

MANAGING THE MACAW: THIRD-PARTY HARASSERS, ACCOMMODATION, AND THE DISAGGREGATION OF DISCRIMINATORY INTENT

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This Article exploits an anomaly in Title VII doctrine to develop a new theory of employment discrimination law. The anomaly is that employers are held liable for discrimination when their employees are harassed by customers or other third parties. Such liability cannot be squared with traditional Title VII theories of disparate treatment or disparate impact. Instead, courts accept claims that essentially assert denial of reasonable accommodations, notwithstanding the consensus that Title VII disallows such claims.

To understand this anomaly, the Article posits a new analysis of what disparate treatment and nonaccommodation have in common. First, both involve “membership causation”: workplace harm caused by an individual employee’s membership in a protected class. Second, both involve criteria for establishing an employer’s responsibility for preventing membership causation. These structural continuities facilitate Title VII liability in third-party harasser cases. In these cases, membership causation exists in conjunction with employer negligence as a basis for responsibility, even though the employer lacks any discriminatory intent. This analysis also illuminates a series of other confused areas where Title VII doctrine deviates from a discriminatory intent standard without turning to disparate impact, all of which conjoin membership causation and a basis for employer responsibility.

More generally, membership causation and employer responsibility enable a theoretical synthesis of disparate treatment and nonaccommodation. That synthesis offers employment discrimination law a firmer normative foundation in liberal egalitarian thought. Such a theory may provide an alternative to established approaches built on the process defects of discriminatory intent or the structural goal of ending group subordination, while retaining the primary virtues of those approaches.

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INTRODUCTION

Work does not occur in a bubble. A day on the job is shaped in countless ways by what happens outside the workplace, whether during the commute that morning, at home the night before, or in the many preceding years of one's life. Furthermore, our jobs create encounters not only with our coworkers but also with many others: retail customers, prison inmates, high school students, hospital patients, or a technician who comes in to fix the photocopier. These interactions affect our working conditions, sometimes for the worse.

Recognizing these facts, this Article builds a new account of employment discrimination law that rejects any bright line between inequality originating inside versus outside an organization. To do so, it begins with a seemingly anomalous body of law: Title VII doctrine specifying an employer's duties when a third party sexually or racially harasses an employee. By "third party" I mean an actor who neither employs the victim nor is employed by the victim's employer.

Surprisingly, an employer must do more than respond evenhandedly when an employee suffers racial or sexual harassment by a third party. Instead, it must affirmatively counteract inequalities introduced by third-party harassers. In essence, it must reasonably accommodate the harasser's victim. Finding an accommodation mandate is surprising because Title VII is generally understood to allow an employer to take its workers as it finds them. An employer must not *introduce* sex- or race-based disadvantage by acting with discriminatory intent. But an employer need not go further and deviate from its ordinary practices in order to make up for sex- or race-based disadvantage originating outside the employer's own decisionmaking processes.

Consider a typical recent third-party harasser case. Lisa Dunn sued Washington County Hospital, her employer, for sex discrimination in violation of Title VII.¹ Dunn alleged that Thomas Coy, a doctor at the hospital, sexually harassed her, that she complained about it, that the hospital did nothing, and that the harassment continued. The first twist is that Dr. Coy was not a hospital employee; he was an independent contractor.² So the question arose whether the hospital could be held liable for discriminating against Dunn when the harasser was a third party. The district court answered no and dismissed the case. The Seventh Circuit reversed. It reasoned that "[t]he employer's responsibility is to provide its employees with nondiscriminatory working conditions. The genesis of inequality matters not; what *does* matter is how the employer handles the problem."³

1. *Dunn v. Wash. County Hosp.*, 429 F.3d 689 (7th Cir. 2005).

2. Thus, he was not Dunn's co-employee, even though they might loosely be termed coworkers.

3. *Dunn*, 429 F.3d at 691.

The striking notion here is that “the genesis of inequality matters not,” even if that genesis lies outside the employer’s conduct and outside its employees’ conduct on the employer’s behalf. To put the point more technically, it did not matter that only the doctor, not the hospital, acted with discriminatory intent, even though the doctor was not the hospital’s agent. The employer did not engage in disparate treatment, and yet it discriminated in violation of Title VII. Nor did the *Dunn* court analyze the case in terms of disparate impact. In these regards, *Dunn* typifies a large and unanimous body of appellate case law and administrative guidance that holds employers liable when their employees suffer harassment from third parties.

A second feature of *Dunn* is even more intriguing. To drive home the point that “the genesis of inequality matters not,” Judge Easterbrook’s opinion transmogrifies Dr. Coy into a macaw.⁴ Adapting his hypothetical into a form I will use repeatedly throughout this Article, the story goes like this:

Imagine that a colorful but sometimes cruel macaw regularly invades a workplace. The bird attacks a female employee because she is a woman; had she been a man instead, the bird would not have attacked her. This employee complains to her employer about the incident, including its basis in her sex, and demands that the employer prevent a recurrence. The employer knows the victim’s account is true and, with modest effort, could stop the macaw from striking again. For some reason, though, the employer fails to intervene. The macaw attacks continue and severely disrupt the victim’s ability to work in reasonable comfort.⁵

By substituting a bird for a person, the macaw hypothetical ups the ante. It entirely removes from consideration the human decisionmaking process connoted by “intent” rather than merely shifting it from the employer to a third party. Instead, what matters is simply the chain of causation leading female employees to suffer harm because of their sex. While fanciful in its particulars, the macaw thus provides a bridge between third-party harassment and the many other processes that, though originating outside the employer’s conduct, cause an employee to suffer workplace harm as a result of her sex or race. Ultimately, my analysis will provide a theoretical foundation for that bridge, but I begin on the near side, with the recurring problem of the third-party harasser.

The Article’s first task is to carry out a possibility proof: In at least one recurring scenario—third-party harasser cases—Title VII mandates reasonable accommodation by employers, rather than simply banning

4. See *id.*

5. Judge Easterbrook’s version “[s]uppose[s] a patient kept a macaw in his room” and is not explicit either about the employer’s knowledge that “the bird bit and scratched women but not men,” or about how burdensome would be its “responsibility to protect its female employees by excluding the offending bird from its premises.” *Id.*

disparate treatment or disparate impact. To be clear, I do not make the much stronger claim that Title VII *always* requires reasonable accommodation.

To make this showing, I introduce the concept of “external causation” and demonstrate its centrality to claims of failure to make reasonable accommodations. There is external causation when an employee suffers workplace harm because of her disability (or sex, or race, and so on), even though her employer never took her disability into account. In other words, her disability entered the causal chain leading to harm somewhere outside of her employer’s decisionmaking process. For instance, if an employee loses her job because she cannot use a particular tool, and she cannot use that tool because of her disability, then she loses her job because of her disability even if her disability played no role in her employer’s decisions to require use of that tool and to enforce that requirement against the employee. Similarly, when a third party harasses an employee because of her sex, the employee suffers harm because of her sex even if her sex played no role in her employer’s response to the harassment.

Demonstrating the possibility of Title VII nonaccommodation claims is important because courts frequently reject Title VII claims by invoking the axiom that, under this statute, there can be no discrimination without disparate treatment or disparate impact. Nonaccommodation is another recognized theory of discrimination, but not one explicitly available under Title VII.⁶ Instead, it is associated with the Americans with Disabilities Act (ADA), which requires employers to accommodate an employee’s disability-related limitations, notwithstanding that the employer did not create those limitations.

Title VII’s restriction to disparate treatment and disparate impact is normatively controversial, despite being universally accepted as descriptively accurate. Countless feminist and antiracist critiques of existing law argue that the statute ought to prohibit employers from manufacturing workplace disadvantage out of the raw materials of sex- or race-based differences, even when those differences do not originate with the employer.⁷ My analysis suggests that Title VII may have greater doctrinal capacity to reach such circumstances than previously believed, and to do so in a way distinct from disparate impact theory.

6. Except for religious discrimination, which I set aside for now and discuss *infra* Part IV.C.1.

7. See, e.g., Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal. L. Rev. 1279 (1987) (arguing for restructuring institutions so they do not systematically disadvantage traits and practices culturally associated with women relative to those associated with men); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329 (1991) (arguing for restructuring workplace practices that privilege accents associated with dominant racial and ethnic groups and subordinate people with accents associated with immigrants and people of color).

Another surprise: Courts and commentators have not noticed the seeming aberration that third-party harasser doctrine relies neither on disparate treatment nor disparate impact but instead imports a reasonable accommodation mandate into Title VII jurisprudence. Considering how aggressively courts usually enforce Title VII's limited concept of discrimination, how can the third-party harasser cases fit in so seamlessly?

Addressing this question leads to the Article's second major argument, a broader one. Analyzing nonaccommodation in terms of external causation reveals a previously underappreciated commonality between disparate treatment and nonaccommodation claims. This commonality facilitates harassment law's transition from disparate treatment when the harasser is a supervisory employee to nonaccommodation when the harasser is a third party.

The commonality lies in what I term "membership causation": There is membership causation when an employee suffers workplace harm due to her membership in a protected class. Requiring employers to refrain from disparate treatment and to provide reasonable accommodations both accomplish a single end: preventing membership causation. In a disparate treatment case, the employer decides to impose (or not to prevent) workplace harm based on whether the worker belongs to one group or another. In such cases, the employee's protected class membership plays a causal role within the employer's decisionmaking process. I call this "internal causation," which is one form of membership causation and is equivalent to what ordinarily is termed "discriminatory intent." In a nonaccommodation case, the employer's *un*responsiveness to class membership with regard to one decision (whether to provide a special tool as an accommodation) leads the worker to suffer some *other* harm (such as getting fired for inability to use the standard tool) because of her class membership. Here, too, there is membership causation, but it arises in the form of external causation, not internal causation. Thus, disparate treatment and nonaccommodation theories share a common focus on membership causation, each targeting one of its two basic forms.

By identifying this common thread of membership causation, this Article contributes to the growing literature on the relationship between nonaccommodation theories normally associated with the ADA and the disparate treatment and impact theories traditionally associated with Title VII. It offers a new way to make the case that these theories are fundamentally similar,⁸ contrary to the conventional view that the ADA's ac-

8. See Samuel R. Bagenstos, "Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights, 89 Va. L. Rev. 825 (2003) [hereinafter Bagenstos, Rational Discrimination] (using similarities between accommodation mandates and ban on so-called rational disparate treatment to argue that justifying latter requires commitment to eradicating group subordination and stigma that also would justify former); Christine Jolls, Antidiscrimination and Accommodation, 115 Harv. L. Rev. 642 (2001) (arguing that, like accommodation mandates, established Title VII doctrines impose financial costs on employers rather than simply ban economically irrational

commodation mandate broke sharply from Title VII's approach to discrimination.⁹ Establishing this similarity is significant because it implies that accommodation mandates should rise or fall with the rest of antidiscrimination law, contrary to seeing them as either violating antidiscrimination principles or as requiring entirely distinct justification.

Most arguments that nonaccommodation liability is unexceptional shift the unit of analysis to groups, as a disparate impact theory would. By contrast, my analysis, organized around membership causation, preserves disparate treatment's characteristic focus on harms to individual employees. I also use the concept of membership causation to locate the similarity between disparate treatment and nonaccommodation within the claims' doctrinal elements. In contrast, others have brought disparate treatment and nonaccommodation together only by analyzing more abstract questions of their economic effect or normative basis.¹⁰

Identifying membership causation as the link between disparate treatment and nonaccommodation does not yet explain what allows third-party harasser cases to cross the real boundary between the two theories, the boundary between the internal and external forms of membership causation. Something about the difference between them matters less in third-party harasser cases than elsewhere in Title VII doctrine.

The Article's third, and most expansive, argument addresses this question by pairing membership causation with employer responsibility, both of which are required for a successful employment discrimination claim. Analyzing the role of discriminatory intent in this new way, I con-

conduct); Michael Ashley Stein, Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination, 153 U. Pa. L. Rev. 579 (2004) (arguing accommodation mandates, like traditional Title VII doctrine, make room for "difference" by altering established workplace norms structured around needs and experiences of socially dominant groups).

9. For leading articulations of the conventional view, see Tristin K. Green, A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong, 60 Vand. L. Rev. 849 (2007) [hereinafter Green, Structural Approach]; Samuel Issacharoff & Justin Nelson, Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?, 79 N.C. L. Rev. 307 (2001); Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L.J. 1 (1996); Mark Kelman, Market Discrimination and Groups, 53 Stan. L. Rev. 833 (2001); Stewart J. Schwab & Steven L. Willborn, Reasonable Accommodation of Workplace Disabilities, 44 Wm. & Mary L. Rev. 1197 (2003); J.H. Verkerke, Disaggregating Antidiscrimination and Accommodation, 44 Wm. & Mary L. Rev. 1385 (2003) [hereinafter Verkerke, Disaggregating].

10. See Mark Kelman, Defining the Antidiscrimination Norm to Defend It, 43 San Diego L. Rev. 735 (2006). Professor Kelman notes that Bagenstos, Jolls, and Stein alternate,

at times imprecisely, between the claim that there are no interesting *descriptive* distinctions between situations that call for accommodation and those in which the plaintiff will be included if not faced with conventional discrimination and the claim that although the demands are descriptively distinguishable, they are of equal, and fundamentally indistinguishable, *normative* force.

See *id.* at 765.

tend that proving discriminatory intent ordinarily serves a second function in a disparate treatment claim, apart from establishing the causal connection between class membership and workplace harm. Such proof also establishes that the *employer*, as opposed to another actor, is responsible for preventing that causal connection from arising. In disparate treatment cases, the employer bears that responsibility because it injected the worker's class membership into the causal chain.

In third-party harasser cases, this responsibility-establishing function of discriminatory intent is superfluous. All hostile work environment claims address employer responsibility through a separate element, one absent from traditional disparate treatment analysis of tangible employment actions like hiring or firing. An employer is liable only if it was on notice of the harassment and failed to take reasonable steps to prevent or correct it. These conditions provide a case for employer responsibility grounded in negligence. In other words, in hostile work environment cases, an employer is held liable, if but only if, it negligently fails to prevent membership causation.

My analysis thus extends and systematizes aspects of David Oppenheimer's well-known and insightful article "Negligent Discrimination."¹¹ Oppenheimer observes that features of negligence analysis appear in hostile work environment, reasonable accommodation, and disparate impact cases. Oppenheimer, however, is unclear as to what the "discrimination" is that employers have a duty of care to avoid or prevent.¹² This leads him not to theorize the connection between negligent and so-called intentional discrimination. I argue that membership causation is the harm that employers are held responsible for inflicting in all these cases, and they differ only in how they establish employer responsibility.

In short, I propose that we can unify antidiscrimination theory by disaggregating discriminatory intent. Showing discriminatory intent establishes two different things that are more fundamental: individual workplace harm caused by membership in a protected class (membership causation), and employer responsibility for membership causation. Action with discriminatory intent, however, is not the only scenario that can exhibit these two elements. So, too, does a successful third-party harasser claim: The employer is held liable for negligently failing to prevent membership causation. Therefore the unimportance of establishing discriminatory intent becomes much less puzzling.

Separating membership causation from employer responsibility suggests a more general theory of employment discrimination law, one that offers an alternative to the familiar paradigms of anticlassification and

11. 141 U. Pa. L. Rev. 899 (1993).

12. "Discrimination" sometimes seems to mean disparate treatment by the employer, see *id.* at 902-16, sometimes refers to aggregate effects on race- or sex-defined groups, see *id.* at 933, and sometimes is simply left unspecified.

antibordination.¹³ Beginning with an individual's harm suffered because of group membership avoids the sterile proceduralism of insisting that discriminatory intent captures the entire social problem of discrimination;¹⁴ my approach differs from anticlassification theories by not fetishizing discriminatory intent. But requiring such an individual harm—not more and not less—makes it possible to reject the “perpetrator perspective” of discriminatory intent¹⁵ and yet remain grounded in concrete injuries to individuals, unlike antibordination theories' turn to group stigma and disadvantage. That individualism resonates with the language of our employment discrimination statutes and with their judicial exposition; it avoids relying on the philosophically problematic moral status of groups; and it mitigates the practical difficulties of translating structural critique into the adjudication of individual cases. Where disparate treatment provides the model for anticlassification theories and disparate impact provides the model for antibordination theories,¹⁶ reasonable accommodation can provide the model for a genuine and attractive third way.

In this respect, this Article begins to answer Samuel Bagenstos's compelling recent calls “for a renewed attention to antidiscrimination *theory*,”¹⁷ and to draw inspiration for that task from patterns that are already present in our law but that have been ignored or misunderstood.¹⁸ In

13. See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antibordination?*, 58 U. Miami L. Rev. 9, 9–10 (2003) (characterizing antibordination principle as idea that “law should reform institutions and practices that enforce the secondary social status of historically oppressed groups” and anticlassification principle as idea that actors “may not classify people either overtly or surreptitiously on the basis of a forbidden category”); Owen Fiss, *Another Equality*, *Issues in Legal Scholarship: The Origins and Fate of Antibordination Theory*, 2004, art. 20, at 20, at <http://www.bepress.com/ils/iss2/art20/> (on file with the *Columbia Law Review*) [hereinafter Fiss, *Another Equality*].

14. Cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

15. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049, 1054–57 (1978).

16. See Balkin & Siegel, *supra* note 13, at 9–10; Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331, 1341–46 (1988).

17. Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 *Harv. L. & Pol’y Rev.* 477, 492 (2007); see also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 *Cal. L. Rev.* 1, 3 (2006) [hereinafter Bagenstos, *Structural Turn*] (arguing that addressing major challenges of workplace inequality requires “going beyond the generally accepted normative underpinnings of antidiscrimination law”).

18. See Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 *Mich. L. Rev.* 1, 3 (2006) (“[J]urisprudence ought to go doctrinal. We can make headway by thinking not about the readily ridiculed idea of a legal right, but about actual legal rights.”); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *Yale L.J.* 1683, 1732–38, 1798 (1998) [hereinafter Schultz, *Reconceptualizing*] (building theory of sexual

doing so, I also step away from the heavy reliance on the social science of intra-workplace race, gender, and disability dynamics that characterizes much important employment discrimination law scholarship of the past two decades.¹⁹ That approach has been deeply illuminating, but too often it seeks to fit increasingly sophisticated accounts of employer conduct into a theoretical straitjacket with two arms—disparate treatment and disparate impact. This Article revisits the question of what we are looking for when we seek to root out discrimination, not just how it occurs and where we can find it. My analysis suggests a new answer: membership causation.

I proceed as follows. Part I makes the negative case that third-party harasser doctrine is not an application of either disparate treatment or disparate impact theory. Part II makes the affirmative case that third-party harasser cases are best understood as holding employers liable for failure to accommodate. Part III argues that a new theory of employment discrimination law structured around membership causation and employer responsibility makes sense of courts' openness to mandating accommodations under Title VII. Part IV shows this framework's broad utility by employing it to illuminate a wide variety of scenarios outside the hostile work environment context. In each case, Title VII imposes liability even though the discriminatory intent standard breaks down and without turning to disparate impact.

PART I. THE THIRD-PARTY HARASSER ANOMALY: NEITHER DISPARATE TREATMENT NOR IMPACT

“Discrimination” is the wrong forbidden by Title VII and other major employment civil rights statutes, including the ADA.²⁰ The doctrine rec-

harassment in part by drawing on early opinions that did not disaggregate sexual and nonsexual forms of harassment against women); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 *Harv. L. Rev.* 1749, 1770–75 (1990) [hereinafter Schultz, *Telling Stories*] (drawing support for her critique of Title VII occupational sex segregation from Title VII case law addressing racial segregation).

19. See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *Cornell L. Rev.* 1259 (2000) [hereinafter Carbado & Gulati, *Working Identity*]; Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *Yale L.J.* 1 (1995); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 *Harv. C.R.-C.L. L. Rev.* 91 (2003) [hereinafter Green, *Workplace Dynamics*]; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987); Matsuda, *supra* note 7; Schultz, *Telling Stories*, *supra* note 18; Kenji Yoshino, *Covering*, 111 *Yale L.J.* 769 (2002).

20. See 29 U.S.C. § 623(a) (2006) (age discrimination); 42 U.S.C. § 2000e-2(a) (2006) (Title VII); 42 U.S.C. § 12112(a) (ADA); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 292 n.22, 295 (1976) (construing 42 U.S.C. § 1981 to “proscribe discrimination”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub.*

ognizes three theories of discrimination by an employer: disparate treatment, disparate impact, and failure to make reasonable accommodations (“nonaccommodation”).²¹ Title VII is universally understood to prohibit only disparate treatment and disparate impact. Abstracting from doctrinal particulars, several scholars have recently argued that all three theories share features of fundamental conceptual importance.²² In this Part and the next, I make a stronger, though narrower, argument: Title VII third-party harasser claims typically lack the elements necessary for a disparate treatment or disparate impact claim (this Part), and yet courts recognize such claims as valid by virtue of the same doctrinal elements that constitute nonaccommodation (the next Part). It is not merely that Title VII claims are in some relevant sense like nonaccommodation claims despite, doctrinally, remaining within the confines of disparate treatment and impact. Instead, Title VII actually allows nonaccommodation claims in some circumstances, and by virtue of just those features that distinguish them doctrinally from disparate treatment and disparate impact.

By organizing my analysis around disparate treatment, disparate impact, and nonaccommodation, I rely on the notion that “hostile work environment” is not a distinct theory of discrimination. Instead, it is something else entirely: a form of harm, like a termination, pay cut, or lost promotion. These harms violate Title VII (or the ADA) only when they arise in a discriminatory fashion. To determine whether they do, we must turn to theories like disparate treatment, disparate impact, and nonaccommodation that relate workplace harms to the protected categories of race, sex, disability, and so on.²³ This view of where the hostile work environment concept fits into employment discrimination law now dominates

Aff. 107, 108 (1976) [hereinafter Fiss, Groups] (characterizing antidiscrimination as dominant “mediating principle” for understanding constitutional equal protection).

21. See, e.g., 1 Barbara T. Lindemann & Paul Grossman, *Employment Discrimination Law* (C. Geoffrey Weinrich et al. eds., 4th ed. 2007) (organizing discussion of “theories of discrimination” around these three accounts). Using these doctrinal categories leaves open to analysis how they relate to each other and to any overarching theory of discrimination. The scholarly convention of comparing nonaccommodation and “discrimination,” see, e.g., Jolls, *supra* note 8, at 651 (defining “discrimination” as the disparate treatment and disparate impact theories recognized by Title VII), prejudices those questions. See Balkin & Siegel, *supra* note 13, at 10 (criticizing Fiss for conflating “discrimination” with an anticlassification approach).

22. See sources cited *supra* note 8.

23. The contrary view is a relic of the early years of sexual harassment law, when reliance on the conduct’s sexual character to identify it as “because of sex” created discontinuity with the rest of employment discrimination law. See Schultz, *Reconceptualizing*, *supra* note 18 (reviewing and criticizing emphasis on sexual conduct in then-current sexual harassment jurisprudence).

the relevant case law²⁴ and scholarship.²⁵ I will not restate its merits here, though I acknowledge that some residual controversy and confusion remains.²⁶

A. *The Conventional View: Title VII Forbids Only Disparate Treatment & Impact*

Few propositions are less controversial or more embedded in the structure of Title VII analysis than that the statute recognizes only “disparate treatment” and “disparate impact” theories of employment discrimination.²⁷ These theories are mutually exclusive, though of course a plaintiff may plead them together.²⁸ Based on these principles, courts

24. See, e.g., *Burlington Indus. v. Ellerth*, 524 U.S. 742, 753–54 (1998) (rejecting conception of “sexual harassment” as wrongful conduct defined by its sexual character and then divisible into “quid pro quo” or “hostile work environment” forms); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (stating hostile work environment plaintiff must show “discrimination . . . because of . . . sex” like other Title VII plaintiffs and holding sexual conduct is neither necessary nor sufficient for that showing (emphasis omitted)); *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (characterizing subjection to hostile work environment as form of “disparate treatment” (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986))); *Gregory v. Daly*, 243 F.3d 687, 698–99 (2d Cir. 2001) (holding “quid pro quo” harassment claims are to be analyzed as claims of disparate treatment in tangible employment actions).

25. See generally I Lindemann & Grossman, *supra* note 21; Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 *Cornell L. Rev.* 1169 (1998); Schultz, *Reconceptualizing*, *supra* note 18; Rebecca Hanner White, *There’s Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 *Wm. & Mary Bill Rts. J.* 725 (1999); Steven L. Willborn, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*, 7 *Wm. & Mary Bill Rts. J.* 677 (1999).

26. For decisions implying or holding that “discrimination” means something different in hostile work environment cases, see, e.g., *Huff v. Sheahan*, 493 F.3d 893, 902–03 (7th Cir. 2007); *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000); *Gen. Accident Ins. Co. v. Gastineau*, 990 F. Supp. 631, 637–38 (S.D. Ind. 1998). Their suggestion that hostile work environment cases require a special, yet to be specified theory of discrimination appears to rely on an unduly narrow conception of disparate treatment or a failure to consider the applicability of a disparate impact theory. For decisions analyzing similar factual scenarios within a disparate treatment framework, see, e.g., *Petrosino v. Bell Atl. Corp.*, 385 F.3d 210, 221–23 (2d Cir. 2004); *Ocheltree v. Scollon Prods.*, 335 F.3d 325, 332–33 (4th Cir. 2003) (en banc); *Beard v. Flying J, Inc.*, 266 F.3d 792, 798–800 (8th Cir. 2001); *Brown v. Henderson*, 257 F.3d 246, 252–55 (2d Cir. 2001); see also L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 *U. Kan. L. Rev.* 341, 345, 351–52 (2005); *infra* notes 52, 55. For decisions invoking disparate impact concepts, see, e.g., *Maldonado v. City of Altus*, 433 F.3d 1294, 1303 (10th Cir. 2006); *EEOC v. Nat’l Educ. Ass’n.*, 422 F.3d 840, 846 (9th Cir. 2005); see also Hébert, *supra*; Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?*, 81 *Neb. L. Rev.* 1152 (2003).

27. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993).

28. I Lindemann & Grossman, *supra* note 21, at 111. A qualification: Disparate treatment and disparate impact theories may coexist when they attack different decisions. Thus, decisions applying a so-called “neutral” rule may be attacked for their disparate impact, while the decision to adopt that rule might be attacked for disparate treatment. See *infra* note 52.

routinely dismiss a plaintiff's suit if both her disparate treatment and disparate impact claims fail, or if one fails and she has not pled the other. The one exception is Title VII claims for religious discrimination. There, courts recognize a claim for nonaccommodation and treat it as analytically distinct from disparate treatment and disparate impact.²⁹ Similarly, under the ADA, courts recognize nonaccommodation claims but consider them to be fundamentally unlike disparate treatment and disparate impact claims.³⁰

If Title VII recognizes only disparate treatment and disparate impact theories, and if nonaccommodation is analytically distinct from them, then it follows that Title VII (religion aside) does not recognize nonaccommodation as a theory of prohibited discrimination. As a leading treatise puts it, “[f]ailure to provide a reasonable accommodation is a type of unlawful discrimination . . . not generally applicable to all the protected status groups under Title VII, and has been reserved to issues of discrimination on the basis of religion and disability.”³¹

Accent discrimination and pregnancy discrimination illustrate how lack of a nonaccommodation theory makes a difference. Current Title VII doctrine holds that it is not national origin discrimination for an employer to deny employment to someone based on listeners' genuine difficulty understanding her accented speech, even if the worker has the accent because she was born and raised in another country.³² The employer has no obligation to accommodate accent-related communication difficulties by providing interpreters, relying more on written or visual communication, or making other changes. In contrast, were a speech impairment to cause equivalent communications difficulties, the case would raise a colorable ADA reasonable accommodation claim.³³

29. See, e.g., *Abramson v. William Paterson Coll.*, 260 F.3d 265, 281 & n.12 (3d Cir. 2001).

30. See, e.g., *Erickson v. Bd. of Governors of State Colls. and Univs. for Ne. Ill. Univ.*, 207 F.3d 945, 949–50 (7th Cir. 2000); *Green v. Nat'l Steel Corp.*, 197 F.3d 894, 898 (7th Cir. 1999); see also Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 *Duke L.J.* 861 (2006) (discussing and criticizing conventional separation between nonaccommodation and disparate impact claims).

