

ANTIDISCRIMINATION LAW IN THE ADMINISTRATIVE STATE

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Is the goal of antidiscrimination law to promote substantive ideals of equality, or is it limited to remedying wrongful acts of discrimination? This is the fundamental question at stake in debates about the most contested doctrines in antidiscrimination law, namely liability for disparate impact,¹ hostile work environment,² and failure to accommodate the disabled.³ This article argues that the answer to this question should affect a society's choices about the powers exercised by the administrative state in enforcing antidiscrimination law. In the United States, antidiscrimination law is mainly enforced through quasi-tort lawsuits against alleged discriminators.⁴ Unlike administrative agencies enforcing other bodies of law in the United States,⁵ and also unlike the administrative agencies en-

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1. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (invalidating employment selection criteria under Title VII having disproportionate impact on blacks when not shown to be related to business necessity); see also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 584–87 (1979); *Dothard v. Rawlinson*, 433 U.S. 321, 328–29 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430–31 (1975).

2. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 810 (1998) (finding employer vicariously liable for hostile environment); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding that an employer can avoid vicarious liability for hostile environment by supervisors by taking reasonable care to correct such conduct); *Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993) (holding that conduct need not seriously affect employee's psychological well-being or lead to serious injury to constitute hostile environment); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (recognizing hostile work environment sexual harassment as sex discrimination under Title VII).

3. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (1995).

4. Justice O'Connor has noted that "Title VII offers a tort-like cause of action to those who suffer the injury of employment discrimination." See, e.g., *United States v. Burke*, 504 U.S. 229, 254 (1992) (O'Connor, J., dissenting).

5. For example, agencies such as the Environmental Protection Agency frequently exercise rulemaking power to set pollution standards, whereas agencies such as the National Labor Relations Board exercise adjudicatory power to enjoin unfair labor practices. Some agencies, such as the Fed-

forcing antidiscrimination law in Britain,⁶ the U.S. Equal Employment Opportunity Commission (EEOC) does not exercise adjudicatory or rulemaking power in pursuit of policies promoting equality. If the goal of antidiscrimination law is to pursue a substantive vision of equality, greater regulation by the administrative state is warranted.

The scope of liability for disparate impact, hostile work environment, and failure to reasonably accommodate the disabled is hotly contested⁷ because these developments challenge the conventional wisdom that antidiscrimination law is primarily concerned with corrective justice, the provision of remedies to individuals for wrongful acts committed against them. U.S. antidiscrimination law originated with the purpose of remedying race-based slavery and other morally blameworthy acts of excluding blacks on the basis of animus against them,⁸ through the passage of the Thirteenth and Fourteenth Amendments. Thus, the preoccupation of U.S. antidiscrimination law with wrongdoing is not surprising.

eral Trade Commission and the Securities and Exchange Commission, frequently exercise both rulemaking and adjudicatory power. See discussions *infra* Part V.B.

6. In Britain, the Sex Discrimination Act of 1975 delegates to the Equal Opportunities Commission power to investigate allegations of discrimination and to issue non-discrimination notices, as well as rulemaking power to adopt Codes of Practice. Sex Discrimination Act, 1975, c. 65 § 67 (Eng).

7. Since *Griggs*, there has been much debate over the extent of and justification for liability for disproportionate impact. See, e.g., Paul Brest, *In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 52 (1976) (arguing that disparate impact liability should be limited by the antidiscrimination principle); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147–55 (1976) (arguing that disparate impact liability should be understood through a group-disadvantaging principle); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1145 (1997) (arguing that adopting disparate impact liability under the Equal Protection Clause would more effectively destabilize race and gender hierarchies). Scholars have also debated the justification for hostile environment liability. See, e.g., Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 859–61 (1991) (arguing that sexual harassment is a sexual injury); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1691–92 (1998) (arguing that sexual harassment is wrong because of its exclusion of women). Finally, the extent of the reasonable accommodation requirement, and its normative relationship to prohibitions of intentional discrimination, is the subject of much scholarly debate. See Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 833–34 (2003) (arguing that accommodation claims are continuous with antidiscrimination norms); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 309–11 (2001) (arguing that accommodation requirements are redistributive, and thus different from traditional antidiscrimination law); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 645 (2001) (arguing that accommodation requirements are equivalent to disparate impact antidiscrimination mandates); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1 (1996) (noting that accommodation mandates are fundamentally different from antidiscrimination claims); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 583–84 (2004) (arguing that accommodation requirements are antidiscrimination requirements because they seek to include a previously excluded group); J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1402–03 (2003) (arguing that the overlap between antidiscrimination and accommodation requirements is small).

8. In the *Slaughter-House Cases*, the Supreme Court held that the purpose of the Thirteenth and Fourteenth Amendments to the Constitution was the emancipation of the black race. See *Slaughter-House Cases*, 83 U.S. 36, 67–71 (1872).

However, the duties imposed by antidiscrimination law can also be premised on a theory of distributive justice⁹ rather than corrective justice.¹⁰ This would mean that employers and the state have duties to eradicate disadvantage even if they are not morally responsible for having brought about that disadvantage by wrongful, blameworthy acts. The duty to undo disadvantage would be derived from the duty to establish and maintain a just distributive scheme, not from the duty to repair harms one caused by wrongdoing. Arguably, in attempting to remove hiring criteria that disadvantage certain groups and to impose on employers the costs of enabling disabled people to work, employment discrimination law does more than merely remedy wrongdoing—it attempts to achieve a vision of fairness and equality in the distribution of jobs and other social goods.

This article argues that some features of antidiscrimination law are better explained by principles of distributive justice than by principles of corrective justice. The fit between distributive justice and these particular aspects of antidiscrimination law is made even more apparent when considering some central features of British antidiscrimination law. I argue that regulation by the administrative state is an important and underused tool for achieving the principles of distributive justice embedded in antidiscrimination law.

The argument of this article is twofold. First, this article shows that principles of egalitarian distributive justice explain the function and goals of certain features of contemporary antidiscrimination law. Second, as a prescriptive matter, this article argues that regulation by administrative agencies is better suited to a society's collective pursuit of equality than tortlike lawsuits. In areas such as disparate impact, hostile environment, and reasonable accommodation, regulatory standards set by agencies are more appropriate, as such standards can be aimed at eradicating inequality prospectively rather than remedying specific harms after they have already occurred.

This article looks primarily to statutes, doctrines, and institutional arrangements that constitute antidiscrimination law in the United States and Britain to make these arguments. The United States and Britain lend themselves to comparison in this area of law for a variety of reasons. First, U.S. law, particularly its judicially created disparate impact doctrine, influenced the adoption of provisions prohibiting indirect discrimination in the British sex discrimination and race discrimination statutes.¹¹

9. In this article, the term "distributive justice" is used broadly. "Distributive justice" refers to any theory of the just distribution of goods. These goods can include wealth and other material goods and also intangible goods such as self-respect.

10. Corrective justice is explained in JULES L. COLEMAN, *RISKS AND WRONGS* (1992) and JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001).

11. See Bob Hepple, *Have Twenty-Five Years of the Race Relations Acts in Britain Been A Failure?*, in *DISCRIMINATION: THE LIMITS OF THE LAW* 19, 23 (Bob Hepple & Erica M. Szyszczak eds.,

In discussing indirect discrimination in the legislative histories of the Sex Discrimination Act (SDA)¹² and Race Relations Act (RRA)¹³ in Britain, British lawmakers invoked ideas of distributive justice. In addition, despite the American influence, British lawmakers delegated different powers to the administrative agencies for antidiscrimination law than those delegated to the U.S. EEOC, which gave rise to an alternative model of enforcement.¹⁴ Although a variety of institutional, political, social, and cultural differences between the two countries may also explain the different choices made, it is not the purpose of this article to describe or evaluate those differences.¹⁵ Rather, this article takes the different choices made with regard to the role of agencies as given and probes the normative conceptions of antidiscrimination law that those choices reflect and facilitate.

Part I of this article begins by asking what principles, if any, are embodied in the legal practices known as antidiscrimination law and contrasts two approaches to justice that provide plausible explanations of these legal practices: corrective and distributive justice. Part I also considers the relationship between principles of corrective justice and distributive justice.

Part II points to features of U.S. and British antidiscrimination law that are evidence of the implementation of corrective and distributive justice principles, contrasting the centrality of corrective justice to U.S. antidiscrimination law, and the centrality of distributive justice in Britain. Despite the centrality of corrective justice to U.S. antidiscrimination law, Part II suggests that the most recent developments of the last fifteen years are better explained by principles of distributive justice.

Part III contrasts the regulatory powers delegated to the EEOC in the United States with those delegated to the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE), and the Disability Rights Commission (DRC) in Britain. Unlike the EEOC, the British agencies have the power to issue non-discrimination notices after investigating alleged discriminators, as well as rulemaking power to issue Codes of Practice. Administrative agencies on both sides of the Atlantic

1992) (noting the influence of *Griggs* on the Sex Discrimination Act 1975); Christopher McCrudden, *Changing Notions of Discrimination*, in *EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE* 83, 84 (Stephen Guest & Alan Milne eds., 1985) (acknowledging that the concept of "indirect" discrimination in the Sex Discrimination Act 1975 and Race Relations Act 1976 was based on the approach of U.S. courts' interpretations of Title VII).

12. Sex Discrimination Act, 1975, c. 65 (Eng.).

13. Race Relations Act, 1976, c. 74 (Eng.).

14. The Commission for Racial Equality, like the Equal Opportunities Commission, has the power to issue non-discrimination notices and to issue Codes of Practice. See Race Relations Act, §§ 47, 58 (Eng.).

15. For an account of the history of race discrimination law in Britain, with particular attention to the cultural, historical, and social contexts that provide "frames" for understanding this body of law, see ERIK BLEICH, *RACE POLITICS IN BRITAIN AND FRANCE: IDEAS AND POLICYMAKING SINCE THE 1960s*, at 35–113 (2003).

have interpreted antidiscrimination law to encompass the distributive justice goal of achieving equal opportunity.

Part IV shows how courts in both the United States and Britain have tended toward a corrective justice interpretation of antidiscrimination law, both in their interpretations of the scope of liability and in their understanding of the agencies' limited roles in enforcement.

Part V puts forth EEOC reform as a possibility for administrative experimentation in the field of employment discrimination and inequality. The successes and failures of the British experiments with delegating stronger rulemaking and cease-and-desist authority to its antidiscrimination agencies can provide a point of departure for considering experimentation by U.S. agencies in the regulation of equality in employment. Once inequality correlated with race, gender, disability, and other group characteristics is understood as a problem of distributive justice rather than corrective justice, it follows that more robust regulatory approaches to the problem are appropriate. EEOC reform is one of a variety of possible regulatory approaches that may best realize the normative principles embedded in antidiscrimination law.

I. CORRECTIVE JUSTICE AND DISTRIBUTIVE JUSTICE IN ANTIDISCRIMINATION LAW

A. *Conceptual Analysis of Antidiscrimination Law*

The first purpose of this article is to determine what principles, if any, are embodied in the legal practices known as antidiscrimination law. In the United States, this includes the Equal Protection Clause,¹⁶ Title VII,¹⁷ the Americans with Disabilities Act (ADA),¹⁸ and other statutes that prohibit discrimination on the basis of group characteristics. In Britain, this includes the SDA,¹⁹ the RRA,²⁰ and the Disability Discrimination Act (DDA).²¹ Although antidiscrimination law includes a prohibition on discrimination in many aspects of life, including employment,²² education,²³ public facilities,²⁴ and the provision of public services,²⁵ this

16. U.S. CONST. amend. XIV, § 1.

17. Civil Rights Act of 1964, 42 U.S.C. § 2000e-(2) (2000).

18. Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (2000).

19. Sex Discrimination Act, 1975, c. 65 (Eng.).

20. Race Relations Act, 1976, c. 74 (Eng.).

21. Disability Discrimination Act, 1995, c. 50 (Eng.).

22. Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e-2 (2000).

23. Title VI of the Civil Rights Act of 1964 prohibits discrimination in federally assisted programs, including educational institutions that receive federal funding, 42 U.S.C. § 2000d (2000).

24. Title III of the Civil Rights Act of 1964, 42 U.S.C. § 2000b (2000).

25. In the United States, discrimination by federal and state entities are prohibited by the Fifth and Fourteenth Amendments. See U.S. CONST. amend. V; U.S. CONST. amend. XIV. In Britain, the Sex Discrimination Act, the Race Relations Act, and the Disability Discrimination Act prohibit discrimination by public authorities as well as employers. See Disability Discrimination Act, 1975, c. 50 (Eng.); Race Relations Act, 1976, c. 74 (Eng.); Sex Discrimination Act, 1975, c. 65 (Eng.).

article focuses the discussion on employment discrimination because doctrines developed in this area, such as disparate impact, challenge the corrective justice approach to discrimination. Furthermore, because an administrative agency, namely the EEOC, was created to enforce Title VII, employment discrimination law naturally lends itself to questions about the proper role of administrative governance in addressing discrimination and group-based inequality.

In searching for the principles that give coherence to antidiscrimination law, this article applies the method of conceptual analysis of legal practices set forth by Jules Coleman.²⁶ The purpose is to make sense of existing legal practices as embodying certain normative principles. These principles that make sense of existing legal practices may or may not be justified. The aim is not to defend a justification of those principles, but to “identify the normatively significant elements of the practice and to explain them as embodiments of principle.”²⁷ In looking for the principles embodied in employment discrimination law, this article identifies the goals, functions, and other features that constitute the nature of employment discrimination law, not merely the goals and functions that happen to be served by it.²⁸ Furthermore, as Nicola Lacey has argued, a full understanding of legal concepts requires both a philosophical analysis as well as a study of the social institutions and the contexts in which those concepts, rules and arrangements are embedded.²⁹ Thus, the inquiry focuses on the role of administrative agencies entrusted with the enforcement of antidiscrimination law, which is often overlooked by antidiscrimination scholarship.

This article shows that the statutory provisions and case law of U.S. and Britain employment discrimination law can plausibly be understood as embodiments of corrective justice or distributive justice. The preoccupation with intentional discrimination in Equal Protection jurisprudence, and the availability of punitive and compensatory damages for disparate treatment under Title VII, are among the features that embody corrective justice. At the same time, features such as disparate impact liability and the duty to accommodate the disabled, in which punitive and compensatory damages are rarely available, suggest that these legal practices are ways in which society is attempting to achieve the equal employment opportunity by imposing special duties on employers, the legal persons most capable of providing job opportunities. In short, such provisions embody principles of distributive justice. This article argues that distributive justice principles provide a more coherent account of the law

26. JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY*, *supra* note 10, at 5.

27. *Id.* at 6.

28. *Cf. id.* at 14.

29. Nicola Lacey, *Analytical Jurisprudence versus Descriptive Sociology Revisited*, 84 *TEX. L. REV.* (forthcoming).

addressing what this article refers to as “cumulative outsider disadvantage.”³⁰

B. Corrective Justice and Distributive Justice

The distinction between distributive justice and corrective justice has been a theme in legal philosophy and ethics since Aristotle. Aristotle distinguished between distributive and corrective justice in the following way: corrective justice sought to remedy wrongs committed by one party against another.³¹ Distributive justice, in contrast, concerned the distribution of honor or money in accordance with the proportion due to each person.³² Responsibility for corrective justice falls on the wrongdoer—the wrongdoer has special reasons for acting to rectify the harm he has caused.³³ In contrast, the responsibility for distributive justice falls on society at large—all persons have reasons for acting to provide “each member of the community with whatever the principle of distributive justice requires.”³⁴ Because coordination to discharge this duty is difficult, citizens empower the state to act as their agent to see to it that citizens collectively discharge their duties under distributive justice.³⁵ Through regulation, the state provides public goods and services in furtherance of distributive justice.

Corrective justice consists of the principle that “individuals who are responsible for the wrongful losses of others have a duty to repair the losses.”³⁶ Corrective justice posits a significant relationship between the injurer and the victim. In law, corrective justice is primarily pursued through torts.³⁷ The victim sues the person he alleges injured him, and argues that the injurer acted wrongfully toward him, which caused him harm. The causal relationship between the wrongfulness of the act and the harm caused are pertinent to the outcome of the lawsuit.³⁸ An act may be characterized as wrongful in at least two different ways. Wrong-

30. Cumulative outsider disadvantage is similar to what Susan Sturm refers to as “second generation employment discrimination.” Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468 (2001). See discussion *infra* note 66.

31. ARISTOTLE, NICOMACHEAN ETHICS V:iv (Christopher Rowe Trans., Oxford Univ. Press 2002).

32. *Id.* at V:ii–iii.

33. See, e.g., Jules Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 434–35 (1992).

34. *Id.* at 434.

35. See COLEMAN, RISKS AND WRONGS, *supra* note 10, at 312.

36. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY, *supra* note 10, at 15.

37. To say that corrective justice is primarily pursued through torts is not necessarily to say that torts primarily pursue corrective justice.

38. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY, *supra* note 10, at 20.

fulness may consist of a moral defect in the action or in the character of the actor, or it may consist merely of a breach of duty.³⁹

In contrast, distributive justice is primarily concerned with the just distribution of certain goods within a society. Questions of distributive justice have been at the center of Anglo-American normative political philosophy ever since John Rawls' *A Theory of Justice* appeared in 1971,⁴⁰ the same year that disparate impact doctrine was judicially adopted by *Griggs v. Duke Power Co.*⁴¹ In addition to material goods and income, the goods to be justly distributed include rights and liberties, opportunities and powers, and income and wealth. Rawls notes that a sense of one's own worth is a very important primary good.⁴² Theories of distributive justice attempt to articulate principles that shape the basic structure of a society. A legal regime that embodies distributive justice attempts to define and maintain the just distribution of these goods. A clear example of a legal regime embodying distributive justice is the tax system.⁴³ Taxes coerce some citizens to relinquish wealth in order to provide other citizens with resources to maintain whatever the society views as a just distribution of wealth.⁴⁴ In a corrective justice regime, the coercive authority of law is applied only to bring about a remedy for wrongdoing. In a distributive justice regime, the coercive authority of law is applied whenever society fails to maintain the just distribution of goods, however that just distribution is defined.

Corrective justice and distributive justice each provide different and plausible explanations as to what is being accomplished through laws prohibiting discrimination on the basis of race, sex, age, disability, sexual orientation, religion, and other characteristics. If antidiscrimination law embodies corrective justice, its core function and purpose is to provide victims of discrimination remedies for the harms they suffer as a result of an identifiable injurer's past wrongful acts. On this account, the characterization of discrimination as a wrongful act—whether it consists of disparate treatment or disparate impact—is extremely important, as is the causal relationship of the wrongful act to the harm suffered by the victim. In such an instance, the actor is blameworthy.

In antidiscrimination law, harms intentionally imposed upon persons on the basis of their race constitute the paradigmatic instance of dis-

39. See John Gardner, *Obligation and Outcome in the Law of Torts*, in *RELATING TO RESPONSIBILITY* 111, 111 (John Gardner & Peter Cane eds., 2001) (noting that conditions under which one wrongs another are identical to conditions under which one fails to perform an obligation toward the other).

40. See JOHN RAWLS, *A THEORY OF JUSTICE* 4, 7, 61 (1971).

41. 401 U.S. 424 (1971).

42. RAWLS, *supra* note 40, at 92.

43. See generally LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002). Murphy and Nagel argue that taxes are "the most important instrument by which the political system puts into practice a conception of economic or distributive justice." *Id.* at 3.

44. See Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 *YALE L.J.* 283, 284–85 (1994).

crimination.⁴⁵ These include the exclusion of blacks from juries on the basis of race, the segregation of blacks and whites in public education resulting in the inferior education of blacks, and the refusal to hire blacks on the basis of their race. These acts fit the corrective justice paradigm. The harm consists in both the stigma and material disadvantage of exclusion, and the act of exclusion is characterized as wrongful because it is motivated by racial animus. The victim of such a harm is entitled to recover a remedy from the perpetrator. It does not matter that society at large may share the racial animus; in a discrimination suit, there is a special relationship between the injurer and the victim such that the plaintiff's right to a remedy is premised on a finding that the particular defendant did something wrong that caused the plaintiff harm. The wrongfulness of intentional discrimination lends credence to the corrective justice account of antidiscrimination law.

Antidiscrimination law can be said to embody corrective justice in another respect. The law itself could be viewed as a remedy for collective acts of wrongdoing by the state against particular groups. The legal prohibition of racial discrimination then functions to compensate black people collectively for the injuries they suffered and continue to suffer as a result of slavery, Jim Crow, and other forms of state-sanctioned wrongdoing against blacks. Antidiscrimination law can be seen as a large-scale remedy to the entire group.

