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A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong

Tristin K. Green 60 Vand. L. Rev. 849 (2007)

A structural approach to employment discrimination law seeks to impose an obligation on employers not to facilitate discriminatory decisionmaking in the workplace. Scholars across disciplines agree that a structural approach is a crucial element of an effective antidiscrimination law. Existing law fails to account for the ways in which bias manifests subtly in day-to-day workplace decisionmaking, or for the influence of organizational context on that decisionmaking. But the future of a structural approach depends, in part, on its normative foundation. Without sufficient normative underpinning, a structural approach is unlikely to gain traction in the public or in the courts.

In this Article, Professor Tristin Green makes the normative case for a structural approach. She argues that a structural approach sits within the core of employment discrimination law, imposing costs on employers for their own wrongs against individuals in the workplace. At the same time, she challenges the emerging view that all (or almost all) antidiscrimination law is inherently and exclusively distributive. That view, she argues, is both mistaken and dangerous, for it casts aside the longstanding fault-based component of the nondiscrimination obligation.
A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong

Tristin K. Green*

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* Professor of Law, Seton Hall Law School. I owe thanks to Michelle Adams, Rachel Arnow-Richman, Samuel Bagenstos, Carl Coleman, Rachel Godsil, Mitu Gulati, Erik Lillquist, Solangel Maldonado, Frank Pasquale, Susan Sturm, and Charles Sullivan for valuable conversations and comments on earlier drafts. Thanks also to Pinar Ozgu for excellent research assistance and to the Seton Hall Law School faculty scholarship fund for financial support of this project.
Employment discrimination law is at a crossroads. A wealth of interdisciplinary research suggests that the problem for the future of workplace equality is subtle and "structural" rather than overt and individual. Race, sex, and other protected group characteristics will continue to factor into employment decisions, but the decisions are more likely to be driven by unconscious biases and stereotypes operating within a facilitating organizational context than by conscious animus operating in isolation. Recognizing that Title VII of the Civil Rights Act of 1964, the mainstay of legal prohibition on discrimination in employment, falls short of addressing the problem, legal scholars have begun to formulate a new paradigm of regulation that would impose an obligation on employers—through legal rights or otherwise—to take structural measures to minimize discriminatory bias in workplace decisionmaking.¹ This "structural approach" aims to minimize discriminatory decisionmaking at the individual level and to reduce unequal treatment in the workplace by pushing change at the organizational level in work environments and decisionmaking systems.

Over the past several years, however, a handful of scholars, most notably Professor Samuel Bagenstos in his recent article The Structural Turn and the Limits of Antidiscrimination Law, have cautioned against using antidiscrimination law to target more subtle forms of employment discrimination.² These critics do not dispute that the problem of structural discrimination is a real one, nor do they question the empirical foundation for or description of the problem. Instead, the recent calls for caution, even retreat, stem from a single underlying concern: that structural discrimination does not fit the paradigmatic picture of discrimination as the product of a discrete


² Samuel R. Bagenstos, The Structural Turn and the Limits of Antidiscrimination Law, 94 CAL. L. REV. 1, 40 (2006) (arguing that a structural approach "may be asking antidiscrimination law to do too much of the work of responding to society's inequalities"). Professor Bagenstos is the first to question directly the normative foundation for a structural approach, but other scholars have argued that a structural approach, if pursued, should be understood as a form of distributive justice, see, e.g., Julie Chi-hye Suk, Antidiscrimination Law in the Administrative State, 2006 U. ILL. L. REV. 405, 407, and still others have attempted to recast the problem of structural discrimination to fit the paradigmatic case of intentional or animus-based exclusion as a way of gaining political traction, see, e.g., Michael Selmi, Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms, 9 EMP. RTS. & EMP. POL'Y J. 1, 3-4 (2005) (arguing that recent class action cases are "inconsistent with the emphasis on subtle discrimination").
decision to exclude based on animus or irrational stereotype. By diverging from the prevailing story, the argument goes, a structural approach to employment discrimination law loses the normative force that underlies an animus-based, individualized approach, and it is therefore likely to face substantial political resistance.

My goals in this Article are twofold. First and foremost, I seek to set the normative foundation for a structural approach to employment discrimination law. Current pessimism concerning the political viability of a structural approach, I argue, stems from the assumption that a structural approach aims to impose costs on employers for societal barriers to employment. That assumption is mistaken. A structural approach to employment discrimination law imposes costs on employers that are tied to employers’ wrongs against individuals in the workplace. An employer that facilitates discriminatory workplace decisionmaking engages in the wrong of treating individuals differently on the basis of protected group status or characteristics and, perhaps more importantly, is worthy of fault for its role in that wrong.

But the current pessimism concerning a structural approach is rooted in a much broader challenge to employment discrimination law. There is a growing sense in America that employment discrimination laws have become little more than employer-funded subsidies. A recent line of legal scholarship adds fuel to this idea by seeking to erase the normative divide between antidiscrimination and accommodation mandates. Professor Bagenstos, for example, has argued that accommodation mandates “target conduct that is

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3. For example, in his 1996 presidential campaign, Republican candidate Bob Dole railed against the creation of “special rights” for disadvantaged groups: “[Rights] ought not to be based on gender or ethnicity or color or disability. . . . This is America. No discrimination. Discrimination ought to be punished. . . . [T]here ought to be equal opportunity . . . [b]ut we cannot guarantee equal results in America.” Transcript of Second Televised Debate Between Clinton and Dole, N.Y. TIMES, Oct. 17, 1996, at B10, B11.

For a fascinating account of conservative legal activism surrounding “special rights” in the context of treaty-rights claims of Native American tribal nations, see Jeffrey R. Dudas, In the Name of Equal Rights: “Special” Rights and the Politics of Resentment in Post-Civil Rights America, 39 LAW & SOC'Y REV. 723 (2005).

4. E.g., Samuel R. Bagenstos, “Rational Discrimination,” Accommodation, and the Politics of (Disability) Civil Rights, 89 VA. L. REV. 825 (2003); Michael Ashley Stein, Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination, 153 U. PA. L. REV. 579, 585 (2004) (arguing that the ADA reasonable accommodation requirement is normatively similar to Title VII’s requirements because it “remedies the avoidable workplace exclusion of a targeted group”); see also Deborah L. Brake, Retaliation, 90 MINN. L. REV. 18, 21 (2005) (arguing that “[t]heorizing retaliation as a form of discrimination” is useful because it “requires moving beyond discrimination law’s current dominant framework of status-based differential treatment and toward a broader conception that views discrimination as the maintenance of race and gender privilege”).
normatively similar to that targeted by antidiscrimination [mandates]." 5 From this, he maintains that all discrimination laws—or at least those that target anything other than the paradigmatic animus-based discrimination—"must be justified in a manner that takes full account of the incidence and distributive effects of their implicit taxes and subsidies." 6 And Professor Richard Ford takes a similar position in his important new book, Racial Culture, when he proposes a Coasian "joint-costs" analysis of antidiscrimination law under which the benefits of the laws must always be weighed against the costs imposed on employers and others. 7

The "tax and subsidy" scholarship appropriately highlights the end-goal of social equality and the implications of costs imposed on employers for attaining that goal, but it mistakes a common end-goal for an identical normative underpinning and, in doing so, it casts aside the longstanding fault-based component of much of employment discrimination law. My second goal in this Article, therefore, is to reclaim the normative core of employment discrimination law. I argue that there is a meaningful normative distinction between antidiscrimination and accommodation mandates, a distinction that rests on the idea of correction for and prevention of wrongful acts in the employment relationship but that does not limit such wrongful acts to those based on affirmative animus or conscious reliance on irrational stereotypes.

The Article is organized in three main Parts. In Part I, I describe the problem of structural discrimination and define a structural approach to employment discrimination law. Despite extensive empirical work tying structural discrimination to continued workplace subordination and segregation, legal scholars have been surprisingly slow to theorize an approach to employment discrimination law that would address structural forms of discrimination. And those scholars who have attempted to define a "structural approach" have done so without agreeing on a common definition of the term. In this Part, I define a structural approach to employment discrimination law, and I situate that definition within broader social theory and distinguish it from other scholars' recent uses of the term. A structural approach, as I understand it, is one that identifies the facilitation of discriminatory bias in workplace decisionmaking as a form of discrimination. It seeks to impose a normative—and corresponding legal—obligation on employers not to

5. Bagenstos, supra note 4, at 922.
6. Id. at 921.
facilitate discriminatory decisionmaking in the workplace. Defining a structural approach in terms of employer obligation rather than in the specifics of any particular regulatory scheme, I argue, allows for exploration of how a structural approach fits within the normative underpinnings of antidiscrimination law generally, before taking on the implications of that fit for the contours of a regulatory framework.

In Parts II and III of the Article, I lay the normative foundation for a structural approach. In Part II, I map the limits, the normative core and political stress points, of employment discrimination law. I do not dispute that the end-goal of all antidiscrimination law is social equality, but I argue that antidiscrimination mandates carry greater normative force than accommodation mandates, because antidiscrimination mandates impose costs tied to employers' wrongs in the workplace—rather than solely to society's wrongs or to the employer wrong of contributing to social inequality. Antidiscrimination mandates, accordingly, do not require the distributive justification required of their accommodation-mandate counterparts, a fact that makes the normative distinction between antidiscrimination and accommodation important from a policy perspective. Moreover, the divide that I mark as a normative matter mirrors prevailing judicial interpretation of and political responses to existing employment discrimination laws and, therefore, sets some rough limits on the viability of employment discrimination laws in the current political climate.

In Part III, I then situate a structural approach within this broader normative framework by tying the costs imposed on employers to employer wrong. Professor Bagenstos, I argue, mistakenly assumes (as do others) that a structural approach expects employers to bear the costs for society's wrongs. On the contrary, employer facilitation of discriminatory bias in workplace decisionmaking violates the longstanding norm against different treatment in employment on the basis of protected characteristics, and thus inflicts a moral wrong on individuals in the employment relationship, regardless of whether the employer or the decisionmaker acts with animus or intent to harm. But a structural approach to employment discrimination law, by separating employer from individual wrong, stands on even stronger normative footing. Under a structural approach, individual actors need not be labeled "evil discriminators" in order for employers to engage in wrongful discrimination. Organizational decisions concerning workplace policies, operations, culture, decisionmaking systems—the structures that create the context in which individual perceptions and judgments about merit are made—become the focus of inquiry, and the locus of
employer wrong. With the normative foundation of a structural approach to employment discrimination law in mind, legal actors—judges, legislatures, agencies—should be comfortable holding employers responsible for structural discrimination. And advocates of reform should be more confident than scholars have thus far acknowledged that their efforts to address structural discrimination will gain the political traction needed for meaningful change.

I. DEFINING A STRUCTURAL APPROACH

There is substantial legal scholarship reviewing the social science literature on implicit bias, much of which I have detailed in earlier work. I provide only a brief review of this research here, before turning to the project that has received much less scholarly attention: that of theorizing an approach to employment discrimination law that accounts for organizationally enabled forms of discrimination.

A. The Problem of Structural Discrimination: Implicit Bias and Organizational Context

A well-developed social science literature on the operation of human bias forms the empirical foundation for a structural approach to employment discrimination law. This research shows that discriminatory bias remains widespread, but that it is often implicit, operating behind the scenes rather than at the forefront of consciousness. The research also shows that the specific organizational context in which individuals interact influences the operation and effect of bias.

Perhaps the most well-known recent work on the pervasiveness of unconscious bias is the Implicit Association Test (“IAT”), developed by social psychologists Anthony Greenwald and Mahzarin Banaji.

8. Green, Discrimination in Workplace Dynamics, supra note 1, at 95-108.

The IAT measures differences in the speed of cognitive processing in order to identify biases not found in response to explicit questioning. The basic idea behind the IAT is that our minds work faster when we make stereotype-consistent associations and more slowly when we fight against those stereotype-consistent associations. Available to participants online, the IAT has amassed a wealth of data, and compilation of that data reveals a substantial dissociation between explicit and implicit beliefs and attitudes regarding race and sex. In other words, we may believe that we associate African Americans equally with positive characteristics as with negative ones, but our speed of processing reveals otherwise.

More significantly, studies also show a correlation between scores on implicit attitude tests and behavior toward group members, suggesting that these biases actually do translate into behavior. In a variety of contexts, researchers continue to document the substantial effect of discriminatory biases, whether conscious or unconscious, on real-world decisions. In one recent study, researchers responded to over 1300 help-wanted advertisements with sets of four fictitious

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10. See Dasgupta, supra note 9. The IAT is available on-line at https://implicit.harvard.edu/implicit/.

11. See John F. Dovidio et al., Implicit and Explicit Prejudice and Interracial Interaction, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002) (reporting experimental research that correlates explicit bias to measures of verbal friendliness and self perception and implicit bias to nonverbal friendliness and perception by others). See generally Kang & Banaji, supra note 9, at 1072-75 (describing studies revealing behavioral manifestations of bias); Kang, supra note 9, at 1514 (“There is now persuasive evidence that implicit bias against a social category, as measured by instruments such as the IAT, predicts disparate behavior toward individuals mapped to that category.”). Kang goes on to detail studies from a variety of contexts. Id. at 1514-28.
resumes. Each resume was randomly assigned an African American-sounding name (e.g., Jamal or Lakisha) or a white-sounding name (e.g., Greg or Emily), and each set of four resumes included two higher-qualified applicants and two lesser-qualified applicants. The white-sounding names received fifty percent more callbacks than the African American-sounding names, and while the better resume assisted white-sounding names by thirty percent, the better resume only minimally assisted African American-sounding names.

The empirical research also reveals that discriminatory biases are influenced by the specific contexts in which individuals operate. Recent research using the IAT as a baseline, for example, shows that the race of leadership figures can affect the degree of unconscious bias exhibited in non-leaders. Other studies suggest that demographic makeup of the workplace as a whole and of work groups, salience of alternative in-group and out-group boundaries, distribution of

12. Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, 94 AMER. ECON. REV. 991, 992 (2004). The researchers responded to advertisements in Boston and Chicago for positions in sales, administrative support, clerical services, and customer services. Id. at 994.
13. Id. at 992, 994-95.
14. Id. at 997-98, 1000-01. The researchers found little evidence that other factors that might he inferred from the names, such as social class, drove the results. Id. at 1007-09. Some of the decisions to prefer white-sounding names over Black-sounding names undoubtedly could have been consciously racist. Nonetheless, the expressed attitudes of whites have become consistently more egalitarian over the past several decades, suggesting that at least some of the decisions were driven by implicit bias. See HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 120-21 (1997) (concluding that five decades of survey data show a consistent trend toward expressed white acceptance of racial equality and integration).
15. For a more detailed discussion of contextual influences on decisionmaking, drawing on research on organizational wrongdoing in areas other than discrimination, see Tristin K. Green, Targeting Workplace Context: Title VII as a Tool for Institutional Reform, 72 FORDHAM L. REV. 659, 662-71 (2003).
18. See, e.g., Samuel L. Gaertner et al., Across Cultural Divides: The Value of a Superordinate Identity, in CULTURAL DIVIDES: UNDERSTANDING AND OVERCOMING GROUP CONFLICT 173 (Deborah A. Prentice & Dale T. Miller eds., 1999) (describing the effect of group boundaries on bias and identifying group-based techniques for reducing intergroup bias). Based on social cognition theories that stress the importance of social categorizing for individuals' self-
power, institutional culture, and information availability all affect the degree of unconscious bias and its effect on decisionmaking.

