Brooklyn Law Review

Volume 88 | Issue 1 Article 2

12-9-2022

# Last Rights: A Theory of Individual Impact

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# Last Rights

## A THEORY OF INDIVIDUAL IMPACT

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### INTRODUCTION

Title VII law is incomplete. It recognizes three basic claims, though it should recognize four. The first Title VII claim is individual disparate treatment. This claim, which is the most intuitive of the three,[1] makes it unlawful for an employer to intentionally discriminate against an individual because of that person's race, sex, color, creed, or national origin.[2] Second comes pattern or practice cases, which forbid intentional, systemic employment discrimination against a protected class.[3] The third type of discrimination is called disparate impact.[4] Such a claim does not require intent but is based on a facially neutral employment practice that has a disproportionate, adverse effect

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[1] *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986 (1988) (characterizing disparate treatment as "the most easily understood type of discrimination") (quoting Teamsters v. United States, 431 U.S. 324, 335, n.15 (1977)).

[2] *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (commenting that disparate treatment is intentional discrimination); Yu v. Idaho State Univ., 11 F.4th 1065, 1074 (2021) (asserting that unconscious discrimination is relevant to proving intent, which is an element of disparate treatment); Pinkston-Shay v. Metro. Transp. Auth., 2021 WL 1226874, at *3 (S.D.N.Y. Apr. 1, 2021) (noting that cases alleging unlawful intentional discrimination, known as disparate treatment, infrequently find support from direct evidence and therefore rely on inferential support).

[3] *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308–12 (1977) (discussing the statistical comparison relevant to a pattern and practice case); Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 334–35, 340 (1977) (announcing that pattern and practice cases involve "purposeful" discrimination); Tapia v. Boeing Co., 2021 WL 949622, at *4 (E.D. Cal. Mar. 12, 2021) (remarking that pattern and practice cases are built on systemic, intentional discrimination).

[4] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (recognizing Title VII claims that challenge employment "practices that are fair in form, but discriminatory in operation").

on a protected class.[5] Not requiring intent or any other mental state, disparate impact is a strict-liability claim.[6] Because disparate-impact theory prohibits discrimination on a group-wide basis, it, like pattern or practice theory, establishes claims based on systemic discrimination. The fourth possible claim is conspicuously absent from this classification scheme.[7] The law does not recognize a claim for individual disparate impact, or, more simply put, "individual impact."[8]

Classification of Title VII Claims

| | Individual Cases | Systemic Cases |
|---|---|---|
| Disparate Treatment | Recognized | Recognized |
| Disparate Impact | Not Recognized | Recognized |

This void in protection arises because of a problem of proof. Merely showing that one African American lost a job opportunity because of a test score, resume evaluation, or interview would not prove that any of these selection criteria had a disparate impact on that person, and therefore unlawfully discriminated within the meaning of Title VII. A Title VII plaintiff must demonstrate that the rejection was "because of" race.[9] To carry this burden, the plaintiff, alleging disparate

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[5] *See* Connecticut v. Teal, 457 U.S. 440, 448 (1982) (holding that an employment practice that has "a discriminatory impact on black employees, clearly falls within the literal language of § 703(a)(2), as interpreted by *Griggs*").

[6] *See, e.g.*, A.H.D.C. v. City of Fresno, No. Civ-F-97-5498 OWW SMS, 2004 WL 5866233, at *20 (E.D. Cal. Mar. 9, 2004) (remarking that "strict liability is imposed upon any finding of 'disparate impact'"); Dallan F. Flake, *When Should Employer Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2214 (2018) (asserting that disparate-impact theory imposes strict liability).

[7] Although this article argues only for individual-impact claims under Title VII, similar arguments suggest adoption of such claims under the Americans with Disabilities Act (*see* Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) (recognizing disparate-impact claims under the Americans with Disabilities Act)), and under the Age Discrimination in Employment Act (*see* Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (recognizing claims for disparate impact under the Age Discrimination in Employment Act)).

[8] This article uses the term "individual-impact theory" or "individual-impact claim" to refer to the author's proposal.

[9] 42 U.S.C. § 2000e-2(a)(2) (2018). The section provides:

> It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.

impact, would seemingly need statistics to prove the discriminatory impact of the selection criterion on African Americans as a group.[10] But this observation casts doubt on the viability of individual-impact theory. If group-based statistics are necessary to prove an individual-impact case, then such a case merges into the existing type of disparate-impact case.[11] Put another way, the plaintiff in either type of case must prove systemic impact.

This problem is not hypothetical. The African American who lost the job because of a low test score may not be able to prove that the employer had discriminatory intent, which is often difficult.[12] The only remaining fallback position for such a plaintiff is disparate impact. But suppose that the employer only recently adopted the test or suppose that the employer has not used the test extensively. The test may therefore have affected an insufficient number of employees to allow a psychometrician or industrial psychologist to develop a valid and reliable statistic that would establish a prima facie case of disparate impact. Even if the employer has used the test extensively, the test may not have excluded many, if any, African Americans other than the plaintiff. Again, the task of developing a persuasive inferential statistic demonstrating disparate impact might stymie the most capable industrial psychologist. The problem in a nutshell is small sample size.[13]

A feasible solution to this problem adapts individual disparate treatment law to disparate-impact law. The Supreme Court in *McDonnell Douglas Corp. v. Green* crafted a three step burden shifting framework for individual treatment cases.[14] This ingenious framework permits a factfinder to infer discriminatory

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*Id.* (emphasis added).

[10] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 426 (1975) (applying statistical analysis on group-wide basis).

[11] *See* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1214 (1999) (questioning the viability of individual-impact theory because claims would require statistical proof, which would probably be unavailable to plaintiffs).

[12] *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (explaining that the *McDonnell Douglas* framework "sharpen[s] the inquiry into the elusive factual question of intentional discrimination." (internal quotation marks omitted) (quoting Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 255, n.8 (1981)); Feliciano de la Cruz v. El Conquistador Resort and Country Club, 218 F.3d 1, 5 (1st Cir. 2000) (noting that proving motive and intent is elusive).

[13] *See* Flake, *supra* note 6, at 2210 (noting that "[a] final problem with the disparate impact framework is that establishing a statistically significant adverse impact almost always requires that a sufficiently large and diverse population be affected by the challenged practice").

[14] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–07 (1973).

intent absent direct evidence.[15] Although the Supreme Court in *St. Mary's Honor Center v. Hicks* hobbled the three-step *McDonnell Douglas* framework,[16] the surviving framework, if suitably adapted, provides a means to rescue individual-impact theory from the dead zone that it now occupies.

Part I of this article traces the development of disparate-impact theory. It analyzes *Griggs v. Duke Power Co.*, which announced this theory extending the protective reach of Title VII to include facially neutral employment practices that have a disproportionate, adverse effect on a protected class.[17] *Connecticut v. Teal* declared that Title VII focuses on individual victims of discrimination, rather than on groups.[18] The emphasis on individual rights implies that the courts should recognize individual-impact claims. As noted, however, the law must overcome the problem of small sample size.

Part II examines the *McDonnell Douglas* approach in individual-disparate-treatment cases. It then discusses *Furnco Construction Corp. v. Waters* and *Texas Department of Community Affairs v. Burdine*, which not only clarified but also affirmed *McDonnell Douglas.* [19] Although *Hicks* altered the *McDonell Douglas* framework, diminishing its efficacy,[20] *Hicks*

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[15] *Id.* at 807 (remanding the case to the district court to afford the plaintiff the opportunity "to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application"). *McDonnell Douglas* established the three-step framework for disparate-treatment cases. *Id.* at 802–04. The purpose of this framework was to ease plaintiff's burden of proving discriminatory intent. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 255 (1981). The first step requires the plaintiff to prove a prima facie case, which is a relatively light burden. *McDonnell Douglas,* 411 U.S. at 802. The second step requires the defendant merely to "articulate . . . [a] nondiscriminatory reason for" the challenged adverse employment action. *Id.* The third step provides that, if the plaintiff disproves the employer's step-two articulated reason, the plaintiff wins the case. *Id.* at 804.

[16] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (holding that *McDonnell Douglas* and *Burdine* adopted the permissive pretext only approach, meaning that even if a plaintiff disproves an employer's articulated nondiscriminatory justification for the challenged employment practice, the factfinder may nevertheless rule against the plaintiff).

[17] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[18] Connecticut v. Teal, 457 U.S. 440 (1982).

[19] Furnco Constr. Corp. v. Waters, 438 U.S. 702 (1978); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248 (1981).

[20] Most commentators agree that *Hicks* both contradicted and diminished the effectiveness of *McDonnell Douglas* and *Burdin. See, e.g.*, Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law,* 31 FLA. ST. UNIV. L. REV. 859, 869 (2004) (questioning what purpose *McDonnell Douglas* serves after *Hicks)*; Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment,* 81 TEX. L. REV. 1177, 1179 (2003) (arguing that *Hicks* heightened the burden of proof for plaintiffs alleging disparate treatment); Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption,* 26 CONN. L. REV. 997, 1007–08 (1994) (arguing that *Hicks* contradicted *McDonnell Douglas* by rejecting the pretext-only approach). *But see* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks*,* 93 MICH. L. REV. 2229,

stopped short of overruling *McDonnell Douglas* and left its fundamental structure intact. One may adapt the modified *McDonnell Douglas* framework to individual-impact cases and combine that modified framework with existing disparate-impact theory to construct a proposal for individual-impact theory. This theory would provide a means for plaintiffs to establish a prima facie case of individual impact without a strong statistical basis.

Part III of this article details the elements of individual-impact theory and provides both practical and policy justifications for the theory. Because of the historic struggle for civil rights, this article focuses on the policy to eradicate race-based discrimination. Despite this article's focus on race discrimination, similar policy justifications apply to all of Title VII's protected classes, including sex, religion, and national origin, which have endured long-standing stereotypes and exclusion from employment opportunities.[21] This Part also shows, using hypothetical examples, how individual-impact theory would function. Under traditional disparate-impact law, a finding of unlawful discrimination requires a statistic based on a large sample size of affected employees or job applicants. Individual-impact theory would eliminate this hurdle. The theory would make a finding of discriminatory impact feasible, despite too small a sample size to support a group-based inferential statistic. This Part goes on to discuss two affirmative defenses to such a claim: (1) disproving that the challenged employment practice had a disparate impact on a protected class; and (2) proving the business-necessity defense, which is part of the traditional *Griggs* framework.[22] Another feature of the *Griggs* framework—the less discriminatory alternative doctrine—would also apply to individual-impact cases.[23]

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2266 (1995) (arguing that "it is difficult to read *McDonnell Douglas-Burdine* as embodying the strong pro-plaintiff orientation needed to justify a mandatory pro-plaintiff presumption that is insufficiently supported by the weight of the evidence").

[21] *See infra* notes 218–224 (discussing the argument that Title VII is a super-statute because it combats racial inequality in the workplace, and suggesting that the application of the benefits of recognizing Title VII as a super-statute recognition be accorded to all Title VII protected classes).

[22] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that "[t]he touchstone [for determining permissible employment practices] is business necessity . . . [meaning that the practice is] related to job performance")

[23] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (holding that "[i]f an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interests in 'efficient and trustworthy workmanship'") (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

Part IV further explores benefits of individual-impact theory. First, the theory would increase the availability of a strict-liability claim to victims of unlawful discrimination who are unable to prove intent. Second, and perhaps most important, individual-impact theory would root out instances of unconscious discrimination that might otherwise go undetected. In its exploration of unconscious discrimination, Part IV discusses the concerns of the Supreme Court and prominent scholars with the undetectability and prevalence of unconscious discrimination in the workplace and the failure of current law to expose or deter unconscious bias.[24] Although individual-impact theory does not pretend to unearth all instances of unconscious discrimination, it would provide a means of uncovering more such instances than are detected under current law. Third, individual-impact theory would provide victims of discrimination with a viable claim that might result in a meaningful remedy.[25] Finally, by broadening the protective scope of Title VII, individual-impact theory would deter employers from adopting practices that might have a discriminatory impact on employees and job applicants.[26] It would operate as a prophylactic measure, chastening employers to scrutinize employment practices for discriminatory impact before implementing them.

The article concludes by observing that Title VII already provides the statutory basis for a claim of individual impact. The marriage of an adapted *McDonnell Douglas* approach to the traditional *Griggs* framework would obviate the need for a plaintiff to proffer group-based statistics to prove disparate impact. Such an approach would result in a viable individual-impact theory.

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[24] *See, e.g.*, Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990 (1988) (justifying the application of disparate-impact theory to subjective practices because that employers may engage in unconscious discrimination, which might elude detection if plaintiffs had no alternative to proving discriminatory intent); Yu v. Idaho State Univ., 11 F.4th 1065, 1074 (9th Cir. 2021) (observing that unconscious bias infects employment decision making); Stephanie Bornstein, *Reckless Discrimination,* 105 CAL. L. REV. 1055, 1105 (2017) (arguing that unconscious discrimination poses a major problem in the workplace); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination,* 95 VA. L. REV. 1893, 1895–96 (2009) (pointing out the prevalence of unconscious employment discrimination).

[25] *See, e.g.*, Landgraf v. USI Film Prod., 511 U.S. 244, 252 (1944) (stating that Title VII provides victims of discrimination with equitable relief).

[26] *See, e.g.*, Russell M. Gold, *Compensation's Role in Deterrence,* 91 NOTRE DAME L. REV. 1997, 2002–03 (2016) (noting that litigation costs and reputational harm deter businesses from engaging in employment discrimination).

## I. THE SCOPE OF DISPARATE-IMPACT THEORY UNDER TITLE VII

The primary purpose of Title VII of the 1964 Civil Rights Act is to eradicate intentional discrimination.[27] The Supreme Court, however, expanded the protective scope of Title VII, establishing a theory of redress that does not require proof of intent or of any guilty mental state.[28] This strict-liability theory is called disparate impact.[29]

### *A. Disparate-Impact Theory*

In *Griggs v. Duke Power Co.*, the Supreme Court took the momentous step of recognizing disparate-impact theory.[30] The Court adopted an expansive view of the protective scope of Title VII, interpreting that statute to prohibit facially neutral practices that cause discriminatory outcomes.[31]

#### 1. *Griggs v. Duke Power*: The Advent of the Theory

Duke Power operated an energy generating facility at Dan River, North Carolina.[32] Until the effective date of the 1964 Civil Rights Act, Duke Power openly discriminated against African Americans, limiting them to jobs in its Labor Department.[33] Jobs in this department were the lowest paying at the Dan River facility.[34] Duke Power required applicants for

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[27] *See* Ricci v. DeStefano, 557 U.S. 557, 557 (2009) (commenting that "[a]s enacted in 1964, Title VII's principal nondiscrimination provision held employers liable only for disparate treatment").

[28] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (stating that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices").

[29] *See* A.H.D.C. v. City of Fresno, No. 97-CV-5498, 2004 WL 5866233, at *20 (E.D. Cal. Mar. 9, 2004) (commenting that "strict liability is imposed upon any finding of 'disparate impact'"); Kenneth R. Davis, *The Invisible Ban: Negligent Disparate Impact*, 70 AM. U. L. REV. 1879, 1894 (2021) (observing that disparate-impact theory imposes strict liability); George O. Luce, *Why Disparate Impact Claims Should Not Be Allowed Under the Federal Employer Provisions of the ADEA*, 99 NW. U. L. REV. 437, 440 (2004) (noting that "disparate impact theory was created as a form of strict liability that targets unfair results, without regard to the employer's motivation or intent") (emphasis omitted).

[30] Griggs, 401 U.S. at 424 (1971).

[31] *Id.* at 429–30.

[32] *Id.* at 426.

[33] *Id.* at 426–27.

