

## TOWARD POSITIVE EQUALITY: TAKING THE DISPARATE IMPACT OUT OF DISPARATE IMPACT THEORY

by  
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*Employment discrimination doctrine has become so dependent upon the concept of social group membership that group consciousness is generally viewed as an essential and defining feature of antidiscrimination law. Just over a decade ago, however, Professor Mark Kelman launched an investigation into whether and why antidiscrimination law must or should make reference to group status. This Article extends that investigation into the disparate impact arena by exploring the proper role, if any, that group consciousness should play in legal efforts to ensure that facially neutral employment practices are demonstrably merit-based. This analysis reveals the value in considering a practice-conscious rather than a group-conscious approach to legal regulation of workplace practices. Rather than tailoring legal protection by allowing only members of certain groups to challenge the business necessity of any exclusionary employment practice, legal protection could instead be tailored by allowing any worker to challenge the business necessity of only certain suspect practices. This Article uses Kelman's insights to help identify the subset of practices that should be subject to such universal challenge, and it analyzes the benefits and shortcomings of a practice-conscious approach to advancing a norm of positive equality in the workplace.*

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## I. INTRODUCTION

In the United States, employment discrimination doctrine has become so dependent upon the concept of social group membership that group consciousness is generally viewed as an essential and defining feature of antidiscrimination law.<sup>1</sup> Just over a decade ago, however, Professor Mark Kelman launched a thought-provoking investigation into whether and why antidiscrimination law must or should make reference to social group status.<sup>2</sup> Kelman's primary goal was to understand whether antidiscrimination norms "protect individuals *qua* individuals or protect people only by virtue of their membership in certain social groups."<sup>3</sup> Kelman's resulting article, *Market Discrimination and Groups*, remains among the most influential efforts to decipher the proper role, if any, that group consciousness should play in employment discrimination law. More importantly, Kelman's inquiry remains an ongoing project within antidiscrimination law and theory.

This Article extends Kelman's investigation along one particular dimension by applying his analysis to the disparate impact context. Specifically, this Article explores the proper role, if any, that group consciousness should play in legal efforts to ensure that facially neutral employment practices are demonstrably merit-based. In doing so, this project seeks to understand whether group consciousness is necessary in order to use the law to move the workplace toward "a norm of positive equality," which Professor J.H. Verkerke describes as "an affirmative obligation to use merit-based criteria to make employment decisions."<sup>4</sup>

Kelman's article begins by dividing antidiscrimination law into two realms: laws prohibiting simple discrimination and laws requiring workplace accommodation.<sup>5</sup> Kelman argues that an accommodation norm cannot meaningfully be conceptualized without reference to group status because the norm's very existence can be justified only by invoking a public interest in integrating social groups.<sup>6</sup> In contrast, Kelman argues that it is quite possible to ignore group status in the context of simple

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<sup>1</sup> See, e.g., Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643 (2001) ("The canonical idea of 'antidiscrimination' in the United States condemns the differential treatment of otherwise similarly situated individuals on the basis of race, sex, national origin, or other protected characteristics."); Susan Stefan, *"Discredited" and "Discreditable": The Search for Political Identity by People with Psychiatric Diagnoses*, 44 WM. & MARY L. REV. 1341, 1348 (2003) ("A claim of discrimination is obviously a political claim of unjustified treatment on the basis of membership in a certain group.").

<sup>2</sup> See Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 834, 838 (2001).

<sup>3</sup> *Id.* at 834.

<sup>4</sup> J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1389 (2003).

<sup>5</sup> Kelman, *supra* note 2, at 834.

<sup>6</sup> *Id.* at 834, 839–40.

discrimination, simply by protecting every individual's right to receive rational treatment in the labor market.<sup>7</sup> Nevertheless, Kelman identifies specific administrative and substantive reasons for using social group membership to restrict legal protection even in the simple discrimination realm.<sup>8</sup>

This Article takes a step further by critically examining the difference between individual market-irrational decisions and firmwide market-irrational practices. While Kelman generally treats these two situations similarly within his broad category of simple discrimination, this Article explores whether the specific administrative and substantive reasons that he identifies for invoking group consciousness in the disparate treatment context apply similarly in the context of disparate impact claims. As Kelman's analysis implies, it is indeed quite possible to envision a non-group-conscious disparate impact theory: one that would allow *any* excluded worker to challenge the business necessity of *any* facially neutral employment practice. Yet it is less obvious whether the reasons that Kelman identifies for nevertheless incorporating social group status as a limiting principle when regulating individual market-irrational decisions apply with equal force when regulating firmwide market-irrational employment practices.

To the extent that Kelman's analysis carries weight in the latter context, this Article argues that it provides an equally persuasive justification for adopting a *practice*-conscious, rather than a *group*-conscious, legal approach. Rather than limiting legal protection by allowing *only* members of certain groups to challenge the business necessity of *any* exclusionary employment practice, legal protection could instead be limited by allowing *any* worker to challenge the business necessity of *only* certain suspect practices.

Part II begins by establishing the basis for Kelman's prudential justification of a group-conscious approach to employment discrimination law. Simple discrimination claims are then disaggregated in Part III, which analyzes whether Kelman's reasons for supporting a group-conscious approach apply with similar force in the context of both disparate treatment and disparate impact claims. To the extent that his justifications carry weight in the disparate impact context, this analysis reveals that those justifications provide persuasive support for a different limiting principle: one that subjects only certain market-irrational employment practices to legal challenge by all, rather than one that subjects all market-irrational practices to legal challenge only by members of certain disparately impacted groups. Part III.A explains how Kelman's analysis may be used to help identify the particular subset of market-irrational practices that should be subject to legal redress by all adversely affected employees. Part III.B discusses several existing

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<sup>7</sup> *Id.* at 838–39.

<sup>8</sup> *Id.* at 839.

examples of practice-conscious regulations of market-irrational employment practices, and Part III.C analyzes the benefits and shortcomings of a practice-conscious approach to advancing positive equality in the workplace.

## II. GROUP CONSCIOUSNESS IN SIMPLE ANTIDISCRIMINATION AND ACCOMMODATION CLAIMS

Professor Kelman began his investigation into “whether antidiscrimination law ought to be ‘group-conscious’” by dividing employment discrimination into two general categories: “simple discrimination” and “accommodation” claims.<sup>9</sup> In Kelman’s taxonomy, simple discrimination exists whenever an employer pays attention to traits that are irrelevant to a worker’s economic function.<sup>10</sup> In this view, workers are understood as nothing more nor less than their embodied “net marginal product.”<sup>11</sup> Employers discriminate whenever they treat one worker worse than another worker whose net marginal product is the same.<sup>12</sup> Claims of simple discrimination thus demand merely that employers engage in impersonal, market-rational, profit-maximizing behavior: that employers treat workers “no worse than they treat others who are equivalent sources of money.”<sup>13</sup> Because such claims need not be weighed against the claims of others, nor against employers’ economic

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<sup>9</sup> *Id.* at 834.

<sup>10</sup> *Id.* at 841.

<sup>11</sup> *Id.* Kelman defines a worker’s net marginal product as “the value of the increase in goods or services the firm will produce if the employee is added to the firm, net of the added costs that the firm will incur if she were employed by that firm.” *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 835, 839, 841; see also John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2605 (1994) (describing one understanding of antidiscrimination law as “a legal guarantee that [one’s] labor will be compensated in the same fashion that it would be in a perfectly competitive and nondiscriminatory market”). Although this Article uses Kelman’s framework as a valuable tool for analyzing the proper role of group consciousness in antidiscrimination law, this Article’s reliance on his framework is not intended to endorse an uncritical acceptance of efficiency as the sole or even the primary rationale for antidiscrimination law. Cf. Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 31 (2000) (arguing that attempts to justify antidiscrimination law solely on notions of “instrumental rationality” ignore “the many ways in which instrumental rationality can itself actually reinforce existing social practices”); John H. Schaar, *Equality of Opportunity, and Beyond*, in LEGITIMACY IN THE MODERN STATE 193, 203 (1981) (criticizing justifications of antidiscrimination law that reduce each individual “to a bundle of abilities, an instrument valued according to its capacity for performing socially valued functions with more or less efficiency”); Verkerke, *supra* note 4, at 1408 (arguing that “[n]o one could reasonably claim . . . that efficiency is an essential characteristic for civil rights measures,” and noting that “[m]oral and political considerations dominate the public debate”).

costs, Kelman describes demands to be free from simple discrimination as “rights claims.”<sup>14</sup>

When a worker makes an accommodation demand, in contrast, the worker asks that an employer be required to ignore certain input costs that the worker needs to generate the same output as others.<sup>15</sup> Accommodation claims thus demand that employers treat certain workers in terms of their gross rather than their net value added to the firm.<sup>16</sup> Because such claims compete against others’ requests for accommodation and must also be weighed against employers’ costs, Kelman describes workplace accommodation demands as “distributive claims.”<sup>17</sup> “[W]hile the plaintiff in a simple discrimination case seeks to enjoin mistreatment,” he explains, “the plaintiff in accommodation cases is a resource claimant . . . .”<sup>18</sup>

Because accommodation claims seek resource distribution, Kelman argues that it is difficult to meaningfully conceptualize such claims without reference to the social group status of those making the accommodation requests.<sup>19</sup> Certainly, we could imagine “an individualistic, universalized, non-group-referential right” for all workers to demand that employers ignore the input costs that workers need to produce a particular level of output.<sup>20</sup> But implementing such a rule would be virtually impossible.<sup>21</sup> A workable accommodation norm requires some underlying principle for resolving competing demands for limited resources and for weighing such demands against employers’ economic costs. According to Kelman, that underlying principle is the

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<sup>14</sup> Kelman, *supra* note 2, at 852.

<sup>15</sup> *Id.* at 842, 892.

<sup>16</sup> *Id.*; see also Donohue, *supra* note 13, at 2605–09 (describing an accommodation mandate as seeking a form of “constructed equality,” which demands more from employers “than an idealized, perfectly competitive market” would produce); Verkerke, *supra* note 4, at 1390 (explaining that “an ‘accommodation’ mandate requires employers to make costly exceptions to their merit-based criteria”).

<sup>17</sup> Kelman, *supra* note 2, at 834, 852, 880.

<sup>18</sup> *Id.* at 836 n.8.

<sup>19</sup> *Id.* at 834, 839–40, 858, 895.

<sup>20</sup> *Id.* at 840, 877; see also Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391, 403–04 (2001) (envisioning a form of non-group-conscious accommodation mandate by suggesting that “[w]hen individuals complained that they were barred from . . . [a] job because they were deemed outside the range of people the organization could accommodate, society could then decide on a case-by-case basis whether it wished the environment to change or wished to permit the exclusion of individuals because the environment found their characteristics unacceptable”).

<sup>21</sup> Kelman, *supra* note 2, at 840, 877 (describing a universalized accommodation right as “nonsensical”). Kelman does consider the possibility of designing a universalized accommodation right around a non-group-conscious limiting principle, such as requiring the worker to show that “the inputs she seeks would be of ‘substantially’ less use to others.” *Id.* at 877. But he concludes that any such rule would itself be “quite blurry,” and extremely difficult for a factfinder to apply. *Id.*

public interest in breaking down social group segregation and exclusion.<sup>22</sup>

The justification for employer-subsidized resource distribution is stronger for members of historically subordinated groups who are seeking workplace integration than it is for “random individuals seeking higher levels of social inclusion,” Kelman argues, because group-based exclusion can create widespread social segregation.<sup>23</sup> While random individuals may be “isolated” without resort to workplace accommodation, they are unlikely to be “socially segregated.”<sup>24</sup> As a result, argues Kelman, group consciousness is necessarily relevant to accommodation claims, which seek to redistribute opportunities for labor force participation in order to address broader, hierarchical social segregation.<sup>25</sup> Because the public interest in integrating social groups is what justifies the very existence of an accommodation norm, Kelman concludes that the norm cannot be understood “without reference to the existence of social groups.”<sup>26</sup>

In contrast, Kelman argues that it is quite possible and arguably defensible to enforce a legal prohibition against simple discrimination without any reference to social group status.<sup>27</sup> Because he defines simple discrimination as any failure to treat workers with similar net marginal products similarly, a law prohibiting simple discrimination sensibly could be understood to protect everyone, regardless of one’s membership in a socially excluded group, and regardless of whether a group-based motivation triggered the employer’s market-irrational behavior.<sup>28</sup> Such a law would simply grant every worker the right to receive market-rational treatment in the workplace.<sup>29</sup> Claims of simple discrimination thus do not depend upon social group membership either to justify their existence or to give them meaning.<sup>30</sup>

Yet despite this profound observation, Kelman identifies at least four specific reasons for nevertheless supporting the use of social group status to restrict legal protection against simple discrimination.<sup>31</sup> While group consciousness is not *necessary* to enforce a simple discrimination norm,

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<sup>22</sup> *Id.* at 840, 880, 884–85; *see also* Verkerke, *supra* note 4, at 1390 (justifying accommodation mandates that require employers “to make costly exceptions to their merit-based criteria” as a means “to increase employment opportunities for individuals who otherwise would be excluded”).

<sup>23</sup> Kelman, *supra* note 2 at 840, 884–85.

<sup>24</sup> *Id.* at 885.

<sup>25</sup> *Id.* at 886.

<sup>26</sup> *Id.* at 834.

<sup>27</sup> *Id.* at 838–39, 858, 893.

<sup>28</sup> *Id.* at 834, 838–39.

<sup>29</sup> *Id.* at 838–39, 859, 893.

<sup>30</sup> *Id.* at 839, 858 (arguing that “the case for restriction to group members is much stronger in the case of accommodation than in the case of simple discrimination”).

<sup>31</sup> *Id.* at 834, 839, 859–60.

Kelman argues persuasively that group consciousness is nonetheless the most prudent approach.<sup>32</sup>

The first reason that Kelman identifies for limiting legal enforcement against simple discrimination to members of particular groups is administrative in nature. As a practical matter, it is often difficult to identify market-irrational treatment in the workplace. Because employers cannot always accurately predict nor directly observe a worker's net marginal product, an employer's decision to treat similarly situated individuals differently does not always reflect discrimination.<sup>33</sup> Sometimes it merely reflects "nonactionable error" or "random bad luck."<sup>34</sup> Kelman suggests that constructing groups as statistical artifacts can help solve this proof problem by making it easier to identify the market-irrational treatment that is at the core of a simple discrimination claim.<sup>35</sup> Although it is often impossible to determine whether a single individual was the victim of actual discrimination, we would expect that any random errors would "average out" across a large population of workers.<sup>36</sup> Looking at labor market outcomes for statistical aggregates is therefore a useful way to discern whether individuals are receiving market-rational treatment.<sup>37</sup> If the overall compensation for members of a particular group is lower than that group's productivity would predict, for example, we could infer that discrimination is playing a role.<sup>38</sup> In this context, group consciousness is invoked for proof purposes, rather than to advance any independent, substantive social goals.