The term "structural discrimination" brings these critical insights on the operation of discriminatory bias together and identifies a form of discrimination that involves the interplay between individuals and the larger organizational environments in which they work. Discrimination under this view becomes more than a problem of bias in isolation at discrete moments of formal decisionmaking; it becomes a problem of the workplace structures and environments that facilitate bias in the workplace on a day-to-day basis.

**B. A Structural Approach to Employment Discrimination Law:**

Seeking Change in Organizational Context

Building on this understanding of the underlying problem, a "structural" approach to employment discrimination law aims to minimize discriminatory bias in everyday workplace decisionmaking by triggering change in the organizational context in which those decisions are made. In short, it envisions an employer obligation to avoid facilitating or enabling discriminatory bias in workplace decisionmaking.

This focus on contextual change distinguishes a structural approach from the individualized, motivational approach that dominates existing antidiscrimination jurisprudence. Under an individualized approach, disadvantage is located exclusively in the esteem and their understanding of themselves and the world, this research suggests that changing individuals' perception of their group identity to include a broad, overarching group helps reduce subgroup tension. *Id.* at 190.


22. In earlier work, I used the term "discrimination in workplace dynamics" to describe this form of discrimination. Although I still think this term more helpful (and less potentially confusing) than the term "structural discrimination," the latter, as Professor Bagenstos's critique suggests, seems to have gained momentum.

23. For several hypothetical examples illustrating the role that organizational structures can play in enabling the subtle operation of discriminatory bias, see Green, *Discrimination in Workplace Dynamics*, supra note 1, at 109-11. For examples of cases involving organizational facilitation of bias, see Green, *supra* note 15, at 683-87.
motivation of individual actors, either in the discriminatory motivation of the discrete decisionmaker or in the choice of women and people of color. An individualized approach, accordingly, aims to reduce discrimination in the workplace by prohibiting exclusionary policies and by encouraging employers to create incentives that deter individuals from consciously discriminating at crucial moments of advancement, such as in promotions or hiring. Even unconscious bias is seen under an individualized approach as a problem to be addressed directly, by convincing people that they may be biased and by urging them to control for their biases.

A structural approach to employment discrimination law, in contrast, aims to reduce bias indirectly by triggering change in the context of everyday decisions, perceptions, and judgments. This effort finds empirical support in the research on the prevalence of implicit bias and the influence of context, already discussed, and also in research suggesting that unconscious bias may be more easily controlled through contextual influence than through self-conscious attempts not to discriminate. Results of the IAT and other studies that demonstrate a disconnect between explicit and implicit attitudes provide the first clue that it may be more difficult than we think to control for our implicit biases. Even those of us who subscribe wholeheartedly to an egalitarian ideal (and spend much of our working lives trying to further that ideal) tend to register some bias on the IAT. Moreover, although research supports the view that implicit biases—and/or the translation of those biases into behavior—can be lessened with self-conscious effort, that same research suggests that self-conscious correction is difficult and unlikely to produce substantial change on its own.

In the mid-1990s, social scientists Timothy Wilson and Nancy Brekke undertook an extensive examination of the research on self-

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25. Cf. Bagenstos, supra note 2, at 10 (explaining that a structural approach aims to "enhance decisionmakers' awareness, motivation, and control of [stereotypes and prejudices] and thus mitigate the effects of implicit bias[,]" without mention of context).

26. The law, of course, is concerned primarily with the translation of biases into behavior. Although it seems reasonable to expect that reduction in bias will result in reduction in biased behavior, it is also possible that biased behavior might be reduced even without a reduction in bias itself. See, e.g., Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. Personality & Soc. Psychol. 5 (1989) (reporting studies that dissociate automatic processes from controlled processes); see also Christine Jolls & Cass R. Sunstein, Debiasing Through Law, 35 J. Legal Stud. 199, 200 (2006) (distinguishing between efforts to "debias" society through law versus traditional efforts to insulate legal outcomes from bias); Jolls & Sunstein, supra note 9, at 976-91 (same).
correction for what they called "mental contamination," or biases that are inconsistent with one’s normative ideals.\textsuperscript{27} Their review revealed that correction for bias in cognitive processing like that involved in discriminatory decisionmaking requires awareness, motivation, and the ability not only to discern accurately the magnitude of biases but also to correct for those biases, each of which is difficult.\textsuperscript{28} Self-correction of unconscious bias in the employment context is made even more difficult by the variety of factors that go into employment decisions. The discomfort most Americans feel about discriminating makes it more likely that they will act on biases when there are other plausible reasons for the decision.\textsuperscript{29} Because judgments about merit and success in work are multi-faceted and frequently involve perceptions about social skills as well as judgments about technical ability, bias is likely to go uncorrected.

Recent research, moreover, suggests that extensive training designed to reduce implicit biases may actually result in backlash, or "reactance" and "correction," particularly in moments of deliberative decisionmaking, like a hiring or promotion decision. According to reactance theory, people will react against threats that limit their personal sense of behavioral freedom.\textsuperscript{30} Correction theory takes this idea one step further to posit that "people do not simply resist attempts at control[,] . . . they assess the direction and extent of potential influence and then adjust and calibrate their responses to compensate for this impact."\textsuperscript{31} In line with these theories, one recent study showed that people who were subjected to extensive training in gender bias against women and who were then asked to make an employment decision about a leadership position tended to favor men over women in that decision, just as people who were not subjected to

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31. \textit{Id.}
\end{footnotesize}
the training did. Only when the people subjected to the training were asked to make an employment decision at the same time that they performed another task (thus increasing their cognitive load) did they not favor men over women.\textsuperscript{32} This finding suggests that reducing bias in decisionmaking directly through diversity training may be even more complex than commentators have thus far realized.\textsuperscript{33}

This research should not be taken to mean that attempts to instill self correction are misguided or inconsistent with a structural approach. Change in contextual variables that increase self control and awareness of the possibility of unconscious bias, such as decisionmaking systems that require articulation of objective, non-biased reasons and accountability mechanisms,\textsuperscript{34} even training,\textsuperscript{35} may be an important avenue for minimizing discriminatory decisionmaking in the workplace. However, self correction is neither the exclusive nor the primary avenue utilized by a structural approach. Instead, a structural approach seeks to minimize the operation of discriminatory bias by altering the workplace context in which day-to-day perceptions and judgments are made. In this way, a structural approach shares common ground with recent efforts within the law and economics school to account for bounded rationality through law.\textsuperscript{36}

By emphasizing the "intermediate level of analysis," a structural approach also builds on a long line of work by structuralist theorists, both inside and outside the legal academy.\textsuperscript{37} In addition to Rosabeth Moss Kanter and other sociologists whose research emphasizes the role of context in shaping judgments, perceptions, and expectations,\textsuperscript{38} legal scholars, particularly in the area of sex and

\textsuperscript{32. Id.}

\textsuperscript{34. See Barbara F. Reskin & Debra Branch McBrier, Why Not Ascription? Organizations' Employment of Male and Female Managers, 65 AM. SOC. REV. 210, 214 (2000); Reskin, supra note 17, at 325.}

\textsuperscript{35. See Joanna L. Grossman, The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law, 26 HARV. WOMEN'S L.J. 3, 42-49 (2003) (describing studies on the impact of training on incidence of sexual harassment and concluding that the "studies make training a worthwhile subject of study and probably a worthwhile pursuit for employers").

\textsuperscript{36. See Jolls & Sunstein, supra note 26.}

\textsuperscript{37. ROSABELTH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION xiii (1977).}

\textsuperscript{38. See, e.g., Robin J. Ely & David A. Thomas, Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes, 46 ADMIN. SCI. Q. 229 (2001); Susan T. Fiske, Controlling Other People: The Impact of Power on Stereotyping, 48 AM. PSYCHOLOGIST 621 (1993); Reskin, supra note 17.}
gender, have argued that the environment in which decisions are made plays a crucial role in perpetuating workplace subordination. In her work on sexual harassment in the workplace, for example, Professor Vicki Schultz has argued that "[i]nstead of encouraging employers to deal with sex harassment by prohibiting sexual interaction, the law should encourage them to attend to the larger structures of gender inequality," and Professor Theresa Beiner recently proposed doctrinal changes to sexual harassment law that would require factfinder consideration of structural factors, such as whether the workplace is gender homogenous or is sexualized, in determining whether a harassing environment is "because of sex." Professor Susan Sturm has argued more broadly for law as a tool to effect structural change, and Professors Devon Carbado and Mitu Gulati have provided a "structural critique" of the workplace in the area of race, using the literature on organizational behavior both to unearth a "homogeneity incentive" for employers and to explore the implications of that incentive for employees' performance of race and racial identity.


40. THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 204, 205 (2005) ("Courts need to understand that sexual harassment is not just the result of the presence of an individual bad actor but it is also highly influenced by the working environment.") Although the primary emphasis in sexual harassment law has been on the immediate impact of a hostile work environment on women, see Meritor Sav. Bank v. Vincent, 477 U.S. 57, 67 (1986) (requiring that, to be actionable, harassment must be "sufficiently severe or pervasive" so as to alter the terms & conditions of employment and "create an abusive working environment") (internal quotations omitted), some courts have recognized in passing the effect of a pervasively hostile work environment on the operation of bias, see, e.g., Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1503 (M.D. Fla. 1991) ("The availability of photographs of nude and partially nude women .... may encourage a significant proportion of the male population in the workforce to view ... women coworkers as . . . sex objects.") (citing expert witness testimony).

41. See Sturm, supra note 1.

42. Devon W. Carbado & Mitu Gulati, The Law and Economics of Critical Race Theory, 112 Yale L.J. 1757, 1788-89 (2003) (book review) [hereinafter Carbado & Gulati, Law and Economics]; see also id. at 1765 (suggesting that key concepts in critical race theory scholarship fail to provide a "structural/institutional critique of the workplace"). Professors Carbado and Gulati's work picks up on a key theme in structural theory: that structural conditions affect the behavior of women and people of color as well as the males and whites who act on biases against them. See Devon W. Carbado & Mitu Gulati, Working Identity, 85 Cornell L. Rev. 1259 (2000) [hereinafter Carbado & Gulati, Working Identity] (describing the extra "identity work" of women and people of color); see also KANTER, supra note 37, at 262 (summarizing that "what appear to be 'sex differences' in work behavior emerge as responses to structural conditions"); 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 (1990) (emphasizing the organization's role in shaping employee interest in nontraditional jobs). For the same reason that disability activists have had little success relocating difference, efforts to use law to address this problem are likely to be seen as crossing over into the realm of
In my own work, I have also advocated a structural approach to employment discrimination law. In *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, I examined the problem of "discrimination in workplace dynamics" and identified its importance to the antidiscrimination project.\(^4\) Existing antidiscrimination law, I argued, is ill-equipped to identify and address the more subtle forms of discrimination that operate to limit opportunity on a day-to-day basis in the modern workplace, largely because the legal doctrine is driven at one end by an individualistic conception of discrimination and at the other end by an institutional conception of discrimination, while often ignoring the interplay between the two.\(^4\)\(^3\) Elsewhere, I have examined the specific problem of discriminatory work cultures and have argued for regulatory reform aimed at changing the context in which those cultures are formed.\(^4\)\(^5\)

A structural approach to employment discrimination law captures each of these more discrete scholarly endeavors by setting the responsibility of the employer to avoid facilitating discriminatory bias in workplace decisionmaking apart from the specifics of the particular regulatory scheme. As such, a structural approach as I define it differs in a critical respect from Professor Susan Sturm's recent use of the term. Her pathbreaking work, particularly her article *Second Generation Employment Discrimination: A Structural Approach*, vividly illustrates the problem of structural discrimination and provides the beginnings of a normative theory to justify intervention.\(^4\)\(^6\) The primary focus of that work, however, is on building a system of bottom-up governance.\(^4\)\(^7\) She argues that structural accommodation mandate, and, accordingly, are likely to face greater political resistance. For further discussion of this point, see infra Part III.C.

\(^4\)\(^3\) Green, *Discrimination in Workplace Dynamics, supra* note 1.

\(^4\)\(^4\) Id. at 111-44. Scholars in the field of organizational behavior have termed this a "meso-level" theorizing. See Robin Ely & Irene Padavic, *A Feminist Analysis of Organizational Research on Sex Differences*, 32 ACAD. MGMT. REV. (forthcoming, 2007) (stating that "meso-level theorizing... focuses on the interplay between organizational features and individual-level processes").

\(^4\)\(^5\) Green, *Work Culture and Discrimination, supra* note 1.


\(^4\)\(^7\) Sturm, *supra* note 1, at 463 (explaining that the "motif of th[e] second generation regulatory approach is that of structuralism," described as "an approach that encourages the development of institutions and processes to enact general norms in particular contexts"). Professor Sturm's regulatory vision builds on the work of a number of scholars who argue for
discrimination is not well suited to the rule-based, after-the-fact adjudicative nature of existing legal regulation and instead necessitates a process of problem solving, one that she calls a “structural approach” that “encourages organizations to gather and share relevant information, builds individual and institutional capacity to respond, and helps design and evaluate solutions that involve employees who participate in the day-to-day patterns that produce bias and exclusion.”  

Although I agree with Professor Sturm on the importance of opening our minds to new theories of governance, for purposes of clarity, I submit that the particular governance scheme that she advocates would be better termed, as it has been elsewhere, a “problem-solving approach” or “new governance approach” to distinguish it from the normative vision of employer obligation that it seeks to advance.

Of much more importance as a normative matter, though, is the prevailing misconception that a structural approach seeks to impose costs on employers for society’s wrongs. Professor Bagenstos, in his recent critique, seems to agree that the term “structural approach” better refers to a vision of employer obligation than to a precise regulatory scheme, though he does not draw that distinction expressly. However, Professor Bagenstos assumes that a “structural” approach necessarily seeks to address society-wide rather than bottom-up rather than top-down governance. For a description of some of the various approaches in this area, see Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 MINN. L. REV. 342 (2004).

48. Sturm, supra note 1, at 475.

49. See Susan Sturm, Lawyers and the Practice of Workplace Equity, 2002 WIS. L. REV. 277, 282-83 (using “problem-solving” process); Lobel, supra note 47, at 345-46 (listing the various terms used to refer to nontraditional, bottom-up systems of governance and adopting the term “new governance model” to describe that paradigm of regulation).

