

Righting the World: Sullivan on Disparate Impact

*Steven L. Willborn**

I. INTRODUCTION	1495
II. IN THE BEGINNING	1497
III. SUSAN SONTAG AND THE THEORY OF DISPARATE IMPACT.....	1499
IV. DOUBLING DOWN ON DISPARATE IMPACT	1501
V. ARTIFICIAL INTELLIGENCE AND STRATIFICATION	1505
VI. THE TURN TOWARDS MERITOCRACY.....	1508
VII. CONCLUSION.....	1515

I. INTRODUCTION

Charlie has been a polymath in his scholarship. Although his primary topic has been employment discrimination, he has written on a variety of topics within and outside employment law ranging from faithless servants¹ to the Herfindahl-Hirschman index.² So I decided to ask Charlie for help in deciding on my topic for this symposium. I asked him what his favorite article was. He lamented that friends can be annoying when they force one to become introspective (it is always satisfying to annoy Charlie), but nevertheless he reported that his favorite article was *The World Turned Upside Down?: Disparate Impact Claims by White Males*.³ I decided to make that article the central focus of my contribution to this symposium, but expanded the topic a bit to include the rest of his scholarship on the

* Judge Harry A. Spencer Professor of Law, University of Nebraska College of Law. Thanks to Bill Corbett, Tim Glynn, Tristin Green, Ramona Paetzold, Stewart Schwab, Mike Selmi, and Charlie Sullivan for helpful comments and suggestions.

¹ Charles A. Sullivan, *Mastering the Faithless Servant?: Reconciling Employment Law, Contract Law, and Fiduciary Duty*, 2011 WIS. L. REV. 777 (2011).

² Neil B. Cohen & Charles A. Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration*, 62 TEX. L. REV. 453 (1983).

³ Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004) [hereinafter Sullivan, *Upside Down*].

disparate impact doctrine.

The main theme of this article is that Charlie makes us think about things in new and interesting ways. This will not be an article that attempts to survey and integrate Charlie's views about disparate impact across all his articles on the topic. Instead, it will be a series of riffs on ideas that Charlie has raised in the area. Charlie is such an insightful and provocative scholar that many riffs are possible; I will limit myself to a few.

Charlie began thinking about disparate impact in 1975 almost as soon as it had emerged as a concept. Four years after the seminal case *Griggs v. Duke Power Company*,⁴ he noodled⁵ about how the recently enacted South Carolina Human Affairs Law would be interpreted and, as part of that, he considered *Griggs*.⁶ In the first section of this article, I will recount how incredibly prescient Charlie was in that article.

Then, after a break (of about 30 years, but who's counting?), he published his favorite piece on this or any topic, *The World Turned Upside Down*.⁷ In that article and others,⁸ he reviewed the various theories that have been forwarded to rationalize the disparate impact concept. In Section II, I will talk about the interesting problems presented by the theory (or, maybe better, non-theory) of disparate impact.

A couple years later, Charlie published *Disparate Impact: Looking Past the Desert Palace Mirage*.⁹ The central claim in this article was that disparate impact is a powerful anti-discrimination tool, better in many ways than disparate treatment. He encouraged plaintiffs to use it more often. In Section III, I will not only agree with Charlie, but double down on his claim.

Most recently, Charlie published *Employing AI*.¹⁰ The question he addressed in this article was what does thinking about artificial intelligence tell us about disparate impact. (He also asked what it tells us about disparate treatment, but that is not the topic here.) In Section IV, I focus on one of his main conclusions: employment outcomes driven by AI, almost

⁴ 401 U.S. 424 (1971).

⁵ I discovered at the symposium that this word was used by Charlie and his good friend, Mike Zimmer, when they thought something was worth thinking about.

⁶ Charles A. Sullivan & Michael J. Zimmer, *The South Carolina Human Affairs Law: Two Steps Forward, One Step Back?* (pts. 1 & 2), 26 S.C. L. REV. 1 (1974), 27 S.C. L. REV. 1 (1975) [hereinafter Sullivan & Zimmer, *Two Steps Forward*].

⁷ Sullivan, *Upside Down*, *supra* note 3.

⁸ See Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 964–66 (2005) [hereinafter Sullivan, *Mirage*]; Sullivan, *Upside Down*, *supra* note 3, at 1521–23.

⁹ Sullivan, *Mirage*, *supra* note 8.

¹⁰ Charles A. Sullivan, *Employing AI*, 63 VILL. L. REV. 395 (2018).

by definition, will be correlated with some sort of business necessity because that is what AI does. But AI correlates in a particularly complex, effective, and often, obscure way. So, Charlie asks, should we think about bare correlations as business justifications differently? Charlie's answer, by my lights right again (as usual for Charlie), is that yes, we probably should. I agree again, but add some of my own thoughts and musings.

Finally, in Section V, I return to Charlie's favorite article, *The World Turned Upside Down*. The basic question he addressed there was whether disparate impact claims by Whites and males should be cognizable under Title VII. Charlie's clear opinion was that the doctrine should not be available to White and male plaintiffs, but he somewhat reluctantly concluded that it must be available, otherwise the whole doctrine would be in constitutional jeopardy. In Section V, I focus on an issue Charlie raises in that article: just how many more claims would we expect to see if disparate impact were expanded to cover such claims?¹¹

II. IN THE BEGINNING . . .

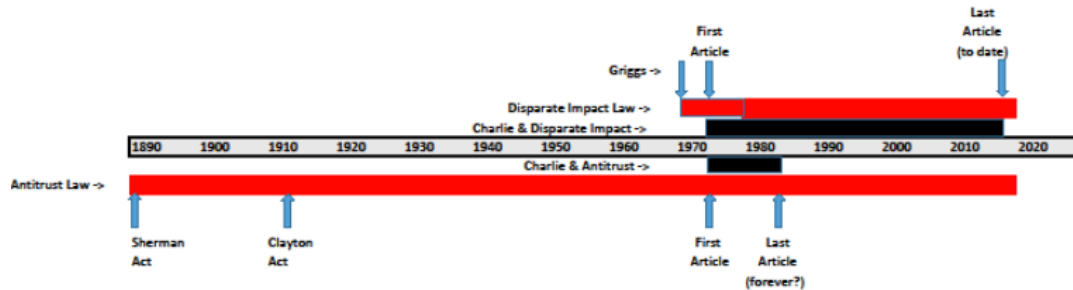
First, an observation: Charlie really was there at the beginning. Although there were glimmers earlier, disparate impact doctrine really began in 1971 with *Griggs*. Charlie was there practically at birth; he published his first article on the topic in 1975. For most of us in the field, we have only known disparate impact from the time of its adolescence, or for some perhaps even its adulthood. But Charlie was practically one of disparate impact's midwives. For context, compare it with another area he has written in: antitrust. (See Figure 1 below.) Even Charlie probably does not personally remember much about the details of its birth in the Sherman Antitrust Act of 1890,¹² or the Clayton Act in 1914,¹³ or whenever you want to date its birth.