[34] *Id.* at 427. Duke's five operating departments were "(1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test." *Id.* With the adoption of the 1964 Civil Rights Act, Duke abandoned its policy of restricting African Americans to the Labor Department, but instituted a new policy requiring a high school diploma for transfer to a higher-paying department. *See id.* The Court found it revealing that white employees hired in these departments before institution of the diploma

new jobs to have a high school diploma and to pass two standardized aptitude tests.[35] Applicants for transfer from the two lowest paying operating departments, labor and coal handling, also needed to pass the aptitude tests.[36] Because racially segregated schools spawned educational inequities, African Americans fared worse than their white counterparts on Duke Power's employment selection criteria.[37] One striking fact called Duke Power's motives into question: it adopted the aptitude test requirements for new employees on July 2, 1965—the effective date of the 1964 Civil Rights Act.[38]

Despite the suspicious timing of Duke Power's adoption of the test requirements, the Fourth Circuit held that Duke Power had not acted with discriminatory intent.[39] The Supreme Court did not upset this finding,[40] but rather bolstered it, noting that the Company's policy to finance two-thirds of the tuition cost of high school training for its undereducated employees suggested the absence of such intent.[41] The issue in the case was

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requirement performed satisfactorily. *Id.* On the effective date of the 1964 Civil Rights Act, Duke added the further requirement that new hires in any department other than the Labor Department had to attain the median score of high school graduates on two aptitude tests. *Id.* at 427–28. The two tests were the Wonderlic Personnel Test, purportedly a measure of general intelligence, and the Bennett Mechanical Comprehension Test. *Id.* at 428. Duke later modified its requirements, permitting transfers to higher-paying departments based solely on passage of the two aptitude tests. *Id.*

[35] *Id.* at 427–28. The two tests that Duke Power used as selection criteria were the Bennett Mechanical Comprehension Test and the Wonderlic Personnel Test. *Id.* at 428. To justify its use of these tests, it relied on § 703(h), which permits the use of nondiscriminatory professionally developed tests. *Id.* at 433. The subsection provides in pertinent part:

> [It is not] an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or *used* to discriminate because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h) (emphasis added). The Court found that these tests did not measure job qualifications or predict job performance. *Griggs*, 401 U.S. at 431. Thus, although the tests were not designed or intended to discriminate, the tests were *used* to discriminate against African Americans. *See id.* at 426 n.1. Such use, even if unintentionally discriminatory, violates the statute. *See id.* at 436. The Court's reading of this subsection comports with the general assumption that all words in a statute should be given effect. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 174 (1st ed. 2012). Section 703(h) prohibits tests "designed," "intended" or "used" to discriminate. 42 U.S.C. § 2000e-2(h). Thus, the word "used" in the subsection must mean "used" but neither "designed" nor "intended" to "discriminate."

[36] *Griggs*, 401 U.S. at 428.

[37] *Id.* at 430.

[38] *Id.* at 427.

[39] *Id.* at 432.

[40] *Id.* at 427.

[41] *Id.* at 432.

whether Duke Power, despite lacking discriminatory intent, violated Title VII.[42]

*a. Plaintiff's Prima Facie Case*

To resolve this issue, the Court observed that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."[43] By dismissing motivation as a necessary element of a Title VII violation, the Court acknowledged a strict-liability theory of discrimination.[44] This theory of liability, the Court explained, prohibits "practices, procedures, or tests neutral on their face, and even neutral in terms of intent . . . if they operate to 'freeze' the status quo of prior discriminatory employment practices."[45]

Although the text of the unanimous opinion did not cite statutory authority to justify this expansive interpretation of Title VII, a footnote to the opinion quoted § 703(a)(2) of the statute. This section forbids employers "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee, because of . . . race, color, religion, sex, or national origin."[46] The *Griggs* decision, however, did not explain how § 703(a)(2) provided a basis for disparate-impact theory.[47]

*b. The Business-Necessity Defense*

After establishing disparate-impact theory, the Court went on to recognize an affirmative defense to such a claim.[48]

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[42] *Id.* at 429.

[43] *Id.* at 432 (emphasis omitted).

[44] *See, e.g.*, A.H.D.C. v. City of Fresno, 2004 WL 5866233, at *20 (E.D. Cal. Mar. 9, 2004) (noting that "strict liability is imposed upon any finding of 'disparate impact'"); Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law,* 56 B.C. L. REV. 1417, 1426 (2015) (recognizing that disparate impact is a theory of strict liability).

[45] *Griggs,* 401 U.S. at 430. Although the timing and efficacy of the requirements that Duke implemented raised the specter of racial animus, the Supreme Court implicitly indorsed the Fourth Circuit's finding that Duke did not act with discriminatory intent. *Id.* at 432. To support this exoneration, the Court noted that Duke financed two-thirds of the cost of tuition for its undereducated employees. *Id.*

[46] *Id.* at 426 n.1 (citing Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352 § 703(a)(2), 78 Stat. 256 (codified at 42 U.S.C. § 2000e-2 (2012))).

[47] The Civil Rights Act of 1991 codified disparate-impact theory. 42 U.S.C.§ 2000e-2(k)(1)(A). This subsection provides: "An unlawful employment practice based on disparate impact is established under this subsection only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin . . ." *Id.*

[48] *Griggs*, 401 U.S. at 431.

The "touchstone," the Court held, "is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited."[49] The Court found that Duke Power's diploma and test requirements bore no demonstrable relationship to job performance.[50] No validation study supported these requirements, and the company's vice president, in defense of these requirements, offered the flimsy rationale that they improved the quality of Duke Power's workforce.[51] It is hard to fathom how a high mechanical aptitude might enhance one's prowess for shoveling coal. Moreover, direct evidence refuted the vice president's assertion.[52] Employees hired and promoted before Duke Power adopted the diploma and test requirements performed satisfactorily at their jobs.[53]

### *c. The Limits of* Griggs

*Griggs* held that Title VII forbids facially neutral employment practices that have a disproportionate, adverse impact on a protected class.[54] *Griggs* did not address whether disparate-impact theory might apply to instances of individual discrimination. *Connecticut v. Teal* suggested an answer to this question by clarifying that the liability principle of disparate-impact theory applies not only to instances of group

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[49] *Id.* Later in the opinion the Court phrased the business-necessity defense as requiring "a *manifest* relationship to the employment in question[,]" a rephrasing, which suggests a stricter standard than merely requiring some relationship between a selection criterion and job performance. *Id.* at 432.

[50] *Id.* at 431.

[51] *Id.*; *see also* Dothard v. Rawlinson, 433 U.S. 321, 332 (1977) (rejecting the business-necessity defense of the Alabama Board of Corrections where it did not a present the results of a validated test to prove that its height and weight requirements, which had a discriminatory impact on women, were job performance related).

[52] *Griggs*, 401 U.S. at 431.

[53] *Id.* Section 703(h) permits the use of "any professionally developed ability test . . . not designed, intended, or used to discriminate. . ." *Id.* at 433 (emphasis and internal quotation marks omitted) (quoting 42 U.S.C. §§ 2000e-2). Duke argued that, given its lack of discriminatory intent, § 703(h) of the Act permitted Duke to use the two aptitude tests to screen prospective and incumbent employees for hire or transfer. *Id.* After reviewing the legislative history of § 703(h) and relevant EEOC (Equal Employment Opportunity Commission) guidelines, the Court concluded that the section authorized only job performance-related tests. *Id.* at 434–36. The Court might also have pointed out that each of the three limiting words in the section—"designed," "intended," and "used"—should, in keeping with the rules of statutory construction, be accorded a different meaning. *See, e.g.*, *In re* I80 Equip., LLC, 938 F.3d 866, 870 (7th Cir. 2019) (stating that "[e]ach word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous" (quoting People v. Perez, 18 N.E.3d 41, 44 (2014))). Thus, § 703(h) prohibited the "use" of a test with a discriminatory effect, even if the employer lacked discriminatory intent.

[54] *Griggs*, 401 U.S. at 429–30.

discrimination, but also applies with even greater force to instances of individual discrimination.[55]

### 2. *Connecticut v. Teal* Individualized Relief

The issue in *Connecticut v. Teal* was whether the so called "bottom-line" defense could shield an employer from disparate-impact liability.[56] A majority of the *Teal* Court rejected this defense.[57] In doing so, the Court emphasized that Title VII focuses on individual, rather than group, rights.[58]

In *Teal*, provisional supervisors working for the Connecticut Department of Income Maintenance (the department) took a written examination to qualify for promotion to permanent supervisor.[59] Forty-eight of the applicants who took the test were African American and 259 were white.[60] The pass rate of African American applicants was 54 percent compared to a 68 percent pass rate for the white applicants.[61] Based on these test results, African Americans who failed the test brought a Title VII action for disparate impact.[62] On the eve of trial, the department decided whom it would promote to permanent supervisor.[63] These last-minute decisions took into account past work performance, recommendations, and seniority.[64] Based on this mix of factors, the percentage of African American applicants promoted to permanent supervisor was 22.9 percent compared to a promotion rate of 13.5 percent for white applicants.[65]

The department's belated attempt, only one month before trial, to mitigate the impact of the written test by introducing other factors in the decision-making process probably did not impress the Court.[66] In any event, the bottom-line results favored the African American applicants over the white applicants, although the written test operated to exclude African Americans disproportionately.[67] The department argued that,

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[55] Connecticut v. Teal, 457 U.S. 440, 453–54 (1982).

[56] *Id.* at 445.

[57] *Id.* at 448.

[58] *See id.* at 451.

[59] *Id.* at 442–43.

[60] *Id.* at 443.

[61] *Id.*

[62] *Id.* at 443–44.

[63] *Id.* at 444.

[64] *Id.* The Second Circuit characterized this broadening of the criteria for promotion as affirmative action. *Id.*

[65] *Id.*

[66] *See id.* at 444.

[67] *Id.* at 443–44.

despite this exclusion, the bottom-line results exonerated it from Title VII liability.[68]

*a. Individual Rights*

The Supreme Court began its discussion in *Teal* by analyzing § 703(a)(2) of Title VII.[69] Noting the breadth of the section's language, the Court found that the written examination violated that section.[70] The Court focused on the section's broad prohibitory language, which evidenced Congress's determination to eradicate invidious discrimination from the workplace.[71] Thus, the section forbids "*limitations* and *classifications* that would deprive any individual of employment *opportunities*."[72] The Court might also have noted other expansive proscriptive language in the section.[73] Specifically, the section prohibits limitations in employment that even "tend to deprive" employees "in any way" of employment opportunities or "otherwise adversely affect" an individual's employment status.[74] The prohibitory wording of the section could not be more robust.

Given the broad language of § 703(a)(2), the Court concluded that focusing exclusively on bottom-line results would impermissibly disregard the written test's disqualification of individual African Americans.[75] The Court reasoned that relying on bottom-line results ignores the very purpose of Title VII, which is to guarantee all individuals, regardless of race or sex, equal employment opportunity.[76] "Every *individual* employee,"

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[68] *Id.* at 444. Most federal circuit and district courts that had confronted the issue sustained the bottom-line defense. *Id.* at n.5.

[69] *Id.* at 444–46.

[70] *Id.* at 448.

[71] *Id.* The Court noted that disparate-impact theory "reflects . . . Congress' basic objectives . . . 'to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.'" *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1973)) (emphasis omitted).

[72] *Id.* (emphasis added and omitted).

[73] *See* 42 U.S.C. § 2000e-2(a)(2).

[74] *Id.*

[75] *Teal,* 457 U.S. at 448. The Department invoked § 703(h) to exempt it from liability. *Id.* at 452. Asserting a variation on Duke Power's argument, the Department argued that its test was not "'used to discriminate' because [the test] did not actually deprive disproportionate numbers of [African Americans from receiving a] promotion[ ]." *Id.* The Court rejected this argument, invoking *Griggs's* holding which interpreted § 703(h) to prohibit tests that are not job-performance related. *Id.* Justice Powell, however, saw nothing in *Griggs* or its progeny that interpreted § 703(h) as rejecting a bottom-line defense. *Id.* at 456–57 (Powell, J., dissenting).

[76] *Id.* at 451. The Court bolstered this conclusion with two additional arguments. First, it noted that Congress in its 1972 amendments to Title VII extended the protections of the statute "to state and municipal employees." *Id.* at 449. This extension of rights, the Court believed, demonstrated Congress' commitment to equal

the Court declared, "is protected against both discriminatory treatment and 'practices that are fair in form, but discriminatory in operation.'"[77]

This analysis emphasized individual, rather than group, rights. The Court reinforced this viewpoint by citing prior decisions that had similarly interpreted Title VII.[78] For example, the Court in *Furnco Construction Corp. v. Waters*[79] stated that "the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant."[80] Similarly, in *Los Angeles Dep't of Water & Power v. Manhart*, the Court acknowledged the "statute's focus on the individual."[81]

*b. Group Rights*

Justice Powell dissented.[82] He argued that the majority conflated disparate impact with disparate treatment.[83] Individual disparate treatment cases, he noted, are based on the violation of individuals' rights.[84] In sharp contrast, disparate-impact cases are based on the violation of group rights.[85] Justice Powell concluded that by vindicating individual rights in a disparate-impact case, the majority blurred the distinction between the two theories.[86]

Although appealing, Justice Powell's argument is not nearly as persuasive as the majority's point that Title VII emphasizes individual rights, regardless of whether a case alleges disparate treatment or disparate impact.[87] To strengthen its position, the majority might have focused on the individualized remedies available to victims of disparate

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employment opportunity and the elimination of "barriers" that might impede such "opportunities." *Id.* (quoting *Griggs*, 401 U.S. at 429–30) (internal quotations omitted). Second, the Court emphasized that its decisions following *Griggs* focused on the impact of employment practices on individuals rather than on groups. *Id.* at 450. The *Teal* Court noted, for example, that the Court remanded Albemarle Paper Co. v. Moody, 422 U.S. 405, 436 (1977) to the district court to provide Albemarle Paper with an opportunity to prove that the tests it used for promotions were job performance-related. *Id.* The *Teal* Court stressed that it did not suggest in *Albemarle* that Albemarle Paper could avoid liability with bottom-line results favorable to African Americans. *Id.*

[77] *Id.* at 455–56 (quoting *Griggs,* 401 U.S. at 431).

[78] *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

[79] *Id.*

[80] *Id.* at 579 (cited in *Teal,* 457 U.S. at 454).

[81] L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (cited in *Teal,* 457 U.S. at 455).

[82] *Teal,* 457 U.S. at 456 (Powell, J., dissenting).

[83] *Id.* at 459 (Powell, J., dissenting).

[84] *Id.* at 458 (Powell, J., dissenting).

[85] *Id.* (Powell, J., dissenting).

[86] *Id.* at 462 (Powell, J., dissenting).

[87] *Id.* at 455–56 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

impact.[88] In *Albemarle Paper Co. v. Moody*, the Court emphasized that Title VII affords victims of disparate impact a range of equitable remedies, including backpay.[89] Like other individualized remedies such as front pay and reinstatement, which are also available to disparate-impact plaintiffs, backpay is tailored to the specific circumstances of each plaintiff.[90] Individualized remedies imply individualized rights and individualized claims. Individual-impact theory would establish such a claim.

### *B. A Proposal for Individual-Impact Theory*

*Teal* established that disparate-impact theory applies on the individual level.[91] The Court, however, stopped short of expanding the disparate-impact theory to individual-impact cases.[92] This constricted framing of the theory is a mistake. Disparate-impact theory should also apply to adverse impacts on individuals.

The efficacy of such a theory, however, faces a significant hurdle. It might well be specious from a statistical standpoint to base a finding of individual impact on a minimal sample size.[93] The statutory foundation of impact theory, § 703(a)(2), makes it unlawful "to limit" employment opportunities "because of" race or membership in another protected class.[94] In *Watson v. Fort Worth Bank & Trust*, the Supreme Court underscored that impact cases rely on statistics to meet the statutory causation requirement.[95] The *Watson* Court remarked that "[t]he evidence in these 'disparate impact' cases usually focuses on statistical

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[88] *See, e.g.*, Landgraf v. USI Film Prod., 511 U.S. 244, 252–54 (1994) (recognizing that Title VII provides prevailing plaintiffs with appropriate equitable remedies); Winsor v. Hinkley Dodge, Inc., 79 F.3d 996, 1002 (10th Cir. 1996) (noting that backpay, front pay, and reinstatement are available to victims of discrimination).

