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Two-Party Disparate Impacts in Employment Discrimination Law

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ABSTRACT

An employer who adopts a facially neutral employment practice that disqualifies a larger proportion of protected class applicants than others is liable under a disparate impact theory. Defendants can escape liability if they show that the practice is justified by business necessity. But demonstrating business necessity requires costly validation studies that themselves impose a significant burden on defendants. This essay argues that in a limited circumstance, liability should turn on the explanation for the disparity, in a manner not recognized by current law: an employer should have a defense against disparate impact liability if he can show that protected-class applicants failed to make reasonable efforts to train or prepare for a job-related test. I demonstrate that a lack of effort defense is consistent with the text of Title VII and the case law (which has largely ignored this issue). I then argue that my proposal is supported by both the theoretical rationales for disparate impact and a consequentialist analysis.
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Introduction

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

Left unexamined by *Griggs*, and by virtually all subsequent disparate impact cases, was the question of why the disparity in pass rates occurred in the first instance. In the context of *Griggs*, the neglect of this question was understandable. The reason why black applicants in 1965 North Carolina had lower high school graduation rates and scored lower on the “intelligence” test than whites was obvious: it was the legacy of decades of Jim Crow (including segregated and inferior education) and hundreds of years of slavery and discrimination. Much of this legacy remains with us today, and plays a continuing role in explaining inter-group disparities.

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1 401 U.S. 424 (1971).
2 Id. at 430.
3 The issue of two-party causation in disparate impact law is as absent from the scholarly literature as it is from the case law. For example, Richard Primus’ persuasive recent analysis of the constitutional basis for disparate impact does not consider this issue. See, Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003). Ramona L. Pactzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C.L. REV. 325 (1996) focus on cases where there are no measured disparities if race and gender are taken into account simultaneously, but disparities do emerge if each factor is considered separately (or vice-versa). They conclude that “[o]rdinary disparate impact cases view causation with blinders, not because the cases arise in a single-cause context, but because they ignore causes external to the employer that contribute to the impact. The blinders necessarily mean that employers may be held legally responsible for impacts that are ‘caused’ in substantial part by factors external to the employers.” Id. at 355 (emphasis added). They do not, however, consider cases where some or all of the multiple causal factors are internal to the plaintiff/employees; it is precisely these cases that are the focus of this essay. Some of these ideas that follow were explored in a note written under my supervision. See, Laya Sleiman, *Note, A Duty to Make Reasonable Efforts and a Defense of the Disparate Impact Doctrine in Employment Discrimination*, 72 FORDHAM L. REV. 2677 (2004).
But the problem of disparate impact liability has come to take on an unappreciated dimension—some disparities are caused, in part, by applicants’ failures to make reasonable efforts to train for a test or to prepare for some other job requirement. Thus, imagine a running test that has a higher pass rate for men than for women; but suppose that among women who made a modest effort to train for the test, the pass rate would be virtually the same as that for men. The question then arises: Should the women who did not train be included in the calculation of the test’s disparate impact? Should employers be absolved of responsibility for the failure of non-trainers?

These questions motivate this essay, but before addressing them, an important preliminary issue must be resolved: Does it constitute “Blaming the Victim” to attribute some responsibility for disparities in pass rates by race or gender to the applicants themselves? I believe the answer is “No,” for three reasons. First, I am not suggesting that all, or even most, disparities are caused by the victims of such disparities. In many instances, there will be little or nothing that plaintiffs can do to overcome the effects of an employment requirement. My analysis is limited only to those cases where there is something that plaintiffs could have done to improve their chances of passing a test or meeting some other requirement. Second, I will argue that applicants should only be required to make such efforts to prepare or train for a test as are both feasible and reasonable. Those who fail to meet this standard are plausibly seen as inflicting injuries on themselves: but for their own actions, which could have been different, a more successful outcome would have been realized. When the “victim” and the “injurer” are actually the same person, one is free to characterize the explanation for the plaintiff’s lack of success as “Blaming the Injurer,” rather than “Blaming the Victim.” Finally, as Amy Wax has persuasively argued, there are cases where the injured party is “the only one who

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4 This is not a hypothetical example. See the discussion of Lanning v. SEPTA, infra.
5 The phrase was originated by the sociologist William Ryan (see, BLAMING THE VICTIM (2nd ed. 1976)) to describe “an ideology . . . [that] attributes defect and inadequacy to the malignant nature of . . . [factors] located within the victim, inside his skin.” Id. at 7 (emph. in original).
can wholly undo the harm he has suffered from others’ wrongful actions. The victim must restore himself to the rightful position.”

Thus, even when an injury is not the victim’s fault, we might still recognize that the only (or the best) source of remedy is the victim himself. There are therefore some cases in which we are justified in absolving the victim of responsibility (blame) for the injury, but also justified in insisting that the victim take steps to improve his own condition. Society may still be entitled to ask potential plaintiffs to make reasonable efforts to undertake training (even if the injuries they suffered are not “their fault”) if no better solution is available.

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

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

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

I. An Overview of the Problem

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

A. The Lanning Problem

*Lanning v. SEPTA*7 concerned the use of a timed running test as a criterion for hiring transit police officers. The cutoff score was set at 12 minutes for a 1.5 mile run, in order to screen out those with an aerobic capacity of less than 42.5 mL/kg/min.8 Twelve percent of the female applicants completed the run in under the threshold time, while sixty percent of male applicants did, so the test concededly had a disparate impact by gender. A divided panel of the Third Circuit concluded that the 12.5 minute cutoff score might have been set at a level above “the minimum qualifications necessary for successful performance of the job in question,” which was what it concluded the disparate impact standard required.9

Apart from the holding, what is striking about *Lanning* is the fact—ignored by the majority, but stressed by the dissent—that

> the named plaintiffs and some of the class members who failed demonstrated . . . a ‘cavalier’ attitude towards the running test. Videotapes showed some of these applicants walking at the halfway point, either because they were indifferent or unable to run for

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7 181 F.3d 478 (3rd Cir. 1999). As noted below, after remand, the 3rd Circuit reversed course and upheld the district court’s decision to permit the use of the challenged test. See, *Lanning v. SEPTA*, 308 F.3d 286 (3d Cir. 2002) (hereinafter, *Lanning II*) (upholding use of cutoff score that disqualified more women than men as job related and consistent with business necessity).

8 The defendant’s expert testified that aerobic capacity was an important attribute of the police officer positions at issue, and that the running test measured this capacity. But it was never established that a capacity of 42.5 mL was necessary to do the job.

9 Id. at 481. The case was then remanded for further hearing on whether the cutoff score appropriately measured the minimum qualification for the job.
even that short a period of time. Thus, although there was a significant disparity between
the pass-fail rates of male and female applicants, the extent of the difference appears to
have been exaggerated . . . by the approach taken by some of the applicants. A
physiologist, Dr. Lynda Ransdell, testified that 40% of all women starting at an aerobic
capacity of 35 to 37 mL can train to pass the running test in eight weeks, and that 10% of
all women between 20 and 29 years of age can do so without any training. She concluded
that the average sedentary woman can achieve SEPTA’s performance standard with only
moderate training. SEPTA sent applicants a letter outlining recommended training
techniques that Dr. Ransdell testified were adequate.10

Assuming the dissent’s characterization of the facts is accurate, Lanning raises the possibility
that an identified disparate impact can have two causes.11 On one hand, the female applicants for
the SEPTA jobs may have been slower in the running test than their male counterparts, on
average.12 On the other hand, the failure of the female applicants to train or prepare for the running
test—or perhaps to run hard during the exam itself—also apparently explained at least some of the
gender disparity in test results.13

10 Lanning, supra n. 7 at 495 (Weiss, J., dissenting). An interesting question not raised in any of
the opinions is whether the disparate impact might have been eliminated if the employer had
required training itself, as well as a passing score on the running test, as a condition of employment.
If training were as effective as Judge Weiss believed, mandatory training might have eliminated the
gender disparity in pass rates, especially since training would have helped the women applicants
more than it did the men.

11 In a companion essay, I take up the problem of two-party causality in disparate treatment
cases. See, Siegelman Two-Party Causality in Employment Discrimination Law: How Should We Protect the
Non-Exemplary Worker? (Univ. of Conn. Law School, 2005). In my view, the two problems are
strikingly different: while less-than-exemplary disparate treatment plaintiffs deserve the full
protection of anti-discrimination law, the same does not apply for disparate impact plaintiffs.

12 Nothing turns on whether average differences in running speed between men and women are “innate” or “cultural,” as long as the dissent is correct that the differences can be overcome by training.

13 An important question—discussed infra, section V.C, is whether the employer can defend
against a disparate impact claim by arguing that there would be no aggregate male/female disparity at
all if sufficient numbers of women adequately trained for the test; or would the defense be limited to
challenging individual plaintiffs who did not exert sufficient effort to train for or take the test?

Given the difference in pass rates by gender (12 percent vs 60 percent), it seems unlikely that
more training by women would have completely eliminated the disparity in Lanning. But note that
the EEOC’s 80 percent standard requires only that the female pass rate be at least 80 percent of the
male rate (here, 48 percent, or 0.8(60 percent) to avoid a disparate impact. While training might
conceivably have increased the female pass rate four-fold to 48 percent, this still seems unlikely.
Suppose an employer confronts a situation such as the one SEPTA found itself in. Why not simply demonstrate that the test in question was “job related and consistent with business necessity,” as required by Title VII? In fact, this is exactly what the 3rd Circuit required the employer to do in Lanning, but the problem is that this can be an extremely onerous burden. Although nobody really knows the cost of conducting a sufficiently rigorous validation study, the anecdotal evidence suggests that it is in the range of several hundred thousand dollars.\(^{14}\) That amounts to a significant cost even for large employers, and will likely be prohibitive for smaller ones.

