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DISPARATE IMPACT AND THE UNITY OF EQUALITY LAW

BY

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Disparate Impact and the Unity of Equality Law

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Abstract

This Article offers a new theory of disparate impact liability. This theory emerges from and advances a unified account of employment discrimination law as a whole. Like disparate treatment and nonaccommodation, disparate impact claims target a distinctive injury to individuals: suffering workplace harm because of one's race, sex, disability or other protected status. That injury of "status causation" offends basic commitments to equality and individual freedom. Rather than focusing on employers' decision-making processes or on social hierarchy between groups, this approach draws directly from statutory text emphasizing causation and individual harm.

A disparate impact claim's statistical comparison of group outcomes provides evidence that individuals have suffered status causation. Group outcomes are constructed by aggregating individual outcomes. Disparities between group outcomes can emerge only if many individual group members suffer harm because of their protected status (status causation). But not all group members suffer this injury; it is spread unevenly within the group. The statistical evidence demonstrates that some individuals suffered discrimination's injury, but not which individuals.

Highlighting intra-group variation explains fundamental but otherwise perplexing features of disparate impact doctrine. Refusing to treat group members as interchangeable explains the structure of the *prima facie* case, including its rejection of any "bottom line" defense based on aggregate workforce composition. Also noted are other significant implications for remedies and for the relationship between employment discrimination law and redistributive social policy. In each case, the focus is one those individuals who have suffered status causation, not necessarily a group as a whole.

Disparate Impact and the Unity of Equality Law

INTRODUCTION

Antidiscrimination jurisprudence is in disarray. In cases such as *Wal-Mart v. Dukes*[1] and *Ricci v. DeStefano*,[2] the Supreme Court's most conservative wing has moved to eviscerate longstanding forms of statutory liability that address structural bias in organizations. Last Term, however, the Court pulled back from the brink. It preserved disparate impact claims under the Fair Housing Act.[3] Also, under Title VII of the Civil Rights Act of 1964,[4] it allowed the functional equivalent of denial of reasonable accommodation ("nonaccommodation") claims.[5]

Unfortunately, this past Term's fragile majorities failed to articulate any clear vision for an expansive antidiscrimination law, one that can compete with the conservatives' cramped focus on discriminatory intent as the *sine qua non*.[6] Nor did any concurring liberal Justice step up to do so. Instead, the opinions relied defensively on *stare decisis* and technicalities, continuing the pattern set by the weak dissents to *Wal-Mart*, *Ricci*, and related conservative victories.

This Article offers a new way forward. It does so by starting with the concrete harm to individuals that makes disparate treatment so obviously an affront to equal freedom, and so straightforwardly grounded in statutory text. This injury of "status causation" arises when, in Title VII's words, an individual suffers workplace harm "because of such individual's race, color, religion sex, or national origin."[7] By attacking status causation, employment discrimination law seeks to conform our workplaces[8] to a simple liberal ideal: nobody should enjoy lesser freedom because she is black rather than white, a woman rather than a man, and so on.[9]

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[1] 131 S. Ct. 2541 (2011) (rejecting class certification of a systemic disparate treatment employment discrimination claim).

[2] 557 U.S. 557 (2009) (limiting employers' ability to reduce racial disparities without triggering disparate treatment liability, and suggesting that disparate impact prohibitions are constitutionally suspect).

[3] *See* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (construing Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*).

[4] 42 U.S.C. § 2000e *et seq.*

[5] *See* Young v. UPS, 135 S. Ct. 1338 (2015) (allowing denials of pregnancy accommodations to be challenged as disparate treatment under a lenient evidentiary standard); EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015) (allowing denials of religious accommodations to be challenged as disparate treatment of practices that are religiously motivated).

[6] *See* Noah D. Zatz, *The Many Meanings of "Because Of"*, 68 STAN. L. REV. ONLINE 68 (2015).

[7] 42 U.S.C. § 2000e-2(a). Similar language recurs across antidiscrimination statutes. *See* 29 U.S.C. § 623(a)(1)-(2) (2013) (age discrimination); 42 U.S.C. § 2000ff-1(a) (2013) (genetic information discrimination); 42 U.S.C. § 12112(a)-(b) (2013) (disability discrimination). I do not take on here the important task of explaining or justifying which statuses receive protection. *See, e.g.*, JOSEPH FISHKIN, BOTTLENECKS 13 (2014).

[8] On the possibility of important "spherical" variations across domains such as employment, housing, and voting, *see* BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 3 (2014).

[9] *See* Tommie Shelby, *Race and Social Justice*, 72 FORDHAM L. REV. 1697, 1713 (2004). This reflects a more general egalitarian view that "resource outlays should not be influenced by morally arbitrary factors," Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Acccommodation*, *in* REASON

The insight driving this Article is that status causation is not unique to disparate treatment (also known, misleadingly, as "intentional discrimination"[10]). It can arise through multiple mechanisms and can be detected through multiple methods of proof. The major discrimination claims—individual disparate treatment, nonaccommodation, systemic disparate treatment, and disparate impact[11]—track these variations. Each targets status causation in its own way. The resulting framework for the field makes sense of all the claims and gives primacy to none.

Part I begins by reviewing the prior demonstration[12] that individual disparate treatment and nonaccommodation claims both revolve around status causation.[13] One way for an employee's protected status to influence a workplace outcome is for an employer to consider that status when making a decision. Disparate treatment claims identify that mechanism, often characterized less technically as "discriminatory intent."[14] Nonaccommodation claims identify another path to status causation. Consider the paradigmatic example under the Americans with Disabilities Act (ADA): an applicant loses a job because, without an accommodation, she cannot use a required tool, and she cannot use that tool because of her disability. Absent her disability, she would have gotten the job. Without an accommodation, she suffers status causation. That fact holds even if the employer requires all workers to use the same tool and accommodates none of them, without regard to disability and thus without committing disparate treatment.

This focus on status causation holds obvious promise for theorizing disparate impact liability. Grounding the analysis in workers' injuries coheres with the convention characterizing disparate impact as addressing the "effects" of employer conduct.[15] But it resists the equally conventional notion that this concern for effects is *opposed* to a concern about employer intent.[16] Instead, on my view, discriminatory intent creates an equality problem precisely because of its effects: it causes workers to suffer harm because of their protected status. With this, a path opens toward analyzing disparate impact and disparate treatment as separated superficially by the

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AND VALUE 270, 273 (R. Jay Wallace et al., eds., 2004), that they should be "responsibility-tracking," *see* Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES IN LAW 271 (2008).

[10] *See* Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1 (2011).

[11] For the reasons to treat hostile work environments as a type of harm, not a type of claim, see Rebecca Hanner White, *There's Nothing Special About Sex*, 7 WM. & MARY BILL RTS. J. 725 (1999); Steven L. Willborn, *Taking Discrimination Seriously*, 7 WM. & MARY BILL RTS. J. 677 (1999); Noah D. Zatz, *Managing the Macaw*, 109 COLUM. L. REV. 1357, 1367-68 (2009).

[12] *See* Zatz, *supra* note 11.

[13] This represents a terminological change from the substantively identical concept of "membership causation" developed in Zatz, *supra* note 11. This shift better reflects how Title VII applies to all individuals with respect to a protected status (race, color, sex, national origin, religion), not to membership in one versus another group.

[14] *See* Rich, *supra* note 10.

[15] *See, e.g.*, Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518, 2522 (2015).

[16] *See, e.g.*, *id.* at 2518 (characterizing disparate impact liability as "focus[ing] on the *effects* of the action on the employee rather than the motivation for the action of the employer" (quoting Smith v. City of Jackson, 544 U.S. 228, 236 (2005)).

presence or absence of discriminatory intent but united fundamentally in addressing a common injury: status causation. Like nonaccommodation, disparate impact could identify status causation that arises without the employer's disparate treatment.

But a barrier seemingly blocks the way. Emphasizing individual injury appears at odds with disparate impact claims' focus on inequality between groups. Disparate impact's move away from discriminatory intent has long been associated with a move away from individualism,[17] and with good reason. Consider a uniformly-applied high school degree requirement. A disparate impact claim must show that this requirement screens out applicants of color more often than whites. Such evidence of inter-group disparities suffices to establish the *prima facie* case. No proof is needed that any one individual lacked a degree because of her race[18] and therefore suffered status causation when denied a job for lack of a degree.

This Article develops a novel account of disparate impact liability that bridges this gap between an evidentiary showing of group disparities and a conceptual foundation in individual status causation. To do so, Part II takes a simple approach: focus on the fact that what typically are characterized as "group" outcomes actually are statistical aggregations of diverse individual experiences. Consider the progenitor of disparate impact liability, *Griggs v. Duke Power*.[19] To conclude that a degree requirement harmed African Americans relative to whites, the *Griggs* Court relied on evidence that, in the 1960s, 12% of individual African Americans had high school degrees (88% did not), compared to 34% of individual whites (66% did not).[20]

This aggregative understanding of statistical comparison pervades the "government by numbers" characteristic of the modern regulatory state.[21] Consider environmental regulation of some toxin. To establish that the toxin causes cancer, epidemiological evidence observes higher cancer rates among a group exposed to the toxin than among a group not exposed. The disparity represents the number of exposed individuals who got cancer because of the exposure. This is the logic behind familiar reports that smoking, air pollution, and so on cause some number of additional deaths—deaths of individual human beings—per year. The impetus behind regulating the toxin is to prevent those additional deaths.[22]

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[17] *See, e.g.*, Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237-238 (1971); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 2, 48-52 (1976); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 44, 50 (1991); Richard A. Primus, *Equal Protection And Disparate Impact*, 117 HARV. L. REV. 493, 552-54 (2003); Richard Thompson Ford, *Civil Rights 2.0*, 11 STAN. J. C.R. & C.L. 155, 173 (2015).

[18] Peter Siegelman, *Contributory Disparate Impacts in Employment Discrimination Law*, 49 WM. & MARY L. REV. 515 (2007).

[19] 401 U.S. 424 (1971).

[20] *See* discussion of *Griggs*, *infra* Part III.A.

[21] ACKERMAN, *supra* note 8.

[22] *See, e.g.*, Steven R.H. Barrett et al., *Impact of the Volkswagen emissions control defeat device on US public health*, 10 ENVIRON. RES. LETT. 114005, 114005 (2015) (estimating that bringing Volkswagen cars equipped with "defeat devices" into compliance with the Clean Air Act emissions rules would save 130 lives).

Nonetheless, such statistical proof cannot identify which specific individuals got cancer from the toxin. It establishes that these individuals exist, but it cannot distinguish them from other exposed individuals who also got cancer but not because of their exposure. After all, many got cancer without any toxic exposure at all.

This use of aggregate comparisons to detect harms to individuals, but not which individuals were harmed, is already well established in another area of antidiscrimination law. Systemic disparate treatment claims, like disparate impact, begin with statistical evidence comparing outcomes between groups, such as hiring more whites than African Americans.[23] Unlike disparate impact, a systemic disparate treatment analysis controls for racial disparities in unprotected characteristics, such as educational attainment, that could have produced the hiring disparity without the employer ever considering an individual's race. If statistically significant race differences in hiring remain despite these controls, then the inference is drawn that the employer took individuals' race into account—committed disparate treatment—frequently enough to produce the observed aggregate disparity.

This Article's innovation is to extend to disparate impact this simple, familiar understanding of statistical analysis. As Part III explains, disparate impact claims identify the presence of individual instances of status causation within a larger population, just as systemic disparate treatment claims do. The difference is that disparate impact analysis identifies status causation that arises without disparate treatment by the employer. Instead, it detects the causal influence of protected status on some intermediate characteristic—like high school graduation or facility with a tool—that the employer does consider directly.[24] In other words, disparate impact analysis identifies the same mechanism of status causation at work in nonaccommodation claims. Disparate impact claims detect do so using statistical analysis of aggregated outcomes, unlike the individualized evidence characteristic of nonaccommodation claims.[25]

Puzzlingly, disparate impact claims have not previously been conceptualized in this way, despite the familiarity of statistically detecting individual injuries within a larger group.[26] The

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[23] *See* discussion *infra* Part II.B.

[24] I am using causal concepts in the ordinary, descriptive "but for" sense. This is consistent with what, in the disability context, is known as the "social model." When someone cannot use a tool because of her disability, that is a result both of the set of capacities denoted an "impairment" *and* of how the tool is designed to require different capacities. *See* Adam M. Samaha, *What Good is the Social Model of Disability*, 74 U. CHI. L. REV. 1251 (2007); Zatz, *supra* note 11, at 1393 n.142. Thus, identifying the causal role of protected status in some (socially allocated) harm or advantage does not naturalize difference or inequality. *See also* Markovits, *supra* note 9, at 281-82.

[25] *See* Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006).

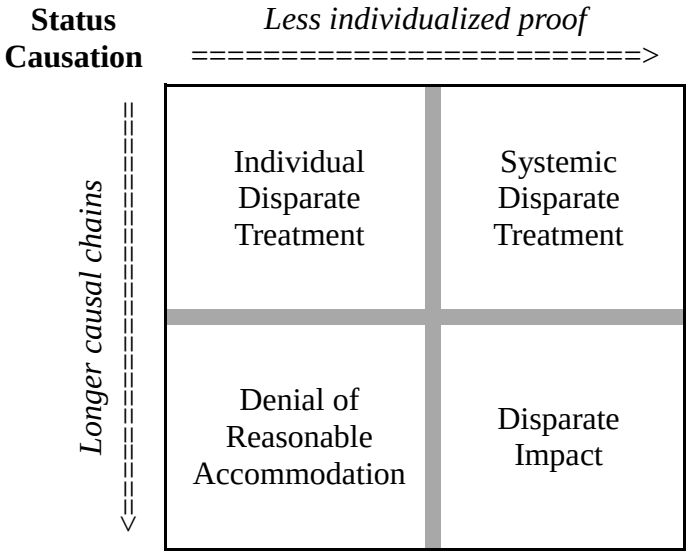
[26] For prior accounts of disparate impact liability, see generally George Rutherglen, *Disparate Impact Under Title VII*, 73 VA. L. REV. 1297, 1399 (1987); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive*, 52 N.Y.U. L. REV. 36 (1977); Fiss, *supra* note 17; Joel Wm. Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII*, 65 TEX. L. REV. 41 (1986); Steven L. Willborn, *The Disparate Impact Model of Discrimination*, 34 AM. U. L. REV. 799 (1984); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact*, 74 N.C. L. REV. 325

missing link has been an appropriate account of individual injury. When individuals' subjection to discriminatory intent is taken as the core of disparate treatment's injury, then defining disparate impact by the absence of discriminatory intent drives a wedge between the theories. This barrier has stood notwithstanding the well-known continuities in their methods of proof.[27]

The concept of status causation reshapes this terrain. It allows us to see systemic disparate treatment and disparate impact claims as using similar methods to get at variants on a single theme: workplace injury suffered because of one's protected status.

Putting these pieces together yields a coherent overall picture of employment discrimination claims, as represented in Figure 1. The major claims can be organized along two axes, both anchored in status causation. One axis moves from the employer's consideration of an employee's protected status (disability, race) to the employer's consideration of an unprotected characteristic (inability to use a tool, lacking a degree) itself caused by protected status. The other axis moves from individualized to aggregated evidence.

Figure 1.



In this framework, disparate impact liability is two steps removed from individual disparate treatment, one step along each axis. Disparate impact is to nonaccommodation as systemic disparate treatment is to individual disparate treatment. And disparate impact is to systemic disparate treatment as nonaccommodation is to individual disparate treatment.

(1996); Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523 (1991); Martha Chamallas, *Evolving Conceptions of Equality Under Title VII*, 31 UCLA L. REV. 305 (1983); Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII*, 8 YALE L. & POL'Y REV. 223 (1990). *See also* Reva B. Siegel, *From Colorblindness to Antibalkanization*, 120 YALE LAW JOURNAL 1278, 1344-47 (2011); Brest, *supra* note 17; Michael Selmi, *Was The Disparate Impact Theory A Mistake?*, 53 UCLA L. REV. 701 (2006).

[27] *See* Segar v. Smith, 738 F.2d 1249, 1267 (D.C. Cir. 1984); EEOC v. Joe's Stone Crab, 220 F.3d 1263, 1273-74 (11th Cir. 2000).

This theory of disparate impact liability is significant in several respects. Most obviously, it provides a novel, robust account of a branch of Title VII jurisprudence that goes back to the statute's earliest days[28] but has long has been controversial and recently has come under existential threat. So long as discriminatory intent and its variants are the *sine qua non* of discrimination, disparate impact liability appears as an anomaly that is unjustified,[29] unconstitutional,[30] or, at best, superfluous.[31]

More generally, this capacity to explain disparate impact liability demonstrates the power of placing status causation at the center of equality law. Doing so dislodges disparate treatment from its privileged place without ignoring its significance. Importantly, this displacement extends to even the most expansive conceptions of disparate treatment,[32] those that apply to all "social category-contingent behavior,"[33] including "implicit bias."[34] Those concepts rightly push beyond the confines of self-conscious bigotry, but that is not enough. Flaws in the employer's decision-making process—and in particular, deviations from colorblindness—are not what make the outcome an affront to equality.[35] That is the value of drawing inspiration from nonaccommodation.[36]

Unlike most other attempts to move away from a "perpetrator perspective"[37] focused on the employer's decision-making process, this Article builds up from individual harm, not down from the social status of groups writ large. This feature grounds my account in Title VII's

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[28] On the history of disparate impact, see NANCY MACLEAN, FREEDOM IS NOT ENOUGH (2006); Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251 (2011). *Griggs* itself was unanimous, and soon thereafter Congress approved of it in the Civil Rights Act of 1972. *See* Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982); ACKERMAN, *supra* note 8.

