

# Michigan Law Review

---

Volume 113 | Issue 6

---


2015

## Griggs at Midlife

Deborah A. Widiss

*Indiana University Maurer School of Law*

Follow this and additional works at: <http://repository.law.umich.edu/mlr>

 Part of the [Civil Rights and Discrimination Commons](#), [Courts Commons](#), [Labor and Employment Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Deborah A. Widiss, *Griggs at Midlife*, 113 MICH. L. REV. 993 (2015).

Available at: <http://repository.law.umich.edu/mlr/vol113/iss6/12>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## GRIGGS AT MIDLIFE

Deborah A. Widiss\*

THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE *Griggs v. Duke Power* Story. By Robert Belton. Edited by Stephen L. Wasby. Topeka: University of Kansas Press. 2014. Pp. xi, 424. \$39.95.

“Midlife transition’ is a natural stage that happens to many of us at some point (usually at about age 40, give or take 20 years). . . . [It] can include . . . [q]uestioning decisions made years earlier and the meaning of life [and] [c]onfusion about who you are or where your life is going.”<sup>1</sup>

— *Psychology Today*

### INTRODUCTION

Not all Supreme Court cases have a midlife crisis. But it is fair to say that *Griggs v. Duke Power Co.*,<sup>2</sup> which recently turned forty, has some serious symptoms. *Griggs* established a foundational proposition of employment discrimination law known as disparate impact liability: policies that significantly disadvantage racial minority or female employees can violate federal employment discrimination law, even if there is no evidence that the employer “intended” to discriminate.<sup>3</sup> *Griggs* is frequently described as one of the most important decisions of the civil rights era, compared to *Brown v. Board of Education* for its “momentous social consequences.”<sup>4</sup> In 1989, a

---

\* Associate Professor of Law, Indiana University Maurer School of Law. My thanks to KT Albiston, Rachel Arnow-Richman, Joseph Fishkin, Tristin Green, Serena Mayeri, Camille Gear Rich, and Leticia Saucedo, as well as to participants at the 2014 Annual Labor and Employment Law Scholarship Colloquium and the “Past and Future of Disparate Impact” panel discussion held at Vanderbilt Law School, for their helpful suggestions in response to earlier drafts. I also thank the editors of the *Michigan Law Review* for their extremely conscientious work.

1. *Mid-Life*, PSYCHOL. TODAY, <http://www.psychologytoday.com/conditions/mid-life> (last visited Sept. 25, 2014).

2. 401 U.S. 424 (1971).

3. *Griggs*, 401 U.S. at 431 (“The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”).

4. Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHL.-KENT L. REV. 1, 1–2 (1987); see also H.R. REP. NO. 102-40(I), at 23 (1991) (characterizing *Griggs* as “[t]he single most important Title VII decision, both for the development of the law and in its impact on the daily lives of American workers”); ROBERT BELTON, THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE GRIGGS V. DUKE POWER STORY 5 (2014) (noting a television interview with Chief Justice Burger in which he identified *Griggs* as the most important case handed down in his first two terms on the Court).

Supreme Court decision threatened to gut the doctrine by significantly decreasing the burden on employers to justify policies with such disparate effects.<sup>5</sup> Two years later, Congress repudiated that decision, embracing disparate impact as a key aspect of discrimination law and codifying the more rigorous standard initially enunciated in *Griggs*.<sup>6</sup> The bill passed with landslide majorities.<sup>7</sup>

At the time, this seemed a significant victory that would put to rest claims that disparate impact liability was illegitimate. But in recent years, there has been growing doctrinal and theoretical criticism of disparate impact. In 2009, Justice Scalia warned of a coming “war” between disparate impact and equal protection, suggesting that the doctrine might be unconstitutional because it requires employers to assess whether a policy has racially disparate effects.<sup>8</sup> The current Court has not been shy about reconsidering bulwarks of the civil rights revolution,<sup>9</sup> and Title VII’s disparate impact provisions may likewise be in jeopardy. (Indeed, as this Review was being finalized for publication, the Supreme Court granted certiorari on a case regarding whether disparate impact claims are cognizable under the Fair Housing Act.<sup>10</sup>) Aside from this brewing constitutional question, disparate impact has recently been criticized by leading commentators as being unreasonably disadvantageous to *both* employer and employee interests. For example, Professor Wax argues that disparate impact unfairly exposes businesses to liability for adopting measures that predict job performance but also cause a racially disparate impact.<sup>11</sup> And Professor Selmi suggests that,

---

5. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) (“[T]he dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. . . . [T]here is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business.”).

6. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991) (“The purposes of this Act are . . . to codify the concepts of ‘business necessity’ and ‘job related’ enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) . . . [and] to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits . . . .”); *id.* § 105 (codified at 42 U.S.C. § 2000e-2(k) (2012)) (setting forth the burden of proof in disparate impact cases).

7. The Act passed 93 to 5 in the Senate and 381 to 38 in the House. Pub. L. No. 102-166, 105 Stat. 1071.

8. *Ricci v. DeStefano*, 557 U.S. 557, 595–96 (2009) (Scalia, J., concurring).

9. See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (holding unconstitutional section 4 of the Voting Rights Act, which set forth the coverage formula for preclearance requirements); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding unconstitutional use of race as a factor to increase diversity in K–12 schools); see also *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (emphasizing that racially based affirmative action in the education context must be subject to a searching examination).

10. See *The Inclusive Communities Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275 (5th Cir. 2014), *cert. granted in part*, 82 U.S.L.W. 3686 (U.S. Oct. 2, 2014) (No. 13-1371). This case may well be decided on statutory interpretation grounds rather than constitutional grounds, but the Court’s reasoning might be significant in any subsequent challenge to disparate impact under Title VII.

11. Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621 (2011) (arguing that, because job-predictive tests consistently cause racially disparate effects, disparate impact

although plaintiffs used the doctrine in some important victories, it may have hindered other efforts to address discrimination by curtailing conceptions of discriminatory intent.<sup>12</sup> Moreover, as a practical matter, disparate impact plays a relatively small role in modern employment discrimination litigation, in part because a different portion of the 1991 Act enhanced the remedies available for plaintiffs who prove intentional discrimination.<sup>13</sup> Thus, even if the Court reaffirms its constitutionality, disparate impact risks receding into obsolescence. Like other forty-year-olds, *Griggs* must come to terms with its place in modern society.

It is thus fortunate that, at this critical juncture, Robert Belton's *The Crusade for Equality in the Workplace: The Griggs v. Duke Power Story*<sup>14</sup> has been published. The book is the first comprehensive history of the litigation campaign that led to this seminal decision. Belton, a former law professor and a nationally recognized expert in employment discrimination law, began his legal career as an attorney at the NAACP Legal Defense and Educational Fund ("LDF"). He was hired shortly after Title VII was enacted, and he was charged with figuring out how best to litigate under the new statute. *Griggs* was one of his first cases.

Belton's primary objective in the book is to offer a window into disparate impact's birth and early life. In this respect, the book unquestionably succeeds. Belton provides an insightful account of how lawyers, judges, academics, and activists sought to realize Title VII's transformative potential; *The Crusade for Equality* is an important addition to the growing body of work on *Griggs*'s origins.<sup>15</sup> Although Belton acknowledges debate over disparate impact, he offers little direct response to recent critical or doctrinal

---

should be modified or eliminated); cf. Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2159 (characterizing research as establishing a "consensus in the scholarly literature that as a statistical matter, a cognitive ability test is likely to have something approaching one standard deviation of disparate racial impact on Blacks" but arguing that this finding emphasizes the need for retaining disparate impact liability).

12. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006); see also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 20–24 (2006) (arguing that disparate impact has been ineffective at challenging subjective employment practices or other structural aspects of employment besides testing).

13. See, e.g., Selmi, *supra* note 12, at 738–42 (finding that relatively few "pure" disparate impact claims succeed); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597 (2004) (reviewing cases in which disparate impact could have been pleaded but was not). As discussed *infra* Part III, the doctrine has regained some prominence as a vehicle for challenging criminal background screens.

14. Robert Belton was Professor of Law Emeritus, Vanderbilt Law School.

15. Other significant accounts include the following: ROBERT SMITH, RACE, LABOR, & CIVIL RIGHTS: *GRIGGS VERSUS DUKE POWER AND THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY* (2008) (emphasizing the role that Willie Boyd, one of the plaintiffs in *Griggs*, and other grassroots labor and civil rights activists played in early implementation of Title VII); Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251 (2011) (emphasizing the extent to which state and federal agencies addressing employment discrimination even prior to Title VII's enactment utilized disparate impact

challenges. This Review addresses that crucial gap. My focus is not the looming question of disparate impact's constitutionality—an issue that has been well plumbed in the years since Justice Scalia's shot across the bow<sup>16</sup>—but rather the deeper question of how much will, or could, the result in that coming war matter? In other words, how useful is disparate impact?