¹¹ Charlie published one other article focused on disparate impact in addition to the four mentioned in the text: Charles A. Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. L. REV. 411 (2010). This was a careful, early analysis of *Ricci*. Charlie's answer to the question in the title, correct by my lights, was that *Ricci* was just another turn in the road. The case was definitely interesting, but because of its odd setting and its density, it was unlikely to have broad impact. Because the case was such a cul-de-sac, I do not discuss this article here.

¹² Sherman Antitrust Act, ch. 647, 26 Stat. 210 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2018)).

¹³ Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2018)).

Figure 1: The Lifespan of Disparate Impact, Antitrust, and Charlie's Scholarship on Each



An amazing thing about Charlie's first article on disparate impact in 1975 is just how prescient he was about the kinds of issues that would arise. For example:

- He says that *Griggs* (in combination with *McDonnell Douglas*)¹⁴ maybe approves, or at least holds open the possibility, that a cause of action for discrimination could be made out even without identifying a specific employment practice, by comparing the composition of an employer's workforce to demographic statistics.¹⁵ Note that this is two years before *Teamsters*¹⁶ and *Hazelwood*,¹⁷ the seminal cases introducing the systemic disparate treatment theory of discrimination. So he was right, just not about the theory being a part of disparate impact doctrine.
- He points out that extending disparate impact analysis to the Equal Protection Clause would cause problems that are not present in cases limited to the employment discrimination statutes.¹⁸ This was a year before *Washington v. Davis*,¹⁹ which held that disparate impact analysis was not cognizable under the Equal Protection Clause.
- He discusses whether a factor that an employee can voluntarily comply with can be attacked using disparate impact,²⁰ predicting *Spun Steak*²¹ (requiring bilingual employees to speak English) and

¹⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹⁵ Sullivan & Zimmer, *Two Steps Forward*, *supra* note 6, at 13–14.

¹⁶ *Teamsters v. United States*, 431 U.S. 324 (1977).

¹⁷ *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).

¹⁸ Sullivan & Zimmer, *Two Steps Forward*, *supra* note 6, at 32–34.

¹⁹ 426 U.S. 229 (1976).

²⁰ Sullivan & Zimmer, *Two Steps Forward*, *supra* note 6, at 24–26.

²¹ *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir. 1993) (holding that an English-only rule with a disparate impact against employees of Mexican origin did not

*Lanning*²² (requiring people to train to run 1.5 miles in 12 minutes) by about 20 and 30 years, respectively.²³

- He discusses the problem of just which members of the protected class should be entitled to a remedy after a disparate impact case is made out. What about especially disloyal employees, as in *McDonnell Douglas*? Or ones who would not have been hired anyway for other reasons?²⁴ Again, this was years before the two-stage liability-then-remedies concept was developed.²⁵

All in all, it was an amazingly prescient article.

III. SUSAN SONTAG AND THE THEORY OF DISPARATE IMPACT

Charlie discussed the theory of disparate impact in some of his articles,²⁶ as have I²⁷ and many others.²⁸ But none of the theories have been widely accepted; all have flaws. Marcuse famously said that Susan Sontag could make a theory out of a potato peel.²⁹ Unfortunately, no Susan Sontag

violate Title VII because bilingual employees could voluntarily comply with the rule).

²² *Lanning v. SEPTA*, 308 F.3d 286, 292 (3d Cir. 2002) (holding that an employment test requiring applicants to run 1.5 miles within 12 minutes that had a disparate impact against women was not a violation of Title VII because most women would be able to comply with the requirement with moderate training).

²³ This issue also arose under a later-enacted statute, the Americans with Disabilities Act (ADA). Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2018)). In three 1999 decisions, the Supreme Court held that individuals who had limitations that could be corrected through a medical or physiological intervention did not qualify as “individuals with a disability” under the ADA. These holdings were later overturned by the 2008 Americans with Disabilities Act Amendments Act (ADAAA). For a discussion, see CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 450–51 (9th ed. 2017). Nevertheless, the issue still has resonance after the ADAAA. See *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1109 (8th Cir. 2016) (holding that obesity did not qualify as an impairment under the ADA).

²⁴ Sullivan & Zimmer, *Two Steps Forward*, *supra* note 6, at 22–27.

²⁵ See *Teamsters v. United States*, 431 U.S. 324, 361–62 (1977) (describing and approving the two-stage remedial process).

²⁶ See, e.g., Sullivan, *Mirage*, *supra* note 8; Sullivan, *Upside Down*, *supra* note 3; Sullivan & Zimmer, *Two Steps Forward*, *supra* note 6.

²⁷ Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799 (1985).

²⁸ See, e.g., JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014); Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987); Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357 (2017).

²⁹ Vivian Gornick, *She Made Thinking Exciting: The Life and Work of Susan Sontag*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/books/review/sontag-her-life-and-work-benjamin-moser.html> (reviewing BENJAMIN MOSER, *SONTAG: HER LIFE*

has arisen to solve the potato peel of disparate impact.