The second reason that Kelman identifies for applying group consciousness in the simple discrimination realm is also largely pragmatic. We may decide that it is only worth invoking state enforcement power to remedy forms of simple discrimination that are unlikely to be addressed by market forces alone.<sup>39</sup> If so, social group membership becomes relevant because members of historically subordinated groups are the most likely to face widespread, systematic, and persistent market irrationality.<sup>40</sup> Although other individuals may suffer harm from an idiosyncratic market-irrational employer, those individuals are likely to receive rational treatment from other employers "who do[] not share the initial discriminator's peculiar tastes."<sup>41</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 860–61.

<sup>34</sup> *Id.* at 859–61.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 861.

<sup>37</sup> *Id.* at 861, 893.

<sup>38</sup> *Id.* at 861.

<sup>39</sup> *Id.* at 859–60, 863–65, 893.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 863–64. Kelman uses the example of "a person [who] is denied a job he is entitled to because he reminds the employer of a hated stepfather" to illustrate this point. *Id.* at 866. Although the person has experienced simple discrimination, we may not be sufficiently "perturbed" to provide a legal remedy, in part "because the

Members of historically subordinated groups, however, face widely shared prejudice and group-based stereotypes, which makes “market exit” a far less likely remedy for their mistreatment.<sup>42</sup> Social group status thus provides a useful criteria to help focus state power on forms of simple discrimination that market competition is unlikely to correct on its own.<sup>43</sup>

Kelman’s third reason for supporting group consciousness in simple discrimination claims relies on a related pragmatic objective of maximizing legal impact. Just as we may decide to invoke state enforcement power only to remedy intractable forms of market irrationality, we similarly may decide to grant legal protection only for individuals whose successful discrimination claims are likely to benefit others.<sup>44</sup> If so, group membership once again becomes relevant, as simple discrimination claims by members of oppressed social identity groups are most likely to serve a private attorney-general role by effectively representing and benefiting similar others.<sup>45</sup>

The final reason that Kelman identifies for supporting a group-conscious simple discrimination law rests on substantive rather than administrative grounds. While all victims of simple discrimination, by definition, suffer the harm of being treated unfairly in the market, some forms of discrimination are more invidious. Some forms of market-irrational treatment do more than merely frustrate an individual’s material expectations: they also stigmatize the victim and produce negative third-party effects.<sup>46</sup> To the extent that such forms of injury uniquely warrant state intervention, social group status should play a central role in defining the boundaries of a legally enforceable antidiscrimination norm.<sup>47</sup> Irrationality in the labor market is most likely

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applicant is likely to find a job elsewhere.” *Id.*; see also Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1523 (2011) (arguing that “legislatures choose not to intervene with respect to characteristics such as height, eye color, blood type, and left-handedness” because “the probability of bias based on these traits is very low”).

<sup>42</sup> Kelman, *supra* note 2, at 863–64; see also Post, *supra* note 13, at 8 (“Antidiscrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities.”).

<sup>43</sup> Kelman, *supra* note 2, at 864, 893.

<sup>44</sup> *Id.* at 860, 893. Returning to the example of “a person [who] is denied a job he is entitled to because he reminds the employer of a hated stepfather,” Kelman explains that although the person has experienced simple discrimination, another reason we may not provide a legal remedy is “because his victory in the suit will help few others.” *Id.* at 866; see also *supra* note 41.

<sup>45</sup> Kelman, *supra* note 2, at 860, 865–66, 893–94.

<sup>46</sup> *Id.* at 860, 866–67.

<sup>47</sup> *Id.* Cf. Jolls, *supra* note 1, at 696–97 (“From an antisubordination perspective, prohibitions on intentional discrimination . . . are fundamentally concerned with the elimination of group subordination, not with requiring treatment of individuals purely in accordance with their personal merit or productivity.”).



to stigmatize its victims and produce negative spillover on others when the market-irrational behavior is linked to one's membership in an historically subordinated social identity group.<sup>48</sup> Group-status-based market irrationality has the pernicious effect of not only demeaning the individual victim, but of imposing one group's power over another and thereby reinforcing social hierarchies in a way that does not occur when "unpatterned" market irrationality is involved.<sup>49</sup>

As a result, any liberty interest that employers may assert in associating with the individuals of their choice (and in making economically irrational decisions) is weaker when invoked to support the exclusion of members of oppressed social identity groups.<sup>50</sup> In that situation, an employer is not asserting a private and expressive associational preference, but is instead "seeking to help bolster a particular sociopolitical system."<sup>51</sup> When an employer seeks to protect its ability to prioritize the exclusion of members of social identity groups (even over profit maximization), the employer is "making a claim to social power," rather than asserting a true liberty claim.<sup>52</sup>

Based on all of these reasons, Kelman makes a very persuasive case that limiting antidiscrimination protection to members of historically subordinated groups (rather than demanding "full-blown, cross-the-board capitalist rationality") effectively targets the forms of market irrationality in which employers' interests are weakest, in which the victims' harms are greatest, and in which society has the most to gain.<sup>53</sup> Kelman's analysis, however, focuses largely on market-irrational decisions by individual employment decisionmakers, rather than on firmwide market-irrational policies and practices. In other words, his analysis focuses primarily on conduct that is housed within our disparate treatment jurisprudence, rather than activities that fall within the disparate impact realm.

In a footnote, Kelman does stake out the position that disparate impact claims properly should be understood as part of his simple discrimination category, not as an accommodation mandate.<sup>54</sup> That position has generated extensive literature debating whether, when, and

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<sup>48</sup> Kelman, *supra* note 2, at 860, 866–67, 894.

<sup>49</sup> *Id.* at 866–67. Kelman's example of the person "denied a job he is entitled to because he reminds the employer of a hated stepfather" illustrates this point as well. *Id.* at 866; *see also supra* notes 41 & 44. Kelman explains that we may not provide a legal remedy even though the person has experienced simple discrimination in part because the employer's decision "does not confirm traditional status-based hierarchies," which allows the victim to attribute the job loss to the isolated conduct of "a stupid jerk," rather than to a societal design to "keep groups 'in their place.'" Kelman, *supra* note 2, at 866–67.

<sup>50</sup> *Id.* at 867, 894.

<sup>51</sup> *Id.* at 869.

<sup>52</sup> *Id.* at 869–70, 894.

<sup>53</sup> *Id.* at 870–71, 894.

<sup>54</sup> *See id.* at 891 n.86.

the extent to which disparate impact doctrine does or does not embody an accommodation norm.<sup>55</sup> While the precise line between disparate impact and accommodation has thus become blurred and remains contestable,<sup>56</sup> most scholars continue to agree with Kelman's view that the core of disparate impact doctrine is both descriptively and normatively distinguishable from an accommodation mandate.<sup>57</sup> Based on that view,

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<sup>55</sup> See Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 851, 866–73 (2007) (describing the ongoing scholarly debate about “the normative divide between antidiscrimination and accommodation mandates”); Jolls, *supra* note 1, at 644 (“The relationship between antidiscrimination and accommodation . . . has been the subject of an old and expansive debate spanning several decades.”). Several scholars have argued that the more strictly courts construe the business necessity defense to disparate impact claims, *see infra* note 63 and accompanying text (describing the business necessity defense), the more likely it is that disparate impact theory will operate as an accommodation mandate. *See, e.g.*, Jolls, *supra* note 1, at 665 (“[I]f . . . the business necessity criterion required merely some legitimate business ground for the employer’s decision, then disparate impact liability would rarely, if ever, operate to require accommodation.”); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1312–16 (1987) (suggesting that “the magnitude of the burden that the [business necessity] defense imposes on the defendant” defines the extent to which disparate impact doctrine operates as an accommodation norm); Verkerke, *supra* note 4, at 1399 (observing that “disparate impact doctrine most closely resembles an accommodation requirement” if courts require proof “that a practice is truly ‘necessary’—rather than merely useful or job-related”—because that approach “predictably filters out at least some meritocratic standards and thus requires the employer to incur some cost or loss of productivity in order to avoid the practice’s exclusionary effect”).

<sup>56</sup> *See, e.g.*, Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 922 (2003) (arguing that accommodation mandates “target conduct that is normatively similar to that targeted by antidiscrimination” law); Green, *supra* note 55, at 875–76 (“In some circumstances, disparate impact theory imposes an antidiscrimination mandate; in others, it imposes an accommodation mandate.”); Hoffman, *supra* note 41, at 1542 (arguing that “the cause of action for disparate impact . . . embod[ies] what are essentially reasonable accommodation requirements”); Jolls, *supra* note 1, at 645, 652–66 (arguing that “certain important aspects of disparate impact liability are in fact accommodation requirements,” and that “antidiscrimination and accommodation are overlapping rather than fundamentally distinct categories”).

<sup>57</sup> *See, e.g.*, Donohue, *supra* note 13, at 2605–06, 2609–10 (arguing that disparate impact theory advances “intrinsic equality” by demanding that neutral practices be more “tightly tied” to individual productivity, while accommodation theory advances “constructed equality” by demanding more from employers “than an idealized, perfectly competitive market” would produce); Green, *supra* note 55, at 852 (arguing “that there is a meaningful normative distinction between antidiscrimination and accommodation mandates”); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 312–20 (2001) (arguing that the accommodation theory is distinguishable from other antidiscrimination theories because it “starts . . . with the claim that differently situated persons should be treated differently”); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 2 (1996) (arguing that an accommodation mandate “offers a fundamentally different approach to—and a fundamentally different remedy for—

Kelman suggests—again in a footnote—that his analysis of group consciousness in the simple discrimination arena would apply similarly in the context of both disparate treatment and disparate impact claims.<sup>58</sup> “Disparate impact law,” Kelman explains, “is the best expression of my view that the regime forbidding simple discrimination establishes affirmative entitlements to market-rational treatment, at least for members of historically subordinated groups.”<sup>59</sup>

This Article critically examines whether meaningful differences exist when considering firmwide market-irrational policies and practices, rather than individual market-irrational decisions.<sup>60</sup> To that end, Part III begins by exploring more explicitly whether the administrative and substantive reasons that Kelman identifies for invoking social group status in the disparate treatment context apply with similar force in the context of disparate impact claims. In doing so, this analysis seeks to better understand the specific role, if any, that group consciousness should play in legal efforts to ensure that facially neutral employment practices are demonstrably merit-based.

### III. GROUP CONSCIOUSNESS AND DISPARATE IMPACT DOCTRINE

Conventional disparate impact doctrine in employment discrimination law prohibits employers from using market-irrational facially neutral practices that have a disproportionately negative effect on members of a protected class.<sup>61</sup> Under existing doctrine, a plaintiff must

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invidious discrimination than prior legal regimes”); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1201, 1204 (2003) (arguing that accommodation is “a distinctive model of discrimination” that “stakes out a strong and independent position” from other forms of antidiscrimination theory); Verkerke, *supra* note 4, at 1387 (arguing that “the categories of antidiscrimination and accommodation draw a meaningful distinction between alternative strategies for defining and remedying employment discrimination”).

<sup>58</sup> See Kelman, *supra* note 2, at 891 n.86.

<sup>59</sup> *Id.*

<sup>60</sup> Kelman’s general definition of “simple discrimination”—treating one worker worse than another worker whose net marginal product is the same—is itself most easily understood in the context of individual employment decisions, and it provides a clear definition of market irrationality in that context. See *id.* at 835, 841, 875 n.68. Defining market irrationality in the context of firmwide practices is more difficult because the focus is on assessing the business justification of the practice in the aggregate, rather than on individual outcomes. As a result, it is difficult to sidestep the debate regarding the point at which the demand for a demonstrable business justification of a particular practice becomes so demanding that it pushes disparate impact doctrine into the accommodation realm. See *supra* note 55. For purposes of this Article, market-irrational practices refer to practices that an employer would be unable to defend under the “job-related . . . and consistent with business necessity” standard that Title VII currently applies to conventional disparate impact claims. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

<sup>61</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); see also 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (codifying the disparate impact theory in Title VII).

prove that a facially neutral particular employment practice causes members of one protected class to experience substantially different employment opportunities than others.<sup>62</sup> Proof of such group-based effects obligates the employer to demonstrate that the practice is job-related and consistent with business necessity, or the practice will be deemed unlawfully discriminatory.<sup>63</sup> Even if the employer meets its burden of proving the business necessity of a challenged practice, the practice will still be deemed unlawful if the plaintiff can identify an alternative practice that also serves the employer's business needs but imposes less disproportionately negative results on protected group members.<sup>64</sup> Group status thus plays an essential role in conventional disparate impact doctrine. Because group-based effects define when employers must prove the market rationality of their facially neutral employment practices, group status establishes the line between market-irrational practices that are and are not legally redressable.<sup>65</sup>

Although group consciousness has thus become a defining feature of our existing disparate impact doctrine, Kelman's analysis reveals that it is quite possible to envision a non-group-conscious disparate impact law.<sup>66</sup> Such a law would allow *any* excluded worker to challenge the business necessity of *any* facially neutral employment practice. In other words, a

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<sup>62</sup> See 42 U.S.C. § 2000e-2(k); see also Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 37–38 (2005) [hereinafter Travis, *Recapturing*] (describing traditional disparate impact doctrine).

<sup>63</sup> See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

<sup>64</sup> See *id.* §§ 2000e-2(k)(1)(A)(ii), 2000e-2(k)(1)(C).

<sup>65</sup> Although group consciousness has thus become ingrained in our basic notion of both disparate treatment and disparate impact law, group status plays a somewhat different role in each context. In both contexts, group status identifies who may seek legal redress—either for market-irrational treatment by an employment decisionmaker or for the application of a market-irrational employment practice. In both contexts, group status also restricts the forms of market-irrational decisions and practices that are redressable. In disparate treatment law, however, group status limits the forms of redressable market-irrational decisions by requiring proof that one's group membership played a motivating role in the market irrationality. In disparate impact law, group status limits the forms of redressable market-irrational practices only by requiring proof that the practice negatively impacts members of one group more than another. Kelman argues that it would be normatively superior to eliminate the link between group status and motive in disparate treatment claims by using group status only to limit the class of individuals who may contest discrimination, and by allowing group members to challenge *any* form of market-irrational treatment regardless of its motivation. See Kelman, *supra* note 2, at 834 n.2, 839 n.10, 873 n.66. Kelman suggests that refocusing the role of group status in such a way would render disparate treatment law more consistent with disparate impact law, where he argues that “we have already most clearly made that move.” *Id.* at 839 n.10.

<sup>66</sup> See *id.* at 891 n.86; see also Verkerke, *supra* note 4 at 1389–90, 1397 (envisioning an across-the-board legal obligation “that employers prove that their personnel tests and other selection criteria are significantly related to job performance”—i.e., “a demanding requirement that any exclusionary employment practice be genuinely ‘necessary’ in order to justify them”).

non-group-conscious disparate impact law would subject *all* market-irrational employment practices to legal redress.<sup>67</sup> “Such an approach,” explains Professor Adrienne Asch, “simply calls for employers to ascertain which purported job requirements are truly necessary and which are the results of custom or convenience.”<sup>68</sup> As such, a non-group-conscious disparate impact law would ensure that the right to be free from simple discrimination encompasses not just a right “to be free from impermissibly motivated conduct,” but instead establishes an “affirmative entitlement[]” to receive “market-rational treatment” in the workplace.<sup>69</sup>

Kelman’s placement of disparate impact theory alongside disparate treatment theory within his simple discrimination category is consistent with Professor J.H. Verkerke’s more general distinction between positive and negative equality.<sup>70</sup> According to Verkerke, negative equality seeks “the elimination of certain illegitimate motives from decision-making processes,” while positive equality imposes “an affirmative obligation to use merit-based criteria to make employment decisions.”<sup>71</sup> Consistent with Kelman’s taxonomy, Verkerke distinguishes both forms of equality from accommodation mandates, which require employers “to make costly exceptions to their merit-based criteria.”<sup>72</sup> Like Kelman, Verkerke recognizes that a law enforcing positive equality need not necessarily be

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<sup>67</sup> Cf. Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 626, 699 (2011) (noting the “meritocratic goals of disparate impact principles” and observing the “paradox of disparate impact that employers are restricted to some form of meritocratic selection—that is, selection on criteria shown to be job-related—only if the workplace shows a racial [or other protected status-based] imbalance”).