B. Generalizing the Example

It is worth stressing that not all disparate impact cases involve two-sided causation issues. For example, a height requirement is likely to have a disparate impact by gender that—assuming height is unalterable—can not be overcome by any amount of “effort” by female plaintiffs. Tests that can not be studied or trained for (personality tests, for instance) are also immune from these problems, precisely because there is nothing that plaintiff/applicants can do that would change either their own results or the overall disparity. But the prospect that plaintiffs have contributed something to a measured disparity in test outcomes is potentially at issue in many situations.

The magnitude of the lack of effort problem in disparate impact cases is thus an important empirical question. Unfortunately, it is one without a compelling answer. At a theoretical level, Stephen Coate and Glen Loury have developed a model of what is essentially a moral hazard\(^ {15}\) in


\(^{15}\) Moral hazard may be loosely defined as a change in behavior brought about by the presence of insurance. See infra n. 63 for a further discussion of this term.
antidiscrimination law, which suggests that there will be some circumstances in which “too much” protection can lead protected class workers to make curtail their own investments in human capital. As they put it, “if the policy forces firms to ‘patronize’ some workers by setting lower standards for them, then the workers may be persuaded that they can get desired jobs without making costly investments in skills.”

But they offer no empirical evidence on the importance of this kind of feedback from civil rights protection to lower skill investment by protected groups, and there are reasons to doubt that their characterization of the disincentives is applicable to disparate impact doctrine. Although my discussion of the case law in the next section offers several illustrations of disparate impact plaintiffs who failed to train for various tests, such anecdotes obviously do not rise to the level of serious evidence. The relative scarcity of such cases may indicate that the problem is not widespread; but it could just as well suggest that no one has yet recognized its existence.

Regardless of its empirical importance, the two-party causality problem in disparate impact law still calls for our attention as a logical and moral matter. Normatively, my argument is that the law should treat the joint causation problem in disparate impact cases very differently from the disparate treatment setting. We do—and should—afford disparate treatment protection to those plaintiffs whose behavior is imperfect or non-exemplary. But the case for protecting disparate impact plaintiffs from

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17 See infra, section IV.A.1. In a recent empirical paper, Pedro Carneiro, et al demonstrate that inter-race gaps in the acquisition of pre-market skills are largely uninfluenced by market outcomes of any kind (including the existence of labor market discrimination and presumably—although they do not explicitly say so—anti-discrimination laws). Pedro Carneiro, James J. Heckman and Dimitriy V. Masterov, *Labor Market Discrimination and Racial Differences in Premarket Factors*, 48 J. L. & Econ. 1 (2005). Note, however, that both Coate & Loury and Carneiro, et al are interested in the long term relationship between labor market conditions and pre-market investment in skill-acquisition (for example, by youth who are still in school). Thus, both papers are of questionable relevance to the short term decision (by someone who is already in the labor market) to train or study for a particular test.
18 The paradigmatic case is a black worker who is fired for stealing, but who demonstrates that whites who stole were not fired. While stealing is clearly a fireable offense if it is punished uniformly,
the consequences of their own non-exemplary behavior is much weaker. Instead, I argue that the law should give employers an affirmative defense to a disparate impact claim if they can show that plaintiffs failed to make reasonable efforts (in a sense defined below).

II. Fitting a Duty to Train Into The Law of Disparate Impact

In this section, I make three arguments. First, I show how the mechanics of a duty to train requirement can be integrated into the broad contours of the existing defense to disparate impact liability. Next, I demonstrate why my proposal is consistent with the text of Title VII’s provisions governing disparate impact. In the final section, I review the case law—such as it is—that speaks to whether defendants have such a defense already.

A. The Statutory Bases for a Reasonable Efforts Defense

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

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

Section 703(k) of Title VII was added by the 1991 Civil Rights Act, and embodies Congressional recognition of both the existence of disparate impact liability and the defense an employer has to a plaintiff’s prima facie case of disparate impact. The section makes clear that once a plaintiff establishes that an employer uses “a particular employment practice that causes a disparate racial disparities in the treatment of stealing do and should give rise to liability for discrimination. I discuss these issues at length elsewhere. See, Siegelman, supra n. 11.

I’m especially grateful to Jon Bauer, both for demonstrating the need for sections A and B and for suggesting how to handle the issues discussed here.
impact,”20 the employer can escape liability if she can “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”21 Leaving aside the difficult questions of what these phrases actually mean, what role does this leave for my suggested failure-to-train defense? There are two equally unsatisfactory possibilities.

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

A second possibility is that the reasonable efforts defense simply adds nothing at all to existing law—if defendants always have to prove business necessity and job relatedness, then it doesn’t matter whether plaintiffs trained for the test or not, since the test would have to be justified by business necessity in either case.

Neither prospect is appealing. The first allows employers scope to exploit the lack of effort defense by erecting barriers to exclude protected class members when the latter have to undertake more arduous training than others. The second eliminates any requirement that applicants make

20§ 703(k)(A)(i).
reasonable efforts, since everything turns on the nature of the test itself. In essence, this eliminates the possibility of two-party disparities, precluding any recognition of the role plaintiffs might play producing the uneven outcome. As I argue at length in below, this is not a good outcome on either jurisprudential or consequentialist grounds.

A better solution is to make a lack of effort defense a substitute only for the business necessity prong of the employer’s defense, while maintaining the requirement that employers demonstrate job-relatedness. In other words, once a plaintiff had made a prima facie case of disparate impact, the employer would always have to establish that the test was job related. Having done so, an employer would then face two alternatives. First, she could show that the test was justified by business necessity. Alternatively, after proving job relatedness, the employer might show that plaintiffs failed to make reasonable efforts to train for the test. This would obviate the need for demonstrating business necessity. For example, in *Lanning*, SEPTA could then have prevailed under this standard without having to show that the cutoff score actually measured the minimum acceptable level of aerobic performance, if it could demonstrate that many women in fact failed to make reasonable efforts to prepare for the test.

This proposal maintains the requirement that tests with disparate impact be job-related. Loosely speaking, this means that a test must be a reasonably accurate predictor of performance on an important aspect of the job. Preserving the requirement thus prevents employers from choosing a test merely to screen out workers with high training costs. On the other hand, the proposal serves the interests of employers—and, I argue in Sections III and IV, of society as a whole—by

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21 *Id.*

22 In *Lanning*, for example, SEPTA was ultimately able to satisfy both the trial court and the 3rd Circuit that the 12 minute cutoff time for the running test was “necessary” because it measured the minimum aerobic capacity necessary to be an acceptable police officer.

23 For a summary of the law regarding the job-relatedness requirement, see Lindemann and Grossman.
recognizing that some disparate results are due, in part, to the behavior of plaintiffs. When they can establish that plaintiffs failed to undertake reasonable training efforts, employers should be excused from having to argue for the “necessity” of the selection mechanism, for reasons I detail below.

2. Statutory Bases for a Failure to Train Defense

Title VII contains three sections—§§ 703(k)(1)(A)(i), 703(k)(1)(B)(ii), and 706(g)—that can serve to ground a failure to train defense. While it is difficult to read any of these sections as compelling this defense, they do show that it is compatible with Title VII’s text; and in one instance, a failure to train defense may actually help to explain a perplexing redundancy in the statutory text.

a. § 703(k)(1)(A)(i) and Causation

As noted above, § 703(k) was added by the 1991 Civil Rights Act to codify Congress’ understanding of disparate impact liability, as well as to place limits on its scope. The text states that an “unlawful practice based on disparate impact” occurs when “a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact . . .” (emph. added). Without wishing to get tied up in metaphysical knots, it is apparent that the use of the word “causes” (instead of some more neutral language such as “has” or “gives rise to” or “generates”) offers some scope for a failure-to-train defense. The argument is straightforward: the use of “causes” opens up the possibility that jointly-caused events may not result in liability for the employer. In particular, when plaintiffs fail to train, the selection device chosen by the employer is not the sole cause of the disparate impact. The disparity is as much the result of plaintiffs’ lack of effort as it is of the test itself.

The obvious—and correct—response is that Congress probably did not understand “causes a disparate impact” to mean “causes a disparate impact all by itself.” In fact, it is unlikely that any selection procedure could cause a disparate impact all by itself; so, taken literally, this reading would eliminate disparate impact liability altogether. (In Griggs, for example, the employer’s use of a high
school graduation requirement would not have caused a disparate impact by race were it not for background social conditions that restricted the availability of secondary education to African-American applicants.)

My point is only that the use of “causes,” rather than an alternative verb, offers some scope for limiting liability when the causation is clearly divided between defendants and plaintiffs. This case might be distinguished from the case where causation is divided between employers and “broader social factors.” My argument is merely that the statutory language puts these ideas “in play;” I don’t mean to suggest that my result is required by the text.

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

Section (B)(ii) is somewhat puzzling. It reads:

If the respondent demonstrates that a specific employment practice does not cause a disparate impact, the respondent shall not have to be required to demonstrate that such a practice is required by business necessity.

Presumably, this section was meant to cover situations where there is a dispute about what constitutes the relevant baseline against which disparities are to be measured. For example, suppose a restaurant uses word-of-mouth to hire its waitstaff, and this produces a labor force that is 35 percent female. Plaintiffs claim that this practice has a disparate impact, because the relevant labor market is 50 percent female. However, the defendant is able to convince the court that the relevant labor market (say, persons with more than 5 years experience waiting tables) is actually only 30 percent female, so there is no disparate impact against women. In this instance, Section (B)(ii) would forestall the employer’s need to justify the word-of-mouth hiring by demonstrating its consistency with business necessity.

