
IS THE ROAD TO DISPARATE IMPACT PAVED WITH
GOOD INTENTIONS?: STUCK ON STATE OF MIND
IN ANTIDISCRIMINATION LAW

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INTRODUCTION

*I'm just a soul whose intentions are good
Oh Lord, please don't let me be misunderstood¹*

The disparate impact theory of liability in antidiscrimination law is in its fourth decade of doctrinal development, but the theory remains misunderstood, mislabeled, and misused.² Although the effects-based theory emerged as a method of proof theoretically unconcerned with the concept of intent—whether of the “good” or “bad” variety—all of the stakeholders using the disparate impact theory have remained stuck on state of mind.³ This Article examines the particular way in which the focus on the defendant’s state of mind in disparate impact cases has helped undermine the theory, despite the belief of many theorists that a thorough grounding in intent may be necessary to ensure the theory’s survival.⁴ This Article explores both housing and employment

* Associate Professor of Law, Tulane University Law School. The Author would like to thank Bob Schwemm, Steve Dane, and Joel Friedman for their thoughtful editorial suggestions, as well as Aaron Greenbaum, Kevin McCormick, Sara Porsia, and Natalie Sexsmith for their excellent research assistance. The Author would also like to express appreciation to Tulane Law School for summer research grants that supported the work on this article and the Southeastern Association of Law Schools for providing the opportunity to present the paper at a New Scholars Workshop. Special thanks to G.E. and M.C.

1. THE ANIMALS, *Don't Let Me Be Misunderstood*, on ANIMAL TRACKS (MGM Records 1965).

2. See Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims By White Males*, 98 NW. U. L. REV. 1505, 1521 (2004) (“[I]t is safe to say that disparate impact theory remains a complicated and confusing doctrine.”).

3. See *infra* Part I.

4. See, e.g., *infra* Part I.C.

settings to further the analysis.

The idea that the disparate impact theory is misunderstood is hardly novel. The theory continues to receive an extraordinary amount of attention from scholars and theorists.⁵ But most of the analysis is focused on whether particular kinds of exclusionary conduct are better addressed under an intent-based method of proof versus an effects-based method of proof. For example, commentators have paid increasing attention to more structural forms of discrimination and debated the relative merits of the disparate treatment (intent-based) and disparate impact (effects-based) theories in addressing these more subtle forms of discrimination.⁶

Despite the considerable attention that theorists have paid to what is wrong and what is right with the disparate impact theory, few have focused on the degree to which the confusion surrounding the theory is rooted in the blending, or enmeshing, of the disparate impact and disparate treatment theories.⁷ Litigants mix and match disparate treatment and disparate impact allegations, defenses, and burdens of proof like spring sportswear. But the result can look something like a plaid and polka dot ensemble—clashing and dissonant. Courts and scholars have not always assisted in sorting and re-classifying these theories of liability and their burdens of proof, which only serves to magnify the dissonance.⁸

Against the backdrop of confusion and enmeshment, there is a growing trend among theorists to argue, somewhat counter-intuitively, that the disparate treatment and disparate impact theories should be merged once and for all.⁹ Of late, the debate has heated considerably, with some scholars proposing that the disparate impact theory was a mistake, others proposing it has barely been developed, and still others proposing that the disparate impact and disparate treatment theories have all along been two sides to the same coin, with disparate impact merely serving as an alternative vehicle for proving intent.¹⁰ In this Article, I take

5. *See infra* Part I.C.

6. *See infra* note 203 and accompanying text.

7. *But cf. infra* Part II.A (describing support for the merger of the disparate treatment and disparate impact theories).

8. *See infra* Parts I.B & I.C.

9. *See infra* Part II.A.

10. *See* George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 *FORDHAM L. REV.* 2313, 2330 (2006) (describing “the Court’s continuing commitment to imposing liability for discriminatory effects as a means of preventing hidden and otherwise elusive forms of discrimination”); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 *UCLA L. REV.* 701, 706, 776–78 (2006) (arguing that the disparate

precisely the opposite view, based on the enduring principles of *Griggs v. Duke Power Co.*¹¹ and re-examined conceptions of evil and responsibility in which intentionality plays a diminishing role.

Sometimes, not only in the metaphysical contexts of evil and suffering, but also in the political contexts of workplaces and neighborhoods, intent matters little. “What goes on” in the hearts and minds of those who exclude, or who can prevent exclusion but choose not to, is less important than how the benefits and burdens get distributed, how they build on past exclusion, and whether the exclusion is justified. There are certainly those who are doubtful or dismissive of our capacity to release disparate impact from what Professor Charles A. Sullivan would describe as the “moorings” of intent.¹² This Article suggests that recent events, like Hurricane Katrina, may have made it possible for us to look past “good intentions,” to revisit our notions of culpability and fault, and to reinvigorate a disparate impact theory focused solely on effects.

In Part I of the Article, I discuss the way in which all of the stakeholders—litigants, courts, and theorists—remain stuck on state of mind by blending, or enmeshing, the disparate impact and disparate treatment theories. Litigants do this in three ways. First, plaintiffs bring disparate impact claims as a form of insurance in cases that are fundamentally about intent, based on the notion that the disparate impact theory is a less demanding theory of liability. Second, plaintiffs offer evidence of intent to bolster disparate impact claims, even though such intent evidence is not required. Third, defendants in disparate treatment and disparate impact cases either on their own, or in response to plaintiffs’ blending of the burdens, offer disparate treatment defenses, such as “I’m just a soul whose intentions are good,” in disparate impact cases. Courts and scholars have entered the fray. The Supreme Court has blended the burdens in its misleading discussion of “pretext” in the context of the plaintiff’s final showing in disparate impact cases. Scholars discuss effects theories as alternative vehicles for proving intent. In this Article, I suggest that the persistent focus on state of mind among

impact theory was a mistake because it limited the expansion of disparate treatment theory); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 985 (2005) (“[F]rom the point of view of precedent, disparate impact is barely constructed at all.”); see also Charles F. Abernathy, *Legal Realism and the Failure of the “Effects” Test for Discrimination*, 94 GEO. L.J. 267, 269–70 (2006) (reviewing twenty-seven years of Title VI jurisprudence and concluding that the effects test was a failure as a “judicially manageable tool for reviewing state and local practices having a disparate effect on racial minorities”).

11. 401 U.S. 424 (1971).

12. See Sullivan, *supra* note 2, at 1523.

all of the stakeholders contributes to the perverse consequence of a de facto intent requirement in disparate impact cases, a result that is antithetical to *Griggs*.

In Part II of the Article, I discuss the growing trend among theorists to advocate a unitary theory of liability in antidiscrimination law. The arguments for merging the two theories of liability vary. Theorists on the right urge a unitary theory of liability based on the belief that the disparate impact and disparate treatment theories are the same. Theorists on the left urge a unitary theory of liability based on a belief, among other things, that the disparate treatment theory would have flourished beyond the limiting concepts of motive and intent if the disparate impact theory had not been in the way. Neither view takes into account the extent to which the focus on state of mind in the disparate impact theory has limited its effectiveness, perpetuated uncertainty, and flouted the principles enunciated by the Supreme Court when first recognizing the theory in *Griggs*.

In Part III of the Article, I consider, and reject, the proposition that the primary mission of effects theory is to serve as what Professor Richard A. Primus has described as “evidentiary dragnet”¹³—i.e., to root out intentional discrimination that is simply too hard to prove. I also reject the notion that the disparate impact theory must cast itself as a fault-based theory of liability to survive. In so doing, I examine Susan Neiman’s work discussing the “banality of evil,” in which intentionality recedes as the principal cause of evil and suffering, and other more passive and indifferent forces emerge.¹⁴ In light of Neiman’s work and recent events such as Hurricane Katrina, I ask whether the causes of suffering and exclusion matter. I argue that “what goes on” in the hearts and minds of those who were merely thoughtless, rather than malevolent or biased, matters little when class-based exclusion occurs. Several post-Katrina exclusionary zoning disputes are presented to illustrate a conception of disparate impact liability in which state of mind does not matter. Neiman suggests that our conceptual resources are “exhausted” with respect to attempts to create accountability for suffering that is not intended. But this Article posits that if *Griggs* means what it says, then a pure effects theory must be embraced—one that relies not on state of mind, but on whether conduct has the “consequence of perpetuating

13. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 520 (2003).

14. SUSAN NEIMAN, *EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY* 280–81 (2002).

segregation”¹⁵ and exclusion.

I. STUCK ON STATE OF MIND

Litigants, courts, and theorists have all contributed to the enmeshment of the disparate impact and disparate treatment theories, and each of these stakeholders has remained stuck on state of mind evidence in a way that has helped erode the disparate impact theory.

It may help at the outset to review the distinctiveness of the theories. First, the disparate treatment theory is an intent-based theory of liability.¹⁶ Plaintiffs may prove intent through direct evidence, or, in the absence of direct evidence, plaintiffs may offer circumstantial evidence of intent through a burden-shifting method of proof created by the Supreme Court in *McDonnell Douglas Corp. v. Green*¹⁷ and *Texas Department of Community Affairs v. Burdine*.¹⁸ This method of proof gives the plaintiff the opportunity to make a prima facie showing designed to eliminate the most common, nondiscriminatory explanations for a particular act or decision.¹⁹ This initial showing then creates a rebuttable presumption that a prohibited factor motivated the decision maker.²⁰ If the plaintiff can make this prima facie showing, the burden then shifts to the defendant to produce evidence of a legitimate, nondiscriminatory reason for the complained-of action.²¹ If the defendant meets this burden of production, the plaintiff will then have the burden of proving that the nondiscriminatory reason offered by the defendant was not the true reason for the offending act or decision, but merely a pretext for illegal discrimination.²² In cases where both a

15. See *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (Arlington II)*, 558 F.2d 1283, 1289–90 (7th Cir. 1977).

16. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1002 (1988) (Blackmun, J., concurring in part).

17. 411 U.S. 792, 802–04 (1973).

18. 450 U.S. 248, 252–56 (1981).

19. *Id.* at 253–54. Although the Court in *McDonnell Douglas* stated that its suggested prima facie showing “is not necessarily applicable in every respect to differing factual situations,” generally a plaintiff would need to show the following:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

McDonnell Douglas, 411 U.S. at 802 & n.13 (1973).

20. *Burdine*, 450 U.S. at 254 & n.7.

21. *Id.* at 254.

22. *Id.* at 256.

nondiscriminatory reason and a prohibited reason are alleged to have played a role in the complained-of act or decision, the inquiry focuses on whether the prohibited reason was a “motivating factor” for the defendant.²³ Thus, in disparate treatment cases, the focus is always on the state of mind of the decision maker, regardless of whether this state of mind can be ascertained through direct or circumstantial evidence.

By contrast, the disparate impact theory, as first enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, is designed to remove “artificial, arbitrary, and unnecessary barriers . . . when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”²⁴ Further, “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”²⁵ Thus, Congress “directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.”²⁶

The Civil Rights Act of 1991 sets forth the burden of proof to be used in most employment sector disparate impact cases.²⁷ First, a complaining party must demonstrate that “a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”²⁸ Next, the burden shifts to the respondent to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”²⁹ If the respondent meets the burden of

23. *See* *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94–95 (2003). For a fuller discussion of the various possible implications of the approach enunciated by the Court in *Desert Palace*, including whether the *Desert Palace* method of proof supersedes the *McDonald Douglas* approach, see Sullivan, *supra* note 10, at 933–38.

24. 401 U.S. 424, 431 (1971). For a thorough examination of the history and significance of the *Griggs* decision, see Samuel Estreicher, *The Story of Griggs v. Duke Power Co.*, in *EMPLOYMENT DISCRIMINATION STORIES* 153 (Joel Wm. Friedman ed. 2006).

25. *Griggs*, 401 U.S. at 430.

26. *Id.* at 432.

27. 42 U.S.C. § 2000e-2(k) (2000). The Supreme Court has interpreted the Age Discrimination in Employment Act to require a distinct burden of proof in disparate impact cases. *See* *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005). Also, the disparate impact burden of proof structure may differ in the fair housing context. *See, e.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988) (“Once a plaintiff has made a prima facie showing of discriminatory effect, a defendant must present bona fide and legitimate justifications for its action with no less discriminatory alternatives available.”).

28. 42 U.S.C. § 2000(e)-(2)(k)(1)(A)(i).

29. *Id.*

proof on job relatedness and business necessity, the complaining party may also prevail by demonstrating that an alternative employment practice exists that would be equally as effective in serving an employer's legitimate business goals, and the respondent refuses to adopt such an alternative employment practice.³⁰

Given the distinctness of the theories, how have the disparate impact and disparate treatment theories been enmeshed, and how has a defendant's state of mind been a constant theme in effects cases?

A. *How Litigants Get Stuck on State of Mind*

It may be counterintuitive, but plaintiffs themselves contribute to a pernicious form of "intent creep" in cases about effects. In some instances, plaintiffs bring disparate impact claims as a form of insurance in cases that are fundamentally about state of mind, based on the notion that the disparate impact theory is a less demanding theory of liability.³¹ In other cases, plaintiffs offer evidence of intent to bolster disparate impact claims, even though

30. 42 U.S.C. § 2000(e)-(2)(k)(1)(A), (1)(C); *see also* *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 998 (1988).

31. *See, e.g.*, *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 48–53 (2d Cir. 2002) (holding that there were grounds for a disparate treatment claim but not a disparate impact claim based on a single act); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555–56 (5th Cir. 1996) (awarding judgment for the defendant on a disparate impact claim when the plaintiff was challenging a single act by the defendant and brought forth no statistical evidence of impact); *Palmieri v. Town of Babylon*, No. 01 CV 1399, 2006 WL 1155162, at *13 (E.D.N.Y. Jan. 6, 2006) (dismissing disparate impact claim for failure to provide any evidence of impact on minorities); *Ventura Vill., Inc. v. City of Minneapolis*, 318 F. Supp. 2d 822, 827 (N.D. Minn. 2004) (holding that a single act by the defendant municipality was not enough to establish a "policy or practice" for plaintiff's disparate impact claim); *Hamm v. City of Gahanna*, No. C-2-96-0878, 2002 WL 31951272, at *7 (S.D. Ohio Dec. 23, 2002) (granting summary judgment for the defendant because the plaintiff was challenging a single act by the defendant and presented no statistical evidence of impact); *Marbly v. Home Props. of N.Y.*, 205 F. Supp. 2d 736, 743–44 (S.D. Mich. 2002) (finding no evidence of disparate impact to support the plaintiff's claim that an apartment building operator engaged in a single act of discrimination by raising plaintiff's rent); *United States v. Salvation Army*, No. 96 CIV. 2415 WHP, 1999 WL 756199, at *9 (S.D.N.Y. Sept. 24, 1999) (rejecting disparate impact claim where plaintiff challenged single instance of refusal to rent); *Thomas v. First Fed. Sav. Bank of Ind.*, 653 F. Supp. 1330, 1340 (N.D. Ind. 1987) (involving challenge to a single instance of redlining where the plaintiff offered little statistical evidence as well as little intent evidence, and, consistent with *Arlington II*, considering the lack of intent evidence when analyzing the disparate impact claim).

such intent evidence is not required.³² Finally, defendants in disparate treatment and disparate impact cases either on their own, or in response to the plaintiff's blending of the burdens, offer disparate treatment defenses in disparate impact cases or vice versa.³³

An example of the pleading of a disparate impact claim as a form of insurance is the case of *Bangerter v. Orem City Corp.*,³⁴ in which the plaintiff challenged a statute that, on its face, "treat[ed] the handicapped differently from non-handicapped residents of the city" through group home restrictions.³⁵ Despite this explicit classification, the plaintiff did not allege that "Orem City had a discriminatory motive in adopting the challenged ordinance, but only that the ordinance results in a discriminatory effect."³⁶ Of course, the disparate impact theory is not designed for policies that involve "explicit distinctions drawn on lines of race and national origin."³⁷ The disparate impact theory was created for neutral policies that are "fair in form, but discriminatory in operation."³⁸ The plaintiff, in fact, may have fared better challenging the statute and ordinance under a disparate treatment theory, under which such explicit distinctions would be difficult to defend on the basis of a nondiscriminatory reason. Rather, the court in *Bangerter* accepted the defendant City's justification for the ordinance under an equal protection-style balancing approach.³⁹

What would be a plaintiff's motivation for bringing a disparate treatment claim as a disparate impact claim? Plaintiffs may bring disparate treatment cases under the guise of disparate impact claims because of the notion that impact cases are "easier" to prove.

