains a policy under either of these circumstances, the neutrality of that policy is at best suspect.

And yet, despite the blurred line between policies that are "neutral" and those that are not, courts maintain the legal separation with little or no flexibility. Only a few years ago, the Supreme Court reversed a lower court finding of discrimination on the grounds that the court of appeals had impermissibly applied disparate impact standards in a disparate treatment case.[53] Given this continued dichotomy, it seems entirely possible that some kinds of employer practices will fall between these doctrinal cracks and will, despite their disparate impact on protected classes of workers, escape legal challenge. Thus, for example, in a number of cases challenging an employer's reliance on excessive, unguided subjectivity in decisionmaking, courts have been unwilling to view the practice as either neutral or intentionally discriminatory and have rejected challenges as inappropriate under either theory.[54] Similarly, word-of-mouth hiring policies have struck some courts as facially neutral, others as intentionally discriminatory, and still others as impossible to categorize.[55] These are precisely the kinds of employer practices

49. *Joe's Stone Crab*, 220 F.3d at 1282.

50. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

51. *Id.*

52. 42 U.S.C. § 2000e-2(K)(1)(A)(ii) (2000).

53. Raytheon Co. v. Hernandez, 540 U.S. 44, 55 (2003).

54. *See* Hart, *supra* note 33, at 778–88 (discussing judicial response to subjective decisionmaking claims).

55. *See, e.g.*, EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 305 (7th Cir. 1991) (reversing a district court finding of disparate impact discrimination with the conclusion that word of mouth hiring was passive conduct by the employer and thus did not constitute a "practice" that could be challenged under federal law as either disparate impact or disparate treatment); EEOC v. Consolidated Serv. Sys., 989 F.2d 233, 238 (7th Cir. 1993) (affirming a district court finding that use of a word-of-mouth policy was not intentional discrimination); Domingo v. New England Fish Co., 727 F.2d 1429, 1435–36 (9th Cir. 1984) (affirming a district court application of disparate impact theory, but noting that on the particular facts disparate treatment might have been the more appropriate theory); NAACP v. City of Evergreen, 693 F.2d

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

THE CONTINUING IMPORTANCE OF IMPACT IN COMPLIANCE EFFORTS

In light of these limitations to disparate impact litigation, there may be some significant value to shifting the focus of the discussion from litigation strategy to strategies and goals for compliance. Of course, litigation is absolutely essential because discrimination is prevalent and destructive and litigation should provide remedies for acts of discrimination that do occur. Litigation also provides the best incentive to employers to take action to avoid future discrimination, and many employers are working hard not to discriminate. So determining what the governing litigation standards mean for compliance obligations and opportunities is essential. What do the available theories under Title VII tell us about the purpose of this antidiscrimination law and the obligations it imposes? After all, the remedial aspects of the statute are intended to spur employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination.[56]

This focus on compliance is part of a larger scholarly trend that acknowledges the role that well-intentioned employers, among others, must play in giving true meaning and life to civil rights laws.[57] As Susan Sturm, whose work has been central in turning attention to the role that non-litigation enforcement mechanisms play in achieving workplace equality, recently wrote, "[t]hose on the front line must figure out how to achieve inclusive institutions when the problems causing racial and gender under-participation are structural, and they must do this under conditions of considerable legal ambiguity."[58] With a growing recognition that litigation must be only one part of a broader agenda for changing workplace dynamics, many scholars and advocates are turning their eye to internal mechanisms for accountability and change.

The scholarship that has focused attention on employment in higher education—and in particular on the presence of women and minorities in the faculty ranks—has generally concluded that in this field, as much if not more than in others, the best chance for real change will likely come from within. As Martha

1367, 1369 (11th Cir. 1982) (reviewing a district court's class certification decision in a case asserting disparate treatment discrimination in part based on a word-of-mouth hiring policy). *See also* Matthew Noll, Comment, *Can there be Harmony?: Word of Mouth Hiring Practices after September 11, 2001*, 4 HOUS. BUS. & TAX L.J. 151, 166–71 (2004) (discussing word of mouth cases in several circuits).

56. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975); Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976).

57. *See, e.g.*, Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2006 UTAH L. REV. (forthcoming); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 249 (2006).

58. Sturm, *supra* note 35, at 249.

West, who has done some of the most detailed and sustained research into representation of women in the academy, said over a decade ago, "[t]o make real progress against discrimination, we must pursue change within the universities themselves."[59] Courts have taken such an extremely deferential approach to academic hiring decisions that litigation often seems unlikely to force reforms in areas where they are needed.[60] There is, however, some evidence that internal compliance mechanisms can lead to substantive reform and a more inclusive academic workplace.