Furthermore, corrective justice may also explain other legal rules pertaining to discrimination in addition to the prohibition on discrimination by the state or by an employer. Examples include affirmative action⁴⁶ and reparations for descendants of slaves.⁴⁷ Indeed, the United States Supreme Court has traditionally viewed affirmative action as legitimate only when, as Kathleen Sullivan has put it, it functions as "pre-

45. The Supreme Court has noted that intentional discrimination, or disparate treatment, is the most easily understood type of discrimination. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Furthermore, scholars often use the term "discrimination" to refer to intentional discrimination, while recognizing that the law includes disparate impact within the definition of discrimination. See, e.g., Bagenstos, *supra* note 7, at 833–34; Brest, *supra* note 7, at 1–2; Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 686 n.2 (2004); Jolls, *supra* note 7, at 646–51.

46. Corrective justice could provide a justification for affirmative action to the degree that affirmative action functions as a remedy for disadvantages suffered by certain groups as a result of past wrongful conduct against them. See Forde-Mazrui, *supra* note 45, at 709 (arguing that corrective justice can be applied to affirmative action to support America's responsibility for past societal discrimination against blacks).

47. In the debate over reparations, both sides invoke corrective justice. For example, Charles Ogletree argues that reparations are needed to repair the injustices of the past. See Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. REV. 279, 283–84 (2003). Opponents of reparations argue, assuming a corrective justice standpoint, that reparations do not make sense because the wrongful act of slavery is too attenuated from the current condition of African Americans. See John McWhorter, *Blood Money*, *The Am. Enterprise*, July/Aug. 2001, at 18. Kyle Logue has recently argued, however, that reparations are justified by distributive justice rather than corrective justice. See Kyle Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1323–24 (2004).

cise penance for the specific sins of racism a government, union, or employer has committed in the past."⁴⁸ The principle of corrective justice in antidiscrimination law can be understood on either a collective or an individualized model of injury. If antidiscrimination law is about corrective justice, the goal of the law is to identify wrongdoers, and, in part, to punish them by holding them financially, and otherwise, responsible for the harms they have caused to other persons.

But what about the forms of unintentional discrimination also prohibited by antidiscrimination law, such as disparate impact and failure to accommodate the disabled? If corrective justice is taken as the principle that explains this body of law, disparate impact and the failure to accommodate have to be understood as wrongful acts. As such, they can be analogized to the tort of negligence.⁴⁹ In tort law, an actor is liable for negligence if she fails to exercise the care of a reasonable person. The wrongfulness of an act or omission is not characterized as culpability or moral blameworthiness, but as the actor's breach of a duty. To say that an agent breached a duty in a moral sense is to say that agent had a duty to avoid the harm, that the harm caused by the act or omission was a foreseeable and avoidable consequence of the agent's act or omission, and that the agent carried on nonetheless.⁵⁰ Take, for example the reasonable accommodation context. If that provision of law can be explained by corrective justice, it would mean that an employer has a duty to all disabled persons to provide reasonable accommodation to enable them to work, that the employer could foresee that certain conditions or policies would make it impossible for a disabled employee to work (for example, the lack of an elevator for a person in a wheelchair), and that the employer still does not make the accommodation. In a corrective justice regime, an actor is liable for a harm if he is responsible for bringing it about, and he is at fault for bringing it about.⁵¹

Distributive justice provides an alternative explanation of the same legal rules pertaining to discrimination.⁵² Distributive justice puts forth a substantive vision of the just distribution of various goods. So injustice is understood as a failure to achieve the just distribution. Injustice is a state of affairs that can occur without the commission of individual wrongful acts that were intended to undermine the just distribution. As John

48. See Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (commenting on *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)).

49. David Oppenheimer proposes conceptualizing disparate impact policies, the failure to accommodate, and hostile work environment analogously to the tort of negligence. See generally David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

50. This account of negligence relies on Stephen Perry, *The Impossibility of General Strict Liability*, 1 CANADIAN J.L. & JURISPRUDENCE 147 (1988).

51. See Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE 237, 238 (Jeremy Horder ed. 2000).

52. Scholars, particularly those writing in Britain, have noted that distributive justice provides an attractive explanation of disparate impact doctrine. See, e.g., John Gardner, *Liberals and Unlawful Discrimination*, 9 OXFORD J. LEGAL STUD. 1, 5 (1989); McCrudden, *supra* note 11, at 86.

Gardner puts it, the principle of distributive justice is meant to “authorize the correction of existing patterns of advantage and disadvantage *exclusively*”; it is not meant “to respond to information of certain other kinds about the various citizens involved, such as their past conduct or their personal responsibility for the existing patterns.”⁵³ For example, take Rawls’s principles of distributive justice. First, they require equal rights to the most extensive basic liberty compatible with similar liberty for others and second, social and economic inequalities are to everyone’s advantage, and attached to positions and offices open to all.⁵⁴ Legal regimes and institutions can be designed to implement these principles. As Arthur Ripstein puts it, “[i]nstitutions of distributive justice serve to guarantee the conditions of free interaction, so that the results of voluntary interaction reflect choices rather than arbitrary starting points.”⁵⁵

Antidiscrimination law might be seen as society’s collective attempt to guarantee the conditions of free interaction so as to undo the unfair effects of individuals’ arbitrary starting points in life. From a Rawlsian standpoint, characteristics like race, gender, and disability are arbitrary from a moral standpoint—these characteristics are arbitrarily given to us by luck, and so they should not determine our life prospects. Therefore, a rule prohibiting discrimination becomes an important way of operationalizing both the first and second principles. First, in order to provide equal rights to the most extensive basic liberty compatible with similar liberty for others, a society must prohibit taking morally irrelevant characteristics such as race, gender, or disability into account. In addition, making positions and offices open to all requires that nobody is excluded on the basis of morally irrelevant characteristics.

Principles of distributive justice also provide convincing explanations for rules prohibiting policies that cause unfair disadvantages to certain groups, even when these policies are not intended to do so. One way of looking at it is to imagine rules one might adopt in Rawls’ original position,⁵⁶ which might include a rule against policies having a disparate impact, as well as a rule requiring the reasonable accommodation of the disabled. Not knowing what their social positions will be—including each person’s race, sex, or disability—rational persons might be inclined to choose a rule that prohibits employer policies disadvantaging racial minorities or women when those policies cannot be shown to be necessary for business interests. They might also choose a rule that requires the accommodation of the disabled, so long as the costs of accommoda-

53. Gardner, *supra* note 52, at 9.

54. RAWLS, *supra* note 40, at 60.

55. ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 2 (1999).

56. In invoking Rawls’ original position here, I do not mean to suggest that it is the only means of determining principles of justice, but rather to use one example to show how theories of distributive justice could support antidiscrimination norms. In Rawls’ theory of justice, the original position is an imagined primitive condition of culture in which rational beings with their own ends, who are unaware of what those particular ends are, choose the principles of justice. See RAWLS, *supra* note 40, at 12.

tion are not too burdensome for everybody else. These rules would implement the principle that all human beings, regardless of their unlucky arbitrary starting position in groups that are stigmatized or disadvantaged, should have equal chances at living a successful life, and immutable and unchosen characteristics should not lead to disadvantages for persons possessing these characteristics.

Thus far this article has discussed how antidiscrimination law could be understood as one of several legal regimes whose purpose is to implement a Rawlsian conception of distributive justice.⁵⁷ But other conceptions of distributive justice may also provide a plausible account of antidiscrimination law. A conception of distributive justice that emphasizes the value of membership in cultures or other groups⁵⁸ might also explain rules against discrimination or disadvantage on the basis of mutable characteristics as well as immutable ones. Such a theory stipulates that all human beings have a right to equal opportunities, employment, political participation, and personal autonomy, and people who belong to certain groups, even by choice, should not be at a disadvantage because membership in such groups is valuable.⁵⁹

These egalitarian conceptions of distributive justice support the proposition that a just society has a general duty to eliminate disadvantages faced by women, racial and ethnic minorities, the disabled, and perhaps other groups, even when the disadvantages were not clearly caused by wrongful acts. Thus, a society committed to one of these conceptions of distributive justice would have a duty to promote equality independent of, and in addition to, its duty to remedy particular wrongful acts that cause inequalities that violate the distributive justice ideal. Whereas a corrective justice regime imposes the duty to repair harm on the wrongdoer who caused it, a distributive justice regime imposes the duty on all participants in a just society. This ultimately imposes greater burdens on those who are most able to repair harm. If distributive justice explains disparate impact, the duties imposed on employers are regarded as discharging the general duty of society as a whole to achieve

57. The claim that antidiscrimination law implements Rawlsian distributive justice does not, however, amount to the claim that it is the exclusive legal regime necessary to implement Rawlsian distributive justice. Clearly, Rawls' two principles of justice might also require the state to provide such things as minimum subsistence, basic health care, and primary and secondary education, among other primary goods. Furthermore, the implementation of "offices open to all" might require protections for fairness, such as greater protections for workers against wrongful or arbitrary termination, that go beyond the scope of antidiscrimination law. Nonetheless, antidiscrimination law could be understood as one of a number of regimes necessary to achieve distributive justice.

58. See, e.g., WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989).

59. In *The Morality of Freedom*, Joseph Raz argues that rights against discrimination on religious, ethnic, and racial grounds are justified because discrimination on such grounds distorts the ability of persons "to feel pride in membership in groups identification with which is an important element in their life." JOSEPH RAZ, *THE MORALITY OF FREEDOM* 254 (1986). "[T]he right is meant to foster a public culture which enables people to take pride in their identity as members of such groups." *Id.*

and protect an ideal of fair equality of opportunity rather than a specific duty of repair arising from a past wrongful act.⁶⁰

If the goal of antidiscrimination law is to ensure that results reflect fair and voluntary interaction rather than arbitrary starting positions, it is an important function, if not the goal, of this body of law to eradicate disadvantages faced by women, minorities, the disabled, and other groups, even when these disadvantages cannot be attributed to particular acts of wrongdoing. The notion that antidiscrimination law is a public policy aiming to eradicate group-based disadvantage is consistent with the idea that the law should regulate conduct and patterns of interaction that cumulatively lead to the disadvantage of women, minorities, and the disabled, even when such conduct cannot be characterized as morally defective. Susan Sturm has referred to that conduct as second generation employment discrimination.⁶¹ Second generation employment discrimination is defined as “patterns of interaction among groups within the workplace that, over time, exclude nondominant groups,”⁶² as distinct from first-generation discrimination, which corresponds to the wrongful, intentional acts of exclusion or injury by identifiable discriminators.⁶³

The patterns of interaction that, over time, lead to the disadvantage of women or racial minorities occur in informal norms, networking, training, mentoring, and evaluation. Women and minorities face disadvantages in patterns of work assignment, training, and mentoring, routine comments on appearance, sexuality, and competence, harsh assessments of the work styles and competence of women and minority workers, and the invisibility of the contributions by women and minorities to the work being done. Some of these patterns are fueled by stereotypes about women and minorities that are incompatible with the image of the ideal worker. These stereotypes are often unconscious.

These patterns may also be caused by the fact that people in power may unconsciously give more favorable treatment to persons of the same social, cultural, or religious background as themselves because they feel more comfortable with them.⁶⁴ For instance, a white male supervisor might feel more inclined to mentor a young employee who reminds him of himself, and this can work to the detriment of women and minorities. These patterns of interaction may include some of the more subtle forms of hostile work environment. Consider, for example, a workplace in which banter by male colleagues and supervisors about their sexual desires has the effect of alienating women and decreasing their productivity, especially in teamwork with these male colleagues.

60. See Gardner, *supra* note 52, at 10.

61. See Sturm, *supra* note 30, at 468.

62. *Id.*

63. *Id.* at 465–66.

64. BOB HEPPLE, MARY COUSSEY & TUYFAL CHOUDHURY, EQUALITY: A NEW FRAMEWORK: REPORT OF THE INDEPENDENT REVIEW OF THE ENFORCEMENT OF UK ANTI-DISCRIMINATION LEGISLATION 15 (2000).

This type of discrimination seldom involves a conscious decision to exclude or subordinate. Many scholars have noted that some patterns of behavior that result in the inequality of women and minorities might involve unconscious racial and gender stereotypes.⁶⁵ Many group-correlated disadvantages are caused today by the failure of people in positions of power to relinquish their comfort zones and to make deliberate attempts to overcome their biases, desires, preferences, and stereotypes. For lack of a better term, I shall refer to this phenomenon as cumulative outsider disadvantage.⁶⁶ The prevalence of such interactions may justify policies that promote equal opportunity and diversity by formalizing mentoring networks, monitoring the progress of women and minorities, and having codes of respectful conduct.

The disadvantage of women and minorities is often caused by the informal processes by which people in power gravitate toward underlings with whom they share certain experiences and backgrounds, with whom they feel more comfortable. In other words, the communitarian tendencies of people in power may be a leading cause of the underrepresentation of women and minorities at the highest levels, when women and minorities are recruited at the same rate. It is difficult to characterize the communitarian tendencies as blameworthy, and therefore wrongful acts, from a corrective justice standpoint. Indeed, rather than blame, praise might be appropriate in some contexts for those who mentor others who share the same background, experiences, and interests.⁶⁷ The communitarian tendencies are only problematic to the degree that they cause the cumulative disadvantage of outsiders. These behaviors cannot independently be characterized as morally blameworthy. Communitarian behaviors that tend to advantage men or whites, for instance, word-of-mouth recruiting and seniority systems, need to be curbed by law not because they are evil but because they cause disadvantages that undermine distributive justice.

Since there is no clear act of blameworthy wrongdoing, what is troubling about cumulative outsider disadvantage is the resulting harm of inequality, not the moral character of the behaviors themselves. If the

65. The canonical statement of this view is found in Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–26 (1987). Linda Hamilton Krieger has also drawn upon the work of psychologists to show that gender and race-based unequal treatment results largely from the operation of unconscious cognitive categories. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1200–02 (1995).

66. Although cumulative outsider disadvantage closely approximates what Susan Sturm calls “second generation employment discrimination,” see Sturm, *supra* note 30, at 468–74, the term is not used here merely to avoid confusion. British scholars use the term “third generation” to refer to existing frameworks that inadequately address behaviors similar to those identified by Sturm. See HEPPLER, COUSSEY & CHOUDHURY, *supra* note 64, at 18–19.

67. Many political theorists have argued that shared backgrounds, experiences, and cultures provide an important basis for successful democratic political communities. Accordingly, these commonalities can form the basis for partiality toward members of one’s own community. See, e.g., DAVID MILLER, ON NATIONALITY 53 (1995); YAEL TAMIR, LIBERAL NATIONALISM 95–116 (1993).

eradication of cumulative outsider disadvantage is an important goal, function, or feature of antidiscrimination law, distributive justice provides a more coherent explanation of this body of law than does corrective justice. The ideal of egalitarian distributive justice holds that all persons should have equal access to economic opportunity, and this means that criteria irrelevant to employment goals and decisions are unnecessary and unacceptable barriers to equal access. It does not matter, on this theory, whether a barrier was initially constructed with the purpose to exclude; what matters is that the barrier is unnecessary for the purported goals of an organization and that it undermines equality. On this theory, egalitarian distributive justice could provide the rationale for public policies that aim to remove such barriers, outside the context of lawsuits that attempt to show the wrongfulness of such barriers.

C. *The Relationship Between Corrective and Distributive Justice*

Corrective justice and distributive justice are related in important ways. Corrective justice is primarily concerned with repairing harms that are caused by wrongdoing. But what constitutes a harm? The very idea of harm relies on some account of a legitimate interest, entitlement, or right, because harm is a setback of interest or a violation of an entitlement or right. In order to classify any event or effect as a harm, some account of a right or interest is needed. In other words, an underlying theory of distributive justice is needed to determine the entitlements that form the baseline according to which harm is defined.

One might question the distinction between corrective justice and distributive justice as principles explaining antidiscrimination law, given this relationship between corrective and distributive justice. But even though corrective justice might defend entitlements set by a theory of distributive justice, the purpose of corrective justice is not to maintain a distributive scheme as such.⁶⁸ Corrective justice only maintains a distributive scheme when a blameworthy act undermines the distributive scheme, and the actor is thus held responsible. A corrective justice regime does not do anything about the fact that some members of society fall short of the rights and benefits to which they are entitled, unless it understands that condition as resulting from an actor who is responsible for that outcome. The goal of a corrective justice regime is to require the responsible actor to remedy the victim's harm, not to generally defend and maintain a system of entitlements.⁶⁹

The pursuit of corrective justice may also help shape and change prevailing notions of distributive justice. Often, a sense of wrong or in-

68. Perry, *supra* note 51, at 237.

69. *Id.*

justice precedes the articulation of a conception of distributive justice.⁷⁰ The attempt to remedy the wrong makes possible the articulation of the right that the offending act violates.⁷¹ In the United States, antidiscrimination law may have intended initially to remedy wrongful acts of exclusion and subordination on the basis of race. Remedying these harms provided an opportunity to articulate why it is wrong to exclude and subordinate on the basis of race. Doing so requires some understanding of the principle of equality before the law. Therefore, while principles of distributive justice do not depend on principles of corrective justice, the articulation of distributive justice has often been made possible by the operation of corrective justice regimes.

II. PROVISIONS OF U.S. AND U.K. ANTIDISCRIMINATION LAW

A. *The Predominance of Corrective Justice in U.S. Antidiscrimination Law*

1. *The Blameworthiness of Intentional Discrimination*

One feature of antidiscrimination law that strongly supports a corrective justice explanation of this body of law is its characterization of discrimination, particularly racial discrimination, as a blameworthy act. This occurs largely in the U.S. Supreme Court's interpretation of the scope of the Equal Protection Clause, as well as in courts' understandings of what constitutes intentional discrimination, also known as disparate treatment in violation of statutes such as Title VII. The blameworthiness of discrimination is located in the intent to exclude, subordinate, or otherwise harm certain classes of persons. Indeed, the paradigmatic instance of discrimination⁷² is a harmful act that is motivated by racism, sexism, or other wrongful animus against a group.

In the Equal Protection context, the notion that only those acts motivated by race-based animus took shape in the Supreme Court's earliest interpretations of the provision. In the *Slaughter-House Cases*, the Supreme Court characterized the race-based discrimination as an "evil,"⁷³ laying the groundwork for the notion that discrimination is a blameworthy act. In that case, the Court rejected an Equal Protection challenge by white butchers to a Louisiana law restricting the operation of slaughter

70. See JUDITH SHKLAR, *THE FACES OF INJUSTICE* 11 (1990); JUDITH N. SHKLAR, *The Liberalism of Fear*, in *POLITICAL THOUGHT AND POLITICAL THINKERS* 3, 10–11 (Stanley Hoffman ed., 1998).

71. Richard Primus argues that substantive rights in the United States were articulated in response to past atrocities. See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 60–62 (1998); see also KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* 26 (2004) (arguing that civil rights and liberties emerged from American institutions' development).

72. By "paradigmatic instance," I refer to the "central or most clearly established instances." See JED RUBENFIELD, *FREEDOM AND TIME* 180 (2001). I also acknowledge the possibility that some cases of discrimination may not fit this description.

73. *Slaughter-House Cases*, 83 U.S. 36, 80 (1872).

houses to particular locales.⁷⁴ Although the butchers claimed that their Equal Protection rights had been violated because the law benefited some other persons at their expense, the Supreme Court held that, in understanding what constitutes a violation of equal protection, “it is necessary to look to the purpose which we have said was the pervading spirit of them all [the Civil War Amendments], the evil which they were designed to remedy.”⁷⁵ The notion that the Equal Protection Clause was designed to remedy “evil” suggests that a violation was understood as blameworthy. The Court specified the nature of the blameworthy acts that the law was intended to remedy: “The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.”⁷⁶ In the absence of a similar “evil” of imposing hardship on blacks “as a class,” the Supreme Court held that there was no unlawful discrimination.⁷⁷

When the Court first struck down state laws as violations of Equal Protection, the discriminatory laws were understood as impositions of harm motivated by racial prejudice. In *Strauder v. West Virginia*, the first case invalidating a state statute on equal protection grounds, the Supreme Court found a law excluding persons from jury service to be unlawful because

[t]he very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.⁷⁸

By emphasizing the express denial of a right by the state, the expression of inferiority, and “race prejudice,” this understanding of the Equal Protection violation suggests that unlawful discrimination involves intentional, and therefore blameworthy, impositions of harm.

In *Brown v. Board of Education* and *Loving v. Virginia*, the Court effectively took racial classification to be a proxy for racial animus, with the result that racial classification has become the prima facie indicator of discrimination.⁷⁹ Through the strict scrutiny framework, courts ulti-

74. *Id.* at 57–62, 82–83.

75. *Id.* at 72.

76. *Id.* at 81.

77. *Id.* at 82–83.

78. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

79. The Court in *Brown* held that “separate educational facilities are inherently unequal,” *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), and laid the groundwork for later decisions applying strict scrutiny to any regime of racial classification. In *Loving v. Virginia*, the Supreme Court held that the Fourteenth Amendment required a determination as to “whether the classifications drawn by any

mately require a racial classification to be “invidious” in order to violate Equal Protection. That is, a racial classification by itself does not constitute a violation; it is only when there is no compelling state interest justifying it that it is “invidious.”⁸⁰ The descriptor “invidious” strongly connotes blameworthiness. To violate equal protection, the state must intend to act, and that intent must be understood, whether through the classification analysis or through the animus analysis, to be invidious and therefore blameworthy.