[29] *See* Brest, *supra* note 17, at 4; Amy L. Wax, *The Dead End of "Disparate Impact"*, 12 NATIONAL AFFAIRS 53, 55 (2012).

[30] *See* Ricci v. DeStefano, 557 U.S. 557, 594-95 (2009) (Scalia, J., concurring).

[31] *See* Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 700-01 (2011). Disparate impact often is reduced to a mere proxy for disparate treatment that is difficult to detect. *See, e.g.*, In re Emp't Discrimination Litig. Against Ala., 198 F.3d 1305, 1322 (11th Cir. 1999); *Ricci*, 557 U.S. at 594-95(Scalia, J., concurring); Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2544, 2550 (2015) (Alito, J., dissenting). *See generally* Brest, *supra* note 17, at 22-52; Primus, *supra* note 17, at 498-99, 520-21.

[32] *See generally* Rich, *supra* note 10.

[33] Jerry Kang & Mahzarin R. Banaji, *Fair Measures*, 94 CAL. L. REV. 1063, 1067 (2006).

[34] Jerry Kang, *Rethinking Intent and Impact*, 66 ALA. L. REV. 627 (2015).

[35] This focus on decision-making process is characteristic of anticlassification or equal treatment theories. *See, e.g.*, Brest, *supra* note 17, at 6-7; Larry Alexander, *What Makes Wrongful Discrimination Wrong?*, 141 U. PA. L. REV. 149 (1993).

[36] Nonaccommodation developed alongside disparate treatment and disparate impact, but it did not prosper before the ADA. *See* Alexander v. Choate, 469 U.S. 287 (1985) (recognizing disability reasonable accommodation claims under Section 504 of the Rehabilitation Act of 1973); discussion *infra* note 74.

[37] Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049 (1978).

textual emphasis on individual harms.[38] It also resonates with the concern for individual freedom so pronounced in conventional understandings of individual disparate treatment claims, the statute's least controversial aspect. This is the value of displacing rather than erasing disparate treatment. In contrast, other efforts to situate disparate impact liability within a broader theory generally take structural subordination between groups as fundamental, with individual disparate treatment of merely derivative significance.[39]

In short, this new account departs markedly from those that have dominated the field for at least 40 years. It splits apart the questions of discriminatory intent and individualism, displacing the former while embracing the latter. That confounds critics of disparate impact liability who see it as inevitably sacrificing individual freedom to group rights,[40] as well as critics of liberalism who see its individualism as a barrier to moving beyond disparate treatment analysis.

More concretely, my theory also makes theoretical sense of persistent doctrinal puzzles. Part IV provides a fine-grained account of the *prima facie* case of disparate impact, one that explains the pervasive focus on the particular mechanisms that generate disparities. The best

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[38] *See* 42 U.S.C. § 2000e-2(a)(1) (making it an unlawful employment practice "to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin") (emphasis added). *See also id.* at § 2000e-2(a)(2).

[39] On the conventional typology of anticlassification vs. antisubordination, or "equal treatment" vs. "equal achievement," see, *e.g.*, Fiss, *supra* note 17, at 237-49; Robert Belton, *Discrimination and Affirmative Action*, 59 N.C. L. REV. 531, 540-41 (1981); Belton, *supra* note 26; Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment*, 101 HARV. L. REV. 1331, 1336-42 (1988); Ruth Colker, *Anti-Subordination Above All*, 61 N.Y.U. L. REV. 1003, 105-08 (1986); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition*, 58 U. MIAMI L. REV. 9 (2003); Owen Fiss, *Another Equality*, 2 ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY (2004); Primus, *supra* note 17, at 518. *See also* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994); Kenneth L. Karst, *Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). Indeed, justifying disparate impact liability long has been central to the antisubordination tradition. *See* Fiss, *Groups and the Equal Protection Clause*, *supra*, at 8; Balkin & Siegel, *supra*, at 11. Such foundations for disparate impact imply either substantially reconceiving individual disparate treatment, *see generally* Colker, *supra*; David A. Strauss, *The Law and Economics of Racial Discrimination in Employment*, 79 GEO. L.J. 1619 (1991); Richard Thompson Ford, *Beyond Good and Evil in Civil Rights Law*, 32 BERKELEY J. EMP. & LAB. L. 513 (2011), or deep theoretical pluralism within the field, *see* Belton, *supra*. When disability accommodation is at issue, anticlassification's dominance leads some to label it simply "antidiscrimination" or "simple discrimination" in contrast to nonaccommodation. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001). *But see* Balkin & Siegel, *supra*, at 10. Nonetheless, the same basic dyad persists. *See* Kelman, *supra*, at 834, 840; Michael Ashley Stein, *Same Struggle, Different Difference*, 153 U. PA. L. REV. 579 (2004). *See also* Fiss, *Another Equality*, *supra*, at 14; Bagenstos, *supra*, at 838-41.

[40] *See, e.g.*, Brest, *supra* note 17, at 52. On the limits of anticlassification's individualism, see Reva B. Siegel, *Discrimination in the Eyes of the Law*, 88 CAL. L. REV. 77, 92-93 (2000).

known example is *Connecticut v. Teal*'s still-controversial rejection of a "bottom line defense."[41] *Teal* allowed a disparate impact attack on one step in a multi-step decision-making process even if no disparity remained by the end of the process. My explanation is that status causation inflicted on some individuals at one step cannot be offset by other steps' effects on other individuals, even other members of the same group.[42]

To recap, Part I introduces status causation as the injury at issue in employment discrimination law and uses it to reinterpret and connect disparate treatment and nonaccommodation claims. Part II uses systemic disparate treatment claims to illustrate how statistical comparisons of group outcomes can identify when some, but not all, individual group members have suffered status causation. Part III integrates these two points to conceptualize disparate impact analysis as using statistical techniques to identify when status causation occurs absent disparate treatment, though without identifying which individuals suffered that injury. Part IV deploys this account to explain the *prima facie* case of disparate impact, especially its approach to bottom-line analysis. The Conclusion briefly notes additional insights that may flow from recognizing intra-group differences within disparate impact theory.

I. Step One: From Discriminatory Intent to Status Causation

Employment discrimination law aims to prevent or remedy status causation. This Part shows how this simple idea makes sense of individual disparate treatment liability, including its characteristic individualism and its emphasis on causation over motivation. If an employer decides to impose some workplace harm based on an employee's protected status, then the employee suffers harm as a result of her status. In such cases of intentional discrimination, there is "internal" status causation: protected status enters the causal chain through the employer's decision-making process. That is why discriminatory intent matters.

Status causation, however, is equally present in individual nonaccommodation claims, without any form of disparate treatment. There, protected status enters the causal chain outside the employer's decision-making process but ultimately affects the outcome of that process. Such "external" status causation occurs when disability affects tool use and tool use is the employer's basis for decision. That is why discriminatory intent is not essential.

By building a bridge across the supposed chasm between the presence and absence of discriminatory intent, this analysis takes the first step toward integrating disparate treatment into a common framework that includes not only nonaccommodation but also disparate impact. As represented schematically in Figure 2, this argument puts in place the vertical axis presented

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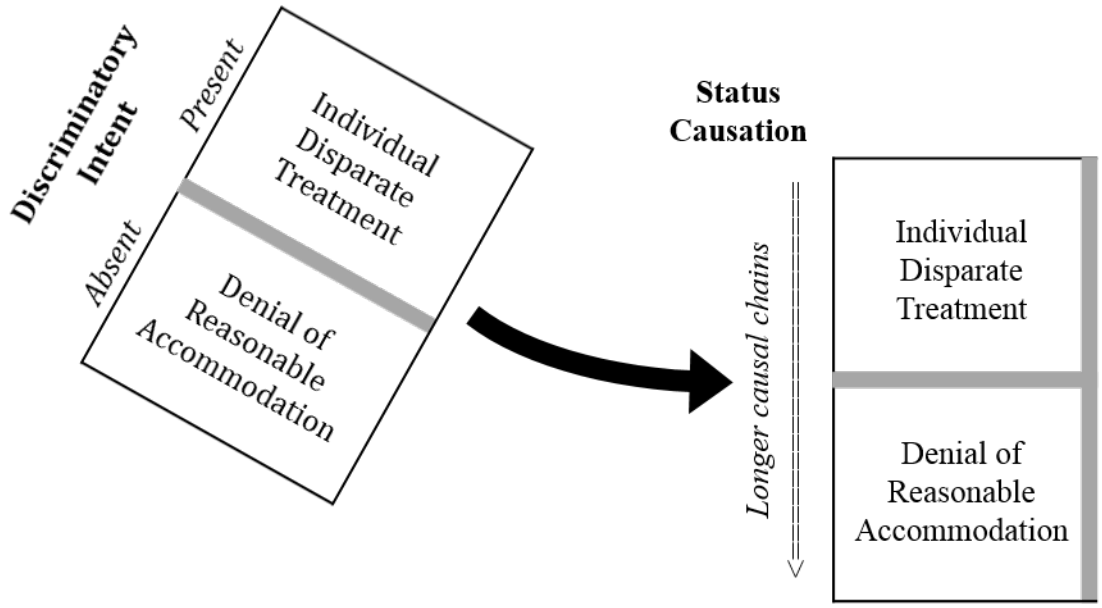
[41] 457 U.S. 440 (1982). For a recent argument that *Teal* exemplifies theoretical challenges in equality law, see Ford, *supra* note 17, at 174 (criticizing Teal as "hard to square with any conceptually coherent account of the law").

[42] A similar "bottom-line" analysis has motivated a prominent critique of the "ban the box" movement to limit employer inquiries into criminal convictions. Some commentators have defended criminal record screening as advancing racial justice by increasing minority hiring overall, notwithstanding that those screened out are disproportionately people of color. *See* Lior Jacob Strahilevitz, *Privacy versus Antidiscrimination*, 75 U. CHI. L. REV. 363 (2008).

earlier in Figure 1. It replaces an opposition in terms of discriminatory intent with a continuum in forms of status causation.

Figure 2



A. Disparate Treatment Claims Identify Status Causation

Generally speaking, a disparate treatment claim arises whenever an employer makes a decision based on an individual's protected status. The canonical formulation focuses on causation: "treatment of a person in a manner which but for that person's sex [or other protected status] would be different,"[43] or what David Strauss aptly termed the "reversing the groups" test.[44] As an initial matter, notice simply that there is status causation whenever there is disparate treatment.

The centrality of individualized causal analysis is illustrated by the irrelevance of an employer's bottom-line workforce composition. The issue is joined when a female plaintiff claims sex discrimination but there is intra-group variation in how women are treated. The Supreme Court confronted this in its first Title VII decision, *Phillips v. Martin Marietta Corporation*.[45] The employer refused to hire women with young children but did not distinguish among men based on parental status. However, women *without* young children were hired at such a high rate that the workforce's total proportion of women exceeded their representation in the applicant pool.[46] These bottom-line statistics, according to the employer, "established that there was no discrimination against women in general," and the district court granted it summary

[43] UAW v. Johnson Controls, 499 U.S. 187, 200 (1991) (quoting City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 711(1978)).
[44] David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956–65 (1989).
[45] 400 U.S. 542 (1971) (per curiam).
[46] *Id.* at 543.

judgment on that basis.[47] In a terse opinion, the Court disagreed and applied the "reversing the groups test" to find discrimination.[48]

Phillips became the touchstone for a long line of "sex-plus" cases imposing disparate treatment liability when employers draw intra-group distinctions and exclude only those women with some additional factor, like having young children.[49] Intra-group distinctions can be double-edged, as *Phillips* showed.[50] Many subsequent sex-plus cases involved airlines that strongly preferred its flight attendants to be young, unmarried, childless, slim, conventionally attractive women. Airlines hired these women at much higher rates than men but were less discriminating among the men they did hire. Female plaintiffs who lacked the required plus factor uniformly succeeded in attacking these policies as disparate treatment: the airline would hire a man, but not a woman, who was older, married, of average weight, had children, and so on.[51] It was of no moment whether the employer hired enough *other* women to leave women "as a group" overrepresented in the job category.[52] All that mattered was that an individual lost employment "because of such individual's race, color, religion, sex, or national origin."[53]

Despite this causal analysis, disparate treatment claims long have been glossed in terms of the employer's mental state, not the employee's injury. They are characterized as claims of "intentional discrimination," which require proof of "discriminatory intent" or "animus." Such invocations of mental state suggest a particular understanding of what defines discrimination and makes it wrongful. That understanding focuses on how the employer thinks about its employees and goes about making employment decisions. Discrimination is a problem of defects in this process, from "forbidden grounds"[54] for decision to cognitive errors that require "debiasing."[55]

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[47] 411 F.2d 1, 2 (5th Cir. 1969); *see also* 400 U.S. at 543.
[48] 400 U.S. at 544.
[49] *See also* Enrique Schaerer, *Intragroup Discrimination in the Workplace: The Case for Race Plus*, 45 HARV. C.R.-C.L. L. REV. (2010); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001).
[50] For this reason, "plus" cases extend the principle prohibiting double standards. That principle allows but-for causation to establish disparate treatment even when protected status is not the *sole* cause. *Phillips* rejected the sole cause standard on which the lower court had relied, *see* 411 F.2d at 3, and quickly reaffirmed the principle in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282-83 & n.10 (1976). If an employer requires a high school degree from African Americans but hires white drop-outs, African Americans are not excluded *solely* based on race but instead based on both race and educational attainment. Such a double standard would suppress aggregate black employment, unlike the case for women in *Phillips*. *See also* Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994).
[51] *See* Gerdom v. Cont'l Airlines, 692 F.2d 602, 605-07 (9th Cir. 1982) (collecting cases).
[52] So-called "equal opportunity harassers" raise similar issues by targeting both women and men. Even if women as a group fare no worse than men, a female plaintiff wins if she was harassed because of her sex (or race, etc.). In that case, the discrimination she faced cannot be cured by harassment of a man. Brown v. Henderson, 257 F.3d 246, 254-55 (2d Cir. 2001) (synthesizing cases).
[53] 42 U.S.C. § 2000e-2(a).
[54] RICHARD A. EPSTEIN, FORBIDDEN GROUNDS (1992). *See also* Alexander, *supra* note 35, at 153 ("examining discrimination as an expression of various types of preferences").
[55] Kang & Banaji, *supra* note 33.

Disparate treatment jurisprudence fits poorly into this process-defect picture. Established doctrine focuses on the causal role of protected status, not the employer's reasons for giving protected status causal significance.[56] "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."[57]

This principle explains why "rational discrimination" is prohibited as disparate treatment. Such cases arise when an employer uses sex or race instrumentally to pursue some ordinarily legitimate business goal. Classic contexts in which this could plausibly happen include sex differences in longevity, sex differences in reproduction, sex and race differences in likelihood of acceptance by customers or co-workers, and race/national origin differences in citizenship/immigration status. Even if the correlation is imperfect, an employer might rationally use sex or race as a proxy for some other permissible consideration.[58]

A rational business motive allows individual disparate treatment to be recharacterized as sex/race-neutral at the level of groups.[59] In the foundational *Manhart* case, the employer used women's greater average longevity to justify deducting higher pension contributions from each woman's paycheck.[60] Thus, it argued, women and men were treated equally as groups: both received the same return in annuities paid out relative to the contributions they paid in (men paid in less and died sooner). Each individual woman and man paid in an actuarially sound amount. The Court resoundingly rejected this mode of analysis:

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . .

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[56] *See* Rich, *supra* note 10.

[57] UAW v. Johnson Controls, 499 U.S. 187, 199 (1991). *Accord* Ferrill v. Parker Grp., 168 F.3d 468, 473 & n.7 (11th Cir. 1999).

[58] Such instrumental motives may also coexist with various forms of stereotyping and bias. *See, e.g.*, Wendy W. Williams, *Equality's Riddle*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 335-338 (1984) (arguing that cost justifications of pregnancy discrimination ignore the role of sex-stereotyping).

[59] The same is true for sex stereotyping cases in which employers require workers to conform, depending on their sex, to one or another gender stereotype. Because only the nonconforming subgroup faces injury, the employer may plausibly disclaim any motive to harm the group as a whole: the employer could simply require gender conformity from both women and men, assigning roles thought to be complementary rather than hierarchical. Mary Anne Case, *Feminist Fundamentalism on the Frontier Between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, 384 (2009); Mary Anne Case, *"The Very Stereotype the Law Condemns"*, 85 CORNELL L. REV. 1447, 1473-76 (2000). Courts reject this defense on principle, without needing to determine whether separate really is equal. Instead, individual treatment drives the analysis. *See* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 122 (2d Cir. 2004). Prohibiting disparate treatment thus protects a zone of individual liberty regardless of whether relative group status is at stake. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2007).

[60] City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

> Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.[61]

Accordingly, the Court applied the "simple test of whether the evidence shows 'treatment of a person in a manner which but for the person's sex would be different.'"[62] Since *Manhart*, the general rule is that disparate treatment is prohibited whether it is instrumentally rational or not.[63]

As Stephen Rich has shown, this focus on status causation is more robust than the current vogue for using "implicit bias" to loosen the strictures of "discriminatory intent" within disparate treatment doctrine.[64] If an employer responds negatively to a woman because she is a woman, the "simple test" of but-for causation is met even if the employer *does not realize* the role the employee's sex is playing in the decision-making process. But so what? Standard analyses of implicit bias invoke process defect: employees should be judged according to legitimate business criteria like cost and productivity, criteria independent of their protected status. Deviations from those criteria are "bias," which is equally unfair whether intentional or not.[65] But this account cannot explain the prohibition on rational disparate treatment.[66]

In contrast, if the problem of discrimination is the unfairness of status causation, then disparate treatment doctrine's "simple test" is elegantly tailored to the issue at hand. From the perspective of the injured worker, the injury is constant whether disparate treatment is rational or irrational, self-conscious or implicit: I lost this job because I am a woman rather than a man.[67]

B. Status Causation Links Disparate Treatment to Nonaccommodation

Conventionally, disparate treatment and nonaccommodation are seen as fundamentally different accounts of discrimination: the former grounded in the wrong of discriminatory intent, the latter unmoored from that wrong.[68] My contrary view is that both share the same two foundational elements: status causation (not getting the job because of protected status) and, what I have not highlighted until now, employer responsibility for the injury. Giving separate regard to employer responsibility makes sense of the conventional distinction while pointing to additional forms of continuity.

