The Juxtaposition Turn: *Watson v. Fort Worth Bank & Trust*

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I. INTRODUCTION

In this Symposium honoring the scholarly work of Charles Sullivan, mentor to many (including me) and prolific and influential legal scholar, I seek to advance what some may consider a shockingly bold claim: that Charlie is wrong—at least when it comes to his portrayal of the systemic theories of discrimination under Title VII, especially systemic disparate treatment theory. Charlie is, however, in good company. Employment discrimination scholars, attorneys, and judges today—in casebooks, articles, briefs, and judicial opinions—tend to describe the concepts of disparate treatment and disparate impact as wholly distinct, even diametrically opposed.[1] What's more, they portray systemic disparate treatment theory as

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[1] Charlie's casebook on employment discrimination law, which he for many years co-authored with professors Michael J. Zimmer and Rebecca Hanner White, is actually one of the few casebooks that presents a somewhat more nuanced account of the line between impact and treatment. *See* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT

narrowly constrained, stating, for example, that "intentional discrimination" proven by systemic disparate treatment theory requires evidence of a particular state of mind on the part of leaders of a company, or that "implicit bias" exercised by low-level decision makers within a company cannot amount to disparate treatment by the entity for which those decision makers are acting.[2]

While my overall claim is bold, my immediate goal for this Essay is much more modest. I seek to expose a key turn in employment discrimination jurisprudence that may have led us astray. To do so, I take a deep dive into a case that most people think of as plaintiff friendly and relatively simple: *Watson v. Fort Worth Bank & Trust*, decided by the Supreme Court in 1988. *Watson* is well known for its holding that an employer's subjective decision-making practice can be challenged using disparate impact theory—and for Justice Sandra Day O'Connor's plurality opinion restructuring the doctrine of disparate impact to be substantially more defendant friendly, later taken up by the Court in *Wards Cove* and

DISCRIMINATION 2 (8th ed. 2013) (quoting a passage from *Teamsters v. United States*, but noting that the *Teamsters* Court's description is "enigmatic"); *see also* CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 1–2 (9th ed. 2017) (removing the word "enigmatic" but still mentioning uncertainty in understanding of the term "disparate treatment"). *Cf.* MARIA L. ONTIVEROS ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 96–97 (9th ed. 2016) (emphasizing "intent" as the distinguishing line between disparate treatment and disparate impact and suggesting that the term "intentional discrimination" is easily and widely understood, if not easily proven); JOSEPH A. SEINER, EMPLOYMENT DISCRIMINATION: PROCEDURES, PRINCIPLES, AND PRACTICE 80 (2d Ed. 2019) (stating that "there are two different types of employment discrimination claims — disparate treatment (or intentional discrimination) and disparate impact (or unintentional discrimination)").

For examples of articles in which authors draw a descriptively stark line between treatment and impact along a line of subjective "intent," see Sandra F. Sperino, *Justice Kennedy's Big New Idea*, 96 B.U. L. REV. 1789, 1790–91 (2016) (describing the line between disparate impact and disparate treatment as one of "intent" without further discussion); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 919–20, 923–25 (2013) (equating disparate treatment with subjective intent and arguing for a negligence standard); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach*, 47 STAN. L. REV. 1161, 1167 (1995) ("Every successful disparate treatment story needs a villain."). *See also* Sullivan, *infra* note 2. I do not claim that these authors argue in favor of subjective intent as the line between treatment and impact; only that they seem to assume as much or in some cases to describe the law as stating as much. For more on judges and judicial opinions, see *infra* Part III.

[2] Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 949 (2005) (stating that systemic disparate treatment theory "is open to the same foundational problem as individual disparate treatment: if 'intent' does not include cognitive mistakes or extend to characteristics only correlated with the excluded groups, the employer may still avoid liability, even in a systemic case, by so persuading the factfinder"); *see also id.* at 970 ("[T]he advantage of the bias-related label [of disparate treatment], and even its accuracy, depends on defining 'bias' in a nonintuitive way.").

ultimately reversed by Congress in the 1991 Civil Rights Act (CRA).[3] What commentators have missed is that *Watson* represents a turning point for employment discrimination law from understanding systemic theories of discrimination as softly bounded and interwoven to understanding those theories as sharply constrained and juxtaposed.

I argue in this Essay that the problem with *Watson* lies not in what the Court held or said about disparate impact, but in what it said (and did not say) about systemic disparate treatment. The Supreme Court in *Watson* juxtaposed disparate impact against disparate treatment in two ways: first, it expressly described disparate treatment so as to considerably narrow the scope of systemic disparate treatment theory; and, second, it failed to interrogate why the plaintiff in the case had turned to disparate impact in the first place, thereby leaving the impression that systemic disparate treatment was not an appropriate tool for the plaintiff in a case like *Watson*. In doing so, the Supreme Court set the stage for mistaken assumptions and ultimately for the erosion of civil rights afforded by the Court's earlier seminal systemic disparate treatment decisions, *International Brotherhood of Teamsters v. Unites States*[4] and *Hazelwood School District v. United States*.[5]

The Essay is organized in three parts. In the first, I surface history. I show that advocates in the early days of Title VII put disparate impact forward as an overarching concept for employment discrimination law, rather than as a precise systemic legal theory. By this I mean that the goal was for the disparate impact concept to permeate all of employment discrimination law, including individual claims of discrimination. This history also shows that for years the Court resisted disparate impact as an overarching concept, especially efforts to bring disparate impact to bear on individual claims of discrimination, but it did so without juxtaposing impact against treatment.