The Supreme Court has understood blameworthiness as a necessary element of discrimination in violation of the Equal Protection Clause. Characterizations of violations as “evil” and “invidious” support this reading. The importance of blameworthiness to discrimination is also evidenced by *Washington v. Davis*, in which the Supreme Court held that disproportionate impact on a race was insufficient to constitute an equal protection violation, and required a showing of discriminatory intent.⁸¹ Similarly, in the gender context, *Personnel Administrator v. Feeney* also held that the foreseeability of a policy’s adverse effects on women was insufficient to constitute an equal protection violation.⁸² Viewing the discriminatory act as a blameworthy wrongdoing resonates with the corrective justice explanation of antidiscrimination law, since corrective justice is primarily concerned with providing remedies for wrongful acts.

The corrective justice understanding that unlawful discrimination is a form of wrongdoing also explains judicial understandings of disparate treatment, in violation of Title VII, the Age Discrimination in Employment Act (ADEA), or the ADA. In distinguishing between disparate treatment and disparate impact violations of Title VII, the Supreme Court has noted, “Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.”⁸³ In generally prohibiting employers from using classifications tracking the prohibited categories under the statute, the prohibition on disparate treatment recognizes that “employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females,”⁸⁴ because it is wrong to treat an individual as merely a component of a racial, religious, sexual, or national class.

When classifications are not at issue, liability for disparate treatment turns on whether an employer’s adverse action against an employee was *motivated* by consideration of race, gender, disability, or other statutorily protected trait. In fact, the 1991 Civil Rights Act provides, inter

statute constitute an arbitrary and invidious discrimination,” concluded that such classifications could not be justified by a rational purpose. 388 U.S. 1, 10 (1967).

80. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 219–20 (1995).

81. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

82. *Personnel Adm’r v. Feeney*, 442 U.S. 256, 273 (1979).

83. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (citing 110 CONG. REC. 13088 (1964) (remarks of Sen. Humphrey)).

84. *City of Los Angeles Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978).

alia, that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”⁸⁵ Motive is an important element of disparate treatment liability because it permits the adverse employer action to be characterized as blameworthy and wrongful. Even if animus is not needed to show discriminatory motive, disparate treatment in violation of Title VII requires the employer’s consciousness that race, gender, or other protected trait influenced the decision, and the employer is thus characterized as a wrongdoer.⁸⁶ These features of disparate treatment in violation of Title VII support the corrective justice explanation. Because the majority of litigated Title VII cases involve disparate treatment claims rather than disparate impact claims,⁸⁷ it makes sense to say that corrective justice is the predominant principle in Title VII as well as equal protection.

2. *The Remedial Approach to Congress’s Enforcement Power*

Another feature of federal antidiscrimination law in the United States that suggests a corrective justice orientation is the requirement that laws enacted to enforce Equal Protection be corrective and remedial rather than substantive. The Supreme Court has long understood that Congress’s power to enforce equal protection, under Section 5 of the Fourteenth Amendment, should be limited to acts remedying wrongful discrimination. Invalidating portions of the Civil Rights Act of 1875, the Supreme Court in 1883 established that Congress’s power to enforce equal protection was “corrective in its character,”⁸⁸ meaning that it did not encompass the “power to legislate generally upon [life, liberty and property].”⁸⁹ In so holding, the *Civil Rights Cases* invalidated federal legislation guaranteeing the full and equal enjoyment of public accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement, to citizens of every race and color.⁹⁰ The Supreme Court held that the Act was not corrective of any constitutional violation.

More recently, in *City of Boerne v. Flores*, the Supreme Court reaffirmed this understanding of what it means to enforce the Fourteenth Amendment, holding that the enforcement power is “corrective or preventive, not definitional,”⁹¹ and “remedial, rather than substantive.”⁹²

85. 42 U.S.C. § 2000e-2(m) (2000).

86. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248–50 (1989).

87. For an empirical study of Title VII litigation, including breakdown of cases between disparate treatment and disparate impact, see John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991).

88. *The Civil Rights Cases*, 109 U.S. 3, 15 (1883).

89. *Id.* at 14–15.

90. *Id.* at 8.

91. 521 U.S. 517, 525 (1997).

Since *Boerne*, the Court has reiterated its view that statutes enacted pursuant to Section 5 must constitute remedies for constitutional violations. It held that the ADEA was not a valid exercise of Section 5 power (though valid under the Commerce Clause) because it was “out of proportion to a supposed remedial object” responding to a constitutional violation.⁹³ Similarly, it also held that Congress could not validly create a federal cause of action for victims of gender-motivated violence against their alleged perpetrators on the grounds that such a cause of action was not an appropriate remedy for alleged discrimination by the state, the only discrimination proscribed by the Equal Protection Clause.⁹⁴ In short, the Supreme Court’s Section 5 jurisprudence echoes its view that the Equal Protection Clause is about corrective justice.

These features of U.S. antidiscrimination law support the understanding that corrective justice is the principle that best explains this body of law. Because the corrective justice idea has been around since the earliest Fourteenth Amendment cases, the idea that antidiscrimination law is a remedy for wrongful acts of discrimination pervades courts’ approaches to discrimination.

B. *The Possibility of Distributive Justice in U.S. Antidiscrimination Law*

Although many features of U.S. antidiscrimination law enable corrective justice to provide the most plausible explanation of it, some features are better explained by the principle of distributive justice. Examples include the prohibition of disparate impact policies, the requirement to accommodate the disabled, and hostile work environment doctrine.

1. *Disparate Impact*

Griggs v. Duke Power Co. held, “If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”⁹⁵ It read the purpose of Title VII broadly, stating that the objective of Congress “was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”⁹⁶ The Court held that Title VII “proscribes not only overt

92. *Id.* at 520.

93. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 86 (2000).

94. *United States v. Morrison*, 529 U.S. 598, 625–26 (2000). For a thorough discussion of the Court’s Section 5 jurisprudence, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943 (2003); Reva Siegel & Robert Post, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *YALE L.J.* 441 (2000).

95. 401 U.S. 424, 431 (1971).

96. *Id.* at 429–30.

discrimination but also practices that are fair in form, but discriminatory in operation.”⁹⁷

In *Griggs*, the employer practice at issue was the requirement of a high school diploma and the use of a standardized general intelligence test, neither of which were “shown to be significantly related to successful job performance.”⁹⁸ Based on its holding, the Supreme Court subsequently applied the disparate impact analysis to a variety of facially neutral practices by employers, including seniority systems for job assignment that could disadvantage racial minorities,⁹⁹ minimum height and weight requirements that could disadvantage women,¹⁰⁰ and subjective or discretionary employment criteria that could disadvantage racial minorities and women.¹⁰¹

It was plausible to view disparate impact doctrine in *Griggs* as an evidentiary tool to get at intentional blameworthy discrimination. But *Griggs* provided that the “touchstone” of the disparate impact inquiry was “business necessity,”¹⁰² while also stating that the challenged practice must be “related” to job performance,¹⁰³ suggesting that the doctrine was doing more than merely uncovering bad motives. There was considerable confusion in subsequent case law about the appropriate standard.¹⁰⁴ This matters a great deal in determining which principle, corrective justice or distributive justice, better explains disparate impact. If the doctrine is understood as prohibiting disparate impact policies that are not “necessary,” it is more likely that the purpose is to achieve equal employment opportunity in a broad sense. If the doctrine is understood as merely requiring a reasonable relationship between the policy having a disparate impact and the job, then it is more likely that the doctrine functions to identify and remedy intentional and blameworthy forms of discrimination.

Wards Cove Packing Co. v. Atonio suggested that manifest relationship to “legitimate employment goals” was sufficient to justify a disparate impact policy, rejecting the business necessity standard.¹⁰⁵ That case also required the plaintiff to prove that a challenged device was not a business necessity, instead of placing the burden of proving business necessity on the defendant.¹⁰⁶ The codification of disparate impact liability in the Civil Rights Act of 1991 can be seen as an attempt to favor the

97. *Id.* at 431.

98. *Id.* at 426.

99. *See, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

100. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

101. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

102. *Griggs*, 401 U.S. at 431.

103. *Id.*

104. Many cases following *Griggs* applied the “job related” standard, instead of “business necessity.” *See, e.g.*, *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430 (1975).

105. 490 U.S. 642, 659 (1989).

106. *Id.* at 659–60.

business necessity standard. The provision makes a policy having a disparate impact unlawful if it is not shown to be “job related for the position in question and consistent with business necessity,” or if a plaintiff points to an alternative employment practice that fulfills the same goal, which the employer refuses to adopt.¹⁰⁷ Congress also made clear, though in a very unclear way, that it intended, at least with regard to the “business necessity” standard, to undo *Ward’s Cove*.¹⁰⁸ Some have argued that the 1991 Act requires showing “business necessity” to justify disparate impact policies,¹⁰⁹ while others have emphasized the “job related” language to discover a more relaxed standard.¹¹⁰

It is clear, however, that even if the 1991 Act does not require a strict showing of business necessity, the employer has to do more than show job relatedness alone. That is, the employer must do more than simply give a legitimate reason for having a disparate impact policy. This suggests that disparate impact doctrine is not merely a tool to uncover intentional or blameworthy discrimination. By requiring a stronger justification than that which sounds reasonable, the new standard, albeit muddled, suggests that disparate impact liability is not merely a way of getting at intentional discrimination, but a step toward achieving equality of opportunity. A complainant is able to point to an alternative employment practice that does not have a disparate impact. The provision imposes a duty on the employer to adopt such an alternative. Read together with the *Griggs* understanding of Title VII as an attempt to achieve equal opportunity, the employer’s duty arises from his capacity to help achieve distributive justice, by providing employment opportunities, not from his duty to repair harms resulting from his past wrongful acts. In light of the 1991 Act, distributive justice provides a more plausible explanation than corrective justice of the rule against unjustified disparate impact.

2. *Reasonable Accommodation*

Principles of distributive justice are also manifested in U.S. law prohibiting discrimination on the basis of disability. In the United States, the ADA of 1990 not only prohibits discrimination on the basis of dis-

107. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

108. “The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ‘alternative employment practice.’” 42 U.S.C. § 2000e-2(k)(1)(C).

109. See Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 387–88 (1996) (arguing for a reading of the 1991 Act that requires a strict business necessity standard).

110. See Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1157 (1993) (arguing that the *Wards Cove* standard with regard to employers’ justification for disparate impact survived the 1991 Act).

ability on terms parallel to those in Title VII,¹¹¹ it additionally defines discrimination as the failure to make reasonable accommodations for a disabled employee.¹¹² In short, the statute imposes a duty on employers to accommodate the disabled. The requirements of the ADA are not premised on the need to remedy past wrongdoing—the ADA does not limit its coverage to persons with historically stigmatized, or even visible conditions. Rather, the ADA seeks to prevent disabled persons from being disadvantaged in employment, regardless of whether the disadvantage was caused by some past wrongful act.¹¹³

Many scholars have argued that the employer's duty to reasonably accommodate the disabled under the ADA can most plausibly be explained by a principle of distributive justice.¹¹⁴ The statute requires accommodation without inquiring into whether the arrangements or physical premises causing disadvantage to the disabled were brought about by some wrongful act by the employer. Employers are called upon to accommodate the disabled in such circumstances, presumably for the purpose of providing equal employment opportunity to disabled persons rather than as a remedy for any past wrongdoing on their part. Indeed, the stated goals of the ADA are "equality of opportunity, full participation, independent living, and economic self-sufficiency for [the disabled]."¹¹⁵

3. *Hostile Environment*

U.S. law recognizes hostile work environment as discrimination, even when no particular adverse employment action is taken.¹¹⁶ In recognizing hostile environment, the U.S. Supreme Court applied a totality

111. Like Title VII, the ADA prohibits discrimination in the "terms, conditions, or privileges of employment." See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000); Americans with Disabilities Act, 42 U.S.C. § 12112(a) (2000). The ADA's definition of "discriminate" includes, in essentially identical terms to Title VII, 42 U.S.C. § 2000e-2(a)(2), "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." Americans with Disabilities Act, 42 U.S.C. § 12112(b)(1).

112. Unlike Title VII, the ADA includes in its definition of "discriminate": not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. 42 U.S.C. § 12112(b)(5)(A).

113. Samuel Bagenstos defends this understanding of the ADA in Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 24 (2004), and in Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 449 (2000).

114. See, e.g., Issacharoff & Nelson, *supra* note 7, at 310–11 (contrasting the tort-based claims of discrimination "simpliciter" under Title VII with claims under the ADA, which often involve a claimed failure to redistribute); John M. Vande Walle, *In the Eye of the Beholder: Issues of Distributive and Corrective Justice in the ADA's Employment Protection for Persons Regarded as Disabled*, 73 CHI.-KENT L. REV. 897, 925 (1998) (noting that the employer's duty is based on a redistributive rationale rather than the employer's wrongdoing).

115. Americans with Disabilities Act, 42 U.S.C. § 12101(a)(8) (2000).

116. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–23 (1993).

of the circumstances test, including considerations of frequency and severity of discriminatory conduct, “whether it is physically threatening or humiliating . . . and whether it unreasonably interferes with an employee’s work performance.”¹¹⁷ In such cases, employers are liable because, in Justice Ginsburg’s words, “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹¹⁸ The fact that employers can avoid liability altogether by putting in place reasonable measures to avoid harassment and to eliminate it when it occurs¹¹⁹ supports the inference that the recognition of hostile work environment claims functions not only to compensate victims for the wrongful conduct of employers, but to attempt to improve the way employers structure the workplace for the sake of equality, in keeping with a distributive justice approach.

It should be noted that the hostile work environment that the U.S. Supreme Court has recognized as violating Title VII does not include all the forms of cumulative outsider disadvantage that I have identified as problematic from a distributive justice standpoint. Indeed, cases like *Harris v. Forklift Systems* involved stereotypes and conduct that were far from subtle—comments referring to the plaintiff as “a dumb ass woman,” and demands that female employees get coins from the male defendant’s front pants pocket.¹²⁰ As Vicki Schultz has argued, these types of hostile work environments function to undermine women’s participation in the workplace, in part as an attempt by men to reclaim work and work competence as a masculine-identified turf.¹²¹ To the degree that the acts of exclusion are intended to harm and exclude women, they may be blameworthy, and explainable by a corrective justice paradigm. But sometimes, when the workplace is already identified as a masculine or white turf, women and minorities may be unintentionally overlooked or excluded from informal networks and mentoring, not because of some wrongful intent to exclude, but because those in power simply engage more comfortably in informal interactions with the people most like themselves. Thus, while the forms of hostile work environment that are currently recognized by the courts as violations of Title VII do not extend to all the cumulative outsider disadvantages that I have described, what they have in common is that behavior is influenced by the identification of the workplace as a masculine-identified turf.

In imposing liability on employers for disparate impact, accommodation of the disabled, and hostile work environment, the law imposes duties of repair on employers even when employers have not done anything wrong. It does so largely because the employers are best placed to

117. *Id.* at 23.

118. *Id.* at 25 (Ginsburg, J., concurring).

119. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

120. 510 U.S. at 19.

121. See Schultz, *supra* note 7, at 1755.

act toward the achievement of equality in employment. The main problem with disparate impact policies, failure to accommodate, and hostile environment is the disadvantaging effect on certain classes of employees. Antidiscrimination law attempts to prevent disadvantaging effects by holding employers liable for them. In the United States, developments over the last fifteen years strengthen the distributive justice explanation. Indeed, recent scholarship attempting to make sense of the ADA's accommodation command in light of disparate impact doctrine under Title VII has concluded that the achievement of distributive justice is at least implicitly a goal of antidiscrimination law.¹²²

When disparate impact doctrine was young, Paul Brest's classic account of antidiscrimination law in 1976 understood disparate impact through principles of corrective justice. Brest argued that the "antidiscrimination principle remain[ed] the vital force behind contemporary civil rights policy."¹²³ The "antidiscrimination principle" disfavors race-dependent decisions that disadvantage members of a minority group,¹²⁴ proscribing the harmful effects resulting from invidious motives.¹²⁵ Brest described the race-dependent conduct as reflecting the assumption that members of one race were superior to another, which went against shared fundamental moral values.¹²⁶ The goal of antidiscrimination law was to remedy this morally wrongful conduct. Brest advocated limiting the scope of disparate impact liability in light of this goal.

At the same time, Owen Fiss argued that the group-disadvantaging principle should be the mediating principle for equal protection law.¹²⁷ The group-disadvantaging principle expresses the ethical view against caste. Fiss recognized the causal relationship between past acts of wrongdoing and the current disadvantage of groups, noting that the current disadvantage of black people in America, consisting of poverty, lack of educational opportunity, underemployment, and overrepresentation in prisons, is largely the result of slavery and segregation.¹²⁸ Kenneth Karst's argument in 1977 that the principle of equal citizenship constituted the essence of substantive equal protection also embodies the understanding that antidiscrimination law is attempting to achieve a goal in

122. See sources cited *supra* notes 112–13.

123. Brest, *supra* note 7, at 53.

124. *Id.* at 4–5.

125. *Id.* at 19, 28.

126. *Id.* at 5.

127. Fiss, *supra* note 7. Many scholars have recently reflected on the significance of this essay in Symposium, *Fiss's Way, The Scholarship of Owen Fiss*, 58 U. MIAMI L. REV. 1 (2003). See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (attributing to Fiss the "antisubordination principle"); Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35 (2003) (discussing implications of Fiss's argument for voting rights); George L. Priest, *Beyond Brown: Opportunity Versus Equality as an Empowerment Norm: An Essay for Owen Fiss*, 58 U. MIAMI L. REV. 347 (2003) (arguing the need to move beyond equality); Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51 (2003) (critiquing Fiss's decontextualized method).

128. See Fiss, *supra* note 7, at 150–51.

distributive justice, namely an equal distribution of membership and self-respect.¹²⁹

More recently, scholars attempting to make sense of the ADA's accommodation requirement and disparate impact doctrine after the 1991 Act have concluded that a goal of antidiscrimination law, at least implicitly, is to achieve distributive justice. Pamela Karlan and George Rutherglen argue that the ADA model involves "an open-ended responsibility to enable all workers to enjoy equal employment opportunities by taking account of the particular way in which their membership in a protected class has impaired their full participation in the economy," which could well be extended to other protected groups.¹³⁰ Samuel Issacharoff and Justin Nelson argue that employment discrimination laws have a "dual" objective—they "condemn the subjugation of defined groups" based on prejudice, fear, cognitive distortions, and assumed characteristics, as well as "alter the outcomes of how employees are selected and how their services are valued in the private market."¹³¹

Within this literature, some have critiqued the tendency to view the distributive justice goal of antidiscrimination law as fundamentally different from the corrective justice view that has been identified with traditional civil rights law. Christine Jolls has argued that there is equivalence between the "accommodation" requirements of the ADA and the "antidiscrimination" requirements of Title VII.¹³² Jolls argues that disparate impact liability is really an accommodation requirement. Furthermore, she argues that even the prohibition on intentional discrimination is very much like an "accommodation" requirement because they both require employers to undertake the real financial costs of employing members of certain groups.¹³³ Samuel Bagenstos has extended Jolls' description of the equivalence between antidiscrimination and accommodation into a normative argument: "Antidiscrimination law is best justified as a policy tool that aims to dismantle patterns of group-based social subordination, and that does so principally by integrating members of previously excluded, socially salient groups throughout important positions in society."¹³⁴

Bagenstos's understanding of the aims of antidiscrimination law exemplifies Robert Post's sociological approach to antidiscrimination law. Post views antidiscrimination law as "a social practice that acts on other

129. See Kenneth L. Karst, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5–6 (1977).

130. Karlan & Rutherglen, *supra* note 7, at 41.

131. Issacharoff & Nelson, *supra* note 7, at 308–09.

132. Jolls, *supra* note 7, at 645. J.H. Verkerke critiques Jolls' equivalence between antidiscrimination and accommodation, noting that most antidiscrimination cases involve disparate treatment, such that the overlap between antidiscrimination and accommodation is small. Verkerke, *supra* note 7, at 1402–03.

133. *Id.* at 698.