[89] Albemarle Paper Co. v. Moody, 422 U.S. 405 417–19 (1975)

[90] *Id. See also Windsor*, 79 F.3d at 1002 (listing equitable remedies available to victims of discrimination).

[91] *Teal,* 457 U.S. at 453–54 (recognizing that Title VII protects individuals from employment discrimination).

[92] *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986 (1988) (emphasizing that disparate-impact theory prohibits "facially neutral employment practices that have significant adverse effects on protected *groups* . . ."); *Teal,* 457 U.S. at 448 (noting that *Griggs* focused on employment practices that have an adverse impact on groups).

[93] *See, e.g.*, *Watson,* 487 U.S. at 987 (observing that "the evidence in these 'disparate-impact' cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities"); *Allen v. Seidman*, 881 F.2d 375, 378–79 (7th Cir. 1989) (observing that a large number of candidates taking a test may produce a highly significant statistic, which though not conclusive, may substantiate a claim of disparate impact); *Flake*, *supra* note 6, at 2210 (noting that a prima facie case of disparate impact requires a statistically significant finding of a differential adverse effect, which in turn requires a sufficient sample size).

[94] 42 U.S.C. § 2000e-2(a)(2).

[95] *Watson*, 487 U.S. at 991, 994–95 (1988).

disparities, rather than specific incidents."[96] The Court further clarified the role of statistics in impact cases, stating that "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[97]

An overwhelming consensus of courts and commentators questions the predictive value of a statistic based on a small sample size.[98] One authority has observed that "statistical evidence can become increasingly less useful in establishing a prima facie case of job discrimination as the size of the sample from which statistics are compiled diminishes."[99] A small sample size may render it difficult, if not impossible, to show that a selection criterion denied an individual an employment opportunity because of that person's membership in a protected status.[100]

Assume, for example, that a single African American and a single white individual apply for an opening for a salesclerk at a department store. The store manager, a white male, interviews both applicants and, based solely on the interview, the manager hires the white applicant. Although the interview resulted in the denial of the job to the African American, there is an insufficient basis to conclude that the denial of the job to the African American was "because of race."[101] If more job opportunities became available, the interviewer might hire the number of African American applicants reflected in the available labor

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[96] *Id.* at 987.

[97] *Id.* at 994.

[98] *See, e.g.,* Ochoa v. Monsanto Co., 473 F.2d 318, 320 (5th Cir. 1973) (rejecting disparate-impact claim based on insufficient sample size); James Buchwalter, et al., 14A C.J.S., § 678 (Nov. 2021 update) (stressing the importance of sample size in establishing a prima facie case of disparate impact); *see generally* U.S. v. City of N.Y., 637 F. Supp. 2d 77, 86–87 (E.D.N.Y. 2009) (noting that courts rely on two statistical indicators of significance in disparate-impact cases: the 80% rule); *see also* 29 C.F.R. § 1607.4(D) (1978)) and significance based on standard deviations; 29 C.F.R. § 1607.14(B)(5) (1978).

[99] Barbara J. Van Arsdale et al., 45C Am. Jur., *Job Discrimination* § 2394 (Nov. 2021 update) (citing Int'l Brotherhood Of Teamsters v. United States, 431 U.S. 324 (1977)); Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535, 570 (2011) (observing that a small sample size increases the "likelihood of false negatives, indicating the absence of discrimination, when, in fact, it exists"); Elaine W. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 801 (1978) (noting the importance of adequate sample size).

[100] *See, e.g.*, Wax, *supra* note 11, at 1214 (pointing out that, because of a small sample size, individual complainants in impact cases may not have valid inferential statistics available).

[101] *See Ochoa*, 473 F.2d at 320 (rejecting disparate-impact claim because of insufficient sample size).

market or the applicant pool.[102] Such an outcome would disprove disparate impact. Individual-impact theory provides a means for plaintiffs to prove disparate impact despite a small sample size. This theory derives partly from an adaptation of the framework that the Supreme Court announced in *McDonnell Douglas v. Green*.[103] This article presents the specifics of individual-impact theory in Part III. First, however, Part II discusses the *McDonnell Douglas* framework.

## II. *MCDONNELL DOUGLAS V. GREEN*: A FRAMEWORK FOR PROVING INTENTIONAL DISCRIMINATION

Exposing an employer's discriminatory intent in disparate treatment cases may prove elusive.[104] Employers that engage in unlawful discrimination will prevaricate to cover their tracks.[105] Such employers are loath to defend their conduct in court where the time and expense of litigation may drain a company's financial vitality.[106] Public exposure of a company's unlawful discrimination also subjects it to reputational harm.[107] A backlash of public opinion might choke off a company's revenue stream.[108] It is therefore not surprising that employers guilty of discrimination attempt to conceal their wrongdoing.[109]

The Supreme Court recognized the plight of plaintiffs who, despite employer evasions, seek to prove discriminatory

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[102] If the interviewer hired a disproportionately high number of white applicants based on job qualifications, this reason for rejecting African American applicants would enter the analysis when the employer sought to prove business necessity.

[103] McDonnell Douglas v. Green, 411 U.S. 792 (1973).

[104] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 526 (1993) (Souter, J., dissenting); *see also* Tex. Dep't of Cmty. Affs. V. Burdine, 450 U.S. 248, 255, n.8 (1981) (characterizing intentional discrimination as an "elusive factual question").

[105] *See* Pinkston-Shay v. Metro. Transit Auth., No. 19cv1671 (DLC), 2021 WL 1226874, at *3 (S.D.N.Y. Apr. 1, 2021) (observing that it is difficult for plaintiffs to uncover direct evidence of intentional workplace discrimination).

[106] *See* David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases,* 115 HARV. L. REV. 831, 853 (2002) (arguing that the threat of damages deters wrongdoing).

[107] *See, e.g.*, Abdel-Razeq v. Alvarez & Marsal, Inc., No. 14 Civ. 5601(HBP), 2015 WL 7017431, at *6 (S.D.N.Y. 2015) (noting that a public record of discrimination deters employers from future violations of Title VII); *see also* Gold, *supra* note 26, at 2004 (noting that litigation provokes reputational harm, which in turn deters employment discrimination).

[108] *See id. But see* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Litigation and Its Effects,* 81 TEX. L. REV. 1249, 1331–32 (2003) (reporting statistical data that supports a backlash of reputational harm only to companies found to have engaged in intentional discrimination as opposed to companies found to have engaged in unintentional discrimination).

[109] *See supra* notes 204–205 and accompanying text (discussing the difficulty in discovering a fact that might prove discriminatory intent).

intent.[110] In *McDonnell Douglas v. Green*, the Court devised a framework to ease the plaintiff's burden.[111]

### *A. Adoption of the Framework*

Green, an African American, worked as a mechanic for McDonnell Douglas.[112] During a reduction in force, McDonnell Douglas discharged him.[113] A longtime civil rights activist, Green accused the company of racial bias in his discharge and in its hiring practices, and he participated in two organized civil rights actions.[114] The first was a "stall-in," where protesters blocked

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[110] *See, e.g.*, Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990 (1988) (highlighting the difficulty in detecting and policing intentional discrimination).

[111] McDonnell Douglas v. Green, 411 U.S. 792, 802–04 (1973) (discussing the three-step burden-shifting framework). The *McDonnell Douglas* framework is not the only method for proving individual disparate impact. In *Price Waterhouse v. Hopkins*, the Court faced a mixed-motive case, in which a prestigious accounting firm denied a female candidate partnership for both sexist and legitimate reasons. Price Waterhouse v. Hopkins, 490 U.S. 228, 236–37 (1989). The Court recognized that the *McDonnell Douglas* approach was inappropriate for a mixed-motive case because *McDonnell Douglas* is premised on the assumption that either the discriminatory reason or the nondiscriminatory reason, but not both, was the true reason for the adverse employment action. *Id.* at 247. A plurality of the Court ruled that by proving that unlawful discrimination played a motivating part in an adverse employment decision, a plaintiff has established a prima facie case. *Id.* at 258. The defendant, however, establishes a complete defense if they can demonstrate that they would have made the same decision based on the nondiscriminatory reason alone [the "same decision" defense]. *Id.* Justice O'Connor concurred in the judgment. *Id.* at 261. She argued that, rather than merely proving that unlawful discrimination played a motivating role in the challenged decision, the plaintiff needed to prove that, based on direct evidence, unlawful discrimination played a substantial factor. *Id.* At 275. Once a plaintiff meets this burden of proof, Justice O'Connor argued that the burden should shift to the defendant to prove the same-decision defense. *Id.* at 279. In the Civil Rights Act of 1991, Congress adopted the plurality's "motivating factor" test, but recast the same-decision defense by providing that it did not absolve the defendant of liability but merely limited the plaintiff's remedies. 42 U.S.C. § 2000e-2(m). Thus, § 2000e-2(m) of the Civil Rights Act of 1991 provides in pertinent part: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Section 2000e-5(g)(2)(B) of the Civil Rights Act of 1991 provides for a partial affirmative defense as follows:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief [excluding admission, reinstatement, hiring, promotion, or payment] and attorney's fees and costs . . .

*Id.*; *see* Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003) (holding that any evidence, whether direct or circumstantial, may support a finding that unlawful discrimination was a motivating factor of an adverse employment action).

[112] *McDonnell Douglas,* 411 U.S. at 794.

[113] *Id.*

[114] *Id.* at 794–95.

access to McDonnell Douglas's plant.[115] The second was a "lock-in," where protesters padlocked the plant's front door to prevent employees from entering and leaving the building.[116] Three weeks after the "lock-in," McDonnell Douglas advertised for mechanics.[117] Green applied for a mechanics job, but, ostensibly because of his involvement in the two civil rights activities, McDonnell Douglas rejected him.[118] In response, Green brought a racial-discrimination claim against the company.[119]

The Supreme Court accepted this case to establish a three-step framework for claims of individual disparate treatment.[120] Step one of the framework requires the plaintiff to prove a prima facie case.[121] The elements of a prima facie refusal to hire case are that (1) the plaintiff was a member of a protected class, (2) he was qualified and applied for a job opening, (3) "he was rejected," and (4) "the employer continued to seek applicants" after rejecting him.[122] If the plaintiff succeeds in proving these elements, the burden of production shifts to the defendant merely to articulate a nondiscriminatory reason for the alleged discriminatory action.[123] Once the employer has articulated a nondiscriminatory reason for its action, the plaintiff bears the burden of persuasion to show that employer's nondiscriminatory reason was a pretext for discrimination.[124]

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[115] *Id.* Green parked his car on the access road to the plant, blocking access to during rush hour. *Id.* at 795. When the police arrived on the scene and asked him to move his car, he refused. *Id.* The police then towed his car and arrested him. He pleaded guilty to obstructing traffic and was fined. *Id.*

[116] *Id.* at 795. The lock-in occurred while ACTION, a civil rights organization, was picketing McDonnell Douglas's plant. Green "acknowledge[d] that he was chairman of ACTION at the time" of the lock-in and that he participated in and ran the picketing; however, no evidence tied him to the lock-in, and he was not arrested. *Id.* at 795, n.3.

[117] *Id.* at 796.

[118] *Id.*

[119] *Id.* Green alleged that, by discharging him, McDonnell Douglas engaged in unlawful discrimination. *Id.* He also alleged that, by refusing to rehire him, McDonnell Douglas engaged in unlawful retaliation. *Id.*

[120] *Id.* at 800. The *McDonnell Douglas* framework applies to disability discrimination cases, *see, e.g.,* Granda v. Old Dominion Freight Line, Inc., No. 3:19-cv-03294-JMC, 2021 WL 4472743, *2 (D.S.C. Sept. 30, 2021), and to age discrimination cases, *see, e.g.*, McCuen v. PI Corp. Servs. LLC, No. 6:19-cv-02602-TMC-JDA, 2020 WL 8713661 (D.S.C. Aug. 11, 2020). Similarly, disparate-impact theory applies to both disability and age discrimination cases. *See infra* note 313 and accompanying text. The theory of individual impact could therefore apply to all such cases.

[121] *McDonnell Douglas,* 411 U.S. at 802.

[122] *Id.* The Court noted that the elements of a prima facie case would vary depending on the type of job opportunity involved. *Id.* at n.13.

[123] *Id.* The plaintiff may articulate more than a single nondiscriminatory reason to justify the challenged adverse employment action. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 522–23 (1993) (commenting that an employer articulates its step two reasons through the submission at trial of admissible evidence). For simplicity's sake, the hypotheticals in this article will presume that the employer has articulated a single reason.

[124] *McDonnell Douglas,* 411 U.S. at 804.

Applying this framework to the case before it, the Court held that Green proved the elements of a prima facie case.[125] McDonnel Douglas, in turn, met its step-two burden by asserting that it refused to rehire Green because he participated in the two unlawful civil rights actions.[126] The district court, however, had not applied step three of this newly minted framework.[127] The Supreme Court therefore remanded the case to the district court to provide Green "a fair opportunity to show that [McDonnell Douglas's] stated reason for [its] rejection was in fact pretext."[128] The Court outlined how Green might meet this step three burden.[129] For example, he might show that the company retained or rehired white employees who had engaged in serious anticompany activities.[130] He might also show how the company treated him before his lay off.[131] The company's general policy and practice toward minority employment would also be relevant along with statistics bearing on these issues.[132] The Court instructed that on retrial Green may rely on such evidence to prove "that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision."[133]

The meaning of *McDonnell Douglas* is clear. If a plaintiff disproves an employer's articulated, nondiscriminatory reason, the plaintiff wins the case.[134] The import of the *McDonnell Douglas* framework is also clear. The framework affords the plaintiff a tenable means of proving discriminatory intent,[135] and thereby eases the plaintiff's burden of having to ferret out hidden racial motives.[136] By forcing a defendant to articulate its ostensible reason for the challenged action, the framework provides the plaintiff with a stationary target. If a plaintiff disproves the employer's articulated reason for its adverse

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[125] *Id.* at 802.

[126] *Id.* at 803–04.

[127] *Id.* at 798. The district court dismissed Green's discrimination claim, brought under § 703(a)(1), on the ground that the EEOC had not found probable cause to support the claim. *Id.* The Supreme Court pointed out that the district court erred in denying Green the opportunity to present his case to the district court merely because the EEOC did not find probable cause. *Id.* at 798–99.

[128] *Id.* at 804.

[129] *Id.* at 804–05.

[130] *Id.* at 804.

[131] *Id.*

[132] *Id.* at 804–05.

[133] *Id.* at 805.

[134] *Id.* at 807.

[135] *Id.* (providing a framework for proving that an employer's ostensible reason for an adverse employment action was a coverup for discrimination).

[136] *Id.*

action, the plaintiff demonstrates indirectly that the employer's step two reason was a pretext for discrimination.[137]

Such a showing meets the causation requirement of § 703(a)(1). That section makes it unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin."[138] By disproving the employer's step two reason, the plaintiff demonstrates indirectly that the challenged adverse employment action was "because of" plaintiff's membership in a protected class.[139]

### *B.* Furnco Construction Corp. v. Waters*: Explanation of the Framework*

In *Furnco Construction Corp. v. Waters*, the Supreme Court explained the *McDonnell Douglas* presumption of discrimination arising from the prima facie case. Furnco was in the business of relining blast furnaces.[140] Three African Americans alleged that Furnco intentionally discriminated against them based on race, two arguing that Furnco denied them employment and the third arguing that Furnco delayed hiring him for an inordinate period.[141]

The *Furnco* Court explained that "[a] prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[142] The Court observed that people tend not to act "in a totally arbitrary manner, without any underlying reasons, especially in a business setting."[143] Thus, when all nondiscriminatory reasons have been eliminated, the Court presumes unlawful discrimination.[144]

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[137] *Id.* at 807.