But that poses a puzzle—if there is no disparate impact in the first place, why should an employer ever have to justify a practice’s consistency with business necessity? There would seem to

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24 Paetzold and Willborn describe this a case of “concurrence,” meaning that two factors combine to create the disparity in results.
be nothing to justify without a disparate impact in the first instance. Moreover, §703(B)(ii) is as interesting for what it omits as for what it redundantly seems to include. Missing entirely is any language about the job-relatedness requirement, which seems to suggest that employers may have to show job relatedness even when there isn’t any cognizable disparate impact at all.

The proposed failure-to-train defense not only comports with the language of §703(B)(ii), it also offers a partial resolution of the over- and under-inclusiveness problems just described. Suppose that the plaintiff asserts that there is a cognizable disparate impact, and the employer—instead of refuting the existence of a disparity—argues that the reason for the disparity is that plaintiffs failed to train for the test. If such a defense were recognized, the employer would then not need to show the business necessity of the proposed test. But the omission of any “job-relatedness” language from §703(B)(ii) means that the employer would still have to demonstrate the test’s job-relatedness. (As explained earlier, this has the effect of preventing an employer from using a bogus test to disqualify protected class applicants.) The possibility that a test could have a disparate impact that is excused by applicants’ failure to train makes sense of what would otherwise be a puzzling requirement that an employer would have to demonstrate job relatedness even when there was no disparate impact in the first instance. What the statute might be referring to is the case in which there is a disparity, but its existence is justified by something other than the business necessity of the practice at issue. (Of course, it might just have been bad drafting.)

c. § 706(g) and the Duty to Mitigate

Section 706(g)(1) lays out the basic remedies available under Title VII.26 Embodying a principle

25 Note again the reference to a “specific employment practice [that] does not cause the disparate impact.”

26 The language of Section 706(g) refers explicitly to respondents who have “intentionally engage[d] in . . . an unlawful employment practice,” which on first reading might seem to exclude disparate impact claims that are the focus of our concern. However, this section has been read to authorize damages in cases of disparate impact liability, despite the language referring to “intent.” See, e.g., Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972) (finding that in the
widely recognized in other remedial settings, the section imposes an avoidability (or duty to mitigate) requirement on prevailing plaintiffs, reducing back pay damages by “amounts earnable with reasonable diligence by the person or persons discriminated against.”

The duty to mitigate is usually applied after the defendant’s wrongful actions have harmed the plaintiff. But it is not too much of a stretch to see plaintiffs’ failure to train for a test as a kind of ex ante failure to mitigate the harm that results from the test itself. So understood, §706(g) might be read to eliminate damages for a plaintiff who could have had the job if she had trained for the test, but failed to do so. 27 Title VII’s codification of a duty to mitigate thus implicitly recognizes the role that plaintiffs may play in creating (or reducing) a defendant’s backpay liability, and it is precisely this two-party or interactional harm that is at the center of my argument.

B. The Case Law

There is an extensive body of case law defining what constitutes a legally cognizable disparity. 28 Selection procedures that are found to have a disparate impact can still be maintained, however, if

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context of 706(g), “intentional” refers not to the discrimination itself, but to the act of choosing a particular employment practice that has a disparate impact. I am grateful to John Donohue and George Rutherglen for this reference.

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

28 See, e.g., EEOC Guidelines for Personnel Selection, 29 CFR 1607.4(D) (1987), which state that

[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

Courts are split on whether a showing of statistical significance is required, in addition to a ratio of selection rates below 80 percent. There are also disagreements about whether statistical significance is enough to sustain liability, even when the ratio of selection rates is above 80 percent. See, e.g., Isabel v. City of Memphis, 404 F.3d 404 (6th Cir. 2005) (finding defendants liability for a statistically
the employer can demonstrate their “business necessity” and “job-relatedness,” both of which are
terms of art with extensive precedents.29

Largely missing from the case law, however, is any discussion of whether a disparity in pass
rates by race or sex is excused when plaintiffs’ behavior is partially—or even wholly—responsible
for the observed disparity. A careful search of the disparate impact decisions reveals only a very few
examples in which courts have taken any notice at all of plaintiffs’ behavior, let alone suggesting
whether such behavior could serve as defense for an employer. Even in Lanning I, the majority never
acknowledged the dissent’s observations about the lack of training or effort by some of the
plaintiffs. Hence, it is unclear whether that case affirmatively held that lack of training or effort by
plaintiffs was not a defense in a disparate impact claim, or merely suggests this conclusion by
negative implication.30 In this section, I describe and analyze what seem to be the relevant
precedents on this issue.

1. Lack of Effort May Count Against a Plaintiff

Some courts do seem to suggest—albeit obliquely—that plaintiffs who don’t try hard enough to
pass a test can not then pursue a disparate impact claim. For example, In re Scott31 involved a 34 year
old male state trooper who, like the Lanning plaintiffs, complained about a timed running test. The
Vermont State Police required males between 30 and 39 years of age to run 1.5 miles in less than
12:51 minutes in order to be retained on the force. Scott failed this test on four separate occasions,
never running faster than 14:29 minutes. Moreover, he failed to “take advantage of his employer's

29 For an analytic survey of the case law, see Barbara Lindemann and Paul Grossman,
30 The cutoff score was ultimately upheld on rehearing (see Lanning II, supra n. 7), and the final
opinion does seem to give some weight to the fact that some of the plaintiffs failed to train. See infra,
TAN 36.
offers to train on work time, . . . [refused] assistance in formulating an individual exercise program,”
and apparently did not train at all.32 Although he was chided by the court for these failures, Scott’s
lack of training was in the end irrelevant to the Vermont Supreme Court’s holding that he had not
made out a prima facie case of disparate impact.33

Berkman v. New York34 involved a series of physical exams for firefighters. The defendant
“obtained foundation funding for a special training program for women to prepare them for the test.
Most of the women who participated actively in the training program passed the physical test . . . .
The pass rates on the test were: men, 95.42 percent; women, 46.67 percent.”35 The court ultimately
rejected the plaintiff’s claim that the test had a disparate impact. But although it noted that the
defendant offered training for the test, that the plaintiff apparently refused this training, and that the
training was “effective,” its reasoning did not explicitly turn on any of these factors.36

In Gilbert v. Little Rock,37 Grady Anthony alleged that the Little Rock Police Department’s test
for promotion to lieutenant had a disparate impact. The court found that

[e]ighty items from the 1980 examination (on which Anthony scored 100) for which he had
studied were used in the 1982 test, word for word. Scores for these items totaled 80 out of
the possible 100 points. Grady Anthony missed 24 of these identical items in 1982 that he

32 Id. at 291.
33 The court concluded that
male troopers did not have a higher percentage of test failures than women troopers
[so there was no disparate impact]. Moreover, [Scott’s] claim that he was
discriminated against because female troopers and older troopers were held to a
‘lesser standard’ suffers from a fatal factual flaw: [his] times for the 1.5 mile test were
insufficient even if he had received the ‘benefit’ of being assessed either by the
standard required of women in his age group or for older troopers. Id. at 295.
34 812 F.2d 52 (2d Cir., 1987).
35 Id. at 55.
36 Instead, Judge Newman’s rationale for upholding the test was that it measured strength,
which was an important and legitimate requirement for firefighting, even if other attributes such as
stamina might also be important and were not well measured. Id at 60. Judge Newman also pointed
out that a greater emphasis on stamina would not have made much, if any, difference to the gender
disparity. Id.
had gotten right in 1980. In spite of his contentions, the test does not improperly impact upon blacks, but instead the low test score resulted from lack of study (sic).\textsuperscript{38}

Although the court in \textit{Gilbert} opined that the plaintiff’s low test score was the result of his own failings, the disparate impact issue was never squarely addressed, so this case does not speak to the question of whether a failure to study limits a plaintiff’s disparate impact claim.\textsuperscript{39}

Slightly more on point is \textit{Perry v. Orange County}, in which the plaintiffs originally alleged that a test for promotion to lieutenant in the fire department had a disparate impact by race.\textsuperscript{40} Commenting on one of the plaintiffs, the magistrate judge pointed out that

> [the trial court] also noted that [plaintiff’s expert] Dr. Hoffman did not ‘take into account the potential impact of failure to study.’ Dr. Hoffman should have investigated plaintiffs’ test preparation and other non-discriminatory factors that affected test scores. Plaintiff McLean underscores these failings and plaintiffs’ unreasonable pursuit of the disparate impact claim (sic). McLean should have been excluded from the disparate impact analysis because he did not attend an Orientation Workshop, did not request the materials from the Orientation Workshop, and did not purchase all of the study materials. As McLean acknowledged, he was not fully prepared, but plaintiffs charged ahead despite the obvious problems with McLean’s case.\textsuperscript{41}

This comes close to suggesting that an employer might have an affirmative defense if a plaintiff failed to study for an exam; but that issue was not squarely before the court, and the justification for this conclusion is conspicuously absent.

\textsuperscript{38} \textit{Id.} at 1253. Anthony claimed that his lack of studying was attributable to the Department, which subjected him to stress, failed to give him sufficient notice of the test date and contents, and allowed him insufficient study time. \textit{Id.} at 1252. The court rejected these claims out of hand.

\textsuperscript{39} The opinion does not make it clear whether Anthony was even raising a disparate impact claim in the first instance, although the court’s description makes it seem as if the allegation is one of disparate treatment.

\textsuperscript{40} 341 F. Supp. 2d 1197 (2004). Given the unusual procedural posture of the litigation, however, the opinion does not do much to clarify whether the court thought plaintiffs had any duty to prepare or train for the exam. The case was actually before the court on the defendant’s motion to recover its fees after the plaintiffs lost on summary judgment and their appeal was rejected by the 11th Circuit. \textit{Id} at 1202. (Given that the court required plaintiffs to pay some of the defendant’s fees, this was presumably an unusually weak case, requiring frivolousness or bad faith by the plaintiffs in bringing the litigation.)