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[61] *Id.* at 708-09. *See also* Floyd v. City of New York, 959 F. Supp. 2d 540, 664 (S.D.N.Y. 2013).
[62] 435 U.S. at 711. *Manhart* focuses on the use of sex to apply a policy to individuals, not on the reasons for adopting the policy. No finding of discriminatory intent was made regarding the latter.
[63] *See generally* Bagenstos, *supra* note 39. *Manhart*'s refusal to excuse individual disparate treatment so long as groups are treated equally in aggregate stands in tension with some lower courts' attempts to carve out exceptions to disparate treatment doctrine in analogous situations. *See* Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1083 (9th Cir. 2004); Hamm v. Weyauwega Milk Prods., 332 F.3d 1058, 1066-68 (7th Cir. 2003) (Posner, J., concurring).
[64] *See* Rich, *supra* note 10.
[65] Kang, *supra* note 34, at 646-47; Kang & Banaji, *supra* note 33, at 1067 & n.15, 1076 & n.70.
[66] *See* Rich, *supra* note 10.
[67] *See* Fiss, *supra* note 17, at 260; Bagenstos, *supra* note 39, at 857; Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?*, 61 LA. L. REV. 495, 499 (2001); Kang & Banaji, *supra* note 33, at 1076.
[68] *See, e.g.*, Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate*, 60 VAND. L. REV. 849 (2007).

1. Internal and External Forms of Status Causation

Status causation is essential both to disparate treatment and to nonaccommodation claims, but it manifests in two different forms: internal and external. Discriminatory intent establishes *internal* status causation, in which protected status enters the causal chain through the employer's decision-making process itself. An employer makes a decision "based on" the employee's protected status or "takes it into account" in the following sense: the employer would have reached a different decision if faced, at the moment of decision, with an otherwise identical employee who differed only in protected status.[69] This conception takes the employee as the employer finds her and ignores any role protected status might have had further back in the causal chain. Thus, if an employer requires workers to use some specific tool and two applicants can do so equally well, it is disparate treatment for the employer to break the tie based on sex. But if their ability to use the tool differs and the employer acts on that difference, there is no disparate treatment.

Notice that the distinction between "intentional" and "implicit" bias makes no difference here. Both refer only to employer decision-making responsive to an employee's protected status. There is neither intentional nor implicit bias where the employer responds only to ability to use the tool. Thus, although the Article often uses "discriminatory intent" as shorthand, my argument is robust to expansive conceptions of disparate treatment that include both implicit bias and rational disparate treatment.

Status causation also arises when protected status enters the causal chain outside the employer's decision-making process. An applicant who cannot use the tool well because of her disability will not get the job because of her disability, notwithstanding the absence of disparate treatment. This scenario raises only a question about nonaccommodation.[70] Here, protected status affects the worker's other characteristics, and those other characteristics in turn are considered by the employer. This is *external* status causation.

Status causation unites disparate treatment and nonaccommodation liability. Whether the causal pathway is internal or external to the employer's decision-making process matters little on a plausible account of the injustice from the employee's or applicant's perspective: either way, I

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[69] For this reason, disparate treatment requires information about protected status. *See* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003).

[70] If the worker's disability is part of why the employer refuses to make an exception, then a disparate treatment claim would arise, but nonaccommodation claims do not require such a showing. *See* Bagenstos, supra note 39. *See also* Young v. UPS, 135 S. Ct. 1338 (2015) (allowing disparate treatment liability for selective nonaccommodation of pregnancy). The same point can apply to adoption of a facially neutral rule because of relative lack of concern for those harmed by it. *See* Brest, *supra* note 17, at 15 (analyzing "racially selective sympathy"); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2029 (1995) (analyzing "transparently white decisionmaking"). Again, a valid nonaccommodation claim does not require (either logically or legally) such disparate treatment. *See* Bagenstos, *supra* note 39, at 852-55; Zatz, *supra* note 11, at 1390. *See also* Mari J. Matsuda, *Voices of America*, 100 YALE L.J. 1329 (1991) (arguing for a nonaccommodation analysis of accent discrimination to go beyond a disparate treatment analysis of subtle forms of cultural bias).

lost out because of my race, sex, disability, or other protected status. The same point that ties together diverse forms of disparate treatment, whether self-conscious or implicit, rational or irrational, likewise unites all forms of disparate treatment with nonaccommodation.

This causal analysis also comports with a straightforward interpretation of statutory text. The recurring operative phrase is a prohibition on employer conduct that occurs "because of" or "on the basis of" an employee's protected status. The dissenting Justices in *Inclusive Communities Project* insisted, quite stridently, that employer action "because of" an employee's race means "only employer decisions motivated by a protected characteristic," in the disparate treatment sense;[71] anything else would "tortur[e] the English language."[72] But consider the following sentence: "the driver struck the pedestrian because of the pedestrian's failure to heed the 'Don't Walk' signal." This could mean that the driver chose to strike the pedestrian, despite the ability to avoid her but motivated by the pedestrian's reckless and law-breaking behavior. It also could mean that, because the pedestrian stepped into moving traffic, the driver had no opportunity to avoid striking her despite being indifferent to how she entered the street.[73] The former corresponds to internal status causation and the latter to external. The *Inclusive Communities Project* dissenters mistakenly collapse the causal statutory language into the one specific causal mechanism that runs through a decision-maker's motivations.

This textual point has two important legal precedents. First, the Supreme Court itself once interpreted Title VII's text this way, when it allowed a religious accommodation claim before Congress amended the statute to effectuate one explicitly.[74] Second, in the ADA, Congress explicitly defined "[to] discriminate against a qualified individual on the basis of disability" to include "not making reasonable accommodations" for such an individual.[75] Thus, what the *Inclusive Communities Dissenters* deem unimaginable is precisely what Congress did explicitly in the ADA. That surely renders plausible a similar interpretation in a closely related statute. Indeed, lower courts have relied upon precisely this causal reading to *restrict* ADA nonaccommodation claims. No accommodation obligation is triggered merely because a worker

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[71] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2526-27 (2015) (Thomas, J., dissenting). *Accord id.* at 2534 (Alito, J., dissenting).

[72] *Id.* at 2534 (Alito, J., dissenting).

[73] *See* Zatz, *supra* note 6.

[74] *See* Trans World Airlines v. Hardison, 432 U.S. 63, 74-75 & n.11 (1977). *Hardison* entertained a Title VII claim based on a worker's refusal to work on Saturday because of his religious beliefs. There was no contention that the employer was motivated by the religious origins of the refusal, nor is there anything intrinsically religious about refusing to work on Saturday. The Court nonetheless held that this could be discrimination "because of [the plaintiff's] religion." Congress recently had amended Title VII to ensure this result by defining "religion" to include any religiously motivated practice unless it could not be reasonably accommodated. *See* Equal Employment Opportunity Act of 1972, sec. 2, § 701(j), Pub. L. 92-261, § 2(7) (March 24, 1972) (codified at 42 U.S.C. § 2000e(j)). The Court, however, relied only on the pre-amendment statute in order to avoid the retroactivity question.

[75] 42 U.S.C. § 12112(b)(5)(A). Both as a matter of statutory text and judicial interpretation antidiscrimination law uses "because of" and "on the basis of" interchangeably. *See* 42 U.S.C. § 2000e(k) (2013); *id.* § 2000e-2(e); Smith v. City of Jackson, 544 U.S. 228, 238-39 (2005) (plurality opinion); *Smith*, 544 U.S. at 246 (Scalia, J., concurring in part and concurring in the judgment).

with a disability cannot use a particular tool; instead, the worker must be unable to use the tool *because of* her disability, and thereby, absent accommodation, face workplace harm *because of her disability.*[76]

2. Separating Employee Injury from Employer Responsibility

From the perspective of the injured employee, disparate treatment and nonaccommodation involve the same thing: harm suffered because of one's protected status. Nonetheless, what plausibly could differentiate internal and external forms of status causation is something else: the basis for holding the employer responsible for inflicting this injury. In disparate treatment cases, the origination of status causation within the employer's own decision-making process helps justify holding the employer to account for the injury, all the more so in the paradigmatic case where disparate treatment is both knowing and irrational. In other words, discriminatory intent does double duty: it both establishes status causation and supports employer responsibility.[77] Disaggregating these functions is the key to seeing the continuities with nonaccommodation.

Nonaccommodation doctrine formally separates these questions of injury and responsibility. As we will see, disparate impact does, too. For nonaccommodation, responsibility turns on a separate inquiry into the employer's knowledge that it is inflicting disability-based harm and its ability to prevent or remedy that harm reasonably and without undue hardship.[78] Both notice and needlessness are simply presumed in paradigmatic disparate treatment cases involving knowing reliance on protected status for spurious or pernicious reasons.[79] Thus, differences in how status causation arises produce distinct approaches to establishing employer responsibility.

For this argument to accomplish anything, those differences cannot amount to finding responsibility whenever there is internal causation but never when there is external status causation. Otherwise, the fundamental divide between disparate treatment and nonaccommodation would re-emerge under the rubric of responsibility, notwithstanding the unified harm represented by status causation. Happily, recalling the ban on "rational" disparate treatment clarifies that no plausible account of employer responsibility will establish a firm boundary between disparate treatment and nonaccommodation.

To make a long story short, avoiding internal causation (disparate treatment) can be burdensome, just like making accommodations can be therefore. Therefore, employer responsibility for disparate treatment already accepts the feature sometimes asserted to preclude

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[76] *See generally* Cheryl L. Anderson, *What Is "Because of the Disability" Under the Americans with Disabilities Act?*, 27 BERKELEY J. EMP. & LAB. L. 323 (2006). *See also* Zatz, *supra* note 11.
[77] *See* Zatz, *supra* note 11, at 1411-12.
[78] *Id*.
[79] *Id.* Consistent with this analysis, disparate treatment liability becomes more controversial—and in ways that track disputes over nonaccommodation liability—when it extends beyond self-conscious, instrumentally irrational "discriminatory intent" to include consideration of protected status that may be unconscious, difficult to control, or costly to avoid, as it does in realms of implicit bias, subordinate bias, and rational discrimination. *Id.* at 1426 & n.265.

responsibility for external causation: taking on costs to advance workplace equality.[80] Conversely, avoiding external causation (nonaccommodation and, as I will show, disparate impact) can be cheap or even costless. Therefore, employers would be held responsible for some forms of nonaccommodation (and disparate impact) even on a narrow view that precluded liability for rational disparate treatment.[81]

For these reasons, any persuasive account of employer responsibility will not draw the line at the boundary between internal and external status causation. Therefore, providing such an account is beyond the scope of this Article. Providing one seems not to present any distinctive problems for antidiscrimination law.[82] Instead, the fundamental question for the field is the nature of the relevant injury.

Status causation always implicates the employer because, by definition, it involves harm at work in hiring, pay, or other "terms, conditions, or privileges of employment,"[83] and these are matters the employer controls. Nonetheless, employer conduct can be implicated in different ways because the causal chain culminating in workplace harm may lead out of the workplace as it wends its way back to the worker's protected status. These variations in the employer's role are reflected in different approaches to establishing employer responsibility—in disparate treatment, automatically subject to a narrow BFOQ defense; in nonaccommodation, more cautiously, subject to appropriate notice and a weighing of employer burdens. Throughout it all, though, the plaintiff's injury is always status causation. The next Part focuses on how employment discrimination law goes beyond individualized proof to establish the existence of this injury.

II. STEP TWO: FROM INDIVIDUALIZED TO STATISTICAL PROOF

The previous Part's analysis of nonaccommodation opens the door to a similar account of disparate impact claims. These, too, proceed without proof of discriminatory intent. Completing the analogy requires showing that disparate impact claims likewise target status causation, just of the external rather than internal sort.

A serious obstacle lies in the way. Disparate impact claims proceed by establishing group disparities in an employment practice's effects. That showing is both necessary and sufficient to establish a *prima facie* case and burden the employer with justifying its conduct. This group-level analysis seems fundamentally incompatible with the individualized inquiry into status causation that characterizes individual disparate treatment and nonaccommodation claims.

The same obstacle is confronted and overcome in another discrimination claim, that of systemic disparate treatment. Rather than starting with an individual injured worker, systemic disparate treatment analysis starts with a population of workers. It uses disparities in the rates at

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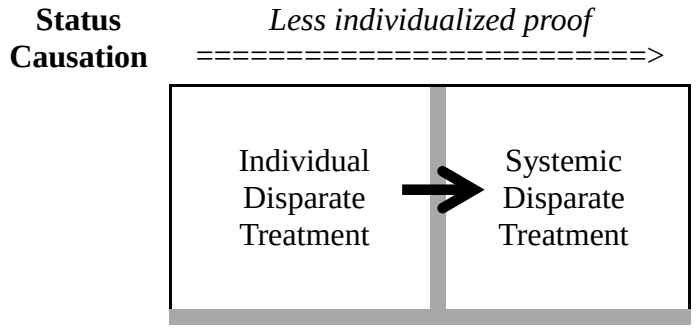
[80] *See* Zatz, *supra* note 11.
[81] *Id.*
[82] For an example of similar problems of responsibility in wage and hour law, see Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010).
[83] 42 U.S.C. § 2000e-2(a)(1).

which workers suffer harm to infer that disparate treatment is occurring within the population. Typically, this internal status causation occurs too infrequently to identify individual victims based on statistical evidence alone; accordingly, no one worker can bring an individual disparate treatment claim. We know that some individuals are suffering status causation, but not which ones.

As represented schematically in Figure 3, this argument puts in place the horizontal axis of the Introduction's Figure 1. The next Part will show how the same understanding of statistical proof can be extended to disparate impact.

Figure 3.



A. The Convergence and Divergence of Nonaccommodation and Disparate Impact

Disparate impact analysis applies to populations composed of individuals. That elementary point provides the basis for using population-level disparities to draw inferences about the experiences of individuals within a population. The point is clearest when individual experiences do not vary within that population.

For this reason, my argument begins with an important scenario where nonaccommodation and disparate impact converge. This happens when identifiable cases of external status causation are a regular occurrence. Their identifiability makes them cognizable as nonaccommodation claims. Their regularity makes them aggregate into noticeable differences across groups, the predicate for a disparate impact claim. The claims part ways, however, when this uniformity breaks down into intra-group variation that cannot be resolved individual-by-individual.

1. Convergence: External Status Causation En Masse

Consider some borderlands between disparate treatment and disparate impact. Like the "plus" cases, these involve intra-group variation: the employer's criterion excludes some but not all group members. But instead of considering both protected status and a distinct "plus" factor, the employer considers a factor that is exclusive to but not universal within a group.

The most obvious example is the exclusion of pregnant women. Women as a class will suffer a disparate impact even though not all women are excluded. Moreover, any one pregnant woman plainly suffers status causation: were she a man she would not be pregnant and therefore

would not be excluded.[84] Or consider alienage. By virtue of territorially-based birthright citizenship rules, only the foreign born can be noncitizens.[85] Therefore, when an employer excludes noncitizens, each worker's national origin is a cause of her exclusion. Moreover, the foreign born suffer a disparate impact as a class. That is true even though some born abroad will not be excluded, namely those who have naturalized.

These scenarios elicit confusion about whether they constitute disparate treatment. They exhibit both exclusivity (only women are refused jobs based on pregnancy) and non-universality (not all women are pregnant). This combination renders it ambiguous whether to conceptualize pregnancy and alienage as distinct from (though causally related to) sex and national origin or, instead, as functionally equivalent to sex and national. In both cases, the Supreme Court initially chose the former path, insulating these practices from disparate treatment attack. The characteristic the employer considered (pregnancy, alienage) was deemed analytically distinct from protected status.[86] Nonetheless, the employer's "facially neutral" practice remained vulnerable to disparate impact attack.[87]

In this Article's terms, disparate treatment on the basis of alienage and pregnancy clearly involve status causation with respect to national origin and sex, respectively. What is debatable is merely the subcategorization into internal or external forms of status causation. We might stipulate that alienage and pregnancy are analytically distinct characteristics, and so an employer can consider them without considering national origin or sex and thus without committing disparate treatment. Even were that so, alienage and pregnancy remain characteristics for which

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[84] This point is complicated by pregnancies in transgender men. That phenomenon raises serious conceptual challenges for the relationship between pregnancy and sex discrimination, *see* Lara Karaian, *Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law*, 22 SOC. & LEGAL STUD. 211 (2013); Darren Rosenblum, et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207, 233 (2010), but it remains rare enough that solving them is unnecessary for present purposes.

[85] As with pregnancy and sex, there is some wiggle room. A natural-born citizen can relinquish U.S. citizenship, *see* 8 U.S.C. § 1481, but, again, this is a sufficiently marginal phenomenon not to disrupt the inference in question.

[86] General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 93-95 (1973). Congress subsequently overruled *Gilbert* with the Pregnancy Discrimination Act of 1978 (the "PDA"), but it has left *Espinoza* in place. Some have argued for broader conceptions of "national origin." *See* Juan F. Perea, *Ethnicity and Prejudice: Reevaluating National Origin Discrimination Under Title VII,* 35 WM. & MARY L. REV. 805 (1993). For related arguments about "race," see Angela Onwuachi-Willig, *Another Hair Piece,* 98 GEO. L.J. 1079 (2010); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?,* 2005 WIS. L. REV. 1283 (2005); DEVON W. CARBADO & MITU GULATI, ACTING WHITE? (2013). *But see* RICHARD FORD, RACIAL CULTURE: A CRITIQUE (2005); Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine,* 55 STAN. L. REV. 2195 (2003).