The second part exposes the juxtaposition turn in *Watson*. Drawing extensively on the briefs and opinions in the case, I show how the Supreme Court's opinion, what is said and also what is not said, can be seen as the first step in a substantial conceptual narrowing of systemic disparate treatment theory.

The third part comes back around to consider how and why the juxtaposition matters. I argue that by shifting our thinking about the

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[3] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 649–50 (1989); Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071. For commentary on *Watson* at the time it was decided, see generally Karen H. Cross, *Recent Development, Title VII: Application of Impact Analysis to Subjective Employment Criteria*—Watson v. Fort Worth Bank & Trust, *108 S.Ct. 2777 (1988)*, 24 HARV. C.R.-C.L. L. REV. 264 (1989).

[4] 431 U.S. 324 (1977).

[5] 433 U.S. 299 (1977).

concepts of impact and intent, the juxtaposition turn of *Watson* can lead us to narrowly construe disparate treatment theories, to conflate individual and systemic theories, and ultimately to reverse well-established and key aspects of employment discrimination law.

II. BEFORE JUXTAPOSITION: TWO OVERLAPPING AND INTERTWINED CONCEPTS

With early Title VII litigation now over forty years behind us, it is easy to forget (or, for some, to never have seen at all) that the concepts of disparate impact and treatment were at one point not a part of employment discrimination law. The statute itself mentioned neither "impact" nor "treatment."[6] It was advocates who took on the terms and began to use them to describe how plaintiffs might prove a claim alleging violation of the Act—and how defendants might defend against those claims.[7] In this part, I show that the concept of disparate impact as understood by advocates during this time was broad and intended to permeate employment discrimination law, and I show that the Supreme Court in its key cases developing the law during this time may have largely rejected that view but nonetheless did not juxtapose impact against intent until *Watson*.

A. *Disparate Impact as a Concept across Employment Discrimination Law*

In *Griggs v. Dukes Power Co.*, an early Title VII case (decided in 1971), the Supreme Court faced the question of whether Title VII of the Civil Rights

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[6] After the 1991 Amendments, Title VII does mention "impact" in a provision that largely codifies a specific systemic theory for proving discrimination that emerged from *Griggs v. Duke Power*. 42 U.S.C. §2000e-2(k) (2018). The 1964 Act, however, provided no mention of the term, instead stating simply that it is 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, condition, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (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.

42 U.S.C. §2000e-2(a).

[7] *See generally* Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972) (on disparate impact theory and its development by advocates and courts); ROBERT BELTON, THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE *GRIGGS V. DUKE POWER* STORY (2014) (same).

Act was limited to subjective intent to discriminate.[8] The Court responded unanimously with a resounding "no."[9] According to the Court, "[w]hat is required . . . is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[10] The Court further explained, "[t]he 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."[11]

As anyone familiar with employment discrimination law knows, out of *Griggs* a precise doctrine for proving disparate impact discrimination would emerge.[12] But *Griggs* was not initially understood to describe a precise doctrine. Rather, the Court there articulated a broad principle that civil rights advocates at the time hoped would permeate throughout employment discrimination law under Title VII—and beyond. Early efforts by civil rights advocates presented disparate impact as a concept more than a precise legal doctrine.[13] The idea was to infuse civil rights laws with disparate impact so that discrimination was pervasively understood not just as a problem of targeted individualized acts of bias or animus, but also of employer or decision maker use of practices or reasoning that would freeze in place an unequal status quo or that were unjustified as business decisions. This meant that early efforts to use *Griggs* spanned both what we tend to think of today as disparate impact (specifically, systemic disparate impact theory, which makes it an unlawful employment practice for an employer to use a practice that has an impact on a protected group and is not justified as job related and consistent with business necessity)[14] and also disparate treatment, especially individual disparate treatment cases and judicial scrutiny of employer-provided reasons for individual employment decisions.

The case of *McDonnell Douglas v. Green* serves as a good example.[15] In that case, Percy Green challenged St. Louis-based aerospace manufacturing company McDonnell Douglas's refusal to rehire him after a layoff on the ground that the refusal violated Title VII as a decision made

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8 401 U.S. 424, 428 (1971).

9 *Id.* at 430.

10 *Id.* at 431.

11 *Id.*

12 The disparate impact theory doctrine has been substantially codified in Title VII. 42 U.S.C. § 2000e-2(k) (2018).

13 *See* Blumrosen, *supra* note 7, at 69–74 (describing thinking around the concept of disparate impact as it informed the litigation in *Griggs*); *see id*., at 84–89 (describing the disparate impact "principle" as it might apply to individuals and employers asserting a "best qualified" defense).

14 *See* 42 U.S.C. § 2000e-2(k).