31. 1 *Lindemann & Grossman*, *supra* note 21, at 265.

32. See *Fragante v. City & County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989); EEOC Compliance Manual, No. 915.003 § V.A (2002), available at <http://www.eeoc.gov/policy/docs/national-origin.html#VA> (on file with the *Columbia Law Review*); *Matsuda*, *supra* note 7, at 1338–39; see also *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88, 93 n.6 (1973) (allowing citizenship discrimination even though noncitizenship is caused by foreign national origin).

33. 42 U.S.C. § 12111(9)(B) (2006); EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002 (2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html> (on file with the *Columbia Law Review*) (citing installation of TTY devices as example of appropriate accommodation for employees with hearing or speech impairments); *Matsuda*, *supra* note 7, at 1359.

When evaluating pregnancy discrimination claims, courts often rely explicitly on the absence of a reasonable accommodation theory. The court in *Troupe v. May Department Stores* rejected the plaintiff's claim that her employer had violated Title VII by discharging her for some combination of arriving late to work due to morning sickness and planning to take a pregnancy-related medical leave.³⁴ The key to the case, Judge Posner explained, is that under Title VII disparate treatment theory "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees." The statute does not, "despite the urgings of feminist scholars, require employers to offer maternity leave or take other steps to make it easier for pregnant women to work."³⁵ Similarly, courts often cabin disparate impact attacks on scheduling inflexibility to avoid results like reasonable accommodation.³⁶ Echoing conventional characterizations of accommodations as "special treatment," *Troupe* explains that the disparate impact theory is no "warrant for favoritism."³⁷ Again, were the physical limitations at issue caused by a disability rather than pregnancy, these would be straightforward nonaccommodation

34. 20 F.3d 734, 737–38 (7th Cir. 1994).

35. *Id.* at 738 (citations omitted); accord *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312 (11th Cir. 1999) (concluding Pregnancy Discrimination Act places employers "under no obligation to extend [the] accommodation [of modified duty] to pregnant employees" who cannot perform their ordinary duties because of pregnancy-related medical limitations); see also *Erickson*, 207 F.3d at 949; *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999). See generally 1 Lindemann & Grossman, *supra* note 21, at 475–79.

36. See *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 584 (7th Cir. 2000); accord *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861 (5th Cir. 2002) (finding no disparate impact when "amount of sick leave granted to employees is insufficient to accommodate the time off required in a typical pregnancy"); see also *Lynch v. Freeman*, 817 F.2d 380, 391 (6th Cir. 1987) (Boggs, J., dissenting) (rejecting disparate impact analysis when "disparity could be eliminated by a greater or lesser expenditure of money and effort to provide amenities, redesign jobs, and so on" because "[t]his type of 'reasonable accommodation' analysis" is appropriate in disability law but not in Title VII race or sex discrimination claims). But see Jolls, *supra* note 8, at 664–65 (criticizing disparate impact analysis of *Troupe* and like decisions as inconsistent with general disparate impact principles).

37. *Troupe*, 20 F.3d at 738; accord *Stout*, 282 F.3d at 861; *Dormeyer*, 223 F.3d at 584; *Spivey*, 196 F.3d at 1312. As Jolls has pointed out rightly, *supra* note 8, at 664–65, Judge Posner's influential opinions in *Troupe* and *Dormeyer* reflect the cramped conception of disparate impact theory that is widely evident in his jurisprudence, a conception that is out of step with disparate impact doctrine in general. Nonetheless, in the context of pregnancy, Posner's approach is widely followed, even outside the Seventh Circuit. See *supra* notes 35, 37. See generally Joanna L. Grossman & Gillian L. Thomas, Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model, 21 *Yale J.L. & Feminism* (forthcoming 2009), available at <http://ssrn.com/abstract=1348711> (on file with the *Columbia Law Review*). For two older cases finding a disparate impact on women when inadequate leave policies lead to termination of pregnant women, see *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811, 817–18 (D.C. Cir. 1981); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 657 (N.D. Ill. 1991).

claims.³⁸

Employment discrimination scholarship shares the case law's assumption that Title VII does not permit an ADA-style nonaccommodation claim. That assumption frames a vigorous debate over whether the ADA's inclusion of accommodation mandates marks it as substantively different from Title VII or whether this doctrinal difference masks fundamental similarities.³⁹ This theoretical debate makes sense only if Title VII doctrine disallows nonaccommodation claims.

Thus, there is a deeply entrenched and broadly significant axiom that Title VII recognizes disparate treatment and disparate impact theories of discrimination but does not allow claims for nonaccommodation. If the axiom fails to hold, important bodies of doctrine and theory rest on a shaky foundation.

B. *The Basic Structure of Third-Party Harasser Doctrine*

Courts require three essential elements for Title VII third-party harasser claims to succeed:

- (1) The work environment was severely or pervasively hostile or abusive to the employee;⁴⁰
- (2) The harassment occurred "because of" the employee's sex, race, or other protected group membership;⁴¹ and
- (3) There is a basis for holding the employer legally responsible for the hostile work environment.⁴²

This framework applies to all hostile work environment cases, regardless of whether the harasser is a company executive, supervisor, co-employee, or third party.⁴³ The harasser's relationship to the employer affects only how the third element is formulated.

38. Pregnancy generally is not considered a "disability" for ADA purposes. See, e.g., *Gover v. Speedway Super Am., LLC*, 254 F. Supp. 2d 695, 705 (S.D. Ohio 2002) (collecting authorities).

39. See *supra* notes 8, 9, and accompanying text.

40. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21–22 (1993).

41. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998).

42. *Faragher v. City of Boca Raton*, 524 U.S. 775, 797–98 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998). Courts often refer to employer "liability" rather than "responsibility," but the latter term better captures this element's substance. See 1 *Lindemann & Grossman*, *supra* note 21, at 1352. All three elements are necessary for liability.

43. See, e.g., *Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 604 (7th Cir. 2006); *Freitag v. Ayers*, 468 F.3d 528, 539 (9th Cir. 2006). See generally 1 *Lindemann & Grossman*, *supra* note 21, at 1320–83. Sometimes courts list additional elements of "unwelcomeness" and, in sex discrimination cases, harassment "of a sexual nature." Both are relics of early harassment theory centered on sexual attention or overtures, and neither does independent analytic work today. The "unwelcomeness" inquiry is subsumed in the employee's subjective experience of hostility. *Id.* at 1349; see also *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007). Sexualized conduct is unnecessary, though it may provide evidence of the other elements. See *Boumehdi*, 489 F.3d at 788–89 (collecting decisions); *Schultz*, *Reconceptualizing*, *supra* note 18; David Schwartz, *When is Sex*

This separate inquiry into employer responsibility is a distinctive feature of hostile work environment law. In cases involving “tangible employment actions,” such as hiring, pay, promotion, or termination, employers always are liable based on their agents’ conduct.⁴⁴ Hostile work environment cases require a more elaborate analysis. An employer may not be liable when a supervisor harasses a subordinate, even if the plaintiff proves that her terms or conditions of employment suffered because of her sex. The employer escapes legal responsibility if it “exercised reasonable care to prevent and correct promptly” any discriminatory hostile work environment and if the “plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁴⁵ In substance, the employer has an affirmative defense when its conduct (the supervisor’s harassing conduct aside) was not negligent, and the plaintiff’s was. Similarly, an employer is legally responsible when its nonsupervisory employees harass a coworker only if the plaintiff can show that the employer was negligent.⁴⁶

Third-party harasser cases apply the same negligence rule as coworker cases: The employer is legally responsible if it knew or should have known about the harassment and failed to take reasonable corrective or preventive action. The Equal Employment Opportunity Commission’s (EEOC) longstanding sexual harassment Guidelines take this position,⁴⁷ eight circuits follow suit,⁴⁸ and none reject the

Because of Sex? The Causation Problem in Sexual Harassment Law, 150 U. Pa. L. Rev. 1697, 1749–58 (2002).

44. *Ellerth*, 524 U.S. at 761–63; see also J.H. Verkerke, Notice Liability in Employment Discrimination Law, 81 Va. L. Rev. 273 (1995) [hereinafter Verkerke, Notice Liability] (summarizing employer liability doctrine under Title VII and proposing restructuring).

45. *Ellerth*, 524 U.S. at 765.

46. See *Faragher*, 524 U.S. at 779–80 (1998); *Swenson v. Potter*, 271 F.3d 1184, 1191–92 (9th Cir. 2001); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074 (10th Cir. 1998); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766 (2d Cir. 1998). Supervisor and coworker harassment differ primarily in which party bears the burden of proof. The coworker standard implicitly incorporates the plaintiff’s contributory negligence because employer negligence requires actual or constructive notice, something the plaintiff must reasonably endeavor to provide. Cf. Verkerke, Notice Liability, *supra* note 44, at 366–72 (arguing directly for making hostile work environment claims contingent on plaintiff’s providing reasonable notice to employer).

47. 29 C.F.R. § 1604.11(e) (2008).

48. For the First Circuit, see, e.g., *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 854 (1st Cir. 1998); for the Third Circuit, see, e.g., *Weston v. Pennsylvania*, 251 F.3d 420, 427 (3d Cir. 2001); for the Sixth Circuit see, e.g., *Slayton v. Ohio Dep’t of Youth Servs.*, 206 F.3d 669, 677 (6th Cir. 2000); for the Seventh Circuit, see, e.g., *Erickson*, 469 F.3d at 605; for the Eighth Circuit, see, e.g., *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1108 (8th Cir. 1997); for the Ninth Circuit, see, e.g., *Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005); for the Tenth Circuit, see, e.g., *Lockard*, 162 F.3d at 1074; and for the Eleventh Circuit, see, e.g., *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003). District courts in the Second, Fourth, Fifth, and D.C. Circuits uniformly take the same approach. For the Second Circuit, see *Lopes v. Caffe Centrale LLC*, 548 F. Supp. 2d 47, 53 (S.D.N.Y. 2008); *McDonald v. B.E. Windows Corp.*, No. 01 CV 6707(RLC), 2003 U.S.

approach.⁴⁹

C. *The Inapplicability of a Disparate Treatment Theory*

This section demonstrates that third-party harasser doctrine holds employers liable under Title VII even if they do not engage in disparate

Dist. LEXIS 7472, at *10 (S.D.N.Y. May 5, 2003); *Peries v. N.Y. City Bd. of Educ.*, No. 97CV7109(Arr), 2001 U.S. Dist. LEXIS 23393, at *19 (E.D.N.Y. Aug. 6, 2001); *Kudatzky v. Galbreath Co.*, No. 96 Civ. 2693(HB), 1997 WL 598586, at *4 (S.D.N.Y. Sept. 23, 1997); for the Fourth Circuit, see *Alford v. Martin & Gass, Inc.*, No. 1:08CV595(LMB/TRJ), 2009 WL 497581, at *6 (E.D. Va. Feb. 25, 2009); *Kandrac v. Charleston County Sch. Dist.*, No. 2:04CV23318(DCN), 2007 U.S. Dist. LEXIS 29864, at *48-*49 (D.S.C. Mar. 16, 2007); *McGuire v. Commonwealth*, 988 F. Supp. 980, 988 (W.D. Va. 1997); *Magnuson v. Peak Technical Servs., Inc.*, 808 F. Supp. 500, 512 (E.D. Va. 1992); for the Fifth Circuit, see *Belgrave v. Splendora Indep. Sch. Dist.*, No. H-07-1704, 2008 WL 4020035, at *11 (S.D. Tex. Aug. 29, 2008); for the D.C. Circuit, see *Martin v. Howard Univ.*, 1999 U.S. Dist. LEXIS 19516, at *7 (D.D.C. Dec. 16, 1999); for further authorities reinforcing these holdings, see *Vajdl v. Mesabi Acad. of KidsPeace, Inc.*, 484 F.3d 546, 550 (8th Cir. 2007); *Holmes v. Utah, Dep't of Workforce Servs.*, 483 F.3d 1057, 1065 (10th Cir. 2007); *Freitag*, 468 F.3d at 538; *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968 (9th Cir. 2002); *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001); *Folkerson v. Circus Circus Enters. Inc.*, 107 F.3d 754, 755-56 (9th Cir. 1997); *Guthrie v. Baker*, 583 F. Supp. 2d 668, 680 (W.D. Pa. 2008); *Mays v. King County*, No. CV07-1114-JCC, 2008 WL 3875435, at *3 (W.D. Wash. Aug. 14, 2008); *Nelson v. Anoka County Cmty. Action Program*, No. 07-4693(DWF/SRN), 2008 WL 2729123, at *3 n.2 (D. Minn. July 10, 2008); *Garrett v. Dep't of Corr.*, 589 F. Supp. 2d 1289, 1297 n.8 (M.D. Fla. 2008); *Picket v. Sheridan Health Care Ctr.*, No. 07C1722, 2008 WL 719224, at *3 (N.D. Ill. Mar. 14, 2008); *Leautaud v. Mkt. Express, Inc.*, No. 2:06CV286DAK, 2008 WL 183699, at *10 (D. Utah Jan. 18, 2008); *Akines v. Shelby County Gov't*, 512 F. Supp. 2d 1138, 1146-47 (W.D. Tenn. 2007); *Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 491 F. Supp. 2d 467, 477 (D. Del. 2007); *Pelt-Washington v. Fresenius Med. Care AG, FMC Holdings Inc.*, No. 1:05-CV-00163-MP-AK, 2007 WL 1488837, at *9 (N.D. Fla. May 17, 2007); *Cloer v. United Food & Commercial Workers Int'l Union*, No. C05-1526JLR, 2007 WL 601426, at *6 (W.D. Wash. Feb. 22, 2007); *Graves v. County of Dauphin*, 98 F. Supp. 2d 613, 620 (M.D. Pa. 2000); *Jarman v. City of Northlake*, 950 F. Supp. 1375, 1378 (N.D. Ill. 1997); *Sabo v. Lifequest, Inc.*, No. CIV. A. 95-3757, 1996 WL 583169, at *6 (E.D. Pa. Oct. 8, 1996); *Mart v. Dr. Pepper Co.*, 923 F. Supp. 1380, 1388 (D. Kan. 1996); *Menchaca v. Rose Records, Inc.*, No. 94 C 1376, 1995 WL 151847, at *3 (N.D. Ill. Apr. 3, 1995); *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1028 (D. Nev. 1992).

49. But see *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 483 n.3 (5th Cir. 1989) (Jones, J., dissenting) (denying employer may be held liable based on third-party conduct). Two opinions cast doubt on employer liability in third-party harasser cases but are ambiguous as to whether they reject it outright or only on the facts presented. See *Maine v. Okla. Dep't of Corr.*, No. 97-6027, 1997 U.S. App. LEXIS 26982, at *6-*7 (10th Cir. Sept. 30, 1997) (mem.); *Hicks v. Alabama*, 45 F. Supp. 2d 921, 931-33 (S.D. Ala. 1998). Subsequent authority in the same circuits now precludes the former interpretation. See *supra* note 48; see also *Slayton*, 206 F.3d at 677-78 (citing *Hicks* as consistent with the proposition that the "general rule against prison liability for inmate conduct does not apply when the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior"); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1017 (S.D. Ohio 1999) (citing *Maine* and *Hicks* to preclude imposing "sexual harassment liability upon correctional institutions for the sexually offensive conduct of inmates" but only "as long as the defendant institution took proper preventive and remedial steps with regard to inmate behavior").

treatment. To do so, and to lay the groundwork for subsequent analysis, I first define disparate treatment more precisely by introducing the concept of “membership causation” and its two variants, “internal causation” and “external causation.” Third-party harasser cases lack disparate treatment’s essential element of internal causation, which is the same as an employer’s discriminatory intent.

1. *Disparate Treatment Requires Internal Membership Causation.* — In U.S. legal culture, disparate treatment has become “the most easily understood type of discrimination.”⁵⁰ All antidiscrimination statutes ban it, as does the constitutional guarantee of equal protection. The canonical formulation of disparate treatment is “treatment of a person in a manner which but for that person’s sex [or other protected class membership] would be different.”⁵¹ David Strauss aptly termed this the “reversing the groups” test.⁵²

Scholars agree that this causal definition best captures the doctrinal category of “disparate treatment.”⁵³ The term “disparate treatment,” moreover, is used interchangeably with “intentional discrimination,” as is action with “discriminatory intent.”⁵⁴ The causal formulation highlights that it does not matter *for what purpose* the employer acts based on class membership,⁵⁵ notwithstanding ubiquitous references to “intent” and even “motivation” that seem to suggest otherwise.⁵⁶ Nor does establishing disparate treatment require cross-group comparisons, though these can provide important evidence: “[W]hat matters in the end is not how the

50. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

51. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978)); accord *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 & n.10 (1976).

52. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 *U. Chi. L. Rev.* 935, 956–65 (1989) [hereinafter Strauss, *Discriminatory Intent*]. As Strauss emphasizes, this analysis also captures a distinct kind of disparate treatment: adopting a policy because of its effects on a protected group, even if application of the policy to individuals does not take their group membership into account. See *Pullman-Standard v. Swint*, 456 U.S. 273, 277 (1982); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66, 270 n.21 (1977). See generally Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 *Harv. L. Rev.* 493, 537–39 (2003).

53. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 *Geo. L.J.* 489, 495–500 (2006); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 *Geo. L.J.* 279, 286–94 (1997); Amy L. Wax, *Discrimination as Accident*, 74 *Ind. L.J.* 1129, 1138–39 (1999); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 *La. L. Rev.* 495, 498 (2001).

54. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

55. *Johnson Controls*, 499 U.S. at 199; *Gregory v. Daly*, 243 F.3d 687, 699 (2d Cir. 2001); see also Bagenstos, *Rational Discrimination*, *supra* note 8, at 834; White & Krieger, *supra* note 53, at 497–98.

56. See *Reeves*, 530 U.S. at 140.

employer treated *other* employees, if any, of a different sex, but how the employer would have treated the plaintiff had she been of a different sex.”⁵⁷ Similarly, an individual may suffer disparate treatment even though other members of her group do not.⁵⁸

The standard causal formulation—“treatment of a person in a manner which but for that person’s [group membership] would be different”⁵⁹—contains an important ambiguity concerning *when* and *how* the employee’s protected characteristic becomes causally significant.⁶⁰ Consider two different scenarios involving two employees, one white and one African American, both employed by the same company. Both drive to work at the same time, along the same route, and in the same manner. In the first scenario, both employees arrive twenty minutes late to work because each was pulled over for speeding during her morning commute. In the second scenario, due to racial profiling, only the African American employee is stopped by the police and is made late to work; her white coworker arrives on time.

In the first scenario, there would be disparate treatment if the employer fires the African American worker for lateness but not her white counterpart. The employer treats them differently because of their racial

57. *Brown v. Henderson*, 257 F.3d 246, 253–54 (2d Cir. 2001); accord *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981) (holding Title VII does not require pay discrimination plaintiffs to compare themselves to employees of different sex in same job category); *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467–68 (2d Cir. 2001) (holding comparisons to other employees are not only way to show disparate treatment).

58. This is the lesson of “sex-plus” cases in which the employee’s sex is a necessary but insufficient condition of mistreatment, with the result that women lacking the “plus” factor do not suffer actionable harm. See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004) (discussing sex-plus theory and its applicability when plaintiff’s group is overrepresented in workplace); see also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (holding excluding women, but not men, with young children violates Title VII); *Brown*, 257 F.3d at 252 (“[D]iscrimination against one employee cannot be cured . . . solely by favorable, or equitable, treatment of other employees of the same race or sex.”). Outside the employment context, constitutional equal protection jurisprudence is inconsistent on this point. See Balkin & Siegel, *supra* note 13, at 16–17. Within Title VII, the special category of “dress and grooming” cases remains anomalous. David Cruz, *Making Up Women: Casinos, Cosmetics, and Title VII*, 5 Nev. L.J. 240 (2004). But see Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 Cal. L. Rev. 1, 18–30 (2000) (arguing dress and grooming cases are consistent with implicit pattern of deviation from formal equality); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 Tex. L. Rev. 167 (2004) [hereinafter Yuracko, *Trait Discrimination*] (arguing sex-differentiated dress and grooming codes may be compatible with, even required by, commitment to substantive equality that properly underlies Title VII jurisprudence).

59. *Johnson Controls*, 499 U.S. at 200 (citation omitted).

60. “But-for” causation always is sufficient when a causal connection is required, but sometimes a lower “motivating factor” or “substantial influence” standard is used. See generally Katz, *supra* note 53, at 500–11 (detailing various standards used to establish causal connection). This distinction is unimportant to the purposes of this Article.

difference.⁶¹ Had the African American been white instead, she would not have been fired despite her lateness.

In the second scenario, again the African American employee gets fired and the white one does not. This time, let us stipulate that the employer did not consider the late employee's race in deciding whether to fire her, and a similarly late white employee *would* have been fired. But in this scenario, the white employee was not late. Nonetheless, the African American employee has been fired because of her race. This time, however, the mechanism is different: Her race was a cause of her being late, not of how the employer responded to her lateness.

Disparate treatment doctrine distinguishes between these two different mechanisms that result in "treatment of a person in a manner which but for that person's [group membership] would be different."⁶² It specifies that the protected trait must enter the causal chain *through the employer's decisionmaking process itself* and not prior to that process. "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role *in that process* and had a determinative influence on the outcome."⁶³ If the employer fired the African American employee because she was late, it is not considered disparate treatment even though she was late because of (the way others responded to) her race.⁶⁴ In the second scenario, only

61. This assumes no other differences of significance to the employer, such as prior attendance record and so forth. The existence of disparate treatment holds even if, in addition to the employee's race, her lateness was another "but-for" cause. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 (1976) ("[P]articipation in a theft of cargo may render an employee unqualified for employment, [but] this criterion must be 'applied, alike to members of all races,' and Title VII is violated if . . . it was not."); *supra* note 58 and accompanying text.

62. *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1205 (7th Cir. 1971) (Stevens, J., dissenting)).

63. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (emphasis added).

64. This hypothetical raises the well-known but still difficult problem that membership in groups defined by race, sex, and so on is properly understood not as a trait inhering in individuals, but rather as a socially assigned or ascribed status. This status emerges from social interaction against the backdrop of historically specific, and contingent, institutions and discourses of group difference. See generally Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990); Deborah A. Stone, *The Disabled State* (1984); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *Yale L.J.* 1757 (2003); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 *U. Pa. L. Rev.* 1 (1995); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 *Ind. L.J.* 63 (2002). Nonetheless, the deeply social character of race or gender does not require that an individual's assignment to race or gender groups be particularly unstable over time or across contexts. Although such instability is possible, a major point of understanding race and gender as highly institutionalized is that, in practice, these institutions tend to enforce stable and predictable group membership. As a result, most people experience such membership as immutable, even natural, most of the time. See, e.g., Richard Ford, *Racial Culture* 103, 116 (2005) [hereinafter Ford, *Racial Culture*]. But cf. Taylor Flynn, *TRANSforming the*

the police officer acted with discriminatory intent, not the employer, though in both scenarios it is the employer who inflicts the harm of termination.

I use “internal causation” to refer to this requirement that the employee’s protected trait enter the causal chain *and* do so through the employer’s own decisionmaking process. This internal causation requirement underlies common formulations of disparate treatment as the employer acting “on the basis” of a protected trait or taking it “into account.”⁶⁵

Internal causation occurs in a subset of situations in which protected class membership is a cause of an individual’s employment-related harm.⁶⁶ I refer to that broader phenomenon as “membership causation.” Membership causation arises without internal causation when an individual’s protected class membership is a cause of a characteristic (like getting delayed by the police) to which the employer subsequently responds. “External causation” refers to this other subset of membership causation in which an individual’s protected class membership enters the causal chain outside the employer’s decisionmaking process. For a disparate treatment claim to succeed, there must be internal causation. External causation does not suffice.

2. *Third-Party Harasser Cases Involve External Membership Causation.* — Establishing a third-party harasser claim under Title VII does not require demonstrating that the employer engaged in disparate treatment. It does not matter whether the victim’s sex played a role in any decisionmaking by the employer.

The macaw hypothetical illustrates this point. To make it even clearer, I add further details that are realistic in their basic structure, if not necessarily in their particularities. First, the complaining employee is not the only woman in the workplace, and not all the other women are

Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L. Rev. 392 (2001); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 Wis. L. Rev. 1283; Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 Cal. L. Rev. 1 (2007). This occurs even as the precise—and consequential—meaning of group membership is constantly negotiated as people “work their identities” as a particular kind of woman, black person, and so on. Carbado & Gulati, *Working Identity*, supra note 19, at 1261. For this reason, throughout this Article I somewhat simplistically refer to group membership as if it were a static trait of an individual, but I acknowledge that doing so ignores important problems that only a more dynamic account can engage. Those problems, however, are far from the whole story of how race and gender make a difference at work.

65. Cf. Katz, supra note 53, at 496 (defining disparate treatment in terms of employer’s “utilization” of employee’s race or sex).

66. For ease of reference, I sometimes substitute the term “workplace harm,” but without meaning to place any weight on the physical boundaries of any worksite.

harassed by the macaw.⁶⁷ Second, the workplace contains other men and women who are harassed by the macaw, but not because of their sex. They also complain to the employer. For example, suppose the macaw attacks these other workers because they are smokers, which our plaintiff is not.

Under a disparate treatment theory, the decisive issue is whether the employer would have responded to the plaintiff's complaint differently had she been a man. If the employer ignores complaints about the macaw from all its workers, men and women alike, then our plaintiff's sex appears to have no effect on her employer's response. The employer treats her as poorly as other employees suffering from the macaw, but not worse. That would not be disparate treatment.

The disparate treatment analysis can be pushed further back in the employer's decisionmaking process. Even if the employer evenhandedly ignores macaw complaints, it might have adopted this stance *because* our plaintiff is a woman and, had she been a man, the employer might have taken all macaw complaints more seriously.⁶⁸ Such an explanation would seem less likely, however, if the employer had a sex-neutral reason to ignore macaw complaints. The employer might be fond of macaws or prefer to avoid even the modest costs associated with addressing such complaints.⁶⁹

Whether internal causation exists is a question of fact. This fact is logically independent of why the macaw attacked our victim. Had it attacked her because she was a smoker, but the employer then ignored her complaint because she was a woman, that would be disparate treatment. It would be analogous to the employer who fires only black employees who arrive late, not white ones. But if the macaw attacked her because she is a woman, and the employer then ignored her complaint for reasons other than her sex, that would not be disparate treatment. In this latter scenario it is irrelevant that the victim suffers workplace harm because she is a woman, for what differentiated her from a man was an outside force (the macaw), and not her employer. The analogy here is to the black employee who is late because of racial profiling and whose employer then fires her for lateness. In that situation there was membership causation, but it was of the external rather than the internal variety.