[138] 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

[139] *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (noting that, if a plaintiff disproves an employer's articulated reason for an adverse employment action, one may infer that the adverse employment actions was "because of" discrimination).

[140] *Id.* at 569.

[141] *Id.*

[142] *Id.* at 577.

[143] *Id.*

[144] *Id.* The Supreme Court rejected the Seventh Circuit's interpretation of *McDonnell Douglas,* a view which would have required employers to use selection criteria that would maximize the number of minority candidates under consideration. *Id.* at 576–77.

*Furnco's* rationale for the *McDonnell Douglas* approach is straightforward. Businesses generally do not make haphazard decisions.[145] A defendant, at step two of the *McDonald Douglas* framework, will take the position that the challenged employment action was nondiscriminatory and attempt to justify that action.[146] If the plaintiff proves the articulated justification false, the most likely conclusion is that the employer unlawfully discriminated.[147] The conclusion of unlawful discrimination is not airtight because it is possible that the employer withheld the true reason for the challenged employment action, which might be nondiscriminatory.[148] For example, the true reason for the challenged action might be embarrassing or seem unpersuasive or even antagonistic to the factfinder.[149] Nevertheless, as the Court stated, if the plaintiff disproves the employer's step two reason, it is more likely than not that the employer unlawfully discriminated.[150]

### *C.* Burdine v. Texas Department of Community Affairs*: Reconfirmation of the Framework*

In *Texas Department of Community Affairs v. Burdine*,[151] Joyce Burdine was a Field Services Coordinator for the Texas Department of Community Affairs (the department).[152] She applied for promotion to Project Director of the department's Public Service Careers Division, but the position went to a man.[153] Shortly thereafter, she was fired and then rehired at the salary she would have made if the department had granted her the promotion.[154] Nevertheless, she alleged that the department had engaged in sex discrimination by both denying her the promotion and firing her.[155]

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[145] *Id.* at 577. *But see* Malamud, *supra* note 20, at 2255 (contending that some employment decisions are arbitrary).

[146] *See Furnco*, 438 U.S. at 578 (explaining that, to meet step two of the *McDonnell Douglas* framework an employer need only articulate a nondiscriminatory reason).

[147] *Id.* at 577.

[148] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993) (stating that if "the employer's proffered reason is unpersuasive, or even obviously contrived," the employer may nevertheless be innocent of unlawful discrimination).

[149] *See* Kenneth R. Davis, *The Stumbling Three-Step Burden-Shifting Approach in Employment Discrimination Cases,* 61 BROOK. L. REV. 703, 741 (1995) (pointing out why an employer might forego revealing the true reasons for a challenged employment action).

[150] *Furnco,* 438 U.S. at 577.

[151] Tex. Dep't of Cmty. Affs. V. Burdine, 450 U.S. 248 (1981).

[152] *Id.* at 250.

[153] *Id.* at 250–51.

[154] *Id.* at 251.

[155] *Id.*

*Burdine* clarified the operation and purpose of the *McDonnell Douglas* framework. The *Burdine* Court explained that the prima facie case eliminates several common deficiencies that might thwart a plaintiff's case.[156] For example, the first element of the prima facie case excludes from protection a plaintiff not in a protected class because such an individual has no standing to sue under Title VII.[157] The second element excludes from statutory protection persons unqualified for the position.[158]

The primary task of the *Burdine* Court, however, was to dispel confusion among the federal judiciary as to whether an employer bears the burden of persuasion of its nondiscriminatory reason or merely bears the burden of production.[159] The Court confirmed the clear pronouncement of *McDonnell Douglas* by holding that the employer's burden is merely one of production, that is, to articulate a nondiscriminatory reason for the challenged employment action.[160] An employer's articulation of an alleged nondiscriminatory reason, the Court explained, narrows the issue in the case so that the "plaintiff will have a full and fair opportunity to demonstrate pretext."[161] This explanation highlighted the pivotal role that pretext plays in establishing discriminatory intent. Eliminating any hint of ambiguity on that score, the Court emphasized that a plaintiff may prove discriminatory intent, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or *indirectly by showing that the employer's proffered explanation is unworthy of credence*."[162]

As noted above, an adapted version of the *McDonnell Douglas* framework provides a feasible mechanism for resolving the statistical objection to individual impact cases. Before explaining how to adapt that framework to individual-impact theory, this article discusses *St. Mary's Honor Center v. Hicks*.[163] Twenty years after *McDonnell Douglas* and twelve years after *Burdine*, *Hicks* distorted the three-step burden-shifting framework thereby heightening the evidentiary burden on plaintiffs.[164]

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[156] *Id.* at 253–54.

[157] *See id.* at 253–54, n.6.

[158] *See id.*

[159] *Id.* at 250.

[160] *Id.* at 254.

[161] *Id.* at 256. *See also* U.S. Postal Serv. Bd. Of Governors v. Aikens, 460 U.S. 711, 716 (1983) (reaffirming that when a plaintiff disproves the employer's articulated, step two reason, the plaintiff is entitled to judgment).

[162] *Burdine*, 450 U.S. at 256 (emphasis added).

[163] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

[164] *Id.* at 511 (abandoning the pretext only standard and replacing it with the permissive pretext only standard, thereby holding that the factfinder may but is not

### *D.* St. Mary's Honor Center v. Hicks*'s Distortion of the Framework*

Melvin Hicks, an African American, was a shift commander for St. Mary's Honor Center, a halfway house in the Missouri correctional system.[165] Over his six-year tenure at St. Mary's, Hicks had a satisfactory record, but, after a change in personnel, Hicks's new supervisors, John Powell and Steve Long, repeatedly disciplined him purportedly for misconduct on the job. The clash between Hicks and his new supervisors intensified until they demoted Hicks and ultimately fired him.[166] Hicks brought a Title VII action, alleging that racial bias motivated his demotion and discharge.[167]

St. Mary's articulated two nondiscriminatory reasons for the disciplinary actions against Hicks: the frequency and severity of his misconduct.[168] Although the trial judge found that Hicks disproved both reasons, the judge ruled against him, concluding that Hicks was the victim of personal animosity, rather than racial bias.[169] The Eighth Circuit, applying the *McDonnell Douglas* framework, reversed the district court's determination, holding that where a plaintiff disproves the employer's articulated reasons for the challenged employment action, the plaintiff is entitled to judgment.[170]

#### 1. A Permissive Inference of Discrimination

In a five to four decision, the Supreme Court disagreed with the Eighth Circuit's correct understanding of *McDonnell Douglas*.[171] Led by Justice Scalia, the Supreme Court majority declared that where a plaintiff disproves the defendant's articulated reasons, the factfinder may but is not compelled to rule for the plaintiff.[172] Justice Scalia attempted to support this dubious reading of *McDonnell Douglas*, *Furnco*, and *Burdine* by

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compelled to find for a plaintiff who disproves the employer's articulated, step two reason).

[165] *Id.* at 504.

[166] *Id.* at 505.

[167] *Id.*

[168] *Id.* at 507.

[169] *Id.* at 508. Distinguishing between racial bias and personal animosity would seem beyond the capabilities of most people trying to determine the cause for Hicks's demotion and discharge.

[170] *Id.* at 508–09.

[171] *Id.* at 509.

[172] *Id.* at 511; *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (reaffirming the holding of *Hicks*, which permits the factfinder to rule for a plaintiff based on the prima facie case plus disproof of the employer's articulated reason).

invoking the principle that a plaintiff must carry "the ultimate burden of persuasion" to win a claim.[173] If a plaintiff disproves an employer's articulated reason, he argued, the plaintiff has not necessarily established discriminatory intent because another nondiscriminatory reason may account for the adverse action.[174] He reasoned that the plaintiff has therefore not met the burden of persuasion.[175]

This analysis overlooked how the *McDonnell Douglas* framework functions. *McDonnell Douglas* held that the plaintiff bears the ultimate burden of persuading the factfinder that the employer's articulated reasons are false.[176] As Justice Souter explained in his dissent, an employer may articulate any and all reasons it wishes to justify the challenged action, including the true nondiscriminatory reason, if one exists.[177] If a plaintiff disproves all the employer's articulated reasons, the plaintiff is entitled to the reasonable inference that the employer engaged in invidious discrimination.[178] Thus, contrary to Justice Scalia's argument, the *McDonnell Douglas* framework, as confirmed in *Furnco* and *Burdine*, does not improperly shift the burden of persuasion to the employer.[179]

2. Reasons Lurking in the Record

*Hicks* recast *McDonnell Douglas* in one additional respect that is adverse to plaintiffs. Although the district court discredited both of St. Mary's articulated reasons, it found, as noted above, that the true reason for the disciplinary actions against Hicks was not racial bias but was personal animosity

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[173] *Hicks*, 509 U.S. at 511; *see also id.* at 524 (arguing "[t]hat the employer's proffered reason is unpersuasive, or even obviously contrived, does necessarily establish that the plaintiff's proffered reason of race is correct").

[174] *Id.* at 511.

[175] *Id.* Justice Souter criticized the majority opinion for rewarding defendants "who present false evidence in court." *Id.* at 533 (Souter, J., dissenting). If an employer is caught in a lie, Justice Souter argued, it should not benefit from its dishonesty. *Id.* at 537. Furthermore, if an employer had a nondiscriminatory reason that it chose to conceal, the law should not reward it for its recalcitrance. *Id.* Justice Souter believed that in either circumstance *McDonnell Douglas* requires that the plaintiff win the case. *Id.* (Souter, J., dissenting). Scalia responded to these arguments, pointing out that disproof of an employer's articulated reason does not imply that the employer lied. *Id.* at 520. Employer's may rely on and accept as truthful statements of employees who are often at low levels in the company's hierarchy. *Id.* Even if the employer did lie, Justice Scalia continued, employer's dishonesty does not violate Title VII. *Id.* at 521.

[176] Tex. Dep't of Cmty. Affs. V. Burdine, 450 U.S. 248, 256 (1981).

[177] *Hicks*, 509 U.S. at 528–29 (Souter, J., dissenting).

[178] *See id.* at 536 (Souter, J., dissenting).

[179] *See id.* at 534 (Souter, J., dissenting) (commenting that *Burdine* answers this question by holding that the plaintiff meets the burden of persuasion by disproving the employer's step two reason).

between Hicks and his supervisors.[180] The Supreme Court majority endorsed the trial court's position, though St. Mary's did not articulate personal animosity to justify the actions taken against Hicks.[181] The dissent disagreed with the majority, arguing that the majority's approach unfairly burdened Hicks because it required him to disprove all possible step two reasons, no matter how vaguely implied, as long as the factfinder might detect them "lurking in the record."[182] Justice Scalia attempted to answer this criticism by asserting that the employer's step two reasons did not exist apart from the record.[183] He pointed out that no pleading or formal statement announces the employer's justifications for its adverse actions against the plaintiff, and therefore any step-two reason that may be gleaned from the record is a properly articulated reason for purposes of *McDonnell Douglas*."[184]

Justice Scalia's point is unpersuasive. He acknowledged that St. Mary's based its defense on the severity and frequency of Hicks's alleged misconduct.[185] He even noted that the issue in the case was whether "the trier of fact's rejection of the employer's *asserted reasons* for its actions mandates a finding for the plaintiff" (emphasis added).[186] Thus, Justice Scalia conceded implicitly that St. Mary's only permissible step two reasons were the severity and frequency of Hicks's alleged misconduct. Justice Scalia therefore refuted his "lurking-in-the-record" argument.

### *E. An Approach to Individual-Impact Cases*

Even after *Hicks*, the *McDonnell Douglas* framework, if suitably modified, leads to the formulation of a theory of individual impact. Such a formulation circumvents the problem that employees face when asserting individual-impact claims: the inability to adduce statistics that show disparate impact on an individual basis. As shown in Part III, combining *Griggs* with

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[180] *See id.* at 508.

[181] *Id.* at 509.

[182] *Id.* at 535 (Souter, J., dissenting). Justice Souter argued that such an open-ended standard will necessitate extensive pretrial discovery to unearth vaguely articulated reasons for the adverse employment action. *Id.* at 538. Longer trials will inevitably result if testimony reveals the mere hint of an unarticulated reason. *Id.* The result will increase both litigation costs and the burden of such suits on the judiciary. *Id.* Deserving plaintiffs may therefore forego pursuing their claims. *Id.* at 537.

[183] *Id.* at 522.

[184] *Id.*

[185] *Id.* at 507.

[186] *Id.* at 504.

a modified version of the *McDonnell Douglas*/*Hicks* framework results in a workable theory of individual impact.

## III. THE ADAPTATION OF *MCDONNELL DOUGLAS* AND *GRIGGS* TO INDIVIDUAL-IMPACT THEORY

*McDonnell Douglas* established a means for meeting the requirement of § 703(a)(1) that an adverse employment action was "because of" plaintiff's membership in a protected class.[187] Disparate-impact theory is based on § 703(a)(2), which uses the identical "because of" language used in § 703(a)(1).[188] One should accord the same meaning to identical terms that appear in subparts of a single section of a single statute.[189] Individual-impact theory may therefore borrow from the *McDonnell Douglas* framework. Borrowing from the *McDonnell Douglas* framework does not imply transferring the requirements of *McDonnell Douglas* indiscriminately. *McDonnell Douglas* does, however, furnish a starting point. As shown below, a workable individual-impact theory adapts the *McDonnell Douglas* framework. The appropriate adaptation resolves the problem of small sample size.

### *A. Plaintiff's Prima Facie Case of Individual Impact*

A prima facie refusal-to-hire case of individual impact would require the plaintiff to prove by a preponderance of evidence (1) that the plaintiff was a member of a protected class, (2) that the plaintiff was qualified for the job opportunity, (3) that the employer denied the plaintiff the job opportunity, (4) what employment practice caused the employer to deny plaintiff the job opportunity, and (5) that the job opportunity went to an individual not in the protected class. The *McDonnell Douglas* decision points out that the elements of a disparate-treatment claim vary with the job opportunity at issue.[190] The same flexibility should apply to individual-impact claims.

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[187] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

[188] *See* 42 U.S.C. § 2000e-2(a)(2).

[189] *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–99 (2003) (conforming the meaning of "demonstrate" in § 2000-e(m) of Title VII to the meaning of "demonstrate" in § 2000e-2(m) of Title VII).

[190] *See McDonnell Douglas*, 411 U.S. at 802 n.13; *see, e.g.*, Haney v. United Airlines, Inc., No. 15-cv-00474-VC, 2016 WL 80554, at *2 (N.D. Cal. Jan. 7, 2016) (holding that the elements of a prima facie failure-to-promote case are that (1) plaintiff was a member of a protected class, (2) plaintiff applied and was qualified for a promotion, (3) plaintiff was rejected, and (4) the employer continued seeking applicants with comparable qualifications).

As *Burdine* explains, the prima facie case serves two functions in disparate-treatment cases.[191] First, it eliminates common defenses and second, it erects a rebuttable presumption of unlawful discrimination.[192] The prima facie case under individual-impact theory similarly eliminates common defenses, but the prima facie case under individual-impact theory does more than erect a rebuttable presumption. It entitles a plaintiff to judgment unless the employer can prove, as an affirmative defense, that the challenged practice is nondiscriminatory, or that business necessity supports the challenged practice. In other words, the prima facie case shifts not the burden of production to the employer but rather shifts the burden of persuasion. Analysis of the prima facie case, bolstered by practical and policy considerations, supports this burden-shifting approach.

