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And Promises to Keep: The Future in Employment Discrimination

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INTRODUCTION

Invited to look forward on the occasion of the School of Law's 150th birthday, I look backward first. In order to understand what the twenty-first century holds for the field of employment discrimination, I need to recall its history When I was a law student more than twenty years ago, there was no field of law called employment discrimination. The premise of my student note,[1] a walk through Title VII of the 1964 Civil Rights Act,[2] seems quaint. The piece was written more than seven years after Congress had passed Title VII, prohibiting discrimination in employment on the basis of race, sex, religion, and national origin, but shortly before the United States Supreme Court ruled that a state statute classifying on the basis of gender was unconstitutional.[3] Now, in my office, I have a looseleaf reporter service with nearly sixty volumes devoted solely to employment discrimination cases.

Overt discrimination, if not commonplace, was not unusual during my student days. I was one of nine women in my class, more than double the number of women students in the class ahead of ours. I still remember a time during my third year of law school when a male friend and I were walking to class. He turned to me and said, "Don't you feel bad?" "About what?" I responded. "Taking the place of a man in law school."[4] Interview season was particularly stressful. One large law firm from Chicago decided to interview me (and the other woman candidate) on a Saturday morning rather than during the normal weekday times. I not only willingly aquiesced, I also allowed the interviewer to lecture me on the inappropriateness of my desire to represent professional athletes in labor negotiations (even though I am the nuttiest sports fan, and it was a great labor law firm). "Besides," he said, "you wouldn't really like it."

Of course, things were worse 150 years ago. Women and African-Americans did not have the right to vote or the right to practice law; slavery was lawful

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1. Julia Lamber, Note, *Equal Rights for Women: The Need for a National Policy*, 46 IND. L.J. 373 (1971).

2. 42 U.S.C. § 2000e (1988).

3. Reed v. Reed, 404 U.S. 71 (1971).

4. At a dinner party recently, I heard similar stories from two of the other seven female guests.

in some states; and married women could not own property in their own names. We have indeed come a long way. Today, more than twenty-five percent of our first-year class are minority group members. In the United States, women now comprise approximately twenty percent of the legal profession.[5]

In Title VII, Congress made a commitment to eliminate discrimination in the workplace. However, Congress has never defined what it meant by discrimination nor articulated its vision of equality by which one could measure success or compliance. Many of the important cases in twenty-five years of Title VII litigation turn on what is the right kind of evidence, or even more formalistically, what is the right order of proof, without focusing on the significance of that evidence in any systematic way.[6] This failure reflects our collective ambivalent attitude toward employment discrimination, or discrimination in general: It is easy to have an opinion about discrimination if one does not have to think about it very hard.

I. EXPANSIVE INTERPRETATION OF RIGHTS UNDER TITLE VII

In recent years, the United States Supreme Court has rendered several unanimous decisions that adopt an expansive interpretation of the rights protected by Title VII. Two recent cases stand out: *Meritor Savings Bank v. Vinson*[7] and *UAW v Johnson Controls*.[8] In the early 1970s, there was no recognized cause of action for what we now call sexual harassment. Early cases found that such conduct was not properly considered under Title VII. The claim was dismissed under one or more of the following theories: (1) Congress never intended such a cause of action;[9] (2) state tort law provided a remedy;[10] (3) the possibility of a bisexual supervisor making advances to both sexes illustrated the folly of considering sexual overtures to be gender discrimination;[11] or (4) the pervasiveness of sexual consideration and advances in the workplace meant too many federal lawsuits.[12] In addition, the behavior in question was considered personal, not professional.

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5. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 36 EMPLOYMENT & EARNINGS 183 (Jan. 1989).

6. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

7. 477 U.S. 57 (1986).

8. 111 S. Ct. 1196 (1991).

9. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 818 (1990).

10. *Id.* at 818.

11. *Id.* at 819.

12. *Id.* at 820.