\textsuperscript{41} \textit{Id} at 1212-13.
More recently, the Fourth Circuit’s decision in *Anderson v. Westinghouse*\(^4^2\) shows that some courts do sometimes ask whether factors other than race can explain a statistical disparity. Although not specifically about plaintiffs’ lack of preparation, *Anderson* involved several black workers who brought a variety of hiring and promotion claims against a large employer. Many of the plaintiffs asserted that the employer’s criteria for promotion had a disparate impact by race, although there were numerous disparate treatment claims as well. Plaintiffs produced evidence that the percentage of black candidates who succeeded at each of three stages in a particular promotion process was lower than statistically expected, and sought to use this evidence to support a disparate impact claim. The court concluded, however, that

> [t]his evidence does not show that the *reason* black applicants failed to proceed at the interview selection stage and position selection stage was their race. Factors such as presentation in the interview, answers to interview questions, demeanor, and ability demonstrated in the interview of course entered into the judgment of the members of the panel as to the candidate who received a position that was being filled. And, at the interview selection stage, for example, education and experience are two factors that [plaintiff’s statistical expert’s] analysis fails to quantify.\(^4^3\)

The opinion seems to require plaintiffs to demonstrate that the racial disparity they complain about remains even after controlling for “other factors” such as demeanor, presentation, and so on. Such “other factors” would surely have to include a lack of preparation or effort by the plaintiff/applicants, although the *Anderson* court’s approach would seem to encompass many other variables in addition to effort or training.\(^4^4\)


\(^{4^3}\) *Id.* at 266 (emphasis added). The dissent by Judge Gregory takes issue with this conclusion.

\(^{4^4}\) Indeed, *Anderson* goes some way towards collapsing the distinction between disparate impact and disparate treatment analysis altogether. In the limit, if a racial disparity in pass rates only counts as evidence of a disparate impact when all other factors (besides race) have been considered and rejected, then we will have eliminated the distinction between disparate impact and pattern and practice theories of discrimination.

It seems clear that *Griggs* would have come out the other way if the Court had used the reasoning of *Anderson*. The *Griggs* plaintiffs failed to prove that “the reason” black applicants
Though not directly relevant to the issue of test-preparation, *Garcia v. Spun Steak Co.* does speak to the broader question of whether disparate impact plaintiffs are required to mitigate the harms of employment policies if they can easily do so. The case concerned a disparate impact challenge to an employer’s English-only work rule by several bilingual employees. In rejecting plaintiffs’ claims, the court observed that

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

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

The clearest recognition of the potential two-party or interactional nature of disparate impact harm comes from the re-hearing of *Lanning*, discussed earlier. The Third Circuit initially remanded the case for further hearing on the issue of whether SEPTA’s cutoff score (12 minutes for a 1.5 mile

disproportionately failed the IQ was their race. Perhaps “the reason” for the disparity was that the black test takers had fewer years of education, or a lower quality of schooling, than most of the white test takers.


46 Id. at 1487 (quoting *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980)). Plaintiffs occasionally prevail on disparate impact challenges to employer grooming or dress codes, but only when compliance with the rules is difficult for race- or gender-contingent reasons. See, e.g., *Bradley v. Pizzaco of Nebraska*, 7 F.3d 795 (8th Cir. 1993) (employer’s “no beards” policy had disparate impact on black males because of pseudofolliculitis barbae, a skin condition affecting African American men that makes shaving difficult, and was not justified by business necessity). More often, however, courts find that when plaintiffs can comply with prohibitions against long or braided hair at relatively low cost, such prohibitions do not constitute violations of Title VII. See, e.g., *Rogers v. American Airlines*, 527 F. Supp. 229, 232 (D.N.Y. 1981) (“[A]n all-braided hairstyle . . . is an ‘easily changed characteristic,’ and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer,” citing *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980)). Rejecting plaintiffs’ gender-based disparate impact challenge to their employer’s dress code, the court remarked in *Batson v. Powell*, 912 F. Supp. 565, 572 (D.D.C. 1996) that “Title VII protects classes defined by certain immutable traits identified by statute and

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run) measured “the minimum aerobic capacity necessary to perform successfully the job of a SEPTA transit police officer.” On remand, the district court concluded that the defendant had established that its cutoff score was appropriate under this standard, and on rehearing, a divided panel agreed that the cutoff score was appropriately set. At the very conclusion of its opinion—almost as an afterthought—the court noted that in addition to those women who could pass the test without training, nearly all the women who trained were able to pass after only a moderate amount of training. It is not, we think, unreasonable to expect that women—and men—who wish to become SEPTA transit officers, and are committed to dealing with issues of public safety on a day-to-day basis, would take this necessary step. Moreover, we do not consider it unreasonable for SEPTA to require applicants, who wish to train to meet the job requirements, to do so before applying in order to demonstrate their commitment to physical fitness.

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

2. Lack of Effort May Not Count Against a Plaintiff

At least one case suggests that there can be nothing resembling a “lack of effort” defense to a disparate impact claim, because no “other factors” may be considered apart from the raw racial disparity giving rise to the disparate impact claim. In Association of Mexican-American Educators v. California (AMAE), the court set out to assess the explanation for why, on average, minority plaintiffs had lower scores than whites on the state-mandated test used to screen public school teachers. In doing so, the court noted that preparation factors [appear to] play a strong role in a candidate's performance on the . . . [test], regardless of the candidate's race or ethnicity. Nevertheless, this analysis is entirely possessed by certain individuals. Traits or factors specifically within an individual’s control are not necessarily protected.”

47 Lanning II, supra n. 7 at 288.
48 Id. at 292.
irrelevant to the issue of adverse impact. *It does not matter why the disparate impact exists.* Defendants cannot escape liability by showing that the disparate impact is attributable to particular background factors. . . “The whole point of a disparate impact challenge is that a facially non-discriminatory employment or promotion device—in this case, an examination—has a discriminatory effect. It would be odd indeed if a defendant whose facially non-discriminatory examination which has a disparate impact could escape the obligation to validate the examination merely by pointing to some other facially non-discriminatory factor that correlates with the disparate impact.”50

A careful reading reveals that this case does not speak directly to the issues we have been considering, however, for two reasons.

First, it is clear from the context of the litigation that “preparation factors” meant the plaintiffs’ general level of education, experience, and English language proficiency, rather than their efforts to train or prepare specifically for the test at issue.51 There is an important—although not always clear—distinction between general background factors and individual-specific factors (such as lack of effort) that influence the probability of test-passing. I argue below that it is not appropriate to impose on plaintiffs the costs of compensating for general background factors that have the effect of disadvantaging their particular group.52 One might nevertheless wish for plaintiffs to make

50 *Id* at 1410 (emphasis added), quoting *Bouman v. Block*, 940 F.2d 1211, 1228 (9th Cir., 1990) (emphasis in original). Note the obvious contrast with *Anderson*, *supra* n. 31.
51 Imagine that we had data on each applicant’s test score and a variety of other attributes (race, age, education, prior experience, and so on). An analysis of disparate impact by race requires that we ignore all these other attributes, even if a regression equation that attempts to predict test scores would perform better—and would probably show a smaller race effect—if age, education, etc. were included in addition to race. See, e.g., Ian Ayres, *Three Tests for Measuring Unjustified Disparate Impacts in Organ Transplantation: the Problem of "Included-variable" Bias*, 48 Perspectives in Biology and Medicine S68 (2005). (For a dissenting view, however, see Robert Bornholz and James J. Heckman, *Measuring Disparate Impacts and Extending Disparate Impact Doctrine to Organ Transplantation*, NBER Working Paper 10946 (2004).) That’s because disparate impact—unlike disparate treatment—is generally about *effects*, not the *reasons* for those effects. A test that disqualifies a disproportionate number of minorities can still be subject to disparate impact liability, even if the “real” reason for the disparity is that minority teachers attended poorer quality schools, or are younger, or have less experience, than their white counterparts.
52 So, for example, although the plaintiffs in *Griggs* could have obtained a high school diploma, the cost of doing so—for African-Americans in North Carolina in the early 1960s—would have been prohibitively high. See *infra*, section V. for further discussion.
reasonable efforts to train for or to pass a particular test. (This might be true even if the reasonable efforts were in fact unsuccessful.53)

The second limitation of the *AMAE* analysis is more narrowly legal. Since the test at issue in *AMAE* had a disparate impact on minorities, the defendant assumed the burden of showing that in spite of this disparity, the test was job related and justified by business necessity. The Court in *AMAE* was concerned with whether this burden could be obviated by evidence that the disparity was based on other factors besides minority status *per se*. The Court held that a “benign” explanation for the disparity does not eliminate the requirement that the test be job related. But for our purposes, the important question is whether lack of training or effort can defeat liability for disparate impact, not whether such behavior can defeat the job-relatedness requirement.54 In other words, *AMAE* could be understood as holding that the defendant still had to show that the challenged test was job-related before being allowed to raise a defense that the plaintiffs did not undertake sufficient (reasonable) effort in preparation for the test or in taking the test itself.

To summarize, then, almost none of the existing case law squarely addresses the question of whether there is any defense to a disparate impact claim based on a plaintiff’s lack of effort or

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53 Thus, we might want the *Lanning* plaintiffs to show that they made reasonable efforts to pass the running test, even if those efforts would not have been successful, as was suggested in *Lanning II*.