In third-party harasser cases, courts do not demand that plaintiffs establish internal causation, plaintiffs do not seek to do so, and defendants do not insist otherwise. Instead, courts usually treat causation as the plaintiff's easiest element and subject it to superficial analysis at most: The third-party customer (or inmate, or patient) harassed the worker be-

67. Implicitly, the macaw attacks the complaining employee because of her sex but not solely because of her sex; this is a sex-plus macaw. See *supra* note 58.

68. See *supra* note 52.

69. Cf. *Garrett v. Dep't of Corr.*, 589 F. Supp. 2d 1289, 1293 (M.D. Fla. 2007) (considering employer's invocation of cost concerns as its basis for refusing to install equipment that might have prevented harassment).

cause of her race or sex, end of story.⁷⁰ Even when causation is at issue, the analysis always centers on the harasser's conduct, not the employer's.⁷¹ In other words, courts analyze whether the hostile work environment was discriminatory by asking whether the *harasser* acted with discriminatory intent, regardless of whether the harasser was a third party, a coworker, a supervisor, or the company president. The question simply is whether the employee's sex played a causal role in the harasser's decision to harass.⁷²

Although courts use the standard tools and terminology of disparate treatment analysis to analyze the causation element, doing so creates conceptual problems when the decisionmaking in question is that of a third-party harasser. By definition, the harasser is an actor legally distinct from the employer. But only the *employer*, not the harasser, can be held liable for an "employment practice" in which the employer "discriminate[s] against an[] individual with respect to his . . . terms, conditions, or privileges of employment."⁷³ The unlawful act cannot be the harasser's conduct. Instead, as the *Dunn* court put it, the issue "is how the employer handles the problem."⁷⁴

Dunn itself relies on this divergence between disparate treatment theory and the role of the employee's sex in third-party harasser cases. The defendant hospital in *Dunn* was a public employer subject both to Title VII and to the Constitution. Despite accepting plaintiff's Title VII claim, the court rejected her equal protection claim for lack of internal causation. Paraphrasing the Supreme Court's famous reasoning in *Personnel Administrator of Massachusetts v. Feeney*,⁷⁵ Judge Easterbrook explained that

[T]he Hospital tolerated [the harasser] despite, rather than because of, his puerile [sex-based] behavior, and thus did not intentionally discriminate. . . . Public employers must avoid sex discrimination in their own acts (including the acts of their em-

70. See, e.g., *Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600 (7th Cir. 2006); *Galdamez v. Potter*, 415 F.3d 1015 (9th Cir. 2005); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998).

71. See, e.g., *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013–14 (8th Cir. 1988).

72. Ann McGinley's recent work richly documents and analyzes the gendered nature of customers' harassment of women workers in highly sexualized, entertainment-related occupations. See generally Ann C. McGinley, *Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. Ill. L. Rev. 1229; Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 *Yale J.L. & Feminism* 65 (2006). McGinley sees the primary difficulties of establishing causation as the same ones that trouble supervisor harassment cases, namely the so-called "equal opportunity harasser" and pervasive sexualization that does not target specific workers. See *supra* note 26. Even in these cases, the focus remains on the harasser, not necessarily the employer.

73. 42 U.S.C. § 2000e-2(a) (2006).

74. *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005).

75. 442 U.S. 256 (1979).

ployees) but are not obliged to root out discrimination by private actors⁷⁶

3. *The Irrelevance of Vicarious Liability.* — Third-party harasser cases typically involve action undertaken with discriminatory intent, albeit by the third party, not the employer. If the harasser's discriminatory intent could be imputed to the employer, then these cases would no longer be inconsistent with disparate treatment theory. This subsection shows why third-party harasser doctrine cannot be explained in this way.

An argument for imputing discriminatory intent to the employer would analogize the third-party harasser to the harassing supervisor. The Supreme Court characterizes employer responsibility for supervisor harassment as resting on vicarious liability.⁷⁷ On such an analysis, the employer's unlawful employment practice is the supervisor's harassing conduct.⁷⁸ Thus, if the supervisor acts with discriminatory intent, so too does the employer.

The justification for attributing a supervisory employee's conduct to the employer is that Title VII defines "employer" to include the employing owner or firm's "agents," such as its employees.⁷⁹ The employer's acts include its employee's acts, so long as they fall within the scope of the employee's employment, by analogy to the standard agency doctrine of respondeat superior.⁸⁰ In *Ellerth* and *Faragher*, however, the Court held that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment."⁸¹ Nonetheless, the Court

76. *Dunn*, 429 F.3d at 692 (citation omitted). Judge Rovner dissented on this point. *Id.* at 694. The court did not explain why Title VII and the Equal Protection Clause would diverge, despite the conventional understanding that Title VII "disparate treatment" and constitutional "intentional discrimination" are the same. See *Williams v. Seniff*, 342 F.3d 774, 788 n.13 (7th Cir. 2003) ("Our cases make clear that the same standards for proving intentional discrimination apply to Title VII and § 1983 equal protection."); *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183, 192 (1st Cir. 2003) ("When a plaintiff attempts to use § 1983 as a parallel remedy to a Title VII claim, the prima facie elements to establish liability are the same under both statutes." (emphasis omitted)); *Okruhlik v. Univ. of Ark.*, 255 F.3d 615, 626 (8th Cir. 2001) ("[T]he elements of a claim of intentional discrimination are essentially the same under Title VII and the Constitution."). I explain below why disparate impact theory does not provide the answer. See *infra* Part I.D. For similar, and similarly undertheorized, assertions that different standards apply to Title VII and constitutional hostile work environment claims, see *Huff v. Sheahan*, 493 F.3d 893, 902–03 (7th Cir. 2007); *Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004); see also *supra* note 26.

77. See *Pa. State Police v. Suders*, 542 U.S. 129, 145–46 (2004); *Faragher v. City of Boca Raton*, 524 U.S. 775, 793–807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754–65 (1998). More generally, the employer responsibility element often is characterized as determining whether to "impute" or "attribute" the harassment to the employer. See, e.g., *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 766–67 (2d Cir. 1998).

78. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117–18 (2002).

79. See *Ellerth*, 524 U.S. at 754 (discussing 42 U.S.C. § 2000e(b) (2006)); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

80. The analogy is rough because no claim lies against the supervisor personally.

81. *Ellerth*, 524 U.S. at 757; accord *Faragher* 524 U.S. at 793–94 .

grounded vicarious liability in the agency law principle of “misuse of supervisory authority,”⁸² in which the agent is “aided in accomplishing the tort by the existence of the agency relation.”⁸³

Third-party harasser cases, however, cannot be governed by the agency principles applicable to supervisors. By definition, the harasser is not the employer’s agent.⁸⁴ Recognizing this point, courts rest employer responsibility on negligence principles, not vicarious liability for intentional discrimination. The employer’s liability under Title VII is “direct rather than derivative.”⁸⁵ As the Tenth Circuit explained, “[t]he focus is not on the [harassing] conduct itself but on the employer’s behavior in response.”⁸⁶ This direct-not-derivative formulation makes the employer responsible for “its own negligence” in failing to prevent or correct the hostile work environment, not for the harasser’s acts themselves.⁸⁷ In third-party harasser cases, employer responsibility no longer rests on agency principles at all.⁸⁸

Thus, the unlawful employment practice is the employer’s own course of preventive and corrective acts or omissions, not the harassment

82. *Faragher*, 524 U.S. at 803; *Ellerth*, 524 U.S. at 764.

83. *Faragher*, 524 U.S. at 801–04 (quoting and discussing Restatement (Second) of Agency § 219(2)(d) (1958)); *Ellerth*, 524 U.S. at 758, 760–64 (same).

84. A similar problem arises with nonsupervisory co-employees, who are the employer’s agents but to whom the misuse of supervisory authority theory does not apply. *Faragher*, 524 U.S. at 800–01; *Ellerth*, 524 U.S. at 760; White & Krieger, *supra* note 53. But see Tristin K. Green, *Insular Individualism: Employment Discrimination Law after Ledbetter v. Goodyear*, 43 Harv. C.R.-C.L. L. Rev. 353, 370 n.108 (2008) [hereinafter Green, *Insular Individualism*] (arguing employers should be vicariously liable for harassment by coworkers who “are given responsibility for performance evaluations or for reporting acts requiring discipline”). I focus on third-party cases because the inapplicability of a vicarious liability analysis is particularly clear. Including coworkers reinforces my overarching argument.

85. *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005); accord *Swenson v. Potter*, 271 F.3d 1184, 1191–92 (9th Cir. 2001) (“Title VII liability is direct, not derivative: An employer is responsible for its own actions or omissions, not for the coworker’s harassing conduct.”).

86. *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001).

87. *Swenson*, 271 F.3d at 1191 (quoting *Ellerth*, 524 U.S. at 759); accord *Freitag v. Ayers*, 468 F.3d 528, 538 (9th Cir. 2006) (“This theory of liability is grounded not in the harassing act itself—i.e., inmate misconduct—but rather in the employer’s ‘negligence and ratification’ of the harassment through its failure to take appropriate and reasonable responsive action.”); *Jensen v. Henderson*, 315 F.3d 854, 861 (8th Cir. 2002) (“The matter alleged to be discriminatory is the adequacy of the [employer]’s response, not [plaintiff]’s co-worker’s underlying behavior.”).

88. Courts rely on a Restatement section providing for liability for negligently “permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.” Restatement (Second) of Agency § 213(d), quoted in *Dunn*, 429 F.3d at 691. The commentary characterizes this provision as resting in tort rather than agency principles. *Id.* § 213 cmt. a. The same is true for the Restatement provisions relied upon in coworker cases. See *id.* at § 219(2)(b), quoted in *Ellerth*, 524 U.S. at 758; *id.* § 219 cmt. e.

itself.⁸⁹ This formulation has a number of important practical implications borne out in the doctrine, thereby buttressing the theoretical point. Several circuits, for instance, treat the employer's response, not the harassment itself, as the challenged employment conduct for the purpose of deciding when the statute of limitations begins to run.⁹⁰ One court has found an employer liable for failure to take preventive measures that would protect its employee from a third-party harasser, even though the only previous acts of harassment had occurred outside the employer's workplace and when neither individual was working for the employer.⁹¹ Relying on *Dunn*, the court held that the critical issue was "whether these defendants had notice of the situation and took prompt and adequate remedial action to ensure that no harassment would occur at [their] workplace" in the future.⁹²

Identifying the employer's own conduct, not the harasser's, as the unlawful act defeats the suggestion that liability rests on imputing the harasser's actions, including his discriminatory intent, to the employer. As the Ninth Circuit squarely declares, "employer liability is grounded in negligence and ratification rather than intentional discrimination."⁹³

D. *The Inapplicability of a Disparate Impact Theory*

The previous section shows that third-party harasser doctrine is not an application of disparate treatment theory because the cases do not require internal causation. This leaves open the possibility that these cases proceed under a disparate impact theory. This section shows that they do not. To demonstrate this, I first define disparate impact more precisely by showing that it requires neither form of membership causation, external nor internal. Instead, it requires that the employer's conduct falls more harshly on one protected class than another. Third-party harasser doctrine, in contrast, does not include this essential element of group harm. Having eliminated both disparate treatment and impact, we are left with a body of law that violates the axiom that Title VII claims can proceed exclusively under those two theories.

1. *Disparate Impact Requires Group Harm, Not Membership Causation.* — The disparate impact theory is Title VII's one recognized alternative to

89. Of course, vicarious liability remains relevant because it is the employers' agents—its managers and supervisors—who engage in these preventive or corrective acts or omissions. Charging the employer with this conduct requires resort to respondeat superior. The real point here is not the distinction between direct and vicarious liability, but rather the type of conduct that violates the statute.

90. *Jensen*, 315 F.3d at 859, 862; *Swenson*, 271 F.3d at 1191; *Frazier v. Delco Elecs. Corp.*, 263 F.3d 663, 666 (7th Cir. 2001).

91. *Guthrie v. Baker*, 583 F. Supp. 2d 668, 677 (W.D. Pa. 2008).

92. *Id.* at 680.

93. *Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005); see also Daniel P. O'Gorman, *Paying for the Sins of Their Clients: The EEOC's Position that Staffing Firms Can Be Liable When Their Clients Terminate an Assigned Employee for a Discriminatory Reason*, 112 Penn St. L. Rev. 425, 437–38 (2007).

disparate treatment. Two critical features differentiate the theories. First, disparate impact does not require discriminatory intent, that is, internal causation. Second, more generally, a disparate impact claim does not analyze causation at an individual level at all but instead requires that the challenged employer practice harm a *group* defined by a protected trait.⁹⁴ Although antidiscrimination theory has long tended to conflate these two features,⁹⁵ they are separable. Their separability is important because, as I will show later, nonaccommodation claims exhibit the first feature but not the second and therefore differ from both disparate treatment and disparate impact theories.

A disparate impact claimant must identify an employer practice that harms one group more than it harms another. In the foundational case of *Griggs v. Duke Power Co.*, the gravamen of the complaint was that the employer's testing and high school graduation requirements screened out African American applicants for jobs or transfers at higher rates than they screened out white applicants.⁹⁶ Demonstrating discriminatory intent was unnecessary.

The disparate impact theory does have a causation requirement, but it operates at the level of group harm. Thus, in *Griggs*, the high school degree requirement harmed African Americans as a class because fewer African Americans than whites had high school degrees. More generally, disparate impact plaintiffs cannot simply identify an employment practice and a disparity in some workplace harm; they must show that the former causes the latter.⁹⁷

Building on this causation requirement, disparate impact claims could be interpreted as involving external causation at the level of groups rather than individuals. Disparities in workplace harm imply that race or sex played a causal role in processes producing the aggregate differences on which an employer later acts. Systemic racial discrimination in the public schools would be analogous to the specific incident of racial profiling in my lateness hypothetical, and lower test scores and graduation rates among African Americans as a class would be analogous to the individual employee's arriving late.

In the individualistic sense in which I am using the term, however, external causation is unnecessary to a disparate impact claim; instead, the group is the unit of analysis.⁹⁸ In *Griggs*, the employer excluded the

94. Disparate impact is often characterized as focusing on discriminatory "effects" rather than "intent." This formulation simply assumes that disparate treatment is discrimination simpliciter. If disparate impact were "real" discrimination, then disparate treatment might not involve discriminatory intent (to affect the relative position of a group), but would tend to produce discriminatory effects.

95. See *infra* notes 293–295 and accompanying text.

96. 401 U.S. 424, 431–32 (1971).

97. 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(B)(ii) (2006); *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000).

98. Even at the group level, courts do not inquire directly into the source of group difference, though sometimes, as in *Griggs*, it is readily apparent. See Peter Siegelman,

plaintiffs from jobs because they lacked the requisite credentials, without considering their race (no internal causation).⁹⁹ But why did they lack high school diplomas and score below the test cutoff? No individual plaintiff in *Griggs* had to answer that question. No one had to show that he personally lacked a high school diploma because of his race. Doing so would have established external causation: no job because no diploma, no diploma because of race, therefore no job because of race. Disparate impact plaintiffs never need to make such a showing, a significant point because often it would be impossible to do so.¹⁰⁰

2. *Third-Party Harasser Doctrine Does Not Require Group Harm.* — Establishing a third-party harasser claim does not require demonstrating that the employer's conduct harmed the plaintiff's class as a whole. All that matters is how the harasser's and the employer's conduct affect the individual employee. In these ways, it differs from a disparate impact claim, even though neither requires showing that the employer acted with discriminatory intent.

The macaw hypothetical also illustrates this point. For a disparate impact claim, the question would be whether an employer practice causes disproportionate harm to women relative to men. Because the employer simply fails to intervene, it might be difficult to specify the challenged practice in a way that satisfies current disparate impact doctrine,¹⁰¹ but the problem goes deeper than that. Does the employer's inaction harm

Contributory Disparate Impacts in Employment Discrimination Law, 49 Wm. & Mary L. Rev. 515, 518–19 (2007).

99. The facts of *Griggs* suggest that the requirements were adopted in order to limit African American employment. If so, *Griggs* would be a case of disparate treatment. The crucial point about *Griggs* and the subsequent case law is that disparate impact liability does not require the factfinder to draw this inference of intent. Nonetheless, some theories of disparate impact liability interpret it as a rough proxy for subtle disparate treatment at the level of policy adoption. See, e.g., *In re Employment Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1322 (11th Cir. 1999). See generally Primus, *supra* note 52; Strauss, *Discriminatory Intent*, *supra* note 52.

100. In *Griggs*, proving external causation in an individual case would have meant unraveling the complex processes that affect whether someone graduates from high school. Nor did the statistical evidence allow the inference that, in any individual case, race more likely than not caused the lack of a high school diploma. Most white men (66%) lacked a high school diploma, though even more African American men (88%) did, too. *Griggs*, 401 U.S. at 430 n.6. These figures imply that, while many African American men lacked diplomas because of race, most African American men who lacked a diploma would have lacked one had they been white, too. This analysis suggests that disparate impact claims might address situations where external causation exists but cannot be allocated to individuals.

101. See *Joe's Stone Crab, Inc.*, 220 F.3d at 1281 (declining to "impose on an employer an affirmative duty under Title VII to ameliorate a public reputation not attributable to its own employment conduct"). Compare *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 305 (7th Cir. 1991) (holding "passive reliance on employee word-of-mouth recruiting" is not "a particular employment practice"), with *Thomas v. Wash. County Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990) (allowing disparate impact challenge to "policies and practices amount[ing] to nepotism and word-of-mouth hiring," including failure to advertise teaching vacancies).

women more than men? The answer depends on whom else the macaw attacks in addition to our complainant.

Women as a class need not suffer disproportionate harm even if the macaw attacks the plaintiff because of her sex. Recall that the macaw also attacks smokers, regardless of sex. Smokers are disproportionately male.¹⁰² Therefore, ignoring macaw complaints might actually have a disparate impact on *men*. Addressing that possibility would be a central issue in a disparate impact claim.¹⁰³

The third-party harasser cases simply never address whether the employer's approach to third-party harassment harms women more than men. Typically, the allegations focus solely on how a single plaintiff was treated by the harasser and how the employer responded.¹⁰⁴ In such cases, as in all hostile work environment cases, the victim need only show that she was harassed because of her race or sex, without regard to whether the harasser also abused other individuals inside or outside her protected class.¹⁰⁵

Even in cases where hostility and abuse pervade the work environment for many employees, the analysis remains at the individual level. For instance, *Turnbull v. Topeka State Hospital* concerned a female staff psychologist at a facility for individuals with severe mental illness, all of whom were admitted "because they posed some danger to themselves or others."¹⁰⁶ Employees, including the plaintiff, had long expressed concern about their safety and requested renovations that would allow them to avoid meeting with patients in confined spaces outside the sight of coworkers. The employer failed to act on that request and also failed to distribute personal alarms that it had purchased. After a patient sexually assaulted her, the plaintiff brought a hostile work environment suit, and the court held that the employer could be held liable based on its failures to take action that could have prevented incidents of this sort.¹⁰⁷ Even though these omissions were not specific to the plaintiff, the court's anal-

102. CDC, Early Release of Selected Estimates Based on Data from the January–June 2006 National Health Interview Survey 48 (2006), available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/200612_08.pdf (on file with the *Columbia Law Review*).

103. Much would turn on how broadly to characterize the employment practice in question: ignoring complaints about macaw attacks versus ignoring complaints about those macaw attacks that are based on sex. This problem bedevils disparate impact theory generally. See *infra* note 284. Compare *Connecticut v. Teal*, 457 U.S. 440, 441 (1982) (requiring discrete steps in hiring process be analyzed for disparate impact rather than "bottom line" results of entire process), with *Ford, Racial Culture*, *supra* note 64, at 190 (criticizing *Teal* and arguing "an employer with a representative and nonstratified workforce *should be* exempt from disparate impact liability because, taken as a whole, his policies do not have a disparate impact").

104. See, e.g., *Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600 (7th Cir. 2006); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1075 (10th Cir. 1998); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d. 848 (1st Cir. 1998).

105. See *supra* Part I.C.2.

106. 255 F.3d 1238, 1241 (10th Cir. 2001).

107. *Id.* at 1245.

ysis never suggests, let alone demands, that the employer's omissions caused greater harm to women than to men. Instead, what made this a case of discrimination "because of sex" was simply the finding that the patient in question attacked the plaintiff because of her sex.

To be sure, in *Turnbull* and other cases the employer's failure to prevent third-party harassment might in fact cause disproportionate harm to women.¹⁰⁸ But courts neither require proof of such disparate impact nor assume that it exists.¹⁰⁹ The pregnancy leave case law provides a striking contrast. There, plaintiffs also suffer harm because of their membership in a protected class (pregnant women), but to make out a disparate impact claim, courts require them to show that the employer's failure to provide scheduling flexibility, leave, or modified assignments causes a disparate impact on the class as a whole.¹¹⁰

Ultimately, the only reason to shoehorn third-party harasser cases into a disparate impact theory is to reconcile liability with the absence of disparate treatment. That reasoning begs precisely the question I am raising here: whether disparate treatment and impact truly are the exclusive Title VII theories of liability.

PART II. THIRD-PARTY HARASSER DOCTRINE AS AN ACCOMMODATION MANDATE

If neither the disparate treatment nor disparate impact theories apply to the employer's conduct in a third-party harasser case, then in what sense is that conduct discriminatory? This Part argues that third-party harasser claims possess the same basic elements as a claim for denial of reasonable accommodation under the ADA. There are differences to be sure, but these concern details that do not implicate the basic contrast between nonaccommodation, disparate treatment, and disparate impact theories.

To motivate this argument, I first point out the similarities between the preventive or corrective actions at issue in third-party harasser cases and the modifications to workplace rules at issue in conventional nonaccommodation cases. Next, I define the nonaccommodation theory more precisely by showing how it uses external causation to satisfy a discrimination claim's core requirement of action "because of" disability or other

108. On the potential, but not the inevitability, for overlap between disparate impact and nonaccommodation theories, see *infra* note 147 and accompanying text; see also Stein & Waterstone, *supra* note 30.

109. The established practice of awarding compensatory and punitive damages in hostile work environment cases, see *Landgraf v. USI Film Prods.*, 511 U.S. 244, 283 (1994); 1 *Lindemann & Grossman*, *supra* note 21, at 1414–15, reinforces the notion that third-party harasser cases are not disparate impact claims for which such damages are unavailable, 42 U.S.C. § 1981a(a)(1) (2006); see also Hébert, *supra* note 26, 343–44 & n.14; White, *supra* note 25, at 738–39.

110. *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1314 (11th Cir. 1999). On potential barriers to this showing, see discussion *infra* note 284; see also text accompanying *infra* notes 155–156.

protected class membership. Third-party harasser claims likewise rely on external causation, and this provides the primary basis for interpreting them as nonaccommodation claims. There are further commonalities too, including the central role of notice to the employer and the requirement of taking only reasonable steps, not all possible ones, to prevent or remedy external causation.

A. *The Similarity Between Preventing Harassment and Accommodating Disability*

“Preventing or correcting harassment” and “making reasonable accommodations” to an individual’s “physical or mental limitations” may sound rather different. In practice, however, the steps employers must take to prevent third-party harassment often involve the same sorts of modifications to prior workplace procedures and structures that are hallmarks of nonaccommodation claims.

Employers may alter an employee’s work schedule to avoid times when the harasser is present.¹¹¹ They may reassign the employee to a different mix of tasks to avoid the harasser,¹¹² or to a different jobsite or position.¹¹³ They may provide specialized training or services so that the employee can better handle the harassment¹¹⁴ or so that the harasser

111. See, e.g., *Pelt-Washington v. Fresenius Med. Care AG*, No. 1:05-cv-00163-MP-AK, 2007 U.S. Dist. LEXIS 36466, at *4 (N.D. Fla. May 17, 2007) (holding defendant took sufficient remedial action by reassigning plaintiff to different patients and not scheduling her to open or close the facility); *Sparks v. Reg'l Med. Ctr. Bd.*, 792 F. Supp. 735, 747 (N.D. Ala. 1992) (holding employer’s response to employee’s complaint, including making “adjustments in plaintiff’s work schedule,” was “both appropriate and prompt . . . and effectively prevented any retaliation or future harassment”).

112. See, e.g., *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1262 (11th Cir. 2003) (concluding employer’s denial of plaintiff’s request not to assign her to location where she had been harassed before helped establish triable issue of fact on adequacy of employer’s response to third-party harassment); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1075 (10th Cir. 1998) (holding employer liable for failing to prevent hostile work environment and noting supervisor “placed Ms. Lockard in an abusive and potentially dangerous situation, although he clearly had both the means and the authority to avoid doing so by directing a male waiter to serve these men, waiting on them himself, or asking them to leave the restaurant”); *Picket v. Sheridan Health Care Ctr.*, No. 07 C 1722, 2008 WL 719224, at *1 (N.D. Ill. Mar. 14, 2008) (holding employer took prompt and appropriate steps in response to employee’s complaints of harassment, including instructing employee “not to enter [the harasser’s room] by herself”).

113. See, e.g., *Guthrie v. Baker*, 583 F. Supp. 2d 668 (W.D. Pa 2008); *Picket*, 2008 WL 719224, at *1; *Catalano v. GWD Mgmt. Corp.*, No. CV 403-167, 2005 WL 5519861, at *6 (S.D. Ga. Mar. 30, 2005); *Graves v. County of Dauphin*, 98 F. Supp. 2d 613, 621 (M.D. Pa. 2000) (holding moving employees to new assignments may preclude liability for hostile work environment claim).

114. See, e.g., *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1241 (10th Cir. 2001) (“The sexual harassment training that was required for each new staff member made no mention of how to respond to sexual harassment by patients.”); *Catalano*, 2005 WL 5519861, at *6.

knows what conduct to avoid.¹¹⁵ Similar actions constitute “accommodations” under the ADA: “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.”¹¹⁶

In addition to these individualized modifications, appropriate preventive or corrective action can include changes to the facilities or equipment used by all employees.¹¹⁷ As noted previously, *Turnbull* involved the distribution of personal alarms to workers and the construction of appropriately sized and visible treatment rooms.¹¹⁸ At issue in other cases was the installation of one-way glass so that corrections officers could observe inmates without the inmates knowing exactly who was watching them or when.¹¹⁹ Furthermore, a number of cases suggest that appropriate measures include maintaining locks and other security devices that control physical access to workspaces, as well as routine monitoring of the workplace environment.¹²⁰ Generalized notices and training addressed to all staff or all visitors are further examples of responses that are not specific either to a harasser or to a harassed employee.¹²¹

As these security measures suggest, appropriate preventive or corrective measures often focus on excluding a third-party harasser from the workplace or from contact with particular employees.¹²² Although there do not appear to be examples of litigation over ADA accommodations excluding a person, by raising the level of abstraction a harasser can sim-

115. *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 813 (7th Cir. 2001); *Pickett*, 2008 WL 719224, at *4–*5.

116. 42 U.S.C. § 12111(9)(B) (2006).

117. See § 12111(9)(A) (requiring “making existing facilities used by employees readily accessible to and usable by individuals with disabilities”).

118. *Turnbull*, 255 F.3d at 1242.

119. *Freitag v. Ayers*, 468 F.3d 528, 536 n.3 (9th Cir. 2006); *Garrett v. Dep’t of Corr.*, 589 F. Supp. 2d 1289, 1293 (M.D. Fla. 2007).

120. See *Erickson v. Wis. Dep’t of Corr.*, 469 F.3d 600, 608 (7th Cir. 2006) (noting that closely monitoring harasser after his first encounter with victim would have been appropriate); *Folkerson v. Circus Circus Enters.*, 107 F.3d 754, 755–56 (9th Cir. 1997) (finding reasonable precautions had been taken where employer enlisted other employees to be attentive to plaintiff’s safety and to provide security during performances).

