2004

Causation in Antidiscrimination Law: Beyond Intent versus Impact

Sheila R. Foster

*Fordham University School of Law*, sfoster@law.fordham.edu

Follow this and additional works at: [http://ir.lawnet.fordham.edu/faculty_scholarship](http://ir.lawnet.fordham.edu/faculty_scholarship)

Part of the [Civil Rights and Discrimination Commons](http://ir.lawnet.fordham.edu/civil_rights_discrimination)

Recommended Citation


Available at: [http://ir.lawnet.fordham.edu/faculty_scholarship/220](http://ir.lawnet.fordham.edu/faculty_scholarship/220)

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
CAUSATION IN ANTIDISCRIMINATION LAW: BEYOND INTENT VERSUS IMPACT

Sheila R. Foster*

TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 1470

II. REASONING ABOUT CAUSATION: ENDOGENOUS AND EXOGENOUS INFLUENCES .............................................. 1480
   A. Endogenous Influences: Counterfactual and Contrastive Reasoning .................................................. 1481
      1. Counterfactual “Mutations” of Expected Outcomes and Factors ................................................. 1481
      2. Contrastive Reasoning and the Search for Comparative Information ........................................... 1484
   B. Exogenous Influences: The Role of Motivation, Bias, and Knowledge .............................................. 1486
      1. Influences on Counterfactual Mutation .................................................................................. 1486

* Professor of Law, Fordham University. I am indebted to the many readers who gave me feedback throughout the gestation period of this Article. They include faculty workshop participants at both Fordham School of Law and American University School of Law. I am particularly indebted to those individuals who commented in depth on the Article, forcing me to think longer and deeper about these issues: Rachel Godsil, Sonya Grier, Darren Hutchinson, Michael Selmi, and Peter Siegelman. Finally, I express profound gratitude to my research assistants, Peter Silverman and Sara Fuks, both of whom shaped this Article in indispensable ways. All mistakes and shortcomings are my own.
I. INTRODUCTION

Antidiscrimination law and scholarship have long been engaged in the debate over whether a discriminatory intent or disparate impact test best captures the type of discrimination the law should, or can, prohibit.¹ This Article suggests that we move

beyond this dichotomous debate and focus instead on how courts reason about discrimination cases brought under both the intent and impact doctrines. This Article identifies a distinct pattern, or framework, in the way courts reason about discrimination in both types of cases that defies neat doctrinal labels. This reasoning process, which I shorthandedly refer to as "causation," is at the heart of evidentiary structures in both intent and impact actions. Unfortunately, the reigning distinction between intentional and disparate impact discrimination—an increasingly blurry one—has obscured the more important focus on the element of causation that, in my view, constitutes the normative core of antidiscrimination law. This Article seeks to shift attention toward this common causal inquiry as a lens into why, despite the persistence of status-based discrimination, so few discrimination claims (either intent or impact based) are successful.

---

considers unconscious racism by evaluating the potential symbolic message of the conduct); Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 HARV. L. REV. 493 (2003) (analyzing the conceptual commitments and tension between equal protection and disparate impact law and promoting disparate impact as the proper standard for much of antidiscrimination law).

2. Of course, although constitutional and statutory prohibitions against intentional discrimination remain, the disparate impact cause of action survives only in civil rights law.

3. See Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065, 1069–73 (1998) (commenting that "the Court's application of the discriminatory intent requirement has been far from coherent" and examining the disparate approaches that are currently used); Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 STAN. L. REV. 1105, 1106–07 (1989) (stating that the doctrine of intent actually shifts burdens of proof to allow the judging of substantive outcomes consistent with liberal ideology); Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 GEO. L.J. 279, 287, 294 (1997) (arguing that the Supreme Court employs such a broad definition of intentional discrimination that it limits its understanding of the doctrine).

4. Notably, others have pointed out that the intent requirement in both constitutional and statutory law is better understood as a causation requirement. See, e.g., Evan Tsen Lee & Ashutosh Bhagwat, The McCleskey Puzzle: Remediaying Prosecutorial Discrimination Against Black Victims in Capital Sentencing, 1998 SUP. CT. REV. 145, 152–53 (comparing the Court's inquiry into discriminatory intent with the "but for" causation of tort and criminal law); Selmi, supra note 3, at 289 (advocating an approach to answering the question of intent by looking at the potential effect of race on the decisionmaking process, rather than subjective mental states); Rebecca Hanner White & Linda Hamilton Krieger, Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making, 61 LA. L. REV. 495, 502–505 (2001) (interpreting the Supreme Court's disparate treatment decisions to show that the Court views the intent inquiry as a question of causation).

5. See, e.g., JAN AYRES, PERVERSIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 4, 11–12 (2001) (arguing that race and gender discrimination in retail sales "is neither a thing of the past" nor limited to the specific markets regulated by the 1960s civil rights legislation).

By definition, all discrimination claims require plaintiffs to demonstrate a causal connection between the challenged decision or outcome and a protected status characteristic.\(^7\) That is, when a plaintiff alleges that she has been discriminated against by a particular decision or action, she is essentially making a causal claim about the relationship between her status and that decision or action. Indeed, this causal link defines the very essence of prohibited discrimination under both constitutional and statutory civil rights law. Not all differential treatment of, or disparate impact on, an individual or group is prohibited by the law. The prohibition against discrimination is a prohibition against making decisions or taking actions on account of, or because of, a status characteristic singled out for protection by our civil rights laws or constitutional traditions (which generally include race, gender, nationality, religion, disability, and age).\(^8\)

Cases involving both intentional and disparate impact discrimination thus require courts and juries to interrogate decisionmaking processes and examine their outcomes to assess the causal link between the plaintiff’s status and the challenged decision or outcome. In intentional cases, a plaintiff must prove that an individual or group’s protected status played a role—

---

\(^7\) Low Success Rates for Women and Minorties, 37 U.C. DAVIS L. REV. 511, 513–17, 566 (2003) (analyzing California jury verdicts in employment discrimination and wrongful discharge cases from 1998–1999 and concluding that juror bias resulted in substantial disadvantage for women and minorities).

[One can literally count on one hand the number of published [employment discrimination] decisions in which, after acknowledging the existence of unconscious bias, the court rules for a race or national origin discrimination plaintiff or reverses a trial court ruling for the defendant. Many more courts, after acknowledging the existence in society generally of subtle or unconscious forms of bias, rule against the disparate treatment plaintiff on the grounds that she has failed to prove the existence of such bias in her case.


8. See, e.g., Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (stating that discriminatory intent “implies that the decisionmaker... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group” (emphasis added)).

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against any individual “because of” that individual’s race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). So too does Title VIII of the Civil Rights Act of 1968, which prohibits housing discrimination “because of” various protected categories. § 3604.

The Americans with Disabilities Act (ADA) similarly prohibits discrimination against a qualified individual “because of” her disability. § 12112(a). Likewise, the Age Discrimination in Employment Act of 1969 (ADEA) prohibits discrimination against an individual “because of” her age. 29 U.S.C. § 623(a)(1).
perhaps a predominant or determinative one—in the decisionmaking process that resulted in differential treatment.\(^9\)

As many commentators have demonstrated, neither conscious prejudice nor actual animus on the part of the decisionmaker is a necessary element of intentional discrimination under constitutional or civil rights law.\(^10\) To prevail in a disparate impact case, a plaintiff must demonstrate that an adverse, disproportionate impact is brought about by decisionmaking criteria or practices that operate to harm individuals on the basis of a protected status characteristic.\(^11\) Under each doctrine, the

---

9. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 517–18 (1993) (declaring that the inquiry under Title VII is whether “the [employment] decision was in reality racially premised”); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (stating that under the ADEA, a plaintiff need only prove that her age “played a role in [the decisionmaking] process and had a determinative influence on the outcome”); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (“[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case . . . .”); see also Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (“The ultimate question [in an intentional action under Title VIII is whether the employee has been treated disparately 'because of race[,] . . . regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.”); George Rutherglen, Discrimination and Its Discontents, 81 VA. L. REV. 117, 127 (1995) (defining “discrimination” as “a process of noticing or marking a difference, often for evaluative purposes”).

How significant a role the prohibited characteristic must play in order to invalidate the decision can vary. Compare Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) (“When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.” (emphasis added), with Miller v. Johnson, 515 U.S. 900, 916 (1995) (defining the plaintiff’s burden in a redistricting case as showing that “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district” (emphasis added)).

10. See Foster, supra note 3, at 1084–97 (illustrating the assertion that different degrees of consciousness, ranging from specific intent to unconscious bias, can satisfy the intent standard in equal protection law); Selmi, supra note 3, at 289 (proposing that the key inquiry in intentional cases under both constitutional and civil rights law should “target[] causation, rather than subjective mental states”); D. Don Welch, Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent, 60 S. CAL. L. REV. 733, 738 (1987) (suggesting that in Title VII disparate treatment cases the U.S. Supreme Court actually requires “motive,” which “is the underlying [possibly unconscious] cause or reason moving an agent to action,” and not “intent,” which “is the conscious purpose with which one acts to effect a desired goal or result”); White & Krieger, supra note 4, at 500–11 (arguing that the evidentiary framework developed by the U.S. Supreme Court in intentional employment discrimination cases under Title VII, the ADA, the ADEA, and similar statutes recognizes many types of discriminatory motives, including those that operate outside of a decisionmaker’s conscious awareness).

11. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (plurality opinion) (“[T]he plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.”); see also Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656–657 (1989) (adopting Watson’s plurality opinion).
ultimate inquiry is the same: How likely is it that the same decision would have been made, or the same outcomes would have resulted, in the absence of the influence of a protected status characteristic?

The status categories protected under antidiscrimination law are often ones that carry a history of pervasive mistreatment, bias, stereotype, social stigma, or persistent disadvantage. Discrimination claims require courts to evaluate whether and how the indicia (or markers) historically associated with these social statuses have influenced particular decisionmaking processes and outcomes in either express or subtle ways. The manner in which courts go about this evaluative exercise ultimately gives content and meaning to the term discrimination, at least as a juridical matter. For that reason, this Article carefully examines the methodology employed by courts to discern whether an adverse decision or outcome more likely than not resulted from the influence of indicia historically associated with status-based discrimination (prejudice, stereotyping, et cetera).

This examination reveals that courts in intent and impact actions share a common way of reasoning about discrimination and, in particular, about the causal inquiry at the heart of discrimination claims. Both intent and impact causes of action are premised on a three-step process of causal inquiry: status inference, neutral explanation, and causal attribution. The plaintiff is expected to introduce status (for example, race or gender) as a possible explanation for the contested decision or outcome. This introduction creates a practical, and often legal, imperative for the defendant to explain its decision or the outcome in status-neutral terms. The factfinder must then decide whether the decision or outcome is more likely attributable to status influences or to the neutral explanation offered by the defendant. Once status influence has been found, the decisionmaker must justify the discriminatory decision; however, this justification occurs only after the causal inquiry has been satisfied.


13. Refer to Part III.A infra.

14. In other words, the decisionmaker’s "explanation" is different from its ultimate "justification" for a discriminatory decision. The causation inquiry precedes the justification stage. In both intent and impact cases, once the factfinder concludes that status has influenced or caused the decisionmaking process to occur, the decision may nevertheless survive, as discussed below, if the decisionmaker can justify it by reference
This three-step causal inquiry is itself based in and reliant upon two types of reasoning processes—counterfactual and contrastive thinking—that social scientists have found dominate causal determinations. For instance, when asking “if X did not occur (or was not present), how likely is it that Y would have happened?” individuals tend both to employ the “what ifs” of counterfactual reasoning in order to evaluate the influence of certain aspects of the occurrence and simultaneously to engage in contrastive reasoning to compare the occurrence with similar
to a “business necessity” or a “compelling state interest,” or by a showing that the same decision or outcome would have been made had status not been an influence. This Article does not focus on those types of justifications.

For example, in disparate impact cases, the defendant can only save its criteria or practices that caused the status-based disparate impact if they are truly necessary or essential to achieving the goals or purposes sought by the decision. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000) (mandating that defendants have the burden to prove “that the challenged practice is job related for the position in question and consistent with business necessity”). Even if the defendant succeeds in making this showing, the defendant can still be liable if the plaintiff demonstrates the availability of a less discriminatory alternative business practice or criteria that the defendant has refused to adopt. § 2000e-2(k)(1)(A)(ii); see also 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994) (codifying the “business necessity” justification in employment discrimination law under Title VII of the Civil Rights Act of 1964). Most other civil rights statutes—housing, age, and disability nondiscrimination acts—use the same basic structure as Title VII. See, e.g., Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 17–18 (1988); Christopher P. McCormack, Note, Business Necessity in Title VII: Importing an Employment Discrimination Doctrine into the Fair Housing Act, 54 FORDHAM L. REV. 563, 563–67, 606 (1986).

Similarly, in intentional cases, the defendant has a chance to justify status-influenced decisions either by demonstrating that there is a compelling state interest in the decision or that the same decision would have been made had the factor been absent. See Miller v. Johnson, 515 U.S. 900, 915–20 (1995) (stating that once a plaintiff shows that race is the “predominant” motive behind a redistricting decision, the legislature must justify the use of race by a compelling state interest); Hunter v. Underwood, 471 U.S. 222, 228 (1985) (“[O]nce racial discrimination is shown to have been a ‘substantial’ or ‘motivating’ factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.”); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (commenting that the decision will not be deemed unconstitutional even if it is based on a status like race if the defendant can show that it would have made the same decision had the impermissible factor not played a role; when this can be established, “the complaining party . . . [can] no longer fairly . . . attribute the injury complained of to improper consideration of a discriminatory purpose”); see also 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2000) (precluding damages to a plaintiff in intentional disparate treatment cases if the defendant can show by a preponderance of the evidence that it would have treated the plaintiff similarly even if the plaintiff’s status had played no role in the employment decision). But see Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–102 (2003) (holding that the plaintiff is not required to present direct evidence of discrimination in mixed motive cases for a reasonable jury to conclude that status was a motivating factor).

occurrences as a way to identify possible explanatory factors. These two reasoning processes not only permeate causal thinking but are also shaped by various influences—normative expectations and cognitive biases, for example—that critically shape these processes and can have a determinative role on causal attributions.

Beyond illustrating this common causal element, a close examination of these two reasoning processes in antidiscrimination law provides a window into understanding why, despite the existence of generous evidentiary mechanisms, intent and impact actions have ceased being a viable avenue of relief for discrimination plaintiffs. In particular, this Article illustrates that the causal inquiry at the heart of evidentiary structures in both intent and impact actions has, over time, become vulnerable in two respects.

First, these evidentiary structures are deeply vulnerable to attribution mistakes that may occur as a result of unconscious stereotypes and cognitive biases that can distort the causal attribution judgments by legal decisionmakers and factfinders. Current psychological research suggests that unconscious biases and cognitive stereotypes account for much of modern day discrimination. Legal decisionmakers and factfinders are not likely to detect these biases either in themselves or in others when evaluating discrimination claims. This Article demonstrates how the same cognitive biases that give rise to discrimination in society can also distort causal judgments about that discrimination. This danger is embedded in the evidentiary frameworks governing intent and impact cases, which allow the causal inquiry underlying discrimination claims to be determined

16. Refer to Part II.A., C infra.
17. Refer to Part II.B infra.
18. See, e.g., Gary Blasi, Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology, 49 UCLA L. Rev. 1241, 1243 (2002) ("The behavior of real human beings is often guided by racial and other stereotypes of which they are completely unaware."); Martha Chamallas, Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes, 74 S. Cal. L. Rev. 747, 753–54 (2001) (acknowledging that contemporary forms of bias are not as pronounced as those traditionally contemplated by antidiscrimination laws, rendering our current legal models an "impediment to addressing the new forms of bias"); Krieger, supra note 6, at 1187–88 (describing how some types of cognitive processing can lead to stereotyping); Lawrence, supra note 1, at 317 (discussing the psychological underpinnings of modern-day discrimination).
19. See Barbara J. Flagg, Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking, 104 YALE L.J. 2009, 2013 (1995) (arguing that transparently white decisionmaking consists of the unconscious use of decisionmaking criteria that are more strongly associated with whites than nonwhites and that these criteria and norms are apt to be interpreted as race neutral rather than as covertly race specific).
by contrastive reasoning exercises—for example, explanations seeking to distinguish disparately treated and affected individuals and groups—that invite reliance on the very stereotypical categorization structures at the root of status discrimination. Many discrimination claims fail because courts are uneven at best—and often neglectful—in evaluating these explanations against existing antidiscrimination norms and current understandings about cognitive prejudice and bias.

There is, however, a deeper vulnerability in the evidentiary structure of antidiscrimination law that is more destabilizing to the causal inquiry that lies at its center. This vulnerability is the erosion of certain normative presumptions that underlie the evidentiary structures in intent and impact cases. The U.S. Supreme Court has rooted its evidentiary frameworks in a set of normative assumptions about the existence, operation, and prevalence of status discrimination in our society. Based on these assumptions, the Court has enabled plaintiffs to establish an inference of discrimination (or status influence) by employing a counterfactual heuristic that imagines what decisionmaking processes and outcomes would look like in a world free of discrimination. The Court then considers deviations from those processes and outcomes to be evidence of discrimination. However, despite the formal retention of these evidentiary structures over time, there has been a steady erosion of the normative assumptions underlying them. The erosion of these presumptions has had a correspondingly devastating impact on the ability of plaintiffs to prove status discrimination, especially given the increasing temporal distance from the worst and most overt forms of discrimination, the increasing subtle and structural nature of discrimination, and the shift in public attitudes regarding the existence of status bias.

This analysis, then, calls into question the belief among civil rights advocates that survival of the disparate impact cause of action and the dismantling of the intent standard will preserve the civil rights gains of the past. Although certainly these two

---

20. Refer to Part III infra (discussing the Court's reliance on such normative assumptions).
22. Refer to Part V infra.
23. Refer to Part V infra (attributing the difficulty in proving discrimination to the Court's decreasing faith in normative assumptions).
steps would appear to stem the “rollback” of these gains, they would ultimately prove to be insufficient and unsatisfactory. Unless this understanding changes in the near future, courts will continue to be an inhospitable forum for discrimination victims, and no amount of doctrinal reform will significantly alter the odds that the court will “see” the increasingly subtle and sophisticated nature of contemporary discrimination.

This Article’s analysis proceeds in four Parts. Part II of the Article reviews the social-psychological literature for insight into how causal judgments are made, specifically to explicate the mechanisms involved in, and influential factors on, causal thought processes. This research has found, not surprisingly, that causal judgments are affected by the knowledge, biases, and motivations that individuals bring to the process. Although much of the way that individuals reason about causal judgments in everyday life is automatic, causal judgments are vulnerable to unconscious and deeply entrenched cognitive biases. These biases are particularly pronounced when making causal judgments regarding the relationship between social status characteristics such as race and gender and targeted or challenged decisions and outcomes. More particularly, researchers find that individuals readily accept explanations for actions and outcomes involving status groups that tend to coincide with stereotyped categorization structures for those groups. This tendency results from insufficient weight being given to these cognitive structures in causal reasoning processes and not enough emphasis being placed on scrutinizing or evaluating these structures against real differences between the groups. In order to reduce causal attribution mistakes where these characteristics are at issue, social scientists find that when causal inquiries place the particular social status at the focus of evaluation—for example, a

25. Since its decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court has yet to find disparate impact discrimination, and lower federal courts have not had much better success. Selmi, supra note 3, at 286–87 (describing the evolution of discrimination law since Griggs). The combination of the tightening of evidentiary standards to prove disparate impact and the increasing willingness of the Court (and lower courts) to accept almost any explanation or justification for those impacts has effectively shut this theory down as a practical matter. See id. at 287 n.31 (explaining that courts have demonstrated a “strong willingness to accept a defendant’s justification for the challenged practice”); see also Ian Ayres & Peter Siegelman, The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas, 74 TEX. L. REV. 1487, 1491–93 & n.18 (1996) (noting that tightening the standards for defining the relevant population baseline increasingly blurs the distinction between disparate impact and disparate treatment); Krieger, supra note 6, at 1243 (pointing out that the levels of culpability in motive and intent cases under civil rights law are often “used interchangeably”).
type of counterfactual heuristic—it reduces reliance on stereotypical cognitive structures and results in more accurate causal judgments.

Part III illustrates that evidentiary frameworks in both intent and impact cases reflect the two predominant reasoning processes—counterfactual and contrastive—that social scientists have demonstrated are central to the formation of causal judgments. Through a counterfactual “heuristic,” the Court allows an inference of status influence from circumstantial evidence that normally would not be indicative of discrimination but that becomes salient based on a set of normative assumptions about the way discrimination operates in our society. Contrastive reasoning, too, is central to the evidentiary frameworks in both intent and impact cases, as evidenced by the ubiquity of the “similarly situated” analysis and its focus on identifying distinctions between disparately treated or impacted individuals or populations. Defendants (and courts) rely heavily on this similarly situated heuristic not only to rebut the inference of status influence—for example, by generating plausible neutral explanations for the challenged decision or outcomes—but also to reason whether there is status influence in the first place. Similarly situated, contrastive analysis can also assist a plaintiff in reaffirming the inference of status influence by showing that she is similarly situated to a population or individual who was treated more favorably.