54 *AMAE* was quoted approvingly and at length in another recent disparate impact case, *Gulino v. Bd. of Educ.*, 236 F. Supp. 2d 314 (D.N.Y., 2002) (Motley, J.), but the issue there was whether the plaintiffs’ expert’s “failure to consider variables other than race/ethnicity” in his expert report “rendered it of little or no probative worth.” *Id.* at 340. The court concluded that in a disparate impact claim, “there is no requirement that plaintiffs control for variables other than race and ethnicity in their statistical proof.” *Id.* at 341. So for example, if black applicants have fewer years of education than white applicants, “controlling” for years of education in a regression explaining test scores would probably make the inter-race difference look smaller, since some of the apparent race effect would be explained by differences in education by race. In a disparate impact context, however, the “real” reason for the disparity is irrelevant, since it is the mere existence of the disparity that generates liability.
preparation to meet a job requirement.55 A few cases suggest in *dicta* that individual disparate impact plaintiffs might be disqualified if they did not make reasonable efforts to prepare or train for a test, although no cases expressly reach this holding. A few others suggest that no explanatory factors (presumably including lack of preparation) can be used to excuse a disparity. But these cases do not deal with the effort or preparation issue directly, focusing instead on general background factors such as educational attainment.

In the end, it seems that we are free to speculate about what the law *should* be. There are two ways to answer this question. A doctrinal approach reasons from first principles, including statutory construction and legal analogies. I attempt an analysis of this kind in section III. A policy or consequentialist approach begins by imagining what real-world behaviors the law is seeking to encourage or discourage, and then reasons backward to the legal rules that best promote such behavior. I present an analysis in this spirit in section IV. Both approaches reach the same conclusion, albeit by different routes: we should not hold employers liable for an employment practice that has a disparate impact when plaintiff/applicants, at low cost to themselves, could have eliminated the harm they suffered, but failed to do so.

III. Doctrinal Foundations for Disparate Impact and the Two-Party Problem

To understand how disparate impact doctrine should address instances of two-party causality, it is helpful to begin by describing the goals or purposes that this doctrine is intended to serve—its rationale or motivation.56 Three theories have been proposed, and I discuss each in turn.

A. Proxy for Motive

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55 Lindemann & Grossman’s comprehensive treatise, *supra* n. 18, makes no mention of these issues at all.

56 For an imaginative recent analysis of the constitutional basis for disparate impact, see Richard Primus, *supra* n. 3. Primus’ analysis is not germane here, however, since this essay takes the constitutionality of disparate impact as given.
An employer’s intent or purpose in adopting a particular employment practice is usually difficult to discern, and even more difficult to prove. Especially in the immediate aftermath of Title VII, it was entirely reasonable to suspect that employers might seek to hide behind facially neutral job requirements such as a high school diploma or an IQ test in order to preserve segregation. Disparate impact might thus be thought of as a way to ferret-out discriminatory intent when an illicit motive is likely, but is impossible to demonstrate given the evidentiary burdens that Title VII plaintiffs face.57

“Judging intent by effects” is certainly a plausible justification for disparate impact liability, although it is problematic in several respects.58 In our context, at any rate, the covert motive theory seems largely consistent with a “lack of effort” defense to disparate impact claims. If some or all applicants demonstrably fail to make reasonable efforts to pass or train for a test, then some of the observed disparity in results should obviously be attributed to the applicants themselves, rather than reflecting any hidden bias on the part of the employer. In Lanning, for example, it is hard to square the employer’s offer of training, and its letter urging applicants to take advantage of the training program, with a covert desire to exclude women. Moreover, if the plaintiffs had made more effort to pass the test, the gender gap would presumably have been reduced, so the test would not have been as effective at eliminating women candidates, even if that were indeed its purpose. “Judging intent by

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

58 For one thing, it seems strongly at odds with the holding in Connecticut v. Teal, 457 U.S. 440 (1982). At issue in Teal was a test that disqualified a greater number of black than white applicants for promotion to supervisor in the state’s welfare eligibility department. (The white pass rate was 79.5 percent, while the black rate was 54.2 percent, for a relative rate of 68 percent.) The state attempted to compensate for the disparity at the testing stage by promoting 11 of the 26 black test passers (42 percent) and only 35 of the of the 206 white test passers (17 percent). Overall, black applicants had a 23 percent chance of getting the job, while white applicants had a 14 percent chance, a relative rate of 170 percent. Since the overall or “bottom-line” results strongly favored blacks, it is hard to argue that the state was using the test in a covert effort to exclude black applicants. Under any motive-based theory, therefore, it would seem that no disparate impact
effects” is simply less persuasive when there is a credible alternative reason for the disparity that has nothing to do with the employer’s intent. That is exactly the case when applicants fail to make reasonable efforts.\(^{59}\)

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

B. Group Rights/Distributive Justice

Another plausible justification for disparate impact liability is that it is a way to alter the allocation of jobs to achieve a more fair distribution of resources among groups. If African-Americans should have had X percent of the jobs at the Duke Power plant, and a test or high school graduation requirement left them with a smaller share than this, we can use disparate impact liability to throw out the screening mechanism so as to provide a fairer allocation.\(^{60}\)

Once again, this line of reasoning seems entirely compatible with—or even to support—a lack of effort defense. Unless one believes that groups have a \textit{per se} entitlement to some (proportionate?) liability should obtain—and yet the Court did find the defendant liable under a disparate impact theory.

\(^{59}\) Of course it’s possible that the employer knew that women would have a harder time passing the test without training (and that they wouldn’t train), and selected the test for the purpose of keeping women off the force. That seems implausible in the current situation given SEPTA’s extensive efforts to validate the test before it was adopted, the obvious relevance of a running test for police officers, and the long history of using such tests. Such suspicions obviously can not be completely ruled out based on the available record, however. The point is merely that if disparate impact is supposed to guard against suspected, but difficult-to-prove, intentional discrimination, these facts do not make out a strong case for its use.

\(^{60}\) On this view, disparate impact is a variant of affirmative action. See, e.g., Primus, supra n. at 524-25 (“disparate impact law is a cousin of affirmative action”), or David A. Strauss, \textit{The Myth of Color Blindness}, 1986 Sup. Ct. Rev. 99 (same). Quite apart from the obvious difficulties in determining what a fair allocation of jobs across groups would look like, \textit{Teal} again seems fatal to this justification. In the end, blacks wound up with 24 percent of the jobs, even though they comprised
share of the jobs at issue, a group’s effort would seem to be relevant in any determination of what its share ought to be. In fact, commonsense notions of fairness traditionally rest on a notion of treating equals equally. It is hard to see why effort should be completely irrelevant in determining what constitutes a fair outcome.

Of course, on a pure group rights or quota theory, effort would be irrelevant—each group would be entitled to a share of the jobs at issue purely by virtue of its share in the labor force or the population. But the cases are replete with fervent exhortations not to regard disparate impact as a form of covert hiring quotas. Moreover, almost no one argues that qualifications are irrelevant, and that the appropriate baseline against which disparities should be measured is a group’s share of the overall population. Rather, courts have consistently used the “qualified labor pool” as the relevant

only 16 percent of the applicant pool. It is hard to see how this is unfair to the plaintiffs, but the Court nevertheless found in their favor.

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

[T]oday's extension of [disparate impact liability] . . . into the context of subjective selection practices could increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment. . . . [However,] the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger [of quotas].


[n]othing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.


62 See EEOC v. Joe’s Stone Crabs, 220 F.3d 1263, 1271-72 (11th Cir. 2000) (rejecting district court’s characterization of the qualified labor pool as 31.9 percent female, and suggesting that the gender composition of the actual applicants—roughly 22 percent female—was the appropriate baseline against which disparities in hiring rates should be measured).
baseline in assessing disparities, which implies that the pure group rights theory can not be the explanation for disparate impact liability.

C. Remedying Past Discrimination

Another view of disparate impact is that it is a remedy not for present unfairness, but for past discriminatory practices that have present effects. The purpose of the doctrine, on this account, is to bar any employment criteria that translate previous discriminatory practices (such as unequal provision of public education, or segregated employment) into current labor market outcomes. Recall that the court in *Griggs* was particularly concerned to “remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”63 This “structural” perspective sees disparate impact liability as a way to sever the connection between past discrimination against a group and current unfavorable outcomes.64

This seems to be one of the stronger rationales for disparate impact liability, since it appeals to a widespread recognition that structural barriers (such as the difficulties some groups had in getting an education) play a major role in group disadvantage, and disallows practices that rely on such barriers, unless they can be shown to be necessary from the employer’s perspective.65

63 *Griggs*, *supra* n. 1 at 426.

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

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

Sovern, *LEGAL RESTRANTS ON RACIAL DISCRIMINATION* at 77 (1966).

65 But consider a police department’s height or weight requirements, which invariably have a disparate impact by gender. Acknowledging that many police departments discriminated against
The problem in the present context is that it is hard to see how asking job applicants to make reasonable efforts to train for a test constitutes the kind of pre-existing structural barrier that disparate impact liability would be designed to combat. A test isn’t really a barrier—and probably not an unfair barrier—if it can be passed with a reasonable amount of effort or training.

