THE RELEVANCE OF DISPARATE IMPACT ANALYSIS IN REACHING FOR GENDER EQUALITY

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This short article is an argument for a way of reaching for gender equality that was advocated early on in the second wave of feminism. The piece contends that, in addition to eliminating actions that facially and intentionally discriminate on the basis of sex, it is necessary to look closely at policies and practices that have a disproportionate effect on one sex. Those that are not essential to meet a compelling interest must then be eliminated. The approach is akin to that used under equal employment and other equal opportunity legislation, but ultimately rejected by the United States Supreme Court as a way of interpreting the United States Constitution.

The piece first provides essential background by describing feminist legal concerns of the 1960s and 70s and the developments that led to dissatisfaction with the early interest in formal equality's requirement that the like be treated alike. It then sets out the disproportionate effect or disparate impact approach here advocated in greater detail, explaining its relevance to sexual inequality and applying it to several examples. Finally, it measures the disparate impact approach against objections to earlier methods and highlights its particular benefits, concluding that disparate impact is crucial to our efforts to reach gender equality.

I. THE BACKGROUND

A. FIRST DIRECTIONS

Sparked by post-World War II confinement to the home and experiences in the Civil Rights movement, many of the legal efforts of the second wave of United States feminism, which developed in the 1960s and 70s, focused on ways women were reduced to second-class citizenship. The United State's social fabric had been shaped by a powerful ideology,

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inherited from the 19th Century, about the proper allocation of tasks between the sexes. The ideology varied somewhat in form and content with changes in the organization of work, but its message was remarkably constant: men and women belong to "separate spheres."[1] Men are the breadwinners and family representatives in the public world, and women are the childbearers and rearers and keepers of the home.[2] In a supportive, complementary role, women are to provide essential services to men; their development and advancement are inevitably subordinated to men's. The belief in the sexes' fundamentally different natures justified maintaining these separate spheres and women's subordination to man.

Federal and state laws as well as numerous employer's practices reflected and reinforced these roles and allocations of worth. A central concern of the 60s and 70s, then, was the pervasive failure to see women as capable of bearing the duties and receiving the benefits of citizens, such as serving as jurors and soldiers, that reinforced the perception that they could not be taken seriously. An equally serious concern was their exclusion from well-paying employment and other forms of advancement. As differential treatment, both public and private, was challenged, discriminatory protective legislation and pervasive sex-stereotyping were brought into question. Women sought to do what men did and to be compensated for it at the same rate.

Early victories on a constitutional level involved rulings that men could not automatically be preferred over women in choosing an executor for an estate[3] nor, as a member of the armed forces, could a woman receive fewer benefits for their work.[4] Cases later in the 70s struck down other state laws that assumed different roles for the sexes[5] as well as invalidating Social Security statute and other federal provisions that failed to accord women the same benefits accorded men for similar efforts.[6] More generally, sex-based

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[1]*See, e.g.*, NANCY COTT, THE BONDS OF WOMANHOOD: "WOMEN'S SPHERE" IN NEW ENGLAND, 1785-1835, 197-200 (1977).

[2]*Id.*; *see also* P. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 827 (1990).

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

[4]Frontiero v. Richardson, 411 U.S. 677 (1973).

[5]Kirchberg v. Feenstra, 450 U.S. 455 (1981); Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975).

[6]Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Westcott, 443 U.S. 76 (1979).

classifications were subjected to something tougher than deferential, rational basis scrutiny that automatically assured affirmance. Though feminist litigators did not succeed in making sex-based classifications subject to strict scrutiny, requiring a compelling justification and narrow tailoring of the means to the end (such as racial classifications require), they did succeed in requiring sex-based classifications to satisfy an intermediate test calling for important justifications and substantial relationships between the means and the end.[7]

There were also significant victories on the private level. *Phillips v. Martin Marietta Corp.*,[8] the United States Supreme Court's first Title VII sex discrimination case, made plain that an employer's rule excluding mothers but not fathers of preschool-aged children from certain jobs constituted a prima facie violation of the employment law. Likewise, decisions in the lower courts provided relief for differences in wages and work conditions based on sex, seniority systems based on sex, priorities for unemployed fathers in job training programs, and policies requiring women employees only to remain single.[9]

Other work limitations, based on more direct assumptions about the centrality of woman's reproductive role, were ultimately more difficult for the Supreme Court to analyze in equality terms. Thus, for example, women school teachers were often forced to take unpaid leaves when their pregnancies advanced.[10] Such rules reflect a variety of assumptions. Among these is the assumption that, inasmuch as women really belong in the private sphere, visibly pregnant women are unseemingly in public. Another assumption is that women will cease working to "mother" once their children are born. Perhaps most importantly, such rules reflect the general view, adopted without regard to any individual woman's condition, that all pregnant women are disabled.

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[7]*Craig*, 429 U.S. at 240 (citing Reed v. Reed, 404 U.S. 71, 76 (1971)). *But see* "Arguments Before the Court," 64 U.S.L.W. 3493, 95, (Case Nos. 94-1941 and 94 -2107 Jan. 23, 1996) (indicating that Supreme Court may subject sex-based classifications to strict scrutiny).

[8]400 U.S. 542 (1971).

[9]Landsdale v. United Airlines, 437 F.2d 454 (5th Cir. 1974); Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied sub nom.*, 404 U.S. 991 (1971); Laffey v. Northwestern Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973); Thorn v. Richardson, 4 F.E.P. Cases 299 (D. Wash. 1971).

[10]*See* companion cases Cleveland Bd. of Ed. v. LaFleur and Cohen v. Chesterfield County Sch. Bd., 414 U.S. 632 (1974).

In imposing forced lay-offs on women about to become parents without imposing similar rules on men about to become parents, and without making any specific determination of individual ability or inability to do the job, such rules obviously discriminated against women. Early challenges to this sort of restriction thus argued that women were being deprived of equality guarantees embodied both in relevant constitutions and fair employment laws.[11] The United States Supreme Court, however, failed to see that presuming all pregnant women are disabled without according them the individual determination of work capacity accorded men, implicates questions of sexual equality. Rather, the Supreme Court invalidated the restrictions as impermissible burdens on reproductive freedom.[12]

Returning to the larger picture, we see that much of the legal energy of the 1960s and 70s sought an end to the plethora of policies and practices that denied qualified women the opportunity to participate and be equally rewarded in public life.[13] These efforts in the public sphere were, to a large extent, successful. For, in this century, as in the last, a woman's ability to do and be recognized for doing what she was able to do was simply her due. They had, moreover, significant ramifications for women in the private sphere in that his recognition is essential to negotiating satisfactory home arrangements.

B. EMERGING QUESTIONS AND TENSIONS

As the mandatory leave cases suggest, the Supreme Court has had great difficulty identifying inequality in pregnancy-related matters. This problem became exquisitely clear in the case of *Geduldig v. Aiello*,[14] which concerned the California disability scheme that afforded benefits to covered employees unable to work for almost all physical and mental conditions

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[11]*See, e.g.*, LaFleur v. Cleveland Bd. of Ed., 326 F. Supp. 1208, 1209 (N.D. Ohio 1971); Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Va. 1971).

[12]*Cleveland Bd. of Ed.*, 414 U.S. at 643.

[13]The early Second Wave feminists, like their predecessors and successors, had other concerns as well, but their concerns were often related. For example, a core argument for the abortion right was that reproductive choice was essential if women were to be able to take advantage of employment and educational opportunities. Denying them that ability was to deny them the liberty guaranteed them by the due process clause. *See* N. Stearns, Roe V. Wade: *Our Struggle Continues*, 4 BERK. WOM. L.J. 1 (1989). Both the fights for equality and for reproductive freedom, then, shared the concern about women being able to do what had all too often been reserved for men.

[14]417 U.S. 484 (1974).

except normal pregnancy and childbirth.[15] Considering the matter as one of differential treatment between pregnant and non-pregnant persons,[16] the Court declined to subject the scheme to the heightened scrutiny required in cases of sex discrimination and simply upheld the law. *Geduldig*, and the Title VII cases decided in keeping with *Geduldig*, triggered both practical and theoretical efforts to ensure pregnancy-related problems were not treated worse than analogous problems. On both the federal and state levels, legislation was enacted and decisions were taken to provide benefits and job guarantees for pregnancy-related leaves. This legislation was of two sorts: The Pregnancy Discrimination Act ("PDA") of 1978 amended Title VII to make clear that pregnancy-based discrimination does constitute sex discrimination within the meaning of the federal equal employment law.[17] Under the approach taken by the PDA, pregnant workers must be treated the same as other workers similar in their ability or inability to work.[18] Likewise, under the 1993 federal Family and Medical Leave Act, as well as various state acts, childbearing leave guarantees are grouped with leaves for other medical reasons, and childrearing leaves are grouped with other nurturing leaves.[19] The other approach, found in some state legislation enacted after the Supreme Court upheld the denial of disability benefits to pregnant women, guarantees benefits to pregnant and childbearing women only.[20]