15 411 U.S. 792 (1973).

because of his race.[16] Green, a black man and well-known civil rights activist (he climbed the St. Louis arch during its construction to protest the lack of black workers), was suspected of being involved in an illegal "stall in" and "lock in" designed to protest the employment practices of McDonnell Douglas as discriminatory.[17] McDonnell Douglas pointed to Green's involvement in the protest activities as its reason for refusing to rehire him and argued that its decision thereby did not violate Title VII.[18] The district judge in the case agreed, holding that McDonnell Douglas's refusal to rehire Green was not discriminatory because it was based on Green's misconduct.[19] The court of appeals, however, relying on the broad concept of *Griggs*, expected McDonnell Douglas to do more than merely point to a non-race-based reason for its decision; the court expected McDonnell Douglas to justify its reason as related to Green's ability to do the job in question.[20] In an opinion of the court of appeals (which was later modified), the court stated:

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a prima facie case of racial discrimination and that the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job. Here, McDonnell Douglas has not demonstrated any testimony or other evidence that Green's participation in the "stall-in" would impede his ability to perform the job for which he applied. There is no evidence that Green's conduct would cause fellow employees or supervisors to refuse to cooperate with Green, thereby disrupting plant operations.[21]

Even after later modification of the opinion to remove the shift in burden, there remained language stating that the district court should have considered "whether the reasons given by McDonnell Douglas for not rehiring Green were related to the requirements of the job."[22] These passages of the court of appeals' opinion reveal an effort to bring the concept of job-related justification from disparate impact into individual cases of discrimination, where an individual is challenging a single decision as discriminatory. Bringing the concept of disparate impact into individual cases would require business justification for the defendant's reasons for the decision.

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16 *Id.* at 796.
17 *Id.* at 794–96.
18 *Id.* at 796.
19 *Id.* at 797.
20 Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972).
21 *Id.* at 344.
22 *Id.* at 349 (Johansen, J., dissenting) (pointing this out).

In its 1973 decision in the *McDonnell Douglas* case, the Supreme Court rejected this position. Instead, it adopted a framework for analyzing individual disparate treatment cases—cases that ask whether a particular employment decision was based on protected group status—that focuses on whether the employer has provided a legitimate, nondiscriminatory reason for its decision. If the plaintiff cannot show that the reason proffered was a pretext for discrimination, no violation of Title VII will be found.[23]

The Court's decision in *McDonnell Douglas* thereby reserved *Griggs* and the concept of disparate impact to systemic cases in which a plaintiff challenges a practice as discriminating against a group rather than challenging an individual decision as biased. Even though the Court firmly limited the reach of disparate impact, however, it did not juxtapose disparate impact against disparate treatment. Instead, it merely stated that an individual challenge to a specific decision is not governed or influenced by *Griggs* and the concept of disparate impact.[24]

Furnco Construction v. Waters,[25] decided several years after *McDonnell Douglas*, might be seen as involving a similar attempt by judges to draw the concept of disparate impact into individual disparate treatment cases. Furnco Construction specialized in re-lining blast furnaces in steel mills, and it was sued by black bricklayers who applied for bricklayer positions by showing up to the job site ("at the gate") and seeking employment from the superintendent on the job.[26] The employer claimed that these workers were rejected because the superintendent, who was charged by Furnco with hiring the most qualified workers, had a policy of not hiring workers at the gate and because the names of the black workers involved were not included on a list drawn up by the superintendent.[27]

The panel for the court of appeals questioned the employer's claim that hiring from a list rather than at the gate was a legitimate nondiscriminatory reason under *McDonnell Douglas*. According to the court, the reason could

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[23] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973). Despite its rejection of the plaintiffs' and court of appeals' effort to draw on the concept of disparate impact, the Court's decision in *McDonnell Douglas* is nonetheless understood as relatively plaintiff friendly in that the framework that the Court established allows individuals to prove disparate treatment discrimination by inference, from falsity of the defendant's proffered reason, without any direct evidence of bias, such as biased statements of the decision maker.

[24] *Id.* at 803 n.14 ("We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be 'shown to bear a demonstrable relationship to successful performance of the jobs' for which they were used." (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971))).

[25] 438 U.S. 567 (1978).

[26] *Id.* at 567.

[27] *Id.*

not be legitimate and nondiscriminatory because it was not adequately designed to capture black as well as white applicants—again, the concept of disparate impact, although in slightly different form. The court expected the employer to make a connection between the reason given and ability to do the job in question and to make a showing that it had used the method of hiring that would yield the highest number of black hires.[28] The Supreme Court again rejected this approach.[29] The Court saw the case as best framed as several individual claims, and, like in *McDonnell Douglas*, it noted that disparate impact from *Griggs* would not apply because the case did not involve a test or practice that, applied broadly, was alleged to have a disparate impact on a group.[30] And the Court corrected the court of appeals' reasoning on the individual claims, stating that "Title VII prohibits [an employer] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."[31]

Even as the Supreme Court closed the disparate impact concept out of individual disparate treatment claims, however, it did not in either of these cases juxtapose disparate impact against disparate treatment by contrasting the theories or drawing a bright line between them. In each case, the distinction the Court made was an individual versus systemic distinction, and even the justices who dissented in part in *Furnco*, Justice Marshall and

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[28] The court of appeals in the case stated the following:

> It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken, with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility of such a method, and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. "Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring."

Waters v. Furnco Constr. Co., 551 F.2d 1085, 1088–89 (7th Cir. 1977) (quoting Reed v. Arlington Hotel Company, Inc., 476 F.2d 721, 724 (8th Cir. 1973)).

[29] Furnco Constr. Co. v. Waters, 438 U.S. 567, 576–77 (1978).