Granted, past disadvantage may make it more difficult for some groups to pass a test than for others. For example, African-Americans had less access than whites to high school education in the Jim Crow South, so requiring a high school diploma posed a severe barrier for blacks in 1965—a barrier one could not reasonably have asked them to overcome. And some barriers—such as a height requirement—are virtually impossible to overcome with any amount of effort. But the standard I propose below does not require superhuman or impossible efforts, only some version of reasonable effort (which is exactly what Judge Weiss concluded the plaintiffs failed to make in Lanning).66

There is nothing structural about asking victims of discrimination to make reasonable efforts to overcome the barriers they encounter. If a test has a disparate impact even on those who studied hard, or a timed run disqualifies a larger number of women than men, even when the women undertook reasonable preparation, then the structural analysis would seem to apply, and the practice might well be subject to liability under a disparate impact standard. But if applicants fail to make reasonable efforts, it is much harder to see why we should eliminate the test or requirement as a structural barrier to advancement. Indeed, the very idea of a “structural” barrier seems to imply an

women in the past, it is not clear that height or weight requirements constituted the structural barrier that excluded women. In fact, before Title VII, height or weight requirements weren’t deployed against women: departments simply refused to hire them outright. Rather, the requirements were directed against—and had the effect of eliminating—short or overweight (underweight?) men. Thus, banning these requirements doesn’t really seem to be severing a structural link. Of course, one could plausibly argue that the requirements themselves now constitute the sex discrimination—but then we’re back to talking about our first rationale—eliminating ongoing discrimination.

66 I discuss how to implement a more precise version of the reasonable effort standard below, section V.
obstacle that individuals can’t overcome, while it is precisely the (reasonably) overcomable obstacles that are the focus of a reasonable effort requirement.

In short, I conclude that the existing doctrinal or jurisprudential theories justifying disparate impact liability support—or are at least compatible with—a lack of effort defense. One might also (instead?) want to think about the problem in a more consequentialist framework, which I undertake in the next section.

IV. An Economic Analysis of Disparate Impact Liability with Two-Party Causation

Disparate impact doctrine does not fit comfortably into a standard economic model of tort liability, and I will not try to adapt that model to this context. Instead, I focus first on a positive description of the effects of disparate impact liability on applicant effort, and then on a crude normative or welfare analysis of these effects. Both parts are necessarily somewhat tentative, but I conclude that a reasonable efforts requirement is likely to be welfare-enhancing, albeit largely for somewhat non-standard reasons.

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

The only analogous effort to view employment discrimination through the lens of the economic theory of accident law is Amy Wax, Discrimination as Accident, 74 Ind. L.J. 1129 (1999). Wax focuses only on disparate treatment, but her analysis has some important points of similarity with what follows.

As Wax noted about disparate treatment, disparate impact is not clearly either a strict liability or a negligence standard. One might analogize disparate impact’s test-validation/job-relatedness requirement to a standard of care under a negligence rule. But the analogy breaks down because even careful validation does not immunize a test from liability for disparate impact if the use of the test is not justified by business necessity.

A further difference is that for tests with a disparate impact, the effects of applicant training are inherently interactive, and hence not analogous to the atomistic “care” decisions of individual injurers or victims in the standard accident model. Put another way, applicant Y’s preparation for the test creates a positive benefit for Y’s employer and a negative benefit for her fellow applicants. Additional training by Y increases the expected pass rate (for female applicants as a group), decreases the expected disparity vis-a-vis white males, and thus the lowers the employer’s expected liability. Simultaneously, Y’s training works to the detriment of the other female applicants, for two reasons. First, it means that they are likely to score worse than Y on the test; it also lowers the
1. Ex Ante Moral Hazard

Is it plausible that applicants might not train for a test because of the possibility that, should they fail, they could nonetheless recover something if the test is found to have a disparate impact? On this view, disparate impact liability could be seen as a kind of insurance policy that cushions the losses an applicant would suffer from failing the test. As such, it might also be expected to lower the incentives s/he would otherwise have to train or prepare, since failure is less costly with the possibility of disparate impact liability than without it.

While possible, such a moral hazard story does not seem especially plausible in the context of disparate impact liability. First, it is hard to believe that prevailing disparate impact plaintiffs are fully compensated by the awards they typically receive. This means that disparate impact liability inherently involves some kind of “uninsured loss”—the residual harm not covered by the defendant’s liability—which in turn gives victims at least some financial incentive to pass the test. More significantly, most applicants are probably unaware of the possibility of disparate impact liability before they take a test. And even those who know about the doctrine have to decide whether to prepare for the test without knowing whether it will in fact produce a disparity at all, let alone a disparity that a court will subsequently recognize as giving rise to liability.68

An applicant’s rational calculus about whether or not to train for a test might therefore look something like Figure 1. Suppose that an applicant who passes the test is guaranteed to get the job, which is worth 100. Training costs 10, and raises the probability of passing from 30% to 40.5%—hence, training has a positive expected value of 0.5 units (0.405×100 - 0.3×100 - 10). If there is no disparate impact liability, the applicant will thus find it in her interest to train for the test, since the likelihood of a female/male disparity that could provide other women with grounds for litigation if they failed the test.
expected value of doing so is 30.5 units, while the expected value of doing no training is only 30 units.

FIGURE 1 ABOUT HERE

Now introduce the possibility of disparate impact liability, as depicted in Figure 2: if the applicant fails, s/he can sue under a disparate impact theory, and if she does, there is a 10% chance that she will end up prevailing. (A prevailing plaintiff only recovers 80% of the benefits she would receive if she actually got the job, however, on the theory that awards are generally undercompensatory.) As constructed—and the decision tree is meant to be illustrative rather than realistic—the expected payoff from training for the test is now \(-10 + 0.405 \times 100 + 0.595 \times 0.1 \times 80 = 35.26\), while the expected payoff from not training is \(0.3 \times 100 + 0.7 \times 0.1 \times 80 = 35.6\). The possibility of disparate impact liability has raised the expected payoff from not-training by more than it raised the payoff from training, making not-training now the optimal strategy.\(^{69}\)

FIGURE 2 ABOUT HERE

But this scenario seems out of line with the stylized facts in \textit{Lanning}, and with what I take to be common sense. If we believe the expert quoted by Judge Weiss, women who trained for the running test would have raised their probability of passing from something like 12 percent—the actual pass rate for women in \textit{Lanning}—to 40 percent.\(^{70}\) For these parameters, the ex ante probability of a

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\(^{68}\) The defendant’s liability depends, among other things, on the care with which the test was validated, whether the test is necessary to the employer’s business, and on the intergroup disparity in pass rates. None of these could be known to applicants at the time they take the test.

\(^{69}\) I assume risk-neutrality, and abstract-away all of the strategic aspects of this problem. For example, the probability of disparate impact liability depends on the training decision of all other female applicants, since if all others train, there will be a much lower likelihood of a gender disparity in the first instance.

\(^{70}\) Of course, we don’t know much about the costs or benefits of training, so knowing about its efficacy alone is not very helpful. My parameters imply a 180 percent return to training. Judge Weiss did suggest that only eight weeks of “moderate training” would be sufficient for the average sedentary woman to be able to pass the test.
disparate impact victory would have to be at least 80 percent—a completely unrealistic figure—in order for the women applicants to find it no longer in their self-interest to undertake the training.

More generally, this highly speculative exercise leads me to conclude that when training is relatively costly and not very effective, disparate impact liability may lead some applicants to forego it. It is certainly possible to concoct stylized examples in which this effect occurs. But as long as training has a reasonably significant expected return, the existence of disparate impact liability is unlikely to make training unattractive, simply because the probability of prevailing in subsequent litigation (estimated before the applicant has to make a decision about whether or not to undertake training) is likely to be quite low. Focusing on ex ante moral hazard therefore seems unrealistic in this context because most applicants will typically decide to undertake training when training has substantial benefits and relatively low costs.
2. Ex Post Moral Hazard

What seems more plausible, however, is an analog of ex post moral hazard. In our context, ex post moral hazard means that applicants who haven’t prepared for the test, for whatever reason, nevertheless file suit alleging disparate impact. Eliminating the possibility of recovery for plaintiffs who don’t train for the test may strengthen incentives to undertake training, but its main effect would clearly be to eliminate the incentive to litigate among those who have not trained: if you know you can’t possibly prevail, you are unlikely to sue in the first instance.

Return to the example of Figure 2, but suppose that one half of the applicants have a cost of training of 9 and half have a cost of 11. The low-training-cost applicants will always find it worthwhile to train, while the high-training-cost applicants will never find it worthwhile. Suppose

71 It is well known that presence of insurance can lead to an increase in claims against the insurer along two separate margins–ex ante care and ex post “utilization” or claiming. Ex ante moral hazard is the tendency to slack off on care in the presence of insurance, leading to higher losses by the insured. In the health insurance context, this might (implausibly) mean eating a less healthy diet because of the attenuated downside risk that insurance provides. Ex post moral hazard is the tendency to increase claims for any given loss, as claiming becomes cheaper. Whatever diet one has chosen, ex post moral hazard occurs if one visits the doctor more often with insurance than without, for any given illness or injury. In the health insurance context, the major concern is obviously ex post, rather than ex ante, moral hazard. For a persuasive dissenting view on the importance of ex post of moral hazard in health care, however, see John A. Nyman, *The Economics of Moral Hazard Revisited*, 18 J. HEALTH ECON. 811 (1999) (arguing that the increase in benefit takeup in the presence of health insurance is a welfare-enhancing income effect, not welfare-reducing moral hazard).

72 Some of these will be persons who have unusually high training costs or low returns from getting the job. Others will be persons who mistakenly believe that they can pass without training, or think that the probability of a disparate impact victory is dramatically higher than it in fact is, or simply suffer from some lapse of judgment or weakness of will. See, e.g., Thomas C. Schelling, *The Intimate Contest for Self-Command*, 60 PUBLIC INTEREST 94 (1980).

73 A reasonable effort defense would remove any possibility that an applicant who chose not to train would be able to sue and prevail. I ignore any possible indirect effects from the introduction of a reasonable effort defense. For example, employers might be prompted to increase the net benefits of training, for example, by holding weekly exercise classes or coaching sessions. This might further encourage applicants to train, since it eliminates liability to any applicants who failed to train when doing so would have been reasonable.