134. Bagenstos, *supra* note 7, at 839.

social practices.”¹³⁵ As such, “antidiscrimination law must be seen as transforming preexisting social practices, such as race or gender, by reconstructing the social identities of persons.”¹³⁶ On Post’s sociological account, the function, if not the goal, of antidiscrimination law is to reshape the way people interact with each other, which in turn reshapes identities according to a normative account of identity.¹³⁷ In arguing that ADA accommodations should be seen as antidiscrimination, Michael Stein takes a similar view; he argues that the goal of the ADA is “transforming societal attitudes towards workers with disabilities.”¹³⁸

In assuming or arguing that antidiscrimination law is a policy toward the eradication of subordination and inequality on the basis of group membership, these scholars seem to envision a duty to alleviate group disadvantage that is independent of the duty to remedy past invidious acts resulting in harm. At the same time, the past subordination of groups does play some role in these distributive justice accounts of antidiscrimination law. The past wrongs provide a descriptive causal explanation as to why a group is today disadvantaged as a historical matter; they do not necessarily carry the moral weight of justification for current action. Current action is justified by an egalitarian account of distributive justice. A distributive justice explanation of antidiscrimination law need not ignore history. History provides evidence to support the intuition that existing racial inequalities do not reflect the voluntary choices of persons. Distributive justice, because it aspires to reflect the voluntary choices of equal persons in society, gives rise to a duty of repair when it is clear that current distributions do not reflect the voluntary choices of equal persons. Thus, the history of subordination plays an important evidentiary role, but it does not play a justificatory role. It is not the wrong upon which a remedy is proportionately fashioned, as in a corrective justice regime.

C. *The Predominance of Distributive Justice in British Antidiscrimination Law*

While some features of British antidiscrimination law can also be explained by corrective justice, many of its features are better explained by distributive justice. The need for antidiscrimination law in Britain was first raised in response to wrongful acts; there were racially motivated violent attacks against members of racial minority groups, which were in need of remedy.¹³⁹ This led to the first RRA in 1965.¹⁴⁰ But the statutes

135. ROBERT C. POST, PREJUDICIAL APPEARANCES 40 (2001).

136. *Id.*

137. *Id.*

138. Stein, *supra* note 7, at 584.

139. See BLEICH, *supra* note 15, at 53–57.

140. See Race Relations Act, 1965, c. 73 (Eng.), reprinted in ANTHONY LESTER & GEOFFREY BINDMAN, RACE AND LAW IN BRITAIN 419 (Appendix 2) (1972).

that are currently in force are concerned with eradicating inequality correlated with race, sex, and disability generally, and not only with remedying wrongful acts.

Britain expanded antidiscrimination law significantly through new RRAs in 1968¹⁴¹ and 1976, incorporating more distributive justice elements. Britain also passed the SDA in 1975.¹⁴² The RRA 1976 and SDA 1975 are the statutes currently in force. When antidiscrimination law was first enacted in Britain, it was designed to remedy injuries resulting from prejudice against immigrants on the basis of their color, race, and national origin. Most of these immigrants arrived in Britain after World War II.¹⁴³ Therefore, the problem of race discrimination facing Britain was relatively new, as compared to that facing the United States in the same era. Perhaps because British antidiscrimination law developed to eliminate the disadvantage of immigrants rather than a group that had historically and collectively been subject to an obvious wrong such as slavery, the corrective justice conception was less pervasive as compared to the United States.

The conception of distributive justice as requiring equal employment opportunity and the removal of unnecessary barriers to equality was influential to the adoption of the two statutes in the 1970s. In the White Paper justifying the new SDA in 1974, the Secretary of State characterized the sex discrimination law as “what needs to be done by legislation to promote equal opportunities for men and women.”¹⁴⁴ The White Paper established that legislation was necessary because women and men did not have equal opportunity: women had lower-paid jobs than men, more girls than boys left school at the minimum school leaving age, and male students at universities outnumbered female students by a ratio of over two to one.¹⁴⁵ It also understood that this inequality was not necessarily caused by an identifiable wrongdoer:

The unequal status of women has not been perpetuated as the result of the deliberate determination by one half of the population to subject the other half to continued inequality. Its causes are complex and rooted deeply in tradition, custom, and prejudice. . . . Their unequal status has been caused less by conscious discrimination against women than by the stereotyped attitudes of both sexes about their respective roles.¹⁴⁶

141. See Race Relations Act, 1968, c. 71 (Eng.), reprinted in LESTER & BINDMAN, *supra* note 140, at 426 (Appendix 3).

142. See Sex Discrimination Act, 1975, c. 65 (Eng.).

143. BLEICH, *supra* note 15, at 37–38.

144. SECRETARY OF STATE FOR THE HOME DEPARTMENT, EQUALITY FOR WOMEN, 1974, Cmnd. 5724, at 1.

145. *Id.* at 2–3.

146. *Id.* at 4.

The White Paper suggested that widespread prejudices, rather than wrongful, intentional acts, were the main cause of the inequality that the new law would attempt to eliminate.

The Secretary of State's White Paper justifying the RRA the following year also saw the aim of the new discrimination statute as the achievement of equal opportunity. After identifying racial inequalities in unemployment, housing conditions, and proportions of groups in dirty and menial jobs, the White Paper concluded that the legislation was needed to fulfill the Government's duty to "prevent these morally unacceptable and socially divisive inequalities from hardening into entrenched patterns."¹⁴⁷ The problem to be addressed was the "cycle of cumulative disadvantage," which was not necessarily caused by a wrongdoer or any particular discriminatory acts:

[R]elatively low-paid or low-status jobs for the first generation of immigrants go hand in hand with poor and overcrowded living conditions and a depressed environment. If, for example, job opportunities, educational facilities, housing and environmental conditions are all poor, the next generation will grow up less well-equipped to deal with the difficulties facing them. The wheel then comes full circle, as the second generation find themselves trapped in poor jobs and poor housing.¹⁴⁸

The White Paper emphasized the "relevance of legislation to the less clear-cut, more complex situations of accumulated disadvantages and of the effects of past discrimination."¹⁴⁹ Furthermore, it explicitly invoked the language of distributive justice: "Racial disadvantage most often occurs in contexts of generalised disadvantage and cannot be realistically dealt with unless there are mechanisms for correcting the maldistribution of resources."¹⁵⁰

In passing the RRA, the British government was also clear that the role of government went beyond corrective justice. The White Paper noted that the enforcement provisions of the new legislative framework "must not only be capable of providing redress for the victim of individual injustice but also of detecting and eliminating unfair discriminatory practices."¹⁵¹ The White Paper suggested that the latter function was an appropriate task for the Government, noting "[i]t is uniquely a responsibility which only the Government can discharge."¹⁵² The legislative history of the British antidiscrimination laws thus reflects a consciousness of the importance of government regulation to the achievement of equal opportunity.

147. HOME DEPARTMENT, RACIAL DISCRIMINATION, 1975, Cmnd. 6234, at 3.

148. *Id.*

149. *Id.* at 6.

150. *Id.*

151. *Id.*

152. *Id.*

Griggs had a significant impact on the drafting of the British anti-discrimination statutes that are currently in force. Although the original SDA bill did not include “indirect discrimination,” as disparate impact is known in Britain, Secretary of State Roy Jenkins cited *Griggs* in urging Parliament to add an indirect discrimination prohibition to the SDA.¹⁵³ Since the RRA copied many of the provisions of the SDA, it also prohibited indirect discrimination. Thus, the statutory regime codified the prohibition of disparate impact discrimination in addition to the prohibition on disparate treatment.¹⁵⁴

1. *Direct Discrimination*

The first provision, prohibiting treating someone “less favourably” on grounds of race or sex, has been referred to as the prohibition on “direct discrimination.”¹⁵⁵ It can be understood to include claims like those of intentional discrimination and disparate treatment in the U.S. context. Like disparate treatment in violation of Title VII, direct discrimination includes the use of sex or race classifications,¹⁵⁶ as well as unfavorable decisions that are based on stereotypes.¹⁵⁷

But British case law has also established a results-oriented “but-for” test to establish less favorable treatment constituting direct discrimination. This test essentially blurs the distinction between direct and indirect discrimination. In the seminal case *James v. Eastleigh Borough Council*, a male plaintiff challenged the policy of municipal swimming baths admitting persons of pensionable age free of charge.¹⁵⁸ In Britain, men reach pensionable age at sixty-five and women at sixty.¹⁵⁹ A sixty-one-year-old man challenged the policy after he was charged for entry, while his wife of the same age was not.¹⁶⁰ The House of Lords held that the policy constituted “direct discrimination,” establishing the following test: “[W]ould the complainant have received the same treatment from the defendant but for his or her sex?”¹⁶¹ The House of Lords noted that this simple test, focusing on the outcome, avoided “complicated questions relating to concepts such as intention, motive, reason, or purpose.”¹⁶² It attempted to define direct discrimination in terms of the resulting harm rather than the wrongful or blameworthy character of the

153. MICHAEL CONNOLLY, TOWNSHEND-SMITH ON DISCRIMINATION LAW: TEXT, CASES, AND MATERIALS 241 (2d ed. 2004).

154. Race Relations Act, 1976, c. 74, § 1; Sex Discrimination Act, 1975, c. 65, § 1.

155. See *James v. Eastleigh BC*, (1990) 2 A.C. 751 (H.L.) (appeal taken from C.A.).

156. See *R v. Birmingham City Council, Ex p. Equal Opp. Com.*, [1989] A.C. 1155 (H.L.) (appeal taken from C.A.).

157. *Alexander v. Home Office*, (1988) 2 All E.R. 118 (C.A.).

158. *James v. Eastleigh BC*, (1990) 2 A.C. 751 (H.L.) (appeal taken from C.A.).

159. *Id.* at 751.

160. *Id.* at 759.

161. *Id.* at 774.

162. *Id.*

act causing the harm. Some have criticized the test articulated in *James* on the grounds that it fails to distinguish between direct and indirect discrimination.¹⁶³ The emphasis on results rather than wrongful acts suggests that this provision of the law functions to defend some conception of the ideal distributive scheme.

2. *Indirect Discrimination*

In addition, the indirect discrimination provisions of the British sex and race discrimination statutes can be explained by the principle of distributive justice. Since the European Council passed the Race Directive in 2000,¹⁶⁴ the Government's 2003 regulations implementing the directive refine the indirect discrimination standard in the race context. The new indirect discrimination test explicitly requires a finding of *proportionality* between the aim of the policy having a disparate impact and the means used.¹⁶⁵ The proportionality requirement requires a justification that goes beyond a legitimate job-related purpose. In requiring more than a legitimate job-related purpose, the indirect discrimination provision cannot be read merely as an attempt to smoke out intentional discrimination. Thus, by prohibiting practices that have a disparate impact in this broader sense, the provision attempts to achieve equal opportunity rather than simply remedy blameworthy intentional acts that harm certain groups.

3. *Disability and Hostile Environment*

Other evidence of distributive justice in British antidiscrimination law includes reasonable accommodation requirements in the disability statute and prohibitions of hostile work environment. The DDA defines discrimination, in language similar to that in the SDA and RRA, as less favorable treatment,¹⁶⁶ but additionally provides that less favorable treatment only constitutes discrimination if it is not justified.¹⁶⁷ Like the ADA, the DDA requires employers to make reasonable adjustments to any arrangements or physical features of the premises that place the disabled person at a substantial disadvantage.¹⁶⁸ British regulations passed in 2003 to comply with the European Council's 2000 Race Directive prohibit harassment on the basis of race or ethnic or national origins by pro-

163. Council Directive 2000/43/EC, 2000 O.J. (L. 180/22).

164. See, e.g., Michael Connolly, *Race, Gender and Mens Rea: Do You Have to Prove a Guilty Mind, or Just a Guilty Act?*, 6 J. CIV. LIB. 150 (2001), excerpted in MICHAEL CONNOLLY, *supra* note 153, at 184–85.

165. Race Relations Act 1976 (Amendment) Regulations 2003, S.I. 2003/1626 ¶ 3 (U.K.).

166. Disability Discrimination Act, 1995, c. 50, § 5(1)(a) (Eng.).

167. *Id.* at § 5(1)(b).

168. *Id.* § 6.

hibiting violations of a person's dignity, as well as "creating an intimidating, hostile, degrading, humiliating, or offensive environment."¹⁶⁹

4. *Institutional Discrimination*

In 2000, the Government amended the RRA to enable the law to combat institutional discrimination. The 2000 Act outlawed race discrimination in public authority functions not previously covered by the 1976 Act. For the first time, the law subjected law enforcement institutions, including police, local authorities, or tax inspectors, to the RRA. In addition to prohibiting public authorities from discriminating, the 2000 Act imposed enforceable positive duties on public authorities to work toward the elimination of unlawful discrimination and to promote equality of opportunity and good race relations between persons of different racial groups.¹⁷⁰ The 1976 Act had declared that it was the duty of local authorities to eliminate unlawful racial discrimination and promote equality of opportunity, but it was not until the 2000 Amendments that an enforcement scheme for these duties emerged. Pursuant to the 2000 Act, the Secretary of State may promulgate rules imposing specific duties to support the statutory general duty. In 2001, the Secretary promulgated a regulation requiring all local authorities subject to the duties of the 2000 Act to devise equality schemes by May 2002.¹⁷¹ The Commission for Racial Equality is charged with enforcing the specific duties.

The 2000 Amendments to the RRA came about upon a recommendation made by the Home Office's investigation into prosecution of the 1993 racially motivated murder of Stephen Lawrence, a black teenager.¹⁷² Police investigations produced no witnesses. Three suspects were tried and acquitted, and two other suspects were dismissed before trial.¹⁷³ The Home Office commenced an inquiry in 1997 to identify lessons about the investigation and prosecution of racially motivated crimes. The Stephen Lawrence Inquiry revealed that the investigation and subsequent prosecutions for the murder were deeply flawed, not because of any overt discrimination, but owing to "professional incompetence, institutional ra-

169. Race Relations Act 1976 (Amendment) Regulations 2003, S.I. 2003/1626, art. 5, ¶ 3A(1)(b) (U.K.).

170. Race Relations (Amendment) Act, 2000, c. 34 (Eng.).

171. Race Relations Act 1976 (Statutory Duties) Order 2001, S.I. 2001/3485 § 2 (U.K.). The regulation provides that a Race Equality Scheme shall state those of its functions and policies relevant to the duty imposed by the RRA, and its arrangements for assessing and consulting on the likely impact of the proposed policies on the promotion of race equality, monitoring its policies for any adverse impact on the promotion of race equality, publishing the results of such assessments, ensuring public access to information, and training staff in connection with the duties imposed by the RRA and the order in question.

172. Sir William Macpherson of Cluny, *The Stephen Lawrence Inquiry: Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty*, Cm 4262-I (Feb. 1999).

173. *Id.* §§ 2.2–2.4.

cism, and a failure of leadership by senior officers.”¹⁷⁴ The inquiry defined “institutional racism” as:

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.¹⁷⁵

The Inquiry drew on academic accounts of institutional racism to distinguish it from the deliberate actions of a small number of bigoted individuals.¹⁷⁶ On this characterization, “institutional racism” approximates what I have referred to as cumulative outsider disadvantage. While casual comments reflecting racial stereotypes may seem harmless day-to-day, they can cumulatively influence the development of collective attitudes that eventually disadvantage minorities. The Inquiry also observed that an organization’s failure to recognize institutional racism exacerbated the problem, and recommended that recognition and acceptance of institutional racism by the Police Services would be the first step toward eradicating it.¹⁷⁷

The imposition of a positive duty to promote equality in all policies is a strategy that has been used in European Union (EU) law to promote sex equality and in Northern Ireland to promote equality of opportunity among Catholics and Protestants.¹⁷⁸ The strategy is known as “mainstreaming” in EU law. Mainstreaming requires equality to be a factor “taken into account in every policy and executive decision.”¹⁷⁹ Mainstreaming is designed to identify hidden and unrecognized ways in which systems and structures are biased in favor of men, and to redress the imbalance.¹⁸⁰ Practically speaking, mainstreaming involves examining policies’ effects on men and women before adopting them, as well as “monitoring.”¹⁸¹ Monitoring refers to the collection of statistical demographic information about the relevant workplace or locality.¹⁸²

174. *Id.* § 46.1.

175. *Id.* § 6.34.

176. *Id.* § 6.5.

177. *Id.* § 6.48.

178. In Northern Ireland, the Fair Employment Act of 1989 imposed positive duties on employers to reduce structural inequality between Protestants and Catholics. The Good Friday Agreement of 1998 imposed a duty on public authorities to promote equal opportunity, not only between Protestants and Catholics, but also between persons of different racial groups, age, marital status, gender, or sexual orientation, persons with and without a disability, and persons with and without dependants. In 1999, the separate commissions dealing with these various types of discrimination were merged into one equality body. Critics of British antidiscrimination law have viewed Northern Ireland’s reforms as a model for potential reforms in Britain. *See, e.g.,* SANDRA FREDMAN, *DISCRIMINATION LAW* 176 (2002); HEPPLER, COUSSEY & CHOUDHURY, *supra* note 64, at 69–72.

179. *See* FREDMAN, *supra* note 178.

180. TERESA REES, *MAINSTREAMING EQUALITY IN THE EUROPEAN UNION: EDUCATION, TRAINING AND LABOUR MARKET POLICIES* 189 (1998).

181. *Id.* at 191.

182. *Id.* at 191–94.

In imposing a positive duty to promote equality on all public authorities, the RRA clearly attempts to promote equality, as well as provide remedies for injuries resulting from wrongdoing. In contrast, U.S. law imposes no such duty on public authorities—it merely subjects them to the constitutional requirement not to discriminate intentionally. The duty to promote equality is a strong indication that the RRA includes an explicit policy of achieving an egalitarian conception of distributive justice.

III. AGENCIES AND DISTRIBUTIVE JUSTICE

Both courts and administrative agencies play a role in enforcing antidiscrimination law. In this Part, the discussion shows that the elements of antidiscrimination law that best fit the distributive justice paradigm have emerged largely from administrative agency action, in both the U.S. and Britain. In contrast, courts tend to reinforce a corrective justice understanding of the law, which in turn makes courts weak in enforcing disparate impact, reasonable accommodation, and hostile work environment problems.

A. *The EEOC*

When Title VII created the EEOC in 1964, it was clear that Congress designed the agency with a corrective justice approach to discrimination in mind. In a report in support of the legislation, several members of Congress noted that a purpose of Title VII was “the elimination of many of the worst manifestations of racial prejudice.”¹⁸³ In discussing the role of the EEOC toward this end, the report stated:

It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.¹⁸⁴

These Congressmen clearly saw the agency’s primary role as obtaining remedies for “abuse”—most likely, blameworthy acts motivated by racial prejudice. The agency was not expected—or permitted—to attempt to achieve equality proactively.

Accordingly, the agency was authorized to process individual complaints of unlawful discrimination to attempt conciliation between employers and employees. In addition, the agency’s power was extremely limited. The statute declined to give the EEOC power to issue cease-and-desist orders, preferring that “the ultimate determination of dis-

183. H.R. REP. NO. 88-914, at 2488 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2391.

184. *Id.* at 2516.

crimination rest with the Federal Judiciary.”¹⁸⁵ The reasoning was that employers and labor unions needed “a fairer forum to establish innocence since a trial de novo is required in district court proceedings together with the necessity of the Commission proving discrimination by a preponderance of the evidence.”¹⁸⁶ The emphasis on the potential “innocence” of employers and the burden on the Commission to prove discrimination by a “preponderance” strongly suggests that discrimination was understood as a blameworthy tortlike act, such that the procedural protections of judicial decision making were needed. Furthermore, only the Attorney General, not the Commission, could bring a civil action to challenge a pattern and practice of discrimination and could intervene in civil actions by aggrieved parties.¹⁸⁷

In 1972, Congress expanded the EEOC’s powers by allowing it to bring suits against employers in pattern-and-practice cases.¹⁸⁸ In the Equal Employment Opportunity Act of 1972, Congress again considered and rejected the possibility of granting the EEOC administrative enforcement power. The House bill proposed the delegation of cease and desist authority to the Commission.¹⁸⁹ It imagined the EEOC as a “quasi-judicial agency,”¹⁹⁰ similar to the National Labor Relations Board. In the legislative debates, proponents of the bill argued that the problem of discrimination should be understood “in terms of ‘systems’ and ‘effects’ rather than simply intentional wrongs.”¹⁹¹ Relying on *Griggs*, they argued that the forms and incidents of discrimination were increasingly complex. “Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance.”¹⁹² Therefore, they argued that employment discrimination was a problem requiring expert assistance and technical perception, which in turn required a specialized agency with adjudicatory powers. The House bill proposed to delegate to the Commission the power to issue complaints and to hold hearings resulting in cease-and-desist orders against discriminatory practices. They saw the Federal Communications Commission, the National Labor Relations Board, and the Federal Trade Commission as analogous agencies. The Commission would then be able to petition a federal court for enforcement of its cease and desist orders, and parties subject to such orders would be able to petition for review in the Courts of Appeals. The proponents of the bill argued that administrative tribunals were better equipped to handle employment discrimination cases, particularly those relating to recruitment, hiring, placement, or promotions. The proposed

185. *Id.* at 2515.

186. *Id.* at 2515–16.

187. Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a) (2000).

188. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-2 to 3 (2000).

189. H.R. REP. NO. 92-238 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2145.

190. *Id.* at 2168.