Charlie has a standard discussion of the theory of disparate impact going through the list of possibilities. Disparate impact could be intended to ferret out difficult-to-prove intentional discrimination. Or it could be a way of limiting the temporal reach of past de jure discrimination or, more broadly, any type of past discrimination or subordination. In *Griggs*, for example, disparate impact limited the damage from unequal educational opportunities. Or even more broadly, perhaps disparate impact is intended to remove all unnecessary barriers to human advancement, to prohibit obstacles that are not firmly tethered to ability to do the job. Like most of us, Charlie does not find any of the theories convincing.³⁰

Disparate impact presents a special case for discrimination theories. As Charlie has said³¹ and as others in this symposium have noted,³² generally we begin with a theory about discrimination and then we develop methods of proof. For example, a central theory in discrimination law is that intentional discrimination on prohibited bases was the main target of Title VII.³³ From there, various methods of proof have been developed: *McDonnell Douglas*, mixed motives, systemic disparate treatment. A curious thing about disparate impact is that it sings that tune backwards, especially after 1991. The 1991 amendments to Title VII specify a method of proof for disparate impact cases without so much as a feint towards an underlying theory.³⁴

In a backhanded way, this raises the issue of just how important a theory is anyway. What function does a theory serve? The standard response is that theories work backwards by rationalizing a body of law and, more importantly, work forwards to help predict future directions.³⁵ Given this, Charlie's *Upside Down* article is an example of the problems that arise when a theory is absent or uncertain. Just how are we supposed to decide (or predict) whether Whites and males ought to be able to bring

AND WORK (2019)). Sontag was a well-known public intellectual at the turn of the 21st century. Marcuse did not say this as a compliment.

³⁰ See generally Sullivan & Zimmer, *Two Steps Forward*, *supra* note 6.

³¹ Sullivan, *Mirage*, *supra* note 8, at 913.

³² See William R. Corbett, Explorations with Charlie Sullivan: Theorizing a Different Universe of Employment Discrimination, 50 SETON HALL L. REV. 1283 (2020).

³³ For an early, important statement of this oft-stated theory, see Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

³⁴ Civil Rights Act of 1991, Pub. L. No. 102-166, § 105 (1991) (codified at 42 U.S.C. § 2000e-2(k)).

³⁵ At a deeper level, a well-theorized law is more likely to be perceived by the public to be sensible, fair, and worthy of support. See William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 689–93 (2010).

disparate impact cases if we have no theory?

In a case like disparate impact, the response might be that we are better off without a theory. The statute provides a proof structure, so just apply it. On Charlie's question about disparate impact claims by White males, that approach provides a pretty straightforward answer. We know that Title VII has been symmetrical since 1976 for race and gender;³⁶ the 1991 proof structure for disparate impact cases can be applied in a straightforward fashion to claims by Whites and males; and nothing in the 1991 act even hints that the structure should not be applied to Whites and males. Q.E.D.³⁷

But in *Upside Down*, Charlie interprets the statute differently because the Q.E.D. result is "ahistorical and lacking any apparent policy justification."³⁸ The interesting twist here is that Charlie's result is not one that is theory free. Instead, it just pushes the theoretical analysis up one level. Instead of articulating and relying on a theory of disparate impact derived from the statute and case law, the result depends on a theory of statutory interpretation. A straight-up textualist theory of statutory interpretation would lead to the Q.E.D. result. But in *Upside Down*, Charlie relies on a different theory—a purposivist theory. So at the end of the day, maybe it is just not possible to go through life and law without a theory, even if it has to be built out of potato peels.

IV. DOUBLING DOWN ON DISPARATE IMPACT

In *Desert Palace Mirage*, Charlie makes a *cri de coeur* for disparate impact. His plea is to revive disparate impact, to use it more because it is so useful.

His central claim in *Desert Palace Mirage* is that the intent-based models—individual disparate treatment, especially, but also systemic disparate treatment—just are not up to the task when we begin thinking, as we have been, about cognitive biases resulting in discrimination.³⁹ Implicit bias and other cognition-based causes of discrimination pose two big problems for the intent-based theories. First, the intent-based theories, precisely because they are intent based, apply only awkwardly if at all to discrimination caused by subconscious biases. And second, even if implicit biases can meet the legal definition of intention, proving causation

³⁶ *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279–80 (1976); *see infra* note 60.

³⁷ Charlie notes this early in the *Upside Down* article. Sullivan, *Upside Down*, *supra* note 3, at 1506.

³⁸ Sullivan, *Upside Down*, *supra* note 3, at 1506–07.

³⁹ *See* Sullivan, *Mirage*, *supra* note 8.

on such bases is exceedingly difficult.

Very interestingly—Charlie is an interesting guy—Charlie points out that the cognitive bias movement and disparate impact are similar in that both lessen the moral disapprobation of discrimination, while widening its scope.⁴⁰ But that is not Charlie's main point and not the one I want to focus on here.

Charlie's main claim is that disparate impact solves, or at least greatly minimizes, the analytical and proof problems presented by implicit discrimination. With disparate impact, the proof is simply that the factor had a disparate impact. We do not care what motivated use of the factor; certainly, we do not care about whether the impact was the product of intentional discrimination or not. As a result, we do not care if cognitive biases had any role in producing the impact. These kinds of questions about motivation are just irrelevant.

I agree with Charlie and, in fact, I would double down on Charlie's claim in a few additional ways. First, in the article, Charlie says litigating under disparate impact will require expert testimony to prove disparate impact—either about statistics, he says, or about cognitive bias.⁴¹ I am not sure that is the case. Sometimes the disparate impact can be proven without any expert statistical evidence. Consider *Ricci v. DeStefano*⁴² or *Connecticut v. Teal*.⁴³ In both those central cases, the proof of disparate

⁴⁰ Sullivan, *Mirage*, *supra* note 8, at 983–84.

⁴¹ Sullivan, *Mirage*, *supra* note 8, at 993.

⁴² *Ricci* considered examinations administered for lieutenant and captain firefighter positions. The Court reported the evidence of disparate impact:

Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics.

Ricci v. DeStefano, 557 U.S. 557, 566 (2009). These pass rates meant that the disparities easily met the four-fifths rule for proving a cognizable disparate impact. Despite the paucity (maybe absence) of expert testimony on the issue, the Court found and the parties did not dispute that a prima facie case of disparate impact had been established. *Id.* at 586. *But see* Joseph L. Gastwirth & Weiwen Miao, *Formal Statistical Analysis of the Data in Disparate Impact Cases Provides Sounder Inferences than the U.S. Government's 'Four-Fifths' Rule: An Examination of the Statistical Evidence in Ricci v. DeStefano*, 8 *LAW, PROBABILITY & RISK* 171, 171 (2009) (criticizing application of the four-fifths rule in *Ricci*).