[30] *See id.* at 575 n.7 ("This case did not involve employment tests, which we dealt with in *Griggs v. Duke Power Co.* and in *Albemarle Paper Co. v. Moody*, or particularized requirements such as the height and weight specifications considered in *Dothard v. Rawlinson* . . . ."). (internal citations omitted). The Court also explained that the case "was not a 'pattern or practice' case like *Teamsters v. United States*." *Id.* (internal citations omitted). The employer in the case had pushed for application of systemic disparate impact theory because it wanted to argue that its other efforts at hiring minority bricklayers should operate as a defense to the plaintiffs' individual claims. This argument was rejected by the Court in a later case, *Connecticut v. Teal*, 457 U.S. 440 (1982), but was still open at the time.

[31] *Id.* at 577–78.

Justice Brennan, agreed.[32] They dissented because they thought the majority erroneously foreclosed the plaintiffs from asserting a systemic disparate impact claim on remand.[33]

B. *Two Theories Sharing Goals*

By the time of *Watson*, the effort to infuse all of employment discrimination law with the concept of disparate impact was largely lost, but disparate impact nonetheless was not yet firmly juxtaposed against disparate treatment. The Supreme Court's decision in *Washington v. Davis* in 1976 is often seen as a key decision driving a hard distinction between disparate treatment and disparate impact.[34] We know after *Washington v. Davis* that "intent" is the talisman of constitutional violation, after all.[35] But even *Washington v. Davis* left room for capacious understanding of systemic disparate treatment, that is, proving systemic disparate treatment by evidence of difference in treatment without evidence of a particular state of mind on the part of an identified decision maker or leader. The majority emphasized that evidence of impact can be relevant, indeed important evidence in inferring a pattern of discrimination by an employer.[36]

Shortly after *Washington v. Davis* came *Teamsters* and *Hazelwood*, two key systemic discrimination cases brought under Title VII. *Teamsters* involved a claim by black and Hispanic truck drivers that they had been denied long-haul truck driving opportunities because of their race and national origin.[37] *Hazelwood* involved a claim by black teachers that they had been denied teaching positions in the Hazelwood School District, a suburban district outside of St. Louis, because of their race.[38] Both cases were built in part on statistics comparing the percentage of those from the group in the relevant labor pool for the position and the percentage of those from the group hired into the position in question, together with other evidence that race could explain the stark disparity.[39]

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[32] *Id.* at 582–84 (Marshall, J., concurring in part and dissenting in part).

[33] *Id.* at 583–84.

[34] 426 U.S. 229 (1976).

[35] *Id.* at 238–243 (rejecting the Title VII disparate impact theory for constitutional claims).

[36] *Id.* at 242 ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."). In concurrence, Justice Stevens expressly noted that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not as critical, as the reader of the Court's opinion might assume." *Id.* at 254 (Stevens, J., concurring).

[37] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 328–29 (1977).

[38] Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 301 (1977).

[39] *Teamsters*, 431 U.S. at 337–38 (describing statistical evidence); *Hazelwood*, 433 U.S. at 303. *See generally* Note, *Employment Discrimination: Statistics and Preferences Under*

Teamsters and *Hazelwood* were heard and decided by the Supreme Court in the same year, 1977. The same justice, Justice Potter Stewart, wrote the majority opinions in both cases, and Stewart treated both cases firmly as disparate treatment cases.[40] As for the holding, understanding that evidence of biased statements by high-level (or even low-level) decision makers would be difficult to obtain, the Court allowed proof of discrimination by inference, like it had done in *McDonnell Douglas*.[41] It also made clear that the same or similar evidence might make out both a systemic disparate treatment and a disparate impact claim.[42]

Moreover, the Court specifically held that statistics alone are enough to prove systemic discrimination; no specific instances need be presented.[43] This holding, in fact, was in response to arguments being made in the lower courts at the time. Some lower courts prior to *Teamsters* and *Hazelwood*, worried about plaintiffs' reliance on statistics to prove discrimination, had adopted a "specific incident" requirement for systemic disparate treatment cases.[44] The plaintiffs in *United Brotherhood Carpenters and Joiners*, for

Title VII, 59 VA. L. REV. 463 (1973) (describing early use of statistics in employment discrimination cases).

[40] *Teamsters*, 431 U.S. at 339–41 n.20; *Hazelwood*, 433 U.S. at 308 n.12. Around this time, a constitutional question was percolating in the courts: the question of whether Title VII's disparate impact concept of discrimination was a valid exercise of congressional power authorized by the Constitution. This question was directly presented to the Court in *Hazelwood*, *see* 433 U.S. at 306 n.12 (describing the questions presented), and Justice Stewart specifically questioned the government's lawyers at oral argument on whether the district court had found intentional discrimination from the evidence presented. *See id.* (oral argument transcript). Placing the case firmly as one of disparate treatment allowed the Court to avoid the constitutional issue raised by the defendant.

[41] *Teamsters*, 431 U.S. at 338, 341; *Hazelwood*, 433 U.S. at 306.

[42] *Teamsters*, 431 U.S. at 336–37 n.15. Justice Stewart's discussion of disparate treatment and disparate impact in footnote 15 of the *Teamsters* opinion is often quoted to portray a stark distinction between disparate treatment and disparate impact, one that confines disparate treatment to purpose. *See supra* note 1 (citing casebook authors relying on *Teamsters* in this way). Justice Stewart is careful to point out in that footnote, however, that motive can be inferred "from the mere fact of differences in treatment[.]" *Id.* at 336 n.15. He also noted that "[e]ither theory may, of course, be applied to a particular set of facts." *Id.* In addition to citing to *Griggs*, Stewart cited to a 1972 law review article by Alfred Blumrosen discussing the concepts of disparate treatment and disparate impact. *Id.; see generally* Blumrosen, *supra* note 7, at 68–69 (describing unequal treatment as a violation of Title VII), and at 69–71 (describing the advocate push for a disparate impact concept that would capture discrimination more widely than the traditional purpose or treatment definitions).