Different approaches appeared on the theoretical level as well, following the defeats in the pregnancy cases. Such views stemmed historically from tensions prompted by the pregnancy cases, but were reinforced and refined by later psychological, sociological and jurisprudential

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[15]*Id.* The California scheme excluded only disabilities less than 8 days in duration unless hospitalization was required or for those individuals classifiable as dipsomaniacs, drug addicts, or psychopaths, or for disabilities attributable to pregnancy.

[16]*Id.* at 497 n.20.

[17]42 U.S.C. § 2000e-2(k) (1988 & Supp. V 1993).

[18]*Id.*; *see also* N.J. STAT. ANN. § 34 :11B-1 (West 1995).

[19]29 U.S.C. § 2601 (1988 & Supp. V 1993); *see also supra* note 17.

[20]*See, e.g.*, CAL. GOV'T CODE § 12945(b)(2) (West 1980 & Supp. 1986); *see also* California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (upholding CAL. GOV'T CODE § 12945(b)(2)).

writings expanding the theoretical debates.[21] For some, it became clear that to consistently pursue a formal equality approach, looking at pregnancy-related conditions as more generalizable conditions relevant to both sexes, was to ignore—and denigrate—women's unique nature.[22] Thus, some came to advocate approaches that recognized women's special nature and accorded women equal power and respect.[23] Though ultimately criticized as thinking of all women as privileged white women,[24] theories were offered stressing the need to recognize and value women's special qualities.[25] Others advocated approaches emphasizing men's domination, particularly their sexual domination of women.[26]

For others, however, a "special treatment" approach was essentially asking for accommodation akin to compensation for women's differences. Doing so risked reviving the different-nature ideology that has been so critical to women's subordination.[27] They also doubted the factual premises of the dominance approach and rejected the passivity it attributed to women. They would, therefore, adhere to an approach seeking to afford women the opportunity to judge women individually, without regard to generalizations about their sex.[28]

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[21]*See generally* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katherine Bartlett & Rosanne Kennedy eds., 1991); FEMINIST JURISPRUDENCE (Patricia Smith ed., 1993); D. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); K. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

[22]Cain, *supra* note 2, at 819-20.

[23]*See generally* C. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); *see also* Cain, *supra* note 2, at 832-35.

[24]T. Grillo, *Anti-Essentialsim and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOM. L.J. 16 (1995); A. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990).

[25]*See generally* Littleton, *supra* note 23, at 1279; Cain, *supra* note 2, at 841-47; C. Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERK. WOM. L.J. 39 (1985); R. West, *Jurisprudence and Gender*, 55 CHI. L.R. 1 (1988).

[26]*See, e.g.*, CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 40-41 (1987); Cain, *supra* note 2, at 834.

[27]W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. LAW REP. 151, 153-54 (1992).

[28]*Id.*; Cain, *supra* note 2, at 846.

The essence of the critique of the formal equality approach used early on is that it asks women to be like men. Its focus is on the individual (often, the atypical woman) has the effect of masking the disadvantages most women continue to suffer. For example, a woman who is able to work the long hours expected of a man should not automatically be disqualified because she has young children. In reality, however, many women are responsible for young children and are not helped by being given the opportunity of being like men. Efforts to improve women's situation, then, must include challenges to the serious and continuing obstacles to their survival and advancement. Moreover, an approach that focuses on the failure of women who are qualified like men does little to value the nurturing that women have traditionally provided and represented.

The critique is a powerful one. Women who want and can benefit from opportunities given to men must be afforded the opportunity to do so. But equality for women must surely mean more. Does valuing and helping "typical" women inevitably mean treating them differently from men? Is there a way to do so that is consistent with the demand that individual women who are similarly situated to men are entitled to the treatment accorded the men? The following section suggests that there is a way: in addition to prohibiting facially discriminatory policies and practices, subject to close scrutiny those policies and practices that are facially neutral, but that have a disproportionate effect on women.