⁴³ *Teal* considered examinations administered for supervisor positions in the Department of Income Maintenance of the State of Connecticut. The Court reported the evidence of disparate impact:

Th[e] written test was administered . . . to 329 candidates. Of these candidates, 48 identified themselves as black and 259 identified themselves as white With the passing score set at 65, 54.17 percent of the identified black candidates passed. This was approximately 68 percent of the passing rate for the identified white candidates.

impact was simple and perfectly sufficient. No expert testimony was required.⁴⁴ And as for expert testimony about cognitive bias, since proof of intention or even the underlying cause of the disparity is not needed, it would be the rare case where expert testimony on cognitive bias would be relevant.

This is where I want to double down on Charlie's analysis. A linchpin of his analysis is that the underlying cause of a disparate impact is irrelevant, and that is a major reason it can be a powerful tool.⁴⁵ And Charlie is exactly right that the underlying cause of the disparity does not matter, and it does not matter big-time.

Consider a few implications from *Griggs* about how little it matters. In *Griggs*, the high school diploma requirement had a disparate impact on Blacks.⁴⁶ That disparate impact may have been caused by discrimination, for example, by the employer putting in the requirement to keep Blacks out or because the state discriminated against Blacks in educational opportunity. Both of these were probably true—and both were completely irrelevant. Plaintiffs did not have to prove either of those things and it would not have been a defense for the employer to disprove either of them.⁴⁷

Second, this blindness to causation means that a large number of very minor causes can be accumulated in a way that disparate treatment does not allow and, in fact, even completely unknown causes can result in a viable claim. For example, say that Blacks in North Carolina got fewer high school degrees because of the accumulation of ten or twenty or fifty small factors—poorer childhood nutrition, fewer words spoken to them when small children, weaker teachers, inadequate textbooks, crumbling buildings, and so on. And let us say none of those factors can be proven to be “the cause” of the disparity. With disparate impact, that does not matter. We can consider the combined effect of all those factors and that is just

Connecticut v. Teal, 457 U.S. 440, 443 (1982). As in *Ricci*, the Court found that these basic statistics established a prima facie case of disparate impact. *Id.* at 448.

⁴⁴ Of course, there was expert testimony in both cases. But the point here is that the testimony was not required in either case to prove disparate impact. It was used for other purposes.

⁴⁵ Sullivan, *Mirage*, *supra* note 8, at 1001 (“Whether the ultimate cause [of a disparity] was animus, rational discrimination, conscious or unconscious stereotyping, workplace dynamics, or workplace culture would not matter [to establish a prima facie case].”).

⁴⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971).

⁴⁷ Mike Selmi recognizes this feature of the disparate impact doctrine—that the underlying cause of the disparity is legally irrelevant—but makes the interesting point that changing perceptions about underlying causes may help explain the Court's efforts to limit disparate impact. See Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 955–66 (2014).

fine. Note this is *not* disparate treatment where the plaintiff has to isolate one factor—intent—and prove that it is an important factor, at least a motivating factor and maybe more.⁴⁸ There is no need to isolate or even consider intent in a disparate impact case. In fact, let us say that North Carolina is utopia and everything between Blacks and Whites is completely equal. (Counterfactual, of course, in North Carolina and everywhere.) Yet despite that, Blacks have a lower graduation rate. Do we care under disparate impact? No, there is no burden on the plaintiff to explain the impact in any way; all the plaintiff has to do is show the disparity. Again, this is *not* disparate treatment.

Third, there is not even any burden to show that the factor had any impact in the particular workplace. In *Griggs*, the employer also required a minimum score on the Wonderlic test, which excluded half of all high school graduates.⁴⁹ So let us say, for discussion purposes, that the test excluded almost all non-high school graduates and half of all high school graduates. And let us say the Wonderlic test was business justified. If there were one or two Black non-high school graduates who passed the test, would their disparate impact claim on the graduation requirement be undermined because the high school diploma requirement did not have a disparate impact in this particular workplace, even though it did generally? The standard model of disparate impact would say, no, it does not matter. Plaintiffs do not have to prove the effect in each particular workplace—rather, they have to prove that the factor would have screened out too many Blacks if applied independently of all other factors.⁵⁰

In sum, Charlie's main claim in *Desert Palace Mirage* is right on target. Disparate impact is a powerful anti-discrimination tool. It is a bit of a mystery why it is used so seldom.⁵¹

⁴⁸ See Sullivan, *Mirage*, *supra* note 8, at 925–38 (after reviewing the history of disparate treatment discrimination, concluding that the plaintiff has the burden of isolating an impermissible factor as a motivating or but-for factor).

⁴⁹ *Griggs v. Duke Power Co.*, 402 U.S. 424, 430 n.6 (1971).

⁵⁰ See Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325, 356 (1996). This is not an incontrovertible proposition. See, e.g., *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1253 (10th Cir. 1986) (disparate impact claim by males fails because plaintiffs failed to show a disproportionality in the actual workforce). But higher authority indicates that it is true. First, Title VII requires focus on a “particular employment practice.” Title VII, § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018). A different result would require inquiry beyond the particular factor to investigate other factors simultaneously at play in the particular workplace. In addition, this result is implied by *Connecticut v. Teal*, 457 U.S. 440, 442 (1982), which holds that an employment practice with a disparate impact is not immunized because other factors at play in the workplace may obscure the effect of the disparate impact.