Part IV examines how the evidentiary frameworks in intent and impact cases are vulnerable to the cognitive biases that can distort causal judgments. This vulnerability arises from the tendency for comparative or contrastive reasoning, such as in the similarly situated analysis, to dominate causal judgments. Courts are too accepting and hesitant to criticize explanations for disparate treatments or impacts generated by such reasoning. As the social science research cautions, comparative analysis emphasizes the sufficiency versus the necessity of a causal factor because it focuses on identifying any distinctive feature between the challenged occurrence and a contrasting occurrence as possible explanations. This type of reasoning is also more subject to cognitive biases because of the tendency to consciously or subconsciously rely upon what many believe are natural or innate characteristics of certain status groups, or certain phenomena associated with status groups, that distinguish them from more favorably treated or impacted groups. As such, the predominance of this type of reasoning in causal attribution often leads to incomplete causal judgments in antidiscrimination law. In other words, there is a tendency to sidestep the normative
work required of the causal inquiry in antidiscrimination law—for example, in evaluating the various ways that status can influence or bias decisionmakers and outcomes—and attribute stereotype-consistent or subtle discriminatory explanations to neutral causes of a challenged decision or event. Thus, when contrastive analysis is allowed to dominate causal judgments about discrimination, those judgments are rendered vulnerable to the very cognitive biases and discriminatory influences that antidiscrimination law is designed to prohibit.

Part V illustrates a much deeper causal vulnerability in antidiscrimination law, marked by the erosion of the normative understandings underlying the evidentiary frameworks in intent and impact cases. This Part takes a close look at the reasoning of recent cases in the Court’s equal protection and civil rights jurisprudence to identify where this erosion has occurred. The Court’s most recent jurisprudence illustrates a significant weakening of three presumptions that have supported its evidentiary frameworks in intent and impact cases: the presumption of historical saliency, the presumption of group parity, and the presumption of persistent bias threat. Thus, even if courts could somehow control and contain the cognitive biases that threaten to seep into the evidentiary frameworks, as indicated in Part IV, there would continue to be a huge gap between the reality of status discrimination and its juridical recognition.

II. REASONING ABOUT CAUSATION: ENDOGENOUS AND EXOGENOUS INFLUENCES

As one philosopher has described it, causation is “the cement of the universe” because it binds together events that might otherwise appear unrelated.26 In much of the law and in life, when we ask whether X caused Y, we are asking about the relationship between these two events or variables, an inquiry undoubtedly influenced by our beliefs about and experiences in the world.27 The “science” of causation—how we determine cause and effect—is a multidisciplinary field that is influenced by philosophy, psychology, and social psychology.28 This Part relies

26. DAVID HUME, AN ABSTRACT OF A TREATISE OF HUMAN NATURE 32 (Cambridge Univ. Press 1938) (1740).
27. See id. at 11–15 (describing the inferences about causation that may be drawn by observing the movement of billiard balls).
28. See Neal J. Roese & James M. Olson, Counterfactual Thinking: A Critical Overview, in WHAT MIGHT HAVE BEEN: THE SOCIAL PSYCHOLOGY OF COUNTERFACTUAL THINKING 1, 2–6 (Neal J. Roese & James M. Olson eds., 1995) [hereinafter WHAT MIGHT
upon the latest social-psychological research—which itself draws heavily upon the other disciplines—to understand the endogenous and exogenous influences that shape causal assessments and tend to alter people’s causal attributions. According to this research, two types of reasoning permeate causal judgments (counterfactual and contrastive thinking), and they are affected by various external influences that can shape and distort them.29

A. Endogenous Influences: Counterfactual and Contrastive Reasoning

1. Counterfactual “Mutations” of Expected Outcomes and Factors. Beliefs about how an occurrence came about are affected by expectations of what might have been, created by the “what ifs” and “if onlys” of counterfactual thinking.30 Counterfactual thinking is a process of imagining alternatives to one or more features of an occurrence.31 People construct counterfactuals to test whether a particular event or factor was a necessary cause of the examined occurrence or outcome. For example, to determine whether a factor (X) is a necessary cause of an outcome (Y), one may construct a counterfactual that negates the factor X (~X).32 The easier one imagines ~X, followed by the negation of Y (~Y), the stronger one should believe that X was necessary to cause Y.33 Simply stated, counterfactual reasoning is the query of whether Y would have resulted if X was different; for

HAVE BEEN] (considering various intellectual perspectives of counterfactual thinking). The aim of philosophy is to develop empirical tests that remove all irrational reasoning from descriptions of causation and determine the objective truth of an occurrence’s cause. See id. at 2–3 (discussing philosophy’s historical roots). Psychologists research how the mind functions when individuals determine a given cause of an occurrence. Id. at 4. Social psychology, in contrast, builds upon the heuristics developed by philosophy and psychology by prescribing experimental subjects to engage in causal analysis and then assessing how their decisionmaking is influenced by the broader social context. Id. at 5–6.

29. See, e.g., David R. Mandel & Darrin R. Lehman, Counterfactual Thinking and Ascriptions of Cause and Preventability, 71 J. PERSONALITY & SOC. PSYCHOL. 450, 460 (1996) (studying the role that counterfactuals play in causation determinations); McGill & Klein, supra note 15, at 903–04 (testing hypotheses directed at both counterfactual and contrastive reasoning in causation determinations).

30. See, e.g., DAVID K. LEWIS, COUNTERFACTUALS 1–4 (1973); J.L. MACKIE, THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION 29–34 (1974) (analyzing the concept of causation and indicating the inherent difficulties in counterfactual reasoning). Counterfactual analysis is a technique predominantly developed by philosophers Lewis and Mackie to examine methods of causal inference, which have since been elaborated upon by the psychological and social-psychological communities.

31. Mandel & Lehman, supra note 29, at 450.

32. Id.

33. Id.
example, whether I would have been late (Y) if I had taken the bus (\neg X) rather than the subway (X).\textsuperscript{34} Counterfactual inquiry thus focuses on an event and then negates some characteristic of the event to analyze its effect on the outcome. In fields such as law and history, where causal attribution is essential yet scientific experimentation is not possible, counterfactual analysis is an accepted and ubiquitous means of inferring causation.\textsuperscript{35}

For several decades, researchers have found a strong correlation between the alteration, or negation, of a factor via counterfactual inquiry—a phenomenon called “mutation”—and the attribution of causal blame to the mutated factor.\textsuperscript{36} Norm theory, one very influential explanation of counterfactual thinking, explains that when a person observes an occurrence, she undergoes a mental comparison between the actual occurrence and “the norm occurrence” to identify violations of expectancies, with the effect of restoring abnormal events back to the norm.\textsuperscript{37} Norm theory proposes that a person’s mental representation of an occurrence can be counterfactually modified in many ways through mutating factors.\textsuperscript{38} The norm occurrence is what the person expects would happen throughout the event. In general, expected or typical factors involved in an occurrence are particularly resistant to counterfactual mutation, while other factors perceived by an individual as atypical are more mutable.\textsuperscript{39}

\textsuperscript{34} See id. (reasoning that one may attribute taking a particular route home as the cause of an auto accident).

\textsuperscript{35} See H.L.A. HART & A.M. HONORE, CAUSATION IN THE LAW 103–08 (1959) (applying counterfactual analysis to legal causation to determine whether an act or omission was the sine qua non of the result or injury); J.D. Fearon, Counterfactuals and Hypothesis Testing in Political Science, 43 WORLD POL. 169, 169 (1991) (arguing that counterfactuals “play a necessary and fundamental role in efforts of political scientists to assess their hypotheses about the causes of the phenomena they study”); Robert N. Strassfeld, If . . . : Counterfactuals in the Law, 60 GEO. WASH. L. REV. 339, 343–45 (1992) (chronicling the methodology of counterfactual statements in the law in order to make sensible use of them).

\textsuperscript{36} See Gary L. Wells & Igor Gavanski, Mental Simulation of Causality, 56 J. PERSONALITY & SOC. PSYCHOL. 161, 167 (1989) (discussing how causal blame is attributed to counterfactually mutated factors); see also Daniel Kahneman & Dale T. Miller, Norm Theory: Comparing Reality to Its Alternatives, 83 PSYCHOL. REV. 136, 143 (1976) (finding that subjects who read a story of a car accident and were asked how the accident could have been avoided tended to mutate antecedents they believed would undo the outcome and to attribute causality to those antecedents).

\textsuperscript{37} See Roese & Olson, supra note 28, at 6–7 (explaining that norm theory describes the mental processes that occur when a person is surprised by an abnormal outcome). The norm is created in direct response to the actual occurrence and is a combination of beliefs, expectancies, and desires derived from past experience shaded by the outcome of the present experience. See id. at 7 (“The particular character of each norm is a combination of a priori beliefs reconstructed uniquely in light of a specific outcome.”).

\textsuperscript{38} See id.

\textsuperscript{39} See Kahneman & Miller, supra note 36, at 143 (finding that test subjects who
Thus, unexpected factors are highly susceptible to mutation and more subject to causal attribution.

For example, Andy always calls Betty to pick him up from school at 2:30 p.m. Andy also always asks Betty to bring a snack for him. Betty always arrives to pick up Andy at 3:00 p.m. with a snack. One day, Andy does not call at 2:30 but rather at 2:45 and asks Betty to bring him a snack. That day, Betty does not pick Andy up at 3:00. Assuming that Andy does not have any other information to explain why Betty was late, he may observe the outcome of not getting picked up, examine what was atypical in the occurrence—his calling at 2:45—and counterfactually mutate the 2:45 call, replacing it with a 2:30 call, and ascribe causality to the tardiness of the call.40

On the other hand, actual events that are consistent with expected ones are less susceptible to mutation. For example, although Betty's acquisition of the snack and not the tardiness of the call may have been the actual cause of the delay, Andy would have difficulty mutating the request for the snack because it was consistent with the expected event. The principle that exceptional events are preferentially mutated is evident in other tendencies or rules that occur as part of counterfactual reasoning. For instance, in addition to unexpected events that are prone to be highly susceptible to mutation, individuals are also more likely to mutate through counterfactual analysis (1) actions rather than inactions,41 (2) controllable factors rather


41. Id. at 138 (citing Kahneman & Miller, supra note 36, and Dale T. Miller et al., Counterfactual Thinking and Social Perception: Thinking About What Might Have Been, 23 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 305 (1990)). But see Christopher G. Davis et al., The Undoing of Traumatic Life Events, 21 PERSONALITY & SOC. PSYCHOL. BULL. 109, 115, 121 (1995) (suggesting that distinguishing between commissions and omissions (actions and inactions) was “not critical for [individuals]”). Generally, human action is considered exceptional when compared with an omission to act. Although in certain circumstances an omission may be viewed as unusual—for example, when a parent omits to care for his child—generally studies have shown that inaction is the expected norm and therefore less susceptible to mutation. See Janet Landman, Regret and Elation Following Action and Inaction: Affective Responses to Positive Versus Negative Outcomes, 13 PERSONALITY & SOC. PSYCHOL. BULL. 524, 529 (1987) (noting that test subjects find action more salient than inaction). For example, in a car accident between A and B, where A turns into B's car while B is driving straight, a witness engaged in causal reasoning would more readily mutate A's turn into B than B's omission to slow down as a contributing factor to the accident. Although B going straight could be described as a positive action that contributed to the accident, B's omission to slow down is a less obvious factor for people to mutate. Omissions can be categorized as static and actions as
than uncontrollable factors, and (3) dynamic rather than constant or static factors.

2. Contrastive Reasoning and the Search for Comparative Information. Although most research on causal thinking identifies counterfactual reasoning as a crucial and common attribution tool, other research has emphasized the importance of contrastive thinking in forming causal judgments. Contrastive thinking is a process by which "people identify causal explanations by contrasting the target event (e.g., the employee who failed) with instances in which the event did not occur (e.g., other employees who succeeded)." Distinctive factors

dynamic, which relate directly to the third tendency rule. This rule relates to norm theory and the first rule of exceptional mutation as well. See Roese & Olson, supra note 28, at 32 (concluding that dynamic factors are more mutable than static factors).

See Roese & Olson, supra note 28, at 31–32 (citing studies demonstrating the higher mutability of controllable factors). "Factors that change in the external world are more easily altered in mental representations . . . ." Id. at 32. Examples of dynamic factors include effort and fortuity. See id. at 33. Examples of static or constant factors are inherent ability and laws of nature—for example, gravity and laws of motion. See id. In attributing cause to outcomes relating to sports, experiments have shown that subjects mutate the effort of the players more than their ability. See Vittorio Girotto et al., Event Controllability in Counterfactual Thinking, 78 ACTA PSYCHOLOGICA 111, 128–129 (1991). People do not expect that the laws of nature, or the intrinsic ability of people, will change over time. See Roese & Olson, supra note 28, at 32 ("Thus, unstable factors such as effort should be more mutable than stable factors such as ability.").

Norm theory posits that when an individual compares an actual event with her imagined norm event, a discrepancy in antecedents between the norm and actual will only arise between factors that are dynamic in the real world. See id. at 32–33. Events involving constant factors will be identical in a person's actual and imagined representations. Id. Using the first hypothetical in which Andy calls Betty to pick him up from school, Andy will more likely have an expected norm that Betty forgot (a person's memory being a dynamic feature) to pick him up than an expected norm that Betty suddenly lost the ability to drive her car (ability being far more static and constant). The dynamic–static distinction relates to the final rule of preference of controllable and uncontrollable antecedents. Id.

See Girotto et al., supra note 42, at 111–33; Miller et al., supra note 41. This finding is consistent with philosophical and motivational theories that suggest that individuals prefer ascribing causality to factors of human agency rather than situational conditionals. See generally 2 THOMAS REID, Of the Liberty of Moral Agents, in THE WORKS OF THOMAS REID, D.D. 599 (Sir William Hamilton ed., 8th ed., James Thin 1895) (1846); see also Roese & Olson, supra note 28, at 32.

McGill & Klein, supra note 15, at 897.

McGill & Klein, supra note 15, at 897.

McGill & Klein, supra note 15, at 897.

Id. Note that the concept called the "Method of Difference" developed by John Stewart Mill in 1843 bears great similarity to contrastive analysis. See JOHN STUART MILL, A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE 256 (Longmans, Green & Co. 1949) (1843). Via the Method of Difference reasoning, if a phenomenon always occurs in the presence of X and not when X is absent, all other things being equal, the perceiver may feel confident in stating that X is the causal factor in the occurrence of the phenomenon. Id. Unique occurrences with unique factual makeups too may utilize the method of difference, although the perceiver must look for general thematic similarities across varied results. For example, murders, regardless of to whom they happen,
between the event in question and the contrasting events become possible causal explanations.\textsuperscript{46} The distinctive factors generated by this comparison are often based on statistical comparative data, general a priori worldviews, and memory or knowledge of similar occurrences.\textsuperscript{47}

Take a tangible example of a basketball tournament in which Michael Jordan plays for the Bulls, who win the tournament. To determine if Michael Jordan was a sufficient cause for the win, an individual would examine past tournaments comparing when the Bulls lost. If the Bulls lost when Michael Jordan played, then Michael Jordan's playing cannot alone be a sufficient cause for the Bulls' victory. If, however, in all instances in which the Bulls lost, Michael Jordan did not play, then one would conclude that Michael Jordan was a sufficient cause of the Bulls' success.

Researchers have shown that contrastive and counterfactual reasoning "may correspond to different types of causal judgments."\textsuperscript{48} Counterfactual thinking involves assessing whether a factor is among those that influence an occurrence, while contrastive thinking involves identifying factors that distinguish an occurrence from contrasting background factors.\textsuperscript{49} In other words, contrastive reasoning is employed when individuals are confronted with an explanation-focused question—"What caused Y?"—whereas counterfactual reasoning is employed when individuals are confronted with evaluative-focused questions—"Did X cause Y?"\textsuperscript{50} Counterfactual reasoning, by focusing on instances in which a particular factor is absent, thus emphasizes the necessity of that factor to the outcome.\textsuperscript{51} This differs from contrastive reasoning, which focuses on instances in which the effect is absent, and thereby emphasizes the sufficiency of the factor.\textsuperscript{52}

\textsuperscript{46} McGill & Klein, supra note 15, at 897.
\textsuperscript{47} Roese & Olson, supra note 28, at 7.
\textsuperscript{48} McGill & Klein, supra note 15, at 898.
\textsuperscript{50} McGill & Klein, supra note 15, at 897–99.
\textsuperscript{51} Id. at 897.
\textsuperscript{52} Id. at 898 (citing D.J. Hilton & J.C. Knott, Explanatory Relevance: Pragmatic Constraints on the Selection of Causes from Conditions (1992) (unpublished manuscript)).
For example, using contrastive reasoning to determine whether being a woman is sufficient for failure to slam-dunk a basketball, one needs to examine statistics or one's own a priori world knowledge to determine whether the factor of female gender has ever been present with the activity of slam-dunking a basketball. If a female has slam-dunked a basketball before, then female gender is not a sufficient cause of one female actor's inability to slam-dunk. Thus, like counterfactual reasoning, contrastive reasoning also involves a type of "mutation." But the difference is that in counterfactual reasoning, the causal factor (such as status) is mutated—would the player have failed to slam-dunk the basketball if she were not a woman. Whereas in contrastive reasoning, the outcome or effect (for example, the adverse outcome) is mutated—What made the difference between instances in which the basketball was slam-dunked and those in which it was not?\textsuperscript{53}

Contrastive reasoning can produce a combination of factors that may have contributed to the occurrence. For instance, in comparing circumstances in which an employee was fired and other employees were not, "social outcomes, such as poor employee performance, may also result from a configuration of factors, for example, gender of the employee, type of supervision, company culture, technical support, and so forth."\textsuperscript{54} Learning the universe of factors sufficient to produce poor employee performance is the byproduct of contrastive reasoning.\textsuperscript{55} However, a further counterfactual step is usually required to evaluate the likelihood that one or more of the possible factors are attributable to the decision. This step removes each factor (including gender) to determine how likely it is that the employee would have failed without the influence of the factor.\textsuperscript{56}

B. Exogenous Influences: The Role of Motivation, Bias, and Knowledge

1. Influences on Counterfactual Mutation. Personal motivation, bias, and knowledge affect an individual's choice of mutation when reasoning counterfactually about causation. Counterfactual inquiry is a fairly automatic process, but is nevertheless susceptible to influence by various motivations, 

\textsuperscript{53} See id. (discussing contrastive and counterfactual reasoning).
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
biases, and knowledge in two ways. First, biases, misconceptions, and knowledge may unconsciously influence the automatic mutation process. Second, the mutation process may be slowed down by the individual's conscious exertion of control over selection of mutation factors consistent with her biases or motivational concerns.

a. Unconscious Influences on Mutation. Norm theory posits that individuals create an imagined scenario while processing an actual occurrence. People examine differences between the actual and the imagined scenarios to select unexpected, active, controllable, and dynamic factors for mutation. A person's world knowledge and bias unconsciously affect what he or she views as unexpected versus normal, active versus passive, controllable versus uncontrollable, and dynamic versus static. Therefore, during representation formation and mutation selection, an individual's knowledge and bias affect his counterfactual analysis. The following are a few examples of how unconscious bias and knowledge can permeate the counterfactual inquiry and mutation process.

Typical factors can be mistaken for unexpected ones, thus causing an individual to mutate and attribute causality mistakenly. For example, an American who is ignorant of British driving conventions visits London and witnesses a head-on collision with one driver on the left side of the road and one on the right side of the road in the same lane. The American, thinking the person driving on the left was the unexpected actor, would unconsciously mutate the left driver's action and ascribe him causal blame. Unwittingly, the American would be guilty of allowing his misconception (that driving on the right side of the road is proper) to cause a wrongful attribution of blame.

Dynamic factors can be erroneously perceived as static and cause an individual to attribute causation to the wrong agents.

58. See id. at 62.
59. Roese & Olson, supra note 28, at 6–7.
60. Refer to Part II.A.1 supra.
61. See generally Seelau et al., supra note 57 (analyzing the techniques used in selecting which factors to mutate).
62. Because counterfactual mutation is reliant upon knowledge of the occurrence, if one has incorrect or inadequate knowledge of an event this will lead to limited or faulty causal attribution. See generally Gary L. Well et al., The Undoing of Scenarios, 53 J. PERSONALITY & SOC. PSYCHOL. 421 (1987) (finding that test respondents did not mutate character actions absent from express factual accounts in experimental scenarios, demonstrating that knowledge was an attenuating factor on subject mutation).
Professor McGill cites an example of citizens living under a historically corrupt political rule. These societies tend to "characterize the abuse and torture of fellow citizens as the result of agitation on the part of the victim rather than the product of a political system gone awry." Hence, society members' ability to ascribe the cause of their anguish to tyranny is handicapped by their perception that the government is a static entity unable to change its unjust ways. Rather, it is easier to see the victim's acts as causal because they are perceived as dynamic and capable of change.

Motivation, too, affects the process of mutation at the unconscious level. The base evolutionary tendency to exert control over one's environment can easily motivate one to erroneously choose certain factors for mutation and can lead to attribution errors. In other words, people are generally motivated to focus on controllable events in assigning causation to avoid negative outcomes in the future. If causal inquiries centered on uncontrollable situational events, people would tend to perceive negative outcomes as unavoidable and would not be able to prepare for them. For example, when someone dies of frostbite, people are intrinsically motivated to attribute causality to his failure to dress appropriately or to other imprudent actions rather than to harsh weather. This attribution provides individuals with the opportunity to avoid the same results in the future, as well as peace of mind that they are not "at the mercy of seemingly fickle events in the environment." This motivation can easily lead to the mutation of individual actions before mutation of uncontrollable conditions. As such, individual actions are often blamed for injuries that may have been unavoidable due to conditional causes. For example, if Johann slipped and fell on a slippery floor, the tendency of most people would be to mutate first a characteristic of Johann (for example, her clumsiness) as opposed to a chance condition of the floor.