II. USING DISPARATE IMPACT ANALYSIS

A. UNDERSTANDING DISPARATE IMPACT ANALYSIS

The disproportionate effect or disparate impact analysis advocated here is perhaps best known as the approach articulated by the United States Supreme Court in *Griggs v. Duke Power Co.*[29] As noted, it calls for a close look at facially neutral rules, and requires, if their impact falls disproportionately on a protected class, the users or proponents of the rules to justify them as truly necessary to the enterprise at hand.[30] Turning to the example of the work hour problem, the disparate impact approach would first ask whether a "neutral" rule that requires all employees to adhere to a rigid work schedule (as opposed to having flexible hours) has a significantly greater impact on women (or another protected class) than on men. Given the childcare responsibilities borne disproportionately by women, such an

[29]401 U.S. 424 (1971).

[30]*Id.* at 430.

impact is, indeed, likely. Once a disparate impact is established, it is necessary to determine whether the rule is truly necessary or is simply a remnant of a world based on separate spheres that assumes that only men—who are free of childcare obligations—are breadwinners. The test developed in the employment context requires the employer seeking to retain rules having a disparate impact to show they are required by a business necessity, such as the organization of the industry or the type of production involved.

B. Benefits of the Disparate Impact Approach

Identifying policies and practices that affect one group more than the other, and deciding whether we want to retain them, is particularly important when the policies and practices have a disparate impact on women or men since our way of doing things has been built on assumptions about women doing certain things and men others. As a result, we are all too likely to adopt operational policies and procedures that assume that women will not be doing the things men do and that make it very difficult, if not impossible, for a woman to take up all or part of a role assumed to be a man's or for a man to take up all or part of a role assumed to be a woman's. Thus, spotting the rules for choosing people to perform a particular function or have a particular job or opportunity which have a disparate impact on women helps us see how the assumptions about proper roles have become deeply ingrained in the organization of our society. Retaining only those rules that are necessary to some other agreed-upon purpose is thus an important way of rooting out and replacing norms and policies based on the assumption of a male standard.

In this way, the disparate impact approach provides an effective way of answering the important critique that a formal equality approach only aids women who can and want to be like men. It is an approach that is exquisitely group sensitive. Combined with the formal equality approach, it challenges both individual and institutional barriers to equal advancement. Moreover, because it seeks to correct society's male tilt, it does so in a way which promises to benefit all, not only women. Think, for example, of the lifting equipment used to help workers complete their job. Such equipment allows female workers, who disproportionately lack the upper body strength to perform their designated tasks without such aids, to perform the same tasks as their male counterparts. Because such equipment can be used, there is no business necessity for rules limiting employment to those with the upper body strength to do without it. Moreover, all workers, not just women, have access to the equipment. The job is now open to men as well as women who do not meet the male, strong-man stereotype, and for everyone—heavy lifters included—there is the possibility of reduced strain.

But what about the related need to value the caring and other special qualities associated with women? How do we correct the hierarchical assumption that what men are assigned to do what is worthwhile? Will disparate impact analysis help solve this continuing and pervasive problem? Initially, it seems difficult to envision a way in which a test that focuses on facially neutral rules that, in actuality, are often reflections of male norms addresses such concerns. A little more attention to the process of disparate impact analysis does, however, reveal some helpful steps. Once the disparate impact of so-called neutral rules is acknowledged, the rules, that is the male norms, must be determined to be necessary. It is that determination that provides an occasion for weighing policies and practices unthinkingly based on traditional male roles against other, traditionally female possibilities. When a traditionally male norm is questioned and compared with alternatives, it may not seem necessary at all. Moreover, the weighing point becomes a time to recognize and acknowledge the value of traditionally female qualities and activities. In other words, although the disparate impact approach does not take on the failure to value the caring and other work women have traditionally done directly, it repeatedly brings light to the problem. It continually asks whether policies and practices that reflect male ways of doing things are necessary and thus implicitly asks whether there are other things that should be done. As such, disparate analysis serves to remind us of the problem, helps remove obstacles to solving it, and gives us occasions to address it.