121. See *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1112 (8th Cir. 1997); *Rosenbloom v. Senior Res., Inc.*, 974 F. Supp. 738, 741–44 (D. Minn. 1997).

122. See *Holmes v. Utah Dep’t of Workforce Servs.*, 483 F.3d 1057, 1069 (10th Cir. 2007) (deeming it adequate and reasonable response to bar harasser from office and forbid him from calling office phone); *Berry v. Delta Airlines Inc.*, 260 F.3d 803, 813–14 (7th Cir. 2001) (holding changing harasser’s shift schedule to significantly diminish interaction with plaintiff is reasonable and adequate corrective measure); *Gliatta v. Tectum, Inc.*, 211 F. Supp. 2d 992, 1002 (S.D. Ohio 2002) (finding delivering letter to harasser barring his presence at workplace is appropriate and timely action); see also *McDonald v. B.E. Windows Corp.*, No. 01 Civ. 6707, 2003 U.S. Dist. LEXIS 7472, at *1–*2, *4 (S.D.N.Y. May 5, 2003); *Hallberg v. Eat’n Park*, No. 94-1888, 1996 WL 182212, at *11 (W.D. Pa. Feb. 28, 1996).

ply be conceived of as a source of sex-differentiated harm. Excluding or removing the harasser then becomes analogous to abating or limiting exposure to toxic or allergenic chemicals, ambient smoke, and the like. And indeed, a number of ADA cases require such accommodations when exposure is especially harmful because of an employee's disability.¹²³ In just this way, the purpose of *Dunn's* macaw hypothetical was to abstract from a human harasser to any source of harm: "The genesis of inequality matters not."¹²⁴

These similarities are suggestive but not decisive. After all, it long has been noted that the remedies in some disparate impact cases may look quite like reasonable accommodations.¹²⁵ The next section defines nonaccommodation more precisely in order to enable a rigorous comparison to third-party harasser claims.

B. *Nonaccommodation Claims Require External Membership Causation*

A nonaccommodation theory does not require discriminatory intent, that is, internal causation. Instead, an employer may "discriminate" even though its decisionmaking process is "neutral" in the sense that it ignores an employee's protected trait. Moreover, a nonaccommodation theory does not require identifying a practice that causes more harm to one group than another. Instead, the crux of a nonaccommodation claim is external causation, that is, a causal connection between an employee's protected class membership and workplace injury, one in which class membership enters the causal chain outside the employer's decisionmaking process. Defining nonaccommodation this way is an innovation of this Article. This section shows why this definition accurately captures the doctrinal requirements of a nonaccommodation claim and distinguishes nonaccommodation from disparate treatment and disparate impact.

123. See *Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633, 646 (Fed. Cir. 2004) (finding employer's failure to transfer plaintiff laterally represented denial of reasonable accommodation of severe bronchial asthma); *Hawkins v. Counseling Assocs.* 504 F. Supp. 2d 419, 437 (E.D. Ark. 2007) (deeming it reasonable accommodation to isolate employee from allergens where disability was sinus disease and rhinitis); *Chan v. Sprint Corp.*, 351 F. Supp. 2d 1197, 1207–08 (D. Kan. 2005) (holding offering ways to minimize and avoid employee exposure to smoke are reasonable accommodations); *Faircloth v. Duke Univ.*, 267 F. Supp. 2d 470, 474 (M.D.N.C. 2003) (noting where employee disability is asthma, reasonable accommodation may require enforcement of smoke-free workplace policy); *Service v. Union Pac. R.R.*, 153 F. Supp. 2d 1187, 1193 (E.D. Cal. 2001) (same); *Bond v. Sheahan*, 152 F. Supp. 2d 1055 (N.D. Ill. 2001); *Hurley-Bardige v. Brown*, 900 F. Supp. 567, 574 n.7 (D. Mass. 1995) (finding refusing to transfer employee with respiratory condition to smoke-free work station might constitute failure to reasonably accommodate).

124. *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005); cf. *Gallagher v. Sunrise Assisted Living*, 268 F. Supp. 2d 436, 439–44 (E.D. Pa. 2003) (involving plaintiff who sought accommodation for allergic reactions to dog present in workplace).

125. See *Jolls*, supra note 8, at 645; *Reva B. Siegel*, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 *Yale L.J.* 929, 943–50 (1985) [hereinafter *Siegel*, *Employment Equality*].

Crucially, external causation allows us to pinpoint when accommodations are necessary or, in other words, to determine when employers will be held liable for failure to accommodate. In contrast, most definitions have characterized nonaccommodation claims in terms of their remedies, or what employers have to do to correct or prevent nonaccommodation liability.

1. *External Causation, Not Different Treatment.* — To build up toward my definition in terms of external causation, I begin with a more typical definition, one offered by leading disability scholar Samuel Bagenstos. Bagenstos characterizes nonaccommodation as a violation of a duty “that employers make individualized changes in facially neutral rules, structures, or tasks to enable a protected class member to perform a given job and produce as much output as non-accommodated coworkers.”¹²⁶ Providing the same computer workstation to every employee, regardless of disability status, would not be disparate treatment. Doing so might, however, constitute a failure to accommodate an employee with a disability if that employee needed modified seating, data input devices, or software in order to use the computer as effectively as someone without a similarly limiting disability.¹²⁷ Note how Bagenstos’ definition (like the statutory language of “not making reasonable accommodations”¹²⁸) frames nonaccommodation in terms of necessary “changes,” rather than defining the circumstances that necessitate those changes.

Such emphasis on individualized modifications prompts courts and scholars to characterize nonaccommodation and disparate treatment as “fundamentally different” theories of discrimination.¹²⁹ Individualized modifications seemingly involve what a ban on disparate treatment forbids: employer decisionmaking based on the employee’s protected trait (providing a modified workstation based on the worker’s disability). Thus, commentators often contrast requiring “same” or “equal” treat-

126. Bagenstos, *Rational Discrimination*, supra note 8, at 836.

127. Under this definition, nonaccommodation could also be disparate treatment if the employer selectively denied an accommodation based on class membership. See *Freeman v. Madison Metro. Sch. Dist.*, 231 F.3d 374, 382–83 (7th Cir. 2000); *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1188–89 (10th Cir. 2000); Bagenstos, *Rational Discrimination*, supra note 8, at 867; Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases* (Univ. of Denver Sturm Coll. of Law, Legal Studies Working Paper No. 07-12, 2006), available at <http://ssrn.com/abstract=960171> (on file with the *Columbia Law Review*). Similarly, adopting a policy because it selectively disadvantages members of a protected class is disparate treatment. See sources cited supra note 52. To avoid confusion on this point, I will use “nonaccommodation” to refer only to claims that cannot be recast as disparate treatment in these ways.

128. 42 U.S.C. § 12112(b)(5)(A) (2006).

129. Karlan & Rutherglen, supra note 9, at 2; Schwab & Willborn, supra note 9, at 1199; accord Issacharoff & Nelson, supra note 9, at 311.

ment (to avoid disparate treatment) with requiring “special” or “different” treatment (to provide reasonable accommodation).¹³⁰

This sameness/difference contrast misleadingly casts the essence of a nonaccommodation claim as an employer’s failure to deviate from a facially neutral rule in an individual case. To see the problem, consider that nonaccommodation claimants often seek to recover for a discriminatory discharge, not to force their employer to provide a particular modification.¹³¹ Such a claimant principally challenges the decision to terminate. Her theory is as follows:

- (1) The employer fired me for poor performance.
- (2) My performance was indeed poor.
- (3) My performance was poor because of limitations caused by my disability.
- (4) With reasonable accommodation, my performance would have been satisfactory notwithstanding those limitations.
- (5) My employer failed to accommodate me.¹³²

In claims with this structure, the employee is not principally seeking the accommodation, the “individualized changes” that Bagenstos invokes.¹³³ Instead, the employee is challenging her termination and its basis in her disability. The availability of an accommodation demonstrates that the termination was unjustified, but the accommodation’s significance is derivative of its connection to the termination being challenged.

Thus, a nonaccommodation claim actually implicates two distinct aspects of the workplace: (A) the employer’s decision whether to alter its “facially neutral rules, structures, or tasks”¹³⁴ (providing a modified workstation), and (B) the workplace harm that results *absent* a modification (termination for poor performance). The same structure applies to

130. Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 Ala. L. Rev. 951, 955 (2004); Issacharoff & Nelson, *supra* note 9, at 315; Karlan & Rutherglen, *supra* note 9, at 2–3, 10; Schwab & Willborn, *supra* note 9, at 1200; Stein, *supra* note 8, at 584. This distinction mirrors one that dominated 1980s feminist debates over pregnancy leave and sex difference more generally. See generally Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118 (1986); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women’s L.J. 1 (1985); Littleton, *supra* note 7; Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984).

131. This is among several reasons why an act/omission distinction does not helpfully characterize differences between disparate treatment and nonaccommodation claims. See Bagenstos, *Rational Discrimination*, *supra* note 8, at 864; cf. Herzog, *supra* note 18, at 25–26 & nn.135–139 (criticizing act/omission distinctions with regard to state action, especially in equal protection context).

132. See, e.g., *Calero-Cerezo v. U.S. DOJ*, 355 F.3d 6, 12–19 (1st Cir. 2004); *Fjellestad v. Pizza Hut, Inc.*, 188 F.3d 944, 947–48 (8th Cir. 1999); see also *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 394–95 (2002).

133. Bagenstos, *Rational Discrimination*, *supra* note 8, at 836.

134. *Id.*

other workplace harms, such as lost promotional opportunities, inability to utilize employer-provided benefits, and painful or onerous working conditions.¹³⁵ Defining nonaccommodation claims in terms of “different treatment” focuses exclusively on (A) (Bagenstos’ “individualized changes”) and provides no account of (B). Such an account lies in the causal connection between disability and injury, and that is what makes nonaccommodation discrimination “because of the disability of such individual.”¹³⁶

To illustrate, consider a paradigmatic case like the employee whose disability-related limitations require a modified workstation. Without those modifications, the employee would be unable to function effectively at work *because of her disability*. The modifications accommodate “the known *physical or mental limitations* of an otherwise qualified individual with a disability,”¹³⁷ as the statutory text demands. If, however, that same employee requested a modified schedule to allow her to attend a family event, no accommodation would be required. Without that modification she would suffer workplace harm (termination or other discipline) because she missed work, but there would be no causal connection between *her disability* and her need for a modified schedule. Thus, the conjunction of class membership (having a disability) and a need for accommodation is insufficient to trigger the employer’s duty; there must also be a causal relationship between the two.¹³⁸ Nothing in the “differ-

135. Accommodations that enable an employee to perform essential job functions are important because they often allow individuals with disabilities to meet the ADA’s threshold requirement that they be “qualified” for the job. 42 U.S.C. § 12111(8) (2006). Nonetheless, reasonable accommodations are not limited to this qualification function, contrary to common characterizations in the literature. See, e.g., Bagenstos, *Rational Discrimination*, supra note 8, at 836; Ball, supra note 130, at 975. Nondiscrimination bars both disparate treatment and nonaccommodation “in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. §§ 12112(a), 12112(b)(5); 29 C.F.R. § 1630.9 (2008). Thus, the ADA’s prohibition on discriminatory hostile work environments should include those that arise out of nonaccommodation, as the case law concerning allergies and chemical sensitivities implies. See *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 175–76 (4th Cir. 2001); *Johnson v. Billington*, 404 F. Supp. 2d 157, 169 (D.D.C. 2005); supra note 123; see also Elizabeth F. Emens, *Integrating Accommodation*, 156 U. Pa. L. Rev. 839, 851 & n.20 (2008).

136. 42 U.S.C. § 12112(a).

137. *Id.* § 12112(b)(5)(A) (emphasis added).

138. See *Wood v. Crown Redi-Mix, Inc.*, 339 F.3d 682, 687 (8th Cir. 2003); *Felix v. N.Y. City Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003). This general principle leaves considerable room to debate how best to specify the requisite causal connection. See Cheryl L. Anderson, *What Is “Because of the Disability” Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 *Berkeley J. Emp. & Lab. L.* 323 (2006). The requisite causal connection between disability and workplace harm may also be broken if the employer’s adverse action is based on something other than the employee’s performance deficiencies, even if there were such deficiencies caused by a failure to accommodate her disability. See *Parker v. Sony Pictures Entm’t, Inc.*, 260 F.3d 100, 107–08 (2d Cir. 2001); *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033–34 (7th Cir. 1999).

ent treatment” characterization captures this fundamental limitation on when workplace modifications may be required.

Doctrinally, and in accord with common sense, a nonaccommodation claim requires membership causation: The modification must be needed because of the employee’s protected class membership. Indeed, this causation requirement is increasingly important in the case law,¹³⁹ though the antidiscrimination/accommodation literature largely neglects it.¹⁴⁰ To be “needed” simply means that, without a modification, some other workplace harm would occur.

Moreover, it is *external*, not internal, membership causation that triggers a nonaccommodation claim. Because of her disability, the employee cannot use her workstation effectively; because she cannot use her workstation effectively, she cannot be as productive as the employer requires; because she cannot meet the employer’s productivity standards, she gets fired.¹⁴¹ There is no *internal* causation because all this occurs without the employer ever taking the employee’s disability into account, though the employer is actively involved in other ways (establishing work routines, monitoring performance, enforcing standards, etc.).¹⁴²

139. See *Foster*, 168 F.3d at 1032–33 (noting causation requirement in nonaccommodation cases “is frequently left unstated”); see generally Anderson, *supra* note 138.

140. But cf. Ball, *supra* note 130, at 959–60 (discussing causal relationship between disability and job opportunities as part of assessing whether accommodations constitute preferential treatment).

141. See *Parker*, 260 F.3d at 107–08 (requiring “causal connection . . . between (1) the failure to accommodate a disability, (2) the performance deficiencies, and (3) the adverse employment action”). The limited existing nonaccommodation statute of limitations jurisprudence generally treats the plaintiff’s claim as accruing at the time an accommodation is refused, see *Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121, 129 (1st Cir. 2009), not when the plaintiff suffers workplace harm from that denial. That approach is in some tension with my emphasis on the ultimate adverse employment action, but the tension may be resolved by understanding the issue in terms of notice. Like an employer’s decision to terminate an employee in the future, a decision to deny accommodation puts the employee on notice that she faces workplace harm because of her protected group membership. See *Del. State Coll. v. Ricks*, 449 U.S. 250, 257 (1980) (holding Title VII statute of limitations began to run on date professor was denied tenure, rather than date of contract expiration).

142. The insight of the “social model of disability” is that physical or mental characteristics caused by a medical condition only become limiting, let alone disabling, in conjunction with a wide array of social conditions, including the built environment, what abilities others value, how others respond to the characteristics in question, and so on. See generally Minow, *supra* note 64, at 12, 15 (advocating “focus on the relationships within which we define and construct difference,” one in which “difference is no longer presumed inherent in the ‘different’ person”). In this sense, limitation does not reside in the person with a disability. Nonetheless, within any given social context, bodies matter, even though other things matter, too. Once we are confronted with stairs, being able to walk or not does make a difference. See generally Samuel R. Bagenstos, *Subordination, Stigma, And “Disability”*, 86 Va. L. Rev. 397, 426–36 (2000); Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. Chi. L. Rev. 1251, 1255–59 (2007). For analogous points about race and gender “difference,” see Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1777 (1993) (criticizing interpretations of affirmative action as form of

Individualized modifications to facially neutral workplace structures disrupt this chain of causation between an individual's disability and workplace harm. Furthermore, once this disruptive role is identified, it follows that an employer's failure to make *individualized* modifications—to engage in different treatment—is not essential to a nonaccommodation claim.

Individualized or disability-specific modifications are simply one possible way to *prevent* external causation. Indeed, many familiar accommodations are more “universal” in character, spreading benefits beyond those employees who do or could sue for nonaccommodation.¹⁴³ In the workstation example, the employer might satisfy its duty to accommodate *either* by adopting a new standard workstation for everyone—one that the employee with a disability may use without disadvantage because of its customizability or other features—or by making individualized modifications just to the employee's workstation. Similarly, a rigid, neutral rule firing any employee who misses scheduled work may violate the ADA's accommodation mandate, but an employer could comply *either* by making exceptions only for disability-related absences *or* by providing medical leave to all employees, regardless of disability. Nothing in ADA reasonable accommodation jurisprudence requires employers to take one approach or the other, although employers sometimes may prefer to comply through “different treatment” when doing so is cheaper or more convenient than a universal solution.

Thus, distinguishing disparate treatment and nonaccommodation theories in terms of same versus different treatment is fundamentally mistaken. It does not specify *which* instances of same treatment give rise to nonaccommodation liability: only those that yield external causation. In lieu of such forms of same treatment, an employer may *either* engage in different treatment that prevents external causation *or* engage in another form of same treatment that prevents external causation. Avoiding external causation is what drives the theory, not whether the employer treats employees differently in the course of making individualized modifications

2. *External Causation, Not Group Harm.* — The key difference between nonaccommodation and disparate impact theories is how they establish liability in the absence of discriminatory intent. They do so on distinct grounds that can, but do not always, lead to divergent results. A nonaccommodation theory requires external causation: The employer fired me for poor performance *and* my performance was poor because of my (unaccommodated) disability. As I argue above,¹⁴⁴ a disparate impact

“preference” for African Americans because such interpretations obscure how race has already produced workplace hierarchy through unacknowledged operation of white privilege); Littleton, *supra* note 7, at 1313 (arguing for “locating difference in the relationship between women and men rather than in women alone”).

143. See generally Emens, *supra* note 135; Minow, *supra* note 64, at 84–85, 96, 269.

144. See *supra* Part I.D.1.

claim requires no such showing. Instead, it requires group disparities in workplace harm. This section makes the converse point, that nonaccommodation claims do not require showing group harm. Again, these differences in the basis for liability are more robust than the commonly drawn contrast between “different treatment” as the remedy for nonaccommodation claims and “same treatment” as the remedy for disparate impact.

Nonaccommodation claimants need not show that the employer’s failure to accommodate causes a disparate impact.¹⁴⁵ They need not present statistics showing that the challenged practice excludes more people with disabilities (or a specific disability) than people without disabilities (or without a specific one).¹⁴⁶ Comparative statistics simply do not enter into the analysis, nor do courts rely on informal assumptions of group effects. Instead, the parties focus on whether an individual plaintiff requires accommodation because of a disability. This point is so ingrained that it hardly ever receives direct attention, but one Second Circuit opinion squarely affirms it. *Henrietta D. v. Bloomberg* held that a successful nonaccommodation claim does not require showing a disparate impact, even in the rare case of a class action charging systemic nonaccommodation.¹⁴⁷ Instead, it suffices to show that, without accommodation, all class members faced harm “by reason of their handicap.”¹⁴⁸

Nor is showing external causation tantamount to establishing disparate impact by a different route. An employment action taken with regard to a single individual cannot have a disparate impact, but it can constitute nonaccommodation.¹⁴⁹ A single individual may claim disparate impact, but succeeding requires showing that her individual injury was one suffered disproportionately by her group as a whole.¹⁵⁰ Thus, in the racial profiling hypothetical, a disparate impact claim would require showing that the plaintiff was late and then fired, *and* that the employer’s no-lateness policy caused more African Americans than whites to be terminated. We cannot tell whether that is so simply by knowing whether

145. In the disability context, the appropriate comparison would be difficult to construct, given the heterogeneity of the group “individuals with disabilities” and more narrowly defined subgroups. See, e.g., Stein & Waterstone, *supra* note 30, at 904–06 (suggesting flashing emergency lights might assist evacuation of deaf people but risk triggering seizures by people with epilepsy).

146. See Verkerke, *Disaggregating*, *supra* note 9, at 1404 (“The individual plaintiff need only develop evidence about her own situation and the ability of her employer to bear any accommodation costs.”).

147. 331 F.3d 261, 272–80 (2d Cir. 2003). *Henrietta D.* involved public services, not employment, but the court treated its approach to nonaccommodation as applicable in both contexts.

148. See *id.* at 276.

149. Disparate impact analysis requires either a general policy, of which an action toward an individual may be a single instance, or a one-time action affecting a large group of workers. Council 31, AFSCME v. Ward, 978 F.2d 373, 377 (7th Cir. 1992).

150. See *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 576 (6th Cir. 2004); *Munoz v. Orr*, 200 F.3d 291, 299–300 (5th Cir. 2000); Stein & Waterstone, *supra* note 30, at 864.

the plaintiff was stopped because of her race. There can be external causation without disparate impact when (1) some but not all class members suffer external causation (not all African Americans are stopped by the police), and (2) some nonmembers suffer harm from the same workplace practice (some white people are late).¹⁵¹ Therefore, both conceptually and as a matter of methods of proof,¹⁵² nonaccommodation is not simply a subset of disparate impact.¹⁵³ That said, neither are they mutually exclusive. The same set of facts might give rise to both nonaccommodation and disparate impact claims.¹⁵⁴

Disparate impact cases challenging employers' no-beard policies illustrate how group harm and external causation can diverge. They also show how this divergence leads disparate impact and nonaccommodation claims to require different factual predicates. To succeed on disparate impact claims, African American workers who cannot shave because they suffer from pseudofolliculitis barbae (PFB) must show that a no-beard policy disproportionately excludes African Americans from employment.¹⁵⁵ It is not enough that PFB is effectively a racially specific disease (implying that individual plaintiffs with PFB are unshaven because of

151. See discussion at *supra* notes 102, 103, and accompanying text.

152. Thus, I disagree with those scholars who treat nonaccommodation theories as attempts to respond to group difference, see e.g., Green, *Structural Approach*, *supra* note 9, at 872, 881–82; Jolls, *supra* note 8, at 648, or to counteract workplace “norms” identified with the perspective or values of a dominant group, see e.g., Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 *Me. L. Rev.* 159, 181 (2002); Stein, *supra* note 8, at 584–85. Both of these approaches tightly link disability nonaccommodation to feminist theories of pregnancy “accommodation” that developed in the 1980s. These theories build on the doctrinal apparatus of disparate impact claims and a theoretical critique of “[a] workplace [that] remains organized on the basis of male norms.” Siegel, *Employment Equality*, *supra* note 125, at 939; accord Finley, *supra* note 130, at 1120; Kay, *supra* note 130, at 32, 34; Littleton, *supra* note 7; Williams, *supra* note 130, at 331. See generally Minow, *supra* note 64 (offering general theory of “the dilemma of difference” integrating feminist and disability theory organized around criticism of “a world constructed with some groups, but not other groups, in mind”). The “male norms” framework pivots either toward disparate treatment, insofar as these norms are favored precisely because of their association with men’s lives, or toward disparate impact, insofar as the wrongfulness of favoring male norms is that doing so tends to disadvantage women relative to men.

153. See also *supra* note 100 (arguing converse).

154. Pregnancy discrimination may be the best example. See *infra* Part IV.C.2. Even when both disparate impact and nonaccommodation analyses lead to the same result, the availability of a nonaccommodation claim may still matter. Doctrinally, it could affect damages. See 42 U.S.C. § 1981a(a) (2006); discussion *supra* note 109. Theoretically, it might affect the legitimacy of the claim, either if one doubts, as many do, the normative basis for disparate impact claims or sees them as necessarily subordinate to disparate treatment claims. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2675 (2009) (characterizing bar on disparate treatment as “original, foundational prohibition of Title VII”).

155. See *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 194 (3d Cir. 1980) (“The evidence was insufficient to support the next inference, the ultimate fact essential to EEOC’s case: that proportionately fewer blacks than whites were eligible for public contact positions and therefore that Greyhound’s policy had a racially discriminatory impact.”); see also *Bradley v. Pizzaco of Neb., Inc.*, 939 F.2d 610, 613 (8th Cir. 1991).

their race). A no-beard policy, as opposed to simply a no-PFB policy, would not have a disparate impact if PFB's racially disproportionate incidence were counteracted by other factors affecting the racial distribution of beards. In theory, some other disease or practice leading men to wear beards might be disproportionately prevalent among whites, in which case, on balance, they might wear beards at least as often as African Americans. Were that the case, then a no-beard policy might not have any disparate racial impact on African Americans.¹⁵⁶ Such facts would not, however, alter the existence of external causation in a PFB case.

The PFB example also illustrates why it is misleading to differentiate nonaccommodation and disparate impact theories of liability in terms of their remedies, as some suggest.¹⁵⁷ When there is disparate impact liability, the most common remedy in Title VII cases is to substitute a new practice that applies to all employees. The employer might substitute a strength test for a height and weight test or a vocational exam for a high school graduation requirement. Such "universal" remedies contrast with the individualized modifications commonly—overly, I have argued¹⁵⁸—associated with the nonaccommodation theory.

156. *Greyhound Lines, Inc.*, 635 F.2d at 194; see also *id.* at 195 (Sloviter, J., dissenting) (disagreeing on evidentiary grounds); *infra* note 284. *Hack v. President and Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000), presented an analytically similar situation under the Fair Housing Act. There, Orthodox Jewish students sought an exception from the college's requirement that all freshmen and sophomores live in university housing when they could not comply without violating their religious requirements of sex segregation. Without doubting plaintiffs' assertion of this conflict, the court rejected their disparate impact claim on the grounds that they failed to "allege that Yale's policy has resulted in or predictably will result in under-representation of Orthodox Jews in Yale housing." *Id.* at 91.

157. See, e.g., Schwab & Willborn, *supra* note 9, at 1238. This is not to say that the distinction between universal remedies and those that are individualized, or group-specific, is unimportant. Universal remedies may encourage integration, prevent stigmatization of those protected by antidiscrimination laws, and widen political support for practices motivated by antidiscrimination concerns. See Emens, *supra* note 135 (endorsing universal remedies); Feldblum, *supra* note 152, 183 (same); Minow, *supra* note 64, at 84–85, 96, 259 (same); Vicki Schultz, *Life's Work*, 100 *Colum. L. Rev.* 1881, 1936–46 (2000) (same). My point is simply that this set of concerns does not map cleanly onto distinctions among disparate treatment, disparate impact, and nonaccommodation as theories of liability. That said, I am skeptical of the case for universal remedies in its strongest forms. Among other reasons, there may be backlash against protected groups when it is understood that universal remedies are imposed in order to protect such groups. This can occur when there are fewer total bathroom stalls in order to make them all wheelchair accessible, when test cutoffs applicable to all are determined in part based on the resulting pass rates for applicants of color, cf. *Ricci*, 129 S. Ct. 2658, or when basic protections against disparate treatment are portrayed as "special rights" for the group most likely to benefit from such protections. For a discussion of the historical links between "special rights" as a charge lodged against race-based affirmative action and early conservative resistance to bans on disparate treatment, see Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* 196–205 (2006); see also *infra* note 164 (discussing universal remedies).