Part I of this Review fleshes out the history of *Griggs*, giving readers a sense of the rich detail found in the book. Belton introduces modern readers to the key players in the unfolding drama and helps us better understand the strategic choices that shaped the now-familiar doctrine. The book establishes that *Griggs* and its progeny played a central role in dismantling facially neutral tests and educational requirements—many of which were implemented by Southern employers who had previously relied on explicit racial classifications to relegate blacks to the least desirable jobs—that could have severely limited the efficacy of Title VII from its inception.

Part II of the Review also explores disparate impact's early years, but it focuses on the development of the doctrine in sex discrimination cases, which are almost entirely absent from Belton's narrative. By supplying this missing piece of the story, Part II provides a more nuanced discussion of disparate impact's history and a more muted assessment of its achievements. This Part shows that courts have generally rejected efforts to use the doctrine to require changes to workplace policies that are insufficiently supportive of pregnancy or family caregiving responsibilities. Advocates have long recognized that women of color were—and remain—disproportionately harmed by such policies. This Part suggests that the failure to develop an intersectional understanding of disparate impact doctrine thus risks ignoring key vectors of exclusion.

Part III then turns to the present, looking at current efforts to use the doctrine to challenge employers' use of criminal background screens in hiring. This campaign is still evolving, and it illustrates some of the pitfalls, but also the promise, that the early history of the doctrine suggested. Part III also further develops the discussion of intersectional disparate impact analysis. Arrest and conviction rates are heavily skewed by both race *and* sex; assessing the disparate impact of a background screening policy on the basis of either factor alone dilutes the disparate impact that such policies impose on black and Latino men. Finally, this Part discusses the central role that

---

frameworks); Samuel Estreicher, *The Story of Griggs v. Duke Power Co.*, in *EMPLOYMENT DISCRIMINATION STORIES* (Joel Wm. Friedman ed., 2006) (tracing history and emphasizing a shift in statutory interpretation methods); David J. Garrow, *Toward a Definitive History of Griggs v. Duke Power Co.*, 67 *VAND. L. REV.* 197 (2014) (book review) (providing a positive review of Belton's book that summarizes key aspects of the history he covers); and Selmi, *supra* note 12, at 708–24 (tracing history similar to that covered by Belton but emphasizing the extent to which these early cases dealt with specific instances of past discrimination).

16. See generally, e.g., Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 *WM. & MARY L. REV.* 197 (2010) (discussing disparate impact's constitutionality under contemporary equal protection jurisprudence); Richard Primus, *The Future of Disparate Impact*, 108 *MICH. L. REV.* 1341 (2010) (same); Rosenthal, *supra* note 11 (same).

compliance work plays in modern efforts to ensure equal employment opportunity.

My title—and my focus—is optimistic. I hope and believe that disparate impact will remain viable and that *Griggs*'s early life offers lessons to capitalize further on the doctrine today. Of course, it is possible that *Griggs* may not be at midlife; it may be on its deathbed. If this turns out to be the case, Robert Belton's book nonetheless deserves attention: it will serve as an eloquent eulogy for a foundational case that expanded employment opportunity in this country and that continues to be a model around the world.

#### I. DISPARATE IMPACT'S EARLY YEARS: RACE DISCRIMINATION

Belton characterizes the story as an “insider's, first-person, behind-the-scenes history of the litigation campaign that led to *Griggs* and much of its progeny” (p. 6). We are lucky to have it. Belton brings readers into the heady days of first litigating under Title VII, a time when leading public interest organizations, private lawyers, government agencies, academics, and judges were all grappling with what “discrimination” would mean under the new law. Belton has a rich trove of sources for his story, including LDF case files and documents that are not yet open to the public; interviews with key participants; papers of some of the judges and Supreme Court justices who participated in the major cases in the story; and, of course, his own memories (pp. 10–11). The manuscript was largely completed prior to Belton's death in 2012. It was finalized for publication by Stephen Wasby, a respected political scientist with an expertise in the civil rights movement and the federal courts (pp. x–xi). The book is well indexed; readers interested in particular civil rights advocates or particular cases during these pivotal years will easily be able to identify their role in the story.

Belton provides context for and texture to the factual allegations recited in the Supreme Court decision in *Griggs*. Students and scholars of employment discrimination law know that, prior to the enactment of Title VII, Duke Power relegated black workers to the least desirable class of jobs in the Dan River power plant (pp. 108–09). The company then used facially neutral rules to freeze these racially discriminatory policies in place; only employees who had graduated from high school or who could pass a standardized intelligence test were permitted to transfer to jobs inside the plant.<sup>17</sup> Belton reminds us that the test requirement was implemented on the day Title VII became effective. We also learn that, notwithstanding the new law, the plant maintained racially segregated locker rooms, showers, drinking fountains, and toilets (p. 109). White employees had facilities inside the power plant's main building; the black employees' facilities were in a separate “crowded, filthy” building at the base of the coal stockpile (p. 109).

---

17. Belton includes some sample questions from the test—for example, “Does B.C. mean ‘before Christ?’”—that vividly illustrate their irrelevance to work at the plant. P. 353 n.45.

In March 1966, all fourteen of the African Americans employed at the plant filed complaints with the Equal Employment Opportunity Commission (“EEOC”) (p. 116). Thirteen of them joined the court case that followed (p. 123).<sup>18</sup> Belton rightly celebrates the courage these “unsung heroes” displayed in their willingness to challenge their employer, particularly since several of them had worked at the facility since it opened in 1949 (pp. 9, 108). The employees collectively decided that Willie Griggs should be named the lead plaintiff because he was the youngest and thus had “the least to lose” if Duke Power retaliated (pp. 123–24). But this is not to say that he had nothing to lose. Griggs, age 32, was married and a father of four.

Belton offers compelling vignettes of the large team of LDF attorneys and collaborating attorneys, testing experts, and federal judges who played key roles in the unfolding story. Many of these vignettes, including Belton’s own experiences growing up in the Jim Crow South (pp. 39–40), provide vivid reminders of the pervasive racism that the Civil Rights Act of 1964 was enacted to address. Although (as discussed *infra* Part II) the narrative does not address the development of disparate impact doctrine in sex discrimination cases, Belton highlights several pioneering women who were lawyers or experts in *Griggs* and other early race discrimination cases.<sup>19</sup>

The snapshots of lawyers and litigants include many arresting details, but the narrative thrust of the book is not the story of the participants—it is the story of the litigation campaign itself. Belton contrasts LDF’s efforts to implement Title VII with its earlier (although then still ongoing) litigation campaign against educational segregation. In the years leading up to and then implementing *Brown v. Board of Education*,<sup>20</sup> LDF painstakingly orchestrated the order in which issues were presented to the courts. But Title VII created a statutory right and a federal agency charged with investigating complaints and providing guidance under the new law. The U.S. Department of Justice and later the EEOC had their own litigation priorities. So did the thousands of employees across the country who filed complaints of discrimination. There was no way LDF could control the campaign with the same discipline it had displayed in the school desegregation context. Instead, as Belton explains, the organization simply tried to act nimbly to present issues in the order and manner it believed would be most effective.

Belton was an expert in Title VII’s procedural and remedial provisions, and the book highlights how early victories on these nonsubstantive fronts dramatically increased the law’s potential for effectuating real change. Contemporary readers may be interested in—and disheartened by—the extent

---

18. The one black employee who did not join the lawsuit had been promoted to a previously all-white job category during the period that the EEOC was investigating the plant. P. 123.

19. See, e.g., pp. 41–42 (discussing Gabrielle Kirk McDonald, who was part of the “core of the LDF’s employment discrimination litigation team” in its early years); pp. 103–04 (discussing Phyllis A. Wallace, who served as chief of technical studies for the EEOC when it developed its first guidelines on testing procedures).

20. 347 U.S. 483 (1954).

to which these early procedural questions continue to reverberate. For example, Belton discusses how employers sought to challenge the adequacy of the EEOC conciliation efforts as a defense to later actions (p. 59); although it remains settled that private parties can proceed to litigation without assessing prior conciliation efforts, this kind of claim has recently been resurrected, and it has gained significant traction as a defense to actions brought by the EEOC itself.<sup>21</sup> Similarly, Belton recounts LDF's efforts to establish that employment discrimination claims may be litigated as class actions (pp. 60–68); this is another doctrine that is once again under pressure.<sup>22</sup> But the plaintiff perspective on one key procedural issue has flipped. Belton explains that, in the early years, he and other LDF attorneys felt that it was absolutely crucial that Title VII claims be tried before judges rather than juries; they assumed, probably correctly, that Southern juries would be hostile to employment discrimination claims (pp. 68–72). Accordingly, they did not even ask for back pay in early cases (including *Griggs*), and they later assiduously sought to characterize such awards as equitable (pp. 68–72). Today, by contrast, plaintiffs' attorneys generally perceive juries as relatively sympathetic to employees in employment discrimination cases, and one of the reforms that civil rights groups sought in the 1991 Act was the right to a jury trial and the economic damages that go with it.<sup>23</sup>

Belton brings readers inside the LDF team's trial preparation for *Griggs*. None of the plaintiffs testified, but each side presented an expert to assess the extent to which the tests and the high-school degree requirement measured job-relevant skills. Additionally, Duke Power's vice president of Production and Operations testified; on cross-examination, he made the key admission that employees without a high-school diploma were able to perform the inside jobs and that he “[did not] think there is anything magic about a High School education” (p. 131).

