

Disparate Impact: Fairness or Efficiency?

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I. INTRODUCTION

Here is a stylized, simplified account of the disparate impact branch of discrimination law. Employer (*E*) uses certain criteria—which I shall call “the test”—to determine whom to employ. Those who qualify under the test may be disproportionately of a certain race, sex, national origin, or religion.¹ I shall call those races, sexes, et cetera, that are disproportionately qualified under the test “the preferred,” and those races, sexes, et cetera, that are disproportionately unqualified under the test “the dispreferred.” In a disparate impact discrimination case—and again, I am simplifying somewhat, though immaterially—an employee candidate (*C*) who is both a member of the dispreferred and who also fails to qualify for employment under the test can sue *E* for discrimination against *C*

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1. Disproportion is relative to the pool of potential employees—however that is determined—which is a matter I do not go into here.

“because of” *C*’s race, sex, et cetera. The discrimination consists of two elements: (1) use of the test, which has an adverse impact on the dispreferred *as groups*, and (2) the absence of a “business necessity”² for using the test.³

So disparate impact discrimination consists of employing an inefficient employment test that has a disproportionate adverse impact on certain groups of candidates, groups that are defined racially, sexually, et cetera. The question is, what justifies making disparate impact discrimination illegal? Its wrongness? But is it wrong? Some other reason? If so, what is it? In what follows I shall consider three possible reasons for the disparate impact cause of action: (1) smoking out disparate treatment discrimination; (2) the inherent unfairness of disproportionate impact; and (3) the unfairness of inefficient job qualifications. I shall conclude that none of these reasons justifies the cause of action.

II. SMOKING OUT DISPARATE TREATMENT

One reason sometimes given as a justification for the disparate impact cause of action is that it is a useful way of uncovering disparate treatment discrimination that might otherwise be difficult to prove.⁴ Suppose, for example, that *E* is prejudiced against blacks or women and wishes to keep the number of black and female employees low. He knows that a stated policy of “no blacks or women need apply” would render him liable for violating antidiscrimination law. So instead of that policy, *E* institutes the test, which he knows will be disproportionately passed by nonblacks and men and disproportionately failed by blacks and women. The test is not one he would have used if his object were to get those employees most qualified to do what his business requires. If his employee pool consisted of only nonblack men, he would *not* have used the test to select among them; he would have used a different test.

2. I shall hereafter consider business necessity to be synonymous with efficiency.

3. I should point out that under federal antidiscrimination law, members of *any* racial, sexual, et cetera, group can bring a disparate impact claim. Disparate impact claims arise under Title VII of the 1964 Civil Rights Act, and it has been long established that the Act protects whites, males, et cetera, from discrimination on the basis of race, sex, et cetera. The leading case, though not itself a disparate impact case, is *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976). Although the Supreme Court has not itself decided any disparate impact cases brought by whites or males, lower federal courts have done so and have found that whites and males could bring disparate impact claims. See, e.g., *Craig v. Ala. State Univ.*, 804 F.2d 682, 683, 688 (11th Cir. 1986). Academic commentary on this issue has been sparse. See, e.g., Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004).

4. See, e.g., David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1643–54 (1991).

E is willing to have a group of employees who, as a group, are less qualified than those he might have had if he were not concerned to keep the number of blacks and women low. He is willing to suffer that loss as the price of indulging his racial and sexual preferences.

Given this kind of scenario, the usefulness of the disparate impact cause of action should be obvious. It may be very difficult for a black or female *C* who fails the test to prove that *E* is engaging in disparate-treatment racial and sexual discrimination by using the test. The disparate impact cause of action gets around this difficulty by requiring only that *C* show the disproportionate impact on the racial, sexual, et cetera, group to which *C* belongs, at which point *E* must prove, as a defense, that the test is efficient. If *E* fails, his use of the test will be held illegal.

On this theory, establishing the disparate impact elements—disproportionate impact along the relevant group axes plus failure by *E* to establish the test's efficiency—results in a conclusive presumption of disparate treatment discrimination. The difficulty with this theory, however, is that the factual basis for such a conclusive presumption is extremely weak—far too weak to justify the presumption. There are many reasons other than disparate treatment why *E* might employ the test.

First, the disparate impact cause of action can be satisfied even if *E* is a member of the dispreferred group. If, for example, *E* is a black female, *E* is still liable for employing the test if *E* cannot establish its efficiency and it disproportionately disprefers blacks and women. It is true, of course, that a black woman might intentionally discriminate against blacks and women. She might, but that is not very likely. It is far too unlikely to justify a conclusive presumption that she is doing it merely because the test she uses has a disproportionate impact on blacks and women and is not the most efficient test possible.

Why, then, would *E*—whether a black female or a white male—choose an inefficient test that has a disproportionate adverse impact on certain groups other than to discriminate against those groups? One set of obvious reasons is that the test, even if not the most efficient, is easily available, easy to administer, or cheap. Another reason may just be *E*'s ignorance regarding the test's inefficiency or the availability of more efficient tests.

Of course, if none of these reasons explains *E*'s use of the test, the inference of intentional discrimination of the disparate treatment variety becomes much stronger. *But then, disparate treatment could be established without the need to employ the conclusive presumption.* Disparate impact as a separate cause of action has no role to play, contrary to what the

theory under examination asserts. I conclude that this theory fails to justify the law of disparate impact.

III. DISPARATE IMPACT AS UNFAIR

It might be suggested that it is somehow unfair to members of adversely impacted groups that *E* employs the test. The claim would be that workforces that are not proportionate in their racial, sexual, et cetera, makeup are not just evidence of some other form of unfairness such as disparate treatment, as the previous theory posits, but rather are unfair in themselves. The unfairness can be outweighed by the value of efficiency. But even if the test is efficient, and thus legally permissible, it is still unfair.