191. *Id.* at 2144.

192. *Id.*

bill also retained the right of an individual to bring a civil suit after exhausting administrative remedies.

Nonetheless, the administrative adjudicatory model for the EEOC was ultimately rejected in favor of requiring the EEOC to bring civil actions against employers in the federal courts to eliminate unlawful discrimination. The opponents of the bill contended that “[i]n practical effect the Committee bill creates a system that presumes persons charged with certain law violations are guilty until proved innocent.”¹⁹³ This “guilty until proven innocent” fear reflects a corrective justice understanding of discrimination, in which discrimination is a blameworthy act that must be remedied by legal action.

At the same time, Congress amended the statute such that Commissioners could more easily file charges and investigate them. With the amendment, a Commissioner no longer had to show “reasonable cause” to believe that a violation of Title VII had occurred or obliged him or her to set forth the facts upon which the charge was based.¹⁹⁴ The statute now simply requires that charges by a Commissioner be “in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.”¹⁹⁵ Shortly before the 1972 Act, the Supreme Court had decided *Griggs*, recognizing that policies having a disparate impact on racial minorities could violate Title VII.¹⁹⁶ Therefore, under the 1972 amendment, a Commissioner could bring a charge against an employer based merely on knowledge of some race inequality at the company, investigate that charge, and bring suit if the evidence uncovered by the investigation is sufficient to support a disparate impact or disparate treatment theory of liability.

In practice, the EEOC’s exercise of its own power suggests that it understood its role to be more proactive in the pursuit of equality than Congress and the courts have envisioned. The *Griggs* decision and the new enforcement powers enabled the Commission to focus on large employers that were thought to be discriminating on the basis of race in a systemic manner. In 1973, the EEOC investigated four of the largest employers in the country at the time—Ford Motor Co., General Electric, General Motors, and Sears, Roebuck & Co.¹⁹⁷ The Commission filed “Commissioner charges” against these employers, and following lengthy investigations and negotiations, reached settlements which provided substantial monetary relief for classes of victims, elimination of discriminatory systems, and affirmative remedies, including hiring and promotion

193. *Id.* at 2168.

194. *Id.* at 2145.

195. Equal Employment Opportunity Act, 42 U.S.C. § 2000e-5(b) (2000); see *EEOC v. Shell Oil Co.*, 466 U.S. 54, 63 (1984) (quoting 42 U.S.C. § 2000e-5(b)).

196. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32 (1971); see discussion *supra* Part I.C.

197. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS, 1965–2000, at 15 (2000) (hereinafter EEOC STORY).

goals and timetables for specified job categories.¹⁹⁸ In addition, the EEOC has issued guidelines interpreting Title VII in ways that enable the statute to address some of the problems I have identified with the distributive justice approach, including disparate impact and hostile environment.

The very idea of disparate impact liability was a theory that was first developed by the EEOC in the issuance of guidelines. In 1966, the EEOC issued Guidelines on Employment Testing Procedures, which provided, inter alia, that only job-related tests could be used. In *Griggs*, the Supreme Court noted that the “administrative interpretation of the Act by the enforcing agency is entitled to great deference Since the Act and its legislative history support the Commission’s construction, this affords good reason to treat the guidelines as expressing the will of Congress.”¹⁹⁹ It is not clear from the language of *Griggs* whether the Supreme Court deferred to the EEOC’s guideline or adopted it for its power to persuade.

The EEOC has also taken the lead on bringing sexual harassment, including hostile work environment, within the ambit of Title VII. EEOC Guidelines determined that sexual harassment was sex discrimination, and defined sex discrimination broadly, so as to encompass hostile work environment.²⁰⁰ The relevant Guideline defined sexual harassment as “[u]nwelcoming sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”²⁰¹ This conduct included economic *quid pro quo* harassment as well as conduct that has “the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”²⁰² The Supreme Court cited these guidelines as persuasive authority when it first recognized hostile work environment as sex discrimination in violation of Title VII in *Meritor Savings Bank v. Vinson*.²⁰³

However, EEOC Guidelines on Title VII have no legal authority. After *Griggs*, the Supreme Court has consistently held that Title VII and its amendments did not delegate to the EEOC rulemaking authority to issue binding rules or regulations. Therefore, the EEOC’s guidelines are not legally binding on employers. In *General Electric Co. v. Gilbert*, the Supreme Court held that discrimination on the basis of pregnancy did not constitute sex discrimination in violation of Title VII, despite the EEOC’s guideline defining sex discrimination to include pregnancy dis-

198. *See id.* at 28.

199. *Griggs*, 401 U.S. at 433–34.

200. *See id.* at 433–36.

201. 29 C.F.R. § 1604.11(a) (2005).

202. *Id.* § 1604.11(a)(3).

203. 477 U.S. 57, 65 (1986).

crimination.²⁰⁴ The EEOC's understanding that pregnancy discrimination is sex discrimination might also reflect a distributive justice orientation to employment discrimination law. Indeed, it is more plausible that an employer's decision to terminate or not hire a pregnant woman is not motivated by animus or otherwise blameworthy intent, but by some desire to save costs. Prohibiting pregnancy discrimination is a way of guaranteeing pregnant women equal employment opportunity more so than it is a way of remedying blameworthy behavior. Congress reacted to the *Gilbert* decision by passing the Pregnancy Discrimination Act, which provided that pregnancy discrimination constituted sex discrimination.²⁰⁵ Because the EEOC's guideline to the same effect did not have the force of law, it had to be changed by an act of Congress. In *Gilbert*, the Supreme Court explained that, because Congress did not confer upon the EEOC authority to promulgate rules or regulations of this sort,²⁰⁶ "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law."²⁰⁷ The Supreme Court looked to *Skidmore v. Swift & Co.*²⁰⁸ and held that the EEOC's guidelines should only be considered for their power to persuade.²⁰⁹ After *United States v. Mead Corp.*, it is clear that EEOC guidelines under Title VII are not entitled to *Chevron* deference by the courts, because they lack the force of law.²¹⁰

Of course the significance of the EEOC's guidelines should not be understated. It is clear that, in cases like *Griggs v. Duke Power Co.*²¹¹ and *Meritor Savings Bank v. Vinson*,²¹² which first recognized a claim of hostile environment sexual harassment as sex discrimination under Title VII, courts agreed with relevant EEOC guidelines and cited them to explain their decisions. There is no question that the EEOC Guidelines strengthened the litigating position of those seeking to establish that disparate impact and sexual harassment constituted violations of Title VII. It is plausible that, in the absence of these guidelines, these cases might not have been litigated at all.

204. 429 U.S. 125, 141, 145-46 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e-2(k) (2000).

205. H.R. REP. NO. 101-644, at 50 (1990).

206. The Court acknowledged that the EEOC had valid authority to issue procedural regulations to carry out the provisions of Title VII, but pointed out that the regulation interpreting pregnancy discrimination as sex discrimination was not procedural in nature or effect. 429 U.S. at 141 n.20.

207. *Id.* at 141 (citation omitted).

208. 323 U.S. 134, 140 (1944).

209. The Supreme Court reaffirmed this approach in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981.

210. In *United States v. Mead Corp.*, 533 U.S. 218, 229-30, 235 (2001), the Supreme Court recognized that, while there was no *Chevron* deference for agency interpretations that did not constitute regulations pursuant to authority delegated by Congress, such interpretations might be entitled to respect under *Skidmore* proportional to its power to persuade.

211. 401 U.S. 424 (1971).

212. 477 U.S. 57 (1986).

At the same time, the difference between *Skidmore* and *Chevron* deference cannot be understated. In *Meritor*, for instance, the Court noted that “the EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII,”²¹³ but also noted that the Guidelines “drew from, and were fully consistent with, the existing case law.”²¹⁴ The application of *Skidmore* rather than *Chevron* to the EEOC’s guidelines gives employers little incentive to comply, since they know that the EEOC, unlike other agencies, will be afforded no deference beyond its power to persuade if the rule is challenged in court.

It is noteworthy that Congress did delegate authority to the EEOC to issue regulations to carry out the employment provisions of the ADA.²¹⁵ Because prohibitions on discriminating against or failing to accommodate the disabled are more easily explained by the aim of promoting equal employment opportunity rather than rooting out animus against the disabled, Congress’s delegation of rulemaking authority in the disabled context, and not Title VII, makes sense. In addition to delegating rulemaking authority to implement the employment provisions of the ADA to the EEOC, Congress also delegated rulemaking authority to the Attorney General to implement the ADA’s public services provisions,²¹⁶ and to the Secretary of Transportation to implement the transportation provisions.²¹⁷ The Supreme Court has noted that no agency has been given authority to issue regulations implementing the generally applicable provisions of the ADA, such as the definition of the term “disability,”²¹⁸ indicating a narrow approach to the scope of the EEOC’s rulemaking authority. Nonetheless, in *Chevron U.S.A. v. Echazabal*,²¹⁹ the Supreme Court held that an EEOC regulation allowing an employer to screen out a potential worker with a disability because of risks on the job to his own health or safety was entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council*.²²⁰

Furthermore, the ADEA also includes a provision permitting the EEOC to “issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it

213. *Id.* at 65.

214. *Id.* at 66.

215. Americans with Disabilities Act of 1990, 42 U.S.C. § 12116.

216. *See* 42 U.S.C. § 12134(a).

217. *See* 42 U.S.C. § 12149(a).

218. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999) (holding that myopic job applicants challenging an airline’s minimum vision requirement for global pilots were not disabled under the ADA).

219. 536 U.S. 73, 84 (2002).

220. 467 U.S. 837, 843 (1984). Samuel Bagenstos has criticized the *Echazabal* decision on the grounds that the EEOC rule was an impermissible interpretation of the statute. *See* Samuel Bagenstos, *The Supreme Court, the Americans With Disabilities Act, and Rational Discrimination*, 55 ALA. L. REV. 923, 930–34 (2004). This critique does not disturb the applicability of *Chevron* analysis to EEOC regulations under the ADA—it merely takes issue with the Court’s decision on *Chevron* Step 1.

may find necessary and proper in the public interest.”²²¹ In *Smith v. City of Jackson*, the Supreme Court recently interpreted the ADEA to authorize recovery in disparate impact age discrimination cases. Citing *Griggs* on Title VII, the majority opinion relied largely on the similarity of the language between Title VII and the ADEA²²² to conclude that the ADEA authorized disparate impact claims. Furthermore, the majority opinion noted that the EEOC’s regulations also supported the Court’s reading. In a concurring opinion, Justice Scalia agreed with the Court’s reasoning, but argued he “would find it a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views of the Equal Employment Opportunity Commission . . . pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* . . .”²²³ Scalia’s concurring opinion argues that courts should defer to the EEOC’s understanding of what constitutes discrimination. These developments in ADA and ADEA jurisprudence demonstrate the possibility of judicial deference to EEOC rulemaking.

B. Administrative Agencies and Antidiscrimination Law in the UK

1. The EOC and CRE’s Power to Investigate and Issue Non-Discrimination Notices

In the United Kingdom, the administrative agency model was adopted to enforce the provisions of the SDA 1975, the RRA 1976, and the DDA 1995. The Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE), and the DRC are all authorized to carry out formal investigations of employers and issue non-discrimination notices that function like cease and desist orders.²²⁴ At the same time, each of these commissions is authorized, like the EEOC, to bring civil actions against employers.²²⁵ Such lawsuits may be on behalf of individual complainants. Unlike the EEOC, however, the British commissions have the power to issue legally enforceable non-discrimination orders as a result of its investigations without having to prove discrimination before a judicial tribunal. The British commissions thus offer a living example of the relative advantages and disadvantages of the administrative regulation model of antidiscrimination enforcement as compared to the civil litigation model.

In Britain, administrative agencies were used to combat discrimination before statutory rights of action were established. The RRA of

221. Age Discrimination in Employment Act, 29 U.S.C. § 628 (2000).

222. *Smith v. City of Jackson*, No. 03-1160, slip op. at 5 (U.S. Mar. 30, 2005).

223. *Id.* at 1 (Scalia, J., concurring).

224. Sex Discrimination Act, 1975, c. 65, § 57(1), § 67(2) (Eng.); Race Relations Act, 1976, c. 74, § 48(1) (Eng.); Disability Rights Commission Act, 1999, c. 17 §§ 3, 4 (Eng.).

225. Sex Discrimination Act, 1975, c. 65, § 71(1) (Eng.); Race Relations Act, 1976, c. 74, § 62(1) (Eng.); Disability Rights Commission Act, 1999, c. 17 § 6(2) (Eng.).

1965, the first statute in Britain to prohibit racial discrimination, entrusted enforcement to an administrative agency that it created, the Race Relations Board. The 1965 statute made it unlawful to discriminate on racial grounds in specified places of public resort, prohibited racial restrictions on the transfer of tenancies, and penalized incitement to racial hatred.²²⁶ The Race Relations Board worked with a network of local conciliation committees to investigate any complaints of unlawful discrimination to attempt conciliation. If conciliation failed, the Attorney General had the sole right to determine whether to bring civil proceedings. In short, the 1965 statute created a Race Relations Board very similar in function and power as the EEOC at that time.²²⁷

The RRA of 1965 was repealed when Parliament passed a new RRA in 1968. The 1968 law prohibited discrimination in employment, housing, the provision of goods, facilities, and services to the public, and the publication of discriminatory advertisements or notices.²²⁸ The 1968 Act created the Community Relations Commission to work alongside the Race Relations Board created by the 1965 Act.²²⁹ The Race Relations Board had a duty to investigate all complaints of unlawful discrimination except employment complaints and complaints about dismissals. The employment complaints and complaints about dismissals were dealt with, respectively, by the industrial machinery approved by the Secretary of State for Employment and the industrial tribunals, which also addressed unfair dismissals generally. The Community Relations Commission was entrusted with the task of promoting harmonious community relations, and advising the Home Secretary on relevant matters.²³⁰

The Race Relations Board was authorized to investigate matters if it had reason to suspect unlawful discrimination, regardless of whether it received an individual complaint. The Board was entrusted to attempt conciliation, in conjunction with local conciliation committees, and if conciliation failed, the Board had the exclusive right to bring legal proceedings on behalf of the victim. Under the 1968 Act, individuals could not bring legal proceedings to challenge unlawful discrimination on the grounds of race on their own.²³¹

226. HOME DEPARTMENT, RACIAL DISCRIMINATION, 1975, Cmnd. 6234, at 7.

227. Race Relations Act, 1965, c. 73 (Eng.). The provisions of the 1965 Act are discussed in detail in the Government's White Paper introducing the Race Relations Act 1976, HOME DEPARTMENT, RACIAL DISCRIMINATION, 1975, Cmnd. 6234, at 7. *See also* CHRISTOPHER MCCRUDDEN ET AL., RACIAL JUSTICE AT WORK: THE ENFORCEMENT OF THE RACE RELATIONS ACT 1976 IN EMPLOYMENT 8-9 (1991).

228. HOME DEPARTMENT, RACIAL DISCRIMINATION, 1975, Cmnd. 6234, at 7.

229. *Id.*

230. Race Relations Act, 1968, c. 71, § 25(3)(a) (Eng.). The provisions of the 1968 Act are discussed in detail in the Government's White Paper introducing the Race Relations Act 1976, HOME DEPARTMENT, RACIAL DISCRIMINATION, 1975, Cmnd. 6234, at 7-11. *See also* MCCRUDDEN ET AL., *supra* note 227, at 9-14.

231. *See* HOME DEPARTMENT, RACIAL DISCRIMINATION, 1975, Cmnd. 6234, at 10.

In contrast, complaints of violations of the Equal Pay Act of 1970 could be brought by individuals before the industrial tribunals.²³² When the SDA of 1975 was passed, the statute allowed individuals complaining of sex discrimination in violation of the SDA to bring suits before the industrial tribunals.²³³ The rationale was that complaints arising under the SDA would be closely related to those arising under the Equal Pay Act.²³⁴ Furthermore, the SDA created an Equal Opportunities Commission to investigate areas covered by the statute and to take action to eliminate unlawful practices, to assist and represent individual complainants in appropriate cases, to conduct inquiries into matters outside the scope of the legislation which may affect the relative positions and opportunities of the sexes and to make recommendations, to review the operation of the legislation and make recommendations, and to conduct research to take action to educate and persuade public opinion.²³⁵

When the Government proposed the SDA of 1975, it considered two different models of enforcement. On one model, individual complainants would bring legal proceedings in the industrial tribunals, as they had been doing under the Equal Pay Act. On another model, upon which the RRA of 1968 had been based, a public body would possess the exclusive right to bring legal proceedings, having investigated complaints and attempted conciliation. Ultimately, the Government concluded that each model would be inadequate by itself, concluding that there was a need for a public body to exercise “strategic functions” to achieve equal opportunity distinct from the processing of individual complaints of discrimination.²³⁶ The Government envisioned an EOC that would address industry-wide and institutional problems of discrimination, rather than remedy individual unlawful acts:

[T]he new Commission will have a major role in enforcing the law in the public interest. Although it will be able to represent individuals in suitable and significant cases, its main task will be wider policy: to identify and deal with discriminatory practices by industries, firms, or institutions. It will be empowered to issue “non-discrimination notices” which could, if breached, be enforced through the civil courts, and to follow up court and tribunal proceedings.²³⁷

The Government clearly intended to limit the Commission’s litigation of individual complaints so as to enable the body to focus on institutionalized discrimination, or practices that only a public agency could target

232. Equal Pay Act, 1970, c. 41, § 2.2.

233. See HOME DEPARTMENT, EQUALITY FOR WOMEN, 1974, Cmnd. 5724, at 6–7.

234. *Id.*

235. *Id.* at 23–24.

236. For a discussion of the Government’s approach to these two models before the passage of the Sex Discrimination Act, see EVELYN ELLIS, SEX DISCRIMINATION LAW 235–36 (1990).

237. HOME DEPARTMENT, EQUALITY FOR WOMEN, 1974, Cmnd. 5724, at 7.

through thorough information-gathering and experience.²³⁸ Although the Commission would retain the power to bring cases to fight specific instances of discrimination, the Government recommended that the Commission use this power only “in cases which seemed likely to raise matters of public importance.”²³⁹

The new EOC was given greater administrative enforcement powers than the Race Relations Board created by the RRA of 1968 and the EEOC in the United States. Not only could the British EOC bring a civil action if it discovered unlawful discrimination in exercising its investigatory powers; the EOC could simply issue an enforceable non-discrimination notice. The notice would require the recipient to cease the practice or to alter it so as to comply with the law. The employer receiving such a notice would then be required to take reasonable steps to notify those likely to be affected by the changes made in the practice concerned.²⁴⁰ The employer would be entitled to appeal a non-discrimination notice to a court of appeals. In addition, under the SDA, the Commission was authorized to undertake a further investigation within twelve months from the date on which a non-discrimination notice became binding to assure compliance.²⁴¹

The following year, when the Government replaced the RRA of 1968 with the new RRA of 1976, it created the CRE, an enforcement agency with broader powers than the former Race Relations Board. The CRE was modeled on the EOC created by the SDA. In the White Paper justifying the RRA of 1976, the Government identified the principal functions of the new agency: “to work towards the elimination of racial discrimination and the promotion of racial equality.”²⁴² In short, the agency was charged not only with the duty to eliminate the forms of discrimination that the statute made unlawful, but also with a duty to promote racial equality. Like the EOC, the CRE was given the power to issue non-discrimination notices following investigations and to bring legal proceedings against employers.

The RRA of 1976 changed the function of the administrative agency charged with enforcing race discrimination law in two significant ways. First, as already noted, the agency was given the power to issue non-discrimination notices that were legally binding and could be enforced by courts.²⁴³ Second, whereas the 1968 Act granted the agency the exclusive right to bring legal proceedings challenging unlawful discrimination in court, the 1976 Act permitted individuals to bring legal pro-

238. See Vera Sacks, *The Equal Opportunities Commission—Ten Years On*, 49 MOD. L. REV. 560, 568 (1986).

239. HOME DEPARTMENT, EQUALITY FOR WOMEN, 1974, Cmnd. 5724, at 25.

240. *Id.* at 24.

241. *Id.* at 25.