In 1986, the Supreme Court held in *Vinson* that nondiscrimination under Title VII included the right to be free from "unwelcome sexual advances that create an offensive or hostile working environment "[13] While we might question why it took so long for the Court to recognize sexual harassment as a form of gender discrimination, the important fact is that it did, and in a unanimous opinion. The Court rejected strict liability of the employer, but it also rejected the employer's argument that failure to notify the employer or failure to use a grievance procedure would insulate the employer.[14] My primary objection to the *Vinson* opinion was the Court's failure to see that the early reasons articulated to exclude sexual harassment from gender discrimination claims were the very reasons to include it as a cause of action under Title VII.[15]

In *Johnson Controls*, female plaintiffs challenged an employer's policy of excluding women from jobs that involved exposure to substances known or suspected of causing harm to fetuses. Similar exclusions were common under early twentieth-century state protective legislation. That legislation was justified in terms of harm to women's reproductive functions.[16] Today's fetal protection policies are justified on the basis of moral qualms about endangering the health of children. While the scientific evidence does not support the exclusionary policies of the early twentieth-century state protective laws, no one scoffs at the prospect of injury to future children who cannot protect themselves or participate in the decisions that will govern their lives. The Supreme Court upheld early state protection legislation against challenges that they were unconstitutional.[17] By contrast, the Court in *Johnson Controls* struck down these policies.[18] In this case, the process used by Johnson Controls to make batteries involved exposure to excessive levels of lead. And we are suspicious of employers who assert their ethical feelings at the expense of women. The Title VII question for the Supreme Court was whether this employer's interest in the health of unborn children met the "bona fide

13. *Vinson*, 477 U.S. at 64.

14. *Id.* at 72.

15. For a discussion of sexual harassment claims, see Estrich, *supra* note 9, at 818-23, and Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989). Both include citations to the voluminous literature on sexual harassment.

16. The most famous case is Muller v. Oregon, 208 U.S. 412 (1908) (upholding constitutionality of maximum hours legislation for women only).

17. *See, e.g., id.*

18. The parallels between earlier state protective legislation and modern fetal protection policies are explored in Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986); Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981).

occupational qualification" (BFOQ) exception to the statute.[19] Construing the exception very narrowly, the Court was unanimous that it did not.[20]

II. EROSION OF THE DISPARATE IMPACT THEORY

In contrast to these decisions adopting an expansive interpretation of the rights protected by Title VII, the Supreme Court has in recent years rendered several opinions that erode the doctrinal and analytical underpinnings of the disparate impact theory The Court itself established the disparate impact theory in *Griggs v. Duke Power Co.*[21] Rejecting the view of the lower courts that Title VII prohibited only intentional discrimination, the *Griggs* Court held that Title VII proscribes "practices that are fair in form, but discriminatory in operation."[22] Thus, disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another. An employer's only defense was that the disparate impact was justified by business necessity [23] Subsequent to *Griggs*, litigants and courts often confronted the issue of the scope of the business necessity defense. Essentially there were two questions: (1) Is there a substantial relationship between the neutral hiring criterion and the employer's stated purpose?, and (2) Is the employer's interest in using a particular criterion sufficiently important given its adverse effect on members of a protected group?[24]

By 1989, with the Court's decision in *Wards Cove Packing Co. v. Atonio*,[25] many observers concluded that disparate impact was no longer a viable theory under Title VII. In *Wards Cove*, the Court held that the plaintiff could not establish a prima facie case of discrimination by comparing the racial composition of the "cannery" workforce, which was essentially unskilled and filled by nonwhites, with the "noncannery" workforce, which

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19. 42 U.S.C. § 2000e-2(e)(1) (1988).

20. The Court split on whether any policy would meet this exception. A majority of the Court said that the bona fide occupational qualification (BFOQ) is limited to those situations where a woman cannot efficiently perform her job; in fetal protection cases everyone agrees she can. *Johnson Controls*, 111 S. Ct. at 1207. The concurrence thought this reading too narrow. For them, excessive costs to the employer could be a defense. *Id.* at 1210.

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

22. *Id.* at 431.

23. *Id.*

24. Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 337-43 (1987); Paulette M. Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555, 591-94 (1985); Julia Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII*, 1985 WIS. L. REV. 1, 34-41.