50. Professor Sturm stresses that the problem-solving process inevitably shades into the project of elaborating the applicable norms.” Sturm, supra note 1, at 474. Although it is undoubtedly true that the precise contours of the employer obligation will likely vary from organization to organization, it is important to pursue an overarching normative vision of employer obligation not to facilitate discriminatory decisionmaking in the workplace. Professor Sturm’s regulatory approach seems consistent with that position, see, e.g., id. at 555 (“Courts, under this approach, are engaged in rearticulating the legitimacy and significance of the general norm, and engaging the relevant actors in a dialogue to give that norm meaning in context.”), and her vision of employer obligation fits within a structural approach as I define it, see id. at 489 (“This legal approach … establishes a requirement that an employer take steps to minimize the likelihood that its subjective decisionmaking processes will produce bias.”). In a more recent work, Professor Sturm advances a norm of institutional citizenship under which employers would be obligated to address barriers to full institutional participation. See Sturm, supra note 46, at 250 (“[A]ll institutional citizens should be able to realize their potential and participate fully in the life of the institution.”).
employer-specific barriers to equality in employment.51 This is not surprising, given his earlier work in the disability context,52 but it is deeply problematic. And Professor Bagenstos is not alone. Scholars across disciplines tend to use the term “structural” to refer broadly to any institutional barrier, employer-created or otherwise, to occupational and/or social equality.53 Although this broad use of the term makes sense descriptively—to redress the inequality identified will require a change in institutional structures—it leads too easily to the assumption that all efforts to effect change in workplace structures are rooted normatively in the social inequality that results from the interplay between societal wrongs and neutral workplace structures.54

51. See Bagenstos, supra note 2, at 40 (arguing that with a structural approach “we may be asking antidiscrimination law to do too much of the work of responding to society's inequalities”).

52. In The Future of Disability Law, Professor Bagenstos argued that the ADA's limited effect on the overall employment of people with disabilities stems primarily from “the inability of antidiscrimination laws to eliminate the deep structural barriers to employment that people with disabilities face.” Samuel R. Bagenstos, The Future of Disability Law, 114 YALE L.J. 1, 4 (2004). Those “structural” barriers, according to Bagenstos, are “societal structures” such as lack of outside-of-work personal-assistance services, accessible transportation, and health care. Id. at 23.

53. See, e.g., Nancy E. Dowd, Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace, 24 HARV. C.R.-C.L. L. REV. 79, 136 (1989) (“[T]hose aspects of the workplace which cause work-family conflict are largely structural features that have resulted from the adoption of facially neutral policies, or from the inaction and inadequacies of the structures which generate conflict between work-family roles.”); Linda Hamilton Krieger, Foreward-Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies, 21 BERKELEY J. EMP. & LAB. L. 1, 3-6 & n.14 (2000) (describing the ADA and disparate impact theory as representing “a "structural model" to equality”); Michael A. Rebell, Structural Discrimination and the Rights of the Disabled, 74 GEO. L.J. 1435, 1452 (1986) (“[T]he critical analytical problem of discrimination in the handicapped context now is less one of overcoming bigotry and invidious prejudice than one of redesigning social structures and institutions to make them more responsive to the needs of the disabled segment of the population. It is, in short, a problem of structural change.”).

54. See, e.g., Linda Hamilton Krieger, Afterword: Socio-Legal Backlash, 21 BERKELEY J. EMP. & LAB. L. 476, 515 (2000) (describing the “structural equality project” of the ADA as one that seeks to remove “structural barriers” and noting that such a project has “significant redistributive implications”); Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA, 94 CAL. L. REV. 1323, 1376 n.140 (2006) (“The [women’s] strike demands represent equality as question of social structure... For the structural/institutional model, inequality is a question of distributive justice that rectifying the social relations producing caregiver dependency can ameliorate.”); Suk, supra note 2, at 418 (using the term “cumulative outsider disadvantage” to refer to disadvantage resulting from biased behavior in day-to-day workplace interactions and stating that “what is troubling about cumulative outsider disadvantage is the resulting harm of inequality, not the moral character of the behaviors themselves” that lead to that inequality).

Use of the term “institutional” discrimination seems to have fared no better. See, e.g., Bagenstos, supra note 2, at 1-3 (describing institutional racism as a problem of neutral practices with harmful effects); cf. Ian F. Haney López, Institutional Racism: Judicial Conduct and a New
In the next Part, I identify the significance of this assumption for a structural approach to employment discrimination law. Bagenstos and others who assume that a structural approach is concerned exclusively with societal effect, I argue, vastly underestimate the strength of the normative foundation for a structural approach. In Part III, I explain why the assumption is mistaken.

II. RECLAIMING THE NORMATIVE CORE OF EMPLOYMENT DISCRIMINATION LAW

Few would dispute that animus-based discrimination is inherently wrongful. The employer that purposefully excludes members of certain groups based on its view that members of that group are of less moral worth has committed a wrong that deserves correction and punishment. But employment discrimination law has not been limited to irrational, animus-based exclusion; instead, it extends to rational reliance on customer preferences and statistical generalizations, use of job requirements that serve as occupational barriers to historically subordinated groups, and failure to provide reasonable accommodations to employees or applicants with known disabilities. The tension between the paradigmatic view of


Indeed, it may be most useful to rework the terminology to capture the forms of discrimination that can result from employers' structures and practices. We might, for example, distinguish "structural discrimination," defined here as the use of structures or institutional practices that facilitate discriminatory bias in workplace decisionmaking, see also Green, Discrimination in Workplace Dynamics, supra note 1 (using the term "discrimination in workplace dynamics"), from "construct discrimination," defined as the use of structures or institutional practices that do not facilitate discriminatory bias in workplace decisionmaking but that do nonetheless contribute to broader social inequality.

55. See Larry Alexander, What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies, 141 U. Pa. L. Rev. 149, 175 (1992) (describing animus-based discrimination as an "intrinsically immoral" act). This, of course, assumes that the employer is an individual or an organization capable of moral wrong. See infra notes 146-47 and accompanying text.

56. See City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978) (stating that, even if discrimination is "based on a sound and well-recognized business practice, it would nevertheless be discriminatory, and the defendant would be forced to assert an affirmative defense").


discrimination as the animus-driven employer and the reality that employment discrimination law seeks to address much more than animus-based exclusion has led to an emerging view that all (or almost all) of antidiscrimination law is inherently and exclusively distributive. In this Part, I pull back on that view. I argue that the existence of an employer wrong, animus-based or otherwise, that is independent of the wrong of contributing to social inequality distinguishes antidiscrimination from accommodation mandates.\(^{59}\)

A. A Meaningful Normative Divide: Costs and Employer Wrong

The Americans with Disabilities Act ("ADA"), with its express requirement in Title I that employers provide reasonable accommodation to individuals with disabilities, renewed a longstanding debate about the distinction between antidiscrimination and accommodation mandates.\(^{60}\) This debate has resulted in a recent scholarly move toward viewing all antidiscrimination law as wholly distributive, as nothing more than a policy decision to impose taxes on certain groups and to provide subsidies to others. In the employment context, the argument is that employment discrimination laws should be viewed as imposing a tax on employers for broader social goals (a tax that might be better imposed on governmental or other entities), and that protected groups should be viewed as receiving a subsidy for those broader social goals. Because this line of scholarship grows out of early efforts to distinguish antidiscrimination and accommodation

\(^{59}\) The terminology here is admittedly confusing, but it is sufficiently entrenched that I hesitate to create new terms. For clarification: the term "antidiscrimination law" is used here to refer to the umbrella of regulation of employer conduct regarding forbidden classifications. Antidiscrimination law, as I understand it, can include antidiscrimination mandates as well as accommodation mandates and, of course, a variety of regulatory schemes, legal rights-based or otherwise. The terms "antidiscrimination mandate" and "accommodation mandate," in contrast, refer to broad categories of regulation within antidiscrimination law, distinguished on the basis of normative underpinning. Within those categories sit specific regulatory schemes, such as an accommodation requirement or a prohibition on intentional, animus-based different treatment. These specific regulatory schemes can in some circumstances impose an accommodation mandate and in others circumstances an antidiscrimination mandate, depending upon whether the costs imposed by the mandate are tied to employer wrong in the workplace. In diagram form, the terminology looks like this:

Antidiscrimination Law (employment)

Normative foundation: Antidiscrimination Mandate—Accommodation Mandate

Regulatory scheme: accommodation requirement—prohibition on animus-based exclusion—
disparate impact—problem solving

\(^{60}\) Feminist scholars have long argued that antidiscrimination law must include an obligation to accommodate when it comes to pregnancy. E.g., Herma Hill Kay, Equality and Difference: The Case of Pregnancy, 1 BERKELEY WOMEN'S L.J. 1, 26-28 (1985).
mandates and subsequent critique of those efforts, it helps to start
with a brief review of that debate.

In the decade after the ADA's passage, commentators
overwhelmingly maintained that the obligation to provide reasonable
accommodation under Title I of the ADA was fundamentally distinct
from the obligation not to discriminate under Title VII of the Civil
Rights Act. Implicit in their arguments was a sense that employers
that refuse to provide disability-related accommodations are not
discriminating per se but rather are responding rationally to the
added cost of those accommodations. According to these scholars, the
ADA's obligation to accommodate, unlike Title VII's obligation not to
discriminate, requires that employers go beyond what "even a
perfectly competitive market would afford." Professor Mark Kelman
has provided one of the more extensive arguments along these lines.
In his article, Market Discrimination, he argues that capitalist
rationality distinguishes "simple discrimination" from requests for
accommodation. For Kelman, refusals to accommodate stand apart
from acts of simple discrimination because they are based on

61. See, e.g., Pamela S. Karlan & George Rutherglen, Disabilities, Discrimination, and
Reasonable Accommodation, 46 DUKE L.J. 1, 41 (1996) (stating that the ADA's reasonable
accommodation requirement sets the ADA "profound[ly]" apart from Title VII); Linda Hamilton
Krieger, supra note 53, at 3 ("The ADA incorporated a profoundly different model of equality
from that associated with traditional non-discrimination statutes like Title VII of the Civil
Rights Act of 1964.").

62. See, e.g., John J. Donohue III, Employment Discrimination Law in Perspective: Three
Concepts of Equality, 92 MICH. L. REV. 2583, 2585-86 (1994) (describing the reasonable
accommodation requirement of the ADA as a "constructed equality" regime that involves "an
effort to go beyond the protections that even a perfectly competitive market would afford"); Samuel Issacharoff & Justin Nelson, Discrimination with a Difference: Can Employment
Discrimination Law Accommodate the Americans with Disabilities Act?, 79 N.C. L. REV. 307, 315-
16 (2000) (arguing that the ADA "marks a... departure" from Title VII, even its disparate
impact branch, because "the claim... is not that employers are enslaved to irrational
preconceptions, but that even if the preconceptions reflect actual productivity, there is an
independent duty to accommodate a disabled candidate"); Mark Kelman, Market Discrimination
and Groups, 53 STAN. L. REV. 833, 834 (2000) (arguing that capitalist rationality distinguishes
"simple discrimination" from accommodation); Stewart J. Schwab & Steven L. Willborn,
(arguing that the ADA "extends beyond the Title VII models" because it "requires employers to
accommodate individuals with disabilities even though they cost more to employ than others or
are able to produce less"); see also Stein, supra note 4, at 616 (describing scholars of the
"canonical" framework as believing "that as a by-product of capitalistic rationality, excluding
disabled employees on economic efficiency grounds does not raise the same ethical issues of
wrongdoing as does irrational omission of other workers").

63. Donohue, supra note 62, at 2586.

64. See Kelman, supra note 62, at 892 ("Broadly speaking, the plaintiff seeking to block
simple discrimination asks to be treated no worse than others who are equivalent sources of
money. ... [T]he plaintiff seeking an accommodation wants the seller or employer to ignore the
input costs associated with generating a certain level of gross receipts or gross outputs... ").
impersonal, capitalist calculations about the costs involved. And, because those costs are just one part of a bigger social fisc, accommodation claims, according to Kelman, require distributive justifications that simple discrimination claims do not. As Kelman explains, “Accommodation claims are best conceived of as zero-sum, distributive claims to a finite pot of redistributed social resources, competing not only with the demands of others who seek accommodation (or the wishes of putative defendants) but with all claimants on state resources.”

At about the same time that Kelman and others stressed the difference between traditional antidiscrimination law under Title VII of the Civil Rights Act and the accommodation requirement of the ADA, scholars began to revisit earlier assumptions about the costs imposed by traditional antidiscrimination laws. In her influential article, Antidiscrimination and Accommodation, Professor Christine Jolls called into question the cost-based distinction between the ADA’s accommodation requirement and Title VII’s prohibition on discrimination. Specifically, she pointed out that in some circumstances the disparate impact theory of Title VII “requires employers to incur special costs in response to the distinctive needs (as measured against existing market structures) of particular, identifiable demographic groups of employees,” just as the ADA accommodation requirement does. To use her example, a disparate impact challenge to an employer’s no-beard policy for pizza deliverers, based on the fact that twenty percent of customers would “react negatively to a delivery man wearing a beard,” imposes an economic cost in the form of lost business or lower prices. Similarly, prohibitions on employer discrimination in response to discriminatory

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65. See id. at 841 (“A person suffers from simple discrimination insofar as an employer . . . fails to treat him ‘impersonally’ . . . [or] insofar as he treats the plaintiff employee or job applicant worse than he treats statistically typical employees or applicants whose net marginal product is no higher.”); id. at 836 n.8 (“It is linguistically awkward to think of the defendant in a simple discrimination suit as “expending” any “resources” when he ceases discriminating against the plaintiff, while it is perfectly comprehensible to speak of the accommodating defendant as expending resources to meeting the plaintiff’s demands.”).

66. Kelman includes disparate impact theory within his simple discrimination category, leaving only the ADA accommodation requirement in the distributive camp. See id. at 891 n.86.


68. Id. at 648 (defining accommodation as a “legal rule that requires employers to incur special costs in response to the distinctive needs (as measured against existing market structures) of particular, identifiable demographic groups of employees, such as individuals with (observable) disabilities, and imposes this requirement in circumstances in which the employer has no intention of treating the group in question differently on the basis of group membership (or ‘discriminating against’ the group in the canonical sense”).

69. Id. at 653-56 (citing Bradley v. Pizzaco of Nebraska, Inc., 939 F.2d 610, 799 (8th Cir. 1991)).
preferences of customers or coworkers, as well as prohibitions on employer reliance on statistical generalizations, impose real financial costs on employers, just as requirements of accommodation do. 70

Professor Bagenstos soon picked up where Professor Jolls left off by challenging the normative vision underlying commentators' distinction between antidiscrimination and accommodation: "that the nonaccommodating employer's pursuit of the proper goal of profit maximization makes him less worthy of moral condemnation, and consequently less appropriately subject to stringent regulation, than the discriminating employer." 71 Antidiscrimination laws have always prohibited rational conduct by employers, argued Bagenstos; indeed, he made a persuasive case that antidiscrimination and accommodation mandates cannot be distinguished on the basis of the costs that they impose. Professor Bagenstos also argued, in this and his earlier work, that traditional antidiscrimination laws and the ADA share a common goal of antisubordination, or social equality. In some respects, this argument mirrored one being made in the traditional civil rights context as scholars struggled to understand the norm of colorblindness and its relationship to the antidiscrimination project, and it holds particular appeal with disability rights scholars who have argued that the ADA's accommodation requirement fits within larger equality ideals. 72 But while most scholars, including Jolls, drew on the similarities between traditional antidiscrimination laws and the ADA to argue for the ADA's legitimacy as an antidiscrimination law, Professor Bagenstos used it to question the normative foundation of all antidiscrimination law. According to Bagenstos, the fact that antidiscrimination and accommodation mandates cannot be distinguished on the basis of the costs imposed, together with the fact that all antidiscrimination laws share a common goal of social equality, 73 means that there is no fundamental normative difference between antidiscrimination and accommodation mandates, and that antidiscrimination and accommodation mandates alike "must be

70. Id. at 686-87; see also Samuel R. Bagenstos, Subordination, Stigma, and "Disability," 86 VA. L. REV. 397, 456-57, 457 n.223 (2000) (discussing the costs imposed by prohibition of forms of "rational" discrimination).