[87] *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Harris v. Pan Am. World Airways, Inc., 649 F.2d 670 (9th Cir. 1980). *Espinoza* rejected a disparate impact claim because Mexican-Americans numerically dominated the workforce. 414 U.S. at 92-93. This "bottom line" reasoning would seem not to have survived *Teal*. It also suggests how sensitive a bottom-line regime is to group definition. Utilizing "foreign born" or "born in Mexico" as the relevant national origin would have substantially altered the bottom line statistics.

national origin and sex are each a cause. Moreover, status causation is individually identifiable: any one worker excluded based on her pregnancy or alienage was excluded because of her sex or national origin. All this arises without the employer ever considering an individual's sex/national origin.

For these reasons, analytically these scenarios present nonaccommodation claims,[88] regardless of whether, doctrinally, Title VII allows such claims. Here, nonaccommodation and disparate impact analysis converge: the employer's practice excludes individuals because of their sex/national origin, and it has a disparate impact on women/immigrants. This convergence suggests my more general claim that nonaccommodation and disparate impact attack the same mechanism of injury, though they may use different evidentiary tools to do so.

Nonetheless, a general account of disparate impact liability must go further, into terrain where a nonaccommodation claim could not follow. Such an account must link disparities at the level of group comparison to status causation at the level of individuals, even when status causation cannot be detected individual-by-individual. The next subsection sharpens this challenge.

2. Divergence: Beyond Individualized Proof

Disparate impact takes center stage when external status causation cannot be established in the individualized way necessary to a nonaccommodation claim. The difficulty attributing status causation to individual class members is evident in the foundational disparate impact case, *Griggs v. Duke Power*.[89] African-American plaintiffs challenged the employer's policy requiring, among other things, a high school degree for workers seeking positions in the power plant's more desirable "inside" jobs. In North Carolina at the time, 34% of white men had high school degrees, as did only 12% of African-American men. The Supreme Court found these statistics sufficient to make out a *prima facie* case under the disparate impact theory.

The *Griggs* degree requirement differs from rules excluding pregnant women or noncitizens. There is some similarity: in each case, there is variation in protected status among those *included* in employment. African American graduates, nonpregnant women, and foreign born citizens all may be hired, along with all whites, men, and native-born citizens. Among those *excluded*, however, the picture is different. The pregnancy and alienage restrictions exclude only women and the foreign born. In *Griggs*, by contrast, while four-fifths of African Americans were excluded by the high school degree requirement, so too were two-thirds of whites.

Because lack of a degree was far from exclusive to African Americans, many African Americans screened out for lack of a degree would also have been screened out had they been white—they might just have been among the many whites without a degree..[90] In contrast, any

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[88] *See* Matsuda, *supra* note 70, at (developing a nonaccommodation analysis of accents arising from national origin), 1359.

[89] 401 U.S. 424 (1971).

[90] For this reason, *Griggs* cannot readily be shoehorned into a disparate treatment framework by treating nongraduation as "functionally equivalent" to blackness, Fiss, *supra* note 17, at 299-301, as the PDA did

excluded by a no-pregnancy rule would not have been excluded had she been a man. For this reason, one cannot in *Griggs* build up to the aggregate disparity by starting with known cases of status causation, again in contrast to pregnancy or alienage exclusions.

Furthermore, additional proof cannot close this gap between group disparities and individually established status causation. In *Griggs* and other typical disparate impact cases, no plaintiff attempts to demonstrate that she in particular did not satisfy the employer's requirement because of her race. Nor does such a demonstration appear feasible. Instead, establishing differential pass/fail rates is both necessary and sufficient to establish a *prima facie* case of disparate impact. Chains of causation for individuals seem irrelevant.

For these reasons, statistics like those in *Griggs* generally are understood as demonstrations of "group harm"[91] or "differential impact on groups."[92] The reliance on group comparisons and lack of individualized proof both support the conventional notion that disparate impact liability rests on "a group-oriented conception that seeks to upgrade the status and condition of protected groups by eliminating all unnecessary barriers to group advancement."[93] This "notion of what constitutes a barrier is defined in terms of the adverse effect it has on the group."[94] Some language in *Griggs* supports this interpretation, including the famous passage reasoning that "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups."[95]

Yet skepticism of this group-harm conception should take root in the same facts that separated disparate impact from nonaccommodation: intra-group variation.[96] Not only did the vast majority of whites (66%) fail the high school degree requirement in *Griggs*, but a significant minority of African Americans (12%) passed. The degree requirement represented a thumb on the scale that neither uniformly favored whites nor uniformly disfavored African Americans.

One response to this point is to redefine the protected class. On such a view, the fundamental flaw with a high school degree requirement is its unfairness to all nongraduates, black or white. Uniformity is reestablished within the class of nongraduates, all of whom are

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by defining sex to include pregnancy. On some limitations of this analysis of pregnancy, see Zatz, *supra* note 11. *See also* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1324-29 (1987) (discussing the difficulties extending feminist analysis of pregnancy to less stark gender differences like caregiving roles).

[91] Chamallas, *supra* note 26, at 318.

[92] Alfred W. Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent*, 20 HARV. J. ON LEGIS. 99, 109 (1983). *See also* Perry, *supra* note 26, at 558-59; Willborn, *supra* note 26, at 801.

[93] Chamallas, *supra* note 26, at 316-17.

[94] *Id.* at 365. *See also* Friedman, *supra* note 26, at 81-84; Paetzold & Willborn, *supra* note 26, at 374-77. Aspects of Paetzold & Willborn's analysis anticipate mine here, but their "barrier theory," like Friedman's "access principle," relies on disproportionate exclusion of a group and assumes uniform harm within the group, once the correct level of particularity is chosen. *See supra* note 26, at 374-77, 380, 382, 397; Friedman, *supra* note 26, at 382.

[95] 401 U.S. 424, 432 (1971).

[96] *See* Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429 (2014).

excluded.[97] From this perspective, the racial disparity is at most a "canary in the coal mine" or an aggravating factor atop something more fundamental. Joseph Fishkin's recent work exemplifies this approach. Faced with *Griggs'* group disparities, Fishkin reasserts a foundation in individual harm by eliminating intra-group variation: all those nongraduates share the same injury of being caught in an opportunity "bottleneck" produced by the degree requirement.[98] This approach, however, attenuates *Griggs'* connection to a specifically *racial* injustice.[99]

This Article blazes a different path. It resists both a shift away from individuals toward group harm and also a shift away from race (or other protected status) toward a direct attack on the criterion that produces a disparate impact. This requires providing a new answer to the problem identified above: what connects group-level disparities to individual injury based on protected status? To meet this challenge, the next section turns to another branch of employment discrimination law: systemic disparate treatment.

B. The Convergence and Divergence of Individual and Systemic Disparate Treatment

This section shows how individual and systemic disparate treatment claims follow the same pattern of convergence and divergence just seen for nonaccommodation and disparate impact. Here, however, the continuity between the claims is well understood. When disparate treatment cannot be established individual-by-individual, systemic disparate treatment claims use statistical evidence of group disparities to show that individuals within a population have suffered disparate treatment. These individuals instances of disparate treatment explain how group disparities arise. This same statistical evidence, however, cannot establish exactly *which* individuals suffered the disparate treatment that generated those disparities. This combination--using statistics to determine that individuals within a population have been injured but without identifying which individuals were injured-- provides the roadmap for understanding disparate impact claims.

1. Convergence: Internal Status Causation En Masse

Like disparate impact claims, "systemic" or "pattern or practice" disparate treatment claims can be subdivided into two types.[100] What both types share is the *systematic* occurrence of disparate treatment, "that racial discrimination was the Company's standard operating procedure—the regular rather than unusual practice" and not merely "isolated," "accidental," or

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[97] In this way, treating the employer's explicit criterion as an independently protected status achieves the same result—turning a disparate impact claim into a disparate treatment claim—as collapsing it into an existing protected status, as in the incorporation of pregnancy into sex.

[98] FISHKIN, *supra* note 7; Fishkin, *supra* note 96.

[99] Many embrace this interpretation of disparate impact analysis precisely because they see it as promoting "universal" concern for disadvantage across racial (or gender, etc.) lines, not "targeted" concern for racial discrimination that risks divisiveness. *See, e.g.*, Fishkin, *supra* note 96; Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838 (2014). Fishkin also characterizes racial status as its own bottleneck. *See* FISHKIN, *supra* note 7.

[100] *See* Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 400-01 (2011).

"sporadic."[101] What differentiates the types is whether this systematic nature can be established by first identifying individual instances of disparate treatment and then aggregating them, or whether instead plaintiffs must rely on statistical comparison to establish pervasive disparate treatment.

In the first type, an employer has a policy of engaging in disparate treatment in every case that meets certain criteria. Each individual case subject to that policy is identifiable, and these aggregate into large-scale disparities. Here, individual and systemic disparate treatment claims converge.

UAW v. Johnson Controls[102] exemplifies this type of case. The employer had a formal policy excluding from battery production jobs all women whose infertility had not been medically documented. Like the pregnancy or alienage exclusions, everyone excluded by the policy was a woman, but not all women were excluded. Each woman excluded by the policy would have an individual disparate treatment claim: she could show that the employer took her sex into account when deciding whether to exclude her. Furthermore, because the policy was applied systematically and excluded only women, it necessarily contributed to a sex disparity in the job category. Similar points apply to *Manhart*,[103] the sex-differentiated pension contribution case.[104] Again, each individual woman could show that her pay was reduced based on her sex, and because this happened systematically, it aggregated into an employer-wide sex disparity in pay.

2. Divergence: Beyond Individualized Proof

Unlike *Manhart* and *Johnson Controls*, most systemic disparate treatment cases cannot be decomposed into identifiable instances of discrimination. In this second type of case, the employer has no policy of taking protected status into account in defined circumstances. Instead, the claims proceed by relying on statistical comparison of aggregate outcomes across groups: the hiring rates of men versus women, the pay rates of whites versus blacks, and so on. In *Hazelwood School District v. United States*, for instance, the plaintiffs' proof showed that blacks were underrepresented among recent hires (3.7%) relative to their presence in the relevant labor market (between 5.7% and 15.4%, depending on how the labor market was defined).[105] And in *Bazemore v. Friday*, the plaintiffs' proof showed that black employees earned on average $300-400 less per year, after controlling for educational attainment, job title, and tenure in position.[106]

Here, systemic disparate treatment claims enter territory where individual disparate treatment claims cannot follow.[107] The substitution of statistical for individualized proof

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[101] Teamsters v. United States, 431 U.S. 324, 336 (1977).
[102] 499 U.S. 187 (1991).
[103] City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978).
[104] *See* discussion *supra* note 60 and accompanying text. Like *Johnson Controls*, *Manhart* was brought as a class action and generally is considered a systemic disparate treatment case. *See, e.g.*, MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION xii (8th ed. 2013).
[105] 433 U.S. 299 (1977).
[106] 478 U.S. 385 (1986).
[107] *See generally* Ford, *supra* note 39.

parallels the divergence of disparate impact from nonaccommodation, as illustrated by the shift from alienage or pregnancy exclusions to a case like *Griggs*.[108] In the systemic disparate treatment context, however, relying on statistical comparisons between groups is not treated as reflecting a fundamental change in the nature of the discrimination at issue. Instead, statistically driven systemic disparate treatment claims allege the same thing we saw in *Manhart* and *Johnson Controls*: the employer's systematic practice of taking individuals' protected status into account when making employment decisions about those individuals.[109] They simply use a different method of proof. The aggregate nature of the evidence is perfectly compatible with an underlying conception of individual harm.

Statistical evidence in systemic disparate treatment cases detects the telltale pattern that arises if disparate treatment occurs regularly, though not uniformly, within a body of employment decisions. In such circumstances, there is no blanket exclusion of everyone within some subclass of women, as was the case in *Johnson Controls*. Nonetheless, individual women frequently face unannounced disparate treatment of the same sort that in principle might be challenged through an individual claim. Actually proving any one individual case is likely to be quite messy because there are many plausible explanations for any individualized, fact-sensitive employment decision.[110] Nonetheless, if disparate treatment regularly occurs, it will cumulate into a disparity visible in aggregate. In the end, fewer women get hired.

Through aggregation, statistical proof overcomes the uncertainty that plagues case-by-case analysis of individual disparate treatment. Imagine that, for any one person of color within a large applicant pool, evidence of disparate treatment varies in strength but never crosses the more-likely-than-not threshold. In some cases there is no evidence at all; in others, it reaches a 33% likelihood that this particular applicant suffered disparate treatment. Proceeding case-by-case, each individual should lose her disparate treatment claim. And yet individual disparate treatment most likely is occurring undetected: 15 cases of a 33% chance imply 5 cases of actual discrimination. Statistical proof overcomes the fallacy of case-by-case analysis of low probability events by aggregating them: it reveals when a third of a population faced disparate treatment even though case-by-case analysis would have implied that no one did.

Consider how the Seventh Circuit explained statistical analysis of disparate treatment in *Baylie v. Federal Reserve Bank of Chicago*:

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[108] *See* discussion *supra* Part II.A.2.
[109] *See* Green, *supra* note 100, at 411-12; Ford, *supra* note 39, at 515-16.
[110] *See* Ford, *supra* note 39, at 516-17; Strauss, *supra* note 39, at 1644.

> Suppose 1,000 employees apply for 100 promotions; 150 of the workers are black and 850 white. If all are equally qualified and the employer ignores race, then 85 white workers and 15 black workers will be promoted, plus or minus some variation that can be chalked up to chance. Suppose only 10 black workers are promoted. Is that the result of discrimination or chance? Econometric analysis (an application of statistical techniques) may suggest the answer by taking into account both other potentially explanatory variables and the rate of random variance.[111]

In this hypothetical, the group comparison would be as follows: among black applicants, 6.7% (10 out of 150) were promoted, but among white applicants, 10.6% (90 out of 850) were promoted. This disparity is what we would expect to observe if disparate treatment against a black applicant occurred one third of the time.

Inferring disparate treatment from the observed disparity requires eliminating two alternate explanations.[112] First, the disparity could arise if the black applicants were *not* "equally qualified" with respect to whatever nonracial considerations the employer takes into account. In that case, a nondiscriminatory employer would not hire black and white applicants at the same rate, defeating one premise of the *Baylie* analysis. Second, the disparity could arise by chance. That is why the statistical alternative to individualized proof requires a large body of similar decisions to analyze for patterns unlikely to occur randomly.

Statistically eliminating those alternative explanations for disparities is the major preoccupation in systemic disparate treatment cases,[113] but those techniques and their difficulties[114] are beside the point here. What matters for my purpose is what a successful statistical showing establishes. In the *Baylie* hypothetical, out of 100 promotion decisions, 5 promotions came out differently because of individual disparate treatment, and so 5 black applicants were denied promotion because of their race. The shift from individualized proof to statistical proof reflects no change in what ultimately is to be proven: that individuals suffered disparate treatment. Instead, the shift simply reflects different methods of detecting those injuries.

Nothing is added by characterizing this proof as showing that African Americans have been treated worse "as a group." That characterization merely glosses the fact that more African Americans were subjected to individual disparate treatment than were whites. Insofar as the "group" characterization adds anything, it is legally superfluous.[115]

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[111] 476 F.3d 522, 524 (7th Cir. 2007).
[112] *See* 2 BARBARA T. LINDEMANN et al., EMPLOYMENT DISCRIMINATION LAW 35-19 (5th ed. 2012).
[113] *See generally* RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION (2012).
[114] *See* James D. Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533 (2008).
[115] Harm at the level of groups may contribute to processes of stigmatization, though proof of such processes is no part of systemic disparate treatment doctrine. For discussion of efforts to ground antidiscrimination law in stigmatization, see *infra* note 170.

Proving that individual disparate treatment occurred systematically is not the same as identifying which individuals suffered disparate treatment.[116] Indeed, that was the ultimate point of *Baylie*'s hypothetical. There, two plaintiffs attempted to establish individual disparate treatment claims by recourse to statistical proof that, in the presence of class certification, might have established systemic disparate treatment. The court rejected these individual claims because, even assuming the statistical proof established systemic disparate treatment,

> [I]t cannot reveal with certainty whether any given person suffered. In this example, 150 black workers applied for promotion; 10 were promoted and the other 140 were not. But for discrimination, 15 would have been promoted and 135 not. Which of the 140 non-promoted employees would have received the other 5 promotions? The statistical analysis does not tell us. . . .[117]

Notice how this analysis tracks the problem of intra-group variation previously noted for *Griggs*. Yes, there is a racial disparity that favors whites (10.6% promotion rate) over blacks (6.7% promotion rate) in aggregate. Nonetheless, the vast majority (90.4%) of white applicants were *not* promoted, and a substantial number (6.7%) of black applicants *were* promoted. Although the statistical evidence establishes that individual disparate treatment pervaded a body of employment decisions, such proof does little to show that any one person suffered disparate treatment.[118]

Instead, as *Baylie* notes, such statistical evidence is "helpful in a [systemic disparate treatment] case, where a judge will be asked to direct the employer to change how it makes hiring or promotion decisions."[119] And indeed, such proof can establish liability and authorize injunctive or declaratory relief with respect to organizational practices as a whole.[120] Such relief is similar in form to the remedies characteristic of disparate impact cases like *Griggs*, which directed the employer to stop using a high school degree requirement, rather than focusing in the first instance on individual plaintiffs.