32. See *infra* notes 53–55 and accompanying text.

33. See *infra* notes 56–57 and accompanying text.

34. 797 F. Supp. 918 (D. Utah 1992).

35. *Id.* at 920–22 (involving a statute that required group homes to obtain conditional use permits, which then led to the imposition of additional conditions on the group home provider by the City Council for people with disabilities).

36. *Id.* at 922.

37. See *Williamsburg Fair Hous. Comm. v. N.Y. City Hous. Auth.*, 493 F. Supp. 1225, 1245 (S.D.N.Y. 1980). Even though this case involved explicit racial quotas—the challenged quota restricted occupancy on the basis of a 75% cap on white residents, a 20% cap on Hispanic residents, and a 5% cap on African American residents, *id.* at 1230—the court went on to consider the evidence as showing "discriminatory motive accompanie[d] by evidence of discriminatory effect." *Id.* at 1245. This formulation is curious because all intentional discrimination cases involving explicit racial classifications could be described as having a disparate impact on the excluded group. See *id.* at 1246.

38. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

39. *Bangerter*, 797 F. Supp. at 922–23.

This approach, described by one theorist as “evidentiary dragnet,”⁴⁰ and referred to in this Article more colloquially as “Plan B,” reflects an assumption that the disparate impact theory is a lowering of the bar, “intent light,” or a ratcheting down of the burdens. This assumption is reflected in some of the case law:

To prove a prima facie case of national origin or racial discrimination under Title VIII [the Fair Housing Act], plaintiffs need only demonstrate that the challenged actions had a discriminatory effect; they need not demonstrate discriminatory intent. The plaintiffs’ burden is lighter, therefore, than under the equal protection clause, which requires a showing of discriminatory intent as well as discriminatory effect.⁴¹

Under the “Plan B,” or “intent light” approach, the disparate treatment theory is viewed as the tiniest of nets with which to catch violators, whereas the disparate impact theory becomes a much broader net that can be used to catch many more violators. “Compared to a theory of intentional discrimination, the theory of disparate impact puts a lighter burden of proof on the plaintiff—to prove adverse effects instead of discriminatory intent—and it puts some burden of proof on the defendant—to justify practices with adverse effects.”⁴²

Quite apart from the issue of whether disparate impact cases are “easier” to prove—some commentators have deftly shown to the contrary,⁴³ and the Supreme Court has taken pains to dispel this notion⁴⁴—plaintiffs bringing disparate impact claims as a form of insurance have unwittingly helped to undermine the theory. To what extent does the “Plan B” approach continue to frame the disparate impact analysis as one in which intent always matters?

When a disparate impact claim becomes a plaintiff’s “Plan B,” regardless of whether the facts actually support a claim about discriminatory effects, it is more likely that a plaintiff will hedge his bets by offering whatever intent evidence exists, thus suggesting that intent is necessary to support a disparate impact claim.⁴⁵ At

40. See Primus, *supra* note 13, at 520.

41. *Williamsburg*, 493 F. Supp. at 1245 (citations omitted).

42. George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory Of Discrimination*, 73 VA. L. REV. 1297, 1297–98 (1987).

43. See *infra* notes 178–80 and accompanying text.

44. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (“Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination.”).

45. See, e.g., *Arthur v. City of Toledo*, 782 F.2d 565, 571 (6th Cir. 1986). (discussing a situation where the plaintiffs brought a disparate impact claim but tried to present evidence of intent; the district court found that there was no

the same time, courts examining disparate treatment claims dressed up as disparate impact claims will be more likely to analyze the claim with an eye towards the underlying motivation behind the complained-of conduct.⁴⁶ Courts may have trouble letting go of intent in cases with facts that look, act, and “quack” like disparate treatment, but are labeled as having a disparate impact. Worse, courts may become conditioned to look for evidence of intent in all disparate impact cases, not just those that are brought as “Plan B.”⁴⁷

For example, in another fair housing case, *Robinson v. 12 Lofts Realty, Inc.*, the Second Circuit proceeded nominally under a discriminatory effects theory, even though the case involved a single act of disparate treatment.⁴⁸ A seller of a cooperative apartment was willing to sell to an African-American purchaser, but the cooperative board disapproved the application.⁴⁹ Of most significance was the court’s focus on intent evidence—“[e]ven if a motivation test were applied Robinson would be found to have established his prima facie case”⁵⁰—and the court’s assignment of a disparate treatment/*McDonnell-Douglas*-style burden on the defendant of coming forth with “evidence to show that his actions were not motivated by considerations of race.”⁵¹ This form of enmeshment is based on the assumption that a case without direct evidence of discrimination must proceed under an effects theory rather than a disparate

evidence of intent, and the circuit court chose not to consider intent at all).

46. See *infra* notes 49–52 and accompanying text (discussing *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979)); see also *Corp. of the Episcopal Church in Utah v. W. Valley City*, 119 F. Supp. 2d 1215, 1219 (D. Utah 2000) (explaining that evidence of intentional discrimination is one of the two strongest factors in a plaintiff’s favor when the plaintiff presents evidence of intentional discrimination as part of a disparate impact claim).

47. See *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1184 (E.D.N.Y. 1993) (finding “substantial evidence” of intent in a case challenging a zoning ordinance under the disparate impact theory); see also Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 420 (1998) (“The accumulated Title VII case law—particularly the more recent case law—suggests that many courts, while not requiring an overt finding of intent to discriminate, implicitly incorporate such a requirement or its functional equivalent in their application of the disparate impact standard.”).

48. See *Robinson*, 610 F.2d at 1038 (“[T]he district court in the present case adopted the effects test as the proper standard.”). It is not clear from the court’s opinion whether the plaintiff introduced the discriminatory effects theory or whether the court adopted the theory, if only nominally, sua sponte. See *id.*

49. *Id.* at 1033–34.

50. *Id.* at 1038.

51. *Id.* at 1039.

treatment theory resting on circumstantial evidence.⁵² In fact, aside from the mislabeling of the case as an effects case, no other badge of the disparate impact theory was present.

Another way in which plaintiffs contribute to the enmeshment of the disparate impact and disparate treatment theories is the gratuitous introduction of intent evidence in cases that are fundamentally about discriminatory effects.⁵³ In contrast to the prior form of enmeshment, these are cases in which the disparate impact claims are appropriate, but plaintiffs are focused on state of mind. This focus is likely based on the assumption that some intent evidence is better than none and may tip the scales in the plaintiff's favor in a close case. Intent evidence may well more favorably dispose a court to the disparate impact claim,⁵⁴ whether this happens on a conscious level or otherwise.⁵⁵ The risk, of course, is that plaintiffs' gratuitous proffers of intent evidence will condition courts to expect such evidence, and even require it, as a matter of equity when considering whether to award relief to disparate impact plaintiffs.

The persistent focus on state of mind by plaintiffs may have another unintended consequence. What is sauce for the goose is sauce for the gander, and disparate treatment burdens can be

52. *Id.* at 1043 (“[W]hen a discriminatory effect is present, the courts must be alert to recognize means that are subtle and explanations that are synthetic.”)

53. *See* Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth., 417 F.3d 898, 903 (8th Cir. 2005) (involving a case where the plaintiffs primarily supported their disparate impact claim with proof that the defendant’s stated objectives were pretextual); Arthur v. City of Toledo, 782 F.2d 565, 575 (6th Cir. 1986) (discussing a situation where the plaintiff presented evidence of intent to support a disparate impact claim); United States v. City of Black Jack, 508 F.2d 1179, 1181–82, 1185 (8th Cir. 1974) (dealing with a situation where the plaintiff offered intent evidence in support of the disparate impact claim, contending that the purpose of the defendant’s actions was to exclude African-Americans); Bronson v. Crestwood Lake Section 1 Holding Corp., 724 F. Supp. 148, 150 (S.D.N.Y. 1989) (dealing with a case where the plaintiff alleged intentional discrimination in support of a disparate impact claim).

54. *See* Corp. of the Episcopal Church in Utah v. W. Valley City, 119 F. Supp. 2d 1215, 1219 (D. Utah 2000) (finding evidence of intentional discrimination in support of a disparate impact claim to be one of the strongest factors in the plaintiffs’ favor).

55. *See* Owen Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 300 (1971) for a discussion of Supreme Court “functional equivalence” cases in the context of voting. “There was no doctrinal requirement that there be a racial motivation [for the literacy test], and in some instances not even an explicit speculation as to the likely motivation. But the presence and significance of the surrounding circumstances could scarcely have been ignored, and surely they had an impact.” *Id.*

misapplied by defendants as well as plaintiffs.⁵⁶ With plaintiffs having blended theories and burdens, defendants will be tempted to offer evidence that they were motivated by “good intentions” in cases that are fundamentally about discriminatory effects, not state of mind.⁵⁷ Plaintiffs’ assertions of discriminatory intent, even if made off-handedly in the context of a disparate impact case, will almost certainly be met by counter-assertions or countervailing evidence of the lack of discriminatory intent or the existence of good intent. Suddenly, intent has taken center stage in a case in which intent was presumed no longer to be relevant.

If courts as an equitable matter warm to a plaintiff’s intent evidence in the disparate impact setting, will they warm equally to a defendant’s evidence of good intent? *Griggs v. Duke Power Co.* instructs otherwise.⁵⁸ The *Griggs* defendants had attempted to use the lack of discriminatory intent evidence as a shield to liability.⁵⁹ Although the *Griggs* Court refused to find error in the lower courts’

56. See, e.g., *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 92 (2d Cir. 2000) (Moran, J., dissenting) (“Defendants seek to avoid the disparate impact theory of liability by contending, incorrectly, that discriminatory animus must be alleged to maintain a claim under [the FHA].”).

57. See *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 741 (8th Cir. 2005) (discussing a situation where the defendant argued, in opposition to the plaintiff’s disparate impact claim, that the plaintiff did not show any evidence of discriminatory purpose); *Williams v. Matthews Co.*, 499 F.2d 819, 827 (8th Cir. 1974) (reversing the district court’s judgment in a disparate impact case where the district court found that the defendant’s testimonial evidence that the board of directors had accepted “integration as the law of the land” and integration as “morally right” was enough to overcome the claim); *Scaife v. Roush*, 370 F. Supp. 2d 798, 804 (N.D. Ind. 2005) (rejecting the defendants’ argument that the disparate impact claim could not stand because the defendants did not know that the plaintiff was black at the time they refused his housing application); *Cabrini-Green Local Advisory Council v. Chi. Hous. Auth.*, No. 96 C 6949, 1997 WL 31002, at *12–13 (N.D. Ill. Jan. 22, 1997) (discussing a case where the defendant argued that the plaintiff failed to state a disparate impact claim due to the fact that there was no evidence of discriminatory intent); *McHaney v. Spears*, 526 F. Supp. 566, 571 (W.D. Tenn. 1981) (highlighting that intent is not a factor in disparate impact claims and awarding judgment for the plaintiffs where the defendants asserted that their refusal of the plaintiff’s offer to buy property had nothing to do with race and also argued that their past business record with minorities demonstrated that they did not have a discriminatory attitude towards minorities); *Dreher v. Rana Mgmt., Inc.*, 493 F. Supp. 930, 935 (E.D.N.Y. 1980) (dealing with a case where the defendant argued, in response to a single disparate impact claim, that it had no discriminatory intent and that the decision to rent exclusively to students was the result of a perfectly reasonable contract with a university).

58. See 401 U.S. 424, 432 (1971).

59. *Id.*

examination of the employer's intent,⁶⁰ it found that defendants' showing of good intent "does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups."⁶¹ Despite the clear pronouncement on this subject by the *Griggs* Court, subsequent courts have managed to remain stuck on state of mind.

B. How Courts Get Stuck on State of Mind

Undoubtedly, some of the confusion displayed by litigants in their approach to satisfying their respective burdens of proof in disparate impact cases can be attributed to the mixed signals they are receiving from the courts.⁶² The decision to authorize disparate impact claims necessarily involves a threshold determination that evidence of intent will not be required.⁶³ Why do courts, after deciding that evidence of intent is unnecessary, go looking for it?⁶⁴

60. *Id.* ("We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent . . .").

61. *Id.*; see also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988) ("[T]he [*Griggs*] Court concluded that such practices [with a disproportionate impact on minorities] could not be defended simply on the basis . . . of the employer's lack of discriminatory intent.").

62. Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325, 327 n.5 (1996) ("The courts have struggled in their attempts to present a clear vision of the scope and application of the model."); see also *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 92 (2d Cir. 2000) (Moran, J., dissenting) (describing the relevant standards for a disparate impact claim under the Fair Housing Act as "rather fluid"); *Roth v. City of Syracuse*, 96 F. Supp. 2d 171, 183–84 (N.D.N.Y. 2000) (noting, erroneously, the lack of disparate impact evidence where plaintiffs had operated on an intent-based theory, to wit, that defendant acted with racial animus in blocking minorities from renting apartments in primarily white neighborhoods). Mislabeling a disparate treatment case alleging a pattern and practice of discrimination as a disparate impact case is one manifestation of jurisprudential blending of the standards. See RAMONA L. PAETZOLD & STEVEN L. WILLBORN, *THE STATISTICS OF DISCRIMINATION* § 8.06 (1994).

63. See *Smith v. City of Jackson*, 544 U.S. 228, 235 (2005) ("We thus squarely held [in *Griggs*] that §703(a)(2) of Title VII did not require a showing of discriminatory intent."); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349 (1977) ("[T]he Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group."); *Griggs*, 401 U.S. at 430 ("Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

64. See, e.g., *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1184 (E.D.N.Y. 1993) ("Although the plaintiff is not required to prove discriminatory intent in order to show discriminatory effect, in balancing

The use of state of mind evidence is certainly understandable when both disparate treatment and disparate impact theories are alleged.⁶⁵ It is entirely plausible that both intent and effects theories could be applied to fact patterns arising in housing and employment cases.⁶⁶ As long as an intent claim hovers over the litigation, it may be difficult for the court—indeed anyone—to ignore evidence of intent even while analyzing the very distinct claim of disparate impact.

Despite the often legitimate alternative pleading in civil rights cases that occurs when both intent and effects theories are applicable to a given fact pattern, there is considerable focus on state of mind in effects cases regardless of whether a disparate treatment claim is also under consideration.

disparate impact against a governmental interest, evidence of such intent weighs heavily in the plaintiffs favor.” (citing *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1998)); *Strykers Bay Neighborhood Council, Inc. v. City of New York*, 695 F. Supp. 1531, 1543 (S.D.N.Y. 1988) (dismissing disparate impact case on summary judgment, and not only noting the failure of the plaintiffs to submit evidence of bad faith, but also pointing to evidence of the defendants’ good faith).

65. Of course, the disparate impact theory of liability is not universally available as an independent method of proof. *See, e.g.*, *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982) (concluding that the disparate impact theory is unavailable in cases brought pursuant to 42 U.S.C. § 1981); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (concluding that the disparate impact theory is unavailable to establish a constitutional claim under the Equal Protection Clause). When the disparate impact theory is not available, such as in cases challenging governmental actions as unconstitutional under the Equal Protection Clause, a different form of enmeshment occurs. Evidence of discriminatory effects is then used as “an important starting point” for ascertaining the motivation of decision makers. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252, 266 (1977). In such cases, courts may treat discriminatory effects evidence as a type of circumstantial evidence that may, but not necessarily, be enough to establish a prima facie case of disparate treatment. *See, e.g., id.*

66. One prototypical example of a case where both discriminatory intent and effect can be pled as alternative, noncontradictory theories is in the exclusionary zoning context. Parties could plead without straining credulity that a local government body was motivated by prohibited racial concerns when it enacted a moratorium on certain types of low-income housing opportunities. Although constituents are free under the First Amendment to express all manner of bias when petitioning their local government representatives to enact exclusionary zoning measures, local government actors may not use their constituents as a shield to liability if they in fact act on constituent bias in enacting such measures. *See, e.g.*, *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1223–24 (2d Cir. 1987). At the same time, the policy of excluding low-income housing opportunities in certain zoning districts may be shown, in many communities throughout the United States, to have a disproportionate impact on communities of color.

