CONTRIBUTORY DISPARATE IMPACTS IN EMPLOYMENT DISCRIMINATION LAW

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ABSTRACT

An employer who adopts a facially neutral employment practice that disqualifies a larger proportion of protected-class applicants than others is liable under a disparate impact theory. Defendants can escape liability if they show that the practice is justified by business necessity. But demonstrating business necessity requires costly validation studies that themselves impose a significant burden on defendants—upwards of $100,000 according to some estimates. This Article argues that an employer should have a defense against disparate impact liability if it can show that protected-class applicants failed to make reasonable efforts to train or prepare for a job related test. That is, I propose that when plaintiffs contribute to a disparity in this way, the employer should not be liable. I demonstrate that the "lack of effort" defense is consistent with the text of Title VII and the case law, which has largely ignored this issue. Finally, I show that my proposal is supported by both the theoretical rationales underlying disparate impact and a consequentialist analysis.

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INTRODUCTION

In the first—and in some sense the paradigmatic—disparate impact case, *Griggs v. Duke Power Co.*,[1] the Supreme Court declared that Title VII protects workers who are victims of "practices, procedures, or tests neutral on their face, and even neutral in terms of intent ... [that] operate to 'freeze' the status quo of prior discriminatory employment practices."[2] At issue in *Griggs* was the employer's use of a high school graduation requirement and an "intelligence" test, both of which disqualified a larger proportion of black than white applicants.[3]

Left unexamined by *Griggs*, and by virtually all subsequent disparate impact cases, was the question of *why* the disparity in pass rates occurred in the first instance.[4] The neglect of this

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1. 401 U.S. 424 (1971).

2. *Id.* at 430.

3. *Id.* at 425-28.

4. The issue of two-party causation in disparate impact law is almost as absent from the scholarly literature as it is from judicial opinions. For example, Richard Primus's persuasive recent analysis of the constitutional basis for disparate impact does not consider this issue. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003). Ramona Paetzold and Steven Willborn focus on cases in which there are no measured disparities if race and gender are taken into account simultaneously. *See* Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325, 329-31 (1996). They conclude that:

> Ordinary disparate impact cases view causation with blinders, not because the cases arise in a single-cause context, but because they *ignore* causes *external to the employer* that contribute to the impact. The blinders necessarily mean that employers may be held legally responsible for impacts that are "caused" in substantial part by factors external to the employers.

Id. at 354 (second emphasis added). They do not, however, consider cases in which some or all of the multiple causal factors are internal to the plaintiffs; it is precisely these cases that are the focus of this Article. In the context of the Americans with Disabilities Act (ADA), Jill Hasday has argued in favor of imposing a duty on disabled individuals to make reasonable efforts to mitigate their disabilities as a precondition for maintaining litigation. *See* Jill Elaine Hasday, *Mitigation and the Americans with Disabilities Act*, 103 MICH. L. REV. 217, 219 (2004). Under her proposal, employers would not be liable for failing to accommodate a disabled individual who could have reduced or eliminated his or her own disability at low cost, but failed to do so. *See id.* at 226. Her logic is in many ways similar to that developed here, although the doctrinal contours of disparate impact liability under Title VII are of course different from disparate treatment under the ADA. Some of the ideas in this Article were previously explored in a note written under my supervision. *See* Laya Sleiman, Note, *A Duty To Make Reasonable Efforts and a Defense of the Disparate Impact Doctrine in Employment*

question is understandable in the context of *Griggs*. The reason black applicants in 1965 North Carolina had lower high school graduation rates and scored lower on "intelligence" tests than whites is obvious: it was the legacy of decades of Jim Crow, including segregated and inferior education, and hundreds of years of slavery and discrimination. Much of this legacy remains today and plays a continuing role in explaining inter-group disparities.

But in the years since *Griggs*, the problem of disparate impact liability has come to take on an unappreciated dimension: some disparities are caused, in part, by applicants' failure to make reasonable efforts to train for a test or to prepare for some other job requirement. Thus, imagine a running test that had a higher pass rate for men than women. Imagine further that most female applicants did not train for the test, although among those who made a modest effort to do so, the pass rate was virtually the same as that for men.[5] Or consider a reappointment test for a city auditor position, for which several of the incumbent Hispanic auditors failed to study under the unreasonably mistaken belief that they did not need to take the exam. Although the pass rate for Hispanics who *did* study was no lower than for whites, inclusion of the non-studying Hispanic applicants created at least a prima facie case of disparate impact.[6] These examples raise the obvious question of whether the performance of those who did not train should be included in the calculation of the tests' disparate impacts. Put another way, should employers be responsible for the poor performance of non-trainers?

Before addressing this question, an important preliminary issue must be resolved: Does it constitute "blaming the victim"[7] to attribute some responsibility for disparities in pass rates by race or gender to the applicants themselves? I believe the answer is "no" for two reasons. First, I am not suggesting that all, or even most,

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Discrimination, 72 FORDHAM L. REV. 2677 (2004).

5. This is not a hypothetical example. *See* Lanning v. Southeastern Pa. Transp. Auth. (*Lanning I*), 181 F.3d 478, 482-83, 495 (3d Cir. 1999), discussed *infra* at greater length.

6. This example is also taken from an actual case, *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1274-75 (9th Cir. 1981), discussed *infra* notes 79-84 and accompanying text.

7. This phrase was coined by the sociologist William Ryan to describe an "ideology ... [that] attributes defect and inadequacy to the malignant nature of [factors] ... located *within* the victim, inside his skin." WILLIAM RYAN, BLAMING THE VICTIM 7 (2d ed. 1976).

disparities are caused even in part by the victims of such disparities. In many instances, there will be little or nothing that plaintiffs can do to overcome the effects of an employment requirement. My analysis is limited only to those cases in which there *is* something that plaintiffs could have done to improve their chances of passing a test or meeting some other requirement. Second, I will argue that applicants should only be required to make such efforts to prepare or train for a test as are both feasible and reasonable. Those who fail to meet this standard can be seen, plausibly, as inflicting injuries on themselves; but for their own actions, which could have been different, a more successful outcome would have been realized. When the "victim" and the "injurer" are actually the same person, one is free to characterize the explanation for the plaintiff's lack of success as "blaming the injurer," rather than "blaming the victim."

In one sense, the existence of two-party disparate impacts is an indicator of progress. No longer is it true that the only reason black or female applicants fare worse than whites or males is the dead hand of the past. Put another way, to the extent that disparities in pass rates are caused by applicants' failure to make reasonable efforts to train, it is tautologically true that the disparities would be smaller if such efforts had been made, regardless of the applicant's race or gender. The good news, then, is that there is something else we can do about disparate impacts besides outlawing them—we can encourage applicants to eliminate the disparities themselves by making reasonable efforts.

This Article suggests that the way to accomplish this goal is to give employers an affirmative defense if they can show that plaintiffs seeking to establish disparate impact liability failed to make reasonable efforts to meet the job requirement being challenged. Following a description of the problem in Part I, Part II discusses the statutory and case law bases for disparate impact liability when plaintiffs fail to make reasonable efforts to train for or to pass a test. I show that such liability is consistent with Title VII and with the meager body of cases that have recognized the problem. Part III then examines various theoretical justifications for disparate impact liability. I conclude that these theories support, or are at least consistent with, a requirement that plaintiffs make reasonable efforts to prepare for a test. Drawing loosely on the

economic theory of tort law, Part IV offers a consequentialist analysis of a reasonable efforts requirement, demonstrating why such a requirement is likely to be welfare-enhancing. Finally, Part V shows how a duty to make reasonable efforts could be operationalized, and also considers some implementation issues.

I. AN OVERVIEW OF THE PROBLEM

The problem of two-party causality in disparate impact suits has not been widely recognized or adequately addressed by either courts or scholars. To fix ideas, I begin with an example, which also illustrates the basic contours of disparate impact liability.

A. The Lanning *Problem*

Lanning v. Southeastern Pennsylvania Transportation Authority (SEPTA) concerned the use of a timed running test as a criterion for hiring transit police officers.[8] To make out a prima facie case of disparate impact, the law requires that plaintiffs identify "a particular employment practice that causes a disparate impact."[9] In this case, the particularity requirement was easily met by pointing to the cutoff score on the test, which had been set at 12 minutes for a 1.5 mile run, in order to screen out those with an aerobic capacity of less than 42.5 mL/kg/min.[10]

The standard for what constitutes a cognizable disparate impact is articulated by the Equal Employment Opportunity Commission's Performance Selection Guidelines, which suggest that an employment practice that generates

> [a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal

8. 181 F.3d 478, 484 (3d Cir. 1999).

9. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105(a), § 703(k)(1)(A)(i), 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)).

10. *Lanning I*, 181 F.3d at 482. The defendant's expert testified that aerobic capacity was an important attribute of the police officer positions at issue, and that the running test measured this capacity. *See id.* It was never established, however, that a capacity of 42.5 mL was necessary to do the job. *See id.*

> enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.[11]

Twelve percent of the female applicants completed the run in under the threshold time, while 60 percent of male applicants did,[12] so the test had a pass rate ratio of 0.2 (.12/.6), far short of the EEOC's 4/5ths threshold.

The *Lanning I* plaintiffs clearly made out a prima facie case of disparate impact, but SEPTA had an affirmative defense if it could show that the contested selection practice was "job related for the position in question and consistent with business necessity."[13] Although the definition of what constitutes "job relatedness" and "business necessity" are among the murkiest areas of employment discrimination law, the basic idea is that selection procedures must accurately predict actual performance in an important area of the job.[14] In *Lanning I*, a divided panel of the Third Circuit concluded that the 12.5 minute cutoff score might have been set at a level

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11. EEOC Guidelines for Personnel Selection, 29 C.F.R. § 1607.4(D) (2006). Although the EEOC does not have formal rule-making authority in this area, the guidelines have nevertheless been accorded "great deference." *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). Courts are split on whether a showing of statistical significance is required in addition to a ratio of selection rates below 80 percent. Courts also disagree about whether statistical significance is enough to sustain liability even when the ratio of selection rates is above 80 percent. *See, e.g.*, Isabel v. City of Memphis, 404 F.3d 404, 409, 412-13 (6th Cir. 2005) (finding defendants liable for a statistically significant disparity in pass rates, even though the ratio of pass rates was above the EEOC's 80 percent threshold). For a sophisticated recent analysis of the statistical properties of the 4/5ths rule, see Philip L. Roth, Philip Bobko, & Fred S. Switzer III, *Modeling the Behavior of the 4/5ths Rule for Determining Adverse Impact: Reasons for Caution*, 91 J. APPLIED PSYCHOL. 507 (2006) (criticizing the 4/5ths rule for leading to high rates of false positives). A qualified defense of the rule is provided by Paul Meier, Jerome Sacks & Sandy L. Zabell, *What Happened in* Hazelwood*: Statistics, Employment Discrimination, and the 80% Rule*, 1984 AM. B. FOUND. RES. J. 139 (asserting that the 4/5ths rule remedies some of the defects of a purely statistical approach to liability, which tends to punish even small relative disparities if sample sizes are large enough).

12. *Lanning I*, 181 F.3d at 482-83.

13. Civil Rights Act of 1991 § 703(k)(1)(A)(i). The statute also provides that even when the defendant can demonstrate the job relatedness and business necessity of its selection procedure, the plaintiff may nevertheless prevail if she can identify an alternative employment practice that would suit the employer's legitimate interests with a smaller disparity in selection rates. *Id.*

14. *See* Equal Employment Opportunity Guideline, 29 C.F.R. § 1607.4(c) (2006) (explaining that discriminatory tests must be "predictive of ... important elements of work behavior which comprise ... the job ... for which candidates are being evaluated").

above "the minimum qualifications necessary for successful performance of the job in question," which was also what it concluded the business necessity standard required.[15] Ultimately, SEPTA was able to demonstrate that the cutoff score on the running test was job related and consistent with business necessity as required by Title VII and *Lanning I*.[16]

The problem, however, is that this requirement can be an extremely onerous burden. Although the cost of conducting a sufficiently rigorous validation study to establish business necessity is unknown, the anecdotal evidence suggests that it is in the range of several hundred thousand dollars.[17] This amounts to a significant cost even for large employers and is likely to be prohibitive for smaller ones. Facing this prospect, many employers will find it in their best interest to lower the passing score, which necessarily reduces disparate impacts, or simply drop the test altogether. In either case, employers' ability to match workers to jobs will be impaired.