The first element of the prima facie case—membership in a protected class—obviously puts the plaintiff within the protective ambit of the statute. Membership in a protected class is also an element of a disparate-treatment prima facie case.[193]

The second element excludes unqualified individuals from bringing a lawsuit. This element may appear anomalous because qualifications are irrelevant to traditional disparate-impact suits and would similarly seem irrelevant to individual-impact suits. The reason for excluding job qualification as an element of a prima facie case under traditional disparate-impact theory is that disparate impact is based on whether an employment practice discriminates against a protected class, regardless of an individual's qualifications.[194] However, the qualification element under individual-impact theory serves as a gatekeeper, limiting the number of suits by denying standing to individuals unqualified for the job opportunity in question. If

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[191] *See* Tex. Dep't of Cmty. Affs. V. Burdine, 450 U.S. 248, 253–54 (1981) (noting that "[t]he prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection").

[192] *Id.* See Fed. R. Evid. 301, which provides:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Fed. R. Evid. 301; *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) (quoting rule 301 in connection with the *McDonnell Douglas* framework).

[193] *See McDonnell Douglas*, 411 U.S. at 802 (setting forth the elements of a prima face refusal-to-hire case).

[194] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that business necessity enters the analysis as an affirmative defense but not as an element of a prima facie case).

a claim for individual impact did not require this element, one might criticize the doctrine for creating too broad a group of potential plaintiffs and thereby potentially inundating the Equal Employment Opportunity Commission (EEOC) and the courts with an unmanageable number of claims.

The third element—that the employer denied the plaintiff a job opportunity—meets the requirement of § 703(a)(2) that the employer "limited" the plaintiff's employment opportunities. This element is also an element in the existing *McDonnell Douglas*/*Hicks* framework.[195]

The fourth element requires the plaintiff to identify the employment practice that resulted in the denial of a job opportunity. This element is a requirement of traditional disparate-impact cases under *Griggs* and *Teal*.[196] It pinpoints the cause of the adverse impact and provides a compass heading from which the employer may seek to prove business necessity.[197]

The fifth element of an individual-impact case—that the job opportunity went to an individual not in the protected class—diverges from the *Griggs* formulation. Under *Albemarle v. Moody*,[198] the plaintiff must demonstrate a statistically significant disproportionate adverse impact on the protected class in question.[199] Plaintiffs in individual-impact cases would often falter if required to prove this element because the sample size might be too small to generate a valid inferential statistic.[200] In other words, the circumstances of a plaintiffs denial of a job opportunity may have been unique to the plaintiff, or, even if other individuals faced like circumstances, the number of such individuals may still fall short of the number required to establish statistical significance.[201]

Nor is the fifth element part of the *McDonnell Douglas* prima facie case, which merely requires that the job opportunity remained open.[202] The function of this element in an individual-impact case is to meet the requirement of § 703(a)(2) that the limitation was "because of" plaintiff's membership in a protected

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[195] *Id.*

[196] *See* Connecticut v. Teal, 457 U.S. 440, 444 (1982) (noting that plaintiff's alleged that the employer used promotions on a discriminatory examination).

[197] *See id.* at 446.

[198] 422 U.S. 405 (1975).

[199] *Id.* at 431 (relying on EEOC guidelines).

[200] *See supra* note 99 and accompanying text (noting the pitfalls of a small sample size).

[201] *See id.*

[202] *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973) (setting forth the elements of a prima facie case, including the fourth element, which requires that "after [the plaintiff's] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications").

class. Because the fifth element requires awarding the job to an individual not in the protected class, its inference of discrimination, though admittedly not conclusive, is stronger than the inference of discrimination raised by the rebuttable presumption in a traditional *McDonnell Douglas* case.[203] The inference of discrimination in an individual-impact prima facie case is stronger than the rebuttable presumption of discrimination in a *McDonnell Douglas* case for another reason: *McDonnell Douglas* raises the presumption of intent, which is not an element of individual impact. Individual impact merely rests on a showing of differential outcomes to establish liability. The hurdle facing a prima facie case of individual impact is therefore lower than the hurdle facing a prima facie case of disparate treatment.

Adopting individual-impact theory would not appreciably increase the number of Title VII claims because the prima facie case is more restrictive than the prima facie case adopted in *McDonnell Douglas* and affirmed in *Hicks*. Implementation of the theory would, however, increase the number of successful Title VII claims for two reasons. First, an individual-impact plaintiff need not prove discriminatory intent. Second, as more fully discussed below, the employer would bear the burden of persuasion to prove the challenged practice nondiscriminatory.

Shifting this burden of persuasion to the employer puts the plaintiff in a highly advantageous position compared to plaintiffs in either traditional disparate-impact cases or disparate-treatment cases. Even granting that a prima facie case of individual impact is more robust than a prima facie case for disparate treatment, one might reasonably seek additional justification for individual impact's burden-shifting approach. Concededly, a single instance where a qualified member of the protected class experiences a differential outcome compared to a nonmember does not conclusively establish that the differential outcome was "because of" plaintiff's membership in the protected class. It is possible that the challenged employment practice, if used extensively, would not have a discriminatory impact.

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[203] Discharge cases decided under *McDonnell Douglas* often require the preferential treatment of someone not in the protected class. *See, e.g.*, Watkins v. Tegre, 997 F.3d 275, 282 (5th Cir. 2021) (holding that an element of a prima facie discharge case is that the employer treated an employee not in the protected class more favorably than the plaintiff); McCuen v. PI Corp. Support Servs. LLC, No. 6:19-cv-02602-TMC-JDA, 2020 WL 8713661, at *3 (D.S.C. Aug. 11, 2020) (holding that an element in of a prima facie discharge-and-replacement case under the Age Discrimination in Employment Act is that plaintiff was replaced by a significantly younger person).

### *B. Additional Justifications for Shifting the Burden of Persuasion to the Employer*

Several sound reasons justify shifting the burden of persuasion to the employer. These justifications involve access to information, costs, available remedies, and the urgency of Title VII's policy to eradicate discrimination from the workplace.

#### 1. Access to Information, Costs, and Remedies

The discriminatory impact of a challenged employment practice is readily provable in a traditional disparate-impact case. In an individual-impact case this is not so. Thus, proving discriminatory impact becomes a crucial issue in an individual-impact case. An employer, compared to a plaintiff, is in an advantageous position to bear the ultimate burden of persuasion on this issue. The outcome of the case will depend substantially on the employer's records and the testimony of its workers with information relevant to the plaintiff's case. The employer, not the plaintiff, has unfettered access to those records and most relevant facts. Discovery is a costly and cumbersome process that may not equalize the employer's informational advantage.[204] In addition, management will likely find deposed company employees more cooperative than will the plaintiff's attorney. These costs and disadvantages present a reason to shift the burden of proving differential impact to the defendant in an individual-impact case.

Even more important, the company will be in a better financial position than the plaintiff to bear the costs of an industrial psychologist engaged to build a case. To determine whether a challenged employment selection practice operates in a discriminatory manner, an industrial psychologist might decide, for example, to conduct an experimental study with volunteer or paid subjects.[205] Such a study would entail significant costs. The issue of expense does not arise in traditional disparate-impact cases because, given a substantial number of affected employees or applicants, the impact of a

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[204] *See, e.g.*, Diego A. Zambrano, *Discovery as Regulation,* 119 MICH. L. REV. 71, 73 (2020) (noting that critics of the current discovery process characterize it as "burdensome, overly costly, [and] intrusive"); *see also* Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery in a Digital Age,* 58 DUKE L.J. 889, 893, 896 (2009) (reporting that in federal cases discovery accounts for half of total litigation expenses, and referring to "discovery excesses").

[205] *See* David Howie, *Interpreting Probability: Controversies and Developments in the Early Twentieth Century*, 37 (2002) (showing that one may infer a characteristic of a population from "random samples from [the] population").

challenged practice, as noted above, is readily ascertainable by both sides.

The remedies for disparate impact versus disparate treatment violations also differ. A disparate-treatment violator will compensate the victim of its intentional discrimination with compensatory damages,[206] and in instances of reckless or malicious violations punitive damages.[207] Only equitable remedies are available for impact violations.[208] Because disparate treatment entails the imposition of damages whereas individual impact does not, the burden on the plaintiff in a disparate-treatment case should be greater than the burden on a plaintiff in an individual-impact case.

2. Title VII as a Super-Statute

Another justification for generous treatment of individual impact plaintiffs arises from Title VII's policy to advance racial equality in the workplace.[209] Scholars have argued that this policy elevates Title VII to a "super-statute."[210]

William N. Eskridge, Jr. and John Ferejohn introduced the concept of super-statutes, arguing that such laws promote policies to address fundamental social and economic issues of widespread public concern.[211] Over time, these statutes establish norms that reshape cultural values and transform society.[212] Wielding enormous influence, super-statutes affect the interpretation of other laws, lead to the passage of new law, and

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[206] 42 U.S.C. § 1981a(b)(3)(A)–(D) (2022).

[207] *Id.* § 1981a(b)(1).

[208] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 252 (1944) (stating that Title VII provides victims of discrimination with equitable relief); *Windsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1002 (1996) (noting that prevailing Title VII plaintiffs may be entitled to reinstatement, backpay, front pay, and declaratory and injunctive relief).

[209] *See, e.g.*, 110 Cong. Rec. 7220 (1964) (condemning the "social malaise and [] social situation which we should not tolerate") (statement of Sen. Clark); *id.* at 6548 (advocating passage of the 1964 Civil Rights Act because it would address "the plight of the [African American] in our economy") (statement of Sen. Humphrey); U.S. Comm'n on Civil Rights, For All The People . . . By the People—A Report on Equal Opportunity in State and Local Government Employment 119 (1969), reprinted in 118 Cong. Rec. 1817 (1972) (supporting the 1972 amendments to the 1964 Civil Rights Act because of "[b]arriers to equal opportunity" in state and local government affecting "recruitment and selection devices which are arbitrary, unrelated to job performance, and result in unequal treatment of minorities . . .").

[210] *See* Maria L. Ontiveros, *The Fundamental Nature of Title VII*, 75 OHIO ST. L.J. 1165, 1175 (2014) (characterizing Title VII of the Civil Rights Act of 1964 as a "super-statute," entitled to deference and expansive interpretation that exceeds its literal terms).

[211] *See* William Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

[212] *See id.*

even alter interpretations of constitutional principles.[213] To achieve the purposes of such statutes, courts often suspend traditional rules of statutory construction, interpreting them expansively, and sometimes ignoring constraints of the statutory language itself.[214]

Eskridge and Ferejohn argue that the Civil Rights Act of 1964 (the Act) is a super-statute.[215] Preceded by "intense political struggle," the Act, when finally passed, embodied the "great principle" of antidiscrimination.[216] The scope of the Act was broad, advancing the equality principle in voting, housing, public accommodations, and employment.[217] It has animated other state and federal statutory regimes and has even influenced the interpretation of the Commerce Clause.[218] Most important, it has established a societal norm condemning racism.[219]

Maria L. Ontiveros has elaborated on this argument, focusing on Title VII.[220] She traces the roots of Title VII to the Thirteenth Amendment,[221] asserting that Title VII is part of an historic movement to create equal employment opportunity and to guarantee "the right to own" and benefit from one's labor.[222] Title VII, she argues, has left an indelible imprint on American society, which has internalized the norm of equal employment opportunity.[223] She concludes that traditional rules of statutory construction should not constrain the remedial purpose of Title VII and that courts should read it generously to advance its salutary purpose and design.[224]

Title VII occupies a unique position even among super-statutes. Eclipsing all other issues of national concern, the struggle for employment equality has etched itself into the

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[213] *See id.* at 1216–17.

[214] *See id.* The authors offer the Sherman Antitrust Law as an example of a "super-statute." *Id.* at 1231. They argue that the statute's prohibition of monopolistic activities that restrain trade has exerted enormous influence on American law and has reshaped norms of fair competition in a free market society. *Id.* at 1232. The authors support this assertion by discussing the influence that the Sherman Act has had on regulatory, statutory, and even constitutional law. *Id.* 1235–36. They note, for example, that the Sherman Act has led to the expansion of the Commerce Clause. *Id.* at 1236.

[215] *Id.* at 1237.

[216] *Id.*

[217] *See id.*

[218] *See id.* at 1240–41.

[219] *See id.* at 1237.

[220] *See* Ontiveros, *supra* note 210, at 1175.

[221] *Id.* at 1189.

[222] *Id.* at 1167. To support her view that Title VII is a super-statute, she notes that "international law recognizes" the sanctity of human rights as a peremptory norm, which supersedes all conflicting national law. *Id.* at 1194. She argues that the "freedom from employment discrimination" is a human right. *Id.* at 1197.

[223] *See id.* at 1175.

[224] *Id.*

public consciousness.[225] Title VII represents Congress's foremost attempt at cleansing injustice from the workplace. No other statute stands on a more compelling historical foundation or advances a more urgent national policy. Following the thesis of Eskridge, Ferejohn, as animated by Ontiveras, this article advocates construing Title VII expansively to achieve its goal to rid the workplace of invidious discrimination.[226] Given these justifications for individual-impact theory, the following sections discuss how this theory would function.[227]

### *C. Application of the Prima Facie Case*

Assume that Rivet Welding Company employs ten welders, one of whom is African American. The company has one opening for head welder. The only applicants for the opening are two of Rivet's incumbent welders, one white and the other the African American. The promotion process has two stages. First comes a review of an applicant's previous job performance. The second stage is an interview conducted by the shop foreman. After both applicants complete the process, the promotion goes to the white applicant. The African American believes that his job performance was superior to that of the white applicant. He concludes that the interview accounted for the denial of his application for the promotion.

Having received a right-to-sue letter from the EEOC, the African American applicant commences a lawsuit alleging individual impact.[228] The plaintiff would meet the requirements of a prima facie case. First, the plaintiff is African American.

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[225] *See id.* at 1177.

[226] Based on the centuries-long struggle for racial equality, Ontiveros focuses her argument that Title VII is a super-statute on the issue of racial discrimination. Ontiveros, *supra* note 210, at 1167. Although her argument is most compelling when applied to the inequities imposed on African Americans, analogous arguments of the pervasive stereotyping and denying of employment benefits based on sex, religion, and national origin suggest that these protected classes should also benefit from the broadest protections under Title VII. *See, e.g.*, Thomas H. Barnard & Adrienne L. Lapp, *Pregnant Employees, Working Mothers and the Workplace—Legislation, Social Change, and Where We Are Today*, 22 J.L. & HEALTH 197 (2009) (discussing denial of employment benefits and opportunities based on sex).

[227] *See infra* Part III.C–E (discussing the operation of the prima facie case, the affirmative defenses, and the less discriminatory alternative doctrine).

[228] 42 U.S.C. § 2000e-5(f)(1) provides in pertinent part:

> [If the Commission is unable to secure a conciliation agreement acceptable to it], the Commission, or the Attorney General in a case involving the government, government agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the party claiming to be aggrieved . . .

Second, the plaintiff's employment record establishes that the plaintiff was qualified for the promotion to head welder. Third, Rivet denied the plaintiff the promotion. Fourth, the plaintiff would establish, by admissible evidence, that the interview, rather than previous job performance, caused Rivet to deny him the promotion. Fifth, the promotion went to the white applicant. At this point, the plaintiff has established a prima facie case for individual impact. The plaintiff has proven that the identified selection criterion—the interview—resulted in the award of the promotion to the white applicant "because of" race.[229]

The African American would not be able to prove a traditional disparate-impact case because of the small sample size. Because the prima facie in the individual-impact case rests on a single instance of a differential outcome, the prima facie case is admittedly inconclusive.[230] Therefore, the employer must have the opportunity to prove that the challenged selection criterion—the interview—was nondiscriminatory. The employer bears the burden of persuasion to prove this affirmative defense.

Before discussing this affirmative defense and the business-necessity defense, two additional concerns with individual-impact theory deserve consideration.

First, the employer or its agent may have concealed the true reason for the adverse decision, thereby misleading the plaintiff into stating the wrong reason for the lost job opportunity. For example, the employer might fail to disclose that nepotism was the true reason because nepotism might prove embarrassing. When faced with either embarrassment or liability for unlawful discrimination, most employers would probably opt for embarrassment.