242. HOME DEPARTMENT, RACIAL DISCRIMINATION, 1975, Cmnd. 6234, at 11–12.

243. HOME DEPARTMENT, EQUALITY FOR WOMEN, 1974, Cmnd. 5724, at 7.

ceedings.²⁴⁴ While the new statute did not take the right of action away from the agency, the Government intended to transform the agency's role by allowing individuals to bring suit. With individuals permitted to bring suit, the agency was relieved of the obligation to investigate every individual complaint and to attempt conciliation of individual grievances of discrimination. The Government concluded that the Commission's powers "must necessarily be confined to investigations conducted in the public interest rather than in the interest of a potential plaintiff."²⁴⁵

The RRA delegated to the Commission the power to conduct formal investigations on its own initiative "for any purpose connected with the carrying out of its functions."²⁴⁶ The investigations could be wide-ranging or confined to named persons, i.e., a particular organization or individual.²⁴⁷ If an investigation of a named person disclosed an unlawful act or practice, the Commission was empowered to issue non-discrimination notices on the named person requiring the recipient to cease doing such acts or to alter its practices to comply with the law.²⁴⁸ The non-discrimination notice was to function like the enforcement notices issued by planning authorities or the prohibition notice under the Health and Safety Act 1975, which permitted agencies to require compliance with the law without going to court first.²⁴⁹ There were some procedural protections afforded to the recipient of a non-discrimination notice, including a requirement that the Commission give notice to the recipient of its intention to issue a non-discrimination notice, as well as an opportunity for the recipient to make oral or written representations.²⁵⁰ In addition, the recipients of non-discrimination notices have a right to judicial review; they are entitled to appeal to the tribunal or court against any requirement of the notice on the ground that it is unjustified or unreasonable.²⁵¹

The expansion of the administrative agency's powers coincided with the statutory redefinition of the scope of discrimination to include indirect discrimination. Whereas the RRA of 1968 had only prohibited discriminatory acts that would be classified as "direct discrimination,"²⁵² the 1976 statute additionally prohibited "indirect discrimination,"²⁵³ understood through the lens of *Griggs* as policies having a disparate impact on the basis of race. Some commentators at the time saw the Commission's

244. Race Relations Act, 1976, c. 74 (Eng.).

245. HOME DEPARTMENT, RACIAL DISCRIMINATION, 1975, Cmnd. 6234.

246. Race Relations Act, 1976, c. 74, § 48(1) (Eng.).

247. *See id.* § 49.

248. *See id.* § 58(2).

249. RUNNYMEDE TRUST, RACIAL DISCRIMINATION: A GUIDE TO THE GOVERNMENT'S WHITE PAPER, 12 (1975); *see also* MICHAEL CONNOLLY, *supra* note 153, at 550-51.

250. Race Relations Act, 1976, c. 74, § 58(5) (Eng.).

251. HOME DEPARTMENT, RACIAL DISCRIMINATION, 1975, Cmnd. 6234; Race Relations Act, 1976, c. 74, § 59 (Eng.).

252. Race Relations Act, 1968, c. 71 (Eng.); *see also* MCCRUDDEN ET AL., *supra* note 227, at 14.

253. Race Relations Act, 1976, c. 74 (Eng.); *see also* MCCRUDDEN ET AL., *supra* note 227, at 14.

new powers to investigate and issue non-discrimination notices as being directly linked to the statute's new prohibition on indirect discrimination.²⁵⁴ Because unlawful discrimination was being redefined to include unintentional discrimination, wide-ranging investigations were considered appropriate to identify these harms.²⁵⁵

Furthermore, the CRE understood its investigatory powers in broad terms. It assumed that the investigatory powers could be used toward the goals of gathering information that would inform the codes of practice, as well as enjoin clear acts of unlawful discrimination. Between 1977 and 1982, the CRE had begun forty-seven formal investigations. Most of these (twenty-nine) were investigations into an allegation of unlawful discrimination against a named person. Fifteen were investigations of named persons not alleging unlawful discrimination. These fifteen investigations targeted organizations based on some suspicion that discrimination was occurring. The belief was based on research that discrimination might occur in similar organizations, because the organization employed disproportionately few ethnic minorities, or based on the size of the organization.²⁵⁶ There were also a handful of investigations into a more general situation not alleging unlawful discrimination or naming particular persons. By 1982, the CRE had completed ten of the investigations commenced, and issued non-discrimination notices in eight of them.²⁵⁷

2. *Rulemaking Authority in the Codes of Practice*

Both the EOC and the CRE are authorized by statute to issue Codes of Practice.²⁵⁸ The Codes of Practice can contain practical guidance on the elimination of discrimination and the promotion of equal opportunity. The statutes also provide that a code of practice may include "such practical guidance as the Commission think fit as to what steps it is reasonably practicable for employers to take for the purpose of preventing their employees from doing in the course of their employment acts made unlawful by this Act."²⁵⁹ Both the SDA and the RRA provide that "[a] failure on the part of any person to observe any provi-

254. In her discussion of the Equal Opportunities Commission's role in combating sex discrimination, Vera Sacks points out that one reason for entrusting a public agency with the enforcement of antidiscrimination law was that "a considerable amount of discrimination is either so covert that experience and expertise are essential to detect it, or so institutionalised that many practices or rules appear neutral, *i.e.* non-discriminatory and reasonable." Sacks, *supra* note 238, at 568.

255. RUNNYMEDE TRUST, RACIAL DISCRIMINATION: A GUIDE TO THE GOVERNMENT'S WHITE PAPER 8-9 (1975).

256. MCCRUDDEN ET AL., *supra* note 227, at 57-58.

257. For a discussion on investigation in 1977-1998, see JULIAN CLARKE & STUART SPEEDEN, THEN AND NOW: CHANGE FOR THE BETTER? (Commission for Racial Equality 2001).

258. See Sex Discrimination Act, 1975, c. 65, § 56A(1) (Eng.); Race Relations Act, 1976, c. 74, § 47(1) (Eng.).

259. Sex Discrimination Act, 1975, c. 65, § 56A(11) (Eng.); Race Relations Act, 1976, c. 74, § 47(11) (Eng.).

sion of a code of practice shall not of itself render him liable to any proceedings;²⁶⁰ but that in any proceedings under the statute before an industrial tribunal, any code of practice is admissible in evidence, and “if any provision of such a code appears to the tribunal to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.”²⁶¹

One reason for giving the Commissions the power to issue Codes of Practice was the addition of the indirect discrimination provisions to the statutes. Whether indirect discrimination occurred would be determined by effects and justifiability, an idea that was not as straightforward as an intentions-based test. Therefore, the Government saw a useful role for a Code to spell out the meanings and implications of indirect discrimination.²⁶² It was noted that in *Griggs*, from which the British derived the notion of “indirect discrimination,” the Supreme Court had accorded some weight to an EEOC guideline.²⁶³

The CRE initiated the issuance of an Employment Code of Practice in 1978. It presented an informal draft code in 1979 for discussion with industry and voluntary organizations. The Code included a recommendation of ethnic monitoring on the part of employers—the collection of statistics regarding the ethnic composition of employees. The CRE issued the code in July 1983, and Parliament approved it in 1984.²⁶⁴ A revised Code was approved by Parliament in October 2005 and is expected to go into effect in April 2006.²⁶⁵ The Code recommends that employers implement a race equality policy, which is then enforced through the training of all employees and monitoring of progress toward race equality. To make sure that an employer is in compliance with the indirect discrimination provisions of the RRA, the draft code states, “Employers should monitor the effects of all employment selection decisions and make any modifications or changes to their policies and procedures, as necessary, to ensure equality of opportunity and fair participation.”²⁶⁶ The Code specifies the type of education employers should provide to all workers about issues of equality and the practices that might constitute discrimination.²⁶⁷ The code also provides very detailed recommended procedures for selection, assessment, job-related training and develop-

260. Sex Discrimination Act, 1975, c. 65, § 56A(10) (Eng.); Race Relations Act, 1976, c. 74, § 47(10) (Eng.).

261. Sex Discrimination Act, 1975, c. 65, § 56A(10) (Eng.); Race Relations Act, 1976, c. 74, § 47(10) (Eng.).

262. See Christopher McCrudden, *Codes in a Cold Climate: Administrative Rule-Making by the Commission for Racial Equality*, 51 MOD. L. REV. 409, 413 (1988).

263. *Id.* at 414.

264. See *id.* at 417–26 (giving historical account of Code’s enactment).

265. See Commission for Racial Equality, *A New Statutory Code of Practice on Racial Equality in Employment*, at <http://www.cre.gov.uk/gdpract/employmentcode 2005.html> (last visited Nov. 21, 2005).

266. Statutory Code of Practice on Racial Equality in Employment, Consultation Draft, § 3.29 (May 2004) (Eng.).

267. *Id.* § 3.24.

ment, promotion, and grievances that constitute good employment practice in compliance with the RRA.²⁶⁸

In the area of selection, there are many examples of recommendations that, if complied with, would significantly reduce disparate impact by removing unnecessary barriers to equal opportunity. The Code tells the employer to monitor every stage of the selection process and examine it for adverse impact on racial groups.²⁶⁹ It also recommends that descriptions of job skills and qualifications avoid subjective criteria such as “empathy” or “sociability,” which “permit stereotyped thinking to flourish.”²⁷⁰ The Code advises that the employer train persons conducting hiring interviews to help them “recognise [sic] when they are making unfounded assumptions” based on the candidate’s sex or race.²⁷¹ It also suggests that, when asking for references, employers avoid requesting general character references, and send all referees job descriptions so that the references can focus on information relevant to the job.²⁷²

In the area of assessment, the Code warns against the dangers of turning employee assessments into assessments of a person, based on unconscious biases about the group to which the employee belongs. To combat such tendencies, the Code states that employers should make sure that judgments of performance are judgments of actual performance of specific tasks, with annual assessment reports referring to specific tasks and achievements.²⁷³ In training and development, the Code recommends that employers formulate a clear policy describing the development opportunities open to all employees, including mentoring opportunities.²⁷⁴ To avoid indirect discrimination in the selection of employees for limited training opportunities, the Code recommends that these criteria be reviewed periodically, and that opportunities be advertised as widely as possible within a firm.²⁷⁵ The Code also provides:

Managers should not be encouraged to invite workers to put themselves forward for training opportunities, unless they encourage all the workers they are responsible for. This could result in some workers being overlooked for training, on the basis of subjective judgments about their abilities as members of particular racial groups. Moreover, some workers themselves may be reluctant to apply for opportunities, particularly if they believe the outcomes are predetermined.²⁷⁶

268. *Id.* § 4.

269. *Id.* § 4.3(2)(d).

270. *Id.* § 4.4(a).

271. *Id.* § 4.22(c)(1).

272. *Id.* § 4.26.

273. *Id.* §§ 4.44–.45.

274. *Id.* § 4.48(a).

275. *Id.* § 4.48(f).

276. *Id.* § 4.48(g).

These examples, among many specific recommendations for employers, demonstrate the extent to which compliance with the Code could reduce indirect discrimination.

The Code of Practice on Racial Equality in Employment is a strong proof that rulemaking by an administrative agency can produce specific, detailed rules aimed at reducing disparate impact. Even though these rules are not self-enforcing, British courts have recognized that they must be taken into account when relevant. In *West Midlands Passenger Transport Executive v. Singh*,²⁷⁷ the Employment Appeal Tribunal and the Court of Appeal held, relying on the Code of Practice, that statistical evidence had probative value in a direct discrimination case. In that case, the industrial tribunal permitted discovery of statistical information about the numbers of whites and nonwhites who had applied for jobs with the employer in question, on the grounds that such information was relevant to a direct discrimination claim.²⁷⁸ In affirming, the Court of Appeal noted that the Code of Practice recommended that employers monitor such statistics on ethnicity in order to determine whether they were effectively carrying out their equal employment policies.²⁷⁹ The Employment Appeal Tribunal noted that, in adopting the Code of Practice, Parliament intended for such statistics to have probative value.²⁸⁰

In the sex discrimination context, the Employment Appeal Tribunal reversed and remanded the holding of an employment tribunal rejecting a female plaintiff's Equal Pay claim on various grounds, instructing the employment tribunal, inter alia, to take into account the employer's violation of the EOC's Code of Practice on Equal Pay. In *Barton v. Investec Henderson Crosthwaite Securities Ltd.*,²⁸¹ Louise Barton, a media expert in an investment firm, challenged a pay disparity in bonuses between herself and a comparable male employee. The employment tribunal held in favor of the employer, holding that the difference in pay resulted from the employer's concern about retaining the male employee rather than from discriminatory motives.²⁸² The tribunal noted that the bonuses were discretionary.²⁸³ In permitting the appeal, one component of the Employment Appeal Tribunal's holding was that the SDA required the tribunal to take into account any relevant statutory codes of practice.²⁸⁴ The Employment Appeal Tribunal cited the provisions of the Code of Practice requiring that pay systems be transparent. The Code of Practice also required that, when a pay system is not transparent and it operates to the substantial disadvantage of one sex, the onus is on the employer to

277. [1987] I.R.C. 837 (E.A.T.), aff'd, [1988] I.R.C. 614 (C.A.).

278. [1988] I.R.C. at 622.

279. *Id.*

280. [1987] I.R.C. at 851.

281. [2003] I.R.C. 1205 (E.A.T.).

282. *Id.* at 1211.

283. *Id.*

284. *Id.* at 1213-14.

show that the pay differential is not in fact discriminatory.²⁸⁵ The Employment Appeal Tribunal also pointed to Code provisions recommending ways of reviewing pay systems for sex bias.²⁸⁶ Thus, even if the Codes of Practice are not legally binding, the statutory provisions requiring their consideration by trial courts enable the rules contained in the Codes to carry greater weight than do EEOC guidelines in the U.S.

3. *A New Equality Commission*

The enforcement framework of three separate commissions was criticized for being too fragmented.²⁸⁷ In October 2003, the British Government announced that a new Commission for Equality and Human Rights (CEHR) will be created, to take effect in 2006. The new agency will replace the EOC, CRE, and DRC, taking over their current functions. Like the existing commissions, the CEHR will have the power to undertake both general and named person investigations, with the power to issue non-discrimination notices in named-person investigations. The general investigations, as they are called in the SDA, RRA, and DDA, are referred to as “general inquiries” in the Government’s May 2004 White Paper on the new CEHR.²⁸⁸ In “general inquiries,” the CEHR will be able to “explore and research problem areas in depth, identifying barriers to good practice and making recommendations.”²⁸⁹ The new Commission will also have rulemaking power to issue Codes of Practice.

IV. COURTS AND CORRECTIVE JUSTICE

A. *The Limits of Litigation in Combating Disparate Impact and Cumulative Outsider Disadvantage*

In an empirical study of class action employment discrimination litigation under Title VII, Michael Selmi shows that these lawsuits, despite reaching record breaking monetary settlements, have had limited effects on firms and limited benefits to plaintiffs.²⁹⁰ Remedies focus on monetary compensation for past discrimination without particular concern for preventing future discrimination. Furthermore, Selmi notes that, even when settlements call for prospective relief such as diversity programs, the changes that are implemented are largely cosmetic, designed primarily to improve public relations after the negative press of a lawsuit rather

285. *Id.* at 1214.

286. *Id.*

287. See HEPPLER, COUSSEY & CHOUDHURY, *supra* note 64.

288. SECRETARY OF STATE FOR TRADE AND INDUSTRY & SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS, FAIRNESS FOR ALL: A NEW COMMISSION FOR EQUALITY AND HUMAN RIGHTS, 2004, at 38.

289. *Id.*

290. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003).

than to provide benefits to the plaintiff class.²⁹¹ The emphasis on damage awards in employment discrimination litigation has diminished the public nature and efficacy of these lawsuits.²⁹²

In U.S. law, there are no compensatory or punitive damages available to plaintiffs in disparate impact and indirect discrimination cases.²⁹³ In U.S. reasonable accommodation cases, no compensatory or punitive damages are available if the employer shows a good faith effort to accommodate, regardless of the outcome of the lawsuit.²⁹⁴ Therefore, in contrast to intentional discrimination cases, the incentive for bringing disparate impact and reasonable accommodation cases is low. The limitation on remedies creates a situation in which a complaining plaintiff shoulders a disproportionate burden in combating a problem that affects an entire group, if not society at large.²⁹⁵ That disparate impact cases constitute a small percentage of employment discrimination cases in federal courts is empirically supported.²⁹⁶

When it comes to cumulative outsider disadvantage, lawsuits may fail to address the harm because, in addition to there being multiple victims, the injury itself is more difficult to quantify. There is no single wrongful act that can be pinned down as the cause of the injury, and there is no single wrongdoer who can be blamed. For example, suppose a black man works in an environment in which he is frozen out of crucial informal interactions and mentoring networks, performs poorly on the job due to this lack of mentoring and discomfort with comments reflecting racial stereotypes by his white colleagues, receives no formal evaluations of his work despite firm policy to the contrary, is not considered for a major promotion, and then leaves the firm.²⁹⁷ Courts fail to recognize such a pattern of events as discrimination, largely because they are unable to clearly identify the injury and wrongful act.²⁹⁸ Indeed, these pat-

291. *Id.* at 1250.

292. *Id.* at 1298.

293. See 42 U.S.C. § 1981a (2000).

294. 42 U.S.C. § 1981a (2000).

295. See Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 224 (1995) (noting the lack of incentives for victims to bring disparate impact cases).

296. Donohue & Siegelman, *supra* note 87, at 1019–21.

297. These experiences are described in detail in PAUL M. BARETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999). Barrett recounts the experience of Larry Mungin, a black law firm associate who sued the firm for racial discrimination when he was not considered for partnership. On Kenji Yoshino's account, Mungin sought success in the law firm by attempting to "cover" his racial identity—to blend in with whites in order to belong to the system. On Yoshino's account, cultural environments that exert strong pressures on racial minorities and other groups to "cover" can be harmful. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 884–85 (2002).

298. Although the jury determined that Larry Mungin had suffered racial discrimination at trial, the D.C. Circuit reversed the verdict, finding that no reasonable jury could find discrimination. The D.C. Circuit noted, in accordance with other circuits, that "interlocutory or mediate decisions having no immediate effect upon employment . . . were not intended to fall within the direct proscriptions of . . . Title VII." *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1555 (D.C. Cir. 1997) (citing cases). Mungin was not fired—he resigned when he was not considered for partnership despite a possibility still formally left open that he would be considered the following year. Therefore, the court rejected his constructive discharge claim. David Wilkins' assessment of Mungin's claims in the lawsuit

terns might merely be considered “business-as-usual mismanagement” with no racial content.²⁹⁹ Nonetheless, such patterns of interaction can result in very low levels of women and minorities at the senior levels of a firm in proportion to the levels at which they are recruited and hired. The lower success rate of women and minorities in such circumstances can be characterized as an unfair disadvantage from the standpoint of distributive justice; it is a disadvantage that occurs through no fault of one’s own which does not reflect the free choice made by the individual under fair conditions.

Lawsuits are ineffective at addressing these unfair patterns of interaction. These patterns tend not to fit into the paradigm of disparate impact discrimination applied by courts. Courts tend to reject disparate impact claims when the plaintiffs challenge the overall decision-making process of an employer and the bottom-line racial or gender imbalance of the firm without challenging a specific practice that caused a specific harm.³⁰⁰ Thus, litigation is an inappropriate strategy for inducing employers to change their overall decision-making processes with the goal of mitigating or eradicating the racial and gender imbalance.

These unfair patterns of interaction are best addressed through a business’s own attempts to implement policies and practices for hiring, mentoring, evaluating, and promoting that do not lead to undeserved disadvantages, with particular attention to the effects of the policies on women and minorities. Employers should be required to improve their practices in the interests of equal opportunity as a general matter, and not only as a remedy following litigation.

Indeed, courts can order an employer to adopt some of these policies, including diversity training. But a court can only order such a policy as a *remedy* once a legal violation in need of a remedy has been established, or as part of a settlement if the employer agrees to settle a case. Diversity policies can be part of settlement agreements when employees bring race or sex discrimination lawsuits against their employers.³⁰¹ In such cases, employers agree to implement policies that will enhance diversity and equal opportunity without admitting wrongdoing or liability. In the absence of settlement, however, such remedies are rare because courts do not recognize cumulative disadvantage as a violation of Title

is apt: “[A]ntidiscrimination law is far too blunt an instrument to remedy the difficulties that black lawyers face in contemporary elite firms.” David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924, 1927 (1999).

299. Wilkins, *supra* note 298, at 1927.

300. See, e.g., *Bennett v. Roberts*, 295 F.3d 687, 698 (7th Cir. 2002) (rejecting a disparate impact claim in which the plaintiff alleged that the use of all-white screening committees disadvantaged her candidacy for a job); *Brown v. Coach Stores*, 163 F.3d 706, 713 (2d Cir. 1998) (rejecting a disparate impact claim in which the plaintiff pointed to the general racial imbalance of the firm and holding that plaintiff’s claims of discrimination in training and promotion were unconnected to this imbalance).

301. See generally Consent Decree, *EEOC v. Abercrombie & Fitch Stores, Inc.*, Nos. 03-2817, 04-4730, & 04-4731 (N.D. Cal. Nov. 16, 2004).