[43] *Teamsters*, 431 U.S. at 339; *Hazelwood*, 433 U.S. at 307–08.

[44] *See, e.g.*, Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 508 (E.D. Va. 1968) ("But the plaintiffs have not shown any instance of a qualified Negro being denied employment or promotion to a supervisory position."); *see generally* Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, *supra* note 39, at 472–73, n.38 (citing to lower court cases in which the judge imposed a "specific act requirement" and describing the requirement as inconsistent with *Griggs*); *see also* Note, *Beyond the Prima Facie Case in Employment Discrimination Law*, 89 HARV. L. REV. 387, 392–93 (1974) (noting the "specific

example, sought to show a pattern of discrimination against blacks, and to do this they presented statistics showing a dearth of black members of the carpenters' union in a geographic area with a significant black population.[45] The district court judge in the case found no discrimination, reasoning that the small number of black members in the carpenters' union "might readily be attributed to a lack of diligent efforts on the part of the blacks to effectively pursue their attempts to become union members."[46] The judge also found that nepotism was "not racially oriented" and that, in regard to the hiring halls, "[t]here was not one scintilla of evidence presented to show that this particular procedure resulted in any racial discrimination."[47] By this the judge meant that no "specific incident" of discrimination had been presented.

This specific incident requirement was rejected by several appellate courts prior to *Teamsters* and *Hazelwood*. As one scholarly note at the time described, "The emphasis on specific incidents of discrimination has tended to incorporate an unwarranted requirement of invidiousness into the Act's definition of discrimination."[48] The Supreme Court also expressly rejected the specific incident requirement in *Teamsters* and *Hazelwood*. Statistics alone are enough, held the Court, to make out a prima facie case of a pattern or practice of discrimination, a systemic disparate treatment claim.[49]

III. *WATSON* AND THE JUXTAPOSITION TURN

The Supreme Court's opinion in *Watson v. Fort Worth Bank* did more than reject disparate impact as an overarching concept (even as it allowed plaintiffs to use it to challenge subjective decision-making practices); it positioned disparate treatment as a narrowly-confined conscious animus theory that stands in stark contrast to disparate impact. The Court did this not by its holding, but by the way it construed the concept behind the theories of impact and treatment and by the way it treated Watson's disparate treatment claims brought in the courts below.

act requirement" in the lower courts and stating that the trend toward such a requirement was "waning").

[45] United States v. United Broth. & Carpenters of Am., 457 F.2d 210, 214 (7th Cir. 1972) (explaining that plaintiffs regularly start with statistics to prove a pattern of discrimination: "[o]n the basis that a showing of an absence or a small black union membership in a demographic area containing a substantial number of black workers raises an inference that the racial imbalance is the result of discrimination, the burden of going forward and the burden of persuasion is shifted to the accused, for such a showing is enough to establish a *prima facie* case").

[46] *Id.* at 215.

[47] *Id.*

[48] *See* Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, *supra* note 39, at 473.

[49] *See supra* notes 43–47 and accompanying text.

A. *The Case*

Clara Watson, the lead plaintiff in the *Watson* case, filed suit against Forth Worth Bank & Trust in 1981, alleging that the bank discriminated against her and other similarly situated persons on the basis of race in violation of Title VII.[50] Watson had applied several times for a teller position at the bank before she was hired in 1973 as a proof operator, not a teller.[51] She and the other four black employees of the bank at the time worked in the back room and had no contact with the public. Watson was later promoted to a teller position in the motor bank,[52] and then in 1980 she was transferred to the bank's main lobby. Between 1980 and 1981, Watson applied for four different promotions into supervisory positions and was turned down each time, and each time a white man or woman was promoted or hired instead.[53]

Watson filed suit seeking certification of a class consisting of black employees and applicants at the bank, and the trial judge initially certified the class.[54] Watson presented evidence at trial that included statistical evidence regarding hiring over a period of four years and evidence that black employees were evaluated more severely than white employees, were paid

[50] Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 794 (5th Cir. 1986).

[51] *Id.* at 793.

[52] *Id.* When Watson initially inquired of Gary Shipp, a white man and the vice president in charge of personnel at the time, about a teller position, he told her that tellers have to handle too much money "for blacks." *See* Brief for Petitioner at n.5, Watson v. Fort Worth Bank & Trust, 487 U.S 977 (1988) (No. 86-6139) (relaying Watson's testimony that when she asked about a teller position, "Gary Shipp, bank vice-president for personnel, replied, 'I don't know girl, it's a big responsibility,' and 'It's a lot of money, you know, for blacks to have to count'"). *See also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) (stating that "petitioner was apparently told at one point that the teller position was a big responsibility with 'a lot of money . . . for blacks to have to count'").