158. See discussion *supra* Part II.B.1.

Universal remedies, however, cannot reliably distinguish disparate impact from nonaccommodation. As Christine Jolls has argued, Title VII disparate impact liability can yield individualized rather than universal remedies.¹⁵⁹ If a system of narrow exceptions will eliminate the disparate impact, that is perfectly permissible. In cases addressing no-beard policies' disparate impact on African American men, the remedy most often at issue is requiring exceptions for employees medically certified as unable to shave, not abandoning the no-beard policy for all workers.¹⁶⁰ In another context, even an explicitly sex-differentiated response may be permissible. Women working in male-dominated workplaces have successfully brought disparate impact challenges to unisex toilet facilities (or a lack thereof) that are filthy, unsanitary, and lacking in privacy.¹⁶¹ Although a "universal" solution of appropriate unisex facilities may well be available and preferable, sex-separated toilets almost certainly would be a permissible remedy, perhaps the most likely one given that separate restrooms are the U.S. norm for sex-integrated spaces.¹⁶²

Under Title VII, what constrains such "different treatment" remedies is the independent prohibition of disparate treatment, which ordinarily forbids employment practices based on race or sex.¹⁶³ Within that con-

159. See Jolls, *supra* note 8, at 653–56.

160. *Id.*; see, e.g., *Bradley v. Pizzaco of Neb.*, 7 F.3d 795, 799 (8th Cir. 1993); *Richardson v. Quik Trip Corp.*, 591 F. Supp. 1151, 1155 (S.D. Iowa 1984); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 59 (D. Colo. 1981). Another example is hiring restrictions based on prior criminal conviction, which have a disparate impact based on race. Employers could mitigate the disparate impact either by narrowing which offenses trigger exclusion or by allowing exceptions based on individualized evidence of trustworthiness, as the plaintiff sought in *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 245–46 (3d Cir. 2007).

161. See, e.g., *Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987); *James v. Nat'l R.R. Passenger Corp.*, No. 02 Civ. 3915, 2005 WL 6182322 (S.D.N.Y. Mar. 30, 2005); see also *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000) (endorsing legal theory but treating it as waived); *Dauer v. Verizon Commc'ns, Inc.*, No. 03 Civ. 05047, 2009 WL 186199 (S.D.N.Y. Jan. 26, 2009) (accepting legal theory but rejecting plaintiff's claim on facts); *Mary Anne Case, All the World's the Men's Room*, 74 U. Chi. L. Rev. 1655, 1665–68 (2007).

162. Sharon M. McGowan, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 *Colum. J. Gender & L.* 77, 123 (2003).

163. See also 42 U.S.C. § 2000e-2(1) (2006) (banning "race-norming" of vocational tests). Because the ADA does not protect people without disabilities, ADA remedies may more readily incorporate individualized, or class-specific, "different treatment." See Stein & Waterstone, *supra* note 30, at 919–20. Similarly, where Title VII allows disparate treatment based on sex, there is room for sex-differentiated remedies. Although the permissibility of sex-segregated restrooms under Title VII has not been adjudicated, the EEOC's guidelines interpreting the bona fide occupational qualification (BFOQ) exception strongly suggest that they are legal, see 29 C.F.R. § 1604.2(b)(5) (2008), as do a long line of BFOQ cases permitting employers in some circumstances to engage in sex-differentiated hiring in part to preserve the single-sex character of bathrooms that employees would have to enter as part of their jobs, see, e.g., *Robino v. Iranon*, 145 F.3d 1109, 1111 (9th Cir. 1998); *Hernandez v. Univ. of St. Thomas*, 793 F. Supp. 214, 218 (D. Minn. 1992); *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1423 (N.D. Ill. 1984);

straint, however, there is no intrinsic connection between disparate impact liability and universal remedies, just as there is no intrinsic connection between nonaccommodation and individualized remedies.¹⁶⁴

3. *External Causation, Not the Cost of Compliance.* — Finally, defining nonaccommodation through external causation is superior to defining it in terms of the financial cost to employers of complying with their legal duties, an oft-cited criterion in the literature. Many then differentiate the ban on disparate treatment (and sometimes disparate impact) as costless, relative to an idealized market baseline.¹⁶⁵ Again, the focus is on the employer's preventive or remedial conduct.

Such cost-oriented approaches are flawed as descriptions of existing doctrinal categories of discrimination. First, they do not adequately specify *in which cases* employers must bear costs for the benefit of accommodated workers, just as the sameness/difference framework fails to identify which instances of "equal treatment" improperly deny accommodation; again, external causation provides this specificity. Second, as Jolls and Bagenstos have demonstrated, it often is financially costly to avoid disparate treatment and disparate impact, too.¹⁶⁶

Additionally, an accommodation mandate need not impose costs. Without engaging in disparate treatment, an employer might refuse to make even financially costless (or profitable) adjustments that would prevent external causation. The employer could simply dislike the employee for reasons independent of class membership, or the employer might value existing workplace structures for noninstrumental reasons of aesthetics or tradition. Reasonable accommodation doctrine would require

see also *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (permitting pregnancy-specific leave under Title VII); Jolls, *supra* note 8, at 660–65.

164. The distinction between universal remedies and targeted exceptions is itself unstable, dependent upon how one defines the challenged employment practice. See *supra* note 103. If that practice is an employer's refusal to allow medical exceptions to the no-beard policy, rather than the entire no-beard policy, then requiring such exceptions is a "universal" remedy. See *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1114 (11th Cir. 1993) (challenging defendant's elimination of no-beard policy medical exception). Similarly, allowing employees to take sick days off from work could be viewed as a "universal" remedy (relative to allowing exceptions only for pregnancy) or as an "exception" to the general policy requiring attendance.

165. See, e.g., Kelman, *supra* note 9, at 835; Verkerke, *Disaggregating*, *supra* note 9, at 1389–90; see also Jolls, *supra* note 8, at 646–68; Schwab & Willborn, *supra* note 9, at 1204–12. I am glossing over various nuances and disagreements among these scholars and will attempt to address them only when they might affect the fundamentals of my argument. Among other things, authors characterizing accommodation mandates as imposing costs may disagree, or remain agnostic, on whether doing so is justified.

166. Bagenstos, *Rational Discrimination*, *supra* note 8; Jolls, *supra* note 8; see also David Strauss, *The Myth of Colorblindness*, 1986 *Sup. Ct. Rev.* 99 [hereinafter Strauss, *Myth*]; Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 *Cal. L. Rev.* 751 (1991) [hereinafter Sunstein, *Three Fallacies*]. But see Schwab & Willborn, *supra* note 9, at 1236, 1242–43 (arguing that Title VII generally does not impose financial costs on employers).

such adjustments, and their costlessness (in the relevant sense¹⁶⁷) would make them all the more reasonable, not less of an accommodation.¹⁶⁸ External causation explains why such claims are conceptually of a piece with nonaccommodation claims that require costly modifications.

C. *The Centrality of External Causation in Third-Party Harasser Cases*

The deep connection between third-party harasser and nonaccommodation doctrines now is apparent. Neither requires that the employer act with discriminatory intent (no internal causation). Neither requires that the employer's conduct cause harm to the plaintiff's group. Nonetheless, both do require discrimination "because of" the plaintiff employee's class membership. Both doctrines do so through a showing that, as a result of the employer's acts or omissions, the worker faced workplace harm because of her protected class membership. In short, they require external causation, but not internal causation or group harm.

As I noted earlier, in most third-party harasser cases, the plaintiff establishes external causation by showing that the third-party harasser acted with discriminatory intent.¹⁶⁹ That fact establishes that the employee suffered a hostile work environment because of her sex. The exact mechanism linking her work environment to her sex is unimportant, as *Dunn* emphasized with its macaw hypothetical: "[I]t makes no difference whether the [harassing] actor is human" or "whether [the harasser] intended to injure women; the right question is whether the [employer] intentionally created or tolerated unequal working conditions."¹⁷⁰ In other words, there was "sex discrimination" if there was membership causation. Demonstrating a third party's discriminatory intent suffices as a method of proving that crucial fact, but it is not strictly necessary if membership causation can be established in another fashion.

167. Overriding these preferences could be construed as a "cost," in the sense that the employer loses welfare. Defining "cost" this broadly, however, destroys attempts to distinguish any form of disparate treatment as costless. Such a definition implies a "cost" to overriding any preference, including animus, that motivates race- or gender-differentiated conduct, see Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 42–43, 164 (1992), and constitutes what Gary Becker termed a "taste for discrimination." See Gary S. Becker, *The Economics of Discrimination* 14 (2d ed. 1971). For this reason, Kelman carefully attempts to narrow the concept of costliness to deviations from profit-maximizing market-rationality, Kelman, *supra* note 9, at 841–42 & n.14, though Bagenstos has persuasively criticized this effort. Bagenstos, *Rational Discrimination*, *supra* note 8, at 880–99; see also Strauss, *Myth*, *supra* note 166, at 115.

168. Verkerke suggests that in such circumstances a worker "would need only to invoke the norm of positive equality rather than seek an accommodation." Verkerke, *Disaggregating*, *supra* note 9, at 1390. But no legal theory of "discrimination" forbids deviations from "merit-based criteria" (positive equality) absent a showing of disparate treatment or disparate impact.

169. See *supra* Part I.C.2.

170. *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691–92 (7th Cir. 2005).

This focus on external causation, regardless of whether *any* party acted with discriminatory intent, is exactly what we see in a typical disability nonaccommodation case. Reconsider the macaw scenario, except now imagine that the macaw menaced the employee because of her disability rather than her sex. The macaw is functionally identical to an airborne chemical that is especially harmful to the employee because of her disability. If the employer refuses to do anything about the macaw, the disabled employee suffers workplace harm because of her disability. And yet there might be no party with discriminatory intent. The whole point of defining ADA discrimination to include nonaccommodation is to address situations just like this. Whether the mechanism of harm is a macaw, an environmental toxin, an architectural feature of a building, or anything else, the point is simply that the employee suffers harm because of disability; no attempt is made to displace discriminatory intent onto these non-human phenomena.¹⁷¹

Of course, *Dunn* actually involved a lecherous doctor and not a macaw. Thus, it remains possible that courts would refuse to apply third-party harasser doctrine when no third party acts with discriminatory intent and yet an employee suffers a hostile work environment because of her sex.¹⁷² As *Dunn* points out, however, such a rule would seem to represent an arbitrary limitation on an employer's obligation not to "create [] or tolerate [] unequal working conditions."¹⁷³ Moreover, other cases have confronted and rejected analogous employer arguments that the plaintiff must identify some party acting with discriminatory intent for the work environment to be hostile "because of sex" in the requisite sense.

The Eighth Circuit's opinion in *Crist v. Focus Homes* confirms that external causation, not a third party's discriminatory intent, is the crucial factor.¹⁷⁴ *Crist* held that a group home operator violated Title VII by

171. Cf. *Samaha*, supra note 142, at 1303–04 (noting from an egalitarian perspective, "an entitlement to assistance is unrelated to a history of socially imposed oppression or even a contemporary social cause of this individual's or that group's particular disadvantage").

172. Such an approach would be consistent with Tristin Green's recent analysis of the normative basis for holding employers liable for structural discrimination. See Green, *Structural Approach*, supra note 9. Green grounds liability in "the wrong of treating individuals differently on the basis of protected group status or characteristics." *Id.* at 851. But she would hold employers liable for organizational practices that "facilitate" disparate treatment even if those practices were not adopted with discriminatory intent. *Id.* at 851, 893 & n.162 & 897.

173. 429 F.3d at 692. Green, for instance, relies heavily on the wrongfulness of "purposefully exclud[ing] members of certain groups based on [the] view that members of that group are of less moral worth," Green, *Structural Approach*, supra note 9, at 874, to distinguish disparate treatment from nonaccommodation. Yet she offers no theory that justifies treating other forms of disparate treatment (such as unconscious bias or rational discrimination) as similar to animus-based exclusion and still dissimilar to cases of external causation.

174. 122 F.3d 1107, 1110–11 (8th Cir. 1997).

failing to stop one of its severely developmentally disabled residents from sexually assaulting female employees. The district court reasoned that the resident's "inability to form intent" precluded Title VII liability.¹⁷⁵ The Court of Appeals disagreed, explaining that even if the resident "had no intent to target women," the evidence of sex-differentiated behavior permitted the conclusion that "the harassment was based on sex."¹⁷⁶ As in *Dunn*, with (external) causation established, the crucial issue was the employer's "responsibility to its employees" "to adequately respond to their concerns regarding [the resident's] behavior."¹⁷⁷

To be sure, third-party harasser cases involve intentional conduct on the part of employers, but it is important doctrinally to distinguish between acting with discriminatory intent and merely intentionally acting in a way that the employer knows will lead to harm because of group membership—that is, membership causation. For instance, in *Dunn* Judge Rovner reasoned in dissent that discrimination is intentional if it is "deliberate rather than accidental (i.e. negligent); and in the present context, where the state actor is charged with deliberately acceding to the discriminatory actions of a third party, it is beside the point whether the state actor itself was motivated by a class-based animus or some other reason."¹⁷⁸ On this basis, she dissented from the majority's holding that the public employer, though it violated Title VII, did not violate the Equal Protection Clause because it did not act with discriminatory intent.¹⁷⁹ This reasoning simply refuses the Supreme Court's distinction between acting "because of" group membership and acting "in spite of" knowledge of the action's membership-based effects,¹⁸⁰ as when employers know that favoring military veterans leads to excluding women barred from military service because of their sex¹⁸¹ or that enforcing citizenship requirements leads to excluding people because they were not born in the United States.¹⁸² Indeed, without this distinction, it would be possible to ascribe discriminatory intent to all denials of reasonable accommodation in which an employer refuses to act despite knowing that this will cause the employee to suffer harm because of her disability.¹⁸³

175. *Id.* at 1110.

176. *Id.* at 1111; see also *Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 491 F. Supp. 2d 467, 470–80 (D. Del. 2007); *supra* note 26; cf. *Reeves v. C.H. Robinson Worldwide, Inc.*, 525 F.3d 1139, 1144–45 (11th Cir. 2008), vacated and reh'g en banc granted, 569 F.3d 1290 (11th Cir. 2008) (holding plaintiff's exposure to sexist radio show played in workplace satisfied "because of sex" requirement by analogy to exposure to racial epithets "particularly offensive to [the plaintiff] as a black male").

177. *Crist*, 122 F.3d at 1110.

178. 429 F.3d at 694 (Rovner, J., dissenting).

179. See *id.* at 692; *supra* notes 75–76 and accompanying text.

180. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1976).

181. *Id.*

182. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 86 (1973).

183. See *Munson v. Del Taco, Inc.*, 522 F.3d 997, 999 (9th Cir. 2008) (certifying to California Supreme Court question of whether "intentional discrimination" under

To the extent that this “because of/in spite of” distinction seems unimportant normatively, it only reinforces my ultimate argument for the important role that notice of, and control over, membership causation play in connecting disparate treatment and nonaccommodation. At stake here is whether the vague concept of “intentional discrimination”¹⁸⁴ might embrace more than disparate treatment, as this Article argues has occurred under Title VII.

D. *Additional Commonalities*

Thus far, I have argued that third-party harasser doctrine establishes the existence of injury “because of sex [or other protected class membership]” in the manner characteristic of nonaccommodation claims—external causation—and different from disparate treatment and impact. Third-party harasser doctrine also has two other features essential to an accommodation mandate: a notice requirement and consideration of the costs imposed on employers. The first is a point of similarity with disparate treatment; the second is common to disparate impact. What is unique to nonaccommodation is the combination of the two. These features reinforce the case for characterizing third-party harasser claims as nonaccommodation claims. They also lay the groundwork for the argument developed in Parts III and IV, which conceives of antidiscrimination law as coupling membership causation on the one hand with circumstances establishing employer responsibility on the other. Notice and cost are leading considerations in the latter inquiry.

1. *Employer Notice.* — The employer responsibility element in a third-party harasser claim requires that the employer had actual or constructive notice of both the harassment and its basis in race or sex.¹⁸⁵ Similarly, in an ADA nonaccommodation claim, it is the employee’s “*known* physical or mental limitations” that the employer must accommodate;¹⁸⁶ the claim fails if the employer neither knew nor should have known that the employee’s performance-related shortcomings were due to a disability.¹⁸⁷ Like the causation requirement, the role of notice has received scant theoretical attention in the literature.

California law includes nonaccommodation when there is “an intent to act (or not act) in a way that the actor is aware will fail to provide full and equal treatment”).

184. See *supra* note 94.

185. *Erickson v. Wis. Dep’t of Corr.*, 469 F.3d 600, 605–08 (7th Cir. 2006); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074–75 (10th Cir. 1998); *McPherson v. HCA-HealthONE, LLC*, 202 F. Supp. 2d 1156, 1170 (D. Colo. 2002).

186. 42 U.S.C. § 12112(b)(5)(A) (2006) (emphasis added); see also Verkerke, *Notice Liability*, *supra* note 44, at 340.

187. See *Cordoba v. Dillard’s, Inc.*, 419 F.3d 1169, 1186 (11th Cir. 2005); *Taylor v. Principal Fin. Group*, 93 F.3d 155, 164 (5th Cir. 1996); *Miller v. Nat’l Cas. Co.*, 61 F.3d 627, 630 (8th Cir. 1995); *Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995). The analogous principle applies in religious accommodation cases. See *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Turpen v. Mo.-Kan.-Tex. R.R.*, 736 F.2d 1022, 1026 (5th Cir. 1984).

Disparate treatment theory incorporates a similar notice requirement. As the Supreme Court explained recently,

If [the decisionmaker] were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on respondent's disability. And, if no part of the hiring decision turned on respondent's status as disabled, he cannot, ipso facto, have been subject to disparate treatment.¹⁸⁸

In contrast, a disparate impact claim does not require employer notice that the challenged practice caused disproportionate harm.¹⁸⁹

2. *Balancing Nondiscrimination Against Its Costs.* — The employer responsibility element in a third-party harasser claim also incorporates a negligence standard that balances employee and employer interests. An employer is not necessarily obligated to prevent all harm. Instead, “all that [the employer] [is] required to do in order to satisfy its obligations under Title VII [is] to take prompt action reasonably calculated to end the harassment and reasonably likely to prevent the conduct from recurring.”¹⁹⁰ In other words, the employer's obligations are limited by their practical difficulty and possible expense. Although the terminology differs, this analysis is structurally analogous to the reasonableness and undue hardship inquiries in reasonable accommodation cases.¹⁹¹

The disparate impact theory engages in similar balancing through the employer's affirmative defense that its practice is “consistent with business necessity.”¹⁹² Although this standard's content is hardly clear,¹⁹³ it permits employers to create a disparate impact when avoiding that impact would seriously undermine otherwise legitimate business goals. The employer has no defense when avoiding the disparate impact would undermine such goals only to some minimal degree.¹⁹⁴

188. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 n.7 (2003).

189. See Verkerke, Notice Liability, *supra* note 44, at 334; see also 42 U.S.C. § 2000e-2(k)(1)(A) (requiring employer notice only when plaintiff attempts to overcome employer's business necessity defense by showing existence of less discriminatory practice); 1 Lindemann & Grossman, *supra* note 21, at 111.

190. *Berry v. Delta Airlines Inc.*, 260 F.3d 803, 813 (7th Cir. 2001).

191. Oppenheimer, *supra* note 11, at 936, 946–49.

192. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

193. See *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 241 (3d Cir. 2007) (stating that previous cases have not provided a precise definition of “business necessity”); *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 488 (3d Cir. 1999) (noting confusion in other courts regarding what employer must show to establish business necessity).

194. *Jolls*, *supra* note 8; see also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989) (requiring employers to show challenged practice advanced legitimate business interest “in a significant way” and not in “mere[ly] insubstantial” one); *Lanning*, 181 F.3d at 487, 493 (holding Civil Rights Act of 1991 made business necessity defense more demanding than *Wards Cove* required, and rejecting employer's “more is better” theory in which any performance benefit could justify disparate impact). But see Schwab & Willborn, *supra* note 9, at 1241–46 (arguing Title VII disparate impact doctrine does not require employers to bear increased costs).

In contrast, the disparate treatment theory has a nearly absolute quality. Once we step beyond the bounds of internal causation, there can be no claim of wrongful discrimination. Within those bounds, however, there is no routine balancing of antidiscrimination against other values; to engage in disparate treatment is to commit discrimination in violation of Title VII. At the extreme, statutory prohibitions on race and color discrimination allow no exceptions for competing employer interests.¹⁹⁵ And even Title VII's bona fide occupational qualification (BFOQ) defense to sex and national origin claims is "extremely narrow"¹⁹⁶ and plays no role in the vast majority of cases.¹⁹⁷ In contrast, the business necessity, reasonableness, and undue hardship issues are litigated in almost every disparate impact or nonaccommodation case, as they routinely are in third-party harasser cases. Moreover, it is difficult to imagine any plausible version of these legal theories that eschewed all such balancing and required employers to eliminate all intergroup disparities, prevent all harassment, and eliminate all effects of any disability on job performance.

* * *

Figure 1 summarizes the case for interpreting Title VII's third-party harasser doctrine as an accommodation mandate. This doctrine requires external causation but neither internal causation nor group harm. It requires employer notice that its actions implicate antidiscrimination concerns, and it limits employer responsibility to circumstances where avoiding discrimination is not unduly burdensome. These are the basic features of a nonaccommodation theory, and neither disparate treatment nor disparate impact theory shares them all.¹⁹⁸

195. *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 473–75 (11th Cir. 1999); *Patrolmen's Benevolent Ass'n v. City of New York*, 74 F. Supp. 2d 321, 337–39 (S.D.N.Y. 1999).

196. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

197. Moreover, the defense lacks any clear justification that coheres with the rest of disparate treatment doctrine. See Sharon M. McGowan, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 *Colum. J. Gender & L.* 77, 79 (2003). The most compelling account of the BFOQ, Kimberly Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 *Cal. L. Rev.* 147 (2004), succeeds precisely by reframing the issue in terms other than discriminatory intent. Cf. *infra* note 304.

198. I do not claim that third-party harasser claims replicate the precise form of reasonable accommodation implemented under the ADA, including its standard of "reasonableness" and "undue hardship." These standards implement only one possible incarnation of nonaccommodation liability. Even if, counterfactually, the ADA required that accommodations need only be "effective" rather than "reasonable," see *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400–02 (2002) (holding "reasonable accommodation" in ADA does not mean merely effective accommodation), or if it allowed employers to avoid only those accommodations that would "fundamentally alter the essential nature" or "threaten the existence of" its business, rather than those that pose an "undue hardship," see *Bagenstos, Rational Discrimination*, *supra* note 8, at 836 n.28 (quoting S. 2345, 100th Cong. § 7(a)(1) (1988)), the result would be a different accommodation mandate, but an accommodation mandate nonetheless. Such a mandate would remain differentiable from disparate treatment and impact based on the criteria utilized above.

FIGURE 1. COMPARING LEGAL THEORIES OF DISCRIMINATION

	Disparate Treatment	Disparate Impact	Reasonable Accommodation	Third-Party Harasser
Internal causation (discriminatory intent)	Yes	No	No	No
Group harm	No	Yes	No	No
External causation	No	No	Yes	Yes
Employer notice	Yes	No	Yes	Yes
Balancing	No	Yes	Yes	Yes

PART III. A THEORETICAL EXPLANATION: MEMBERSHIP
CAUSATION PLUS RESPONSIBILITY

The third-party harasser cases contradict the axiom that Title VII bars only disparate treatment and disparate impact and does not otherwise mandate reasonable accommodations. More surprising still is that courts uniformly extend Title VII liability beyond disparate treatment and disparate impact virtually without dissent and without recognizing that they are breaching the supposedly firm and fundamental limits on the statute's scope.¹⁹⁹ This Part develops a theoretical framework that makes sense of this apparent anomaly and offers broader insights into the structure of employment discrimination law.

This framework's foundation is the observation of a fundamental commonality between disparate treatment and nonaccommodation theories, one that has not been identified previously. Both theories require employers to protect their employees from membership causation. This commonality, however, should not be confused with identity. The two claims divide along the line between internal and external forms of membership causation. This divide between ways of establishing membership causation corresponds to differences in how the two claims approach a second question. A disparate treatment theory uses internal causation not only to establish membership causation but also to delineate when membership causation is the employer's responsibility. In contrast, nonaccommodation claims use external causation to establish membership causation and add other requirements that identify the scope of the employer's responsibility. Likewise, in third-party harasser cases courts can elide the internal/external distinction because of a special feature of hostile work environment law: It explicitly addresses employer responsibility apart from analysis of the causal role of race or sex. Thus, disparate treatment and nonaccommodation claims both establish membership causation and employer responsibility, but they do so in different ways.

199. In the course of making a different argument, Daniel O'Gorman has questioned third-party harasser doctrine for imposing liability without intentional discrimination by the employer. O'Gorman, *supra* note 93, at 437-48.

A. *Membership Causation Connects Disparate Treatment and Nonaccommodation*

Once we place external causation at the center of nonaccommodation, it no longer seems fundamentally different from disparate treatment. Both claims demand that the employee receive “equal treatment,” so long as one focuses on the harm that accommodation prevents instead of the accommodation itself.²⁰⁰ Providing an accommodation with respect to one workplace practice (the configuration of a workstation) allows the employee to be treated equally with respect to another workplace practice (decisions based on productive use of the workstation).²⁰¹

Banning disparate treatment and mandating accommodation both accomplish the same end: preventing employees from suffering workplace harm because of their protected class membership. They simply target different mechanisms by which membership causation occurs.

200. Long ago, Herma Hill Kay made this point incisively with regard to pregnancy discrimination. See Kay, *supra* note 130, at 30 (arguing Supreme Court’s pregnancy discrimination jurisprudence focused on “the wrong point in the reproductive cycle”). Her analysis begins:

Let us postulate two workers, one female, the other male, who respectively engage in reproductive conduct. Assume as well that prior to this activity, both were roughly equal in their ability to perform their similar jobs. The consequence of their having engaged in reproductive behavior will be vastly different. The man’s ability to perform on the job will be largely unaffected. The woman’s ability to work, measured against her prior performance, may vary with the physical and emotional changes she experiences during pregnancy. . . . In order to maintain the woman’s equality of opportunity during her pregnancy, we should modify as far as reasonably possible those aspects of her work where her job performance is adversely affected by the pregnancy. Unless we do so, she will experience employment disadvantages arising from her reproductive activity that are not encountered by her male co-worker.

Id. at 26–27. Without accommodation, a woman will be treated differently because of her sex, even though her sex is not taken into account at the moment of decision. See also Ball, *supra* note 130, at 962–63 (“The preferential treatment [of accommodation] is sometimes necessary in order to place individuals with disabilities in a position where they are similarly situated to their nondisabled counterparts.”); Harris, *supra* note 142, at 1779–80 (analyzing affirmative action as corrective to white privilege). Kay, however, limits her analysis to areas of systematic biological differences between men and women. In that context, external causation and disparate impact converge. Cf. *supra* notes 149–154 and accompanying text.

201. Christine Littleton’s theory of “equality of acceptance” adopts a structurally analogous approach by advocating for an antidiscrimination law that “make[s] . . . difference[] . . . costless,” such that acknowledging difference with regard to one set of traits or practices (becoming pregnant, or bearing primary childcare responsibilities) advances equality with respect to some other measure (having both a family and a career). Littleton, *supra* note 7, at 1297–99. Littleton’s analysis, however, considers “culturally female” vs. “culturally male” conduct or traits that systematically differ along gender lines. *Id.* at 1284–85. Therefore, it tends to converge with disparate impact analysis, see also Case, *supra* note 19, at 76 (arguing employer demands for “gendered characteristics” such as “masculine leadership styles” are properly analyzed using disparate impact theory), and it provides no account of harms that arise because of an individual’s class membership without being characteristic of the class as a whole.

Thus, two core elements are common to both disparate treatment and nonaccommodation claims:

- (1) The employee suffered employment-related harm (whether a tangible employment action or a hostile work environment); and
- (2) The employee suffered that harm because of her race, sex, or disability (membership causation).

