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Work Culture and Discrimination

Tristin K. Green†

TABLE OF CONTENTS

Introduction.....	625
I. Defining Work Culture.....	629
II. Increased Demands for Conformity to Work Culture	634
A. Managerial Discourse: The Turn to Culture as a Business Tool.....	634
B. On the Ground: Restructuring Work	640
III. Work Culture and Discrimination	643
A. Discriminatory Work Cultures: Brief Examples	644
1. Displays of Competence: Bravado and Tinkering.....	644
2. Informal Socializing: Sports Talk, Beer Drinking, and Sex	645
3. Appearance: The Right Look	646
B. Agency and Structure: Why Work Culture Discriminates	646
C. Harm: Incorporating Performance and Identity Costs.....	650
IV. Current Legal Discourse: Title VII Legal Theories and Judicial Deference to Work Culture	653
A. Theories of Discrimination and Doctrinal Limitations.....	654
B. Judicial Deference: Work Culture as a Business Prerogative.....	658

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1. Appearance Codes	658
2. Lack-of-Interest Analysis	660
3. The Behavioral Catch-22	661
4. Traditionally Crass Work Environments	662
V. Charting a Course for Change	664
A. Reshaping Existing Legal Theories.....	665
1. Practical Problems: Regulating Social Relations.....	667
2. Normative Problems: Legal Determinations and Essentialism	672
B. Beyond Legal Rights: Possible Alternatives	674
1. A Doctrinal Alternative	678
2. An Administrative Alternative.....	681
Conclusion	683

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INTRODUCTION

In all but the most solitary of work, we constantly engage in and are constrained by a social process called work culture. Work culture tells us what to wear, how to talk, what to talk about—in short, how to interact—whether informally in the lunch room or in more formal group meetings. And yet, traditional employment antidiscrimination efforts have largely ignored the role that work culture plays in perpetuating workplace discrimination and segregation. This is a mistake. Particularly in the modern workplace, where social relations are increasingly crucial to individuals' employment success, understanding the ways in which work culture can be a source of discrimination takes on critical importance.

In this Article, I endeavor to frame an expanded antidiscrimination discourse that isolates work culture as a source of employment discrimination and puts legal pressure on employers to devise meaningful programs for reform. My endeavor involves two main undertakings, one largely descriptive and conceptual, and the other more strategic, directed at generating specific legal incentives for change. As to the first undertaking, by identifying work culture as a source of discrimination in the modern workplace, I hope to bridge the conceptual divide between individual actors and organizational choices that dominates traditional antidiscrimination discourse. For this reason, this Article can be seen as part of a larger, interdisciplinary movement toward conceptualizing discrimination as a problem with both human and organizational dimensions.¹ At the same time,

1. For some of the psychological and sociological research along these lines, see William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120 (2000) (reviewing recent studies of contextual influence on decision making); Marilyn B. Brewer et al., *Diversity and Organizational Identity: The Problem of Entrée after Entry*, in CULTURAL DIVIDES: UNDERSTANDING AND OVERCOMING GROUP CONFLICT 337 (Deborah A. Prentice & Dale T. Miller eds., 1999) (exploring the influence of group and organizational dynamics on the success of newcomers); Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice*, in CONFRONTING RACISM: THE PROBLEM AND RESPONSE 33 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (discussing the influence of power on stereotypic thinking and perceived intergroup differences); Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319 (2000) (reviewing research on the ways in which organizational context can activate or suppress social psychological and cognitive processes). For legal scholarship in this area, see Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 672-74 (1997) (providing an empirical study of the effect of organizational characteristics of elite law firms on workforce integration); David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination*

uncovering the discriminatory potential of work culture builds on the work of a handful of legal scholars who have begun to focus on the problems that an assimilationist bias and, more concretely, that specific employment demands to assimilate raise for the equality ideal.² Although these scholars have not examined the concept of work culture specifically, they have made a strong case that employment discrimination takes a variety of forms, not always recognizable through the lens of targeted animus or identifiable job detriment. Recognizing work culture as a source of discrimination may help to address some of the harms that these scholars have identified, along with more traditionally recognized harms.

As to the second undertaking, after surveying some of the ways in which courts and existing legal doctrine currently defer to work culture, placing even discriminatory work cultures beyond the purview of legally triggered change, I seek to set the foundation for a somewhat unconventional, although not unprecedented, regulatory approach to reform.³ Here, I depart substantially from scholars who have proposed a legal rights

Law for "High-Level" Jobs, 33 HARV. C.R.-C.L. L. REV. 57 (1998) (arguing that the organizational structure of firms is an important feature in analyzing the causes of discrimination and the effects of antidiscrimination law); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 660 (2003) [hereinafter Green, *Targeting Context*] (framing recent class action lawsuits as efforts to trigger organizational change that will reduce bias in individual decision making); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 93 (2003) [hereinafter Green, *Discrimination in Workplace Dynamics*] (arguing in favor of a theory of discrimination that conceptualizes discrimination as "a problem of overlapping individual and institutional dimensions"); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2172 (2003) (calling for an approach to sexual harassment that encourages attention to "larger structures of gender equality in which genuine sex harassment flourishes"); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (describing the problem of "second generation" discrimination as involving social practices, patterns of interaction, and structures of decision making and opportunity).

2. See, e.g., Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (book review) (examining employer incentives to pursue workplace homogeneity and exploring several models for combating those incentives); Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595 (1999) (exploring the norm of assimilation as it applies to language and arguing that Title VII should prohibit employers from requiring that Spanish- and English-speaking employees speak only English while on the job); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995) (examining ways in which Title VII might provide protection from employer-imposed, race-specific behavioral norms); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (exploring the relationship between assimilation and discrimination through the lens of "covering demands").

3. Scholars in a variety of contexts have begun to explore the potential of alternatives to the legal rights approach to regulation. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Sturm, *supra* note 1.

approach to combating employer demands to assimilate.⁴ Effective regulation of discriminatory work cultures, I argue, requires that we rely less on courts to articulate and enforce specific, across-the-board rules and more on legal incentives that will facilitate contextual problem solving by employers. Moreover, taking into account the dangers of regulating workplace social relations, I suggest that these efforts should be aimed at altering the organizational structures and policies that influence the shape and development of work cultures rather than at regulating social relations themselves.

The Article proceeds in five Parts. In Part I, I set about defining work culture. Drawing on a diverse literature on the concept of culture, I identify a social-relations definition as most useful for antidiscrimination purposes. According to this definition, culture is a process of social interaction and impression management, the social creation of a set of practices that signal membership in a group. Work culture, then, like its larger conceptual counterpart, lies in the “rituals of day-to-day conformity.”⁵ It defines the social, behavioral expectations of interaction that manifest in everything from informal interactional style and appearance signals to specific displays of competence. What I am expected to wear, how I am expected to interact, and what I am expected to talk about, whether informally in the lunch room or in more formal work groups—all of these behavioral expectations and more are determined on a day-to-day basis through a process of social interaction and boundary setting that I identify as work culture.

In Part II of the Article, I build the case for taking work culture seriously as an antidiscrimination concern. Specifically, I argue that there are two principal, interrelated reasons why work culture, and the ability or willingness to conform to a particular work culture, are likely to take on greater significance as a determinant of an individual’s success in the modern workplace. First, over the past several decades, the business literature has urged employers to use work culture, or “corporate culture” as it is called in the business literature, as a managerial tool. In other words, employers are urged to take measures to create or shape a strong work culture as a means of fostering employee productivity and of aligning employer and employee goals. Following from this business literature, employers are likely to be increasingly concerned with employee “fit,” both at the hiring stage and at the promotion stage. Second, even apart from the business literature espousing the benefits of a strong work culture, ongoing changes in the nature of the employment relationship and the structure of work

4. See, e.g., Carbado & Gulati, *supra* note 2, at 1819-24 (exploring variations on the right to be free from discrimination); Flagg, *supra* note 2, at 2038-51 (proposing two models of employer liability under Title VII); Yoshino, *supra* note 2, at 936-38 (proposing a legal right to be free from covering demands).

5. JUDITH S. MCLWEE & J. GREGG ROBINSON, *WOMEN IN ENGINEERING: GENDER, POWER, AND WORKPLACE CULTURE* 17 (1992).

suggest that social relations are becoming increasingly important in determining success. As firms move from a long-term, hierarchical relationship with their employees to a more fluid, contingent relationship, and as work becomes less individualized and more team based, social relations, and accordingly conformity with work culture, become more crucial to success.

In Part III, I turn to examine work culture as a source of discrimination. Conformity is central to any culture, including work culture, but increasing employer demands to conform to work culture (whether through overt efforts to reward "fit" or more indirectly through structural shifts that heighten social interaction as a day-to-day determinant of success) are particularly problematic if that culture is defined along racial or gender lines. I begin this Part with a few brief examples of what I suggest are discriminatory work cultures before turning to an exploration of some of the social science and humanities literature that attempts to explain why work cultures are likely to develop and persist around a white, male norm. This research demonstrates that work culture, as a human process of social interaction, is subject to a myriad of cognitive and motivational biases. At the same time, the research makes clear that work culture is influenced by larger organizational context. Discriminatory work cultures are not solely the product of an organic social process subject to human bias; they are shaped and influenced by the larger organizational policies and structures within which individuals and groups interact.

I also explore in this Part the potential harms, both economic and social, to victims of discriminatory work cultures. In addition to disparity in promotions, wages, and other easily identifiable, external determinants of success, discriminatory work cultures impose costs even on those who ultimately succeed in fitting in. Drawing on the work of scholars such as Barbara Flagg, Devon Carbado, Mitu Gulati, and Kenji Yoshino, I examine how setting behavioral expectations along a white, male norm imposes extra performance costs on outsiders and forces reconstruction of identity.

In Part IV of the Article, I survey the existing legal discourse. Not only do existing legal theories fall short of addressing discrimination by work culture, but, in a variety of ways, courts more generally tend to defer to work culture, placing it outside the purview of law. The problem for women and minorities, according to the prevailing discourse, is one of cultural disadvantage or personal choice rather than discrimination by work culture. In this Part, I provide several illustrations of this judicial deference to work culture and touch upon some of the more modest ways in which we might incorporate the concept of work culture into modern antidiscrimination discourse.

In Part V, I then chart a course for more targeted reform. I recognize at the outset that the most obvious way to trigger employer attention to work culture as a source of discrimination is to create a private right of

action under existing legal theories. Indeed, this is the direction that most scholars who have explored the harms attendant to an assimilationist bias have taken. I argue, however, that this approach to combating discriminatory work cultures is ill-advised. In doing so, I pause to recognize the benefits of work culture and social relations to employees in the modern workplace and to society. Whether by choice or necessity, most adults spend much of their lives at work; the workplace therefore serves as a primary venue for making friends, finding mates, and simply connecting with others. Recognizing these and other benefits of social relations at work exposes the risks inherent in regulating, or attempting to regulate, those relations. Indeed, as part of this cautionary inquiry, I take lessons from a relatively recent attempt to regulate social relations in the workplace: the law of sexual harassment. That law has been both hailed for eradicating certain invidious forms of discrimination and assailed for damaging valuable social relations, for “sanitizing” rather than equalizing relations in the workplace.

Even more so than with sexual harassment, discriminatory work cultures pose difficult questions about line drawing and the ability of law or employers to change worker social relations without destroying the benefits of those relations. Taking these practical concerns into account, I conclude that discriminatory work cultures are too complex and too intertwined with valuable social relations to be easily regulated through judicial pronouncements and direct regulation of relational behavior. Moreover, I submit that creating a legal right under existing legal theories raises disturbing normative implications that caution against such an approach. Instead, I explore several alternatives to a legal rights approach—one that builds on existing legal doctrine and another that is driven by an administrative obligation—that might provide the necessary legal incentive and public oversight for the kind of contextual problem solving needed for meaningful change.

I

DEFINING WORK CULTURE

Culture is a pervasive but often ill-defined, amorphous concept in modern American rhetoric.⁶ In this Part, I seek to develop a precise

6. See Naomi Mezey, *Approaches to the Cultural Study of Law: Law as Culture*, 13 *YALE J.L. & HUMAN.* 35, 35 (2001) (“Culture can mean so many things: collective identity, nation, race, corporate policy, civilization, arts and letters, lifestyle, mass-produced popular artifacts, ritual.”). According to genealogist Raymond Williams, “culture is one of the two or three most complicated words in the English language.” *RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 76 (1976). Indeed, it is with some trepidation that I use the term “culture” at all, for it carries with it a certain amount of conceptual baggage that is well beyond my expertise and the scope of this Article. Culture, after all, is the subject of entire academic disciplines and at times holds questionable standing even within those disciplines. See, e.g., ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS’*

definition of the term “work culture” and to situate the term within the broader antidiscrimination and organizational discourse. After a brief discussion of some of its more common uses, I settle on a social-relations definition of the term. Work culture, I suggest, is a human process that is both separate from and intimately related to broader organizational structures and requirements.

The famous culture genealogist Raymond Williams traces use of the term “culture” back to the fifteenth century.⁷ Culture as then understood was a “noun of process: the tending of something, basically crops and animals.”⁸ By the sixteenth century, however, the term took on a connection with human growth, particularly the cultivation or refinement of the human mind.⁹ Culture in this sense stood as the antithesis of raw nature or barbarism. It was civilization, and thereby culture became a goal rather than simply a process.¹⁰ People attained culture through study of the arts, philosophy, music, and literature. As described by the nineteenth-century poet Matthew Arnold, culture was “the best that has been thought and known in the world.”¹¹ This meaning of culture is still used today, for we often describe a person as “cultured” if he or she is learned in the various arts and philosophies.

More recently, culture has come to be seen less as an aspiration than as a particular way of life.¹² Under this broad social definition, culture represents an entire mindset that explains and controls behavior and beliefs. Culture in this sense is often a “quasi-deterministic concept, meaning those features of social life—custom, kinship, language, ritual, mythology—which choose us far more than we choose them.”¹³ For the most part, this understanding of culture dominates current mainstream discourse. When politicians declare wars on the “drug culture” or on the “culture of violence,” they adopt this meaning of culture, for they hold out culture as a

ACCOUNT [X] (1999) (arguing that “the more one considers the best modern work on culture by anthropologists, the more advisable it must appear to avoid the hyper-referential word altogether”). It is my hope, however, that I will be able to develop a precise definition of the term for use in the employment-discrimination context, a definition that will inform but stand separate from some of the more vague everyday uses.

7. See WILLIAMS, *supra* note 6, at 77.

8. *Id.*

9. *See id.*

10. *See id.* at 78.

11. See MATTHEW ARNOLD, *CULTURE AND ANARCHY AND OTHER WRITINGS* 79 (Stefan Collini ed., 1993). As other commentators have noted, Arnold was not as elitist as this excerpted quotation might suggest. Culture, as understood by Arnold and others of his time, was a process of humanization to be contrasted with the mechanization of the 1800s. *See Mezey, supra* note 6, at 41 n.23 (noting the “moral and egalitarian impulses behind Arnold’s formulation”).

12. WILLIAMS, *supra* note 6, at 79 (describing the shift in culture to include “the specific and variable cultures of different nations and periods”).

13. TERRY EAGLETON, *THE IDEA OF CULTURE* 28 (2000).

life construct, a relatively stable source of value and behavior constraint.¹⁴ Culture used in this way is both immensely broad and disturbingly vague. Indeed, this mainstream understanding of culture frequently leads to the conflation of culture and race. Culture, like race, is used to distinguish the other, this time in social rather than biological terms.¹⁵

Culture is most useful for antidiscrimination discourse, in contrast, when it is understood more discretely as a process of developing shared meanings of experience through ongoing, day-to-day social interaction. In this sense, culture is largely a matter of micro social action and the relational or behavioral expectations that signal membership in a group.¹⁶ This social-relations meaning of culture is related to the more mainstream use in that it recognizes the power of culture to shape beliefs, expectations, and behavior, but it is also more definite in its understanding of culture as a dynamic process of social interaction and signaling that both constitutes and is constituted by the individuals who engage in it. This meaning also goes hand-in-hand with voluntary identity formation, while at the same time recognizing the bounded nature of choice. Culture, in other words, is a form of “‘impression management’: we act in a way that creates an impression in others that we are adhering to a set of values.”¹⁷

This understanding of culture as a process of impression management builds most directly on the work of sociologist Erving Goffman.¹⁸ Through

14. Cf. Mezey, *supra* note 6, at 36-37 (discussing Congress’s reaction to the Columbine shooting and its attempt to change culture through legislative initiative). The growing divide between conservatives and liberals is also sometimes described as a matter of “culture.” See, e.g., JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 42-48 (1991) (describing the “cultural conflict” between the “orthodox” and the “progressive”).

15. See EAGLETON, *supra* note 13, at 26-27 (“[Culture] is always ‘an idea of the Other’ To define one’s life-world as a culture is to risk relativizing it. One’s own way of life is simply human; it is other people who are ethnic, idiosyncratic, culturally peculiar.”) (quoting Fredric Jameson, *On “Cultural Studies,”* 34 *SOCIAL TEXT* 17, 34 (1993)); Leti Volpp, *Blaming Culture for Bad Behavior*, 12 *YALE J.L. & HUMAN.* 89, 94 (2000) (“Culture, for communities of color, is transformed into what Paul Gilroy calls a ‘pseudo-biological property of community life.’”) (quoting PAUL GILROY, *SMALL ACTS: THOUGHTS ON THE POLITICS OF BLACK CULTURES* 24 (1993)).

16. See Mezey, *supra* note 6, at 42 (defining culture as “any set of shared, signifying practices”).

17. MCLWEE & ROBINSON, *supra* note 5, at 17.

18. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959) [hereinafter GOFFMAN, *PRESENTATION OF SELF*]; ERVING GOFFMAN, *INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR* (1967). The social-relations definition of culture also builds on the work of Clifford Geertz in the anthropological context:

The concept of culture I espouse is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning.

CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS BY CLIFFORD GEERTZ* 5 (1973). Geertz was largely responsible for the interpretive turn in anthropology in the 1960s and the emersion of what is known as “symbolic anthropology.” See Bernard Harcourt, *After the “Social Meaning Turn”: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 *LAW & SOC’Y REV.* 179 (2000).

the image of the dramaturgical performer, Goffman describes social interaction as a complex process of signaling and receiving signals.¹⁹ Behavior, rather than the beliefs or values that it represents, is the key to successful social interaction and the development of meaning systems. Of course, ideology, including values and assumptions about social reality, is part of any culture and frequently serves as a boundary mechanism,²⁰ but as Goffman and others emphasize, ideology is manifested through behavior; indeed, behavior may be driven by an effort to signal membership in a group without actual adherence to the group values or beliefs.²¹

Culture understood in this way is neither neutral nor static; rather, it is an active process of social interaction that affects and is affected by power dynamics. In his overview of the field of cultural studies, Richard Johnson suggests a Marxist influence on the social-relations definition of culture, identifying the following shared premises:

The first is that cultural processes are intimately connected with social relations, especially with class relations and class formations, with sexual divisions, with the racial structuring of social relations and with age oppressions as a form of dependency. The second is that culture involves power and helps to produce asymmetries in the abilities of individuals and social groups to define and realise their needs. And the third, which follows the other two, is that culture is neither an autonomous nor an externally determined field, but a site of social differences and struggles.²²

Applying a social-relations definition of culture to the workplace, one can see the role that work culture plays in defining behavioral expectations on the job. Work culture establishes expectations as diverse as styles of interaction and conversation boundaries, modes of dress or other appearance signals, and day-to-day displays of competence. In some workplaces, for example, employees may be expected to openly share information about themselves and their families; at other workplaces, they may be expected to talk only about work matters. Similarly, at many workplaces,

19. GOFFMAN, PRESENTATION OF SELF, *supra* note 18.

20. See Cynthia Fuchs Epstein, *Tinkerbells and Pinups: The Construction and Reconstruction of Gender Boundaries at Work*, in CULTIVATING DIFFERENCES: SYMBOLIC BOUNDARIES AND THE MAKING OF INEQUALITY 232 (Michelle Lamont & Marcel Fournier eds., 1992) (exploring the use of gender ideology as a boundary mechanism); see also *infra* notes 47-48 and accompanying text (discussing the difference between the concept of "corporate culture" in the business literature and the concept of work culture as a source of discrimination).

21. See GOFFMAN, PRESENTATION OF SELF, *supra* note 18 (distinguishing between performer and character); see also GEERTZ, *supra* note 18, at 17 ("Behavior must be attended to, and with some exactness, because it is through the flow of behavior—or, more precisely, social action—that cultural forms find articulation."). In his cultural ethnology of a high-tech engineering firm, Gideon Kunda provides a fascinating account of the intricacies of signaling and its effects on the workers' sense of self. See GIDEON KUNDA, ENGINEERING CULTURE: CONTROL AND COMMITMENT IN A HIGH-TECH CORPORATION 160-216 (1992).

22. Richard Johnson, *What is Cultural Studies Anyway?*, 16 SOC. TEXT 39 (1987).

employees are expected to adhere to a relatively strict appearance code, even when not formally mandated. Even job competence can be a matter of work culture, as employees (or employers) determine the interactional styles that define success and measure competence not just by output or end product, but by conformity with those styles.

As the dynamic nature of a process of social relations suggests, there is rarely one work culture operating within an organization; instead, there are multiple work cultures that vary across professional and hierarchical divides. Even within the same institution, secretaries may adhere to a different work culture than engineers,²³ paralegals to a different work culture than attorneys.²⁴ Similarly, work culture can develop differently within a small work group than it does organization-wide.

Nor is work culture stable over time. Rather, like culture more broadly, work culture is constantly shifting and changing as internal conflicts and negotiations determine which expectations will prevail.²⁵ As one scholar describes it, culture is “‘essentially contestable’—cultural meanings are ‘constantly up for grabs’ as individuals negotiate for the power to make and control them.”²⁶

Even with its complexities, the concept of work culture as I define it is useful to the antidiscrimination project, both conceptually and practically: conceptually because it captures the active, relational, yet contextual, nature of the process of discrimination and exclusion through work culture, and practically because it captures harms beyond absolute exclusion, harms in time and energy devoted to engaging in appropriate work culture behavior and harms in devaluation and transformation of identity. Moreover, whether as a direct result of formal, overt employer efforts to strengthen work culture or an indirect result of employer-driven changes in the nature of the employment relationship and structure of work, conformity with work culture is likely to take on increased significance as a determinant of success in the modern workplace. With this increased importance should come increased concern about its discriminatory potential.

23. See KUNDA, *supra* note 21, at 205-13 (describing differences in work cultures within a high-tech engineering firm).

24. See JENNIFER L. PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* (1995) (describing differences in work cultures within a law firm).

25. Cf. Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495, 511-19 (2001) (tracing a shift in anthropology from viewing culture as a static “thing” to viewing culture as a fluid, contested process of social interaction).

26. *Id.* at 515. There is an obvious tension between recognizing the unstable and ever-changing nature of work culture and attempting to pin it down as a source of discrimination. This tension illustrates the importance of understanding the evolving shape of particular work cultures as the product of structural constraints as well as social struggle. See *infra* notes 99-106 and accompanying text (discussing organizational influences on the shape and development of work cultures).

II

INCREASED DEMANDS FOR CONFORMITY TO WORK CULTURE

There are two, largely interrelated reasons to expect that conformity with work culture is becoming an increasingly important factor in success at work. First, the business literature's turn to culture as a managerial tool suggests that employers are more likely to engage in express efforts to strengthen and shape their work cultures. In other words, there is reason to expect that employers will formally reward conformity with work culture in ways that their predecessors did not. Second, apart from the influence of the business literature, recent, more general organizational shifts in the nature of the employment relationship and structure of work are likely to heighten the importance of social relations and, correspondingly, individuals' ability to navigate work culture in determining success. As employers restructure the employment relationship from the bureaucratic to the more fluid and contingent, from the individualized to the team based, conformity with work culture becomes increasingly important.

A. *Managerial Discourse: The Turn to Culture as a Business Tool*

Over the past several decades, the managerial discourse has turned to culture as a normative tool of employee motivation and control. The concept of "corporate culture" emerged in the business literature in the early 1980s with several prominent articles in the mainstream business press²⁷ and the publication of three influential books: *Theory Z* (1981), by William Ouchi; *Corporate Cultures* (1982), by Terrence Deal and Allen Kennedy; and *In Search of Excellence* (1982), by Thomas Peters and Robert Waterman.²⁸ Responding to a perceived management crisis in which American companies were losing competitive advantage over their Japanese counterparts, the authors of these works advocated more attention to constructing values within an organization, values that would

27. See, e.g., Tom Peters, *Corporate Cultures: The Hard-to-Change Values that Spell Success or Failure*, *BUS. WK.*, Oct. 27, 1980, at 148 (stating that "[j]ust as tribal cultures have totems and taboos that dictate how each member will act toward fellow members and outsiders, so does a corporation's culture influence employees' actions toward customers, competitors, suppliers, and one another."); Bro Uttal, *The Corporate Culture Cultures*, *FORTUNE*, Oct. 17, 1983, at 66.

28. TERRENCE E. DEAL & ALLEN A. KENNEDY, *CORPORATE CULTURES: THE RITES AND RITUALS OF CORPORATE LIFE* (1982); WILLIAM OUCHI, *THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE* (1981); THOMAS J. PETERS & ROBERT H. WATERMAN, JR., *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES* (1982). The concept of organizational culture was first developed in 1979 in the academic literature by Andrew Pettigrew. See Andrew Pettigrew, *On Studying Organizational Culture*, 24 *ADMIN. SCI. Q.* 570 (1979). Academics began to mention culture and symbolism in organization in the mid-1970s, but it was not until the publication of the Ouchi, Deal & Kennedy, and Peters & Waterman books that practitioner managerial interest in organizational culture swelled. See MARTIN PARKER, *ORGANIZATIONAL CULTURE AND IDENTITY* 9-10 (2000). For an interesting account of the convergence of academic and practitioner conceptions of corporate culture, see Stephen R. Barley et al., *Cultures of Culture: Academics, Practitioners, and the Pragmatics of Normative Control*, 33 *ADMIN. SCI. Q.* 24 (1988).

purportedly lead to greater employee productivity and increased organizational performance. The authors stressed the importance of people and culture to the success of an organization.²⁹ And each of the authors pointed to successful or “excellent” companies of the time, companies like Hewlett-Packard, IBM, Tupperware, and Frito-Lay, as evidence that strong cultures lead to strong bottom lines.³⁰ As Deal and Kennedy put it, “We need to remember that people make businesses work. And we need to relearn old lessons about how culture ties people together and gives meaning and purpose to their day-to-day lives.”³¹

This emerging emphasis on corporate culture took place as part of a larger normative turn in managing. After years of a scientific emphasis on organization systems and hard data,³² the business world had begun to shift its focus to softer, social mechanisms of employee control.³³ Peters and Waterman, for example, criticized business school curricula as overly focused on numbers and strategic decision making.³⁴ They argued that the scientific, rational model of management should give way to a relational model in which management motivates its workers by appreciating the complexities of the human mind, including the importance of self-perception, the benefits of positive reinforcement, and the workings of

29. See DEAL & KENNEDY, *supra* note 28, at 15 (“We think that people are a company’s greatest resource, and the way to manage them is not directly by computer reports, but by the subtle cues of culture.”); OUCHI, *supra* note 28, at 4 (arguing that “involved workers are the key to increased productivity”); PETERS & WATERMAN, *supra* note 28, at 39 (“Treating people—not money, machines, or minds—as the natural resource may be the key to it all.”).

30. See DEAL & KENNEDY, *supra* note 28, at 7 (identifying eighteen high-performing, “strong culture companies”); OUCHI, *supra* note 28, at 7 (using Hewlett-Packard as an example of a Theory Z corporation); PETERS & WATERMAN, *supra* note 28, at 19-26 (describing a study of sixty-two high-performing companies).

31. DEAL & KENNEDY, *supra* note 28, at 5.

32. The era of “scientific management,” driven in part by the work of Fredrick Winslow Taylor, emphasized detailed bureaucratic structures, clearly specified job tasks, and advancement up vertical ladders or pyramids, with autonomy and decision making concentrated at the top. FREDRICK WINSLOW TAYLOR, *PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911); see generally Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 529-35 (2001) (describing the era of scientific management).

33. See, e.g., PASCALE & ATHOS, *THE ART OF JAPANESE MANAGEMENT* 80 (1982) (arguing that the “hard S’s” of “strategy, structure and systems” should be supplemented by the “soft S’s” of “style, skills, and staff”). Taylor’s work on scientific management is often portrayed as an effort to mechanize man through the use of structure and scientific approach, but some accounts suggest that he, too, was concerned with the harmonization of management and worker interests. See Lucy Taksa, *Scientific Management: Technique or Cultural Ideology?*, 34 J. OF INDUS. REL. 365 (1992). Indeed, the emphasis on corporate culture follows a variety of earlier efforts at understanding the social dimensions of behavior within organizations, such as human relations theory, see, e.g., ELTON MAYO, *THE HUMAN PROBLEMS OF AN INDUSTRIAL CIVILIZATION* (1933), and institutional theory, see, e.g., PHILIP SELZNICK, *LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION* (1957). For a detailed discussion of the work of Elton Mayo as a precursor to corporate culturalism, see PARKER, *supra* note 28, at 32-33.

34. See PETERS & WATERMAN, *supra* note 28, at 29-36.

various cognitive biases.³⁵ Similarly, Deal and Kennedy emphasized the role of informal norms rather than formal rules in controlling employee behavior. They pointed to Tandem Computers, a highly successful Silicon Valley firm, as a prototypical “strong culture” company: “Tandem has no formal organizational chart and few formal rules. Its meetings and memos are almost non-existent. Jobs are flexible in terms of duties and hours.”³⁶ And yet, “[w]hat keeps employees off each other’s toes and working in the same direction” are the “unwritten rules and shared understandings.”³⁷

The business emphasis on culture as a managerial tool also capitalized on the fear of “anomie” instilled by the work of Emil Durkheim³⁸ and books like *The Organization Man*,³⁹ which argued that increased bureaucracy in people’s lives was leading to personal fragmentation and normlessness. By espousing an identity benefit to employees and a corresponding performance increase for employers, the corporate culture authors of the early 1980s pitched their approach as a business model that took human needs into account.⁴⁰ Ouchi’s book in particular argued that a strong corporate culture would benefit individual employees by providing them with security and autonomy.⁴¹ According to this line of reasoning, the advantage of using a strong corporate culture as a means of control is that by socializing employees to a common goal and permitting employees the autonomy to choose to adhere to those socialized norms, the firm facilitates personal well-being at the same time that it increases work motivation toward the common goal. Ouchi provides the following explanation of the difference between what he calls the “clan” (corporate culture) approach and the bureaucratic approach to the problem of individual self-interest for organizations:

In a clan, each individual is . . . effectively told to do just what that person wants. In this case, however, the socialization of all to a common goal is so complete and the capacity of the system to measure the subtleties of contributions over the long run is so exact that individuals will naturally seek to do that which is in the common good. Thus the monk, the marine, or the Japanese auto worker who appears to have arrived at such a selfless state is, in

35. Peters and Waterman draw extensively on social science research to support their position that *humans*, and not just businesses, must be managed. See *id.* at 67-86.

36. DEAL & KENNEDY, *supra* note 28, at 10.

37. *Id.*

38. See EMIL DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* (George Simpson trans., 1933).

39. WILLIAM WHYTE, *THE ORGANIZATION MAN* 397-98 (1956).

40. See, e.g., DEAL & KENNEDY, *supra* note 28, at 15-16 (explaining that a strong culture is a “powerful lever for guiding behavior” because it “enables people to feel better about what they do, so they are more likely to work harder”).

41. See OUCHI, *supra* note 28. Indeed, Ouchi may have borrowed the term “theory Z” from the work of humanistic psychologist Abraham Maslow, who used it to refer to the highest levels of personal satisfaction that an individual can achieve. See PARKER, *supra* note 28, at 14.

fact, achieving selfish ends quite thoroughly. . . . Only the bureaucratic mechanism explicitly says to individuals, "Do not do what you want, do what we tell you because we pay you for it." The bureaucratic mechanism alone produces alienation, anomie and a lowered sense of autonomy.⁴²

This idea of benefit to employees, as well as to employers, pervades much of the business discourse on corporate culture. The managerial rhetoric promises employees greater autonomy and self-fulfillment in an era in which employees expect their jobs to "mean" something.⁴³ In this way, the business emphasis on culture also picked up on the larger political themes of enterprise and individualism dominant in the 1980s and, to a large degree, still popular today.⁴⁴

By the 1990s, the concept of corporate culture had become entrenched in the managerial discourse. One poll conducted in 1989 found that 80% of polled senior human resources managers felt that their firms' cultures needed to be changed.⁴⁵ Moreover, despite more recent criticism from organizational-analysis scholars,⁴⁶ this perspective of corporate culture remains dominant in mainstream business discourse. The right corporate culture, it is said, will increase corporate performance and employee motivation, while the wrong corporate culture will lead to ethical wrongdoing, render mergers unsuccessful, and endanger a company's "very survival."⁴⁷

At first glance, the idea of corporate culture in the business literature may seem quite different from my definition of work culture as the development of group-based behavioral expectations through day-to-day social interaction. According to the business discourse, a strong corporate culture is largely a matter of centrally imposed, commonly held beliefs and values that serve to guide employee behavior organization-wide.⁴⁸ Upon closer examination, however, it becomes clear that this concept of corporate

42. OUCHI, *supra* note 28, at 84-85.

43. See, e.g., PETERS & WATERMAN, *supra* note 28, at 323 (explaining that a strong corporate culture delivers "meaning as well as money" to employees).

44. See Paul DU GAY, CONSUMPTION AND IDENTITY AT WORK 71-72 (1996). The emphasis on heroic managers is similarly consistent with the emerging emphasis on enterprise and individualism. See, e.g., HICKMAN & SILVA, CREATING EXCELLENCE 25 (1985) ("Individual leaders, not organizations, create excellence.").

45. JOHN P. KOTTER & JAMES L. HESKETT, CORPORATE CULTURE AND PERFORMANCE 10 n.27 (1992).

46. For an interesting account of the differing approaches to the study of organizational culture, see Joanne Martin & Peter Frost, *The Organizational Culture War Games: A Struggle for Intellectual Dominance*, in STUDYING ORGANIZATION 346 (Stewart R. Clegg & Cynthia Hardy eds., 1999). For a discussion of the transformation of the concept of culture to suit the practical concerns of consultants and managers, see Barley et al., *supra* note 28.

47. See Jerry Want, *Corporate Culture: Illuminating the Black Hole*, J. BUS. STRATEGY, June 27, 2003, at 14 (stating that "[c]ulture directly contributes to or detracts from the bottom line as well as a company's very survival").

48. See, e.g., DEAL & KENNEDY, *supra* note 28, at 15 ("A strong culture is a system of informal rules that spells out how people are to behave most of the time.").

culture simply conflates the process of social interaction with larger organizational influences.⁴⁹ The business discourse's emphasis on corporate culture as an organizational means of controlling employee behavior, in other words, reflects a recognition of the strength of social norms and work cultures at the local level, and at the same time represents an effort to actively shape those cultures from the organizational level.⁵⁰ This business emphasis on corporate culture, then, has serious implications for the development of particular work cultures and for the effects of work culture demands.

Indeed, taking corporate culture seriously as a business matter means making efforts to shape and strengthen that culture. The business literature suggests a number of ways in which firms can change and strengthen their corporate cultures, from the structuring of formal policies to the creation of rituals and ceremonies,⁵¹ but the most frequently espoused means of cultural influence is the selection of and reward for culture "fit."⁵² Managers are urged, in other words, to screen employees "according to how well their values and behavior fit in."⁵³ One author describes the hiring process at a company with a strong corporate culture as one in which "every potential new member . . . must be interviewed by at least five to ten people, and only if that individual is acceptable to the entire set, is he or she offered the job."⁵⁴ When interviewers at this company were asked what they looked for in a candidate, they responded: "We want someone who will fit in."⁵⁵

49. There is an extensive literature critiquing the simplistic understanding of culture prevalent in the managerial discourse. See, e.g., MATS ALVESSON, UNDERSTANDING ORGANIZATIONAL CULTURE (2002); cf. PARKER, *supra* note 28, at 10 (seeking to "rescu[e] 'culture' from managerialism").

50. See JOANNE MARTIN, CULTURES IN ORGANIZATIONS: THREE PERSPECTIVES 45-70, 46 (1992) (describing the "lure of organization-wide consensus"); Barley et al., *supra* note 28, at 31 (noting the emphasis in the business literature on manipulation of culture by management).

51. See, e.g., DEAL & KENNEDY, *supra* note 28, at 21-103, 164-69; GARY DESSLER, WINNING COMMITMENT: HOW TO BUILD AND KEEP A COMPETITIVE WORKFORCE 28-34 (1993); ERIC G. FLAMHOLTZ & YVONNE RANDLE, CHANGING THE GAME: ORGANIZATIONAL TRANSFORMATION OF THE FIRST, SECOND, AND THIRD KINDS 250-51 (1998); OUCHI, *supra* note 28, at 97-129; EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 228-53 (1992); HARRISON M. TRICE & JANICE M. BEYER, THE CULTURES OF WORK ORGANIZATIONS 418-20 (1993).

52. See, e.g., DESSLER, *supra* note 51, at 29-30 (describing "certified interviewing" by J.C. Penney involving a series of questions "to identify and hire high-potential employees, those with values that 'fit' the firm"); FLAMHOLTZ & RANDLE, *supra* note 51, at 251 (noting that "[t]he firm will want to ensure that it is recruiting and selecting people who have values consistent with the desired culture"); SCHEIN, *supra* note 51, at 243-44 (describing the role of recruitment and hiring in transmitting culture); TRICE & BREYER, *supra* note 51, at 416-17 (stressing the need to "recruit like-minded people" to create a strong organizational culture); KOTTER & HESKETT, *supra* note 45, at 7 (noting that organizational culture can be perpetuated in a variety of ways, including screening potential employees and rewarding those who follow cultural norms).

53. KOTTER & HESKETT, *supra* note 45, at 7.

54. SCHEIN, *supra* note 51, at 76 (1992).

55. *Id.*

And managers seem to be paying attention. In addition to the best-selling status of some of the early corporate culture business literature,⁵⁶ firms across the country are hiring “culture experts,” holding mandatory company culture orientation sessions, and disseminating mission speeches of top executives through newsletters, videos, and in-person presentations.⁵⁷ All of these moves represent efforts to create a certain, common ideology and, ultimately, to foster conforming employee behavior.

A recent rise in the use of personality tests in hiring decisions also suggests that employers are taking the corporate culture literature seriously. By one account, most Fortune 1,000 companies were using personality tests or some other form of psychological testing in 2003.⁵⁸ Although personality tests can measure anything from honesty to job loyalty,⁵⁹ anecdotal evidence suggests that some personality tests are being used specifically to measure culture fit.⁶⁰ Robert Smith, the designer of IBM’s pre-employment personality test, for example, explains that the IBM tests are designed to determine how well the applicant’s character will mesh with the company’s

56. *In Search of Excellence*, for example, sold over five million copies by 1985 and was translated into fifteen languages. PARKER, *supra* note 28, at 10.

57. At Wal-Mart, the discount store chain, every employee nationwide is sent to a central culture training program and required to attend daily meetings, which include briefings on the Wal-Mart culture and participation in a Wal-Mart cheer. *See* *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 151-53 (N.D. Cal. 2004) (describing employer efforts to instill a Wal-Mart “culture”). In *Engineering Culture*, Kunda describes a firm with a “culture expert” who holds training sessions and passes out a “Culture Operating Manual” to new hires. *See* KUNDA, *supra* note 21, at 6.

58. Harry Wessel, *Attracting the Best: Can Standardized Tests Really Predict How Well You’ll Do On the Job?*, CHI. TRIB., Feb. 5, 2003, at C1; *see also* ANNIE MURPHY PAUL, *THE CULT OF PERSONALITY* 66 (2004) (citing a 2003 survey by Management Recruiters International showing that 30% of companies now administer personality tests); Malcolm Gladwell, *Annals of Psychology: Personality Plus*, NEW YORKER, Sept. 20, 2004, at 42, 43 (reporting that eighty-nine Fortune 100 companies use the Myers-Briggs personality test); Sara Terry, *Hiring Firms Give Weight to “Style,”* CHRISTIAN SCI. MONITOR, Mar. 11, 2002, at 19 (describing the “style analysis” used to determine if a candidate is suited to a particular job). Since 1997, the American Management Association has annually surveyed its members on the use of personality and other psychological tests. That survey revealed an increase in the use of personality tests in 1998, from 19% to 28%, *see* AMERICAN MANAGEMENT ASSOCIATION, *JOB SKILL TESTING AND PSYCHOLOGICAL MEASUREMENT* 5 (1998), but a drop in the use of personality measurements in 2000 and 2001, from 17.6% of respondents in 1999 to 16.3% in 2000 to 13.1% in 2001, *see* AMERICAN MANAGEMENT ASSOCIATION, *SURVEY ON WORKPLACE TESTING: BASIC SKILLS, JOB SKILLS, PSYCHOLOGICAL MEASUREMENT, SUMMARY OF KEY FINDINGS* 5 (2001).

59. *See* PAUL, *supra* note 58, at 65; *see also* Matthew W. Finkin, *From Anonymity to Transparency: Screening the Workforce in the Information Age*, 2000 COLUM. BUS. L. REV. 403 (describing personality tests used in the employment context).

60. *See Personality Tests Do Pay Off: Firm Saves Money by Hiring Employees Who Fit the Workplace Culture*, CHARLOTTE OBSERVER, Apr. 14, 2003, at 3D (stating that Falcon Metal Corp. of Charlotte, North Carolina, uses psychological and personality tests to save the time and money of training employees who do not fit well into its workplace). There is also a growing body of work in the social sciences exploring the effect of personality on work performance. *See, e.g.*, Murray R. Barrick & Michael K. Mount, *The Big Five Personality Dimensions and Job Performance: A Meta-Analysis*, 44 PERS. PSYCHOL. 1 (1991); Joyce Hogan & Brent Holland, *Using Theory to Evaluate Personality and Job Performance Relations: A Socioanalytic Perspective*, 88 J. APPLIED PSYCHOL. 100 (2003).

culture.⁶¹ According to Smith, it might be “good” to fail such a test because failure “may prevent an applicant from working at a company where they [sic] wouldn’t fit in.”⁶²

Once accepted by the firm as sound business practice, this search for fit is likely to extend beyond hiring. Indeed, the business literature urges managers to make those people who successfully display adherence to organizational norms into heroes and to penalize those who do not.⁶³

Work culture naturally involves demands for conformity, but the recent emphasis on corporate culture suggests that employers are likely to engage in affirmative demands for work culture conformity through hiring and institutional reward systems. In other words, employees will be required to conform with work culture to attain jobs and promotions in the modern workplace. Moreover, even if employers are not formally or overtly searching for fit as a means of strengthening work culture, many employers are restructuring the organization of work in ways that are likely to make conformity with work culture a significant determinant of success. In the next Part, I review some of these structural changes and explore their impact on work culture conformity demands.

B. *On the Ground: Restructuring Work*

At the same time that employers began to turn to culture as a means of employee control, they also began to restructure the organization of work.⁶⁴ Specifically, in the early 1980s, companies began flattening their hierarchies and blurring job boundaries, allocating work on a team rather than an individual basis, and adopting more subjective, skill-based evaluation systems.⁶⁵ Whether driven by the corporate culture turn⁶⁶ or, as some literature

61. See Carla D-Nan Bass, *Personality Tests Increasingly Popular Among Employers*, DALLAS MORNING NEWS, Dec. 13, 1999; DESSLER, *supra* note 51, at 29 (describing J.C. Penney “certified interviewing” program).

62. Bass, *supra* note 61.

63. See, e.g., KOTTER & HESKETT, *supra* note 45, at 7 (“Perhaps most fundamental, people who follow culture norms will be rewarded and those who do not will be penalized.”); Want, *supra* note 47, at 21 (2003) (“The culture is about behaviors. Politics as usual, punishment, projection of blame, persistently negative attitudes and obsessive compulsive behaviors must be replaced by positive behaviors—or the people who exhibit them.”).

64. See EILEEN APPELBAUM & ROSEMARY BATT, *THE NEW AMERICAN WORKPLACE: TRANSFORMING WORK SYSTEMS IN THE UNITED STATES* 15 (1994). For a discussion of some of the recent changes in the nature of the employment relationship and the structure of work, as well as their implications for equality in the workplace, see Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 TEX. J. WOMEN & L. 345 (2003); Green, *Discrimination in Workplace Dynamics*, *supra* note 1, at 99-108; Stone, *supra* note 32.

65. See Green, *Discrimination in Workplace Dynamics*, *supra* note 1, at 101-03 (detailing some of the recent structural changes).

66. Some firms may decide to decentralize and move toward team-based work as a means of fostering stronger normative controls. These employers would take a hands-off approach precisely so that work culture can develop organically, pressuring conformity through day-to-day social interaction rather than top-down instruction. See, e.g., DEAL & KENNEDY, *supra* note 28, at 10 (describing the

suggests, by an effort to increase organizational flexibility to better respond to rapidly shifting consumer demand,⁶⁷ these structural moves pull back on clearly delineated, hierarchical paths for success and leave in their place a path determined largely by social relations. One organization, for example, describes its structural changes as follows:

[The organization] ha[s] chosen to move from a strictly hierarchical structure to a flatter structure; from top-down decision making to empowerment at the point of customer contact; from measurement of outputs to measurement of outcomes; and most dramatically, from an exclusionary division of labor to a team-based, inclusionary model. The emphasis is on moving from rigid procedures and policies, to flexible, empowering guidelines for behavior. The organization rewards behaviors conducive to the workplace vision, and confronts/surmounts behaviors which detract from that vision.⁶⁸

As social relations take center stage, increased pressure to conform to work culture follows. In a relationally dependent work environment, recommendations for promotion are made on an informal, ad hoc basis; performance reviews are conducted by coworkers, group leaders, and even subordinates; and determinations of skill competence are ongoing. All of these judgments depend in part on others' perception of an individual's ability or willingness to fit in with prevailing social expectations. And fitting in, of course, is largely a matter of conforming to work culture.

Sociologist Margaret Tierney's study of a small software development firm in Ireland provides one particularly vivid illustration of the increased importance of social relations in firms with informal organizational

absence of organizational charts and formal rules as part of a "strong culture" firm); OUCHI, *supra* note 28, at 78-83 (describing a consensual, participative decision-making process as an element of a successful "Theory Z" organization). Although I could not locate any empirical evidence that expressly tied the culture movement in the business literature to the trend toward reorganization of work, one prominent organizational theorist, Edward Lawler, calls the approach to organizational structure dominant from World War I until the late 1970s the "control-oriented approach," and the more recent approach the "involvement-oriented approach." EDWARD E. LAWLER III, *THE ULTIMATE ADVANTAGE: CREATING THE HIGH-INVOLVEMENT ORGANIZATION* 25 (1992). These terms, at least, suggest an interconnectedness between recent organizational restructuring and attempts to use normative rather than structural controls on behavior. Moreover, Lawler, like the culture proponents, advises that the employer's selection task is to find individuals who "fit the learning environment that is provided by the organization." Edward E. Lawler III, *From Job-Based to Competency-Based Organizations*, 15 *J. Org. Behav.* 3, 9 (1994). The emerging interest in network organizations and, at the individual level, in networking also suggests an interconnectedness between the turn to culture and the restructuring of work. See Nitin Nohria, *Is a Network Perspective a Useful Way of Studying Organizations?*, in *NETWORKS AND ORGANIZATIONS: STRUCTURE, FORM, AND ACTION* 1-3 (Nitin Nohria & Robert G. Eccles eds., 1992) (describing the rise in interest in networks).

67. See PETER CAPPELLI ET AL., *CHANGE AT WORK* 29-32 (1997); LAWLER, *supra* note 66, at 14-21; see also Green, *Discrimination in Workplace Dynamics*, *supra* note 1, at 100 n.37 (describing other possible causes of the reorganization trend).

68. University of Maryland Libraries, Final Report of Work Culture Task Force (1999) (on file with author).

structures.⁶⁹ According to Tierney, social ties between the “lads,” as she calls them, “provide[d] them with a resource for shaping their present and future work which is not available to those outside the circle.”⁷⁰ Specifically, these lads—young, single (or at least childless) men who played soccer, ate lunch, and went drinking together—were able to negotiate bonuses, earn positive work appraisals, and secure promotions that their non-lad counterparts were not.⁷¹ As Tierney explains:

The lads constitute the dominant grapevine through which crucial pieces of seemingly extraneous bits of work-related information are traded. One example is the Performance Bonus. Since the company is organized as a ‘professional’ office, nobody is paid official overtime, though quite considerable amounts of overtime are done. Instead, staff and managers are paid a performance bonus every six months, which is partially dependent on the half-yearly audited profit position of the company as a whole. However, for each individual, it is also dependent on how their own project has originally been costed out. As Fergus [a lad] pointed out:

Not that many people know exactly how those costings are done. I mean, I’d tell the lads here and that. But it doesn’t go up on the notice board or anything. Anyway, my bonus is always good. I mean, I know how the sales costings are done—sure, I *do* them half the time!—and they are just guesses. If they tried to cut my bonus for some wacky reason like that a project had gone over its estimated cost, I’d kick up murder.

But not everyone knows (or can successfully argue) that the costings are wacky—only Fergus, and whomever he chooses to tell.⁷²

Obtaining favorable work appraisals, too, required certain informal tactics, tactics on which lads were groomed and non-lads were not, and movement to other positions within the firm required sponsors who were often

69. Margaret Tierney, *Negotiating a Software Career: Informal Work Practices and “The Lads” in a Software Installation*, in *THE GENDER-TECHNOLOGY RELATION: CONTEMPORARY THEORY AND RESEARCH* 192 (Keith Grint & Rosalind Gill eds., 1995); see also Rosabeth Moss Kanter, *Variations in Managerial Career Structures in High-Technology Firms: The Impact of Organizational Characteristics on Internal Labor Market Patterns*, in *INTERNAL LABOR MARKETS* 109 (Paul Osterman ed., 1984) (describing the structural characteristics of high-tech manufacturing firms, including decentralization, matrix organization, and heavy reliance on teams, and their implications for managerial career paths). Of course, social relations can be important even in more traditionally organized workplaces. See, e.g., MELVILLE DALTON, *MEN WHO MANAGE: FUSIONS OF FEELING AND THEORY IN ADMINISTRATION* 173-78 (1959) (exploring the role that “connections” played in departures from official salary structures); Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643 (1996) (describing the importance of outside-of-work activities).

70. Tierney, *supra* note 69, at 201.

71. See *id.* at 201-08.

72. *Id.* at 202.

unwilling to sponsor non-lads.⁷³ As one would expect, the lads “‘just naturally’ progress[ed] higher and faster through the skill hierarchy” than their non-lad counterparts.⁷⁴

In most workplaces, the “in-group” advantage is not quite this stark, but the same tie between success and relational demands can be seen even in more seemingly equalized settings. Just as an entering employee at Tierney’s software-development firm would benefit from an ability to connect with the “lads” through playing soccer, drinking beer, and telling common stories, employees working in groups in more traditionally organized firms will benefit from conformity with behavioral expectations that signal membership in the group. If group dynamics have established, for example, that team players sit quietly while each member makes a presentation, the team member who immediately engages in debate may be perceived negatively as aggressive and domineering. In a workplace where work is performed on an individual basis and measured in terms of output or end performance, this employee may succeed, but in a setting where relational dynamics take precedence, her failure to conform to the group work culture serves as a significant impediment to success.⁷⁵

These employer moves toward increased emphasis on social relations and fitting in with corporate culture trigger equality concerns. In the next Part, I explore some of those concerns and position work culture as a useful concept for tackling the harms, both economic and social, attendant to heightened demands for behavioral conformity.

III

WORK CULTURE AND DISCRIMINATION

Just because work culture has taken on greater significance as a determinant of success does not, of course, mean that it is discriminatory. Indeed, work culture itself is not inherently discriminatory in the sense that it necessarily treats members of protected groups differently or subjects members of certain groups to subordination. Certainly, those individuals who either lack the cultural capital to negotiate their work culture or who choose not to conform to work culture will suffer adverse consequences, but encouraging employees, whether formally or informally, to display commitment to common work norms is not discrimination. The problem with work culture from an antidiscrimination perspective, rather, is that the process of social interaction is likely to be infected with discriminatory

73. *See id.* at 205-07.

74. *Id.* at 208.

75. This is not to say that bureaucratic, hierarchical paths to success are necessarily better, from an antidiscrimination perspective or otherwise. *See Green, Discrimination in Workplace Dynamics, supra* note 1, at 107-08 (describing some of the benefits of a reorganized workplace and new employment relationship).

bias, leading to work cultures that are defined and imposed along racial and gender lines.

A. *Discriminatory Work Cultures: Brief Examples*

As a complex process of social relations, discriminatory work culture can begin to seem so situational and indeterminate that it will never be pinned down. I begin this Part, therefore, with three diverse examples of discriminatory work cultures. The first two draw directly on the expansive sociological research on the study of gender in the workplace, while the third draws more narrowly from existing legal scholarship and stories in the employment discrimination case law. These examples are not intended as a comprehensive account of all possible discriminatory work cultures,⁷⁶ nor are they meant to suggest that work cultures can be easily divided into categories of behavior.⁷⁷ Rather, they are admittedly overly simplistic accounts intended to serve as concrete scenarios or stories to help illustrate some of the various types of work culture behavioral expectations and some of the ways in which work culture can disadvantage women and people of color in the workplace.

1. *Displays of Competence: Bravado and Tinkering*

Almost two decades ago, sociologists Judith S. McIlwee and J. Gregg Robinson identified work culture as a central component of women's disadvantage in the traditionally male-dominated field of engineering.⁷⁸ The status and success of engineers in some workplaces, their research showed, depended not just on technical competence but also on the way in which that competence was displayed. Particularly in workplaces in which engineers as a group were powerful, there was enormous pressure to conform to the image of the "good" engineer, an image characterized by displays of bravado and frequent demonstrations of technical, hands-on competence.⁷⁹ To be accepted in the lab, in other words, "one had to conform to the image of the 'technical jock.'"⁸⁰ The research showed that women could, and did,

76. Although my examples, and this article, focus on work cultures developed along sex and race lines, work culture can be problematic in other contexts as well. Indeed, work culture is becoming increasingly salient in the religion context. See Russell Shorto, *Faith at Work*, N. Y. TIMES MAG., Oct. 31, 2004, at 40 (describing the rise of religion in the workplace).

77. For a fascinating account of the fluidity across behavioral categories and complexities of gendered work culture in United Kingdom police forces, see LOUISE WESTMARLAND, *GENDER & POLICING: SEX, POWER, AND POLICE CULTURE* (2001).

78. See MCLLWEE & ROBINSON, *supra* note 5. McIlwee and Robinson conducted a study of in-depth interviews and surveys from a random sample of engineering graduates (years 1976 to 1985) from two public universities in Southern California. See *id.* at 4, 193-200 (describing research methods). Their research built in part on Sally Hacker's earlier study of the "culture of engineering." See, e.g., Sally L. Hacker, *The Culture of Engineering: Woman, Workplace and Machine*, 4 WOMEN'S STUD. INT'L Q. 341 (1981).

79. MCLLWEE & ROBINSON, *supra* note 5, at 115-16.

80. *Id.* at 123.

gain the technical competence required for excellent engineering, but that they had difficulty displaying their competence in the ways that were required by the work culture of these firms—that is, through frequent informal displays of technical know-how and a love of tinkering.⁸¹

2. *Informal Socializing: Sports Talk, Beer Drinking, and Sex*

Informal socializing is an important way in many organizations for workers to obtain choice work assignments and to garner trust with influential coworkers and supervisors. In her ethnography of a large corporation's legal department, sociologist Jennifer Pierce recounts the conversational and behavioral boundaries faced by women in these informal settings.⁸² One woman explained that when she first started working at the firm, she "went out for drinks with the boys," but she found that talk always turned to baseball, a subject in which she had little interest.⁸³ Another woman explained that she disliked the "macho" atmosphere at informal social events. "I went once," she said, "and all the associates were trying to see who could drink the most beer. Maybe they did it because I was there. I don't know, but I never went again."⁸⁴ Much like the sexual behavior common in construction and other blue collar industries so vividly portrayed by a host of legal scholars and commentators,⁸⁵ the work culture at this firm involved relational behaviors that women were often unwilling or unable to perform.

Similarly, Rosabeth Moss Kanter, in her famous ethnology of the large corporation, provides the following description of male behavior in the presence of token women:

[T]he camaraderie of men . . . was based in part on tales of sexual adventures, ability with respect to 'hunting' and capturing women, and off-color jokes. Other themes involved work prowess and sports, especially golf and fishing. The capacity for and enjoyment of drinking provided the context for displays of these themes.⁸⁶

The men that Kanter studied tended to close ranks when women were introduced into their midst, and one means of closing those ranks was to

81. *See id.* at 117-26.

82. PIERCE, *supra* note 24.

83. *Id.* at 107.

84. *Id.*

85. *See, e.g.*, CLARA BINGHAM & LAURA LEEDY GANSLER, *CLASS ACTION: THE STORY OF LOIS JENSON AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW* (2002); SUSAN EISENBERG, *WE'LL CALL YOU IF WE NEED YOU: EXPERIENCES OF WOMEN WORKING CONSTRUCTION* (1998); MARY LINDENSTEIN WALSHOK, *BLUE COLLAR WOMEN: PIONEERS ON THE MALE FRONTIER* (1981).

86. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 223 (1977).

engage in and require a certain interactional style in which most of the women had little interest.⁸⁷

3. *Appearance: The Right Look*

A number of legal scholars have also described work cultures that discriminate based on appearance, albeit without identifying them precisely as discriminatory work cultures. Professor Barbara Flagg, for example, tells the story of Keisha Akbar, an African American woman scientist employed as a researcher by a small research firm.⁸⁸ Keisha “often wears clothing that features African styles and materials, frequently braids her hair or wears it in a natural style, and at times speaks to other black employees in the dialect linguists designate as ‘Black English,’ though she always uses ‘Standard English’ when speaking with whites.”⁸⁹ As the firm grew, it planned to elevate each of the original members of the research team to positions as department heads. Despite excellence in the technical aspects of her work, Keisha was not asked to head a department. Flagg explains that the individuals making the decision “felt that [Keisha] lacked the personal qualities that a successful manager needs. They saw Keisha as just too different from the researchers she would supervise to be able to communicate effectively with them. The firm articulated this reasoning by asserting a need for a department head who shared the perspectives and values of the employees under her direction.”⁹⁰ In this example, the research firm had developed a work culture that disfavored Keisha’s African American appearance signals. Had Keisha forgone her braided hairstyle, her “Black English,” and her African-style clothing, she might have sent the message that she shared the same “perspectives and values” as the white employees whom she would be supervising.

B. Agency and Structure: Why Work Culture Discriminates

How did these work cultures come to or, perhaps more importantly, why do they continue to define acceptable and favored behavior along a white, male norm? The answer to this question requires an understanding of both the human and structural dimensions of work culture. Work culture, as a human process of social interaction, is subject to a myriad of

87. In this way, work culture is not unlike sexual harassment. Indeed, many feminists claim that sexual harassment is a form of discrimination precisely because it is a relational means of male domination and exclusion. See, e.g., CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683 (1998). Sexual harassment can be, in that sense, a type of work culture. The problem of work culture, however, extends far beyond the law of sexual harassment as currently conceived. See *infra* notes 138-44 and accompanying text.

88. Flagg, *supra* note 2.

89. *Id.* at 2011 n.4.

90. *Id.* at 2011.

cognitive and motivational biases. At the same time, it is influenced by larger organizational context, left to flourish in work environments with little formal organizational structure, where white males are given the power to dominate and define.

As a social process whereby people create meaning systems through ongoing interaction, discriminatory work culture is at its core a human problem. That is, it is a problem of people perceiving, judging, and framing behavioral boundaries on a day-to-day basis. A rich social science literature explores the operation of bias and the human tendency to enforce group boundaries as a means of retaining status and power. The predisposition to categorize and stereotype along racial and gender lines,⁹¹ the need to feel good about oneself and the use of group membership to serve that need,⁹² and the asymmetry of in-group favoritism and out-group bias depending on one's position of power and individual desire for social dominance⁹³ all suggest that work cultures are likely to develop and persist along racial and gender lines.⁹⁴ Even the most basic similarity-attraction theory

91. According to social cognition theory, categorization is a natural part of human cognitive processing, and categories, once formed, affect one's perception and judgment of others. See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (1991). Social cognition theory has been particularly salient in criticisms of existing antidiscrimination doctrine's focus on discriminatory intent or motivation. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1189-90 (1995) (using social cognition theory to explain ongoing racial and gender bias in employment decision making); Ann C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 *CORNELL J.L. & PUB. POL'Y* 415 (2000) (noting that the subconscious factors motivating discrimination complicate judicial inquiry into intent).

92. According to social identity theory, people have a fundamental need to feel positive about themselves and often favor members of their own group to raise their self-esteem. See Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* 33, 40-43 (William G. Austin & Stephen Worchel eds., 1970). For an exploration, using social identity theory, of the process of integrating newcomers into a group, see Brewer et al., *supra* note 1, at 337.

93. Social dominance theory posits that people use in-group favoritism and out-group derogation to maintain power and group dominance. See Jim Sidanius et al., *Peering into the Jaws of the Beast*, in *CULTURAL DIVIDES*, *supra* note 1, at 80 [hereinafter Sidanius et al., *Peering into the Jaws*]; see also Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice*, in *CONFRONTING RACISM*, *supra* note 1, at 33-53 (1998) (emphasizing the importance of power in racial oppression). Some research in this area suggests that individuals vary in the degree to which they desire and support group-based social hierarchy. See Sidanius et al., *Peering into the Jaws*, *supra*, at 99-102. Indeed, men are thought to have, on average, higher levels of social dominance orientation than women. See Jim Sidanius et al., *Social Dominance Orientation and the Political Psychology of Gender: A Case of Invariance?*, 67 *J. PERS. & SOC. PSYCHOL.* 998 (1994).

A related concept, realistic-group-conflict theory, posits that prejudice results from competition over scarce resources among groups that have incompatible goals. See ROBERT A. LEVINE & DONALD T. CAMPBELL, *ETHNOCENTRICISM: THEORIES OF CONFLICT, ETHNIC ATTITUDES, AND GROUP BEHAVIOR* 29-42 (1972).

94. For an overview of many of these theories and a brief survey of the social science research supporting these theories, see Sidanius et al., *Peering into the Jaws*, *supra* note 93, at 99-102. For a more in-depth discussion of some of these theories and their relevance to the constitutionality of

suggests that we tend to favor those who are like us.⁹⁵ Whether male engineers developing expected displays of competence at the high-tech firms studied by McIlwee and Robinson, or white workers developing interactional styles and appearance rules in work teams or informal gatherings, there is reason to expect that the dominant group—white males more often than not—will create a work culture that disadvantages women and people of color.⁹⁶

Nor is discriminatory bias limited to the development of behavioral expectations. Research indicates not only that work cultures in workplaces dominated by white males are likely to develop around a white, male norm, but also that outsiders, whether identified by race, sex, or both, must overcome a presumption against fit.⁹⁷ Women and people of color in these workplaces must signal, by conforming to work culture, that they are the exception rather than the rule, that they *really do fit in*.⁹⁸

While discriminatory work culture stems in part from the cognitive and motivational biases of employees, it also has a strong structural dimension. Work culture discrimination is at its core a human problem; however, as the business literature on corporate culture suggests,⁹⁹ organizations influence and shape work culture through structural and other institutional choices. Employers, in other words, create the context in which work cultures develop. Kanter's work, for example, showed the importance of

governmental affirmative action efforts, see Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089 (2002).

95. See DONN BYRNE, *THE ATTRACTION PARADIGM* (1971); Donn Byrne, *An Overview (and Underview) of Research and Theory Within the Attraction Paradigm*, 14 J. SOC. & PERS. REL. 417 (1997); see also Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 387-91 (2000) (describing studies on in-group sympathy). For discussion of the similarity-attraction theory and its link to social identity theory, see Carbado & Gulati, *supra* note 2, at 1796 nn.164-66.

96. Indeed, William Ouchi observed that the strong-culture companies that he studied "have a tendency to be sexist and racist." See OUCHI, *supra* note 28, at 91.

97. See Brewer et al., *supra* note 1, at 340 (stating that "[w]hen newcomers belong to the same social category as oldtimers, ingroup biases operate to create expectancies that the newcomer has the requisite values and abilities to be a full group member" but that "[w]hen newcomers are perceived as outgroup members, the self-fulfilling effects of positive expectancies are not likely to be engendered. Instead, it will be up to the newcomer to 'prove' that he or she has the required abilities to be a valued contributor and the willingness to meet the group's goals").

98. As a number of scholars and the U.S. Supreme Court have recognized, this presumption often presents a double bind for women: a penalty for failing to engage in the interactional style required for success, and a penalty for engaging in that interactional style when it conflicts with normative beliefs about how women should act. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch-22: out of a job if they behave aggressively and out of a job if they do not."); Fuchs Epstein, *supra* note 20, at 245 (reviewing research finding that "women are in a no-win situation whatever their style of behavior"); Yoshino, *supra* note 2, at 905-13 (describing the unique position of women who are asked to both cover and reverse-cover—that is, to both emphasize and de-emphasize their identities as women).

99. See *supra* note 51.

group demographics on the heightening of boundaries and the use of exclusionary tactics, and a large body of research buttresses her findings.¹⁰⁰ This literature shows a clear link between numerical disparity in a work setting and the incidence of discrimination and stereotyping by the dominant group. The fewer people of color or women in the work group, the more likely that work culture will develop along a white, male norm.¹⁰¹

The structural roots of discriminatory work cultures, though, extend beyond numbers. Allocation of power, too, influences work culture development.¹⁰² By removing formal paths for success and turning work into a team rather than an individual endeavor, employers reallocate power to employee groups to define the behavioral requirements for success. McIlwee and Robinson's study of engineering firms highlights the importance of work culture as a source of discrimination in relationally dependent contexts.¹⁰³ Their research reveals that discriminatory work cultures are more likely to develop in some workplaces than others.¹⁰⁴ Indeed, McIlwee and Robinson discovered that women engineers were far more likely to succeed in more traditionally organized bureaucratic firms than in high-tech firms where the path for success was much more flexible and dependent on social relations.¹⁰⁵ In the high-tech firms, engineers as a group were

100. See KANTER, *supra* note 86; VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 139-42 (1998); Krieger, *supra* note 91, at 1193-94; see also Susan Fiske & Peter Glick, *Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change*, 51 J. SOC. ISSUES 97, 106-10 (1995) (describing how sex segregation increases the likelihood of sexual harassment); Schultz, *supra* note 1, at 2139-45 (reviewing studies on the effect of sex-segregated environments on the incidence of sexual harassment); Reskin, *supra* note 1 (reviewing literature on the effect of heterogeneous work groups on cognitive processing). For a recent application of Kanter's theory to elite law firms, see Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 LAW & SOC. INQUIRY 41 (2000).

101. Although Kanter's work focuses on tokens operating within a dominant group, a discriminatory work culture may develop without the presence of women or people of color. See *supra* notes 91-95 and accompanying text; see also Benjamin Schneider, *The People Make the Place*, 40 PERS. PSYCHOL. 437 (1987) (summarizing theories about why firms become more homogeneous over time).

102. For a discussion of some of the ways in which power influences stereotyping and categorization, see Operario & Fiske, *supra* note 1, at 33; and Reskin, *supra* note 1, at 323.

103. See MCLWEE & ROBINSON, *supra* note 5, at 21, 117-38 (contrasting women's negative experiences in a relationally dependent, high-tech firm with their successes in a more traditionally bureaucratic, aerospace firm).

104. See *id.*

105. See *id.* Interestingly, women in the more bureaucratic firms did encounter sexism and exclusionary messages, but they seemed to respond differently to those messages. See *id.* at 133-34. One woman, for example, described a male engineer's "girlie" calendar and her willingness to confront him about it. See *id.* According to the researchers, the woman did not seem diminished or oppressed by the calendar's message. Unlike women seeking to succeed in firms where male engineers held a great deal of power, she "saw it as *their* problem, not hers." *Id.* at 134. Notably, as federal contractors, the firms with more traditionally bureaucratic structures were also subjected to affirmative action mandates, which one recent study suggests may have had a significant impact on the success of women and minorities within those firms. See, e.g., Alexandra Kalev et al., *Two to Tango: Affirmative Action, Diversity Programs and Women and African Americans in Management* (on file with author).

powerful and were therefore both less likely to control for discriminatory bias and more motivated to preserve their position by designing a work culture with behavioral expectations that many of the female engineers were either unwilling or unable to display.¹⁰⁶

Although work culture is a relational process involving all of the cognitive and normative biases that go along with social interaction, it does not develop in a vacuum; it is influenced by the environment in which it operates. This realization helps make clear that recent structural moves by employers cannot be separated from the problems of intergroup inequality in the modern workplace. Discriminatory work cultures are not merely social problems transferred to the employment context. Employers' organizational choices can both facilitate and constrain the development of discriminatory work cultures.

C. Harm: Incorporating Performance and Identity Costs

At the most obvious level, a discriminatory work culture is likely to lead to disparity in success rates. Fewer women and people of color will succeed in work environments dominated by a white, male culture, either because they are unwilling or unable to conform to the behavioral expectations of the work culture. As social relations and culture "fit" take on greater significance in the modern workplace, failure to conform to work culture is likely to have a greater detrimental effect on success.

But a discriminatory work culture in a workplace where social relations take on greater importance does more than lead to disparity in promotion, wages, and other easily identifiable, external determinants of success. A discriminatory work culture is, as Kenji Yoshino would put it, a "covering demand."¹⁰⁷ By demanding that women and minorities conform to stereotypically white, male behaviors, a discriminatory work culture imposes costs on even those women and people of color who ultimately succeed in fitting in. Setting behavioral expectations along a white, male norm both imposes extra performance costs on outsiders and sets the framework for construction of identity.

A number of legal scholars, Yoshino included, have laid a solid foundation for the conceptual recognition of these often hidden costs. This body of scholarship begins with the concept of identity performance, which, like my definition of work culture, draws on Erving Goffman's seminal work on the presentation of self. Again, according to Goffman, much, if not all, of our behavior is relational; it serves as a signal about who we are and

106. See MCLWEE & ROBINSON, *supra* note 5, at 21; see also Operario & Fiske, *supra* note 1, at 50 (describing the role of power in shaping racist behavior).

107. Yoshino, *supra* note 2.

what we are like to a particular audience.¹⁰⁸ At work, those audiences include various formal and informal work groups, whether comprised of co-workers or supervisors. And, as I explained earlier, the work cultures developed by these work groups provide the behavioral map for creating the impression that one is adhering to a set of community work group values, that one really does fit in. Moreover, identity, too, is dialogical in that we define ourselves through our interactions with others.¹⁰⁹ How we perceive ourselves, in other words, is determined in large part by how others perceive us.

This idea of identity performance is implicated in several ways by discriminatory work cultures. First, identity performance describes the extra work that outsiders, often women and people of color, have to perform to send the message that they fit in. In their recent article, *Working Identity*, Devon Carbado and Mitu Gulati describe how outsiders may engage in what they call "extra identity work" to counteract perceived negative assumptions about their identities.¹¹⁰ Because members of outsider groups are likely to perceive themselves as subject to negative stereotypes, Carbado and Gulati argue, "[T]hey are also more likely to feel the need to do significant amounts of 'extra' identity work to counter those stereotypes."¹¹¹

Although Carbado and Gulati focus on perceived negative assumptions, the cost of extra identity work is not limited to that context. Indeed, social science research indicates that outsiders actually do have to work harder than their counterparts to fit into a work culture defined along a white, male norm, precisely because insider discriminatory bias is likely to result in a presumption against fit.¹¹² Women in high-tech engineering firms with work cultures that require frequent displays of hands-on competence and a love of tinkering, for example, will likely have to engage in more such behavior than their male counterparts because they are presumed to lack these abilities.

108. See GOFFMAN, PRESENTATION OF SELF, *supra* note 18, at 252-53 (noting that "[t]he self, . . . as a performed character, is not an organic thing that has a specific location, whose fundamental fate is to be born, to mature, and to die; it is a dramatic effect arising diffusely from a scene that is presented"); see also Yoshino, *supra* note 2, at 773 (stating that "assimilation is not a simple performance on the part of an agent, but rather a dialectic between an agent and her audiences").

109. This concept of the performative identity has been developed by a number of scholars in various contexts. See, e.g., JUDITH BUTLER, GENDER TROUBLE, FEMINISM & THE SUBVERSION OF IDENTITY (1999); JUDITH BUTLER, BODIES THAT MATTER (1993); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1264-66 (2000); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 3-5 (1991); Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1763-64 (1993); Kenneth Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 287 (1995); Yoshino, *supra* note 2, at 888.

110. See Carbado & Gulati, *supra* note 109, at 1268-70.

111. *Id.* at 1262.

112. See *supra* notes 97-98 and accompanying text.

Second, beyond the costs of extra identity work lies the harm to identity itself.¹¹³ Because behavior is intricately intertwined with self conception, engaging in the behavior expected by work culture has implications for one's sense of self. A true social definition of work culture recognizes that work culture both constitutes and is constituted by the individuals who engage in it. Defining relational behavior along a white, male norm, therefore, may compromise the identities of nonmembers as they gain entrée into the group.¹¹⁴ Imagine the African American woman who chooses her braided hairstyle as an expression of her racial identity. When she takes the time, money, and energy to straighten her hair for work, her white coworkers and employer respond in ways that suggest that she is acceptable in the white world. In the process, however, she has compromised her sense of self. By pressuring this woman to take on behavioral traits stereotypically associated with and defined by white men and women, without any connection between the traits and her ability to do her job, the work culture has succeeded in redefining her identity and in devaluing her race.¹¹⁵

A number of scholars have recognized this harm, largely in response to what they consider an assimilationist bias in the prevailing color-blind approach to equality.¹¹⁶ Barbara Flagg and Paulette Caldwell have each argued, for example, that Title VII should prohibit discrimination based on race-expressive traits and behavior as well as the status of race.¹¹⁷ More recently, Kenji Yoshino has argued for protection from demands to cover,¹¹⁸ and Devon Carbado and Mitu Gulati have argued in favor of a

113. This is not to say that a person has a true or essential identity. For a discussion of some of the dangers of identity categories, see Nancy Levit, *Introduction: Theorizing the Connections Among Systems of Subordination*, 71 *UMKC L. REV.* 227 (2002).

114. See Brewer et al., *supra* note 1 (distinguishing initial entry into a group from successful integration, or entrée).

115. For other, more detailed examples of some of the forms that harm to identity might take, see Carbado & Gulati, *supra* note 109; Flagg, *supra* note 2; and Yoshino, *supra* note 2. For an exploration of identity harms in the equal protection context using Goffman's work on stigma, see R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 *N.Y.U. L. REV.* 803 (2004). More broadly, a discriminatory work culture may inhibit intra- and intergroup coalition building. See Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 *IND. L.J.* 63, 74-75 (2002) (describing sanctions, both formal and informal, imposed on workers who engage in acts of intergroup solidarity). For a fascinating account of some of the social norms, including increased individualism, that sustain employer pay confidentiality rules, even in the face of laws making such rules illegal, see Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 *BERKELEY J. EMP. & LAB. L.* 167 (2004).

116. See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 *YALE L.J.* 485, 490 (1998) (describing the "assimilationist bias" of current equal protection jurisprudence that "manifests itself in . . . immutability and visibility factors"); see also Yoshino, *supra* note 2, at 771 (describing the "assimilationist dream" that celebrates assimilation into mainstream society).

117. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 *DUKE L.J.* 365 (1991); Flagg, *supra* note 2.

118. Yoshino, *supra* note 2.

“difference model” of discrimination to offset employer incentives to achieve homogeneity.¹¹⁹

The recognition of identity harms as a stand-alone basis for Title VII liability is understandably controversial. Not only does it require acceptance of noneconomic harms in the absence of tangible job detriment; it also requires a legal determination that certain behaviors or traits are central, essential, or integral to a protected individual’s identity.¹²⁰ Even if we could devise a way to identify these behaviors,¹²¹ a legal determination regarding their centrality to a particular individual has implications for other members of the group. As Richard Ford has argued:

If misrecognition is a serious harm then we must be concerned that legal recognition may go wrong, misrecognizing already subordinated groups and codifying that misrecognition with the force of law and the intractability of *stare decisis*. We’d better be pretty sure that the traits the law recognizes are the right ones.¹²²

Incorporating the concept of work culture into antidiscrimination discourse offers some respite from this debate, for a solution to discriminatory work culture will capture identity harms along with the more traditionally recognized harms. Moreover, as I will discuss in Part V, an antidiscrimination approach to work culture that focuses on organizational influences rather than on specific relational behaviors or their centrality to identifiable individuals provides the added benefit of removing the legal imprimatur from particular expressions of difference.

IV

CURRENT LEGAL DISCOURSE: TITLE VII LEGAL THEORIES AND JUDICIAL DEFERENCE TO WORK CULTURE

Despite its importance, work culture goes unrecognized as a source of discrimination in current legal discourse. In this Part, I examine some of the ways in which courts defer to work culture, placing culture change

119. Carbadó & Gulati, *supra* note 2, at 1819-24; see also Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1139 (2004) (arguing that courts should “abandon the current definitions of race and ethnicity under Title VII that exempt from protection ‘voluntary’ aspects of racial and ethnic identities”).

120. See Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in LEFT LEGALISM / LEFT CRITIQUE 38 (Wendy Brown & Janet Halley eds., 2002).

121. See Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167 (2004) (“For a trait to be considered integral to group identity must the trait be possessed by 50% of the members of the group, 75% of the members, 90% of the members, or just some lesser ‘critical mass’ of members? How long must the trait have been associated with the group’s shared identity? Does it matter if a trait has been widely associated with the group for ten years or a hundred years?”); Roberto J. Gonzalez, Note, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2211 (2003) (arguing that “[t]he primary problem is the courts’ meager institutional competence in determining which characteristics are constitutive of a given identity and which are merely secondary or marginal”).

122. Ford, *supra* note 120, at 53.

beyond the purview of law.¹²³ I begin with a brief survey of the three principal theories of discrimination under Title VII and an outline of some of the doctrinal limitations of those theories for addressing work culture as a source of discrimination. I then step back from the specific legal theories to examine a broader judicial tendency to defer to work culture. I submit that judges currently tend to view work culture as a matter of business prerogative, and I present four examples of this tendency. As I will explain in greater detail in Part V, I do this not to argue that the substantive law in each specific doctrinal area that I have identified needs rethinking, although I do suggest as much for some areas, but rather to make clear the extent to which work culture is now missing from the prevailing discourse and to drive home the importance of breaking through existing legal deference to work culture to begin to explore the potential of work culture as a source of discrimination.

According to the prevailing legal discourse, the problem, if there is one, for women and people of color in a relationally dependent work world is one of cultural disadvantage or personal choice, rather than one of discrimination by work culture. And the solution, correspondingly, is necessarily centered on the outsider. In short, girls are encouraged to tinker so that they can comfortably engage in the displays of hands-on competence required for success in engineering; African American women are urged to style their hair without braids; and women generally are encouraged to develop an interest in sports and, at least in some work sectors, an acceptance of sexual banter and crass language to better fit in with the male style. Work culture itself goes unexamined in this discourse.

A. *Theories of Discrimination and Doctrinal Limitations*

Title VII of the Civil Rights Act makes it unlawful for an employer to discriminate in employment on the basis of race, color, religion, sex, or national origin.¹²⁴ Enforcement efforts under the statute have centered primarily on three theories of discrimination: disparate treatment theory,

123. Given the longstanding conceptual dichotomy between law and culture, it is not surprising that courts have tended to place work culture outside the purview of law. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (Scalia, J., dissenting) (arguing that the majority had “mistaken a Kulturkampf for a fit of spite”). As the burgeoning scholarship on law and norms reveals, it is overly simplistic to think that law does not influence culture, or vice versa, but the notion prevails.

124. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e–2000e-17. The statute provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-2(a).

which holds employers liable for intentionally discriminatory, identifiable employment actions taken by particular wrongdoers and for systemic practices or policies of intentional exclusion; disparate impact theory, which holds employers liable for the use of employment practices that have an adverse effect on members of particular groups and are not justified by business necessity; and hostile work environment theory, which protects employees against harassing conduct that rises to the level of a hostile environment. Each of these theories presents a number of doctrinal barriers for recognizing work culture as a source of discrimination.¹²⁵

The doctrinal barriers are most starkly evident with disparate treatment theory. To prevail on a claim of disparate treatment, a plaintiff typically must identify a particular decision maker¹²⁶ who has taken a “materially adverse”¹²⁷ employment action against her, and she must prove intent to discriminate,¹²⁸ frequently construed as conscious bias or animus,¹²⁹ on the part of the decision maker. In contrast, a discriminatory

125. For a more in-depth exploration of the conceptual and doctrinal limits of these theories for addressing forms of discrimination that result from the interplay between organizational context and individual biases, see Green, *Discrimination in Workplace Dynamics*, *supra* note 1.

126. In some cases, the ultimate decision maker may be a group rather than a single individual, *see, e.g.*, *Hopkins v. Price Waterhouse*, 490 U.S. 228, 232-33 (1989) (involving a decision made by a committee reviewing recommendations of partners), or a superior in a chain-of-command, *see, e.g.*, *Kendrick v. Penske Transp., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000) (involving a manager acting as a “rubber stamp, or the ‘cat’s paw,’ for a subordinate employee’s prejudice”). Nonetheless, current disparate treatment doctrine focuses the inquiry on the states of mind of specific individuals whose discriminatory decisions infect the ultimate decision. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716-17 (1983) (describing inquiry into state of mind).

127. *See, e.g.*, *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 887 (6th Cir. 1996) (requiring “materially adverse” action); *Crady v. Liberty Nat’l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) (same). For a thorough discussion of this requirement, see Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

128. *See* *Reeves v. Sandersen Plumbing Prod.*, 530 U.S. 133, 153 (2000) (“The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.”).

129. Numerous scholars have documented and critiqued the prevailing interpretation of intent in Title VII and Equal Protection doctrine. *See, e.g.*, Ian Haney-Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000); Krieger, *supra* note 91; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); McGinley, *supra* note 91. In a handful of reported cases, nonetheless, courts have been more flexible in their interpretation of intent. *See, e.g.*, *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999) (“The ultimate question is whether the employee has been treated disparately ‘because of race.’ This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.”); *EEOC v. Inland Marine*, 729 F.2d 1229, 1236 (9th Cir. 1984) (holding that continued reliance on subjective wage-setting practices supported a finding of intentional discrimination); *see also* Green, *Targeting Context*, *supra* note 1, at 682-89 (describing recent employment discrimination class action lawsuits). For arguments that the existing doctrine as established by the Supreme Court leaves room to include unconscious as well as conscious intent, *see* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. (forthcoming May 2005) and Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997).

work culture is likely to involve unconscious as well as conscious biases operating within a larger organizational context on a day-to-day basis, culminating in a materially adverse employment action only when or if an individual fails to live up to prevailing behavioral expectations.¹³⁰ Moreover, even if the plaintiff were to identify a discrete, materially adverse decision to exclude, such as denial of a promotion or raise, the decision maker is likely to have ready a “legitimate” basis for the decision: that the plaintiff was not well liked by her peers, indeed, that she “just didn’t fit in.”¹³¹

Alternatively, with its focus on structures rather than decisions by individual bad actors, one might expect that disparate impact theory would account for discriminatory work cultures, but, on a number of fronts, it too falls short. In order to prevail under disparate impact theory, a plaintiff must demonstrate that the employer “uses a particular employment practice that causes a disparate impact” on members of a protected group.¹³² This requirement poses three practical difficulties for its use in addressing work culture as a source of discrimination. First, because work culture is, at least in part, a matter of individual biases, some courts may find that it does not qualify as a “particular employment practice.”¹³³ Second, even if a plaintiff were to overcome this hurdle, courts have held that an employer’s “passive

130. Many of these same difficulties carry over into the systemic disparate treatment context, where the emphasis is on employer intent to discriminate, whether evidenced by formal policy or a pattern of system-wide individual decisions to discriminate, rather than on the organizational choices and institutional practices that shape work cultures. See Green, *Discrimination in Workplace Dynamics*, *supra* note 1, at 119-26.

131. Statements indicating that an employee does not “fit” the corporate culture are typically not considered evidence of discrimination. See, e.g., *Shorter v. ICG Holdings*, 188 F.3d 1204, 1212 (10th Cir. 1999) (dissenting opinion) (finding a statement by plaintiff’s supervisor that she “talked like other people did in her culture” insufficient evidence of pretext) (quoting testimony in appellant’s brief); *Clay v. Hyatt Regency Hotel*, 724 F.2d 721, 722 (8th Cir. 1984) (affirming the trial court’s conclusion that an assertive black male “would not fit into the defendant’s organization as well as other applicants would”); *Kazin v. Metro-N. Commuter R.R.*, No. 91 Civ 1331, 1994 U.S. Dist. LEXIS 2168 at *14 (S.D.N.Y. Mar. 1, 1994) (finding that a statement that plaintiff “did not fit the corporate culture” did not give rise to an inference of religious discrimination); *Leisner v. N.Y. Tel. Co.*, 358 F. Supp. 359, 365 (S.D.N.Y. 1973) (approving an employer’s decision not to promote based on an employee’s answer to the question, “Is this person going to be successful in our business?”).

132. 42 U.S.C. § 2000e-2(k). The statute provides:

An unlawful employment practice based on disparate impact is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity

§ 2000e-2(k)(1)(A).

133. See, e.g., *Wright v. Circuit City Stores*, 201 F.R.D. 526, 540-41 & n.22 (N.D. Ala. 2001) (characterizing the plaintiffs’ disparate impact challenge to subjective decision-making practices as individual disparate treatment claims); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 552-54 (D.S.C. 2000) (same). *But see* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (permitting the use of disparate impact theory to challenge subjective employment criteria).

reliance” on relational means of exclusion is not subject to disparate impact attack.¹³⁴ Finally, the plaintiff would also be required to demonstrate a disparate impact on the employment opportunities of the protected group.¹³⁵ Among other things,¹³⁶ this requirement invokes the rhetoric of choice, a rhetoric that spans across all three theories of discrimination and that I will consider in more depth in the next Part. In short, courts have taken the view that an employment practice does not have a disparate impact on the employment opportunities of a protected group if members of that group could have conformed their conduct to the employer’s requirements.¹³⁷

Nor does hostile work environment theory provide a ready avenue for recognizing work culture as a source of discrimination. Hostile work environment theory shares some immediate conceptual affinity with the problem of discriminatory work cultures, for it recognizes that exclusion may result from something less than a materially adverse employment action.¹³⁸ As it has played out in practice, however, the theory has several very real limitations for addressing work culture as a source of discrimination. As in the disparate treatment context more generally, courts applying hostile work environment theory have tended to focus on targeted, exclusionary conduct by particular, identifiable harassers rather than on the institutional environment as a whole.¹³⁹ At the same time, courts have tended to focus on sexual behavior rather than on nonsexual forms of exclusion.¹⁴⁰ Finally,

134. See, e.g., EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 304-05 (7th Cir. 1991) (holding that “passive reliance on employee word-of-mouth recruiting” did not constitute a particular employment practice). For a deeper exploration of judicial implications of the failure to recognize employer inaction and default structures as employment practices, see Michelle Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. (forthcoming 2005).

135. The EEOC guidelines state:

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

29 C.F.R. § 1607.4.(D).

136. For a detailed discussion of the variety of difficulties this requirement poses for plaintiffs seeking to use disparate impact theory to challenge decisions based on personal characteristics that “intersect seamlessly” with self-definition, see Flagg, *supra* note 2, at 2025-28.

137. See, e.g., Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980) (reasoning that there is no disparate impact if the policy is one that the affected employee “can readily observe and nonobservance is a matter of personal preference”); Rogers v. Am. Airlines, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (“[A]n even-handed policy that prohibits to both sexes a style more often adopted by members of one sex does not constitute prohibited sex discrimination. This is because this type of regulation has at most a negligible effect on employment opportunity.”).

138. A plaintiff proceeding under a hostile work environment theory must show that the work environment was “sufficiently severe or pervasive to alter the conditions of [the victim’s] employment.” Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (citations omitted).

139. See Schultz, *supra* note 87.

140. See *id.* at 1692-96 (showing that courts have tended to focus on sexual conduct based on a “sexual desire-dominance paradigm”).

under existing hostile work environment theory, a work environment is considered discriminatory only if it is pervasively hostile or abusive.¹⁴¹ Although some work cultures may rise to that level, most will not,¹⁴² despite the various harms that discriminatory work cultures impose.

B. Judicial Deference: Work Culture as a Business Prerogative

Aside from these specific doctrinal barriers, there exists an overarching tendency on the part of courts to defer to work culture. I present here four specific examples of this tendency. In each of these accounts, work culture is deemed a matter of business prerogative rather than an antidiscrimination concern. With work culture out of the picture, the problem for women and minorities comes to be framed in terms of lack of ability¹⁴³ or personal choice rather than in terms of subordination, organizational responsibility, and inequity.

1. Appearance Codes

One of the most prominent illustrations of judicial deference to employer efforts to define work culture is the treatment of formal employer appearance codes. In numerous cases over the past three decades, courts have consistently upheld sex-based and sociocultural appearance codes against employee challenges under each of the three principal theories of discrimination. Because these cases involve formal behavioral rules rather than informal expectations developed through the process of work culture, they provide particular insight into the prevailing judicial deference to work culture, for they remove any question about whether the employer played a role in facilitating the particular requirements.

Many of the early appearance code cases involved sex-based dress and grooming requirements.¹⁴⁴ Perhaps the most well-known of these cases is *Willingham v. Macon Telegraph Publishing Co.*,¹⁴⁵ in which the Fifth Circuit, sitting en banc, provided the following explanation for its holding that an employer's rule prohibiting male (but not female) employees from having hair longer than shoulder length was not discriminatory:

Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the

141. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (holding that an employee's terms and conditions of employment are altered "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive"); *Vinson*, 477 U.S. at 67.

142. See *supra* Part III.A.

143. Indeed, the prevailing story in some ways is not unlike the "cultural deprivation" project of the 1950s. See CHRIS JENKS, *CULTURE: KEY IDEAS* 159-72 (1993) (critiquing the theory of cultural deprivation as failing to account for the school as an agent in creating success or failure).

144. See, e.g., *Barker v. Taft Broad. Co.*, 549 F.2d 400 (6th Cir. 1977); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc); *Baker v. Cal. Land Title Co.*, 507 F.2d 895 (9th Cir. 1974); *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973).

145. *Willingham*, 507 F.2d 1084.

basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for men and another for women *if* the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity. . . . If the employee objects to the grooming code, he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job.¹⁴⁶

This treatment of appearance codes as a matter of business prerogative has carried over into the race context as well.¹⁴⁷ In the case of *Rogers v. American Airlines*, for example, an African American woman sued American Airlines for discrimination on the basis of race when it fired her for wearing an all-braided, "corn row" hairstyle to work.¹⁴⁸ The court held that American Airlines could forbid the plaintiff from wearing her hair in cornrows.¹⁴⁹ Braided hairstyles, according to the court, represent a personal choice rather than a protected immutable racial or gender characteristic.¹⁵⁰ Moreover, American had adopted its no-braids policy in order to help project a "conservative, and business-like image."¹⁵¹ American, in other words, had defined its work culture as a business matter, and Rogers was left to decide whether to abide by that culture or to get out.

146. *Id.* at 1091 (5th Cir. 1975) (en banc); *see also* *Knott v. Mo. Pac. R.R.*, 527 F.2d 1249, 1251-52 (8th Cir. 1975) (adopting the view that "the Act was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers"); *Fagan*, 481 F.2d at 1125 ("Good grooming regulations reflect a company's policy in our highly competitive business environment."). Even the EEOC seems to have backed down from its earlier claim that appearance codes were a form of discrimination. *See* Compliance Manual, § 619.1 (1996) (concluding that "successful litigation of male hair length cases would be virtually impossible" and advising administrative closure of all such cases). Some courts are willing to make an exception when the employer's appearance requirements impose an "unequal burden," *see, e.g.,* *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076, 1081 n.4 (9th Cir. 2004) (applying an "unequal burdens" test that measures burdens "beyond the requirements of generally accepted grooming standards"), or when the requirements are "demeaning" to women, *see, e.g.,* *Carroll v. Talman Fed. Saving & Loan Ass'n*, 604 F.2d 1028, 1032 (7th Cir. 1979) (holding that an employer's policy requiring women to wear uniforms but permitting men to wear "normal business attire" was discriminatory). For an insightful discussion of employer appearance regulation and its role in enforcing social norms, *see* Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 *NEW ENG. L. REV.* 1395 (1992) (arguing that appearance regulation functions in part as a normalizing discipline).

147. Cases involving English-only language requirements follow similar reasoning. *See, e.g.,* *Garcia v. Spun Steak*, 998 F.2d 1480, 1487 (9th Cir. 1993); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980).

148. 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (arguing violation of Title VII and the Thirteenth Amendment of the Constitution).

149. *See id.*

150. *See id.* at 232. The immutability aspect of the *Rogers* court's opinion has received extensive academic attention highlighting the costs associated with demands to assimilate. *See, e.g.,* Klare, *supra* note 146, at 1414; Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 *CARDOZO WOMEN'S L.J.* 115, 136-40 (2001); Yoshino, *supra* note 2, at 891.

151. *Rogers*, 527 F. Supp. at 233.

2. *Lack-of-Interest Analysis*

One can also see judicial deference to work culture in cases of disparate treatment in which employers have attempted to rebut evidence of stark job segregation by arguing that women lack interest in certain jobs. The *Sears* case is probably the most famous of these cases, although there have been a number of cases brought more recently in which employers have made similar arguments in their defense.¹⁵² In *Sears*, the EEOC claimed that Sears had engaged in a system-wide practice of discrimination in the hiring and promotion of women into commission sales jobs, relegating them to lower-paying, hourly wage sales jobs.¹⁵³ Hiring decisions for the sales jobs were made primarily on the basis of interviews, and the interviewers were expected to learn the appropriate salesperson characteristics from observing past successful commission salespeople, most of whom were male.¹⁵⁴ Applicants for sales positions were regularly given a test of Mental Alertness and a Mental Temperament Schedule in which they were asked a number of questions, including: "Do you swear often?"; "Have you ever done any hunting?"; and "Have you played on a football team?"¹⁵⁵

Sears did not dispute the stark disparity between the number of men and women in sales commission jobs,¹⁵⁶ but instead argued that those numbers were attributable not to discrimination by Sears but to the work preferences of women.¹⁵⁷ The trial court accepted this argument.¹⁵⁸ In doing so, it accepted the behavioral characteristics expected of a commission salesperson as neutral and necessary to the job; nowhere did the court inquire into the prevailing work culture of sales commission work at Sears or into the ways in which that culture might affect the interests of women, particularly those who were already working for Sears, in those positions.¹⁵⁹

152. EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 301 (7th Cir. 1988). For more recent cases see *Stender v. Lucky Stores*, 803 F. Supp. 259, 325 (N.D. Cal. 1992) (summarizing the employer's argument that statistical disparities between men and women were the result of differing job interests); and *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (same). For an extended discussion of courts' acceptance of the lack-of-interest argument, 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 (1990).

153. *Sears, Roebuck & Co.*, 628 F. Supp. at 1289.

154. *Id.* at 1290-92 (describing qualifications and hiring process). The Sears Retail Testing Manual, which contained the only written description of the desired characteristics of a commission salesperson, described that person as one who is "active" and has "considerable physical vigor." Indeed, until 1953, the manual described a commission salesperson as a "man" with those characteristics. *Id.* at 1300.

155. *Id.* at 1300 n.29.

156. *See id.* at 1324-27.

157. *Id.*

158. *Id.*

159. *Id.* McIlwee and Robinson's ethnological work helps push the boundaries of this prevailing story. As part of their project, they interviewed a number of female engineers at a high-tech engineering firm with a culture that emphasized tinkering and self-promotion, *see supra* Part III.A. As traditionally conceived, sexual harassment was all but absent from the women's workplaces; nonetheless, these

3. *The Behavioral Catch-22*

The Supreme Court's opinion in *Price Waterhouse v. Hopkins* reveals a similar deference to work culture.¹⁶⁰ In that case, Ann Hopkins sued the accounting firm Price Waterhouse, alleging that the firm violated Title VII by denying her partnership because of her sex. Hopkins worked in an undeniably male-dominated work environment in which the traits of competitiveness and assertiveness were valued. In 1982, the year that she was considered for partnership, 7 of the 662 partners at the firm were women; Hopkins was the only woman in the pool of 88 nominees.¹⁶¹ Despite her record for generating new business and billing hours, however, Hopkins was not invited into the partnership.¹⁶² According to the firm, Hopkins' lack of "interpersonal skills," specifically her unpleasantness in dealing with staff, was the primary reason for the decision,¹⁶³ and the firm presented uncontroverted evidence that Hopkins had on occasion yelled profanities at her staff.¹⁶⁴ Nonetheless, as has been recounted numerous times, the partners' comments about Hopkins reflected expectations that she conform to gendered stereotypes, specifically that she was "overly aggressive" and "overcompensated for being a woman," as well as suggestions that she "take a course at charm school."¹⁶⁵

The case is notable for the Supreme Court's recognition of the "double bind" for women like Hopkins: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch[-]22: out of a job if they behave aggressively and out of a job if they do not."¹⁶⁶ According to this reasoning, if women engage in behavior expected of successful men, an employer cannot penalize them for doing so. In other words, if one signal of assertiveness used by male candidates is yelling obscenities at the staff, women should not be criticized for doing the same.

This double-bind rationale makes sense, particularly in Hopkins' case, but it also tends to obscure the role that discriminatory work culture might have played in defining behavioral expectations at Price Waterhouse in the

women's stories reflect feelings of incompetence (and decisions to leave the field of engineering) driven largely by their lack of conformity with the dominant interactional style. See MCILWEE & ROBINSON, *supra* note 5, at 119-26.

160. 490 U.S. 228 (1989).

161. *Id.* at 233.

162. The district court specifically concluded that Hopkins "had no difficulty dealing with clients and her clients appear to have been very pleased with her work." It also found that she was generally viewed as a "highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked." *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1112-13 (D.D.C. 1985).

163. *Price Waterhouse*, 490 U.S. at 233-34.

164. *Price Waterhouse*, 618 F. Supp. at 1115.

165. *Price Waterhouse*, 490 U.S. at 235.

166. *Id.* at 251.

first place. The Supreme Court assumes that requiring aggressive behavior is unproblematic. However, if a partner-candidate brings in more business than any other candidate and bills the most hours, why should she also be expected to yell obscenities at the staff? It is true, of course, that an employer is more likely to merely tolerate the yelling of obscenities rather than to formally expect it. Price Waterhouse, at least according to the district court, "consistently placed a high premium on candidates' ability to deal with subordinates and peers on an interpersonal basis and to promote cordial relations within a firm which is necessarily dependent on team effort."¹⁶⁷ Nonetheless, in the same year that Hopkins was rejected for partnership, two other candidates were extended offers, despite their troubles dealing pleasantly with staff.¹⁶⁸ This suggests the possibility, at least, that the work culture at Price Waterhouse favored assertive and aggressive behavior defined along a male norm that included the use of obscenities directed at staff. And yet, this culture goes unexamined, placed instead within the realm of an employer's business prerogative.

4. *Traditionally Crass Work Environments*

The judicial deference to work culture in my final example is likely to be much more obviously troubling to most readers than the others that I have presented. Indeed, the courts that defer to work culture in this example are in the minority. Nonetheless, I include it for its power to illustrate the inclination of judges to view particular work cultures as neutral and just, simply because those cultures are entrenched and longstanding. To these courts, work culture is not just a matter of business concern; it is a way of life that the law has no right to disturb. In this way, my final example brings us back around to the first. Like the judicial response to employer appearance codes, the judicial response in these cases reveals the impact of prevailing social norms on attention to work culture as a source of discrimination.

It is by now relatively well known that courts implementing hostile work environment theory tend to focus on sexual conduct rather than broader nonsexual demands to conform to prevailing behavioral expectations, a focus that neglects many nonsexual manifestations of work culture.¹⁶⁹ Even within this narrow realm of sexual harassment, however, some courts display a clear deference to work culture in their hesitancy to impose liability on employers for work environments with a history of sexually charged language and behavior.¹⁷⁰ Specifically, these courts have held that

167. *Price Waterhouse*, 618 F. Supp. at 1116.

168. One was said to act like a "Marine drill sergeant"; the other to be "abrasive and overbearing." *Id.* at 1115.

169. *See* Schultz, *supra* note 87.

170. *See, e.g.*, *Smith v. Northwest Financial Acceptance, Inc.*, 129 F.3d 1408, 1414 (10th Cir. 1997) (distinguishing *Gross*, 53 F.3d 1531, on the ground that "[t]his is not a factual scenario . . . where

plaintiffs subjected to sexually offensive behavior while working in traditionally crass, blue collar jobs must meet a higher standard for proving objectively severe or pervasive conduct than their white collar counterparts. As the Tenth Circuit has explained:

We must evaluate [the plaintiff's] claim of gender discrimination in the context of a blue collar environment where crude language is commonly used by male and female employees. Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments.¹⁷¹

Earlier courts espoused similar views. In *Rabidue v. Osceola Refining Co.*, for example, the district court provided the following explanation for its application of a higher standard to plaintiffs working in traditionally crass environments:

[T]he standard for determining sex[ual] harassment would be different depending upon the work environment. Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girly magazines may abound. Title VII was not meant to[—nor can it—]change this.¹⁷²

Each of these examples illustrates a tendency of courts to place work culture outside of antidiscrimination concern. Whether by enforcing appearance codes, accepting “lack-of-interest” arguments at face value, glossing over the role of work culture in shaping performance expectations, or holding plaintiffs in traditionally male, crass environments to a higher

the rough and tumble surroundings of the construction industry can make vulgarity and sexual epithets common and reasonable conduct”); *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1538 (10th Cir. 1995); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1126 (10th Cir. 1993) (affirming the district court’s finding that the plaintiff “‘accepted’” the “‘unusually rough, sexually explicit and raw atmosphere’” of the Salt Lake County Attorney’s Office) (citation omitted); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620-21 (6th Cir. 1986); *see also* *Ocheltree v. Scollon Prods.*, 335 F.3d 325, 344 (4th Cir. 2003) (Williams, C.J., dissenting in part and concurring in the judgment in part). *But see* *O’Rourke v. City of Providence*, 235 F.3d 713, 735 (1st Cir. 2001) (“[T]here is no merit to the City’s argument . . . that it was entitled to a jury instruction that the firefighters’ conduct should be evaluated in the context of a blue collar environment”); *Connor v. Schrader-Bridgeport Int’l, Inc.*, 227 F.3d 179, 194 (4th Cir. 2000) (“We are unable to discern an ‘inhospitable environment’ exception to Title VII’s mandate that employers may not discriminate”); *Jackson v. Quanex Corp.*, 191 F.3d 647, 662 (6th Cir. 1999) (“[T]he district court was wrong to condone continuing racial slurs and graffiti on the grounds that they occurred in a blue collar environment.”); *Williams v. GMC*, 187 F.3d 553, 564 (6th Cir. 1999) (“[W]e reject the view that the standard for sexual harassment varies depending on the work environment.”). This reliance on “social context” to create differing standards depending on the history of the work environment has received remarkably little academic attention. For an argument in favor of this development, see Michael J. Frank, *The Social Context Variable in Hostile Work Environment Litigation*, 77 NOTRE DAME L. REV. 437 (2002); for one against this development, see Melissa K. Hughes, Note, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CALIF. L. REV. 1437 (2003).

171. *Gross*, 53 F.3d at 1538.

172. 584 F. Supp. 419, 430 (E.D. Mich. 1984), *aff’d*, 805 F.2d 611, 620-21 (6th Cir. 1986) (quoting part of the district court’s opinion).

standard for proving sexual harassment, courts display their belief that work culture is a matter of business prerogative rather than a matter of antidiscrimination concern. According to this view, outsiders, and not the work environment, serve as both the source of the problem and the solution. In other words, women and people of color fail to succeed either because they lack the cultural training to behave as required by the work culture, or because they choose not to; once (or if) people of color and women learn to and decide to engage in the interactional style required by the organizational culture, they, too, will succeed.

This account underestimates the significance of work culture as a source of discrimination in the modern workplace. It may be that in some cases a work culture defined along a white, male norm will be so connected with the ability to do one's job that it must be accepted as within the business prerogative. The prevailing legal discourse, however, prevents us from engaging in this inquiry altogether. Only by recognizing work culture as a possible source of discrimination can we begin to explore the law's power and limits for reconstructing subordinating social practices in the workplace.

V

CHARTING A COURSE FOR CHANGE

Recognizing the discriminatory potential of work culture and the increasing importance of conformity with work culture to job success should, at the very least, trigger modest reforms in the way courts and litigants think about traditional discrimination claims. Simply because work culture appears as an organic process of human interrelation does not mean that employers play no role in defining the context of those relations or in determining their significance for success. Courts should be skeptical of lack-of-interest arguments in the face of employer moves that capitalize on culture as a means of employee control, and in the face of evidence of work cultures defined along gender or racial lines. Similarly, in the hostile work environment context, courts should refrain from deferring to sexually hostile work environments simply because the harassing behavior is part of a long-standing discriminatory work culture.

Apart from these relatively modest reforms within existing legal theories, however, remains the more difficult question of whether and how we might incorporate work culture into the nondiscrimination obligation more broadly to trigger targeted employer reform. Most legal scholars who have explored the identity harms attendant to an assimilationist bias have proposed the recognition of a new legal right, fashioned under one of the existing Title VII theories of discrimination.¹⁷³ I begin this Part by arguing that

173. See, e.g., Cabardo & Gulati, *supra* note 2 (disparate treatment); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination under Title VII*, 35 WM. & MARY L. REV.

this approach to work culture, at least, is misguided, both as a practical matter because discriminatory work cultures are too complex and too intertwined with valuable social relations to be easily regulated through judicial pronouncements and direct regulation of relational behavior, and as a normative matter because providing a legal right under existing legal theories makes group difference the turning point for liability. The practical objection stems from the benefits of work culture. Because work culture provides the relational foundation for social connections at work, its regulation must be approached with some caution. As part of this cautionary inquiry, I look to the law of harassment, particularly sexual harassment, and seek to take lessons from the successes and failures of this recent effort to regulate social relations in the workplace. The normative objection, in contrast, stems from lingering essentialist concerns, concerns that are alleviated by a focus on work culture rather than on the centrality of traits to a group identity but that, I argue, are not adequately allayed without a move away from existing legal theories.

I then turn to explore possible alternatives. Taking into account the fact that law emerges not just from formal judicial decisions declaring legal rights but also from courts, agencies, and other intermediate actors who facilitate and oversee processes of self-regulation, I focus on two possible ways in which we might trigger targeted attention to work culture as a source of discrimination in the modern workplace. Although these alternatives differ substantially in their specific details, they share an emphasis on facilitation of “problem solving” aimed at altering the organizational context in which work cultures develop rather than on governance of the “command-and-control” variety aimed at regulating social relations directly.

A. *Reshaping Existing Legal Theories*

The most obvious way to trigger targeted employer attention to work culture as a source of discrimination is to fashion a private right of action under one of the existing discrimination theories. Using disparate treatment theory, for example, we might provide individuals with a legal right to be free from adverse employment actions taken for lack of fit with a discriminatory work culture.¹⁷⁴ This approach would permit Keisha, the African

805 (1994) (disparate treatment); Gonzalez, *supra* note 121 (disparate impact); Flagg, *supra* note 2 (disparate impact). Barbara Flagg’s “alternatives model” is the exception to this general tendency. Flagg, *supra* note 2, at 2044-51. Although she characterizes this proposal as a variation on disparate impact theory, its focus on the context of decision making sets it apart from other efforts to address identity harms. *See id.*

174. Even under this approach, it seems an employer would not be liable if the particular behavioral expectation defined by work culture was legitimately tied to job performance. There may, for example, be good reason to require employees to wear hats or to speak English on the job. *See* Ford, *supra* note 120, at 54; Gonzalez, *supra* note 121, at 2217.

American woman who wears her hair in cornrows, to sue for discriminatory denial of promotion when that decision was based on her failure to comply with a discriminatory work culture.¹⁷⁵ It would also mean that a woman working in the engineering firm studied by McIlwee and Robinson could sue for denial of a promotion based on failure to engage in frequent displays of hands-on competence.¹⁷⁶ Indeed, a number of multiculturalist scholars have proposed variations of this approach when they have argued that performance of race or other protected group status is part of that status and therefore warrants Title VII protection.¹⁷⁷

Alternatively, using disparate impact theory, we might provide individuals with a legal right of action for work cultures that have a disparate impact on members of protected groups. Roberto Gonzalez suggests a disparate impact approach in response to what he sees as lingering essentialist concerns of the disparate treatment approach to identity harms.¹⁷⁸ Similarly, Barbara Flagg argues that Keisha should be permitted to sue for the foreseeable disparate effects of what Flagg calls “transparently white subjective decisionmaking.”¹⁷⁹ Under a disparate impact approach like that suggested by these scholars, individuals would be permitted to obtain legal redress if they could show that a particular work culture has a disparate impact on members of their particular group and if the employer cannot justify the use of that culture as job related and consistent with business necessity.¹⁸⁰ To capture the identity harms implicated by demands to conform to a white, male norm, the disparate impact in these cases would be established by showing that the work culture’s valued behavioral expressions are “disproportionately correlated along [protected group] lines.”¹⁸¹

As the examples of prevailing legal discourse laid out in Part IV suggest, each of these approaches would require substantial reshaping of existing legal doctrine¹⁸² and, as I have argued elsewhere, a reconceptualization

175. See *supra* notes 88-90 and accompanying text.

176. See *supra* notes 78-81 and accompanying text.

177. See, e.g., Carbado & Gulati, *supra* note 2, at 1821 (describing a “difference approach” to a disparate treatment claim); Perea, *supra* note 173, at 839 (arguing that Title VII should protect against discrimination based on “physical and cultural characteristics that make a social group distinctive”); Yoshino, *supra* note 2, at 937 (describing an approach that would delineate certain traits that would “count” as traits “that ought to be protected against covering demands”).

178. See Gonzalez, *supra* note 121, at 2211.

179. See Flagg, *supra* note 2, at 2009. More recently, Charles Sullivan has argued that disparate impact theory is capable of addressing a variety of structural forms of discrimination. See Charles A. Sullivan, *Disparate Impact: The Way Out of the Desert?*, 47 WM. & MARY L. REV. (forthcoming 2005).

180. See 42 U.S.C. § 2000e-2(k); see also *supra* note 132-36 and accompanying text.

181. See Gonzalez, *supra* note 121, at 2223 (arguing for a disparate impact approach under which a plaintiff would be required to show that “the conduct is disproportionately correlated along racial or national lines”); see also Flagg, *supra* note 2, at 2040-41 (arguing that disparate impact should be established when the plaintiff can show that an employment decision was based on a characteristic “more frequently possessed by whites than nonwhites”).

182. See *supra* Part IV.

of the nature of discrimination underlying the theories.¹⁸³ Aside from those difficulties, however, remain the practical problems of contextual complexity inherent in relational dynamics and the danger of regulating social relations directly. Creating a legal right of action under either disparate treatment or disparate impact theory would leave courts to dictate the boundaries between legal and illegal conduct on a case-by-case basis. And it would leave employers searching for bright-line relational rules to impose upon their workers. I focus here on these latter difficulties, difficulties that I conclude caution against a legal rights approach under any of the existing theories.

1. *Practical Problems: Regulating Social Relations*

Understanding the practical difficulties inherent in regulating work culture through existing legal theories necessarily begins with a recognition of the benefits of shared styles of interaction, conversation boundaries, and other behavioral signals and expectations to workplace relationships. Signals of group membership provide common ground on which to build social connection. And that connection, once made, turns work into a much more rewarding experience for individuals and for society.¹⁸⁴ I pause here to recognize these benefits and to identify the risks attendant to attempts to regulate social relations at work. These risks, I conclude, should lead us away from creating a new legal right that would place responsibility with the judiciary to determine whether a particular work culture is discriminatory, and that may result in employer efforts to directly regulate social relations rather than to alter the organizational context in which those social relations take place.

There are a number of ways in which the relational ties established at work benefit individuals and society. The most immediate benefit to individuals lies in social connection. Particularly with other forms of civic engagement on the decline,¹⁸⁵ people increasingly turn to fellow workers for conversation, networks, and relationships. Take the following example:

[Becky O'Grady] joined [the company] in 1990, one of 30 MBAs recruited by the company—six of whom—including O'Grady—ended up marrying each other. Today, she does her dry cleaning, car tune-ups, film developing, exercising, and much more at the shops tucked along the company's labyrinthian corridors. When

183. See Green, *Discrimination in Workplace Dynamics*, *supra* note 1.

184. Stronger social bonds at work may also result in increased employee productivity, providing benefit to businesses as well as to individuals and society. See *supra* Part II.A (espousing benefits of strong work culture to businesses).

185. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

she's not at work, where she's the marketing manager of cereals, O'Grady socializes almost entirely with workmates.¹⁸⁶

While not all workers are as socially entrenched in their work as Becky O'Grady, the workplace is undeniably a principal site of social connection for many working Americans. In her study of the "time bind," Arlie Hochschild discovered that stressed-out parents, particularly women, often found the workplace a welcome refuge from home life, in part because of the social connections that it provided.¹⁸⁷ Survey research buttresses Hochschild's account, showing that employees frequently turn to coworkers for advice and emotional support in times of emergency.¹⁸⁸ Even in noncrisis situations, workers frequently report sharing personal information with and enjoying the company of their coworkers. According to one recent study, 89% of employees surveyed agreed with the statement, "I look forward to being with the people I work with each day."¹⁸⁹

Nor are the benefits of social relations at work limited to the personal. As Cynthia Estlund explores in her recent book and earlier article with the same lead title, *Working Together*,¹⁹⁰ civil rights laws and other constraints on workplace demographics mean that individuals are "in some sense compelled to work with others whom they do not meet in their [more segregated] neighborhoods and voluntary associations."¹⁹¹ Social ties in the workplace thus serve a mediating, societal integrative function as well as a personal function. "The process of working together leads to sharing of experiences and beliefs, and it does so in the context of ongoing cooperative and constructive, even friendly, relations among citizens whose daily lives may not otherwise intersect."¹⁹² A wealth of social

186. CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 29 (2003) (quoting Maggie Jackson, *Is Your Company Your Hometown?*, ASSOC. PRESS, Sept. 29, 1998).

187. See ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME & HOME BECOMES WORK* 42, 75 (1997). Interestingly, Hochschild's in-depth view of workers within a single organization attributes the employer's efforts to foster employee commitment as a cause of the growing preference of social life at work over social life at home:

While some married people have dispensed with their wedding rings, people proudly wore their 'Total Quality' pins or 'High Performance Team' tee-shirts, symbols of their loyalty to the company and its loyalty to them. In my interviews, I heard little about festive reunions of extended families, while throughout the year, employees flocked to the many company-sponsored ritual gatherings.

Id. at 44.

188. See *id.* at 42 (citing a study in which respondents identified work as a more helpful resource in coping with a mother's death than a spouse or religion).

189. See JAMES T. BOND ET AL., *FAMILIES AND WORK INSTITUTE: THE 1997 NATIONAL STUDY OF THE CHANGING WORKFORCE* 106 (1997).

190. ESTLUND, *supra* note 186; Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000).

191. *Id.* at 5; see also Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1888-90 (2000) (discussing the community value of work).

192. ESTLUND, *supra* note 186, at 104.

science research on the contact hypothesis supports this view. Intergroup contact, according to much of this research, tends to reduce prejudice and discriminatory bias when individuals interact “on an equal-status basis in pursuit of common goals.”¹⁹³ Although, as Estlund recognizes, this utopian view of workplace social relations is tempered by a cloud of discrimination and subordination and other constraints on freedom, there remains an unquestionable societal value in social relations at work.

Work culture is a central ingredient to the development of social connection among employees. By delineating a map of behaviors that signal adherence to common work values and norms, work culture provides the relational foundation for connection at work. Work culture pulls workers together by framing the relational structure on which to build important social bonds.

Yet, despite the importance of social relations at work, we do not place all relational behavior off limits to government regulation. Sexual conduct in the workplace provides the prime example. At the same time that we may recognize the benefits of sexually charged language and other sexual behavior as a means of facilitating social relations and heightening group solidarity, we have also recognized its harms as a tool of exclusion and domination along gender lines. Since the early 1980s—when first the Equal Employment Opportunity Commission and later the Supreme Court identified sexual harassment as a form of discrimination actionable under Title VII¹⁹⁴—employers have been legally obligated to regulate social relations in their workplaces. The law of harassment and its implementation, then, provides a useful starting point for thinking about attempts to regulate work culture more broadly.

According to existing harassment doctrine, victims of workplace harassment have a legal cause of action under Title VII when they suffer *quid pro quo* harassment (e.g., “I’m firing you because you won’t have sex with me.”) or when they are subjected to a hostile work environment, an environment that is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment.’”¹⁹⁵ Under this law, courts have held employers liable both for employee sexual propositions tied to threats of job penalties and for more generalized forms of harassment, such as the widespread use of sexual jokes, unwanted touching or propositions by supervisors or

193. Deborah A. Prentice & Dale T. Miller, *The Psychology of Cultural Contact*, in CULTURAL DIVIDES, *supra* note 1, at 1-19; *see also* H.D. FORBES, ETHNIC CONFLICT: COMMERCE, CULTURE, AND THE CONTACT HYPOTHESIS 115 (1997) (surveying research on the contact hypothesis and finding a consensus that, under certain conditions, intergroup contact tends to reduce prejudice). Indeed, studies suggest that a strong nondiscriminatory work culture that strengthens identity with the organization and decreases the salience of race and other differences decreases bias in decision making and has a positive effect on intergroup relations. *See* Brewer et al., *supra* note 1.

194. *See* Interpretive Guidance, 29 C.F.R. § 1604.11(a) (1980); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

195. *Meritor*, 477 U.S. at 67.

coworkers, and, in some cases, nonsexual conduct like unsubstantiated public reprimands for poor job performance or work sabotage.¹⁹⁶ In response, employers have sought to eliminate harassing conduct in a variety of ways, but efforts have centered on harassment training, punishment of individuals for acts of harassment, and elimination of sexuality and sexual relations from the workplace altogether.¹⁹⁷

The results of these efforts present a somewhat conflicting picture. On the one hand, the development of sexual harassment law has been hailed as “one of the most successful legal and political changes women have accomplished.”¹⁹⁸ On the other hand, it has been assailed as damaging valuable social relations—as “sanitizing” rather than equalizing—workplace relations.¹⁹⁹ In her recent article, *The Sanitized Workplace*, Professor Vicki Schultz makes the latter case. As part of her project, she examines employer harassment policies and identifies an emerging trend toward efforts to eliminate sex from the workplace.²⁰⁰ She points to bans on sexual jokes or innuendoes, no-fraternization policies, and “zero tolerance” policies under which all conduct with sexual overtones is prohibited and punished.²⁰¹ In an effort to avoid allegations of sexual harassment, employers are attempting to directly regulate social relations by formally banning sexuality from the workplace.

As one might expect, some employees working under these policies report an anxiety in social relations. These employees fear that any attempt to make a personal connection will prompt an accusation of sexual harassment and put them at risk of losing their jobs or reputations.²⁰² Indeed, one byproduct of current efforts to regulate sexual conduct in the workplace is the possibility that women and people of color are more likely to lose out

196. See, e.g., *White v. N. Hamp. Dep't. of Corrs.*, 221 F.3d 254 (1st Cir. 2000); *Allen v. Tyson Foods*, 121 F.3d 642 (11th Cir. 1993); *Cardin v. Via Tropical Fruits, Inc.*, No. 88-14201, 1993 U.S. Dist. LEXIS 16302 (S.D. Fla. July 9, 1993). See generally Schultz, *supra* note 87; Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 565 (2001).

197. See Kalev et al., *supra* note 105 (noting the prevalence of diversity training); Schultz, *supra* note 1 (pointing to punishment of individuals and desexualization of workplaces as an employer-driven solution); see also Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147 (2001) (noting the prevalence of diversity training programs and calling for empirical research on the effects of those programs on sexual harassment).

198. Catherine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 831 (2002).

199. See Schultz, *supra* note 1.

200. See *id.* at 2095-131.

201. See *id.* For a critical look at zero-tolerance policies, see Margaret S. Stockdale et al., *Coming to Terms with Zero Tolerance Harassment Policies*, 4 J. OF FORENSIC PSYCHOL. PRACTICE 65 (2003).

202. See Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1171-79 (2000) (documenting employee reactions to sexual harassment law). It is possible that other employees may actually welcome such policies. Cf. Bierman & Gely, *supra* note 115, at 176-77 (describing privacy considerations favoring employer pay confidentiality rules).

on important mentoring relationships because white men are worried about allegations of inappropriate conduct.²⁰³

Although Schultz argues that employers responded to sexual harassment law as a “cover” for a deeper motivation to desexualize work,²⁰⁴ she also recognizes that the difficulties in implementing sexual harassment law are in part a product of the complexities of using law to regulate social relations. Because the determination of whether particular conduct meets the legal standard of a hostile or abusive work environment is rarely clear, employers, looking for a bright-line rule to impose upon their employees, have settled upon sexual conduct and sexual relations. “No more intimate relationships and no sexual conduct in the workplace” is a rule that employees can easily grasp, and one that employers can then fairly enforce. Instead of focusing on the structural aspects of the problem of sexual harassment, employers have sought to develop and impose relational rules. Employees are no longer permitted to engage in certain social behavior, specifically, any social behavior involving sex. Not only does this approach stifle social connection; it also ignores the broader institutional context of segregation and subordination in which sexual harassment becomes a form of discrimination. It turns what should be understood as a problem of discrimination into a problem of individual sexual transgressions.

Even more so than with sexual harassment, discriminatory work cultures pose difficult questions about line drawing and the ability of law or employers to change worker social relations without destroying those relations. Not only will it be difficult for a legal rule to isolate the boundary between discriminatory and nondiscriminatory conduct; it will also be difficult for employers to adequately resolve the problem of discriminatory work culture by directly regulating social behavior. Taking into account the benefits of social relations in the workplace, the solution to a discriminatory work culture cannot be as simple as punishing employees who engage in certain social behavior, whether it be displays of tinkering or talking about sports.²⁰⁵ Nor can the solution be to pull back completely from social

203. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 355-56 (1995) (documenting reports by male lawyers that they avoid travel and closed-door meetings with female associates); *id.* at 376 (documenting reports by male lawyers of a “blanket rule not to dine or have drinks with women associates after late night work sessions or while working on a case”).

204. See Schultz, *supra* note 1, at 2064.

205. Employer efforts to directly regulate social relations in response to sexual harassment law, whether mandated by the law or a product of over-deterrence, have also raised First Amendment concerns. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 *OHIO ST. L.J.* 481 (1991); Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 *TEX. L. REV.* 687 (1997); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 *UCLA L. REV.* 1791, 1809-14 (1992). Although a thorough examination of the First Amendment issues raised by a proposal that would either require or lead to direct regulation of employees' social expression and speech is beyond the scope of

relations in determining job success. Indeed, there is reason to believe that informal personnel systems, at least in some circumstances, hold potential for equalizing job success by breaking down separate career trajectories for different groups.²⁰⁶

Rather than eliminating work culture and social relations at work altogether or forcing bureaucracy over flexibility in all workplaces, the goal should be to encourage employers to explore ways in which organizational choices may be used to broaden the range of interactional style so that demands to conform to work culture are not demands to conform to a white, male norm. Avoiding the dangers involved in directly regulating social behavior requires that we focus attention on the contextual factors over which employers have some real degree of control. For that reason, I suggest an approach that focuses attention on organizational context rather than on the social relations themselves.

2. *Normative Problems: Legal Determinations and Essentialism*

My second principal objection to establishing a new legal right to be free from discrimination by work culture rests on its normative implications. Focusing on work culture as a source of discrimination eases the essentialist difficulties inherent in an approach that turns on the centrality of particular traits or behaviors to protected group status.²⁰⁷ It does not, however, entirely avoid those difficulties, at least not if courts are expected to make legal determinations as to whether particular work cultures are discriminatory.

The essentialist concern most frequently articulated by scholars is that by legally recognizing certain behaviors or traits as central or essential to a protected group identity, those particular behaviors or traits will become ascribed to all members of that protected group.²⁰⁸ Richard Ford makes this point in discussing the case of the African American woman fired for wearing cornrows:

Suppose some black women employed by American Airlines wished to wear cornrows and advance the political message they ostensibly embody, and others thought cornrows damaged the

this article, many of these same concerns would make direct regulation of social relations in response to the problem of discriminatory work cultures problematic, if not unconstitutional.

206. See Marta M. Elvira & Christopher D. Zatzick, *Who's Displaced First? The Role of Race in Layoff Decisions*, 41 *INDUS. RELATIONS* 329 (2002) (suggesting that some formal personnel systems create separate career trajectories for different groups). *But see* Barbara F. Reskin & Debra Branch McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 *AM. SOC. REV.* 210, 214 (2000) (citing research suggesting that informal, subjective personnel practices increase the risk of reliance on stereotyping).

207. See *supra* Part III.C.

208. See Ford, *supra* note 120, at 56 (“[T]he ill effects of the codification of bad definitions of group culture and identity will not be limited to the litigant asserting the right: they will instead be deployed to regulate all members of the group.”).

interests of black women in particular and reflected badly on the race as a whole. . . . Now Rogers' claim is no longer plausibly described as a claim on behalf of black women. Instead, it is a claim on behalf of some black women over the possible objections of other black women.²⁰⁹

By shifting inquiry away from the question of whether certain behaviors constitute protected group identity, the concept of work culture eases this essentialist concern; a court need only decide that the particular work culture is impermissibly drawn along race or gender lines. A legal rights approach to discrimination by work culture, however, at least under existing legal theories, would still require a court to hold in each case that an employer discriminated against an employee or prospective employee by demanding conformity with a work culture defined along a white, male norm. In order to make that determination, the court must find that certain behaviors are associated with whites to a greater extent than nonwhites, or with men to a greater extent than women.²¹⁰ Of course, this sort of determination is implicit in any argument that work culture is drawn along racial or gender lines, but the determination is particularly problematic when made in isolation by legal ruling rather than contextually as part of a larger organizational inquiry.²¹¹ Placing a legal imprimatur on particular behavioral differences in isolation is likely to lead to group-based categorization, entrenched stereotypes, and connotations of inferiority.

These lingering concerns about the normative implications of a legal rights approach under existing legal theories, together with the practical difficulties inherent in legal regulation of complex social behavior, caution against such an approach. It may be possible to devise a legal theory that takes some of these concerns into account,²¹² but existing legal theories,

209. *Id.* at 39.

210. Indeed, this is the disparate impact approach proposed by Barbara Flagg and Roberto Gonzalez. See Flagg, *supra* note 2, at 2040 (identifying one of the factors that might enable one to distinguish between white-specific criteria and those that are genuinely race neutral: "that the criterion be associated with whites to a greater extent than with nonwhites"); Gonzalez, *supra* note 121, at 2222-23 (suggesting that courts would become entangled in making decisions about "actionable" group traits).

