

## Charlie Sullivan's Scholarly Impact: A Modest Overview

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On November 1, 2019, Seton Hall faculty, students, and alumni, as well as leading scholars from around the country, gathered to celebrate the extraordinary scholarly achievements of Charlie Sullivan. We did so in the best way possible, filling the day with presentations critiquing, extending, and reframing Charlie's contributions across the spectrum of employment and employment discrimination topics that Charlie has confronted over the last five decades. Of course, Charlie was given the opportunity to respond in real time, and he did not disappoint, offering Sullivanesque rebuttals, good-natured critiques, and insightful questions. Always collegial, but not one to concede ground easily, Charlie's acknowledgement on several occasions that he was impressed, puzzled, or would need more time to ponder a concept is a testament to the quality of what he had heard. Indeed, anyone who has exchanged ideas with him knows that stumping Charlie Sullivan is one of the more difficult challenges in life.

The group is grateful to the *Seton Hall Law Review* for agreeing to publish this symposium, which contains the articles resulting from the day's presentations. These works speak for themselves in terms of capturing Charlie's contributions, and some explicitly survey the various areas in which he has written. The purpose of this overview therefore is modest—I offer a historical and statistical snapshot of Charlie's scholarly impact, and his lasting influence on (literally) generations of students and scholars that places these articles in a broader context.

Charlie has been and remains a prolific scholar. He started more than five decades ago, and he has not slowed down. He published his first article in 1974, as a junior scholar at South Carolina Law School.<sup>1</sup> That piece, it is

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<sup>1</sup> Charles A. Sullivan & Michael J. Zimmer, *The South Carolina Human Affairs Law: Two Steps Forward, One Step Back?*, 26 S.C. L. REV. 1 (1974).

worth noting, was co-authored with his colleague Mike Zimmer, foreshadowing a long and fruitful partnership in the employment discrimination field that lasted until Mike passed away in 2015. Indeed, as Steve Willborn describes in his article,<sup>2</sup> Charlie was there (along with Mike) almost from the beginning of that discipline, writing about and teaching Title VII in the early years following its enactment. And their casebook, *Cases and Materials on Employment Discrimination*, most recently co-authored with Rebecca White (also a participant in this symposium), not only was one of the first in the area—the inaugural edition was published in 1982—but also remains widely adopted today. To say Charlie has been a “profoundly influential” employment discrimination scholar would be an understatement: he has played a significant role in *establishing* the field.

Viewing Charlie’s scholarship from 1974 until today through a quantitative lens is another way to drive home his extraordinary impact. He has published over forty law review articles and book chapters, as well as four books/casebooks (and at least eighteen editions).<sup>3</sup> His works have garnered over 913 HeinOnline views over the last twelve months,<sup>4</sup> and, as of the date this symposium went to press, over 5,200 SSRN downloads. Moreover, both scholars and courts have relied on Charlie’s scholarship for decades. To date, he has over 1,830 Google Scholar citations,<sup>5</sup> and courts have cited his work at least sixty-two times, including two Supreme Court and seventeen federal circuit court opinions.<sup>6</sup> Along the way, he has consistently participated as a member of the ALI, presented his work scores of times, and has been an editor and frequent contributor at Workplace Prof Blog for many years. It almost goes without saying that Charlie is frequently called upon to review colleagues’ drafts and to guide new faculty. One therefore need not overtheorize<sup>7</sup> to explain the frequent acknowledgements he has received in his colleagues’ asterisk footnotes and elsewhere.

Although the center of gravity of Charlie’s scholarship is employment and employment discrimination doctrine and its implications, Charlie is a tinkerer, and thus, his work also has uncommon range. For example, Charlie was (is?) an antitrust scholar.<sup>8</sup> Additionally, during his career, he has never

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<sup>2</sup> Steven L. Willborn, *Righting the World: Sullivan on Disparate Impact*, 50 SETON HALL L. REV. 1495, 1496–99. (2020).

<sup>3</sup> A complete list of these articles and books is on file with the author.

<sup>4</sup> Documentation of HeinOnline views (as of February 21, 2020) is on file with the author.

<sup>5</sup> A complete list of these citations (as of February 21, 2020) is on file with the author.

<sup>6</sup> A complete list of these case citations is on file with the author.

<sup>7</sup> *Contra* Charles A. Sullivan, *The Under-Theorized Asterisk Footnote*, 93 GEO. L.J. 1093 (2005).