This commonality is captured by the idea that, from the employee's perspective, it matters little whether the harasser is a supervisor or a third party. Either way, she suffers a hostile work environment because of her sex. Similarly, it matters little whether an employee loses her job because she cannot use her workstation as a result of her disability or because her employer evaluated her performance more harshly because of her disability. The work-related harm she suffers is the same,²⁰² as is its basis in group membership.²⁰³

B. *The Bases for Employer Responsibility Differ*

Membership causation alone never provides a complete account of "discrimination." Disparate treatment theory adds this additional element:

202. There may well be a special dignitary harm in facing employer conduct motivated by animus or disrespect, but that harm, while relevant to damages, cannot be made a necessary component of discrimination without calling into question not only accommodation mandates but also the ban on "rational" disparate treatment. See Bagenstos, *Rational Discrimination*, supra note 8 (arguing attempts to distinguish nonaccommodation from disparate treatment typically fail because they cannot explain rational disparate treatment not motivated by employer animus).

203. Arguments against distinguishing unconscious from conscious disparate treatment often rely on analogous points. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 Cal. L. Rev. 1063, 1076 (2006) (arguing, given evidence of "real-world consequences of implicit bias," addressing "discrimination should be a constitutionally compelling interest regardless of whether explicit or implicit bias actuates the discrimination"); Oppenheimer, supra note 11, at 916 (asserting "a theory of employment discrimination that focuses on an intent to discriminate" is inadequate, since victims of unconscious discrimination have suffered same economic and emotional damages as victims of intentional discrimination); White & Krieger, supra note 53, at 499 ("Framing the disparate treatment inquiry as a search for conscious intent, however, under-identifies instances in which an employee or applicant has been denied employment because of his or her protected group status."). Arguments against distinguishing cost-justified from animus-driven disparate treatment also rely on such points. See Bagenstos, *Rational Discrimination*, supra note 8, at 857 ("[T]o the victim of the employment decision the appearance of the conduct is identical, whether the use of race is efficiency-related or not." (quoting Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 260 (1971))). I see no reason not to extend this critique by applying it to the internal/external distinction between disparate treatment and nonaccommodation, yet Bagenstos does not do so when comparing arguments for accommodation mandates to those for banning "rational" discrimination. Compare id. at 857, with id. at 866–67.

- (3a) The employee's race, sex, or disability played a causal role in the employer's decisionmaking process that led to the employment-related harm (internal causation).

What is the point of this additional requirement, the requirement of *internal* causation, which is absent from third-party harasser and other species of nonaccommodation claims?

I contend that the internal causation requirement is best understood as a way to establish that the *employer* should bear responsibility for preventing membership causation. Recall that in the racial profiling hypothetical the employee was delayed by the police because of her race and then fired because she was late. From this employee's perspective, she lost her job because of her race. That seems unfair. Yet the employer, despite being the one who fired her, is not the only party who contributed to this outcome: The police officer also contributed. Indeed, the employer is *never* the sole actor able to break the chain leading from group membership to workplace injury: The maker of the inaccessible computer workstation could do so, as could the third-party harasser.²⁰⁴ The same is true for disparate treatment. Most obviously, a clear display of nondiscriminatory preferences by customers could prevent disparate treatment that employers undertook to cater to customers' preferences; indeed, customer preferences for patronizing nondiscriminatory employers could, in principle, dissuade employers who might otherwise engage in disparate treatment for reasons other than customer preference. More generally, third parties can exert pressure for or against employers' disparate treatment and influence employees' qualifications or performance, as well as employers' perceptions of both.²⁰⁵ Thus, third-party conduct is always a cause-in-fact of disparate treatment.

204. This is the general problem with using causation-in-fact to assign legal responsibility. See Herzog, *supra* note 18, at 26; Arthur Ripstein, *Equality, Luck, and Responsibility*, 23 *Phil. & Pub. Aff.* 3, 6 (1994); see also Verkerke, *Notice Liability*, *supra* note 44, at 304.

Title VII separately bars as "unlawful employment practices" discrimination by specific third parties—placement agencies, unions, and training programs—with substantial influence over the employment prospects of individuals who are not themselves employed by those parties. 42 U.S.C. § 2000e-2(b)–(d) (2006). Additionally, some courts have held that, under relatively narrow circumstances, employers may be liable under Title VII for discriminatory "interference" with employment relationships to which they are not parties but over which they exert substantial influence. See, e.g., *Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572 (9th Cir. 2000); *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). But see *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 374 (2d Cir. 2006) (criticizing *Sibley* and its progeny).

205. Cf. Brishen Rogers, *Towards Third-Party Liability for Wage Theft*, 31 *Berkeley J. Emp. & Lab. L.* (forthcoming May 2010) (arguing for legal rules that leverage third-party customers' influence over suppliers' wage practices). More expansively, the legal system could assign to any actor the post hoc responsibility for compensating the employee for workplace harm suffered because of class membership. Doing so would then create an incentive for that actor to find a (cheaper) way to prevent that harm, such as paying the employer to avoid it.

In a disparate treatment claim, the internal causation requirement protects any given employer from having to take on all workplace inequality traceable to its employees' class membership. This feature figures prominently in cases where membership causation is clear but internal causation is absent. The early Title VII case of *Espinoza v. Farah Manufacturing Co.* examined whether an employer's refusal to hire noncitizens constituted national origin discrimination.²⁰⁶ The Supreme Court found no discrimination because citizenship and national origin are analytically distinct, and the employer took into account only the former. The dissent charged that Title VII forbade the practice because foreign national origin was itself a cause of noncitizenship, and therefore the applicant was denied employment "because of" her national origin. The Court acknowledged the point but insisted on internal, not external, causation. It explained that "it is not the employer who places the burdens of naturalization on those born outside the country, but Congress itself."²⁰⁷ Rather than denying the plaintiff's injury, the Court invoked intent in order to allocate legal responsibility among causally responsible actors.²⁰⁸ Similarly, critics charge that, by dispensing with discriminatory intent, the ADA's accommodation mandate enlists private employers in remedying disadvantages that are properly the public's responsibility.²⁰⁹

In essence, the employer's narrowest rejoinder to a nonaccommodation claim is this: "I acknowledge that it is unfair for you to lose your job because of your disability (or sex, race, etc.), but addressing that unfairness is not my responsibility." The first half of this response gives weight to membership causation, unlike the more fundamental defense of an intent requirement that insists, "Because I did not take your disability (or sex, race, etc.) into account in denying you a job, you have suffered no special harm at all." The second half, however, separates the question of the injustice suffered by the employee from the question of the employer's remedial obligations. Moreover, it implicitly draws the limit of employer responsibility at the line between internal and external causation.

206. 414 U.S. 86 (1973).

207. *Id.* at 93 n.6; see also Sunstein, *Three Fallacies*, *supra* note 166, at 762 & n.33; cf. *Washington v. Davis*, 426 U.S. 229, 248 (1976) (reasoning constitutional disparate impact claims would impose excessive burdens on state policy to correct for widespread racial disparities produced by other actors).

208. In other cases, questions of information may lie at the forefront. In the racial profiling hypothetical, for instance, it would be difficult for the employer to know whether race played a role in an employee's lateness. Cf. *Holloman v. Chertoff*, 533 F. Supp. 2d 162, 172-74 (D.D.C. 2008) (rejecting plaintiff's claim that his employer violated Title VII by firing him for receiving disorderly conduct citation in off-duty incident plaintiff attributed to police racism, relying on employer's lack of information about role race may have played in incident).

209. Samuel R. Bagenstos, *The Future of Disability Law*, 114 *Yale L.J.* 1, 53 (2004) [hereinafter Bagenstos, *Disability Law*].

Thus, I propose that we analytically disaggregate discriminatory intent into two components: a wrong suffered by the employee (identified by membership causation) and a basis for holding the employer responsible for preventing or rectifying that wrong (identified by internal causation). Doing so allows us to pinpoint both what disparate treatment has in common with nonaccommodation and also where they differ: the basis for assigning responsibility to the employer.

In third-party harasser cases, no internal causation requirement limits the employer's responsibility. But this does not leave the employer exposed to limitless obligations. Instead, there is the distinctive third component of a hostile environment claim, the element of employer responsibility:²¹⁰

(3b) The employer was on notice that, if it failed to take reasonable corrective or preventive action, the employee would suffer a hostile work environment because of her race or sex.

Hostile work environment doctrine organically limits employer responsibility regardless of how membership causation occurs. Indeed, in cases involving harassing supervisors, the *Faragher/ Ellerth* defense shields employers from liability even though there is *internal* causation.²¹¹ The employer responsibility component of hostile work environment law thus makes the line between internal and external causation far less consequential, because that boundary is not what protects the employer from a cavalcade of claims. Instead, the employer's responsibility remains limited by negligence, regardless of whether there was internal or external causation.

Returning finally to conventional ADA nonaccommodation claims, they too incorporate a third element addressing employer responsibility:²¹²

(3c) The employer was on notice that, if it failed to make reasonable accommodations that did not impose an undue hardship, the

210. See *supra* Parts I.B, I.C.3, and II.D.

211. Whether to characterize harassing supervisory conduct as part of the employer's decisionmaking process is sometimes ambiguous for the reasons so thoughtfully discussed in Justice Souter's *Faragher* opinion. *Faragher v. City of Boca Raton*, 524 U.S. 775, 793–804 (1998). As the doctrine has developed subsequently, however, many lower courts have made the *Faragher/ Ellerth* defense available even when supervisory harassment takes the form of adverse conduct clearly within the scope of supervisors' employment, such as decisions about suspensions, task assignment, and transfers. See, e.g., *Roebuck v. Washington*, 408 F.3d 790, 793–94 (D.C. Cir. 2005). This is despite the fact that *Faragher* appeared to distinguish just such cases from those exclusively involving sexual comments and overtures, with only the latter raising doubts about vicarious liability. See 524 U.S. at 799–800 (distinguishing discrimination in job assignments from “express[ions of] sexual interest[]”); see also *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005) (“The Supreme Court likely would say that a transfer is a ‘tangible employment action’ (it is an official decision by the employer) . . .”). For a discussion of similar ambiguities, and why resolving them is ultimately unimportant, see *infra* Part IV.B.

212. See *supra* Part II.D.

employee would suffer employment-related harm because of her disability.

This analysis does not render disparate treatment, third-party harasser, and nonaccommodation cases identical. Everything about their relationship turns on where we draw the line between “reasonable” and “unreasonable” employer action to prevent membership causation. Were it always unreasonable to expect employers to avoid external causation, then third-party harasser and nonaccommodation claims would collapse into a nullity. Neither third-party harasser doctrine nor nonaccommodation theory interprets reasonableness in this fashion, however. Instead, they use different techniques for establishing employer responsibility in the presence of membership causation.

Seeing the theories in this light makes it clear why crossing the line between internal and external causation need not be treated as a move between fundamentally different approaches to discrimination. Instead, membership causation remains constant while courts take a baby step along a continuum of bases for responsibility, just the sort of thing they do in the common law tradition.²¹³

C. *Unifying Antidiscrimination Theory by Disaggregating Discriminatory Intent*

Once we disaggregate discriminatory intent into two components, we can synthesize it with other theories of discrimination that share these same components. The first function of a discriminatory intent standard is to identify the presence of membership causation. But identifying external causation accomplishes the same end by different means. The second function of a discriminatory intent standard is to establish the employer’s responsibility for preventing or correcting membership causation. Again, the notice and reasonableness requirements of nonaccommodation claims accomplish the same end by different means.

To be sure, an actor’s discriminatory intent is a sensible indicator of its responsibility. When an employer self-consciously takes class membership into account, it obviously is on notice of its causal role. And when class membership enters the causal chain through a decisionmaking process that the employer creates, understands, and controls, the employer is well positioned to modify its decisionmaking process to prevent this.

The crucial question, however, is whether discriminatory intent exhausts the possible bases for responsibility. It is difficult to see why it would, once discriminatory intent’s other function—determining that

213. It may not be coincidental that these innovations have occurred in cases in which highly sympathetic plaintiffs faced often extreme and outrageous behavior by third parties committing sexual assault or expressing racial hostility, as was also true in the early development of the hostile work environment theory of harm. See Schultz, *Reconceptualizing*, supra note 18. Nonetheless, that is not a sufficient explanation, because even in such cases courts still draw the line of employer responsibility somewhere, and, as Part IV shows, cases not involving harassment of any form exhibit a similar, though less well-developed, pattern.

the worker has experienced employment-related harm because of protected class membership—has been carried out by other means. Discriminatory intent involves notice of membership causation,²¹⁴ but so too do the requirements of nonaccommodation and hostile work environment claims. And even without discriminatory intent, class membership may enter the causal chain through mechanisms over which the employer can exercise control, including interactions between its employees and third parties, the physical environment of the workplace, and standard workplace practices and requirements. Modifications to these mechanisms are precisely what third-party harasser and nonaccommodation doctrines demand. In doing so they draw on robust common law traditions requiring actors to prevent harm “upon premises or with instrumentalities under [their] control.”²¹⁵

The most obvious reason for distinguishing discriminatory intent from other bases for responsibility would be if the former were costless and the latter were costly. Even that view would depend on the controversial idea that employers should prevent membership causation only if it can be done for free. Regardless, we have already seen that this distinction fails to hold up: Even conventional disparate treatment doctrine forbids economically rational discrimination, and it can be costless to comply with accommodation mandates.²¹⁶

I propose treating disparate treatment and nonaccommodation as specific applications of a single, more general theory of employment discrimination rather than as fundamental categories in themselves. The general structure of an individual employment discrimination claim would be as follows:

- (1) The employee suffered employment-related harm (whether a tangible employment action or a hostile work environment);
- (2) The employee suffered that harm because of her membership in a protected class (membership causation); and
- (3) There is a basis for holding the employer responsible.

The first two elements represent the common thread of membership causation. The third element abstracts from the specific analyses of responsibility catalogued above: internal causation for disparate treatment (3a); notice and reasonable preventive or corrective action in third-party harasser cases (3b); and notice, reasonableness, and absence of undue hardship in nonaccommodation cases under the ADA (3c).²¹⁷

214. For a discussion of the subtleties of unconscious bias, see *infra* note 265.

215. *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005) (quoting Restatement (Second) of Agency § 213(d) (1958)); see also Bagenstos, *Disability Law*, *supra* note 209, at 53 (showing ADA requires only “job-related” accommodations); *supra* Part I.C.3 (tracing courts’ importation of common law agency and negligence principles into Title VII jurisprudence).

216. See *supra* Part II.B.3.

217. I leave open whether disparate impact liability can be brought under this rubric, despite its focus on group harm rather than individual membership causation. Title VII might simply address multiple forms of race- and gender-related injustice. Cf. *Sophia R.*

This theory recommends distinguishing two very different kinds of disputes over the presence of discriminatory intent. In the garden variety individual disparate treatment case, internal causation provides the plaintiff's only factual theory of membership causation: The way her race or sex affected the employment outcome was that her employer's decision-making process took account of it. In such a case, the key question is the one that Title VII's elaborate system of shifting burdens of proof is designed to answer: Did the plaintiff's race or sex influence a manager's decisionmaking process, or did that process only take into account non-discriminatory factors? If the plaintiff cannot establish discriminatory intent, her claim fails under the general standard proposed above: no internal causation means no membership causation. Therefore, such cases are entirely unaffected by questions about whether internal causation is required to establish employer responsibility.

There is, however, a second class of cases in which membership causation can be established *without* demonstrating that the employer acted with discriminatory intent. Third-party harasser cases are one example. Assessing membership causation typically involves simply asking whether the third-party harassed with discriminatory intent. Of course, doing so can raise difficult evidentiary questions. These, however, are no different than those we face in run-of-the-mill individual disparate treatment cases that inquire into a supervisor's intent when he harassed or terminated an employee. Disability nonaccommodation cases likewise involve a straightforward path to membership causation that does not run through the employer's discriminatory intent. In all such cases, the root concern of employment discrimination law is present: harm to an individual's employment suffered because of her membership in a protected class. Thus, the employer's lack of discriminatory intent raises a much narrower, though still important question: whether it is responsible for preventing or correcting that harm.

Put this way, placing membership causation at the center of antidiscrimination theory simultaneously makes sense of ordinary disparate treatment claims while also opening the door to imposing liability without discriminatory intent. Moreover, imposing such liability does not require shifting to a theory of group harm. Congress and the courts have walked through this door at least twice, once under the ADA and again in Title VII hostile work environment cases, and Part IV provides further examples. To be sure, they do not always cross this threshold, do not always notice when they do, and do not always agree on where to stop on the other side. But the door is open.

Moreau, *The Wrongs of Unequal Treatment*, 54 U. Toronto L.J. 291, 294 (2004) (arguing Canadian equality jurisprudence presents several irreducibly distinct conceptions of the wrong of unequal treatment). As an alternative, disparate impact might be analyzed as a probabilistic application of external causation. See *supra* note 100. A similar analysis might also account for affirmative action. Cf. *infra* note 225.

PART IV. BEYOND HARASSMENT: REINTERPRETING
DISPARATE TREATMENT CONTROVERSIES

The third-party harasser cases provide particularly fertile ground for crossing the line between internal and external membership causation, but they are not unique. Instead, the preceding analysis suggests a more general set of circumstances when employment discrimination doctrine would depart from an intent standard without turning toward disparate impact, or at least would struggle with whether to do so. First and foremost, there must be membership causation, even if internal causation is absent or ambiguous. Second, there must be a plausible basis for employer responsibility, typically involving the employer having notice of membership causation and being relatively well positioned to prevent or remedy it.

This Part identifies and analyzes several such examples: third-party conduct leading to tangible employment actions, employer decisions based on biased conduct or evaluations by nondecisionmakers within the organization, and employer decisions based on an employee's pregnancy or religious practice. These are recurring, important Title VII scenarios that implicate tangible employment actions, not only hostile work environments. In each case there is membership causation but internal causation either plainly is absent or becomes conceptually difficult to analyze. This combination produces doctrinal confusion and controversy.

The theory developed above explains why plaintiffs have compelling cases despite their difficulty establishing internal causation—there is membership causation. It also explains why the countervailing considerations involve notice and feasibility, even though these are irrelevant to the presence of discriminatory intent—these are disputes over employer responsibility. In each case my analysis is brief and cannot decisively exclude all other interpretations. In the aggregate, however, the recurring pattern is compelling, especially in conjunction with an explanatory theory.

I have two broad goals in reviewing these disputes over the limits of disparate treatment theory. First, I aim to show that the third-party harasser cases are not unique. Consequently, to reject them as wrongly decided not only would undermine this well-established body of law, but it also would tear the fabric of disparate treatment doctrine more generally. Placing the third-party harasser cases in good company also further weakens three alternatives to my analysis, that third-party harasser doctrine (a) simply reflects a special theory of discrimination limited to hostile work environment claims;²¹⁸ (b) fundamentally relies on the presence of discriminatory intent, albeit located in a third party rather than the employer;²¹⁹ or (c) implicitly relies on a disparate impact theory.²²⁰

218. See *supra* notes 23, 26, and accompanying text.

219. See *supra* Part II.C.

220. See *supra* Parts I.D, II.B.2.

My second, and more ambitious, goal is to show the robustness of analyzing employment discrimination law in terms of membership causation and employer responsibility. Not only does it make sense of third-party harasser doctrine, but it sheds light on a series of disputed or confused topics. From this new perspective, once membership causation can be established without recourse to the employer's discriminatory intent, further analysis in terms of discriminatory intent only sows confusion. The real issue is the extent of the employer's responsibility for preventing or correcting membership causation.

A. *Third Parties with Discriminatory Intent*

Harassment is not the only way a third party may influence an employment relationship. The well-known "customer preference" scenario is another. An employer commits disparate treatment and violates Title VII if it refuses to hire a woman or a person of color for a customer contact position because the employer knows that its customers would prefer a man or a white person instead.²²¹

Customer preference cases typically involve straightforward disparate treatment. Recall that an employer acts with discriminatory intent simply by taking race or sex into account, including when it does so only as part of its more general practice of taking all customer preferences into account so as to maximize revenue.²²² No more nefarious motivation is required. This doctrinal analysis, and the broader class of cases involving so-called "rational discrimination," is notoriously troublesome for theories of discriminatory intent that identify it with employer "animus" or deviations from profit-maximizing business rationality.²²³

What makes these cases conceptually vexing is that internal causation always can be laundered out of a customer preference or other "rational discrimination" scenario.²²⁴ Imagine that an employer develops a feedback form asking customers how satisfied they are with individual employees. The form includes a numerical scale from one to ten and a

221. See, e.g., *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1284 (11th Cir. 2000); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 302 (N.D. Tex. 1981) (refusing to recognize sex appeal as BFOQ despite customer preference for female flight attendants). See generally Bagenstos, *Rational Discrimination*, *supra* note 8.

222. See Bagenstos, *Rational Discrimination*, *supra* note 8; *supra* Part I.C.1. Schwab and Willborn disagree and argue that employers win if they "can prove that employees of a particular sex will be less productive because of discriminatory customer preferences." Schwab & Willborn, *supra* note 9, at 1236 (emphasis omitted). However, they cite only cases about Title VII's BFOQ defense, not its definition of discriminatory intent. As to the BFOQ, the Supreme Court rejects their view. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991) (holding financial costs associated with employing members of protected class generally do not establish BFOQ justification for disparate treatment of that class).

223. See, e.g., Andrew Koppelman, *Antidiscrimination Law and Social Equality* 5, 33 (1996); Bagenstos, *Rational Discrimination*, *supra* note 8, at 848–52; Kelman, *supra* note 9, at 840–42, 845–48, 850–52.

224. For a concrete example, see *infra* note 240.

space for written comments. The company discharges any employee who receives a ten for “extremely dissatisfied” more than three times in a month. For this purpose, the employer disregards the written comments because case-by-case evaluation would be onerous, and it wants to avoid customer dissatisfaction regardless of the reason.

In this system an employer may well discharge an employee because of her race (membership causation) without taking her race into account (no internal causation).²²⁵ The employer mechanically applies its “neutral” three-strikes policy without regard to the employee’s race. But what if, in the comments, a customer articulates a racist reason for her extreme dissatisfaction with the employee? Now the employer is on notice that following its neutral rule means terminating an employee because of her race. Avoiding that result would require disregarding the customer complaint. Does Title VII require the employer to make this exception, this accommodation?²²⁶

No published decision is precisely on point, but several related ones strongly suggest that the employee could win in this scenario. Certainly it would not be a slam dunk for the employer. After all, if, based on the employee’s race, the employer accurately predicted future customer dissatisfaction and terminated the employee for that reason, there would be a clear case of disparate treatment.²²⁷ To reach a different result in my hypothetical seems purely formalistic. And yet, if internal causation is the touchstone, the employer should win easily.

225. David Strauss has deployed a similar hypothetical device to illustrate connections between rational discrimination and affirmative action. See Strauss, *Myth*, *supra* note 166, at 108–09. In my view, nonaccommodation provides the better analogy because the beneficiaries of affirmative action typically are selected based on class membership, without any additional inquiry into whether (without affirmative action) they as individuals would suffer a specific workplace injury because of their class membership, that is, without any individualized inquiry into membership causation. See Ball, *supra* note 130, at 974–75 (discussing need for individualized assessment in nonaccommodation settings as opposed to affirmative action settings).

226. This scenario again illustrates the instability of distinctions like same/different treatment and universal/specific remedies. See *supra* notes 163–164, 200, and accompanying text. Barring employer decisions based on customers’ racialized preferences treats everyone the same in one sense (race cannot be taken into account) but different in another sense (people who are equally costly to employ as a result of customer preferences are treated differently depending on whether those customer preferences are mediated by race). Cf. Epstein, *supra* note 167, at 315 (criticizing Title VII’s ban on “rational” disparate treatment because “workers who impose unequal costs on the firm are required by law to receive equal benefits”).

227. Schwab and Willborn again disagree, suggesting that any Title VII ban on cost-justified disparate treatment extends only to race- or sex-based generalizations, not to individualized productivity assessments. Schwab & Willborn, *supra* note 9, at 1247. This view is inconsistent both with the prevailing causal account of disparate treatment and with the sparse case law on point. See *Lust v. Sealy*, 383 F.3d 580, 586 (7th Cir. 2004) (finding disparate treatment liability for refusal to employ woman based on anticipated repetition of customers’ previous sex-based negative reactions to her); *Magnuson v. Peak Technical Servs., Inc.*, 808 F. Supp. 500, 514 (E.D. Va. 1992) (same).

One analogue arises when a temporary services agency (“temp agency”) assigns an employee to a client organization. Pursuant to an agreement between the two firms, the temp agency recruits and pays the worker while the client controls day-to-day supervision and may terminate the assignment. In such circumstances, courts and the EEOC hold the temp agency (the employer) liable for discrimination if it knowingly inflicts workplace injury on its employee based on actions the client took with discriminatory intent.

The issue arises if the temp agency ends its employee’s assignment, or her employment altogether, based on the client’s discriminatory request for termination. If the agency honors all client requests to remove an employee, there would be no internal causation.²²⁸ However, there would be external causation. Moreover, if the agency *knows* that the client acted based on the employee’s race or sex, the agency faces a situation like my feedback form hypothetical.

A temp agency violates Title VII if it knowingly acts on such a removal request. Crucially, this is so even if the agency honors the request *despite* its client’s discriminatory intent, not because of it. The EEOC takes the following position:

The firm is liable if it participates in the client’s discrimination. For example, if the firm honors its client’s request to remove a worker from a job assignment for a discriminatory reason and replace him or her with an individual outside the worker’s protected class, the firm is liable for the discriminatory discharge. *The firm also is liable if it knew or should have known about the client’s discrimination and failed to undertake prompt corrective measures within its control.*²²⁹

The second sentence prohibits disparate treatment based on customer preference. The third, italicized sentence goes beyond discriminatory intent and applies the same basic standard applicable in third-party harasser cases: The employer must make exceptions to its the-client-is-always-right policy and “undertake prompt corrective measures.”²³⁰

The EEOC’s Guidance draws directly from the leading temp agency opinion of *Caldwell v. ServiceMaster Corp.*²³¹ The *Caldwell* plaintiffs contended that the client harassed them and ultimately terminated their assignments based on their sex and race. With respect to the harassment, the court held the agency not liable because it lacked notice of the hostile work environment. With regard to the terminations, however, there was notice of alleged discrimination. The court held for the agency nonethe-

228. O’Gorman, *supra* note 93, at 459.

229. EEOC, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (1997), at <http://www.eeoc.gov/policy/docs/conting.html> (on file with the *Columbia Law Review*) [hereinafter EEOC, Guidance] (emphasis added).

230. *Id.*

231. 966 F. Supp. 33 (D.D.C. 1997).

less, but only because it “took those corrective measures that were within its control” by finding new assignments for the terminated employees.²³² The court’s analysis implies what the EEOC later affirmed, that Title VII obligated the agency to do what it actually did: make reasonable efforts to find a new assignment,²³³ even though only the client had acted with discriminatory intent and not the agency.²³⁴ The reassignment was, in essence, a reasonable accommodation.²³⁵

In the one other case squarely confronting these issues, another district court followed *Caldwell*.²³⁶ Thus, the case law remains sparse,²³⁷ and we cannot know whether courts would adopt the EEOC’s position, as they have with regard to third-party harassers.²³⁸ Nonetheless, what authorities we have follow the same pattern as the third-party harasser cases.

Another structurally similar scenario arose recently when a taxi company conditioned its drivers’ employment on their eligibility for coverage under the employer’s insurance policy. After the insurer refused to cover a driver based on his age, the employer suspended him.²³⁹ The Ninth Circuit panel’s majority and dissenting opinions agreed that the employer could be held liable under a disparate treatment theory even if the employer acted without discriminatory intent when it selected the insurer and even if the employer would have terminated any employee excluded from insurance coverage. In other words, the absence of internal causation was not fatal to the plaintiff’s claim, even under what nominally was a disparate treatment theory. Instead, the majority and dissent disagreed about two issues: (1) whether the employer was on notice of its insurer’s discriminatory policy, and (2) whether the employer avoided liability

232. *Id.* at 48.