64. Roese & Olson, supra note 28, at 33.
65. See Bernard Weiner, An Attributional Theory of Motivation and Emotion 2-6 (1986) (asserting that mastery of one's environment has been theorized as the base evolutionary purpose of counterfactual thought).
68. See Roese & Olson, supra note 28, at 31–32 (explaining how people focus on controllable behaviors in order to navigate toward desired outcomes).
69. This phenomenon is known as the illusion of control. See Langer, supra note 66, at 311–13 (noting that skill tasks involving personal action and familiar objects are
b. Conscious Impact of Motivation, Bias, and Knowledge. In addition to biases that unconsciously pervade the counterfactual process, individuals may consciously bias their counterfactual attribution and assignment of causality for various reasons, including outright bias against certain groups. For instance, when researchers in one study directed its subjects' counterfactual inquiries toward a specific purpose—for example, the creation of counterfactuals to determine who is blameworthy for a crime—they observed that the subjects' counterfactual thought process slowed down, became a conscious process, and was influenced by their motivation, knowledge, and bias.\textsuperscript{70} Individuals with racist tendencies have been shown to assign causality to the group they disfavor, regardless of what factors they initially mutated.\textsuperscript{71}

Furthermore, individuals may consciously mutate certain factors in an effort to save themselves from blame.\textsuperscript{72} Experiments that placed the research subject in a storyline, implicating the subject in an unpleasant event, demonstrated that the subjects selectively mutated certain factors in order to blame others.\textsuperscript{73} Other findings demonstrated that subjects mutated situational rather than personal factors for events in which an actor similar to the subjects was observed doing wrongful behavior.\textsuperscript{74} In contrast, where research subjects differed from the target actors, they tended to mutate the target actors' behavior and then

situations in which one's control is likely to be overestimated).

\textsuperscript{70} See Christopher T. Burris & Nyla R. Branscombe, \textit{Racism, Counterfactual Thinking, and Judgment Severity}, 23 J. APPLIED SOCIAL PSYCHOL. 980, 992 (1993) (finding that subjects with heavy racist dispositions did not alter their mutations to satisfy their racist leanings, as norm theory might predict, but did assign more blame to members of the disfavored race). One study suggests that stereotypes and biases also influence causal attribution. See George I. Whitehead III et al., \textit{The Effect of Subject's Race and Other's Race on Judgments of Causality for Success and Failure}, 50 J. PERSONALITY 193, 200-01 (1982). Individuals who judged others from different status groups attributed the others' failure at a task more frequently to lack of inherent ability while attributing failures of the same status group to lack of effort or luck. \textit{Id}. at 201.

\textsuperscript{71} Burris & Branscombe, \textit{supra} note 70, at 991–93.

\textsuperscript{72} See Neal J. Roese & James M. Olson, \textit{Self-Esteem and Counterfactual Thinking}, 65 J. PERSONALITY & SOC. PSYCHOL. 199, 199–200 (1993) (explaining that mutating one's own actions in response to a negative outcome is "conceptually similar to denying responsibility for failure").

\textsuperscript{73} \textit{Id}. at 200–04 (finding that individuals with high self-esteem tended to assume credit for success and blame others for failure).

\textsuperscript{74} See Neal J. Roese et al., \textit{Perceived Similarity and Defensive Counterfactual Thinking: Evidence for Motivational Determinants of Counterfactual Content} 5, 9 (1994) (unpublished manuscript, on file with the Houston Law Review) ("When subjects saw themselves as similar to the perpetrator, they tended to mutate situational factors"); Roese & Olson, \textit{supra} note 28, at 26 (concluding that participants were more likely to mutate aspects of the situation than actions by the perpetrator).
ascribed them blame. The researchers hypothesized that this could be due to a "self-serving bias" causing purposeful manipulation of counterfactual mutations.

2. Influences on Contrastive Thinking. Contrastive analysis is particularly susceptible to distortion from differences in motivation, cognitive biases, and faulty background knowledge. As explained, the use of comparative or "covariation" information is critical to generating causal explanations for contrastive reasoning. However, a contrasting characteristic or factor must be mutable in order for a person to compare it with other covariation information. If a person is unable to mutate certain characteristics, he will either not compare it with "covariation" information or will find it very uninformative to do so. The research on contrastive reasoning has shown, for instance, that individuals find it difficult to mutate (negate as an influence) gender and social group for stereotypical behaviors and the roles of those groups. These characteristics thus heavily influence contrastively selected causes and often distort causal attributions.

75. Roese & Olson, supra note 28, at 26.
76. Id. at 42. Experiments have also shown that individuals may purposefully manipulate counterfactuals to create an optimistic worldview, which "make[s] themselves...feel better." Neal J. Roese, The Functional Basis of Counterfactual Thinking, 66 J. PERSONALITY & SOC. PSYCHOL. 805, 805–06 (1994). The tendency to make oneself "feel better" may motivate individuals to select positive or neutral causes of an event rather than negative explanations—for example, individuals may be more prone to finding that a rejected applicant from a historically prejudiced status group did not get the job because of a status-neutral reason rather than the employer's conscious (or unconscious) bias for the particular status group. Note further that people who tend to believe that "the world is a just place" or that "people get what they deserve" will have more difficulty imagining how things could have turned out differently, impeding counterfactual mutation altogether. Margaret Kasimatis & Gary L. Wells, Individual Differences in Counterfactual Thinking, in WHAT MIGHT HAVE BEEN, supra note 28, at 81, 88 (concluding that believers in a just world should engage in less counterfactual thinking than do nonbelievers).
77. See Ann L. McGill & Jill G. Klein, Counterfactual and Contrastive Reasoning in Explanations for Performance: Implications for Gender Bias, in WHAT MIGHT HAVE BEEN, supra note 28, at 333, 335 (finding that both counterfactual and contrastive reasoning are necessary for a "complete assessment of causation").
79. See McGill & Klein, supra note 77, at 347–48; see also Grier & McGill, supra note 78, at 562–63 (suggesting that stereotype-inconsistent behavior is more often attributed to external causes, such as luck, or internal unstable causes, such as effort, than stereotype-consistent behavior).
a. The Effect of Gender Roles. Researchers have found that male gender is less mutable—that is, removable as an influence—than female gender and therefore covariation information across gender is manipulated differently.\(^\text{80}\) For instance, studies have shown that men who fail at a task are compared with men who succeed, but women who fail are compared to both men and women who succeed.\(^\text{81}\) This finding indicates that observers tend not to mutate male gender and thus confine the contrastive search for cause strictly to other factors that might explain negative outcomes associated with men failing at certain tasks.

For example, research subjects in one study were unable to mutate maleness when using comparative data, but they could mutate femaleness.\(^\text{82}\) When experimenters asked subjects why a particular man succeeded or failed at a task in a given scenario, the subjects compared the man’s actions predominantly to other men.\(^\text{83}\) Because of that comparison, subjects tended to causally attribute results of the man’s actions to personal characteristics, for example, “Johnny’s skill caused his failure or success.”\(^\text{84}\) Conversely, subjects compared the acts of a particular woman to both men and women to explain why the woman had failed.\(^\text{85}\) These across-gender comparisons led subjects to explain female failure more frequently in gender terms, for example, “women are not successful at these tasks.”\(^\text{86}\)

The inability of people to mutate male gender is the result of a type of “model actor fallacy.”\(^\text{87}\) That is, the discrepancy in mutability between men and women is because men are generally considered the default or model actor in circumstances involving traditionally male roles and behavior.\(^\text{88}\) This tendency

\(^{80}\) McGill & Klein, supra note 77, at 346–47; see also McGill, supra note 40, at 704–05 (noting that “preference for different sorts of backgrounds lead to different causal explanations for the failure of men and women”); Alice H. Eagly & Mary E. Kite, Are Stereotypes of Nationalities Applied to Both Men and Women?, 53 J. PERSONALITY & SOC. PSYCHOL. 451, 461–62 (1987) (arguing that nationality-based stereotypes apply to a nation’s men because men are more often “observed engaging in the distinctive behaviors of national groups” than women).

\(^{81}\) McGill & Klein, supra note 77, at 347.

\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) Id.

\(^{85}\) Id.

\(^{86}\) Id. at 333, 347.

\(^{87}\) The “model actor fallacy” is a term novel to this Article and is used to describe the phenomena of gender, race, and other classes being assigning prototypical activities and roles by outside observers.

\(^{88}\) Dale T. Miller et al., Gender Gaps: Who Needs to Be Explained?, 61 J.
is most apparent when women participate in traditionally male activities, for example, the workplace, sports, and games. Social norms thus influence the tendency to use men as the prototypical actor who serves as a comparison or reference point for all genders, that is, to compare men to men and women to men as well.

b. The Effect of Social Group Stereotypes. Similarly, an individual's social or status group is also resistant to mutation when that person engages in an activity typical of a member of the social group. On the other hand, social group is more readily mutated when group members perform tasks atypical of their social group.

For example, if a Hispanic person plays soccer—assuming soccer is an activity perceived as typical of that social group—and excels, there is a tendency to compare that person's performance to the performance of other Hispanic soccer players. The causal evaluator may not look to the performance of others in different social groups if she concludes that any information concerning players from other social groups would not be as valuable. On the other hand, if an African-American is a chief executive officer of a company and commits a business error—assuming that being a CEO is considered atypical of African-Americans—evaluators of this error are more likely to search for covariation information by comparing errors made by a group thought to be typical of that position—assume, for example, whites—to explain the outcome. In other words, the heightened mutability of social group for actors engaged in atypical behavior can

Personality & Soc. Psychol. 5, 5–12 (1991) (testing the conclusion that the default gender for voters is viewed as male by demonstrating that people imagine a man when they think of the typical voter).

89. In contrast, when men participated in activities historically occupied by women, individuals would more frequently compare men to women. McGill, supra note 40, at 704 (noting an "increased tendency to compare the unsuccessful male with successful females for the female-oriented tasks"). This is consistent with the elements of norm theory that predict individuals will mutate the gender of those who occupy roles different from a perceived expectation. Id.

90. McGill, supra note 40, at 704; Miller et al., supra note 88, at 11 ([M]en will be viewed as the prototypical members of those categories they statistically dominate as well as those in which they and women are equally common . . . .

91. See Grier & McGill, supra note 78, at 559 (summarizing an experiment and concluding that "within-group comparisons were rated as more informative for typical actors and across-group comparisons rated more informative for atypical actors").

92. Id. at 556–57, 561–63.

93. Id. at 557 (finding that participants in one study "rated across-group comparisons higher for actors engaged in events that were atypical for their social category; i.e., White actors engaged in typically Black activities and Black actors engaged in typically White activities").
determinatively influence the process of choosing subjects or events for comparison toward the conclusion that social group is the causal explanation. 94

This “model actor fallacy” also distorts the use of comparative information for social groups. People tend to rely solely on comparative information from the social group whom they perceive as the norm actor. For example, if a blue person engages in a typically purple person’s activity, the blue person is much more likely to be compared to other purple people in divining causes for the blue person’s behavior. But if a blue person participates in a typically blue activity, the blue person is likely to be compared only to other blue people. Thus, when blue person X engages in a typical blue activity, others will ascribe causality to X’s individual traits for the outcome—for example, “X has a particular skill or deficiency at this task.” But when blue person X is engaged in atypical blue behavior, others will ascribe causality to the blue social group for the outcome—“blue people are not particularly good at purple people tasks.” 95

C. Concurrent Use of Contrastive and Counterfactual Thinking:
A Complete, Unbiased Causal Picture

Given the external influences on causal thinking, researchers caution that both contrastive and counterfactual analysis need to be employed concurrently to achieve the most complete and unbiased causal assessment. 96 When a dual analysis occurs, the biases specific to each method can be

94. See id. at 561 (finding in one study that “differential attention to group characteristics can be stigmatizing for actors considered atypical by suggesting that their behavior is the result of factors that are common to the group and not the result of individual choice”).

95. Use of comparative information in this manner can cause individuals to think, “People like me are just not meant to participate in this activity,” as opposed to, “I need to refine some personal quality to succeed in this activity.” See Grier & McGill, supra note 78, at 561 (stating that the “effect of typicality might explain why smoking among minority consumers is often attributed to group-based factors . . . , whereas use of these products by members of the majority population is attributed to individual factors”); Miller et al., supra note 88, at 11 (noting that when explaining gender differences in voting, an atypical behavior for women, “there may be a preference for focusing on those characteristics that are lacking in women but present in men over those characteristics that are present in women but lacking in men”).

96. See Hilton, supra note 49, at 73–74, 77 (explaining that the conversational model examines causal explanations by evaluating a target case against an applicable contrast case to cure any presupposed norms or gaps in the information researchers give their subjects); McGill & Klein, supra note 77, at 335–36 (explaining that both counterfactual and contrastive reasoning are necessary for complete causation assessment and citing research suggesting that people imperfectly apply these covariants in a variety of circumstances, leading to “incomplete use of covariant information”).
mitigated, and a more nuanced and accurate assessment of causation may be attained.

As previously discussed, counterfactual inquiries are susceptible to an individual's mistaken world knowledge, personal biases, and motivation. Contrastive inquiries are susceptible to people's stereotypes and their inability to mutate social groups and gender categories. When counterfactual reasoning is followed with contrastive analysis, the generation of comparative information can dispel any mistaken worldviews, knowledge, personal biases, and motivational influences that infect the counterfactual inquiry.\(^{97}\) Similarly, when explanations generated by contrastive reasoning are then followed with counterfactual mutations of different factors—like gender or social group—such an exercise can dispel any attribution errors that may have been caused by the model actor fallacy in contrastive reasoning.\(^{98}\)

Counterfactual inquiry specifically isolates and removes certain factors to examine their role in the outcome, while contrastive inquiry removes results and examines which factors or influences are still present.\(^{99}\) Using both processes together, researchers suggest, allows more factors to be examined in more varied ways than either one can alone.\(^{100}\) Counterfactual and contrastive analyses, limited by their own vulnerabilities to bias, are thus strengthened when applied together, enabling a richer and more accurate causal analysis.

### III. CAUSATION IN ANTIDISCRIMINATION LAW

Both counterfactual and contrastive reasoning lie at the center of the causal inquiry in antidiscrimination law. Embedded within the evidentiary framework of both intentional and disparate impact discrimination cases is a counterfactual exercise that allows the plaintiff to demonstrate, at least initially, that her status characteristic influenced, or caused to

\(^{97}\) See Grier & McGill, supra note 78, at 561 (explaining that neglecting to use individual characteristics but relying on those of a group leads to biased conclusions); McGill & Klein, supra note 15, at 903–04 (examining research suggesting that neglecting to follow contrastive reasoning with counterfactual reasoning creates flawed explanations for events); McGill & Klein, supra note 77, at 335–41, 347–51 (concluding that using both counterfactual and contrastive reasoning will decrease bias associated with attributing a poor work performance to gender).

\(^{98}\) See McGill & Klein, supra note 15, at 903–04.

\(^{99}\) Refer to Part II.B supra.

\(^{100}\) See McGill & Klein, supra note 15, at 904 (suggesting that combining counterfactual with contrastive reasoning would cause individuals to create more accurate explanations for events).
occur, the decision, action, or outcome. Once the plaintiff crosses this hurdle, the burden practically (and often legally) shifts to the decisionmaker to offer a status-neutral explanation. By rooting the plaintiff’s prima facie case of status influence in a counterfactual mutation, the Court has had to be open about its normative assumption about how social status operates in society and its assumptions about decisionmaking processes and procedures in the various contexts in which discrimination tends to occur. Because some of these normative assumptions are subject to contestation, contrastive reasoning plays an important role in making sure that they are not automatically determinative of the causal inquiry.

Contrastive reasoning thus plays a crucial role in generating other, more neutral explanations for decisions or outcomes that initially may seem to be influenced by the plaintiff’s status. Indeed, evidentiary structures in both intent and impact cases allow, and sometimes mandate, comparisons between the plaintiff’s treatment (or impact on her) and others who are “similarly situated” as a way of generating alternative explanations or affirming the inference garnered in the counterfactual exercise. Because the quality of this contrastive exercise depends largely on the selection of the comparator individual or group, much of the dispute in these cases revolves around this selection.

A. Counterfactual Inferences of Status Influence: Why Deviations from Expected Procedures and Outcomes Matter

The Court has aided plaintiffs, in both intent and impact cases, in proving a prima facie case of intentional discrimination by using a counterfactual “simulation heuristic” rooted in a

101. See, e.g., Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (illustrating the Court’s consideration of assumptions based on that which “we know from our experience” when evaluating a plaintiff’s prima facie discrimination case).


If one assumes that, absent discrimination, members of different racial groups are relatively similar in their interests and abilities, then one would expect to find a relatively similar distribution of different groups throughout various fields of social endeavor; if, on the contrary, one assumes that there are significant and lasting differences amongst such groups, then one would expect to find an unequal distribution of the groups throughout the society.

Id.

103. See Daniel Kahneman & Amos Tversky, The Simulation Heuristic, in JUDGMENT UNDER CERTAINTY: HEURISTICS AND BIASES 201, 201–03 (Daniel Kahneman et al. eds., 1982) (describing a “simulation heuristic” as a mental operation that retrieves
normative assumption about the historical and continuing influence of status discrimination in our society. This heuristic involves imagining what decisionmaking processes and outcomes would look like in a nondiscriminatory world and deeming deviations from those processes and outcomes to be indicative of status influence. As such, deviations from expected decisionmaking outcomes or procedures may be presumed to be a telltale sign of discrimination, absent a status-neutral reason for the outcomes or results. This heuristic has the effect of giving determinative weight and import to various types of circumstantial evidence that it ordinarily would not carry in the absence of the counterfactual exercise.

1. Departures from Expected Outcomes. As the Court has emphasized in its equal protection jurisprudence, the uneven or disparate outcomes of a decision are ordinarily of no constitutional or judicial concern. However, in cases involving disparate adverse impacts on certain “suspect” groups, the Court has candidly acknowledged the close connection between these impacts and intentional discrimination. In equal protection jurisprudence, evidence of stark status disparities provides, at the least, an important starting point for ascertaining the motivation of decisionmakers and, in some circumstances, might alone be enough to infer intentional discrimination.

In crediting disparate impact evidence as probative of intentional discrimination, the Court engages in a form of counterfactual reasoning in which it mutates the historical influences of certain status characteristics to ask, in essence, “Would this particular decision or outcome be suspect without

---

*instances* from the mind and constructs scenarios to analyze and judge real events).


Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.

105. Id. at 272–73 (explaining that classifications like race and gender “supply a reason to infer antipathy” in part because they “have traditionally been the touchstone for pervasive and often subtle discrimination”).

the history and experience of discrimination against the particular status group impacted?” In this sense, the Court’s approach to disparate impacts on historically discriminated-against groups is the mirror of its “suspect classification,” reflecting a general suspicion that disparate status outcomes are motivated by prejudice or stereotypes toward certain groups. It thus did not strain credulity in early race discrimination cases to infer intentional discrimination from the complete exclusion of African-Americans and other minorities from juries, voting districts, and other social goods, given knowledge of the prevalent racial attitudes at the time. The history of discrimination transmits a social background and normative expectation that decisionmakers are prone to rely upon impermissible status characteristics, allowing the Court to treat status as a likely explanatory factor for a facially neutral decision that results in disparate impacts.

The historical and social context of bias has continued to give salience to discriminatory outcomes that disproportionately exclude members of protected status groups, even as the proximity to the worst period of this history decreases. For example, in Rogers v. Lodge, the Court found crucial to the challenge of an at-large voting system the fact that, despite its large African-American population, the voters had never elected

107. See, e.g., Feeney, 442 U.S. at 272–74 (“The cases of Washington v. Davis . . . and Arlington Heights . . . recognize that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may . . . be at work.”).

108. See, e.g., Strauder v. West Virginia, 100 U.S. 303, 305–10 (1880) (recognizing that the Fourteenth Amendment was passed to eliminate discriminatory behavior and is violated when jury selection processes exclude people based on race or color).

109. See Selmi, supra note 3, at 296–97 (explaining that, for example, without the historical background, there would have been no reason in Yick Wo v. Hopkins “to suspect discrimination as the impetus for the city’s change in law, as other race-neutral reasons may have been equally or more plausible”).

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886); see also Feeney, 442 U.S. at 275 (“If the impact of the statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral.”); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (noting that the unexplained redrawing of district lines in a way that excluded African-Americans rendered the “conclusion . . . irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote”).