There was little statistical evidence proffered. Belton explains that “[s]trong evidence as to the adverse impact of the test battery on [blacks] . . . was simply not available because only three employees—one white and two blacks—had opted to take the tests, and none had passed” (p. 129). Ultimately, the Supreme Court inferred the disparate impact by taking judicial notice of statewide graduation rates and prior EEOC decisions regarding racial disparities on the intelligence tests.<sup>24</sup> Interestingly, the high-school data compared the graduation rates of black males to those of white males; this fact was not mentioned as significant in any respect. As discussed *infra* Parts II and III, an intersectional approach to disparate impact has never been developed, although current cases concerning criminal record checks

---

21. See *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 182–84 (7th Cir. 2013) (detailing a circuit split regarding whether such claims are cognizable), *cert. granted*, 134 S. Ct. 2872 (2014).

22. See, e.g., *Walmart v. Dukes*, 131 S. Ct. 2541 (2011).

23. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072–74 (1991).

24. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971).



may call for such an approach. More generally, the Court's ready use of statewide data rather than employment-specific data stands in sharp contrast to the requirements placed on plaintiffs in modern disparate impact litigation.

Belton discusses in detail the decisions in the lower courts—a loss in the district court<sup>25</sup> and a partial victory at the U.S. Court of Appeals for the Fourth Circuit.<sup>26</sup> Leading up to the decision in the Fourth Circuit, opinion drafts were circulated among all of the circuit's judges, not merely among members of the panel. Belton quotes extensively from memoranda documenting an internal debate as to the appropriate framework for assessing the claims; he states that a majority of the full circuit supported the position that Judge Sobeloff adopted in his partial dissent, which foreshadowed the Supreme Court's favorable treatment of disparate impact (pp. 151–57). We also learn that the LDF lawyers were divided on whether to petition for certiorari and that their key academic adviser, as well as their allies in the Justice Department and the EEOC, opposed seeking review (pp. 162–65). Nonetheless, LDF took its chances and won a significant victory. Belton discusses LDF's briefing strategy in the Supreme Court; important amicus briefs; pivotal moments in the oral argument; the justices' positions at conference, as gleaned from the notes of Justices Douglas and Blackmun; and revisions that were made to Chief Justice Burger's first draft of the opinion (pp. 162–87).

While the book is illuminating in its detail, some readers might crave a little more critical assessment of these strategic choices, most centrally the decision to position intentional discrimination only as a “fallback” argument (p. 170). Certainly, there is reason to believe that the company adopted the intelligence tests knowing full well the racial impact they would have. The suspicious timing, and the fact that the company maintained segregated locker rooms and restrooms even after Title VII went into effect, could have bolstered a case for intentional discrimination. Although the Supreme Court ultimately accepted the lower courts' determination that Duke Power had not “intentionally” discriminated,<sup>27</sup> Selmi and others argue that the Court might have concluded differently if the plaintiffs had framed the company's conduct as intentionally exclusionary.<sup>28</sup> Belton's discussion of the briefing strategy, however, does not substantively engage with this critique (p. 170). He merely mentions earlier in the narrative that the members of the litigation team found it “ironic” that the tests were put into place on the day Title VII went into effect (p. 111).

The latter half of the book shows how LDF capitalized on its win in *Griggs*. Belton provides an extensive discussion of *Albemarle Paper Co. v.*

---

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

26. *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970).

27. *Griggs*, 401 U.S. at 428, 432.

28. See, e.g., Selmi, *supra* note 12, at 757–58.

*Moody*<sup>29</sup> and *Franks v. Bowman Transportation, Inc.*,<sup>30</sup> which further developed the standard that would be used to assess employers' justifications for practices that cause a disparate impact and established Title VII's "make whole" approach to remedies (ch. 11). Belton provides less detail regarding the doctrine's development after the 1970s, but he ably summarizes how *Griggs* interacted with the affirmative action debates of the 1980s (ch. 12) and describes the watering down of the disparate impact doctrine in *Watson*<sup>31</sup> and *Wards Cove*<sup>32</sup> (ch. 13). Belton then discusses the "resurrection" of disparate impact as part of the 1991 Civil Rights Act (ch. 14). Pulling language from *Griggs* and *Moody*, the law requires employers to demonstrate that any specific employment practice that causes a disparate impact is job related and a business necessity, and the law further states that plaintiffs may prevail by identifying a less discriminatory alternative.<sup>33</sup> Although Congress failed to delineate precisely what these terms mean, the 1991 Act clearly endorses disparate impact doctrine as an important mechanism for addressing employment discrimination, and Belton rightly celebrates it.

An epilogue maps out *Griggs*'s ongoing significance at the micro level—what happened to the employees who brought the suit—and at the macro level—the key role that *Griggs* has played in theoretical understandings of discrimination under other federal statutes, state employment discrimination statutes, and the development of employment discrimination doctrine around the world.<sup>34</sup> These effects continue to be significant. After the book went to press, the U.S. Department of Housing and Urban Development issued new regulations endorsing the doctrine as applicable under the Fair Housing Act (as noted above, as this Review was being finalized for publication, the Supreme Court granted certiorari on a case challenging the regulations).<sup>35</sup> Nonetheless, in the employment discrimination context, disparate impact has enjoyed relatively few courtroom successes since 1991—and, as the next Part makes clear, its impact even prior to 1991 was somewhat more muted than Belton's story suggests.

## II. DISPARATE IMPACT'S EARLY YEARS: SEX DISCRIMINATION

There were, unsurprisingly, no women among the plaintiffs in *Griggs* (p. 107); Belton does not address the extent to which this fact suggests that sex

---

29. 422 U.S. 405 (1975).

30. 424 U.S. 747 (1976).

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

32. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, § 105, 105 Stat. 1071, 1071, 1074–75 (1991).

33. 42 U.S.C. § 2000e-2(k)(1) (2012).

34. For a recent assessment of *Griggs*'s influence on the development of European antidiscrimination law, see Julie C. Suk, *Disparate Impact Abroad*, in *A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT FIFTY* (Samuel R. Bagenstos & Ellen D. Katz eds., forthcoming 2014), available at <http://ssrn.com/abstract=2408143>.

35. 24 C.F.R. § 100.500 (2014); see also *supra* note 10.

discrimination—as well as race discrimination—was at work. More generally, the book’s conclusions are somewhat distorted by its exclusive focus on race discrimination cases. Broadening the lens to consider the contemporaneous development of the doctrine in sex discrimination cases offers a more nuanced assessment of disparate impact’s achievements, even in the early years on which Belton focuses.<sup>36</sup>

Sex discrimination cases pose some questions that are distinct from those implicated in race discrimination cases. In part, this is because Title VII categorically prohibits discrimination on the basis of race, but it provides a statutory defense for discrimination on the basis of sex if an employer can prove that sex was a “bona fide occupational qualification” (“BFOQ”) for the position in question.<sup>37</sup> Additionally, the EEOC and the courts had to grapple with the extent to which Title VII required employers to respond to, or permitted employers to consider, the physical differences between men and women and the gendered expectations of family roles.<sup>38</sup> These questions intersected with disparate impact doctrine in ways that Belton fails to consider but that help explain the doctrine’s ultimate reach.

The very first Title VII case that the Supreme Court decided—the term before it decided *Griggs*—foreshadowed the complicated interplay between these issues, although the short per curiam opinion that the Court issued in the case, *Phillips v. Martin Marietta Corp.*,<sup>39</sup> obscures this interplay. Ida Phillips applied for a job as an assembly trainee but was denied the position because Martin Marietta refused to hire women with preschool-age children. Phillips contended that this refusal constituted sex discrimination since the company hired *men* with preschool-age children; the company defended its actions on the grounds that it did not generally discriminate against women, only women with young children. The Supreme Court held that summary judgment for the employer was inappropriate and remanded for further

---

36. My analysis focuses on the importance of considering sex as well as race (also sometimes litigated as discrimination on the basis of color) because the Supreme Court has analyzed the doctrine in those two contexts far more often than in other contexts. This is not surprising since sex and race are, and have long been, by far the most common bases of Title VII claims. Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1335 (2012) (noting that one-third of the claims the EEOC received in its first year were related to sex discrimination); *Charge Statistics FY 1997 Through FY 2013*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 25, 2014) (showing race and sex claims to be far more common than other claims besides retaliation); *Charge Statistics FY 1992 Through FY 1996*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm> (last visited Sept. 25, 2014) (same). That said, it is important to recognize that disparate impact doctrine, as well as the “bona fide occupational qualification” defense, also applies to national-origin and religion claims. Disparate impact has played a significant role in challenging English-only policies. See *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); 29 C.F.R. § 1606.7(a)–(b) (2013). It has been less utilized in the religion context because of a separate statutory obligation to make reasonable accommodations. 42 U.S.C. § 2000e(j).