⁵¹ Disparate impact discrimination is less favorable to plaintiffs than disparate

V. ARTIFICIAL INTELLIGENCE AND STRATIFICATION

In *Employing AI*, Charlie considers how artificial intelligence challenges (and exposes) our current conceptions of discrimination. On disparate impact, he worries that, by its nature, AI will almost always be able to prove business necessity if all that is required is a correlation between the challenged employment practice and a good business outcome.⁵² That, after all, is what AI does; it sorts through the available data to find the best correlation between qualities an employee presents at application and the employer's preferred measures of a good employee. But it is certainly possible that we will have no idea *why* that correlation exists, or even exactly how the AI reached its result. The computer figured it out by itself and it will not tell us. Even more plausibly, it is possible that the reason a factor correlates with a good business outcome is opaque. For example, it could be that the computer discovers that an applicant's favorite kind of music, whether she owns a car, or her zip code predicts productivity.⁵³ A solution to this problem is to require more than a mere correlation to make out the business necessity defense. In addition, the employer must present a reasonable explanation for why the challenged factor leads to a better business outcome.⁵⁴

For me, that brought to mind stratification and Susan Sontag. Consider this situation: an employer requires a certain score on a test and the plaintiff shows it has a disparate impact against women overall. (See Table A.) But then the employer stratifies the same data and shows that if you consider college graduates and non-graduates separately, there is no disparate impact against women in either group. (See Table B.) Should

treatment discrimination on a number of dimensions, including the lack of a jury trial, 42 U.S.C. § 1981a(c); more limited remedies, 42 U.S.C. § 1981a(b)(3); and statutory exemptions, 42 U.S.C. § 2000e-2(h) (exempting seniority systems); *see also* 42 U.S.C. § 2000e-2(k)(3) (exempting drug testing). But these marginal limitations are insufficient to explain the low usage of disparate impact. *See* Sullivan, *Mirage*, *supra* note 8, at 968–69; Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Good For? What Not?*, 42 BRANDEIS L.J. 597, 597 (2004) (suggesting that the reason for the under-use of disparate impact is that the practicing bar under-appreciates it).

⁵² Sullivan, *Employing AI*, *supra* note 10, at 420–28.

⁵³ These examples come from Charlie. Charles A. Sullivan, *Comprehending Causation & Correlation*, JOTWELL (Aug. 4, 2017), <https://jotwell.com/comprehending-causation-and-correlation/>. A well-known and disconcerting example of this outside of the employment context occurred when the father of a teenage girl was surprised to learn that she was pregnant from Target marketing. Target had developed pregnancy predictions, including due dates, based on her consumer behavior. CHARLES DUHIGG, *THE POWER OF HABIT: WHY DO WHAT WE DO IN LIFE AND BUSINESS* 182–97 (2012).

⁵⁴ James Grimmelman & Daniel Westreich, *Incomprehensible Discrimination*, 7 CAL. L. REV. ONLINE 164, 170 (2017) (arguing that to prove business necessity, employers must show that “its model’s scores are not just *correlated* with job performance but *explain* it”).

that be a defense? Note a few things. This is not bottom line and *Connecticut v. Teal*. Only one employment practice is at issue here.⁵⁵ But it is similar to bottom line in that if you stratify you can get any combination of results.⁵⁶ For example, in this case, a disparate impact exists overall, but not in either of the two subgroups. But you could also see a disparate impact overall, but only in one of the two subgroups. Or you could see the converse: a plaintiff using stratification offensively when no disparate impact exists overall, but there is a disparate impact against one or both of the subgroups.⁵⁷ Lest this seem insignificant, consider that there is almost an infinite number of ways to stratify the overall group—here I did it by education, but it could be by time, or age, or hair color, or height, or whatever. What to think about this?

Table A: Disparate Impact Overall

	Pass	Fail	Total	Pass Rate	Four-Fifths Rule
Men	400	200	600	0.66	
Women	200	200	400	0.50	0.76

⁵⁵ *Connecticut v. Teal* involved a situation where an employment test used for promotions had a disparate impact against blacks, but a set of other employment practices counter-balanced the results of the test so that blacks received their proportionate share of promotions. *Connecticut v. Teal*, 457 U.S. 440, 443–44 (1982). Thus, the class of cases covered by *Teal* requires at least two employment practices that counter-balance each other. In this example, there is only one employment practice. The “counter-balancing” occurs by considering the single employment practice’s adverse impact across different populations.

⁵⁶ This situation and *Teal* give rise to a common misunderstanding about these types of two-factor situations. In *Teal*, for example, it seems only logical that if the employment test had a disparate impact against blacks but when other factors were applied there was no disparate impact, then the other factors by themselves must not have had a disparate impact against blacks, indeed, they must have had a disparate impact against whites. Charlie and I have both used our “common sense” to make this incorrect claim. Sullivan, *Upside Down*, *supra* note 3, at 1511 (“logically” in *Teal* since the test had a disparate impact against blacks but promotions overall did not, the other factors used had to have a disparate impact against whites); Willborn, *supra* note 27, at 829 (“One is certain when a system has a disparate impact that an element or combination of elements of that system also has a disparate impact.”). But that is simply not the case. This seems to violate “common sense” but it is true; there is good reason that the example illustrated in Tables A and B is referred to as an aggregation paradox. See, e.g., Clifford H. Wagner, *Simpson’s Paradox in Real Life*, 36 AM. STATISTICIAN 46 (1982).

⁵⁷ For a detailed discussion of the possibilities and legal responses to them, see Paetzold & Willborn, *supra* note 50, at 336–42, 387–97.

Table B: Disparate Impact Stratified by Education

	Pass	Fail	Total	Pass Rate	Four-Fifths Rule
Non-College Graduates					
Men	150	200	350	0.43	
Women	115	180	295	0.39	0.91
College Graduates					
Men	250	0	250	1.00	
Women	85	20	105	0.81	0.81

Interestingly, the solution to the stratification issue may be the same one that Charlie accepts in *Employing AI*. That is, the employer can defend by stratifying, but only if it can demonstrate that the stratification makes sense.⁵⁸ So in my case, it would not make sense, for example, if the stratification to explain a difference in test scores was by height and, conversely, an education stratification would not make sense if the factor being challenged was a height requirement. The appropriate rule would be that the employer can defend by stratifying only if the stratifying variable is closely related to the employer's business interests. Similarly, plaintiffs can use stratification offensively only if they can provide a reasonable explanation for why stratifying on the variable makes sense. This is very similar to the rule suggested in *Employing AI*: a bare correlation between the employment practice and a business outcome is not enough to establish a business necessity defense. The employer also has to provide a reasonable explanation for the correlation.