In sum, as a supplement and complement to the formal equality approach used by feminists litigators in the 1960s and 70s, the disparate impact approach goes a long way towards answering the criticisms of the earlier approach. It is an approach that is terrifically sensitive to group inequality and thus provides the much-needed counterbalance to equality formulations centered solely on the similarity of individual qualifications. At the same time, by leading to a reformulation of policies and practices built on stereotypes, the approach will benefit everyone affected by those policies and practices. Furthermore, because the remedies for norms and standards reflecting society's male tilt are thoughtful efforts at truly neutral policies and practices and not efforts at accommodating or compensating one sex only, this approach does not run the risk of reinforcing or reintroducing stereotypes.[31]

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[31]Williams, *supra* note 27, at 153-54.

C. DOES IT REALLY WORK?

However powerful the arguments in favor of disparate impact analysis are, the rule simply won't accomplish its desired ends if it is not workable. Are there shoals to be wary of? Yes, as with any other course. One obvious concern is whether it will be possible to convince decision-makers that discrimination in the sense of unjustified disproportionate effect has occurred. There must be a true commitment to recognizing the disparate impact.[32] Likewise, as the weakening of the Title VII business necessity test that preceded the Civil Rights Act of 1991[33] makes clear, a need both for a strong initial commitment and constant vigilance to ensure the willingness to require such policies and practices are truly justified. The necessary commitment must include a willingness to incur and impose the sometimes substantial costs of eliminating the male tilt. The broader understanding of common interests and the sounder social policies that would seem to result from the search for truly neutral standards will hopefully provide the motivation for this commitment. The breadth of the class of employees now benefitting from the Family and Medical Leave Act provides a classic example.[34]

An equally serious concern is the ability of decision-makers to recognize and reject proffered justifications that themselves incorporate a male tilt. A classic example of this concern was the business necessity offered to justify a height requirement for pilots. The seemingly neutral concern that pilots must be able to reach the instruments controlling the planes requires closer examination: cockpits have been designed and built according to male specifications. In countries in which the male pilots have smaller average heights than in the United States, it has still been possible to build planes where the pilots can reach the instruments. Indeed, it is very probable that when such assumptions are revealed, a creative engineering solution that can be used by pilots of varying heights will be forthcoming.

Will our still predominantly male judiciary be able to scrutinize proffered justifications adequately? Will they be willing to do so? Answers to these hard questions rest on the nature of the world in which they sit.

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[32]*Cf.* New York Urban League, Inc. v. New York, 71 F.3d 1031 (1995).

[33]137 CONG. REC. S15276 (daily ed. Oct. 25, 1991) (Interpretive Memorandum) ("The terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).").

[34]29 U.S.C. § 2601 (1988 & Supp. V 1993).

Judges are, after all, likely to respond to demands placed on them. If, as seems essential, an understanding of and desire to eliminate the continuing male tilt of our public sphere is what brings about the commitment to the adoption of disparate impact test and if that understanding and desire do not simply wither away, judges are likely to look closely at proffered justifications. And should use of the analysis ever turn to scrutiny of the private sphere with its benefits and burdens showing a decidedly female tilt, judicial responsiveness to male demands for truly neutral norms and standards would not be surprising.

III. CONCLUDING REMARKS

Feminist litigators made an important beginning in the struggle to end women's subordination. In establishing women's right to be treated equally, however, this important beginning revealed that more work was needed. But women needed more than the opportunity to do what they were qualified to do, even if it had been traditionally reserved for men. They needed the norms and standards reflecting the assumptions that only men were expected to function in this arena to be re-examined and reformulated. Simply put, they need remedies for both individual and group inequality.

As a complement to early equal treatment analysis, the disparate impact approach can provide the needed sensitivity to group inequality. Where a protected class like women are disproportionately affected by a policy or practice, the policy or practice must be shown to be necessary by its proponent. The requirement of showing necessity and the difficulty in meeting the requirement is well suited to exposing the stereotypical assumptions that underlay so many of today's rules. The need to show that no non-discriminatory alternatives are available is likely to reveal multiple possibilities of different rules that are able to meet the enterprise's need without having the disparate impact. Moreover, the alternative measures are likely to help not only members of the protected class, but also members of the so-called privileged class who fail to meet the stereotypes attributed to the class. As such, the disparate impact approach may help free us from the gendered assumptions that have disadvantaged women and constrained us all.