<sup>68</sup> See Asch, *supra* note 20, at 405. Asch has urged such an approach in the disability discrimination context. See *id.* at 405, 408. She argues that the law should allow all individuals who are excluded from a job because of a medical condition to demand that the employer demonstrate the job-relatedness of its medical standards. See *id.* Rather than focusing on whether the individual is or is not a person with a disability, the focus would be on “the relevance of the standard to the job.” *Id.* at 408. Asch arguably goes even further to advocate for a non-group-conscious accommodation mandate as well. See *id.* at 403–05 (suggesting that rather than analyzing “which kinds of people” may challenge the design of traditional employment environments, “attention should go to determining which environments—which social, physical, bureaucratic, and communication structures—could incorporate the widest array of individuals”). Although a full exploration of the role of group consciousness in accommodation claims is beyond the scope of this project, this Article’s shift from a group-based to a practice-based approach provides a potential analytic lens through which to revisit and question Kelman’s view that an accommodation norm cannot meaningfully be conceptualized without reference to group status. That inquiry, however, is left for a subsequent project.

<sup>69</sup> See Kelman, *supra* note 2, at 891 n.86; see also Donohue, *supra* note 13, at 2609–10 (arguing that disparate impact theory “is consistent with the goal of trying to guarantee intrinsic equality” by demanding that neutral rules be more “tightly tied” to individual productivity, as “would exist in a market that was as perfectly competitive as the capital market”).

<sup>70</sup> See Verkerke, *supra* note 4, at 1389–90.

<sup>71</sup> *Id.* at 1389.

<sup>72</sup> *Id.* at 1390.

group-status based.<sup>73</sup> We could envision a non-group-conscious legal requirement “that any exclusionary employment practices be genuinely ‘necessary.’”<sup>74</sup> “A court implementing a norm of positive equality,” explains Verkerke, could enforce a general, across-the-board obligation “that employers prove that their personnel tests and other selection criteria are significantly related to job performance.”<sup>75</sup>

Yet despite the fact that a non-group-conscious norm of positive equality is consistent with our society’s commitment to meritocratic ideals,<sup>76</sup> existing antidiscrimination law imposes no general requirement that employers run their workplaces as a competitive meritocracy.<sup>77</sup> Nor does Kelman contend that it should. By locating disparate impact theory alongside disparate treatment theory within his simple discrimination category, Kelman suggests that the administrative and substantive reasons for incorporating group consciousness to limit legal protection would apply similarly in both contexts. Kelman’s analysis implies that although group consciousness is not a necessary component of disparate impact theory, a group-conscious disparate impact doctrine is nonetheless the most prudent approach.<sup>78</sup>

Part A questions that conclusion by exploring whether the reasons that Kelman identifies to justify a status-based disparate treatment law apply similarly to the disparate impact context—i.e., whether the reasons for incorporating group status as a limiting principle when regulating individual market-irrational employment decisions apply with equal force when regulating firmwide market-irrational employment practices. To the extent that these reasons carry weight in the latter context, this analysis suggests that they provide an equally persuasive justification for adopting a *practice*-conscious rather than a *group*-conscious legal approach. Rather than limiting legal protection by allowing *only* members of certain disparately impacted groups to challenge the business necessity of *any* exclusionary employment practice, legal protection could instead be limited by allowing *any* worker to challenge the use of *only* certain exclusionary practices. Part B provides examples of such non-group-conscious, practice-specific workplace regulations that attempt to move employers toward a positive equality norm by

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<sup>73</sup> See *id.* at 1389–90, 1397.

<sup>74</sup> *Id.* at 1397.

<sup>75</sup> *Id.* at 1389–90.

<sup>76</sup> See *id.* at 1391; see also Post, *supra* note 13, at 13 (“[W]hat antidiscrimination law seeks to uncover is an apprehension of ‘individual merit.’”).

<sup>77</sup> See Wax, *supra* note 67, at 710 (noting that “there is no general requirement to adopt a system of competitive meritocratic job selection”).

<sup>78</sup> See Kelman, *supra* note 2, at 891 n.86 (defending disparate impact law’s establishment of “affirmative entitlements to market-rational treatment, at least for members of historically subordinated groups”); see also Verkerke, *supra* note 4, at 1397 (explaining that a modest yet more feasible incarnation of positive equality would design disparate impact law specifically “to attack any ‘arbitrary barriers’ to the advancement of protected group members”).

prohibiting their reliance on particular, highly suspect practices. Part C analyzes the potential benefits and risks of a practice-conscious rather than a group-conscious approach to regulating facially neutral practices in the workplace.

*A. Justifying a Practice-Conscious Rather Than a Group-Conscious Approach*

As explained above, Kelman's first reason to justify group consciousness in simple discrimination claims is to help distinguish discriminatory market-irrational treatment from instances of mere "error" or "random bad luck."<sup>79</sup> Because random errors should "average out" across a large population of workers, constructing groups as statistical artifacts can provide evidence of actual discrimination by revealing patterned irrationality.<sup>80</sup> Constructing groups as statistical artifacts helps prove "whether or not the treatment [that a particular individual] received matches the treatment received by those with identical traits"—i.e., it helps prove the threshold question of whether or not the plaintiff has received market-irrational treatment in the first place.<sup>81</sup> This evidentiary justification for invoking group consciousness applies only in the context of individual market-irrational decisions, not in the context of firmwide market-irrational practices. As Kelman himself acknowledges, this proof-based justification "simply disappears when [a plaintiff] is the victim of an explicit policy."<sup>82</sup>

In the disparate impact context, when an employer makes decisions based on a facially neutral practice, there is no problem determining why one individual was excluded rather than another.<sup>83</sup> "In such cases," explains Kelman, "we do not need to investigate . . . what accounted for the differential outcome, because the defendant tells us what did."<sup>84</sup> Social group membership is neither necessary nor helpful in determining whether the plaintiff received market-irrational treatment: all that is needed is to assess whether the practice is merit-based.<sup>85</sup> Thus, whenever an employer "articulates an explicit exclusionary policy," no evidentiary basis exists for limiting legal protection only to "members of a discernible group."<sup>86</sup>

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<sup>79</sup> See Kelman, *supra* note 2, at 859–61.

<sup>80</sup> See *id.*

<sup>81</sup> See *id.* at 862–63.

<sup>82</sup> *Id.* at 863.

<sup>83</sup> See *id.* at 862.

<sup>84</sup> *Id.*

<sup>85</sup> See *id.* at 862–63.

<sup>86</sup> *Id.* at 863 (arguing that "as long as an employer . . . articulates an explicit exclusionary policy—or explicitly elicits information that is arguably irrelevant for an impersonal rationalist—we should . . . protect individuals challenging such policies with little regard to the niceties of the question of whether they are members of a discernible group"). Kelman argues that this conclusion should hold particular weight in the disability context where group membership frequently plays a central

Kelman's second justification for limiting legal protection from simple discrimination in the workplace is based on the pragmatic desire to focus government enforcement power (and allocate limited government resources) to remedying forms of discrimination that are unlikely to be addressed by market forces alone.<sup>87</sup> Unlike the first justification, this rationale carries weight when considering both disparate treatment and disparate impact claims, but it does not necessarily lead to a group-conscious approach in both contexts.

Social group status can indeed play an important role in targeting market-resistant individual irrationality.<sup>88</sup> As explained above, members of historically subordinated social identity groups are the most likely to face widespread, systematic, and persistent market irrationality at the hands of individual employment decisionmakers who share similar prejudices and rely upon common group-based stereotypes.<sup>89</sup> Because these stereotypes "are both socially created and social-norm-enforced," they are unlikely to be corrected through market competition, rendering market exit an unlikely remedy for members of socially subordinated groups.<sup>90</sup> Social group status can thus help focus state power on forms of individual disparate treatment that the market is unlikely to correct on its own.<sup>91</sup>

Social group status, however, provides a less direct and blunter tool for targeting market-resistant irrational employment practices that are facially neutral and consistently applied. Of course, employers adopt some such practices for the illicit purpose of discriminating against members of a social identity group. When a facially neutral employment practice is a mere pretext for discrimination against members of a subordinated social identity group, using group-based effects to establish the line between market-irrational practices that are and are not legally redressable can indeed help direct resources toward some particularly intractable practices. When disparate impact doctrine is used for the very narrow purpose of rooting out group-based intentional discrimination, the doctrine effectively serves the norm of negative rather than positive equality.<sup>92</sup> In that narrow context, Kelman's justification for using group

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and determinative role in claims brought under the Americans with Disabilities Act. *See id.* Whenever an employer uses an explicit policy of excluding individuals based on "any physical/medical trait," Kelman argues, "we should subject his practice to scrutiny without regard to whether the physical trait he considers was conventionally considered a disability." *Id.*

<sup>87</sup> *Id.* at 859–60, 863–65, 893.

<sup>88</sup> *See id.* at 864, 893.

<sup>89</sup> *See id.* at 859–60, 863–65, 893; Post, *supra* note 13, at 8.

<sup>90</sup> Kelman, *supra* note 2, at 863–64.

<sup>91</sup> *Id.* at 864, 893.

<sup>92</sup> *See* Verkerke, *supra* note 4, at 1397, 1401 fig.2; *see also* Rutherglen, *supra* note 55, at 1312–16 (distinguishing the negative use of disparate impact doctrine "to prevent pretextual discrimination" from the positive use of disparate impact doctrine to "promot[e] equal opportunity").



consciousness to help direct the government's resources and remedial powers is at its strongest.<sup>93</sup>

But many facially neutral employment practices that lack demonstrable business necessity were not adopted to advance an illicit motive of excluding members of subordinated social identity groups, nor is there reason to believe that all market-irrational practices inadvertently produce such group-based effects. Yet many such practices are unlikely to be corrected by market forces alone. Employers frequently use "cheap proxies" to assess worker productivity when it is difficult to measure the true productivity of workers on an individual basis, and identity group status is not the only type of proxy upon which employers rely.<sup>94</sup> Evidence suggests, for example, that an employee's physical presence and visibility in the workplace has become a widespread but inaccurate proxy for employee productivity in many information and service jobs in which individual performance is difficult to measure.<sup>95</sup> Many such market-irrational practices persist because of information deficits resulting from the difficulty of obtaining information to accurately determine the business necessity of existing or alternative practices, the inability to identify or value all cost-benefit variables, and the lack of incentives or capacity to engage in long-term cost-benefit analyses.<sup>96</sup>

The persistence of market-irrational employment practices is also facilitated by several pervasive cognitive biases.<sup>97</sup> Employment decisionmakers, like all of us, have a strong predisposition for preserving

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<sup>93</sup> Cf. Green, *supra* note 55, at 875 (arguing that disparate impact theory advances an antidiscrimination norm rather than an accommodation norm "[w]hen disparate impact theory roots out employer intent to discriminate"); Jolls, *supra* note 1, at 652 (noting that disparate impact liability operates as an antidiscrimination law rather than as an accommodation mandate when it is used to "smok[e] out . . . underlying . . . intentional discrimination"); Rutherglen, *supra* note 55, at 1315 (describing disparate impact doctrine's "most compelling purpose" as "prevent[ing] pretextual discrimination," and its "more controversial purpose" as "promoting equal opportunity directly by discouraging employment practices with adverse impact").

<sup>94</sup> See Donohue, *supra* note 13, at 2595–98.

<sup>95</sup> See Travis, *Recapturing*, *supra* note 62, at 16; see also Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 *FORDHAM L. REV.* 2221, 2236 (2002) (citing work by Professor Lotte Bailyn of the Massachusetts Institute of Technology that documents the cognitive biases that contribute to employers' tendency to erroneously equate face-time with talent, performance quality, and productivity).

<sup>96</sup> See Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 *CONN. L. REV.* 1081, 1097, 1099, 1100 n.59, 1102–03 (2010) [hereinafter Arnow-Richman, *Incenting Flexibility*] (identifying "informational deficits that may impede rational choice," particularly in the context of flexible work arrangements to enhance work/family balance).

<sup>97</sup> See *id.* at 1103 (explaining that when employment decisionmakers are deciding whether to modify existing employment practices, they "may unduly rely on recent information, generalize based on particular salient experiences, over- or underestimate future risk, overvalue the status quo, and take other cognitive shortcuts in processing information and reaching a result").

the status quo.<sup>98</sup> We tend to systematically over-value our current situation in comparison to alternatives of objectively equal value.<sup>99</sup> In the workplace, this means that employers often over-value existing policies and practices, leading to results that can be at odds with what rational choice theory would predict.<sup>100</sup> Employers may prefer the traditional arrangement of having workers perform all working hours at the work site, for example, rather than allowing workers to telecommute for a brief period each day, “even if all other aspects of the alternative arrangement are objectively equal.”<sup>101</sup>

This resistance to critically examining the business necessity of existing workplace practices is exacerbated by the fundamental attribution error, which refers to a well-documented phenomenon that occurs when we try to determine the cause of other people’s behavior.<sup>102</sup> In making these types of causal attributions, we tend to systematically overestimate the role of people’s internal, dispositional characteristics and to systematically underestimate the situational constraints on people’s behavior.<sup>103</sup> This bias is particularly likely to occur in the highly role-differentiated employment setting when employers are evaluating employee performance.<sup>104</sup> Because employers over-ascribe individual performance to enduring dispositional factors of individual employees, the causal role of background workplace policies, practices, and norms is often rendered invisible.<sup>105</sup> It is therefore unsurprising that employers do

<sup>98</sup> See *id.* at 1103, 1107, 1099 (describing how employers’ decisions about workplace policies and practices “reflect an intractable desire to preserve the status quo”); see also Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625 (1998) (describing the status quo bias).

<sup>99</sup> See Arnow-Richman, *Incenting Flexibility*, *supra* note 96, at 1106.

<sup>100</sup> See *id.*

<sup>101</sup> *Id.*

<sup>102</sup> See RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 121 (1980) (describing “people’s overwillingness to ascribe behavior to enduring dispositions”); Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173, 198–200 (Leonard Berkowitz ed., 1977) (describing the fundamental attribution error); see also Travis, *Recapturing*, *supra* note 62, at 13–16 (describing how the fundamental attribution error affects employment decisionmaking).

<sup>103</sup> See NISBETT & ROSS, *supra* note 102, at 121; Ross, *supra* note 102, at 198–200.