74 There would be no incentive for the high-cost applicants to train even if the probability of prevailing on a disparate impact suit were zero, so there is no ex ante moral hazard here.
there are 1000 applicants (500 of each type) and consider the makeup of the pool of litigants. Of the 500 low-cost applicants, all will choose to train, and 59 percent of them (295) will fail the test and sue. Of the high-cost applicants, none will choose to train, and 70 percent (350) will fail the test and sue. A duty to train would eliminate this latter group of litigants (who constitute 54 percent of the total), even though the new rule would have no effect at all on anyone’s ex ante training decision.

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

B. A Normative Analysis

1. Offsetting Benefits and the Measure of Harm

Suppose driver X runs over pedestrian Y’s foot with his car. We could of course shift that loss back to the injurer, to an insurance company, to the public at large—or we could decide to leave it where it lies, with the injured victim. But no matter what we choose, there is one fewer foot in the world after the accident than before. This is significant because it means that the optimal level of accidents is the one that minimizes the sum of expected accident costs (whoever these end up falling on) and accident prevention costs (whoever these end up falling on). At least in the classic account, distribution doesn’t matter.

Failing a test does not constitute a social cost in this sense, however, because the social cost of failing is inherently distributional, and is therefore entirely separate from the harm experienced by the

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

76 There is a large and increasingly sophisticated sub-literature on the use of tort law as a distributional mechanism, especially in the presence of inefficiencies in the tax system. See, e.g., Ronen Avraham, David Fortus, and Kyle Logue, Revisiting The Role of Legal Rules and Tax Rules in Income Redistribution, 89 IOWA L. REV. 101 (2004); Chris William Sanchirico, Deconstructing the New
test-failer herself. Suppose Y is an applicant who fails a test, rather than a pedestrian with an injured foot. Y’s individual, private injury (the cost to her of failing to get the job) can not be a direct measure of the social loss, since her failure necessarily means that some other applicant Z will get the job instead. At least as a first approximation, the gain to Z will offset the loss to Y, leaving no net effect at all.

This does not imply that there are no social costs to disparities in pass rates by race or sex. Suppose that Y is female and Z is male. For a variety of reasons discussed earlier, society may have a stake in Y’s getting the job rather than Z. The point is only that society’s interest in Y’s getting the job bears no obvious relationship to Y’s private interest—it could be larger or smaller than Y’s stake.

This means, however, that any normative analysis in this context is extremely tricky. Suppose, for example, that either Y or Z would gain $10 if they get the job, but that society attaches a value of $2 to Y’s getting the position rather than Z. It would seem to follow that Y (and Z) have an excessive incentive to invest in obtaining the position, since both will trade off the private benefits ($10) against the private costs of training for the test. If both Y and Z invest $9 to secure the position, which Y ultimately gets, the winner will have $1 of private surplus, the loser will have a $9 private loss, but society will realize a net loss of $6 (2 + 1 - 9). Alternatively, suppose that society valued Y’s getting the job at 10, while Y and Z valued it at 2 each. If Y and Z each invest 1 each to secure the position, which Y ultimately gets, we have a net welfare gain of 10 (= 10 + 1 - 1). Everything depends on the relative size of private and social gains from allocating the position. Moreover, training is likely to

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77 This is a classic example of a positional goods/prisoner’s dilemma problem. See, e.g., Robert Frank, CHOOSING THE RIGHT POND (arguing that humans have a tendency to overinvest in zero-sum, positional contests). In this context, a reduction in training might actually be welfare-enhancing.
have directly productive as well as distributional effects—regardless of who gets the job, the successful applicant might actually perform better as a result of having trained.\textsuperscript{78}

These examples lead me to conclude that the welfare consequences of a duty to train are difficult to determine. The current level of preparation may be inefficiently high, or inefficiently low; and in either case, some groups may engage in too much training, while others undertake too little. And since there is probably relatively little ex ante moral hazard involved, the effects of disparate impact liability are largely distributional, which pushes us away from an efficiency analysis towards a fairness-based rationale.\textsuperscript{79}

Here, I think there is a stronger case to be made for a duty to train, based on within-group fairness. Absent such a duty, courts are forced to treat those who trained just like those who did not. Even if this has no effect on who decides to train, it seems unfair: among a group of plaintiffs, all of whom failed the test, why shouldn’t society prefer those applicants who made an effort to pass over those who didn’t?

2. Non-Distributional Preferences

The key issue in this context may not turn out to be society’s preferences over the final distribution of losses and gains from a hypothetical test, but rather for the means by which those

\textsuperscript{78} There is also a threshold question of the test’s validity or predictive ability. If the test does not do a good job of measuring who will do well on the job (or—not necessarily the same thing—who will do badly), then the case for training is obviously weakened: why should we encourage studying for a test that yields little predictive information? One answer is that as between the studiers and non-studiers, the studiers have at least shown more motivation, even if their efforts were fruitless (in the sense of improving their performance on the job). Another answer is that the standard requirements for job relatedness and business necessity would still obtain. Unless the lack of effort defense completely eliminates plaintiffs’ disparate impact claims, the employer will still have to show that the selection procedure is job related, and if he can not do so, he will not prevail.

\textsuperscript{79} Even the administrative savings from eliminating potential plaintiffs who didn’t train (ex post moral hazard) are likely to be small: reducing the number of plaintiffs does not guarantee a proportionate reduction in the administrative costs of disparate impact liability, since all the test-failers (regardless of whether or not they had trained) might well have joined in a single suit against the employer.
losses and gains are realized. For example, suppose society prefers to have 50 percent representation of women in some job, for which there is a qualifying test. Assume that absent training by the women applicants, the test has a disparate impact by sex, but that training completely eliminates the disparity. There are then two ways of achieving the goal of equal representation. One possibility is that women train for the test and achieve a pass rate equivalent to that of men. Another alternative is that women fail to train, but achieve a 50 percent representation rate through disparate impact litigation.

Society might well prefer the first approach to the second, even though they achieve identical results. First, the non-litigation strategy presumably involves lower administrative costs. Second, the training strategy almost certainly produces less antagonism or demoralization of male test takers. If the women train, some men who took the test will lose out to some of the women who trained for it. In the second scenario, these same men will initially rank higher on the test, but will subsequently lose out to the women who sued. Quite apart from any endowment effects, the mere fact of litigation almost inevitably sharpens antagonisms and leads to increased hostility between winners and losers. Much of this could presumably be avoided if the final allocation of jobs to applicants were not achieved by litigation. Finally, there may be some kinds of injuries that can only be overcome by efforts by the injured party. Test-failers will sometimes succeed in using disparate impact liability to overturn the use of the test and secure a position for themselves. But one might question whether litigation can provide a real remedy in this context, since hostility and stigma are the likely consequences of such an action.

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

81 It seems intuitively plausible that the affected men would feel worse about losing a job they (thought they) “had” than about not getting one in the first instance. Antagonism and a sense of unfairness would only be compounded if the men lost out to women who did not train in the first instance.
Of course, to the extent that society’s preference for training is based on the benefits it provides to those other than the trainees, we must confront both the distributional and efficiency questions once more: is it fair that women have to bear the costs of training for the running test in order to confer benefits on men? And is it clear that the benefits to the men are larger than the training costs incurred by the women? I don’t see any plausible way of answering the second question. As to the first, it might make sense to require that if women or African-American applicants must train for a test in order to achieve (more-) equal pass rates with white males, the employer subsidize such training. Indeed, a requirement that applicants make reasonable effort to train would presumably encourage employers to lower the costs of training, for example, by providing sample tests, workout guides and so forth. By doing so, an employer would eliminate some potential liability, either because applicants refused to train and lost their ability to sue, or because they did train and therefore had a higher pass rate.

V. Implementation

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

A. What Does Reasonable Effort Mean

1. A Cost/Benefit Test

If plaintiffs should be required to make reasonable efforts to prepare for a test before they make a disparate impact claim, it remains to determine what the proper standard for applicant effort should be. An analog of the “Hand Rule” articulated in U.S. v. Carroll Towing suggests an appropriate answer.

82 See, e.g., Amy L. Wax, Some Truths About Black Disadvantage, WALL ST J., Jan 3, 2005 at A8 (arguing that there are times when “the victim is the only one who can wholly undo the harm he has suffered from others’ wrongful actions.”)
Return to the facts of *Lanning*, and suppose, as suggested by the dissent, that many applicants could have passed the test with a relatively modest amount of training (which the employer in fact urged them to undertake). It seems likely that the police jobs at issue in *Lanning* were substantially better than the best alternative the plaintiffs would have be able to find if they failed the test. The monetary gain in earnings for the plaintiffs if they got the job ($E$) would therefore be large. Judge Weiss’ dissent quoted earlier strongly suggested that training could have dramatically increased the chances that the plaintiffs would have been able to pass the test; thus, $p$, was also likely to have been large. And Judge Weiss also concluded that the cost of training ($C$) was fairly small.\(^8\) It follows that the expected gain from training (absent disparate impact liability) would be larger than the costs—$pE > C$—and by the Hand Rule, plaintiffs failed to make reasonable (cost-justified) efforts to prevent the harm. Put another way, the plaintiffs could probably have forestalled the harm to themselves at relatively low cost, and because they failed to do so, they should not be allowed to invoke disparate impact protection.