If there was a satisfactory alternative to making employers like SEPTA conduct a costly and time-consuming validation study, and if, in addition, the alternative was appealing on doctrinal and public policy grounds, cases like *Lanning I* could be resolved in a more satisfying way. I suggest that there is such an alternative, one that begins with facts about the case that the *Lanning I* majority ignored. As the dissent stressed:

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15. *Lanning I*, 181 F.3d at 481. The case was then remanded for further hearing on whether the cutoff score appropriately measured the minimum qualifications for the job. *Id.* at 494. On rehearing after remand, the Third Circuit reversed course and upheld the district court's decision to permit the use of the challenged test. *See* Lanning v. Southeastern Pa. Transp. Auth. (*Lanning II*), 308 F.3d 286 (3d Cir. 2002) (upholding use of cutoff score that disqualified more women than men as job related and consistent with business necessity).

16. *See supra* note 13 and accompanying text.

17. *See, e.g.*, BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 113 n.106 (1983) (noting that the costs of a validation study in 1978 were in the hundreds of thousands of dollars); James Gwartney et al., *Statistics, the Law and Title VII: An Economist's View*, 54 NOTRE DAME L. REV. 633, 643 (1979) (estimating that it cost $20,000 to $100,000 to validate a single test twenty-seven years ago); Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1169 n.31 (1991) (arguing that "[v]alidating tests locally can certainly be expensive, with cost running into the many hundreds of thousands of dollars").

> The named plaintiffs and some of the class members who failed demonstrated ... a "cavalier" attitude towards the running test. Videotapes showed some of these applicants walking at the halfway point, either because they were indifferent or unable to run for even that short a period of time. Thus, although there was a significant disparity between the pass-fail rates of male and female applicants, the extent of the difference appears to have been exaggerated ... by the approach taken by some of the applicants.
>
> A physiologist, Dr. Lynda Ransdell, testified that 40% of all women starting at an aerobic capacity of 35 to 37 mL can train to pass the running test in eight weeks, and that 10% of all women between 20 and 29 years of age can do so without any training. She concluded that the average sedentary woman can achieve SEPTA's performance standard with only moderate training. SEPTA sent applicants a letter outlining recommended training techniques that Dr. Ransdell testified were adequate.[18]

Assuming the dissent's characterization of the facts is accurate, *Lanning I* raises the possibility that an identified disparate impact can have two causes. On one hand, the female applicants for the SEPTA jobs were almost certainly slower in the running test than their male counterparts, on average, before either group had done any training.[19] But the failure of the female applicants to train or prepare for the running test—or perhaps to run hard during the exam itself—also apparently explained at least some of the gender disparity in test results.[20] As I argue below, when plaintiffs

18. *Lanning I*, 181 F.3d at 495 (Weiss, J., dissenting). An interesting question not raised in any of the opinions is whether the disparate impact might have been eliminated if the employer had required *training* itself, as well as a passing score on the running test, as a condition of employment. If training were as effective as Judge Weiss believed, mandatory training might have eliminated the gender disparity in pass rates, especially since training would have helped the female applicants more than it did the male applicants.

19. Nothing turns on whether average differences in running speed between men and women are "innate" or "cultural," as long as the dissent is correct that the differences can be overcome, or at least diminished, by training.

20. An important question, discussed *infra* Part V.B, is whether the employer could defend against a disparate impact claim by arguing that there would be no aggregate male/female disparity *at all* if sufficient numbers of women adequately trained for the test, or whether the defense would be limited to challenging individual plaintiffs who did not exert sufficient effort to train for or take the test. Given the difference in pass rates by gender, 12 percent compared to 60 percent, it seems unlikely that more training by women would have completely eliminated the disparity in *Lanning*. Note, however, that the EEOC's 80 percent

contribute to the existence of a disparity by their failure to make reasonable efforts to train for a job related test, employers should not be held liable for the disparate impact.

B. Generalizing the Example: The Breadth of the Problem

It is worth stressing at this point that not all disparate impact cases involve contribution by plaintiffs. For example, a minimum height requirement for prison guards[21] is likely to have a disparate impact by gender that—assuming height is unalterable—cannot be overcome by any amount of "effort" by female applicants. Tests that cannot be studied or trained for—personality tests, for instance—are also immune from these problems, precisely because there is nothing that applicants could do to change either their own results or the overall disparity. But the prospect that plaintiffs have contributed to a measured disparity in test outcomes is at least potentially an issue in many situations.

The magnitude of the problem is ultimately an empirical question, one that cannot be resolved with anecdotes. Unfortunately, the question has no compelling answer. At a theoretical level, Stephen Coate and Glenn Loury have developed a model of what is essentially a moral hazard[22] in antidiscrimination law, which suggests that there will be some circumstances in which "too much" protection can lead protected-class workers to curtail their own investments in human capital.[23] As they put it, "[i]f the policy forces firms to 'patronize' some workers by setting lower standards for them, then the workers may be persuaded that they can get desired jobs without making costly investments in skills."[24] But they offer no

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standard requires only that the female pass rate be at least 80 percent of the male rate—here, 48 percent, or 0.8(0.6)—to avoid a disparate impact. 29 C.F.R. § 1607.4(D) (2006). Although training conceivably might have increased the female pass rate four-fold to 48 percent, this seems unlikely.

21. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (striking down an Alabama statute that required prison guards to be at least 5 feet 2 inches tall on the basis that it had a disparate impact on women).

22. Moral hazard may be loosely defined as a change in behavior brought about by the presence of insurance. See *infra* text accompanying notes 117-18 for a further discussion of this term.

23. Stephen Coate & Glenn Loury, *Antidiscrimination Enforcement and the Problem of Patronization*, 83 AM. ECON. REV. 92 (1993).

24. *Id.* at 92.

empirical evidence on the importance of this kind of feedback from civil rights protection to lower skill investment by protected groups, and there are reasons to doubt that their characterization of the disincentives is applicable to disparate impact doctrine.[25]

Although my discussion of the case law in the next Part offers several illustrations of disparate impact plaintiffs who failed to train for tests,[26] these anecdotes obviously do not have the value of empirical evidence. The relative scarcity of such cases may indicate that the problem is not widespread, but it could just as well suggest that no one has yet recognized the problem's existence.

Regardless of its empirical importance, however, the two-party causality problem in disparate impact law still calls for our attention as a logical and moral matter. Normatively, the law should treat joint causation in disparate impact cases very differently from the disparate *treatment* setting. The legal system does, and should, afford disparate treatment protection to those plaintiffs whose behavior is imperfect or non-exemplary.[27] But the case for protecting disparate *impact* plaintiffs from the consequences of their own non-exemplary behavior is much weaker. Instead, I argue that the law should give employers an affirmative defense to a disparate impact claim if they can show that plaintiffs failed to make reasonable efforts.[28]

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25. *See infra* Part IV.A. In a recent empirical paper, Pedro Carneiro, James Heckman, and Dimitriy Masterov demonstrated that inter-race gaps in the acquisition of *pre*-market skills are largely uninfluenced by market outcomes of any kind, including the existence of labor market discrimination and presumably—although they do not explicitly say so—anti-discrimination laws. Pedro Carneiro et al., *Labor Market Discrimination and Racial Differences in Premarket Factors*, 48 J.L. & ECON. 1 (2005). Note, however, that both Coate & Loury and Carneiro et al. are interested in the *long-term* relationship between labor market conditions and pre-market investment in skill acquisition, for example, by youth who are still in school. Thus, both papers are of questionable relevance to the short-term decision by someone who is already in the labor market to train or study for a particular test.

26. *See infra* Part II.B.

27. The paradigmatic case is a black worker who is fired for stealing or other malfeasance, but who demonstrates that whites who committed similar bad acts were not fired. Although stealing is clearly a fireable offense, if it is punished uniformly, racial disparities in the punishment for stealing do and should give rise to liability for discrimination. I discuss these issues at length elsewhere. *See* PETER SIEGELMAN, PROTECTING THE COMPROMISED WORKER (forthcoming) (unpublished manuscript, on file with the author).

28. *See infra* Part V.A (discussing the term "reasonable efforts").

II. FITTING A DUTY TO TRAIN INTO THE LAW OF DISPARATE IMPACT

This Part makes three arguments. First, I show how the mechanics of a duty to train could be integrated into the broad contours of the existing defense to disparate impact liability. Next, I demonstrate why my proposal is consistent with the text of Title VII's provisions governing disparate impact. In the final section, I review the case law that speaks to whether defendants already have a reasonable efforts defense.

A. The Statutory Bases for a Reasonable Efforts Defense

Whatever the theoretical justifications for a reasonable efforts defense, the proposal immediately confronts two practical problems. First, how would the proposal intersect with existing statutory defenses? And second, is there a sufficient grounding for the proposal in the text of Title VII? I discuss these issues in turn.

1. Integrating a Failure To Train Defense with Current Defenses to a Prima Facie Case of Disparate Impact

Section 703(k) of Title VII was added by the 1991 Civil Rights Act, and embodies Congressional recognition of both the existence of disparate impact liability and the defense an employer has to a plaintiff's prima facie case of disparate impact.[29] The section makes clear that once a plaintiff establishes that an employer uses "a particular employment practice that causes a disparate impact,"[30] the employer can escape liability if she can "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[31] This language seems to leave two equally unsatisfactory possibilities for my suggested failure to train defense.

First, failure to train might serve as a complete alternative to the standard business necessity defense. On this account, an employer

29. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105(a), § 703(c)(1)(A)(i), 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(I) (2006)).

30. *Id.*

31. *Id.*

could escape liability in *either* of two ways: (a) by demonstrating a test's job relatedness and business necessity; or (b) by showing that plaintiffs failed to make reasonable efforts to train for the test. This standard obliges plaintiffs to train for *any* test, even one that is manifestly not job related or consistent with business necessity, before they can mount a disparate impact claim. It raises the specter that an employer might choose a test precisely to discourage applicants from a group that would have to train harder to pass. For example, a law school intent on limiting the number of women on its faculty might adopt a running test, which is clearly not job related, in order to discourage women from applying. Women who wanted to challenge the test's disparate impact would nevertheless have to train for it in order to surmount the employer's reasonable efforts defense, even though the test itself was illegitimate.[32]

A second possibility is that the reasonable efforts defense would add nothing to existing law; if defendants always had to prove business necessity and job relatedness, it would not matter whether plaintiffs trained for the test because the test would have to be justified in either case.

Neither prospect is appealing. The first allows employers to exploit the "lack of effort" defense by erecting barriers to exclude protected-class members when the latter have to undertake more arduous training than others. The second eliminates any requirement that applicants make reasonable efforts, since everything turns on the nature of the test itself. In essence, this eliminates the possibility of two-party disparities, precluding *any* recognition of the contribution plaintiffs might make to producing an uneven outcome. As I argue at length below,[33] this is not a good result on either equitable or consequentialist grounds.

A better solution is to make lack of effort a substitute only for the business necessity prong of the employer's defense, while maintaining the requirement that employers demonstrate job relatedness. In

32. Note, however, that any employer who deployed a test with the intent to disproportionately screen out protected class workers would obviously be liable under a disparate *treatment* theory. *See* Title VII of the Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2 (2006) (allowing use of tests only if they are not "designed, intended, or used to discriminate"). Disparate impact liability would be useful, in this context, only if the plaintiff lacked sufficient evidence of the employer's discriminatory intent.

33. *See infra* Part IV.

other words, once a plaintiff made a prima facie case of disparate impact, the employer would *always* have to establish that the test was job related. Having done so, an employer would then face two alternatives. First, she could show that the test was justified by business necessity.[34] Alternatively, after proving job relatedness, the employer might show that the plaintiffs failed to make reasonable efforts to train for the test. This would obviate the need for demonstrating business necessity. For example, in *Lanning I*, SEPTA could have prevailed under this standard without having to show that the cutoff score actually measured the minimum acceptable level of aerobic performance if it could demonstrate that many women in fact failed to make reasonable efforts to prepare for the test.

My proposal maintains the requirement that tests with disparate impact be job related. Loosely speaking, this means that a test must be a reasonably accurate predictor of performance on an important aspect of the job.[35] Preserving this requirement prevents employers from choosing a test merely to screen out workers with high training costs. On the other hand, the proposal serves the interests of employers—and, as I argue in Parts III and IV, of society as a whole—by recognizing that some disparate results are due, in part, to the behavior of plaintiffs. For reasons I detail below, when employers can establish that plaintiffs failed to undertake reasonable training efforts, they should be excused from having to argue for the "necessity" of the selection mechanism.[36]

2. Statutory Bases for a Failure To Train Defense

Title VII contains three sections—§ 703(k)(1)(A)(i), § 703(k)(1)(B)(ii), and § 706(g)—that can serve to ground a failure to train defense. Although none of these sections compels the recognition of the proposed failure to train defense, it is entirely compatible with

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34. In *Lanning II*, for example, SEPTA was ultimately able to convince both the trial court and the Third Circuit that the twelve minute cutoff time for the running test was "necessary" because it measured the minimum aerobic capacity necessary to be an acceptable police officer. *See* Lanning v. Southeastern Pa. Transp. Auth. (*Lanning II*), 308 F.3d 286, 288 (3d Cir. 2002).