<sup>104</sup> See Travis, *Recapturing*, *supra* note 62, at 15–16; Michelle A. Travis, *Perceived Disabilities, Social Cognition, and “Innocent Mistakes”*, 55 VAND. L. REV. 481, 524 (2002) [hereinafter Travis, *Perceived Disabilities*]; see also Lee D. Ross et al., *Social Roles, Social Control, and Biases in Social-Perception Processes*, 35 J. PERSONALITY & SOC. PSYCHOL. 485, 494 (1977) (noting that the differentiated social roles that exist in the employer–employee relationship can bias interpersonal judgments).

<sup>105</sup> See Travis, *Recapturing*, *supra* note 62, at 13–16 (describing how the fundamental attribution error contributes “to the invisibility of existing workplace structures”); cf. Travis, *Perceived Disabilities*, *supra* note 104, at 519–25 (using the fundamental attribution error to help explain why employers overestimate employee impairments and misperceive nondisabled employees as disabled, rather than focusing on the limiting aspects of workplace design).

not systematically assess the business necessity of many exclusionary practices in the workplace.

Both the status quo bias and the fundamental attribution error contribute to the larger phenomenon of workplace essentialism, which describes the highly resilient assumption that all workplaces share the same inherent, defining characteristics.<sup>106</sup> One of the core attributes of our essentialized workplace is the “full-time face-time norm.”<sup>107</sup> This norm refers to the unstated assumption that the best jobs—whether white-collar or blue-collar—must be constructed around full-time positions with long hours or unlimited overtime, rigid work schedules for core working hours, performance at a shared work location, and “uninterrupted worklife performance (with severe consequences for time off during crucial, ‘up-or-out’ phases of career development).”<sup>108</sup> Because full-time face-time has become more than merely descriptive, but has taken on both normative and definitional force, employers tend not to question or critically evaluate the panoply of workplace policies and practices that are designed to support this norm.<sup>109</sup>

As a result, many work/family scholars have documented employers’ failure to modify rigid workplace practices, even in the face of evidence of the economic benefits of workplace flexibility.<sup>110</sup> Employers continue

<sup>106</sup> See Travis, *Recapturing*, *supra* note 62, at 9–10; see also Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 936 (1995) (defining essentialism as “the belief that a type of person or thing has a true, intrinsic, and invariant nature . . . that is constant over time and across cultures and that consequently defines and constitutes it”); Arnow-Richman, *Incenting Flexibility*, *supra* note 96, at 1105 (explaining that employers “rely on heuristics based in an essentialistic understanding of the proper structure of work”); Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 54 (2003) (noting “the possibility of essentializing ideas (as opposed to the more common discussion of essentializing groups of people)”).

<sup>107</sup> See Travis, *Recapturing*, *supra* note 62, at 10.

<sup>108</sup> See *id.*; see also JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 5, 71–72, 76, 79–81 (2000) (describing the common characteristics of the best blue-collar and white-collar jobs); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1223–24, 1227 (1989) (describing how the most desirable jobs are constructed to require “Herculean time commitments,” “stringent limits on absenteeism,” and a “protracted evaluation period (often six to ten years) that precedes promotion decisions”).

<sup>109</sup> See Travis, *Recapturing*, *supra* note 62, at 10. When adjudicating conventional disparate impact challenges to workplace structures supporting the full-time face-time norm (e.g., no-leave policies, mandatory overtime, policies prohibiting part-time work, etc.), judges also fall prey to workplace essentialism by frequently refusing to recognize such structures as “particular employment practices” that are subject to legal challenge at all. See *id.* at 36–46.

<sup>110</sup> See Michelle A. Travis, *What a Difference a Day Makes, or Does It? Work/Family Balance and the Four-Day Work Week*, 42 CONN. L. REV. 1223, 1245 (2010) (“Scholars have identified a variety of reasons why employers may not respond to the growing evidence of a link between workplace flexibility and business efficiency.”); Travis, *Recapturing*, *supra* note 62, at 9–21 (analyzing “why data revealing the economic

to resist flexible work scheduling, job sharing, reduced-hour positions, compressed work weeks, telecommuting, and other practices that challenge the full-time face-time norm, despite research finding that these types of work arrangements can improve recruiting, reduce turnover and absenteeism, and increase worker productivity.<sup>111</sup> Our essentialized notion of the workplace creates a gravitational force that inhibits organizational change, “even when change could produce real economic gains.”<sup>112</sup> This problem is often exacerbated by the lack of organizational structures that would allow employers and employees to exchange necessary information to identify mutually beneficial flexible work arrangements.<sup>113</sup> For all of these reasons, many market-irrational practices involving work scheduling, working time, and work location are unlikely to be remedied by market forces alone.<sup>114</sup>

These examples of market-resistant irrational employment practices highlight the importance of Kelman’s second justification for limiting legal protection from simple discrimination in ways that efficiently direct government enforcement power and allocate limited government resources. Yet unlike in the disparate treatment context where social

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benefits of flexible work arrangements have not produced significant changes by presumably economically efficient employers”).

<sup>111</sup> See WILLIAMS, *supra* note 108, at 65, 88–93; Travis, *Recapturing*, *supra* note 62, at 12; Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 364–67 (2003) [hereinafter Travis, *Virtual Workplace*] (describing the economic benefits of telecommuting); see also ANNA DANZIGER & SHELLEY WATERS BOOTS, URBAN INST., *THE BUSINESS CASE FOR FLEXIBLE WORK ARRANGEMENTS 1–2* (2008), available at <http://workplaceflexibility2010.org/images/uploads/Business%20Case%20for%20FWAs.pdf> (establishing the business case for flexible work arrangements).

<sup>112</sup> See Travis, *Recapturing*, *supra* note 62, at 12; see also Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 67–68 [hereinafter Arnow-Richman, *Public Law*] (explaining why synergies between family-friendly workplace practices and economic business interests “are not likely to be achieved wholly through market forces”).

<sup>113</sup> See Arnow-Richman, *Public Law*, *supra* note 112, at 55, 67–68 (explaining how the lack of a “safe forum” in which employers and employees can “educate each other through an objective process” and can “identify and explore change” creates a barrier to the adoption of cost-effective flexible work arrangements); Arnow-Richman, *Incenting Flexibility*, *supra* note 96, at 1099 (arguing that employers often fail to adopt flexible working time practices that are “mutually advantageous” because of “defects and limitations in their decisionmaking process”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 478 (2001) (arguing that many employers lack the necessary “organizational systems” for identifying how workplace flexibility might produce financial gains, either at the workplace level or on an individual employee basis).

<sup>114</sup> See Arnow-Richman, *Incenting Flexibility*, *supra* note 96, at 1096, 1103 (using behavioral economics to challenge rational choice theory and demonstrate that “employers are unlikely to act optimally” when considering flexible workplace practices, many of which would “result[] in cost savings” but “likely are not being implemented”); Arnow-Richman, *Public Law*, *supra* note 112, at 67–68 (arguing that many cost-effective flexible work arrangements “are not likely to be achieved wholly through market forces”).

group status is likely to reveal the most intractable forms of individual market-irrational decisionmaking, focusing exclusively on a practice's effects on subordinated social groups will fail to uncover many forms of intractable market-irrational workplace practices. When considering how to most effectively focus legal intervention in the disparate impact context, Kelman's compelling emphasis on identifying market-resistant forms of discrimination also suggests a more direct focus on regulating particular practices that are shown to possess that characteristic. In other words, Kelman's second justification for adopting group consciousness could equally support a practice-conscious approach. Rather than limiting legal protection from market-irrational employment practices by allowing only members of certain disparately impacted social identity groups to challenge any type of exclusionary practice, a practice-conscious approach would instead limit legal protection by allowing any worker to challenge only certain highly suspect practices.

Kelman's third reason for supporting group consciousness in simple discrimination claims arguably leads to the same conclusion. Kelman persuasively argues that just as we may decide to invoke state enforcement power only to remedy intractable forms of market irrationality, we similarly may decide to grant legal protection only when an individual's successful discrimination claim is likely to benefit others.<sup>115</sup> While this pragmatic objective of maximizing legal impact also carries weight when considering both disparate treatment and disparate impact claims, it once again does not necessarily lead to a group-conscious approach in both contexts.

When challenging individual market-irrational employment decisions, members of oppressed social identity groups are indeed most likely to serve a private attorney-general role by implicitly representing and benefiting others who are subject to the same underlying prejudices and group-based stereotypes.<sup>116</sup> Kelman illustrates this point by contrasting simple discrimination claims based on race or sex, for example, from a simple discrimination claim by a qualified worker who is not hired "because he reminds the employer of a hated stepfather."<sup>117</sup> Although that individual has experienced simple discrimination, we may decide not to provide a legal remedy for such idiosyncratic irrationality "because his victory in the suit will help few others."<sup>118</sup>

While social group membership provides an indirect means for ensuring that one plaintiff's discrimination claim will assist others by revealing a widespread form of market-irrational decisionmaking, the remedy in a typical disparate impact case can itself directly benefit similar others. The core remedy for a successful disparate impact claim is practice-specific rather than plaintiff-specific. If an employer cannot

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<sup>115</sup> See Kelman, *supra* note 2, at 860, 893.

<sup>116</sup> *Id.* at 860, 865–66, 893–94.

<sup>117</sup> *Id.* at 866.

<sup>118</sup> *Id.*

demonstrate the business necessity of a challenged practice, the standard remedy is to enjoin the employer from using that practice in the future.<sup>119</sup> Thus, whenever an individual successfully challenges a market-irrational workplace practice, the resulting injunctive relief will assist all others whom the practice harms or excludes, “regardless of whether the policy refers to anything that might be called a social identity group.”<sup>120</sup> To the extent that the practice is commonly shared by other employers, a successful challenge to one employer’s use of the practice can create a strong incentive for other employers to modify their practice as well. As a result, directing legal protection toward market-irrational practices that are common and widespread may advance a private attorney-general objective just as effectively as targeting only those practices that disparately impact members of oppressed social identity groups.

Kelman’s final justification for a group-conscious simple discrimination law rests on the substantive goal of targeting the most stigmatizing forms of labor market irrationality, rather than merely the most intractable.<sup>121</sup> The concepts of stigma and related third-party effects have been studied most extensively in the context of individual decisionmaking, and in that context the role of social group status seems imminently clear. Individual market-irrational decisionmaking that is based on one’s membership in an historically subordinated identity group affects all members of the group by reinforcing traditional status-based social hierarchies, and it is uniquely demeaning because it imposes one group’s power over another.<sup>122</sup> It is more difficult, however, to identify the circumstances under which market-irrational facially neutral

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<sup>119</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“If an employment practice which operates to exclude [members of a protected class] cannot be shown to be related to job performance, the practice is prohibited.”); see also Jolls, *supra* note 1, at 655–56 (noting that “the . . . usual approach in the disparate impact arena” is to enjoin the employer from using the successfully challenged practice); Schwab & Willborn, *supra* note 57, at 1238 (explaining that “[t]he standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody”); Travis, *Recapturing*, *supra* note 62, at 38 (explaining that “[i]f a plaintiff succeeds in a disparate impact case, a court may require the employer to eliminate the exclusionary workplace practice for *all* workers”).

<sup>120</sup> See Kelman, *supra* note 2, at 865–66 (noting that “injunctive relief against a defendant’s practice may well help other members of the group,” particularly “when the plaintiff seeks to overturn an explicit policy or practice”). Kelman acknowledges that even in the context of idiosyncratic market irrationality, there is a stronger basis for providing a legal remedy when an employer institutionalizes the irrationality in a firmwide policy or practice. See *id.* at 866. “[A]n employer who refused to hire all those born under what he thought of as a bad astrological sign,” argues Kelman, “would more reasonably be subject to suit than one who didn’t hire Plaintiff P because he reminded him of his stepfather.” *Id.* “This is true,” explains Kelman, “even though neither plaintiff may be a member of any conventionally cognizable social group,” because “[a]t least overturning the general policy would help all applicants with the same astrological sign.” *Id.*

<sup>121</sup> *Id.* at 860, 866–67.

<sup>122</sup> *Id.* at 860, 866–67, 869, 894.

employment practices will be particularly stigmatizing. It is not obvious whether market-irrational employment practices that disparately impact members of protected statuses necessarily will impose the greatest stigma and third-party effects (at least when considering practices that were not adopted as a pretext for intentional group-based discrimination).<sup>123</sup>

When weighing the potential gains from regulating particularly stigmatizing forms of market irrationality against the costs to employers' competing liberty interests,<sup>124</sup> the role of social group status in assessing the employer's side of the equation is similarly unclear in the disparate impact arena. In the context of individual employment decisionmaking, any liberty interest that employers may assert in associating with the individuals of their choice is weaker when invoked for the purpose of excluding members of oppressed social identity groups.<sup>125</sup> In that situation, the employer's conduct shifts from being the mere assertion of an expressive preference into an act of social power that reinforces a hierarchical sociopolitical system.<sup>126</sup> In the context of facially neutral employment practices, the existence of inadvertent exclusionary effects on members of subordinated classes similarly may weaken an employer's liberty interest in organizing the workplace. The existence of such group-based effects may transform a private associational interest into an act of social power by erecting "artificial, arbitrary, and unnecessary barriers" that "operate to 'freeze' the status quo of prior discriminatory employment practices."<sup>127</sup>

That observation, however, does not preclude the possibility that employers' liberty interests may also lack strength when invoked for the purpose of establishing or maintaining *other* forms of market-irrational employment practices. What Kelman's analysis reveals is not only the specific relationship between social group status and the strength of employers' liberty claims, but the more general need to identify the

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<sup>123</sup> See *id.* at 875 n.68 (noting that "employer practices that exclude those who are not obviously as qualified as those who are included may not be especially stigmatizing, even if such practices adversely affect members of groups that are especially vulnerable to stigmatization," and arguing that although "[i]t seems clear that members of subordinated groups will experience transparently market irrational behavior as stigmatizing, . . . it is not clear that they will or should feel stigmatized when those with whom they deal can justly claim that they believe that they are behaving market rationally" (emphasis omitted)).

<sup>124</sup> See *id.* at 867–71, 894 (explaining the need to weigh potential plaintiff gains against competing employer interests); see also Verkerke, *supra* note 4, at 1391 (noting that the norm of positive equality "clashes with the laissez-faire values that still distinguish U.S. employment and labor regulation from its far more intrusive European counterparts").

<sup>125</sup> See Kelman, *supra* note 2, at 867–71, 894.

<sup>126</sup> *Id.*

<sup>127</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

circumstances in which market-irrational practices become tools “to control social structure,” rather than being mere exercises of expressive life.<sup>128</sup> While disparate effects on certain social groups are one means for revealing such practices, they are not the exclusive means by which market-irrational workplace practices become acts of social power.