One prototypical example of a court's focus on state of mind evidence in disparate impact cases arises in the housing context. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights (Arlington II)*, the plaintiffs contended that the village's refusal to rezone certain property to permit construction of federally financed low-cost housing violated the Fair Housing Act and the Equal Protection Clause.⁶⁷ The district court denied relief under an intent theory,⁶⁸ and the Seventh Circuit affirmed.⁶⁹ However, the Seventh Circuit reversed the district court's findings on disparate impact, concluding that the failure to rezone had a discriminatory effect.⁷⁰ Next, in applying recent precedent, the Supreme Court noted that the Equal Protection Clause is unavailable for effects challenges and remanded the case to the Seventh Circuit to consider whether there was a violation under the Fair Housing Act.⁷¹ In finding that the Fair Housing Act can be violated by a showing of discriminatory effect without discriminatory intent, the Seventh Circuit enumerated four factors that should govern the inquiry.⁷² Curiously, one of the factors is whether there is "some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis*."⁷³ The court acknowledged that "the equitable argument for relief is stronger when there is some direct evidence that the defendant purposefully discriminated against members of minority groups."⁷⁴ Nonetheless, the court went on to acknowledge that intent is the least important of the four factors.⁷⁵

The focus on state of mind in effects cases is not peculiar to the realm of housing and is not even peculiar to lower courts. In

67. 558 F.2d 1283, 1286 (7th Cir. 1977).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, 271 (1977).

72. *Arlington II*, 558 F.2d at 1290.

73. *Id.* Other factors included the strength of the plaintiff's showing of effect, the defendant's interest in taking the action complained of, and whether the plaintiff sought to compel provision of housing or to restrain interference with those who would provide such housing. *Id.*

74. *Id.* at 1292.

75. *Id.*

Albemarle Paper Co. v. Moody, the Supreme Court joined the fray.⁷⁶ In that Title VII disparate impact case, the Court considered the job relatedness of an employer's testing program that was shown to disproportionately exclude African-Americans.⁷⁷ Inexplicably, the Court cited *McDonnell Douglas*, a watershed disparate treatment case, when setting out the order and allocation of proof in disparate impact cases.⁷⁸ The Court then proceeded to mix burdens of proof and characterize the plaintiff's final showing of a less discriminatory alternative as evidence of pretext.⁷⁹ The Court's reference in dicta to pretext did not actually impose a pretext burden—essentially an intent burden—on the disparate impact plaintiffs. Indeed, this reference to pretext was irrelevant in *Albemarle Paper* because the Court was concerned only with the defendant's burden of establishing job relatedness, not the plaintiff's final showing.⁸⁰ Further, *McDonnell Douglas* would be inadequate support for requiring plaintiffs in disparate impact cases to show pretext, because the *McDonnell Douglas* Court was itself careful to distinguish the *Griggs*-style disparate impact case from the one before it.⁸¹ However, the "intent creep" that occurred in *Albemarle*

76. 422 U.S. 405 (1975). Another example of the "intent creep" phenomenon can be found in *Connecticut v. Teal*, 457 U.S. 440 (1982). In that case, the Court described disparate impact cases as consisting of both intent and effects: "When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity . . ." *Id.* at 448. The Court's formulation in *Teal* reads like an "intent plus" requirement. If you can show that an employer is using a barrier "in order to" deny someone a job benefit *and* the barrier has a disparate impact, Title VII is violated.

77. *Albemarle Paper*, 422 U.S. at 425.

78. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Perhaps the Court intended primarily to borrow *McDonnell Douglas*'s burden-shifting approach rather than its substantive prescriptions. The Court referred to the plaintiff's burden of making out a prima facie case of discrimination, then explains how the plaintiffs would do so in the case before it, "i.e., . . . show[] that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* The Court discussed how the burden shifts to defendants to show job relatedness, then, assuming the employer can meet its burden, the plaintiff would have to show "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Id.* (citation omitted).

79. *Id.* ("Such a showing [that other tests would also serve a legitimate interest of the employer] would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." (citation omitted)).

80. *Id.*

81. *McDonnell Douglas*, 411 U.S. at 806 ("*Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which,

Paper, though not significant to the holding in that case, has been repeatedly quoted in other cases, which certainly magnifies the potential for enmeshment, if not just extraordinary confusion.

An example of one such Supreme Court decision that cites *Albemarle Paper* and sows additional seeds of enmeshment is *Watson v. Fort Worth Bank & Trust*.⁸² In that Title VII case, Justice O'Connor wrote for the majority in finding that subjective or discretionary employment practices may be analyzed under the disparate impact theory.⁸³ In reaching her holding, Justice O'Connor "suggest[s] that a finding of unlawful disparate impact should be the 'functional equivalent' of a finding of intentional discrimination."⁸⁴ Justice O'Connor's statement raises a recurring question for disparate impact purists: is the disparate impact theory merely just "evidentiary dragnet," or Plan B?⁸⁵

Despite arguments to the contrary, O'Connor's use of the term "functional equivalent" in context supports the notion of the disparate impact theory as a distinct method of proof in civil rights cases. "[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."⁸⁶ It is significant that O'Connor used

however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions Respondent, however, appears in different clothing.").

82. 487 U.S. 977, 979 (1988).

83. *Id.* at 991.

84. Mahoney, *supra* note 47, at 495; *see also Watson*, 487 U.S. at 987. O'Connor writes for the majority when she first introduces the concept of "functional equivalence," holding that subjective or discretionary employment practices may be analyzed under the disparate impact approach, but loses three justices and writes only for a plurality when she discusses evidentiary standards that should apply in disparate impact cases. *See id.* at 981, 987, 991.

85. *See supra* notes 40–47 and accompanying text.

86. *Watson*, 487 U.S. at 987. To be sure, O'Connor wanted to make certain that disparate impact plaintiffs are put to their paces in pursuing this alternative theory of liability.

The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. . . . Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination.

Id. (citations omitted). Still, declaring that the ultimate legal issue, i.e., whether unlawful discrimination occurred, is the same in disparate impact and disparate treatment cases does not amount to the imposition of an intent requirement onto all discrimination cases. *See infra* notes 101–05 and

the phrase “adopted without a deliberately discriminatory motive” when referring to employment practices that are the “functional equivalent” of intentional discrimination.⁸⁷ Practices adopted without a discriminatory state of mind can have the same outcome as practices adopted with a discriminatory state of mind. The key phrase is “in operation.”⁸⁸ A neutral policy or practice may “in operation” exclude African-Americans from employment opportunities in the same way that a “No Blacks Need Apply” sign would exclude them. From the standpoint of the excluded party, the result is the same. As the Court further explained, “a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices.”⁸⁹ The better reading of Justice O’Connor’s “functional equivalence” parlance, therefore, is that it does more to reinforce the distinctness of the disparate impact theory than to undermine it.

The Justice herself noted that disparate impact is not merely a vehicle for challenging hidden intentional discrimination, but an approach to practices “adopted without a deliberately discriminatory motive,” which cannot be defended “on the basis of the employer’s lack of discriminatory intent.”⁹⁰ Thus, if an “undisciplined system of subjective decisionmaking” and a system “pervaded by impermissible intentional discrimination” have “precisely the same effects,” then Title VII should apply.⁹¹

But the *Watson* decision’s more flagrant focus on state of mind takes place in a later section of the opinion in which O’Connor no longer writes for a majority. In that section, Justice O’Connor loses three justices when she evaluates the evidentiary standards to be applied in disparate impact cases involving challenges to subjective employment practices.⁹² In the course of taking a “fresh and somewhat closer examination of the constraints that operate to keep [disparate impact] analysis within its proper bounds,”⁹³ Justice

accompanying text.

87. *See Watson*, 487 U.S. at 987.

88. *Id.*

89. *Id.* at 990. “If an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.” *Id.* at 990–91.

90. *Id.* at 987, 988; *see also* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 21 (2006) (rejecting the notion that the kind of challenge authorized in *Watson* involved the use of subjective criteria to cover intentional discrimination).

91. *Watson*, 487 U.S. at 990–91.

92. *Id.* at 991–93 (plurality opinion).

93. *Id.* at 994 (plurality opinion).

O'Connor digs deeper into the realm of state of mind. She cites *Albemarle Paper* while discussing factors that would be relevant "in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment."⁹⁴

This latter formulation of functional equivalence can be explained away in the same manner as the former. The challenged practice itself is not equated with a discriminatory pretext. It is *operating* in the same manner as pretext. Different weapon, same injury. But certainly *any* discussion of pretext in the context of disparate impact is troubling. The reason why discussion of pretext is troubling is not because of any suggestion that the ultimate legal issue in both disparate impact and treatment cases is the same.⁹⁵ The ultimate legal issue always relates to whether a particular incident, series of incidents, policy, or practice constitutes discrimination under civil rights law, notwithstanding the method of proof used to reach the issue. No enmeshment there. But to overlay a pretext showing onto disparate impact is to allow through the back door what *Griggs*, its progeny, and Congress disallowed through the front door: an intent requirement.

Justice Blackmun authored a concurring opinion in *Watson* that criticizes the plurality for "turn[ing] a blind eye to the crucial distinctions between the two forms of claims."⁹⁶ But Justice Blackmun does not point to the plurality's discussion of pretext as emblematic of their blurring the lines. Rather, he focuses on the plurality's insistence that the burden of persuasion remains at all times with the plaintiff, contending that this allocation is "flatly contradicted by our cases"⁹⁷ and "bears a closer resemblance to the allocation of burdens we established for disparate-treatment claims [in *McDonnell Douglas* and *Burdine*]."⁹⁸

94. *Id.* at 998 (plurality opinion).

95. *See id.* at 987 ("The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used.").

96. *Id.* at 1002 (Blackmun, J., concurring).

97. *Id.* at 1000–01 (Blackmun, J., concurring). "Our cases make clear [that in disparate impact cases], . . . a plaintiff who successfully establishes this prima facie case shifts the burden of *proof*, not production, to the defendant to establish that the employment practice in question is a business necessity." *Id.* at 1001 (citations omitted).

98. *Id.* at 1001 (Blackmun, J., concurring); *see also id.* at 1004 (Blackmun, J., concurring) ("But again the plurality misses a key distinction: An employer accused of discriminating intentionally need only dispute that it had any such intent—which it can do by offering *any* legitimate, nondiscriminatory justification. Such a justification is simply not enough to legitimize a practice that has the effect of excluding a protected class from job opportunities at a

Of course, the pretext showing referenced in *Albemarle Paper* and *Watson* does not arise unless the plaintiff makes the requisite showing of impact and the defendant succeeds in demonstrating that the neutral policy causing the impact is justified. Nevertheless, this final opportunity for plaintiffs to prevail in disparate impact cases, which is now characterized as the showing of an alternative business practice that would be equally as effective as the challenged practice in serving the employer's legitimate business goals,⁹⁹ cannot simply revert to an intent showing and remain consistent with *Griggs*.¹⁰⁰

Ultimately, only a strained reading of *Watson* would support an intent requirement in disparate impact cases. Indeed, the majority opinion is replete with references to intent evidence requirements, or lack thereof, as the distinguishing feature of disparate treatment and impact cases, respectively.¹⁰¹ This did not prevent one wing of the Court from continuing to pursue an approach to the disparate impact theory that is stuck on state of mind.

In *Wards Cove Packing Co. v. Atonio*,¹⁰² the controversial decision partially overruled by the Civil Rights Act of 1991, the majority compounds the confusion by citing *Albemarle Paper* and *Watson* in their discussion of the following proposition: "If respondents . . . come forward with alternatives to petitioners' hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons."¹⁰³ This reference assumes that an employer would be making a showing in a disparate impact case that it adopted a practice for nondiscriminatory reasons. Of course, the employer's

significantly disproportionate rate."); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

99. See *Watson*, 487 U.S. at 998 (plurality opinion).

100. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988) (noting that "[n]o circuit, in an impact case, has required plaintiffs to prove that defendants' justifications were pretextual").

101. See, e.g., *Watson*, 487 U.S. at 988 ("This Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent. . . . In contrast, we have consistently used conventional disparate treatment theory, in which proof of intent to discriminate is required, to review hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria.").

102. 490 U.S. 642 (1989).

103. *Id.* at 660-61 (citing *Watson*, 487 U.S. at 998; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

burden in such cases is to show justification, not “good intent.”¹⁰⁴ *Griggs* makes that clear.¹⁰⁵ Again, perhaps the Court was offering its suggestions on pretext gratuitously for the purpose of informing litigants about what kind of evidence would be acceptable in disparate treatment cases, but this is doubtful. More likely, the Court was blending the burdens because it sees disparate impact theory as an alternative vehicle for proving state of mind.

The *Wards Cove* majority’s misapplication of *Albemarle Paper* and *Watson* is predictable in that those earlier decisions left the door wide open to subsequent blending of the impact and intent doctrines.¹⁰⁶ But the majority went a significant step further. In articulating its more diluted version of the employer’s burden in disparate impact cases, it recast the burden as one of production, rather than persuasion.¹⁰⁷ The majority wanted to bring disparate impact cases in line with disparate treatment cases, in which the plaintiff ultimately bears the “burden of disproving an employer’s assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration.”¹⁰⁸ In addition to resting the ultimate burden of proof on the plaintiff, the majority patterned impact cases after intent cases by focusing on the “legitimacy” of the defendants’ justification: “whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.”¹⁰⁹ Casting the defendants’ burden in terms of “serving legitimate goals” is a near dead ringer for the “good intent” defense applicable in disparate treatment cases, but explicitly rejected in *Griggs*. Thus, the majority was attempting to unify impact and intent cases both in the nature of the defendants’ burden

104. See *Wards Cove*, 490 U.S. at 668–69 (Stevens, J., dissenting) (stating that the majority opinion “blurs” the distinction between the employer’s burden in disparate treatment cases of coming forward with evidence of legitimate business purpose, i.e., intent, versus the employer’s burden in a disparate-impact case of proving an affirmative defense of business necessity). For an example of a disparate impact case in which the court considered whether the defendants’ proffered justifications were pretextual, see *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988) (“The district court did not err in concluding that dispersion was a pretextual reason for imposing the low-income quota.”).

105. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971).

106. The Court has subsequently scolded at least one lower court for engaging in the same kind of blending of burdens. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 51, 53 (2003) (finding that the lower court “erred by conflating the analytical framework for disparate-impact and disparate-treatment claims” and warning that “courts must be careful to distinguish between these theories”).

107. See *Wards Cove*, 490 U.S. at 659–60.

108. *Id.* at 660.

109. *Id.* at 659.

and in the weight of that burden. The majority did not characterize this particular maneuver as an evolution in doctrine or as a “check” on a wayward disparate impact theory; rather, the Court portrayed its iteration of the employer’s burden in disparate impact cases as “well established” and as the most reasoned interpretation of earlier decisions.¹¹⁰

Justice Stevens, in his dissenting opinion in *Wards Cove*, attempted to right the ship. Indeed, the Civil Rights Act of 1991 overrules the *Wards Cove* majority’s articulation of the defendant’s burden in disparate impact cases.¹¹¹ Justice Stevens foreshadowed Congress’s intervention by making clear that “intent plays no role in the disparate-impact inquiry. The question, rather, is whether an employment practice has a significant, adverse effect on an identifiable class of workers—regardless of the cause or motive for the practice.”¹¹² Justice Stevens would have another opportunity to reiterate his “intent has no role” vision of *Griggs* fifteen years later in a decision extending the application of the disparate impact theory to the Age Discrimination in Employment Act.

In 2005, Justice Stevens wrote for the majority in *Smith v. City of Jackson*, a five-to-three decision resolving a circuit split and authorizing recovery in disparate impact cases under the Age Discrimination in Employment Act.¹¹³ Even though the Court relied on differences in the statutory language of Title VII and the ADEA to lighten the burden placed on defendants in age cases,¹¹⁴ what is perhaps most significant to the instant discussion is the way Justice Stevens characterizes the disparate impact theory he is applying: “We . . . now hold that the ADEA does authorize recovery in ‘disparate impact’ cases comparable to *Griggs*.”¹¹⁵ Thus, the most recent treatment of the disparate impact theory by the Court is consistent with the “intent has no role” notion articulated by Justice Stevens in *Wards Cove*;¹¹⁶ yet the view that disparate impact and

110. *See id.* at 659–60.

111. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000) (requiring an employer to “demonstrate that the challenged practice is job-related . . . and consistent with business necessity”).

112. *Wards Cove*, 490 U.S. at 670 (Stevens, J., dissenting).

113. 544 U.S. 228 (2005). Chief Justice Rehnquist took no part in the decision.

114. *Id.* at 233–40.

115. *Id.* at 232.