37. 42 U.S.C. § 2000e-2(e).

38. For a detailed account of Title VII’s early sex discrimination doctrine, see Franklin, *supra* note 36.

39. 400 U.S. 542 (1971) (per curiam).

consideration.<sup>40</sup> The Court did suggest, however, that the policy might be justified as a BFOQ, which spurred Justice Marshall to issue a strongly worded concurrence warning that the exception should not be allowed to “swallow the rule” by permitting ongoing reliance on the (presumed) “proper role for women” to justify discrimination.<sup>41</sup>

*Phillips* was not a disparate impact case. Rather, the case was the genesis of the doctrine that came to be known as *sex-plus*. Indeed, since the company openly differentiated between employees with young children on the basis of sex, the case appears to be the antithesis of a typical disparate impact case. But if the company had simply framed its policy as a refusal to hire primary caregivers of young children—that is, no longer making explicit the stereotyped assumption that undergirded the company’s actual policy—it would immediately become a disparate impact case, in which a facially neutral policy has a disproportionate effect on the basis of sex. And, in this respect, Justice Marshall’s concerns regarding the malleability of the BFOQ were prescient, not only in the context of the BFOQ defense itself but also in the related analysis employed in the “business-necessity” defense announced the following year in *Griggs*. In general, sex-based disparate impact claims have been a successful tool for challenging discrete employer requirements such as height or weight restrictions, but courts have not required employers to restructure workplace norms that fail to respond adequately to caregiving responsibilities or to the physical aspects of pregnancy.

As I discuss elsewhere, immediately after Title VII was enacted, the EEOC, courts, and advocates struggled to determine whether and how Title VII’s prohibition on discrimination on the basis of “sex” applied to pregnancy.<sup>42</sup> By 1972, however, the EEOC promulgated guidelines stating that pregnancy discrimination would generally be considered a form of sex discrimination.<sup>43</sup> The guidelines also incorporated disparate impact, providing that terminating “temporarily disabled” employees pursuant to a policy that affords insufficient or no employment leave for health conditions violates the statute if the policy “has a disparate impact on employees of one sex and is not justified by business necessity.”<sup>44</sup> In the years immediately after the guidelines were released, lower courts generally accepted the EEOC’s reasoning.<sup>45</sup>

---

40. *Phillips*, 400 U.S. at 544.

41. *Id.* at 545 (Marshall, J., concurring).

42. See Deborah A. Widiss, Gilbert Redux: *The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 979–84 (2013).

43. See Guidelines on Discrimination Because of Sex, 37 Fed. Reg. 6835, 6837 (Apr. 5, 1972) (codified at 29 C.F.R. § 1604.10(a)–(b)); see also Widiss, *supra* note 42, at 989–91 (discussing the EEOC’s guidance).

44. Guidelines on Discrimination Because of Sex, 37 Fed. Reg. at 6837.

45. See Widiss, *supra* note 42, at 991 n.129 (collecting cases).

In 1976, however, the Supreme Court disagreed. *General Electric Co. v. Gilbert*<sup>46</sup> was a challenge to a company's disability policy that covered most health conditions but excluded coverage for pregnancy. The Court first relied on a prior constitutional decision to hold that the pregnancy exclusion did not automatically qualify as sex discrimination.<sup>47</sup> Then it considered whether the employees could succeed on a disparate impact claim. Professor Mayeri documents that Justices Powell and Stewart initially considered *Griggs* as persuasive or controlling.<sup>48</sup> Ultimately, however, they both joined Justice Rehnquist's majority opinion rejecting the disparate impact claim and holding that, because there was "no *proof* that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect."<sup>49</sup> Justice Brennan (joined by Justice Marshall) dissented, arguing that the Court should defer to the EEOC's reasonable conclusion that the plan had discriminatory effects.<sup>50</sup>

Underneath the formalistic disagreement as to the sufficiency of the proof, the justices were carrying on an argument *sotto voce* regarding the viability of disparate impact under Title VII more generally. The timing is significant here. Just six months earlier, the Court had held in *Washington v. Davis* that disparate impact claims are not cognizable under the Equal Protection Clause.<sup>51</sup> *Gilbert* was the Court's first opportunity to consider *Washington v. Davis*'s significance to Title VII analysis. Justice Rehnquist's first draft of the majority decision in *Gilbert* was read by some as effectively overruling *Griggs*; Justice Powell responded by suggesting several changes that were adopted to shore up *Griggs*.<sup>52</sup> To the extent that the majority opinion remained unclear,<sup>53</sup> Justices Stewart and Blackmun each filed brief concurrences that affirmed that *Griggs* remained good law,<sup>54</sup> as did the dissents filed by Justices Brennan, Marshall, and Stevens.<sup>55</sup>

---

46. 429 U.S. 125, 127–28 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, *as recognized in* *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 89 (1983).

47. *Gilbert*, 429 U.S. at 133–37 (citing *Geduldig v. Aiello*, 417 U.S. 484, 494, 496–97 (1974)).

48. See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 111 (2011).

49. *Gilbert*, 429 U.S. at 138 (emphasis added).

50. *Id.* at 155–56 (Brennan, J., dissenting).

51. 426 U.S. 229, 242 (1976).

52. MAYERI, *supra* note 48, at 113–14.

53. See *Gilbert*, 429 U.S. at 137 (suggesting that a showing of intent might be required at least to proceed under section 703(a)(1) of Title VII).

54. *Id.* at 146 (Stewart, J., concurring); *id.* (Blackmun, J., concurring).

55. *Id.* at 153, 154–55 (Brennan, J., dissenting) (emphasizing that prior decisions of the Supreme Court and "every Court of Appeals now have firmly settled that a *prima facie* violation of Title VII . . . is established by demonstrating that a facially neutral classification has the effect of discriminating against members of a defined class" and criticizing the majority opinion's "unexplained and inexplicable implications to the contrary" (footnote omitted)); *id.* at 161 (Stevens, J., dissenting) (citing *Griggs* favorably).

The following year, the Court again grappled with a sex discrimination case that could have diminished disparate impact's viability generally. In *Dothard v. Rawlinson*, Dianne Rawlinson challenged Alabama regulations that set minimum height and weight requirements for prison guards; the regulations also precluded women from guarding men in maximum-security prisons and men from guarding women in the (lone) maximum-security prison housing female inmates.<sup>56</sup> Alabama sought to make the case a broader referendum on the meaning of *Griggs*. In its brief, the state cited *Gilbert*, and the evidence referenced in *Griggs* that Duke Power had overtly discriminated on the basis of race, to suggest that the plaintiff would have to show a disproportionate effect *and* a "past history of overt sexual discrimination."<sup>57</sup> The state also contended that Rawlinson's reliance on national statistics to demonstrate the height and weight regulations' disparate impact was insufficient because the statistical averages did not necessarily represent actual "applicants."<sup>58</sup>

Again, the Court rejected these broader attacks on disparate impact. Without mentioning *Gilbert*, the Court reaffirmed that disparate effects alone were sufficient to state a prima facie case of disparate impact.<sup>59</sup> It then baldly stated that there was "no requirement . . . that a statistical showing of disproportionate impact must always be based on the characteristics of actual applicants," noting, reasonably, that individuals who could not meet the height or weight requirements might not bother to apply.<sup>60</sup> The Court went on to hold that, because Alabama had failed to show that the requirements correlated with the strength required to do the job, these requirements could not satisfy the job-related and business-necessity test.<sup>61</sup> But three justices filed a concurrence simply to highlight the grounds on which general population statistics could be challenged in the future and to emphasize that employers might be able to prove that height and weight requirements are an adequate proxy for strength.<sup>62</sup> Moreover, the majority held (over a passionate dissent by Justices Marshall and Brennan) that the sex-matching requirements could be justified under the BFOQ defense, on the ground that sex offenders and other prisoners might be especially likely to assault female guards.<sup>63</sup>

*Gilbert* and *Dothard* together preserved the possibility of disparate impact claims on the basis of sex and the formal framework as enunciated in *Griggs*, but they circumscribed the extent to which the doctrine could be used to make workplaces more welcoming to women. Although later courts

---

56. 433 U.S. 321, 324–25 (1977).

57. Brief of Appellants at 39–40, *Dothard v. Rawlinson*, 453 U.S. 321 (1977) (No. 76-422).

58. *Id.* at 41.

59. *Dothard*, 433 U.S. at 329.

60. *Id.* at 330.

61. *Id.* at 331.

62. *Id.* at 337–40 (Rehnquist, J., concurring).