<sup>8</sup> *See, e.g.*, Neil B. Cohen & Charles A. Sullivan, *The Herfindahl-Hirschman Index and*

stopped “noodling,”<sup>9</sup> resulting in works that seek to resolve legal puzzles,<sup>10</sup> connect seemingly disparate legal disciplines,<sup>11</sup> and take an acorn of an idea from something he has seen or read to yield an oak of new theory or conceptualization.<sup>12</sup> And Charlie’s curmudgeonly wit has found its way into print more than once, enhancing both his legend and his downloads.<sup>13</sup>

Finally, I would be remiss if I lauded Charlie’s scholarly achievements without acknowledging how much else he has done at the same time for Seton Hall Law, his students, and his colleagues. Since he arrived in 1978, Charlie has taught and mentored thousands of students. Ever curious and always willing to help with course coverage, he has run toward rather than away from new preps. He has taught everything from Employment Law and Discrimination to Contracts to Remedies to Civil Procedure to Administrative Law to Professional Responsibility to Seton Hall’s six-credit, first-year Lawyering course. He even dabbled in Health Law once, although I am told that is where he may have met his match. . . . Charlie’s record of administrative service to Seton Hall Law is equally extraordinary. He served as an Associate Dean under three different Deans and has overseen or led countless law school initiatives. He was even willing to step in when needed as the law school’s interim Library Director—“interim” being a bit of a misnomer given his extended tenure. And, for four decades, he has been the go-to person at Seton Hall for scholarship and other advice. I have never sent an article out the door without Charlie’s review, and I am not alone. He has been the ultimate mentor to each generation of faculty members who have joined Seton Hall since he arrived. He also might be the easiest co-author one can ask for, except for the guilt—okay, maybe just deep sense of inadequacy—that comes from never being as timely or productive as he is. How Charlie has done so much for so long is simply inexplicable, and we are all the beneficiaries of his generosity.

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*the New Antitrust Merger Guidelines: Concentrating on Concentration*, 62 TEX. L. REV. 453 (1983); Charles A. Sullivan, *Private Enforcement of Government Antitrust Decrees by Private Parties: Third Party Beneficiary Rights and Intervenor Status*, 123 U. PA. L. REV. 822 (1975).

<sup>9</sup> See Willborn, *supra* note 2 at 1498 n.5.

<sup>10</sup> See, e.g., Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143 (2006).

<sup>11</sup> See, e.g., Erik Lillquist & Charles A. Sullivan, *The Law and Genetics of Racial Profiling in Medicine*, 39 HARV. C.R.-C.L. L. REV. 391 (2004); Charles A. Sullivan, *Revisiting the “Neglected Stepchild”: Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L.F. 621; Michael J. Zimmer & Charles A. Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163 (1976).

<sup>12</sup> See, e.g., Charles A. Sullivan, *Clergy Contracts*, 22 EMP. RTS. & EMP. POL’Y J. 371 (2018).

<sup>13</sup> See Charles A. Sullivan & Timothy P. Glynn, *The FAA Triumphal: A Modest Opinion*, 19 EMP. RTS. & EMP. POL’Y J. (2015); Sullivan, *supra* note 7.

This symposium therefore celebrates only one aspect of Charlie, but perhaps the one for which he has the greatest passion: employment law and employment discrimination. This passion emerges in each of the following articles, all written by his co-authors, other contemporaries, and colleagues he mentored as junior scholars.

The symposium begins with Sam Estreicher's brief tribute to Charlie.<sup>14</sup> It then turns to a deep dive into employment contracts. Rachel Arnow-Richman evaluates recent reforms limiting the use of noncompetition agreements through the lens of the risks of such use that Charlie identifies in his scholarship, concluding that these reforms are a step in the right direction but are ultimately insufficient.<sup>15</sup> Matt Bodie both explores Charlie's contributions to our understanding of contract law in the employment context, including Charlie's work on the role of the common law (and common-law judges), and considers the underappreciated role of the worker within an organization.<sup>16</sup>

Shifting the focus to antidiscrimination law, Bill Corbett reviews Charlie's and Mike Zimmer's critiques of the Supreme Court's narrow and dichotomous view of employment discrimination law and offers reforms that will broaden and improve employee protections.<sup>17</sup> Sandra Sperino surveys the expansion and misuse of the cat's paw metaphor in antidiscrimination law, a concept on which both she and Charlie have written extensively.<sup>18</sup> Using the treatment of older women in television news as a poignant illustration, Rebecca Hanner White uncovers further inadequacies with our antidiscrimination laws and proof frameworks, this time with regard to the intersectional question of protecting older women against discrimination.<sup>19</sup>

Other implications of Charlie's scholarship emerge in several pieces. Although Charlie and others have resoundingly criticized the enforcement of mandatory arbitration clauses in employment contracts, Michael Green sees the potential in another form of workplace ADR, asserting that outside neutral mediators should assist employers and employees in determining a

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<sup>14</sup> Samuel Estreicher, *The Indispensable Charlie Sullivan*, 50 SETON HALL L. REV. 1221 (2020).