71. Bagenstos, supra note 4, at 830.


73. Professor Bagenstos makes this argument in Rational Discrimination and in an earlier article, Subordination, Stigma & "Disability." See Bagenstos, supra note 4, at 839 (arguing that antidiscrimination requirement of Title VII and accommodation requirement of ADA share common goal of "dismantl[ing] patterns of group-based social subordination"); Bagenstos, supra note 70, at 452-61 (arguing for an antisubordination approach to all civil rights laws).
justified in a manner that takes full account of the incidence and distributive effects of their implicit taxes and subsidies.”

Professor Richard Ford presents a variation on this theme in his recent book, *Racial Culture*. Professor Ford spends much of the book developing a trenchant examination of the dangers posed by arguments for a legal right to be free from employer demands to assimilate. In the last chapter, however, he proposes a Coasian, joint-costs approach to the analysis of antidiscrimination law, including employment discrimination laws, under which the costs of regulation are weighed against the costs of nonregulation to determine whether to regulate. According to Ford, this Coasian approach pushes us to consider the nature of the imposed costs—whether “hard” or “soft”—and to see employees as well as employers as actors who can change their behavior to alleviate those costs. Moreover, argues Ford, a joint costs analysis facilitates consideration of the cost imposed by legal rights on other employees within the group being protected and, accordingly, on the group as a whole.

On some level, Professors Bagenstos and Ford must be right. If the end goal of antidiscrimination law as a whole is to increase social equality for groups that have been historically subjected to stigma and subordination, then one must consider the possibility that particular

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74. Bagenstos, supra note 4, at 921. This is the danger of advocating an antisubordination theory of discrimination without attention to the normative implications of that move. See, e.g., Brake, supra note 4, at 21 (arguing that “[t]heorizing retaliation as a form of discrimination” is useful because it “requires moving beyond discrimination law’s current dominant framework of status-based differential treatment and toward a broader conception that views discrimination as the maintenance of race and gender privilege”).

75. FORD, supra note 7, at 171.

76. See id. at 169-209. Professor Ford begins the chapter with a quote from Mark Kelman & Gillian Lester’s book, *Jumping the Queue*, suggesting that Ford believes that right-to-difference proponents are “claim-hopping on the (ideological) backs of instances of genuine victimization.” Id. at 169 (quoting MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES 226 (1997)). But Professor Ford’s reliance on Kelman and Lester’s work here is puzzling, for he does not seem to think that right-to-difference proposals serve as tax-and-spend mechanisms in the way that Kelman and Lester think that the ADA’s accommodation mandate does. Instead, his argument is that a joint-costs analysis weighs against recognizing a legal right to difference in employment discrimination law.

77. See id. at 174 (“By looking at the problem as one of joint costs, we can see that both parties are potentially empowered to affect the outcome.”). In considering the costs imposed on individuals for changing their “mutable” behaviors and traits, Professor Ford focuses exclusively on what he calls the “soft” costs associated with identity. See id. at 174-75 (contrasting “hard,” or objective, costs with “soft,” or subjective and nonmonetary, costs). But see Green, *Work Culture*, supra note 1, at 650-53 (examining both the objective and subjective harms associated with employer demands to assimilate along a white, male norm).

78. See FORD, supra note 7, at 177 (“Rights-to-difference will function to regulate members of the group they purport to protect, effectively requiring them to bear some of the costs of rights assertion whether they like it or not.”).
antidiscrimination requirements, and the costs imposed by those requirements, fail to translate into greater social equality. This is why empirical work on the effect of employment discrimination laws on the employment of women, racial minorities, and individuals with disabilities is so important.\textsuperscript{79} It shows us whether the methods that we have adopted serve to further or undermine the broader goal.

But Professor Bagenstos is wrong to suggest that there is no fundamental normative difference between antidiscrimination and accommodation mandates in a particular context, like employment.\textsuperscript{80} There is no question that antidiscrimination laws, including those regulating employment discrimination, aim to achieve social equality. As a number of scholars have shown, it is difficult, if not impossible, to understand antidiscrimination laws without reference to broader social goals.\textsuperscript{81} But employment discrimination laws achieve the end of social equality, for the most part, by imposing burdens on employers for their own wrongful treatment of individuals in the workplace; in other words, by imposing antidiscrimination mandates. Only when employment discrimination laws seek to achieve social equality by imposing costs on employers that cannot be tied to employer wrong in the workplace do the laws stand or fall on the strength of their distributive claims.\textsuperscript{82} Scholars who miss this distinction cast aside the fault-based component of much of antidiscrimination law.

\textsuperscript{79} See, e.g., The Decline in Employment of People with Disabilities: A Policy Puzzle (David C. Stapleton & Richard V. Burkhauser eds., 2003) (exploring various explanations for the decline in employment among the working-aged disabled population); Christine Jolls, Identifying the Effects of the Americans with Disabilities Act Using State-law Variation: Preliminary Evidence on Educational Participation Effects, 94 AM. ECON. REV. 447 (2004) (providing evidence that the ADA caused a greater increase in educational opportunities for disabled individuals in states where the statute was a substantial innovation).

\textsuperscript{80} Bagenstos's failure to see the normative distinction leads him to his assumption that a structural approach aims to impose costs for society's wrongs. See infra Part III. He makes a similar claim in the ADA context. See Bagenstos, supra note 52 (arguing that the employment title of the ADA aimed to increase employment of individuals with disabilities by imposing costs associated with larger societal barriers on employers).

\textsuperscript{81} See Jack M. Balkin & Reva B. Siegel, The American Civil Rights Tradition: Anticlassification or Antisubordination?, 58 U. MIAMI L. REV. 9, 10 (2003) (arguing that "antisubordination values have shaped the historical development of anticlassification understandings"); Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown, 117 HARV. L. REV. 1470, 1477 (2004) (arguing that "antisubordination values live at the root of the anticlassification principle"); see also Robert Post, Prejudicial Appearances: The Logic of American Antidiscrimination Law, 88 CAL. L. REV. 1, 17 (2000) (arguing that antidiscrimination law should be understood "as a social practice, which regulates other social practices").

\textsuperscript{82} I agree with those scholars who argue that regulated conduct in this area falls on a continuum, e.g., J.H. Verkerke, Disaggregating Antidiscrimination and Accommodation, 44 WM. & MARY L. REV. 1385, 1401-02 (2003), but the distinction between antidiscrimination and
In much the same way, a Coasian “joint-cost” analysis like that proposed by Professor Ford, although helpful for its ability to bring costs into focus, risks casting an employer’s act of discrimination as nothing more than a violation of rules of efficiency. Antidiscrimination law under this account does not correct for, punish, or deter wrongs; it distributes costs. Of course, it is possible to bring justice concerns back in, as Professor Ford’s analysis reflects, but a Coasian approach nonetheless suggests that the policy decision whether to impose costs on employers can be made without considering whether the costs imposed are tied to specific employers’ wrongs in the workplace, or whether they instead must be justified more broadly, independent of those wrongs, as a means of furthering social justice.

In *A Structural Turn*, in fact, Professor Bagenstos describes the political resistance to employment discrimination laws that impose costs absent employer wrong, without recognizing that that political resistance maps onto a meaningful normative divide between antidiscrimination and accommodation mandates. According to Professor Bagenstos, the limits of antidiscrimination law are defined by one of two competing purposes: social equality (sometimes called a theory of “antisubordination”) or punishment and correction for moral wrongs (commonly understood as a theory of “antidiscrimination”). I submit that these two purposes are concurrent and overlapping rather than competing, at least for antidiscrimination mandates. In other words, even if we were to achieve broader social equality, we would be likely to retain antidiscrimination mandates, both to compensate for harm to individuals and to deter employers from engaging in wrongful acts that have the potential of returning us to the segregation and subordination of the nation’s past. We would be less likely, however, to accommodation mandates is nonetheless important, both normatively and politically. See infra Part III.

83. See *Ford*, supra note 7, at 176 (arguing that all antidiscrimination law allocates social costs, but recognizing that “it is appropriate to require potential discriminators to bear these costs”).

84. Professor Bagenstos does use the word “normative” to describe the divide, *Bagenstos*, supra note 2, at 4, but, given his other work, I suspect that he would not consider the divide a “meaningful” one. Instead, he sees the normative foundation of all antidiscrimination law as one of moral obligation not to contribute to social and economic subordination in society. See *Bagenstos*, supra note 4, at 837-38.

85. *Bagenstos*, supra note 2, at 40-41.

retain accommodation mandates, for those mandates are imposed exclusively to achieve social equality.87

The immediate challenge—both normative and political—for a structural approach to employment discrimination law, then, lies not in accounting for imposition of costs or justifying employer-based subsidies, but in locating employer wrong. Existing antidiscrimination doctrine largely fits this account, and where it does not, without some alternative justification for maintaining the imposition of cost, courts are likely to balk (or to reframe it so that it does).88 In the next Section, I trace existing antidiscrimination doctrine under Title VII of the Civil Rights Act and Title I of the ADA to map the divide I have outlined between antidiscrimination and accommodation mandates. This examination, drawing extensively on Professor Jolls’s cost-based insights, reveals two circumstances in which existing employment discrimination law imposes an accommodation mandate, and uncovers advocates’ efforts to justify imposing costs in those circumstances.

B. Locating Employer Wrong in Existing Employment Discrimination Law

Existing employment discrimination law largely mirrors the normative divide that I have identified between antidiscrimination and accommodation mandates. When the law imposes costs absent

87. See Alfred W. Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 MICH. L. REV. 59, 106 (1972) ("We will revert back toward evil-motive and equal-treatment concepts of discrimination when the social system operates in a fairer way."). If we were to achieve social equality and to maintain it for some number of years, it is possible that we would no longer impose antidiscrimination mandates (just as we do not prohibit discrimination based on hair color or shoe size).

This view roughly parallels the philosophical concepts of corrective and distributive justice, with corrective justice focusing on wrongs done to others and distributive justice on a just and equitable distribution of wealth and power. ARISTOTLE, NICOMACHEAN ETHICS 115-23 (Martin Ostwald trans., 1962); Peter Benson, The Basis of Corrective Justice and Its Relation to Distributive Justice, 77 IOWA L. REV. 515, 515-16 (1992) (questioning whether corrective and distributive justice are wholly unrelated and, if so, whether the two concepts are reconcilable).

The concept of corrective justice has been used to refer broadly to efforts to correct present effects of past wrongs as well as to efforts to correct for society’s wrongs. E.g., Paul Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 COLUM. L. REV. 728, 731-32 (1986). I use the term “corrective” here to refer to laws that are aimed at redressing (and prohibiting) an employer’s wrong committed against individuals in the workplace. By arguing that antidiscrimination mandates obtain normative strength from their corrective focus, however, I do not mean to suggest that distributive concerns are not implicated. For a recent argument that distributive ideals should inform calculation of damage awards in the tort context, see Martha Chamallas, Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss, 38 LOY. L.A. L. REV. 1435 (2005).

88. Professor Bagenstos recognizes this much in A Structural Turn, but nonetheless misunderstands the goals of a structural approach. See infra Part III.
employer wrong in the workplace, it faces greater political resistance and requires a distributive justification for imposing the costs on employers rather than on governmental or other entities. Existing employment discrimination laws impose accommodation mandates in two circumstances, one involving disparate impact liability and the other involving liability for failure to accommodate a disability or other protected characteristic or behavior.

1. Disparate Treatment Liability

Disparate treatment theory imposes liability on an employer when that employer is shown to have intentionally disfavored individuals based on their membership in a protected group.\(^8\) In addition to holding employers liable for express policies, disparate treatment theory holds employers liable for pervasive patterns or practices of segregation and subordination that give rise to an inference of intent.\(^9\) With its focus on intent, disparate treatment theory has long been understood to present the paradigmatic picture of discrimination as the product of animus against or conscious reliance on irrational stereotypes concerning members of particular groups. Costs imposed by disparate treatment liability are justified by the employer's commitment of, as Professor Larry Alexander puts it, an "intrinsically morally wrong" act.\(^9\) Disparate treatment law therefore imposes an antidiscrimination mandate. The employer who purposefully excludes members of certain groups based on its view that members of that group are of less moral worth has committed a wrong that deserves correction and punishment.

The definition of "intent," of course, is the subject of substantial debate, and my aim in this Article is not to redefine the meaning of intent in disparate treatment theory doctrine. It is enough, for now at least, to recognize that intentional discrimination as traditionally understood has not been limited to animus-based exclusion, and that, even when the cases involve individual rather than systemic disparate

89. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 153 (2000) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.").

90. In "pattern or practice" cases, significant disparities between the makeup of the employer's workforce and the makeup of the pool from which the employer draws its employees is evidence of intentional discrimination because, absent explanation, "it is ordinarily to be expected that nondiscriminatory hiring [and promotion] practices will in time result in a work force more or less representative of the racial and ethnic composition of the populating in the community from which the employees are [drawn]." Int'l Bhd. Of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

91. Alexander, supra note 55, at 158-59 (describing an "intrinsically wrong" act of discrimination as one that judges others incorrectly "to be of less moral worth").
treatment and the employer’s liability is vicarious rather than direct, the moral wrong of the employer has gone largely unquestioned.\textsuperscript{92}

2. Disparate Impact Liability

Rather than expressly searching for intent, disparate impact theory imposes liability on an employer when it is shown that the employer uses an employment practice that has a disparate impact on a group with protected characteristics and when the employer cannot show that the use of that practice is job related and consistent with business necessity.\textsuperscript{93} In some circumstances, disparate impact theory imposes an antidiscrimination mandate; in others, it imposes an accommodation mandate.

When disparate impact theory roots out employer intent to discriminate, it imposes an antidiscrimination mandate.\textsuperscript{94} Griggs v. Duke Power Co., the first Supreme Court case to recognize disparate impact theory as a theory of discrimination under Title VII, provides a good example.\textsuperscript{95} Although the district court in the case found no intent to discriminate, and the Supreme Court did not question that finding, the facts of Griggs suggest otherwise.\textsuperscript{96} The case involved a claim by a black plaintiff against an employer with a history of blatantly exclusionary practices under which black employees were restricted to the Labor Department, one of five departments at the power station.

\textsuperscript{92} One notable exception is in the Fourth Circuit. See, e.g., Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 291 (4th Cir. 2004) (holding that an employer cannot be held liable for the biased action of a subordinate to the ultimate decisionmaker, even if that subordinate’s bias played a “significant” role in the employment decision); cf. EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476 (10th Cir. 2006) (holding that an employer can be held liable for the biased action of a subordinate to the ultimate decisionmaker if the employee shows that the subordinate’s biased action “caused” the employment decision), cert. granted, 127 S. Ct. 852 (2007), cert. dismissed, 127 S. Ct. 931 (2007) (upon settlement).