This kind of statistically justified, prospective intervention in organizational practices is characteristic of the modern regulatory state more generally. Judge Easterbrook offered this analogy:

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[116] *See* Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455 (2011).
[117] 476 F.3d at 524.
[118] Although liability in systemic disparate treatment claims neither requires nor establishes proof that any one individual faced disparate treatment, there typically is a remedial phase that allows for individualized identification of victims. *See id.*; *see also* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).
[119] 476 F.3d at 524.
[120] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

> Suppose we know that 20,000 of 100,000 persons exposed to high dosage x-rays eventually develop cancer, and that 19,500 of 100,000 persons not so exposed develop cancer. Should we attribute the apparent excess risk of 500 cancers to the x-ray, or might it have some other cause? . . . A statistical analysis may be able to answer these questions-and, if the answer is yes, the knowledge that high-dosage x-rays increase the risk of cancer may inform a decision whether the benefits of the procedure are worth the extra risk. But it will not tell us whether a given person who develops cancer did so because of the x-ray; only 2.5% of cancers can be attributed to the radiation, so 97.5% of all cancers, even among persons exposed to high-dosage x-rays, have other causes.[121]

In order to prevent hundreds of individuals from suffering harm, we might intervene in whether or how x-rays are used. It is those hundreds of individual harms that motivate the intervention. These harms are detected through statistical analysis, even though we may not be able to identify any one individual who has suffered this harm.

To deny that harm occurs merely because exemplary individuals cannot be identified is to bury one's head in the sand.[122] We do not do so with regard to x-rays causing cancer, and, by virtue of systemic disparate treatment claims, employment discrimination law does not commit that error with regard to disparate treatment.[123]

In sum, systemic disparate treatment claims routinely bridge the gap that seemed so troublesome when comparing nonaccommodation and disparate impact analysis. The statistical comparison of group outcomes is an evidentiary means to an individualistic end: identifying the existence of individual instances of status causation within a larger pool of employment decisions. Conceptually, establishing the existence of such individual injuries is perfectly compatible with being unable to identify exactly which individuals suffered those injuries, even though the existence of those injuries is the *raison d'être* of the claim. Moreover, such evidence provides a sensible basis for legal intervention to prevent or remedy real but elusive harms.

III. PUTTING THE PIECES TOGETHER: EXTERNAL STATUS CAUSATION PROVEN STATISTICALLY

Part I showed how status causation can arise through more than one mechanism, thereby connecting individual disparate treatment to individual nonaccommodation claims. Part II then showed how status causation can be detected through more than one method of proof, thereby connecting individual to systemic disparate treatment claims. This Part integrates these two points to explain disparate impact liability in terms of status causation. A disparate impact claim establishes the existence of external status causation (like nonaccommodation) through statistical proof (like systemic disparate treatment). Thus, one can reach disparate impact claims either by starting with nonaccommodation and introducing statistical methods of proof, or by starting with

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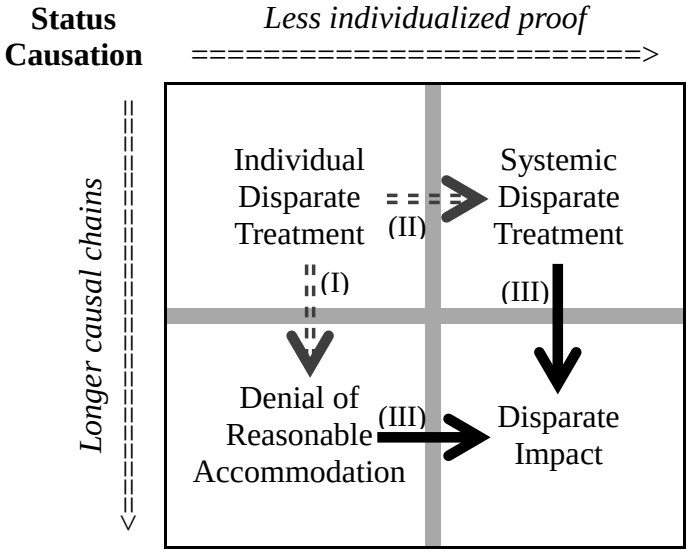
[121] 476 F.3d at 524.
[122] *See* Ford, *supra* note 39, at 516.
[123] *See also* Kang & Banaji, *supra* note 33, at 1080 (analogizing antidiscrimination law to public health policy).

systemic disparate treatment and moving across the boundary between internal and external status causation. This Part traces both routes, which are schematized in Figure 4.

Figure 4.



A. Griggs' *Fable: From Nonaccommodation to Disparate Impact*

Just as statistical proof in systemic disparate treatment cases establishes *internal* status causation (disparate treatment), so too does statistical proof in disparate impact analysis establish *external* status causation. *Griggs* itself described the import of statistical disparities in terms that point to external status causation as the ultimate injury of interest, but it did so in ways that elided rather than explained the specific dynamics of statistical proof.

1. Let the Fox Drink: External Status Causation As the Source of Disparities

Griggs did not merely observe the bare fact of group disparities. Instead, it explained their significance by reference to the particular mechanisms that produced the aggregate statistics by acting on the underlying individuals.

Griggs specifically contemplated a mechanism that fits my definition of external status causation. Against the backdrop of Jim Crow North Carolina, the Court observed that whites' relative success under Duke Power's rules was "directly traceable to race" because African Americans "have long received inferior education in segregated schools."[124] "Congress has now required that the *posture and condition of the job-seeker* be taken into account"[125] by requiring the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of a racial or other impermissible

[124] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).
[125] *Id.* at 431 (emphasis added).

classification."[126] These barriers do not act directly on "the group" but on the individual job-seekers who constitute it.

Griggs' protagonist is an individual, the "the job-seeker." This job-seeker has suffered external status causation: because of his race, he received an "inferior education" that leaves him in a disadvantaged "posture" as he seeks employment. His employer did not take his race into account, but the employer did take into account this "posture" (educational attainment). Had the job-seeker grown up white, he could have gotten a job at Duke Power because he would have arrived in a different posture.

By making hiring decisions based on that educational criterion, the employer intertwines its allocation of jobs with racial dynamics originating in the nominally separate educational sphere. The job-seeker excluded by the employer's choice is the quintessential nonaccommodation plaintiff. The inability to see his grievance is the signature limitation of a discriminatory intent standard, a failure that accounting for implicit bias would not cure. Focusing on the decision-making process blocks inquiry backwards in time and outwards in social space[127] to see how the job-seeker acquired the characteristics on which the employer's decision turned. It ignores external status causation.

Griggs reinforces this connection to nonaccommodation by invoking the fable of the stork and the fox. To illustrate the job-seeker's predicament, the Court compares him to the short-tongued fox who cannot drink from the long-necked vessel well-suited to a stork's bill. To overcome this injustice, Congress has instructed that "the vessel in which the milk [job opportunities] is proffered be one all seekers can use."[128] It is not enough to avoid disparate treatment, to give the fox and the stork the same vessel. Underlying *Griggs* is a metaphor of reasonable accommodation: modifying the tool (here, the vessel) so that the ability to use it is not a function of one's protected status (here, being a fox rather than a stork).

2. The Fable's Limits: Variation Within the Group

By invoking nonaccommodation, *Griggs* captures the causal chain from the job-seeker's race to workplace disadvantage, a chain completed by Duke Power's choice to use the hiring criteria it did. Nonetheless, the nonaccommodation parable is misleading in one crucial respect. The fox's short tongue and snout are both visible and universal among foxes, as is the long, narrow beak among storks. Like the pregnancy and alienage scenarios discussed above, external status causation can be identified in each individual case, and it occurs uniformly within a defined population. But here the analogy to *Griggs*' actual facts breaks down, and for reasons intrinsic to its reliance on statistical proof.

Not every *Griggs* plaintiff is analogous to the fabled fox, the proverbial job-seeker who loses access to employment because of his race. In the fable, for each fox who could not drink, it

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[126] *Id.*
[127] *See, e.g.*, Gotanda, *supra* note 17, at 38-46; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).
[128] 401 U.S. at 431.

was because he was a fox. Among the *Griggs* plaintiffs, however, for each black applicant who lacked a degree (and thus could not be hired), it was not necessarily because of his race.

Recall how *Griggs'* reliance on statistics led it to diverge from a mass of individual nonaccommodation claims. The "group" comparisons in *Griggs* showed variation, not uniformity, within racial groups. Imagine that, absent Jim Crow, the African-American graduation rate would have increased from 12% to equal the white rate of 34%. Of the 88% who had not graduated when *Griggs* was litigated, one-fourth (22% of the whole group) would have graduated under conditions of racial equality (12% + 22% = 34%). But even under conditions of racial equality, the remainder (66% of African Americans, and of whites) still would not have graduated. The 12% vs. 34% *difference* in graduation rates is readily attributable to race, but any individual educational result may not be; neither may any individual's education-based exclusion from employment.

Individualized, non-statistical evidence ordinarily cannot fill this gap. The causal processes typically are too complex and the evidentiary uncertainties too great to show persuasively why any one person did not graduate from high school, and whether his race played a significant role somewhere along the way. Realistically, there is no way to tell which black applicant lacked a degree because of his race and which did not. These uncertainties of individualized proof are analogous to, though perhaps more extreme than, the ones that often plague individual disparate treatment claims and that motivate the turn to statistical proof of systemic disparate treatment.[129]

In sum, *Griggs* uses a fable that sounds in nonaccommodation to stand in for a mix of experiences among many individuals, a mix that aggregates to disparities at the level of groups. This synecdoche exploits the moral appeal of accommodation mandates while obscuring the complexities produced by intra-group variation. Nothing more clearly illustrates both the deep connections and subtle distinctions between nonaccommodation and disparate impact theories.

B. Disparate Impact as Statistical Proof of External Status Causation

Griggs saw correctly that disparate impact claims advance the antidiscrimination project because an employer practice that inflicts a disparate impact is a practice that causes job-seekers to lose employment opportunities because of their race. No discriminatory intent or any form of disparate treatment by the employer is necessary for this relationship to hold. Instead, the fabled job-seeker lacks a degree because of his race and loses a job for that reason: external status causation. This section spells out how statistical proof that an employer practice causes a disparate impact establishes that it inflicts external status causation, just as statistical proof of systemic disparate treatment establishes that it inflicts internal status causation.

1. Only Status Causation Can Generate Group Disparities

The basic intuition is this: for a disparity to arise, some mechanism must interact with individuals' protected status in enough instances to produce the divergent outcomes in aggregate

[129] *See* sources cited *supra* note 110.

graduation rates or the like.[130] Any such mechanism, by definition, produces status causation when this intermediate outcome (graduation) becomes the basis for employer decision-making about some ultimate workplace benefit or harm. Disparities imply that some such mechanism(s) of status causation exist, even when those specific mechanism(s) remain unknown. Just as disparities establish the existence of status causation without identifying individual victims, they likewise do so without identifying the exact causal mechanism linking protected status to harm.

Recall the basic logic of statistical proof of systemic disparate treatment. First, individual instances of disparate treatment will accumulate to produce detectable disparities. Second, although systemic disparate treatment will cause disparities, it does not follow that any disparity is caused by systemic disparate treatment. In addition to random variation, a disparity also will be generated if, within the initial population, there is a correlation between race and some other characteristic on which the employer bases decisions.

This second point is illustrated by imagining *Griggs* beginning as a systemic disparate treatment claim. There, about a third as many African Americans as whites had high school degrees. If Duke Power excluded nongraduates and did not consider individuals' race, then the racial composition of hires would mirror the subset of the initial pool consisting of high school graduates; it would not mirror the racial composition of the initial pool as a whole. If the employer hires African Americans at a rate far below their representation in the entire initial pool but equal to their representation among high school graduates, a policy excluding nongraduates can explain the disparity. There is no basis for inferring systemic disparate treatment, at least if the employer actually imposes and enforces a high school graduation requirement.

Now shift focus from internal to external status causation and revisit the first analytical step above. External status causation should produce disparities. Stipulate that the employer excludes nongraduates and does not engage in disparate treatment. Any status causation must run through an interaction between race and high school graduation. Imagine a cohort of students who entered high school indistinguishable except with respect to race. If each student's race has no effect on whether she graduates, then the racial composition of graduates should mirror that of the entering cohort, random variation aside. If, instead, many African Americans, but hardly all of them, do not graduate because of their race, then African Americans will be underrepresented among graduates relative to the entering class. At a high enough rate in a large enough sample, the resulting disparity will be distinguishable from random variation. Because the employer excludes nongraduates, the rate of nongraduation due to race is the rate of exclusion from employment due to race[131]; it is the rate of external status causation.

Notice that, for these analytical purposes, it does not matter exactly *how* an individual's race affects graduation. There might be many possible pathways: through school discipline, through grading, through course assignments, through health, through removal into the juvenile

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[130] For a couple minor caveats, see discussion *infra* at Part III.B.2.

[131] I am assuming, as *Griggs* did, that the racial distribution of high school degrees within the relevant applicant pool mirrors that in the general population. That assumption will not always hold, but for reasons that do not affect my argument here.

justice system, and on and on. If entry into or progression through these pathways is affected by an individual's race and goes on to affect whether they graduate, the result will be racial disparities in graduation rates, and then in hiring.

Now, the second step. Pervasive external status causation causes disparities, but which disparities are caused by accumulated external status causation? All of them. Once we have ruled out internal status causation (disparate treatment) as the disparity's cause, external status causation is the only possibility. Really. The key to understanding this point is to keep the focus on status causation, not to change the subject by turning to questions of responsibility. I will get to those questions, but they are analytically distinct.

This inevitable inference from disparities to *external* status causation marks an important difference from the contingent inference from disparities to *internal* status causation discussed above. Its inevitability understandably provokes resistance from those (rightly) trained to disentangle causation and correlation.

But consider what we are doing when performing that disentanglement in a systemic disparate treatment case. Typically, that effort proceeds from within a perpetrator perspective concerned with only one specific mechanism of status causation: disparate treatment by the employer. In that vein, Douglas Laycock criticizes the "central assumption"[132] of statistical proof:

> [B]ut for discrimination, the employer's work force would in the long run mirror the racial composition of the labor force from which it was hired. . . . It is a powerful and implausible assumption: the two populations are assumed to be substantially the same in their distribution of skills, aptitudes, and job preferences. Two hundred and fifty years of slavery, nearly a century of Jim Crow, and a generation of less virulent discrimination are assumed to have had no effect; the black and white populations are assumed to be substantially the same. All the differential socialization of little girls that feminists justifiably complain about is assumed to have had no effect; the male and female populations are assumed to be substantially the same.[133]

Laycock's critique concerns statistical proof in systemic disparate *treatment* claims. Its force relies entirely on confining employer "discrimination" to disparate treatment. Indeed, the primary defensive technique in statistically-driven systemic disparate treatment cases is to "factor out" race, etc., from the employer's decision-making process. If there is a racial disparity in possession of some credential (like high school graduation), then the employer's consideration of that credential would produce hiring disparities without any disparate treatment by the employer.

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[132] Kingsley Browne, *Statistical Proof of Discrimination*, 68 WASH. L. REV. 477, 482-83 (1993).
[133] Douglas Laycock, *Statistical Proof and Theories of Discrimination*, 68 LAW & CONTEMP. PROBS. 97, 98 (1986). *See also* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2530 (2015) (Thomas, J., dissenting).

This practice of identifying a "facially neutral" "confounding factor"[134] does not show that individuals' race made no difference to whether they got hired; it does not negate status causation. Instead, it merely shows that their race made no difference *to the employer*.[135] That, however, is perfectly consistent with simply pushing the operation of protected status further back in the causal chain, beyond the boundaries of the employer's decision-making process and therefore beyond the reach of a disparate treatment claim. But the confounding factor can explain the disparity *only* if that factor is itself distributed unevenly by race. Only because high school graduation correlates with race can a high school graduation requirement explain the spurious correlation between race and hiring.[136] But where did the graduation rate disparity come from?

Explaining away one racial disparity by identifying a confounding "neutral" factor always relies on a racial disparity in the distribution of that "neutral" factor. Therefore, the "factoring out" process simply continues iteratively without ever reaching a point where racial disparities disappear. A racial disparity in graduation rates may not come from the racially selective denial of diplomas to students who have met all the graduation requirements. More likely, it may be composed of the "neutral" (in the disparate treatment sense) denial of diplomas to students who are expelled, who fail to accumulate necessary credits, or who drop out. But where do those disparities comes from? If racial disparities in high school graduation rates can be explained by racial disparities in the quality of students' primary education, or in their subjection to school discipline, or in their family income, then somewhere along the line, individuals' race is making a difference in these causal inputs into graduation and then into hiring.

Far from denying a causal role to protected status, factoring-out techniques affirm that role while merely pushing it further back in the causal chain. Laycock's invocation of Jim Crow and childhood socialization appeals precisely to obvious ways that race and sex *do* matter, just not in the one specific way relevant to a disparate treatment claim. Denying disparate treatment simply pushes the entry point for protected status across the boundaries between institutional spheres, as we move from internal to external mechanisms of status causation and then among various possible external mechanisms. This shift in location may affect which actors bear responsibility for status causation, but it makes no difference to whether workers suffered that injury.

2. The Stability of Protected Status Blunts the Correlation/Causation Problem

My argument faces an obvious objection. It seems to run afoul of the dictum against confusing correlation with causation. But the reasons for that dictum do not apply with their usual force to the particular case of status causation.