25. 490 U.S. 642 (1989).

was skilled and filled by whites. The Court additionally undercut the utility of the disparate impact theory by imposing a specific causation requirement on the plaintiff[26] and reducing the defendant's burden on the issue of business necessity [27]

III. THE FUTURE

A. More of the Same: The Civil Rights Act of 1991

Primarily in response to the decision in *Wards Cove* (and others decided that same term that also weakened the effectiveness of Title VII),[28] Congress passed the Civil Rights Act of 1991.[29] Overruling *Wards Cove* was so integral to the congressional action that the stated purpose of the Act mentions both *Wards Cove* and *Griggs* by name.[30] An additional purpose of the 1991 Act was to provide monetary damages for intentional discrimination and unlawful harassment.[31] This damage award is a direct consequence of the Court's 1986 recognition that sexual harassment is a form of gender discrimination under Title VII.[32] Once the Court recognized that cause of action, the inadequacy of Title VII's equitable remedies was obvious. The damage remedy will have a profound but unknown impact on future Title VII litigation because these claims will now be tried before a jury Ironically, it was the civil rights organizations who opposed jury trials during consideration of the 1964 Civil Rights Act, just as it was the civil rights organizations who

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26. *Id.* at 656-58 (finding that plaintiff must isolate and identify the specific employment practices that are allegedly responsible for any observed disparity).

27. *Id.* at 659-61 (reducing the inquiry into whether a practice serves a legitimate business reason and shifting the burden to the plaintiff to show that the requirement was not justified).

28. Patterson v. McLean Credit Union, 491 U.S. 164, 171-75 (1989) (limiting the scope of section 1981); Price Waterhouse v. Hopkins, 490 U.S. 228, 239-52 (1989) (establishing standards for evaluating mixed-motive employment discrimination claims); *Wards Cove*, 490 U.S. at 650-55 (substantially undercutting the disparate impact theory of discrimination the Court enunciated in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)); Martin v. Wilks, 490 U.S. 755, 766-68 (1989) (broadening the right of white employees and applicants to challenge affirmative action plans in consent decrees); Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 904-13 (1989) (requiring discriminatory intent for allegations of sex discrimination in seniority systems); *see also* EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227, 1230-36 (1991) (holding that Title VII does not have extraterritorial effect); West Virginia Univ. Hosp. v. Casey, 111 S. Ct. 1138, 1140-48 (1991) (limiting the availability of expert witness fees to prevailing plaintiffs in civil rights cases); Library of Congress v. Shaw, 478 U.S. 310, 318-20 (1986) (finding U.S. government not liable for interest on Title VII judgements).

29. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of U.S.C.).

30. *Id.* § 3, 105 Stat. at 1071.

31. *Id.*

32. *See supra* text accompanying note 13.

pushed for them in 1991. Obviously, the calculation of whom to trust to balance the interest of employers and employees has changed over the years.

In contrast to these definite, intended changes in how Title VII cases will be litigated, the effect of the provision overruling *Wards Cove* is less clear. In the 1991 Act, Congress intended to codify the concepts of "business necessity" and "job-relatedness" enunciated by the Supreme Court in *Griggs* and in the other decisions prior to *Wards Cove*.[33] Congress also intended to provide guidelines for the adjudication of disparate impact claims. The statute provides that plaintiffs can establish a disparate impact claim if they prove that "a particular employment practice" causes a disparate impact and the employer fails to prove that the challenged practice is both "job related" and consistent with "business necessity."[34]

This language apparently achieves two goals of those who sought to neutralize the Supreme Court's decision in *Wards Cove*. First, the employer, not the plaintiff, has the burden of showing that the employment practice is justified in the face of its adverse impact. Second, the employer's burden is considerable, requiring it to show both the employment practice's relationship to the job in question and the importance of the employment practice to the employer. Thus, this language resolves some issues that are often raised in disparate impact cases, such as the relationship between job-relatedness and business necessity on the one hand and the relationship between business necessity and the BFOQ defense on the other.[35] The language does little, however, in setting a standard by which to decide whether a practice is "job related" or "consistent with business necessity."

How these provisions are implemented will preoccupy litigants, courts, and scholars for some time. Besides the statutory language, Congress did not tell us very much. The agreed-upon exclusive piece of legislative history concerning *Wards Cove* provides that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and in the other Supreme Court decisions

33. Civil Rights Act of 1991 § 3, 105 Stat. at 1071.

34. Civil Rights Act of 1991 § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. III 1991). The plaintiff can also establish a claim of disparate impact by showing that there is an alternative employment practice that serves the employer's purpose and the employer refuses to adopt it. *Id.* § 703(k)(1)(A)(ii).