\textsuperscript{93} 42 U.S.C. § 2000e-2(k)(1)(A) (1991). Although historically associated with race- and sex-discrimination under Title VII, and now expressly incorporated into that statute, supra, disparate impact liability is available in other contexts. See Smith v. City of Jackson, 544 U.S. 228 (2005) (holding that disparate impact claims can be brought under the ADEA); Raytheon Co. v. Hernandez, 540 U.S. 44, 51 (2003) (holding that disparate impact claims can be brought under the ADA). For an argument that disparate impact theory should be used more widely in the disability context, see Michael Ashley Stein & Michael E. Waterstone, Disability, Disparate Impact, and Class Actions, 56 DUKE L.J. 861 (2006).

\textsuperscript{94} The employer is blameworthy in this scenario because it intends to exclude members of certain groups, judging members of that group to be of less moral worth. See Alexander, supra note 55. The reverse, however, is not always true. Lack of intent, in other words, does not necessarily lead to lack of blameworthiness. See infra Part IIIB.


\textsuperscript{96} The Court relied on Duke Power’s willingness to pay some of the education costs for those who sought to finish high school as evidence of nonintent. Id. at 432.
run by Duke Power Co.\textsuperscript{97} Following the passage of the Civil Rights Act—indeed, on the same date that Title VII was to become effective—Duke Power replaced its express exclusionary practices with two facially neutral job requirements for non-Labor jobs: a high school diploma and a satisfactory score on two standardized aptitude tests.\textsuperscript{98} Workers in the previously all-white departments who did not have high school diplomas continued to work in those departments and to achieve promotions.\textsuperscript{99} The timing and nature of the new job requirements, together with the lack of legitimate business reason for their adoption, lead one to suspect that Duke Power turned to requirements that were generally known to have a significant racial impact as a way of maintaining its segregated workforce.\textsuperscript{100} Disparate impact liability in these circumstances imposes an antidiscrimination mandate, for costs imposed are tied to the employer’s moral wrong of intending to exclude members of a certain race.\textsuperscript{101}

Although \textit{Griggs} and many other early cases can be read to support this rooting-out rationale for disparate impact liability, the Civil Rights Act of 1991, as Professor Jolls points out, gives disparate impact liability a much broader scope.\textsuperscript{102} A brief background on the case law leading up to the 1991 Act illustrates this point.

In the late 1980s, when the Supreme Court held that disparate impact theory could be applied to subjective decisionmaking practices as well as to objective job requirements like those at issue in \textit{Griggs}

\textsuperscript{97} Id. at 426-27.

\textsuperscript{98} Id. at 427-28. Prior to the Act’s passage, Duke Power required a high school diploma for all non-labor positions, but Black employees with high school diplomas were still employed only in the labor department. Blumrosen, \textit{supra} note 87, at 64. After the Act’s passage, Duke Power extended the high school diploma requirement to all positions. \textit{Id.} at 65. For initial employment in the previously all-white departments, Duke Power required a high school diploma and passage of two aptitude tests. \textit{Id.} For transfer between departments, Duke Power required a high school diploma or passage of the two tests. \textit{Id.} Similarly, many of the early disparate impact cases involved seniority and transfer systems that locked in the effects of past blatant discriminatory practices. \textit{E.g.}, Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 983 (5th Cir. 1969).

\textsuperscript{99} Griggs, 401 U.S. at 427.


\textsuperscript{101} See George Rutherglen, \textit{Disparate Impact Under Title VII: An Objective Theory of Discrimination}, 73 VA. L. REV. 1297, 1299-1311 (1987) (arguing, before congressional amendment of Title VII in 1991, that the smoking-out rationale is the only defensible basis for disparate impact theory). Some might argue that it is problematic to use disparate impact theory in this way, because it requires a lesser showing of intent, but if it captures those cases in which the employer did intend to exclude, it nonetheless serves as an antidiscrimination mandate.

\textsuperscript{102} Jolls, \textit{supra} note 67, at 665-66.
and other earlier cases, Justice O'Connor, in a plurality opinion, argued that employers need only offer “legitimate business reasons” for the challenged practice in order to avoid liability.\textsuperscript{103} The following year, in \textit{Wards Cove Packing Co. v. Atonio}, Justice O'Connor attained a majority for her position, and the Court held that the “dispositive issue” for purposes of determining business necessity was “whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.”\textsuperscript{104} Although a “mere insubstantial justification will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices,” the challenged practice, according to the Court, need not be “‘essential’ or ‘indispensable’ to the employer’s business for it to pass muster.”\textsuperscript{105} Congress responded to \textit{Wards Cove} in the Civil Rights Act of 1991.\textsuperscript{106} There, it adopted the language “business necessity” and supplied an interpretive memorandum accompanying the relevant portion of the act, which states that “business necessity” is “intended to reflect the concepts enunciated in the Supreme Court in \textit{Griggs v. Duke Power Co.}, and in other Supreme Court decisions prior to \textit{Wards Cove Packing Co. v. Atonio.”}\textsuperscript{107}

As Professor Jolls illustrates, when disparate impact theory imposes liability in cases in which the employer lacks a legitimate business reason for adopting the requirement, it is reasonable to infer that the employer acted intentionally, and disparate impact theory imposes an antidiscrimination requirement.\textsuperscript{108} When disparate impact theory imposes liability in cases in which the employer had a legitimate business reason for adopting the requirement but could not meet the business necessity standard, in contrast, it imposes an accommodation mandate.\textsuperscript{109}

\begin{thebibliography}{99}
\footnotesize
\item 105. Id.
\item 107. 137 CONG. REC. 28,2680 (1991). The memorandum also provides that the interpretive memorandum is the only source of legislative history that may be “relied upon in any way” in interpreting the business necessity requirement. \textit{Id.}
\item 108. Jolls, \textit{supra} note 67, at 647.
\end{thebibliography}
Although Jolls does not put it this way, the law in this latter circumstance requires the employer to bear a cost that is not tied to its own wrongdoing. A simple variation on Griggs provides a basic example. In the real case, the Court held that the employer had provided no empirically supported business justification for its use of a high school diploma requirement (and, as discussed above, although the Court does not expressly rely on it, there was evidence that might have supported an inference of intent on the part of the employer in that case). If, however, the employer had provided a business justification showing some correlation between attainment of a high school diploma and success in the jobs in question, although not one sufficient to meet the business necessity requirement, then to hold the employer liable would impose a cost on the employer tied not to the employer's wrongdoing but to society's longtime segregation and subordination of African Americans in high school education.

Indeed, much of the rhetoric in Griggs suggests the Supreme Court's intention to impose an accommodation mandate as a way of breaking down barriers to employment, regardless of any wrongdoing on the part of the employer. According to the Court, "Congress has now required that the posture and condition of the job-seeker be taken into account." And, consistent with this view, most commentators characterize disparate impact theory as a unique civil rights vision that furthers a "[g]roup interest in seeing that its members are not harmed in employment because of discrimination elsewhere in society." In practice, of course, the line between disparate impact liability as antidiscrimination mandate and disparate impact liability


112. See generally JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM 55-61 (1986) (describing the social forces that render "screening" mechanisms, like the high school diploma requirement in Griggs, barriers to employment for certain groups). The wrong of the employer in this circumstance can only be framed in terms of broader social inequality: the use of job requirements that perpetuate workplace segregation, social stigma, and subordination of Blacks. See infra Part III.


114. E.g., Belton, supra note 100, at 471-72 (describing Griggs as part of a litigation strategy to broaden the meaning of discrimination and to "reshape the contours of the debate about equality"); Blumrosen, supra note 87, at 67; id. at 69-71 (describing the development of a definition of discrimination that would "relate ... more closely to the social problems that had generated the enactment of the Civil Rights Act of 1964"). This rationale also explains, at least in part, the Supreme Court's hesitancy to read a similar mandate into the Equal Protection Clause. It does not explain, however, why the Court has read "intent" as narrowly as it has.
as accommodation mandate is not easily drawn, and that fact may serve as a strong justification for a stringent business necessity requirement and, accordingly, a more sweeping scope of disparate impact liability. As Professor Jolls explains, "[I]t is entirely obvious that employers would often be able to come up with some sort of legitimate business ground for their practices even when their motives are in fact discriminatory."\footnote{115. Jolls, \textit{supra} note 67, at 676.} A broader disparate impact liability, in this view, is needed to "police underlying intentional discrimination effectively."\footnote{116. \textit{Id.} at 675.}

It may also be possible to justify a more sweeping disparate impact liability by reaching to the broader goal of social equality, as many scholars have done. According to this view, the cost imposed on employers is justified not because it is tied to employer wrong but because it is the best way to further the goal of eliminating group stigma and subordination in society.\footnote{117. It is possible to rephrase this argument in terms of employer wrong. \textit{See, e.g.}, Bagenstos, \textit{supra} note 4, at 858 ("Individual employers have a moral obligation to avoid contributing to [a system of subordination and occupational segregation] because they are the only ones who can take effective action against it...."). The rephrasing highlights the employer's role in creating and maintaining social inequality, but the wrong nonetheless inheres solely in societal inequality.} One might argue, for example, that disparate impact liability in a case like \textit{Griggs} is justifiable because it serves to remove longstanding barriers to people of color in the workforce. This justification, however, requires at least some consideration of whether other groups (other than employers) might better bear that cost.\footnote{118. There may, of course, be policy differences among accommodation mandates. The United States government does not have a policy of providing social welfare to African Americans or women or other protected groups who face barriers that operate to "freeze the status quo" of inequality or segregation (unless those individuals fall below the poverty line or are eligible for unemployment). The government does, however, have a longstanding policy of providing extra benefits for disability-related unemployment.}

At the least, it should be clear from this discussion that disparate impact liability in the latter circumstance, in the absence of evidence of intent and in the face of a legitimate business reason for using the neutrally applied practice, requires some justification for imposing costs on the employer, rather than on some other entity, whereas disparate impact liability in the former circumstance, while open to empirical critique if it does not result in greater social equality, does not. Of particular importance to the antidiscrimination project, moreover, disparate impact liability in the latter circumstance is likely to (and currently does) face greater political resistance than disparate impact liability in the former. Courts have been largely
unreceptive to broad use of disparate impact theory, and a robust social antisubordination theory as the sole rationale for imposing costs on employers has been less than wholly accepted.

3. Reasonable Accommodation Liability

In addition to imposing liability under the well-known theories of disparate treatment and disparate impact, Title I of the ADA imposes liability on an employer when it is shown that the employer failed to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability,” unless the employer shows that the accommodation would impose an undue hardship on the operation of its business. Like disparate impact liability, this reasonable accommodation requirement can, in some circumstances, impose an antidiscrimination mandate, but in other circumstances it imposes an accommodation mandate.

Specifically, the accommodation requirement of the ADA can offset discriminatory bias and put individuals with disabilities on equal footing with their similarly situated counterparts. At least some case law suggests that employers regularly accommodate nondisabled employees in various ways, but that those same employers frequently will not provide similar accommodations to disabled employees. An employer might, for example, permit nondisabled employees to arrive late to work because of a routine doctor’s appointment without any


121. See Bagenstos, supra note 4, at 867-68 & n.135-36 (citing sources); Bagenstos, supra note 2, at 16-17 (noting that accommodation requests to employers from disabled employees are often seen as “unfair demand[s] for a special privilege”); Robert L. Burgdorf, Jr., “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 530-33 (1997) (arguing that employers regularly make accommodations based on assumptions about employee characteristics, and that these accommodations could just as easily be based on the characteristics of disabled employees).

A similar bias has been identified in the gender and race context. See Joan C. Williams, The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense, 7 EMP. RTS. & EMP. POL’Y J. 401, 415-16 (2003) (describing a “leniency bias” that advantages the in-group).
thought of "accommodation," but view a disabled employee's request to arrive late for a reason associated with her disability as a request for "special treatment." Similarly, an employer might provide additional book shelves, flat-screen computer monitors, or docking stations for laptops to nondisabled employees upon request, but refuse a disabled employee's request for an accessible desk or chair. In these cases, the requirement that employers provide reasonable accommodations is little more than a method of requiring equal treatment. The employer is held liable when it fails to provide accommodations to disabled individuals that it would provide to nondisabled individuals.

In other circumstances, however, the reasonable accommodation requirement imposes costs on employers that are not as easily tied to employer wrongdoing to individuals in the workplace. When, for example, an employer is required to provide an interpreter to facilitate communication between a severely hearing-impaired employee and other employees, the ADA exacts a cost not unlike the cost exacted in the disparate impact accommodation mandate circumstance described earlier. The employer in this case bears a cost for society's construction of a dominant communication system that excludes severely hearing-impaired people. Similarly, when an employer is required to retrofit a building to support wheelchairs, the employer bears a cost for society's reliance on building standards that exclude people who cannot climb stairs.

Again, like with the disparate impact accommodation mandate, the line between accommodation requirement as antidiscrimination mandate and accommodation requirement as accommodation mandate is not always easy to draw in practice. Moreover, there may be strong social justice and distributive reasons why antidiscrimination law, and specifically employment discrimination law, should include an accommodation mandate for individuals with disabilities. Professor Michael Stein's recent argument that the reasonable accommodation requirement of the ADA should be "grounded in equality theory" is

122. I draw these examples from Bagenstos and Burgdorf. Bagenstos, supra note 2, at 17; Burgdorf, supra note 121, at 530-32. I should note that Professor Burgdorff goes further, arguing that office features that are designed with nondisabled individuals in mind are "accommodations" much like the accommodations required for disabled individuals under the ADA. Burgdorf, supra note 121, at 531-33.

123. Although Professor Bagenstos recognizes this parallel between the mandate imposed by the accommodation requirement of the ADA in this circumstance and the mandate imposed by a structural approach, Bagenstos, supra note 2, at 16-17, he overlooks the distinction between the mandate imposed in this circumstance (and the one imposed by a structural approach) and the mandate imposed when the employer is applying a standard or requirement, even one socially constructed with the nondisabled in mind, neutrally to disabled and nondisabled employees. See infra Part III.
best understood in this way. Professor Stein makes a compelling case that the ADA employment accommodation requirement is properly located within antidiscrimination law, where costs will be borne by employers rather than crafted as an explicit tax-and-spend program. Reaching to the end-goal of social justice, he argues that the ADA accommodation requirement “appropriately remedi[es] historical exclusion” of individuals with disabilities and that it achieves that goal by removing artificial barriers to employment at reasonable cost and by effectuating change in the societal perception towards the disabled. But, despite his assertions to the contrary, the very nature of Professor Stein’s argument, one that considers alternative, non-employer-based distributive approaches and justifies limits on costs to employers as a matter of fairness rather than solely in light of their implications for the end-goal of social equality, reveals that at some point the ADA reasonable accommodation requirement crosses over into the realm of accommodation mandate. At that point, it requires additional justification and analysis that is not required for antidiscrimination mandates tied to employer wrong.

Moreover, like with disparate impact, to the extent that the ADA has been viewed as a “social welfare” Act, it has met substantial political resistance. Many commentators read the Supreme Court’s exceedingly narrow definition of disability in that way. And, as

124. Stein, supra note 4, at 664. Professor Burgdorf’s argument that ADA accommodations are fair and reasonable is also best understood in this way. See Burgdorf, supra note 121, at 533 (describing reasonable accommodation for individuals with disabilities as a “method for eliminating discrimination that inheres in the planning and organization of societal opportunities based on expectations of certain physical and mental characteristics”).