Assume, for example, in the Rivet case that the foreman promoted his son-in-law to head welder. The foreman tried to conceal the nepotism because, if Rivet's owner learned of it, the owner would rebuke or even fire the foreman.[231] Conciliation proceedings at the EEOC[232] and pretrial discovery would likely uncover the truth.

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[229] *Id.* § 2000e-2(a)(2).

[230] *See* Van Arsdale et al., *supra* note 99 (noting that a single instance of differential treatment does not establish unlawful discrimination).

[231] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 537 (1993) (Souter, J., dissenting) (noting that although "employers [may] have nondiscriminatory reasons for their actions, but ones so shameful that they wish to conceal them," their concealment does not justify abandoning "an orderly procedure for getting at 'the elusive factual question of intentional discrimination'") (citing Tex. Dep't of Cmty. Affs. V. Burdine, 450 U.S. 248, 255, n.8 (1981)).

[232] 42 U.S.C. § 2000e-5(b) provides in pertinent part:

Hiding the true reason for the adverse employment action may backfire on an employer. If the factfinder decided that the employer's ostensible reason for the plaintiff's loss of a job opportunity was not the true reason, the plaintiff would vault into the *McDonnell Douglas*/*Hicks* analysis. The shift to a disparate-treatment case would occur because the plaintiff would have met and exceeded the requirements of a *McDonnell Douglas*/*Hicks* prima facie case and would also have proven pretext. Under *Hicks*, once the plaintiff disproves the employer's proffered reason, the factfinder is permitted, but not required, to hold that the employer intentionally discriminated against the plaintiff.[233] Such a finding of disparate treatment would entitle the plaintiff to compensatory damages[234] and punitive damages if the plaintiff could prove the employer's discrimination was reckless or malicious.[235]

Second, one might argue that the sheer number of individual-impact claims would drive employers to abandon subjective practices and adopt objective ones that entail less risk of litigation but may be less predictive of job performance.[236] Such an undesirable consequence is doubtful. As noted in *Watson v. Fort Worth Bank & Trust*, employers are unlikely to abandon subjective practices because they are indispensable

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> [After receiving or initiating a complaint, the EEOC will investigate the circumstances that led to the complaint and] [i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

[233] *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 134 (2000) (reaffirming the holding of *Hicks* by asserting that the demonstration of pretext is circumstantial evidence that may in some cases convince the factfinder that the employer intentionally discriminated); *see also Hicks*, 509 U.S. 502, 511 (1993) (clarifying that when a plaintiff disproves an employer's purported nondiscriminatory reason, the factfinder may but is not obligated to "infer the ultimate fact of intentional discrimination"); Pennucci-Anderson v. Ochner Health Sys., No. 19-271-DPC, 2021 WL 242862, *6 (E.D. La., Jan. 25, 2021) (noting that the combination of plaintiff's prima facie case and disproof of the employer's step two reason "may permit" the factfinder to "conclude that the employer unlawfully [intentionally] discriminated"); Holmes v. Town of Clover, No. 0:17-3194-JMC-SVH, 2019 WL 5865597, at *6 (D.S.C. June 25, 2019) (following the *Hicks* framework).

[234] 42 U.S.C. § 1981a(b)(3)(A)–(D) (providing maximum compensatory damage limits depending on the number of defendant's employees).

[235] *Id.* § 1981a(b)(1) (providing that a plaintiff may recover punitive damages on a showing of "malice" or "reckless indifference to the federally protected rights of an aggrieved individual").

[236] *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 993 (1988) (contending that the expansion of disparate-impact theory to subjective practices would not "have any chilling effect on legitimate business practices").

tools needed to hire and promote the ablest employees.[237] An objective test score will never replace the need for a face-to-face meeting between an applicant for promotion and a supervisor. Nor will it replace a supervisor's assessment of an incumbent employee's performance. The likely outcome of adopting individual-impact theory is improvement in the evenhandedness of applying selection practices, whether objective or subjective.

### *D. Affirmative Defenses*

Although Title VII favors a generous interpretation of the rights it affords employees, it also recognizes legitimate employer prerogatives.[238] Individual-impact theory would recognize these legitimate interests by providing employers two affirmative defenses: (1) the challenged practice is nondiscriminatory, and (2) business necessity supports the challenged practice.

#### 1. First Affirmative Defense: Nondiscrimination

A prevailing plaintiff in a *McDonnell Douglas*/*Hicks* case must disprove the employer's step two reason.[239] Similarly, in a traditional *Griggs* disparate-impact case, the plaintiff bears the burden of persuasion to prove that the challenged employment practice was discriminatory.[240] In sharp contrast, once a plaintiff alleging individual impact has proven a prima facie case, the employer bears the burden of persuasion that the challenged employment practice was nondiscriminatory. If the employer meets this burden, the employer has established an affirmative defense.

Turning to the Rivet hypothetical, Rivet must prove that the interview resulting in the denial of the plaintiff's promotion was nondiscriminatory. The minimal sample size of those applying for the promotion—a single African American and a single white applicant—would be insufficient to generate a reliable or valid statistical analysis.[241] Even if there were more applicants, hiring a white person for a single job opening would

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[237] *See id.* at 993 (contending that the expansion of disparate-impact theory to subjective practices would not "have any chilling effect on legitimate business practices").

[238] *See* McDonnell Douglas v. Green, 411 U.S. 792, 801 (1973) (noting "[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions").

[239] *See, e.g.*, Tex. Dep't of Cmty. Affs. V. Burdine, 450 U.S. 248, 253 (1981).

[240] *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 578 (2009).

[241] *See* Selmi, *supra* note 108 and accompanying text.

not support an inference that the challenged employment practice had a discriminatory impact.[242] In such cases, Rivet might offer other sources of evidence.[243] For example, the employer might adduce the credentials and job performance records of other employees hired, promoted, or otherwise advanced where the employer used the challenged selection criterion. Other types of relevant evidence would be (1) the record of the decisionmaker in administering the selection criterion in question and administering other selection criteria, and (2) the employer's overall record of hiring and promoting African Americans.[244]

Assume that the white applicant's resume and past job performance were stronger than the comparable credentials of the African American applicant. This evidence would support the business-necessity defense. On the other hand, assume that the African American applicant's credentials were superior to those of the white applicant. The interviewer might seek to justify the decision to promote the white applicant based on the "impression" that the white candidate made during the interview. The interviewer might explain, for example, that the white candidate "seemed more motivated" or that "I just hit it off with the guy." Such explanations are subjective, vague, and unverifiable. They might persuade the factfinder that the interview was discriminatory and that the interviewing shop foreman's decision to reject the African American applicant was "because of" race. The shop foreman's discrimination may not have been intentional; it may have been unconscious. But inadvertent discrimination meets the strict-liability standard of individual-impact theory.

Similarly, if Rivet's shop foreman had a history of preferring white applicants to African Americans, a factfinder might reasonably conclude that the challenged selection criterion—the interview—operated adversely toward African Americans as a class, regardless of the intent of the shop foreman, who might have discriminated unconsciously.

Even though the employer bears the ultimate burden of persuasion, the plaintiff will not stand idle. The plaintiff will offer all available admissible evidence to persuade the factfinder that

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[242] *See id.*

[243] *See id.*

[244] *See* Van Arsdale et al., *supra* note 99 (noting the relevance of an employer's treatment of other members of the protected class).

the interview resulted in unlawful discrimination.[245] Thus, both parties will have a full opportunity to present their evidence.

It is always possible that the employer found liable for individual impact *did* intentionally discriminate. As noted in Part II, proving discriminatory intent is a slippery proposition.[246] The advantage of individual-impact theory is that a plaintiff need not meet the burden of proving intent. Thus, individual impact operates as a fallback position where proof of discriminatory intent is elusive.[247]

Because the *McDonnell Douglas*/*Hicks* framework provides a plaintiff with a means of proving discriminatory intent,[248] whereas individual-impact theory would provide a means to establish strict liability, the two theories justify different remedies. Title VII calibrates the available remedies to the degree of blameworthiness.[249] A plaintiff who proves that the decisionmaker acted with discriminatory intent becomes entitled to compensatory damages,[250] and, in the case of employer recklessness or malice, punitive damages.[251] In the case of individual impact, as in cases of traditional disparate impact, a prevailing plaintiff is entitled only to equitable remedies, including reinstatement, backpay, front pay,

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[245] *See* Tex. Dep't of Cmty. Affs. V. Burdine, 450 U.S. 248, 257–58 (1981) (noting that the defendant may submit multiple reasons for the challenged employment action and has the incentive to prove these reasons).

[246] *See* Ann C. McGinley, *Discrimination Redefined,* 75 MO. L. REV. 443, 443 (2010) (observing that "employers' new sophistication about employment discrimination has virtually eliminated direct evidence of discrimination").

[247] *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990 (1988).

[248] *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

[249] *See infra* notes 243–245 and accompanying text (discussing available remedies for Title VII violations).

[250] *See* 42 U.S.C. § 1981a(a)(1), which provides:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act . . . and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed under subsection (b) . . .

*Id.*

[251] *See* § 1981a(b)(1), which provides:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, governmental agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

*Id.*

declaratory relief, and certain forms of injunctive relief, and attorney's fees.[252]

### 2. Second Affirmative Defense: Business Necessity

The business necessity defense adopted in traditional disparate-impact cases should also apply in individual impact cases. *Griggs* placed the burden of proving business necessity on the defendant.[253] In *Albemarle Paper Co. v. Moody*,[254] the Supreme Court clarified this burden, holding that it requires rigorous statistical evidence.[255]

Albemarle, which operated a mill to convert raw wood into paper products,[256] used two aptitude tests to determine transfers to relatively high-paying positions.[257] African American employees brought a class action lawsuit, alleging that the aptitude tests had an adverse discriminatory impact on them.[258] Asserting the business necessity defense, Albemarle relied on a validation study, which, it argued, justified its use of the two aptitude tests.[259] The Supreme Court subjected the study to rigorous analysis, which exposed serious flaws in the study's methodology and results.[260] The Court therefore rejected Albemarle's business-necessity defense.

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[252] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 252 (1994) (stating that Title VII provides victims of discrimination with equitable relief); Windsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1002 (1996) (noting that prevailing Title VII plaintiffs may be entitled to reinstatement, backpay, front pay, and declaratory and injunctive relief).

[253] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971). In *Wards Cove Packing Co. v. Atonio,* the Supreme Court shifted the burden of proving business necessity to the plaintiff. 490 U.S. 642, 659 (1989) *superseded by statute,* Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53 (2003). Congress responded by overruling *Wards Cove* and returning the burden of proving business necessity to the employer. *See* Civil Rights Act of 1991, Pub. L. No. 102-166 § 105(a), 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i)) (providing in pertinent part a plaintiff alleging disparate impact will prevail only if "the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . .").

[254] Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

[255] *See id.* at 430–36. In cases of public interest, the Supreme Court has applied a relaxed standard for the business-necessity defense. *See, e.g.*, N.Y.C. Transit Auth. V. Beazer, 440 U.S. 568, 592–93 (1979) (applying a less stringent standard where the New York City Transit Authority's policy of refusing to hire methadone users had a disparate impact on African American and Latino applicants); Washington v. Davis, 426 U.S. 229, 250 (1976) (lowering the business-necessity standard where a test had a disparate impact on academy cadets in training for a police department).

[256] *Albemarle,* 422 U.S. at 427.

[257] *Id.* at 410–11, 427.

[258] *Id.* at 408–09.

[259] *Id.* at 411. The Court seemed displeased that Albemarle "engaged an industrial psychologist" to conduct the validation study "on the eve of trial." *Id.*

[260] *Id.* at 431–35. Albemarle used the aptitude tests to qualify applicants for entry-level jobs. *Id.* at 435. Although many disqualified individuals were African American, only four African Americans were included in the sample used in the study.

In two public employment cases arguably involving public safety, the Supreme Court dispensed with *Albemarle's* rigorous scrutiny of validation statistics aimed at proving business necessity.[261] Excluding such extraordinary circumstances, individual-impact theory should incorporate the *Albemarle* standard.

### *E. The Less Discriminatory Alternative Doctrine*

Even if an employer establishes business necessity, the plaintiff in a traditional disparate-impact case may prevail if able to prove that the employer refused to adopt a less discriminatory alternative that would have met its needs.[262] This doctrine should likewise apply to individual-impact theory. In practical effect, however, this doctrine is unlikely to help many plaintiffs. Although the doctrine is sensible, federal courts have overwhelmingly been reluctant to find that plaintiffs have proven less discriminatory alternatives.[263]

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*Id.* at 430. Compounding this error, the study correlated aptitude scores with the performance of workers in high-level jobs, *id.* at 433–34, though African Americans held lower-level positions. *Id.* at 435. The study was also flawed because it relied on the subjective performance evaluations of supervisors who made their evaluations without clear guidelines. *Id.* at 433. Perhaps because of the subjectivity of the supervisor evaluations and the vagueness of the standards, the results of the study were often contradictory and sometimes statistically insignificant. *Id.* at 432.

[261] *See* Washington v. Davis, 426 U.S. 229, 250 (1976) (applying a weakened standard to police trainees); N.Y.C. Transit Auth. V. Beazer, 440 U.S. 568, 571 (1979) (applying a weakened standard to transit employees).

[262] 42 U.S.C. § 2000e-2(k)(1)(A)(ii). That subsection provides in pertinent part, "[A complainant alleging disparate impact will prevail if] the complaining party makes the demonstration described in paragraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice." *Id.*; *see also Albemarle*, 422 U.S. at 425 (holding that the plaintiff bears the burden of proving a less discriminatory alternative).

[263] *See, e.g.*, Chi. Teachers Union v. Bd. of Ed., 14 F.4th 650, 657–58 (7th Cir. 2021) (affirming summary judgment for school board where African American teacher laid off based on declining student enrollment did not prove viable less discriminatory alternative); Lopez v. City of Lawrence, 823 F.3d 102, 121 (1st Cir. 2016) (rejecting all of plaintiff's several suggested alternatives); Williams v. Wells Fargo Bank, N.A., 901 F.3d 1036, 1041–42 (8th Cir. 2018) (affirming summary judgment against African American and Latinx plaintiffs who argued that providing notice of the opportunity to secure disqualification waivers was a less discriminatory alternative to excluding felons from job opportunities); Hardie v. Nat'l Collegiate Athletic Ass'n, 876 F.3d 312, 323–24 (9th Cir. 2017) (affirming summary judgment against plaintiff who proposed two alternatives to the National Collegiate Athletic Association's policy of barring felons from coaching tournaments); Johnson v. City of Memphis, 770 F.3d 464, 476–77 (6th Cir. 2014) (rejecting plaintiffs' proposed alternative to a police department's testing protocol for promotion); Shollenbarger v. Planes Moving & Storage, 297 F. App'x 483, 486–87 (6th Cir. 2008) (affirming directed verdict for defendant, despite its failure to explore possible less discriminatory alternatives to layoff policy that disproportionately affected women); Allen v. City of Chicago, 351 F.3d 306, 316 (7th Cir. 2003) (affirming summary judgment for the city because the plaintiffs did not prove a less discriminatory alternative to contested police promotions). *But see* NAACP v. North Hudson Reg'l Fire & Rescue, 742

## IV. ELUSIVE INTENT, UNCONSCIOUS DISCRIMINATION, REMEDIATION, AND DETERRENCE

This Part explores additional benefits of individual-impact theory. First, the theory would enhance a plaintiff's capability of prevailing in a case where intent eludes detection. Second, the theory would increase the likelihood that plaintiffs would prevail in cases where the employer engaged in unconscious discrimination.[264] Third, the theory would provide more victims of unlawful discrimination with a claim, which might well result in the award of an equitable remedy. Fourth, by exposing employers to a broadened scope of potential liability the theory would deter unlawful workplace discrimination. This Part begins with a discussion of *Watson v. Fort Worth Bank & Trust*, which highlighted the issues of elusive intent and unconscious discrimination.[265]

### *A.* Watson v. Fort Worth Bank & Trust*: Subjective Selection Criteria*

In *Watson v. Fort Worth Bank & Trust*,[266] the Supreme Court faced the issue whether disparate-impact theory should apply to subjective employment practices. Grappling with this issue, the Court recognized the inadequacies of disparate-treatment theory's ability to expose subtle instances of discriminatory intent.[267] The Court also recognized the harm that unconscious discrimination may cause in the workplace.[268] To provide a remedy for these elusive forms of discrimination, the court extended traditional disparate-impact theory to subjective selection criteria.[269]

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F. Supp. 2d. 501, 525 (D.N.J. 2010), *aff'd,* 665 F.3d 464 (3d Cir. 2011) (agreeing with plaintiffs' proposal that a fire department to hire a certain percentage of bilingual firefighters as opposed to the challenged policy of hiring firefighters based on residency); Kilgo v. Bowman Transp., Inc., 570 F. Supp. 1509, 1512, 1521 (N.D. Ga. 1983) (finding that a training program for truck drivers was a less discriminatory alternative to a one-year experience requirement that had a disparate impact on women). *See generally* Kevin Tobia, *Disparate Statistics,* 126 YALE L.J. 2382, 2411–12 (2017) (arguing that courts should approve less discriminatory alternatives that plaintiffs suggest, even if those alternatives imply insignificant reductions in discriminatory outcomes).