63. *Id.* at 335–37 (majority opinion).

have rejected claims that being male is a BFOQ for guarding men,<sup>64</sup> they are often quite deferential to strength or endurance tests that also tend to disadvantage women.<sup>65</sup> Moreover, even though a 1977 Supreme Court case held that a policy that stripped seniority from women on maternity leave was illegal under a disparate impact theory,<sup>66</sup> and even though Congress overrode *Gilbert* in 1978,<sup>67</sup> courts have generally remained hostile to disparate impact claims based on pregnancy.<sup>68</sup> Similarly, despite a few exceptions, efforts to use the doctrine to challenge policies that disadvantage part-time workers or that fail to accommodate caregiving responsibilities have generally foundered; courts typically conclude either that there is insufficient statistical evidence of a particular practice's disparate impact or that workplace time norms are justified as a business necessity.<sup>69</sup> (In Europe, however, where *Griggs* helped shape the emergence of what is known as *indirect discrimination*, claims concerning part-time workers have been far more successful.<sup>70</sup>) And, as discussed more fully below, the Court's questioning in these early sex cases regarding the appropriateness of relying on national or regional statistics, as opposed to data from an employer's own policies, has since borne fruit.

The discussion so far has analyzed these cases simply as sex discrimination cases. But in fact, as Mayeri's research makes clear, issues of race and sex intersect throughout this doctrine, although they often do so under the surface.<sup>71</sup> For example, consider once more *Phillips*, the Supreme Court's very first Title VII case. Ida Phillips was white, but she was represented in the case by LDF. Her Supreme Court brief emphasized the extent to which the employer's refusal to hire women with young children had a significant "adverse impact" on black mothers because they were more likely to be working than white mothers.<sup>72</sup> "Black women," the brief argued, "suffering under the double discrimination of race and sex are the most oppressed

---

64. See, e.g., Suzanne Wilhelm, *Perpetuating Stereotypical Views of Women: The Bona Fide Occupational Qualification Defense in Gender Discrimination under Title VII*, 28 WOMEN'S RTS. L. REP. 73, 85–90 (2007) (gathering cases and noting that courts *do* accept arguments that being female is a BFOQ for guarding women).

65. See, e.g., *Lanning v. Se. Pa. Transp. Auth.*, 308 F.3d 286 (3d Cir. 2002).

66. *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

67. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)).

68. See, e.g., Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 41–49 (2009) (gathering and critiquing cases); Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 32–35 (2007) (similar).

69. See, e.g., Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1144–52 (gathering and critiquing cases); O'Leary, *supra* note 68, at 35–38 (similar).

70. See Suk, *supra* note 34 (manuscript at 8–12).

71. See generally MAYERI, *supra* note 48.

72. Brief for Petitioner at 13, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (No. 73).

group of workers in the society.<sup>73</sup> The Supreme Court's decision, however, did not explore whether there could be racial dimensions to the policy, and subsequent decisions have evinced a similar discomfort with considering what became known as *intersectional claims*.<sup>74</sup>

If both sex and race claims are raised in a disparate impact case but they address policies that are wholly separate and distinct, the analysis is straightforward. For example, in an early class action initiated by Elizabeth Smith, an African American woman, against the East Cleveland police department, the court held that the department's height and weight requirements unlawfully discriminated on the basis of sex, and the court separately concluded that the department's written entrance exam unlawfully discriminated on the basis of race.<sup>75</sup> When the claims are more integrated, however, it is less clear how the disparate impact analysis should proceed. The leading case typically cited as rejecting intersectional analysis was a disparate impact case (also litigated by LDF in the mid-1970s) that challenged a seniority system, alleging that black women were uniquely disadvantaged by the employer's use of hiring practices, prior to the effective date of Title VII, that discriminated on the basis of both race *and* sex.<sup>76</sup> Although the claims of race and sex discrimination were joined, the court insisted on analyzing the sex claim as totally distinct from the race claim rather than creating a "new 'super remedy.'"<sup>77</sup> While later cases have occasionally recognized the possibility of bringing intersectional disparate *treatment* claims,<sup>78</sup> intersectional disparate *impact* doctrine has been very little developed.<sup>79</sup>

---

73. *Id.*; see also MAYERI, *supra* note 48, at 51–56 (discussing this case).

74. Professor Crenshaw is generally credited with articulating the theoretical frame we now call intersectionality. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

75. *Smith v. City of E. Cleveland*, 363 F. Supp. 1131, 1144, 1149 (N.D. Ohio 1973), *aff'd in part, rev'd in part sub nom. Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975); MAYERI, *supra* note 48, at 106 (discussing this case). Because the facts in the case predated Title VII's applicability to municipal employers, the plaintiffs brought claims under the Equal Protection Clause and § 1983.

76. *DeGraffenreid v. Gen. Motors Assembly Div.*, St. Louis, 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480, 483 (8th Cir. 1977).

77. *Id.* at 143.

78. The leading case is *Jeffries v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1032–33 (5th Cir. 1980). See also *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987). See generally Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991 (2011).

79. An intersectional disparate impact claim was brought in *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987), a challenge to a club with a "role-model" rule that required firing employees who became pregnant while unmarried. The court accepted the intersectional claim without any substantive analysis but then found that the rule was justified as a business necessity.



This is unfortunate. As *Phillips* suggested, failure by employers to accommodate pregnancy and caregiving responsibilities disproportionately affects women of color. Black and Latino women are more likely to work in service or other low-wage jobs that are often particularly hostile to providing accommodations for pregnancy or giving time off for maternity leave or family obligations.<sup>80</sup> They are more likely than white women to be raising children as single mothers, and thus they are more likely to need flexibility to accommodate unexpected caregiving needs.<sup>81</sup> And black and Latino women are less likely than white women to be covered under the Family and Medical Leave Act, because they are disproportionately unlikely to meet the statute's prerequisites of having worked for a current employer for at least a year and for at least 1,250 hours.<sup>82</sup>

It seems doubtful that courts will suddenly change course and begin holding that disparate impact analysis requires employers to modify workplace structures to accommodate pregnancy and caregiving responsibilities. Rather than pushing disparate impact theory, advocates have advanced arguments under the amended Americans with Disabilities Act ("ADA"),<sup>83</sup> the Pregnancy Discrimination Act ("PDA"),<sup>84</sup> and Title VII disparate treatment

---

80. See generally STEPHANIE BORNSTEIN, CTR. FOR WORKLIFE LAW, POOR, PREGNANT, AND FIRED: CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS (2011), available at <http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf>; REBECCA THIESS, ECON. POLICY INST., BRIEFING PAPER NO. 341, THE FUTURE OF WORK: TRENDS AND CHALLENGES FOR LOW-WAGE WORKERS 4 (2012), available at <http://s2.epi.org/files/2012/bp341-future-of-work.pdf> (indicating that low-wage workers are disproportionately female and disproportionately minority).

81. *Children in Single-Parent Families by Race*, KIDS COUNT DATA CTR., <http://datacenter.kidscount.org/data/tables/107-children-in-single-parent-families-by#detailed/1/any/false/868,867,133,38,35/10,168,9,12,1,13,185/432,431> (last updated Feb. 2014).

82. See, e.g., O'Leary, *supra* note 68, at 41–45.

83. See, e.g., U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE NO. 915.003, PREGNANCY DISCRIMINATION AND RELATED ISSUES (2014), available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm) (discussing when the ADA would require workplace accommodations for pregnancy); Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodations After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97 (2013) (discussing claims for pregnancy accommodations under the amended ADA).

84. See, e.g., U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 83 (interpreting the PDA as often requiring workplace accommodations for pregnancy); Widiss, *supra* note 42 (arguing that the PDA generally requires that pregnant employees receive the same level of accommodations that employees with disabilities or workplace injuries receive). As this Review was being finalized for publication, the Supreme Court was considering a case regarding the extent to which the PDA requires workplace accommodations. See *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013), cert. granted, 134 S. Ct. 2898 (2014). An amicus brief filed in the case highlights the particular salience of the issue for black women. See Brief of Amicus Curiae Black Women's Health Imperative, Joined by Other Black Women's Health Organizations, in Support of Petitioner, *Young v. United Parcel Serv., Inc.*, 134 S. Ct. 2898 (2014) (No. 12-1226).

stereotyping claims,<sup>85</sup> as well as lobbied for new legislation,<sup>86</sup> that support pregnant women and working parents. There have been promising developments on all of these fronts in recent years. One can wonder, however, whether the disparate impact doctrine would have developed more favorably if courts had considered the racial as well as the gendered aspect of the discrimination at issue. As discussed below, the failure to develop a robust understanding of intersectional disparate impact analysis may also have ramifications for the current challenges against criminal background screens, which tend to disproportionately exclude black and Latino men.

### III. DISPARATE IMPACT TODAY: CRIMINAL BACKGROUND SCREENING

In an influential article published in 2006, Professor Selmi asked whether disparate impact had been a mistake.<sup>87</sup> He reviewed the basic contours of the history that Belton discusses, as well as the early sex discrimination cases, and concluded that disparate impact has enjoyed little success outside the testing context in which it was born.<sup>88</sup> Selmi suggested that courts were reluctant to require businesses to modify workplace practices more generally because disparate impact was divorced from “blameworthy” discrimination.<sup>89</sup> And finally, he argued that, without disparate impact, litigants and courts might have developed a more robust understanding of “intentional” discrimination, one that could have been a successful vehicle for challenging subtle or systemic discrimination.<sup>90</sup> Selmi’s critique is important, and it deserves—and has received—considerable debate and discussion.