125. Stein, supra note 4, at 602.

126. See id. at 649 (arguing that, “for reasons of both economic efficiency and prudential propriety, ADA accommodations are more properly allocated as an antidiscrimination device (whose costs are borne by employers) than as a subsidy program (where the expenses are paid for by the state)").

127. See id. at 585-97 (arguing that the ADA accommodation requirement should be viewed as a “pure” antidiscrimination provision); id. at 662 (denying that the ADA accommodation requirement is a “redistribution device”).

128. For an insightful discussion of the ADA’s requirement of consideration of the interests of nonclaimants as an example of how the ADA is consistent with communitarian theory, see Carlos A. Ball, Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law, 66 OHIO ST. L.J. 105, 157-64 (2005).

129. See, e.g., Mathew Diller, Judicial Backlash, the ADA, and the Civil Rights Model, 21 BERKELEY J. EMP. & LAB. L. 19, 23 (2000) (arguing that “the pattern of narrow and begrudging interpretations of the ADA derives from the fact that the courts do not fully grasp, let alone accept, the statute’s reliance on a civil rights model for addressing problems that people with disabilities face in the workplace”); Krieger, supra note 54, at 516 (noting that “the ADA’s definition of disability has come under such powerful narrowing pressure because people do not understand that the ADA is an anti-discrimination statute rather than an entitlement program”); see also Samuel R. Bagenstos, The Americans with Disabilities Act as Welfare Reform,
Professor Bagenstos has illustrated in his earlier work, courts and other regulatory institutions interpreting the ADA have construed the act narrowly in an effort to tie its requirements to employer wrong, even one broadly defined as a wrong of contributing to social inequality.\textsuperscript{130}

The political difficulty faced by disparate impact liability and failure-to-accommodate liability as well as the additional justification provided by scholars for including the theories within antidiscrimination law make more sense once one understands that each of those theories in some circumstances impose an accommodation mandate. In the next Part, I situate a structural approach, in contrast, as an antidiscrimination mandate.

III. SITUATING A STRUCTURAL APPROACH

Current pessimism concerning the political viability of a structural approach stems from the assumption that a structural approach aims to impose costs on employers for societal barriers to employment. According to Professor Bagenstos, for example, a structural approach to employment discrimination is analogous to an ADA requirement that employers provide home-based personal assistance to individuals with disabilities.\textsuperscript{131} Bagenstos's view is particularly extreme,\textsuperscript{132} but it reflects a more widely held concern that

\textsuperscript{130} Bagenstos, supra note 52, at 35-37 (describing the courts' and EEOC's interpretation of the accommodation requirement as limited to "job-related" rather than "personal" accommodations). The "job-related" rule, under which employers may be required to provide an accommodation that "specifically assists the individual in performing the duties of a particular job," but will not be required to provide "an adjustment or modification [that] assists the individual throughout his or her daily activities, on and off the job," 29 C.F.R. pt. 1630 app. § 1630.9 (2007), attempts to limit the employer's accommodation obligation to the obstacles that it erects to employment of people with disabilities. Imposing an obligation on employers to provide home-based personal assistance and transportation to work requires a different distributive justification than imposing an obligation on employers to install ramps in a building with stairs used or owned by the employer. When the employer is required to make changes to the work environment, it is being asked to reduce its contribution to social subordination and inequality. When it is asked to provide outside-of-work assistance, in contrast, it is being asked to alleviate social subordination and inequality directly. Although Professor Bagenstos rightly points out the "substantial indeterminacy" in the job-related rule as applied, Bagenstos, supra note 52, at 44-45, he misses this distinction and fails to recognize its relevance to the policy-based, distributive arguments for imposing these and other accommodation mandates on employers.

\textsuperscript{131} See Bagenstos, supra note 2, at 3-4 n.9; id. at 43.

\textsuperscript{132} Professor Bagenstos cannot be right when he says that a structural approach to employment discrimination law is analogous to an ADA requirement that employers provide home-based personal services, for that analogy ignores the descriptive reality, which he does not dispute, that structural discrimination is a problem of the interplay between individuals and
by diverging from the paradigmatic story of discrimination, a structural approach to employment discrimination law loses its normative force.

In this Part, I explore the normative underpinning of a structural approach that would impose an obligation on employers not to facilitate discriminatory decisionmaking in the workplace. Taking the normative and political divide between antidiscrimination and accommodation mandates as a starting point, I argue that a structural approach to employment discrimination law serves as an antidiscrimination mandate, imposing costs that are tied to employer wrong to individuals in the workplace. My argument is two-fold. In the first Section of this Part, I take a closer look at the circumstances described above in which existing antidiscrimination law imposes an accommodation mandate on employers, and I make the case that a structural approach is different from those uses of law because a structural approach imposes costs for a workplace wrong. Structural discrimination is a workplace wrong (as well as a societal wrong), I argue, because it violates the long-standing norm against employment decisions that are affected by protected group status or characteristics. This is so regardless of the state of mind of the employer or of the individual decisionmaker or decisionmakers involved. In the second Section of this Part, I then turn more explicitly to the question of fault. The empirical work that forms the foundation for a structural approach illustrates that employers, as organizational actors, are active, causal participants in the problem of structural discrimination. A structural approach translates this descriptive reality into normative obligation; it seeks to hold employers responsible for their role in the wrong of structural discrimination. This normative vision is workplace structures within which they work. As distributive measures, accommodation mandates require a policy determination that the employer is best situated to redress the particular social need. In most cases, the mandates are justified on the ground that the disadvantage suffered by members of the protected group can be tied to an act of the employer. Indeed, the existing accommodation mandate of the ADA has been justified by disability rights advocates in largely that way. Framed frequently in terms of the employer wrong of contributing to social inequality, the argument is that the design of the employer's facilities (and the employer's act either in designing the facilities or in choosing to move into the facilities), interacting with the inability of people who use wheelchairs to climb stairs, disadvantages individuals with disabilities in employment, and employers should therefore bear some reasonable cost in removing the barrier by redesign of its facilities. It is possible, however, to have a law that imposes costs on employers without tying the mandate to an employer act. The law could, for example, require that employers pay for home-based personal care for individuals with disabilities so that they can get up and ready for work in the morning. The courts' and the EEOC's adherence to a "job-related rule," supra note 130, illustrates the political difficulty in doing so, but it is a possibility. Even if a structural approach were an accommodation mandate, which I argue it is not, it would be an accommodation mandate of the former rather than the latter type.
consistent with law and scholarship concerning other forms of organizational wrongdoing. In addition, it finds support in existing Supreme Court case law and in empirical work on people's willingness to hold organizations responsible for wrongdoing that is caused, in part, by individuals. A structural approach to employment discrimination law, by seeking to hold employers responsible for the organizational role that they play in the different treatment of women and people of color in their workplaces, therefore holds greater political and normative traction than commentators have recognized. In the third Section of this Part, I reinforce this point by exploring how an expanded conception of a structural approach, to include employer facilitation of disadvantaging behavior by outsiders as well as facilitation of discriminatory bias in decisionmakers who act against outsiders, crosses over into an accommodation mandate.

A. Structural Discrimination as a Workplace Wrong

The normative foundation for a structural approach to employment discrimination law builds on the widespread understanding that it is morally wrong to treat equally situated employees differently because of race or other protected characteristics. The anticlassification principle, whether understood in light of larger antisubordination goals or not, remains a firmly rooted normative principle for most Americans.

133. See, e.g., Christine Jolls, Hands-Tying and the Age Discrimination in Employment Act, 74 Tex. L. Rev. 1813, 1813 (1996) ("Title VII's prohibitions on discrimination based on race, gender, religion, and national origin are typically justified on grounds other than economic efficiency. These prohibitions reflect, for many of us, a basic normative judgment that different outcomes for equally qualified employees of different races or other protected categories are simply wrong . . . ."). In this way, a structural approach builds most directly on a norm of what Professor Verkerke calls "negative equality," see Verkerke, supra note 82, at 1389 ("[T]he principle of negative equality bars specific grounds for employment decisions that the law deems illegitimate but otherwise leaves businesses free to manage their affairs as they wish.").

134. Scholars have made a strong argument that the anticlassification principle cannot be fully understood without reference to antisubordination. See, e.g., Jack M. Balkin, Plessy, Brown, and Grutter: A Play in Three Acts, 26 Cardozo L. Rev. 1689, 1711-12 (2005) (describing dangers of adhering to the anticlassification principle without reference to antisubordination); Balkin & Siegel, supra note 81, at 10 (arguing that "antisubordination values have shaped the historical development of anticlassification understandings"); Siegel, supra note 81, at 1477 (arguing that "antisubordination values live at the root of the anticlassification principle").

135. Although I am convinced that the anticlassification principle cannot (and should not) be understood without reference to antisubordination, see supra note 134, and that achievement of social equality requires more than formal equality, there is reason to believe that many Americans currently adhere to an anticlassification principle that does not take into account larger antisubordination goals. See Balkin, supra note 134, at 1711-12 (describing the palatability of the anticlassification principle for whites). Resolution of this issue is important for
Employment decisions that are tainted by implicit bias violate this norm against different treatment. This is true whether one takes an individualized or a structural approach to the problem of implicit bias. From an individual perspective, if an employment decision was infected by the racial biases of decisionmakers, that decision was affected by race. Similarly, from a structural perspective, if an employer has created an organizational context that facilitates racially discriminatory bias in workplace decisionmaking, even with a legitimate business reason for each of its structural choices, its individual employment decisions are likely to be affected by race.

Importantly, the wrongfulness of the action here does not depend on the state of mind of the employer or of any particular decisionmaker. To be denied employment opportunities on the basis of stereotypes or biases of workplace decisionmakers is to suffer an incommensurable moral wrong, regardless of whether the employer in structuring the workplace or the individual actors who acted on their biases intended to wrongfully discriminate. The actor's intent in making a decision influenced by discriminatory bias may be relevant to a judgment of the blameworthiness of the actor, but what makes the action itself wrongful is its violation of the anticlassification norm.

Unlike the costs imposed by accommodation mandates, therefore, the costs imposed by a structural approach to employment discrimination law are tied to a specific employment wrong: the wrong of biased employment decisions based on protected group status or characteristics. A structural approach is unquestionably concerned
defining the precise contours of the moral wrong, in particular for determining whether a member of a traditionally privileged group (i.e., a white male) suffers a wrong when race is a factor in workplace decisionmaking. However, because resolution of the issue is not necessary to the argument that I make in this Article, I leave it for another day.

136. This is not true of all actions—to murder, for example, is by definition to "kill wrongfully where part of what makes it wrongful derives from the culpable state of the actor"—but it does seem true of classification. Deborah Hellman, It's Not the Thought that Counts 10 (U. of Maryland Legal Studies Research Paper, No. 2005-43, 2005) available at http://ssrn.com/abstract=741245.

137. The employer is morally blameworthy, for example, if it adopts a job requirement that has the effect of screening out members of a protected group with the purpose of excluding members of that group. In this circumstance, the employer has wrongfully discriminated by judging others incorrectly "to be of less moral worth," Alexander, supra note 55, at 159, and by acting on that judgment, even if the workplace wrong is largely expressive in nature. See generally Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Wrong: A General Restatement, 148 U. PA. L. REV. 1503 (2000) (a survey of expressivist theories).

138. See, e.g., Alexander, supra note 55, at 182-83 (distinguishing between unconscious biases that result in personal aversions and those that result in preferences for goods or services). For an argument that intent is not relevant to the moral assessment of whether a decision wrongfully discriminates, see generally Hellman, supra note 136.
with the broader goal of attaining social equality, but the costs imposed are aimed at minimizing the wrongful treatment of individuals in the workplace.

The hypothetical variation on the *Griggs* case described above serves to illustrate this point. The employer who adopts a high school diploma requirement (with a legitimate business reason and no discriminatory purpose) that has a disparate impact on African Americans does not treat applicants differently on the basis of race; instead, use of the requirement disadvantages African American applicants because of the long history of subordination and segregation in education in our country. If the employer has engaged in a wrong, it can only be a wrong of contributing to social inequality. A law that imposes costs on the employers in this circumstance may be readily justifiable, but it is nonetheless an accommodation mandate, for, unlike a structural approach, the costs imposed cannot be tied to a wrong against individuals in the workplace.139

It also helps to take a closer look at one of Professor Jolls's examples of disparate impact as imposing an accommodation mandate. *Banks v. City of Albany* involved a disparate impact challenge to the Albany Fire Department's policy of subjective hiring based on personal contacts and familial relationships.140 In short, the Fire Chief decided whom to hire based on whether he or other firefighters in the all-white department knew the candidates personally or were related to the candidates.141 Professor Jolls argues that, assuming no purpose to preserve the racial composition of the fire department, if the fire department adopted this policy to "maximize the effectiveness and long-term commitment of its workforce," then imposing disparate impact liability in this case imposes an accommodation mandate.142

Instead of neutrally screening applicants, however, the Albany Fire Department's policy, at least that portion that relied on the

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139. The same is also true of behavioral expectations and "work cultures" developed along racial and gender lines. Discriminatory work cultures, as I have argued elsewhere, are frequently the product of employer-facilitated discriminatory bias. See Green, *Work Culture*, supra note 1, at 646-50. A structural approach to employment discrimination law should, therefore, have a beneficial effect on the development of discriminatory work cultures. Moreover, because work culture itself is an on-going process of social interaction that is susceptible to the influence of discriminatory bias, an employer's reliance on a discriminatory work culture is likely to result in employment decisions that are affected by protected group status. The operation of discriminatory bias within work cultures, therefore, sets discriminatory work cultures apart from the disparate impact and ADA accommodation mandates involving static, neutrally applied job requirements or environmental barriers.


141. *Id.* at 33-34.

existence of personal friendships, was likely to result in hiring decisions that were based on race. Use of such a policy had the potential to perpetuate stratification and exclusion in the fire department not solely because society had erected barriers, such as longstanding segregation and subordination for African Americans in education or in residence, but because the fire chief and the firefighters in the Albany Fire Department were likely to be racially biased in their choice of friends. The fire department's policy simply pushed the discriminatory bias to a more informal level of decisionmaking. African American and white applicants were likely to be treated differently in hiring decisions based on the biases of the Albany Fire Department employees. The costs imposed by disparate impact theory in this circumstance are tied to the employment wrong of different treatment, and the law therefore serves as an antidiscrimination rather than an accommodation mandate.

In this way, a structural approach is similar to the ADA accommodation requirement that serves to put individuals with disabilities on equal footing with individuals without disabilities, who are frequently given special accommodations. The ADA accommodation requirement in that circumstance corrects for the wrong of different treatment of individuals by employers, thereby imposing an antidiscrimination mandate. Only when the ADA accommodation requirement loses its corrective component—for example, when it requires accommodation for society's construction of a physical environment that disadvantages individuals with disabilities—does it become an accommodation mandate, triggering additional analytical hurdles and greater political resistance.