Under this reasoning, any market-irrational employment practice that reinforces and perpetuates a broader exclusionary social structure should be a potential target for legal redress, regardless of whether the practice has a demonstrable effect on members of a traditionally recognized protected class. Workplace practices designed around the full-time face-time norm may be examples that meet that criteria. Organizing the workplace around the full-time face-time norm entrenches the social order of “domesticity,” which developed in the late eighteenth and early nineteenth century when our growing commercial and industrial economy forced a separation between “work” and “home.”<sup>129</sup> While domesticity marked a step forward from the explicit patriarchal power that governed the previously intertwined space of work and family life, it did so by dividing the home and the paid labor market into women’s and men’s respective spheres.<sup>130</sup> The full-time face-time norm reflects that particular social order by structuring market work around workers who have no meaningful household or caregiving responsibilities, and who are therefore able to provide an uninterrupted stream of unlimited market work.<sup>131</sup> As a result, workplace practices that enforce the full-time face-time norm may be understood as a means “to control social structure” or “to help bolster a particular sociopolitical system,”<sup>132</sup> by excluding individuals with significant caregiving responsibilities, single parents, members of dual-earner families, and others who fall outside of domesticity’s social order.<sup>133</sup>

In addition to specifically identifying the exercise of social power as a useful inquiry for revealing highly suspect market-irrational practices, Kelman’s analysis also suggests a more general heuristic for assessing the strength of employers’ claims to be free to organize the workplace as they see fit. Kelman contends that the interest in free association carries the most weight in individual relationships that are “personal and intimate,” but carries little weight in mass interactions that are “impersonal and distant.”<sup>134</sup> In the latter scenario, liberty claims are more likely to be

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<sup>128</sup> See Kelman, *supra* note 2, at 867–71, 894.

<sup>129</sup> See Travis, *Recapturing*, *supra* note 62, at 11; see also WILLIAMS, *supra* note 108, at 20–25, 31 (explaining the concept and development of domesticity).

<sup>130</sup> See Travis, *Recapturing*, *supra* note 62, at 11; see also WILLIAMS, *supra* note 108, at 20–25, 31 (describing domesticity’s historic development).

<sup>131</sup> See Travis, *Recapturing*, *supra* note 62, at 11; see also WILLIAMS, *supra* note 108, at 2, 23–24, 71 (describing these characteristics as defining “ideal worker” status).

<sup>132</sup> See Kelman, *supra* note 2, at 869–70 (arguing that an employer’s liberty interest is weakest when exercised toward these ends).

<sup>133</sup> See Travis, *Recapturing*, *supra* note 62, at 12.

<sup>134</sup> Kelman, *supra* note 2, at 868–70.



claims to social power rather than true expressions of personal associational preference.<sup>135</sup> This distinction suggests that market-irrational facially neutral practices that employers use on a mass scale to mechanically screen out individuals for entry-level jobs will generally be more appropriate targets for legal redress than, for example, a market-irrational practice that a firm's CEO adopts to help select his or her personal assistants. As Kelman explains, "claims for rational treatment made by individuals claiming no group affiliation might well be strong enough to outweigh libertarian associational interests in any setting in which the would-be excluder typically develops nothing more than the most minimal relationship."<sup>136</sup>

This final point highlights the overall conclusion that Kelman's justifications for group-conscious regulation of simple discrimination lead to slightly different results in the context of disparate treatment and disparate impact claims. In the context of individual employment decisionmaking, Kelman's justifications compellingly reveal how limiting antidiscrimination protection to members of historically subordinated social identity groups will target the forms of market irrationality in which the potential gains to individuals and to society most clearly outweigh any incursion into employers' rights. In the context of market-irrational practices, however, Kelman's analysis arguably leads in two directions. In addition to providing some support for using particular group-based effects to identify which market-irrational practices should be legally redressable, Kelman's justifications also suggest the value of a practice-conscious approach. In addition to justifying the need for members of historically subordinated groups to be able to demand that employers justify the business necessity of any practice that adversely affects their group, Kelman's analysis also justifies the need for all workers to be able to challenge a subset of suspect market-irrational practices. Market-irrational practices should most clearly qualify as "suspect" if they are widely used (particularly for entry-level hiring), if they are demonstrably resistant to competitive market forces, and if they perpetuate an exclusionary social structure beyond the boundaries of the individual employment relationship.<sup>137</sup>

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<sup>135</sup> See *id.* at 870.

<sup>136</sup> *Id.* at 871 (placing in this category "employment cases in which the decision maker has limited contact with the object of his decision").

<sup>137</sup> Although this Article focuses solely on the class-based approach to employment discrimination law, the thesis is in some ways analogous to Professor Evan Gerstmann's proposal for rethinking the class-based approach to Equal Protection analysis in constitutional law. Cf. EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* (2d prtg. 2003). Gerstmann argues that a "rights-based system" should replace the existing "class-based system" in Equal Protection jurisprudence. *Id.* at 15. Rather than focusing on which classes of individuals should be protected, Equal Protection law should focus on "which rights, such as sexual privacy, qualification to volunteer for military service, marriage, and so forth, must be equally enforced." *Id.* at vii-viii. "[T]he level of constitutional protection against a challenged law should be based on

*B. Examples of a Practice-Conscious Approach*

Our existing legal landscape already includes several examples of a practice-conscious rather than a group-conscious approach to regulating suspect employment practices. This Part highlights one prominent example: the medical inquiry provisions of the Americans with Disabilities Act of 1990 (the ADA).<sup>138</sup> Because this portion of the ADA is aimed at regulating particular employment practices rather than at directly protecting members of the statute's targeted class, *all* affected workers may seek redress for violations of these provisions, whether they are individuals with disabilities or not. The ADA's medical inquiry provisions illustrate two general types of practice-conscious regulation: a non-rebuttable approach that absolutely prohibits a suspect practice, and a rebuttable approach that presumes a practice unlawful unless the employer proves the market rationality of the practice by demonstrating that the practice is job-related and consistent with business necessity. This Part describes the details of both types of practice-conscious regulations in the ADA and analyzes their success and potential for advancing a positive equality norm.

Although much attention has been paid to the ADA's group-conscious antidiscrimination provisions, the ADA also regulates covered employers' use of medical inquiries and medical exams for both job applicants and incumbent employees.<sup>139</sup> These practice-based regulations are divided into three categories governing different stages of the employment relationship. Before an employer extends an employment offer, the ADA prohibits the employer from making any medical inquiries or conducting any medical exams.<sup>140</sup> During that period, the ADA permits employers to ask applicants only about their ability to

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the right involved," argues Gerstmann, "rather than the group affected." *Id.* at 15. "Instead of asking *who* has been denied equality," he explains, "the Court would ask *what kind* of equality has been denied." *Id.*

<sup>138</sup> 42 U.S.C. § 12112(d) (2006).

<sup>139</sup> *Id.*; see *id.* § 12111(5)(A) (defining covered employers to include all private employers "engaged in an industry affecting commerce" and employing "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year"); see also Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 336–49 (2009) [hereinafter Travis, *Lashing Back*] (analyzing how the ADA's medical inquiry provisions benefit individuals without disabilities).

<sup>140</sup> See 42 U.S.C. § 12112(d)(2). The ADA's language arguably prohibits only a *subset* of all pre-offer medical inquiries to job applicants because the statute refers only to inquiries "as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." *Id.* § 12112(d)(2)(A). However, the Equal Employment Opportunity Commission has interpreted the ADA to prohibit virtually all questions of a medical nature at the pre-offer stage. See U.S. EEOC, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 5.5(b), (f) (1992) [hereinafter EEOC, MANUAL] (listing examples of questions that may not be asked on application forms or in job interviews).

perform specific functions related to the job.<sup>141</sup> At the post-offer pre-employment stage, the ADA allows an employer to subject incoming employees to a medical exam, but only if the employer subjects all individuals in the same job category to the same exam, and only if the employer maintains all resulting medical information on separate forms, in separate files, and subject to strict confidentiality obligations.<sup>142</sup>

For incumbent employees, the ADA only permits employers to use medical inquiries or exams that are “shown to be job-related and consistent with business necessity,”<sup>143</sup> and the same confidentiality obligations apply. The EEOC has targeted one over-broad medical inquiry practice in particular, which is the previously common practice of subjecting incumbent employees to full physical exams before allowing them to return to work after a medical leave, rather than limiting inquiries only to information that is necessary to assess a returning employee’s ability to perform essential job tasks.<sup>144</sup> The recent amendments to the ADA target another particular practice as well:

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<sup>141</sup> See 42 U.S.C. § 12112(d)(2)(B).

<sup>142</sup> See *id.* § 12112(d)(3). An employer may not keep the medical information in an employee’s regular personnel file. See *Enforcement Guidance: Preemployment Disability-Related Questions & Med. Examinations*, U.S. EEOC (Oct. 10, 1995), <http://eeoc.gov/policy/docs/preemp.html> [hereinafter EEOC, *Preemployment Disability-Related Questions*]. The ADA identifies only three situations in which an employer may reveal an employee’s medical information: (1) “supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations”; (2) “first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment”; and (3) “government officials investigating compliance with this chapter shall be provided relevant information on request.” 42 U.S.C. § 12112(d)(3)(B)(i)–(iii).

If an employer withdraws an employment offer because of the results of a medical examination that is otherwise permissible at the post-offer pre-employment stage, the criteria that the employer uses “must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities,” unless the employer can prove that the practice is job-related and consistent with business necessity. See 29 C.F.R. pt. 1630, app. § 1630.14(b) (interpretive guidance); see also 29 C.F.R. § 1630.14(b)(3) (2011). While all workers may challenge an employer’s failure to comply with the procedural and confidentiality requirements governing medical examinations at this stage, only individuals with disabilities will be able to challenge an employer’s use of resulting medical information as an improper screening device.

<sup>143</sup> See 42 U.S.C. § 12112(d)(4). The ADA permits employers to obtain medical information from incumbent employees through voluntary medical exams that are part of an on-site employee health program, but employers must follow the ADA’s confidentiality requirements, see *supra* note 142, for all medical information that is obtained. See 42 U.S.C. § 12112(d)(4)(B)–(C).

<sup>144</sup> See *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, U.S. EEOC (July 27, 2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> [hereinafter EEOC, *Disability-Related Inquiries*]; see also Deborah F. Buckman, Annotation, *Construction and Application of § 102(d) of Americans with Disabilities Act (42 U.S.C.A. § 12112(d)) Pertaining to Medical Examinations and Inquiries*, 159 A.L.R. FED. 89, 110–11 (2000) (advising employers that requiring full medical exams of employees returning from leave under the Family and Medical Leave Act is a practice that violates the ADA).

employers' use of "qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision," at all stages of the employment process.<sup>145</sup>

These prohibitions on market-irrational practices related to employee medical information apply regardless of the information's source. Employers may not obtain medical information from third parties, such as a state agency or an employee's doctor, former employer, coworker, family member, or friend.<sup>146</sup> Nor may employers use indirect methods to obtain such information, such as searching an employee's belongings to find evidence of an employee's medical condition.<sup>147</sup>

Unlike the ADA's antidiscrimination provisions, which only protect workers who fall within the protected class of individuals with disabilities, the ADA protects all workers who are injured by an employer's violation of the medical inquiry rules.<sup>148</sup> Because the ADA's medical inquiry provisions are practice-focused rather than group-conscious, protected class status is irrelevant in claims alleging that an employer engaged in an improper medical inquiry, conducted an improper medical exam, or improperly disclosed confidential medical information.<sup>149</sup> This is the case

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<sup>145</sup> See 42 U.S.C. § 12113(c) (Supp. III 2009).

<sup>146</sup> See EEOC, *Disability-Related Inquiries*, *supra* note 144.

<sup>147</sup> See *id.* n.20; see, e.g., *Doe v. Kohn Nast & Graf, P.C.*, 866 F. Supp. 190, 197 (E.D. Pa. 1994) (holding that an HIV-positive employee stated an ADA claim against an employer for allegedly searching the employee's office for evidence of his condition).

<sup>148</sup> See 29 C.F.R. pt. 1630, app. Introduction & n.1 (interpretive guidance) (explaining that "individuals seeking protection under the[] anti-discrimination provisions of the ADA generally must allege and prove that they are members of the 'protected class,'" but "[c]laims of improper disability-related inquiries or medical examinations, [or] improper disclosure of confidential medical information . . . may be brought by any applicant or employee, not just individuals with disabilities"); EEOC, *Disability-Related Inquiries*, *supra* note 144 (stating that "the ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities," and that all employees have "a right to challenge a disability-related inquiry or medical examination that is not job-related and consistent with business necessity"). The recent ADA amendments' prohibition on market-irrational selection criteria "based on an individual's uncorrected vision," 42 U.S.C. § 12113(c), also apply to any applicant or employee who is "adversely affected," not just to a "person with a disability," see 29 C.F.R. pt. 1630, app. §§ 1630.2(j)(1)(vi), 1630.10(b).

<sup>149</sup> See 29 C.F.R. pt. 1630, app. Introduction & n.1 (interpretive guidance); *Karraker v. Rent-A-Center, Inc.*, 239 F. Supp. 2d 828, 834–36 (C.D. Ill. 2003); see also Natalie R. Azinger, Comment, *Too Healthy to Sue Under the ADA? The Controversy over Pre-Offer Medical Inquiries and Tests*, 25 J. CORP. L. 193, 206 (1999) (describing the rules governing pre-offer medical inquiries and exams as "a process barrier," which "the legislature expected . . . to be enforced without requiring a plaintiff to prove a disability as defined in the ADA" (emphasis omitted)); Elinor P. Schroeder, *Regulating the Workplace Through Mandated Personnel Policies*, 48 U. KAN. L. REV. 593, 594, 595–98 (2000) (describing the ADA's medical inquiry provisions as uniquely "prescriptive," unlike our typical "proscriptive" employment laws, because they mandate the use of particular personnel practices).

not only for incumbent employees,<sup>150</sup> but also during the pre-offer period and the post-offer pre-employment stage.<sup>151</sup>

Based on the criteria suggested by Kelman's analysis, the medical inquiry practices that are targeted by these ADA provisions appear to be good candidates for practice-conscious regulation. Before Congress enacted the ADA, it was common for application forms and employment interviewers to request a wide range of information about applicants' physical and mental health histories as part of the initial job-screening process.<sup>152</sup> Many employers routinely asked job applicants to reveal all past and present medical conditions, all prescription medication use, and any involvement in prior workers' compensation claims.<sup>153</sup> This was often

<sup>150</sup> See, e.g., *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 94–95 (2d Cir. 2003); *Fredenburg v. Contra Costa Cnty. Dep't of Health Servs.*, 172 F.3d 1176, 1181–82 (9th Cir. 1999); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997); *Pouliot v. Town of Fairfield*, 184 F. Supp. 2d 38, 53–54 (D. Me. 2002); *Pollard v. City of Northwood*, 161 F. Supp. 2d 782, 793 (N.D. Ohio 2001); *Gonzales v. Sandoval Cnty.*, 2 F. Supp. 2d 1442, 1444 (D.N.M. 1998). But see *Krocka v. Bransfield*, 969 F. Supp. 1073, 1094 (N.D. Ill. 1997), *aff'd sub nom.* *Krocka v. City of Chi.*, 203 F.3d 507 (7th Cir. 2000) (holding that, “because the ADA protects only people with disabilities,” nondisabled employees “would not have standing to sue” for violations of the medical inquiry provisions in § 12112(d)(4)); *Varnagis v. City of Chi.*, No. 96 C 6304, 1997 WL 361150, at \*6 (N.D. Ill. June 20, 1997) (suggesting that nondisabled incumbent employees cannot sue for violations of the ADA's medical inquiry provisions).