[53] When Watson applied for promotion to the position of supervisor of tellers, Gary Shipp chose Richard Burt, a white man who was then supervisor in the bookkeeping department. *See* Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner at *4–5, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (No. 86-6139) [hereinafter Brief of ACLU] (describing facts). Burt had been at the bank six years fewer than Watson, but the bank pointed to Burt's year of supervisory experience as the reason for the decision. *Id.* When Watson applied for promotion to the position of motor bank teller supervisor, Burt, now supervisor of all tellers, chose a white woman, Pat Cullar. *Id.* at *5. Watson had four years more experience than Cullar at the bank, but Cullar had seventeen years of experience at another bank. Neither had supervisory experience. *Id.* at *6. When Watson applied again for the position of supervisor of tellers (after Burt had been promoted to a higher supervisory position), the new supervisor again chose Cullar for the position. *Id.* When Cullar's position of motor bank supervisor became vacant upon her promotion, Watson applied for that position. *Id.* She and another black woman and a white man, Kevin Brown, applied for the position. *Id.* Brown had been working at the bank for one year, but the bank pointed to his supervisory experience at Six Flags Amusement Park as the reason for the decision to promote him rather than Watson. *Id.* at *6–7.

[54] *Watson*, 487 U.S at 983.

less, and advanced more slowly in responsibilities and promotions.[55]

After the evidence was presented at trial, the judge decertified the class on the ground that a single person did not make both the applicant and the employee decisions, and then the judge refused to certify a class of employees on the ground that there were too few black employees working at the bank to warrant class treatment.[56] This was the end of Watson's systemic disparate treatment claim involving employees at the trial level. The judge ended up finding no systemic discrimination against the applicant class.[57] For the individual claim involving Watson and her treatment as an employee, the judge applied *McDonnell Douglas* and found that Watson had not proven pretext as to any of the four promotion decisions that she sought.[58]

The appellate court, in a 2-1 panel decision, upheld the district court judge's decisions.[59] The appellate court held that the district court judge did not abuse his discretion in decertifying the class.[60] As for Watson's individual claim, the court held that the proper analysis was the *McDonnell Douglas* disparate treatment analysis, and it went on to uphold the district judge's factual findings regarding pretext under a clearly erroneous standard.[61]

By the time the case reached the Supreme Court, the question posed

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[55] *See Watson*, 798 F.2d at 810–14 (Goldberg, J., dissenting) (describing plaintiffs' evidence).

[56] *Id.* at 796.

[57] The district court judge's reasoning was as follows:

> After considering the statistical evidence introduced by plaintiffs regarding the hiring of blacks by the defendant, the Court find that they do not present a prima facie case of race discrimination. Blacks represent 13.1% of defendant's non-exempt employees and 11.8% of the population in Tarrant County, 10.2 % of the population of the Fort Worth Metropolitan area and 22.8% of the population of Fort Worth. Accordingly, the Court finds that no discrimination against blacks as a class has been proved on the basis of defendant's hiring practices.

Id. at 811 (Goldberg, J., dissenting) (quoting the district court's opinion). For explanation of why this reasoning is problematic, see *id.* at 811–13.

[58] *Id.* at 798.

[59] *Id.* at 799.

[60] *Id.* at 796. Instead of relying on the district court judge's reasoning regarding commonality, however, asking whether a single person made all personnel decisions at the bank, the court of appeals pointed to Watson's statistical evidence as reason to believe that Watson's promotion claim was not typical of the applicant claims. *Id.* "The applicant class claims relied primarily on applicant flow statistics," said the court. *Id.* "In contrast, the proof asserted in support of the promotions claims focused on statistical evidence of the Bank's treatment of black individuals in the employee evaluation process, promotions process, compensation process and other employment practices." *Id.* As the dissenting judge in the court of appeals pointed out, this reasoning makes no sense. *Id.* at 806 (Goldberg, J., dissenting).

[61] *Watson*, 798 F.2d at 797–99. The court upheld the district court's findings despite inconsistency in the bank's reasons provided for the decisions. *Id.* at 799.

was whether Watson should have been allowed to challenge the subjective decision-making system at the bank (under which each of her promotion decisions were made) using disparate impact theory.[62] This question masked an underlying struggle about disparate treatment, specifically the desire on the part of defendants for courts to require evidence of specific instances in systemic disparate treatment cases (a position rejected by the Supreme Court in *Teamsters* and *Hazelwood*, as discussed above, but nonetheless still surfacing in lower court decisions in new ways) and at the same time to turn cases involving evidence of specific instances into individual disparate treatment cases where the focus is often on intent with respect to specific decision makers rather than on the practice of the entity as a whole.[63] The defendant's position in *Watson* was that once an employer considered an applicant's individual qualifications, the case became one of individual disparate treatment to be analyzed solely under *McDonnell Douglas*.[64]

B. *The Juxtaposition Turn*

At first glance, Justice O'Connor's opinion in *Watson* (written for a unanimous court) was a big plaintiff-side win: disparate impact theory can be used to challenge a subjective decision-making system like the one used by Fort Worth Bank & Trust.[65] From there, Justice O'Connor in her plurality opinion went on to cut back the law of disparate impact significantly, a position later taken by a majority of the Court in *Wards Cove*[66] and overturned in part by Congress in the 1991 CRA.[67] But it is the first portion of the opinion (for a majority of the Court) that I am concerned with in this Essay: disparate impact theory can be used to challenge subjective decision making. Between the lines of this portion of the opinion, in both what she said and what she did not say, O'Connor set disparate impact against

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[62] *See* Brief for Petitioner at *i, Watson v. Fort Worth Bank & Trust, 487 U.S 977 (1988) (No. 86-6139) (stating the question presented as: "Whether an employer's practice of committing employment decisions to the wholly subjective discretion of its supervisors which adversely affects minority employees may be tested under the disparate impact theory of proof of employment discrimination recognized by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)").