35. For a summary of the law regarding the job relatedness requirement, see BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 106-10 (3d ed. 1996).

36. *See infra* Part II.A.2.b.

the statute and may actually help to explain a perplexing redundancy in the text.

a. § 703(k)(1)(A)(i) and Causation

As noted above, § 703(k) was added by the 1991 Civil Rights Act[37] to codify Congress's understanding of disparate impact liability. The text states that an "unlawful employment practice based on disparate impact"[38] occurs when "a complaining party demonstrates that a respondent uses a particular employment practice that *causes* a disparate impact ...."[39] The use of the word "causes," instead of more neutral language such as "has," "gives rise to," or "generates," offers some support for a failure to train defense. The argument is straightforward: the use of "causes" opens up the possibility that jointly caused events may not result in liability for the employer. In particular, when plaintiffs fail to train, the selection device chosen by the employer is not the sole cause of the disparate impact. The disparity is as much the result of plaintiffs' lack of effort as it is of the test itself.

The obvious—and correct—response to this argument is that Congress did not understand "causes a disparate impact" to mean "causes a disparate impact *all by itself*." In fact, it is unlikely that any selection procedure could cause a disparate impact "all by itself"; taken literally, this reading would eliminate disparate impact liability altogether.[40] Cases involving causation by both plaintiff and defendant might be distinguished from those in which causation is divided between employers and "broader social factors," as in *Griggs*. However, the fact remains that Congress's use of "causes," rather than an alternative verb, offers some support for limiting liability when the causation is clearly divided between defendants and plaintiffs.

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37. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105(a), § 703(k)(1)(A)(i), 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2 (k) (2006)).

38. *Id.*

39. *Id.* (emphasis added).

40. In *Griggs*, for example, the employer's use of a high school graduation requirement would not have caused a disparate impact by race were it not for background social conditions that restricted the availability of secondary education to African American applicants. Paetzold & Willborn describe this as a case of "concurrence," meaning that two factors combine to create the disparity in results. *See* Paetzold & Willborn, *supra* note 4, at 329-30.

b. § 703(k)(1)(B)(ii) and Job Relatedness

Section 703(k)(1)(B)(ii) is somewhat puzzling; it reads: "If the respondent demonstrates that the specific employment practice does not cause a disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity."[41] Presumably, this section was meant to cover situations in which there is a dispute about what constitutes the relevant baseline for measuring disparities. For example, suppose a restaurant's use of word-of-mouth to hire its waitstaff results in a labor force that is 35 percent female. Suppose further that the plaintiffs claim that this practice has a disparate impact because the relevant labor market from which the waitstaff was drawn is 50 percent female. The defendant, however, is able to convince the court that the relevant labor market—say, persons with more than five years experience waiting tables—is actually only 30 percent female, so there is no disparate impact against women.[42] In this instance, Section 703(k)(1)(B)(ii) would forestall the employer's need to justify the word-of-mouth hiring practice by demonstrating its consistency with business necessity.[43]

This situation poses a puzzle: if there is no disparate impact in the first place, why should an employer *ever* have to justify a practice's consistency with business necessity? If no disparate impact exists, then there is nothing to justify on the basis that it is required by business necessity. Moreover, § 703(k)(1)(B)(ii) is as interesting for what it omits as for what it redundantly seems to include. Missing entirely is any language about the job relatedness requirement, which seems to suggest that employers have to show job relatedness even when there is not any cognizable disparate impact at all.

The proposed failure to train defense not only comports with the language of § 703(k)(1)(B)(ii), but also offers a partial resolution of the over and underinclusiveness problems just described. Suppose

41. Civil Rights Act of 1991 § 703(k)(1)(B)(ii). Note again the reference to a "specific employment practice [that] does not cause the disparate impact." *Id.*

42. This hypothetical is drawn from the facts of *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000).

43. *See id.*

a plaintiff asserts that there *is* a cognizable disparate impact, and, instead of refuting the existence of a disparity, the employer argues that the reason for the disparity was that the plaintiff failed to train for the test. If such a defense were recognized, the employer would not need to show the business necessity of the proposed test. But the omission of any job relatedness language from § 703(k)(1)(B)(ii) means that the employer *would* still have to demonstrate the test's job relatedness.[44] The possibility that a test could have a disparate impact that is excused by the applicant's failure to train makes sense of what would otherwise be a puzzling requirement—that an employer demonstrate job relatedness even when there was no disparate impact in the first instance. The statute might be referring to the case in which there *is* a disparity, but the disparity is justified by something other than the business necessity of the practice at issue.[45]

c. § 706(g) and the Duty To Mitigate

Section 706(g)(1) describes the basic remedies available under Title VII.[46] Embodying a principle widely recognized in other remedial settings, the section imposes an avoidability, or duty to mitigate, requirement on prevailing plaintiffs, reducing back pay damages by "amounts earnable with reasonable diligence by the person or persons discriminated against."[47] Courts have interpreted this straightforward language to mean that a victim's actual or potential earnings—if the latter is greater—are to be deducted from the amount the defendant owes, on the principle that the plaintiff

44. As explained earlier, this has the effect of preventing an employer from using a bogus test to disqualify protected-class applicants. *See supra* note 35 and accompanying text.

45. Of course, it might just have been bad drafting.

46. The language of § 706(g) refers explicitly to respondents who have "intentionally engaged in ... an unlawful employment practice." Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 261 (codified at 42 U.S.C. § 2000e-5(g)(l) (2006)). At first blush, this language might seem to exclude all of the disparate impact claims that are our concern. This section, however, has been read to authorize damages in cases of disparate impact liability, despite the language referring to "intent." *See, e.g.*, Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972) (finding that in the context of § 706(g), "intentional" refers not to the discrimination itself, but to the act of choosing a particular employment practice that has a disparate impact).

47. Civil Rights Act of 1964 § 706(g).

should offset the harm caused by the defendant by finding other work, to the extent feasible.[48]

The duty to mitigate is usually applied after the defendant's wrongful actions have harmed the plaintiff. But it is not implausible or unreasonable to view the plaintiff's failure to train for a test as a kind of ex ante failure to mitigate the harm that results from the test itself. So understood, § 706(g) might be read to eliminate damages for a plaintiff who could have had the job if she had trained for the test, but failed to do so.[49] Title VII's codification of a duty to mitigate thus implicitly recognizes that plaintiffs may play a role in creating—or reducing—a defendant's backpay liability, and it is precisely this two-party or interactional harm that is at the center of my argument.

B. The Case Law

An extensive body of case law defines what constitutes a legally cognizable disparity.[50] Largely missing from the cases, however, is any discussion of whether a disparity in pass rates by race or sex is excused when plaintiffs' behavior is partially or even wholly responsible for the observed disparity. A careful search of the disparate impact decisions reveals only a very few examples in which courts have taken any notice at all of plaintiffs' behavior, let alone suggested whether such behavior could serve as a defense for an employer. Even in *Lanning I*, the majority never acknowledged the dissent's observations about the lack of training or effort by some of the plaintiffs.[51] Hence, it is unclear whether that case

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48. The duty to mitigate, "rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed plaintiff need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied." Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982) (citations omitted).

49. More generally, failure to train would not reduce a plaintiff's damages to zero unless the employer could show that training would have guaranteed that the plaintiff would have gotten the job for which she applied. But if training would have raised the plaintiff's probability of getting the job from 20 percent to 45 percent, then back pay might be reduced by 25 percent (45-20) of foregone earnings to reflect the probabilistic opportunity to mitigate that the plaintiff failed to take.

50. For an analytic survey, see LINDEMANN & GROSSMAN, *supra* note 35, at 135-62.

51. *See* Lanning v. Southeastern Pa. Transp. Auth. (*Lanning I*), 181 F.3d 478 (3d Cir.

affirmatively held that lack of training or effort by plaintiffs was *not* a defense in a disparate impact claim, or merely suggested this conclusion by negative implication.[52]

In this Part, I describe and analyze what seem to be the relevant precedents on this issue. The cases can be grouped into three categories. Courts in the first group implicitly recognize that plaintiffs' failure to train may serve as a defense to a disparate impact claim, although no court does so explicitly. In a second group of cases, courts have opined on whether disparate impact liability reaches selection criteria based on a plaintiff's easily mutable characteristics, such as hairstyle or dress. Although not directly on point, the general conclusion in these cases is that when plaintiffs can easily alter their behavior to eliminate the disparity, they have no cognizable disparate impact claim. Finally, a few cases take what seems to be a pure "effects" perspective and suggest that disparate impact liability does not permit any investigation whatsoever into the reasons for the disparity—including, presumably, plaintiffs' failure to train or prepare. I explain why the latter cases are not relevant to my argument in Section 3.

1. Failure To Train as a Defense to Liability

Although no court has ever based its decision on the "failure to train" rationale, some courts do seem to suggest, albeit obliquely, that plaintiffs who do not try hard enough to pass a test cannot then pursue a disparate impact claim. For example, *In re Scott* involved a 34-year-old male state trooper who, like the *Lanning* plaintiffs, complained about a timed running test.[53] The Vermont State Police required males between 30 and 39 years of age to run 1.5 miles in less than 12 minutes and 51 seconds in order to be retained on the force.[54] Scott failed this test on four separate occasions, never running faster than 14 minutes and 29 seconds.[55] Moreover, he

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1999).

52. The cutoff score was ultimately upheld on rehearing. *See* Lanning v. Southeastern Pa. Transp. Auth. (*Lanning II*), 308 F.3d 286, 292-93 (3d Cir. 2002). The final opinion does seem to give *some* weight to the fact that some of the plaintiffs failed to train. *See id.*

53. 779 A.2d 655 (Vt. 2001).

54. *Id.* at 657.

55. *Id.* at 657-58.

failed to "take advantage of his employer's offers to train on work time, ... [refused] assistance in formulating an individual exercise program," and apparently did not train for the test at all.[56] Although he was chided by the court for these failures, Scott's lack of training was, in the end, irrelevant to the Vermont Supreme Court's holding that he had not made out a prima facie case of disparate impact.[57]

Berkman v. New York involved a series of physical exams for firefighters.[58] The defendant "obtained foundation funding for a special training program for women to prepare them for the test. Most of the women who participated actively in the training program passed the physical test.... The passing rates on the physical test were: men, 95.42 percent; women, 46.67 percent."[59] The court ultimately rejected the plaintiff's claim that the test had a disparate impact.[60] Although the court noted that the defendant offered training for the test, that the plaintiff apparently refused this training, and that the training was effective, its reasoning did not explicitly turn on any of these factors.[61]

In *Gilbert v. Little Rock*, Grady Anthony alleged that the Little Rock Police Department's test for promotion to lieutenant had a disparate impact based on race.[62] The court found that:

> Eighty items from the 1980 examination (on which Anthony scored 100) for which he had studied were used in the 1982 test, word for word. Scores for these items totaled 80 out of the

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56. *Id.* at 658.

57. *Id.* at 662. The court concluded that:

> [M]ale troopers did not have a higher percentage of test failures than women troopers [so there was no disparate impact]. Moreover, [Scott's] claim that he was discriminated against because female troopers and older troopers were held to a "lesser standard" suffers from a fatal factual flaw: [his] times for the 1.5 mile test were insufficient even if he had received the "benefit" of being assessed either by the standard required of women in his age group or for older troopers.

Id. at 661.

58. 812 F.2d 52, 54-55 (2d Cir. 1987).

59. *Id.* at 55.

60. *Id.* at 59.

61. *Id.* Instead, Judge Newman's rationale for upholding the test was that it measured strength, which was an important and legitimate requirement for firefighting, even if other attributes such as stamina might also be important and were not well measured. *Id.* at 59-60. Judge Newman also pointed out that a greater emphasis on stamina would not have made much, if any, difference to the gender disparity. *Id.* at 60.

62. 544 F. Supp. 1231 (E.D. Ark. 1982).

> possible 100 points. Grady Anthony missed 24 of these identical items in 1982 that he had gotten right in 1980. In spite of his contentions, the test does not improperly impact upon blacks, but instead the low test score resulted from lack of study [*sic*].[63]

Although the court in *Gilbert* opined that the plaintiff's low test score was the result of his own failings,[64] the disparate impact issue was never squarely addressed. Consequently, this case does not speak to the question of whether a failure to study limits a plaintiff's disparate impact claim.[65]

Somewhat more on point is *Perry v. Orange County*, in which the plaintiffs originally alleged that a test for promotion to lieutenant in the fire department had a disparate impact by race.[66] Commenting on one of the plaintiffs, the magistrate judge pointed out that:

> [The trial court] also noted that [plaintiff's expert] Dr. Hoffman did not "take into account the potential impact of failure to study." Dr. Hoffman should have investigated plaintiffs' test preparation and other non-discriminatory factors that affected test scores. [Plaintiff] McLean underscores these failings and plaintiffs' unreasonable pursuit of the disparate impact claim. McLean should have been excluded from the disparate impact analysis because he did not attend an Orientation Workshop, did not request the materials from the Orientation Workshop, and

63. *Id.* at 1253. Anthony claimed that his lack of studying was attributable to the Department, which subjected him to stress, failed to give him sufficient notice of the test date and contents, and allowed him insufficient study time. *Id.* at 1252. The court rejected these claims out of hand. *See id.*

64. *Id.* at 1253.