This is where Susan Sontag comes in. These two separate problems—AI correlations and stratification—seem to have a similar solution. Perhaps there is a theory in there somewhere. Perhaps there is a general rule that statistical correlations should have legal significance in discrimination cases only where they are accompanied by a reasonable, normative explanation. The problem with this, however, is that systemic disparate treatment discrimination depends on almost the opposite. In the normal case, statistical proof of systemic disparate treatment occurs only if an explanation for a disparity is *absent* after accounting for other explanatory factors.⁵⁹ So maybe there is no general principle, or maybe we just have

⁵⁸ For a detailed discussion, see Paetzold & Willborn, *supra* note 50, at 387–97.

⁵⁹ The seminal case phrases it in precisely those terms:

not yet found our Susan Sontag to make sense of these potato peels.

VI. THE TURN TOWARDS MERITOCRACY

Let us return to the main topic, Charlie's *Upside Down* article. The issue Charlie addressed in *Upside Down* was whether disparate impact should be symmetrical or not: should it be as available to White males as to the groups with histories of employment discrimination that the law was primarily intended to protect?⁶⁰

One thing Charlie says in thinking about this is that permitting disparate impact to be symmetrical would, as he puts it, "shift national employment sharply towards a meritocracy."⁶¹ Since almost every neutral factor an employer uses would be challengeable by men or women, employers would need to justify (or be prepared to justify) virtually all of their employment practices. This, Charlie says, would have a significant philosophical effect. The shift would be from the standard anti-discrimination approach of requiring employees to prove bad reasons for an employment decision to one in which employers would have to provide

[A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977) (emphasis added).

The comparison between the two situations, however, is more fraught than I imply in the text, and I do not explore it extensively here. In rough terms, in the disparate impact situation, the claim is that an employment practice with a disparate impact can be used only if it can be justified by a correlation with an articulable and positive business outcome. Similarly, one can stratify only on bases that are business related. In the systemic disparate treatment situation, however, the question is quite different: absent discrimination, how likely is it that one would see a particular outcome? Or more particularly in the regression context, after accounting for other factors, how likely is it that one would see a prohibited characteristic as a significant predictor of particular outcomes, such as salaries? See Steven L. Willborn & Ramona L. Paetzold, *Statistics Is a Plural Word*, 122 HARV. L. REV. F. 48, 56–60 (2009). Thus, in the former a correlation avoids a finding of discrimination, while in the latter it results in an inference of discrimination. One is direct, the other is inferential. On the other hand, the two situations may be the same. In both, the ability to explain the employment practice or outcome based on business-related factors avoids discrimination, while the inability to do so results in a direct finding of illegality for disparate impact and an inference of illegality for systemic disparate treatment. Susan?

⁶⁰ Mostly since Charlie's article was published, the issue of symmetry has received interesting scholarly attention. See Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085 (2017); Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69 (2017). Cf. Saul Levmore, *Title VII to Tinder: Law's Antidiscrimination Asymmetry and Occasional Market Superiority*, 68 ALA. L. REV. 877 (2017) (focusing on the law's asymmetrical application to sellers and employers vs. buyers and employees).

⁶¹ Sullivan, *Upside*, *supra* note 3, at 1512.

good, business-related reasons for their employment practices.⁶²

Charlie does not attempt to quantify how many more policies would be subject to attack under a symmetrical approach, but the implication is that it would be a lot more. But is that the case? Just how should we think about how many more policies would require justification under a symmetrical disparate impact? Would it be twice as many since now both men and women could challenge policies?⁶³ Or are there reasons to think it would be fewer than that?

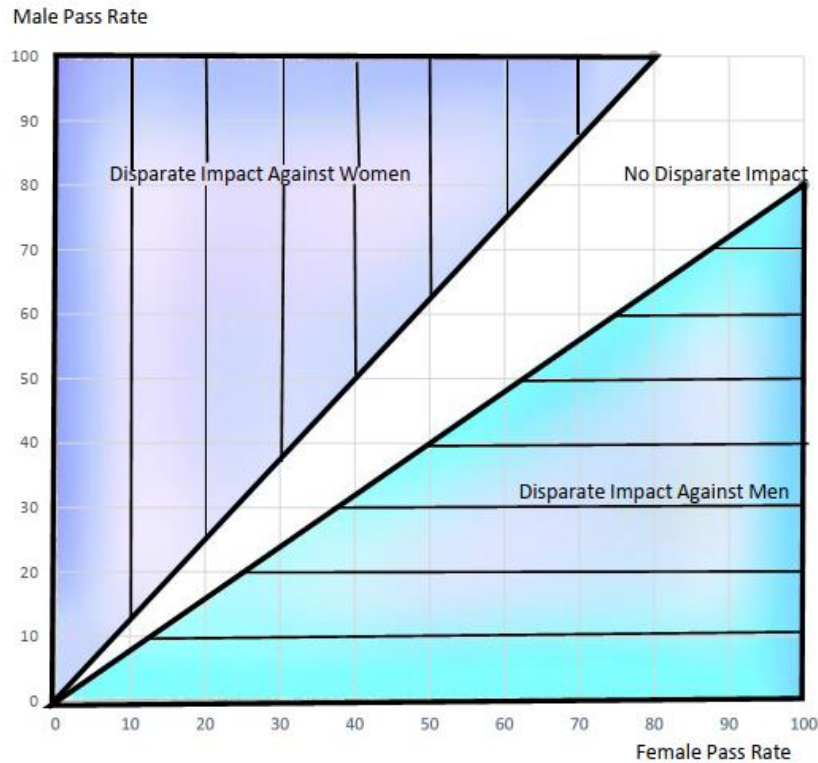
Figure 2 was my first cut at thinking about this issue. The horizontal axis is every possible pass rate for women on a particular employment practice from 0 percent to 100 percent and the vertical axis is the same for men. As a result, the figure reflects each of the 10,000 (100 times 100) possible relationships between the pass rates of women and men. The light blue area with horizontal lines is every cognizable disparate impact against men, that is, every disparate impact that satisfies the four-fifths rule. For example, if the female pass rate is 100 percent (at the far right), then every male pass rate below 80 percent would be a cognizable disparate impact. Similarly, if the female pass rate is 50 percent (at the middle of the horizontal scale), then every male pass rate below 40 percent would be a cognizable disparate impact. And the same is true for disparate impacts against women in the purple area with vertical lines.