VII, unless particular acts or policies causing such disadvantages can be clearly identified.³⁰²

Courts tend to focus on remedies for wrongdoing along corrective justice lines in antidiscrimination litigation, even when disparate impact challenges to particular policies are at issue. *International Brotherhood of Teamsters v. United States*,³⁰³ decided within a few years of *Griggs*, is illustrative: in that case, the Justice Department brought a Title VII action against a union and company for discrimination in the hiring and promotion of black and Spanish-surnamed workers. There was a disparate treatment claim, alleging that the employer purposefully refused to hire minorities for desirable line-driver positions, hiring them only for lower-paying, less desirable positions in a separate bargaining unit.³⁰⁴ The disparate impact claim challenged a seniority system adopted in the collective bargaining agreement, which granted seniority within a bargaining unit. Thus, the seniority system created a disincentive for persons in the less-desirable bargaining unit to move to the more desirable line driver positions, as they would have to forfeit their seniority in order to do so.³⁰⁵

The Supreme Court affirmed the lower courts' findings that the employer discriminated purposefully against blacks and Spanish-surnamed employees in violation of Title VII, and held that those individuals who had been discriminated against would be entitled to relief that would include retroactive seniority to the date that they would have become line drivers but for the company's discrimination.³⁰⁶ At the same time, the Supreme Court reversed the Fifth Circuit's finding that the seniority system itself violated Title VII due to its disparate impact on minorities, relying on a provision of the statute permitting employers to maintain bona fide seniority systems notwithstanding other provisions of Title VII.³⁰⁷ The Supreme Court held that, despite the fact that the seniority system disadvantaged black and Spanish workers and perpetuated the effects of past discrimination, it did not violate Title VII because it did not have its genesis in racial discrimination, and was rational in accord with industry practice.³⁰⁸

Ultimately, the Court evaluated the seniority system on the basis of its intent and rationality, rather than applying the "business necessity" standard alluded to in *Griggs*. Furthermore, the Court's decision to let the seniority system stand was related to its decision to provide retroactive seniority to all individual victims of intentional discrimination. In other words, the Court declined to require an employer to abandon a

302. See, e.g., *Voltz v. Coca-Cola Enters.*, 91 Fed. Appx. 63, 67 (10th Cir. 2004).

303. 431 U.S. 324 (1977).

304. *Id.* at 329.

305. *Id.* at 344.

306. *Id.* at 346-47.

307. *Id.* at 355-56.

308. *Id.* at 356.

policy that it recognized as perpetuating race-based employment inequality, as long as the employer would provide remedies to individual victims for past wrongful acts of discrimination.

Another illustrative example is the Third Circuit case of *Lanning v. Southeastern Pennsylvania Transportation Authority*.³⁰⁹ In that case, female plaintiffs challenged a cutoff score on an aerobic capacity test for entry level transit police officers.³¹⁰ About 12% of female applicants passed the test, which required applicants to run 1.5 miles in 12 minutes.³¹¹ In contrast, 60% of male applicants passed the test.³¹² The litigation began in 1994, when the plaintiffs filed a charge of discrimination with the EEOC and the Pennsylvania Human Relations Commission (PHRC).³¹³ The PHRC found reasonable cause and attempted conciliation.³¹⁴ The EEOC issued a right to sue letter in late 1996, and the plaintiffs filed a class action in a federal district court in early 1997.³¹⁵ After a bench trial of over twelve days, the district court concluded that the aerobic test did not violate Title VII because the test was a “validated test in place which relates to the specific tasks to be performed by its officers.”³¹⁶ Evidence at trial consisted largely of studies and expert testimony that showed that higher aerobic capacity levels led to better field performance in a transit police officer’s job. The Third Circuit reversed and remanded, holding that the district court had applied the wrong standard. The Third Circuit read the Civil Rights Act of 1991 in conjunction with *Griggs*, *Dothard*, and *Albemarle* to require employers to show that a discriminatory cutoff score measures minimum qualifications necessary to perform successfully the job in question.³¹⁷ On remand, the district court allowed the parties to expand the record in light of the new standard, and again concluded that the test did not violate Title VII, holding that applicants who failed the test would not be able to successfully perform the job of transit officer.³¹⁸ The Third Circuit then affirmed the district court’s decision.³¹⁹

In articulating the standard requiring a measurement of minimum qualifications necessary for successful performance and remanding the case back to the district court, the Third Circuit gave the following account of disparate impact liability:

309. *Lanning v. S.E. Pa. Transp. Auth.*, 308 F.3d 286, 292 (3d Cir. 2002) (*Lanning II*).
310. *Lanning v. S.E. Pa. Transp. Auth.*, 181 F.3d 478, 484 (3d Cir. 1999) (*Lanning I*).
311. *Id.* at 482.
312. *Id.* at 482–83.
313. *Lanning v. S.E. Pa. Transp. Auth.*, No. Civ.A. 97-0593, 1998 WL 341605, at *2 (E.D. Pa. June 25, 1998).
314. *Id.*
315. *Id.*
316. *Id.* at *74.
317. *Lanning I*, 181 F.3d at 492–93.
318. *Lanning v. S.E. Pa. Transp. Auth.*, No. Civ.A. 97-0593, 2000 WL 1790125, at *29 (E.D. Pa. Dec. 7, 2000).
319. *Lanning II*, 308 F.3d 286, 293 (3d Cir. 2002).

Inherent in the adoption of this theory of discrimination is the recognition that an employer's job requirements may incorporate societal standards based not upon necessity but rather upon historical, discriminatory biases. A business necessity standard that wholly defers to an employer's judgment as to what is desirable in an employee therefore is completely inadequate in combating covert discrimination based upon societal prejudices.³²⁰

According to this theory of disparate impact liability, the purpose of the doctrine is to uncover harms resulting from bias and prejudice. Bias and prejudice are the very phenomena that make intentional discrimination morally blameworthy on a corrective justice understanding of antidiscrimination law. By viewing disparate impact liability as a way of getting at these morally blameworthy sources of practices causing disadvantage to women, the court effectively took a corrective justice approach to disparate impact. Later in the opinion, the Third Circuit criticized the district court's understanding of business necessity for only requiring a cut-off score to be "readily justifiable," pointing out that such a practice might be "an effort to exclude virtually all women."³²¹ On the Third Circuit's view then, a policy having a disparate impact must be shown to measure minimum qualifications as a way of guarding against efforts to exclude motivated by impermissible and morally undesirable biases, and not necessarily as a way of providing greater employment opportunities to women.

Thus, it is not surprising that the Third Circuit ultimately upheld the district court's conclusion that the test at issue did not violate Title VII. While asserting that the aerobic test measured minimum qualifications to perform the job, Southeastern Pennsylvania Transit Authority (SEPTA) did not discipline the sixty-two percent of incumbent transit officers who failed the test on one occasion.³²² The Third Circuit pointed out that SEPTA was unable to discipline the incumbents because of the officers' union's collective bargaining agreement.³²³ SEPTA accommodated the unionized officers by offering a financial incentive for incumbents to pass the test, as well as by paying for their gym memberships.³²⁴ Yet the Third Circuit did not require SEPTA to adopt the proposed alternative of financial incentives for women who failed the test. The decision reflects courts' understanding that disparate impact liability does not extend so far as to impose a requirement on employers to accommodate members of certain groups so as to provide employment opportunity. Rather, courts understand the business necessity test to smoke out efforts to exclude. As long as a disparate impact policy does not appear, after exten-

320. *Lanning I*, 181 F.3d at 490.

321. *Id.*

322. See *Lanning v. S.E. Pa. Transp. Auth.*, No. Civ.A. 97-0593, 1998 WL 341605, at *32, 33 (E.D. Pa. June 25, 1998).

323. *Lanning II*, 308 F.3d at 299.

324. *Lanning*, 1998 WL 341605, at *33.

sive fact-finding, to be an effort to exclude, courts tend to let them stand even when alternatives might be better from the standpoint of equal employment opportunity.

Although most disparate impact claims are not successful, even recent successful claims are often accompanied by some evidence in the record of intentional discrimination. In such cases, the employer fails the “business necessity” test by also failing the “business justification” test that more closely resembles disparate treatment doctrine. For example, in *Isabel v. City of Memphis*, African American police sergeants successfully challenged a written test cutoff score used in a promotion process under a disparate impact theory.³²⁵ The Sixth Circuit held that there was no business justification for the cutoff score, affirming the district court’s finding that the cutoff score was “nothing more than an arbitrary decision.”³²⁶ The opinion mentions that, in a separate lawsuit, police officers seeking promotion to sergeant in the same city succeeded in challenging the test used in that process under an intentional discrimination theory.³²⁷ That is, prior to this decision, the court had determined that the same defendant intended to discriminate in adopting a similar test in a different promotional process. Federal courts seem to have difficulty getting away from a corrective justice framework even when evaluating disparate impact claims.

B. Judicially Enforced Limits on Agency Power in Britain

In Britain, courts have taken a corrective justice view of antidiscrimination law, particularly in their interpretation of the scope of the administrative agencies’ investigatory authority under the statutes, which has been at odds with the agencies’ own understandings. Shortly after the CRE embarked on formal investigations in the late 1970s and early 1980s, investigated parties mounted challenges to these investigations. The judiciary took a corrective justice view of the role of formal investigations, and narrowed the Commission’s investigatory power in accordance with this conception. In 1982, the House of Lords decided *Hillingdon London Borough Council v. CRE*,³²⁸ interpreting the RRA as requiring several procedural safeguards for named persons investigated by the Commission. The Hillingdon Borough Council was responsible for providing several public facilities, including accommodation for immigrant families arriving at Heathrow Airport who were unintentionally homeless.³²⁹ The Council had publicly taken the position that the responsibility for housing homeless immigrants should fall on the entire nation and be carried out by the Foreign and Commonwealth Office, rather

325. *Isabel v. City of Memphis*, No. 03-5912, 2005 WL 819938, at *4 (6th Cir. Apr. 11, 2005).

326. *Id.* at *6.

327. *Id.* at *3.

328. [1982] A.C. 779, 781 (H.L.) (appeal taken from C.A.).

329. *Id.* at 782–83.

than on Hillingdon, where Heathrow Airport was located.³³⁰ On one occasion, the Council removed an Asian family from the overnight accommodation it had initially provided and dumped the family at the Foreign and Commonwealth Office.³³¹ Around the same time, the Council provided accommodation to a white family from Rhodesia.³³²

The Commission resolved to investigate the Hillingdon Borough Council. Pursuant to section 49(4) of the RRA, the Commission provided terms of reference for the investigation stating that the Commission believed that the Hillingdon Borough Council may have contravened the RRA through direct and indirect discrimination “in the provision of facilities or services to the public or such sections thereof as are or were in need of housing through homelessness.”³³³ Hillingdon applied for judicial review to the industrial tribunal, requesting an order of certiorari to quash the commission’s determination, which the tribunal granted.³³⁴ The Court of Appeal and the House of Lords both affirmed the tribunal’s decision.³³⁵

Section 49(4) of the RRA provides:

Where the terms of reference of the investigation confine it to activities of persons named in them and the Commission in the course of it propose to investigate any act made unlawful by this act which they believe that a person so named may have done, the Commission shall—

(a) inform that person of their belief and of their proposal to investigate the act in question; and

(b) offer him an opportunity of making oral or written representations with regard to it³³⁶

The House of Lords held that the terms of reference were invalid because they were broader than the Commission’s actual belief of unlawful discrimination.³³⁷ The terms of reference would entitle the Commission to investigate whether Hillingdon discriminated in the provision of facilities to the public or sections thereof in need of housing through homelessness, rather than the narrow question of whether it discriminated in providing facilities to immigrants arriving at Heathrow in need of housing. The Commission argued that the statute permitted it to draft terms of reference for an investigation that were reasonably related to the facts of which the Commission had suspicion.³³⁸ The House of Lords relied on

330. *Id.* at 783.

331. *Id.*

332. *Id.*

333. *Id.* at 788 (citation omitted).

334. *Id.* at 791.

335. *Id.* at 792–94.

336. Race Relations Act, 1976, c. 74, § 49(4) (Eng.).

337. *Hillingdon London Borough Council v. CRE*, [1982] A.C. 779, 789 (H.L.) (appeal taken from C.A.).

338. *Id.* at 781–82.

the statute's requirement that the person investigated be given an opportunity to make oral or written representations to conclude that "the right of a person to be heard in support of his objection to a proposal to embark upon an investigation of his activities cannot be exercised effectively unless that person is informed with reasonable specificity what are the kinds of acts to which the proposed investigation is to be directed and confined."³³⁹ Thus, the House of Lords held that the statute required the Commission to confine the terms of reference of a belief investigation to the particular kinds of acts which the Commission genuinely believed the persons named may have done, and that these limits on the terms of reference also limited the kinds of acts that may be subject to a non-discrimination notice.³⁴⁰ The *Hillingdon* decision made it more difficult for the Commission to investigate the discriminatory practices of particular institutions and companies without first naming a reasonably held belief that a particular unlawful discriminatory act had taken place. Even with a reasonably founded belief that a discriminatory practice was occurring, the Commission could only then investigate that practice, and not other related discriminatory practices of the employer.

The restrictions on the CRE's investigatory power were strengthened by the Court of Appeal's decision in *R v. CRE ex parte Prestige Group PLC*.³⁴¹ In that case, the Commission alerted the Prestige Group that it was contemplating conducting a formal investigation into the company.³⁴² A formal investigation ensued, and the Commission issued a non-discrimination notice against the company.³⁴³ In light of the House of Lord's decision in *Hillingdon*, however, the company then sought judicial review to quash the non-discrimination notice on the grounds that the company had not been given an opportunity to make representations before the formal investigation began. The court quashed the non-discrimination notice on those grounds.³⁴⁴

The Commission argued that the requirements of section 49(4) did not apply to this investigation because it only applied to investigations in which the terms of reference "confine the investigation to the activities of a named person."³⁴⁵ The investigation of Prestige Group, in contrast, was not one that had been premised on the belief that it had been engaging in any unlawful activities. The Commission believed that the statute permitted it to investigate a "named person" without a belief that it had committed any unlawful act.³⁴⁶ The House of Lords rejected this interpretation of the statute. It held that a named person investigation under

339. *Id.* at 787-88.

340. *Id.* at 788.

341. *R v. CRE ex parte Prestige Group PLC*, [1984] I.R.C. 473 (H.L.) (appeal taken from D.C.).

342. *Id.* at 476.

343. *Id.* at 477.

344. *Id.*

345. *Id.* at 487.

346. *Id.*

the statute was necessarily a belief investigation, such that any investigation of a particular company or institution (as distinct from a general investigation of an entire industry) required a belief that unlawful conduct is occurring.³⁴⁷ Such cases required an opportunity for the named person to make representations.³⁴⁸ As a result of the *Prestige* decision, the Commission could no longer investigate companies or government institutions without a concrete belief that it had engaged in acts of unlawful discrimination. Indeed, the court held that an investigation of a named person had to be “accusatory” and not “exploratory.”³⁴⁹ It could not investigate the largest companies, merely because they were large employers, for example, to find out whether it had hiring policies that had a disparate impact on racial minorities. Since the investigatory powers of the EOC under the SDA are enumerated in identical statutory language, the *Hillingdon* and *Prestige* decisions have been understood to impose the same limits on the EOC’s investigatory powers.

The courts’ limitations on the Commissions’ investigatory power and their procedural protections for investigated parties reflect an assumption that the formal investigation process should be limited to correcting wrongdoing by particular actors. The *Hillingdon* and *Prestige* decisions portray the investigations as processes by which wrongful acts by the investigated person are discovered and rooted out. In accusing the investigated person of a wrongful act, the investigated person is transformed into a wrongdoer—a status that should be attributed only with caution. Other judicial decisions have likened investigation by the CRE to a criminal charge,³⁵⁰ an engine of oppression,³⁵¹ and the Spanish Inquisition.³⁵² In short, the judicial understanding of the formal investigation is that it is an exercise in corrective justice.

Yet, courts’ understanding of the role of formal investigations is out of sync with the Government’s vision when introducing the RRA of 1976 and the way in which the CRE had been exercising the power before these cases were decided. The 1976 Act conceived the investigation as a “mechanism . . . to reach the types . . . of discrimination which would be unlikely to be addressed in individual litigation, to bring about changes in the organisational practices of employers” to increase equal opportunity.³⁵³ The CRE selected large companies in industrial sectors in which ethnic minorities were concentrated for investigation.³⁵⁴ The experience gained from the investigations formed the basis for recommendations in

347. *Id.* at 487–88.

348. *Id.* at 486.

349. *Id.* at 484.

350. *See Mandla v. Dowell Lee*, [1982] Q.B. 1, 17–18 (C.A.).

351. *Id.* at 18.

352. *See Science Research Council v. Nasse*, *Leyland Cars v. Vyas*, [1979] QB 144, 172 (C.A.).

353. *See McCrudden et al.*, *supra* note 227, at 48.

354. Mary Coussey, *The Effectiveness of Strategic Enforcement of the Race Relations Act 1976*, in *DISCRIMINATION: THE LIMITS OF THE LAW* 35, 38 (Bob Hepple & Erika M. Szyszczak eds., 1992).

the Code of Practice, "as these enquiries identified most of the potentially discriminatory practices and other barriers caused by disadvantage in the labour market."³⁵⁵ Many of these were practices that could be characterized as indirect discrimination. They included word-of-mouth recruiting, application of geographical preferences, informal oral or written English tests that had little relation to job performance, and subjective criteria.³⁵⁶ The Commission's initial uses of formal investigatory powers helped identify and define practices that caused inequality, which enabled the Commission to set standards with regard to indirect discrimination in its Code of Practice rulemaking. In short, it used the tools of administrative regulation to pursue distributive justice.

As a result of criminal- and corrective-justice-inspired protections for investigated parties emerging from the *Hillingdon* and *Prestige* decisions, the formal investigation has become a burdensome and costly process for agencies. There are significant delays, since respondents seize every opportunity to delay investigations by seeking judicial review.³⁵⁷ In addition, the requirement that the commissions confine their investigations to the narrow factual issue which was reported to them prohibits the commissions from going on "fishing expeditions"³⁵⁸ that might uncover the subtle and indirect forms of discrimination that are more difficult to detect. After *Prestige* was decided, eight of the investigations commenced between 1977 and 1983 were regarded as ultra vires,³⁵⁹ and the raised costs of investigations due to the procedural protections deterred the Commission from exercising the formal investigation power. The Commission only commenced twelve formal investigations between 1983 and 1989³⁶⁰ as compared to the forty-six investigations it began between 1977 and 1983.³⁶¹

Some critics have noted that the judicial approach to the CRE's powers in *Hillingdon* and *Prestige* diverged from case law interpreting similar statutory powers vested in other agencies. Agencies can investigate taxpayers and corporations' finances to enforce tax and securities laws without any requirement by courts that the investigated party be afforded an opportunity to be heard to determine whether the agency has a prima facie case justifying investigation.³⁶² In 1983, 1988, 1992, and 1998, the CRE has repeatedly proposed the statutory reversal of the *Prestige* decision, without success.

355. *Id.*

356. *Id.*

357. See Evelyn Ellis & G. Appleby, *Blackening the Prestige Pot? Formal Investigations and the CRE*, 100 L. Q. REV. 349, 354 (1984).

358. See Sacks, *supra* note 238, at 583.

359. See MCCRUDDEN ET AL., *supra* note 227, at 77.

360. *Id.* at 78.

361. See *id.* at 76-77.

362. See Vera Sacks & Judith Maxwell, *Unnatural Justice for Discriminators*, 47 MOD. L. REV. 334, 339 (1984).

Nonetheless, in response to the narrow judicial interpretations of the commissions' investigatory power, Parliament worded differently the delegation of investigatory power to the DRC and the new CEHR. The Disability Rights Commission Act provides that the paragraph establishing the right of the investigated person to make representations "applies where the Commission proposes to investigate in the course of a formal investigation (whether or not the investigation has already begun) whether (a) a person has committed or is committing any unlawful act"³⁶³ Through this provision, the statute explicitly countenances a named-person formal investigation which is not directed at investigating whether a person has committed an unlawful act. That provision makes clear that a named-person formal investigation can become one in which a particular allegation of an unlawful act is investigated during the course of the investigation. The scope of the investigatory power for the new CEHR is also being considered in light of the judicial limitations on the CRE's power.

V. TOWARD REGULATORY MODELS OF ANTIDISCRIMINATION ENFORCEMENT

A. *Why Regulate Equal Employment Opportunity?*

Thus far, this article has argued that antidiscrimination law in the U.S. and Britain, particularly in light of the most recent developments, can be seen as embodying principles of distributive justice as well as corrective justice. Administrative agencies have interpreted the law as promoting a policy of equal opportunity, whereas courts have taken a narrower view of antidiscrimination law as proscribing and remedying wrongful acts. If distributive justice is taken to be the best explanation of certain features of antidiscrimination law, an increased role for administrative agencies should follow.