65. The opinion does not make it clear whether Anthony was even raising a disparate impact claim in the first instance, although the court's description makes it seem as if that was at least part of the plaintiff's theory. *See id.* at 1233 (noting that part of the plaintiff's claim was "that the promotion system ... impacts ... black employees in a disproportionate fashion").

66. 341 F. Supp. 2d 1197, 1202 (M.D. Fla. 2004). Given the unusual procedural posture of the litigation, however, the opinion does not do much to clarify whether the court thought plaintiffs had any duty to prepare or train for the exam. The case was actually before the court on the *defendant's* motion to recover its fees after the plaintiffs lost on summary judgment and their appeal was rejected by the Eleventh Circuit. *Id.* at 1202. Given that the court required plaintiffs to pay some of the *defendant's* fees, *id.* at 1218, this was presumably an unusually weak case, signaling frivolousness or bad faith by the plaintiffs in bringing the litigation.

> did not purchase all of the study materials. As McLean acknowledged, he was not fully prepared, but plaintiffs charged ahead despite the obvious problems with McLean's case.[67]

The magistrate judge's observation comes close to suggesting that an employer might have an affirmative defense if a plaintiff failed to study for an exam; however, that issue was not squarely before the court, and the justification for this conclusion is conspicuously absent.

More recently, the Fourth Circuit's decision in *Anderson v. Westinghouse Savannah River Co.*[68] shows that some courts do ask whether factors other than race can explain a statistical disparity. Although not specifically addressing plaintiffs' lack of preparation, *Anderson* involved several black workers who brought a variety of hiring and promotion claims against a large employer.[69] Many of the plaintiffs asserted that the employer's criteria for promotion had a disparate impact by race, although there were numerous disparate treatment claims as well.[70] The plaintiffs produced evidence that the percentage of black candidates who succeeded at each of three stages in a particular promotion process was lower than statistically expected, and sought to use this evidence to support a disparate impact claim.[71] The court concluded, however, that:

> This evidence does not show that the *reason* black applicants failed to proceed at the interview selection stage and position selection stage was their race. Factors such as presentation in the interview, answers to interview questions, demeanor, and ability demonstrated in the interview of course entered into the judgment of the members of the panel as to the candidate who received a position that was being filled. And, at the interview selection stage, for example, education and experience are two factors that [the plaintiffs' statistical expert's] analysis fails to quantify.[72]

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67. *Id.* at 1212 n.7 (citations omitted).
68. 406 F.3d 248 (4th Cir. 2005).
69. *See id.* at 258-59.
70. *See id.*
71. *See id.* at 261-62, 265.
72. *Id.* at 266 (emphasis added). Judge Gregory, in dissent, took issue with this conclusion. *Id.* at 280-82 (Gregory, J., dissenting).

The opinion seems to require plaintiffs to demonstrate that the racial disparity they complain about remains even after controlling for other factors such as demeanor, presentation, and so on. Such "other factors" would surely have to include a lack of preparation or effort by the applicants, although the *Anderson* court's approach would seem to encompass many other variables in addition to effort or training.[73]

The clearest recognition of the potential two-party or interactional nature of disparate impact harm comes from the re-hearing of *Lanning*,[74] discussed earlier. The Third Circuit initially remanded the case for further hearing on the issue of whether SEPTA's cutoff score, 12 minutes for a 1.5 mile run, measured "the minimum aerobic capacity necessary to perform successfully the job of a SEPTA transit police officer."[75] On remand, the district court concluded that the defendant had established that its cutoff score was appropriate under this standard, and on rehearing, a divided panel agreed that the cutoff score was appropriately set.[76] At the very conclusion of its opinion, almost as an afterthought, the court noted that:

> [I]n addition to those women who could pass the test without training, nearly all the women who trained were able to pass after only a moderate amount of training. It is not, we think, unreasonable to expect that women—and men—who wish to become SEPTA transit officers, and are committed to dealing with issues of public safety on a day-to-day basis, would take this necessary step. Moreover, we do not consider it unreasonable for SEPTA to require applicants, who wish to train to meet

73. Indeed, *Anderson* goes some way towards collapsing the distinction between disparate impact and disparate treatment analysis altogether. At the limit, if a racial disparity in pass rates only counts as evidence of a disparate impact when all other factors—besides race—have been considered and rejected, then we will have eliminated the distinction between disparate impact and pattern and practice theories of discrimination. For example, it seems clear that *Griggs* would have come out the other way if the Court had used the reasoning of *Anderson*. The *Griggs* plaintiffs never even sought to demonstrate that the reason black applicants disproportionately failed the IQ test was their race. Perhaps the reason for the disparity was that the black test takers had fewer years of education or a lower quality of schooling than most of the white test takers.

74. Lanning v. Southeastern Pa. Transp. Auth. (*Lanning II*), 308 F.3d 286 (3d Cir. 2002).

75. *Id.* at 288.

76. *See id.* at 288, 292.

> the job requirements, to do so before applying in order to demonstrate their commitment to physical fitness.[77]

Although *Lanning II* did hint at the possibility of a reasonable efforts defense, it is clear from the rest of the six-page opinion that the failure to train by some female applicants was at most a secondary factor supporting the majority's analysis.[78]

Contreras v. City of Los Angeles[79] is the only other case that takes on the failure to train issue directly. Plaintiffs were Hispanic city employees who failed a written examination that was required for retention after the city reorganized their department.[80] The trial court found that the plaintiffs had failed to study for the exam,[81] and held that this lack of preparation vitiated the plaintiffs' prima facie case of discrimination.[82] The Ninth Circuit agreed, concluding that "the impeachment of the [pass rate] statistics by evidence of the accountants' failure to study, [among other things,] convince[s] us that the district court's conclusion was not an unreasonable interpretation of the evidence presented."[83] Without explicitly saying so, the *Contreras* court seems to endorse the proposition that

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77. *Id.* at 292.
78. *See id.* at 292-93.
79. 656 F.2d 1267 (9th Cir. 1981).
80. *Id.* at 1271.
81. As the court explained:

> Facts stipulated by the parties include the statement of a City official that [the plaintiff] accountants confessed to lack of preparation at a meeting held to air accountants' complaints about the examination.... The same City official who revealed accountants' admission to their lack of study filed a report describing the meeting at which the admission occurred. That report, prepared several months before accountants filed a complaint in the district court, related plausible reasons for their failure to study: they believed not only that the voters would pass [a] charter amendment exempting them from the examination requirements, but also that they would receive a second opportunity to take the examination if the amendment failed.
>
> That accountants failed to prepare adequately for the examination is corroborated by their examination performance. Their average examination score, aside from being well below the established passing score, was 11.58 percent below the average score of the other 13 Spanish-surnamed applicants who took the test. Moreover, they scored well below the average Spanish-surnamed score in every examination category.

Id. at 1273-74.

82. *Id.*
83. *Id.* at 1274.

plaintiffs cannot even make out a prima facie case of disparate impact if the reason for their failure on the examination was their own lack of preparation.[84]

2. No Disparate Impact for Easily Mutable Characteristics

Further support for the idea of a duty to train comes from the analysis of disparate impacts caused by easily mutable characteristics. Courts have addressed a number of contexts in which a workplace rule has a disparate impact on protected-class members, but those impacts can be overcome at low costs to the workers themselves. These cases are generally consistent with my proposed rule governing training for tests: disparate impacts that can be surmounted or eliminated by low-cost alterations in plaintiffs' behavior are generally not held to be a basis for liability. Put another way, these cases generally conclude that disparate impact plaintiffs are obliged to mitigate the harms of the impact-creating rule they are challenging when they could do so easily. Only those impacts that are not easily overcome by plaintiffs can be a source of employer liability.

Garcia v. Spun Steak Co.[85] provides one example of this kind of reasoning. The case concerned a disparate impact challenge to an employer's English-only work rule by several bilingual employees.[86] In rejecting the plaintiffs' claims, the court observed that:

84. This conclusion is both stronger and weaker than the standard I propose below. *Contreras* seems to stand for the proposition that non-studying plaintiffs are ineligible to sue for disparate impact, but not for the broader implication that the failure to study can be used to attack the existence of the disparity altogether, which is what I propose. On the other hand, the *Contreras* court suggested that plaintiffs' failure to study doomed their prima facie case. Under my proposal, non-studying plaintiffs could maintain a prima facie case, but employers could rebut more easily by showing only job relatedness, and not business necessity. Note too that my standard would allow for a cost-justified failure to study, whereas *Contreras* does not address the costs of training at all.

85. 998 F.2d 1480 (9th Cir. 1993). Charles A. Sullivan briefly discusses—disapprovingly—what he terms an emerging "volitional exception" to disparate impact liability when disparities are due to circumstances that a plaintiff can easily control. *See* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1562-63 (2004).

86. *See Garcia*, 998 F.2d at 1483-84.

> The bilingual employee can readily comply with the English-only rule and still enjoy the privilege of speaking on the job. "There is no disparate impact" with respect to a privilege of employment "if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference."[87]

By extension, this principle would seem to imply that plaintiffs who could readily pass an exam if they trained for it, but did not do so, might not have a sustainable disparate impact claim.

Similarly, plaintiffs occasionally prevail on disparate impact challenges to employer grooming or dress codes, but only when compliance with the rules is difficult for race- or gender-contingent reasons.[88] More often, courts find that when plaintiffs can comply with prohibitions such as those against long or braided hair at relatively low cost, there is no disparate impact.[89] A typical example of this reasoning is *Batson v. Powell*,[90] in which the court rejected the plaintiffs' gender-based disparate impact challenge to their employer's dress code, remarking that "Title VII protects classes defined by certain immutable traits identified by statute and possessed by certain individuals. Traits or factors specifically within an individual's control are not necessarily protected."[91]

There may be strong diversity and other grounds for concluding that altering one's dress or hairstyle is in fact more burdensome than the courts cited above seemed to assume. I am not concerned with the correctness of these decisions, however, as much as the principle they endorse: *if* plaintiffs can overcome a disparate impact at little cost to themselves, they should be required to do so. That is precisely the line I wish to take as regards training for a test.

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87. *Id.* at 1487 (quoting Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980)).

88. *See, e.g.*, Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795, 799 (8th Cir. 1993) (explaining that employer's "no-beard policy" had a disparate impact on black males because of pseudofolliculitis barbae, a skin condition affecting African American men that makes shaving difficult, and was not justified by business necessity).

89. *See, e.g.*, Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981) ("An all-braided hairstyle is an 'easily changed characteristic,' and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer." (citing *Garcia*, 618 F.2d at 269)).

90. 912 F. Supp. 565 (D.D.C. 1996).

91. *Id.* at 572.

3. No Plaintiff Contribution to Disparate Impacts

At least one case seems to suggest that there can be nothing resembling a "lack of effort" defense to a disparate impact claim, because no other factors may be considered apart from the raw racial disparity giving rise to the disparate impact claim.[92] Under this view, disparate impacts are inherently one-sided. In *Association of Mexican-American Educators (AMAE) v. California*, the court set out to assess the explanation for why, on average, minority plaintiffs had lower scores than whites on the state-mandated test used to screen public school teachers.[93] In doing so, the court noted that:

> [P]reparation factors [appear to] play a strong role in a candidate's performance on the [test], regardless of the candidate's race or ethnicity.
>
> Nevertheless, this analysis is entirely irrelevant to the issue of adverse impact. *It does not matter why the disparate impact exists.* Defendants cannot escape liability by showing that the disparate impact is attributable to particular background factors.... "[T]he whole point of a disparate impact challenge is that a facially non-discriminatory employment or promotion device—in this case an examination—has a discriminatory *effect*. It would be odd indeed if a defendant whose facially non-discriminatory examination which has a disparate impact could escape the obligation to validate the examination merely by pointing to some *other* facially non-discriminatory factor that correlates with the disparate impact."[94]

A careful reading, however, reveals that *AMAE v. California* does not speak directly to the issues I have been considering for two reasons. First, it is clear from the context of the litigation that "preparation factors" meant the plaintiffs' general level of education, experience, and English-language proficiency, rather than their

92. *See* Ass'n of Mex.-Am. Educators v. California (*AMAE*), 937 F. Supp. 1397 (N.D. Cal. 1996).