[264] *See generally* Ann C. McGinley, *Discrimination Redefined,* 75 MO. L. REV. 443, 457 (2010) (inviting scholars to innovate variations on disparate-impact theory to combat unconscious bias).

[265] Watson v. Fort Worth Bank Tr., 487 U.S. 977 (1988).

[266] *Id.*

[267] *Id.* at 990.

[268] *Id.* (recognizing "the problem of subconscious stereotypes and prejudices").

[269] *Id.* at 991.

Clara Watson, an African American teller at Fort Worth Bank & Trust (the bank), applied on numerous occasions for promotion to supervisory positions, but in each instance a white applicant received the promotion.[270] All promotion decisions rested on the subjective judgments of the candidate's supervisors, all of whom were white.[271] Watson filed an action in federal district court, alleging a claim for disparate impact.[272]

Arguing that disparate-impact theory should not apply to subjective practices, the bank asserted that objective assessments of performance cannot accurately measure intangibles such as good judgment, ambition, and loyalty.[273] Because of the inability of employers to measure these qualities accurately, employers would not be able to meet the burden of proving business necessity.[274] The inability to mount a defense might impel employers to resort to quotas.[275]

Despite recognizing the legitimacy of the bank's arguments, the Court held subjective practices amenable to disparate-impact analysis.[276] The Court was concerned that if it excluded subjective practices from disparate-impact analysis, employers would replace objective practices, such as tests, with subjective practices such as supervisor evaluations.[277] Such a development might foretell the demise of disparate-impact analysis and the protection it affords employees.[278] To answer the bank's arguments, the Court observed that a plaintiff must identify the "specific employment practice" at issue and that pinpointing relevant subjective practices may be challenging.[279] If the plaintiff cannot identify these practices, the employer would not need to defend them.[280] The Court also emphasized that a successful plaintiff must link a challenged practice to an

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[270] *Id.* at 982.

[271] *Id.*

[272] *Id.* at 984.

[273] *Id.* at 991.

[274] *Id.* at 991–92.

[275] *Id.* at 992.

[276] *Id.* at 990. The Court was unanimous in believing that subjective practices should be amenable to disparate-impact analysis. *Id.* at 978–81.

[277] *Id.* at 990.

[278] *Id.* at 992.

[279] *Id.* at 994.

[280] *See id.* It is ironic that the Court first held subjective practices to disparate-impact analysis, and then justified its decision by declaring that plaintiffs will have a hard time identifying such practices. *Id.* at 990, 994. This rationale for the Court's decision provides scant comfort to plaintiffs. Critical of the plurality for advocating a "fresh" assessment of evidentiary standards, Justice Stevens counseled that the plurality should have delayed its comments until the district court made findings on the adequacy of plaintiff's prima facie case and the defendant's explanation for granting supervisors discretion in making promotions. *Id.* at 1011 (Stevens, J., concurring in the judgment).

adverse outcome.[281] The business necessity defense, the Court stated, furnishes the defendant with yet another means of avoiding liability.[282] Perhaps most importantly, the Court asserted that in cases involving subjective practices formal validation studies might be unnecessary.[283] Personal qualities that are difficult to measure may affect job performance, particularly in managerial positions, and the courts may legitimately defer to an employer's discretionary evaluation of such qualities.[284]

The Court relied on two additional reasons to support extending disparate-impact theory to subjective practices.[285] The first is the elusiveness of proving discriminatory intent, and the second is the undetectability of unconscious discrimination.[286] These two reasons support recognition of individual-impact theory.

1. Elusive Intent

The Court explained that subjective selection criteria, although a legitimate basis for business decision-making, may conceal discriminatory animus.[287] Subtle indications of discriminatory intent may be difficult to detect.[288] Because disparate-treatment theory requires a plaintiff to prove the defendant's discriminatory intent, this theory is ineffective in cases where the defendant conceals forbidden bias.[289] Disparate-impact theory addresses this concern by dispensing with an intent requirement.[290] In essence, the *Watson* Court positioned disparate-impact analysis as a fallback if a plaintiff could not prove intent.[291]

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[281] *Id.* at 994–95.

[282] *Id.* at 997. The Court implied that the employer's burden is merely to produce evidence supporting a business-necessity defense. *Id.* at 998. Thus, it seemed that the Court was shifting the burden of persuasion to the plaintiff. *Id.* Justice Blackmun criticized the plurality on this point, noting that the employer bears "the burden of *proof,* not production, to the defendant to establish that the employment practice in question is a business necessity." *Id.* at 1001 (Blackmun, J., concurring in part and concurring in the judgment).

[283] *Id.* at 999.

[284] *Id.* This rationale also offers little comfort to plaintiffs. Blind deference to an employer's evaluations of subjective practices would dilute, if not defeat, the effectiveness of disparate-impact analysis.

[285] *Id.* at 990, 999.

[286] *Id.*

[287] *Id.* at 999.

[288] *Id.*

[289] *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254–56 (1981) (noting that a plaintiff must persuade the court that a defendant's proffered, nondiscriminatory reason for the action "was not the true reason for the employment decision").

[290] *Id.*

[291] *Watson*, 487 U.S. at 990.

Current disparate-impact theory imposes liability when a facially neutral employment practice has a disproportionate negative impact on a protected class.[292] This theory, however, applies to groups subjected to discriminatory employment practices.[293] Establishing liability requires a significant statistical showing.[294] Current disparate-impact theory does not apply to individual cases of unintentional discrimination because an individual cannot marshal an adequate statistical basis for a claim.[295] Nor does it apply to small groups for the same reason.[296] Individual-impact theory provides a means for individuals and small groups to establish a claim, even when plaintiffs cannot adduce persuasive statistics. It therefore fills the voids left by current disparate-impact theory and enables more plaintiffs to assert valid claims, regardless of their ability to prove discriminatory intent.

2. Unconscious Discrimination

The *Watson* Court acknowledged that disparate-treatment analysis, which requires proof of discriminatory intent, does not adequately police unconscious stereotypes and prejudices.[297] Suggesting that the problem of unconscious bias may be pervasive, the Court noted that Clara Watson endured a racial slur in the workplace by way of an offhand comment implying that African Americans are incapable of counting large sums of money.[298]

Individual-impact theory strengthens a plaintiff's ability to expose unconscious discrimination. By broadening impact claims to cover individual instances of discrimination, individual-impact theory would detect more instances of unconscious discrimination than would current theories of Title VII.

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[292] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (recognizing disparate-impact theory in noting that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

[293] *See id.* at 430–32.

[294] *See* Flake, *supra* note 6, at 2210–11 (discussing the statistical requirements of disparate-impact theory).

[295] *See id.*

[296] *See id.*

[297] Watson v. Fort Worth Bank Tr., 487 U.S. 977, 999 (1988).

[298] *Id.* at 990. Someone remarked to Watson that a teller had significant responsibilities with "a lot of money . . . for blacks to have to count." *Id.*

### *B. Scholars' Concerns with Unconscious Bias*

The problem of unconscious discrimination has sparked substantial scholarly attention.[299] This body of scholarship has shown the inadequacy of current theories of Title VII to address unconscious discrimination.

#### 1. A Negligence Approach to Address Unconscious Bias

Professor David Benjamin Oppenheimer asserts that unconscious discrimination runs rampant in the workplace.[300] In his article, written in 1993, he criticizes theories of Title VII liability for not adequately addressing this problem.[301] Unfortunately, this gap in Title VII persists to the present day.

Citing the scholarship of Charles Lawrence,[302] Oppenheimer argues that, because people need to understand complex environments, they develop coping mechanisms.[303] Some of these coping mechanisms categorize people by group and impute stereotypes to them.[304] Learned at an early age, many of these stereotypes, such as those imposed on African Americans, become internalized.[305] When cultural condemnation of racism confronts individuals harboring ingrained racist beliefs, the mind suppresses those beliefs, which become buried in the unconscious.[306] Thus, despite an employer's conscious wish to provide a workplace free of bias, that employer and its

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[299] *See, e.g.*, Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339–44 (1987). In a groundbreaking article, Charles Lawrence cited experimental data to support the contention that white employers professing to condemn racial discrimination often harbor unconscious racial bias. *Id.*; *see also, e.g.*, Aziz Z. Huq, *What Is Discriminatory Intent?* 103 CORNELL L. REV. 1211, 1260 (2018) (exposing the implicit bias that occurs in law enforcement and sentencing); Amelia M. Wirts, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination,* 58 B.C. L. REV. 809, 811 (2017) (suggesting that the unconscious absorbs biases perpetrated by societal and cultural norms); Christopher Cerullo, *Everyone's a Little Bit Racist? Reconciling Implicit Bias and Title VII,* 82 FORDHAM L. REV. 127, 141 (2013) (discussing the prevalence of implicit bias in hiring practices); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory,* 38 HARV. C.R.-C.L. L. REV. 91, 91–92 (2003) (observing that current theories under Title VII do not adequately address unconscious discrimination).

[300] David Benjamin Oppenheimer, *Negligent Discrimination,* 141 U. PA. L. REV. 899, 902 (1993).

[301] *Id.* at 916.

[302] Lawrence, *supra* note 299.

[303] Oppenheimer, *supra* note 300, at 901–02.

[304] *Id.*

[305] *Id.* at 902.

[306] *Id.*

managers with decision-making authority may cling unconsciously to racial stereotyping.[307]

To solve this problem, Oppenheimer advocates the adoption of a general negligence theory of Title VII liability.[308] Oppenheimer argues that an employer is negligent when it fails to discard procedures that allow unconscious biases to influence decision making in the workplace.[309] He supports the adoption of a general negligence theory by pointing out that, at the time he wrote his article, negligence-based principles were at the core of many doctrines recognized under Title VII.[310] For example, the less discriminatory alternative doctrine permits disparate-impact plaintiffs to override a business-necessity defense if they can prove that the employer failed to implement a practice that is less discriminatory than but equally effective as the practice the employer adopted.[311] In essence, an employer's failure to

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[307] *Id.* Citing experimental data reported by social scientists, Oppenheimer believed that, despite a decline in overt racism, cover or unconscious racism presented an intractable problem. *Id.* at 903–04.

[308] *Id.* at 967. Other scholars have followed Oppenheimer's suggestion that the courts should recognize a negligence theory of unlawful discrimination under Title VII. *See* Kenneth R. Davis, *The Invisible Ban: Negligent Disparate Impact,* 70 AM. U. L. REV. 1879, 1900 (2021) (proposing a theory of negligent disparate impact, derived from the language of Title VII and general principles of tort law); Leora F. Eisenstadt & Jeffrey R. Boles, *Intent and Liability in Employment Discrimination,* 53 AM. BUS. L.J. 607, 621–22 (2016) (suggesting that the standard of criminal negligence should apply to Title VII); Catherine E. Smith, *Looking to Torts: Exploring the Risks of Workplace Discrimination,*75 OHIO ST. L.J. 1207, 1216 (2014) (arguing that a negligence approach to employment discrimination, based on an "unreasonable risk" standard, would detect more instances of implicit bias than an intent-based approach); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law,* 66 STAN. L. REV. 1381, 1384 (2014) (theorizing that liability under Title VII should arise when an employer fails to exercise due care to protect workers from "social segregation or hierarchy"); Noah D. Zatz, *Managing the Macaw: Third Party Harassers Accommodation, and the Disaggregation of Discriminatory Intent,* 109 COLUM. L. REV. 1357, 1364 (2009) (arguing that Title VII liability should depend on the reasonableness of an employer's response to the potential harm that might befall members of a protected class). *Cf.* Mark S. Brodin, *Discriminatory Job Knowledge Test, Police Promotions, and What Title VII Can Learn from Tort Law,* 59 B.C. L. REV. 2319, 2363–68 (2018) (advocating the incorporation into Title VII the tort-law presumption that people intend the natural consequences of their actions, and concluding, from that presumption, that the law attributes intent to employers who repeatedly use practices likely to have discriminatory outcomes). Other scholars have criticized applying tort doctrine to Title VII. *See* W. Jonathan Cardi, *The Role of Negligence Duty Analysis in Employment Discrimination Cases,* 75 OHIO ST. L.J. 1129, 1132 (2014) (arguing that Title VII should not borrow the duty element from negligence law because tort duties weigh policies such as judicial economy, deterrence, and foreseeability of harm, none of which apply with equal force to discrimination law); Ontiveros, *supra* note 210 at 1176, 1202–03 (elevating Title VII to the status of a super-statute and urging that imposing negligence standards of causation into Title VII would dilute the statute's mission of creating equal economic opportunity); Sandra F. Sperino, *The Tort Label,* 66 FLA. L. REV. 1051, 1077–79, 1085 (opposing the engrafting of tort law concepts of causation and injury into federal discrimination law).

[309] Oppenheimer, *supra* note 300, at 970.

[310] *Id.* at 932–33.

[311] *Id.* at 933–34.

meet its duty of care to find and adopt a less discriminatory alternative sounds in negligence.[312]

Another example of a negligence-like doctrine in operation under Title VII is the employer's duty to make reasonable accommodations in "religion, pregnancy, [and] disability" cases.[313] The very use of the concept of reasonableness implies a balancing of interests inherent in determining the scope of a negligence-based duty of care.[314] An explicit example of the importation of negligence theory into Title VII is employer liability for failing to take reasonable measures to prevent the sexual harassment that one employee inflicts on a coworker.[315]

Oppenheimer's proposal might well reduce the incidence of unconscious workplace bias, but a general negligence theory is not the most effective approach to deal with the problem. Such a theory has limited utility because the burden of proving an employer's negligent breach of duty imposes a barrier to recovery. Assume that a manager for a technology company has an opening for a systems analyst. Eight candidates all with strong credentials apply, seven white and one African American. The interviewer hires one of the white candidates. Proving the employer's negligence might be a daunting undertaking, particularly if the interviewer had no history of choosing white candidates over African Americans. It is hard to see how a plaintiff confronting such circumstances could prove that the employer breached a duty of care.[316]

The difficulty in proving negligence is not limited to interviews. Negligence would be hard to prove whenever an employer uses subjective decision-making practices.[317] An effective alternative to negligence theory is a strict-liability approach. Such an approach would relieve the plaintiff of the burden of proving that the employer breached a duty of care. Individual-impact theory is a strict-liability approach. It would

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[312] *Id.*

[313] *Id.* at 936.