The principles of corrective justice and distributive justice have different answers to the question of whose duty it is to eradicate inequalities on the basis of race, gender, disability, and other categories. Whose responsibility is racial inequality in employment? Does the duty to eradicate unjust inequality lie with those who have caused inequality, or with all citizens committed to a just society? Should we hold employers responsible for addressing racial inequality only to the degree that they have caused particular inequalities, or to the degree that they have the capacity to contribute to the achievement of racial equality? A corrective justice approach imposes the duty to remedy injustice on wrongdoers, whereas a distributive justice approach imposes a duty to achieve a just society on all its members. If wrongdoing is the main problem with discrimination, then a tortlike litigation model is appropriate. But if the

363. Disability Rights Commission Act, 1999, c. 17, § 3(1) (Eng.).

problem resides also in the persistence of unjust inequality, which all members of a just society share a duty to eliminate, then the problem must be addressed by the democratic institutions of a just society, including administrative agencies that implement statutory law.

The use of regulatory strategies to implement the provisions of antidiscrimination law that attempt to achieve and promote equal opportunity by imposing costs on employers responds to some commentators' identification of the particular problems confronted by courts in enforcing the ADA's accommodation provisions. Issacharoff and Nelson argue, for instance, that in attempting to enforce the accommodation provisions of the ADA, courts have found themselves in a "regulatory abyss."³⁶⁴ Courts have to assess public safety considerations and weigh them against the employment interest of the disabled worker. In addition, the imposition of civil liability imposes greater costs on a particular employer who happens to have employed a disabled person,³⁶⁵ instead of spreading costs generally across all employers by making them all contribute to providing equal employment opportunity to the disabled. Furthermore, Karlan and Rutherglen have also noted the deficiencies of using litigation to achieve accommodation for the disabled. They point out that very few accommodation claims are brought by job applicants as distinct from those already hired, and employers are generally free to reject applications of disabled persons without discussion of possible accommodations.³⁶⁶ This is the "structural defect of private enforcement."³⁶⁷

One general justification for regulation by administrative agencies is that the market is unable to deal with structural problems, including economic inefficiency and health or safety risks to citizens.³⁶⁸ Since the 1960s, the American administrative state has expanded to address a variety of structural social problems. Cass Sunstein has referred to the expansion of social regulation in the 1960s as a "rights revolution."³⁶⁹ Regulation has been understood as a means of promoting the democratic aspirations of a people.³⁷⁰ Democratic aspirations may include collective values that cannot be measured or produced by the market. These are, in Richard Stewart's terminology, non-commodity values. Citizens may seek such goals in the political realm, and not through their behavior in economic markets.

364. Issacharoff & Nelson, *supra* note 7, at 340.

365. *See id.* at 354.

366. Karlan & Rutherglen, *supra* note 7, at 4.

367. *Id.* at 34.

368. STEPHEN BREYER, *REGULATION AND ITS REFORM* 15 (1982).

369. *See generally* CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990).

370. *See* Richard Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 *YALE L. J.* 1537, 1541 (1983). As Richard Stewart has noted, liberalism poses certain tensions for regulation aiming to promote collective non-commodity values. He argues that regulation promoting democratic aspirations can be justified when it promotes values that can be reconciled with the liberal principles of neutrality and avoidance of coerced wealth transfers.

When the inequalities addressed by antidiscrimination law are seen as problems of distributive justice rather than corrective justice, a regulatory approach should be deployed to address those inequalities. The problems of disparate impact, failure to accommodate the disabled, and cumulative outsider disadvantage are analogous to pollution, safety hazards, and other problems that are regulated by agencies in a few important respects. The acts and behaviors in question are not forms of wrongdoing in the sense of blameworthiness. As Jeremy Waldron described it:

Treating people differently on the basis of racial or sexual prejudice is widely regarded as an appalling way to behave. Most of us (though I fear not all) condemn such behaviour and would not want to be associated with anyone who practised racial or sexual discrimination in that sense. . . . Now as a matter of fact, most people do not feel so strongly about . . . “indirect discrimination”. If I discovered that somebody was discriminating not intentionally but indirectly, I might put some pressure on him to change his ways; but I would not be inclined to condemn him or to shun his company in a way that a deliberately racist or deliberately sexist company ought to be shunned.³⁷¹

The same can be said of a variety of regulatory problems. There are many behaviors and acts that cause or risk causing undesirable or harmful outcomes; yet these acts are not to be condemned, but rather to be regulated. These problems include pollution, and practices that cause occupational health and safety risks. Indeed, society is justified in pressuring those who pollute the air or adopt disparate impact policies to change their ways—in coercing them to do so through law. But such coercion should be conceived along regulatory lines, rather than along tort models that emphasize remedies for wrongdoing.

Some features of the EPA’s regulation of air pollution under the Clean Air Act may serve as a model for the regulation of disparate impact and cumulative outsider disadvantage. Under the Clean Air Act of 1970, Congress delegated to the EPA rulemaking authority to promulgate a variety of standards, including ambient air-quality standards. The Act requires the EPA to establish the maximum permitted levels of regulated pollutants no higher than what the protection of public health requires,³⁷² so-called risk standards. The EPA also sets standards based on the feasibility of pollution mitigation, called “technology” standards.³⁷³

371. Jeremy Waldron, *Indirect Discrimination*, in *EQUALITY AND DISCRIMINATION: ESSAYS IN FREEDOM AND JUSTICE* 93, 93 (Stephen Guest ed., 1985).

372. Clean Air Act, 42 U.S.C. § 7409(b) (2000).

373. 42 U.S.C. § 7411(h) (2000). Many commentators have pointed out that a significant difference between the American and European approaches to environmental regulation is that the United States EPA tends to focus on risk standards, emphasizing proof of harm and risk as a predicate to standard-setting, whereas the European counterparts tend to focus on imposing technology standards, implementing a precautionary approach to anticipated risk. See, e.g., NOGA MORAG-LEVINE, *CHASING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE* 1–3 (2003); Jona-

In so doing the EPA imposes two sets of duties on regulated entities—the duty not to cause harm or risk of harm to public health by not exceeding a certain level of pollution, and the duty to prevent harm and risk of harm resulting from pollution by adopting available and practicable means of reducing pollution. Once promulgated, these standards can be challenged and subjected to judicial review under the Administrative Procedure Act.³⁷⁴ Similarly, through rulemaking, the EEOC would be able to identify the actions and behaviors by employers that cause unnecessary disadvantage, as well as prescribe best practices and available solutions for employers to avoid causing such disadvantages.

B. Proposals for Experimentation and Reform

It is time to rethink the functions and powers of the EEOC to move toward more robust regulatory models of antidiscrimination enforcement. I propose that British experimentation with administrative regulation in antidiscrimination law, which is ongoing, be viewed as a point of departure for regulatory experimentation in the enforcement of antidiscrimination law in the United States. The fact that the British model was largely influenced by American case law on disparate impact highlights the possibility that the seeds of a regulatory model are already in U.S. law. Since Congress delegated rulemaking power to the EEOC to promulgate the employment provisions of the ADA, a similar delegated authority in the context of Title VII is also imaginable and should be seriously considered. British regulation of discrimination and equal employment opportunity serves as one model for rethinking the EEOC; the regulatory models used by other U.S. agencies regulating pollution, health, and safety might also provide some guidance.

The remainder of this article roughly sketches three proposals for EEOC reform. These are intended to serve as starting points for regulatory experimentation in the enforcement of antidiscrimination law in order to better operationalize the distributive justice understanding of this body of law. The discussions draw upon both the British experience as well as that of U.S. agencies enforcing other bodies of law that have exercised a broader range of regulatory powers than the EEOC. The main concern of this article is to provide an argument for moving in a regulatory direction in the enforcement of antidiscrimination law. Should this argument succeed, a fuller and more detailed account of the institutional design of the EEOC than that provided here will be needed.

than B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. & INT'L L. 207, 209–11 (2003).

374. Administrative Procedure Act, 5 U.S.C. §§ 702–706 (2000).

Eliminate the EEOC's Duty to Process All Individual Complaints

One of the main obstacles to the EEOC's ability to effectively pursue the distributive justice goals of antidiscrimination law is its duty to process all individual complaints. In the last decade, the EEOC has processed between 77,444 and 87,529 charges of discrimination per year.³⁷⁵ In fiscal year 2004, the EEOC processed 79,432 charges.³⁷⁶ It found reasonable cause in 4.9%, or 4,169, of those charges, and no reasonable cause in 62.4%, or 53,182, of those charges.³⁷⁷ Only 1.4%, or 1,217 cases, were successfully conciliated, and 3.5%, or 2,952 cases, were unsuccessfully conciliated.³⁷⁸ Of the 2,952 cases in which the EEOC found reasonable cause but did not successfully conciliate, the agency filed merits suits in only 379 of them, around 13%.³⁷⁹ In short, in almost 90% of charges in which there may be reasonable cause to believe that discrimination occurred and conciliation is unsuccessful, complainants are ultimately left to seek remedies on their own in federal court, without the EEOC's assistance. Nonetheless, they are required to file first with the EEOC, and receive a right to sue letter from the EEOC before proceeding with a lawsuit.

These statistics raise questions about whether individual charge processing is the most effective use of the EEOC's time and money. After all, even in cases in which the EEOC finds no reasonable cause, the agency's finding does not preclude plaintiffs from then filing a lawsuit in federal court. In 2004, the EEOC found no reasonable cause in 53,182 cases.³⁸⁰ The Administrative Office of the U.S. Courts reported that there were 19,746 civil rights employment cases commenced in the district courts in 2004.³⁸¹ The EEOC invests its resources in investigating every charge filed, even though its investigations lead to litigation of a very small percentage of cases that it determines might have merit, and fails to prevent the litigation of a very large percentage of cases that it deems to be meritless. If individuals were permitted to bring lawsuits on their own behalf without being required to first file a charge with the EEOC, the EEOC's resources currently devoted to processing all individual grievances would become available to regulate the promotion of equal opportunity more broadly.

375. Charge Statistics from the U.S. EEOC, FY 1992 Through FY 2004, <http://www.eeoc.gov/stats/charges.html> (last visited Oct. 6, 2005).

376. EEOC Charge Statistics, *supra* note 375.

377. EEOC All Statutes Statistics, FY 1992 Through 2004, <http://www.eeoc.gov/stats/all.html> (last visited Oct. 6, 2005).

378. EEOC All Statutes Statistics, *supra* note 377.

379. EEOC Litigation Statistics, FY 1992 Through FY 2003, <http://www.eeoc.gov/stats/litigation.html> (last visited Oct. 6, 2005).

380. EEOC All Statutes Statistics, *supra* note 377.

381. Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2000 Through 2004, <http://www.uscourts.gov/judbus2004/appendices/c2a.pdf> (last visited Oct. 6, 2005).

Rulemaking to Set Standards

Congress should explicitly delegate authority to the EEOC to promulgate rules implementing the disparate impact provisions of Title VII as amended by the Civil Rights Act of 1991. In codifying the disparate impact theory of liability, the 1991 Act requires an employer to show that a challenged policy having a disparate impact is “job related” and “consistent with business necessity.”³⁸² If an agency were to implement the disparate impact provisions of Title VII, it would be the agency’s responsibility, and not that of litigants, to research the effects of certain kinds of employment practices on various groups, the effectiveness of alternative practices that might replace policies having a disparate impact, and the costs to employers to produce rules with the force of law that employers would have to follow.

Some of these rules could resemble existing EEOC guidelines on employment selection procedures³⁸³ and sexual harassment.³⁸⁴ The selection procedure guidelines require employers to examine their policies for adverse impact on protected groups,³⁸⁵ to consider alternative selection procedures to those having an adverse impact and to adopt alternatives when possible,³⁸⁶ and to document the validation of selection criteria that have a disparate impact.³⁸⁷ The sexual harassment guidelines provide:

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.³⁸⁸

The British CRE’s Code of Practice on Racial Equality in Employment³⁸⁹ may also serve as a model for rules that the EEOC could adopt to implement Title VII. The Code gives employers fairly detailed procedural rules that can mitigate the effects of stereotype and subjective judgment in hiring and promoting procedures.

Inspiration for the possibility of EEOC rulemaking may also come from the analogy of the Clean Air Act, which charges the EPA with the task of identifying those pollutants that pose a risk to public health and safety. Similarly, a disparate impact delegation under Title VII would charge the agency with identifying those employer practices that tend to

382. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

383. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1-18 (2004).

384. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2004).

385. 29 C.F.R. § 1607.4.

386. *Id.* § 1607.3B

387. *Id.* § 1607.5-9.

388. *Id.* § 1604.11(f).

389. See *supra* text accompanying notes 266–76.

disfavor women and minorities, instead of leaving that task to potential plaintiffs. Because the incentive to bring disparate impact cases is low, and because individual complainants often lack information to know whether a facially neutral policy that disfavors them is one that statistically disfavors the group to which they belong, an agency is much better placed to identify these practices and to establish standards for their validation or justification.

The current EEOC guidelines on selection procedures include several rules for validating disparate impact policies that, if followed, would plausibly increase equality in hiring. Similarly, the sexual harassment guidelines require employers to prevent and remedy sexual harassment, including hostile environment. But these rules lack the force of law—they are merely intended to assist employers in complying with Title VII.³⁹⁰ In the sexual harassment area, the Supreme Court has held an employer vicariously liable to an employee for hostile work environment created by a supervisor, and the employer could avoid liability by showing that it exercised reasonable care to prevent and correct any sexually harassing behavior.³⁹¹ In so holding, the Court cited the EEOC Guidelines as persuasive authority, but stopped short of holding that employers were required to have anti-harassment policies in order to avoid liability. The Court stated, “While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating [reasonable care].”³⁹²

The EEOC has no authority to enforce its guidelines—the agency cannot require employers to validate their selection procedures in terms of business necessity nor require employers to have anti-harassment policies or fine employers for failing to do so. Indeed, employers may look to the Guidelines for advice as to how to avoid liability, but courts have not held that adhering to the Guidelines is necessary to avoid liability. Although potential liability in discrimination lawsuits undoubtedly provides employers with an incentive to avoid policies having a disparate impact, for example, the incentive would be stronger if validation of se-

390. 29 C.F.R. § 1607.1

391. See *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

392. *Burlington Indus.*, 524 U.S. at 765. In *Faragher v. City of Boca Raton*, the Supreme Court evaluated the adequacy of the employer’s anti-harassment policy, concluding that the employer’s policy was insufficient to constitute “reasonable care.” 524 U.S. at 807–08. In *Faragher*, the Court relied on the District Court’s record establishing that the employer had failed to disseminate its policy against sexual harassment and that the officials made no attempt to keep track of the supervisors who had committed the offending conduct. *Id.* at 808. The record also established that the employer’s policy “did not include any assurance that the harassing supervisors could be bypassed in registering complaints.” *Id.* The Court concluded, “Under such circumstances, we hold as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors’ harassing conduct.” *Id.*

lection procedures pursuant to either the EEOC's guidelines or to the British Code of Practice were required of all employers as a regulatory rule.

The experience of other agencies, such as the Federal Trade Commission, can be instructive. Consider the Federal Trade Commission's rulemaking authority to issue rules under its governing statute, which authorizes the Commission to prevent "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."³⁹³ In *National Petroleum Refiners Association v. Federal Trade Commission*, the D.C. Circuit upheld the FTC's authority to promulgate a rule declaring that failure to post octane rating numbers on gasoline pumps at service stations was an unfair method of competition and an unfair or deceptive act or practice.³⁹⁴ Having established such a rule, the Federal Trade Commission could then exercise its statutory investigative and adjudicatory powers to bring proceedings against gasoline dealers who failed to post octane rating numbers. In the absence of such a rule, the agency would bear the burden of proving, in each individual instance, that a gasoline dealer's failure to post octane rating numbers deceived or was likely to deceive a large number of purchasers. But with the regulation requiring gasoline dealers to post octane rating numbers, the agency would merely have to show that regulated parties failed to comply with a rule.³⁹⁵ Similarly, if the EEOC had rulemaking authority to promulgate disparate impact regulations, the EEOC could then promulgate rules requiring all employers to (1) research the effect of hiring and promoting policies on women, racial minorities, and other protected groups, (2) thoroughly research and consider the effectiveness and costs of alternative policies to those having adverse impacts on protected groups, and (3) produce a validation study of policies having a disparate impact. If such rules existed, an employer's failure to comply with these rules could establish a violation of Title VII in litigation. It would lower the EEOC or plaintiff's burden of proof in disparate impact litigation and narrow the issues to be litigated.

Furthermore, if the EEOC had delegated authority to promulgate rules under Title VII, the rules would be adopted pursuant to the requirements of the APA. The APA requires a notice of proposed rulemaking,³⁹⁶ as well as an opportunity for interested persons "to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."³⁹⁷ Thus, rules implementing disparate impact, promulgated through notice-and-

393. 15 U.S.C. § 45(a)(1) (2000).

394. 482 F.2d 672 (D.C. Cir. 1973).

395. Mashaw, Merrill, and Shane argue that such rules could ease the agency's burden of proof and narrow the issues to be litigated, leading to less litigation. See JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 448 (4th ed. 1998).

396. 5 U.S.C. § 553(b) (2000).

397. *Id.* § 553(c).

comment rulemaking, would involve more participation by interested parties, and thus reflect a more democratic understanding of the principles of equality being pursued.³⁹⁸

Authority to Issue Cease-and-Desist Orders

As compared to the British antidiscrimination agencies and to other U.S. agencies, the EEOC is weak because it lacks enforcement authority. Although Congress considered granting the EEOC cease-and-desist authority in 1964 and 1972, it declined to do so, fearing that procedural protections for employers accused of discrimination would be inadequate in adjudicative proceedings in an agency rather than in a federal court. Such concern about procedural protections is appropriate if the accusation of discrimination is understood as an accusation of morally blameworthy behavior in a corrective justice framework. But if an employer is accused of conduct that may be harmful but is not morally blameworthy, the need for procedural protections may be less strong. Thus, an agency's allegation that an employer engaged in unlawful disparate impact is also analogous to the Federal Trade Commission allegation, as litigated in adjudicative proceedings within the agency, that a regulated entity engaged in unfair competition.

Therefore, the distributive justice explanation of antidiscrimination law, including rules prohibiting disparate impact, leads to a consideration of the delegation of cease-and-desist authority to the EEOC. Cease-and-desist authority would then be understood as a way for an agency to require regulated entities to fulfill their duties toward the collective goals that a statutory and regulatory framework is attempting to achieve, and not as the imposition of punishment or remedies for individual acts of wrongdoing.

If the EEOC had both rulemaking power as well as the power to issue cease-and-desist orders, it could use investigations to determine whether employers are following rules similar to existing EEOC Guidelines and to require employers to cease-and-desist from practices that tend to have a disparate impact. The combination of rulemaking and adjudication is important. Rulemaking power can cabin the agency's discretion in investigating and issuing cease-and-desist authority. The rules promulgated by an agency could serve as guidelines that limit the scope of the agency's investigations for discriminatory practices. In requiring

398. There are some reasonable concerns, however, about the possibility of agency capture. In response to such critiques, collaborative models of administrative governance have emerged. Private parties and nongovernmental organizations play an increased role in working with agencies to regulate. See generally Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1 (1997). New developments include agency-supervised regulatory negotiation among representatives from the industry, the public, and state and local governments to reach consensus on new agency regulations, known as "reg-neg." *Id.* at 33-34; see Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 *YALE J. ON REG.* 133 (1985); see also Stewart, *supra* note 370.

employers to refrain from practices that tend to disadvantage certain groups without litigating each such case, the EEOC could be playing a proactive role in pursuing an ideal of equal opportunity.

VI. CONCLUSION

In both the U.S. and Britain, developments in antidiscrimination law at the statutory level suggest that this body of law is evolving toward the promotion of equal opportunity in the pursuit of distributive justice. The U.S. move in this direction is evidenced by the statutory codification of the prohibition on disparate impact, imposing the burden of proving business necessity on employers, as well as the ADA's requirement that employers reasonably accommodate the disabled. In addition to having similar substantive provisions as these, British antidiscrimination statutes also impose positive duties on all public authorities to promote equality. The British statutes also delegate authority to agencies to require employers and public institutions to refrain from discriminatory practices, as well as issue Codes of Practice that have some legal force. Entrusting administrative agencies with these powers both reflects and facilitates the understanding that antidiscrimination law includes a public policy aspiring to achieve equality, beyond merely providing remedies for specific wrongfully imposed harms. By delegating rulemaking authority to the EEOC to enforce the employment provisions of the ADA, Congress has begun the move toward greater experimentation and increasing the role of the agency in enforcing antidiscrimination law.

A principled argument in favor of the shift toward regulatory approaches to discrimination and inequality is that antidiscrimination law embodies principles of distributive justice, not only principles of corrective justice. Properly understood, this body of law imposes duties on all persons to eradicate unjust group-based inequalities, not just those that are specifically caused by identifiable acts of wrongdoing. Those who are in a special position to eradicate inequality in employment, namely employers, can and should be required to fulfill this duty by being regulated by standards of conduct applicable to all employers. Once the duties of employers in antidiscrimination law are understood through the lens of distributive justice, it is up to the administrative state to regulate and eradicate group-based inequalities.