93. *Id.*

94. *Id.* at 1410 (emphasis added except "why," "effect," and "other") (quoting Bouman v. Block, 940 F.2d 1211, 1228 (9th Cir. 1990)). Note the obvious contrast with *Anderson v. Westinghouse Savannah River, Inc.*, 406 F.3d 248 (4th Cir. 2005), discussed *supra* notes 68-73 and accompanying text.

efforts to train or prepare *specifically* for the test at issue.[95] There is an important—although not always clear—distinction between general background factors and individual-specific factors, such as lack of effort, that influence the probability of passing tests. I argue below that it is not appropriate to impose on plaintiffs the costs of compensating for general background factors that have the effect of disadvantaging their particular group.[96] One might nevertheless wish for plaintiffs to make reasonable efforts to train for a particular test, regardless of whether the reasonable efforts turned out to be successful.[97]

The second limitation of the *AMAE* analysis is more narrowly legal. Because the test at issue in *AMAE* had a disparate impact on minorities, the defendant assumed the burden of showing that in spite of this disparity the test was job related and justified by business necessity.[98] The court in *AMAE* was concerned with whether this burden could be obviated by evidence that the disparity was based on other factors besides minority status per se.[99] The Court held that a benign explanation for the disparity does not eliminate the requirement that the test be job related.[100] But for

95. Imagine that we had data on each applicant's test score and a variety of other attributes—race, age, education, prior experience, and so on. An analysis of disparate impact by race would seem to require that we *ignore* all these other attributes, even if a regression equation that predicted test scores would perform better—and would probably show a smaller race effect—if age, education, etc. were included in addition to race. *See, e.g.*, Ian Ayres, *Three Tests for Measuring Unjustified Disparate Impacts in Organ Transplantation: The Problem of "Included-Variable" Bias*, 48 PERSP. BIOLOGY & MED. S68, S70-73 (2005). *But see* Robert Bornholz & James J. Heckman, *Measuring Disparate Impacts and Extending Disparate Impact Doctrine to Organ Transplantation* (NBER Working Paper No. 10946, 2004), *available at* http://www.nber.org/papers/w10946. That is because disparate impact—unlike disparate treatment—is generally concerned with *effects*, not the *reasons* for those effects. A test that disqualifies a disproportionate number of minorities can still be subject to disparate impact liability, even if the "real" reason for the disparity is that minority teachers attended poorer quality schools, are younger, or have less experience than their white counterparts. *See* Ayres, *supra* at S70-73.

96. So, for example, although the plaintiffs in *Griggs* could have obtained a high school diploma, the cost of doing so for African Americans in North Carolina in the early 1960s would have been prohibitively high. *See infra* Part V for further discussion.

97. Thus, we might want the *Lanning* plaintiffs to show that they made reasonable efforts to pass the running test, even if those efforts would not have been successful, as was suggested in *Lanning II*. *See* Lanning v. Southeastern Pa. Transp. Auth. (*Lanning II*), 308 F.3d 286 (3d Cir. 2002).

98. *See AMAE*, 937 F. Supp. at 1410.

99. *Id.*

100. *Id.*

our purposes, the important question is whether lack of training or effort can defeat liability for disparate impact, not whether such behavior can defeat the job relatedness requirement.[101] In other words, *AMAE* is consistent with the argument advanced here: a defendant must show that the challenged test was job related *before* being allowed to raise a defense that the plaintiffs did not undertake sufficient reasonable effort in preparing for the test or in taking the test itself.

To summarize, almost none of the existing case law squarely addresses the question of whether there is any defense to a disparate impact claim based on a plaintiff's lack of effort or preparation to meet a job requirement.[102] A few cases suggest in dicta that individual disparate impact plaintiffs might be disqualified if they failed to make reasonable efforts to prepare or train for a test, although no cases expressly reach this holding. A few others suggest that *no* explanatory factors—presumably including lack of preparation—can be used to excuse a disparity. But these cases do not deal with the effort or preparation issue directly, focusing instead on general background factors such as educational attainment. In the end it seems that there is opportunity to speculate about what the law *should* be.

There are two ways to answer this question, doctrinally or with a policy-based approach. A doctrinal approach first reasons from principles, including statutory construction and legal analogies. I attempt an analysis of this kind in Part III. A policy, or consequentialist, approach begins by imagining what real world behaviors the law is seeking to encourage or discourage, and then reasons backward to the legal rules that best promote such behavior. I present an analysis in this spirit in Part IV. Both approaches

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101. *AMAE* was quoted approvingly and at length in a more recent disparate impact case, *Gulino v. Bd. of Educ.*, 236 F. Supp. 2d 314 (S.D.N.Y. 2002), but the issue there was whether the plaintiffs' "expert's failure to consider ... variables [other than race/ethnicity] render[ed] his report of little or no probative worth." *Id.* at 340. The court concluded that in a disparate impact claim, "there is no requirement that plaintiffs control for variables other than race and ethnicity in their statistical proof." *Id.* at 341. For example, if black applicants have fewer years of education than white applicants, controlling for years of education in a regression explaining test scores would probably make the inter-race difference look smaller, because some of the apparent racial disparities would be explained by differences in education by race.

102. Lindemann and Grossman's comprehensive treatise makes no mention of these issues at all. *See* LINDEMANN & GROSSMAN, *supra* note 35.

reach the same conclusion, albeit by different routes: we should not hold employers liable for an employment practice that has a disparate impact when applicants, at low cost to themselves, could have eliminated the harm they suffered but failed to do so.

III. THEORETICAL FOUNDATIONS FOR DISPARATE IMPACT AND THE TWO-PARTY PROBLEM

To understand how disparate impact doctrine should address instances of two-party causality, it is helpful to understand the rationale for disparate impact doctrine.[103] Three major rationales have been proposed: proxy for motive, distributive justice, and remedying past discrimination. I discuss each in turn.

A. Proxy for Motive

An employer's intent or purpose in adopting a particular employment practice is usually difficult to discern and even more difficult to prove. Especially in the immediate aftermath of Title VII, it was entirely reasonable to suspect that employers might seek to hide behind facially neutral job requirements such as a high school diploma or an IQ test in order to preserve segregation. Disparate impact might thus be thought of as a way to ferret out discriminatory intent when an illicit motive is likely, but is impossible to demonstrate given the evidentiary burdens that Title VII plaintiffs face.[104]

"Judging intent by effects" is certainly a plausible justification for disparate impact liability, although it is problematic in several respects.[105] At any rate, the covert motive theory seems largely

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103. For an imaginative recent analysis of the constitutional basis for disparate impact, see Primus, *supra* note 4. Primus's analysis is not germane here, however, because this Article takes the constitutionality of disparate impact as a given.

104. *See, e.g.*, Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 29 (1976) (arguing that disparate impact should be used "selectively ... to create rebuttable ... presumptions of discriminatory intent").

105. For instance, it seems strongly at odds with the holding in *Connecticut v. Teal*, 457 U.S. 440 (1982). At issue in *Teal* was a test that disqualified a greater number of black than white applicants for promotion to supervisor in the state's welfare eligibility department; the white pass rate was 79.5 percent, whereas the black rate was 54.2 percent, for a relative rate of 68 percent. *Id.* at 444 n.4. The State attempted to compensate for the disparity at the testing stage by promoting 11 of the 26 black test passers (42 percent) and only 35 of the 206

consistent with a "lack of effort" defense to disparate impact claims. If some or all applicants demonstrably fail to make reasonable efforts to pass or train for a test, then some or all of the observed disparity in results should obviously be attributed to the applicants themselves, rather than reflecting any hidden bias on the part of the employer. In *Lanning*, for example, it is hard to reconcile the employer's offer of training and its letter urging applicants to take advantage of the training program with a covert desire to exclude women. Moreover, even if the test had been intended to disqualify female candidates, it would have been less effective in achieving this goal, if the plaintiffs had made more effort to train for the test, thereby raising their pass rate. "Judging intent by effects" is simply less persuasive when there is a credible alternative reason for the disparity that has nothing to do with the employer's intent. That is exactly the case when applicants fail to make reasonable efforts.[106]

In sum, the "proxy for intent" theory suggests that disparate impact liability is not justified when the disparity at issue is substantially the result of the applicant's failure to make reasonable efforts, precisely because the plaintiff's behavior, rather than the defendant's discriminatory intent, is likely to have caused some or all of the disparity.

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white test passers (17 percent). *Id.* at 443. Overall, black applicants had a 23 percent chance of getting the job, while white applicants had a 14 percent chance, a relative rate of 170 percent. Because the overall, or "bottom-line," results strongly favored blacks, it is hard to argue that the State was using the test in a covert effort to exclude black applicants. Under any motive-based theory, therefore, it would seem that no disparate impact liability should obtain—and yet the Court rejected a "bottom-line" theory of defense. *See id.* at 442.

106. Of course, it is possible that the employer knew that women would have a harder time passing the test without training, guessed that they would not train, and selected the test for the purpose of keeping women off the force. That seems implausible in the *Lanning* context, given SEPTA's extensive efforts to validate the test before it was adopted, the obvious relevance of a running test for police officers, and the long history of using such tests. *See generally* Lanning v. Southeastern Pa. Transp. Auth. (*Lanning I*), 181 F.3d 478 (3d Cir. 1999). Such suspicions obviously cannot be completely ruled out based on the available record, however. The point is merely that if disparate impact is supposed to guard against suspected, but difficult to prove, intentional discrimination, these facts do not make out a strong case for its use.

B. Group Rights/Distributive Justice

Another plausible justification for disparate impact liability is that it is a way to alter the allocation of jobs to achieve a more fair distribution of resources among groups. For instance, if a test or high school graduation requirement for jobs at Duke Power Plant leaves African Americans with a smaller percentage of jobs than they should have, then disparate impact liability provides a means to expunge the screening mechanism so as to create a more fair allocation.[107]

Once again, this line of reasoning seems entirely compatible with, or even to support, a "lack of effort" defense. Unless one believes that groups have a per se entitlement to some share of the jobs at issue, a group's average effort to prepare would seem to be relevant in any determination of what its share ought to be. Common sense notions of fairness traditionally rest on the idea of treating equals equally. Thus, it is hard to see why effort should be irrelevant in determining what constitutes a fair outcome.[108] Only on a pure group rights or quota theory would effort be irrelevant—each group would be entitled to a share of the jobs at issue purely by virtue of its share in the labor force or the population. However, the cases are replete with fervent exhortations *not* to regard disparate impact as a form of covert hiring quotas.[109]

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107. Under this view, disparate impact is a variant of affirmative action. *See, e.g.*, Primus, *supra* note 4, at 524-25 (arguing that "disparate impact law is a cousin of affirmative action"); David A. Strauss, *The Myth of Color Blindness*, 1986 SUP. CT. REV. 99. Quite apart from the obvious difficulties in determining what a fair allocation of jobs across groups would look like, *Teal* again seems fatal to this justification. Blacks ultimately obtained 24 percent of the jobs, even though they comprised only 16 percent of the applicant pool. *See supra* note 105 and accompanying text. This is hardly unfair to the plaintiffs, but the Court nevertheless found in their favor.

108. One could press further: disparate impact doctrine treats protected-class applicants as a homogenous group. But in conferring a benefit on protected-class applicants who failed the test, disparate impact liability will often disadvantage those protected-class applicants who passed the test, as they now have a larger pool of competitors for a limited number of job vacancies.

109. The Supreme Court has explicitly recognized that disparate impact liability *could* lead to pressure to hire on a quota system, and has suggested that this is not only undesirable but also inconsistent with its definition of disparate impact:

> [T]oday's extension of [disparate impact liability] into the context of subjective selection practices could increase the risk that employers will be given

Moreover, almost no one argues that qualifications are irrelevant, or that the appropriate baseline against which disparities should be measured is a group's share of the overall population. Rather, courts have consistently used the "qualified labor pool" as the relevant baseline in assessing disparities,[110] which implies that the pure group rights theory cannot be the explanation for disparate impact liability.

C. Remedying Past Discrimination

Another view of disparate impact is that it is a remedy not for present unfairness, but for past discriminatory practices that have present effects. The purpose of the doctrine, on this account, is to bar any employment criteria that translate previous discriminatory practices, such as unequal provision of public education or segregated employment, into current labor market outcomes. Recall that the court in *Griggs* was particularly concerned with "remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees."[111] This "structural" perspective views disparate impact liability as a way to sever the

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> incentives to adopt quotas or to engage in preferential treatment.... [However,] the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger [of quotas].

Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 993 (1988). The Court's attitude towards quotas reflects congressional language in Title VII, which states that:

> Nothing contained in [Title VII] shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer ... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (2000).

110. *See* EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1271-72 (11th Cir. 2000) (rejecting the district court's characterization of the qualified labor pool as 31.9 percent female, and suggesting that the gender composition of the actual applicants—roughly 22 percent female—was the appropriate baseline against which disparities in hiring rates should be measured).

111. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

connection between past discrimination against a group and current unfavorable outcomes.[112]

This seems to be one of the stronger rationales for disparate impact liability. It appeals to a widespread recognition that structural barriers—such as the difficulties some groups have experienced obtaining an education—play a major role in group disadvantage, and disallows practices that rely on such barriers unless they are shown to be necessary from the employer's perspective.[113]

Despite the appeal of the structural barriers argument, it is difficult to analogize asking job applicants to make reasonable efforts to train for a test to the kind of pre-existing structural barrier that disparate impact liability was designed to combat. A test is not really a barrier—and is hardly an unfair one—if it can be passed with reasonable effort or training.

Past disadvantage may make it more difficult for some groups to pass a test than for others. For example, African Americans had less access than whites to a high school education in the Jim Crow South, so high school diploma requirements posed a severe barrier

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112. Whatever its attraction on the merits, it is not clear that this structural analysis comports with Title VII's original prohibition of discrimination. For instance, Michael Sovern, a pro-civil rights scholar writing just after Title VII went into effect, argued explicitly that the statute was *not* designed to solve general social problems:

> In a southern school district, for example, training in metal trades may be available in the white, but not in the Negro, vocational school; as a result, when a local metal-working shop advertises for high school seniors with metal-trades training, there is a sense in which it is discriminating against Negroes. But section 703(h) makes it clear that this is not the sense in which Title VII uses the word "discriminate." To violate Title VII, one must treat differently because of race itself and not merely because of an applicant's lack of qualification which he was prevented from acquiring because of his race.

MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION 71 (1966).

113. But consider a police department's height or weight requirements, which invariably have a disparate impact by gender. Many police departments discriminated against women in the past, but it is not clear that height or weight requirements constituted a structural barrier that excluded women. In fact, before Title VII, height or weight requirements were not deployed *against* women; departments simply refused to hire them outright. Rather, the requirements were directed against—and had the effect of eliminating—short or overweight *men*. Consequently, banning these requirements does not really seem to be severing a structural link. One could plausibly argue that the requirements themselves now constitute sex discrimination, but use of disparate impact liability to eliminate *ongoing* discrimination cannot be justified by a rationale based solely on the existence of structural barriers created by *past* discrimination. Elimination of ongoing discrimination comports better with the "proxy for intent" rationale discussed *supra* in Part III.A.

for blacks in 1965, a barrier one could not reasonably have asked them to overcome.[114] Some requirements, such as a minimum height standard, are virtually impossible to overcome with *any* amount of effort. But the standard I propose below does not require superhuman or impossible efforts, only some version of reasonable effort. Reasonable effort is exactly what the plaintiffs apparently failed to undertake in *Lanning*. Likewise, the *Contreras* plaintiffs apparently made no effort at all.[115]

There is nothing "structural" about asking victims of discrimination to make reasonable efforts to overcome barriers they encounter. If a written test has a disparate impact even on those who studied hard, or a timed run disqualifies a larger number of women than men even when the women undertook reasonable preparation, then a structural analysis would seem to apply and the practice would presumptively be subject to liability under a disparate impact standard. But where applicants fail to make reasonable efforts, it is more difficult to justify forcing employers to eliminate the test or requirement as a structural barrier to advancement. The very idea of a "structural" barrier implies an obstacle that individuals cannot overcome whereas, in stark contrast, it is precisely the reasonably "overcomeable" obstacles that are the focus of a reasonable effort requirement.

In short, the existing doctrinal or jurisprudential theories justifying disparate impact liability support—or are at least compatible with—a "lack of effort" defense. It is also possible to approach the problem under a more consequentialist framework. The next Part undertakes this task.

IV. AN ECONOMIC ANALYSIS OF DISPARATE IMPACT LIABILITY WITH TWO-PARTY CAUSATION

Disparate impact doctrine does not fit comfortably into the standard economic model of tort liability[116] because it is neither a

114. *See, e.g.*, *Griggs*, 401 U.S. at 430 n.6.

115. *See infra* Part V for a discussion on how to implement a more precise version of the reasonable effort standard.

116. The only literature to view employment discrimination through the lens of the economic theory of accident law is Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999). Wax focuses only on disparate treatment, but her analysis has some important points

strict liability nor a negligence standard. One might analogize disparate impact's test validation/job relatedness requirement to the standard of care under a negligence rule. But the analogy is attenuated because even careful validation does not immunize a test from liability for disparate impact if the use of the test is not justified by business necessity. A further difference between disparate impact and either strict liability or negligence is that, for tests with a disparate impact, the effects of applicant training are inherently interactive, and hence not analogous to the atomistic "care" decisions of individual victims in the standard accident model. Put another way, female applicant *X*'s preparation for the test creates a positive benefit for her employer and a negative benefit for her fellow applicants. Additional training by *X* increases the expected pass rate for female applicants as a group, decreases the expected disparity vis-à-vis white males, and thus lowers the employer's expected liability. *X*'s training simultaneously works to the detriment of the other female applicants, for two reasons. First, it means that her rivals are likely to score worse than *X* on the test. Second, it lowers the likelihood of a female/male disparity that could provide other women with grounds for litigation if they fail the test.

Given the tenuous analogy between disparate impact liability and the standard tort model, I focus instead on a positive description and a crude normative, or welfare, analysis of the effects of disparate impact liability on applicant effort. I conclude tentatively that a reasonable efforts requirement is likely to be welfare-enhancing, albeit largely for somewhat non-standard reasons.

A. The Effects of Disparate Impact Liability on Effort by Applicants

1. Ex Ante Moral Hazard

Moral hazard is the tendency for parties to take less care in the presence of insurance that cushions their downside risk.[117] Is it

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of similarity with my analysis of disparate impact liability.

117. Kenneth J. Arrow is credited with introducing this concept into modern economic analysis in *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963). For an intellectual history of the term and analysis of its modern (mis)applications, see Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

plausible that applicants might not train for a test because of the possibility that, should they fail, they could nonetheless recover something if the test is found to have a disparate impact? On this view, disparate impact liability could be seen as offering a kind of insurance that reduces the losses an applicant might otherwise expect to suffer from failing the test.

Although possible, such a moral hazard explanation does not seem especially plausible in the context of disparate impact liability. First, it is hard to believe that prevailing disparate impact plaintiffs are fully compensated by the awards they typically receive. The absence of full compensation means that disparate impact liability inherently involves some kind of uninsured loss or co-payment for the residual harm not covered by the defendant's liability, which in turn gives victims at least some financial incentive to pass the test. More significantly, many applicants are probably unaware of the possibility of disparate impact liability before they take a test. And even those applicants who know about the doctrine have to decide whether to prepare for the test without knowing whether it will in fact produce a disparity *at all*, let alone a disparity that a court will subsequently recognize as giving rise to liability.[118]

An applicant's rational calculus about whether to train for a test might, therefore, look something like Figure 1.[119] Suppose that a risk-neutral applicant who passes the test is guaranteed to get the job, which is worth 100. Training costs 10, and raises the probability of passing from 30 percent to 40.5 percent—hence, training has a positive expected value of 0.5 units ($(0.405 \times 100) - 10 - (0.3 \times 100)$). If there is no disparate impact liability, the applicant will thus find it in her interest to train for the test, because the expected value of doing so is 30.5 units, whereas the expected value of not training is only 30 units.

118. The defendant's liability depends, among other things, on the care with which the test was validated, whether the test is necessary to the employer's business, and on the intergroup disparity in pass rates. *See generally* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993); Gillespie v. Wisconsin, 771 F.2d 1035 (7th Cir. 1985). None of these could be known to applicants at the time they take the test. Therefore, if disparate impact doctrine provides plaintiffs a kind of insurance, it is highly probabilistic insurance at best.

119. The decision tree is meant to be illustrative rather than realistic.

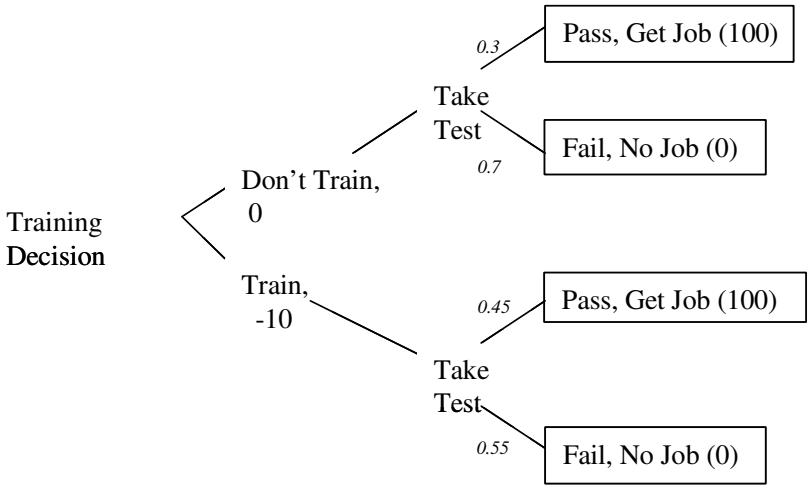

Figure 1: Decision To Train, Without Potential Disparate Impact Liability

Now introduce the possibility of disparate impact liability, as depicted in Figure 2: if the applicant fails, she can sue under a disparate impact theory, and if she does, there is a 10 percent chance that she will prevail. A prevailing plaintiff, however, only recovers 80 percent of the benefits she would receive if she actually got the job (on the theory that awards are generally under-compensatory). The expected payoff from training for the test is now (-10 + (0.405 × 100)) + (0.595 × 0.1 × 80) = 35.26, whereas the expected payoff from *not* training is ((0.3 × 100) + (0.7 × 0.1 × 80)) = 35.6. The possibility of disparate impact liability has raised the expected payoff from *not* training by more than it raised the payoff from training, thus making it optimal not to train for the test.[120]

120. I assume risk-neutrality, and abstract away all of the strategic aspects of this problem. For example, the probability of disparate impact liability depends on the training decision of all other female applicants because if all others train there will be a much lower likelihood of a gender disparity in the first instance.

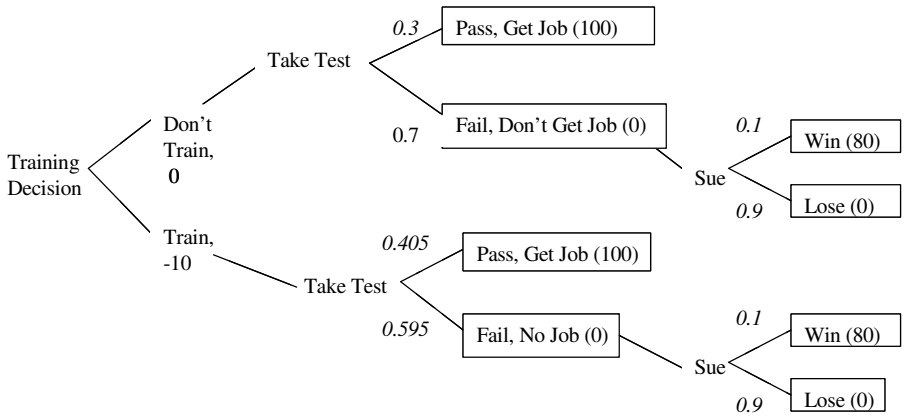

Figure 2: Decision To Train With Potential Disparate Impact Liability and No Duty To Train

But this scenario seems out of line with the stylized facts in *Lanning*, and with what I take to be common sense. If we believe the expert quoted by Judge Weiss, women who trained for the running test would have raised their probability of passing from something like 12 percent, the actual pass rate for women in *Lanning*, to 40 percent.[121] For these parameters, the ex ante probability of a disparate impact victory would have to be at least 80 percent, a completely unrealistic figure, in order for the female applicants to find it no longer in their self-interest to undertake the training.

Generally, this highly speculative exercise lends support to the conclusion that when training is relatively costly and not very effective, disparate impact liability may lead some applicants to forego it. It is certainly possible to concoct stylized examples in which this effect occurs. But as long as training has a reasonably significant expected return, the existence of disparate impact

121. *See* Lanning v. Southeastern Pa. Transp. Auth. (*Lanning I*), 181 F.3d 478, 495 (3d Cir. 1999) (Weiss, J., dissenting). Of course, we do not know much about the costs or benefits of training, so knowing about its efficacy alone is not very helpful. My parameters imply a 180 percent return on training. Judge Weiss did suggest that only eight weeks of "moderate training" would be sufficient for the average sedentary woman to be able to pass the test. *See id.*

liability is unlikely to make training unattractive, simply because the probability of prevailing in subsequent litigation—estimated before the applicant has to make a decision about whether to undertake training—is likely to be quite low. Focusing on ex ante moral hazard, therefore, seems unrealistic in this context because rational applicants will usually want to undertake training when training has substantial benefits and relatively low costs.