<sup>151</sup> See 42 U.S.C. § 12112(d)(2)–(3) (2006) (using the broad term, “job applicant[s],” in the pre-offer medical inquiry provisions, rather than the narrow term, “qualified individual with a disability,” which is used in the ADA's antidiscrimination provisions); see, e.g., *Cossette v. Minn. Power & Light*, 188 F.3d 964, 969–70 (8th Cir. 1999); *Murdock v. Washington*, 193 F.3d 510, 512 (7th Cir. 1999) (dicta); *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 561–63 (5th Cir. 1998); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594–95, 595 n.5 (10th Cir. 1998); *Buchanan v. City of San Antonio*, 85 F.3d 196, 199–200 (5th Cir. 1996); *Connolly v. First Pers. Bank*, 623 F. Supp. 2d 928, 932 (N.D. Ill. 2008); *Green v. Joy Cone Co.*, 278 F. Supp. 2d 526, 537–38 (W.D. Pa. 2003); *Mack v. Johnstown Am. Corp.*, No. CIV. A. 97-325J, 1999 WL 304276, at \*5 (W.D. Pa. May 12, 1999); see also Azinger, *supra* note 149, at 196–99 (summarizing case law on whether nondisabled applicants can sue for violations of the ADA's rules on pre-offer medical inquiries and exams); Allyson R. Behm, Note, *The Americans With (or Without) Disabilities Act: Pre-employment Medical Inquiries and the Non-disabled*, 26 AM. J.L. & MED. 439, 444–49 (2000) (same); William D. Wickard, Comment, *The New Americans Without a Disability Act: The Surprisingly Successful Plight of the Non-Disabled Plaintiff Under the ADA*, 61 U. PITT. L. REV. 1023, 1042–48 (2000) (same). But see *O'Neal v. City of New Albany*, 293 F.3d 998, 1010 n.2 (7th Cir. 2002) (holding that a nondisabled employee “cannot recover” for violations of subpart (c) of the pre-employment medical exam provisions); *Varnagis*, 1997 WL 361150, at \*7 (stating that “the pre-offer medical examination prohibition applies only to a ‘qualified individual with a disability’”).

<sup>152</sup> See H.R. REP. NO. 101-485(II), at 72 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355; H.R. REP. NO. 101-485(III), at 42 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 465; S. REP. NO. 101-116, at 9–10 (1989); 136 CONG. REC. 11,460 (1990) (statement of Rep. Owens).

<sup>153</sup> See EEOC, *Disability-Related Inquiries*, *supra* note 144 (“Historically, many employers asked applicants and employees to provide information concerning their

accomplished by requiring applicants to check off all conditions that they had ever experienced from a long, pre-printed list of physical and mental conditions, ranging from mild to severe.<sup>154</sup>

These practices were not only widespread, but they often lacked any demonstrable business necessity, and the market provided few corrective incentives.<sup>155</sup> Because employers frequently used these types of medical questionnaires to screen out applicants for entry-level jobs in labor pools that provided more than enough qualified applicants to fill the positions, employers typically did not measure or identify any connection between job performance and the wide range of medical conditions for which they demanded employee disclosure, nor did they measure or identify any business justification for excluding workers on the basis of their responses. Employers also did not treat employee medical information as confidential, often sharing such information with other employers, which ended up excluding workers with some medical conditions from a wide range of jobs.<sup>156</sup>

Although employers' pre-ADA medical screening practices went well beyond excluding only individuals with physical or mental disabilities, the use of these practices was supported by and reinforcing of the widespread stereotypes, fears, and irrational prejudices against members of that social identity group. Employers' medical screening practices effectively erected "artificial, arbitrary, and unnecessary barriers" in a way that "operate[d] to 'freeze' the status quo of prior discriminatory employment practices"<sup>157</sup> against individuals with disabilities. As a result, the use of medical screening practices—particularly for large groups of entry-level employees—could be viewed as an act of social power, rather than as a purely private exercise of an employer's liberty interest.<sup>158</sup>

Given that context, it is unsurprising that our practice-conscious regulations on employers' acquisition and use of employees' medical information is housed within the ADA, which is otherwise designed

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physical and/or mental condition."); Travis, *Lashing Back*, *supra* note 139, at 339–40 (describing employers' pre-ADA practices involving medical inquiries and exams).

<sup>154</sup> See 29 C.F.R. pt. 1630, app. § 1630.14(a); EEOC, *MANUAL*, *supra* note 140, at § 5.5(b).

<sup>155</sup> See EEOC, *Disability-Related Inquiries*, *supra* note 144 (explaining that the Congressional intent behind the ADA's practice-conscious medical inquiry provisions was "to prevent employers from asking questions and conducting medical examinations that serve no legitimate purpose").

<sup>156</sup> See, e.g., *Cossette*, 188 F.3d at 970–71 (holding that a nondisabled plaintiff stated a claim under the ADA's medical confidentiality provisions by alleging that her employer revealed her back injury to a prospective employer that then refused to hire her); *Heston v. Underwriters Labs., Inc.*, 297 F. Supp. 2d 840, 842, 845–46 (M.D.N.C. 2003) (holding that a nondisabled plaintiff stated a claim under the ADA's medical confidentiality provisions against her former employer for allegedly telling prospective employers about her back injury, causing her to lose job opportunities).

<sup>157</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32 (1971) (describing the effect of practices that have disparate effects along racial lines).

<sup>158</sup> See Kelman, *supra* note 2, at 869–70, 894.

primarily as a group-conscious antidiscrimination law. As a practical matter, it is difficult for political movements to successfully coalesce, lobby, and produce legislative change without “considerable group self-consciousness.”<sup>159</sup> Meaningful attempts to restrict employers’ ability to engage in simple discrimination typically do not gain momentum through coalitions of individual workers who seek protection from widely varied forms of irrational treatment in the labor market.<sup>160</sup> Such efforts are more easily advanced by reference to the shared effects of simple discrimination among members of an already identifiable disadvantaged social group.<sup>161</sup> Yet Kelman’s analysis nevertheless highlights the fact that just because “the political impetus behind state efforts to eradicate market discrimination may well come from people acting in a self-consciously group-identified fashion,” that does not necessarily mean that the resulting legal norms “do or should make reference to the group status of those who claim to be victimized by discrimination.”<sup>162</sup>

The ADA’s medical inquiry provisions exemplify that observation. Although the ADA is the product of the disability civil rights movement, the resulting legal norms against market-irrational uses of workers’ medical histories are not restricted to members of the disability community. Yet the connection between the disability rights movement and the ADA’s non-group-conscious medical inquiry provisions has not gone unnoticed by the courts. Judges often characterize the ADA’s medical inquiry provisions as a delegation of private attorney-general power to non-disabled workers as a way to more efficiently eliminate disability-based discrimination in the workplace.<sup>163</sup>

While the extent to which the ADA’s medical inquiry provisions have advanced workplace equality specifically for individuals with disabilities remains unclear, evidence suggests that the ADA’s practice-conscious regulations have significantly altered employers’ conduct regarding the acquisition, use, and dissemination of employees’ medical information, which has helped shift employers closer to a positive equality norm. Although the ADA’s restrictions on medical inquiries and exams do not affirmatively obligate employers to base their employment decisions

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<sup>159</sup> *See id.* at 838.

<sup>160</sup> *See id.*

<sup>161</sup> *See id.*

<sup>162</sup> *Id.*

<sup>163</sup> *See, e.g., Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594 (10th Cir. 1998) (explaining that the goal of eliminating disability-based discrimination “is best served by allowing all job applicants who are subjected to illegal medical questioning and who are in fact injured thereby to bring a cause of action against offending employers, rather than to limit that right to a narrower subset of applicants who are in fact disabled” (emphasis omitted)); *Mack v. Johnstown Am. Corp.*, No. CIV. A. 97-325J, 1999 WL 304276, at \*5 (W.D. Pa. May 12, 1999) (“[T]he theory behind private attorneys general is that the more of them who can bring suit, the more effectively the prohibition on those examinations can be enforced.”).

upon merit-based criteria,<sup>164</sup> the ADA nudges employers in that direction by removing a common source of non-merit-based decisionmaking.

To ensure compliance with the ADA's medical inquiry provisions, the EEOC instructs employers to purge their application forms and job interviews of virtually all medical-related questions.<sup>165</sup> Employers have received similar advice from employment attorneys, who routinely counsel employers to avoid medical inquiries altogether, particularly at the pre-offer stage.<sup>166</sup> As a result, a wide range of medical questions that used to be a standard part of the hiring process have become largely obsolete, including questions about an applicant's past illnesses, existing medical conditions, prior hospitalizations, drug or alcohol addiction, physical or mental health treatment, workers' compensation history, and lawful medication use.<sup>167</sup> Although employers may conduct medical inquiries and exams in compliance with strict procedural limits at the post-offer pre-employment stage, employers may only *use* the resulting information to make employment decisions if doing so is "job-related and consistent with business necessity."<sup>168</sup> Employment attorneys therefore advise employers not to ask for any medical information that does not demonstrably relate to the worker's ability to perform essential functions of the job.<sup>169</sup> In addition, many employers now maintain *all* employee

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<sup>164</sup> See Verkerke, *supra* note 4, at 1389 (defining "a norm of positive equality" as "an affirmative obligation to use merit-based criteria to make employment decisions").

<sup>165</sup> See EEOC, MANUAL, *supra* note 140, §§ 5.1, 5.5(a), (b), (f) (providing a wide-ranging and comprehensive list of questions that employers should not ask job applicants at the pre-offer stage); see also 29 C.F.R. pt. 1630, app. § 1630.14(a) (interpretive guidance) (advising employers against the practice of asking applicants to mark any condition that they have had from a long list of impairments); EEOC, *Disability-Related Inquiries*, *supra* note 144 (listing subjects that are inappropriate to discuss at the pre-offer stage).

<sup>166</sup> See, e.g., Azinger, *supra* note 149, at 207 (advising employers to "tread very carefully" with all pre-offer medical inquiries and exams); Teresa L. Clark, *A Map for the Labyrinth: How to Conduct Job Interviews and Obtain Medical Information Without Violating the Americans with Disabilities Act*, 13 LAB. LAW. 121, 123, 127 (1997) (advising employers to have an attorney assist in "developing and utilizing standardized hiring practices, such as written job applications and interview scripts," and in "formulating a standardized set of questions to ask in job interviews").

<sup>167</sup> See Travis, *Lashing Back*, *supra* note 139, at 336–49 (describing the effects that the ADA's medical inquiry provisions have had on employment hiring practices).

<sup>168</sup> See 29 C.F.R. § 1630.14(b)(3); 29 C.F.R. pt. 1630, app. § 1630.14(b) (interpretive guidance); EEOC, *Preemployment Disability-Related Questions*, *supra* note 142; Travis, *Lashing Back*, *supra* note 139, at 341–42.

<sup>169</sup> See, e.g., Clark, *supra* note 166, at 137 ("Unless the medical information is actually needed to make an ADA-permitted decision, employers would be well-advised to not even ask the question."); see also Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View From the Inside*, 64 TEMP. L. REV. 521, 538 (1991) (discussing the practical effect of the ADA's restrictions on medical examinations and inquiries); Travis, *Lashing Back*, *supra* note 139, at 336–49 (same).



medical information—regardless of the stage at which it is obtained—in separate, locked, and confidential files.<sup>170</sup>

Perhaps more important than the ADA's explicit prohibition against employment practices that rely upon non-job-related medical information, however, is the incentive that the ADA creates for employers to instead rely upon merit-based decisionmaking criteria.<sup>171</sup> The EEOC advises employers to focus their pre-offer inquiries on an applicant's ability to perform the essential functions of the job.<sup>172</sup> The EEOC encourages employers to prepare concrete and detailed job descriptions, and to link interview questions to the specific tasks that make up each position.<sup>173</sup> The EEOC's Technical Assistance Manual even provides employers with sample questions to replace their prior, general inquiries about workers' physical or mental health histories.<sup>174</sup> Rather than asking applicants to identify any medical conditions that they have experienced from a long list of illnesses and impairments, for example, the EEOC suggests that employers instead provide applicants with a list of specific job functions and ask, "[c]an you perform these tasks?"<sup>175</sup> As a result, the ADA's medical inquiry provisions help shift employers away from reliance upon workers' non-relevant characteristics and toward selection practices that more fairly assess individuals on their abilities to perform the job. In this way, the ADA's medical inquiry provisions move employers closer to a general norm of positive equality: and they do so without resort to a group-conscious assessment of the impact of employers' medical inquiry practices.

Although the ADA's medical inquiry provisions are perhaps the most prominent example of using practice-conscious employment regulation rather than relying solely on a group-conscious disparate impact approach, other examples exist and are becoming more common at both the federal and state levels. In 2008, Congress enacted the Genetic Information Nondiscrimination Act (GINA),<sup>176</sup> which contains genetic inquiry provisions that are similar to the medical provisions in the ADA. GINA makes it unlawful for a covered employer to "request, require, or purchase genetic information with respect to an employee or a family member of the employee," except under limited circumstances,<sup>177</sup> and

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<sup>170</sup> See EEOC, MANUAL, *supra* note 140, § 6.5 (advising employers on the proper confidential treatment of employee medical information); see also Travis, *Lashing Back*, *supra* note 139, at 336–49 (describing the effects of the ADA's confidentiality provisions on employers' treatment of employee medical information).

<sup>171</sup> See Travis, *Lashing Back*, *supra* note 139, at 348.

<sup>172</sup> See EEOC, MANUAL, *supra* note 140, §§ 5.5(d), (f).

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> See *id.* § 5.5(f).

<sup>176</sup> Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified at 42 U.S.C. §§ 2000ff to 2000ff-11 (Supp. III 2009)) [hereinafter GINA].

<sup>177</sup> See GINA § 202, 42 U.S.C. § 2000ff-1(b) (Supp. III 2009); see also *id.* § 201, 42 U.S.C. § 2000ff-4(a) (Supp. III 2009) (defining genetic information to include

GINA imposes strict confidentiality and non-disclosure requirements on all employee genetic information.<sup>178</sup> Like the ADA, *all* workers may sue for violations of GINA's practice-based rules.<sup>179</sup>

Unlike the ADA, however, GINA's practice-conscious regulations are not embedded within a law that is primarily focused on group-conscious antidiscrimination protection.<sup>180</sup> As one commentator has observed, "GINA is perhaps the first antidiscrimination statute passed without an associated identity group."<sup>181</sup> GINA is neither premised upon the existence of a "genetic underclass,"<sup>182</sup> nor does GINA directly protect members of other recognized classes. To the contrary, GINA specifically excludes from its protective reach any information about an individual's sex, age, race or ethnicity whenever that information "is not derived from a genetic test."<sup>183</sup> Yet advocates for GINA were certainly aware of and motivated at least in part by the potentially disparate effects that genetic

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information about an employee's or applicant's "genetic tests," "the genetic tests of family members," and "the manifestation of a disease or disorder in family members"); *id.* § 201, 42 U.S.C. § 2000ff (7)(A) (Supp. III 2009) (defining a genetic test as "an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes"). The EEOC's regulations translate GINA's general prohibitions on employers' acquisition of genetic information into both specific unlawful practices and suggested alternative approaches. *See* 29 C.F.R. § 1635.8(a) (2011) (defining prohibited employment requests to include "conducting an Internet search on an individual in a way that is likely to result in . . . obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in a way that is likely to result in . . . obtaining genetic information"); 29 C.F.R. § 1635.8(b)(1)(i)(B) (providing employers with scripted language to use when seeking medical information from employees to avoid inadvertently violating GINA's prohibitions on the acquisition of genetic information).