116. For an earlier iteration of Justice Stevens’s “intent has no role” conception of liability, see *Washington v. Davis*, 426 U.S. 229, 254 (1976) (Stevens, J., concurring) (“I do not rely at all on the evidence of good-faith efforts to recruit black police officers. In my judgment, neither those efforts nor the subjective good faith of the District administration, would save Test 21 if it were otherwise invalid.”).

disparate treatment are two sides to the same coin persists.¹¹⁷

C. *How Theorists Get Stuck on State of Mind*

It is remarkable that since the disparate impact theory was created, two parallel discussions of the theory have emerged—one official, and one unofficial. The Official View of the disparate impact theory, regardless of its actual application in any particular case, is that intent simply need not be shown.¹¹⁸ Furthermore, according to *Griggs*, “good intent” on the part of the party causing the impact is not going to insulate that party from liability.¹¹⁹ Thus, officially, intent would seem to be irrelevant in disparate impact cases. But the unofficial discussion regularly indulges a notion of the disparate impact theory in which intent truly matters and might even be vital to the disparate impact theory’s survival.

In most discussions aimed at discerning the theoretical basis for disparate impact, theorists consider the proposition that disparate impact exists primarily to help litigants uncover discriminatory motive that is lurking below the surface, but unable to be rooted out through the intent-based method of proof. As previously noted, this basis is framed by Professor Primus as “evidentiary dragnet.”¹²⁰ He characterizes evidentiary dragnet this way: “Establishing liability for disparate impact . . . reliev[es] a plaintiff of the need to prove her employer’s motive *directly* as long as the employer’s actions create a sufficient pattern of disparate results.”¹²¹ Disparate impact is thus conceived as a method of proof through which intent can be proven *indirectly*. Of course, direct evidence of intent need not be shown even to support intent-based theories of liability.¹²² Also, this theoretical basis presumes that discriminatory intent is present in any case warranting judicial intervention, through disparate treatment or its helper, disparate impact.

Others who have posited this role for the disparate impact theory include Professor George Rutherglen, who asserts that “[l]iability has actually been imposed usually only when there is some reason to believe that the employer has engaged in intentional discrimination Liability for disparate impact under Title VII,

117. See Rutherglen, *supra* note 10, at 2330 (describing the *Smith v. City of Jackson* decision as demonstrating “the Court’s continuing commitment to imposing liability for discriminatory effects as a means of preventing hidden and otherwise elusive forms of discrimination”).

118. See *supra* note 63 and accompanying text.

119. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

120. Primus, *supra* note 13, at 520.

121. *Id.* (emphasis added).

122. *McDonnell Douglas* and its progeny create a burden shifting analysis through which intent can be proven circumstantially.

whatever the hopes of its advocates, has never strayed very far from liability for intentional discrimination.”¹²³ Professor Rutherglen conceives the disparate impact theory as a means of “smoking out” the more subtle forms of discrimination that emerged after more obvious forms of discrimination became less frequent.¹²⁴ Thus, Professor Rutherglen not only considers the possibility, but asserts as fact the notion that the disparate impact theory “rests on the practical need, recognized by Congress in the central provisions of title [sic] VII and implemented by the Supreme Court in *Griggs*, to prevent pretextual discrimination by institutional defendants.”¹²⁵ Such a notion of disparate impact focuses on state of mind because it assumes that all disparate impact liability results from some discriminatory motivation, no matter how well-concealed.

The most persuasive argument offered by Professor Rutherglen for his “disparate impact as evidentiary dragnet” approach relates to the conceptual difficulty of discerning the motivation of an institution: “[t]he intent of different individuals may conflict, their authority may overlap, and actual practices may deviate from formulated institutional policy.”¹²⁶ But the fact that proof of discriminatory intent may be more complicated in some contexts does not logically support a limiting construction of the disparate impact theory. There is still an argument to be made, even in these more complex institutional environments, that a particular act or decision was motivated by a prohibited factor. Of course, this proof is difficult, but not impossible. Litigants may well be motivated to bring alternative disparate impact claims in such contexts, if appropriate, but not solely because intent is “just too hard to prove.”

Professor Rutherglen also believes that disparate impact can serve as “evidentiary dragnet” when economic incentives to limit contact between those with discriminatory tastes and the disfavored group motivate employers to discriminate as much as their own racial animus.¹²⁷ *Griggs* would then simply be used to “reduc[e] the plaintiff’s burden of proof and . . . [place] a burden on the defendant

123. Rutherglen, *supra* note 10, at 2330 (footnote omitted); *cf.* *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (involving a successful challenge under the disparate impact theory based on impact of height and weight minimum requirements for women).

124. Rutherglen, *supra* note 10, at 2328.

125. Rutherglen, *supra* note 42, at 1345.

126. *Id.* at 1310; *see also* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 538 (2001) (“The reality of decision making in the employment area . . . is that multiple individuals are often involved in making employment decisions affecting an employee.”).

127. Rutherglen, *supra* note 42, at 1310.

to justify . . . practices with adverse impact.”¹²⁸ First, the fact that neutral selection procedures are employed, as Professor Rutherglen describes, “to obtain the benefits of satisfying others’ tastes for discrimination,”¹²⁹ would support a disparate treatment claim because the adoption of the procedures was undertaken for a racial reason.¹³⁰ Second, even though disparate impact may be available for neutral policies that are motivated by discriminatory intent, *Griggs* does not support the contention that the effects theory *must* be limited to this category of cases.

Despite the argument that some have made that “disparate impact as evidentiary dragnet” is the most defensible justification under the Constitution,¹³¹ this depiction of the disparate impact theory has itself created a good deal of confusion in the doctrine and has had the perverse result of keeping the focus precisely where it need not be: on the state of mind of the defendant.

Another theorist, Professor Charles A. Sullivan, characterizes the evidentiary dragnet rationale for the disparate impact theory in terms of legal realism—avoiding bad facts by altering the law.¹³² This would apply in cases where proof of intent was lacking but the defendant somehow failed the “smell test,” resulting in a strong suspicion of discriminatory intent.¹³³ In the end, Professor Sullivan takes the “intent has no role” view from *Griggs*. He suggests that the disparate impact theory may have initially been implemented to root out intentional discrimination that was well concealed, and therefore, too hard to prove.¹³⁴ But he goes on to note that, at least since 1991 when Congress codified the disparate impact theory,¹³⁵ it “distinguish[ed] impact claims from treatment claims This suggests that disparate impact is not merely a surrogate proof method for intentional discrimination, but instead is a distinct theory aimed more broadly at practices that disproportionately

128. *Id.* at 1311.

129. *Id.* at 1310.

130. Personal racial animus is not required in order to engage in a particular act or decision “because of” race. *See* Sullivan, *supra* note 10, at 916 (“The Court soon established that certain motivations, such as animus or disdain, were not essential to a violation”). It is enough to act “because of” *others’* racial animus to find oneself squarely within the ambit of prohibited, intentional discrimination.

131. *See, e.g.*, Primus, *supra* note 13, at 520–21.

132. Sullivan, *supra* note 2, at 1522.

133. *Id.*

134. *Id.* at 1522–23. Of course, the use of disparate impact theory as a “Plan B” method of proof where intent plays a hovering role has never been consistent with *Griggs*. *See supra* notes 58–61 and accompanying text.

135. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75.

burden protected groups, whether or not intent to discriminate is present.”¹³⁶

As Professor Sullivan contends, any lingering confusion over the role of intent in disparate impact cases might have been put to rest with the 1991 Act.¹³⁷ Notwithstanding this congressional guidance, the “intent has no role” vision of the disparate impact theory has been less than self-evident to litigants, courts, and commentators.¹³⁸

II. THE UNITARY THEORY OF LIABILITY—STILL STUCK

Against the backdrop of confusion and enmeshment, there is a steady drumbeat of theorists arguing that the disparate treatment and disparate impact theories should be merged once and for all.¹³⁹ These theorists would subordinate the discriminatory effects theory in service of the disparate treatment theory or abandon the notion of discriminatory effects liability altogether. The arguments for merging the two theories of liability vary, and are being made from both the left and the right, but at bottom, they would result in the creation of a unitary theory of liability in antidiscrimination law.¹⁴⁰

136. Sullivan, *supra* note 2, at 1524.

137. Some might assert that the Civil Rights Act of 1991 perpetuates the confusion of *Albemarle Paper* and *Watson* by codifying the plaintiffs' opportunity to make a final showing that an alternative employment practice exists that would be equally as effective in serving an employer's legitimate business goals, and the respondent refuses to adopt such an alternative employment practice. See 42 U.S.C. § 2000e-2(k)(1)(A)(ii), -2(k)(1)(C). But the 1991 Act does not construe this final showing as tantamount to pretext. Further, an employer might have neutral reasons for wishing to maintain a policy that he has shown to be job-related, and, in any event, these reasons would be irrelevant under a disparate impact standard. See *infra* notes 192–94 and accompanying text.

138. See *infra* notes 177–82, 197–98 and accompanying text. But see Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175, 219 (2001) (rejecting a justification for disparate impact theory that would assume that all discriminatory effects were rooted in some deliberate discrimination); see also *id.* at 235 (noting that in disparate impact cases, “intent plays no role; the plaintiffs are disadvantaged by an employment practice that the employer uses in good faith, and the selection criterion is the cause of their injury” (footnote omitted)).

139. See, e.g., Gold, *supra* note 138; Selmi, *supra* note 10.

140. Of course, for cases in which disparate impact theory is not available, such as in the Equal Protection context, the unitary theory of liability prevails. See *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (“Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.”).

The unitary theory creates more problems than it solves, because it either conflicts with the vision of discrimination articulated by the Supreme Court in *Griggs* (and later ratified by Congress in the Civil Rights Act of 1991)¹⁴¹ or it assumes that the prima facie and defense burdens that have evolved in disparate treatment and disparate impact cases can be mixed and matched and otherwise used interchangeably.¹⁴² Most importantly, the unitary theory is still hopelessly stuck on state of mind.¹⁴³

There are two major forces pressing for a unitary theory of liability. The principal theorist arguing for a unitary theory from the left is Professor Michael Selmi, who argues that the disparate impact theory is a mistake because it has been terrifically unsuccessful and has had the unintended consequence of overshadowing and limiting the notion of what may constitute intent for purposes of disparate treatment liability.¹⁴⁴ From the right, there are theorists arguing that the Supreme Court has refined *Griggs* in cases like *Watson v. Forth Worth Bank & Trust*¹⁴⁵ in such a way as to make clear that the true purpose of the disparate impact theory is to prove intent, not effects.¹⁴⁶

A. *A Proposed Merger*

Upon surveying the steady encroachment that disparate treatment analysis has made upon disparate impact doctrine, which has been occasioned by all the stakeholders—litigants, courts, and theorists—the question arises: is this encroachment the product of incremental doctrinal change or mass confusion?¹⁴⁷ If the former, is

141. See *infra* notes 209–16 and accompanying text.

142. See *infra* note 203 and accompanying text.

143. See, e.g., Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 137 (2006) (“By combining disparate treatment and disparate impact as part of the same analysis, . . . there would be a ‘focus on intent’ in all cases of discriminatory workplace standards, and the courts would be forced to examine the employer’s motivation for implementing any workplace rule.” (footnotes omitted)). There is at least one theorist urging a unitary theory of liability who acknowledges the irrelevance of intent in disparate impact cases. See Gold, *supra* note 138, at 235. Despite Professor Gold’s assertion that disparate treatment and disparate impact theories overlap based on their common concern with “unequal treatment,” the fact that “only intent distinguishes them,” makes any merger of proof schemes strained, if not impossible. *Id.* at 251.

144. See generally Selmi, *supra* note 10.

145. 487 U.S. 977 (1988).

146. See, e.g., Mahoney, *supra* note 47.

147. See Linda Lye, *Title VII’s Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. &

the ultimate agenda of those pushing for incremental doctrinal change the *sub silentio* overruling of the *Griggs* doctrine? If the latter, is there a path forward, or more accurately, a path backward to reacquaint current stakeholders with *Griggs* in a way that reconciles *Griggs* with current, binding standards governing disparate impact?

One of the theorists suggesting that the disparate impact and disparate treatment theories are more alike than different is George Rutherglen. For example, Professor Rutherglen points to disparate treatment cases as showing “how a theory of disparate treatment comes to approximate one of disparate impact when it is applied to general employment practices.”¹⁴⁸ Also, Professor Rutherglen describes the disparate impact and disparate treatment theories as relying on the same evidence.¹⁴⁹ He describes the disparate impact theory as “effectively shifting part of the plaintiff’s burden of proving discrimination onto the defendant to prove absence of discrimination.”¹⁵⁰ He portrays all claims of discrimination as consisting of the same two elements: “the plaintiff’s initial showing of discriminatory intent or effects and the defendant’s offered justification for the disputed decision.”¹⁵¹ Interestingly, Professor Rutherglen would wonder “why all the fuss” about defending the borders between these two theories: “If only a subtle shift in the burden of proof is at stake, why do the parties care so much about this issue?”¹⁵²

Professor Rutherglen’s merging of the disparate treatment and disparate impact theories serves to lessen the burden on defendants under both theories, because a business justification cannot be equated with a nondiscriminatory reason. Even Justice O’Connor, in her majority opinion in *Watson*, recognizes the distinctiveness of the burdens: “The factual issues and the character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination.”¹⁵³ For example,

LAB. L. 315, 333 (1998) (“Disparate impact had never exorcized the specter of disparate treatment. Over the years, the Court had attempted to align the two models—partly due to its genuine confusion . . . and partly as a conscious effort.”).

148. Rutherglen, *supra* note 42, at 1311.

149. Rutherglen, *supra* note 10, at 2313.

150. *Id.* at 2314.

151. *Id.* at 2320.

152. *Id.* at 2323.

153. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). O’Connor blends the burdens, though, when she describes the defendants’ evidence in disparate impact cases as focusing on “competing explanations” for statistical disparities. *Id.* An explanation focuses on the reason why the

if defendants need only demonstrate a nondiscriminatory reason, i.e., good intentions, to justify a policy shown to have a disparate impact against protected groups, they would nearly always prevail, because the plaintiff has not been required to offer any evidence to rebut this assertion of “good intent.” Even if plaintiffs have the opportunity to argue that the defendants’ “good intent” evidence is pretextual, the parties are still engaged in the inappropriate exercise of arguing about credibility and the “real reasons” behind certain policy decisions. The unanimous *Griggs* court explicitly rejected the notion that one could escape disparate impact liability by simply claiming “oops, didn’t mean it; it was an accident.”¹⁵⁴

Conversely, Professor Rutherglen asserts that “[e]vidence of job relationship or business necessity, available as a defense to claims of disparate impact, can also be used to defeat a claim of intentional discrimination.”¹⁵⁵ This form of burden swapping is equally problematic. As long as defendants can demonstrate a business justification for their actions, then any form of intentional discrimination could be justified. The possibilities here are endless. “I will lose money if I rent to African-Americans because all my other tenants will move out.” Or, “I can’t rent to a person in a wheelchair because it might cause my insurance premiums to rise.” Or, “if I hire people of different races, I will have more conflict between employees and less work will get done.” As Professor Sullivan has stated, “even admittedly rational, business-oriented judgments are discriminatory within the statute’s meaning if the employer uses the race or gender criterion to make distinctions.”¹⁵⁶

Professor Rutherglen may not intend all of the above consequences when he suggests that the disparate treatment and disparate impact theories are more alike than different. But the consequences are real because the theories are qualitatively different. First, as discussed in Part I, *supra*, the disparate impact theory is not a theory that merely requires “less evidence.” Second, contrary to Professor Rutherglen’s assertion, the qualitative difference *does* relate to the evidence used to support or defeat a

disparity exists, which bears greater resemblance to the disparate-treatment-style burden of offering a nondiscriminatory reason for a particular course of action. A justification is an argument focused not on the cause of the disparity, but on the fact that any disparity is justified. *See* Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 n.5 (1981) (“[Compared with the burdens applicable to disparate-treatment claims,] the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes.”).

154. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

155. Rutherglen, *supra* note 10, at 2322.

156. Sullivan, *supra* note 10, at 916.

claim, not just which party has the burden of proof. Burden of proof is extremely important,¹⁵⁷ but it is an oversimplification to sum up all of the differences between the impact and intent theories as merely “disputes over the burden of proof.”¹⁵⁸

Another theorist proposing a merger is Peter E. Mahoney. He undertakes what he would describe as an archeological exploration of the application of the disparate impact theory in the realm of fair housing law.¹⁵⁹ In so doing, Mahoney seems inclined to import the intent standard from Equal Protection jurisprudence to argue for a “[u]nified [t]heory of [d]iscrimination.”¹⁶⁰ He asserts that “in both constitutional and statutory settings, . . . absent a principle based on intent or ‘the functional equivalent’ thereof, disparate impact doctrine appears to have a limitless reach.”¹⁶¹ How would Mahoney implement this unified theory of discrimination? “[T]he disparate impact test—although codified in Title VII—might be construed as merely an evidentiary variant of the disparate treatment doctrine, using modified *McDonnell Douglas* standards to permit purely statistical evidence to be used in a manner that is probative of intent.”¹⁶² Mahoney’s vision of disparate impact, then, is that it is an alternative means of proving intent. Thus, in any case warranting judicial intervention, some underlying discriminatory motivation is present.

According to the Rutherglen and Mahoney view, therefore, the merger of disparate impact and disparate treatment can be easily accomplished because, they are, and have always been, the same theory.

B. *Never Mind Effects?*

Not all theorists urge a unitary theory of liability in antidiscrimination law based on the belief that the disparate impact

157. Professor Rutherglen effectively demonstrates the importance of the burden of proof:

Lawyers care about the burden of proof because, in close cases, it determines who wins or loses, with doubts resolved against the party who bears the burden. The party who does not have the burden of proof can blame all the gaps in the evidence and in the resulting inferences on the party who does. Placing the burden of proof on the opposing party often gives lawyers a decisive edge in litigation.

Rutherglen, *supra* note 10, at 2323.

158. *See id.*

159. *See Mahoney, supra* note 47.

160. *Id.* at 495.

161. *Id.* at 499.

162. *Id.* at 497.

and disparate treatment theories are the same. One theorist in particular, Professor Michael Selmi, argues that the disparate impact theory “was a mistake” and should be abandoned.¹⁶³ Primarily, he argues that “much of the battle to remedy discrimination was lost when we moved away from the focus on intent.”¹⁶⁴ The arguments he makes in favor of abandoning the disparate impact theory are helpful in the sense that they clarify why a distinct method of proof in antidiscrimination law is necessary. Professor Selmi alternately argues that the disparate impact theory has been terrifically unsuccessful, it has overshadowed the development of the disparate treatment theory, and it is ultimately superfluous.¹⁶⁵

1. *Is the Disparate Impact Theory Worth the Candle?*

First, Professor Selmi points to the lackluster performance of the disparate impact theory and argues that the theory has been “an ill fit for any challenge other than to written examinations.”¹⁶⁶ Underlying this argument is the contention that where courts have developed the theory, i.e., in the written test context, the theory’s usefulness is expanded, whereas in less traditional contexts with fewer guideposts, courts are more likely to accept defendants’ proffered business justifications. That the disparate impact theory is less helpful where it has been used the least does not support Professor Selmi’s contention that it should be put out to pasture. In fact, there are those who would make precisely the opposite claim. Professor Sullivan argues that disparate impact should be reinvigorated because it has been underutilized and “barely constructed at all.”¹⁶⁷

Professor Selmi goes on to make the observation that the disparate impact theory is more focused on upending social norms, rather than preserving them, which dooms it to failure and explains why the theory “never has been taken particularly seriously by courts.”¹⁶⁸ Professor Selmi quotes Judge Posner in arguing that the

163. Selmi, *supra* note 10, at 782.

164. *Id.* at 768.

165. *Id.* at 707.

166. *Id.* at 705.

167. Sullivan, *supra* note 10, at 984–85; *see also* Abernathy, *supra* note 10 (discussing the failure of the effects test in the Title VI context).

168. Selmi, *supra* note 10, at 707–08. Professor Selmi uses pregnancy discrimination cases to demonstrate the disparate impact theory’s potential for altering the status quo: “If the disparate impact theory were applied with rigor to policies that adversely affect pregnant women or women with childrearing responsibilities, it could conceivably invalidate many central, and common, employment policies, including routine work hours, most leave policies, and

disparate impact theory “proved too much.”¹⁶⁹ Professor Selmi uses pregnancy and age discrimination cases to punctuate his argument. He reasons that the disparate impact theory cannot succeed in these contexts especially, because it will consistently be used to challenge “core business practices,”¹⁷⁰ which will always survive under the business necessity defense.

Age and pregnancy cases are important, but the fact that the disparate impact theory is of more limited utility in these contexts does not establish that the theory is, or should be, a dead letter. More importantly, it would be disingenuous to argue that any aspect of the antidiscrimination project, even the intent-based theory of discrimination, was norms-reinforcing at the time *Griggs* was decided in 1971. A norms revolution is more like it. The housing context is instructive. Title VIII of the Civil Rights Act of 1968, or the Fair Housing Act,¹⁷¹ was passed only three years prior to the *Griggs* decision in 1971, and then only as a result of the death of Dr. Martin Luther King, Jr.¹⁷² The idea that discrimination in housing—the intentional kind—engendered any serious social stigma for property owners in the early 1970s is not persuasive, given the difficulty in passing an antidiscrimination law in housing prior to Dr. King’s death.¹⁷³ Thus, the disparate impact theory cannot be described as vastly more radical an approach than disparate treatment with respect to rooting out discrimination, at least at the time the disparate impact theory was adopted.¹⁷⁴ Put

mandatory overtime.” *Id.* at 751. But the fact that the disparate impact theory *may* involve challenges to “core business practices,” *id.*, does not prove that it is always so used, particularly outside of the pregnancy and childrearing context. *See also* Bagenstos, *supra* note 90, at 40 (“[T]he difficulties with a structural approach to employment discrimination law may reflect yet a deeper problem: we may be asking antidiscrimination law to do too much of the work of responding to society’s inequalities.”).

169. Selmi, *supra* note 10, at 747.

170. *Id.* at 751.

171. Pub. L. No. 90-284, §§ 801–901, 82 Stat. 81–90 (1968).

172. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 5:2 (2007) (linking the passage of the FHA with “such nationally traumatic events as the urban riots of 1967 and the assassination of Dr. Martin Luther King, Jr.”); *see also* H.R. REP. NO. 100-711, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2176 (explaining that the enactment of the FHA directly followed the assassination of Dr. Martin Luther King, Jr.). For a detailed discussion of the legislative history of the FHA, *see* Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 149–61 (1969).

173. SCHWEMM, *supra* note 172, § 5:2.

174. *See* David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 939 (1989) (“The discriminatory intent standard is in fact at least as vague and indeterminate as the alternatives; and rigorously

differently, while it may be true that the disparate impact theory “[if taken] seriously . . . would have posed a substantial challenge to existing practices,”¹⁷⁵ it cannot be claimed to represent a greater challenge to the status quo than the disparate treatment theory, particularly at the time these theories were introduced. The cases, even the more recent ones, illustrate that overt discrimination, even if less fashionable in some quarters, is not obsolete.¹⁷⁶

Professor Selmi rightly notes that litigants (and commentators) have leaned on the disparate impact theory because of the general perception that an intent requirement is more difficult to prove *per se*.¹⁷⁷ In discussing the failure of the disparate impact theory to deliver on this operating assumption,¹⁷⁸ Professor Selmi operates under a certain assumption of his own—that “courts never fully accepted the disparate impact theory as a legitimate definition of discrimination.”¹⁷⁹ But it would be inaccurate to say that litigants were achieving high rates of success in pursuing disparate treatment theories, in that disparate treatment has certainly experienced its share of judicial resistance.¹⁸⁰ And even though there are instances in which courts have simply rejected the theory outright,¹⁸¹ even after Congress codified the theory in 1991,¹⁸² this

applied, it is no less threatening to established institutions.”)

175. See Selmi, *supra* note 10, at 708.

176. See Kenneth R. Harney, *Report Brings an Ugly Practice to Light*, WASH. POST, Apr. 15, 2006, at F1 (reporting on a recent two-year study funded in part by the federal government and conducted by the National Fair Housing Alliance, which found an eighty-seven percent rate of racial steering in the residential real estate market); see also *United States v. Plaza Mobile Estates*, 273 F. Supp. 2d 1084 (C.D. Cal. 2003) (declaring the policies of a mobile home park to be blatant violations of the FHA); *Broome v. Biondi*, 17 F. Supp. 2d 211 (S.D.N.Y. 1997) (upholding an award of punitive damages against an apartment complex that refused to rent to an African-American couple); *Cato v. Jilek*, 779 F. Supp. 937 (N.D. Ill. 1991) (granting summary judgment for a mixed-race couple against a landlord who refused to rent to them).

177. Selmi, *supra* note 10, at 706.

178. Professor Selmi focuses particularly on the willingness of courts to deny relief to disparate impact plaintiffs based on their acceptance of defendants’ justifications for whatever disproportionate impact is shown. *Id.* at 705–06.

179. *Id.* at 706.

180. See Sullivan, *supra* note 10, at 941–43, 976. Professor Sullivan also questions whether the disparate treatment theory’s “profoundly unsatisfactory history should prompt a reconsideration of how much effort should be spent trying to salvage it.” *Id.* at 913.

181. See *United States v. North Carolina*, 914 F. Supp. 1257, 1265 (E.D.N.C. 1996) (“[T]he Supreme Court has overruled *Griggs sub silentio*. The concept of ‘unintentional discrimination’ is logically impossible. Title VII was never intended to require employers to hire by racial, sexual, or other quota applicants who failed to qualify for a job because they could not meet some

Article posits that at least some of the failure of litigants to prevail under the disparate impact theory may be attributed to the misplaced focus on state of mind, described in Section I, *supra*. The fact that litigants have been less successful in disparate impact cases than is widely perceived, or even that litigants are less successful in effects cases than in intent cases, does not support the “never mind effects” position that Professor Selmi urges.

2. *Has Disparate Impact Overshadowed Disparate Treatment?—The Linear Approach.*

Second, Professor Selmi levels this blow: that “seeking an expansive role for the disparate impact theory ultimately has left us with a truncated definition of intentional discrimination.”¹⁸³ Does the disparate impact theory really begin where intentional discrimination ends? Embedded in such a conceptual framework—originally suggested by Justice Stevens¹⁸⁴—is the notion that the antidiscrimination proof analysis should be conducted in a linear fashion. Many scholars take the same approach, arguing that the line of demarcation between the disparate treatment and disparate impact theories should be redrawn this way or that way. There is a wide divergence of opinion as to how the lines should be drawn, with some scholars arguing that more claims should be encompassed under the disparate impact theory,¹⁸⁵ and others arguing that the

objective requirement.”).

182. See 42 U.S.C. § 2000e-2(k) (2000).

183. Selmi, *supra* note 10, at 706.

184. See *Washington v. Davis*, 426 U.S. 229, 254 (1976) (Stevens, J., concurring); see also Rutherglen, *supra* note 10, at 2313–14.

185. See Sullivan, *supra* note 10, at 941–52 (2005) (arguing that the disparate treatment theory imposes too high a burden on plaintiffs and that courts should utilize disparate impact instead); see also Jennifer C. Johnson, *Race-Based Housing Importunities: The Disparate Impact of Realistic Group Conflict*, 8 LOY. J. PUB. INT. L. 97, 130 (2007) (“[R]ealistic group conflict theory illustrates that an effects-based test, which can examine group situational dynamics, is the avenue through which the Court *must* grapple with deciding how much effort is needed by those in power to ensure fair treatment of those without it.”); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 607–13 (2004) (discussing cases in which plaintiffs who lost on a disparate treatment theory might have succeeded under a disparate impact approach); Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 911 (2006) (“[D]isparate impact theory as applied to failure to accommodate cases is necessary to challenge facially neutral policies and practices that have a disproportionately negative effect on people with disabilities.”); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1644 (1991) (arguing against the inefficiencies of the disparate

line should move so as to allow more claims to fall under the rubric of disparate treatment.¹⁸⁶ Professor Melissa Hart describes a “blurred” line between policies that are purportedly “neutral” (she questions whether, in fact, many policies are actually neutral) and those that are not, with “some kinds of employer practices [falling] between these doctrinal cracks” and escaping legal challenge.¹⁸⁷ Of course, Professor Selmi not only contends that claims previously brought under the disparate impact theory should now be brought under the disparate treatment theory, but he would retire the disparate impact theory altogether from the antidiscrimination toolbox.

This linear approach to the antidiscrimination proof analysis, while offering some insight into the divergence of scholarly opinion, presents some pitfalls. Primarily, it tends to categorize claims on a quantitative basis, rather than on a qualitative one. In other words, the evaluation of whether the disparate impact theory is applicable becomes, at least for some, a question of “how much” intent evidence one has. The less intent evidence one has, the more applicable the disparate impact theory would be, and vice versa. Even if the nature of the intent evidence were considered as well as the extent of such evidence, the inquiry would be more quantitative than qualitative. In cases with sufficient intent evidence, the disparate treatment theory would suffice, but the disparate impact theory would be called upon as “back up” in cases where the intent evidence was deemed insufficient. Graph A illustrates the quantitative nature of this linear approach. Proceeding under a disparate impact theory solely because there is “a little” intent evidence,¹⁸⁸ as demonstrated by Graph A and more fully discussed in Part I.A, *supra*, frequently results in the offering of such evidence in support

treatment approach in favor of a “strict disparate impact approach”).

186. See *infra* note 204. For additional criticism of the disparate impact theory, see generally RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 184 (1992) (describing *Griggs* as “fatally misguided as an exercise of statutory construction”); Michael Evan Gold, *Griggs’ Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 457 (1985) (“In practice, [under the disparate impact theory,] employers are forced to hire and promote by quotas.”).

187. Melissa Hart, *Disparate Impact Discrimination: The Limits of Litigation, the Possibilities for Internal Compliance*, 33 J.C. & U.L. 547, 554–55 (2007) (questioning the disparate impact theory as a litigation tool, but encouraging its use as a compliance tool).

188. See Selmi, *supra* note 10, at 706 (“The disparate impact theory has often been justified based on the difficulty of proving intentional discrimination, particularly in cases where evidence of overt bias or animus is lacking.”).

of disparate impact claims, the conditioning of courts to expect it in the context of such claims, and the inappropriate “good intent” defenses that inevitably result from the persistent focus on intent.¹⁸⁹

Professor Selmi further urges his linear view of the disparate impact theory by claiming that the move to the disparate impact theory “sent a signal that intentional discrimination was largely a thing of the past.”¹⁹⁰ However, *Griggs* was decided in 1971, only seven years after the passage of Title VII and three years after the passage of Title VIII. Thus, the Court adopted the disparate impact theory relatively early in the antidiscrimination project’s life cycle—too early to signal an end to intentional discrimination. Also, the Supreme Court developed the proof framework for cases built on circumstantial evidence of intent *after* it adopted the disparate impact theory in *Griggs*.¹⁹¹ This chronology lends further support to the notion that the disparate impact theory was envisioned as a distinct method of proof meant to co-exist alongside other methods of proof focused on intentional discrimination.

An exacting analysis of disparate impact theory must be a qualitative one. While intent evidence is mentioned in passing (as unnecessary to prove discrimination) in the cases and statutes that define the disparate impact theory, those cases and statutes do not frame the theory as one riding on the presence or absence of intent.¹⁹² The theory was authorized to challenge practices that are “fair in form, but discriminatory in operation.”¹⁹³ “Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.”¹⁹⁴ Whether intent evidence happens to

189. See *supra* Part I.A and accompanying text.

190. Selmi, *supra* note 10, at 707.

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

192. There is no mention of a need for intent in the codification of the disparate impact standard by Congress in the Civil Rights Act of 1991. See 42 U.S.C. § 2000e-2(k) (2000). The Supreme Court has never enunciated a requirement of a showing of intent to prove disparate impact. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975) (“Title VII is not concerned with the employer’s ‘good intent or absence of discriminatory intent’ for ‘Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.’” (citation omitted)); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (“[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”); see also Selmi, *supra* note 10, at 722–23. Professor Selmi notes that “the proposition for which [*Griggs*] is now best known—proof of intent is not necessary to establish a violation under Title VII—was not a central part of the case.” *Id.* at 722.

193. *Griggs*, 401 U.S. at 431.

194. *Id.* at 432.

be present is relevant to the yes-or-no question of whether a disparate treatment claim should be brought (on its own or alongside other claims). It is not relevant to the yes-or-no question of whether a disparate impact claim should be brought. An illustration of the qualitative relationship between the disparate treatment and disparate impact theories is shown in the Venn diagram in Graph B.