But mistake or not, disparate impact *did* happen. And although the doctrine was rather moribund when Selmi published his article, it has recently regained some prominence, most notably as a mechanism for challenging the widespread and relatively indiscriminate use of criminal background checks in employment. Moreover, it is unlikely that even a more capacious understanding of intentional discrimination would reach employers’ use of

---

85. See, e.g., *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009) (reversing summary judgment granted to employer who had denied a promotion to a mother of triplets based on the assumption that she would prioritize caregiving responsibilities over her paid job).

86. See, e.g., *Pregnant Workers Fairness Act*, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/issues/fairness/pregnant-workers-fairness-act.html> (last visited Sept. 25, 2014) (collecting resources regarding state and proposed federal legislation mandating employer accommodations for pregnancy); *Paid Leave*, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/issues/work-family/paid-leave.html> (last visited Sept. 25, 2014) (collecting resources regarding state and proposed federal legislation providing paid family and medical leave); *SUPPORT PAID SICK DAYS*, <http://paysickdays.org> (last visited Sept. 25, 2014) (collecting resources regarding state and proposed federal legislation on paid sick days, including paid days to take care of family members who are sick).

87. Selmi, *supra* note 12.

88. *Id.* at 734–53.

89. *Id.* at 773–75.

90. *Id.* at 776–82.

criminal background checks, particularly for employers who maintain relatively high levels of minority employment.<sup>91</sup> Cases regarding criminal background screens thus isolate the essence of disparate impact as a vehicle to challenge a facially neutral policy that is implemented without any “intent” to discriminate but that disproportionately excludes black or Latino applicants. My objective here is not to offer a comprehensive discussion of the many complicated questions raised by the use of background checks (for example, there is some evidence that they actually *increase* absolute levels of minority employment by letting employers “disprove” stereotyped assumptions that all black males are likely ex-offenders<sup>92</sup>), nor do I provide a full assessment of the EEOC’s response to this practice.<sup>93</sup> I also do not take a position on Selmi’s underlying question of whether disparate impact was a mistake. I simply hope to show how the strengths and limitations that are revealed by disparate impact’s early history continue to reverberate and to suggest some potential avenues for building on the doctrine’s early success.

The backdrop for this story is the dramatic expansion of the criminal-justice system over the past several decades. An estimated sixty-five million U.S. adults, more than 25% of the adult population, have at least an arrest on their record.<sup>94</sup> (Although many individuals who are arrested are never convicted of a crime, arrests generally show up on criminal background checks.<sup>95</sup>) There is a significant racial and gender skew in arrests; for example, African Americans account for about 28% of all arrests, even though they make up only 14% of the U.S. population,<sup>96</sup> and nearly 74% of all

---

91. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978) (recognizing that the racial makeup of a workforce may be evidence of the absence of intentional discrimination).

92. E.g., Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006). As a matter of doctrine, this is insufficient to defeat a disparate impact claim, see *Connecticut v. Teal*, 457 U.S. 440 (1982), but it is relevant to policy arguments over the use of screens.

93. For a recent report collecting divergent views (albeit with an editorial slant against the EEOC’s guidance), see U.S. COMM’N ON CIVIL RIGHTS, *ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S CONVICTION RECORDS POLICY* (2013). See also Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers’ Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197 (2014) (providing a generally positive assessment).

94. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 & 27 n.2 (2011), available at [http://www.nelp.org/page/-/SCLP/2011/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf); see also OFFICE OF THE ATTORNEY GEN., U.S. DEP’T OF JUSTICE, *THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS* 51 (2006), available at [http://www.bjs.gov/content/pub/pdf/ag\\_bgchecks\\_report.pdf](http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf) (estimating that 30% of the adult population has a state rap sheet).

95. Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 NAT’L INST. JUST. J. 42, 43 (2012), available at <http://www.ncjrs.gov/pdffiles1/nij/238488.pdf>.

96. *Id.* at 44; *Crime in the United States 2012: Table 43*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/43/taledatadecoverviewpdf> (last visited Sept. 25, 2014).

arrests are of men.<sup>97</sup> The United States also has the highest incarceration rate in the world, with approximately one in every 100 adults incarcerated at any given time.<sup>98</sup> Like arrest rates, incarceration rates vary dramatically by race and by sex. Black men are imprisoned at about six times the rate of white men, and Hispanic men at about three times the rate of white men.<sup>99</sup> Women in general are far less likely than men to be imprisoned, and although women of color are more likely to be imprisoned than white women, the racial divergence is less pronounced.<sup>100</sup> Research suggests that, although black men may commit certain crimes at higher rates than members of other racial groups, the biases of police, judges, prosecutors, jurors, and defense counsel also significantly contribute to the different rates of arrests, convictions, and incarcerations.<sup>101</sup>

The cumulative upshot of these disparities is stark: in 2001, nearly 17% of adult black males had been incarcerated;<sup>102</sup> by contrast, in that same year, only 2.6% of adult white men had spent time in prison, and only 0.3% of white women had.<sup>103</sup> If current trends continue, one in every three black male babies born today will spend time in jail.<sup>104</sup> Professor Alexander has provocatively argued that mass incarceration represents a new Jim Crow regime, in that it enforces a racial caste system, albeit using a “colorblind,” race-neutral rhetoric.<sup>105</sup> Whether or not one agrees with her claims or with the imputation of racially discriminatory intent undergirding the system, it is clear that the criminal-justice system reaches deep into society and that

---

97. See *Crime in the United States 2012: Table 33*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/33table-datadeoverviewpdf> (last visited Sept. 25, 2014).

98. PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 3 (2008), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/onein100pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf). Given significant budget shortfalls and mounting criticism, incarceration rates have declined somewhat since 2008, but they remain quite high. Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 25, 2013, at A11, available at <http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html>.

99. See E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, NCJ 239808, *PRISONERS IN 2011*, at 8 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

100. See *id.*

101. THE SENTENCING PROJECT, *REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 3–16* (2013), available at [http://sentencingproject.org/doc/publications/rd\\_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf](http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf).

102. THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, NCJ 197976, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001*, at 5 (2003).

103. *Id.*

104. See *id.* at 8. Although the Bonczar report is now more than ten years old, recent publications continue to project that one in three African American males will go to prison. See, e.g., Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. (ISSUE 3 SUPP.) 87S, 88S (2011).

105. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012).

black and Latino men disproportionately feel its effects.<sup>106</sup> This reality profoundly impacts employment because employers now commonly use criminal background screens as an element in hiring.<sup>107</sup> A recent survey found that almost 90% of employers run background checks for at least some positions, with 69% screening *all* prospective employees.<sup>108</sup> Additionally, many employers ask applicants to disclose on application forms whether they have been convicted of a crime.<sup>109</sup>

A patchwork of laws mitigates to some extent the exclusionary effects that would otherwise result from the use of background screens. A number of states and localities have enacted “ban-the-box” measures that preclude at least public employers from asking about criminal records on application forms; most of these statutes permit employers to make such inquiries only after applicants have advanced to a later stage in the screening process.<sup>110</sup> Some state laws explicitly limit the extent to which employers may make decisions based on an applicant’s criminal record.<sup>111</sup> The federal Fair Credit Reporting Act and state analogues require employers to inform individuals when they are taking an adverse action based on a background check.<sup>112</sup> (This requirement may easily be violated,<sup>113</sup> which is particularly troublesome because reports have found widespread inaccuracies in criminal background databases.<sup>114</sup>) Additionally, disparate impact has played a significant

---

106. For a critique of the analogy, see James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012).

107. See, e.g., SOC’Y FOR HUMAN RES. MGMT., SHRM SURVEY FINDINGS: BACKGROUND CHECKING—THE USE OF BACKGROUND CHECKS IN HIRING DECISIONS 6 (2012), available at [http://www.shrm.org/Research/SurveyFindings/Articles/Documents/2012BackgroundCheck\\_Criminal\\_FINAL.pptx](http://www.shrm.org/Research/SurveyFindings/Articles/Documents/2012BackgroundCheck_Criminal_FINAL.pptx) (discussing reasons for the rapid increase in background screening); Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. (forthcoming 2014) (manuscript at 29–30), available at <http://ssrn.com/abstract=2442629> (similar).

108. See SOC’Y FOR HUMAN RES. MGMT., *supra* note 107, at 2.

109. See, e.g., NAT’L EMP’T LAW PROJECT, STATEWIDE BAN THE BOX: REDUCING UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS (2014), available at <http://www.nelp.org/page/-/SCLP/ModelStateHiringInitiatives.pdf?nocdn=1>; Judy Greenwald, *Employers Still Ask Applicants about Criminal Convictions, Survey Shows*, CRAIN’S DETROIT BUS. (Apr. 11, 2014, 7:01 AM), <http://www.craindetroit.com/article/20140411/NEWS/140419973/employers-still-ask-applicants-about-criminal-convictions-survey#> (reporting on a 2014 survey that found that 66% of employers asked candidates to disclose convictions on job applications).

