CHAPTER II

WHAT IS INEQUALITY?—PROVING DISCRIMINATION

INTRODUCTION

Our legal theories on the meaning of equality and inequality are translated into pragmatic questions of responsibility when equality laws are enforced in the courts. Most often, enforcement takes the form of litigating equality rights under constitutional provisions and anti-discrimination statutes. These are usually challenges to private or public acts of discrimination in employment, housing, education, voting, access to public accommodations, and the provision or withholding of public services or benefits. The common question in determining whether the plaintiff has established a violation of a constitutional provision or statute is whether s/he has proven discrimination. But what does proof of discrimination require? Should we require evidence of the intent to discriminate? If so, should we require a malicious intent, or merely the intent to differentiate? Does this equate with proof of a discriminatory motive? If so, must it be a conscious motive? Or is unintended discrimination, such as applied stereotyping, sufficient? That is, can discrimination be negligent? Alternatively, is it enough to show that there was a difference in treatment, whether intended or not? And if a difference is demonstrated, who should hold the burden of explaining or justifying it? How we answer these questions may depend on whether we see equality rights as individual or group rights. Consider these problems as you read the material that follows.

PROBLEMS

- A school district requires all incoming first grade students to take a standardized intelligence test. Ninety percent of the students from the local majority group test between the 30th and 95th percentile, while ninety percent of the children from the local minority group generally test between the 20th and 40th percentile. The school requires students testing below the 30th percentile to attend a special school, which provides fewer academic courses, and fewer opportunities for academic or vocational advancement. The result is that the main school is mostly made up of majority group students, most of whom advance to the university, while the special school is mostly made up of minority group members, most of whom drop out of school at age 16. Can the minority group members prove discrimination? Does it matter whether the test was adopted for the purpose of segregating the minority students, or whether it was adopted merely with knowledge of the likely results, or whether it was adopted by officials who had no idea what the results would be? If the officials testified that they had no idea what the results would

he, would you believe them? If not, how would you prove what they knew?

- An employer has office workers, most of whom are from the majority group, and laborers, most of whom are from a minority group. The employer provides two cafeterias, one for office workers and one for laborers. Can the minority group members prove discrimination? What if the food quality is better in the office workers' cafeteria? What if the employer needs to provide better food to the office workers to keep them from quitting? What if the employer provides different bathrooms for the two groups?
- Again, an employer has office workers and laborers. In this case, the office workers are all majority group women, and the laborers are all minority men. Can either group prove discrimination? Could both?
- A minority group member applies for a job and is not selected. Should the employer be required to explain its reasons? What (if anything) should the employee be required to show before the employer is required to provide an explanation? What if the employer offers an explanation which the applicant demonstrates is false? Should we assume that the actual reason for the hiring decision is the applicant's minority status?
- A minority group member applies for a job and is not selected. A statistician studies the employer's most recent 500 hiring decisions and testifies that there is a 95% likelihood that the decision was based on the applicant's minority status. Should this be sufficient to prove discrimination? What if there was a 51% likelihood?
- An employer's decision-making process encourages supervisors to use their subjective evaluation of who is ready for management in making promotion decisions. Most of the supervisors are men, most of the supervisors choose men as ready for promotion, and very few women are promoted. Can a class of women prove discrimination? Can any individual woman prove discrimination?
- A night club sets up a velvet rope to screen potential patrons. Patrons must meet a certain dress code. Has there been a violation of the equality principle? Patrons must look "hot." Has there been a violation of the equality principle? African Americans are less likely to be admitted than whites. Can any of the rejected patrons prove discrimination?
- A graduate school requires applicants to take its own admission test, which it administers only on Saturday mornings. A potential applicant objects that as an observant Jew she is precluded from taking the test. Can she prove discrimination? What if a musician objects that he plays late into the night on Fridays, and cannot take the test on Saturdays until afternoon? Can he prove discrimination?
- A woman of African descent applies for a job for which she is well qualified, attaching her resume, which includes a photo clearly indicating her skin color. She is rejected. She re-submits it, using a photo of a white friend. She is contacted for an interview. When she appears at the interview, the employer rejects her because she

committed an act of dishonesty in submitting a substitute photo. Can she prove discrimination?

A. INTENTIONAL & UNINTENTIONAL (OR DIRECT AND INDIRECT) DISCRIMINATION

Most forms of discrimination are characterized through two dominant legal frameworks. The first is often described in the United States as "intentional" discrimination. It is comparable (but not identical) to what Europeans describe as "direct" discrimination. The second is commonly described in the U.S. as "unintentional," "adverse impact" or "effects" discrimination. It is comparable (but again not identical) to what is often called "indirect" discrimination outside the U.S. As you read the following materials think about what types of conduct, and states of mind, these theories are trying to capture.

Griggs v. Duke Power Co.

401 U.S. 424 (1971)

■ BURGER, C.J., delivered the opinion of the Court.

The objective of Congress in the enactment of Title VII [of the 1964 Civil Rights Act] is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices. * * * 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. * * * [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

Washington v. Davis

426 U.S. 229 (1976)

■ JUSTICE WHITE delivered the opinion of the Court.

As the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's

possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today. * * * The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.... But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact. * * * Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Massachusetts v. Feeney

442 U.S. 256 (1979)

■ Justice Stewart delivered the opinion of the Court.

* * * The sole question for decision on this appeal is whether Massachusetts, in granting an absolute lifetime preference to veterans, has discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment. * * *

The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions. Her position was well stated in the concurring opinion in the District Court:

"Conceding ... that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme-as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are that inevitable, can they meaningfully be described as unintended?" 451 F.Supp., at 151.

This rhetorical question implies that a negative answer is obvious, but it is not. The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. *See United Jewish Organizations v. Carey*, 430 U.S. 144 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. Yet, nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

NOTES

1. Does the *Griggs* case require employers to engage in affirmative action to avoid liability for unintentional discrimination? Stephan and Abigail Thernstrom have made this claim: "In 1964 Congress had been concerned about 'the *consequences* of employment practices, not simply the motivation,' Justice Burger claimed. It was an audacious rewriting of the statutory history.... The Civil Rights Act had maintained the traditional distinction between practices that were intentionally racist and those that were normal to the world of business and thus legitimate. Yet *Griggs* branded all aptitude tests and other sorting mechanisms—whatever the intent behind them and however fairly they were administered—as discriminatory devices if they were not indisputably job-related and if proportionately more blacks than whites failed them. * * * And thus while Title VII did not refer to affirmative action except as an available remedy for proven wrongs, with *Griggs* the Court took a significant step toward encouraging employers to rely on race in deciding whom to hire." Stephan & Abigail Thernstrom, AMERICA IN BLACK AND WHITE. ONE NATION, INDIVISIBLE at 432 (1997).

2. The relevant language of the U.S. employment discrimination law, Title VII of the 1964 Civil Rights Act, provides: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or, (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." The term "discriminate" is not defined by the Act. Title VII is discussed further in chapter III.

3. The basic international treaty prohibiting racial discrimination is the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted in 1965, and entered into force in 1969. It does provide a definition of discrimination. "Article 1, Section 1. ...the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition,