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Hillel Bavli is an Assistant Professor of Law at SMU Dedman School of Law. His teaching and scholarship interests are in the fields of evidence, torts, complex litigation, law and economics, and empirical legal studies. He is particularly interested in applications of statistics to law. Prior to joining SMU's faculty, he practiced law in the field of complex commercial litigation, and he completed a number of fellowships, including a Fulbright Fellowship in Jerusalem, Israel, and visiting fellowships at the Yale Law School Center for Private Law and the Harvard Institute for Quantitative Social Science. Hillel holds an A.M. in Statistics and a Ph.D. in Statistics in Law and Government, in addition to a J.D.

Causal Sets in Antidiscrimination Law

Standards of causation in antidiscrimination law, and disparate-treatment cases in particular, are deeply flawed. Their defects have caused an illogical, obscure, and unworkable proof scheme that requires an overhaul in order to curb the harm that it engenders and to allow the antidiscrimination statutes to serve their objectives effectively. This article proposes a theory and method of causation that achieves this goal. The problem stems from the inadequacy of the “but-for” test in disparate-treatment cases, and the vague and deficient “motivating-factor” test with which courts and legislatures have frequently replaced it. The difficulty of this issue is highlighted by the large number of times it has been addressed by the Supreme Court, including in two cases before the Court in the current term.

The proposed “factorial” approach entails three innovations over current causation schemes: 1) it adopts a predominant framework for cause and effect in the sciences, called the “potential-outcomes” framework, as a central structure in which to sharply define and analyze the causal inquiry; 2) it employs a causal measure, called the “NESS” test, that refines and, in a sense, unifies the but-for and motivating-factor tests by retaining the central feature of the but-for test—the “necessity condition”—but in less restrictive form; and 3) it applies a legal framework grounded in tort law and recent advances regarding multiple sufficient causes. In addition to reflecting actual cause and effect, the proposed approach promotes antidiscrimination law’s deterrence and fairness objectives while preventing windfall recoveries and their distorting effects on incentives. It also allows an interpretation of causal language in antidiscrimination statutes that is consistent with good policy and Congress’s intent—an interpretation not possible under current standards.