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[134] *See* Greiner, *supra* note 116, at 536.
[135] *See id.* at 576-77.
[136] *See* PAETZOLD & WILLBORN, *supra* note 113, at § 6.2

Reconsider the epidemiological analogy. If we want to know whether x-ray exposure causes (some people to become ill with) cancer, we need to control for the possibility that features of individuals that cause x-ray exposure select for heightened cancer risk. So, for instance, if people get x-rays when they feel sick, and having cancer makes people feel sick, then the correlation between x-ray exposure and cancer diagnosis might not indicate that x-ray exposure causes cancer. Instead, the causation could run the other way: cancer is causing people to get x-rays. That is why, in general, correlation does not imply causation.[137]

The reverse causation problem, however, typically does not apply to disparate impact because of specific features of protected status. The analogue to asking "what causes x-ray exposure?" is to ask "what causes protected status?" If high school graduation can cause people to become white, then racial disparities could reflect graduation's effect on race, not the reverse. If, on the other hand, protected status is immutable from birth, then there is no possible basis for this fallacy of inferring causation from correlation.[138]

This reason for discounting the reverse causation problem is consistent with the conventional association of protected status with immutable characteristics. It also can be consistent with a strongly constructivist account if the social practice of ascribing protected status to any one individual is relatively consistent over time.[139] So long as that is generally true, case-by-case disproof of this possibility is unlikely to be worth the trouble. It does, however, provide an important theoretical limit on disparate impact analysis when that analysis is not accompanied by identification of the specific mechanisms producing the disparity.[140] That limit will increase in importance as disparate impact analysis extends beyond its historical foundation

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[137] *See id*.

[138] A subtler problem would arise if some third factor causes both protected status and the confounding factor, leading the latter two to correlate without a causal relationship in either direction. *See id*. The epidemiological analogy would arise if people who smoke are more likely to get x-rays and also more likely to get cancer; x-ray exposure might not cause cancer or vice versa, but instead smoking might cause them both. Again, this problem arises when the cause of protected status itself is at issue. Intergenerational inequality could generate such a problem. If a parent's race is a cause of both her child's race and the size of her child's inheritance, then racial disparities in inheritance might be explained by reference to parents' race, not their children's. That analysis begs difficult questions about processes of racial ascription and about the counterfactual nature of causal claims. For present purposes, the following proposition seems roughly right and sufficient to defeat the objection: an African American suffers harm because of her own race (not just her ancestors') if she suffers harm today because her great-great-grandparents were born into slavery and the intervening generations were born into and lived under Jim Crow. *See* R. Richard Banks, *"Nondiscriminatory" Perpetuation of Racial Subordination*, 76 B.U. L. REV. 669, 670 (1996).

[139] *See* Gotanda, *supra* note 17, at 30-31; FORD, *supra* note 86, at 103.

[140] It may also suggest variation in the applicability of disparate impact analysis across forms of protected status. For instance, if educational attainment or income are more likely to cause a change in religious affiliation than a change in sex, disparate impact analysis might require greater caution for religion than for sex.

in race and sex discrimination, where the case for status stability over time is strongest, to focus on other forms of protected status.[141] I content myself here with the traditional cases.

3. Distinguishing Among Mechanisms of External Status Causation is Unimportant

As argued above, distinguishing between systemic disparate treatment and disparate impact amounts to distinguishing between internal and external forms of status causation. Employment discrimination law rigorously scrutinizes this internal/external distinction, but it shows no interest in further distinguishing among mechanisms of external status causation.[142] Racial disparities in high school graduation rates indicate that individuals' race is making a difference, but they do not show *how* race matters. Disparate impact doctrine requires nothing more. This failure to probe exactly how the disparity arises supports my claim that what matters is status causation. Once disparities establish the existence of this injury, further inquiry into mechanism is superfluous.[143]

Griggs itself is ambiguous on this point. On the one hand, there was no proof of exactly how race affected educational attainment. But, in context, *Griggs* is also consistent with a narrower "past discrimination" theory of disparate impact. On that view, disparate impact liability is and should be limited to disparities originating in disparate treatment by some third party, even if not the employer. *Which* third party, or what combination of them, might remain unimportant; they, after all, are not the defendants. But on this view, the injury of discrimination arises only when *some* actor has taken one's protected status into account. In *Griggs* it seemed obvious that, as the Court noted, educational disadvantage originated in the pervasive disparate treatment of Jim Crow; that could explain why it was superfluous to parcel out causation among the constellation of racist participants in that system.

Yet grounding liability in a third-party's discriminatory intent is a peculiar and unstable view,[144] and the courts quickly rejected any such limitation on disparate impact claims.[145] In *Dothard v. Rawlinson*,[146] the Supreme Court did not hesitate to apply *Griggs* to sex disparities created by minimum height and weight requirements. There was no suggestion that these disparities arose from anything other than biological sex differences, let alone that disparate treatment had caused men to become taller and heavier than women. This, of course, is perfectly consistent with the fox and stork fable invoked by *Griggs*: the unfairness of offering the vessel

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[141] This argument does not rely on the notion that immutability or its analogues is the *reason* to protected certain statuses, just on the extent to which protected statuses, however they are designated, have these features. *See generally* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015).
[142] Paetzold & Willborn, *supra* note 26, at 353.
[143] Again, the analogous point holds for systemic disparate treatment claims. Once the existence of pervasive disparate treatment is established, the law "does not (and should not) require identification of the precise practices, cultures, and policies that produce widespread disparate treatment within the defendant organization." Green, *supra* note 100, at 1446.
[144] *See* Willborn, supra note 26, at 341; Chamallas, supra note 26.
[145] Primus, *supra* note 17, at 524 n.133; Selmi, *supra* note 26.
[146] 433 U.S. 321 (1977).

to the fox derived not from its having been designed to exclude him but from it excluding him in fact.

Dothard establishes that disparate impact liability arises regardless of whether disparities are traceable to prior disparate treatment by any actor, even if not the employer. For this reason, it is true but irrelevant that disparities need not imply any history of disparate treatment, conscious or otherwise.[147] Disparate impact's defenders accept too stringent a standard when they invoke that inference,[148] valid as it may be in many cases, especially those involving racial disparities.

Dothard illustrates the unfairness of losing a job because of one's sex regardless of whether anyone else took sex into account. ADA nonaccommodation claims illustrate the same point.[149] Because a *prima facie* case of disparate impact implies external status causation, attempts to fix the exact mechanism are beside the point. Disparate impact doctrine does not require the parties to waste effort on a useless exercise. Indeed, this feature is crucial to the administrability of disparate impact liability. Without it, an evidentiary quagmire would arise from trying to sort out which mechanisms generated the disparities.[150]

One final point illustrates both the inference from disparities to status causation and the irrelevance of its precise mechanism. The *prima facie* case makes no inquiry into whether the disparities could have been erased if only members of the disadvantaged group had made different choices. In *Griggs*, African Americans in Jim Crow North Carolina had not been *forbidden* to go to high school, or to graduate from it. So in a tendentious sense disparities in graduation rates were caused by fewer African Americans "choosing" to do whatever it took (which some blacks did) to complete high school. But surely that analysis misses the point by ignoring the comparison to what it took for whites, and it did not detain the *Griggs* court.[151]

The irrelevance of plaintiff choices is illustrated by a more recent case involving physical training. In *Lanning v. SEPTA*, the Third Circuit reinstated a disparate impact challenge to a police academy's physical test with a massive disparate impact on women. By doing so, the court rejected the dissent's objections that most women who failed the test could have passed it with sufficient training, and that some women had a "cavalier" attitude toward the test.[152] All that could be true and yet do nothing to displace sex as a cause of the disparity. If similarly cavalier men tended to pass the test without significant training, then the unfairness of a double standard remains: a woman could pass the test by training hard, but a man could just wing it.[153]

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[147] *See* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2530 (2015) (Thomas, J., dissenting).
[148] *See* Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1136 (2010).
[149] *See also* Zatz, supra note 11, at 1401.
[150] *See* Sunstein, *supra* note 39, at 2424.
[151] *See* Ian Ayres, *Market Power and Inequality*, 95 CAL. L. REV. 669, 713 n.159 (2007).
[152] 181 F.3d 478, 495 (3d Cir. 1999) (Weiss, J., dissenting). When the court later upheld judgment for the employer after remand, Judge Weiss, now in the majority, did not revive the personal responsibility argument from his earlier dissent. Lanning v. Se. Pa. Transp. Auth., 308 F.3d 286 (3d Cir. 2002).
[153] *See also* Lynch v. Dean, No. 81-3420, 1985 WL 56683, at *4 (M.D. Tenn. Sept. 30, 1985) (rejecting women's disparate impact challenge to unsanitary toilet facilities because plaintiffs could have avoided

Sex remains a cause of whether a given level of effort suffices to pass the test. As with the "plus" disparate treatment cases, what matters is the presence of status causation, not the absence of other causes.[154]

At root, arguments from choice reassert a perpetrator perspective in which status causation matters only when produced through disparate treatment; otherwise, inequality is naturally ordained[155] or self-inflicted.[156] These are substantive arguments against disparate impact liability generally and against the current structure of the *prima facie* case specifically, but they are not disagreements with my positive analysis in terms of status causation.

To the contrary, all these objections illustrate my broader claim that disparate impact liability rises or falls on the same general principles underlying other areas of employment discrimination law. Disparate treatment and nonaccommodation liability face similar charges that they sometimes wrongly condemn employers for merely acting based on "real differences," rather than imposing liability only when employers irrationally or prejudicially create difference.

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harm by providing their own toilet paper, toilet covers, and cleaning agents), *rev'd* by Lynch v. Freeman, 817 F.2d 380, 388 (6th Cir. 1987) (finding "no legal basis" for inquiring into whether plaintiffs "could have alleviated the effect of the unsanitary facilities"); Onwuachi-Willig, *supra* note 86, 1122-23, 1130-31; Gonzalez, *supra* note 86. *But see* Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (rejecting disparate impact challenge to English-only rules as applied to bilingual Latinos capable of complying with them); Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (same).

[154] *See* discussion *supra* Part I.A. The irrelevance of choice extends to disparities explicable by differences in personal qualities or preferences, such as the *Lanning* dissent's insinuation that women were *more frequently* "cavalier" about training than men. The dubious accuracy of such assertions aside, notice how they imply rather than deny status causation: certain individuals have certain values, preferences, or capacities *because they are members of particular groups*. *See* Siegel, *supra* note 40, at 99-105; Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 26 (2013).

[155] *See, e.g.*, RICHARD HERNSTEIN & CHARLES MURRAY, THE BELL CURVE (1994); Lawrence H. Summers, *Remarks at NBER Conference on Diversifying the Science & Engineering Workforce* (Jan. 14, 2005), *transcript available at* http://www.harvard.edu/president/speeches/summers_2005/nber.php. *But see, e.g.*, REBECCA M. JORDAN-YOUNG, BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX (2010); Stephen Jay Gould, *Curveball*, NEW YORKER, Nov. 28. 1994 (critically reviewing The Bell Curve). The more respectable variants turn to "cultural" rather than biological difference, especially forms lodged early in childhood and deep in the "private" family; these often are inferred from differences in choices without reckoning with the double standard problem. *See, e.g.*, WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS 140 (1996) (arguing that claims about racial differences in work ethic are contradicted by evidence that urban African Americans have lower reservation wages than other groups but face even worse job prospects); Vicki Schultz, *Telling Stories about Women and Work*, 103 HARV. L. REV. 1749 (1990) (arguing that gender differences in occupational preference are produced by working in a sexist opportunity structure).

[156] *See* EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734, 753 (S.D. Fla. 1989) ("[I]f Hispanics do not wish to be discriminated against because they have been convicted of theft, then they should stop stealing."). Other courts consistently allow a *prima facie* case based on the racial disparities produced by criminal records screening, *see* El v. SEPTA, 479 F.3d 232 (3d Cir. 2007); Green v. Missouri Pacific Railroad Co., 523 F.2d 1292 (8th Cir. 1975), and *Carolina Freight Carriers* relied upon other doctrines repudiated by the Civil Rights Act of 1991. *See also* Clarke, *supra* note 141, at (analyzing prohibitions on criminal record discrimination as an example of the limits of grounding antidiscrimination law in protected choices).

They likewise face challenges that employers should not be liable for harms that, while suffered because of protected status, also could have been avoided through plaintiffs' different choices.[157] Indeed, "plus" disparate treatment cases routinely raise this issue: an employer who refuses to hire African Americans with criminal records but gives whites a pass commits disparate treatment, notwithstanding that anyone could have avoided discrimination by choosing not to commit a crime.

Across all these objections and with respect to each type of discrimination claim, a full-throated defense of employment discrimination law may retort "So what?"[158] Status causation is what matters. Inversely, to accept such objections is not to raise any special problem with disparate impact analysis but instead is to challenge the causal analysis that undergirds the entire field. For better or worse, status causation is what holds the field together.

C. Across the Treatment/Impact Divide: Same Injury, Different Responsibility

The previous two sections showed how the analysis of status causation can move from individualized proof of external status causation in nonaccommodation claims to statistical proof of external status causation in disparate impact claims. This section explains how refinements in statistical proof move from demonstrating internal status causation in systemic disparate treatment claims to demonstrating external status causation in disparate impact claims. Conceptualizing the relationship between the two claims this way makes sense of their well-known practical continuity in litigation. That continuity is best understood not as a switch between two fundamentally different claims but instead as a progressive calibration of the employer's responsibility for the injuries of status causation.

Courts and commentators have long recognized that an employer's successful defense against a systemic disparate treatment claim is functionally equivalent to a plaintiff's *prima facie* case of disparate impact liability.[159] Recall the *Baylie* hypothetical systemic disparate treatment claim premised on a showing that 90 out of 850 whites (10.6%) were promoted, compared to only 10 out of 150 blacks (6.7%). The inference of disparate treatment followed only if relevant qualifications were equally distributed among whites and blacks. The defendant employer might attempt to defeat this assumption with proof that it required a high school degree for promotion, and that 450 white and 50 black applicants met that requirement. Taking this into account, the

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[157] *See generally* Jill Elaine Hasday, *Mitigation and the Americans With Disabilities Act*, 103 MICH. L. REV. (2004). For areas where current law partially incorporates choice-based objections of this form, *see* Zatz, *supra* note 11, at 1436 n.304; 42 U.S.C. § 12114 (modifying ADA analysis for drug addiction and alcoholism); 42 U.S.C. § 12211 (excluding from "disability" various conditions including "sexual behavior disorders" and "compulsive gambling").

[158] Littleton, *supra* note 90, at 1297 (arguing for a core commitment to "making difference costless"). *But see* Daniel Markovits, *How Much Redistribution Should There Be?*, 102 YALE L.J. 101 (2003) (arguing that removing all disadvantage from unchosen differences would undermine the values motivating their removal).

[159] *See* Segar v. Smith, 738 F.2d 1249, 1270 (D.C. Cir. 1984); Griffin v. Carlin, 755 F.2d 1516, 1526-28 (11th Cir. 1985).

statistics now show that white and black high school graduates have the same promotion rate of 20% (90/450 and 10/50). The systemic disparate *treatment* claim is defeated.

This defeat, however, relies upon the racial disparity in high school graduation rates: among applicants for promotion, 53% (450/850) of whites and 33% (50/150) of blacks had graduated. Thus, the evidence that defeats systemic disparate treatment is the same evidence that a plaintiff would utilize to establish a disparate impact: the employer's high school degree requirement screens out far more black applicants (67%) than white ones (47%). That is *Griggs*.

If one thinks of systemic disparate treatment and disparate impact as fundamentally different claims, then this evidentiary relationship between the two seems to put an employer in a damned-if-you-do, damned-if-you-don't double bind.[160] But the picture looks different once one understands *both* systemic disparate treatment *and* disparate impact claims to use statistical proof to establish the existence of the *same* injury: status causation.

On the view I defended above, the bare showing of a statistical disparity establishes that (random variation aside) status causation is occurring within the population of those suffering workplace harm: among all those denied promotion, some (but not all) African Americans lost out because of their race. Defeating the systemic disparate treatment claim does not change that. It merely clarifies the mechanism of status causation by showing that individuals' race entered the causal chain through the processes leading to high school graduation, not through the process of choosing among high school graduates.

Notwithstanding the constant injury of status causation, distinguishing between its internal and external mechanisms matters to how readily the employer will be held responsible for these injuries. As noted in Part I, the law applies a strong presumption of responsibility for disparate treatment. In the domain of external status causation, the possibility of employer responsibility remains, but on more cautious terms. In the nonaccommodation context, the case for employer responsibility remains strong if the employer knowingly and needlessly imposes a requirement that excludes workers because of their disability. The same is true when avoiding injury imposes some burden on the employer, but not an "undue hardship." This result is consistent with the principle barring "rational" disparate treatment, which likewise imposes costs on employers.

The move from systemic disparate treatment to disparate impact mirrors the move from individual disparate treatment to nonaccommodation. Rather than being nearly automatic, employer responsibility becomes a matter of degree, something that the employer can avoid through an affirmative defense establishing the strength of its legitimate business reasons for the practice. The employer may justify imposing a disparate impact by proving that its practice is

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[160] *See, e.g.*, *Segar*, 738 F.2d at 1270 (discussing "the perceived unfairness of placing on the defendant the dual burden of articulating which of its employment practices caused the adverse impact at issue and proving the business necessity of the practice"); Paul N. Cox, *The Future of the Disparate Impact Theory of Employment Discrimination After Watson v. Fort Worth Bank*, 1988 B.Y.U. L. Rev. 753, 763 & n.48 (1988) (citing *Segar* as an example of the "substantial boundary problems" arising from the "distinct obligations imposed by the two theories"); ZIMMER ET AL., *supra* note 104, at 290 (characterizing *Segar* as "out of the disparate treatment pan into the disparate impact fire").

"job related for the position in question and consistent with business necessity."[161] If an employer knows that using a given test tends to exclude workers because of their race but refuses to use an alternative selection device that is equally costly and effective with less of a disparate impact, the employer is held liable.[162]

Thus, the job-relatedness/business necessity defense to disparate impact liability performs the same function as the undue hardship defense in a nonaccommodation claim. More generally, considerations of notice,[163] control,[164] and cost[165] similarly play an important role in limiting liability.