[314] *Id.* at 933–34.

[315] *Id.* at 951–52.; *see* Vance v. Ball St. Univ., 570 U.S. 421, 424 (2013) (asserting that employers are liable under negligence theory for the sexual harassment of an employee inflicted on a coemployee); Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic,* 79 OHIO ST. L.J. 1057, 1074, n.144 (2018) (citing authority supporting a negligence standard for hostile-work-environment harassment committed by employees against coemployees); Flake, *supra* note 6, at 2215 (quoting the *Vance* majority's acknowledgment of a negligence standard for coemployee harassment).

[316] *See* Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability,* 121 YALE L.J. 142, 158 (2011) (noting that duty is an element of a negligence claim).

[317] Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005).

catch unconscious discrimination that a negligence approach might miss.

### 2. A Skeptical Assessment of a Strict-Liability Approach to Address Unconscious Bias

Amy L. Wax considers the imposition of a strict-liability theory under Title VII and concludes that such a theory would not effectively tackle unconscious discrimination.[318] She begins her analysis by noting that cognitive psychological research has not determined the scope of unconscious workplace discrimination.[319] Despite this uncertainty, Wax acknowledges that unconscious discrimination occurs and observes that the broad proscriptive language of Title VII prohibits it.[320] Although the Supreme Court fashioned *McDonnell Douglas* to address intentional discrimination, Wax correctly points out that *McDonnell Douglas* will sometimes weed out unconscious bias because a finding of pretext may uncover a bias unknown even to the decisionmaker.[321] Wax, however, sees the *McDonnell Douglas* approach as an unsatisfactory means of uncovering unconscious motives.[322] Its inadequacy stems from its reliance on assessing the credibility of an employer's explanation for a challenged adverse action.[323] Unconscious discrimination may slip past such assessments, which focus the factfinder on premeditated cover ups.[324]

Wax acknowledges that a strict-liability approach under Title VII would divert the factfinder's focus away from intentional or even negligent discrimination and might therefore direct attention to unconscious bias.[325] The strict-liability paradigm that Wax considers is an individual's allegation of disparate impact based on group statistics.[326] After raising this possible solution to the problem of identifying unconscious motives in employment decision-making, Wax concludes that this approach is unlikely to reap significant benefits.[327] She

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[318] Wax, *supra* note 11, at 1157–58.

[319] *Id.* at 1141–42.

[320] *Id.* at 1153.

[321] *Id.* at 1150.

[322] *Id.* at 1150–51.

[323] *Id.*

[324] *Id.*; *see* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (explaining that "if disbelief [of the employer's articulated, step two reason] is accompanied by a suspicion of mendacity," the factfinder may conclude, based on that suspicion and the prima facie case, that the employer unlawfully discriminated).

[325] Wax, *supra* note 11, at 1153.

[326] *Id.* at 1171.

[327] *Id.* at 1154–55.

bases this conclusion on her belief that strict liability would neither deter unconscious discrimination[328] nor adequately compensate the victims of such discrimination.[329] She reasons that group statistics may be unavailable because an individual plaintiff may encounter unique circumstances.[330] More broadly, Wax's skepticism arises because unconscious discrimination is sporadic, often indeterminate in its effect on decision making,[331] hard to detect, and equally hard to modify.[332] She observes that many employers have implemented ameliorative strategies such as training programs to reduce the risks and costs of liability.[333] Because such strategies fail to address the elusiveness of unconscious discrimination, she concludes that employers may be disinclined to invest in additional measures unlikely to diminish their legal exposure.[334] Even if employers adopt such measures, she argues that such measures are unlikely to alter the bias of decisionmakers who are unaware of prejudices buried in their unconscious.[335]

Although Wax makes thoughtful points against the effectiveness of a strict-liability approach to Title VII, her arguments do not detract significantly from the usefulness of individual-impact theory. Although the capacity of the theory to uncover unconscious discrimination is imprecise, it would succeed in some cases where disparate-treatment theory and current disparate-impact theory would fail. Because individual-impact theory is based on strict liability, it would ease the burden of proof on plaintiffs who would otherwise allege disparate treatment and need to prove discriminatory intent. Individual-impact theory would prove more effective than

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[328] *Id.* at 1206.

[329] *Id.* at 1211–12.

[330] *Id.* at 1172–73.

[331] *Id.* at 1230.

[332] *Id.* at 1169. Wax points to research in cognitive psychology that demonstrates the intractability of unconscious bias. *Id.* at 1158–59. This body of research shows that, because people with unconscious biases are unaware of the stereotypes they harbor, managers with such biases will respond to remedial interventions with denial. *Id.* Similarly, the subtlety of such biases makes detection difficult, and therefore employers will have limited success in modifying biased decision-making based on racial and sex-based stereotypes. *Id.* at 1170.

[333] *Id.* at 1175–76, 1189.

[334] *Id.* Wax mentions several strategies available to employers to cope with unconscious prejudice. *Id.* at 1184–85. For example, she discusses diversity awareness training, which would presumably sensitize employees to the prevalence and unfairness of destructive stereotyping. *Id.* She concludes, however, that because unconscious biases are hidden from awareness, such training is unlikely to reap substantial benefits. *Id.* at 1185. Similarly, diversity action programs such as affirmative action plans, though resulting in the hiring of more disadvantaged individuals, will not reduce the prevalence of unconscious discrimination among the rest of the workforce. *Id.* at 1188.

[335] *Id.* at 1158–59.

current disparate-impact theory in uncovering unconscious discrimination because it does not require a large sample size.

### 3. A Strict-Liability Approach to Address Unconscious Discrimination

Amelia M. Wirts cites findings showing that people internalize cultural norms into their unconscious.[336] She points to experimental research demonstrating that such biases influence employment decision making.[337] To address this problem, she advocates a strict-liability approach to employment discrimination.[338] She models her proposal on *International Brotherhood of Teamsters v. United States*,[339] although she acknowledges that *Teamsters* is a pattern or practice case, which bases liability on intentional, systemic discrimination, rather than a strict-liability case.[340]

In *Teamsters*, the United States Justice Department sued T.I.M.E.-D.C., Inc., a trucking company, for pattern or practice discrimination against African Americans and Latinx truck drivers.[341] Statistical evidence provided a central point of attack.[342] Although 5 percent of the trucking company's drivers were African American, African American drivers held only 0.4 percent of its lucrative "line driving" jobs.[343] Similarly, although 4 percent of the company's drivers had Latinx surnames,[344] Latinx drivers held only 0.3 percent of those jobs.[345] The company relegated the minority drivers to less lucrative city driving jobs.[346] Based primarily on these statistics, African American and Latinx drivers alleged systemic and purposeful discrimination.[347] The Supreme Court agreed with the Fifth Circuit that the statistical evidence overwhelmingly proved

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336 Wirts, *supra* note 299, at 811.

337 *Id.* at 816–17.

338 *Id.* at 813–14, 821–22, 853–54.

339 Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

340 *See id.* at 336; *see also* 110 Cong. Rec. 14270 (1964) (documenting that before passage of the Civil Rights Act of 1964, Senator Humphrey characterized pattern or practice cases as "a pattern or practice would be present only when [author's note: sometimes incorrectly quoted as "where"] the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature").

341 *See Teamsters*, 431 U.S. at 328–29*; see also supra* note 3 and accompanying text (defining pattern or practice discrimination).

342 *Teamsters*, 431 U.S. at 337–38.

343 *Id.*; *see also id.* at 324, 329–31 (noting that line drivers, who were white employees, preferentially earned seniority under the relevant collective bargaining agreement over non-Line drivers who were African American and Latinx).

344 *Id.*

345 *Id.*

346 *Id.* at 329.

347 *Id.* at 335.

pattern or practice discrimination because the minimal number of minority line drivers approached "the 'inexorable zero.'"[348]

Wirts observes that *Teamsters* based Title VII liability on stark statistics, absent direct proof of intent, and proposes to expand the *Teamsters* model to a theory of strict liability.[349] Recognizing that current disparate-impact theory imposes strict liability, she criticizes that approach for requiring a plaintiff to prove that an identifiable employment practice caused the discriminatory impact.[350] She would relieve plaintiffs of the burden of identifying an offending employment practice, such as an aptitude test or diploma requirement, and simply predicate Title VII liability on a causative link between membership in a protected class and an adverse employment action such as demotion or discharge.[351]

Although her proposal is intriguing, Wirts does not explain how a plaintiff might establish the required causative link.[352] Her lack of specificity casts doubt on the efficacy of her proposal. If her strict-liability approach requires a *Teamster*-like statistical showing, it would seem to devolve into the current theory of disparate impact, a model which she expressly criticizes.[353]

Individual-impact theory would unburden plaintiffs of the weighty *Teamster*-like statistical requirement. Unlike Wirts's proposal, individual-impact theory would require a plaintiff to identify an employment practice that caused the loss of a job opportunity, but it would provide a workable means for imposing strict liability on employers for discriminating against individuals in a protected class.

### *C. Remediation*

Recognition of individual-impact theory would result in new Title VII rights and a new federal claim. Such an expansion of Title VII would signal to victims of discrimination, business, and society at large that the law has become responsive to employees with legitimate grievances to subtle instances of bias that the law had previously overlooked. A greater number of deserving plaintiffs would have their day in court, which is a

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[348] *Id.* at 342 n.23 (quoting United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 315 (5th Cir. 1975)) (rejecting the defendant's arguments that the government's statistics were too spotty, too old, and misleading because they came from unrepresentative terminals reflecting atypical disproportions of minority line drivers).

[349] Wirts, *supra* note 299, at 854.

[350] *Id.* at 855.

[351] *Id.* at 854.

[352] *Id.*

[353] *Id.*

desirable end, in and of itself, because such individuals would feel empowered.[354] Equally important, many would find judicial vindication of their claims and secure equitable remedies.[355]

### *D. Deterrence*

A rise in successful discrimination lawsuits would chasten employers to take steps to avoid an unpleasant encounter in the courthouse.[356] The risk of adverse judgments would impel employers to scrutinize their decision-making practices and prune those that are or even might prove discriminatory.[357]

A further incentive for employers to abandon suspect practices is the public disapprobation and reputational harm that follow news items reporting judicial findings of corporate discrimination.[358] Consumers often close their wallets to corporations that offend their values. Strict liability may not involve fault, but the public is unlikely to make fine legal distinctions when the media publicizes stories of racial bias.[359] The threat of reputational harm is a powerful force for ethical behavior.

## CONCLUSION

Title VII is a four-cylinder engine, running on three pistons. After recognizing three theories of recovery, it comes to a full stop. But stopping there is premature because the taxonomy of Title VII leaves the classification system one claim short. Neither Congress nor the courts have recognized a claim for individual impact. This dead spot in the protective scope of Title VII leaves many victims of disparate-impact discrimination without a cognizable claim. The statute and case law suggest that this gap is unnecessary. Section 703(a)(2) declares it unlawful to "limit" the employment opportunities of an individual "because of"

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[354] *See* Paul K. Legler, *Beyond Legal Rights? The Future of Legal Rights and the Welfare System*, 6 BYU J. PUB. L. 69, 89 (1992).

[355] *See supra* notes 88–90 and accompanying text (listing the remedies available to disparate-impact plaintiffs).

[356] *See* Civil Rights Act of 1991, Pub. L. No. 102-166 §§ 1, 105 Stat. 1071. Congress made compensatory and punitive damages available to victims of intentional discrimination "to deter unlawful harassment and intentional discrimination in the workplace." *Id.*

[357] *See id.*

[358] *See* Gold, *supra* note 26, at 2003.

[359] *See id.* at 2002–03 (arguing that compensation to individual plaintiffs results in reputational harm to the wrongdoer); *see* Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information,* 91 WASH. L. REV. 1193, 1205 (2016) (emphasizing the role of media coverage in inflicting reputational harm).

that person's membership in a protected class.[360] *Griggs* holds that an employment practice with a disproportionate adverse impact on a protected class violates § 703(a)(2).[361] *Teal* emphasizes that Title VII confers employment rights on individuals and suggests that Title VII prohibits employment actions with a disproportionate adverse impact not only on groups, but also on individuals.[362] Yet the law does not recognize such a claim. The problem is small sample size.

Individual-impact theory resolves this problem. It achieves this result by adapting the *McDonnell Douglas*/*Hicks* framework to impact cases.[363] If a plaintiff establishes a prima facie case of unlawful discrimination, the burden of persuasion, not production, shifts to the employer, who will have the opportunity to prove two potential affirmative defenses. First, the employer may demonstrate that the challenged employment practice does not discriminate against plaintiff's protected class. If the employer fails to establish this affirmative defense, the employer may nevertheless escape liability by proving business necessity, defined as job performance relatedness.[364]

Charging the employer with the burden to persuade the factfinder that the challenged employment practice did not discriminate against a protected class minimizes the burden placed on plaintiffs. Sound reasons support this burden shift. First, the prima facie case for individual impact requires a plaintiff to show that the job opportunity at issue went to an individual not in plaintiff's protected class. The prima facie case for individual impact is therefore more robust than the prima facie case for disparate treatment, which has no such element. Second, unlike in a disparate-treatment case, a plaintiff in an individual-impact case does not seek to prove that the employer intended to discriminate. Individual impact imposes liability without fault. Because an individual-impact plaintiff seeks to prove less than a disparate-treatment plaintiff, an individual-

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[360] 42 U.S.C. § 2000e-(a)(2).

[361] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (announcing that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); Connecticut v. Teal, 457 U.S. 440, 452 (1982) (sustaining the plaintiffs' claim of disparate impact).

[362] *Teal*, 457 U.S. at 452–53 (1982) (stressing that § 703(a)(2) of Title VII "prohibits practices that would deprive or tend to deprive '*any individual* of employment opportunities'" (emphasis added) (quoting 42 U.S.C. § 2000e-2(h)).

[363] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (discussing the three-step burden-shifting framework).

[364] *See, e.g.*, Ricci v. DeStefano, 577 U.S. 557, 577 (2009) (reaffirming that the defendant bears the burden of proving that the challenged employment practice was job-performance related).

impact plaintiff should bear a reduced burden of proof. Considerations of cost, access to relevant information, and available remedies also argue for shifting the burden of persuasion to the defendant. There is also an overarching consideration: the antidiscrimination policy embodied in Title VII traces its origins from slavery through the centuries-long struggle for civil rights.[365] The policy to eradicate discrimination elevates Title VII to a "super-statute", which deserves the broadest possible interpretation.[366]

Recognition of a claim for individual impact would advance the cause of employees' rights on several fronts. First, such claims would provide a remedy for employees subjected to disparate impact on an individual basis. Second, such claims would hold employers liable for violations that would otherwise slip past the legal system. Individual-impact claims would provide a stopgap for plaintiffs unable to prove discriminatory intent, which is a required element of an individual disparate-treatment claim.[367] Third, expanding the protective scope of Title VII would deter employers from future violations. The natural reluctance to avoid the courtroom and the adverse publicity that might follow from a finding of liability would spur employers to scrutinize their workplaces for discriminatory practices and, once identified, to abandon them.[368]

Numerous scholars have grappled with the problem of detecting and eliminating unconscious discrimination.[369] A claim for individual impact would bring to light some, though not all, instances of unconscious discrimination that would otherwise escape accountability. Any approach that promises to reduce stealth discrimination is an approach worth considering.

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[365] *See* Ontiveros, *supra* note 210, at 1173–74 (arguing that Title VII serves a central role in the centuries-long struggle for racial equality).

[366] *Id.* at 1175.

[367] *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990 (suggesting that plaintiffs may encounter difficulty proving intentional discrimination when managers have unchecked discretion when making employment decisions, and concluding that disparate-impact theory, which has no intent requirement, provides a feasible alternative to disparate-treatment theory).

[368] *See, e.g.*, Gold, *supra* note 26, at 2002–03 (commenting on the deterrent effects of litigation).

[369] *See supra* Part III.B.