<sup>178</sup> *See* GINA § 206, 42 U.S.C. § 2000ff-5(a) (Supp. III 2009) (requiring covered employers to treat all employee genetic information "as a confidential medical record" and to maintain all such information "on separate forms and in separate medical files," and explaining that compliance with the ADA's confidentiality rules would constitute compliance with GINA); *see also id.* § 206, 42 U.S.C. § 2000ff-5(b) (Supp. III 2009) (prohibiting a covered employer from disclosing an employee's genetic information except under a narrowly defined set of circumstances); 29 C.F.R. § 1635.9(a)(1) (applying GINA's confidentiality requirements to genetic information in both written and electronic form).

<sup>179</sup> *See* 29 C.F.R. § 1635.10.

<sup>180</sup> *See* Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 484 (2010) (explaining that GINA is "without a recognized category of people targeted by its protections"); *see also* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. (forthcoming 2012) (manuscript at 32), available at <http://ssrn.com/abstract=1887772> (explaining that because GINA "covers all types of genetic information and every individual has a genetic makeup[,] the result is that GINA covers everyone").

<sup>181</sup> Roberts, *supra* note 180, at 484.

<sup>182</sup> *See id.*

<sup>183</sup> *See* 29 C.F.R. § 1635.3(c)(2); *see also* GINA § 201, 42 U.S.C. § 2000ff (4)(C) (Supp. III 2009) (stating that genetic information "shall not include information about the sex or age of any individual").

discrimination could have on members of historically disadvantaged social identity groups.<sup>184</sup> Congress codified that awareness in a formal finding acknowledging that “many genetic conditions and disorders are associated with particular racial and ethnic groups and gender,” which places members of those groups at greater risk for being “stigmatized or discriminated against as a result of that genetic information.”<sup>185</sup>

This connection between the acquisition and use of genetic information and the perpetuation of traditionally recognized forms of group-based discrimination provides one reason that employers’ genetic information practices were appropriate targets for regulation, even though they had not yet become sufficiently widespread to assess the discipline potential of competitive market forces.<sup>186</sup> Because the expansion of employers’ acquisition and use of employees’ genetic information would likely reflect, reinforce, and exacerbate our existing social stratification along racial, ethnic, gender, and class lines,<sup>187</sup> genetic inquiry practices trigger Kelman’s concerns about exercises of social power that masquerade as expressions of private liberty interests.<sup>188</sup>

Employers’ genetic information practices are also likely to produce negative third-party effects beyond merely frustrating the material expectations of individual employees, which further weakens employers’ claims to associational freedom.<sup>189</sup> Unlike the results of most medical testing, testing positive for a genetic marker of disease necessarily impacts an individual’s family members, who may possess a similar genetic make-

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<sup>184</sup> See Elaine Draper, *The Screening of America: The Social and Legal Framework of Employers’ Use of Genetic Information*, 20 BERKELEY J. EMP. & LAB. L. 286, 288, 291 (1999) (analyzing how employers’ acquisition and use of employees’ genetic information will “exacerbate existing racial and class stratification”); Elizabeth Pendo, *Race, Sex, and Genes at Work: Uncovering the Lessons of Norman-Bloodsaw*, 10 HOUSTON J. HEALTH L. & POL’Y 227, 229, 250–53 (2010) (suggesting that employers’ acquisition and use of employees’ genetic information “often reflects and reinforces long-standing patterns of stratification by race and sex”).

<sup>185</sup> See GINA § 2(3), 42 U.S.C. § 2000ff (illustrating this finding with reference to past discrimination against carriers of sickle cell anemia—“a disease which afflicts African-Americans”).

<sup>186</sup> See Roberts, *supra* note 180, at 441, 457, 462–71 (noting that “scant evidence indicated a significant history of genetic-information discrimination” prior to GINA’s enactment, and describing GINA as a “preemptive” law that “anticipates a form of discrimination that may pose a future threat” (emphasis omitted)).

<sup>187</sup> See, e.g., Draper, *supra* note 184, at 288, 291 (arguing that employers’ acquisition and use of genetic information “exacerbate[s] existing racial and class stratification” because genetic information is used to reinforce the pre-existing “layering of our society by race and ethnicity, gender, and social class”); Pendo, *supra* note 184, at 229, 250–53 (arguing “that the acquisition and use of genetic information in the workplace is not neutral, and often reflects and reinforces long-standing patterns of stratification by race and sex”).

<sup>188</sup> See Kelman, *supra* note 2, at 869–70.

<sup>189</sup> See *id.* at 866–67, 894.

up.<sup>190</sup> As a result, the risk of genetic-based discrimination was causing people to avoid seeking diagnoses and treatments that could improve their own and their family members' health, and it was slowing the development of useful genetic technologies.<sup>191</sup>

These unique aspects of genetic discrimination not only help justify GINA's practice-conscious employment regulations, but also help explain why practice-based regulation became GINA's *exclusive* regulatory approach. In contrast, the ADA's practice-conscious medical inquiry provisions,<sup>192</sup> which allow any worker to challenge only specific medical-related practices, exist alongside a conventional group-conscious disparate impact provision,<sup>193</sup> which permits only individuals with disabilities to challenge any practice that disproportionately affects group members. Because GINA was in many ways a preemptive antidiscrimination statute, enacted before genetic discrimination could become entrenched enough to create a cognizable and stigmatized "class of genetically disadvantaged people,"<sup>194</sup> GINA does not currently permit conventional group-based disparate impact claims.<sup>195</sup>

Other examples of exclusively practice-based employment regulation are expanding in the state law arena as well. Several states have adopted statutes that bar employment decisionmaking on the basis of a worker's legal, non-job-related, off-duty conduct.<sup>196</sup> Some state laws restrict

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<sup>190</sup> See Roberts, *supra* note 180, at 472; see also Carolyn Park, *Genetics Offers Tool in Combat of Cancer*, ARK. DEMOCRAT-GAZETTE, Aug. 24, 2008, at 1 (explaining that genetic testing "automatically affects your family members," which makes it "fundamentally different from traditional medical tests"); Sen. Olympia J. Snowe, *Genetic Non-Discrimination—Time to Act to Protect our Privacy*, US FED NEWS, July 16, 2004 (available through LexisNexis) (describing a constituent's decision to forgo genetic testing due to concern that the test results could adversely affect her child).

<sup>191</sup> See Roberts, *supra* note 180, at 471–74.

<sup>192</sup> See 42 U.S.C. § 12112(d) (2006).

<sup>193</sup> See *id.* § 12112(b)(3). See generally Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006) (analyzing the potential for using conventional group-based disparate impact claims under the ADA).

<sup>194</sup> See Roberts, *supra* note 180, at 457, 484.

<sup>195</sup> See GINA § 208, 42 U.S.C. § 2000ff-7(a) to (b) (Supp. III 2009) (stating that an allegation of "disparate impact" . . . on the basis of genetic information does not establish a cause of action" under GINA); see also Roberts, *supra* note 180, at 453 (noting that, "unlike Title VII, claimants cannot file disparate impact actions" under GINA). This may change in the future, as GINA requires that Congress establish a commission six years after the statute's enactment "to review the developing science of genetics and to make recommendations to Congress regarding whether to provide a disparate impact cause of action under this Act." GINA § 208, 42 U.S.C. § 2000ff-7(b) (Supp. III 2009); see 29 C.F.R. § 1635.5(b) (2011); Jessica L. Roberts, *The Genetic Information Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597, 642–43 (2011) (arguing that GINA should incorporate disparate impact to better reflect antisubordination principles).

<sup>196</sup> See Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 640–70 (2004) (summarizing relevant state laws); Shelbie J.

employers' acquisition and use of non-job-related information regarding a worker's criminal arrest or conviction record.<sup>197</sup> Seven states have recently enacted statutes limiting employers' acquisition and use of non-job-related information in workers' credit reports.<sup>198</sup> And New Jersey recently passed a law prohibiting employers from posting either print or online job advertisements that attempt to exclude currently unemployed applicants from consideration for a job.<sup>199</sup> While these state laws, and others, are quite varied in content, they all reflect concerns about simple discrimination in the workplace. Yet the classes of individual workers most likely to experience these varied forms of market irrationality generally do not self-identify as organized social identity groups. As a result, these statutes all take a practice-conscious approach—one that directly regulates highly suspect practices that appear lacking in demonstrable business necessity—rather than adding new suspect classes to our existing group-based disparate impact regimes. And although Kelman's ground-breaking analysis was intended to provide a prudential defense of group-conscious simple discrimination laws, his analysis also provides a uniquely valuable tool, as described above,<sup>200</sup> for analyzing whether these and other market-irrational employment practices are appropriate targets for such practice-conscious regulation.

### C. *Benefits and Shortcomings of a Practice-Conscious Approach*

While Kelman's analysis may help identify specific suspect employment practices for which direct regulation might most effectively move employers toward a positive equality norm, this Part explores the more general benefits and shortcomings of a practice-conscious approach to regulating market-irrational employment practices. Whenever groups of workers find themselves facing systematic exclusion

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Byers, Note, *Untangling the World Wide Weblog: A Proposal for Blogging, Employment-at-Will, and Lifestyle Discrimination Statutes*, 42 VAL. U. L. REV. 245, 266–75 (2007) (same); Joseph Lipps, Note, *State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age*, 72 OHIO ST. L.J. 645, 654–67 (2011) (same).

<sup>197</sup> See Christine Neylon O'Brien & Jonathan J. Darrow, *Adverse Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination*, 42 WAKE FOREST L. REV. 991, 995–1013 (2007) (summarizing state laws regulating employment practices involving the acquisition and use of workers' criminal records).

<sup>198</sup> See Pamela Devata & Jeffrey Sand, Seyfarth Shaw LLP, *One Minute Memo: California Joins Other States in Placing Restrictions on Employers' Use of Credit Checks* (Oct. 10, 2011), [http://www.seyfarth.com/dir\\_docs/news\\_item/1c04ad00-04c1-462e-8f25-971443a683dd\\_documentupload.pdf](http://www.seyfarth.com/dir_docs/news_item/1c04ad00-04c1-462e-8f25-971443a683dd_documentupload.pdf) (listing California, Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington).

<sup>199</sup> See Laura Bassett, *New Jersey Bans Job Ads that Discriminate Against Unemployed*, HUFFINGTON POST (April 25, 2011, 6:19 PM), [http://www.huffingtonpost.com/2011/04/25/new-jersey-bans-unemployed-job-discrimination\\_n\\_853513.html?](http://www.huffingtonpost.com/2011/04/25/new-jersey-bans-unemployed-job-discrimination_n_853513.html?) (quoting New Jersey State Representative Celeste Riley as saying, “as a state, . . . we find this practice unacceptable—especially in these hard economic times”).

<sup>200</sup> See *supra* Part III.A.

as the result of practices that lack demonstrable business necessity, seeking non-group-conscious regulation of the particular practices may offer an alternative to seeking expansion of the protected classes that may assert a conventional disparate impact claim. This Part explores the relative advantages and disadvantages of these two different ways to address discriminatory workplace practices.

Perhaps most importantly, non-group-conscious regulation of particular employment practices currently enjoys greater political viability than attempts to expand the list of legally protected social identity groups. This pragmatic point is illustrated by comparing the recent Congressional enactment of GINA's restrictions on employers' genetic information practices<sup>201</sup> with the currently insurmountable resistance to expanding federal antidiscrimination protection to members of the gay, lesbian, bisexual, and transgendered community through the Employment Non-Discrimination Act (ENDA).<sup>202</sup> The recent flurry of state laws regulating employment practices involving applicants' credit reports, as well as the New Jersey law banning job ads that exclude applicants who are currently unemployed, further highlight the potential agility that a practice-conscious approach may have in responding to emerging forms of workplace discrimination.<sup>203</sup> Seeking practice-conscious regulation may allow advocates to avoid politically charged debates about which social identity groups are worthy of legal protection and to sidestep the impossible task of finding a coherent rationale for which groups should be covered and which should not.<sup>204</sup>

More generally, practice-conscious regulations tend to fit more comfortably within antidiscrimination law's broader trend toward prioritizing anticlassification values over an antisubordination norm.<sup>205</sup>

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<sup>201</sup> See Roberts, *supra* note 180, at 442–51 (describing GINA's legislative history and its nearly unanimous vote in Congress).

<sup>202</sup> See H.R. 3017, 111th Cong. (2009); Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 LAW & SEXUALITY 1, 8–11 (2010) (describing ENDA's ill-fated Congressional history); see also Kelman, *supra* note 2, at 838 (noting that “there is a good deal of political struggle, played out in legislatures and referenda, over whether members of certain groups now left uncovered by such laws (especially gays, lesbians, bisexuals, and transgendered persons) ought to be covered”).

<sup>203</sup> See *supra* notes 198–199 and accompanying text.

<sup>204</sup> See Donohue, *supra* note 13, at 2586–90 (explaining why “[d]efining the appropriate characteristics of workers that merit the special solicitude of employment discrimination law is not a simple task”); Hoffman, *supra* note 41, at 1488, 1529–37 (arguing that “no coherent theory can be developed to elucidate why some unalterable traits are awarded protected status by federal law and others are not,” and observing that the lack of coverage based on sexual orientation, appearance, parental status, marital status, and political affiliation “raises serious questions about the coherence of federal employment discrimination law”).

<sup>205</sup> See Areheart, *supra* note 180, at 1, 43 (observing that recent employment discrimination laws reflect “a turn away from antisubordination norms and a turn toward anticlassification principles,” and arguing that future legislative initiatives that reflect an anticlassification principle will be more “publically and politically palatable”).

While antistubordination theory focuses broadly on group-based harm and social oppression, antistubclassification theory focuses narrowly on the unfair treatment of individual workers.<sup>206</sup> Because antistubclassification principles are simpler to articulate and easier to defend, they frequently are more “publically and politically palatable.”<sup>207</sup> In part, the antistubclassification trend may also be the result of the unsurprising fact that individuals are “more apt to support measures that benefit them directly,” which is often more obviously the case with statutes that are framed in antistubclassification terms.<sup>208</sup> The shift away from an antistubordination norm is likely facilitated further by the increasing public belief that employment discrimination against members of oppressed social identity groups is simply a thing of the past.<sup>209</sup>

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than initiatives that reflect antistubordination principles). Scholars have also observed this trend within constitutional law. *See, e.g.*, Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1009 (2002) (arguing that “[c]urrent Supreme Court doctrine understands equal protection as an [antistubclassification] principle rather than an antistubordination principle”); Reva B. Siegel, *Equality Talk: Antistubordination and Antistubclassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1473 (2004) (noting that “equal protection law has expressed antistubclassification, rather than antistubordination, commitments as it has developed over the past half-century”).