It may be in this context that *Griggs* and the disparate impact theory will ultimately be recognized as most important. In the wake of *Griggs*, many employers either chose or were forced to eliminate testing that was unrelated to job performance. Perhaps even more significantly, as both critics and proponents have recognized, the disparate impact theory opened the door for affirmative action policies.[61] Disparate impact theory "recognizes the role that institutional choices, even those that are neutral in design and in application, can play in perpetuating stratification in the workplace."[62] By focusing attention on the discriminatory effect that institutional structures can have, and shifting the focus from individual animus, impact theory opens the door for structural change.

The best hope for employment equality lies in this kind of structural change and the institutional commitment it requires. The kinds of compliance mechanisms most likely to foster a more inclusive workplace are, in many instances, focused on identifying and altering some of the very policies that disparate impact litigation could in theory target. For example, experts recommend that employers carefully examine their recruitment procedures to prevent screening women and minority candidates out of the applicant pool;[63] require written performance evaluations with specific examples to minimize the operation of stereotyping;[64] and advertise or post all positions and promotions, instead of relying on tap-on-the-shoulder or other informal mechanisms.[65] Each of these recommendations targets a policy or practice that, while appearing neutral, in fact operates as a "built-in headwind" to progress for women and minorities in the workplace.

59. Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 68, 70 (1994).

60. *See, e.g.*, Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 2 (2006).

61. *See, e.g.*, Belton, *supra* note 5, at 469; Blumrosen, *supra* note 5, at 4–7; Richard A. Epstein, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 234–36 (1992).

62. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 137 (2003).

63. *See* West, *supra* note 59, at 157.

64. *See* JOCELYN LARKIN & CHRISTINE E. WEBBER, AM. BAR ASSOC., CHALLENGING SUBJECTIVE CRITERIA IN EMPLOYMENT CLASS ACTIONS (2005), *available at* http://www.impactfund.org/pdfs/Subjective%20Criteria.pdf.

65. *See* William T. Bielby, *Can I Get a Witness?: Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 377 (2003).

In addition to monitoring these kinds of practices, employer efforts to ensure employment equality can and should include systemic reform efforts. As the federal Glass Ceiling Commission noted in 1995, the most successful programs for increasing the representation of women and minorities in the workplace—and particularly in the higher ranks—involve strong central commitment and clear channels of accountability.[66] Diversity must become a core institutional value if it is to be an institutional reality. In a recent article, Professor Sturm described the transformation wrought at the University of Michigan through efforts by "university change agents" working together with the National Science Foundation (NSF) through an ADVANCE Institutional Transformation Award.[67] These efforts engaged key administrative personnel in surveying the climate at the University, targeting areas that needed change and developing initiatives that responded directly to perceived barriers. The barriers identified included disproportionate service obligations without corresponding authority for women, lack of openness regarding policies and procedures, continued operation of an "old boy network" and a failure of University policy to take account of "differences in household structure that placed greater demands on women."[68] Through this grant, the University of Michigan successfully removed a number of barriers to women's full "inclusion and advancement" in science and engineering departments at the school.[69] The process of reaching the measurable outcomes that this program achieved was one of program-wide exploration and conversation, which actively involved leaders within the University community in a careful evaluation of the impediments to advancement and the potential for removing those impediments.[70]

Ultimately, if internal compliance efforts are to achieve some part of what litigation has not yet done, they will require this kind of voluntary commitment and cooperation. As Sturm put it in describing the Michigan program, "[w]orkplace equality is achieved by connecting inclusiveness to core institutional values and practices. This is a process of ongoing institutional change. It involves identifying the barriers to full participation and the pivot points for removing those barriers and increasing participation."[71] These kinds of efforts require active, conscious movement toward a more inclusive workplace. They may not be possible in all employment contexts; in particular these internal reforms may be effective primarily in workplaces—like universities—which enjoy a relatively high degree of worker voice. While it is important to recognize this and other limitations to internal compliance as a force in efforts toward equal employment opportunity, academic and similar workplaces may also serve as models of the possible that can be transported to other contexts.

66. DEPARTMENT OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, A FACT-FINDING REPORT OF THE FEDERAL GLASS CEILING COMMISSION (1995), *available at* http://www.dol.gov/oasam/programs/history/reich/reports/ceiling.pdf.

67. Sturm, *supra* note 57.

68. *Id.* at 283–85.

69. *Id.* at 252–53.

70. *Id.* at 287–300.

71. *Id.* at 249.

CONCLUSION

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