110. 458 U.S. 613 (1982).
an African-American candidate to the County Board.\textsuperscript{111} In an opinion written by Justice White, the Court found this evidence highly probative of discrimination: “Because it is sensible to expect that at least some blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion.”\textsuperscript{112} This is especially significant given the County’s record of historical discrimination as developed by the lower court and the likely impact of that discrimination on the ability of African-Americans to participate fully in the voting system.\textsuperscript{113}

Jury selection cases—spanning from \textit{Hernandez v. Texas}\textsuperscript{114} to \textit{Purkett v. Elem}\textsuperscript{115}—provide the most prominent example of the Court allowing a prima facie case of discrimination to be made by showing a pattern of exclusion of a racial group (most typically African-Americans) from the jury venire or jury panel.\textsuperscript{116} Where a pattern of exclusion is established, the “result bespeaks discrimination,” because in large part of the history of exclusion of African-Americans and other racial groups from jury service.\textsuperscript{117} Relying upon statistical “hypothesis testing”-type reasoning,\textsuperscript{118}

\begin{itemize}
  \item \textsuperscript{111} \textit{Id.} at 614–16, 622–27.
  \item \textsuperscript{112} \textit{Id.} at 623–24.
  \item \textsuperscript{113} \textit{See id.} at 623–26 (describing the district court’s findings). The evidence included disparities between the percentage of African-Americans in the voting population and their percentages among candidates for office, infrequent appointments of African-Americans to county boards and committees, historical discrimination in other areas of life that affect voter registration among African-Americans, the presence of racial bloc voting, the unresponsiveness and insensitivity of elected officials to the needs of the African-American populace, and current socioeconomic conditions that created barriers to their participation in the electoral system. \textit{Id.}
  \item \textsuperscript{114} 347 U.S. 475 (1954).
  \item \textsuperscript{115} 514 U.S. 765 (1995).
  \item \textsuperscript{116} Batson v. Kentucky, 476 U.S. 79, 96–97 (1986) (holding that an inference of discrimination can be based on a prima facie showing of a “pattern” of strikes against black jurors”); Castaneda v. Partida, 430 U.S. 482, 484–85, 491–97 (1977) (conferring constitutional scrutiny on Texas’s “key-man” system of grand jury selection based upon evidence of near total exclusion of Mexican-Americans from jury panels over a period of time).
  \item \textsuperscript{117} The Court has held that exclusion on the basis of gender may also constitute an equal protection violation. J.E.B. v. Alabama, 511 U.S. 127, 145–46 (1994); see also Hernandez v. New York, 500 U.S. 352, 356–58 (1991) (holding that excluding bilinguals through peremptory strikes constitutes prima facie evidence of discrimination).
  \item \textsuperscript{118} Batson, 476 U.S. at 94–95; Hernandez, 500 U.S. at 358 (finding that a prima facie case of racial discrimination was satisfied by evidence that the prosecutor challenged the only three prospective jurors with Hispanic surnames).
\end{itemize}
the Court has "declined to attribute to chance" the disproportionate absence of a historically excluded status group from the jury venire or panel. This strategy is particularly relevant to cases in which the decisionmaking process or selection procedure vests significant discretion in the decisionmaker because this discretion "permits those to discriminate who are of a mind to discriminate." Thus, trial courts may infer that race was the motivating purpose, regardless of whether the decisionmaker was conscious of his or her motivation, where the attorney cannot explain disproportionate exclusion of status members from the jury or does not give a sufficient explanation.

The presumption that, absent explanation, disproportionate exclusion or impacts are not a result of chance but instead reflect the likely influence of protected status considerations also predominates civil rights law, particularly in the employment discrimination area. In both disparate impact and disparate
treatment "pattern or practice" cases\(^{124}\) (the latter being a form of intentional discrimination), plaintiffs may raise the inference of discrimination with evidence of status imbalances in the employer's workforce, as compared to their representation in the appropriate labor pool.\(^{125}\) Citing the jury selection cases, the Court has held that "where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."\(^{126}\) The Court treats this evidence as a "telltale" sign of both disparate impact and intentional discrimination because "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."\(^{127}\)

The presumption of status influence in employment cases makes sense only in the context of our collective history and ongoing experience of status-based discrimination in employment markets.\(^{128}\) Thus, where a pattern of decisionmaking outcomes is available, the outcomes are compared to an alternative reality that mutates—removes—the influence of historical and ongoing discrimination.\(^{129}\) In a world in which status was no longer an influence on employment opportunities, there might exist numerous reasons why an employer's workforce would not reflect the racial-ethnic-gender-age composition of the relevant pool of qualified workers. It is also true that in a world in which status exerts a great deal of influence, there are still plenty of other non-status-related reasons and influences that might explain

---


125. See Meier et al., supra note 123 (noting that "statistical evidence of disparity in hiring or promotion may provide evidence" in both disparate impact and disparate treatment cases).

126. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977); see also Teamsters, 431 U.S. at 339 ("We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases.").


128. See Ramona L. Paetzold & Steven L. Willborn, Deconstructing Disparate Impact: A View of the Model Through New Lenses, 74 N.C. L. Rev. 325, 353 (1996) ("The stratification lens helps us to see that every disparate impact case depends on an adverse impact that is created jointly by social factors and the employer's employment practice.").

129. In disparate impact cases, the presumption is that the employer's criteria or practices have interacted with social or historical conditions to exclude the population at issue. See id. at 353–54 (explaining that the disparate impact model is "blinded" to social and historical causes external to the employer that contribute to the impact; instead, the model assumes the interaction between the employment criterion and external social conditions in producing the disparate impact).
deviation from expected proportional representation in the workplace. The Court recognizes this, in part, by allowing any explanations to be put forth and examined by the decisionmaker. However, by placing the burden of proof on the decisionmaker, the Court implicitly credits the fact that race and other social statuses continue to shape decisions and influence decisionmakers in ways that are often hard to detect.

2. Departures from Expected Processes and Criteria. Intentional discrimination is often inferred through a close assessment of the "totality" of circumstances, including evidence of departures from expected procedural and substantive rules and criteria in the decisionmaking process. For instance, the widely relied upon Arlington Heights factors are rooted in a counterfactual reasoning process that again mutates the effect of status influence on expected procedures and outcomes of legislative decisionmaking processes in the absence of that influence. Absent a history of status discrimination, substantive and procedural departures or irregularities in the decisionmaking process might be indicative of a number of status neutral influences on the process. However, the Court allows the inference of discrimination, despite other potential explanations, because status offers the strongest explanation for deviations from normally relied upon decisionmaking procedures in light of our collective historical and social experiences. "For example, when legislatures deviate from customary practices where race may be a factor, and no reasonable explanation for the departure is forthcoming, the legislature's action is understood against the historical fact that legislatures have often made distinctions based on race in order to disadvantage minority groups."

130. See, e.g., id. at 353 (suggesting that a discrepancy in the proportion of black versus white employees with high school diplomas may be attributed to a difference in "the quality of teachers in elementary or secondary school, in the financial resources of the schools attended, in the resources of parents, and in a multitude of other factors").

131. See id.


133. The Arlington Heights Court indicated that the indicia of status influence may be found in a combination of expected outcomes, procedures, and substantive factors, along with the historical background of the decision (including previous decisions by the decisionmaker), the sequence of events leading up to the decision, and presumably any other factor that may shed light on the decisionmaker's motivations. Arlington Heights, 429 U.S. at 267-68.

134. Selmi, supra note 3, at 304-05. Selmi further explains,
Similarly, departures from substantive factors have led the Court to invalidate as discriminatory redistricting legislation designed to increase voting opportunities for certain racial groups. The Court has made clear that although legislatures are always conscious of race while (re)drawing voting lines, status (racial) considerations may not “predominate” the redistricting process. The plaintiff's burden to demonstrate race as the predominant motive can be accomplished through the circumstantial evidence of a district's shape and demographics and, in line with the Arlington Heights totality assessment, by demonstrating that the legislature departed from substantive factors or criteria normally relied upon when redrawing voting lines. For example, a discriminatory purpose can be demonstrated by showing that the legislature substantially neglected or ignored traditional districting criteria such as “compactness, contiguity, and respect for political subdivisions or communities.” Assessing the amount of deviation from these factors allows the Court to engage in a task known for its interpretive complexity: parsing out legitimate (political) and illegitimate (race) influences on the legislature.

Other than our history of racial discrimination, there is no reason that deviations from legislative procedures would be relevant to proving intentional racial discrimination. . . . [A]bsent a history of discrimination, such departures might have been indicative of a propensity to vote against zoning requirements for any number of reasons, including a race-neutral preference for preserving the status quo. But race, we know, is different, and so, at least in Arlington Heights, the Court suggested that certain inferences could be drawn based on our knowledge and expectations about the operation of legislatures—inferrings that would not be plausible absent that historical background.

Id. at 305.


136. Id. at 915–16 (commenting that redistricting involves a “complex interplay of forces” about which the courts must be sensitive). The Court, invoking the discriminatory purpose rule, sets about a search to determine whether “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” Id. at 916.


138. Miller, 515 U.S. at 916. But see Pamela S. Karlan, Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases, 43 WM. & MARY L. REV. 1569, 1584 (2002) (noting that “three factors the Court inexplicably left off its list of traditional districting principles—compliance with one person, one vote; partisan advantage; and protection of incumbents—are always going to be as important”).

139. See Miller, 515 U.S. at 915–16 (noting that the legislature’s redistricting “calculus” involves a “complex interplay of forces”); see also id. at 920 (noting that “a State
By identifying expected salient factors in the redistricting process and then comparing those to actual outcomes—such as the highly irregular or unusual shape of a voting district—the Court has again set up an evidentiary framework for rooting out status influence based on violations of the procedures and outcomes one would expect in a process not influenced by status considerations. Thus, where the legislature has departed from these factors, the Court treats this departure as a form of intentional discrimination on the basis of race and hence a violation of the Equal Protection Clause. Once predominant racial motivation is demonstrated, the Court subjects the

is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests; Bush, 517 U.S. at 964 (noting that “appellants point to evidence that in many cases, race correlates strongly with manifestations of community of interest . . . and with the political data that are vital to incumbency protection efforts, raising the possibility that correlations between racial demographics and district lines may be explicable in terms of nonracial motivations”); id. at 1060 (Souter, J., dissenting) (noting that “in the political environment in which race can affect election results, many of these traditional districting principles cannot be applied without taking race into account and are thus, as a practical matter, inseparable from the supposedly illegitimate racial considerations”).

140. See Miller, 515 U.S. at 913 (viewing the shape of the district as “persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines”); see also Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (finding that based on the unusual shape of the district, the conclusion is “irresistible” that the redistricting was intended to “fenc[e] Negro citizens out of town so as to deprive them of their pre-existing municipal vote”).

141. See, e.g., Miller, 515 U.S. at 903–05, 917, 922 (finding that the proposed redistricting plan violated the Equal Protection Clause by drawing into the district areas containing almost eighty percent of the district’s black population, diluting the black vote, and thus supporting the conclusion that race was a motivating factor). The discriminatory purpose in these cases is not of the Feeney variety—that is, where the legislature has “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” Pers. Adm’r v. Feeney, 442 U.S. 256, 279 (1979). Notwithstanding the Court’s reliance on Feeney, there is no claim by the plaintiffs in these cases that the state legislatures were motivated by ill will, animus, or prejudice toward whites or any other racial or ethnic group or that the legislation had any negative effect on plaintiffs’ right to vote or participate in the political process. See Miller, 515 U.S. at 916, 918–19 (citing Feeney and providing an example of political redistricting with a discriminatory motive that did not involve racial animus or a desire to prevent minorities from exercising their voting rights). Instead, plaintiffs have claimed that they were “discriminated” against by the fact that legislatures were motivated by race at all in redrawing district lines—that redistricting legislation that increased opportunities for African-Americans “violated their constitutional right to participate in a ‘colorblind’ electoral process.” Shaw v. Reno, 509 U.S. 630, 641–42 (1993); see also Bush, 517 U.S. at 1012 n.9 (Stevens, J., dissenting) (“[T]he ‘motive’ with which we are concerned is not per se impermissible. [I]f for that reason, this litigation is very different from . . . Arlington Heights . . ., in which the plaintiffs alleged that the defendant’s action was motivated by an intent to harm individuals because of their status as members of a particular group.”). It is poignant to note that in these cases, as Justice O’Connor noted in Shaw, some of the plaintiffs do not identify themselves as a racial group—for example, “did not even claim to be white.” Shaw, 509 U.S. at 641.
legislation to strict scrutiny, in effect merging the discriminatory purpose rule and the suspect classification doctrine in a way that is consistent with the prevailing “colorblindness” norm in the Court's equal protection jurisprudence.

A similar counterfactual exercise is at work in individual disparate treatment cases under employment discrimination law. A plaintiff in an individual disparate treatment case can establish a prima facie case of intentional discrimination where it is established that she is a member of a protected status group (for example, race), that she was qualified for the job, and that she did not get the job while someone else did. This prima facie case in effect eliminates the most common or expected criteria for hiring or firing a person—for example, that the person was unqualified or that the position

142. See Shaw, 509 U.S. at 653 (justifying the application of strict scrutiny because, without it, “a court cannot determine whether or not the discrimination truly is ‘benign’”). As such, the legislation can only be saved by demonstrating a compelling state interest to justify reliance on racial considerations and narrowly tailored means to achieve the racial purpose. Id. at 658. The invocation of the strict scrutiny standard is a notable departure from the Court's willingness to invalidate decisions motivated by a discriminatory purpose, but may simply be an acknowledgement that racially motivated actions that assist historically subordinated racial groups, as long as they are not the predominant motivation of the decisionmakers, can sometimes be constitutionally permissible, whereas those that have an “adverse effect” on such groups can never be. See Grutter v. Bollinger, 539 U.S. 306, 336–38, 341 (2003) (upholding the explicit use of race in a law school's admissions process where it was only one factor among others in considering potential students and furthered the compelling interest of racial diversity). But see Gratz v. Bollinger, 539 U.S. 244, 271–72 (2003) (finding that race played too large a role in the university admissions process); United States v. Allen-Brown, 243 F.3d 1293, 1295–96, 1298–99 (11th Cir. 2001) (rejecting a defendant's counsel's use of race to strike six white jurors as means of achieving a more diverse jury; the court held that such race-based treatment is subject to strict scrutiny and found there was no compelling justification because counsel did not make a Sixth Amendment claim that the jury was not representative of a fair cross-section of the community).

143. See Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence, 2003 U. ILL. L. REV. 615, 672–73 (discussing the automatic application of strict scrutiny whenever race is shown to be the “predominant factor” in the creation of new voting districts).

144. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); see also Tex. Dep't of Cnty. Affairs v. Burdine, 450 U.S. 248, 253 & n.6 (1981) (relying on McDonnell Douglas and describing the plaintiff's prima facie case as a showing of circumstantial evidence that would permit the inference of unlawful discrimination behind the employment decision). Although these are Title VII (of the Civil Rights Act of 1964) cases, this structure serves as the evidentiary framework under a number of civil rights statutes, including the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). See DeLuca v. Winer Indus., Inc., 53 F.3d 793, 797 (7th Cir. 1995) (discussing how courts have extended the McDonnell Douglas framework from Title VII cases to cases under the ADEA and the ADA). It also serves as an evidentiary framework for nonemployment intentional discrimination cases brought under other civil rights statutes. See, e.g., Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 137–38, 146 (2d Cir. 1999) (using the Title VII framework on an intentional discrimination case brought under 42 U.S.C. §§ 1981 and 1983).
was no longer available.\footnote{See Burdine, 450 U.S. at 253–54 ("The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection.").} Once the plaintiff has established the requisite elements, the Court treats an employer's refusal to hire (or the firing of) the plaintiff as a violation of an expectation that employers will hire (or retain) otherwise qualified and available employees.\footnote{See McDonnell Douglas, 411 U.S. at 807 (holding that the plaintiff's establishment of a prima facie case shifted the burden of production to the defendant to articulate a nondiscriminatory reason for the employment decision).} Clearly, there are many instances in which this assumption is not true. As such, once the plaintiff satisfies the prima facie case, the burden of explanation shifts to the employer to produce a status-neutral reason for its decision.\footnote{Id. at 802.}

However, when an employer cannot convincingly explain its decision—either because it has no admissible evidence of its reasons or because the plaintiff has successfully discredited those reasons—a deviation from "rational" business practices will support the inference of status influence garnered in the prima facie case.\footnote{See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (allowing the factfinder to infer discrimination when it disbelieves the employer's reasons for the challenged decision); see also Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147 (2000) (reconfirming that "in appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose").} The normative assumption is that in the absence of invidious influences, employers should be able to explain their personnel decisions "rationally."\footnote{As the court explained in Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978), "[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."} As such, "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race."\footnote{Id. at 577; see also Reeves, 530 U.S. at 147 ("[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.").}

B. Explaining by Contrasting: Comparing the Treatment and Outcomes of Different Individuals and Groups

A plaintiff reaps the inference of status influence or "discrimination" from evidence given particular weight by a counterfactual simulation heuristic that compels the defendant
to come forth with an alternative explanation. In both intent and impact cases, defendants often rely upon contrastive reasoning to generate and prove status-neutral explanations, and courts often rely on that same reasoning to attribute the decision to the proffered status-dependent reason versus the status-neutral one. This comparative exercise has become indispensable to proving, and disproving, status-based discrimination.

Recall that contrastive reasoning is a comparative exercise designed to identify and then compare the targeted or challenged event with instances in which the event did not occur to explore possible explanations for the difference.\(^\text{151}\) In antidiscrimination law, defendants (and often plaintiffs) engage in this exercise to identify instances in which the decision or outcome was different and compare those to the challenged decision or outcome. Often this comparison involves looking to “similarly situated” individuals or populations, decisions, or other actions to identify distinctive factors that account for their differential treatment or impact. This identification might be based on actual knowledge about the differences between the contrasted individuals or events or on the comparators’ own experience or worldview about general distinctions between them. In other cases, statistical data or the comparisons themselves become useful in identifying particular distinctions or similarities between populations or groups who are treated or impacted differently.\(^\text{152}\)

1. “Similarly Situated” Analysis in Individual Decision Cases. Comparative evidence is crucial to the defendant’s ability to explain the differential treatment of members of different status groups by demonstrating that they are dissimilarly situated from one another vis-à-vis a status-neutral factor. It is also true that prosecutors and plaintiffs can employ the same comparative exercise to call into question a decisionmaker’s status-neutral reason for discrimination by demonstrating that she is similarly situated in all relevant respects to members of another status group, except for the fact that the status group was treated or affected more favorably.\(^\text{153}\)

\(^\text{151}\) McGill & Klein, supra note 15, at 897.

\(^\text{152}\) See, e.g., Pers. Adm’r v. Feeney, 442 U.S. 256, 269–71 (1979) (discussing the percentages of male and female veterans and the gender breakdown of civil service hires in analyzing whether a veterans’ hiring preference for government positions violated the Fourteenth Amendment).


The intellectual exercise of finding the employees to be ‘similarly situated’ is another way of eliminating the nondiscriminatory reasons: if the employees are
In equal protection cases, for instance, courts often ask whether members of a particular status group, such as men and women, are similarly situated vis-à-vis a public benefit or burden, such as jury selection or service,

154 veteran status,

155 selective prosecution,

156 or public services or facilities,

157 taking into account any relevant differences or factors that would distinguish them.

158 For example, in Personnel Administrator v. Feeney

159 the plaintiff brought a gender-based equal protection challenge to a Massachusetts veterans’ “absolute lifetime” preference statute that “operate[d] overwhelmingly to the advantage of males” because the majority of veterans are male.

160 The female challenger was a nonveteran who ranked second and third on two different civil exams but was continuously passed over for civil service positions in favor of male veterans.

161 She alleged that the veteran’s preference barred her from getting on certified eligible lists, despite her test scores, on the basis of her

not similarly situated, then there is a nondiscriminatory reason for treating them differently, but if they are similarly situated, then there can be no such nondiscriminatory reason.

Id.


155. Feeney, 442 U.S. at 275.

156. See United States v. Armstrong, 517 U.S. 456, 465 (1996) (requiring that a challenger claiming selective prosecution produce credible evidence that “similarly situated” defendants of other status groups such as race could have been prosecuted but were not).

157. See Pargo v. Elliott, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995) (analyzing whether plaintiffs, who were female prisoners, were similarly situated with male prisoners and addressing the claim of unequal access to institutional services).

158. See, e.g., Keevan v. Smith, 100 F.3d 644, 648–49 (8th Cir. 1996). In Keevan, a class of female prisoners brought an equal protection challenge alleging that women prisoners were provided with inferior postsecondary educational and employment opportunities compared to male prisoners. Id. at 645. The court rejected the plaintiffs’ claim, in large part because male and female prisoners were not “similarly situated” for a variety of reasons, including length of incarcerations, the size or their respective prison populations, and the availability of male inmates for certain types of jobs. Id. at 647–49.


160. Id. at 259, 261. The statute required that veterans and family members of veterans be ranked above all other candidates on civil service exams, in order of their respective scores. Id. at 263. Over ninety-eight percent of Massachusetts veterans were male; thus the provision effectively limited the availability of civil service jobs for women.

161. Id. at 264.
gender. In answering the central question—"whether this veteran preference excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans"—the Court engaged in a contrastive exercise to determine if men and women were similarly situated vis-à-vis veteran status. Comparing the number of men who were affected by the preference with the number of affected women, the Court reasoned that men and women were similarly situated vis-à-vis the disadvantage of being a nonveteran, and thus gender could not have been the motivating influence behind the preference given to veterans versus nonveterans:

Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—men and women—are placed at a disadvantage. Too many men are affected by [the statute] to permit the inference that the statute is but a pretext for preferring men over women.

162. See id. at 264 (noting that "because of the veteran’s preference, she was ranked sixth behind five male veterans on the Dental Examiner list . . . [and] placed in a position on [another] list behind twelve male veterans, eleven of whom had lower scores").