I provide no account here of precisely where disparate impact doctrine draws the line between employer responsibility and lack thereof. My point is simply the conceptual one that the distinction between systemic disparate treatment and disparate impact frameworks is readily understand as a method of determining how stringently to impose employer responsibility *for a common injury*. From this perspective, there is no tension between defeating the automatic responsibility associated with disparate treatment while remaining subject to the more lenient standards associated with disparate impact. The key is to see both claims as directed toward the same objects: identifying status causation and employer responsibility for it.

D. Summing Up: Proving that External Status Causation Occurred, But Not To Whom

A disparate impact claim demonstrates *inter*-group differences in the *intra*-group mix of individual outcomes. In *Griggs* the graduation requirement excluded some but not all whites and some but not all blacks. On the one hand, there was no uniform experience of advantage or exclusion within either group. Yet the ratios did differ. A focus on status causation captures this subtlety. The injury of concern to employment discrimination law is not simply denial of the job, or denial of the job due to lack of a high school degree, but denial of the job due to one's race. By targeting employer practices that produce disparities, disparate impact claims identify

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[161] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[162] *See id.* § 2000e-2(k)(1)(A)(ii). The formulation in text is the one most demanding of plaintiffs' and adopted by *Wards Cove*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989), before Congress directed a return to pre-*Wards Cove* law. Precisely how different that standard is has not been clarified.

[163] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (basing liability on refusal to implement an alternative presented by the plaintiffs).

[164] The requirement that plaintiffs identify a particular practice that causes the disparity has been used to limit employers' liability for what courts perceive to be mere inaction, such as a passive, word-of-mouth approach to recruitment. *See* EEOC v. Joe's Stone Crab, 220 F.3d 1263, 1279-81 (11th Cir. 2000); EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 305 (7th Cir. 1991). *But see* United States v. Brennan, 650 F.3d 65, 127 n.62 (2d Cir. 2011) (rejecting action/inaction distinctions as a way to identify "practices"). This limitation reflects the familiar notion that employers should be responsible only for their own "intentional affirmative act[s]" rather than being expected to take on an "affirmative duty" to, for instance, "ameliorate a public reputation not attributable to its own employment conduct." *Joe's Stone Crab*, 220 F.3d at 1281.

[165] *See* Electrical Workers (IBEW) Local 605 v. Mississippi Power & Light Co., 42 F.3d 313, 319 (5th Cir. 2006); Ayres, *supra* note 151, at 670-71.

practices that produce individual experiences of status causation. That is sufficient to trigger the core concerns of employment discrimination law, even without being able to identify precisely who those individuals are or exactly how race came to be a source of harm.

Thinking prospectively, if an employer avoids, abandons, or changes a practice that imposes a disparate impact, the employer avoids inflicting status causation, and individuals avoid suffering it. Even if we never know who those individuals are, this is a victory for employment discrimination law. Similarly, it is a victory for environmental law to save the lives of people who would have died from toxic exposure, even if we never know who they are. Individuals get lost in crowds without disappearing from the earth. Title VII's text appears to anticipate just such an approach. It specifically bars employer practices that "*tend[]* to deprive," but do not always deprive, an individual of employment "because of such individual's race."[166] That tendency makes the entire practice unlawful.[167]

The injustice seems plain enough for the job-seekers set up to fail Duke Power's ostensibly "neutral" criteria by virtue of systematic racial discrimination in education. Disparate impact claims scrutinize the need to use hiring criteria that produce that injustice. Indeed, were a court able to identify such job-seekers individually, no recourse should be necessary to aggregate statistics showing that others suffered similar harm or that those harms depressed aggregate employment levels for their group.[168]

Notice, however, how this historicism cuts both ways. Consider an individual African-American plaintiff who lacked a high school degree *not* because of race but only because of the myriad other reasons why one might not graduate. In *Griggs*, such reasons led two-thirds of whites not to graduate either. Were this plaintiff individually identifiable, it is difficult to see why he should receive relief based on the group disparities produced by the graduation requirement.[169] Those disparities arise out of the racial injuries suffered by other individuals, by those whose educational attainment, and therefore whose employment, *was* suppressed because of their race.[170]

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[166] 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

[167] This explains why individuals can bring disparate impact claims, even if, statistically, they may be unlikely to have suffered status causation. So long as they have been harmed by the practice (for instance, they lack a high school degree and are excluded by a degree requirement), they have standing to bring suit as a "person aggrieved" by an illegal practice. *See* 42 U.S.C. § 2000e-5; Thompson v. North American Stainless, LP, 131 S. Ct. 863 (2011).

[168] *See* discussion *supra* Part I.A.

[169] Nonaccommodation plaintiffs lose in analogous circumstances. *See supra* note 76 and accompanying text.

[170] This point assumes that denial of a job is the relevant injury traceable to race. Intra-group variation might be avoided by positing a secondary harm, one caused by belonging to a group that suffers disparities in employment. *See* Primus, *supra* note 17, at 554. This secondary harm suffered by all group members would fit Gerken's model of "aggregate rights." *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1685 (2001). Stigmatization based on protected status arguably fits this description of "linked fate," *see* James Forman, Jr., *The Black Poor, Black Elites, and America's Prisons*, 32 CARDOZO L. REV. 791, 795-99 (2011), and thereby enables group status harm to constitute discrimination while also implicating individual injuries. *See* Karst, *supra* note 39; Fiss,

In this fashion, understanding disparities as statistical proof of status causation does more than explain why disparities matter and how they relate to individualized proof. By both accounting for and implying intra-group variation, they also suggest the value of drawing intra-group distinctions where possible, in order to target employment discrimination law's interventions toward those who have suffered the relevant injury. The next Part shows how that targeting orientation pervasively structures the *prima facie* case of disparate impact, consistent with my claim that it is designed to ferret out status causation.

IV. IMPLICATIONS: STRUCTURING THE PRIMA FACIE CASE TO TARGET STATUS CAUSATION

By showing disparities to be indicators of status causation, this Article places disparate impact liability on a strong foundation, and the same one as other discrimination claims. Furthermore, this theory provides answers to more technical questions about disparate impact doctrine. This Part focuses on the *prima facie* case, which establishes the existence of a disparity and thereby exposes the employer to liability unless it can establish a job-relatedness/business necessity defense.

The *prima facie* case privileges granular analysis of specific employment practices and the specific populations of employees harmed by those practices. It does not focus on workplace composition as a whole, nor even on the entire process leading to a particular decision like hiring or layoff. Instead, in multi-step or multi-pronged processes, it drills down into specific criteria.

This particularity has long posed a puzzle because it seems inconsistent with the conventional understanding of disparate impact as concerned primarily with the overall status of groups. But if status causation is the driving concern, then disparate impact claims should target it as precisely as possible, even when fully individualized determinations are infeasible. This point provides the theoretical basis for rejecting a "bottom-line" defense, which aggregates different practices so that their disparities "cancel out." This feature also reaffirms, at a lower level of abstraction than before, disparate impact's continuity with disparate treatment.

A. The Particularity Requirement Targets Status Causation

The fundamental requirement of a *prima facie* case is a showing that the defendant employer "uses a *particular employment practice* that causes a disparate impact."[171] The particularity requirement reflects the codification by the Civil Rights Act of 1991 of one element of the Supreme Court's constriction of disparate impact liability in its controversial 1989 *Wards*

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supra note 39. However, prioritizing stigmatic harm over concrete losses of jobs or promotional opportunities lets the tail wag the dog, despite important insights. It also faces demanding empirical conditions concerning the scale and institutional location at which stigma is produced. The posit of intra-group uniformity also seems doubtful and contrary to, for instance, tokenism dynamics. *See* Primus, *supra* note 17, at 581-83; James Forman, Jr., *Racial Critiques of Mass Incarceration*, 87 N.Y.U. L. REV. 21, 51-55 (2012) (noting variation in the uniformity of linked fate among African Americans and its historical decline).

[171] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added).

Cove decision.[172] This particularity requirement operates in opposition to a "bottom-line" assessment of disparities in the workforce as a whole.[173]

The key to understanding the particularity requirement is that individuation operates along a continuum; it is not a binary choice between individualized proof and statistical proof within populations.[174] Even without the full individuation one sees in individual disparate treatment or nonaccommodation claims, there remain more and less precise methods of isolating status causation. It can be isolated within larger or smaller populations.

Imagine that 1,000 people lose their jobs, and we know that in 100 cases this was because of the individual's race. Furthermore, we can exclude 500 out of the 1,000 cases as *not* involving status causation. Plainly, an antidiscrimination analysis should not focus on the larger population of 1,000. Instead, our attention should narrow to the subset of 500 within which the 100 instances of status causation arose. Doing so targets the problem with greater precision and avoids intervention in the 500 cases that do not implicate antidiscrimination concerns. Among the 500 terminations that remain, however, we still cannot determine which are the 100 that involved status causation.

One way to target more precisely is to decompose employer decision-making processes into smaller components.[175] Consider the termination of 1,000 employees in a single job category at a large employer. Although the job category had been evenly divided by sex, 600 women and 400 men were terminated. Termination decisions were based on two criteria: low seniority and poor attendance. Each eliminated 500 workers. The seniority criterion eliminated the most recently hired workers without any disparate impact: 250 men and 250 women. The attendance criterion, however, produced the entire disparity (200) seen in the termination as a whole: 350 women and 150 men were terminated based on their attendance.

Were disparate impact liability driven by bottom-line outcomes for the group, there would be no reason to consider the attendance criterion apart from the termination as a whole. From the perspective of numerical group employment outcomes, a woman terminated based on lack of seniority is fungible with a woman terminated based on poor attendance. Retaining either woman will increase the representation of women in the job category. In the ordinary disparate impact case in which there *are* bottom-line disparities, there would be no reason to bother tracing those disparities to specific components of the overall decision-making process. Yet disparate impact doctrine requires just that, at least where the evidence allows it.[176]

In contrast, a concern for status causation explains the disaggregation of the bottom-line into the particular employment practices that produce it. As among women terminated based on attendance, we still do not know whose termination is traceable to sex. Nonetheless, we do

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[172] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).
[173] *See id.* at 656-57.
[174] *See* Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 810-11, 833, 847 (2011) (developing an analogous analysis of "individualized suspicion" under the Fourth Amendment as a matter of degree).
[175] *See* Paetzold & Willborn, *supra* note 26 (discussing "concurrence").
[176] 42 U.S.C. § 2000e-2(k)(1)(B).

know that terminations traceable to sex are concentrated among the attendance-based terminations and not among the seniority-based terminations. Therefore, the precision (with respect to status causation) of our intervention increases by focusing on attendance, not seniority, and notwithstanding that it will remain somewhat imprecise.

This point applies iteratively as component practices can be decomposed further.[177] Perhaps the attendance criterion itself contained two subcomponents, one based on complete absence and the other on late arrival. Were the absenteeism criterion's disparate impact entirely attributable to no-shows, then the case would narrow to focus on that.

In this hypothetical, a disparate impact on women can be demonstrated at all three levels: the terminations as a whole, the attendance-based terminations, and terminations based on no-shows. Nonetheless, it still matters what degree of particularity defines the *prima facie* case. For one thing, it determines the scope of the employer's business necessity defense. If only the no-show criterion were challenged, the employer would not have to defend the seniority-driven or the lateness-driven terminations.[178] The employer might not be liable even if the latter two criteria were arbitrary, because that arbitrariness did not produce a disparate impact. The case would narrow to the justification of the no-show criterion alone.

The particularity of the challenged practice also implicates remedies. If only the absenteeism criterion is discriminatory, then a court could not remedy the discrimination by altering the seniority formula, even if doing so would even up the bottom line. Instead, remedies must focus on preventing or correcting the injury that gave rise to liability. That injury—status causation—occurs only among those terminated based on their attendance. Particularity focuses the analysis, as much as possible, on the smallest population within which status causation can be isolated, even if it cannot go so far as to identify individual victims.

B. Teal *Makes Sense: Individual Injuries Trump "Bottom-Line" Parity*

The previous section showed that, even when a disparity arises both at the "bottom line" and from a more particular practice, it matters which level of particularity is chosen for analysis.

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[177] Similarly, what constitutes the "bottom line" can be pushed upward and outward in breadth. Rather than the results of one round of decisions that affect only a subset of all workers, the "bottom-line" composition of the whole job category might seem more relevant. *See* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring*, 74 TEX. L. REV. 1487, 1517 (1996). Indeed, this broadening could extend from a single job category to the employer's whole workforce or beyond it to the entire labor market.

[178] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (allowing the defense that "*the challenged practice* is job related for the position in question and consistent with business necessity") (emphasis added); 42 U.S.C. § 2000e-2(k)(1)(B)(ii) ("If the [employer] demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity."). Because the "particularity" requirement of (1)(A)(i) can be satisfied by "functionally integrated" but potentially separable requirements, 137 CONG. REC. S15276 (daily ed. Oct. 25, 1991) (Statement of Sen. Danforth) (designated as the exclusive source of legislative history for the disparate impact provisions of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (1991)), the "specificity" provision of (1)(B)(ii) seems to allow defendants to increase the granularity of the analysis further so long as doing so does not insulate disparities from attack. Otherwise, the latter provision would be redundant or incoherent. *See* Paetzold & Willborn, *supra* note 26, at 384-86.

This section extends that point to an important asymmetry in the relationship between disparities at different levels of particularity. Although aggregate disparities indicate individual status causation, as well as disparities at intermediate levels of particularity, the reverse is not true. Individual status causation does not necessarily indicate a disparity at a population level, and a disparity within a particular sub-population does not necessarily indicate a disparity in a larger aggregate.[179]

That asymmetry is at the heart of Title VII's controversial approach to a "bottom-line defense." In *Connecticut v. Teal*,[180] the Supreme Court held that plaintiffs may attack the disparate impact of a particular component of an employer's decision-making process even if the process as a whole yields no disparities at its end. This makes perfect sense under my theory. Status causation is the matter of ultimate concern. Disparities are useful indicators of status causation, but they are not independently significant. Therefore, when we have particularized evidence of status causation, it does not matter whether, at some greater level of aggregation, no disparity is evident. This implication is exactly the opposite of a theory in which differences at the level of group comparison are the matter of basic concern.

1. The Puzzle of Teal*: Group Disparities and Individual Injuries*

In *Teal*, one employer practice—a written test administered to applicants for promotion—had a disparate impact on African Americans relative to whites. However, among those eligible for promotion based on passing the test, African Americans were promoted at a *higher* rate. The latter dynamic dominated the former, creating a bottom-line outcome in which African Americans were over-represented among promotions relative to the initial applicant pool. The employer argued that this bottom line insulated it from disparate impact liability because, in essence, no harm had been done. The Court disagreed.

Teal is a notoriously confounding opinion, and it was quite controversial at the time. The controversy did not readily track the usual ideological divisions, notwithstanding that the Justices themselves voted 5-4 along conventional liberal-conservative lines. Liberal lion Justice Brennan wrote for the majority, yet many civil rights advocates saw both the outcome and the reasoning as a defeat, one that undermined the foundations of disparate impact theory and the legitimacy of affirmative action.

Particularly galling to civil rights progressives was the Court's assertion that, in disparate impact analysis as in disparate treatment analysis, "the principal focus . . . is the protection of the individual employee, rather than the protection of the minority group as a whole."[181] Insofar as the battle over the primacy of discriminatory intent mapped onto a battle over individuals versus groups, this statement was a disaster and, worse yet, a betrayal. Justice Brennan, after all, had not long before penned *United Steelworkers v. Weber*,[182] which had upheld affirmative action in terms that propelled antisubordination theory's focus on group disadvantage to its judicial zenith.

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[179] *See* Brest, *supra* note 17, at 31-35; Willborn, *supra* note 26, at 825.
[180] 457 U.S. 440 (1982).
[181] *Id.* at 453-54.
[182] 443 U.S. 193 (1979).

Weber had relieved an employer of disparate treatment liability for "reverse discrimination" in access to a training program; the opinion endorsed the employer's voluntary affirmative action as a method of eliminating workforce-level "racial imbalances," a function that trumped the employer's explicit reliance on individual employees' race to do so.[183] To some, *Teal* portended the collapse of disparate impact liability, itself understood to rest necessarily on a "group-oriented conception of equality."[184]

By invoking individual interests and downplaying groups, *Teal* poses within disparate impact doctrine the same kind of problem we glimpsed earlier in many sex-plus/stereotyping cases. For instance, *Teal* rejected the employer's attempt "to justify discrimination against [plaintiffs denied promotion based on their test results], on the basis of [its] favorable treatment of other members of [their] racial group."[185] Unsurprisingly, Justice Brennan bolstered this rejection of fungibility among group members by invoking the disparate treatment case law introduced above.[186] The Court cited *Manhart* (sex-differentiated pension contributions based on sex differences in life expectancy) for the proposition that fairness to a group as a whole cannot excuse discrimination against some of its members. And it cited *Phillips* (sex-differentiated rules for parents of young children) for the proposition that aggregate workplace representation (the "bottom line") is irrelevant when discrimination can be established in individual cases. *Phillips* is particularly relevant because it confronts trade-offs among sub-groups of women: on the one hand, exclusion of women with children and, on the other, aggressive hiring of childless women. In *Teal*, the trade-off was between the African Americans excluded from the promotable pool by the test and those ultimately hired from within that pool.