[63] *See* Brief for Respondent at *6, Watson v. Fort Worth Bank & Trust, 487 U.S 977 (1988) (No. 86-6139) ("When the employment practices challenged are subjective, the basis of the complaint is that the subjective criteria have been applied in a discriminatory fashion."); Watson v. Fort Worth Bank & Trust, Transcript of Oral Argument (defendant arguing that "key to the distinction between *McDonnell Douglas* and *Griggs* is that, on the one hand, you have these objective artificial rules which disqualify large groups of people, regardless of consideration of their individual qualifications, where, with *McDonnell Douglas*, you have a consideration of qualifications").

[64] *See supra* note 63.

[65] *Watson*, 487 U.S at 991.

[66] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[67] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

systemic disparate treatment so as to shift our rhetoric and our thinking about those theories.

First, what Justice O'Connor said. O'Connor narrowed disparate treatment by suggesting that stereotyping stands outside of the concept, as if a case is either disparate impact or disparate treatment and the reason plaintiffs need disparate impact for subjective decision-making practices in a case like Watson's is because stereotyping does not fall within disparate treatment.[68] Specifically, O'Connor mentioned that a supervisor's decision based on the belief that being a bank teller involved "a lot of money for blacks to count" would not be captured by any disparate treatment theory and therefore would evade legal redress without availability of the disparate impact theory.[69]

This suggestion is inconsistent with *Teamsters* and *Hazelwood*, where the Court clearly stated that difference in treatment, frequently evidenced by statistics rather than specific instances, is sufficient to prove a pattern or practice of discrimination on the part of an entity.[70] If statistics are sufficient, it matters not whether stereotyping (either conscious or unconscious) or purposeful animus motivated the individualized employment decisions.

The same is true for individual disparate treatment. Nothing in the Court's individual disparate treatment decisions requires that stereotyping be consciously exercised in order to violate Title VII. The Court has held that a plaintiff can prove individual disparate treatment by inference—for example, by comparing the plaintiff's qualifications to those of someone who was given the sought-after promotion—and has held that Title VII prohibits all discrimination, "subtle or otherwise."[71] So long as an

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[68] *Watson*, 487 U.S. at 990.

[69] In full, Justice O'Connor stated:

> It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. Especially in relatively small businesses like respondent's, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the job to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with "a lot of money . . . for blacks to have to count." Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat.

Id. at 990–91. The petitioner's brief set this reasoning up. *See* Brief for Petitioner at 76–77, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (No. 86-6139).

[70] *See supra* note 41–48 and accompanying text.

[71] Price Waterhouse v. Hopkins, 490 U.S. 228, 272 (1989) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

employment decision is taken "because of race" it violates the Act.[72]

Rather than suggesting a narrow scope for disparate treatment, O'Connor could have as easily explained that it makes sense to allow disparate impact challenges to subjective decision-making systems because those can be practices that serve as built-in headwinds that must be altered or removed unless justified. We can have a law that allows a plaintiff to recover for specific decisions that are based on racial bias and that allows the same plaintiff to recover for being subjected to a practice that applied to all has a disparate impact on members of her group. The remedies may be different under the two claims, but the law can easily allow both.

Also significant is what the majority and Justice O'Connor did not say in the *Watson* opinion. Recall that Watson had alleged systemic disparate treatment in the trial court.[73] Judge Goldberg in a strong dissent at the appellate level (as well as the amicus briefs submitted to the Supreme Court by the NAACP[74] and ACLU[75]) claimed that Watson had presented a systemic disparate treatment, pattern or practice case on which she could prevail.[76] Goldberg explained:

> The not particularly voluminous record in this case does not disclose any substantial anecdotal evidence of racial animus [no "specific incidents" in other words] . . . . The numbers, however, belie the bank's claim that it has not discriminated against the class on the basis of race. When Watson began her career at the bank as a proof operator in August 1973, the bank employed four other blacks in its fifty member work force. Two printed checks in the basement, one was a kitchen attendant, and the last was a porter. The bank has never had a black director or officer, nor has it ever had a black supervisor. Watson's unrebutted statistics

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[72] Scholars continue to debate whether "unconscious bias" should be actionable in employment discrimination law, *see, e.g.*, Patrick Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010); Sullivan, *supra* note 2, at 1000–01, despite relatively broad consensus that causation rather than state of mind is the appropriate inquiry, *see, e.g.*, Noah Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1374 (2009) (stating as much); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 984–85 (2008) (agreeing). For discussion of the cognitive bias revolution and its possible influence in the rise of organizational innocence, a perception that discrimination is solely an individual problem and not an organizational one, see TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS IN EQUAL OPPORTUNITY LAW 32–35 (2017).

[73] *See supra* note 54–59 and accompanying text.

[74] *See* Brief for NAACP Legal Defense Fund et al. as Amici Curiae Supporting Petitioner, Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (No. 86-6139).

[75] *See* Brief of ACLU, *supra* note 53, at 48–49.

[76] Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 800 (5th Cir. 1986) (Goldberg, J., dissenting).

> indicate that a black who applies for a job at the bank has one-fourth the chance of a white applicant to get the job; should the black be hired, her performance is apt to be evaluated thirty points lower and she is apt to be paid $46.00 per month less than an identically qualified white; and the Bank is likely to advance her to greater responsibilities at a rate of six-tenths of a pay grade per year more slowly than the equally qualified white. Watson herself unsuccessfully sought promotion on four occasions to supervisory positions.[77]

The Supreme Court ignored these arguments entirely in its opinion, leaving readers thinking that Watson did not have a systemic disparate treatment claim, while under *Teamsters* and *Hazelwood* she clearly did. Here, too, lies the juxtaposition turn: the reasoning goes that without systemic disparate treatment at Watson's disposal, her claim must be open to disparate impact analysis, when in reality she could have had both.