163. Id. at 275 (emphasis added).

164. Id. at 275. The Court also asked the discrimination question in a different way by considering whether a "discriminatory purpose" shaped the legislation. Id. at 276. The Court agreed with the plaintiff that the legislature indisputably had acted intentionally to advantage veterans and thus must have been aware that veterans’ advantage would disadvantage nonveterans, who are disproportionately women. See id. at 278 (describing the legislation as "intentional" and commenting that "it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men"). However, the Court did not agree that by favoring veterans the state had "intentionally incorporated into its public employment policies the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans." Id. at 276. Thus, it concluded,

The District Court’s conclusion that the absolute veterans’ preference was not originally enacted or subsequently reaffirmed for the purpose of giving an advantage to males as such necessarily compels the conclusion that the State intended nothing more than to prefer "veterans." Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law.

Id. at 277.

But this reasoning seems to be tied inextricably to the first inquiry regarding whether the statute excludes women "because they are women or because they are nonveterans." Id. at 275. The Court’s answer to the first causal inquiry—that the statute distinguishes between veterans and nonveterans, not men and women—compels the second conclusion that the legislature did not act out of any “discriminatory purpose” toward women. Id. at 275–77. Although the Feeney Court tried to separate the two questions as analytically distinct, see id. at 274 (“When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate.”), both concern the influence of gender (beliefs, bias, et cetera) on the legislature’s decision to prefer veterans over nonveterans in
Comparative evidence in jury selection cases similarly can assist the prosecutor in generating status-neutral reasons why certain jurors were excluded, while others belonging to different status groups were not. Prosecutors might point to individual, neutral distinguishing factors, ranging from a stated belief that the juror is not intelligent or interested enough to weigh the evidence adequately,\(^\text{165}\) to a suspected inability of jurors to be impartial because of their profession, life experience, or personal affiliations.\(^\text{166}\) When a defendant can point to actual dissimilarities that are unrelated to status as a distinguishing feature between disparately treated individuals or groups, courts tend to accept the proffered reason on its face, though that reason can be shown to be pretextual if a plaintiff can prove that it was false or tainted by stereotypes about a group.\(^\text{167}\) In civil service jobs. See id. at 275–80 (analyzing whether the veterans' preference law was a pretext for preferring men over women and whether it was a gender-based discriminatory purpose that shaped the veterans' preference legislation).

In short, I agree with Justice Stevens's concurrence (in which he was joined by Justice White), where he opined similarly that

I am not at all sure that there is any difference between the two questions posed [by the majority]. If a classification is not overtly based on gender, I am inclined to believe the question whether it is covertly gender based is the same as the question whether its adverse effects reflect invidious gender-based discrimination. However the question is phrased, for me the answer is largely provided by the fact that the number of males disadvantaged by Massachusetts' veterans' preference (1,867,000) is sufficiently large—and sufficiently close to the number of disadvantaged females (2,954,000)—to refute the claim that the rule was intended to benefit males as a class over females as a class.

Id. at 281. Indeed, one need only look to the Court's racial redistricting cases to see how these two inquiries are merged. Refer to notes 135–43 supra and accompanying text (stating that "[r]acial" considerations may not 'predominate' the redistricting process," but that "once predominate racial motivation is demonstrated, the Court subjects the [redistricting] legislation to strict scrutiny, in effect merging that discriminatory purpose rule and the suspect classification doctrine in a way that is consistent with the prevailing 'colorblindness' norm in the Court's equal protection jurisprudence")

165. See United States v. Tucker, 90 F.3d 1135, 1142–43 (6th Cir. 1996) (finding that such explanation, although not "thorough or deep," was not "arbitrary or irrational" and thus there was no clear error on the part of the district court in accepting this explanation).

166. See, e.g., United States v. Perez, 35 F.3d 632, 634–35 (1st Cir. 1994) (upholding the prosecutor's explanation for striking the only juror with a Hispanic surname in a drug conspiracy prosecution based on the explanation that because the juror worked at the housing authority, she may have had the experience of "seeing drugs" in inner city apartments operated by the housing authority and this might influence her impartiality).

167. See Purkett v. Elem, 514 U.S. 765, 768 (1995) (holding that the proffered reason need not be "persuasive, or even plausible" as long as it is facially valid, but also noting that "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination"); see also Luckett v. Kemna, 203 F.3d 1052, 1054–55 (8th Cir. 2000) (finding that though the prosecutor first explained that strikes of African-Americans were based on answers to death penalty questions, which the defendant disputed with pretext evidence that a white juror was also weak on death
Hernandez v. New York,168 for example, a prosecutor was accused of striking potential Latino jurors because of their ethnicity.169 The prosecutor’s explanation was that the excluded jurors differed from the others because of their conduct and responses during voir dire, which indicated that “they might have difficulty in accepting the [official] translator’s rendition of Spanish-language testimony” during the trial.170 The Court engaged in a simple comparative exercise to conclude that the prosecutor’s explanation was facially race neutral—that it “rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals.”171 The Court questioned whether both Latinos and non-Latinos would be similarly situated vis-à-vis the prosecutor’s articulated basis for excluding jurors and concluded that they were:

The prosecutor’s articulated basis for these challenges divided potential jurors into two classes: those whose conduct during voir dire would persuade him they might have difficulty in accepting the translator’s rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos. While the prosecutor’s criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor’s actions into a per se violation of the Equal Protection Clause.172

The Hernandez Court did indicate, however, that the disproportionate impact of the prosecutor’s explanations on Latinos could be considered by the trial judge “as evidence that the prosecutor’s stated reason constitutes a pretext for racial discrimination.”173 The fact of disparate impact (a type of comparative evidence) can be quite useful in proving that the prosecutor’s asserted explanation for striking jurors in a particular status group was pretextual, particularly when the trial court considers the larger social meaning of the exclusion.174

penalty and not struck, a second explanation that the African-American juror was similar in age to the defendant was a sufficient race-neutral reason).

169. Id. at 355.
170. Id. at 361.
171. Id.
172. Id.
173. Id. at 363.
174. As the Hernandez Court explained,
Similarly, where the challenger can show that a white comparator juror who was not excluded from the jury is similar in all relevant respects to the challenged juror, the credibility of the attorney's explanation is called into question. This has the effect of confirming the inference garnered from the counterfactual exercise in the prima facie case that given the inability of the attorney to explain persuasively the reasons behind her decisions, it is more likely than not that the attorney was influenced by status considerations.

Comparative evidence in employment discrimination cases is crucial to identifying other possible bases for the challenged employment decision and to confirming the inference of status influence from the prima facie case. In response to a plaintiff's prima facie showing, an employer may point to almost any factor or variable that distinguishes the treatment of a plaintiff from similarly situated employees in different status groups. For

raised a plausible, though not a necessary, inference that language might be a pretext for what in fact were race-based peremptory challenges. This was not a case where by some rare coincidence a juror happened to speak the same language as a key witness, in a community where few others spoke that tongue. If it were, the explanation that the juror could have undue influence on jury deliberations might be accepted without concern that a racial generalization had come into play. But this trial took place in a community with a substantial Latino population, and petitioner and other interested parties were members of that ethnic group. It would be common knowledge in the locality that a significant percentage of the Latino population speaks fluent Spanish, and that many consider it their preferred language, the one chosen for personal communication, the one selected for speaking with the most precision and power, the one used to define the self.

Id. at 363–64.

175. See, e.g., McClain v. Prunty, 217 F.3d 1209, 1220–23 (9th Cir. 2000) (concluding that the prosecutor's explanations for the exclusion of two black jurors were pretextual based on comparison with similarly situated white jurors who were not excluded); United States v. Stewart, 65 F.3d 918, 926 (11th Cir. 1995) (finding the defense counsel's reasons for striking blacks from the jury to be pretextual where similarly situated white jurors were not also excluded).

176. See Ernest F. Lidge III, The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law, 67 Mo. L. Rev. 831, 859 (2002) (arguing that "distinctions can always be created between employees" so that they are not similarly situated, and "[a]ll employees can be characterized as unique in some ways... depending on the attributes on which one focuses, and the degree of specificity with which one considers that employee's qualifications, skills, tasks and level of performance" (alteration in original) (quoting Marzano v. Computer Sci. Corp., 91 F.3d 497, 511 (3d Cir. 1996))). Courts often also require plaintiffs, as part of their prima facie case, to demonstrate that the employer treated similarly situated individuals differently. See, e.g., Patton v. Indianapolis Sch. Bd., 276 F.3d 334, 338 (7th Cir. 2002); Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1126 (9th Cir. 2000); Rutherford v. Harris County, 197 F.3d 173, 184 (5th Cir. 1999); Taylor v. Va. Union Univ., 193 F.3d 219, 233 (4th Cir. 1999); HolfIELD v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). This requirement, however, appears to contradict the evidentiary framework established by the U.S. Supreme Court in McDonnell Douglas and Texas Department of Community Affairs v. Burdine, arguably frustrating the purposes of the prima facie case set up by the Court. See Lidge, supra, at 855–56 (arguing that the similarly situated requirement frustrates the prima facie case's main
example, in cases challenging firing decisions, among the most common distinguishing factors invoked to distinguish comparator employees are that they have different supervisors, different responsibilities and job titles, and different conduct. As in jury selection cases, courts tend to accept explanations for the decision based upon these comparisons regardless of whether the explanation actually motivated the employer's decision. Because the defendant's burden in individual disparate treatment cases is one of production and not persuasion, the defendant needs only to introduce evidence of any credible, status-neutral explanation or factor that distinguishes the two employees to rebut the inference in the prima facie case.

Plaintiffs may, in turn, attempt to show pretext by establishing that they are similarly situated to favored employees or applicants in all relevant ways, calling into question both the credibility of defendant's explanation and its causal connection to the actual decision. In this way, plaintiffs may employ contrastive analysis as a means of confirming the inference of status influence established by the counterfactual heuristic in the prima facie case. In St. Mary's Honor Center v. Hicks, the plaintiff successfully proved that

purpose, which is "to eliminate the most common reasons for the [decision] so that, at the pretext stage, the focus will be placed on the real reason for the employment action... by making courts exert a lot of effort focusing on fine—and sometimes irrelevant—distinctions between employees"

177. See Lidge, supra note 176, at 863–80 (reviewing the case law).
178. Id. at 878 (arguing that the court in Kendrick v. Penske Transportation Services, Inc., 220 F.3d 1220 (10th Cir. 2000), although correctly determining that "an employer is entitled to make a business judgment that [a black employee's act of] bumping a co-employee [with his chest] is worse conduct than [a white employee's act of] threatening an individual with a crowbar," erred by simply taking "the employer's word that this was its actual motive"). Furthermore, Professor Lidge argues that "the Fourth and Sixth Circuits [have] made similar errors." Id. at 878 n.244.
179. See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (concluding that "the burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence...[of] a legitimate, nondiscriminatory reason" and that the defendant is not required to "persuade the court that it was actually motivated by the proffered reasons"); Chuang, 225 F.3d at 1123–24 (stating that after the plaintiff establishes a prima facie case, "the burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, non-discriminatory reason for the challenged action").
180. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (noting that pretext can be shown by demonstrating that "the employer's proffered explanation is unworthy of credence"); Burdine, 450 U.S. at 253, 256 (noting that in an individual disparate treatment employment discrimination case, once the employer introduces its status-neutral reason, the plaintiff has an opportunity to show "pretext"—to demonstrate that the asserted reasons given by the defendant are not its true reasons). If plaintiff is successful in doing so, "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." Reeves, 530 U.S. at 147.
the reasons the employer gave for his demotion and discharge—"the severity and the accumulation of rules violations"—were false.\textsuperscript{182} The plaintiff, Hicks, was able to demonstrate "that [he] was the only supervisor disciplined for violations committed by his subordinates" and that "similar and even more serious violations committed by [his white] co-workers were either disregarded or treated more leniently."\textsuperscript{183} Under current case law, once the employer's justification is proven to be unworthy of credence, this allows, but does not compel, the conclusion that status played a role in the decision.\textsuperscript{184}

\section*{2. Statistical Comparisons in Pattern and Practice and Disparate Impact Cases.} Evidence establishing (either intentional or impact) discrimination against a class of group members often turns on a statistical disparity showing competing explanations for those disparities. As discussed above, inferring status influence from statistical disparities rests on a counterfactual mutation that treats deviations from roughly equal outcomes as evidence of discrimination.\textsuperscript{185} However, the statistical disparity analysis is, in and of itself, a form of contrastive analysis. It allows a class of plaintiffs to isolate other, more common explanations for adversely differential treatments or impacts by selecting an appropriate comparison pool consisting of individuals who possess similar characteristics (except their status) as those in the disadvantaged status group. Thus, for example, the Court has repeatedly held in the employment context that the proper comparison pool of persons for measuring adverse differential treatment or impacts is "between the racial composition of [the defendant's workforce] and the racial composition of the qualified... population in the relevant labor market."\textsuperscript{186} A careful choice of the comparator population serves to eliminate the most common explanations—the group's qualifications or availability—for the differential

\textsuperscript{182} Id. at 507-08.
\textsuperscript{183} Id. at 508.
\textsuperscript{184} See Reeves, 530 U.S. at 143 (citing Burdine, 450 U.S. at 255 n.10); Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139, 1151 (D.C. Cir. 2004) ("If the factfinder rejects the defendant's proffered explanation, this permits—but does not compel—the factfinder to infer the ultimate fact of intentional discrimination." (quoting Hicks, 509 U.S. at 511)).
\textsuperscript{185} Refer to Part III.A.1 supra.
\textsuperscript{186} See, e.g., Wards Cove Packing Co. v. Atomic, 490 U.S. 642, 650 (1989) (second alteration in original) (citing Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (applying this comparison to pattern and practice discriminatory treatment cases)).
treatment or impact, and also eliminates random chance as an explanation for the status disparity.

For example, in Wards Cove, a class of Filipino and Alaskan native plaintiffs challenged the racially stratified workforce of an employer that operated a salmon cannery. The "cannery" jobs, which were unskilled positions, were filled predominantly with nonwhite workers hired through a local union and a local village. The higher paid "noncannery" positions, a mix of skilled and nonskilled jobs, were filled with predominantly white workers typically hired through the defendants' corporate offices. The plaintiffs argued that the defendant's hiring methods and criteria—"nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels," failure to promote from within, failure to post noncannery openings, an English language requirement, and word of mouth recruitment—were responsible for the racial stratification of the defendant's workforce.

The U.S. Supreme Court rejected as proof of a racially discriminatory impact a comparison showing a disparity between the racial composition of cannery jobs (all nonwhite) and noncannery jobs (virtually all white). Because these workers were not similarly situated in terms of their qualifications and skills, the comparison rendered inapplicable the presumption that absent discrimination, the racial makeup of those respective jobs would mirror each other. In other words, as the Court reasoned, "if the absence of minorities holding such skilled

---

187. See id. at 647–48 (describing the segregated work environment and race-based hiring procedures at the defendant canneries).

188. Id. at 647.

189. Id. Defendant's workplace was racially stratified in other ways as well. Workers in the cannery and noncannery jobs worked and lived separately, "bearing] an unsettling resemblance to aspects of a plantation economy." Id. at 649 n.4; id. at 664 n.4 (Stevens, J., dissenting).

190. Id. at 647–48 (describing the hiring methods and criteria that plaintiff argued led to the racial stratification of defendant's workforce). The plaintiff must isolate with particularity each employment practice or criteria that operates to exclude a disproportionate number of protected status-group members in the relevant population or labor pool. See id. at 657 (explaining that the plaintiff must show that the disparate impact was caused by specific, identifiable employment practices); see also Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A)(i), (B)(i) (2000) (noting an exception "that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice").


192. See id. at 651–52 (describing a comparison of the number of nonwhites holding "skilled" noncannery positions to the number of nonwhites holding cannery positions as "nonsensical" because the groups are not similarly situated).
[noncannery] positions is due to a dearth of qualified nonwhite applicants . . . [the employers'] selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites." Instead, the "proper comparison [should have been] between the racial composition of [the noncannery workers] and the racial composition of the qualified . . . population in the relevant labor market." This comparison would potentially eliminate the most common reason for not hiring plaintiffs' status group in representative numbers—lack of qualifications—as well as eliminate the defendant's decisionmaking process as the cause of the adverse impact.

Just as plaintiffs can demonstrate the influence of status through this type of comparison, so too can defendants use the same comparison to generate an alternative, neutral explanation. Assuming that plaintiffs are able to demonstrate a significant disparity between the advantaged group and the disadvantaged group, controlling for the most common status-neutral reasons that would explain the disparity, it is incumbent on defendants (as it is in individual discrimination cases) to illustrate why the two contrasted groups are not "similarly situated" in any meaningful way. As with challenges to individual discrimination cases, the defendant will point to almost any dissimilarity between the two groups to articulate a neutral reason why the disparity is not causally related to a protected status characteristic.

In Wards Cove, plaintiffs sought to control for differential qualifications by pointing to a more exacting comparison between the racial composition of the cannery workers (all of whom were unskilled) and the racial composition of the unskilled noncannery workers who earned significantly more than the (unskilled) cannery workers. The assumption underlying this showing is that both groups were similarly situated in terms of skill, but not in terms of status, yet one group earned significantly more for essentially the same work. The court of appeals found that this comparison indeed made out a prima facie case of disparate impact. Nevertheless, accepting that the two classes of workers

193. Id.
194. Id. at 650 (third alteration in original) (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977)).
195. Refer to text accompanying notes 176–79 supra (suggesting that courts tend to accept defendants' arguments distinguishing disparately treated individuals or groups).
196. See Wards Cove, 490 U.S. at 652 (citing statistics used by the plaintiffs to support their disparate impact claim).
197. See Atonio v. Wards Cove Packing Co., 827 F.2d 439, 444–45 (9th Cir. 1987).
were similarly situated in terms of their "fungible skills," the Supreme Court rejected the comparison as "irrelevant" by pointing to a status-neutral factor—presumed lack of interest—that might explain the disparity.\textsuperscript{198} The Court held that there was no evidence that the nonwhite cannery workers applied for the higher paid jobs or would have done so "even if none of the arguably 'deterring' practices existed."\textsuperscript{199} On the other hand, there was also no evidence that they were uninterested.\textsuperscript{200}

There is a danger lurking in the pervasive use of the similarly situated, comparative analysis in antidiscrimination cases.\textsuperscript{201} The contrastive, similarly situated exercise in antidiscrimination law can easily be equated with the more evaluative causal inquiry that is central to the wrong of status-based discrimination. Contrastive analysis can generate crucial information on possible explanations for differential treatment and impacts by identifying similar or distinctive features of comparable cases. However, it should not be mistaken for the causal evaluation itself. As some courts have realized, distinguishing factors can always be created between two comparator individuals or outcomes.\textsuperscript{202} As the next Part illustrates, because the contrastive analytical exercise is so vulnerable to cognitive biases, causal judgments heavily reliant

\textsuperscript{198} See Wards Cove, 490 U.S. at 653–54; see also EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1326 (N.D. Ill. 1986) (concluding that the statistical analysis showing a gender segregated workforce despite similar qualifications of women was "virtually meaningless" because it was based on the faulty assumption that female sales applicants were as "interested" as male applicants in commission sales jobs).

\textsuperscript{199} See Wards Cove, 490 U.S. at 653–54.

\textsuperscript{200} See id.

\textsuperscript{201} See Lidge, supra note 176, at 831–32 (describing some of the ways that courts misuse the "similarly situated" concepts). Some courts rigidly apply the similarly situated concept by requiring, for instance, that the plaintiff and the comparator be similar in all respects regardless of the nexus between those similarities and the reasons for the challenged decision. See, e.g., Mitchell v. Toledo Hosp., 964 F.2d 577, 579–80, 583 (6th Cir. 1992) (requiring an African-American female plaintiff who was fired for insubordination by a five-member review board to find a comparator who engaged in the exact same conduct, dealt with the same supervisor, and was subject to the same standards notwithstanding the fact that the supervisor was not responsible for firing the plaintiff, that the same employment manual governed all employees' behavior, and that other employees were not fired for varying types of insubordination).

\textsuperscript{202} See, e.g., Marzano v. Computer Sci. Corp., 91 F.3d 497, 510–11 (3d Cir. 1996) (rejecting a "similarly situated" requirement as part of the plaintiff's prima facie case and reasoning that "all employees can be characterized as unique in some ways and as sharing common ground with 'similarly situated employees' in some other ways, depending on the attributes on which one focusses [sic], and the degree of specificity with which one considers that employee's qualifications, skills, tasks and level of performance"); see also Ortiz v. Norton, 254 F.3d 889, 894–95 (10th Cir. 2001) (finding that the district court had defined the similarly situated employee showing so narrowly as to make it "virtually impossible" for the plaintiff to point to a comparator).
on this type of analysis can give rise to causal attribution mistakes. These judgments tend not to be closely tied to the more evaluative work involved in the causation inquiry that is so critical to an assessment of whether prohibited discrimination exists.