In this way of thinking about the issue, four-fifths of all possible relationships between male and female pass rates result in a cognizable disparate impact and, conversely, one-fifth do not. More to the point of *Upside Down*, Figure 2 illustrates that a symmetrical disparate impact doctrine would double the number of employment practices that would have to be justified. Under a non-symmetrical doctrine only the disparate impacts against women would be cognizable: the two-fifths (40 percent) in the purple area with vertical lines. Under a symmetrical approach, the disparate impacts against both men and women would be cognizable: the four-fifths (80 percent) in both the colored areas.

⁶² *Id.*

⁶³ To simplify the discussion, I've limited the inquiry to symmetry between men and women. Obviously, Charlie's article itself is broader than that; it also considers extending disparate impact to White persons. And the implications are even broader than that.

Figure 2: Universe of Possible Disparate Impacts Against Men and Women



The problem with Figure 2 is that it treats every one of those 10,000 possible outcomes as equally likely.⁶⁴ But that does not seem right, or even close to right. Figure 3 presents another way of looking at it. Figure 3 plots the effects of the universe of employment practices on women. The vertical axis is the number of employment practices and the horizontal axis is the disparate impact of the practices on women. A test with equal pass rates for men and women is right in the middle of the horizontal axis and then the tests have a greater disparate impact against women as you proceed to the left and in favor of women (against men) as you proceed to the right. For example, at 1.0 in the middle of the horizontal axis, men and women would have exactly equal pass rates, while at 0.2 on the left side,

⁶⁴ The actual number of possible outcomes is infinity, not 10,000. 10,000 is the number of possible outcomes if one rounds each possible outcome to a whole number (100 times 100). But, of course, an infinite number of outcomes are possible within each of those whole numbers. But 10,000 seemed more than enough to report for these purposes, and a bit more comprehensible.

the pass rate for women would be 20 percent of the pass rate for men.⁶⁵

The idea here is that employment practices are distributed across the figure in a normal bell curve. Most of the employment practices are in the middle of the horizontal axis and, thus, have no disparate impact. Increasingly fewer practices exist as one moves towards either end of the horizontal axis where cognizable disparate impacts occur against women to the left and against men to the right.

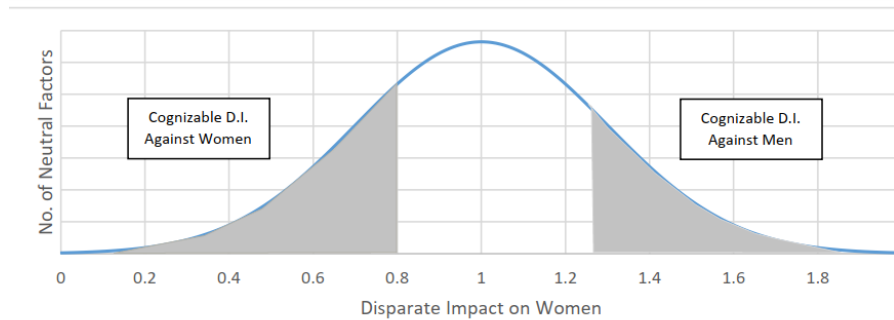
Figure 3 sets 1.0 as the median with a standard deviation of 0.30. If this is how employment practices are distributed, only the shaded areas would have a cognizable disparate impact against women and men, respectively. The shaded area for women is 25 percent of all the employment practices and the shaded area for men is slightly less than that.⁶⁶ The rest of the employment practices—slightly more than 50 percent—would not present a cognizable disparate impact and, as a result, would not have to be business justified. Note that this is quite different from the 80 percent that would have to be justified if all disparate impacts were equally likely, as in Figure 2.

⁶⁵ For example, it could be 20 percent of women and 100 percent of men passing or 10 percent of women and 50 percent of men passing.

⁶⁶ Figure 3 views the universe of employment practices based on their adverse impact on women, that is, it is a normal distribution based on the pass rate of women divided by the pass rate of men. That means that a cognizable disparate impact against women occurs in the space to the left of 0.8, the space that includes all the pass rates for women that are less than four-fifths the pass rates of men. Since the figure is plotting the impact on women, the pass rates have to be inverted to determine the point at which a disparate impact becomes cognizable against men. Although 1.2 seems as if it should be the right point, the actual number is 1.25. If women are passing at 1.25 times the rate of men, then men are passing at 80 percent the rate of women (1.0 divided by 1.25 = .80). If the figure viewed the universe of employment practices based on the adverse impact against men instead of against women, one would see the inverse of this figure, that is, there would be slightly more cognizable disparate impacts against men than against women. A third option would be to plot women and men separately. If that were done to reflect that men and women were affected in the same manner (rather than one in relation to the other), then each plot would have a cognizable disparate impact to the left of 0.8 and each would constitute 25 percent of all employment practices.

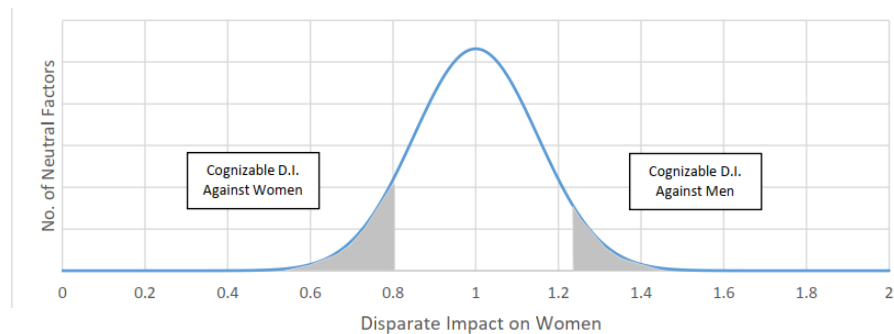
I chose this figure because it best illustrates my points visually and because it best reflects the notion in Charlie's article that the issue is whether male claims should be added to the already well-recognized claims by women. But ultimately, all lead to the same basic outcome.