To whom are such disproportionate workforces unfair? To the disproportionately impacted groups qua groups? That cannot be right. Individuals who make up the group might be treated unfairly, but it is difficult to see how groups that have no corporate organization can, qua groups, be treated unfairly.

Is it the individuals in the disproportionately adversely impacted groups who are treated unfairly? That, too, is implausible. Assume the test is efficient. Under this theory of the inherent unfairness of disproportionate workforces, the members of the adversely impacted groups have still been treated unfairly even though, because the test is efficient, they have not been treated illegally. Moreover, everyone belongs to many demographic groups, some of which are disproportionately adversely impacted while others are disproportionately positively impacted. Have we all been treated simultaneously both “fairly” and “unfairly” by every employment test in existence?

Even if we narrow the focus to specific groups, such as racial and gender groups, disproportionate impact does not in itself appear unfair to members of the affected groups. Suppose the test disproportionately adversely impacts blacks as a group relative to whites—disregard other racial and ethnic groups for the moment. Suppose Black Applicant 1 passes the test and is hired. Is *he* treated unfairly? Suppose Black Applicant 2 fails the test but would also fail more efficient tests. Is *she* treated unfairly? Black Applicant 3, who fails the test but would pass more efficient tests is presumably the object of any fairness concern. But the unfairness, if any, to him seems independent of the effect of the test on Black Applicants 1 and 2 and hence on the group qua group. And White Applicant 1, who also fails the test but would pass a more efficient test, seems to be treated no less unfairly than Black Applicant 3, even though he is not a member of the disproportionately adversely affected group.

Moreover, suppose the test were proportionate along *all* demographic dimensions—an obvious impossibility. It would still be unfair under this theory. For it will still disproportionately adversely impact a group, namely, *the group of “unqualified Cs.”* That group is as much a group as any other. Therefore, *all* employment tests, efficient or inefficient, will, on this theory, be “unfair.” And that fact robs the notion of “unfairness” at work here of all normative significance. Disproportionate impact cannot be unfair in itself.

Perhaps someone might argue that yes, all employment tests, efficient and inefficient, *are* unfair; when the tests are efficient, however, their efficiency *outweighs* their unfairness. That argument is possible, but it is implausible. We do not think of, say, bar exams as unfair to those who cannot pass them, though on balance justifiable based on the benefits of distinguishing those qualified to practice law from those who are not. We do not say to those who flunk, “It is, of course, unfair to you that we have to exclude you from the practice of law, but we have to do so for the greater societal good.” Indeed, even if those who flunked were entirely from some salient demographic group, we would not think of their exclusion as “unfair” if we believed the bar exam sorted well. So, to repeat, disproportionate impact is not inherently unfair.

IV. INEFFICIENCY AS UNFAIR

Unlike the claim of unfairness in the previous theory, the claim of inefficiency does have normative bite. We want businesses to be efficient. Efficiency increases wealth. If *E* is using the test, and the test is inefficient, then *E* is producing less wealth than he could, and that is, *ceteris paribus*, a bad thing.

Perhaps, then, disproportionate impact law is justified as a way of forcing employers to be efficient.⁵ As long as the test is efficient, *E* is legally safe. And because, in the real world, *all* employment tests will have disproportionate impacts on racial groups, on the sexes, or on groups defined by religion or national origin, all employers will be legally compelled to use the most efficient employment tests available. And that is good.

5. See, e.g., Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 258 (1993).

There are two problems with this theory. First, it does not explain why disparate impact law requires those who challenge the test to be members of the disproportionately impacted groups. If the test is inefficient, then anyone, even members of the disproportionately *preferred* groups, should be able to bring suit challenging the test.⁶ Moreover, if the inefficiency of the test is our concern, it should be irrelevant that the disproportionately impacted groups are defined racially, sexually, et cetera. Although any real world employment test will have a disproportionate impact along one or more of these axes—even being listed in the phone book will have a disproportionate impact along these axes—if the concern is the test’s efficiency, that does not disappear when, miraculously, it proportionately impacts all racial, sexual, et cetera, groups. Indeed, if the test had a completely proportionate impact along all these axes, its efficiency would be highly unlikely; it should, therefore, be even more suspect than if it had a disproportionate impact along these axes.

So the first big problem with the efficiency theory of disproportionate impact discrimination law is that, although it explains *E*’s business necessity defense, it does not explain the plaintiff’s *prima facie* case. The second problem is this: if efficiency is our goal, why should we think that judges deciding lawsuits are better at figuring out what are the most efficient employment tests than are the employers? After all, employers have a strong incentive to seek out and use the most efficient employment tests. Their livelihood depends on their doing so. If judges err, however, they suffer no direct loss, although the employer and the rest of us do. It is difficult to see that if efficiency is what we are after, litigation is preferable to the free market. Litigation is extremely costly, a dead weight loss except for the lawyers and judges it employs. And the incentives to avoid inefficient errors are weaker in litigation than in the market.

V. CONCLUSION

In sum, I can find no justification for disparate impact law. Of course, I have only examined three possible justifications. I found these wanting, but perhaps there are others that I have not considered because I have not thought of them. For now, I conclude that disparate impact discrimination should be eliminated as a form of illegality.

6. If adversity is desired for litigation, one could require that the plaintiff be someone who sought employment and failed the test; the groups to which the plaintiff belongs, however, would be immaterial.