IV. CAUSAL ATTRIBUTION AND COGNITIVE BIAS

Violation of antidiscrimination norms is rooted in differential treatment or impact because of an individual or group’s protected status. The causal inquiry is thus not an open-ended, “truth-seeking” one. That is, it does not seek to explain the entire universe of factors that could account for a particular decision or occurrence.\(^{203}\) Rather, it asks only whether a protected status category like race or gender has necessarily or determinatively influenced the challenged outcome or decision. As such, the causal inquiry in antidiscrimination cases is evaluative, not explanatory.\(^{204}\) This evaluative step is really the normative work of antidiscrimination law because it inquires into the social and psychological mechanisms of status discrimination—including reliance on reasons (and reasoning) that may reflect outmoded stereotypes, expectations, and beliefs about different status groups.

The difference between evaluative and explanatory causal heuristics turns importantly on the quality and type of information that they generate. As social science research has illustrated, the difference between counterfactual reasoning (an evaluative exercise) and contrastive reasoning (an explanatory exercise) is that the latter tends to focus on finding any sufficient factor or characteristic that might explain disparate treatment or outcomes, whereas the former tends to focus on the necessity of a particular causal factor to the decision or outcome.\(^{205}\) Another

\(^{203}\) See Selmi, supra note 3, at 327 (“In conducting [the intent] inquiry, a court is not concerned with what the real reason was in some absolute or abstract sense, but only with whether discrimination can be established as the employer’s motive consistent with the applicable standard of proof . . . .”). Indeed, research indicates that “in devising a causal explanation for an occurrence, people typically do not report the complete list of factors they believe are related to an event.” McGill & Klein, supra note 15, at 898. Instead, they select a subset of these factors that render the decision unusual or unexpected. Id.

\(^{204}\) See McGill & Klein, supra note 15, at 898–99 (finding that an explanation-focused causal inquiry seeks to determine the various factors that provide an explanation for an occurrence, whereas an evaluation-focused causal inquiry involves determining whether a factor is among those that influenced an occurrence).

\(^{205}\) See id. at 897 (identifying the emphases of counterfactual and contrastive reasoning). Thus, counterfactual reasoning elucidates factors or influences whose absence would make the decision or outcome unlikely to occur. See id. at 898, 903–04 (describing a
way of stating the difference is that evaluative causal mechanisms such as counterfactuals focus on instances in which the causal candidate is absent ("Would the employee have been fired if she were not a woman?"), whereas explanatory causal mechanisms consider instances in which the effect is absent ("What differentiates the employee who was fired from employees who were not fired?"). Explanatory mechanisms, like contrastive reasoning, are also particularly susceptible to cognitive stereotypes because of the tendency to attribute differences in events, outcomes, and behaviors to social group membership; the immutability of statuses like race and gender only accentuates this problem. For this reason, researchers suggest that explanations for differences in behavior and outcomes involving social status characteristics like race and gender should be subjected to closer evaluation in order to uncover any cognitive biases that may be influencing causal attributions. For example, social scientists suggest that explanations generated by comparative or contrastive reasoning should be followed up by a counterfactual inquiry, which would more thoroughly evaluate the causal candidate(s) identified as an explanation for the decision or outcome.

study suggesting that flawed causal judgments result when "people do not follow up contrastive thinking with counterfactual reasoning when asked to suggest a possible explanation for an event").

206. Id. at 897.

207. See generally id. (detailing two studies suggesting that presenting questions eliciting counterfactual reasoning as opposed to contrastive reasoning "may be most effective in decreasing people's negative beliefs regarding the capabilities of women"); Grier & McGill, supra note 78, at 561–63 (explaining the results of a study finding that individuals attribute stereotype-consistent behavior to internal stable causes (e.g., ability) and stereotype-inconsistent behavior to either external causes (e.g., luck) or internal unstable causes (e.g., effort)); see also Ann L. McGill, Relative Use of Necessity and Sufficiency Information in Causal Judgments About Natural Categories, 75 J. PERSONALITY & SOC. PSYCHOL. 70, 80–81 (1998) (finding that participants in four studies placed less emphasis on necessity information than sufficiency information when the target factor or characteristic corresponded to a "natural" category—like race, age, gender—rather than "artifactual" categories). Participants were less willing "to search for alternative explanations when the target explanation was based on a natural kind category in comparison with artificial or artifactual categories." Id. at 70. McGill concluded that people tend to "judge explanations based on natural categories according to lower standards of evaluations than those based on other explanations." Id. at 80.

208. See, e.g., McGill & Klein, supra note 15, at 903–04 (explaining that study participants who observed instances in which there were no successful females in a job, but some prior successful and unsuccessful males, tended to identify gender as a distinctive explanation for rates of success and to attribute the failure of a recent female employee to her gender). Researchers suggest that such an explanation is flawed because it ignores what would be found out through counterfactual reasoning—that is, if the employee had not been a woman that she nevertheless might have failed. Id.
Yet, as this Part will illustrate, this evaluative step is often skirted or ignored in the evidentiary frameworks that determine the influence of status on otherwise facially neutral decisions and outcomes. For this reason, these frameworks are quite vulnerable to attribution mistakes that result from the very same cognitive biases that give rise to discrimination itself. This vulnerability is most evident in the tendency to allow causal judgments to rest uncritically on comparative (for example, similarly situated) analysis alone. The exercise of selecting and then comparing instances in which the decision or outcome was different to generate explanations for those differences is subject to the type of cognitive biases that, in particular, affect causal judgments about the influences of statuses like gender and race.\(^{209}\) The potential for incomplete or, worse, biased causal judgments lurks in the process of selection and comparison underlying contrastive reasoning in both intent and impact cases.

A. "Dropping" Status as an Explanation

The evidentiary framework in individual disparate treatment employment discrimination cases illustrates the vulnerability of causal judgments when they become unhinged from an evaluative heuristic. As shown above, the plaintiff's prima facie case is often rooted in a counterfactual, evaluative heuristic that infers the influence of status by eliminating the most common status-neutral reasons for the decision and then inferring that status influence where the defendant cannot sufficiently explain the decision.\(^{210}\) Defendants often point to distinguishing factors or explanations to explain why the plaintiff was treated more adversely than others. Because employment decisions are often the result of a complex configuration of factors, it is not enough to simply identify the subset of factors that can possibly explain the decision. The effect of the defendant's proffered explanation should be sharpened but not conclude the causal inquiry by narrowing the universe of causal candidates and allowing the factfinder to then evaluate each in turn.\(^{211}\) In other words, because the crucial inquiry is whether

---

209. See Krieger, supra note 6, at 1204-07 (reviewing attribution theory and explaining that cognitive biases may affect the interpretation of differences in "similarly situated" workers" because individuals tend to "attribute stereotype-consistent behaviors to stable, stereotypic traits" and do not consider other "relevant information").

210. Refer to notes 144–46 supra and accompanying text.

211. See Selmi, supra note 3, at 326-28 ("By separating the world into 'discrimination' and 'nondiscrimination,' the Court's model resembles hypothesis testing, a statistical procedure in which a researcher sets out to prove a proposition by attempting
status played a role in the decision, a further evaluative step is needed to determine the likelihood that status was such an influence, notwithstanding the existence of other factors that might also have influenced the decision or outcomes.\(^\text{212}\)

However, the Supreme Court has severed this evaluative causal inquiry from the evidentiary framework in disparate treatment cases. For example, Hicks dilutes the evaluative exercise required of the factfinder by reversing the inference of status influence garnered in the prima facie case when an explanation, even if proven false, is produced by the employer.\(^\text{213}\)

Recall that the plaintiff in Hicks successfully proved that the reasons the employer gave for his demotion and discharge—the severity and accumulation of rules violations—were false.\(^\text{214}\)

Having satisfied the prima facie case, the Court of Appeals held that the plaintiff was entitled to judgment as a matter of law because the “defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race.”\(^\text{215}\) This was consistent with the original framework set out in McDonnell Douglas, which made clear that after the defendant proffered a believable status-neutral reason for the action, the employment decision “must stand” unless the plaintiff could prove that it was a “pretext.”\(^\text{216}\) However, where the plaintiff did prove that the employer’s reasons were

\(^{212}\) Indeed, the Civil Rights Act of 1991 acknowledges this by requiring plaintiffs to demonstrate only that status was “a motivating factor in the employment decision. 42 U.S.C. 1981 \(\S\) 2000e-2(m) (2000); see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (“When a plaintiff alleges disparate treatment [under the ADEA], ‘liability depends on whether the protected trait . . . actually motivated the employer’s decision.’ That is, the plaintiff’s age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.’” (third alteration in original) (citation omitted) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993))).

\(^{213}\) St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (reiterating strongly that the plaintiff “at all times bears the ultimate burden of persuasion [in discrimination cases]” (internal quotation marks omitted)).

\(^{214}\) See id. at 508 (summarizing the district court’s finding that “the reasons petitioners gave were not the real reasons for [Hicks’s] demotion and discharge”). The plaintiff was able to demonstrate that he was the only supervisor disciplined for violations committed by his subordinates and that similar and even more serious violations committed by his coworkers were either disregarded or treated more leniently. Id.

\(^{215}\) Hicks v. St. Mary’s Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992) (emphasis added). The District Court determined that Hicks’s immediate supervisor manufactured the final confrontation to provoke Hicks into threatening him. Hicks, 509 U.S. at 508.

pretextual, or false, the plaintiff was entitled to judgment based on the inference obtained in the prima facie case.217

The holding of the Hicks Court, however, is contradictory to its earlier statements that the plaintiff's burden of proving intentional discrimination is fulfilled by satisfying the prima facie case (with its presumption of status influence) and by showing that the employer's proffered explanation is unworthy of credence.218 After Hicks, the presumption of status influence, "having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture" and is no longer relevant.219 The Hicks Court reasoned that the fact that the proffered explanation is "unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff’s proffered reason of race is correct.220

The Court is probably correct in its assessment that just because an employer has made a judgment that is "irrational, suboptimal, or inconsistent with judgments made in similar situations" does not necessarily mean the employer has relied upon status considerations.221 On the other hand, there is something inherently suspicious about an employer that needs to produce a false reason for a plaintiff's treatment. As such, it makes sense to preserve, as the Court does, the option of ruling for the plaintiff even without the presumption of status inference—that is, losing the presumption doesn't necessarily mean losing the evaluative focus at the heart of the causal inquiry. As the Court explains, the defendant's "production" of any explanation (regardless of its persuasive effect) still allows the trier of fact to proceed to the "ultimate question" of whether the defendant has discriminated against the plaintiff because of her status.222 Significantly, the Court permits the factfinder to infer from the falsity of the defendant's proffered reasons that the defendant more likely than not was influenced by the

217. See id. (holding that the district judge "must order a prompt and appropriate remedy" if the plaintiff shows that the defendant's proffered reason is pretextual).
218. Tex. Dep't of Cnty. Affairs v. Burdine, 450 U.S. 248, 252-53, 256 (1981) (stating that the plaintiff "may succeed" in persuading the court that she has been a victim of intentional discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence").
219. Hicks, 509 U.S. at 510–11 (emphasis added).
220. Id. at 524.
221. Krieger, supra note 6, at 1181 (noting also that "pretext analysis permits this inferential leap from an apparently irrational or inconsistent judgmental process to an intentionally discriminatory one through the operation of a presumption of invidiousness" (internal quotation marks omitted)).
222. Hicks, 509 U.S. at 511.
plaintiff's status, without any additional proof on the plaintiff's part. 223

It is also true, however, that without the legal inference from the prima facie case, the factfinder may also accept the defendant's explanation without any further evaluation of whether the status of the plaintiff nevertheless influenced the defendant. 224 Indeed, what is lost after Hicks is the force of the normative work done in the prima facie case—not only the assumption that an employer should be able to explain its decisions rationally when it appears from circumstantial evidence that status was a likely influence, but also the reality that status continues to influence employment decisions and practices.

One way of exploring whether a valuable aspect of the causal analysis has been lost after Hicks is to ask, "Under what circumstances would a factfinder conclude, even after the defendant's own reasons for the challenged action have been proven false, that status more likely than not influenced the decision?" After the defendant has produced an explanation—usually by pointing out that the plaintiff is dissimilarly situated to others who were not hired or who were fired vis-à-vis some distinguishing factor—the factfinder's causal compass depends heavily on her own knowledge and assumptions about discrimination and the status group at issue. 225 That is, the possibility of plaintiff's status is still ever present, but there is no real compulsion, legal or otherwise, to evaluate critically how and whether status considerations might have operated on the decisionmaker or the decision here.

223. Id. The Court has since clarified, without overruling Hicks, that "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'" Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 143 (2000) (alteration in original) (quoting Burdine, 450 U.S. at 255 n.10). The evidence of the plaintiff's prima facie case, combined with the fact the defendant's explanation is unworthy of credence, may permit the trier of fact to conclude that status played a determinative role in the decision. See id. at 148 ("Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."). To be sure, however, the plaintiff no longer has a strong presumption that she can carry into this pretextual (causal) assessment from the prima facie case. See id. (cautioning that showing the employer's justification for its action is false will not "always be adequate to sustain a jury's finding of liability").

224. See Hicks, 509 U.S. at 510–11 (explaining that if the defendant meets its burden of production, the prima facie presumption is no longer viable).

225. Refer to Part II.B supra (discussing the effects of bias and personal motivation on counterfactual reasoning about causation).
Recall that a large part of the way individuals reason about causation is dependent upon what they think are "norm" or "typical" occurrences. Individuals often can identify causal variables or explanations by determining whether the occurrence in question is typical or expected under normal circumstances (without the influence of the variable at issue). Whether the challenged decision appears to be typical or expected in many instances will depend on one's own knowledge base and normative expectations, which in turn are influenced by personal ideas—and often stereotypes—about the behavior and roles of different status groups.

For instance, someone who believes that discrimination is largely a phenomenon of the past might be less likely to credit plaintiff's status as a likely explanation, thereby stunting that person's ability to assess accurately the probabilities that the decision was made on account of such status. Likewise, someone with greater knowledge of, or experience with, discrimination will be more able to assess the influence of status in the face of a defendant who has not produced a credible, neutral explanation. The same is true of biases. Someone who believes that women or African-Americans are normally less capable of performing in the particular position at issue will easily, at any level of consciousness, be more inclined to imagine other, neutral reasons why a defendant might have made a particular decision. Another person may tend to see status

226. Refer to notes 37-43 supra and accompanying text (examining Norm Theory).

227. Refer to note 37 supra and accompanying text (suggesting that individuals, when attempting to explain an occurrence, compare it to what that individual believes to be a normal occurrence).

228. See Lawrence, supra note 1, at 338-39 (explaining how an individual relies on stereotyped beliefs when interpreting others' behavior so that the behavior may be perceived to support the individual's existing beliefs).

229. Krieger, supra note 6, at 1226.

Given that pretext theory applies only when relatively more salient direct evidence of animus is lacking, discriminatory intent is not likely to be viewed as a convincing explanation for what occurred. This leaves us with one overwhelming influence on jury decision-making: jurors' preexisting biases regarding the prevalence of conscious, intentional discrimination.

Id.

230. See Kim Taylor-Thompson, The Politics of Common Ground, 111 HARV. L. REV. 1306, 1313 (1998) (reviewing RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997)) (suggesting that "jurors of color may bring distinctive experiences into deliberations and may actually prod an otherwise all-white jury into confronting commonly held assumptions and approaching evidence from a different analytical position").

231. See id. at 1314 (citing research that shows people tend to "resort to categories or stereotypes in attempting to understand and predict the behavior of others").

232. See Lawrence, supra note 1, at 339.

In ambiguous social situations, it will always be easier to find evidence
influence in places where it may not exist because of his own biases in favor of generally disadvantaged groups, and so on.

The point is that the factfinder's ability and willingness to evaluate whether the plaintiff's status motivated the defendant is dependant upon the influence of various cognitive biases that form the knowledge base used to make causal judgments. Moreover, the costs of attribution mistakes made by the counterfactual heuristic employed are much higher at a later stage than at the initial stage—for example, in the prima facie case. Any causal mistakes made by the counterfactual simulation heuristic at the initial stage—such as overestimating the probability that status influenced the outcome—can be corrected at a later stage—for instance, through the generation of more information about the decisionmaking process and its outcomes. In other words, the potential influence of various exogenous factors on counterfactual causal mechanisms suggests a reason for wanting to generate more information about the challenged decisionmaking process and its outcomes before the final attribution stage. Hence, it is fitting that contrastive reasoning is invoked as a check on any mistakes made at the beginning. When the defendant can produce a credible explanation that accounts for the decision, the inference of status influence is weakened and the causal inquiry sharpened such that the factfinder can evaluate the likely influence of each explanation on the decision—for example, by examining each factor more carefully.

But Hicks allows for no compelled correction of any attribution mistakes resulting from cognitive biases formed by

supporting an individual's assumed group characteristics than to find contradictory evidence.... [W]henever one is confronted with the need to interpret the behavior of members of a particular group en masse, there will be little opportunity to observe behavior that conflicts with the group's assumed characteristics.

Id.

233. As Rebecca White and Linda Krieger explain,

A stereotype is best understood as a type of schema. A schema, in turn, is best understood as a "knowledge structure," a network of interrelated elements representing a person's knowledge, beliefs, experiences (both direct and vicarious), and expectancies relating to the schematized object.

Cognitive stereotypes often function not as consciously held beliefs, but as implicit expectancies. Through the mediation of various mental processes, functioning largely outside of conscious awareness, a stereotype, like an invidiously motivated supervisor reporting to his superior, covertly biases the data on which a social judgment will be made, skewing that judgment in a stereotype-reinforcing direction.

White & Krieger, supra note 4, at 516–17 (footnote omitted).
the now-unconstrained causal-attribution judgments.\textsuperscript{234} Instead, the Court has unleashed the factfinder into a world of causal inquiry that is subject to the very biases, stereotypes, and misconceptions that underlie the discrimination of which the plaintiff complains.\textsuperscript{235} After the inference of status influence “drops out of the picture,” or no longer binds the factfinder to assess its role in the decision, the causal judgment need not rest in any factual grounding, particularly once the defendant’s reasons have been proven false.\textsuperscript{236} The factfinder may venture untoward into his or her own a priori world knowledge, which social psychologists have warned tends to subject the inquiry to the very biases that might have cost the plaintiff her job in the first place.\textsuperscript{237} On the other hand, if the factfinder was forced to examine status and examine the asserted reason independently, the risk of bias would be significantly reduced, and the ultimate causal judgment would be rooted in normative and factual reality.

B. Stereotype Vulnerability in Group Comparisons

Although Hicks hints at the vulnerability of the Court’s evidentiary structures to cognitive biases and mistakes, one need not look far to detect the realization of these biases in both discriminatory intent and impact cases. Recall that comparative reasoning, usually via the “similarly situated” heuristic, is one of the predominant causal mechanisms used in both intent and

\textsuperscript{234} Refer to notes 222–23 supra and accompanying text (discussing the permissibility of an inference of discrimination by the factfinder).

\textsuperscript{235} Henry L. Chambers, Jr., Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm, 60 ALB. L. REV. 1, 43–44 (1996) (stating that, as a result of Hicks, “if a case is put to a fact finder without direct evidence supporting either the proffered reasons or intentional discrimination . . ., the fact finder’s verdict will be a referendum on the fact finder’s perceived prevalence of intentional discrimination in society”).

\textsuperscript{236} St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 510–11 (1993) (stating that once the burden of production has been met by the defendant, the presumptions raised by the plaintiff’s prima facie case are no longer valid, and the factfinder is free to proceed on his own beliefs); see also Chambers, supra note 235, at 41–44 (contending that once an employee has disproved the employer’s given explanations, “the factfinder’s interpretation will become speculation centered on unproffered reasons” and “will be based on the factfinder’s life experiences”).

\textsuperscript{237} Linda Krieger makes this point as well. The initial presumption of status, flawed though it may have been, at least served to control the otherwise unrestrained biases about what might have caused the employer’s action. . . . [Without it], jurors can be expected to rely either on the relative salience of the competing explanations or on whatever a priori causal theory they find most representative of the situation at hand.

Krieger, supra note 6, at 1226.
impact cases to generate explanations for the challenged action or outcomes. This reasoning process allows defendants (and plaintiffs) to search for possible distinctions that would explain why individuals from different status groups have been disparately impacted or treated. However, as researchers have illustrated, when these distinctions involve explaining differential outcomes or decisions involving statuses such as race or gender, there is a tendency, either at the subconscious level or through conscious manipulation, to rely on well-entrenched or learned biases and stereotypes about the interests, capabilities, and attributes of different social groups. When these explanations are out in the open, trial courts have the opportunity to probe them for any underlying cognitive biases but often do not, and reviewing courts, lacking the firsthand observation of the trial court, fail to see the underlying stereotype or bias embedded in these otherwise facially neutral explanations.