IV. WHY THE JUXTAPOSITION TURN IN *WATSON* MATTERS

Why does the juxtaposition turn in *Watson* matter? We see casebooks, articles, briefs, and judicial opinions entertaining this juxtaposition without giving it a second thought.[78] Yet it matters because thinking about disparate impact and disparate treatment in this way sets us on a path that is inconsistent with the case law prior to *Watson* and that is devastating to systemic disparate treatment theory. It leads to assumptions and arguments that systemic disparate treatment requires proof of high-level, subjective intent, even purpose,[79] and to conflation of individual and systemic disparate treatment law.[80] While individual claims of discrimination often focus on specific decision makers and the reasons for their decisions, systemic disparate treatment claims, rightly so, focus on patterns and practices of discrimination at the entity level. Conflating the two merely compounds misunderstandings around intent and undermines the Court-approved use of statistics to prove discrimination.

Charlie, for example, in his article, *Disparate Impact: Looking Past the Desert Palace Mirage*, claims that understanding systemic disparate treatment to address "decreased opportunity for disfavored groups

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77 *Id.* at 808.

78 *See supra* note 1 and accompanying text.

79 It also leads to claims that cognitive bias is somehow not meant to be captured by systemic disparate treatment theory, as mentioned above. *See supra* note 2 and accompanying text.

80 *See* Sullivan, *supra* note 2, at 938–39. For an example of why we should be concerned with conflation of individual and systemic disparate treatment, see Tristin K. Green, *On Macaws and Employer Liability: A Response to Professor Zatz*, 109 COLUM. L. REV. SIDEBAR 107, 113 (2009) (pointing out the trouble with Zatz's conflation of individual and systemic disparate treatment).

without . . . a single, identifiable discriminatory decision . . . cuts directly against the grain of the circuits that are increasingly using the notion of 'adverse employment action' to declare many employment-related decisions beyond the reach of Title VII and the other antidiscrimination statutes."[81] By conflating systemic and individual theories of discrimination, Charlie misses that an adverse-employment-action requirement in individual disparate treatment law need not carry over in the same way to systemic disparate treatment law. Indeed, the statistical showings in a systemic disparate treatment case indicate that adverse employment actions have occurred, resulting in difference in pay or promotion (otherwise, the numerical disparities would not emerge). If we impose the adverse employment action requirement as Charlie seems to see it, we would be imposing a specific instance requirement, a requirement that was firmly rejected by the Court in *Teamsters* and *Hazelwood*, as discussed above.

The Supreme Court more recently made a similar mistake in its decision in *Wal-Mart Stores v. Dukes*.[82] There, the defendant once again pressed arguments that sought to divorce individual decisions by individual supervisors from the entity and its practices.[83] Although the judicial decision in the case is one of class certification rather than substantive law, the Court suggests that it would be inclined to impose a numerical threshold for specific incidents before such incidents could buttress plaintiffs' statistical evidence in a systemic disparate treatment case.[84] This is contrary to *Teamsters* and *Hazelwood*, where statistics alone were held to be enough to prove systemic disparate treatment.[85]

If we give *Watson*'s juxtaposition weight—if we take it into our thinking about discrimination and ultimately into our doctrine—we will begin to accept that systemic disparate treatment is somehow naturally cabined and narrow, when *Teamsters* and *Hazelwood* tell us that it is not. At bottom, if we are blind to the crux of this move, we cannot effectively fight for a comprehensive law that protects against discrimination and incentivizes meaningful employer reform.

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81 Sullivan, *supra* note 2, at 949 (quoting Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003)).

82 564 U.S. 338 (2011).

83 Reply Brief for Petitioner at 18, Wal-Mart Stores v. Dukes, 564 U.S. 338 (2011) (No. 10-277) (stating that "plaintiffs in a Title VII class action bear the burden of showing *both* individual instances of actionable discrimination *and* a company-wide pattern or practice of discrimination").

84 *Wal-Mart*, 564 U.S. at 358. *See supra* note 41–48 and accompanying text.

85 *See generally* GREEN, *supra* note 72 (describing the push toward individualizing discrimination and systemic disparate treatment claims).

V. CONCLUSION

As I said at the outset, I see this Essay as a descriptive project with a modest, immediate objective. I aim to tell the missing story of *Watson*—its place in history and its possible (but not yet fully determined) significance for the future. But my end goal is, of course, much bigger than that. I want to challenge Charlie (and many others) to re-think not just their characterization of *Watson*, but their conception of systemic disparate treatment theory. *Watson* and its juxtaposition of impact against treatment should not be allowed to trump established case law or to erode a longstanding theory that is essential for combating systemic discrimination.

Surely I have not in this short essay put to rest all questions about the precise scope of systemic disparate treatment theory—Charlie and I and others will no doubt continue our vigorous debates on that front—but I do hope that I have advanced us to a new level of conversation about what employment discrimination law does and should look like. That is just one of the many things that Charlie and his work have taught me to try to do. I owe thanks to him for so much more, but especially for his open respect—even solicitation of—difficult conversations and differing views.