110. The National Employment Law Project tracks legislation on its website. *Ban the Box: A Fair Chance for a Stronger Economy*, NAT’L EMP’T LAW PROJECT, <http://www.nelp.org/page/content/banthebox/> (last visited Sept. 25, 2014); see also Fishkin, *supra* note 107, at 30–31 (collecting and discussing state and local bans).

111. See Fishkin, *supra* note 107, at 31 n.115 (collecting laws).

112. 15 U.S.C. § 1681b(b)(3) (2012).

113. See Fishkin, *supra* note 107, at 17 n.56 (discussing challenges of determining compliance with this provision).

114. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 5 (2012), available at <http://www.eeoc>

role in legal challenges to the practice of excluding applicants with criminal records.<sup>115</sup>

The leading case addressing the disparate impact of criminal background screens dates from shortly after *Griggs*. In *Green v. Missouri Pacific Railroad Co.*, the plaintiff challenged the employer's refusal to hire anyone who had ever been convicted of a criminal offense other than a minor traffic violation.<sup>116</sup> In finding a prima facie case of disparate impact, the court relied on both local data regarding conviction rates and data from the railroad's employment records showing that blacks were rejected under the policy at a much higher rate than whites; the court then held that a categorical ban was not justified as a business necessity.<sup>117</sup> It suggested that, for a screening policy to pass muster, an employer would need to consider the nature and gravity of the offense, the nature of the position sought, and the time since the offense occurred.<sup>118</sup> The EEOC later endorsed these factors in guidance documents issued in 1987 and 1990 and in its compliance manual.<sup>119</sup>

In recent years, as the prevalence of screens has increased, there have been numerous class actions filed claiming that the indiscriminate use of background screens causes an unlawful disparate impact.<sup>120</sup> The issue gained even more prominence in 2012, when the EEOC provided extensive guidance on the use of background screens<sup>121</sup> and announced that litigating cases of alleged abuse would be one of its strategic priorities.<sup>122</sup> The guidance

---

.gov/laws/guidance/arrest\_conviction.cfm; see also Jeff Rossen & Avni Patel, *Background Check Firms Making Errors*, TODAY (Nov. 9, 2012, 7:41 AM), [http://www.today.com/id/49505767/ns/today-today\\_news/t/rossen-reports-background-check-firms-making-errors/](http://www.today.com/id/49505767/ns/today-today_news/t/rossen-reports-background-check-firms-making-errors/).

115. For a good review of cases, see Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 1 (2012).

116. 523 F.2d 1290, 1292 (8th Cir. 1975).

117. *Green*, 523 F.2d at 1297.

118. *Id.*

119. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC POLICY STATEMENT ON THE ISSUE OF CONVICTION RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1987), available at <http://www.eeoc.gov/policy/docs/convict1.html>; U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE No. 915.061, CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1990), available at [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html); 2 U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL app. § 604-A (1991).

120. See, e.g., *Arroyo v. Accenture*, No. 10-cv-3013 (S.D.N.Y. filed Apr. 8, 2010); *Johnson v. Locke*, No. 10-cv-03105 (S.D.N.Y. filed Apr. 13, 2010); *Mayer v. Driver Solutions, Inc.*, No. 10-cv-1939 (E.D. Pa. filed Apr. 30, 2010); *Hudson v. First Transit*, No. 10-cv-03158 (N.D. Cal. filed July 20, 2010). Some of these cases have since been favorably settled, e.g., *Mayer v. Driver Solutions*, No. 10-cv-1939, 2012 WL 3578856 (E.D. Pa. Aug. 17, 2012), but as this Review went to press, the case against the U.S. Census Bureau was still pending. See *About the Census Worker Class Action Case*, CENSUS WORKER CLASS ACTION WEBSITE, <http://www.censusdiscriminationlawsuit.com/index.php> (last visited Sept. 25, 2014).

121. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 114.

122. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN: FY 2013–2016 (2012), available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

reviews national statistics showing that black and Latino men are arrested and convicted at much higher rates than white men, and it then concludes that an employer's use of background screens would generally establish a prima facie case of disparate impact. Noting that arrests are not proof of criminal conduct and that arrest records are often inaccurate, the EEOC guidance suggests that employers generally should not rely on arrest records in making employment decisions (although the conduct underlying an arrest may be relevant). Regarding convictions, the guidance suggests that employers should not adopt a blanket rule that prohibits the hiring of ex-offenders; rather, the guidance advises employers to assess the relevance of a prior conviction in light of at least all three of the *Green* factors and then provide an opportunity for an "individualized assessment" for anyone who might be excluded because of past criminal conduct.

The EEOC has also brought several high-profile suits on the issue. Some of these cases are still pending, but the early results have not been favorable to the EEOC. Although national statistics strongly suggest that criminal background screens disproportionately impact black and Latino applicants, the court in one early case granted summary judgment to the employer on the ground that the EEOC had not developed sufficiently specific evidence showing that *this* employer's *particular* policies caused a disparate impact.<sup>123</sup> Indeed, the court excoriated the EEOC's expert testimony regarding the screen's alleged disparate impact, characterizing it as "rife with material errors" and "analytical fallacies," such as failure to consider the full applicant pool and to analyze the precise time frame alleged in the complaint.<sup>124</sup> In another early case, the EEOC failed to gather statistical evidence to rebut the employer's motion for summary judgment and eventually agreed to submit a joint motion to dismiss, perhaps in part because the Commission had learned during the course of the litigation that the defendant had actually hired a significant number of ex-offenders.<sup>125</sup>

Although this litigation campaign is still in its early stages, these losses suggest a few lessons. First, the EEOC—and private plaintiffs—will need to investigate rigorously an employer's specific policy to prove that it causes a disparate impact. Although in *Griggs* the Supreme Court was willing to rely on statewide statistics to infer that Duke Power's requirements caused a disparate impact, *Gilbert* and *Dothard* show that, even in those early years, courts were uncomfortable assuming a disparate impact if the challenged conduct did not "feel" discriminatory (in the sense of being intentionally discriminatory). *Wards Cove* emphasized the need to identify a particular

---

123. EEOC v. Freeman, 961 F. Supp. 2d 783, 798–99 (D. Md. 2013).

124. *Freeman*, 961 F. Supp. 2d at 793–96. The methods of the same EEOC expert were also harshly criticized in a case challenging the use of credit histories. EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749 (6th Cir. 2014).

125. EEOC v. Peoplemark, Inc., No. 1:08-cv-907, 2011 WL 1707281, at \*2–3 (W.D. Mich. Mar. 31, 2011) (discussing this history in the context of deciding the employer's motion for fees, costs, and sanctions).

practice giving rise to a disparate impact; this aspect of the decision was not explicitly overridden, and courts continue to rely on it in denying claims.<sup>126</sup>

Second, and relatedly, many of the national statistics that the EEOC uses in its guidance point to intersectional claims; that is, they report the statistical imbalance with respect to African American and Hispanic *men* as compared to white *men*.<sup>127</sup> And in at least one of its recent cases, the EEOC alleged a disparate impact on the basis of both sex and race.<sup>128</sup> Because the court in that case found the statistics generally unreliable, it never addressed what kind of statistical showing would be required to prove an intersectional claim or whether the court would simply assess the issues raised as implicating separate claims on the basis of sex and race. The distinction might be important. As noted above, although women of color are arrested and convicted at higher rates than white women, the disparities are not nearly as significant as they are for men.<sup>129</sup> Thus, evaluating an employer's policy for disparate impact on the basis of race alone would "dilute" the disparate impact experienced by black and Latino *men*.

To see this, consider the following (stylized) example. Imagine an employer hiring for new positions. Twenty-five black men apply; twenty-five white men apply; twenty-five black women apply; and twenty-five white women apply. If the employer excludes from consideration anyone who has ever been incarcerated, statistical averages suggest that six of the black men would be excluded, leaving nineteen eligible for consideration; one of the white men would be excluded, leaving twenty-four eligible for consideration; one of the black women would be excluded, again leaving twenty-four eligible for consideration; and none of the white women would be excluded.<sup>130</sup> If the policy is evaluated simply on the basis of *race*, the passage rates of men and women must be assessed together: 86% of the black applicants can be considered for the job, and 98% of the white applicants can be considered for the job. This is a real disparity, to be sure, but it falls well short of the EEOC's rule of thumb for establishing a *prima facie* case of disparate impact.<sup>131</sup> The same disparity results if the policy is considered on the basis of *sex* alone. But if one considers the passage rates in an intersectional manner—assessing the policy's effects on black men specifically—the resulting disparities are much greater. Only 76% of the black men could be considered, a rate that is far lower than that of any of the other potential groups of comparison (96% of the white men; 96% of the black women; and 100% of

---

126. See, e.g., *Freeman*, 961 F. Supp. 2d at 799 (quoting *Wards Cove* for the proposition that the plaintiff must offer evidence "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities" (internal quotation marks omitted)).

127. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 114, at 9–10.

128. *Freeman*, 961 F. Supp. 2d at 789.

129. See *supra* text accompanying notes 99–100.

130. These projections are based on the national incarceration rates for working-age individuals reported in BONCZAR, *supra* note 102.