Consider, for example, the Court’s interpretation of a defendant’s race- or gender-segregated workforce as an expression of the status group’s own “choice” or lack of interest in the higher paid work. This is a commonly invoked status-neutral explanation in employment discrimination cases that is offered in response to evidence demonstrating a racial or gender disparity, notwithstanding similarly situated qualifications between status groups. As Wards Cove illustrates, the “lack of interest” explanation is raised not by an actual comparison of the interest between the two different status groups, but rather from the cognitive process of looking for any factors that might distinguish the treatment or impact on the groups. We know that this comparative exercise is vulnerable to biases about the abilities, characteristics, and expectations for different groups. As in Wards Cove, courts tend to base comparisons on “broad assumptions about [the] group with respect to an intangible

238. Refer to Part III.B supra.
240. See Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749, 1759 (1990) (“Since 1967, employers have sought to justify patterns of sex and race segregation in their workforces by arguing that these patterns resulted not from any actions they had taken, but rather from women’s and minorities’ own lack of interest in higher-paying nontraditional jobs.”) (footnote omitted)
241. See Wards Cove, 490 U.S. at 653–54 (discussing the distinguishing feature of nonskilled cannery workers only).
quality that eludes objective measurement (their ‘interest’ in the work).\footnote{242}

Professor Vicki Schultz has shown that district courts’ widespread acceptance of lack of interest as an explanation for an employer’s sex-segregated workforce in pattern and practice cases often rests not on statistical data showing that women did not apply for nontraditional jobs in representative numbers, but rather “on conventional images of women as ‘feminine’ and nurturing, unsuited for the vicious competition” of the male-dominated employment positions.\footnote{243} As one court has opined, “common practical knowledge” was enough upon which to base the conclusion that certain work is not attractive to women; it further concluded that “this is a fact of life that an Act of Congress cannot overcome.”\footnote{244} Another lower court, using the same reasoning as the Wards Cove Court, has found that, in the absence of evidence that women ever applied for the jobs, the most likely explanation for the longstanding pattern of sex segregation in defendant’s workforce was the women’s own lack of interest.\footnote{245} That court concluded that “although the plaintiff...
may call this stereotype female classification, the Court has not seen females clamoring to work in such jobs.\textsuperscript{246}

Uncritical acceptance of explanations based upon distinctions between social groups clearly sidesteps the normative work required in antidiscrimination law. Determining whether the proffered explanation is neutral or pretextual requires an evaluative exercise that assesses the proximity of status beliefs and influences on, or in, the proffered explanation. For instance, the Court’s own normative commitments counsel that reliance on differences between the genders or races cannot legitimately rest on stereotypes, gender roles, or outmoded beliefs about the abilities and interests of different status groups.\textsuperscript{247} When examining a proffered explanation for differential treatment that, at first glance, appears to rest on status considerations, the factfinder should evaluate the explanations for their reliance on, or fostering of, these status harms. In other words, the causal assessment should inquire into the relationship between status influences—prejudice or animus against a status group, stereotypical assumptions about the group, or manifestation of historical and social markers of status difference—and the asserted explanation of the decisionmaker.

 Courts, however, have not always avoided this evaluative exercise. For example, during the late 1960s and the early 1970s, some courts resisted explanations based on a “lack of interest” or failure of historically excluded racial groups or women to apply for higher paying, nontraditional jobs.\textsuperscript{248} By examining the history of exclusion and the behavior of employers, many early federal courts instead attributed the failure of minorities to apply for higher paying jobs to the deterrent effect created by this history and behavior, reflected in part by the presence of a segregated workforce.\textsuperscript{249} The U.S. Supreme Court, in an earlier

\textsuperscript{246} Id. (quoting EEOC v. Korn Indus., 17 Fair Empl. Prac. Cas. (BNA) 954, 959 (D.S.C. 1978)).

\textsuperscript{247} See United States v. Virginia, 518 U.S. 515, 550 (1996) (“[G]eneralizations about ‘the way women are’ . . . no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”); City of Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989) (noting, in a case invalidating a city plan designed to remedy past discrimination, that strict scrutiny is used to analyze gender- and race-based classifications to ensure that the classifications are not motivated by stereotypes).

\textsuperscript{248} See Schultz, supra note 240, at 1771–72 (summarizing the courts’ acknowledgment that “where a historically discriminatory labor market had relegated minorities to the lowest-paid, most menial positions, it was legally (and morally) indefensible for employers to attempt to attribute racial segregation in their workforce to minorities’ own job preferences”).

\textsuperscript{249} See, e.g., Schultz, supra note 240, at 1771–73 (recounting the lower courts’ application of the “futility doctrine” in race discrimination cases in the early 1970s, which
pattern and practice case, also rejected the lack of interest explanation for racial disparities for this reason:

If an employer should announce his policy of discrimination by a sign reading “Whites Only” on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer’s actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.\(^{250}\)

Few federal courts, including the Supreme Court, would reason this way today.\(^{251}\)

More recently, courts have critically evaluated proffered explanations for striking jurors of certain racial and ethnic groups for status biases and stereotypes embedded in those explanations. For example, in United States v. Bishop,\(^{252}\) a prosecutor argued that he did not strike an African-American juror because of her race but rather because “she lived in Compton, a poor and violent community whose residents are likely to be anesthetized to such violence and more likely to think that the police probably used excessive force.”\(^{253}\) The Ninth Circuit found this explanation to be pretextual (not race neutral) because it “both reflected and conveyed deeply ingrained and pernicious stereotypes.”\(^{254}\) However, most courts have been less

\(^{250}\) Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977). However, the Court initially refused to presume that all minority employees would have applied for the higher paying jobs and instead required each minority nonapplicant to prove that he or she would have applied to be a line-driver in the absence of the company’s discriminatory policy. Id. at 368–71.

\(^{251}\) See, e.g., EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 1273, 1281–82 (11th Cir. 2000) (rejecting the district court’s reasoning that a small percentage of women applying for server jobs in an establishment with no female servers was probable because women viewed applying for such jobs as “futile” in light of the restaurant’s reputation for not hiring women and finding that the failure of the restaurant to correct its discriminatory “public image” should not subject it to disparate impact liability).

\(^{252}\) 959 F.2d 820 (9th Cir. 1992).

\(^{253}\) Id. at 825 (internal quotation marks omitted).

\(^{254}\) Id.; accord Johnson v. Love, 40 F.3d 658, 668 (3d Cir. 1994) (rejecting a prosecutor’s explanation that a young African-American woman would be less likely to
vigorously and more uneven in their ability or willingness to evaluate proffered explanations critically for their embedded bias.  

As time carries society away from the most egregious and open period of discrimination against historically excluded status groups, courts tend to be much less scrutinizing and suspicious of disparate treatment and outcomes involving those groups.  

The uncritical acceptance of status distinctions and differences are instead too often accepted as a matter of common knowledge, as a natural and static reality in our society.  

Moreover, given the popular belief that discrimination is largely a phenomenon of the past, it is increasingly difficult for courts to see when and how “discrimination” manifests itself in society today.  

Having set up an evidentiary framework that acknowledges the persistence, and even stubbornness, of status influences on decisionmakers and decisionmaking outcomes, courts have stubbornly failed to

convict an African-American defendant as not sufficiently race-neutral because it was based on the assumption that an African-American woman's objectivity would be impaired because of her race.  

255. In United States v. Perez, 35 F.3d 632, 634 (1st Cir. 1994), the court upheld the use of a peremptory challenge to strike the only juror with a Spanish surname in a drug conspiracy case in which all defendants had Spanish surnames. The prosecutor explained that the reason for the strike was because the woman worked as a receptionist at the city's housing authority and, as such, that she may have had more contact with "seeing drugs in BHA operated apartments." Id. Although the court recognized that "inner city exposure to drugs is quite susceptible to impermissible use as a proxy for the race-based exercises of peremptory challenges," it nevertheless reasoned that suspicion of exposure to drugs might as well have motivated the prosecutor to challenge a nonminority juror. Id. at 635 (internal quotation marks omitted). Absent evidence that a similarly situated white juror—one who worked or lived in close proximity to drug use—was not struck, the court was disinclined to find that the peremptory challenge was influenced by racial considerations. Id.; see also United States v. Maserrati, 1 F.3d 330, 335 (5th Cir. 1993) (allowing a prosecutor to strike a Hispanic woman because the prosecutor's "experience in Hispanic culture" told him that a woman is used to doing "what the male in the species is telling her to do"); United States v. Payne, 962 F.2d 1228, 1233 (6th Cir. 1992) (upholding the exclusion of African-American jurors for affiliation "with black activist groups" in a case in which racial discrimination was alleged and not all black jurors were excluded).  

256. See Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 988–89 (1993) ("The Court's discriminatory intent rule . . . treats as blameworthy the form of race discrimination most common in the past but refuses to regard with suspicion the unconscious discrimination that is at least as significant a cause of the oppression of black people today.")).  

257. See generally IAN F. HANEY LOPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003) (making this point in a larger context); see also GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 16–31 (2002) (noting the ubiquity of "self-confirming" racial categorizations and stereotypes that are uncritically relied upon by decisionmakers across society).  

258. See Flagg, supra note 256, at 988 (concluding that the Court's reluctance to consider unconscious discrimination is a reflection of society's overall perception that racism is a problem of the past).
recognize instances in which the remnants of historical bias may lurk.

C. Selection Bias in Comparative Analysis

As the previous subpart discussed, courts need to monitor vigilantly the way that stereotypes and cognitive biases regarding the expected abilities, roles, and interests of different social groups can influence causal explanations generated by comparative exercises that seek to identify distinctive features among social groups. A less obvious or transparent influence of these biases is the way in which they can distort the comparative process itself by influencing the selection of the “causal comparison” or causal background. When this occurs, the comparative analysis can be vulnerable to the influence of status bias, rendering problematic any conclusion that is drawn from the comparative exercise. Courts are apt to miss this type of subtle bias, especially when it results from their own reasoning process, because the contrastive, similarly situated exercise itself is too often mistakenly equated with the causal inquiry at the heart of antidiscrimination law. Because this contrastive reasoning is explanatory and focused on sufficiency, it will miss much of the status evaluation required for causal judgments to avoid entrenching the very bias they are seeking to uproot.

As researchers have shown, selection of the causal comparison is heavily influenced by certain characteristics or features of the targeted subject (for example, a black or female plaintiff) and the subject’s (im)mutability in people’s minds. Recall, for instance, that the model actor fallacy can distort causal attributions by influencing the selection of a causal comparison that reflects the “typicality” of the status group in question. That is, different causal comparisons are apt to be adopted for women depending upon whether the activity or task in question is deemed typical or atypical for their status group.

259. See McGill, supra note 40, at 701 (explaining that causal explanations vary as a function of selection bias in choosing the “causal background”—for example, events, individuals, statistical data—against which the occurrence is compared).

260. See id. (finding that a person’s conclusion about a situation’s cause depends on the causal background chosen by the person and will thus always be influenced by the person’s previous history and biases).

261. Refer to notes 255–57 supra and accompanying text (discussing the one-sided comparative analysis in which courts engage when determining whether discrimination was “because of” race).

262. Refer to notes 87–90 supra and accompanying text (discussing the “model actor fallacy”). That status category may affect the comparison adopted is consistent with norm theory, which explains that “factors that are exceptional are more likely to be modified in
For instance, causal comparisons for men engaged in a traditionally male-oriented activity would likely be other men, and comparisons for women would tend to focus on traditionally female-oriented activities or categories. Thus, causal explanations for why women are not included in a particular professional arena or successful at a particular male activity will be particularly sensitive to expectations about what gender typically succeeds at, or belongs in, that professional arena. Further, those expectations will shape the selection of comparison background, which in turn can dictate causal explanations and attributions.

This type of selection bias is illustrated in *Feeney*, the equal protection case involving a challenge to a veterans' preference law that overwhelmingly benefited men in securing civil service appointments. Recall that central to the Court's conclusion that the law was not discriminatory on the basis of gender, despite its "devastating" impact on women, was its comparison of whether men and women were similarly situated vis-à-vis the preference. The Court concluded that "too many men" were disadvantaged by being in the nonveteran group "to permit the inference that the statute is but a pretext for preferring men over women." Rather, the Court concluded, based on the exercise of comparing the number of men and women in the nonveteran category, that the legislature's purpose was instead to prefer "veterans" over "nonveterans"—a status-neutral distinction without constitutional significance.

At first glance, the Court's rationale seems eminently reasonable. If men and women are similarly situated vis-à-vis the statutory disadvantage of which plaintiff complains, then there would seem to be no intentional discrimination, at least on the basis of gender. However, consider that another comparative exercise was also available for the Court to assess whether the legislative choice to give veterans and their families employment preferences might have been influenced by gender (or more particularly, by gender stereotypes or bias). One might have

people's mental representation of events than factors that are typical or routine." Grier & McGill, *supra* note 78, at 548–49.

263. Refer to Part II.B.2.a *supra*.

264. Refer to Part II.B.2 *supra* (discussing the role of the comparison background in shaping expectations).


266. See id. at 260 (citing the district court's finding).

267. *Id.* at 68–72, 275–78.

268. *Id.* at 275.

269. *Id.* at 275, 280.
asked whether men and women were similarly situated vis-à-vis “veteran” status—the statutory advantage of which the plaintiff complains. This analysis would dictate a starkly different conclusion given that more than 98% of the veterans were men, while only 1.8% were women.\footnote{270} When comparing men and women in the advantaged class of veterans, one might reason in the opposite direction: Too many \textit{women} are affected by the veteran’s preference to allow the conclusion that the statute is not “a pretext for preferring men over women.”\footnote{271}

It is doubtful that this would have ended the analysis of the \textit{Feeney} Court, as it went on to examine the legislative history of the statute to conclude that “nothing in the record demonstrates that this preference for veterans was originally devised or subsequently reenacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.”\footnote{272} But, to be sure, this latter conclusion was made much easier once the Court determined that the distinction on which the statute was based was neutral regarding gender and not a pretext for gender considerations. In this sense, the comparative exercise sharply defined, and perhaps determinatively influenced, the Court’s ultimate conclusion that neither gender bias nor stereotypes were at work.

In other words, a sort of “reversing the groups” test\footnote{273}—a type of counterfactual exercise—would force the factfinder to employ the similarly situated exercise to the other veterans group. The contrasting and opposite results from this comparison should prompt a further evaluation of why, although they are similarly situated vis-à-vis nonveteran status, men and women are not nearly similarly situated vis-à-vis veterans’ status. In fact, their stark dissimilarity in relation to the very intention of the statute—to advantage veterans (not to disadvantage nonveterans)—should prompt the evaluative question: “Is veteran status historically equated with typical male traits?” The reason this question is important is because it gets right at the heart of the status-based discrimination—reliance on the very

\begin{itemize}
  \item \footnote{270} \textit{Id.} at 270.
  \item \footnote{271} \textit{Id.} at 275.
  \item \footnote{272} \textit{Id.} at 279 & n.24 (using the \textit{Arlington Heights} factors to examine the historical and legislative context surrounding adoption of the preference).
  \item \footnote{273} See David A. Strauss, \textit{Discriminatory Intent and the Taming of Brown}, 56 U. CHI. L. REV. 935, 956–57 (1989) (proposing a test for discriminatory intent). “Suppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent.” \textit{Id.}}
notions, ideas, and mechanisms that historically excluded certain status groups from many arenas of civil society. If veterans' status is historically associated with male traits, and women have historically been excluded from this status, it seems implausible that "outmoded notions" and "stereotypes" about the proper roles of men and women could not have influenced the legislative choice.274

V. THE EROSION OF NORMATIVE CAUSALITY

At this point it is tempting to suggest doctrinal reforms that would enable factfinders and reviewing courts to engage in a more controlled, evaluative analysis that would constrain permissive comparative analyses and to stem factfinders' and courts' propensity to rely on cognitive biases.275 As others have pointed out, social science research has shown that cognitive biases can be detected and replaced when conscious, controlled reasoning processes are used.276 Similarly, researchers studying causal processes likewise suggest that following up comparative analysis with a counterfactual exercise—in a sense a more controlled or constrained reasoning process—can also control for cognitive bias and limit its effect on causal judgments.277 But I believe that these reforms would likely prove futile. So much of plaintiffs' ability to prove status influence, given the increasing subtlety of contemporary discrimination, lies in the strength of

274. As David Strauss cogently argues, [T]he distinctive traits that make veterans seem so deserving are associated with being male in somewhat the same way (although not to the same degree) that the capacity to be pregnant is associated with being a woman and the status of a group historically subject to discrimination is associated with being black. Membership in the warrior class has historically been linked with maleness. Willingness to undergo "the sacrifice of military service" is generally thought of as a male virtue, especially where the more dramatic forms of sacrifice, such as physical ordeals and danger, are concerned. Id. at 1002.

275. See, e.g., Jodi Armour, Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit, 83 CAL. L. REV. 733, 737 (1995) (arguing that legal decisionmakers must become more conscious of statuses like race and gender in order to resist falling into the habit of relying on cognitive stereotypes); Gary Blasi, Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology, 49 UCLA L. REV. 1241, 1276 (2002) (suggesting the activation of antidiscrimination norms to control cognitive bias, which might be accomplished through argument, jury instruction, or implicit invocation of antiprejudice norms).

276. Krieger, supra note 6, at 1246 ("[V]arious experiments indicate that carefully specifying evaluative criteria and providing decisionmakers with a large amount of information on those criteria can reduce intergroup bias."); see also Armour, supra note 275, at 760–61 (citing and discussing similar studies).

the normative assumptions underlying the prima facie case. Once courts began to lose faith or confidence in these assumptions, as this Part will show they have, the entire evidentiary structure built on top of them is weakened beyond the point that doctrinal reforms alone can remedy.

Recall that the Court has set up evidentiary frameworks that allow an inference of status influence based on a counterfactual heuristic that posits what outcomes and decisionmaking processes would resemble in a nondiscriminatory world and then deems deviations from those procedures and outcomes to be indicative of status influence.\textsuperscript{278} This counterfactual exercise is itself based in a number of normative expectations or assumptions about the existence, prevalence, and operation of discrimination in a number of contexts. These assumptions are (1) that history is a salient indicator of the tendency of decisionmakers to be affected by existing attitudes and biases about status groups (historical saliency); (2) that groups are relatively equal in their abilities and interests in seeking out political, social, and economic opportunities, and thus absent discrimination wide disparities in the distribution of those opportunities are unexpected (group parity); and (3) that discrimination is not episodic or isolated but is rather a systemic threat that is likely to manifest itself where decisionmakers have the most discretion (persistent bias threat).\textsuperscript{279}

The normative assumptions underlying evidentiary structures in intent and impact cases have served to guide and constrain causal judgments in two ways. First, these assumptions have helped identify the type of circumstantial evidence that can be most indicative of status discrimination. For instance, the historical roots or background of contemporary decisions can make salient certain types of evidence—like disparate, adverse impacts on historically mistreated groups—that might otherwise seem irrelevant or indeterminate. As such, it has not always been easy for defendants or courts to dismiss historical evidence, especially when it implied a historical consistency in the manner that a status group was currently being treated or impacted. Second, these assumptions have grounded causal judgments in a group-equality norm that self-consciousness undermines the essentialist status distinctions traditionally invoked to justify discriminatory treatment. These assumptions have thus functioned to constrain and restrain explanations for disparate treatment and outcomes that, given their

\textsuperscript{278} Refer to Part III.A \textit{supra}.

\textsuperscript{279} Refer to Part III.A \textit{supra}.
historical and social context, too closely correlated with traditional stereotypes and markers of a group's social status.

In this way, the normative assumptions underlying the prima facie cases of discrimination often made it difficult to explain stark group disparities and treatment on status-neutral grounds, particularly when they were contextualized as the historical legacy of more overt forms of discrimination. For instance, in Rogers, the historical context was crucial in allowing the court to draw the causal link between the adoption of the at-large voting system and the disproportionate exclusion of African-Americans from public office, boards, and committees.\(^\text{280}\) This history was useful, the Court reasoned, in drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized [in the past], that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.\(^\text{281}\)

As this Part illustrates, because so much of the strength and effectiveness of the evidentiary structures has rested on this type of contextualized reasoning and its underlying normative assumptions, the erosion of the assumptions has had a deleterious effect on discrimination plaintiffs' ability to uncover and prove status bias. In other words, the guidance and constraints under which the Court previously operated when reasoning about discrimination are noticeably absent in its most recent antidiscrimination jurisprudence. Consistent with the illustrations of the previous Part, causal judgments are increasingly made in an acontextual, ahistorical realm that presupposes a sort of zero-sum status game that is loath to find either historical victims or contemporary perpetrators.

A. The Decreasing Relevance of History and the "Inevitability" of Inequality

Much has been written about the Court's infamous rejection of an equal protection challenge to the Georgia capital sentencing process in McCleskey v. Kemp.\(^\text{282}\) The constitutional challenge was


\(^{281}\) Id. at 625; see also Washington v. Davis, 426 U.S. 229, 242 (1976) (noting the variety of cases in which discriminatory impact "for all practical purposes demonstrate[s] unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds").

based on a sophisticated regression study that demonstrated significant racial disparities in the imposition of the death penalty, both by the race of the victim and, to a lesser degree, by the defendant’s race. But it is worth taking another look at the Court’s reasoning in McCleskey to illustrate the fundamental shift in the Court’s normative understanding of status discrimination since its evidentiary frameworks were initially adopted.

McCleskey sought to establish the presence of racial discrimination in the imposition of his death sentence by using a sophisticated statistical regression analysis that took into account some 230 nonracial variables that could have explained stark racial disparities in more than 2000 murder cases in Georgia on nonracial grounds. Even after controlling for thirty-nine nonracial aggravating and mitigating factors that are typically influential in death penalty cases, the study found that someone like McCleskey, an African-American charged with killing a white person, was 4.3 times more likely to be sentenced to death than a defendant charged with killing an African-American. The study concluded that race was as powerful an influence in the imposition of the death penalty as formal statutory criteria, if not more.