<sup>206</sup> *See* Areheart, *supra* note 180, at 2. Although antistubclassification and antistubordination principles are often described as wholly distinct, many scholars have shown that there is a complex relationship between the two. *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Antistubclassification or Antistubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (arguing that “antistubordination values have shaped the historical development of antistubclassification understandings”); Green, *supra* note 55, at 885 n.134 (“Scholars have made a strong argument that the antistubclassification principle cannot be fully understood without reference to antistubordination.”); Siegel, *supra* note 205, at 1477 (arguing that “antistubordination values live at the root of the antistubclassification principle”).

<sup>207</sup> *See* Areheart, *supra* note 180, at 42–43 (arguing that “the antistubclassification principle represents an easily stated and basic notion of fairness, and thus naturally has a broad appeal”); *see also id.* at 33 (arguing that GINA’s successful enactment was due in part to the fact that “GINA is largely an antistubclassification statute”).

<sup>208</sup> *See id.* at 44; *see also* Derrick Bell, *Brown v. Board of Education: Reliving and Learning from our Racial History*, 66 U. PITT. L. REV. 21, 22 (2004) (positing an interest-convergence hypothesis under which “the interest of blacks in achieving racial equality is accommodated only when that interest converges with the interests of whites in policy-making positions”); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980) (arguing that school desegregation was the result of policymakers recognizing “the economic and political advances at home and abroad that would follow abandonment of segregation”); Travis, *Lashing Back*, *supra* note 139, at 312–13 (noting the importance of “identifying and highlighting benefits to nondisabled workers to help maintain support for the [ADA]”).

<sup>209</sup> *See* William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 100 (2003) (arguing that the trend toward status-neutral workplace protections reflects the fact that “a significant segment of society believes that forty years of powerful legal intervention has abated virulent workplace discrimination against African Americans, women, and others”).

A practice-conscious approach to regulating discriminatory workplace practices may not only be more feasible in the current anti-subordination climate, but it also may be more effective in changing workplace practices in light of the increasingly hostile judicial response to conventional disparate impact claims.<sup>210</sup> Courts have narrowly defined the workplace policies, structures, and organizational norms that constitute particular employment practices that are subject to conventional disparate impact review.<sup>211</sup> Courts have ratcheted up the proof requirements for demonstrating group-based adverse effects.<sup>212</sup> And courts have broadly interpreted the employer's business necessity defense.<sup>213</sup> As a result, even if advocates successfully expand the existing list of protected classes, it is unclear whether conventional disparate impact claims will be a successful tool for group members to challenge market-irrational employment practices from which they suffer adverse exclusionary effects. In addition, the United States Supreme Court's recent decision in *Ricci v. DeStefano*,<sup>214</sup> which holds that an employer's attention to a practice's disparate effects on members of one group may provide evidence of the employer's disparate treatment of members of

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<sup>210</sup> See Arnow-Richman, *Public Law*, *supra* note 112, at 37–38 (noting that “successful ‘unintentional’ discrimination cases have been rare”); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734–53 (2006) (studying a sample of cases from 1984 to 2001 and concluding “that the disparate impact theory has produced limited results in the courts and has rarely been successfully extended beyond the testing context”).

<sup>211</sup> See Arnow-Richman, *Public Law*, *supra* note 112, at 38 (noting the limited effect of disparate impact claims because “courts have taken a narrow view of what it means to demonstrate a ‘job practice’ that creates a disparate effect, refusing to treat workplace norms as practices”); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 21–24 (2006) (describing how courts tend to reject disparate impact challenges to subjective employment practices); Travis, *Recapturing*, *supra* note 62, at 36–46 (demonstrating how courts have treated a wide range of workplace organizational norms as non-practices, thereby placing them beyond the reach of disparate impact law).

<sup>212</sup> See Bagenstos, *supra* note 211, at 13 (describing the hurdle placed before plaintiffs to prove that a particular employment practice rather than an entire decisionmaking process is the source of the group-based disparate impact); Verkerke, *supra* note 4, at 1403–04 (explaining that “[p]roof of adverse impact ordinarily requires evidence of how the practice has affected a group of sufficient size to allow for reliable statistical inferences,” which means that “disparate impact claims may challenge only the limited domain of practices for which plaintiffs are able to gather the necessary data”); Wax, *supra* note 67, at 630 (explaining that disparate impact claims routinely confront “the problem of defining the applicable baseline population against which to assess unlawful impacts”).

<sup>213</sup> See Arnow-Richman, *Public Law*, *supra* note 112, at 38 (arguing that disparate impact claims often fail because courts have “broadly construed” the business necessity defense to include any “legitimate business decision,” including “not only decisions based on cost, but other acts of managerial discretion”); Selmi, *supra* note 210, at 705–06 (arguing that the disparate impact theory “has proved an ill fit for any challenge other than to written examinations” because courts “readily accept most proffered justifications” for discriminatory practices under the business necessity defense).

<sup>214</sup> 129 S. Ct. 2658 (2009).



another group, likely will undermine any voluntary efforts to advance the objectives of conventional disparate impact law.<sup>215</sup> And of course, Justice Scalia's concurrence raises the even more ominous possibility that conventional disparate impact doctrine eventually may succumb altogether to a constitutional attack.<sup>216</sup>

Given this public, political, and judicial environment, members of currently non-protected groups may have more to gain by identifying employment practices that appear to have the most pernicious group-based effects and seeking non-group-conscious, practice-based legislation. Scholars have observed, for example, how members of the gay, lesbian, bisexual, and transgendered community have gained indirect protection from workplace discrimination using non-group-conscious state laws that prohibit employers from making decisions based on a worker's lawful off-duty conduct.<sup>217</sup> Such an approach has the further benefit of reducing the risk that opponents will charge affected group members with seeking or receiving special rights or benefits.<sup>218</sup> By shifting the focus away from protected personal characteristics and toward prohibited employer activities, a practice-conscious approach to workplace discrimination also may reduce the polarizing effects of group members being essentialized, stigmatized, and subject to backlash.<sup>219</sup>

Once in place, practice-conscious workplace laws are also likely to produce less complex litigation. Because any worker may challenge an employer's violation of a practice-based law, litigation will not involve protracted debates about the boundaries of protected class status.<sup>220</sup>

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<sup>215</sup> See *id.* at 2673–77; see also Areheart, *supra* note 180, at 40.

<sup>216</sup> See *Ricci*, 129 S. Ct. at 2681–82 (Scalia, J., concurring) (“[The majority’s holding] merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”).

<sup>217</sup> See, e.g., GERSTMANN, *supra* note 137, at 180–81.

<sup>218</sup> See *id.* at 181 (describing how state laws that prohibit adverse employment actions against all workers because of legal off-duty conduct can “protect gays and lesbians from discrimination without making them vulnerable to the charge that they are seeking or benefiting from special rights”).

<sup>219</sup> See Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1222–24, 1242–44 (2011) (arguing that “[u]nlike projects perceived as redistributing resources based on group differences,” universal legislative solution may avoid the backlash often connected with identity politics, “including stigmatization of the identity group seeking recognition”). A practice-conscious approach also avoids the polarizing forms of challenge to conventional disparate impact doctrine that attempt to justify the disparate effects of various employment practices based on group-based generalizations of skill and human capital. See, e.g., Wax, *supra* note 67, at 697–98 (arguing that “[t]he underrepresentation of minorities in large segments of the job market is overwhelmingly the result of real skill disparities rather than employer indifference to unjustified racial impacts,” and that “existing differentials are more than accounted for by supply-side differences in job preparation or other cognitive or noncognitive group-based factors”).

<sup>220</sup> See Hoffman, *supra* note 41, at 1523–29 (noting that both Title VII and the ADA have “generated significant debate concerning the boundaries of [their] protected

Claims alleging violations of the ADA's medical inquiry provisions, for example, require no analysis of whether the plaintiff is an individual with a disability—a threshold inquiry that has consumed and derailed many claims under the ADA's group-conscious antidiscrimination provisions. Claims alleging violations of practice-conscious laws also will require a much simpler causation analysis. Unlike the complicated statistical inquiry into the differential effects that a practice has on members of one group versus another that is required in conventional disparate impact claims, practice-conscious claims will only require proof that the challenged practice adversely affected the plaintiff in the case.

While recognizing all of these potential benefits to pursuing a practice-conscious approach to discriminatory workplace practices, there are important reasons to view such an approach only as an underappreciated complement to—rather than as a replacement for—conventional group-based disparate impact law. Acknowledging both the legal trend toward prioritizing anticlassification principles and the judicial hostility toward conventional disparate impact claims should not merely spur advocates toward strategic legislative alternatives, but should also illuminate the critical need to shore up the fragile normative foundation for employment discrimination law. Without a deep and continued commitment to antisubordination principles, employment discrimination law will never realize its full promise as a means of disrupting the perpetuation of disadvantaged classes of workers. Because “one cannot be subordinated, in the structural sense, as an individual,”<sup>221</sup> continued theoretical and legal attention to group status continues to play a necessary role in ensuring that the elimination of systemic, class-based inequality does not disappear as a normative pillar supporting antidiscrimination law.<sup>222</sup> Because conventional group-conscious disparate impact doctrine is “intrinsically about antisubordination,”<sup>223</sup> conventional disparate impact law remains essential in foregrounding an antisubordination norm.

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classifications,” particularly in cases involving employers’ dress and grooming codes, English-only rules, religious versus “political” or “lifestyle” beliefs, and “gender identity or gender expression”); Kelman, *supra* note 2, at 838 (observing that group-conscious antidiscrimination statutes produce “a good deal of legal struggle . . . (in the disability rights area especially) over whether particular individuals are members of classes that are expressly protected”).

<sup>221</sup> Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1011 n.206 (1993) (arguing that “[t]here is indeed a necessary connection between the concept of subordination and groups”).

<sup>222</sup> See Areheart, *supra* note 180, at 4 (arguing that the shift from antisubordination to anticlassification norms “imperil[s] the underlying normative foundation of employment discrimination law: fighting past and current group subordination”).

<sup>223</sup> See *id.* at 16. Cf. Roberts, *supra* note 195, at 642–43 (applauding GINA’s practice-based regulations of employers’ use and acquisition of employees’ genetic information, but arguing that GINA should also incorporate a disparate impact theory to better reflect antisubordination principles).

In addition, a solely practice-conscious approach to regulating workplace practices risks diluting the needs of members of socially oppressed groups by trivializing their unique harms.<sup>224</sup> Practice-conscious regulations that provide universal protections may implicitly re-frame discriminatory practices as constraints on liberty, rather than as instruments of inequality, which can mask the deep social and economic constraints within which members of historically subordinated social identity groups must operate.<sup>225</sup> Taken to the extreme, a solely practice-conscious approach that relies upon universal coverage could end up inadvertently serving a political agenda that denies the existence of workplace discrimination altogether.<sup>226</sup> For these reasons, greater exploration of a practice-conscious approach to regulating market-irrational employment practices should be viewed as a complementary strategy alongside a strategy that continues to focus on resuscitating and strengthening conventional group-based disparate impact law.<sup>227</sup>

<sup>224</sup> See Clarke, *supra* note 219, at 1219, 1225, 1247–49 (criticizing “the universal turn in workplace protections”).

<sup>225</sup> See *id.* at 1219, 1223, 1245 (arguing that the trend toward universalizing workplace protections “entails potential risks in terms of equality” by “mask[ing] inequality”).

<sup>226</sup> See *id.* at 1261 (arguing that by reframing discrimination “as a dignitary injury,” the universalist turn in workplace protections could become “part of a political project that denies the existence of discrimination in a post-racist, post-sexist era”).

<sup>227</sup> See Travis, *Lashing Back*, *supra* note 139, at 355 (noting the “scholarly revival of the disparate impact model”); see, e.g., Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 470–71 (2005) (suggesting that disparate impact law has an increasingly important role to play in shaping discrimination class action settlements); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 666–67 (2005) (explaining how disparate impact doctrine could be used to challenge work culture); L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 353–69 (2005) (reframing some sexual harassment cases as disparate impact claims); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 597 (2004) (suggesting that “the disparate impact theory of litigation remain[s] [a] largely untapped resource[] of enormous potential for plaintiffs”); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 912–13, 984–1000 (2005) (seeking future revival of disparate impact theory); Travis, *Recapturing*, *supra* note 62, at 77–91 (observing the “renewed scholarly interest in developing disparate impact jurisprudence” and analyzing how disparate impact law might be used to restructure workplace organizational norms to provide more flexible work arrangements); Travis, *Virtual Workplace*, *supra* note 111, at 341–74 (analyzing whether women workers could use disparate impact claims to obtain more equitable telecommuting and other flexible work arrangements); Roberto J. Gonzalez, Note, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2221–22 (2003) (analyzing how disparate impact claims could be used to challenge assimilationist cultural practices in the workplace).

## IV. CONCLUSION

Just over a decade has passed since Professor Mark Kelman published his influential inquiry into the proper role that group consciousness should play in employment discrimination law. During that period, the success of conventional group-conscious disparate impact claims has waned; federal and state regulation of specific employment practices has grown; and employment discrimination law has shifted its prioritization from antistatutory to anticlassification norms. In light of those developments, this Article seeks to advance Kelman's ongoing investigation by applying his analysis specifically to the disparate impact arena: i.e., by exploring the proper role that group consciousness should play in legal efforts to ensure that facially neutral employment practices are demonstrably merit-based.

Kelman's analysis persuasively demonstrates that a non-group-conscious approach to regulating simple discrimination in the workplace is both conceptually possible and prudentially unwise. In the context of firmwide market-irrational employment practices, however, the reasons that Kelman articulates for restricting the reach of antidiscrimination law by reference to group-based effects also provide support for restricting the law from the opposite direction. Kelman's analysis highlights the potential benefits of targeting legal protection by allowing *any* worker to challenge the business necessity of *only* certain suspect practices, rather than by allowing *only* members of certain disparately impacted groups to challenge the business necessity of *any* practice that is lacking in business necessity.

Universally applicable regulations of particular employment practices are currently likely to be more politically viable than expanding the existing list of protected classes, in part because practice-conscious regulations fit more comfortably within an anticlassification understanding of employment discrimination law. Yet an anticlassification principle cannot, by itself, provide normative guidance as to which classifications should be targeted by a practice-conscious approach to workplace regulation.<sup>228</sup> Although Kelman's work articulates a set of administrative and substantive concerns in order to support a group-conscious approach to disparate impact law, the same concerns also provide a useful basis for identifying which employment practices should be deemed sufficiently suspect to be worthy of direct regulation. At the same time, however, a renewed commitment to the antistatutory principles that animate conventional group-based disparate impact doctrine remains critically important as well. Kelman's work thus reveals two divergent yet complementary strategies in the

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<sup>228</sup> See Areheart, *supra* note 180, at 45 ("Given that the principle of anticlassification provides no normative guidance—i.e., nothing within anticlassification theory tells us which classifications should be forbidden—then some other value must animate the antidiscrimination principle.").

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continued pursuit of workplaces that are built around a positive equality norm.