Indeed, despite the ongoing academic debate concerning the divide between disparate impact theory and disparate treatment theory and the proper place of accommodation requirements within antidiscrimination law, I expect that few commentators would deny this point. Structural discrimination, to the extent that it results in difference in treatment of similarly situated individuals in the workplace because of race or other protected group status, is a

143. This case may be better described as a case of employer "capitalizing" on bias rather than "facilitating bias." The employer is seeking to reap the benefits of greater social cohesion among members of racial groups.


145. See supra notes 120-23 and accompanying text (discussing reasonable accommodation liability under the ADA).
workplace wrong. The concern, instead, seems to be one of fault or blameworthiness. Professor Bagenstos and others see employers—if they see employers as distinct from individual decisionmakers at all—as mere bystanders to the biases that employees bring in to the workplace from outside. A law that imposes costs on employers in this circumstance, the argument goes, asks employers to bear costs for society’s wrongs (socially instilled discriminatory biases) rather than for the employer's own wrongs. In the next Section, I argue that this concern is unfounded, both as a descriptive and a normative matter. Employers as organizational actors are active, causal participants in the wrong of structural discrimination, and prevailing norms concerning organizational facilitation of individual acts of wrongdoing suggest that employers should be held responsible for their role in that wrong.

B. Structural Discrimination as an Employer Wrong

To conclude that employers should be held morally responsible for the wrong of structural discrimination requires first that employers, apart from the organizational superiors who make decisions on behalf of the organization, be capable of being morally responsible. The literature on corporate criminal liability informs this threshold issue. As Professor Lawrence Friedman has argued, corporations, even if they do not possess a human capacity for shame, have discrete identities and expressive potential that renders them capable of suffering moral condemnation, “thereby vindicating the proper valuation of persons and goods whose true worth was disparaged by the corporation’s conduct—just as in the case of an individual wrongdoer.” Employers, in other words, whether taking corporate form or not, have distinct cultures and organizational

146. For a brief review of the current critiques and defenses of corporate criminal liability, see Sara Sun Beale & Adam G. Safwat, What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability, 8 BUFF. CRIM. L. REV. 89, 97-104 (2004). Corporations may be held vicariously liable for criminal actions of their agents. See New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494-96 (1908) (incorporating the civil concept of vicarious liability into the corporate context). I draw here on the criminal liability literature not to make an argument for criminal liability, but to make an argument for the capacity for moral responsibility.

147. Lawrence Friedman, In Defense of Corporate Criminal Liability, 23 HARV. J.L. & PUB. POL’Y 833, 852 (2000). Similarly, Professor Pamela Bucy draws in her work on substantial sociological research in the area of organizational wrongdoing to argue that corporations should be criminally liable for the systems of social structures and internal organizational processes—what she calls the corporate "ethos"—that encourage unlawful behavior. See Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 MINN. L. REV. 1095 (1991).
structures that distinguish them from the individuals who act as their agents.

Those same cultures and organizational structures that give rise to distinct organizational "ethos" serve as the basis for employer responsibility for the wrong of structural discrimination. As the research that forms the empirical foundation for a structural approach illustrates, employers (most often through organizational superiors) make the structural decisions concerning decisionmaking systems, distribution of power, organization of work, and makeup of leadership and work groups, and those structural decisions necessarily shape the context in which employment decisions are made.\textsuperscript{148}

In fact, there is some reason to believe that economic incentives, at least in the short term, may drive employers to devise organizational structures and work environments that facilitate discriminatory bias. Employers today face pressure both to diversify and to homogenize their workplaces. Civil rights laws and a strong norm against discrimination encourage the hiring of visibly diverse workers. In addition, a mass of popular business writing maintains that diversity expands product reach to unserved markets,\textsuperscript{149} and empirical studies suggest that diversity can improve performance by facilitating creativity in problem solving.\textsuperscript{150} At the same time, however, as employers respond to these pressures to diversify by hiring more women and racial minorities into their workplaces, they face a competing pressure to homogenize. Scholars who study organizational dynamics have long emphasized that employee

\textsuperscript{148} See supra notes 15-21 and accompanying text. This research illustrates that the employer necessarily acts by creating the context for decisionmaking. I am wary, therefore, of conceptualizations that cast the employer as a passive bystander, see, e.g., Marc R. Poirier, \textit{Is Cognitive Bias at Work a Dangerous Condition on Land?}, 7 EMP. RTS. & EMP. POL'Y J. 459, 464-65 (2003) (arguing that cognitive bias in workplace decisionmaking should be viewed as a dangerous condition on land), particularly since this conceptualization seems to underlie the pessimism concerning a structural approach. See infra notes 175-76 and accompanying text.


\textsuperscript{150} See, e.g., Poppy Lauretta McLeod et al., \textit{Ethnic Diversity and Creativity in Small Groups}, 27 SMALL GROUP RES. 248, 256-57 (1996) (finding that ethnically diverse workgroups produced higher quality ideas than all-Anglo groups). Most of the research supporting the "value-in-diversity hypothesis" has been conducted in the laboratory or classroom setting. See Katherine Y. Williams & Charles A. O'Reilly, III, \textit{Demography and Organizations: A Review of 40 Years of Research}, in \textit{20 RESEARCH IN ORGANIZATIONAL BEHAVIOR} 77, 79 (Barry M. Staw & L.L. Cummings eds., 1998) (describing some of the limitations of the research). The added limitation of this research is that it tends to define diversity broadly, beyond characteristics protected by antidiscrimination statutes.
commitment is crucial to effective organizations. Research suggests that “affective commitment”—defined as commitment that involves identification with the firm’s goals and a desire to do what is best for the organization—results in employee behavior that goes beyond specific role requirements, behavior that positively correlates with firm productivity. This research on the benefits of extra-role behavior both drives the recent trend toward decentralized decisionmaking and team-based work and heightens the organizational need for strong workplace norms and employee commitment. Affective commitment, in other words, becomes not just an institutional goal but a necessary means of employee control. The task for employers seeking affective commitment, as one organizational theorist explains, is to “find . . . means to convince employees that they are in the same boat together.”

With the organizational benefits of strong affective commitment in mind, the connection between organizational theory and the business incentive for facilitating discriminatory bias becomes clear. A wealth of social science research and theory suggests that discriminatory bias is a powerful tool for building self esteem and ingroup cohesion. Research on similarity-attraction theory and social identity theory reveals, for example, that people are most comfortable

151. Carbado & Gulati, Law and Economics, supra note 42, at 1769, 1789 n.144 (citing sources and providing an insightful exploration of how the “homogeneity incentive” is likely to affect employee selection and racial identity).


153. See Stone, supra note 152, at 87; Green, Work Culture, supra note 1, at 634-43.


with those who are visibly similar to themselves, and that association with visibly similar people raises self-esteem. This, together with research showing a predisposition to categorize along socially and visibly salient lines, such as race and sex, suggests that the operation of discriminatory bias in workplaces is likely to enhance affective commitment, at least that of in-group members.

The idea that employers attain bottom-line benefits from the operation of discriminatory bias (and thus have an incentive to at the least ignore the risk of bias in workplace decisionmaking) is not new. Scholars studying sexual harassment and other forms of hostile work environment have long understood harassing behavior as an extreme form of in-group entrenchment and solidarity. Even Professor Richard Epstein's famous argument against antidiscrimination laws rests on the economic benefits to firms of employee homogeneity. According to Professor Epstein, homogeneity results in efficiencies in

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159. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 61-69 (1992). The problem with Professor Epstein's argument, of course, is that it fails to recognize that women and people of color are likely to lose out in a workplace that capitalizes on discriminatory bias.
accommodating benign preferences, such as choice in music, in addition to efficiencies derived from strong relational ties and employee commitment.

From a normative perspective, however, capitalizing on discriminatory bias to achieve affective worker commitment looks a lot like building a business model based on the racial and gender preferences of co-workers or customers, something that, except in extreme circumstances, has not been tolerated. Existing antidiscrimination law has consistently identified employer efforts to cater to customer or coworker racial or gender preference as a wrong targeted by antidiscrimination mandate. Even the exception written into the law for distinctions based on sex, religion, or national origin has been construed narrowly to screen out the use of customer preference as a means of obtaining a competitive edge.

Of course, organizational superiors are unlikely to make organizational choices with the express purpose of facilitating discriminatory bias in workplace decisionmaking. But purpose has never been the sole determiner of fault-worthiness. In the tort context and even the criminal context, the law has long recognized theories of recklessness and negligence. Moreover, laws regulating organizational wrongdoing of other types, like environmental pollution or securities fraud, do not require purposefulness on the part of the organization in order to impose liability. The trend instead has been toward greater organizational responsibility for the wrongdoing of individuals acting within organizational context, in part because of

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160. Some scholars locate the wrongfulness of the employer's action in this circumstance in the wrongfulness of the customer's or coworker's preference, e.g., Kelman, supra note 62, at 847-49, but, for reasons discussed infra, I find that problematic. See also Alexander, supra note 55, at 176 (suggesting that "the morality of one's treatment of reaction qualifications is not primarily a function of the intrinsic morality or immorality of the reactions").

161. See, e.g., Wilson v. Southwest Airlines Co., 517 F. Supp. 292 (N.D. Tex. 1981) (holding that business generated from sex appeal did not justify hiring only female flight attendants under Title VII's bona fide occupational qualification defense ("BFOQ"); 110 CONG. REC. 13825 (1964) (describing the attempt by Senator McClellan to amend the BFOQ provision to permit racial considerations in employment "when the employer believes, on the basis of substantial evidence, that the hiring of such an individual of a particular race . . . would be more beneficial to the normal operations of his particular business or to its good will than the hiring of an individual of another particular race").

162. A quick survey of the business literature reveals a number of reasons, unrelated to the operation of discriminatory bias, why employers might decide to adopt structures that have the potential to facilitate bias in decisionmaking. Flattened hierarchies, skill-based pay systems, work teams, and subjective performance evaluations are all touted in the business literature as ways of creating flexible institutions that better respond to an increasingly globalized and information-based market. See Peter Cappelli et al., Change at Work 29-32 (1997).

163. Criminal liability for negligence is a controversial issue. See, e.g., Larry May, Sharing Responsibility 95-98 (1992) (summarizing the positions on both sides of the issue).
the understanding that organizations create the incentive-structures that can lead to wrongdoing. Even as the law of organizational liability has begun to recognize that the individuals who engage in wrongdoing are not always rational, amoral actors, it has not absolved organizations from responsibility for their role in creating the context in which decisions are made. Quite to the contrary, the law has shifted its focus more expressly onto the role of organizations in facilitating wrongdoing by triggering cognitive illusions and other human biases and on ways to structure the decisionmaking environment to reduce those biases.


165. Scholars in organizational theory and wrongdoing have been making this point for some time. See, e.g., Kenneth B. Davis, Jr., Structural Bias, Special Litigation Committees, and the Vagaries of Director Independence, 90 IOWA L. REV. 1305 (2005) (relying on behavioral science research to argue that judicial review of special litigation committees should not be limited to a formal evaluation of their independence, but should also consider the quality of their decisionmaking processes and the reasonableness of resulting decisions); Donald C. Langevoort, Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms), 146 U. PA. L. REV. 101 (1997) (relying on social science research on human judgment and decisionmaking to explain why managers of a public corporation would mislead stock market investors either in their SEC filings or in publicity efforts); Vaughan, supra note 20 (arguing against a rational choice model for organizational conduct and advocating a reorientation of regulatory activity toward the social context of decisionmaking). For a discussion of the decision-theory model of corporations that builds on some of this work, and implications of the model for the specifics of regulation, see Edward L. Rubin, Images of Organizations and Consequences of Regulation, 6 THEORETICAL INQUIRIES L. 347, 352-57 (2005).

166. The Sarbanes-Oxley requirement of an outside audit board might be understood as a measure informed by the literature on decision-making within organizations. Rubin, supra note 165, at 382-84; Jolls & Sunstein, supra note 26, at 19-21. The Organizational Sentencing Guidelines, as amended in 2004, also include consideration of whether the firm has an “Effective Compliance and Ethics Program” as a factor for adjusting the criminal penalty imposed on an organization. U.S. Sentencing Guidelines Manual § 8C2.5(f) (2004). And in the environmental context, the EPA has designed administrative incentives for organizations to adopt special “environmental management systems’ that can overcome common deficiencies in existing routines.” See Timothy F. Malloy, Regulation, Compliance and the Firm, 76 TEMP. L. REV. 451, 459-60 (2003) (describing the need for intervention into systems and management routines to reduce environmental violations). A number of scholars have also argued more broadly for a “due diligence” defense to vicarious liability, what is sometimes called a “composite regime” of liability, for organizations. See, e.g., Jennifer Arlen et al., Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation, 21 J. CORP. L. 731 (1996); Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction, 92 HARV. L. REV. 1227 (1979). It is important to note that the analogy to other forms of organizational wrongdoing is not perfect. Indeed, because employment discrimination involves a wrong done to individuals in the workplace, a strong argument can be made that a structural approach to employment discrimination law should not be used to cut back on the existing vicarious liability scheme. Cf. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (framing an affirmative defense to vicarious liability). For a critique of the recent trend toward composite regimes, see Kimberly D. Krawiec, Organizational Misconduct: Beyond the Principal-Agent Model, 32 FLA. ST.
Empirical work on prevailing norms in the area of organizational wrongdoing also suggests that laypeople make normative distinctions between individuals and the organizations within which they act. In the mid-1990s, legal scholar Joseph Sanders and sociologist V. Lee Hamilton conducted a study that measured people's distribution of responsibility for wrongdoing within organizations. Their data suggested that "[o]rganizations are held most responsible when their policies and operations, implemented by organizational superiors, suggest an internal decision structure that leads to acts of wrongdoing."167

Even the Supreme Court has expressed willingness to hold employers responsible for the problem of structural discrimination. In Watson v. Fort Worth Bank & Trust, an African-American woman who had been denied promotions at the bank on four separate occasions sought to challenge the employer's decisionmaking system using disparate impact theory.168 The bank relied on the subjective judgment of its supervisors, who were all white, to evaluate candidates for all hiring and promotions, and Watson argued that the employer's use of this practice had a disparate impact on African Americans because racial biases crept into the supervisors' decisions.169

The Court held that disparate impact theory could be used to challenge the employer's decisionmaking system. Writing for a majority of the Court, Justice O'Connor reasoned that a system of subjective decisionmaking may "in operation be functionally equivalent to intentional discrimination."170 In other words, the employer's organizational choice to use a system of subjective decisionmaking may be discriminatory because it results in different

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169. Id. at 982.

170. Id. at 987. Justice O'Connor did not obtain a majority for that portion of her opinion in which she reformulated disparate impact theory to make it more difficult for plaintiffs to succeed. Later, in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), a majority of the Court did sign onto those views, and in 1991 Congress amended Title VII to overturn much of Wards Cove. See supra notes 104-07 and accompanying text.
treatment of individuals in the workplace. Justice O'Connor recognized that the employer may not have adopted the system with the purpose of facilitating different treatment—disparate impact theory is well known for not requiring a showing of intent—and yet she still assigned responsibility to the employer for its role as an organizational actor in the wrong of different treatment.\textsuperscript{171} She explained:

It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. Especially in relatively small businesses . . . it may be customary and quite reasonable to simply delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain . . . . If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.\textsuperscript{172}

For a variety of reasons, many of which I and others have identified elsewhere, disparate impact theory in its current doctrinal formulation falls short of addressing the problem of structural discrimination. From a purely political/practical perspective, however, Watson is evidence of the Supreme Court's willingness to hold employers responsible for organizational choices that result in employment decisions that are affected by race or other protected characteristics, even when it was simultaneously seeking to cut back on the reach of disparate impact doctrine.\textsuperscript{173}

\textsuperscript{171} Given her history in this area, Justice O'Connor was likely making an instrumental argument rather than a normative one.