Figure 3. Frequency of Cognizable Disparate Impact Against Women and Men / Median of 1.0 (No Disparate Impact); 0.30 Standard Deviation



But consider two other possibilities within this framework. First, as illustrated in Figure 4, it could be that the standard deviation is less than 0.30 so that the tests are more bunched up in the middle. Figure 4 has a standard deviation of half that of Figure 3 (0.15 rather than 0.30). If this is the case, even fewer employment practices would present a cognizable disparate impact and be subject to business justification. In this figure again, a cognizable disparate impact occurs only in the shaded areas. Those areas account for only about 9 percent of employment practices for women and men, respectively, so about 82 percent of all employment practices would not need to be business justified.

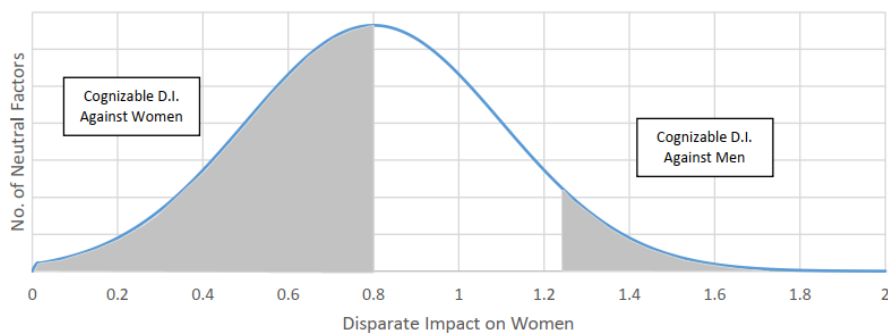
Figure 4. Frequency of Cognizable Disparate Impact Against Women and Men / Median of 1.0 (No Disparate Impact); 0.15 Standard Deviation



Alternatively, it could be that the median disparate impact of all employment practices is not 1.0, but instead that more practices have a disparate impact against women than against men. Figure 5 is similar to Figure 3 in that it has a standard deviation of 0.30, but the median test leans against women and favors men. Figure 5 sets the median test at 0.8 for

women. In this world, half the employment practices would present a disparate impact against women and be subject to business justification, but less than 10 percent of the practices would present a cognizable disparate impact against men and be subject to business justification. Recognizing symmetrical claims would increase the number of employment practices subject to business justification by about 15 percent, not 100 percent as in Figures 3 and 4.

Figure 5. Frequency of Cognizable Disparate Impact Against Women and Men | Median of 0.8 (Disparate Impact Against Women); 0.30 Standard Deviation



How should we think about the refinements of Figures 4 and 5? My intuition is that both are likely to be true to some extent. Employers are very aware of the possibility of a disparate impact lawsuit, so they are likely to shy away to the extent possible from extreme disparate impacts and, instead, try to construct their employment practices to be race and gender neutral. This in fact is one of the recurrent worries of those opposed to disparate impact doctrine,⁶⁷ although it can be done in non-nefarious ways.⁶⁸ Since this is the case, the universe of employment practices over time is likely to tend towards neutrality, to bunch up in the middle of the distribution, to look more like Figure 4 than Figure 3.

Similarly, there are a number of reasons to think that the median disparate impact is not 1.0 but instead leans against women. For example,

⁶⁷ See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 643 (1989) (to avoid disparate impact claims, “the only practicable option would be the adoption of racial quotas”); *Ricci v. DeStefano*, 557 U.S. 557, 581 (2009) (if employers were permitted to discard test results too easily, it “would amount to a *de facto* quota system”); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989 (1988) (rejecting dissent’s claim that permitting disparate impact claims based on subjective practices would force employers “to adopt numerical quotas to avoid liability”).

⁶⁸ Disparate impacts can also be minimized by careful and professional construction of employment practices.

some of the neutral factors may be a cover for discrimination (in line with one of the theories for the doctrine), or maybe the workforce (and these “neutral” factors) are structured on the standard male worker,⁶⁹ or maybe implicit bias skews the tests.

If both of these adjustments are proper—that is, a smaller standard deviation and a median skewed against women—extending disparate impact to White males is not likely to result in a large increase in the number of employment practices subject to challenge and justification.⁷⁰

But what should we make of analysis like this? After all, it is all just theory. By itself, it does not permit us to quantify the actual effect of expanding disparate impact to include Whites and males. We do not know much about the universe of employment practices subject to disparate impact analysis. We do not know the shape of the bell curve. We do not know the disparate impact of the median employment practice. All that is true, of course. But in determining legal doctrine, we often have to make decisions in the absence of firm data. Of course, it is better if firm data is available and we have become much better in recent years in developing and relying on good data. But often, we still have to rely on our intuitions, as we probably have to do in this case. And when we do, even though it is not ideal, it is better to inform those intuitions with a sensible framework for thinking about the issue. And that is the value of an analysis like this.

The additional important point for this symposium is that Charlie tees up issues like this, points out how and why they are important, and makes us think about them in new and perhaps interesting ways.

⁶⁹ Similarly, it may also be that employers are more likely to attend to employment practices with a disparate impact against Whites or males because those practices are more conspicuous and appear more problematic against the norm of the standard male worker.

⁷⁰ Another important reason to think expansion of the doctrine to Whites and males will not lead to a significant increase in the number of employment practices requiring business justification is that almost all practices are already subject to business justification. The quantum leap was made by the Americans with Disabilities Act which recognizes a disparate impact if an employment practice screens out not only a class of individuals with disabilities, but also any individual with a disability. 42 U.S.C. § 12112(b)(6). Given the variety of possible disabilities, this exposes virtually every employment practice to justification. *See also* Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal* (U. San Diego Legal Stud. Res. Paper Series No. 19-421, 2019).

Of course, it is possible to play this tune backwards. Every employment practice has been subject to a claim that it has to be business justified since 1990, and yet we see very few cases. So maybe the threat that most employment practices will have to be business justified is mostly and only theoretical. In the real world, the barriers to disparate impact (finding a lawyer, funding the case, etc.) may be significant enough to shield most employment practices.

2020]

RIGHTING THE WORLD

1515

VII. CONCLUSION

For more than four decades, Charlie has been a leading scholar on employment discrimination law. Like many in the academy, I have learned much from him and, equally important, his work has caused me to rethink many of my own positions. I began this article by saying that Charlie found it annoying that I asked him to be introspective about his own scholarship. I feel no guilt about that. His scholarship has forced all of us in the field to do the same thing about our scholarship. And you know what? I hope he continues to annoy us for many years to come.