Indeed, the argument for reinvigorating a pure effects standard in part addresses Professor Selmi's "overshadowing" criticism of the disparate impact theory.¹⁹⁵ Professor Selmi argues that the overreliance on the disparate impact theory has stunted the disparate treatment theory's growth.¹⁹⁶ Professor Selmi's portrayal evokes an image of the disparate impact theory as the overgrown shrub blocking the wilting flower of disparate treatment from much-needed sunlight. Professor Selmi may be right to the extent that he claims that the disparate impact theory has been overused. However, this overuse has not occurred for the reasons he suggests (that the line of demarcation has been misdrawn). If the disparate impact theory has been overused, it is because litigants, courts, and commentators have misunderstood, misused, and misapplied the theory. If appropriately used, the disparate impact theory would not be capable of "limiting our conception of intentional discrimination"¹⁹⁷ because it would exist on a wholly separate plane from intent.

3. *Is the Disparate Impact Theory Irrelevant?*

Third, Professor Selmi suggests that the disparate impact theory is superfluous.¹⁹⁸ His view is based on the fact that "many successful disparate impact claims also succeeded under a disparate treatment approach."¹⁹⁹ The fact that one-third (appellate court cases) to one-half (district court cases) of the successful disparate impact cases examined by Professor Selmi²⁰⁰ involved successful disparate treatment claims hardly proves that the disparate impact claims were superfluous. Although it is possible that the presence of

195. See Selmi, *supra* note 10, at 767–82.

196. *Id.*

197. *Id.* at 706.

198. *Id.* at 742.

199. *Id.*; see also *id.* at 706–07 ("[The disparate treatment theory] likely could have been expanded to include much of what the disparate impact theory ultimately captured . . ."). Even for those claims that did not proceed under both theories, "it is possible that the gains of the disparate impact theory, particularly in its most successful early years, could have been achieved through claims of intentional discrimination." *Id.* at 754.

200. *Id.* at 740.

intent evidence helped in some of those cases in which plaintiffs enjoyed success under both theories, the suggestion that disparate impact claims were irrelevant is hardly proven by the statistics presented. Indeed, what about the one-half to two-thirds of the successful disparate impact cases that were not accompanied by successful disparate treatment claims? Are we to assume that these cases could have been brought under the disparate treatment theory? This is the assumption at the heart of the enmeshment problem: the notion that disparate impact claims are merely watered down disparate treatment claims. In the end, disparate treatment claims can “stand in” for disparate impact claims, and visa versa, because they are interchangeable. Disparate impact, the assumption goes, merely requires less evidence on the intent spectrum.

Professor Selmi uses the example of a “no beards” policy to illustrate the interchangeability of the disparate impact and disparate treatment theories.²⁰¹ After an employer is informed of the potential impact of his policy, “there is no hiding from an intentional act.”²⁰² Presumably, then, all morally pure employers would rush to eliminate their policies with disparate impacts, while those who persisted in maintaining policies that excluded protected groups would be presumed to harbor prohibited bias. But does it matter why the employer has adopted the “no beards” policy? If state of mind is all that matters, then we never get to the other questions: Is the policy necessary? Are there other equally effective approaches?

Even though Professor Selmi argues that disparate treatment can do much of the work disparate impact is now doing, he does not suggest how he thinks the disparate treatment theory might be expanded to capture more subtle forms of discrimination in cases where racial animus is either not provable or nonexistent.²⁰³

201. *Id.* at 749–53.

202. *Id.* at 754.

203. There is a disagreement among commentators concerning which method of proof is more capable of challenging more structural forms of discrimination. Rather than turn to disparate impact to root out the structural forms of discrimination, scholars focused on cognitive bias argue instead for an expansion of disparate treatment liability. See, e.g., Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 138 (2003) (“Disparate impact theory . . . fails to capture th[e] interplay between individuals and the organizations within which they work, . . . by taking a purely structural account of discrimination, focusing on the unequal effect or consequence . . . rather than on the ways in which institutional structure, systems, and dynamics enable the operation of discriminatory bias.”); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161,

C. *The Unitary Theory of Liability—A Critique*

Theorists on the right urge a unitary theory of liability based on the belief that the disparate impact and disparate treatment theories are the same. Theorists on the left urge a unitary theory of liability based on the belief, among other things, that the disparate treatment theory would have flourished beyond the limiting concepts of motive and intent if the disparate impact theory had not been in the way. Neither view takes into account the extent to which the focus on state of mind in disparate impact cases has limited its effectiveness, perpetuated uncertainty, and flouted the principles enunciated in *Griggs*.

Further, the proposal to merge, once and for all, the disparate impact and disparate treatment theories as an antidote to the limiting concepts of motive and intent seems wildly counterintuitive. If courts, litigants, and theorists all remained stuck on state of mind in traditional disparate impact—or “effects”—cases, how can one reasonably expect the various stakeholders to operate outside the world of intent once effects and intent cases are merged?²⁰⁴

Also, how are the burdens of proof to be assigned in cases like *Griggs* under this new, more elasticized version of the disparate treatment theory? The fact that the preceding theorists posit that the intent framework can be expanded to encompass a broader

1231 (1995) (“The disparate impact paradigm as currently constructed is an inappropriate analytical tool for addressing the intergroup biases inherent in subjective decisionmaking.”); Sullivan, *supra* note 10, at 948. *But see* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1226, 1230 (1999) (concluding that “because we simply lack the tools to *detect* unconscious bias,” “nothing more should be done within the existing legal framework to address unconscious disparate treatment”). Professor Sullivan ultimately urges the use of disparate impact to challenge structural discrimination, arguing that it may be easier to convince the Supreme Court, which has not applied the disparate impact theory under the 1991 Civil Rights Act, to simply apply that theory rather than to “reconsider, and radically expand, ‘intent’ to discriminate.” Sullivan, *supra* note 10, at 985; *cf.* Bagenstos, *supra* note 90, at 45 (“Courts are hostile to disparate impact law for precisely the same reason that they hesitate to read disparate treatment doctrine as embracing implicit bias—because actions taken without a conscious intent to discriminate do not fit the paradigm of a fault-based understanding of ‘discrimination.’”).

204. For an illustration of a litigant’s remaining “stuck on state of mind” in a disparate treatment case, see *Hopkins v. Price Waterhouse*, 825 F.2d 458, 468–69 (D.C. Cir. 1987), *rev’d on other grounds*, 490 U.S. 228 (1989) (plurality opinion) (responding to the defendant’s argument that unconscious stereotypes could not be construed as “intentional” by stating that “the requirement[] of discriminatory motive in disparate treatment cases does not function as a ‘state of mind’ element, but as a method of ensuring that only those arbitrary or artificial employment barriers that are related to an employee or applicant’s race [etc.] are eliminated”).

conceptualization of the prima facie intent case, and a corresponding expansion of the defendants' burden (of production?) to encompass a justification defense, creates more problems than it solves. What will prevent defendants from offering business justifications for good old-fashioned disparate treatment?²⁰⁵ What will prevent defendants from offering a defense of "good intentions" in cases where courts are satisfied that discriminatory effects have been proven? The slope is more slippery than the theorists acknowledge.

Further, despite Professor Selmi's "never mind effects" position, neither he nor the other theorists appear to disagree with the Court's holding in *Griggs* per se.²⁰⁶ In the end, they seem to acknowledge the inevitability of the decision. For example, Professor Selmi acknowledges that the Court would be loathe to permit policies that "effectively would have preserved the segregated job lines that Title VII was intended to eradicate,"²⁰⁷ especially when those policies could not be adequately justified. According to Professor Selmi, therefore, even though the disparate impact theory was a mistake, *Griggs* was not. But under a unified theory of discrimination, where does *Griggs* belong conceptually? Theorists like Professor Selmi seem to argue for an expansion of the notion of intent to encompass the reckless maintenance of policies that have a predictable adverse effect.²⁰⁸ But despite the contention that intent can be inferred from adverse effects, none of the preceding theorists succeed in establishing that *Griggs* could have been fully subsumed into the disparate treatment theory. Maybe "[i]t was all discrimination,"²⁰⁹ but that does not mean that it was all of a piece.

Griggs hatched a conceptually distinct understanding of what would constitute discrimination under Title VII, and eventually, other antidiscrimination statutes.²¹⁰ *Griggs* clearly construes Title VII as being aimed at "the consequences of employment practices,

205. *But see* Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(2) (2000) ("A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.").

206. Rather, Professor Selmi portrays *Griggs* as a somewhat incremental and inconsequential decision. *See* Selmi, *supra* note 10, at 721 ("[T]he Court's unanimous decision in *Griggs* was neither particularly difficult nor far reaching.").

207. *Id.*

208. *See id.* at 708–14 (discussing pre-*Griggs* cases that characterized the perpetuation of past discrimination as a form of intentional discrimination).

209. *Id.* at 723 (quoting Robert Belton, one of the lawyers representing *Griggs*).

210. *But cf. id.* at 721–22 (characterizing *Griggs* as a "norms-reinforcing decision," which did not result in a "different interpretation of equality").

not simply the motivation.”²¹¹ A nondiscrimination policy focused on consequences is really unconcerned with many of the issues vexing those who would like to expand the concept of disparate treatment, such as how to penetrate and root out more subtle, unconscious expressions of bias.²¹² This is an important quest, but it is fundamentally different than the quest legitimized by the *Griggs* Court.

The *Griggs* Court set out *not* to identify bias, whether overt or subtle, but to identify policies or procedures that operated as barriers to equal opportunity or that perpetuated segregation.²¹³ Even Professor Selmi admits that the role of intent was not a central theme in *Griggs*.²¹⁴ The focus, therefore, is on the neutral policy or procedure, its effects, and its justifications, not on the decision maker, his or her decisions, and the decision-making process. This explains why the Court in *Griggs* finds that evidence of “good intent” does not insulate well-meaning employers from liability under certain circumstances.²¹⁵

However, the contention of Professor Selmi and others that courts and employers were less eager to embrace the disparate impact theory as it moved away from whatever roots it had in remedying the present effects of past intentional discrimination raises an important question.²¹⁶ More so than his “overshadowing”

211. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

212. *See supra* note 204 and accompanying text.

213. The Court in *Griggs* noted: “What is required by Congress 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.” *Griggs*, 401 U.S. at 431.

214. *See Selmi, supra* note 10, at 722.

215. *Griggs*, 401 U.S. at 432.

216. Selmi, *supra* note 10, at 716. Professor Selmi makes the further observation that the disparate impact theory becomes less viable outside the contexts of employment seniority systems and testing cases, because these contexts involved identifiable policies with clear impacts and employer justifications that were objective in nature. *Id.* But one can think of numerous other contexts in which the same clarity and objectivity hold. For example, a local zoning ordinance, a landlord’s rental policies, and a mortgage lender’s underwriting criteria all constitute specific practices that can be easily identified and whose impacts can be ascertained; likewise, the defendants’ justifications in these other, housing-related contexts would be fairly straightforward and objective. *See Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729 (8th Cir. 2005) (challenging local housing authority’s decision to vacate and demolish low-income housing); *Khalil v. Farash Corp.*, 260 F. Supp. 2d 582 (W.D.N.Y. 2003) (involving rule prohibiting children from congregating near an apartment complex); *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526 (N.D. Tex. 2000) (striking down a town zoning ordinance because of its discriminatory effects); *Green v. Sunpointe Assocs., Ltd.*, No. C96-1542C,

argument, this is perhaps Professor Selmi's most incisive observation and criticism, to which this Article now turns.

III. REINVIGORATING A PURE EFFECTS STANDARD: BEYOND STATE OF MIND

What goes on in your heart?
*What goes on in your mind?*²¹⁷

Has the focus on state of mind in disparate impact cases evolved as a means of ensuring the disparate impact theory's survival? Or, put another way, would the creation of a pure effects theory have the perverse consequence of hastening the disparate impact theory's demise? The suggestion made by Professor Selmi and others that the disparate impact theory's success is dependent on its role in rooting out intentional discrimination must be addressed. This critique is a powerful one, and the antidiscrimination project would be ill-served by a conception of the disparate impact theory that is borne more of clinging loyalty and nostalgia than real world utility.

Recent events may provide an opportunity to examine anew and embrace the unequivocal holding in *Griggs* that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."²¹⁸

A. *Does Disparate Impact Need "State of Mind" to Survive?*

Much of the recent scholarship addressing the justification for the disparate impact theory is notably cautious. Scholars may well believe that the closer the disparate impact theory approximates the disparate treatment theory, the more insulated the disparate impact theory becomes from overt challenge or passive erosion.

Professor George Rutherglen reveals his sense of caution as rooted in a concern about the potential conflict between "pragmatic effectiveness in eliminating discrimination and preserving quintessentially American values of individual rights, universal coverage, and limited government."²¹⁹ He mirrors the concern of the *Wards Cove* majority of the Supreme Court in stating that "[l]ike affirmative action, the theory of disparate impact emphasizes results over intent, . . . works almost exclusively to the benefit of

1997 WL 1526484 (W.D. Wash. May 12, 1997); *Fair Hous. Council of Orange County, Inc. v. Ayres*, 855 F. Supp. 315 (C.D. Cal. 1994) (finding that a landlord's occupancy restrictions had a disparate impact).

217. THE BEATLES, *What Goes On*, on RUBBER SOUL (Parlophone/Capitol Records 1965).

218. *Griggs*, 401 U.S. at 432.

219. Rutherglen, *supra* note 10, at 2329.

minority groups and women[,] . . . [and] inject[s] courts into a reassessment of the defendant's reasons Courts end up telling defendants what they should do, not just what they should not do."²²⁰

Professor Primus further addresses this conflict in his examination of whether the legislative motives for the disparate impact doctrine would be permissible under the Equal Protection Clause. He concludes that interpretations of the doctrine's purpose that focus on the employers' state of mind would be the most constitutionally sound. But he goes on: "I am sympathetic to the impulse to characterize the doctrine in whatever way makes its survival most likely. Nonetheless, disavowing the historically and group-oriented aspects of disparate impact law may be a gambit that sacrifices too much of what makes the doctrine valuable."²²¹ Professor Primus prefers to choose an interpretation aimed at "breaking down self-perpetuating segregation and racial hierarchy in the workplace."²²² "Abandoning that historical orientation in an attempt to rescue the doctrine might sacrifice the very thing that is most worth saving."²²³

Professor Samuel R. Bagenstos elaborates on this conflict when he discusses two purposes of employment discrimination law identified in the legal scholarship—the antistatutory theory and the antidiscrimination principle.²²⁴ These purposes can also be construed as justifications for antidiscrimination law generally. Under the antistatutory principle, should antidiscrimination law create the kind of social change necessary to eliminate group-based inequality? Or should antidiscrimination law focus on unfairness to individuals and remedying individual harms, in keeping with the antidiscrimination principle?

Professor Bagenstos asserts that "[t]he easier it is to characterize an employer's conduct as wrongful and the plaintiff's injury as unfair [in keeping with the antidiscrimination principle], the more likely judges are to find liability."²²⁵ *Griggs* certainly does

220. *Id.*

221. Primus, *supra* note 13, at 499.

222. *Id.* at 516.

223. *Id.* at 499–500.

224. Bagenstos, *supra* note 90, at 40–41 (citing works discussing the two purposes).

225. *Id.* at 42; *see also id.* at 41 ("[I]n cases where it seems unlikely that the employer's adoption of a practice with a disparate impact served as a cover for intentional discrimination, judges are hesitant to find liability under the disparate impact doctrine."); *cf.* EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1270, 1280–83 (11th Cir. 2000) (ultimately crediting the EEOC's suggestion that the employer's neutral criteria were "a cover or a smokescreen" for intentional discrimination, but rejecting application of the disparate impact

not require a showing under the disparate impact theory of an employer's conduct as "wrongful" or the plaintiff's injury as "unfair." But even if Professor Bagenstos is right as a practical matter, it is worth exploring whether the disparate impact theory can straddle both the antistatutory and the antidiscrimination principles. Is it possible to conceive of a notion of fault that could be reconciled with a more group-based vision of the disparate impact theory? The answer may be traced to an unlikely source.

The majority opinion in *Wards Cove* offers a potentially more expansive notion of fault than was evident to the dissenting Justices. In his dissenting opinion, Justice Stevens was correct to police the majority's persistent focus on state of mind in a disparate impact case. But in one regard, Justice Stevens assumed that the majority's discussion of "fault" necessarily meant that it was imposing an intent requirement.²²⁶ Instead, the majority's discussion of "fault" presents the possibility of conceiving of that term in a way that does not focus on the state of mind of the employer.