<sup>15</sup> Rachel S. Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223 (2020).

<sup>16</sup> Matthew T. Bodie, *Taking Employment Contracts Seriously*, 50 SETON HALL L. REV. 1261 (2020).

<sup>17</sup> William R. Corbett, *Explorations with Charlie Sullivan: Theorizing a Different Universe of Employment Discrimination*, 50 SETON HALL L. REV. 1283 (2020).

<sup>18</sup> Sandra F. Sperino, *Killing the Cat's Paw*, 50 SETON HALL L. REV. 1303 (2020).

<sup>19</sup> Rebecca Hanner White, *Aging on Air: Sex, Age and Television News*, 50 SETON HALL L. REV. 1323 (2020).

reasonable accommodation when mental illness and fears of workplace violence are at issue.<sup>20</sup> Ann McGinley raises concerns about harm to women resulting from male supervisors' reaction to the #MeToo movement and fears of sexual harassment suits, and outlines potential solutions that would make the law more responsive to reality and would accord society a better understanding of harassment.<sup>21</sup> Sachin Pandya offers a unique look at the implications of two of Charlie's articles by positing a counterfactual world in which everyone's professional network position is visible to employers and thus available as evidence in employment law litigation. He then uses Charlie's corpus of legal scholarship to illustrate challenges to collecting and using such evidence of network position.<sup>22</sup>

Next, in the spirit of collegial disagreement and critique, several symposium participants both acknowledge and contest Charlie's contributions. Tristin Green utilizes Charlie's view on disparate treatment and disparate impact as a foil: she contends that Charlie and others are wrong to view these approaches as conceptually distinct legal theories and that the Supreme Court's juxtaposition of these theories in *Watson v. Fort Worth Bank & Trust*<sup>23</sup> is particularly blameworthy for leading us astray.<sup>24</sup> Michael Selmi acknowledges that Charlie's work has shown how employment law has fallen short of its central aspiration of doing justice, but he contends that there are optimistic aspects in two areas of employment discrimination jurisprudence, arbitration and sexual harassment law, that have largely been overlooked.<sup>25</sup> Last but not least, Steve Willborn begins with a laudatory survey of Charlie's employment law scholarship and highlights Charlie's unique ability to tee up new issues for inquiry. He then plunges into Charlie's work on disparate impact, offering, for example, new insights on the prevalence of cognizable disparate impacts that raise questions about Charlie's assertions with regard to disparate impact claims by white men.<sup>26</sup>

Viewing this symposium holistically, we find in it enormous breadth and depth, deep understanding of the doctrine and its policy implications, profound skepticism but occasional optimism, exploration of emergent

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<sup>20</sup> Michael Z. Green, *Mediating Psychiatric Disability Accommodations for Workers in Violent Times*, 50 SETON HALL L. REV. 1351 (2020).

<sup>21</sup> Ann C. McGinley, *#MeToo Backlash or Simply Common Sense?: It's Complicated*, 50 SETON HALL L. REV. 1397 (2020).

<sup>22</sup> Sachin S. Pandya, *On Social Network Position in Employment Law: Conjectures for Charlie*, 50 SETON HALL L. REV. 1427 (2020).

<sup>23</sup> 487 U.S. 977 (1988).

<sup>24</sup> Tristin K. Green, *The Juxtaposition Turn: Watson v. Fort Worth Bank & Trust*, 50 SETON HALL L. REV. 1445 (2020).

<sup>25</sup> Michael Selmi, *Bending Towards Justice: An Essay in Honor of Charles Sullivan*, 50 SETON HALL L. REV. 1465 (2020).

<sup>26</sup> Willborn, *supra* note 2.

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issues without ignoring ongoing struggles, good-natured disagreement, insights about the future built on knowledge of the past, recognition without fear of complexities, serious scholarly evaluation sprinkled with humor, and a fundamental desire to do better—to do justice—for workers. In other words, we find Charlie.