233. See EEOC, Guidance, *supra* note 229 (characterizing offering worker “a different job assignment at the same rate of pay” as “immediate and appropriate corrective action within its control”).

234. *Caldwell* arguably can be limited to joint employment situations. See *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512 (5th Cir. 2001). The EEOC rejects any such limitation, and it is not clear what theory could justify it. EEOC, Guidance, *supra* note 229. For instance, *Caldwell* rejects the proposition that, in a joint employment situation, one employer is automatically liable for discrimination committed by the other. 966 F. Supp. at 48. Therefore, it is not simply that one employer’s discriminatory conduct is attributed to the other. If anything, the joint employment scenario weakens the case against the agency, because the employees still have recourse to suit against the client. See O’Gorman, *supra* note 93, at 465.

235. See 42 U.S.C. § 12111(9)(B) (2006) (listing “reassignment to a vacant position” as form of reasonable accommodation).

236. *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 937 (D.S.C. 1997). *Williams* found for the employer temp agency based on its lack of notice of alleged race-based decision-making by its client; the opinion places great emphasis on the importance of knowledge and never relies on the temp agency’s lack of discriminatory intent. See *id.* at 938.

237. For similar cases in which, unlike *Caldwell*, courts attribute discriminatory intent to the defendant employer, see *supra* note 227.

238. But see O’Gorman, *supra* note 93 (criticizing *Caldwell* and EEOC Guidelines).

239. *Enlow v. Salem-Keizer Yellow Cab Co.*, 389 F.3d 802, 802, 810 (9th Cir. 2004).

through its reasonable efforts to protect (accommodate!) its employee by finding him a temporary position with another company and by negotiating with the insurer for an individualized exception to its age-discriminatory policy. These two issues, of course, track the criteria for employer responsibility in both the temp agency scenario and third-party harasser cases.²⁴⁰

Labor union response to employer discrimination against union members provides an additional example where membership causation arises from a third party's actions with discriminatory intent, not from internal causation. Title VII bars a union from discriminating against its members.²⁴¹ Because the union is the defendant, the employer becomes the third party. A union discriminates in violation of Title VII if it unreasonably fails to challenge the employer's known disparate treatment of union members.²⁴² "Unreasonableness" here extends at least as far as failing to grieve under antidiscrimination provisions of a collective bargaining agreement (CBA) between the union and the employer.²⁴³ Some courts do express skepticism that Title VII could require unions to do more than merely avoid disparate treatment themselves, and yet even these opinions allow for liability without discriminatory intent if the

240. *Enlow* is similar to *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), which involved an employer's use of third-party vendors to manage the post-retirement payout in the employer's defined contribution retirement program. The vendors' annuity options all incorporated sex-differentiated benefit amounts based on actuarial differences in life expectancy by sex. The Court held that the employer committed disparate treatment even though no other vendor offered sex-neutral annuity plans and the employer seemingly acted without discriminatory intent. *Id.* at 1089–91. Had the employer provided the annuities itself, however, the disparate treatment would have been clear, see *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), and the Court held that the employer could not avoid the same result by outsourcing the retirement program. The majority's analysis relies on a questionable baseline in which deferred compensation programs are operated in-house, as they were in *Manhart*. In *Enlow*, however, there was no suggestion that a taxi company ordinarily would or should self-insure. Reconstructed by analogy to *Enlow*, the *Arizona Governing Committee* analysis would be that the employer was responsible because it knew about the sex-differentiated annuity policies and failed to take reasonable steps to avoid them.

241. 42 U.S.C. § 2000e-2(c) (2006).

242. See *Howard v. Int'l Molders & Allied Workers Union*, 779 F.2d 1546, 1553 (11th Cir. 1986) (finding unions liable for Title VII violation when they failed to "use all reasonable effort" to stop employer's use of racially discriminatory tests for promotion).

243. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (finding unions liable for Title VII violation when they followed policy of refusing to file racial discrimination grievances against employers); *id.* at 687 (Powell, J., dissenting) (charging that majority improperly imposed "an affirmative duty on unions to combat discrimination by the employer"); see also *York v. Am. Tel. & Tel. Co.*, 95 F.3d 948, 956 (10th Cir. 1996) ("[A] union cannot acquiesce in a company's prohibited employment discrimination and expect to evade Title VII liability for such discrimination." (citation omitted)); *Rainey v. Town of Warren*, 80 F. Supp. 2d 5, 18 (D.R.I. 2000) ("[A] union violates Title VII by acquiescing in or encouraging employer discrimination if, with knowledge of the discrimination, the union deliberately chooses not to file grievances.").

union refuses to grieve.²⁴⁴ If the union's responsibility ended at the line between internal and external causation, the existence of a CBA would be irrelevant; the only thing that would matter would be whether the union's failure to intervene was based on its members' race or sex. Instead, CBAs matter because they increase the union's capacity to intervene effectively to prevent membership causation. One might say that an applicable CBA provision means that the employer's conduct occurs on the union's metaphorical turf, just as a third-party harasser's conduct occurs on the employer's.²⁴⁵

The temp agency, third-party vendor, and union liability cases all have the same basic structure as third-party harasser cases, except that they involve tangible employment actions rather than the employer's toleration of a hostile work environment. A third party acts with discriminatory intent and the defendant does not. The defendant, however, has notice of the third party's conduct. If the defendant takes reasonable steps to prevent or remedy the harm to its employee (or union member), it escapes liability, but if it simply continues its ordinary practices without adjustment, it "discriminates" in violation of Title VII. Not only do these cases cross the line between internal and external causation, but when they do, the crucial issues are always the same: Did the defendant know that the employee faced harm because of her protected class membership²⁴⁶ and did the nature and degree of the defendant's own ability to prevent or correct that harm give rise to a duty to intervene?²⁴⁷

244. See *EEOC v. Pipefitters Ass'n Local Union 597*, 334 F.3d 656, 661 (7th Cir. 2003) (recognizing union liability for Title VII violation when they have "policy not to grieve complaints of discrimination"); *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 832 (8th Cir. 2002) (recognizing union liability for Title VII violation when they have policy of "rejecting disparate-treatment grievances" (internal quotation marks omitted)).

245. See *Pipefitters Ass'n Local Union 597*, 334 F.3d at 663 (Rovner, J., dissenting) ("Where the facts reveal that, in practice, the union enjoys significant control over working conditions and has the power to correct workplace inequities, it is appropriate to hold it liable for failing to do so on the same basis as the employer.").

246. Notice distinguishes the most significant authority contrary to my analysis, *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982). There, the Court held that defendant employers and trade associations did not discriminate under § 1981 when, without discriminatory intent, they utilized a hiring hall that a labor union operated in discriminatory fashion. The Court emphasized defendants' lack of discriminatory intent. Notably, it saw disparate impact theory as the only alternative. *Id.* at 386. Additionally, however, the Court repeatedly noted the district court's finding that defendants "neither knew nor had reason to know of the Union's discriminatory practices." See *id.* at 383; *id.* at 392 n.18. The Court did not address whether defendants' knowledge of the union's practices would have made a difference. The subsequent decisions in *Arizona Governing Committee* and *Goodman* suggest that it would have. See discussion *supra* notes 240 and 243.

247. The Supreme Court's famously confounding *Shelley v. Kraemer* decision also fits this pattern. See 334 U.S. 1 (1948). *Shelley* held that state enforcement of racially restrictive covenants violates the Equal Protection Clause. *Id.* at 23. The plaintiff essentially demanded an accommodation: An exception from blanket enforcement of private agreements. *Id.* at 6. In my view, the key to *Shelley* is the clear presence of membership causation: "Because of the race or color of these petitioners they have been

The defendant's lack of discriminatory intent does not settle those questions.²⁴⁸

B. *Subordinates with Discriminatory Intent*

The subordinate bias or “cat’s paw”²⁴⁹ controversy also involves employment decisions made by individuals acting without discriminatory intent, and yet ones in which the employee’s protected class membership is a cause of the decision.²⁵⁰ In these cases, class membership enters the causal chain when a nondecisionmaker *within* the organization acts with discriminatory intent. Thus, if the line between internal and external causation is crucial, these cases press on precisely where to locate that line. As this section shows, however, what really drives courts’ analyses—and forms the substance of their disagreement—are the now familiar considerations of notice and responsibility.

The prototypical subordinate bias case involves a middle manager who receives from her subordinate, a line supervisor, a report of employee misconduct. This report prompts the manager to review the report in the context of the employee’s entire file and other managerial considerations, and then to terminate the employee in an exercise of her managerial judgment. In making this decision, the *manager* does not consider (and may not even know) the employee’s race. The difficulty is that the *supervisor* acted with discriminatory intent when submitting the disciplinary report: She took the employee’s race into account either in char-

denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.” *Id.* at 20–21. Moreover, the state knew it. Additionally, making an exception was not particularly burdensome because the state courts could simply refrain from enforcing the covenant. Contrary to my view, the literature typically supposes that *Shelley* points toward the disparate impact theory subsequently rejected in *Washington v. Davis*, 426 U.S. 229 (1976). See, e.g., Stephen Gardbaum, The “Horizontal Effect” of Constitutional Rights, 102 *Mich. L. Rev.* 387, 446–57 (2003); Fiss, *Another Equality*, *supra* note 13, at 10. But see Herzog, *supra* note 18 (emphasizing concept of responsibility).

248. Daniel O’Gorman’s critique of the EEOC’s position on temporary staffing agencies is an interesting case in point. See O’Gorman, *supra* note 93. Although he invokes temp agencies’ lack of discriminatory intent, *id.* at 459–60, O’Gorman also relies heavily on arguments that temp agencies lack sufficient knowledge of client behavior and sufficient means to control it. *Id.* at 462–63, 469.

249. See *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 484 (10th Cir. 2006) (explaining origins of “cat’s paw” metaphor in fable “in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire”), cert. granted, 549 U.S. 1105 (2007), cert. dismissed, 549 U.S. 1334 (2007).

250. See *Galdamez v. Potter*, 415 F.3d 1015, 1026 n.9 (9th Cir. 2005) (criticizing verdict sheets that require identifying specific individual who acts with discriminatory intent, both in third-party harasser and subordinate bias cases).

acterizing the underlying events²⁵¹ or in deciding whether to report them at all.²⁵²

A subordinate bias case plainly involves membership causation, but whether there is *internal* causation depends on whether the employer's decisionmaking process is defined to encompass the supervisor's actions, or only the manager's. The federal courts have divided over how to analyze such situations, and the issue has sown widespread confusion.²⁵³

The common denominator among courts is that "[i]f the ultimate decision maker is aware that the recommendation was improperly motivated, then imposing liability on the employer readily follows."²⁵⁴ This rule departs from an internal causation standard because the ultimate decisionmaker might act despite, rather than because of, the bias in the underlying report. The decisionmaker might, for instance, wish to avoid antagonizing the particular subordinate, or she might think the incident serious enough to warrant dismissal even though the subordinate normally would not have reported it. Most circuits go even further and will impose liability if, without the ultimate decisionmaker's knowledge, the subordinate's biased participation in the process influences its outcome to some extent, with the requisite degree of influence varying among courts.²⁵⁵

Imposing liability without internal causation but based on knowledge of external causation is entirely consistent with the third-party bias and related cases analyzed above. Thus, per my view, it is unsurprising that these are easy cases. Nevertheless, if Title VII requires discriminatory intent on the part of the *decisionmaker*, then the subordinate's bias should be insufficient. With regard to the decision to terminate, the subordinate is no different than a complaining customer.

These cases could be reconciled with an internal causation requirement by treating the *subordinate's* adverse report as the unlawful employment practice; the subsequent termination would be a form of conse-

251. See, e.g., *BCI*, 450 F.3d at 478–82 (describing how supervisor with alleged history of discriminatory conduct toward black employees unfavorably characterized underlying events leading to employee's dismissal).

252. See, e.g., *Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 678 (6th Cir. 2008) (describing how supervisor accurately reported African American employees' use of fireworks at worksite but withheld information that white employees had engaged in identical misconduct).

253. See *BCI*, 450 F.3d at 486 ("[C]ircuits have divided as to the level of control a biased subordinate must exert over the employment decision.").

254. *White & Krieger*, supra note 53, at 512. A potential ambiguity in these cases is the possibility of inferring the decisionmaker's discriminatory intent from her exposure to statements openly expressing bias. One of the decisions relied upon by *White and Krieger* arguably takes this approach. See *Hunt v. City of Markham*, 219 F.3d 649, 652–53 (7th Cir. 2000). The others clearly do not.

255. See, e.g., *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007); *BCI*, 450 F.3d at 486.

quential injury.²⁵⁶ Under this analysis, the employee's race enters the causal chain through the decision to take the action challenged: the report itself.

Focusing on the decision to report brings discriminatory intent within the relevant decisionmaking process, but at the cost of creating two new, and quite serious, problems. First, it runs afoul of a large body of law holding that filing a disciplinary report, even with discriminatory intent, cannot independently violate Title VII because such reports are not tangible employment actions.²⁵⁷ A claim arises only when a subsequent decision, like termination or withholding a bonus, relies upon the report.²⁵⁸ Second, it implies that the statute of limitations runs from the time the subordinate submits the report.²⁵⁹ When faced with these difficulties, most courts and commentators conclude that the final employment decision being challenged (in my example, the termination) must be the unlawful employment action. That conclusion revives the problem of finding discriminatory intent within the relevant decisionmaking process. This tension arises because a discriminatory intent standard requires the introduction of group membership into the causal chain and the imposition of workplace harm to happen at the same time. In contrast, shifting toward a broader concern with membership causation tends to expand the potentially relevant time period, not only within the organization but also outside it, as my earlier discussion of racial profiling suggests.²⁶⁰

Another possibility is to treat *both* the manager's decision to terminate *and* the supervisor's decision to report as part of one extended decisionmaking process.²⁶¹ This analysis faces its own problems. Some "cat's

256. *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004); see also *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc) (indicating discriminatory motives of subordinate cannot be imputed to supervisor unless supervisor's decision is perfunctory adoption of subordinate's biased inclination). The Fourth Circuit requires a single decision made with discriminatory intent and directly imposing the employment related harms at issue. *Id.* at 291. Thus, it excludes the possibility of treating subsequent harms as damages, rather than independent violations. Like the Seventh Circuit, though, it joins discriminatory intent and unlawful employment practice in a single decision.

257. See, e.g., *Davis v. Town of Lake Park*, 245 F.3d 1232, 1237-43 (11th Cir. 2001) (so holding and collecting cases). Nor would such evaluations necessarily create a hostile work environment.

258. See, e.g., *Russell v. Principi*, 257 F.3d 815, 818-20 (D.C. Cir. 2001); *Wilks v. Elizabeth Arden, Inc.*, 507 F. Supp. 2d 179, 193-94 (D. Conn. 2007).

259. *Green, Insular Individualism*, supra note 84, at 373; cf. supra note 90 and accompanying text.

260. See supra Part I.C.1.

261. See *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999) ("When an employee is fired because he acted to defend himself against harassment, which supervisors failed to take reasonable measures to prevent or correct, the termination process cannot be said to be free from discrimination."). Some courts and commentators would accomplish this by invoking agency principles to impute the subordinate's bias to the final decisionmaker and by extension the employer, but only if the subordinate's bias actually played a role in the

paw” cases involve subordinates who provoke the plaintiff into conduct that becomes the basis for subsequent personnel action. Examples include harassing the plaintiff, interfering with job performance, or setting her up for failure.²⁶² In such cases, it requires linguistic gymnastics to characterize the subordinate’s conduct as part of a single, extended “decisionmaking process” about the ultimate personnel action. Indeed, even in more congenial settings involving sequences of supervisory decisions, the Supreme Court’s statute of limitations jurisprudence generally defines the relevant decisionmaking process narrowly and rejects attempts to link discrete employment actions to earlier decisions that other actors made with discriminatory intent.²⁶³

Even if the relevant decisionmaking process were defined so as to find internal causation, the subordinate bias cases would still face a deeper problem. If the causal connection between the subordinate’s biased report and the subsequent termination establishes the employer’s discriminatory intent, then it should be irrelevant whether the manager was on notice of the subordinate’s bias. Indeed, *nothing* should defeat liability once it is established that the employee’s race played a causal role in the employer’s decisionmaking process. Under Title VII’s principle of strict vicarious liability for tangible employment actions, establishing discriminatory intent is the whole of a disparate treatment claim (absent a BFOQ).²⁶⁴

relevant decisionmaking process. See *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487–88 (10th Cir. 2006); *Green, Insular Individualism*, supra note 84, at 369–72; *White & Krieger*, supra note 53, at 520–21.

262. See *Excel Corp.*, 165 F.3d at 639 (finding discrimination where plaintiff was provoked to violent behavior that led to termination of employment); *Austin v. Ford Models, Inc.*, 149 F.3d 148, 155 (2d Cir. 1998) (finding plaintiff’s unwillingness to perform extra work would not preclude discrimination claim if employer assigned plaintiff work because of her race); *Shager v. Upjohn Co.*, 913 F.2d 398, 406 (7th Cir. 1990) (finding willful discrimination not precluded by plaintiff’s failure to meet performance goals where employer made it unreasonable to meet those goals); *DeGrace v. Rumsfeld*, 614 F.2d 796, 804 (1st Cir. 1980) (“If because of the culpable neglect of supervisory personnel plaintiff was put in reasonable fear for his personal safety [based on his race] and if ‘but for’ the fear thus engendered plaintiff would not have absented himself, we do not think Commander Scarfato could properly discharge plaintiff for unauthorized absence.”); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 608 n.14 (S.D.N.Y. 1981) (“The proper question is not whether the victimized employee resigned or was discharged, but whether she acted reasonably in quitting rather than suffering the effects of discrimination.”).

263. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007) (“A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination.”); *Del. State Coll. v. Ricks*, 449 U.S. 250, 257 (1980). Congress’s override of *Ledbetter*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009), did not alter the statute’s general definition of an unlawful employment practice but instead narrowly altered only the calculation of the statute of limitations for discriminatory pay practices. See Kathryn A. Eidmann, Comment, *Ledbetter in Congress: The Limits of a Narrow Legislative Override*, 117 Yale L.J. 971 (2008).

264. See supra Parts I.C.3, II.D.2.

No court, however, has allowed internal causation, when defined broadly to include the supervisor's biased report, to suffice for liability. Some courts require the ultimate decisionmaker to have had notice of the subordinate's bias. Others go further and hold that an employer *may* be liable even absent such notice, but they never go so far as automatically holding the employer liable once discriminatory intent is established.²⁶⁵ Instead, all courts allow the employer to escape liability if it conducts an "independent investigation" that supports the ultimate decision.²⁶⁶ Such investigations generally are characterized as "breaking the chain of causation" between the supervisor's action and the ultimate decision.²⁶⁷ But this is just wrong as a matter of causation-in-fact. Absent the biased report, no investigation would have occurred, and no employment action would have been taken.²⁶⁸

The presence or absence of internal causation simply is not doing the important analytic work here. If the relevant decisionmaking process is defined narrowly, as the manager's decisionmaking process, there can be liability *without* internal causation. If the relevant decisionmaking process is defined broadly, to include the supervisor's conduct, then the employer may escape liability even though there *is* internal causation.

At root, the courts are debating the extent of an employer's responsibility to insulate its decisions from influences traceable to an employee's race or sex. Arguments over the "independent investigation" defense mirror those over the employer responsibility element in hostile work environment claims: how probing must the investigation be, what are the risks of purely symbolic or perfunctory remedial schemes, what organizational dynamics might render these investigations ineffectual, and so forth.²⁶⁹ Similarly, arguments sounding themes of employer responsibility, not simply tracing the causal chain, are marshaled to justify holding employers liable even when the ultimate decisionmaker lacks both dis-

265. Unconscious bias cases raise similar issues because they involve internal causation without actual notice to the decisionmaker. Cf. White & Krieger, *supra* note 53. The employee suffers membership causation even if the employer did not intend it, see sources cited *supra* note 203, but commentators disagree over the employer's responsibility. This dispute centers on the employer's awareness of and control over the unconscious bias. Compare Wax, *supra* note 53 (arguing against liability on grounds that unconscious bias cannot be detected or prevented), with Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 Cal. L. Rev. 969, 980–81 (2006) (analyzing ways to reduce implicit bias), and Kang & Banaji, *supra* note 203, at 1092–110 (2006) (same).

266. *Poland v. Chertoff*, 494 F.3d 1174, 1182–84 (9th Cir. 2007); *BCI*, 450 F.3d at 485; Green, *Insular Individualism*, *supra* note 84; White & Krieger, *supra* note 53; see also Verkerke, *Notice Liability*, *supra* note 44, at 374–77.

267. *BCI*, 450 F.3d at 488; *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004); Green, *Insular Individualism*, *supra* note 84; White & Krieger, *supra* note 53.

268. *Poland*, 494 F.3d at 1181; White & Krieger, *supra* note 53, at 520.

269. *BCI*, 450 F.3d at 492–93 (finding defendant's investigation inadequate); Green, *Insular Individualism*, *supra* note 84, at 369–72.

criminary intent and knowledge of the subordinate's bias.²⁷⁰ The Tenth Circuit recently reasoned this way:

Recognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations. Indeed, such claims have the salutary effect of encouraging employers to verify information and review recommendations before taking adverse employment actions against members of protected groups²⁷¹

These concerns parallel those voiced in cases involving the influence of third parties. Not surprisingly, courts expect employers to take greater responsibility for the influence of their own biased supervisors than for their biased customers. These differences, however, are incremental in nature. They do not involve a sharp divide between internal and external membership causation.

C. *Gerrymandering Discriminatory Intent by Redefining the Protected Class*

Two of Congress's relatively rare amendments to Title VII's substance reinforce the pattern I have been tracing. If the line between internal and external causation were fundamental, then it would be peculiar, or at least momentous, to see Congress crossing it. Many see the ADA's inclusion of nonaccommodation in just that way. If, however, only membership causation is fundamental and employer responsibility is a continuum not always reducible to discriminatory intent, then we would

270. These points suggest a similar analysis of "structural discrimination," in which systemic workplace practices facilitate repeated acts of individual disparate treatment. See Green, *Workplace Dynamics*, supra note 19, at 145 (arguing for "structural account of disparate treatment theory, [which] would hold employers directly liable under Title VII for organizational choices, institutional practices, and workplace dynamics that enable the operation of discriminatory bias on the basis of protected characteristics"); see also Bagenstos, *Structural Turn*, supra note 17 (assessing theories of structural discrimination). Structural discrimination is difficult to fit into the disparate treatment/impact framework because upper level managers may act without discriminatory intent in the course of deciding what firmwide policies and practices to adopt; nonetheless, these managers may have actual or constructive notice that different firmwide policies and practices could reduce the incidence of disparate treatment in lower-level decisionmaking about hiring, promotion, or discipline of specific individuals. The theoretical challenge is how to integrate analysis of these two different decisionmaking processes, the latter involving discriminatory intent but the former arguably lacking it. See *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999). Green characterizes such cases as ones in which the employer "facilitates" disparate treatment by virtue of an "active, causal" role of organizational decisions leading to discrimination. Green, *Structural Approach*, supra note 9, at 851, 884, 889. As in the subordinate bias cases, however, invoking causation glosses over the infinite varieties of causal connection that may exist between organizational decisions and incidents of disparate treatment—all of which have as a but-for cause the very existence of the firm—when, in fact, the controversy almost entirely concerns the scope of conduct that may be deemed "facilitation."

271. *BCI*, 450 F.3d at 486 (citation omitted).

expect Congress to occasionally fine-tune the scope of employer responsibility.

This section argues that Congress did just that when it incorporated religious practice into Title VII's definition of religion and pregnancy into Title VII's definition of sex. Both amendments overrode courts' rigid application of a discriminatory intent standard. They did so where membership causation was clear and with means that still limited the employer's obligations. However, by amending the definitions of religion and sex, rather than the definition of "discrimination," Congress retained a nominal commitment to a discriminatory intent standard, though at the cost of rendering it incoherent. Religious practice and pregnancy are also significant to my larger argument because membership causation (involving religion and sex) is easy to identify without attributing discriminatory intent either to the employer or to any third party.

1. *Incorporating Religious Practice into Religion.* — Congress first deviated from an internal causation standard when it mandated accommodation of religion in 1972.²⁷² Prompted by disputes over scheduling shifts on Sabbath days, the EEOC had opined that religious discrimination included not only disparate treatment but also failure to make reasonable accommodations.²⁷³ Thus, a "neutral" rule requiring all employees to be available for Sunday shifts could violate Title VII even though it did not take individual employees' religious beliefs into account. The Sixth Circuit rejected this view and held that "discrimination" and "failure to accommodate" "are entirely different"; an equally divided Supreme Court failed to resolve the issue.²⁷⁴ Congress intervened and, without controversy,²⁷⁵ codified the EEOC's approach in substance. Congress, at least, did not see accommodation as antithetical to Title VII's antidiscrimination command. Intriguingly, neither did the Supreme Court when it later accepted the EEOC's position as "a defensible construction of the pre-1972 statute."²⁷⁶

Congress mandated religious accommodation in a roundabout way. Rather than define "discriminate" to include failure to accommodate, it defined "religion" to include "all aspects of religious observance and

272. See 42 U.S.C. § 2000e(j) (2006). For brief histories of the amendment, see generally Feldblum, *supra* note 152, at 172–75; Corrada, *supra* note 127, at 19–23.

273. Feldblum, *supra* note 152, at 173. At the time, there was no relevant textual difference between the prohibitions on religious discrimination and race or sex discrimination, all of which were governed by the same prohibitions on discrimination "because of such individual's race, color, religion, sex, or national origin." § 2000e-2(a).

274. *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 335 (6th Cir. 1970), *aff'd per curiam* by an equally divided Court, 402 U.S. 689 (1971).

275. Feldblum, *supra* note 152, at 175 n.55.

276. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 76 n.11 (1977). The Court also gutted the religious accommodation mandate by characterizing "undue hardship" as requiring only a "de minimis" burden on the employer. *Id.* at 84. This interpretation attempted to address Establishment Clause concerns and did not rely on a general antidiscrimination/accommodation distinction.

practice.”²⁷⁷ Thus, making a decision based on an act (such as refusing to work on Sunday) motivated by an employee’s religion becomes an instance of disparate treatment, even if the employer treats that act the same way when the employee has nonreligious motives (attending a family reunion or watching football).

The difficulty with this definitional approach is that Congress also sought to limit employers’ responsibility to accommodate. It did so by further refining the definition of religion to *exclude* “religious observance and practice” when “an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”²⁷⁸

Read as a whole and taken literally, this definition means that the same practice, with the same connection to the employee’s religious convictions, is or is not part of her “religion” depending on her employer’s circumstances. If the employer can accommodate it, then refusal to work on Sunday is part of the employee’s religion, but if the employer cannot do so, then the same refusal becomes separate from the employee’s religion. This is obviously a legal fiction.

The real issue here is not a factual dispute over whether dismissal for religiously based refusal to work on Sunday involves discriminatory intent with regard to the employee’s religion. Instead, the point is that the employee’s religion is the cause of her refusing to work on Sunday, and therefore she loses her job because of her religion even if neither her employer nor anyone else acts with discriminatory intent. The problem is not the scope of “religion” but rather the extent of an employer’s responsibility to avoid harm traceable to an employee’s religion.²⁷⁹

2. *Incorporating Pregnancy into Sex.* — Congress took a similarly evasive approach in the Pregnancy Discrimination Act of 1978 (PDA), which amended Title VII’s definitions to declare that discrimination based on pregnancy is discrimination based on sex.²⁸⁰ This resolved by fiat the conceptually vexing question of whether an employer necessarily takes an

277. § 2000e(j). This approach is analogous to proposals to resolve issues like accent discrimination by construing “race” or “national origin” broadly to incorporate “ethnic traits,” or to add them to the list of prohibited bases of discrimination. See Juan F. Perea, *Ethnicity and Prejudice: Reevaluating National Origin Discrimination Under Title VII*, 35 *Wm. & Mary L. Rev.* 805, 860–61 (1994).