The *Wards Cove* majority considered the way in which the plaintiffs had demonstrated disparate impact, i.e., through statistics showing a high percentage of nonwhite workers in unskilled cannery jobs and a low percentage of such workers in skilled noncannery jobs.²²⁷ The majority pointed out that the nonwhite, unskilled cannery workforce "in no way reflected 'the pool of *qualified* job applicants'" for the skilled noncannery jobs.²²⁸ The majority refused to find disparate impact just because there was an insufficient number of nonwhite applicants for the skilled noncannery jobs.²²⁹ But the majority qualified its analysis by making clear that if the lack of nonwhite applicants could be described as the employer's "fault," then the Court might have reached a different result.²³⁰ In

theory as inapplicable; conversely, the district court below, in finding liability under the disparate impact theory, rejected the intent theory out of hand, finding no express policy of discrimination and noting that the employer had been "courageous in opposing overt discrimination").

226. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 678 n.29 (1989) (Stevens, J., dissenting) ("The Court suggests that the discrepancy in economic opportunities for white and nonwhite workers does not amount to disparate impact within the meaning of Title VII unless respondents show that it is 'petitioners' fault.' *Ante*, at 651; see also *ante* at 653-654. This statement distorts the disparate-impact theory, in which the critical inquiry is whether an employer's practices *operate* to discriminate. *E.g.*, *Griggs*, 401 U.S., at 431. Whether the employer intended such discrimination is irrelevant.").

227. *Id.* at 650.

228. *Id.* at 651.

229. *Id.* at 651-52.

230. *Id.* at 651 & n.7.

elaborating on its concept of “fault,” the Court recognized that practices of the employer “which—expressly or *implicitly*—deterred minority group members from applying for noncannery positions” would change the analysis.²³¹ Importantly, this concept of fault is not limited to an employer’s intentional acts. Practices that “expressly or implicitly” deter nonwhite applicants from competing for more favorable positions within a workplace could include the unwitting acts of an employer that impose prohibitive requirements that are not job related or that otherwise support the status quo. Thus, although at first blush the majority’s discussion of “fault” appears to be focused on state of mind, upon closer examination, the concept of “fault” would encompass a practice or policy of an employer that “operated” as a barrier to nonwhite applicants. This caveat expressed in the *Wards Cove* majority opinion is consistent with *Griggs* and was left intact when Congress intervened in 1991.²³²

In searching for an answer to the question of whether the enmeshment of the disparate impact and disparate treatment theories is an adaptation that has ensured the survival of the disparate impact theory—a legal natural selection, if you will—a re-examination of the concept of fault and intent is in order.

B. A New Understanding of the Evil of Effects

Those who criticize *Griggs* as being “undertheorized”²³³ point to the absence of what they perceive as the moral culpability required to find liability under antidiscrimination law.²³⁴ Professor Selmi discusses the fact that the Court embraced the disparate impact theory in *Griggs* because the factual context involved the perpetuation of past intentional discrimination.²³⁵ Whereas in later cases arising both in and outside of the Title VII context in which the same “moral case for liability” was lacking, such as *Washington v. Davis*²³⁶ in the Equal Protection Clause context, the Court rejected extension or expansion of the disparate impact theory.²³⁷ But the

231. *Id.* at 651 n.7 (emphasis added).

232. *See* 42 U.S.C. § 2000e-2(k) (2000).

233. Selmi, *supra* note 10, at 721 n.81 (discussing the Court’s issuance of short, unanimous civil rights decisions).

234. *See, e.g.*, Richard J. Arneson, *What is Wrongful Discrimination?*, 43 SAN DIEGO L. REV. 775, 794 (2006) (arguing that “disparate impact per se is morally inconsequential”).

235. Selmi, *supra* note 10, at 730 (“In *Griggs*, it was relatively easy to make the moral case for liability given the company’s history of discrimination and the way the tests perpetuated that past discrimination without providing clear information relevant to the employer’s business interests.”).

236. 426 U.S. 229 (1976).

237. *See* Selmi, *supra* note 10, at 731.

notion that the disparate impact theory requires a “moral case for liability” assumes that at some point in time, someone was engaged in intentional discrimination.²³⁸ Is it possible to conceive of a different notion of moral culpability?²³⁹

Susan Neiman, in her book *Evil in Modern Thought: An Alternative History of Philosophy*, discusses the role of intentionality in modern evil.²⁴⁰ Neiman discusses a banal concept of evil that is not dependent on the human will.²⁴¹ For example, she notes that in Rousseau’s version of the Fall, humans merely make “a series of natural, understandable, and contingent mistakes.”²⁴² This notion of evil, she contends, was “brilliant in accounting for evils like inequality, and even slavery, and providing hope that they might be overcome.”²⁴³

Neiman’s discussion of evil is not purely metaphysical. She discusses how Auschwitz challenges two centuries of modern assumptions about intent and evil, which assume that evil and evil intention are so intertwined that “denying the latter is normally viewed as a way of denying the former.”²⁴⁴ This may be because “[a]n old-fashioned picture of evil as inevitably connected to evil intention is more soothing than alternatives.”²⁴⁵ But as Auschwitz demonstrates, “[i]n contemporary evil, individuals’ intentions rarely correspond to the magnitude of evil individuals are able to cause.”²⁴⁶ For example, “the most unprecedented crimes can be committed by the most ordinary people.”²⁴⁷ “Nazis forced everyone from passive bystanders to victims to participate in the vast network of

238. See Arneson, *supra* note 234, at 790 (describing “morally innocent instances of racial discrimination” as those “not driven by animus or prejudice”). But see Andrew Koppelman, *Justice for Large Earlobes! A Comment on Richard Arneson’s “What is Wrongful Discrimination?”*, 43 SAN DIEGO L. REV. 809, 811 (2006) (“The crucial flaw in deontology as Professor Arneson conceives it is that . . . wrongful discrimination is identified wholly in terms of the discriminator’s defective intentions. Social context disappears from the analysis.”).

239. For a lively fictional dialogue that suggests a different notion of moral culpability, see Gold, *supra* note 138, at 221 (“Some philosophers—they’re called consequentialists, I believe—maintain only effects are morally significant, whereas other philosophers—the non-consequentialists—argue both intentions and effects are morally significant; but almost no one (except maybe Kant) asserts effects don’t matter at all. I’ve always thought both intent and effects are morally relevant, and it looks like Congress agrees.” (footnotes omitted)).

240. NEIMAN, *supra* note 14, at 267–81.

241. *Id.* at 280.

242. *Id.* at 268–69.

243. *Id.* at 269.

244. *Id.* at 271.

245. *Id.*

246. *Id.* at 273.

247. *Id.*

destruction. Their success in doing so revealed the impotence of intention on its own.”²⁴⁸ She discusses the ordinary Germans and ordinary bureaucrats who claimed ignorance about the atrocities and the final aims of the Nazis: “They really *didn’t* mean it—and it really doesn’t matter.”²⁴⁹ “Most people desired nothing better or worse than to be left alone to pursue their own private and harmless ends. . . . What better proof can there be that subjective states are not here decisive? What counts is not what your road is paved with, but whether it leads to hell.”²⁵⁰

Neiman’s discussion of the “banality of evil”²⁵¹ provokes consideration of the ways in which self-absorption, passivity, and inaction cause harm. As Neiman notes, “[w]e are threatened more often by those with indifferent or misguided intentions than by those with malevolent ones.”²⁵² Thus, we don’t need to characterize decision makers as “monsters” in order to require them to be accountable for the harm that they cause.

In addition to challenging our assumptions about the causes of evil, Neiman’s work also challenges us to ask whether the causes matter, i.e., when people suffer, does it matter whether anyone intended the suffering? Neiman’s perhaps extreme example of the passive, Nazi-era bystander (“[t]hey really *didn’t* mean it—and it really doesn’t matter”)²⁵³ may make the best case for a system of accountability that is not driven by state of mind. But what about other, more mundane examples? Can the question “does state of mind matter?” be extended to workplaces and neighborhoods? When employment and housing policies are crafted and benefits are distributed, does it matter whether there is intent to exclude if the exclusion nevertheless occurs or builds on historical exclusion? Recent events suggest an answer.

Hurricane Katrina may have caused a shift in our thinking about the decreasing importance of intentionality and state of mind in distributing benefits, burdens, and the tools of survival. It would be difficult to argue that anyone intended for Hurricane Katrina to affect poor persons of color more harshly than wealthier white persons. Those with the least will be least equipped to withstand a crisis. In the case of Hurricane Katrina, those without means were least able to withstand evacuation, catastrophe, displacement, and property loss. That there is disadvantage associated with poverty is

248. *Id.* at 274.

249. *Id.* at 271.

250. *Id.* at 275.

251. *Id.* at 280.

252. *Id.* at 280.

253. *Id.* at 271.

no great revelation. But those left behind in the storm confronted America with an uncomfortable image of a system built on intentionality.

Does it matter that no one intended for a disproportionate number of poor persons of color to be left behind when Hurricane Katrina hit? Does it matter that no one intended for them to be isolated after the storm, without food, water, or shelter? Does it matter that no one intended for the isolation to last for days? Does it matter that no one intended for those without the resources to leave to be now unable to find the resources to return? In the words of one court applying the disparate impact theory in an exclusionary zoning case: “[W]e now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.”²⁵⁴

The Neimanesque view of intent, suffering, and responsibility does not have to translate into liability for every form of thoughtlessness that was pervasive before, during, and after Hurricane Katrina. Indeed, the questions are more metaphysical than political. But the metaphysical question—do we require those who mean no harm to assume responsibility for suffering?—leads to the political one—do we require those who mean no harm to avoid, or provide a remedy for, exclusion that they cause and are in a position to prevent? And does it matter whether the harm was intended or not? Again, events after Katrina might help us answer the political question, if not the metaphysical one.

C. *Moving Beyond the State-of-Mind Inquiry Post-Katrina*

In post-Katrina New Orleans, as the city struggles to recover and even remake itself, a number of policies have proliferated that provide a framework for examining a notion of disparate impact liability that is not dependent on state of mind for its survival. The post-Katrina practices in question, some have argued, will disproportionately exclude the poor people of color who have been displaced in large numbers and have been unable to return. The most striking examples of these practices are zoning restrictions that have arisen in a variety of locations in southeastern Louisiana that have restricted the use, construction, or rehabilitation of rental housing.

For example, in St. Bernard Parish, a suburb located to the southeast of Orleans Parish, the Parish Council passed an ordinance in September 2006 that prohibited the rental of single family homes to anyone other than a “family member(s) related by blood within

254. *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967)).

the first, second or third direct ascending and descending generation(s), without first obtaining a Permissive Use Permit from the St. Bernard Parish Council.”²⁵⁵ One can parse the proposed purpose of the ordinance for evidence of discriminatory motive: “considering the public purpose, benefit, and need to maintain the integrity and stability of established neighborhoods as centers of family values and activities.”²⁵⁶ The integrity and stability of established neighborhoods, in the minds of the Parish Council voting in favor of the ordinance, might have been related to the racial makeup of the Parish: according to 2005 census figures, whites constitute 86.4% of the population and African-Americans constitute 10.5%.²⁵⁷ In fact, there is additional direct evidence of discriminatory intent, including statements by councilpersons voting against the ordinance that the Parish Council’s goal was to “block the blacks from living in these areas.”²⁵⁸ A property owner and fair housing group have, not surprisingly, sued the St. Bernard Parish Council, alleging discrimination under both an intent-based and an effects theory.²⁵⁹

However, if it is established that persons of color are more disproportionately affected by the “blood relative” ordinance, does it matter “what goes on” in the hearts and minds of the St. Bernard Parish Council members? If ninety-three percent of the single family homes in the Parish are owned by whites, then it is easy to see how the ordinance would perpetuate segregation and maintain the racial homogeneity of the Parish.²⁶⁰

What is the justification set forth by the St. Bernard Parish Council? The Parish Council has expressed concern about real estate speculators buying single family homes in large numbers, making minimal, cosmetic repairs, and renting out the properties to families desperate for whatever housing they can find. As effectively noted by those challenging the ordinance, the Parish Council’s stated justification could be accomplished by less discriminatory means, such as measures setting minimum

255. St. Bernard Parish, La., Ordinance SBPC 670-09-06, § 1 (Sept. 19, 2006).

256. *Id.*

257. U.S. Census Bureau, St. Bernard Parish QuickFacts (Aug. 31, 2007), <http://quickfacts.census.gov/qfd/states/22/22087.html>.

258. *White Resident Joins Housing Bias Lawsuit in St. Bernard*, LA. WKLY., Nov. 6, 2006, at 1, available at <http://www.louisianaweekly.com/weekly/news/articlegate.pl?20061106c> (quoting Council Chair Dean).

259. See Amended Complaint for Injunctive Relief, Declaratory Judgment, and Remedial Relief, Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish, No. 2:06-CV-07185 (E.D. La. Nov. 2, 2006).

260. See *id.* ¶ 11.

standards for repair.²⁶¹

St. Bernard Parish Council is not the only local government entity to restrict the housing opportunities of displaced New Orleanians. In November 2005, the Pointe Coupee Parish Police Jury adopted the following ordinance: “RESOLVED, That trailer parks of temporary housing for displaced evacuees of Hurricane Katrina and Rita not be created by FEMA in Pointe Coupee Parish.”²⁶² If it was established that the majority of those displaced persons who would be in need of the housing established by FEMA were persons of color, does it matter “what goes on” in the hearts and minds of the Pointe Coupee Parish Police Jury in blocking emergency housing in the Parish?

Perhaps the best example of the need to preserve the distinctiveness of the disparate impact theory among the post-Katrina exclusionary policies is the effort of a majority African-American council district in Orleans Parish to restrict the development of affordable rental housing in the district.²⁶³ This example undermines Professor Selmi’s argument that the disparate impact theory is merely “superfluous.”²⁶⁴ Pursuing a disparate treatment theory to challenge this particular zoning policy would require a showing of intent on the part of African-American homeowners to exclude low-income persons on the basis of their race. This is a far less intuitive theory than one focused on the racial impact of the exclusionary policy.

The question raised here is whether the disparate impact theory is designed to deal with effects that may or may not be caused by discriminatory intent, or whether the theory is designed to deal with effects that *are* caused by discriminatory intent, but in such a way that proof of the underlying causal intent is not required. This Article takes the position that disparate impact is designed to deal with effects alone,²⁶⁵ and because state of mind is not relevant, it is

261. Memorandum of Points and Authority in Support of Plaintiffs’ Application for a Preliminary Injunction at 31–32, *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, No. 2:06-CV-07185 (E.D. La. Nov. 2, 2006).

262. Pointe Coupee Parish, La., Resolution on Temporary Housing in Pointe Coupee Parish (Nov. 8, 2005); see also Matt Clough, *Police Jury: No FEMA Trailer Parks in Pointe Coupee*, WAFB.COM, Nov. 9, 2005, <http://www.wafb.com/global/story.asp?s=4091690&>.

263. See Leslie Williams & Coleman Warner, *N.O. May Idle Housing in East*, NOLA.COM, Mar. 8, 2007, http://www.nola.com/newslogs/topnews/index.ssf/mtlogs/nola_topnews/archives/2007_03.html#243071.

264. See Selmi, *supra* note 10, at 742.

265. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988) (noting that in *Griggs*, the Court was concerned with employer practices that lacked discriminatory intent).

not necessary to the inquiry.²⁶⁶ Therefore, the possible universe of disparate impact cases includes *both* those cases in which discriminatory intent is causing the impact and those in which discriminatory intent is having no role in the outcome.²⁶⁷ The fact that discriminatory intent, perhaps the subconscious kind, is playing a role, does not disqualify the case from being decided on disparate impact grounds. But the precise role that intent is playing in an impact case need not be, and in fact should not be, decided.