2. Ex Post Moral Hazard

What seems more plausible, however, is an analog of ex post moral hazard. In the medical context, ex ante moral hazard describes the effect of insurance on patients' decisions about how much care to take; ex post moral hazard describes the effect of insurance on doctor visits, prescription drug use, and other decisions patients make after they have chosen how much effort to devote to staying healthy.[122] In our setting, ex post moral hazard describes the decision by applicants who have not prepared for the test[123] to file suit alleging disparate impact. Eliminating the possibility of recovery for plaintiffs who do not train for the test may strengthen incentives to undertake training, but its main effect would clearly be to eliminate the incentive to litigate among those who have not trained. If an employee knows she cannot possibly prevail, she is unlikely to sue in the first instance.[124]

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122. In the health insurance context, the major concern is obviously ex post, rather than ex ante, moral hazard. For a persuasive dissenting view on the importance of ex post moral hazard in health care, see John A. Nyman, *The Economics of Moral Hazard Revisited*, 18 J. HEALTH ECON. 811 (1999) (arguing that the increase in benefit takeup in the presence of health insurance is a welfare-enhancing income effect, not a welfare-reducing moral hazard). In contrast, see Dhaval Dave & Robert Kaestner, *Health Insurance and Ex Ante Moral Hazard: Evidence from Medicare*, (Nat'l Bureau of Econ. Research, Working Paper No. 12764, 2006), *available at* www.nber.org/papers/W12764 (finding that health insurance reduces prevention and increases unhealthy behaviors among the elderly, but that physician counseling is also successful in changing health behaviors).

123. Some of these will be persons who have unusually high training costs or low returns from getting the job. Others will be persons who mistakenly believe that they can pass without training, or simply suffer from some lapse of judgment or weakness of will. *See, e.g.*, Thomas C. Schelling, *The Intimate Contest for Self-Command*, 60 PUB. INT. 94 (1980). Other litigants may be overly optimistic about the probability of a disparate impact victory.

124. A reasonable efforts defense would obviously make it much harder for an applicant who chose not to train to prevail in her disparate impact claim. I ignore any possible indirect effects from the introduction of a reasonable efforts defense. For example, employers might

Return to the example of Figure 2, but suppose that one-half of the applicants have a cost of training of 9 and half have a cost of 11. The low training cost applicants will always find it worthwhile to train, whereas the high training cost applicants will never find it worthwhile.[125] Suppose there are 1000 applicants, 500 of each type, and consider the makeup of the pool of litigants. Of the 500 low-cost applicants, all will choose to train, and 59 percent of them (295) will fail the test and sue. Of the high-cost applicants, none will choose to train, and 70 percent (350) will fail the test and sue. A duty to train would eliminate this latter group of litigants, who comprise 54 percent of the total,[126] even though the new rule would have no effect on anyone's ex ante training decision.

In sum, a duty to train might induce some applicants to train more and would reduce the number of potential plaintiffs who go on to sue. Ultimately, however, the normative case for implementing a duty to train does not rest on either of those factors.

B. Normative Analysis

1. Offsetting Benefits and the Measure of Harm

Suppose driver *X* runs over pedestrian *Y*'s foot with his car. The legal system could of course shift that loss back to the injurer, to an insurance company, to the public at large—or it could decide to leave the loss where it lies, with the injured victim. No matter who bears the loss, however, there is one fewer foot in the world after the accident than before. This is significant because it means that the optimal level of accidents is the one that minimizes the sum of expected accident costs and accident prevention costs, whoever these end up falling upon. At least in the classic account, distribution of loss does not matter.[127]

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be prompted to increase the net benefits of training by holding exercise classes or coaching sessions. This might further encourage applicants to train because it eliminates employer liability to any applicants who failed to train when doing so would have been reasonable.

125. There would be no incentive for the high-cost applicants to train even if the probability of prevailing on a disparate impact suit were one, so there is no ex ante moral hazard.

126. *See infra* Part V, on implementing the duty to train. I assume that applicants would be required to make a reasonable effort–couched in objective, rather than subjective terms—so that the high-cost trainers would still be required to train.

127. There is a large and increasingly sophisticated sub-literature on the use of tort law

Failing a test does not constitute a social cost in this sense, however, because at least some of the social cost of failing is inherently distributional, and is therefore entirely separate from the harm experienced by the test-failer herself. Suppose *Y* is an applicant who fails a test, rather than a pedestrian with an injured foot. *Y*'s individual, private injury—the cost *to her* of failing to get the job—cannot be a direct measure of the social loss, because her failure necessarily means that some other applicant, *Z*, will get the job instead. At least as a first approximation, the gain to *Z* will offset the loss to *Y*, leaving no net effect at all.

Two additional sources of cost need to be considered, however. To the extent that the test is useful to the employer because it allows for better matching of individuals to jobs, the employer may have a stake in whether *Y* or *Z* gets the job. Moreover, there may be some social costs, above and beyond these private costs, from one person passing rather than another. Suppose that *Y* is female and *Z* is male. For a variety of reasons discussed earlier, society may have a stake in *Y* getting the job rather than *Z*. The point is that society's interest in *Y* getting the job bears no obvious relationship to *Y*'s private interest—it could be larger or smaller than *Y*'s stake.

This potential disparity means, however, that any normative analysis in this context is extremely tricky. Suppose, for example, that either *Y* or *Z* would gain $10 if they got the job, but that society attaches a value of $2 to *Y* getting the position rather than *Z*. It might seem to follow that *Y* (and *Z*) have an *excessive* incentive to invest in obtaining the position, since both will trade off the private benefits, $10, against the private costs of training for the test. If both *Y* and *Z* invest $9 to secure the position, which *Y* ultimately gets, the winner will have $1 of private surplus and the loser will have a $9 private loss. Society, however, will realize a net loss of $6 (2 + 1 - 9).[128]

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as a distributional mechanism, especially in the presence of inefficiencies in the tax system. *See, e.g.*, Ronen Avraham, David Fortus & Kyle Logue, *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125 (2004); Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001).

128. This is a classic example of a positional goods/prisoner's dilemma problem. *See, e.g.*, ROBERT H. FRANK, CHOOSING THE RIGHT POND (1985) (arguing that humans have a tendency to overinvest in zero-sum, positional contests). In this context, a reduction in training might

Alternatively, suppose that society valued *Y* getting the job at $10, while *Y* and *Z* valued it at $2 each. If *Y* and *Z* each invest $1 to secure the position, which *Y* ultimately gets, there is a net welfare *gain* of $10 (10 + 1 - 1). Everything depends on the relative size of private and social gains from allocating the position. Moreover, training is likely to have directly productive as well as distributional effects; regardless of who gets the job, the successful applicant might actually perform better as a result of having trained.[129]

Finally, the positional nature of the competition also depends on the employer's procedure for selecting applicants. If the employer chooses among applicants based on their scores, then applicants may have a perverse incentive to maximize their scores. On the other hand, a cutoff point above which all candidates are ranked equally leads applicants to work only hard enough to surpass the cutoff, with perhaps some margin for uncertainty, and does not lead to positional races of the kind described above.

These examples demonstrate that the welfare consequences of a duty to train are difficult to determine. The current level of preparation may be inefficiently high or low; in either case, some groups may engage in too much training, whereas others undertake too little. Because there is probably relatively little ex ante moral hazard involved, the effects of disparate impact liability are largely distributional, which directs the matter away from an efficiency analysis towards a fairness-based rationale.[130]

A stronger case could be made here for a duty to train based on *within*-group fairness. Absent such a duty, courts are forced to treat

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actually be welfare-enhancing.

129. There is also a threshold question of the test's validity or predictive ability. If the test does not accurately measure who will do well on the job, or alternatively, who will do badly, then the case for training is obviously weakened. Why should we encourage studying for a test that yields little predictive information? One answer is that as between the studiers and non-studiers, the studiers have at least shown more motivation, even if their efforts were fruitless, in the sense of improving their performance on the job. Another answer is that the standard requirements for job relatedness and business necessity would still remain. Unless the "lack of effort" defense completely eliminates plaintiffs' disparate impact claims, the employer will still have to show that the selection procedure is job related in order to prevail.

130. Even the administrative savings from eliminating potential plaintiffs who did not train—ex post moral hazard—are likely to be small. Reducing the number of plaintiffs does not guarantee a proportionate reduction in the administrative costs of disparate impact liability, since all the test-failers, regardless of whether they trained, might well have joined in a single suit against the employer.

those who trained just like those who did not. Even if this has no effect on who decides to train, it seems unfair: among a group of plaintiffs, all of whom failed the test, should not society prefer those applicants who made an effort to pass over those who did not?

2. Non-distributional Preferences

The key issue in this context may not turn out to be society's preferences over the final distribution of losses and gains from a hypothetical test, but rather the *means* by which these losses and gains are realized. For example, suppose society prefers to have 50 percent representation of women in some job, for which there is a qualifying test. Assume that absent training by the female applicants, the test has a disparate impact by sex, but that training completely eliminates the disparity. There are then two ways of achieving the goal of equal representation. One possibility is that women train for the test and achieve a pass rate equivalent to that of men. Another alternative is that women fail to train, but achieve a 50 percent representation rate through disparate impact litigation.

Society might well prefer the first approach to the second, even though both achieve identical results. First, the non-litigation strategy presumably involves lower administrative costs.[131] Second, the training strategy almost certainly produces less antagonism or demoralization of male test-takers. If the women train, some men who take the test will lose out to some of the women who trained for it. In the second scenario, these same men will initially rank higher on the test, but will subsequently lose out to the women who sue. Quite apart from any endowment effects, the mere fact of litigation almost inevitably sharpens antagonism and leads to increased hostility between winners and losers.[132] Much of this presumably could be avoided if the final allocation of jobs to applicants was not

131. The tradeoff is that the non-litigation strategy obviously requires higher training costs on the part of the individual plaintiffs. It is not clear a priori which approach has lower *total* costs.

132. It seems intuitively plausible that the affected men would feel worse about losing a job they thought they "had" than about not getting one in the first instance. Antagonism and a sense of unfairness would only be compounded if the men lost out to women who did not even train for the position in question.

achieved by litigation. Finally, there may be some kinds of injuries that can only be overcome by efforts of the injured party.[133] Test failers will sometimes succeed in using disparate impact liability to overturn the use of the test and secure a position for themselves. One might question, however, whether litigation can provide a real remedy in this context, because hostility and stigma are the likely consequences of such an action.

Of course, to the extent that society's preference for training is based on the benefits it provides to those *other* than the trainees, we must confront both the distributional and efficiency questions once more. Is it fair that women have to bear the costs of training for the running test in order to confer benefits on men, or on the rest of society at large? And is it clear that the benefits to the men are larger than the training costs incurred by the women? I do not see any plausible way to answer the second question. As to the first question, it might make sense to require that employers subsidize the training necessary for female or African American applicants to achieve more equal pass rates with white males. Indeed, a requirement that applicants make reasonable efforts to train would presumably encourage employers to lower the costs of training, for example, by providing sample tests, workout guides, and so forth. By doing so, an employer would eliminate some potential liability, either because applicants refused to train and lost their ability to sue, or because they did train and, therefore, had a higher pass rate.

V. IMPLEMENTATION

This Part discusses two related questions concerning the implementation of my proposal. The first is how to define "reasonable efforts," and the second is whether defendants can use applicants' lack of reasonable efforts to attack an overall disparity or only to disqualify certain plaintiffs. I also consider possible extensions of the duty to make reasonable efforts to other disparate impact contexts.

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133. *See, e.g.*, Amy L. Wax, *Some Truths About Black Disadvantage*, WALL ST. J., Jan. 3, 2005, at A8 (arguing that there are times when "the victim is the only one who can wholly undo the harm he has suffered from others' wrongful actions").

A. The Meaning of "Reasonable Efforts"

1. A Cost/Benefit Test

If plaintiffs are required to make reasonable efforts to prepare for a test before they make a disparate impact claim, it remains to determine what the proper standard for applicant effort should be. An analog of the "Hand Rule," articulated in *United States v. Carroll Towing Co.*,[134] suggests an appropriate answer.

Judge Hand's key insight was that the standard of reasonable care to prevent losses to someone's boat is just the amount of care that the defendant would take if he were spending to prevent losses to his boat. Suppose that the amount of loss—the value of the boat—is given at $1 million. The owner has to choose how much care to undertake to reduce the risk of losing his boat. The rational owner will weigh the cost of care against the expected benefit of care, which is just the probability of loss multiplied by the amount of loss. Because more care lowers the probability of loss, the owner will want to keep spending until the cost of an additional unit of care is just equal to the increase in the expected benefits that the care purchases. The Hand formula is just the algebraic embodiment of this insight.[135]

Return now to the facts of *Lanning*, and suppose, as suggested by the dissent, that many applicants could have passed the test with a relatively modest amount of training, which the employer in fact urged them to undertake.[136] It seems likely that the police officer jobs at issue in *Lanning* were substantially better than the best alternative the plaintiffs would have been able to find if they failed the test. The monetary gain in earnings for the plaintiffs if they got the job, E, would therefore be large. Judge Weiss's dissent

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134. 159 F.2d 169, 173 (2d Cir. 1947).