131. 29 C.F.R. § 1607.4(d) (2014) (describing the "four-fifths" rule).



the white women). Although courts and theorists might disagree as to *which* comparison is most appropriate, the resulting disparity from *any* of these comparisons meets the EEOC's threshold test.

Of course, in the real world, applicant pools are not perfectly balanced in terms of race or sex (or age, which is also a key factor in arrest and conviction rates), and the interplay of these statistical averages might vary. Nonetheless, this analysis suggests that an intersectional approach would generally prove advantageous for plaintiffs. That said, even though, as discussed in Part II, the potential salience of an intersectional approach to disparate impact analysis has long been recognized, it has been very little discussed in theory or tested in litigation. A full exploration of the subject is beyond the scope of this Review. My objective is simply to suggest that current litigation over criminal records offers a potentially fertile testing ground. For an intersectional approach to take root, however, it will need to be carefully and thoughtfully developed.

Third, even *if* the EEOC or a private plaintiff can make it past these threshold questions, it may be challenging for a plaintiff to establish that background checks are not job related and a business necessity, or that there is a less discriminatory mechanism for satisfying an employer's legitimate concerns regarding safety. Although in recent decades courts have been quite deferential to employers' claimed justifications, the early history Belton recounts is instructive in reminding us that the standard once *did* have real teeth and that Congress ratified the language through a hard-fought legislative victory. Selmi posits that, in the absence of political pressure or blameworthy conduct, courts are unwilling to require employers to change their standard business practices.<sup>132</sup> In this context, the larger political discussion around ban-the-box legislation may interact in productive ways with formal disparate impact doctrine. Even though, as Professor Fishkin has shown, the advocacy for these new laws is largely framed in colorblind language, there is a growing movement challenging the indiscriminate use of background checks.<sup>133</sup> There is also strong evidence that recidivism rates decline quickly in the years after an offense and that they vary by offense and by the age of the perpetrator.<sup>134</sup> These studies provide support for the "individualized assessment" that the EEOC advocates. They suggest that it should be hard to establish that a categorical ban on hiring ex-offenders—let alone a categorical ban on hiring individuals who have merely been arrested—is a business

---

132. See Selmi, *supra* note 12, at 763–66, 773–76.

133. See Fishkin, *supra* note 107, at 27–36, 55–56.

134. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, *supra* note 93, at 23–24 (testimony by Dr. Blumstein stating that "most recidivism occurs within the first three years after a previous event" and that the "risk pattern of those who were convicted compared to those who were merely arrested was not very much different"); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009) (finding that risk of reoffense after an arrest falls off quickly within a relatively narrow time frame); Megan Kurlychek et al., *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006) (finding risk substantially similar to that of nonoffenders six to seven years after an arrest).

necessity, since more tailored tests would likely be sufficient to address an employer's legitimate concerns that a prospective employee would be particularly likely to engage in misconduct.

Despite these possibilities for the doctrine's productive development, it would be easy to look at the EEOC's win-loss record in court (at this point at least) and conclude that its effort to use disparate impact to address criminal background screens has been a failure. But published court decisions do not fairly capture the full effect of the new guidance or the disparate impact doctrine that underlies it. First, it is important to note that the EEOC entered into significant conciliation agreements with large employers such as Pepsi<sup>135</sup> and J.B. Hunt,<sup>136</sup> agreements in which the companies consented to revise their background screening policies. Private settlements have likewise required policy changes. More generally, equal employment opportunity is now achieved not only through litigation but also through compliance work. In this respect, the EEOC's new guidance and aggressive stance have spurred significant change. A quick search on the internet reveals numerous memoranda and webinars from law firms advising their clients to review and refine their criminal background check policies and counseling clients to eschew screens that make determinations based on arrests.<sup>137</sup> Clients seem to be listening. In a 2014 survey, 88% of businesses said that they had "adopted" the EEOC's guidance, compared with 32% in a survey a year earlier.<sup>138</sup>

---

135. Press Release, U.S. Equal Emp't Opportunity Comm'n, Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>.

136. Press Release, U.S. Equal Emp't Opportunity Comm'n, J.B. Hunt Agrees to Settle EEOC Race Discrimination Case Regarding Criminal Conviction Records (June 28, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-28-13c.cfm>.

137. See, e.g., D. Albert Brannen, *Criminal Background Checks: EEOC Position Presents a Legal Quandary*, FISHER & PHILLIPS LLP (May 28, 2013), <http://www.laborlawyers.com/criminal-background-checks-eeoc-position-presents-a-legal-quandary> (discussing the EEOC's new guidance and the need to evaluate background check practices for compliance); *Background Checks*, OGLETREE DEAKINS, <http://www.ogletreedeakins.com/training-and-compliance/compliance/background-checks> (last visited Sept. 25, 2014) (same); *EEOC Broadens and Clarifies Scope of Title VII Enforcement*, MORGAN LEWIS (Apr. 27, 2012), [http://www.morganlewis.com/pubs/LEPG\\_LF\\_EEOCScopeofTitleVIIEnforcement\\_27april12](http://www.morganlewis.com/pubs/LEPG_LF_EEOCScopeofTitleVIIEnforcement_27april12) (same); *The New EEOC Guidance on the Use of Arrest and Conviction Records in Making Employment Decisions*, JACKSON LEWIS (May 15, 2012), <http://www.jacksonlewis.com/media/pnc/6/media.2016.wmv> (same). A leading organization for human-resources professionals also did training on the new guidance. See Susan R. Heylman, *Using Credit and Criminal Background Checks*, SOCIETY FOR HUMAN RESOURCES MGMT. (May 16, 2013), <http://www.shrm.org/legalissues/federalresources/pages/credit-criminal-background-checks.aspx>.

138. Nick Fishman, *Are Employers Adapting to EEOC Guidance on Employment Background Checks?*, EMPLOYEESCREENIQ (May 27, 2014), <http://www.employeeescreen.com/iqblog/employers-adapting-to-eeoc-employment-background-checks>. The report does not specify what it means to have "adopted" the guidance; only 63% of the companies surveyed indicated that they performed an individualized assessment of the significance of any applicant convictions identified through background screening, even though that procedure is clearly recommended by the EEOC guidance.

Disparate impact is a clunky (and some argue illegitimate<sup>139</sup>) vehicle to address the indiscriminate use of background checks. The underlying problem is the unfair exclusion of individuals—of all races—with criminal records. But as Fishkin points out, disparate impact frequently works to loosen “bottlenecks” that unreasonably limit opportunity for whites as well as for racial minorities.<sup>140</sup> (Also, research suggests that employers are considerably less likely to hire a black or Latino applicant with a criminal record than a white applicant who has been convicted of a comparable offense.<sup>141</sup> Such practices theoretically could be challenged as disparate treatment, but it would often be difficult for an applicant to provide proof that race played a role in the decision.) And while it might be preferable to combat the problem through legislation directly addressing the issue, political realities make that a slow and difficult process. Currently, only six states have legislation substantively regulating how private employers assess past criminal convictions;<sup>142</sup> two of these states, along with three additional states, have enacted ban-the-box laws that prohibit private employers from asking about arrests or convictions early in the application process.<sup>143</sup> Title VII, by contrast, applies in all states and reaches almost all employers. Its protections are also far more robust than the protections in many of these state laws, and violating the statute can give rise to liability for back pay, injunctive relief, and attorneys’ fees.<sup>144</sup>

The threat of disparate impact liability, combined with the EEOC’s determination to enforce Title VII in this context, has engendered a national conversation about the use—and misuse—of criminal background screens. In Title VII’s earliest years, as Belton amply demonstrates, federal judges were often on the vanguard of efforts to expand employment opportunity. Not so today. The contemporary federal judiciary is more conservative, and courts appear (so far at least) to be hostile to disparate impact claims in this context. But despite some early litigation losses, the combination of strong agency guidance, management-side compliance work, and strategic public and private litigation efforts, as well as the growth of ban-the-box legislation, is collectively changing workplace practices. Of course, if the agency and private plaintiffs continue to lose in court, the compliance effects will be diminished. At this point, however, despite its limitations, disparate impact continues to play a significant role in modern employment discrimination

---

139. See, e.g., Letter from the Attorneys General of Nine States to EEOC Commissioners (July 24, 2013), available at <https://doj.mt.gov/wp-content/uploads/EEOC-Letter-Final.pdf> (last visited Oct. 15, 2014).

140. See generally Fishkin, *supra* note 107, at 58–75.

141. See, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 *AM. J. SOC.* 937, 958 (2003); Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 *AM. SOC. REV.* 777, 785–86 (2009).

142. See Fishkin, *supra* note 107, at 31 n.115.

143. See NAT’L EMP’T LAW PROJECT, *supra* note 109.

144. 42 U.S.C. § 2000e-5(a)–(k) (2012).

doctrine, working, in the language of *Griggs*, to achieve “equality of employment opportunities” by removing “artificial, arbitrary, and unnecessary barriers to employment.”<sup>145</sup>

---

145. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429, 431 (1971).