Put another way, whether or not a particular policy or subjective practice caused a disparate impact is relevant. Whether race (or some other prohibited factor) helped shape the policy or practice is irrelevant. In this way, Professor Sullivan is correct in his assessment that disparate impact may be the superior vehicle for challenging more structural or unconscious forms of discrimination.²⁶⁸

Susan Neiman discusses intention operating on a structural level:

Auschwitz revealed the gaps between the pieces of our concepts of intention Struck by the absence of sufficient signs of individual evil intention, some have tried to explain evil by a collective will, or structural intention. Appeals to structural processes that lead to evil remind us of our roles as parts of systems where divisions of labor, and simple distance, obscure individual responsibility.²⁶⁹

However, Neiman describes the mere substitution of collective intention for the individual version as “an attempt to preserve an old framework simply for the sake of having one.”²⁷⁰

What distinguishes a pure effects theory from an intent-based theory, then, is not that we cannot know or prove the intent behind

266. For an alternative, thought-provoking construction of the role of intent in antidiscrimination law, see Koppelman, *supra* note 238, at 812–13 (discussing the way in which the central project of antidiscrimination law “moves in a circle” between process theory (focused on decision making), stigma-focused theory, and group-disadvantage theory, with each theory identifying “one moment in a process by which inequality is institutionalized”).

267. In arguing for a renewed interest in disparate impact, Professor Sullivan states that “[w]hether the ultimate cause was animus, rational discrimination, conscious or unconscious stereotyping, workplace dynamics, or workplace culture would not matter, or at least would not matter if the results could be attributed to employer action.” Sullivan, *supra* note 10, at 1001.

268. *Id.* at 969, 985.

269. NEIMAN, *supra* note 14, at 280.

270. *Id.*

a neutral policy, but that intent does not matter.²⁷¹ “What goes on” in someone’s heart or mind simply is not crucial to determining whether or not a particular policy should be implemented, given the impact of the policy on protected groups and the insufficient justification set forth.²⁷²

Neiman is saying as much when she notes that that the classic notion of intention “cannot carry the weight that contemporary forms of evil bring to bear on it.”²⁷³ At the same time, she is correct that in expanding our current understanding of evil, such that individuals and institutions would be held accountable for the suffering that they did not intend to cause, our conceptual resources are “exhausted.”²⁷⁴ This can be seen in the context of disparate impact liability. In the past, much of the resistance to expanding liability beyond intentional acts—*notwithstanding Griggs*—has been based on the fact that the limits of that liability are too indeterminate.²⁷⁵

271. The notion that intent doesn’t matter is consistent with the view taken early on at the EEOC that “negotiations with employers would be smoother if they could move away from a focus on intentional discrimination, which carried with it an implicit label of blame that employers were expected to resist.” Selmi, *supra* note 10, at 715–16 (citing ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* 73 (1993)).

272. Professor Rutherglen actually uses the complexity of proving “group intent” to justify the disparate impact theory. *See supra* note 125 and accompanying text. This Article does not so much use the unknowability of group intent to justify the disparate impact theory, but to demonstrate the decreasing relevance of state of mind to that theory.

273. NEIMAN, *supra* note 14, at 281.

274. *Id.* For an alternative to the fault-based or “blaming” conception of antidiscrimination law, see Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 990–91 (1993) (“The alternative to a discourse of blaming is a discourse of responsibility. In this model, one takes responsibility for correcting undesirable states of affairs without thereby accepting either blame for, or even a causal connection with, the circumstance that requires correction . . .”).

275. *See* Bagenstos, *supra* note 90, at 34 (“[T]here is no generally accepted understanding . . . of what forms of subtle discrimination are wrongful.”). The only measure of success in reducing structural employment discrimination, Bagenstos argues, is a numerical benchmark, *id.* at 37–38, but policies aimed at proportional racial and gender representation in the workplace are “extraordinarily controversial.” *Id.* at 38–39; *see also* L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 710 n.20 (1978) (“Even a completely neutral practice will inevitably have some disproportionate impact on one group or another.”); Abernathy, *supra* note 10, at 272 (“In the end, there was no ‘law’ in Title VI’s effects test because, as developed in the Supreme Court and lower courts, it called for the balancing of unquantifiable values of an almost infinite variety. Judges across the political spectrum found themselves unwilling to

But theorists objecting to the indeterminacy of the disparate impact theory present a false dichotomy: we must either reject the holding in *Griggs* and pursue a disparate impact analysis that focuses on a defendant's state of mind, or adopt a rationale that would subject employers, housing providers, and government actors to a version of the disparate impact theory that has no bounds.

The perceived indeterminacy of the disparate impact theory simply is not a good enough reason, by itself, to reject the theory; after all, Congress has authorized it.²⁷⁶ Furthermore, this Article has already considered, and rejected, the notion that the disparate impact theory is nothing more than a "back up plan" for challenging discriminatory motivation that is too well-hidden for a disparate treatment challenge.²⁷⁷ But if disparate impact is neither of these extremes, then what is it?

D. Fashioning a Pure Effects Theory

Three questions emerge in the implementation of a pure effects approach that is freed from state of mind: 1) should litigants refrain from offering evidence of intent in disparate impact cases, even though they believe that "the equitable argument for relief is stronger"²⁷⁸ when intent evidence is presented?; 2) should courts refrain from considering "what goes on" in the hearts and minds of defendants, even though the discriminatory intent would make it easier to hold a defendant accountable as a "wrongdoer"?; and 3) what should be substituted for state of mind evidence as a means of "breaking the tie" in a close disparate impact case?

As to the first question, perhaps the use of intent evidence in effects cases is not so insidious. What's the harm in using intent evidence to bolster effects cases? Can we expect plaintiffs' lawyers to refrain from offering any and all possible evidence—including intent evidence—if it could engender some sympathy from a judge in a disparate impact case? A lawyer's foremost obligation, after all, is

perform this task.").

276. *Cf.* *Washington v. Davis*, 426 U.S. 229, 248 (1976) (noting that the disparate impact theory in a constitutional setting "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes," and, as such, "extension of the rule beyond those areas where it is already applicable by reason of statute . . . should await legislative prescription").

277. *See supra* Part I. The fact that courts in cases such as *Wards Cove* have tried to merge the disparate impact and disparate treatment theories does not prove that the theories are one and the same. The attempts to unify the theories have been more confusing than clarifying. *See supra* Part II.

278. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (Arlington II)*, 558 F.2d 1283, 1292 (7th Cir. 1977).

to her client. If the “Plan B” approach gives a civil rights plaintiff an opportunity to resurrect and remake an otherwise faltering disparate treatment claim, both ethics and common sense would seem to require it.

Watson might be a prototype for such an approach. Justice O’Connor, perhaps to provide equitable support for the Court’s holding, makes clear that the employment atmosphere in which the plaintiff worked was not perfectly race-neutral: “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.’”²⁷⁹ In *Watson*, though, the plaintiff brought a disparate treatment claim, which failed. Why the evidence regarding state of mind was insufficient to support Ms. Watson’s disparate treatment claim is unclear. The employer’s race-based reluctance to promote the plaintiff to the teller position would seem to be relevant to the same employer’s reluctance later to promote the plaintiff to other positions within the workplace.²⁸⁰ The issue of what kind of intent evidence courts are willing to consider is beyond the scope of this Article, but it is certainly true that some courts have gone out of their way to disregard direct, relevant evidence of intent under the “stray remark” doctrine.²⁸¹

Whether a plaintiff introduces intent evidence should be tied to whether a disparate treatment claim is made. If both a disparate treatment claim and a disparate impact claim are brought, as in *Watson*, then the intent evidence will be in the record and nearly impossible to extricate from the analysis.²⁸² However, if only a disparate impact claim is brought, then a plaintiff should not

279. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (omission in original).

280. According to petitioner’s brief, at the time Ms. Watson went to work for her employer, a bank, none of the bank’s four black employees (out of over sixty nonexempt employees) held positions that required interaction with the public. When Clara Watson first approached the bank’s Vice-President for Personnel about a promotion to a teller position, he 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.” After another bank employee filed an EEOC complaint, the bank promoted Ms. Watson to the teller position; she was the first black person to ever hold that position. Brief of Petitioner-Appellant at 2 & n.5, *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1988) (No. 86-6139), 1987 WL 881414. Ms. Watson’s subsequent efforts to apply for promotions were unsuccessful, which sparked the aforementioned Title VII litigation. See *supra* notes 82–101 and accompanying text.

281. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151–52 (2000) (concluding that the district court erred in dismissing a supervisor’s comments as “not made in the direct context of [the employee’s] termination”).

282. See *supra* note 86 and accompanying text.

introduce intent evidence to support the disparate impact claim. If any intent evidence exists, it should be offered to support a disparate treatment claim.

As to whether a disparate impact claim should be brought simply to revive a faltering disparate treatment claim, the answer is no. If a showing of impact cannot be made effectively,²⁸³ then proceeding with such a claim on a “Plan B” basis invites the kind of blending of the burdens described in Section I, *supra*. Despite the very real challenges faced by litigants seeking redress for civil rights violations, including healthy skepticism, or downright hostility, exhibited by the courts, defending the borders of intent and effects claims, particularly with respect to the use of state of mind evidence, is paramount to plaintiffs’ ultimate success under either of the theories.

As to the second question, whether courts should examine “what goes on” in the hearts and minds of defendants in disparate impact cases, litigants can minimize this phenomenon by better defending the borders between the theories, as recommended in response to the preceding question. If intent evidence is in the record because both an intent-based and an effects theory are pled, then courts will likely consider the record as a whole, but some other normative reason should be offered to help courts decide close cases.

The issue of what courts should be focused on in close cases prompts the third question. Of course, the “evidentiary dragnet” theory is not the only justification for disparate impact. In *Griggs*, the Court took note of the history of de jure segregation in North Carolina, and the fact that the employees had “long received inferior education in segregated schools.”²⁸⁴ In such a context where past segregation looms large, neutral policies could create unnecessary barriers for some and unfair advantages for others on the basis of race. Of course, not all disparate impact cases are brought based on race. But the fact that, according to Justice O’Connor, the Court has not limited the disparate impact theory “to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination”²⁸⁵ would certainly suggest that the theory is at least available in such cases.

The Seventh Circuit’s iteration of the disparate impact theory in *Arlington II* suggests a justification for the disparate impact theory that goes further than remedying the effects of past intentional discrimination.²⁸⁶ The court reasoned that “[c]onduct that has the

283. See *supra* Part I.A and accompanying text.

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

285. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988).

286. See *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (Arlington II)*,

necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment 'to replace the ghettos by truly integrated and balanced living patterns.'²⁸⁷ This justification is meaningful, but the focus cannot be on whether the segregation is "foreseeable;" that focus approximates the "effects as evidence of intent" approach, which remains stuck on state of mind. The issue is what kind of normative justification should be driving a court in considering whether the parties have met their respective burdens in a close case. Whether conduct perpetuates segregated workforces or segregated neighborhoods should be that justification; state of mind should not.²⁸⁸ In cases where sex or disability are the basis of the disparate impact challenge, then a "perpetuation" argument may still be used, not in the sense of Jim Crow era segregation, but in the sense of overcoming historic patterns of exclusion.

This Article urges the adoption of a pure effects theory in which evidence of intent would not be required to tip the scales in close cases. Consideration of intent evidence would appear innocent enough, but the danger of such an "intent as tiebreaker" approach is that it can lead to the adoption of a de facto intent requirement—one that was explicitly rejected in *Griggs*. Instead, courts should "decide close cases in favor of integrated housing"²⁸⁹ and workplaces.

Several commentators and at least one court have questioned whether the current disparate impact standard bears so little resemblance to *Griggs* that the doctrine has been overruled *sub silentio*.²⁹⁰ The Court's recent extension of the disparate impact

558 F.2d 1283 (1977).

287. *Id.* at 1289–90 (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972)).

288. See Robert G. Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAW. 199, 255 (1978–79) ("[T]he issue in exclusionary zoning cases is not so much who caused segregated housing patterns to develop, but rather what is to be done about them now.").

289. See *Arlington II*, 558 F.2d at 1294 (considering intent as one relevant factor in deciding a disparate impact case, but recognizing that intent is not decisive: "[T]he factor of whether there is some evidence of discriminatory intent should be partially discounted [I]f we are to liberally construe the Fair Housing Act, we must decide close cases in favor of integrated housing."); see also *United States v. Hous. Auth. of Chickasaw*, 504 F. Supp. 716, 732 (S.D. Ala. 1980) (citing the principle from *Arlington II* that courts are required to "decide close cases in favor of integrated housing").

290. See, e.g., *United States v. North Carolina*, 914 F. Supp. 1257, 1265 (E.D.N.C. 1996) ("[T]he Supreme Court has overruled *Griggs sub silentio*. The concept of 'unintentional discrimination' is logically impossible."). The district court in *United States v. North Carolina* grossly misread the plurality in *Watson* to require proof of intent in disparate impact cases in the form of prior

theory to age discrimination cases in *Smith v. City of Jackson*²⁹¹ squarely puts these musings to rest. What does *Smith v. City of Jackson* say about *Griggs* and what are the *Griggs* enduring principles?²⁹² The plurality quotes *Griggs* as follows:

[G]ood faith “does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.” . . . Congress had “directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” . . . We thus squarely held that . . . Title VII did not require a showing of discriminatory intent.²⁹³

A pure effects theory does not exist primarily to come to the rescue of litigants who are feeling insecure about the nature and extent of their intent evidence. By the same token, courts conditioned for whatever reason to look for evidence of intent while examining impact claims are unwittingly imposing burdens on plaintiffs that have no basis in *Griggs* or the Civil Rights Act of 1991. A pure effects theory that is unleashed from the tentacles of the disparate treatment theory would be responsive to the commentary and criticism on both the left and the right and emerge as a truly distinct and alternative method of proof in antidiscrimination law.

history of overt discrimination. *Id.* at 1266; see also Mahoney, *supra* note 47, at 497 (“[T]he disparate impact test—although codified in Title VII—might be construed as merely an evidentiary variant of the disparate treatment doctrine . . .”).

291. 544 U.S. 228 (2005).

292. The discussion of the re-emergence of *Griggs*’ enduring principles in *Smith v. City of Jackson* begs another question: How would the current Supreme Court decide *Griggs* today? Two justices have left the Court since *City of Jackson* was decided, Justices Rehnquist and O’Connor. But neither of these justices were in the majority that authorized the extension of the disparate impact theory. See *id.* at 238. Thus, the fact that the two newest Justices, Roberts and Alito, might be less than enthusiastic about *Griggs* is of little consequence. However, the fifth justice to concur in the *Smith v. City of Jackson* plurality opinion was not the Court’s current swing voter, Justice Kennedy. Justice Kennedy joined the concurring opinion authored by Justice O’Connor, which declined to extend the disparate impact theory to age discrimination cases. See *id.* at 247–48. Rather, it was Justice Scalia who concurred in the *Smith v. City of Jackson* plurality opinion, largely on the basis of his inclination to defer to the EEOC. See *id.* at 243 (Scalia, J., concurring). Although Justice Scalia “agree[d] with all of the Court’s reasoning,” *id.*, which would include the Court’s analysis of *Griggs*, would the Justice adopt a “pure effects theory” of the sort advocated herein? If the federal agencies interpreting the disparate impact theory adopted such a pure standard, perhaps he would.

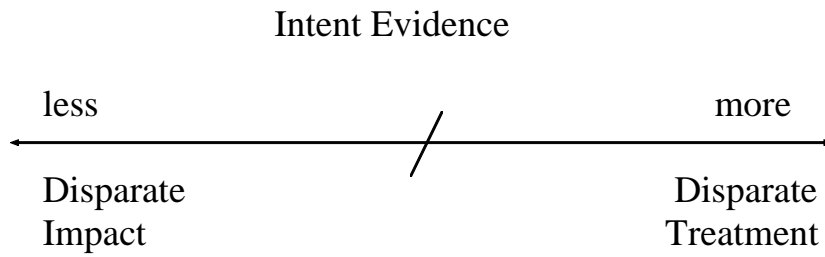
293. *Id.* at 234–35 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432–33 (1971)).

CONCLUSION

Scholars have taken to idealizing and demonizing the competing theories of liability in antidiscrimination law, but few have focused on the persistent focus on state of mind in effects cases and the way in which it may be undermining the disparate impact theory. Rather than pitting these theories against one another, perhaps we should ask another question: does *Griggs* “actually mean[] what it says?”²⁹⁴ If it is true that the disparate impact theory is concerned with consequences, not motive, and if evidence of good intent will not insulate a well-meaning defendant from disparate impact liability, then the disparate impact theory must be steered back to its proper course—away from state of mind—and toward a pure effects theory of liability.

294. Mahoney, *supra* note 47, at 420.

Graph A. The Linear, Quantitative Approach



Graph B. The Qualitative Approach