Teal's invocation of disparate treatment doctrine to solve a disparate impact problem requires explanation. The force of *Phillips* and *Manhart* relies upon first establishing that individuals have been discriminated against. In both cases, employers unabashedly made decisions about individual employees based on their sex; that established disparate treatment under the "simple test of whether the evidence shows 'treatment of a person in a manner which but for the person's sex would be different.'"[187] The Court then refused to disturb that conclusion by reference to how the employers treated other women, or women relative to men in aggregate. Those facts were relegated to legal non sequiturs. But in *Teal*, the analogy seemingly falters at the first step. As the dissent sensibly pointed out, the very structure of a disparate

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[183] *Id.* *See also* Local 28 of Sheet Metal Workers' Int'l v. EEOC, 478 U.S. 421, 474 (1986) (Brennan, J.) (plurality opinion) (upholding race-conscious injunctive relief under Title VII in part because "[s]uch relief is provided to the class as a whole rather to individual members; no individual is entitled to relief, and beneficiaries need not show that they were themselves victims of discrimination").
[184] Chamallas, *supra* note 26, at 314. *Accord* Blumrosen, *supra* note 92. *See also* FORD, *supra* note 86 (criticizing Teal).
[185] 457 U.S. at 454.
[186] *See* discussion *supra* at Part I.A.
[187] City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978).

impact claim "invites the plaintiff to prove discrimination by reference to the group rather than to the allegedly affected individual."[188]

The *Teal* majority attempted to square this circle by asserting that the statute bars practices "that have a discriminatory impact upon individuals."[189] But this statement seems incoherent.[190] "Discriminatory impact" is established by comparing outcomes for groups and not by analyzing how the practice affects or is applied to any one individual. Of course, *after establishing* that the challenged practice is discriminatory, *then* an injured individual could readily claim to have suffered a harm that could not be offset by the treatment of others. But the very question posed in *Teal* was how to decide whether the practice was discriminatory in the first place. Depending on whether the benchmark for assessing disparity was the test results or the bottom line, the answer would be yes or no. Without first resolving that issue, invoking individual experiences of discrimination merely begs the question; it does nothing to decide whether discrimination occurred in the first place.

2. Solving the Puzzle: Intra-Group Variation in Status Causation

By awkwardly invoking *Manhart* and *Phillips*, *Teal* foundered between the individualism characteristic of disparate treatment claims and the need to ground disparate impact liability in something other than discriminatory intent.[191] But my account of status causation releases that tension by advancing a thoroughly individualist account of injury unmoored from discriminatory intent. Justice Brennan can have his cake and eat it, too, if a disparate impact provides probabilistic proof of external status causation.

Insofar as African Americans screened out by *Teal*'s written test suffered status causation, then this individual injury—loss of promotion because of one's race—could not be cured by subsequent favorable treatment of other African Americans. To provide the necessary traction, this injury cannot inhere simply in being a member of a group that has suffered harm in aggregate. That would beg *Teal*'s question of whether to assess group harm at the level of the test (African Americans screened out more than whites) or at the bottom line (African Americans promoted more often than whites).[192] Status causation meets this standard. Group disparities provide *evidence* of status causation, but status causation can exist independently of any group disparities. On my account, a *prima facie* case demonstrates that individuals lost promotional

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[188] 457 U.S. at 459 (Powell, J., dissenting).
[189] *Id.* at 451 (majority opinion).
[190] Friedman, *supra* note 26, at 79; Rutherglen, *supra* note 26, at 1336-37; Ford, *supra* note 17, at 173.
[191] The majority was at pains not to "confuse unlawful discrimination with discriminatory intent," 457 U.S. at 453, because the conservative dissenting Justices were seeking to reduce disparate impact liability to an evidentiary short-cut to establish disparate treatment. *See id.* at 459 (Powell, J., dissenting). *See also* Rutherglen, *supra* note 26, at 1336-37.
[192] Thus, the injury cannot involve an "aggregate right," in which "the individual injury at issue cannot be proved without reference to the status of the group as a whole." Gerken, *supra* note 170, at 1667. With aggregate rights "group members . . . are effectively 'fungible' for liability and remedial purposes," *id.* at 1687. *See also* Friedman, *supra* note 26, at 58. Intra-group uniformity and fungibility are precisely what *Teal* rejects. *See* Gerken, *supra* note 170, at 1685 n.2.

opportunities because of their race but without the employer having taken their race into account: external status causation. These injuries survive any aggregation with other African Americans with different experiences.

Consider a disability analogue. Suppose an employer aggressively recruits and supports users of manually propelled wheelchairs. Applying a general rule barring battery-powered devices (because of electromagnetic interference or some such), the same employer refuses to hire individuals who need to use electrically propelled wheelchairs. If a reasonable accommodation could be made that, without undue hardship, would allow an electric wheelchair user to work, the ADA would mandate that accommodation. The employer could not avoid that mandate by aggregating electric and manual wheelchair users and showing that it had no bottom-line underrepresentation of mobility-impaired individuals, or wheelchair users more narrowly. That would be beside the point, which is that any individual electric wheelchair user faced exclusion because of her disability.

As we saw earlier,[193] nonaccommodation and disparate impact analysis generally converge in scenarios like this, where individually identifiable external status causation recurs and cumulates into a disparate impact. The rule against battery-powered devices has a disparate impact on wheelchair users. Under *Teal*, disparate impact analysis reaches the same result as nonaccommodation analysis: the electric wheelchair users have a disparate impact claim based on the no-batteries rule, even if wheelchair users overall are well-represented at the bottom line.

From this overlap with nonaccommodation, we can move into the heartland of disparate impact by revisiting the seniority- and attendance-based termination scenario from the previous section. Recall the discussion of remedies. The disparate impact caused by attendance-based terminations could not be remedied by ordering the employer to hire, or not to lay off, other women unaffected by those terminations.

To bring us to *Teal*, simply substitute an employer-initiated remedy for a court-ordered remedy. Suppose that, upon noticing that its termination criteria would cause a disparate impact, the *employer* left the attendance-driven terminations untouched but made other changes that erased the bottom-line disparity. Perhaps it altered the seniority formula to capture fewer women, or it added a third, disproportionately male group of layoffs. As a result, the attendance-driven terminations still have the same disparate impact on women as before, but now the terminations in aggregate exhibit no disparity by sex.

If the disparities produced by attendance-driven terminations could be remedied by a *court* order altering the sex composition of other terminations, then an *employer* should be able to avoid liability by doing the same thing proactively. Vice versa, if an employer could avoid liability with a bottom-line defense, then a judicial remedy should be able to eliminate bottom-line disparities even while leaving intact the particular practice that initially produced them.

Teal harmonizes the legal analysis of employer-initiated and court-imposed remedies. In neither case can the disparate impact produced by the challenged practice be cured by offsetting

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[193] *See* discussion *supra* Part II.A.

it with another practice that affects other people. In both cases, the latter "remedy" fails because it does nothing to address the status causation inflicted by the challenged practice.

In the termination hypothetical, the disparate impact tells us that some women identified by the attendance criterion are losing jobs because of their sex. If that justifies liability absent an employer defense, then it should be irrelevant what happens in other components of the selection process, or in the employer's employment practices more generally. Favorable treatment of other women does nothing for those terminated under the attendance criterion because of their sex. Those individuals receive no remedy.

This point retains its force even when those specific individuals cannot be individually identified. We know that they exist within the population of those terminated based on attendance, and we know they are *not* among the population of those terminated based on seniority. Any remedy is off target insofar as it is directed outside the population (attendance-based terminations) whose injuries give rise to liability. The fact that this off-target remedy is delivered to other *women* does not change this point. They are the wrong women.

This is what *Teal* held and how it reasoned. There, the promotion test results were challenged first, and then during litigation the employer made final promotion decisions that prevented any bottom-line disparities.[194] Whether the court or employer intervenes first, an appropriate remedy for those excluded by the test because of their race cannot ignore those individuals and offset their injuries by directing remedies to others, even others of the same race.

In short, understanding disparities as an indicator of status causation provides the reason to focus on those excluded by the particular practice and to distinguish them from those affected by other practices. In contrast, were "improvement in group condition" the purpose of disparate impact liability, the level of analysis would push in the opposite direction, toward more comprehensive assessments of group status at the employer's bottom line and beyond.[195]

For its reasoning that "an employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of . . . discrimination,'"[196] *Teal* relied exclusively on disparate *treatment* cases. To bridge the gap to disparate impact, the Court simply asserted that these were mere variations in "form"[197] but never explained what they shared in substance. Status causation is the answer.

Believing individualism to be confined to disparate treatment and disparate impact to be defined by concern for groups, many have found *Teal* hopelessly confused and probably mistaken. To the contrary, I have shown that *Teal*'s rejection of fungibility among members of the same group makes sense if disparate impact claims are a means of attacking status causation. It is indeed the same principle that has received such robust development in disparate treatment law.

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[194] 457 U.S. at 444.
[195] Chamallas, *supra* note 26, at 369; Paetzold & Willborn, *supra* note 26, at 368.
[196] 457 U.S. at 455 (quoting Teamsters v. United States, 431 U.S. 324, 342 (1977)).
[197] *Id*.

C. The 1991 Act Makes Sense: Bottom-Line Disparities Can Establish Status Causation

This section analyzes the mirror image of the bottom-line defense: a bottom-line *offense*. In such cases, plaintiffs attempt to establish liability based on a bottom-line disparity but without identifying any particular practice that causes a disparate impact.

When the Court faced this issue in *Wards Cove*, it reasoned that symmetry with *Teal* required rejecting such a claim.[198] Congress swiftly overrode other aspects of *Wards Cove* with the Civil Rights Act of 1991, but with respect to the *prima facie* case, it partially embraced the opinion. Consistent with both *Teal* and *Wards Cove*, the Act provided that a claim ordinarily must attack a particular employment practice that causes a disparate impact.[199] Yet Congress also created an exception where "the elements of a respondent's decisionmaking process are not capable of separation for analysis." [200] In such cases, plaintiffs may rely on bottom-line disparities to establish a *prima facie* case. Why the asymmetry with *Teal*?

What drives this structure is the *relative* specificity with which status causation is identified. More is better, but no one degree of particularity is required. Any disparate impact analysis is less specific than identifying an individual case of nonaccommodation. Nonetheless, when individuation is infeasible, observing disparities remains an important method of identifying status causation within a population. It is a second-best, but better than nothing.

This same point iterates when comparing two levels of specificity at which disparities can be measured. When it is infeasible to identify a particular practice that causes a disparity in a small population, observing disparities in the larger population affected by a less particular practice provides additional information. Even if status causation cannot be isolated within any identifiable sub-population, it is still operating somewhere within the set of practices affecting the larger population.

Thus, the bottom line is irrelevant in a case like *Teal* because disparities can be traced to more specific practices. Similarly, group disparities are irrelevant in individual disparate treatment or nonaccommodation cases because status causation can be assessed individually.[201] When this greater level of precision is unavailable, it becomes appropriate to loosen the degree of particularity to one that captures any status causation as precisely as possible. Without either individualized proof or a disparity at some level of particularity, there is simply no evidence of status causation. But where there are bottom-line disparities, this indicates that protected status is making a difference to the outcome in some fashion; that remains so even if the mechanism cannot be identified at the level either of individuals or of particular components of the selection process.

For these reasons, efforts to identify status causation should prioritize individualized proof followed by particular employment practices followed by the bottom line, but the bottom

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[198] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656-57 (1989).
[199] *See supra* Part III.A.
[200] 42 U.S.C. 2000e-2(k)(1)(B)(i).
[201] *See* Henrietta D. v. Bloomberg, 331 F.3d 261 (2d Cir. 2003); discussion *supra* Part I.A.

line remains an appropriate basis for liability when no more specific analysis can be performed. Under the 1991 Act, disparate impact law does exactly that.

CONCLUSION

Its complexities notwithstanding, employment discrimination law is unified by an underlying commitment to reducing status causation and placing on employers some responsibility to do so. Seeing this common foundation shows how a common-sense liberalism can reach ends typically thought to exceed its grasp. It can reject discriminatory intent as the touchstone for discrimination, and do so robustly, without flinching from liberal commitments to meaningful individual freedom and instead turning to structural relationships among groups. There is ample room to move beyond disparate treatment, decisively and unapologetically.

Instead, efforts to loosen the grip of discriminatory intent too often are presented as palatable variants on it. This pattern includes treating disparate impact as an evidentiary shortcut to identifying subtle disparate treatment,[202] as an approach to subconscious or "implicit" disparate treatment,[203] or as an indirect expansion of the protected statuses and thereby of what qualifies as taking protected status into account.[204] Despite their significant insights, those arguments risk overplaying their hand[205] even while legitimizing the intent standard in some form.[206]

By foregrounding the injuries of discrimination and anchoring them in individual harm, this Article's account of disparate impact liability also generates distinctive answers to concrete, important technical questions. This is especially so when issues of targeting and intra-group difference arise. These theoretical implications cohere with controversial doctrinal ones provided by *Teal* and the Civil Rights Act of 1991.

Disparate impact doctrine consistently presses toward greater degrees of particularity, subject to evidentiary constraints. A focus on status causation makes sense of this pattern, which extends past the *prima facie* case to aspects of disparate impact liability beyond the scope of this Article but ripe for future study. For instance, disparate impact remedies often are characterized as distinctively "universal," in contrast to the targeted "special treatment" associated with reasonable accommodations.[207] Yet these "universal" remedies routinely employ intermediate levels of targeting analogous to those seen in the *prima facie* case, and occasionally they

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[202] See, *e.g.*, Selmi, *supra* note 26, at 744-45, 779; sources cited *supra* note 31.
[203] *See* Charles R. Lawrence, Iii, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Kang, *supra* note 34, at 647-48; Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988).
[204] *See* discussion *supra* notes 86, 98 and accompanying text; Flagg, *supra* note 70; CARBADO & GULATI, *supra* note 86; Gotanda, *supra* note 17.
[205] *See, e.g.*, Gonzalez, *supra* note 86.
[206] *See* Primus, *supra* note 17, at 587.
[207] *See, e.g.*, Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1199-1200, 1238 (2003); J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1391 (2003). For a more nuanced account in the same vein, see Fishkin, *supra* note 96, at 1496-99.

converge with accommodations by targeting specific individuals.[208] Rather than a stark opposition between all-inclusive universalism and totally individualized accommodation, these remedial practices may be better placed along a spectrum reflecting how precisely individual instances of status causation can be identified.[209] That spectrum mirrors the one for liability along which disparate impact converges with nonaccommodation at one end[210] while reaching bottom-line disparities at the other.[211]

The drive toward particularity also explains why this area of law focuses on relationships between particular employers and particular employees. As with other branches of employment law, critics of employment discrimination law sometimes assert that its regulatory means are poorly suited to its redistributive ends.[212] Those ends would be better advanced through broad-based redistribution of market outcomes like income or wealth,[213] or through similarly structural interventions like equalizing educational opportunities or stimulating job creation, not by regulating individual employer-employee relationships.[214] Indeed, if what matters in the end is aggregate black employment levels, then it should not matter much whether any particular African American gets hired or at what firm.[215] But if individual status causation is the core concern, then the harms to African Americans denied jobs at Duke Power because of their race cannot be cured by creating jobs for other African Americans at other employers. The argument simply repeats on a larger stage the point that, in *Teal*, denying promotions to some African Americans because of their race by virtue of the standardized test could not be cured by giving promotions to other African Americans who did pass the test.

A society committed to minimizing status causation sensibly institutionalizes that commitment within the workings of labor markets, even if employer-based interventions will be insufficient standing alone. Thus, my argument not only illuminates the internal structure of employment discrimination law but also its place within social policy writ large. Attacking status causation at work is one prong of a broader egalitarian project of structuring social institutions that recognize and facilitate individuals' freedom and equal worth.

Across all these domains, the reasoning reflects a liberal reluctance to treat members of groups as fungible. That feature produces an antidiscrimination jurisprudence consistent with established patterns in disparate treatment law but without being bound by its most troublesome

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[208] *See* Jolls, *supra* note 39. For the analogous analysis of disparate treatment remedies, see Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155 (2015).
[209] *See* Zatz, *supra* note 208, at 1161-64.
[210] *See* Part II.A.1 *supra*.
[211] *See* Part IV.C *supra*.
[212] *See* Daniel Shaviro, *The Minimum Wage, the Earned Income Credit and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997); Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection*, 2009 U. CHI. LEGAL F. 1.
[213] *See* Anne L. Alstott, *Work vs. Freedom*, 108 YALE L. J. 967, 972, 1008-09 (1999). *See also* Scott A. Moss & Daniel A. Malin, *Public Funding for Disability Accommodations*, 33 HARV. C.R.-C.L. L. REV. 197, 224 (1998) (discussing tax credits for accommodations rather than employer-borne costs).
[214] *See* Sunstein, *supra* note 39.
[215] *See* Strauss, *supra* note 39.

constraints. The result simultaneously displaces discriminatory intent from dominance yet acknowledges its importance by situating it within the broader palette of employment discrimination claims.[216]

Seeing this unity of equality law cuts both ways. It suggests that *Ricci* was wrong both to portray Title VII as a house divided and to portray the prohibition on disparate treatment as more fundamental than disparate impact. But standing united also creates shared vulnerability. In Title VII's early days, opposition even to disparate treatment liability sounded the same themes now associated with critiques of disparate impact and nonaccommodation: infringement on employer autonomy by overriding normal market processes, processes that produce inequality only because of real differences originating outside the market sphere. Not only did employers bear no responsibility for these inequalities, but rectifying them constituted favoritism toward those deemed inferior.[217]

Precisely because a straight path runs from easy cases of disparate treatment through nonaccommodation to disparate impact, those who would roll back the latter also march toward the former. No conceptual firewall blocks the path toward legislative repeal or judicial nullification of all civil rights law. Few want to go there.[218] For the rest of us who seek a society where race, sex, and disability status (among others) confer neither unearned privilege nor undeserved disadvantage, I have tried both to chart a new way forward and to renew our appreciation for the fragile achievements of the past.

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[216] *See* Figure 1, *supra*.
[217] *See* MACLEAN, *supra* note 28, at 63-74; Primus, *supra* note 17, at 525.
[218] *But see* EPSTEIN, *supra* note 54; Rep. Ron Paul, Remarks on H. Res. 676, 150 CONG. REC. H4808 (June 23, 2004).