278. § 2000e(j).

279. The analogous point can be made about “foreign” accents and other racially or ethnically marked traits or practices discussed *supra* Part I.A. Rather than arguing about whether accent, language, and so forth are constitutive of group membership or identity, we might focus on the causal connection between group membership and these traits or practices. Doing so could take to heart Richard Ford’s and others’ warnings against the essentialism risked by the former analysis, see generally Ford, *Racial Culture*, *supra* note 64, without simply ignoring the systematic connections between group membership and specific practices.

280. 42 U.S.C. § 2000e(k).

employee's sex into account whenever it takes her pregnancy into account.²⁸¹ The Supreme Court had held otherwise in *General Electric Co. v. Gilbert*,²⁸² and therefore concluded that acting based on pregnancy did not constitute disparate treatment based on sex.

Many arguments for the PDA assert that harms inflicted based on pregnancy injure only women and therefore injure women as a class relative to men. Such arguments, in other words, seek to shift the terrain from discriminatory intent to group harm. In the pregnancy context, however, they prove too much. If disproportionate injury is the key, then there is nothing special about pregnancy. Analogous arguments apply with equal force to many practices or characteristics that differentiate (in the current social reality) women and men *in aggregate*. And indeed, feminists long have used the same theoretical apparatus to attack workplace practices that assume workers do not get pregnant and also those that assume workers do not have child care responsibilities.²⁸³ The PDA, however, picks out pregnancy.²⁸⁴

Focusing on membership causation helps explain why the PDA addresses something not just "different" about women (relative to a male norm) but something *unique* to women. Any harm suffered because of

281. For feminist doubts, see Kay, *supra* note 130, at 22–23 (asking of a woman who is not pregnant, cannot become pregnant, or chooses not to, "[i]s she any less female?"); see also Ford, *Racial Culture*, *supra* note 64, at 111–13 (2005). Even if a pregnancy classification is not intrinsically a sex classification, a strong argument remains that the Supreme Court overlooked disparate treatment in the pre-PDA pregnancy discrimination cases. See Williams, *supra* note 130, at 335–38 (arguing pre-PDA pregnancy discrimination cases could have been analyzed as disparate treatment based on the stereotype, "when wage-earning women became pregnant they did, and should, go home"); see also Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 *Stan. L. Rev.* 1871, 1892 (2006) [hereinafter Siegel, *You've Come a Long Way*] (noting Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003), endorses proposition that decisions based on pregnancy constitute intentional sex discrimination when they rely upon sex stereotypes of gender-differentiated parenting roles); cf. Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 *N.Y.U. L. Rev.* 1134 (2004) (arguing for disparate treatment analysis of employers' negative reactions to race/ethnicity-associated practice).

282. 429 U.S. 125, 137 (1976).

283. Finley, *supra* note 130, at 1126–27; Littleton, *supra* note 7, at 1306–07.

284. Moreover, whether practices that take pregnancy into account have a disparate impact on women depends on how broadly the relevant practice is defined. See *supra* notes 103, 155–156, and accompanying text. *Gilbert* noted that the employer's overall disability benefits package paid more to women than to men, even though the pregnancy exclusion alone harmed women more than men. See 429 U.S. at 130 n.10, 138 n.17. Similarly, when pregnancy is one among multiple bases for taking leave, modifying schedules, or adjusting duties, the relative impact depends on how many men utilize its non-pregnancy-related aspects. Cf. David Cantor et al., *Westat, Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update A-2-6 tbl.A2-2.6* (2001) available at <http://webharvest.gov/peth04/20041030202616/www.dol.gov/asp/fmla/main2000.htm> (on file with the *Columbia Law Review*) (finding significantly higher percentages of men than women take FMLA leave based on non-pregnancy related health conditions).

pregnancy is suffered because of sex: An employee who is not a woman could not become pregnant and therefore could not suffer harm because of pregnancy. Everyone knows this. As Herma Hill Kay observed, if her pregnancy leads to workplace harm, a woman “will experience employment disadvantages arising from her reproductive activity that are not encountered by her male coworker [who also engages in reproductive activity].”²⁸⁵ Therefore, when an employer harms an employee because she is pregnant, the employer does so knowing that the employee suffers injury because of her sex. In other words, the employer knows that there is membership causation with regard to sex. In this way, focusing on membership causation makes the relevant relationship between sex and pregnancy easy to analyze, and doing so renders it unnecessary to decide whether pregnancy discrimination involves internal or external causation based on sex.²⁸⁶

As with the religion amendment, however, the PDA does not fully embrace the equation of pregnancy and sex. If it did, any employer action based on pregnancy would be sex discrimination and would violate Title VII unless a BFOQ could be established. Most important, decisions based on pregnancy would be illegal even if pregnancy was used only as a proxy for potential limitations on the employee’s ability to work and even if the employer would make the same decision based on any similarly limiting condition.²⁸⁷ To the contrary, however, courts permit “rational” disparate treatment based on pregnancy,²⁸⁸ in contrast to the ban on it in other Title VII contexts. Thus, if an employer makes decisions about fitness for duty, eligibility for leave, or access to modified duties based on whether an employee has one of a series of medically limiting conditions, it likely will not violate Title VII for pregnancy to be on that list.

This anomalous limitation on the scope of “disparate treatment” is best understood as an application of the PDA’s second clause, which hedges the simple equation of pregnancy with sex. This clause provides

285. Kay, *supra* note 130, at 27; see also Littleton, *supra* note 7, at 1306.

286. The pregnancy example suggests a more general response to the longstanding criticism of disparate treatment theory, and equality claims more broadly, as foundering on the need to imagine and specify a male comparator—a “pregnant man.” See Finley, *supra* note 130, at 1142–56; see also Yuracko, *Trait Discrimination*, *supra* note 58, at 192–96. A theory of disparate treatment grounded in a principle of impartiality or neutrality does face these problems, see Post, *supra* note 58, at 12; Strauss, *Discriminatory Intent*, *supra* note 52, at 990–98; Yuracko, *Trait Discrimination*, *supra* note 58, but a thoroughly causal account may not. Ascertaining that sex is a cause of pregnancy seems far less difficult than determining how an employer would treat pregnant men.

287. These are precisely the circumstances in which it seems most plausible that acting based on pregnancy is not tantamount to acting based on sex. Cf. Siegel, *You’ve Come a Long Way*, *supra* note 281, at 1894 (“Failure to treat pregnant employees ‘the same as other persons not so affected but similar in their ability or inability to work’ reflects the unconstitutional sex-role stereotype that, as *Hibbs* put it, ‘women’s family duties trump those of the workplace.’”).

288. See, e.g., *Maldonado v. U.S. Bank*, 186 F.3d 759, 767 (7th Cir. 1999); *Ahmad v. Loyal Am. Life Ins. Co.*, 767 F. Supp. 1114, 1119 (S.D. Ala. 1991).

that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”²⁸⁹ As with religious accommodation, it makes no sense that whether a woman’s pregnancy is part of her “sex” could vary depending on her employer’s policies toward other short-term disabilities. The PDA is incoherent simply as a provision declaring that disparate treatment based on pregnancy is disparate treatment based on sex.

From the perspective advocated throughout this Article, however, the PDA makes perfect sense; it fits the recurring pattern seen both in third-party harasser cases and those examined throughout this Part. On the one hand, the PDA recognizes that disparate treatment based on pregnancy always gives rise to membership causation with regard to sex and thereby subjects female employees to the distinctive harm of discrimination. On the other hand, the PDA’s second clause ensures that the employer only has to prevent membership causation (based on sex) when doing so is not unduly burdensome. The employer need do no more than what it already has found feasible for workers facing comparable medical limitations. Thus, once again, employment discrimination law imposes liability based on membership causation even though internal causation is either absent or vexing to analyze, but it limits employer responsibility to circumstances where there is notice of membership causation (based on sex) and preventive action is reasonably feasible. Attempting to characterize liability in terms of discriminatory intent only confuses matters, and yet the alternative does not lie in disparate impact.

CONCLUSION

Courts are doing something remarkable when they hold employers liable under Title VII for failing, in essence, to manage a macaw. They are breaking the duopoly of disparate treatment and disparate impact and establishing a beachhead for accommodation mandates within Title VII. Their method is to ask separately whether a worker suffered discriminatory harm and whether the employer is responsible. With regard to the former inquiry, membership causation suffices: The employee suffered the macaw’s attack because of her sex, regardless of why the employer failed to manage the macaw. With regard to the question of employer responsibility, it is enough that the employer be on notice of the threat and have reasonable means with which to stop it. Ordinarily, in cases that fit the canonical account of intentional discrimination, internal causation plays both these roles. When both requirements are satisfied in some other way, however, Title VII often dispenses with discriminatory intent. Having seen this phenomenon clearly in the third-party harasser

289. 42 U.S.C. § 2000e(k) (2006); see also Siegel, *Employment Equality*, *supra* note 125, at 932 n.17. But cf. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987) (holding, in different context, PDA’s second clause does not limit the first).

cases, we can spot it again throughout Title VII doctrine. Disparate treatment and nonaccommodation are not “fundamentally different”—far from it. They are two peas in one pod.

My argument thus far has been interpretive in nature, not normative. What, if anything, would justify this central role for membership causation? What exactly are the contours of employer responsibility, and what normative theory underlies them? I do not have full answers to these questions now, but I hope to have established the value of addressing them. I conclude with preliminary thoughts about the road ahead.

Theories organized around discriminatory intent begin with the preferences or reasoning behind an employer’s actions. Finding them faulty, these theories assert a duty to repair any resulting damage, in the mode of corrective justice. Without the employer’s wrongdoing, the harm of discrimination cannot exist.

My analysis, in contrast, starts with membership causation. It begins by identifying an employee’s wrongful injury. Like other critics of the corrective justice framework built on discriminatory intent, I would identify employment discrimination law more closely with distributive justice.²⁹⁰ In particular, using membership causation to identify discrimination resonates with liberal egalitarian theory.²⁹¹ The simple idea is, as Mary Anne Case posits with regard to unconstitutional sex discrimination, that “sex should be irrelevant to an individual’s treatment by the law, *and, more broadly, to his or her life chances.*”²⁹²

For reasons elusive to me, scholars long have tied rejection of an intent standard to denial that the individual worker is a relevant unit of

290. See Harris, *supra* note 142, at 1783–84.

291. See Julie Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. Ill. L. Rev. 405, 415; Sunstein, *Three Fallacies*, *supra* note 166, at 770; see also Seana Valentine Shffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, in *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* 270, 275 & n.7 (R. Jay Wallace et al. eds., 2004) [hereinafter Shffrin, *Egalitarianism*] (suggesting “luck-insensitivity” interpretation of liberal egalitarianism would require accommodation mandates roughly like ADA’s).

292. Mary Anne Case, “The Very Stereotype the Law Condemns”: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 *Cornell L. Rev.* 1447, 1473 (2000) [hereinafter Case, *Perfect Proxies*] (emphasis added); see also Harris, *supra* note 142, at 1783 (“[D]istributive justice as a matter of equal protection requires that individuals receive that share of the benefits they would have secured in the absence of racism.”). Note how the structure of Case’s statement mirrors my contention that discriminatory intent (internal causation) is just a special case of membership causation. Membership in protected classes may, in turn, be but one example of a broader category of morally arbitrary factors not necessarily reducible to luck or acquired at birth. See Sujit Choudhry, *Distribution vs. Recognition: The Case of Anti-Discrimination Laws*, 9 *Geo. Mason L. Rev.* 145, 154 & n.41 (2000); Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 *Theoretical Inquiries L.* 271 (2008); Shffrin, *Egalitarianism*, *supra* note 291, at 273; Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. Chi. Legal F. (forthcoming Oct. 2009), available at <http://ssrn.com/abstract=1438234> (on file with the *Columbia Law Review*).

legal or moral analysis.²⁹³ This move is closely associated with substituting disparate impact for disparate treatment as the paradigmatic case of discrimination.²⁹⁴ Taking nonaccommodation seriously as a distinct type of discrimination opens up a third paradigm. We can move away from disparate treatment and discriminatory intent without moving toward disparate impact and group effects.²⁹⁵

Keeping individuals central to employment discrimination theory has considerable virtues. The “easy case” of individual disparate treatment, around which there is wide consensus, remains easy. The focus stays on the causal role of race and sex in individuals’ workplace injuries, the bread and butter of individual disparate treatment litigation.²⁹⁶ No elaborate and empirically contingent explanation is needed to connect individual cases to an ultimate concern with group relations. The pervasive references to individual fairness in the statutory text, judicial gloss, and popular culture continue to make sense.²⁹⁷

293. See, e.g., Bagenstos, *Structural Turn*, *supra* note 17, at 40–41; Crenshaw, *supra* note 16, at 1341–42; Fiss, *Groups*, *supra* note 20; see also Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *Harv. L. Rev.* 1, 6–8, 51 n.285, 65 (1977) (invoking individualistic principle of “equal citizenship” but operationalizing it in terms of “stigma of caste,” understood as structural feature of group position, not individual experience).

294. Case, for instance, rightly notes that “those who think sex should be irrelevant need not confine themselves to urging the abolition of sex-respecting rules,” but she suggests that disparate impact theory operationalizes this point. Case, *Perfect Proxies*, *supra* note 292, at 1473–74; see also Fiss, *Groups*, *supra* note 20; Harris, *supra* note 142; Suk, *supra* note 291; Cass R. Sunstein, *The Anticaste Principle*, 92 *Mich. L. Rev.* 2410, 2429 (1994).

295. For alternatives to the anticlassification/antisubordination dyad other than the one presented here, see, e.g., Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (2006) (shifting emphasis from equality to individual liberty); Kimberly A. Yuracko, *Sameness, Subordination, and Perfectionism: Toward a More Complete Theory of Employment Discrimination Law*, 43 *San Diego L. Rev.* 857 (2006) (building on perfectionist accounts of individual human flourishing); Vicki Schultz, *A Theory of Antidiscrimination Law as Disruption: How the Law Can Target Stereotyping and Transcend Group Boundaries*, Remarks at the UCLA School of Law and School of Industrial Relations (April 19, 2007) (conceptualizing antidiscrimination law as pursuing disruption of processes of group formation and differentiation); see also Koppelman, *supra* note 223 (critiquing and synthesizing various approaches to antidiscrimination law).

296. In contrast, theories of group harm or subordination fare best in controversial areas like disparate impact and affirmative action, where a focus on intent fits awkwardly. See Balkin & Siegel, *supra* note 13, at 12 (“The anticlassification principle impugned affirmative action, while legitimating facially neutral practices with a racially disparate impact, while the antisubordination principle impugned facially neutral practices with a racially disparate impact, while legitimating affirmative action.” (citations omitted)).

297. Thus, I share Green’s emphasis on the importance of articulating expansive theories of employment discrimination liability in ways that emphasize “identification of an individual harm that is distinct from any group harm” and thereby fall “within the dominant individualistic account of discrimination.” Green, *Structural Approach*, *supra* note 9, at 899. Unlike Green, however, I do not believe that disparate treatment theories are the only way to achieve that end.

Strong normative considerations also support reinterpreting internal causation as merely a subset of membership causation, rather than jettisoning it entirely in favor of an analysis founded on groups. The charge John Rawls lodged against utilitarianism, that it fails to “take seriously the distinction between persons,”²⁹⁸ applies with similar force to antisubordination theories that take groups, though not society as a whole, as their basic unit.²⁹⁹ This philosophical objection finds practical significance whenever the harm one individual suffers because of group membership is counterbalanced by benefits to other members of her group,³⁰⁰ or by harms to members of another.³⁰¹

If membership causation marks a wrong that is prior to identifying an actor as wrongdoer, then we face a problem of institutional design. How shall we distribute responsibility for preventing or correcting discrimination? The duties placed on employers by employment discrimina-

298. John Rawls, *A Theory of Justice* 27 (1971); accord Martha C. Nussbaum, Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism, 121 *Harv. L. Rev.* 4, 14 (2007).

299. See, e.g., Lawrence A. Alexander, Equal Protection and the Irrelevance of “Groups,” *Issues in Legal Scholarship: The Origins and Fate of Antisubordination Theory*, 2002, art. 1, at <http://www.bepress.com/ils/iss2/art1> (on file with the *Columbia Law Review*); Richard Thompson Ford, Unnatural Groups: A Reaction to Owen Fiss’s “Groups and the Equal Protection Clause,” *Issues in Legal Scholarship: The Origins and Fate of Antisubordination Theory*, 2003, art. 12, at <http://www.bepress.com/ils/iss2/art12> (on file with the *Columbia Law Review*). Even on this view, groups still matter because their status affects individual members in various ways. See generally Koppelman, *supra* note 223, at 85–92; Tommie Shelby, *We Who Are Dark: The Philosophical Foundations of Black Solidarity* (2005); Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 *Harv. L. Rev.* 1003, 1019–21 (1995); Iris Marion Young, Equality of Whom? Social Groups and Judgments of Injustice, 9 *J. Pol. Phil.* 1 (2001); Fiss, *Another Equality*, *supra* note 13, at 20. But even if attention to group status is necessary to capture some relevant harms to individuals, it does not follow that all relevant harms to individuals are captured by attention to group status, as antisubordination theories imply.

300. *Case*, *Perfect Proxies*, *supra* note 292, at 1476 (arguing “subordination” does not capture harms of discrimination when individual is confined by sex stereotypes even as other members of the same sex receive preferential access to stereotypical role). These are the stakes of the “bottom-line” defense to discrimination claims rejected in *Connecticut v. Teal*, 457 U.S. 440 (1982). See *supra* note 103 and accompanying text; see also David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 *Geo. L.J.* 1619, 1620, 1650 (1991) (using principle of “justice between racial groups” to defend policies under which “an employer can make whatever employment decisions it wishes within the minority employee population, so long as it maintains the required ratios” of group representation).

301. My thanks to Mary Anne Case for pressing me to distinguish these phenomena. The latter is the theoretical difficulty with aspirations to “separate but equal,” a notion far from dead at least where sex is concerned. See Mary Anne Case, *Feminist Fundamentalism* (Mar. 14, 2008) (unpublished manuscript, presented at University of Wisconsin, on file with the *Columbia Law Review*); see also Epstein, *supra* note 167, at 269–82; Frances Olsen, *The Sex of Law*, in *The Politics of Law* 691, 693–97 (David Kairys ed., 3d ed. 1998) (describing feminist strategies that challenge gender hierarchy but accept gender differentiation).

tion law may be understood as part of the answer to that question. Employer wrongdoing would consist of failure to discharge one's duties within a scheme designed to achieve distributive justice, quite like a failure to pay a just redistributive tax.³⁰²

I have not attempted to specify a theory of employer responsibility.³⁰³ Such a theory will be necessary to resolve specific cases, but my purpose here is the preliminary one of clearing the way for an alternative to discriminatory intent. For now, it does not matter whether we do or should assign responsibility to what we might call "cheapest membership-causation avoiders," or on some other basis, so long as that basis is not simply discriminatory intent. Once the wrong is defined in terms of membership causation, that condition should hold. To invoke several familiar criteria, disparate treatment can be difficult to detect, costly to avoid, and motivated by benign purposes. Meanwhile, nonaccommodation can be easy to detect, cheap to avoid, and motivated by malign purposes (ones unrelated to protected class membership). Therefore, we can disagree over exactly where to place the limits on employer responsibility (and why), and yet agree that these limits do not necessarily coincide with the boundary between internal and external causation.

Separating membership causation and employer responsibility thus opens up possibilities that are obscured when analysis proceeds by evaluating the presence or absence of discriminatory intent. I have focused on circumstances that (at least arguably) combine external causation and employer responsibility.³⁰⁴ The possibility that this combination gives

302. With a significant difference: The individual harmed by the action is identifiable. That point may allow considerations of corrective justice to reenter the analysis in some, but not necessarily all, cases. See generally Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in 4 *Oxford Essays in Jurisprudence* 237 (Jeremy Horder ed., 2000). Arthur Ripstein's work suggests that, in the end, an analysis of employer responsibility will be rooted in the same liberal commitments to equality that identify membership causation as wrongful. See generally Ripstein, *supra* note 204.

303. More generally, although my analysis of membership causation as the harm of discrimination can readily be extended beyond the employment arena, the scope of defendants' responsibilities might well vary across types of activity (for instance, employment versus housing) and other distinctions among actors (such as state versus nonstate actors).

304. Additionally, there might be internal causation without employer responsibility. Title VII already allows this through its BFOQ defense. See also Samuel R. Bagenstos, *The Supreme Court, the Americans With Disabilities Act, and Rational Discrimination*, 55 *Ala. L. Rev.* 923, 924–25 (2004) (discussing cost-oriented defenses to disparate treatment under ADA). Additionally, some doctrines limit employer responsibility based on employees' relative ability to avoid membership causation. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (giving employers affirmative defense to claims of supervisor harassment in part because "[i]f the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care"); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 897–98 (9th Cir. 1974) (declining to characterize sex-differentiated grooming policies as disparate treatment because they address matters over which job applicant has complete control); see also Ford, *Racial Culture*, *supra* note 64, at 174;

rise to liability means that establishing membership causation matters independently of establishing discriminatory intent. It may even moot otherwise intractable evidentiary or conceptual problems with determining intent.³⁰⁵ Redirecting the inquiry in this way captures what courts already are doing in third-party harasser, subordinate bias, and other cases discussed above. Extending this approach could open up new lines of analysis in areas where rigid adherence to an intent test thus far has prevailed.³⁰⁶

Notice that the individualistic character of the wrong to be avoided drives employers' role in this problem of institutional design. Employers have particularistic relationships to their own employees—knowledge about them, control over their working conditions, and so on—that they do not have to groups as a whole. If an employer's disparate treatment or nonaccommodation of its own workers could, in principle, be offset by another employer's (or another institution's) actions with regard to other workers,³⁰⁷ then it would be far less obvious what, if any, responsibility individual employers would have.³⁰⁸

Verkerke, *Notice Liability*, *supra* note 44, at 324, 366–70 (arguing for contributory negligence principles in individual disparate treatment cases); cf. Jill Elaine Hasday, *Mitigation and the Americans With Disabilities Act*, 103 *Mich. L. Rev.* 217 (2004) (arguing employees should be under some duty to mitigate their medical conditions before seeking reasonable accommodation of their disability-related limitations); Siegelman, *supra* note 98, at 519 (criticizing disparate impact liability in cases where harm is caused in part by “applicants’ failure . . . to train for a test or to prepare for some other job requirement”). The existence of such limitations is consistent with Ripstein’s argument that responsibility is an irreducibly moral and distributive concept, such that it makes no sense to say that individuals are not responsible for the consequences of their protected group membership unless one is willing to require others to bear those consequences. See Ripstein, *supra* note 204, at 13, 18, 22.

305. See *supra* Part IV.B–C (discussing subordinate bias and pregnancy/sex discrimination); *supra* note 265 (discussing unconscious bias). These areas suggest the limits of arguing that discriminatory intent provides the practical advantage of a relatively clear criterion of employer responsibility. Alternatives like negligence yield the reduced clarity but increased flexibility characteristic of standards. In principle, such considerations might justify tying employers’ legal responsibility to discriminatory intent even if moral responsibility is broader. Even so, that argument differs fundamentally from insisting that no harm of discrimination occurs without discriminatory intent. The former is subject to the usual dynamics of rules versus standards. When the rule loses its virtue of clarity, one must resort to first principles; sometimes the virtues of clarity are outweighed when the rule fails to capture an important set of cases that can be identified using a more flexible standard, and these exceptions then become codified in new rules. See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 *Stan. L. Rev.* 577 (1988). These exact rules/standards dynamics are visible in employment discrimination law’s halting adherence to a requirement of discriminatory intent when membership causation is established by other means.

306. See, e.g., *supra* Part I.A.

307. The employer role also may depend on conceiving of harms to employment as not easily commensurable with lost income. See Seana Valentine Shiffren, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *Fordham L. Rev.* 1643, 1666–69 (2004).

308. Thus, I reject Green’s assumption that grounding antidiscrimination law in distributive justice entails evaluating employer conduct in terms of its “overall effect . . . on

That employers bear *some* responsibility for preventing or correcting membership causation in no way implies that the Title VII/ADA model of employment discrimination law can fully achieve its own goals. Most likely, not *all* such responsibility can be laid at the feet of individual employers. Among other things, sometimes they may be poorly positioned to intervene, relative to other actors. Thus, the approach I have sketched is consistent with calls for a civil rights agenda that stretches far beyond employment discrimination law to address mechanisms of membership causation for which employers cannot be held responsible.³⁰⁹ Yet it can embrace those calls without undermining the foundations of existing law or dismissing as quixotic or misdirected further attempts to strengthen those foundations.³¹⁰

Reconceptualizing employment discrimination law in this way marks a path away from the sterile proceduralism and the cramped conception of inequality that plague anticlassification theories built upon discriminatory intent. Following membership causation beyond the confines of employer decisionmaking also provides a clear way to incorporate history and social context into our understanding of discrimination, something maddeningly absent from a truncated focus on the final moment of decision.³¹¹ It does so, however, without abandoning the idea, entrenched in our legal culture and well-supported by normative theory, that equality is preeminently a relationship among individuals and one toward which we all are duty-bound to strive. We legal theorists can find some wisdom on these points in, of all places, how our judges decide employment discrimination disputes.

Ultimately, the macaw is a colorful metaphor for the many ways our society's stratification by gender, race, and disability comes home to roost

the group as a whole," Green, *Structural Approach*, supra note 9, at 900, and thus its overall effect on "social equality," id. at 866, 869, 872.

309. See, e.g., Bagenstos, *Disability Law*, supra note 209 (arguing goals of disability rights movement cannot be achieved wholly through antidiscrimination law and advocating renewed emphasis on social welfare policy); Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies To Remedy the Gender Gap*, 82 *Geo. L.J.* 89 (1993) (arguing workplace interventions are insufficient to remedy gender inequality at work because of interactions between employment and gendered household divisions of labor); Kang & Banaji, supra note 203, at 1080 (arguing for civil rights strategies analogous to public health policy and focused on "preventative structural measures"); Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 *Nw. U. L. Rev.* 1667, 1682–83 (2008) (arguing public policies can promote civil rights goals by encouraging generation and dissemination of employee-specific information that can substitute for group-based generalizations); Sunstein, *Three Fallacies*, supra note 166 (criticizing approaches to civil rights that focus on adjudicating discrete cases of employer wrongdoing); Vicki Schultz, *Beyond Civil Rights*, Keynote Address at University of Chicago Legal Forum Symposium: *Civil Rights Law and the Low-Wage Worker* (Nov. 4, 2008) (on file with the *Columbia Law Review*).

310. But cf. Sunstein, *Three Fallacies*, supra note 166, at 770 ("[A] large mistake of civil rights policy has been to treat the issue as one of discrimination at all . . .").

311. See Post, supra note 58, at 17 (arguing for approach in which "antidiscrimination law always begins and ends in history").

in individual experiences at work. Demanding that each of us, employers included, pitch in toward managing the macaw strikes me as the moral core of antidiscrimination law, and not too much to ask.