135. In mathematical terms, the owner wants to choose the amount of care, B, so as to maximize the expected net benefits of care ($p(B)\times L-B$), where L is the amount of loss and p is the probability that a loss occurs (which is a negative function of the amount of care taken). The optimum is achieved when $L \times \Delta p / \Delta B = B$. This is identical to Judge Hand's formulation of the rule $B = PL$, if we assume that by P, Judge Hand actually meant the change in the probability of loss resulting from a one unit increase in care.

136. *See* Lanning v. Southeastern Pa. Transp. Auth. (*Lanning I*), 181 F.3d 478, 495 (3d Cir. 1999).

strongly suggested that training could have dramatically increased the chances that the plaintiffs would have been able to pass the test.[137] Thus, p was also likely to have been large. Judge Weiss also concluded that the cost of training, C, was fairly small.[138] It follows that if the expected gain from training, absent disparate impact liability, would be larger than the costs, $pE > C$, then according to the Hand Rule, plaintiffs failed to make reasonable, or cost-justified, efforts to prevent the harm. Put another way, the plaintiffs could probably have forestalled the harm to themselves at relatively low cost, and because they failed to do so, they should not be allowed to invoke disparate impact protection.

The standard for reasonable efforts I have just described is not a demanding one. In fact, any fully informed and rational applicant should voluntarily take such efforts as would maximize his or her net gain from training, which is precisely what the standard requires. Consequently, applicants who fail to make reasonable efforts to study or train will almost by definition be (a) irrational; (b) misinformed about the costs or benefits of training; (c) persons with unusually high discount rates, risk aversion, or other costs of training, or (d) persons with unusually low expected benefits from obtaining the job.[139]

2. The Breadth of the Standard

A good way to test the utility of the reasonable efforts standard is to see what results it yields when applied to the facts of a given case. Consider the requirement that those hired have a high school diploma, which was true for the electric power plant jobs the plaintiffs were seeking in *Griggs*.[140] Application of the reasonable

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137. *See id.*

138. *See id.* Suppose training would increase the probability of passing the test from 0.12 (the average female pass rate) to 0.50, which makes $p = 0.38$. Let the average salary gain from passing the test be $10,000, and the costs of preparation be $3000 (200 hours ($15/hour)). Then the net expected gain from training is ((0.38 × $10,000) - $3000), which is a positive $800.

139. This conclusion is analogous to the result in the standard economic model of accidents under a negligence rule, showing again that it never pays to be negligent. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (4th ed. 2003); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004).

140. *See* Griggs v. Duke Power Co., 401 U.S. 424, 427-28 (1971).

efforts rule would probably sustain this part of the holding in *Griggs* for two reasons. First, the African American plaintiffs would surely have found the cost of securing a high school diploma, C, in the segregated environment of the Jim Crow South to be high. Although the benefits of getting a good job, E, would have been substantial, having a high school diploma would not have helped the plaintiffs, because before passage of Title VII most employers would simply have excluded them on the basis of their race. Thus p would also have been small—in fact, probably zero—and as a result, we can be quite confident that pE would have been less than C for the *Griggs* plaintiffs. Hence, even if the *Griggs* court had seen fit to implement a test of the kind considered here, the plaintiffs' failure to obtain high school diplomas would not have constituted a lack of reasonable effort that would have disqualified their disparate impact claims.

The second reason that a reasonable efforts requirement is consistent with *Griggs* is that it is appropriate to invoke a much narrower definition of "preparation" than in the previous analysis. Consider the decision about whether to obtain a high school diploma. That decision has certain costs, such as out of pocket expenses and foregone time and earnings, as well as certain benefits, such as enhanced future earnings. Few people, however, choose to obtain a diploma based on eligibility for any single job that requires a high school degree. In the case of *Griggs*, for example, even if the plaintiffs could quite easily have completed high school, it might well be the case that the costs of doing so were larger than the Duke Power—specific benefits—that is, the enhanced opportunity for a Duke Power job considered in isolation from any other employment prospect that a high school diploma would have provided.

Consequently, even if the *overall* rate of return of obtaining a high school diploma is very large, as it now is,[141] it is a mistake to excuse any particular employer from disparate impact liability because its standard requires a high school degree that would confer *general* benefits on plaintiffs. The purpose of disparate impact

141. Derek Neal & William R. Johnson, *Basic Skills and the Black-White Earnings Gap*, *in* THE BLACK-WHITE TEST SCORE GAP 480, 490 tbl.14-7 (Christopher Jencks & Meredith Phillips eds., 1998).

liability is not to give plaintiffs an incentive to make decisions about how much to invest in education. Rather, it is to prevent employers from using selection practices that impinge on applicants' civil rights. Plaintiffs should be encouraged to undertake job specific training or preparation because doing so relieves employers of an unfair burden, but there is no reason to use the reasonable efforts defense to encourage *general* training. If society is concerned with low graduation rates, then direct steps to promote graduation are warranted.

It is worth noting, however, that Duke Power apparently did offer "Company financing of two-thirds the cost of tuition for high school training" for those without a high school degree.[142] The existence of this subsidy might conceivably have given Duke Power a "lack of effort" defense under my proposal. The issue would turn on whether the costs of the training, including the subsidy, but also including the non-financial costs such as the opportunity costs of time, were less than the expected benefits in terms of enhanced possibilities for advancement at Duke Power. It is hard to know how this essentially empirical question would be resolved.

It should also be stressed that the *Griggs* plaintiffs challenged not only the use of a high school graduation requirement, but also the use of two tests that Duke Power adopted as requirements for several classes of jobs.[143] There was no offer to subsidize any training for these tests, nor is it clear that such training was even possible, let alone sufficiently cost-effective to qualify as a reasonable effort on the part of the plaintiffs. At least this part of the holding in *Griggs*—striking down the use of these tests—would certainly remain intact under the proposed "lack of effort" defense.

The problem of how broadly to define the benefits of training also arose in *Lanning*. There were probably many benefits from training for the running test that might have flowed to the female plaintiffs in *Lanning*: getting into physical shape can improve one's health,

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142. *Griggs*, 401 U.S. at 432.

143. After the effective date of Title VII, the company required all new employees "to ... register satisfactory scores on two professionally prepared aptitude tests, as well as to have a high school education." *Id.* at 427-28. Current employees who wished to transfer into "the four desirable departments from which Negroes had been excluded" had to have *either* a high school degree or a passing score on "two tests—the Wonderlic Personnel Test ... and the Bennett Mechanical Comprehension Test." *Id.* at 428.

psychological mood, longevity, and so on. These benefits should not be included in the cost/benefit test to decide whether female plaintiffs who failed to train for the test were unreasonable. There is no reason to give the employer a free ride just because applicants did not avail themselves of potential benefits that are unrelated to the job in question.[144] Again, disparate impact liability is not supposed to protect only those who work vigorously to protect their own health. Hence, in evaluating the employer's defense in *Lanning*, the only benefits that should be included in the plaintiffs' hypothetical calculations are those directly traceable to the increased likelihood of obtaining SEPTA employment—the benefits of passing the test.

B. Wholesale Disparities vs. Individual Plaintiffs

Imagine a test that is passed by 75 percent of men and 40 percent of women. There is a clear disparate impact here, because the female pass rate is only 53 percent of the figure for male applicants. But suppose that 80 percent of the women applicants did not train for the test, and that if they had, they would have passed at the same 75 percent rate as men.[145] In this obviously extreme example, the pass rate *with* training would be identical, so there would be no disparate impact when everyone trained.

The question then arises whether an employer in this situation should be allowed to use a reasonable effort requirement to challenge the *existence* of the disparity, or whether he should only be allowed to use the requirement to disqualify the 55 applicants who failed but did not train.[146] My tentative answer is that this situation is unlikely to arise, but if it does, employers should be able to use failure to train to rebut the existence of a disparity. It seems incongruous to disqualify the 55 non-training test-failers as potential plaintiffs, but to count their failures nonetheless when

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144. For a contrary view based on efficiency concerns, see Robert Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict*, 29 J. LEGAL STUD. 19 (2000) (arguing that risks to self should increase the care owed to others).

145. Consequently, 20 percent of the women trained and passed at a 75 percent rate, while 80 percent of the women did not train and passed at a 31.25 percent rate, for an average pass rate of 40 percent for women as a group.

146. Suppose there are 100 applicants. There will be (1-0.3125)(80) = 55 non-training test failers, yet there will also be (1-0.75)(20) = 5 applicants who trained and still failed.

assessing liability to the remaining five test-failers who did train. Moreover, by providing this defense, employers are encouraged to promote training by applicants, for example, by offering in-house training programs.[147] The burden, of course, would be on the employer to show what the counterfactual pass rate would have been if more women had trained, and that the training would have been reasonable in the sense defined above.

C. Other Contexts

Disparate impact liability is a feature of many other civil rights statutes apart from Title VII. Space does not permit a thorough examination of all of these settings, but the same reasonable effort principles could apply to plaintiffs in housing, credit markets, and other circumstances. Consider automobile finance, for example. In *Coleman v. GMAC*,[148] plaintiffs alleged that the lender who financed the purchases of their new cars encouraged dealers to charge a markup to the buyer/borrower, and that these markups had a racially disparate impact in violation of the Equal Credit Opportunity Act.[149]

As in *Lanning*, it is true that the plaintiffs could probably have done something to reduce or even eliminate the disparity. In *Coleman*, the obvious alternative was for the plaintiffs to secure more or better financing offers through sources other than the dealership from which they were buying their cars. Shopping around is not especially onerous, and on any reasonable guess as to costs, it would likely be an investment with a positive net return given the substantial markups the dealers were charging. Shopping would thus likely be required of reasonable plaintiffs under the rationale discussed above.

Although the buyers did fail to look beyond the dealership for financing, there are two strong arguments for why *Coleman* was nevertheless correctly decided in the buyers' favor. First, the markups were never disclosed. Buyers were not told the dealership's "buy rate," its cost of funds from the lender, or the markup they

147. Applicants who did not train would thus forfeit their ability to sue, and those who did not train and failed the test would not be counted in the overall failure rate for their group.

148. Coleman v. GMAC, 196 F.R.D. 315 (M.D. Tenn. 2000).

149. *Id.* at 317-18.

were being charged;[150] all they knew was the ultimate interest rate. Thus, plaintiffs would be unlikely to know that they should have shopped around because the benefit of doing so—the reduction in markup—was hidden by the defendant.[151] When the defendants know the benefits of effort and plaintiffs do not, defendants should be able to use a reasonable efforts defense *only* if they disclose such benefits. This, in effect, reveals to plaintiffs that they have an interest in further search.[152]

Even if the markups were disclosed, however, the defendant's decision to extract supra-competitive prices by exploiting their market power should not constitute a justification for a practice with a disparate impact under the business necessity defense. In this instance, efficiency and equity can be seen to work together, forcing sellers to abandon discretionary markups.[153]

CONCLUSION

An employer's liability for selection procedures that have a disparate impact by race or gender unjustified by business necessity is now a settled element of employment discrimination law. Neither courts nor scholarly commentators have devoted much attention to whether an employer is liable for *any* disparity, largely because the theory of disparate impact seems to suggest that the mere identification of a racial or gender disparity suffices to create liability, regardless of the reason for its existence.

Disparate impact liability can be thought of as a kind of implicit social contract. The terms of that contract are, of course, unclear, as they always are in implied contracts. But on one side, the contract clearly offers certain groups protection against disparities or other unfair outcomes that are beyond their control. The other side of the implicit bargain is that when protected-class applicants can

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150. *See id.*

151. *See id.*

152. Note that in *Lanning I*, the defendants did suggest that training for the test would be beneficial, and even offered guidelines on how to train effectively. By contrast, the seller(s) in *Coleman* made every effort to conceal the size of the finance charge markup. *Compare* Lanning v. Southeastern Pa. Transp. Auth. (*Lanning I*), 181 F.3d 478, 495 (3d Cir. 1999), *with Coleman*, 196 F.R.D. at 317-18.

153. *See* Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts are Justified*, 95 CAL. L. REV. 669 (2007).

prevent or mitigate the disparity that results from some selection mechanism, they should have a duty to do so. Otherwise, disparate impact doctrine runs the risk of becoming a form of patronization, implicitly assuming that protected-class applicants are simply too infirm to help themselves and should not be asked to do so. In the context of *Griggs*, that assumption was socially and historically plausible; but it is strikingly less so in today's world.

In the end, the purpose of this Article is a modest one. It is merely to suggest that not all disparities are the same: there are some instances in which plaintiffs could eliminate or reduce disparities at a reasonable cost to themselves. When this is possible, the law should encourage them to do so.