Additionally, the study introduced by McCleskey found that the most significant racial disparities occurred where the most discretion lay in the capital decisionmaking processes. This was

283. Id. at 286.
284. Id. at 286–87.
285. Id. at 287. This data was supplemented by evidence specific to the county in which McCleskey was sentenced. David C. Baldus et al., Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction, 51 WASH. & LEE L. REV. 359, 366 (1994). Though based on smaller samples, this county data was as revealing as the statewide data. See id. at 366 n.29 (reporting the findings of the author of McCleskey's study and noting that after adjustment for the different levels of criminal culpability, the race-of-victim disparity in the Fulton County cases was twenty-eight percentage points and in the category where McCleskey's race was located, the race-of-victim disparity was forty points).
286. McCleskey, 481 U.S. at 355 (Blackmun, J., dissenting). For instance, the race of the victim was a variable nearly as influential as a prior conviction for armed robbery, rape, or even murder. Id. at 355 n.9 (Blackmun, J., dissenting) (pointing out that a prior conviction for armed robbery, rape, or murder increases one's odds of being sentenced to death by a factor of 4.9—as opposed to an increase of 4.3 for murdering a white victim). Additionally, the race-of-victim variable proved to be more influential in the imposition of the death penalty than whether the defendant was a prime mover in the homicide, a statutory aggravating factor. Id. (Blackmun, J., dissenting).
287. See id. at 287 n.5 (citing the study author's argument that the most dramatic racial disparities were in the "mid-range" cases, where the decisionmakers have a real choice whether to impose the death penalty). Based on these disparities in the midrange cases, the study's author concluded that "if there's room for the exercise of discretion, then
significant in large part because the study's author concluded that McCleskey's case fell in the midrange level of aggravated homicide, in which racial factors are more likely than not to play a significant role and where the largest statistical disparities lie.  

McCleskey's showing should have resonated with a Court that had established in two distinct lines of precedent that statistical disparity evidence was indicative of status influence and, indeed, of intentional discrimination, particularly where the most common reasons for disparate treatments and outcomes were accounted (or controlled) for in the statistical comparisons. The inference of status from this evidence was partially based on the expectation that, given our history and experience with status bias, discretionary decisionmaking processes are vulnerable to the influence of status bias and "permit[] 'those to discriminate who are of a mind to discriminate.'" It was also based on the assumption that, absent systemic discrimination or bias, similarly situated groups and individuals would be similarly treated and impacted. Setting aside the Court's strained attempt to distinguish these two lines of precedent and their application in the death penalty context, the Court carved out a larger normative stance that virtually reverses all of the assumptions underlying its previous evidentiary frameworks in equal protection cases.

The rejection of McCleskey's evidence as indicative of status influence in his case—or in the Georgia system as a whole—is facilitated first and foremost by the Court's dismissal of the historical context that rendered that evidence salient. This history indicated that "for many years, Georgia operated openly and formally precisely the type of dual system the evidence shows is still effectively in place. The criminal law expressly differentiated between crimes committed by and against blacks and whites, distinctions whose lineage traced back to the time of

the [racial] factors begin to play a role." Id. (alteration in original).

288. Id. (finding that 14.4% of the black-victim midrange cases resulted in the death penalty while 34.4% of the white-victim cases did).


290. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339–40 & n.20 (1977); see also Bazemore v. Friday, 478 U.S. 385, 400–01 (1986) (Brennan, J., concurring) (concluding that the statistical disparity of salaries paid to blacks as compared to similarly situated whites, taking into account four independent variables, supported a finding of pattern and practice discrimination with respect to salaries). Refer to Part III.A.1 supra.

291. I have elsewhere detailed the Court's reasoning and its flaws at length. See Foster, supra note 3, at 1144–61.
slavery." In other words, the history of Georgia's system of crime and punishment categorized along racial lines and ideology, just as social scientists indicate individuals do today, albeit automatically and unconsciously. The statistical study captured in objective terms what we know (and the Court had consistently acknowledged) to be true both as a social and psychological reality and as a historical matter.

Yet stripped of the historical understanding and context, evidence illustrating stark racial outcomes in highly discretionary decisionmaking processes may be troubling but ultimately must be tolerated in any imperfect system of justice. At least this is the Court's reasoning as it distances itself and equal protection doctrine from much of the history that gave birth to it. By the majority's calculation, the virtually unbroken historical treatment of blacks and whites in Georgia's system of crime and punishment is just that—history. This history, although formally relevant (the Court perfunctorily cited Arlington Heights v. Metropolitan Housing Development Corp. for this point) ultimately "has little probative value" unless it is "reasonably contemporaneous with the challenged decision." Genuflecting to the "undeniable" history of racial discrimination in this country, the majority nevertheless is ready to leave this history, finally, behind us. Requiring that history be "contemporaneous" with the decision, in other words, is another way of rendering the history all but irrelevant, because its utility is exactly in interpreting contemporary events against past practices and patterns.

In important ways, the other two assumptions, group parity and persistent bias threat, hinge unmistakably on the historical salience of race and racial distinctions. Without this history, it is unproblematic for us to assume that different groups of people in society are (or should be) differently situated and deserving of

292. See McCleskey, 481 U.S. at 329–34 (Brennan, J., dissenting) (chronicling at length the history of the Georgia death penalty system).

293. Indeed, the dissent echoes exactly this point:

Evaluation of McCleskey's evidence cannot rest solely on the numbers themselves. We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience. Georgia's legacy of a race-conscious criminal justice system, as well as this Court's own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey's claim is not a fanciful product of mere statistical artifice.

McCleskey, 481 U.S. at 328–29 (Brennan, J., dissenting).

294. Id. at 298 n.20.

295. Id. ("[W]e cannot accept official actions taken long ago as evidence of current intent.").
different treatment and impacts. That is, our suspicion about adverse treatment or outcomes that “correlate” with status is largely based on our collective history and experience with invidious treatment on the basis of that status. Without this history, a group parity or egalitarian norm lacks the requisite constitutional imperative necessary to render the treatment or outcomes damaging to our social system—and so the Court reasons in *McCleskey*. Having rendered the history of racialized criminal justice in Georgia nonprobative, the Court easily concluded that “at most, the Baldus [statistical] study indicates a discrepancy that appears to correlate with race.” But this is not problematic in an acontextual, dehistorized evaluation of the evidence, as indicated by the Court’s ultimate conclusion that “apparent disparities in sentencing are an inevitable part of our criminal justice system.” Racial disparities have all but been stripped of any particularized social meaning when the historical saliency of race—and even the formal discriminatory treatment on the basis of race—has been wiped clean from the slate of causal reasoning.

The Court just as potently rejects the third assumption that the threat of racial bias is persistent in discretionary processes. Recall that the Court has inferred from statistical disparities the existence of intentional bias where the decisionmaker(s) cannot explain the differential treatment or outcome reflected by the disparities on neutral grounds. The Court’s willingness to allow this inference in criminal justice (jury exclusion) and employment cases has also rested squarely on the shoulders of historical and contemporary experience. We know from this experience that the penchant to categorize and stereotype on the basis of race and gender is more likely to occur in uncontrolled or discretionary situations. Yet in *McCleskey*, this discretion becomes a shield rather than a sword against judicial scrutiny for bias: “Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.” Citing other constitutional “safeguards” designed to minimize racial bias in the criminal

296.  *Id.* at 312.
297.  *Id.* at 313.
298.  Refer to Part III.A.1 (discussing previous instances in which the Court has presumed discrimination, absent counterproof from the defendant, where expected outcomes were not reached).
299.  Refer to Part III.A supra (expounding upon cases in which the Court used historical experience to infer discriminatory impact).
300.  Refer to notes 120, 289 supra and accompanying text.
process, such as the prohibition on race-based jury selection and selective prosecution, and the "benefits of discretion" in the criminal process, the Court simply concludes that whatever threat of racial bias that may lurk in the sentencing process (as indicated by the statistical study) is not significant enough to be of constitutional concern.\footnote{302}

Even if we were to accept the unique nature of the capital sentencing process and system as a bona fide reason for rejecting its own precedent, we can still find elsewhere in the Court's recent jurisprudence evidence of the erosion of confidence in the evidentiary frameworks that are set up to detect discrimination. The Court's contrarianism in the face of its own normative and evidentiary commitments is clearly on display in two opinions that followed closely on the heels of \textit{McCleskey}.\footnote{303} These latter decisions reflect the same reversal of fortune in the ways that courts reason about the causal inquiry at the heart of discrimination cases. Together with \textit{McCleskey}, these cases leave very little doubt that there has been a significant, even seismic, shift over time in the juridical assumptions about discrimination.

\section*{B. Blinded Agency and the Redemption of Innocence}

One need look no further than the Court's recent employment discrimination cases to confirm the shift in its assumptions about the nature of contemporary status bias and discrimination. Recall that in pattern and practice and disparate impact cases, the Court assumed a reasonable expectation "that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial[,] ethnic[,] and gender] composition of the population in the community from which employees are hired."\footnote{304} This was an assumption based on a norm of status parity, which takes as its baseline the notion that status bestows no inalterable differences in the talents, interests, and abilities of individuals. The other assumption is one of persistent status bias threat, which is based on the notion

\footnote{302. See \textit{id.}}

\footnote{In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.}


\footnote{304. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1976).}
that, absent invidious influences, employers should be able to explain their decisions by reference to neutral considerations. As we have seen, once the most common reasons for employment actions are taken into account (or controlled for through the prima facie case showing), the Court’s evidentiary frameworks treat the possibility of even subconscious bias lurking as a threat in decisionmaking processes. This is particularly so given the history (and contemporary reality) of labor market bias. For this reason, requiring employers to retain records and to articulate plausible reasons for the challenged employment action is a way of checking or controlling the danger of status biases that threaten to exert their influence on employment decisions.

Reading the Court’s opinions in Hicks and Wards Cove illustrates just how far the Court has distanced itself from the normative assumptions that have previously guided and governed the evidentiary frameworks in statutory intent and impact cases. What is striking about the Court’s reasoning in both cases is the almost complete erasure of, and blindness to, the historical and social context of status discrimination. In an important sense, the Court has wiped the slate clean of any remnants of historical bias or the ways in which this history has left an unbroken legacy of differential treatment in contemporary labor markets. There is a complete reversal of the presumption, indeed, that discrimination operates often below the radar of obvious racial indicia but nevertheless can manifest itself in the irregularities of decisionmaking processes and deviations from expected outcomes. Discrimination is now treated like a relic of the past, difficult to unearth because its effects have largely receded from the societal structures and institutions where its influence was once thought to be so powerfully, yet subtly, exerted.

In Hicks, the most dramatic move made by the Court in its reversal of fortune for discrimination plaintiffs was the reduction of the presumption of status influence from the plaintiff’s prima facie case showing to a mere “procedural device, designed only to establish [the] order of proof and production,‖ one that is no different than a host of other procedural rules that litter civil procedure. Shorn of its normative underpinnings, the device assumes absolutely nothing about the existence—not to mention the persistence—of status bias threat in the labor market. It is as if the Court has suddenly become blinded to the ways in which status bias has historically and persistently shaped the labor

305. Hicks, 509 U.S. at 521.
market decisions and the preferences of individuals within it. Without this larger historical and social context, then, employers stand firmly outside of the web of historical, institutional, and cognitive influences that account for the stubborn persistence of status discrimination. As the Court sternly summed up in Hicks, “Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action...”

Gone are the days when the Court held the employer more accountable under its assumption that “when all legitimate reasons... have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.”

*Wards Cove* also reflects this blinded view of agency. In first conceptualizing the disparate impact cause of action, the Court in *Griggs v. Duke Power*, offered a very powerful narrative about the ways in which historical and contemporary discriminatory practices become entrenched in decisionmaking processes that are “neutral on their face, and even neutral in terms of intent” in ways that “operate to ‘freeze’ the status quo.” The plaintiff's prima facie showing that her status group was adversely and disparately impacted by the employer's decisionmaking process imported this sociohistorical understanding of contemporary discrimination, which gave salience and context to employment practices that, even in the context of a period after the formal disestablishment of overt discriminatory practices, bear a striking resemblance to those shunned practices.

Whereas in *Griggs* the employer's segregated workforce served to highlight the discriminatory nature of the employer's practices, in *Wards Cove* a similarly highly segregated workforce

---

306. *Id.* at 523.

307. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Instead, it is now left up to the factfinder to do the normative work underlying this assumption, a task ill suited in most instances to individuals who have even less control or accountability in their causal reasoning processes. Refer to Part III.A *supra*.

308. *Wards Cove*, 490 U.S. at 663 (Stevens, J., dissenting) (“Turning a blind eye to the meaning and purpose of Title VII, the majority's opinion perfunctorily rejects a longstanding rule of law and underestimates the probative value of evidence of a racially stratified work force.”).


310. *Id.* at 430. In *Griggs*, the Court explained how the employer's requirement of a high school diploma and a standardized intelligence test, in the context of the historically inferior education of African-Americans, caused the employer's workforce to remain racially segregated even after the company ended formal segregation practices. *Id.*
prompted the Court to distance itself from its sociohistorical salience to the defendant's employment practice. In Griggs, the employer's plant was organized into five operating departments, but African-Americans were employed only in the labor department, where the highest paying jobs paid less than the lowest paying jobs in the other four departments.311 After the formal abandonment of its open racial segregation of employees, the employer conditioned transfer into the higher paid departments on a high school degree or intelligence test, both of which "render[ed] ineligible a markedly disproportionate number of [African-Americans]."312 The Court found these practices discriminatory in light of both the larger historical and social context—for example, the fact that blacks received inferior education in the state and the lack of relevance of the test to job performance—and the context of the employer's own segregated workforce.313 Taken together, it was evident that the requirements of a high school degree and intelligence test, although "fair in form," were "discriminatory in operation."314 These facially neutral requirements both reinforced and reflected the existing racial segregation and exclusion in the defendant's workforce.315

The employer in Wards Cove similarly maintained a starkly segregated workforce, not just in the stratification of jobs along racial and ethnic lines, but also in the segregation of housing and dining facilities by race and ethnicity.316 Yet instead of viewing this segregation as indicative of the ways in which the structure of defendant's workforce mimicked even the most overt forms of segregation, the five-member majority cut it cleanly away from the larger functioning of defendant's facially neutral employment practices under challenge by the plaintiff. Indeed, the majority deemed this segregation to raise only the narrow legal question of whether the defendant had intentionally segregated its workforce, a curious inquiry given the difficulty of establishing

312. Id. at 429.
313. Id. at 430–31.
314. Id. at 431.
315. See id. at 432 (describing the requirements as "built in headwinds' for minority groups").
316. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 649 (1989). Not only did the predominantly white noncannery workers earn more than the predominantly nonwhite cannery workers, but they also lived in separate dormitories and ate in separate mess halls. Id.; see also id. at 664 n.4 (Stevens, J., dissenting) (commenting that these characteristics of the employer's workforce "[bore] an unsettling resemblance to aspects of a plantation economy").
such intent. But more to the point, focusing on what the segregation did not say about whether the employer intended to treat these groups differently became a clear distraction from the segregation’s larger salience to the racialized nature of defendant’s employment practices, a nexus that was not difficult to see in this case. Nevertheless, the Court’s reasoning is quite telling:

Whatever the “resemblance” [that the employer’s work force has to a plantation economy], the unanimous view of the lower courts in this litigation has been that [the plaintiffs] did not prove that the canneries practice intentional racial discrimination. Consequently, Justice Blackmun’s hyperbolic allegation that our decision in this case indicates that this Court no longer “believes that race discrimination . . . against nonwhites . . . is a problem in our society, is inapt. Of course, it is unfortunately true that race discrimination exists in our country. That does not mean, however, that it exists at the canneries—or more precisely, that it has been proved to exist at the canneries.

Indeed, Justice Stevens concedes that [the plaintiffs] did not press before us the legal theories under which the aspects of cannery life that he finds to most resemble a “plantation economy” might be unlawful. Thus, the question here is not whether we “approve” of petitioner’s employment practices or the society that exists at the canneries, but, rather, whether [the plaintiffs] have properly established that these practices violate Title VII.317

The majority’s failure to consider the totality of defendant’s employment practices—the subjective hiring practices, the racially stratified workforce, and the adverse wage effect of that stratification—is a myopia that unfortunately characterizes much of its recent reasoning about discrimination.

Ultimately, there is a narrative of innocence that permeates the Court’s view of racial equality and the role of decisionmakers in whatever racial inequality exists in our society. This narrative is exemplified by the lengths to which the Court went in both *Hicks* and *Wards Cove* to shift the agency behind disparate treatment and impact away from what it once understood as the historical legacy and remnants of discrimination to more innocent forces that would account for any status inequality that might still exist. Consider, for instance, the Court’s explanation for why status discrimination is no longer an appropriate

---

317. *Id.* at 649 n.4 (citations omitted) (second and third alterations in original).
inference for an employer's failure to persuasively explain its reasons for an adverse employment action against a plaintiff who is otherwise qualified and available:

Assume that 40% of a business' work force are members of a particular minority group, a group which comprises only 10% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that same minority group, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired. Under McDonnell Douglas, the plaintiff has a prima facie case, and under the dissent's interpretation of our law not only must the company come forward with some explanation for the refusal to hire (which it will have to try to confirm out of the mouth of its now antagonistic former employee), but the jury must be instructed that, if they find that explanation to be incorrect, they must assess damages against the company, whether or not they believe the company was guilty of racial discrimination.318

In the first instance, this hypothetical reveals a normative vision that the world in which we live is rooted in a contrafactual assumption of equality between groups. That is, it places remarkable faith in a status egalitarianism that is contraindicated by most empirical evidence of the distribution of racial and ethnic groups in labor markets. As importantly, it reveals a seemingly prevalent fear in this society that innocent whites, or innocent societal practices, will be blamed for inequalities that have their origins in actions that are either the alleged victim's fault or the responsibility of forces that no one individual or institution should be held responsible for—in part because of the historical and social complexity of the phenomenon that gives rise to these forces.

A proffered causal explanation offered by the Court in Wards Cove similarly reflects this theme of innocence. Recall that the plaintiff demonstrated a racial disparity in defendant's workforce between workers with similar, or fungible, skills.319 In rejecting this disparity as indicative of the racial biases, the Court imagined another, far more virtuous causal explanation for the disparity:

The peculiar facts of this case further illustrate why a comparison between the percentage of nonwhite cannery

workers and nonwhite noncannery workers is an improper basis for making out a claim of disparate impact. Here, the District Court found that nonwhites were "overrepresented" among cannery workers because [defendants] had contracted with a predominantly nonwhite union (local 37) to fill these positions. As a result, if [defendants] (for some permissible reason) ceased using local 37 as its hiring channel for cannery positions, it appears (according to the District Court's findings) that the racial stratification between the cannery and noncannery workers might diminish to statistical insignificance. Under the Court of Appeals' approach, therefore, it is possible that with no change whatsoever in their hiring practices for noncannery workers... [defendants] could make [plaintiffs'] prima facie case of disparate impact "disappear." 320

It is true that there surely exist many innocent, or non-status-related, causes for disparate treatments and impacts. The Court need not "see" discrimination lurking everywhere in order to see that it continues to exist somewhere. But it is telling how much trouble the Court seems to have in identifying status discrimination anywhere, except in the overt use of race and gender classifications for formally benign reasons (for example, to assist historically disadvantaged groups). 321 This failure is particularly noteworthy when considered against the Court's history of identifying what it previously considered to be important hallmarks of status discrimination. What accounts for this myopia is undoubtedly complex and is perhaps subject to contestation. But what cannot be ignored is the normative shift in the Court's vision of status discrimination and its (non)salience as a causal explanation for persistent group disparities and treatment in society.

VI. CONCLUSION

It is time to move beyond the debate in antidiscrimination scholarship over the wisdom of a discriminatory intent versus a disparate impact test. As this Article has argued, this debate has obscured in important ways where the real normative work occurs in antidiscrimination law. The question of whether race, gender, or other protected status is the cause of (intentionally or

320. Id. at 654 (citation omitted) (first alteration in original).
not) the disparate treatment of, or disparate impact on, an individual or group is the central inquiry in both intent and impact cases. Importantly, as this Article has shown, the Court has employed similar causal heuristics to satisfy this inquiry in both types of actions. By looking closely at these heuristics and their evidentiary counterparts, we can see more clearly why neither the discriminatory intent nor disparate impact cause of action can remain fertile ground for relief by plaintiffs claiming unfair discrimination.

This Article identified two key vulnerabilities in current causal analysis in intent and impact cases that, despite the availability of generous evidentiary mechanisms, render the majority of discrimination cases highly likely to be unsuccessful. These vulnerabilities reflect significant shifts in both the way in which courts have come to understand contemporary discrimination and the assumptions that they hold about that discrimination in our society. While many scholars have written about the cognitive biases that can affect employment and other types of decisionmaking that leads to status-based discrimination, courts have not been particularly concerned or scrutinizing of the ways in which those biases can infect decisionmaking about whether discrimination has occurred in a particular instance. More problematically, we have seen a steady erosion of the normative understandings underlying the evidentiary structures used to prove discrimination that have been in place for the past few decades.

This erosion portends a far more fundamental civil rights restoration project than has perhaps been contemplated by those concerned about the decline in antidiscrimination law coverage and protection. In the final analysis, this Article seeks to call attention to the need for more fundamental reform, both in the way that we perceive antidiscrimination jurisprudence and in the types of solutions we seek for its sustainability in the face of evolving patterns of discrimination. What these solutions should look like is a subject for another article. In shifting the focus toward causation, the hope is that future solutions will take up the deeper challenges that constrain the ability of antidiscrimination law to fulfill its potential.