35. Civil Rights Act of 1991 § 703(k)(2) provides that business necessity may not be used as a defense against a claim of intentional discrimination. The BFOQ exception, § 703(e)(1), provides a defense to discrimination on the basis of sex, religion, and national origin "in those certain instances where sex, religion, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business." *Id.*

prior to *Wards Cove Packing Co. v. Atonio*."[36] In codifying the law as it existed before *Wards Cove*, all Congress accomplished was to adopt the messy state of the disparate impact theory, the business necessity defense, and the relevance of alternative employment practices.[37] It does seem clear that in the future "business necessity" will provide the context in which to work out the question of how far we are willing to intrude on individual autonomy in order to stamp out discrimination. My point is simply that these were and will continue to be hotly contested issues. Legislative agreement was forged by continuing our ambiguous commitment to equality in the 1991 statute.[38]

B. Something Different: Feminist Jurisprudence

When thinking about the effects of the Civil Rights Act of 1991, the future looks very much like the past. One gets a different sense, however, about the future of employment discrimination by taking notice of a new direction in scholarship and its theoretical underpinnings. In 1964, when Congress considered Title VII, the overriding notion of equality was that blacks and whites, and therefore presumably women and men, should be treated the same for nearly all employment decisions. The harms of discrimination in employment were overt exclusions because of prejudice or bias and the use of irrational stereotypes that did not allow individuals to be judged on their own merits.

The goal of Title VII was to remove artificial barriers to employment, opening previously closed jobs or careers. The result has been more women in traditionally male-dominated fields, such as law, medicine, science, and publishing. But this goal does not do much to address issues of special concern to women, such as pregnancy or childrearing leaves. It does little to change existing workplace norms that may be inhospitable to women. It does nothing to address the concerns of women who do not want to be path-breakers, tokens, or one of the few in male-dominated jobs.

It is clear that the notion of equality that prevailed in the 1960s and 1970s is not sufficient to eliminate gender discrimination in the workplace, nor is it effective in addressing the reality of women's lives. In response, feminist legal theorists ask how the workplace can accommodate women. A primary

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36. 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991) (citations omitted). The exclusive nature of this legislative history is provided for in Civil Rights Act of 1991 § 105(b), 105 Stat. at 1075.

37. *See supra* sources cited in note 24.

38. The significance of the 1991 Act is further complicated because President Bush's willingness to sign it rather than veto it, as he did the year previously, is probably explained better by the political fallout from the Clarence Thomas confirmation hearings and David Duke's showing in the Louisiana gubernatorial race than by any legislative changes in the Act addressing his previous concerns.

focus of this inquiry has been to acknowledge the differences between men and women and among women themselves. Additionally, these theorists ask whether Title VII *allows* or *requires* employers to take such differences into account if they relate to job qualifications or the workplace more generally There are many controversies within this scholarly literature and whether we achieve meaningful equality in the twenty-first century is dependent upon working out these controversies.[39]

Feminist legal theory has already transformed the debate about the analytical puzzle posed by pregnancy [40] But the prevalence of male models of behavior, especially male models of success, continue. It is important to understand, for example, why so many women join major law firms throughout the country only to quit, and often withdraw from the workforce altogether, before they become partners. We need to understand why, assuming a woman stays at the firm, she finds it necessary to give birth on Friday and return to the office on Monday [41]

Incorporating lessons of feminist legal theory into Title VII jurisprudence means that we will think about gender separately from other forms of discrimination. In the past, we tended to lump all forms of discrimination together. It was important to see the similarities between race and gender discrimination, to interpret the Age Discrimination in Employment Act of 1967[42] in line with Title VII, and to model anti-discrimination provisions for the disabled on Title VII.[43] Now, it is crucial to recognize our differences.

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39. For a recent bibliography, see Paul M. George & Susan McGlamery, *Women and Legal Scholarship: A Bibliography*, 77 IOWA L. REV. 87 (1991). For two recent examples, see Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

40. See, for example, the debate within feminist legal circles over what position to take when the Supreme Court considered California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987), involving leaves for women only. *Compare* Wendy W Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-1985) (discussing equal treatment approach) *with* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (discussing difference approach). *See also* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990); Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F 115.

41. *See, e.g.*, Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1764-68 (1991); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

42. 29 U.S.C. §§ 621-34 (1988).

43. The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12,101-12,213 (Supp. II 1990). Ironically, the legislative provisions adopted in the 1991 Civil Rights Act about the disparate impact theory are lifted from the provisions in the Americans with Disabilities Act. Compare § 703(k) of the 1991 Act, 42 U.S.C. § 2000e-2(k) (Supp. III 1991), with § 12,112(b) of the ADA. The enforcement provisions in the ADA, though, are those found in Title VII. 42 U.S.C. § 12,188(a).