\textsuperscript{172} Watson, 487 U.S. at 990-91. In contrast to Watson, most recent cases involving subjectivity in decisionmaking are brought as class actions, and allege disparate treatment. For a recent example, see Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007). For an examination of these cases as "structural disparate treatment" cases, see Green, Discrimination in Workplace Dynamics, supra note 1 at 151-56, and an argument that they represent a new form of private institutional reform litigation, see Green, supra note 15.

\textsuperscript{173} My argument elsewhere that structural discrimination is properly conceptualized as a problem of different treatment was driven in part by the normative traction of anticlassification and the political uncertainty surrounding disparate impact theory. See Green, Discrimination in Workplace Dynamics, supra note 1 (arguing for a structural account of disparate treatment theory); cf. Sullivan, supra note 119 (arguing for a structural approach through disparate impact theory). My view is not that disparate impact theory holds no promise, but that structural discrimination is better conceptualized as a problem of discriminatory bias that results in different treatment in the workplace. See Green, Discrimination in Workplace Dynamics, supra note 1, at 136-44. For an important article describing some of the difficulties of disparate impact theory and arguing that the theory has had an unintended effect on our conception of intentional
The question nonetheless is likely to arise: If the employer does not intend to facilitate discriminatory bias, is the employer any more fault-worthy when it adopts structures that facilitate bias in workplace decisionmaking than it is when it adopts a job requirement that interacts with societal wrongs to perpetuate social inequality? My response to this question takes us back to the nature of the wrong and the employer's responsibility for that wrong. Employers are under a moral imperative to refrain from facilitating the wrong of biased workplace decisionmaking. That moral imperative does not extend, at least not unqualifiedly, to an employer's contribution to societal inequality. As I have said before, I think a strong argument (even a moral one) can be made that employers should avoid contributing to a system of social subordination and occupational segregation,174 but that argument is one of how best to address societal wrongs and maximize social welfare rather than one of correcting for or preventing employer wrongs to individuals in the workplace.

Several commentators have expressed a related concern that the bias at play in structural discrimination at the individual level is likely to be unconscious or implicit rather than conscious and overt. The concern here seems to be practical as well as normative: that it will be difficult to convince factfinders of the prevalence of unconscious bias, or to convince them to hold employers liable for the operation of that bias.175 This concern, however, even assuming an empirical foundation,176 conflates the individual with the employer wrong. The employer wrong in structural discrimination lies less in the individual
decisionmaker’s action than in the employer’s structuring of a work environment that facilitates bias in the individual decisionmaker’s action. The existence of unconscious or subtle bias of employees is not itself the fault of the employer (any more than the conscious animus of employees is the fault of the employer in the traditional, conscious bias story). Instead, the argument is that employers are responsible for their causal role in the moral wrong of different treatment in the workplace. Work, as others have argued, is quickly becoming a “fundamental attribute of modern citizenship,” and exclusion or denial of success by an employer on the basis of a protected characteristic holds particular normative weight.

For this reason, a structural approach to employment discrimination law may be more viable in the current political climate than a move toward a causation inquiry in individual disparate treatment law. Drawing on the substantial social science research regarding the persistence of implicit biases, a number of scholars have argued for a reformulated individual disparate treatment doctrine that would focus on the issue of causation rather than on the state of mind of discriminators. These scholars argue, rightly I think, that the wrong suffered is the same whether the individual discriminator acted on the basis of conscious or unconscious bias. Nonetheless, a shift toward causation as the sole inquiry in an individual disparate

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177. See Philip Pettit, Responsibility Incorporated (unpublished draft on file with author) (arguing that “it can be perfectly proper to hold the corporate entity responsible, even though none of the individuals involved did any great personal wrong”).


179. For an argument that employers should be held liable under a theory of negligence, see David Benjamin Oppenheimer, Negligent Discrimination, 141 U. Pa. L. Rev. 899 (1993).

180. There are other reasons why a structural approach to employment discrimination law is needed, even if the law moves toward a causation inquiry in individual disparate treatment theory. See Green, Discrimination in Workplace Dynamics, supra note 1 (arguing that structural account of disparate treatment is needed to fill doctrinal gaps and to conceptualize the problem of structural discrimination, or discrimination in workplace dynamics).

181. See, e.g., Krieger, supra note 17, at 1242 (proposing that to establish liability a plaintiff should be required to prove only that his or her group status “played a role in causing the employer’s action or decision”); Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279, 289 (1997) (“What the Court means by intent is that an individual or group was treated differently because of race. Accordingly, a better approach is to concentrate on the factual question of differential treatment. In this way, the key question is whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states.”); David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 957 (1989) (“A court applying the discriminatory intent standard should ask: suppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent.”).
treatment case is open to critique from those unwilling to place blame on individuals for their unconscious biases.\textsuperscript{182} By focusing inquiry on the individual actor, a causation approach to individual disparate treatment law suggests (though it does not require) that the wrong of the employer in structural discrimination is the same as the wrong of the individual actor.\textsuperscript{183} Once the actors are conflated in this way, it becomes difficult to hold the employer morally responsible without first concluding that the individual who was influenced by discriminatory bias was acting wrongfully.

The same is not true of a structural approach. Under a structural approach to discrimination, one can accept that implicit biases have been "programmed into our brains by overarching societal influences"\textsuperscript{184} and at the same time expect employers to refrain from creating work environments that facilitate the operation of those biases in workplace decisionmaking and make it more likely that employment decisions will be influenced by those biases. A structural approach, in other words, holds normative force both in the wrong of different treatment in employment on the basis of membership in a protected group \textit{and} in the employer's role as an organizational actor in facilitating that wrong.

Equally important, the normative underpinning of a structural approach does not rest exclusively on the employer's causation of group-based harm. Facilitating discriminatory bias in workplace decisionmaking is normatively wrong, as I have argued, because individuals are treated differently in the employment relationship on the basis of membership in a protected group. This identification of an individual harm that is distinct from any group harm fits a structural approach within the dominant, individualistic account of discrimination.\textsuperscript{185} A court need not consider the relative treatment of

\textsuperscript{182} The reasoning seems to be that people can't be expected to distinguish between unconscious bias operating in the employment context and unconscious (or conscious) bias operating in social or personal contexts, where some degree of bias may be acceptable or at least where the moral rights of discriminators may be implicated. \textit{See, e.g.}, Alexander, \textit{supra} note 55, at 204.

\textsuperscript{183} A focus on causation in individual disparate treatment theory might be viewed as a particular regulatory scheme that takes a structural approach. By imposing liability on employers for each employment decision that is affected by race or sex, regardless of the nature of the bias behind the decision, individual disparate treatment theory would create an incentive for employers to reduce the operation of bias, implicit as well as explicit, in workplace decisionmaking.

\textsuperscript{184} Bagenstos, \textit{supra} note 2, at 43.

\textsuperscript{185} \textit{See} Heather K. Gerken, \textit{Understanding the Right to an Undiluted Vote}, 114 HABV. L. REV. 1663, 1718-28 (2001) (discussing the Court's discomfort with aggregate rights for which we can only decide if the right is violated by looking at the relative treatment of different groups); Primus, \textit{supra} note 108, at 554 (recognizing that "modern doctrine has... promoted a view on
groups in determining whether an employer has engaged in the wrong of structural discrimination—the harm, in contrast, is to individuals in the employment relationship, regardless of the overall effect of that treatment on the group as a whole.

C. Crossing into Accommodation

A structural approach as I have described it so far—focusing on employer facilitation of discriminatory bias in decisionmakers who act against outsiders—clearly falls within an antidiscrimination mandate. It is possible, however, to conceive of a structural approach that would also include employer facilitation of disadvantaging behavior by outsiders. In this Section I explore this expanded conception of a structural approach and recognize its potential to cross over into an accommodation mandate. This exploration locates space within which a structural approach might impose an antidiscrimination mandate in some circumstances and an accommodation mandate in others, without wholly abandoning the normative distinction between the two.

Scholars have recognized for some time that organizational context can influence the choices and behavior of people of color and women as well as facilitate bias in decisionmaking against members of those groups. Professors Devon Carbado and Mitu Gulati have made a strong case that workplace inequality is perpetuated in certain organizational contexts by the “extra identity work” and risky or self-defeating signaling strategies adopted by members of minority groups. According to one facet of this work, members of minority groups, because they are likely to perceive themselves as subject to negative stereotypes, are likely to feel the need to do more “identity work” to counter those stereotypes, and that extra work can be risky and time-consuming.
Structuralist scholars in the area of gender have made a similar argument. Rosabeth Moss Kanter's work on the aspirations of women in the bureaucratic firm of the 1970s and Professor Vicki Schultz's more recent work on the formation of women's preferences illustrate that women do not form their preferences in a social vacuum, independent of the work force or specific work environments.\textsuperscript{189} And I have argued elsewhere that employers should be expected to take structural measures to redefine work cultures, whether formal or informal, that are drawn along racial or gender lines, in part because of the detrimental effect that those work cultures are likely to have on the success of women and people of color.\textsuperscript{190}

Because much of insider and outsider behavior is likely to be interactional rather than unilaterally responsive,\textsuperscript{191} a structural approach to employment discrimination law that focuses on facilitation of discriminatory bias in decisionmaking against outsiders should, as a practical matter, capture facilitation of outsider behavior as well. People of color may perform extra identity work, for example, because prevailing prescriptive stereotypes put them at a disadvantage as compared with their white counterparts.\textsuperscript{192} As a structural approach is construed to include an independent obligation not to facilitate disadvantaging behavior by outsiders, however, the mandate begins to seem more like an accommodation mandate. In other words, the problem being addressed becomes less one of discriminatory bias operating in the workplace to the disadvantage of members of certain groups and more one of disadvantage that results from the interplay between workplace structures and societal expectations (or, in some cases, inherent differences) of members of certain groups.

Take, for example, the famous \textit{Sears Roebuck} case.\textsuperscript{193} There, the employer argued, and the court accepted, that significant disparities in the numbers of women in commission and non-

\textsuperscript{189} KANTER, supra note 37; Schultz, supra note 39.

\textsuperscript{190} See Green, \textit{Work Culture}, supra note 1 (arguing that employers should be expected to take structural measures to redefine work cultures, whether formal or informal, that are drawn along racial or gender lines).

\textsuperscript{191} See Devon Carbado & Mitu Gulati, \textit{Interactions at Work: Remembering David Charny}, 17 HARV. BLACKLETTER L.J. 13, 18 (2001) (arguing that “extra identity work” required of outsiders is a form of different treatment: it is required of members of certain groups and not of others based on stereotypes held by insiders).

\textsuperscript{192} See id. at 19-20 (arguing that employers are more likely to ask outsiders to perform time-consuming citizenship tasks that inhibit success, and are more likely to accept these tasks as a result of pressure to disconfirm stereotypes).

\textsuperscript{193} EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988).
commission jobs at Sears could be explained by women's lack of interest in the higher paying sales commission jobs. This, of course, is not the whole story. As Professor Schultz details in her work, social science research reveals that women's interest in jobs like the sales commission jobs at Sears is influenced and framed by Sears' (and other employers') structuring and description of those jobs. Putting aside the interactional nature of a "competitive" requirement and the likelihood that Sears' description of the jobs in question would result in discriminatory bias against women (who are presumed not to be interested in the jobs), both of which should be captured by a structural approach that focuses on discriminatory bias against outsiders, forcing change in the requirement of competitive traits or behavior imposes an accommodation mandate. If there is some correlation between "competitive" traits or behavior and success in commission sales jobs at Sears, in other words, then the disadvantage that women face at Sears derives from their reaction to the "competitive" in light of the socially-instilled stereotype that women do not or should not exhibit competitive traits or behavior.

One might argue that employer facilitation of disadvantaging behavior by outsiders, much like employer facilitation of biased decisionmaking by insiders, results in workplace decisions that are affected by group membership and therefore that an obligation not to facilitate disadvantaging behavior by outsiders imposes an antidiscrimination mandate. If a female employee or applicant at Sears, faced with Sears' segregated work force and stereotypical job descriptions, is less likely to express interest in a commission sales position than her equally situated male counterpart, then gender has affected the employment decision of whom to place in that position. The employer wrong, in this account, lies in the employer's role in perpetuating workplace segregation and subordination through facilitation of disadvantaging behavior.

But this is true of all existing employer obligations under antidiscrimination law. It is always possible, in other words, to reframe employer wrong in terms of the perpetuation of workplace segregation and the employer's contribution to a system of society-wide subordination; otherwise, there would be little justification for imposing an obligation, even an accommodation mandate, on employers. Indeed, this is exactly the argument that disability-rights scholars make when they argue that the interplay between

194. Schultz, supra note 39.
195. The exception to this might be imposing costs for home-based personal assistance. This is why I assert that Professor Bagenstos's view of a structural approach is particularly extreme. See supra note 132 and accompanying text.
workplace structures and individuals frames our conceptions of ability and difference. For this reason, I define a structural approach as an effort to alter the organizational structures that facilitate discriminatory bias in workplace decisionmaking, with the understanding that the employer obligation is likely to be construed to include only discriminatory bias in insider decisionmaking against outsiders, but with confidence that a solid argument can be made that a structural approach should be construed to impose this narrow accommodation mandate as well.

CONCLUSION

This Article seeks to set the normative foundation for a structural approach to employment discrimination law, an approach aimed at reducing biased decisionmaking against members of protected groups by changing the structures and environments within which individuals work. A structural approach is a crucial component of an effective system of antidiscrimination law and, contrary to recent commentary, one that fits well into existing norms against workplace discrimination. In setting the normative foundation for a structural approach, I do not attempt to devise a precise regulatory scheme, nor do I address any of the very real concerns about the efficacy in practice of any such scheme. These issues, together with many others, will be left for another day. Moreover, although this Article is unquestionably bold in its attempt to reclaim the normative core of antidiscrimination law, I do not intend to sound a death knell for accommodation mandates, or to put the brakes on any success in conceptualizing accommodation mandates as equality concerns. Indeed, I am persuaded by many of the arguments that employers should bear reasonable costs to avoid contributing to social inequality. But only by recognizing the normative core and political stress points of employment discrimination law can we begin to devise a comprehensive and workable solution to the problems of discrimination, occupational segregation, and inequality—in the workplace and in society. A structural approach to employment

196. See supra notes 124-30 and accompanying text.
197. See supra note 88 and accompanying text (recognizing that courts are likely to construe employment discrimination law to impose antidiscrimination mandates). There is also a risk that imposing any accommodation mandate at all, even a narrow one, will affect the political viability of a structural approach. Interpreting a structural approach to include only facilitation of discriminatory bias in workplace decisionmaking against outsiders eliminates that risk.
198. I have addressed some of these concerns in other work. See Green, supra note 15.
discrimination law, sitting firmly as an antidiscrimination mandate, is a step in that direction.