The standard for reasonable effort I have just described is not a demanding one. In fact, any fully-informed and rational applicant should voluntarily take such efforts as would maximize his or her net gain from training, which is precisely what the standard requires. Thus, applicants who fail to make reasonable efforts to study or train will almost by definition be either: (a) irrational; (b) misinformed about the costs or benefits of training; or (c) persons with unusually high discount rates, risk aversion, or other costs of training (or unusually low benefits from obtaining the job).\(^8\)

\(^8\) Suppose training would increase the probability of passing the test from 0.12 (the average female pass rate) to 0.50, which makes $p = 0.38$. Let the average salary gain from passing the test be $10,000$, and the costs of preparation be $3000$ (200 hours ($15/hour)). Then the net expected gain from training is $(0.38(10,000) - 3000)$, which is a positive $800$.

\(^8\) This conclusion is analogous to the result in the standard economic model of accidents that under a negligence rule, it never pays to be negligent. See, e.g., Robert Cooter and Thomas Ulen, *Law & Economics* (4\textsuperscript{th} ed. 2003) or Steven Shavell, *Foundations of Economic Analysis of Law* (2004).
2. The Breadth of the Standard

How would this rule work in other settings? For example, consider the requirement that those hired have a high school diploma, which was one of the issues in the electric power plant jobs plaintiffs were seeking in Griggs. Application of the reasonable effort rule would probably sustain this part of the holding in Griggs, for two reasons. First, the African-American plaintiffs would surely have found the cost of securing a high school diploma \( C \) in the segregated environment of the Jim Crow South to be high. Although the benefits of getting a good job \( E \) would have been substantial, having a high school diploma would not have helped the plaintiffs, since before passage of Title VII, most employers would simply have excluded them on the basis of their race. Thus, \( p \) would also have been small—in fact, probably zero—and as a result, we can be quite confident that \( pE \) would have been less than \( C \) for the Griggs plaintiffs. Hence, even if the Griggs court had seen fit to implement a test of the kind considered here, plaintiffs’ failure to obtain high school diplomas would not have constituted a lack of reasonable effort that would have disqualified their disparate impact claims.

The second reason that a reasonable efforts requirement is consistent with Griggs is that it is appropriate to invoke a much narrower definition of “preparation” than in the previous analysis. Consider the decision about whether to obtain a high school diploma. That decision has certain costs (out of pocket expenses, plus foregone time and earnings) and certain benefits (enhanced future earnings). But few people choose to obtain a diploma based on eligibility for any single job that requires a high school degree. In the case of Griggs, for example, even if the plaintiffs could quite easily have completed high school, it might well be the case that the costs of doing so were larger than the Duke Power-specific benefits—that is, the enhanced opportunity for a Duke Power job (considered in isolation from any other employment prospects) that a high school diploma would have provided.
Thus, even if the overall rate of return to obtaining a high school diploma is very large, as it now is,\textsuperscript{85} it is a mistake to excuse any particular employer from disparate impact liability because its standard requires a high school degree that would confer \textit{general} benefits on plaintiffs. The purpose of disparate impact liability is not to give plaintiffs an incentive to make decisions about how much to invest in education. It is rather to prevent employers from using selection practices that impinge on applicants’ civil rights. Plaintiffs should be encouraged to undertake job-specific training or preparation because doing so relieves employers of an unfair burden; but there is no reason to use the reasonable efforts defense to encourage \textit{general} training. If society is concerned with low graduation rates, then direct steps to promote graduation are warranted.

It is worth noting, however, that Duke Power apparently did offer “. . . Company financing of two-thirds the cost of tuition for high school training” for those without a high school degree.\textsuperscript{86} The existence of this subsidy might have given Duke Power a reasonable efforts defense under my proposal. The issue would turn on whether the costs of the training—including the subsidy, but also including the non-financial costs such as the opportunity costs of time—were less than the expected benefits in terms of enhanced possibilities for advancement at Duke Power. It is hard to know how this essentially empirical question would be resolved.

It should also be stressed that the \textit{Griggs} plaintiffs challenged not only the use of a high school graduation requirement, but also the use of two tests that Duke Power adopted as requirements for several classes of jobs.\textsuperscript{87} There was no offer to subsidize any training for these tests, nor is it clear

\begin{footnotes}
\item[86] \textit{Griggs}, supra n. 1 at 432.
\item[87] After the effective date of Title VII, the company required all new employees to “. . . register satisfactory scores on two professionally prepared aptitude tests, as well as to have a high school education.” Current employees who wished to transfer into “the four desirable departments from which Negroes had been excluded” had to have \textit{either} a high school degree or a passing score
\end{footnotes}
that such training was even possible, let alone sufficiently cost-effective to qualify as a reasonable
effort on the part of the plaintiffs. At least this part of the holding in Griggs—striking down the use of
these tests—would certainly remain intact under a “reasonable efforts to train” defense proposed
here.

The problem of how broadly to define the benefits of training also arises in Lanning. There were
probably many benefits from training for the running test that might have flowed to the women
plaintiffs in Lanning—getting into physical shape can improve one’s health, psychological mood,
longevity, and so on. Should these benefits be included in the cost/benefit test to decide whether
female plaintiffs who failed to train for the test were unreasonable? My answer is “No;” there is no
reason to give the employer a free ride just because applicants didn’t avail themselves of potential
benefits that are unrelated to the job in question.88 Again, disparate impact liability is not supposed
to protect only those who work vigorously to protect their own health. Hence, in evaluating the
employer’s defense in Lanning, the only benefits that should be included in the plaintiffs’ hypothetical
calculations are those directly traceable to the increased likelihood of obtaining SEPTA employment—
the benefits of passing the test.

B. Wholesale Disparities vs Individual Plaintiffs

Imagine a test that is passed by 75 percent of men and 40 percent of women. There is a clear
disparate impact here, since the female pass rate is only 53 as high as the figure for male applicants.
But suppose that 80 percent of the women applicants did not train for the test, and that if they had,

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88 For a contrary view based on efficiency concerns, see Robert Cooter and Ariel Porat, 
Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict, 29 J. LEGAL STUS. 19
(2000) (arguing that risks to self should increase the care owed to others).
they would have passed at the same 75 percent rate as men. In this obviously extreme example, the pass rate with training would be identical, so there would be no disparate impact when everyone trained.

The question then arises whether an employer in this situation should be allowed to use a reasonable effort requirement to challenge the existence of the disparity, or whether he should only be allowed to use the requirement to disqualify the 55 applicants who failed but did not train? My tentative answer is that this situation is unlikely to arise, but that if it does, employers should be able to use a failure to train to rebut the existence of a disparity. It seems strange to disqualify the 55 non-training test failers as potential plaintiffs, but to count their failures nonetheless when assessing liability to the remaining 5 test-failers (those who did train). Moreover, by providing this defense, we encourage employers to promote training by applicants, for example, by offering in-house training programs. Of course, the burden would be on the employer to show what the counterfactual pass-rate would have been if more women had trained, and that the training would have been reasonable in the sense defined above.

C. Other Contexts

Disparate impact liability is a feature of many other civil rights statutes apart from Title VII. Space does not permit a thorough examination of all of these settings, but I would assume that the same reasonable effort principles would apply to plaintiffs in housing, credit markets, and other

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89 Thus, 20 percent of the women trained and passed at a 75 percent rate, while 80 percent of the women did not train and passed at a 31.25 percent rate, for an average pass rate of 40 percent for women as a group.
90 Suppose there are 100 applicants. Then there will be \((1-0.3125)(80 =) 55\) non-training test failers. There will also be \((1-0.75)(20 =) 5\) applicants who trained and failed anyway.
91 Applicants who did not train would thus forfeit their ability to sue, and those who did not train and failed the test would not be counted in the overall failure rate for their group.
circumstances. Consider automobile finance, for example. In *Coleman v. GMAC*, plaintiffs alleged that the lender who financed the purchases of their new cars encouraged dealers to charge a markup to the buyer/borrower, and that these markups had a racial disparate impact in violation of the Equal Credit Opportunities Act.

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

Although the buyers did fail to look beyond the dealership for financing, there is a strong argument that *Coleman* was nevertheless correctly decided in their favor, for two reasons. First, the markups were never disclosed: buyers were not told the dealership’s “buy rate” (its cost of funds from the lender) or the markup they were being charged. All they knew was the ultimate interest rate. Thus, plaintiffs would be unlikely to know that they should have shopped around, since the benefit of doing so (the reduction in markup) was hidden by the defendant. When the defendants know the benefits of effort and plaintiffs don’t, defendants should be able to use a reasonable efforts defense *only* if they disclose such benefits. This has the effect of revealing to plaintiffs that they have a self-interest in further search.93

93 Note that in *Lanning*, the defendants did suggest that training for the test would be beneficial, and even offered guidelines on how to train effectively. By contrast, the seller(s) in *Coleman* made every effort to conceal the size of the finance charge markup.
Moreover, the ability to price gouge by charging supra-competitive markups seems difficult to justify under a business necessity standard, so the practice of racially disparate markups would fail this test as well.

VI. Conclusion

An employer’s liability for selection procedures that have a disparate impact by race or gender is now a settled element of employment discrimination law. But is an employer liable for any disparity, no matter what the cause? Neither courts nor scholarly commentators have devoted much attention to this issue, largely because the theory of disparate impact seems to suggest that the mere identification of a racial or gender disparity suffices to create liability, regardless of the reason for its existence.

The purpose of this essay is a modest one. It is merely to suggest that not all disparities are the same: there are some instances where plaintiffs could eliminate or reduce disparities at a reasonable cost to themselves, and when this is possible, the law should encourage them to do so.
Figure 1: Decision To Train, Without Disparate Impact Liability

- Don’t Train (30)
  - 0.3 Get Job (100)
  - 0.7 Don’t Get Job (0)

- Train (30.5)
  - -10
  - 0.45 Get Job (100)
  - 0.55 Don’t Get Job (0)
Figure 2: Decision to Train, *With* Potential Disparate Impact Liability