211. Flagg does recognize this risk when she explains that the disadvantage of her disparate impact approach is that it "treats white specificity as an issue of fact, in the sense that a particular criterion of decision either is white-specific, or it is not; in turn, that question depends on the existence *vel non* of some 'real difference' between racial groups." Flagg, *supra* note 2, at 2043-44. She goes on to rightly point out that "it is not the criterion in the abstract that is white-specific, but the criterion in the context of its usage." *Id.* at 2044. Indeed, in response to these concerns, Flagg proposes what she calls an "alternatives approach." *Id.* at 2044. Although Flagg attempts to incorporate this approach within existing disparate impact theory, its structural foundations and elimination of any showing of impact pull it far afield from that theory.

212. I have proposed one possibility in the form of a structural disparate treatment theory that would focus legal inquiry on employer enablement or facilitation of biased decision making in individuals and groups. Because, as social science research suggests, organizational decisions concerning allocation of power and the structure of work, among others, are likely to affect the various

even reformulated, fall short. In the next Section, I explore two possible alternatives to the legal rights approach. Although not without their difficulties, these alternatives (or related alternatives within the broader approach that they represent) might be used to provide a workable legal incentive for employers to engage in a context-specific inquiry and to undertake structural efforts to combat the problem of discrimination by work culture without triggering direct regulation of social relations or legal determinations of difference.

B. *Beyond Legal Rights: Possible Alternatives*

Another way to trigger attention to work culture as a source of discrimination is to devise a regulatory scheme that requires and then monitors a process of problem solving and self-regulation by employers.²¹³ This approach would take courts out of the business of delineating a clear line between discriminatory and nondiscriminatory behavior and instead place courts (or other legal bodies) in the role of facilitator and safeguard. Attention to patterns of bias and relational dynamics, inquiry into organizational influences on intergroup inequities, and context-specific efforts to reshape potentially discriminatory work cultures would become the hallmarks of the legal obligation, while long-term elimination of workplace discrimination, including discrimination by work culture, would serve as an overarching norm.

Law under this approach triggers change by setting broad aspirations at the top and delineating specific process-oriented requirements at the bottom, leaving room in the middle for regulated entities to devise the contours of reform. In this way, a legal requirement of employer self-regulation for discriminatory work culture would build on the existing nondiscrimination norm, a norm that carries with it a powerful social

cognitive and motivational biases in individuals that result in the development of work cultures along racial and gender lines, employers would be required under a structural disparate treatment theory to pay attention to structural choices and their effect on the development of work cultures. For a more in-depth exploration of this approach, see Green, *Discrimination in Workplace Dynamics*, *supra* note 1. This particular legal rights approach, however, does not expressly isolate work culture as a source of discrimination; rather, it incorporates culture within the larger context of workplace decision making.

213. This type of governance approach is being explored by scholars and activists in a variety of contexts. See, e.g., AYRES & BRAITHWAITE, *supra* note 3 (arguing in favor of “responsive regulation” and “enforced self-governance”); JEAN L. COHEN, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* (2002) (advancing a “reflexive law” paradigm to regulate intimacy); CHAYES & CHAYES, *supra* note 3, at 3 (advocating a “cooperative, problem solving approach” to international law compliance); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003) (exploring “experimentalist” or “problem solving” legal institutions); Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 465 (2002) (describing “devolved collaboration” as a new paradigm in environmental regulation); Freeman, *supra* note 3 (1997). In the employment discrimination context, Professor Susan Sturm has undertaken the most in-depth study of this approach, which she calls a “problem-solving approach.” Sturm, *supra* note 1, at 484; Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 282.

obligation of obedience.²¹⁴ At the same time, however, it would provide a coercive legal obligation to root out discriminatory work cultures and would establish monitoring mechanisms to ensure compliance with that obligation.²¹⁵

The Supreme Court has moved in this general direction in recent years by shaping legal doctrine to encourage employers to develop antidiscrimination policies and to engage in internal efforts to prevent harassment and other forms of discrimination.²¹⁶ The Court has held, for example, that an employer can avoid damages or liability for a hostile work environment created by a supervisor if the employer can show that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”²¹⁷ Similarly, the Court has held that an employer will not be held liable for punitive damages if it can show that it has undertaken “good faith efforts at Title VII compliance.”²¹⁸ In each of these instances, the Court has suggested that employers, rather than courts, should undertake the task of devising the precise contours of compliance measures.

A problem-solving approach, of course, is not without its difficulties, the most troubling of which is the risk of co-option by intermediaries, including but not limited to the entities being regulated.²¹⁹ A problem-solving approach to regulating discrimination by work culture necessarily leaves substantial discretion to employers and considerable room for the influence of other private intermediaries such as experts and lawyers. Because intermediaries have their own interests at stake, there exists a real risk that this

214. Numerous studies have documented an increased expressed endorsement of a nondiscrimination, egalitarian norm. See, e.g., JAMES M. JONES, PREJUDICE AND RACISM 93-100 (2d ed. 1997) (detailing studies showing an overall trend toward endorsement of the principle of racial equality in the 1970s); Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 248-49 (1993) (citing studies reflecting a change in attitude concerning sex equality); cf. Katherine Tate & Gloria J. Hampton, *Changing Hearts and Minds: Racial Attitudes and Civil Rights*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 167, 169-81 (Bernard Grofman ed., 2000) (describing some of the complexities of modern racial attitudes).

215. See *infra* note 222 and accompanying text.

216. Movement toward internal compliance regimes is not limited to employment discrimination. See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003) (describing internal compliance-based liability regimes under the Organizational Sentencing Guidelines, corporate and securities law, and sexual harassment law).

217. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998). For an argument that *Burlington* represents but one example of the disfavored status of harassment claims, see Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 355-56 (2004).

218. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999).

219. See Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Laws*, 97 AM. J. OF SOC. 1531, 1536 (1992). For a brief discussion of the process of intermediary mediation of equal employment law, see Green, *Targeting Workplace Context*, *supra* note 1, at 705-08.

approach will result in “sham, or symbolic internal processes that leave underlying patterns of bias unchanged.”²²⁰ Recent empirical research in the sexual harassment context gives added weight to this concern.²²¹

Nonetheless, the problem of discriminatory work culture cannot be addressed through simple legal mandate or punishment of discrete bad actors. The complex, contextual nature of the problem requires an equally complex, contextual solution, one that is not easily devised by outsiders. Moreover, if I am correct that we should avoid regulating social relations directly in this context, then the solution must be a long-term one, again suggesting that the businesses themselves are better suited to the task than are courts. Awareness of the risks of this approach, then, should lead to an emphasis on developing and maintaining adequate oversight, including an intensive, ongoing, interdisciplinary evaluation of employer efforts at reform, rather than abandonment of the project altogether.²²²

The recent business emphasis on diversity management presents a perfect example of precisely the type of intermediary mediation that some critics fear, at the same time that it illustrates the potential of a problem-solving approach. Alongside the managerial turn toward corporate culture as a tool of normative control and the structural shift from bureaucratic, scientific management to individualized career paths and an emphasis on

220. Sturm, *supra* note 1, at 490.

221. Indeed, there is reason to believe that internal grievance procedures and sexual harassment and diversity training, at least as currently implemented, are being used as symbols of compliance without any positive effect on the incidence of discrimination. See, e.g., Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. 1 (2001); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance*, 26 HARV. WOMEN'S L.J. 3 (2003). Although a detailed examination of the shortcomings of the Supreme Court's specific doctrinal formulations in this area is beyond the scope of this article, it may be that lower courts' unwillingness to engage in meaningful oversight has stemmed in part from the Court's own emphasis on specific compliance measures—antidiscrimination policies and internal grievance procedures—rather than on the broader employer obligation to exercise reasonable care to prevent and correct harassing behavior. See Bisom-Rapp, *supra* (revealing a lack of empirical foundation for the Court's assumptions about antidiscrimination policies and internal grievance procedures and examining the possible negative effects of diversity training programs on sexual harassment). Other problems with the law in this area have less to do with the difficulties of a problem-solving approach than with the specifics of the legal mandate and the disconnect between the Supreme Court's normative emphasis on reporting and internal grievance procedures and the reality of managerial and victim behavior. See Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117 (2001) (exposing the disconnect between courts' beliefs about how victims of sexual harassment “should” or “ought to” behave and the reality of the victims' situations).

222. The ongoing struggle to monitor compliance with international human rights laws and corporate codes of conduct suggests the importance of some governmental or public oversight. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 2023 (2002) (arguing for strengthened reporting requirements); Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347, 359 (1999) (describing the lack of effective monitoring provisions in corporate codes of conduct).

social relations, sociologists have identified a third trend in the business literature and human-relations industry: diversity management.²²³ The concept of diversity management is promising from an antidiscrimination perspective because it espouses the business benefits of difference over homogeneity.²²⁴ In practice, however, diversity management efforts have been largely divorced from organizational choices and from civil rights and intergroup equality concerns.²²⁵ The prevailing diversity rhetoric expressly disassociates diversity concerns from civil rights issues,²²⁶ and defines diversity broadly to include everything from race and gender to attitude, education, geography, and lifestyle.²²⁷ This diversity rhetoric, in turn, tends to shift attention away from systemic problems of discrimination and intergroup conflict and toward individualized solutions to individualized conduct. Not surprisingly, in fact, employer efforts to manage diversity have thus far tended to focus more on education measures aimed at individual

223. See Lauren Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. OF SOC. 1589 (2001). Not only has the business literature espoused diversity as a business concern, but employers seem to be taking it seriously. According to a 1991 study, 38% of medium to large organizations conducted some sort of diversity management program. See Frank Linnehan & Alison M. Konrad, *Diluting Diversity: Implications for Intergroup Inequality in Organizations*, 8 J. OF MGMT. INQUIRY 399 (Dec. 1999). A 1999 study of top Fortune 50 companies reported that 70% of the companies had already initiated a formal diversity management program and another 16% intended to do so. See David B. Wilkins, *From 'Separate is Inherently Unequal' to 'Diversity is Good for Business': The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556 n.41 (2004) (quoting ELIZABETH LASCH-QUINN, RACE EXPERTS: HOW RACIAL ETIQUETTE, SENSITIVITY TRAINING, AND NEW AGE THERAPY HIJACKED THE CIVIL RIGHTS REVOLUTION 163 (2001)). Several business rationales for valuing or managing diversity exist. Edelman and her colleagues trace the emergence of diversity rhetoric in the managerial literature to a 1987 report, *Workforce 2000*, that predicted a dramatic shift in the demographic makeup of the workforce. Drawing on this report, the business literature urges managers to promote diversity out of necessity. Employers are also urged to view diversity as a resource; it enhances responsiveness to diverse markets and increases creativity in team problem solving. See Edelman et al., *supra*, at 1618-19. For a discussion of this reasoning as it applies to African American men in law firms, see Wilkins, *supra*. For a description of some of the business-related rationales for valuing diversity in the workplace, see Linnehan & Konrad, *supra*.

224. Edelman et al., *supra* note 223, at 1590 (noting that according to the rhetoric, diversity should be valued and new management styles should be "flexible [and] willing to defer to the interests of individuals").

225. For a review of the business literature on diversity management and the limits of diversity management as currently conceived for intergroup inequality, see Linnehan & Konrad, *supra* note 223.

226. As the founder of the American Institute for Managing Diversity has explained:

[D]ealing with diversity is not about civil rights or women's rights; it is not about leveling the playing field or making amends for past wrongs; it is not about eliminating racism or sexism; and it is not about doing something special for minorities and women. Rather, it is about enhancing the manager's capability to tap the potential of a diverse group of employees.

R. Roosevelt Thomas, Jr., *Managing Diversity: A Conceptual Framework*, in DIVERSITY IN THE WORKPLACE: HUMAN RESOURCES INITIATIVES 311 (Susan E. Jackson & Assoc. eds., 1992).

227. See V. ROBERT HAYLES & ARMIDA M. RUSSELL, THE DIVERSITY DIRECTIVE: WHY SOME INITIATIVES FAIL AND WHAT TO DO ABOUT IT 11 (1997) (advocating a "broad, inclusive definition of diversity" including "all the ways in which we differ") (quoting Pillsbury Co. diversity materials); see also Edelman et al., *supra* note 223, at 1616-18 (surveying diversity rhetoric in the business literature for definitions of diversity).

behaviors and biases than on structural measures aimed at organizational influences on relational dynamics.²²⁸

At the same time that it gives cause for concern, the increased attention to diversity as a business matter also holds promise for those seeking to effect antidiscrimination reform. Employer efforts to manage diversity may provide a foothold for incorporating concern about the impact of organizational choices on worker relations and group-based inequity. It may be possible, in other words, to strengthen existing diversity management efforts by tying those efforts to civil rights and organizational choices through a legal incentive to undertake structural measures to combat discriminatory work cultures. I sketch here two such possibilities, one that builds on existing judicial doctrine and another that sets out a new administrative reporting requirement. By directing employer attention to the implications of organizational choices for day-to-day relational expectations and experiences, either of these alternatives, or both, would help counter the prevailing view that organizational choices about how to structure work are separate from nondiscrimination obligations and concerns about managing diversity.²²⁹

1. *A Doctrinal Alternative*

Building on the Supreme Court's recent doctrinal moves in the sexual harassment area, one way to trigger employer attention to work culture as a source of discrimination is to impose a heightened obligation on employers to avoid liability for instances of discrimination, whether in establishing the affirmative defense laid out in *Burlington Industries*²³⁰ or in defending an allegation of negligence. Specifically, under this doctrinal alternative, employers would be required to take reasonable steps to rid their workplaces of discriminatory work cultures as part of their obligation to exercise reasonable care to prevent and promptly correct all harassing behavior.

228. See Kalev et al., *supra* note 105 (documenting common diversity efforts: employee training, diversity performance evaluations for managers, and networking and mentoring programs); MARY J. WINTERLE, WORK FORCE DIVERSITY: CORPORATE CHALLENGES, CORPORATE RESPONSES 21 (1992) (reporting a 1991 survey of 406 organizations that showed that 63% provided diversity training to managers; 39% provided diversity training to employees; 50% had a statement on diversity from top management; and 31% had a diversity task force).

229. These two options by no means exhaust the realm of alternatives within a problem-solving approach. Another possibility might be to build more directly on the recent movement toward mediation of civil rights disputes, *see, e.g.*, Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws*, 78 TUL. L. REV. 1401, 1417-21 (2004) (discussing the EEOC's mediation program), or internal dispute-resolution systems. Nor are these alternatives intended to cut off attempts to formulate a workable legal right that captures the harms of discrimination by work culture. *Cf.* Green, *Discrimination in Workplace Dynamics*, *supra* note 1 (suggesting one possible legal rights approach that emphasizes change in organizational context). Rather, it is my hope that consideration and implementation of either or both of these alternatives will set the foundation for a more in-depth, interdisciplinary conversation about strategy and specifics.

230. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

This requirement would leave intact the existing standard for determining whether a particular environment was hostile or abusive to a particular victim, while broadening the corrective and protective lens to include work culture.

Although the precise efforts would necessarily vary from situation to situation, an employer faced with a harassment complaint under this alternative would be required to undertake a diagnostic investigation into the possibility that a broader discriminatory work culture may have resulted in the particular harassing conduct. Such an investigation would entail at minimum, I expect, an examination of the makeup of the work group and interviews with workers to discern the contours of the operative work culture.²³¹ Rather than making an across-the-board determination that a particular type of work culture is always discriminatory, the employer would be expected to engage in a contextual inquiry that would take into account the present and historical specifics of the organizational setting. And, given the risks of overregulation and backlash inherent in attempts to regulate social relations directly, reasonable efforts to rid workplaces of potentially discriminatory work cultures should center primarily on structural influences over which employers have some degree of control.²³² Depending on the circumstances, the employer might devise measures to diversify the work group,²³³ reallocate organizational authority, or impose formal authority structures to disestablish long-standing informal power bases.²³⁴ In this

231. The scope of this inquiry would be determined in part by the nature of the individual complaint. In other words, if the complaint involves harassing behavior by a male supervisor against one female employee, the employer might check for patterns of lower promotion rates of women in that department, or for complaints by other female employees that do not involve sexual behavior but that may still indicate a broader discriminatory work culture.

232. The interpretation of reasonableness would depend, of course, on the courts; this highlights one of the limitations of this particular alternative. *See supra* Part IV.B.

233. Social science research suggests a number of ways that employers might undertake desegregation of problematic work groups without making race- or sex-based employment decisions. An employer might, for example, rework a decentralized, subjective decision-making system to reduce the influence of stereotypes and biases on promotion and assignment decisions, *see Reskin & McBrier, supra* note 206, at 214, 222-24; it might restructure a promotion or task-assignment system that relies heavily on networking and informal mentoring relationships to expand recruitment and outreach efforts, *see Reskin, supra* note 1, at 324; or it might establish benchmarks and systems of managerial accountability for diversity, *see id.* at 325-26.

234. *See supra* notes 100-04 and accompanying text. The business literature on corporate culture may have some role to play in this process. Employers might turn to those sources as part of a larger interdisciplinary inquiry into possible measures for reform. Case studies of some successful approaches to diversity management would also be useful. *See, e.g., DIVERSITY IN THE WORKPLACE* (Susan E. Jackson et al. eds., 1992) (presenting three case studies of employers who took structural measures to manage diversity within their institutions); ANN M. MORRISON, *THE NEW LEADERS: GUIDELINES ON LEADERSHIP DIVERSITY IN AMERICA* (Leonard Nadler & Zeace Nadler eds., 1992) (providing case-based research and suggestions for successful management of diversity); DAVID A. THOMAS & JOHN J. GABARRO, *BREAKING THROUGH: THE MAKING OF MINORITY EXECUTIVES IN CORPORATE AMERICA* (1999) (deriving lessons from recent case studies); Debra E. Meyerson & Joyce K. Fletcher, *A Modest Manifesto for Shattering the Glass Ceiling*, *HARV. BUS. REV.* 127 (Jan.-Feb. 2000) (illustrating how three companies used incremental change and problem-solving techniques to bring about systemic

way, broader organizational context and the work culture that it supports would become part of the employer's obligation to correct and prevent individual instances of discriminatory harassment.²³⁵

The most immediate drawback of this alternative, of course, is its possible limitation to cases in which an employee has been subjected to severe or pervasive harassment that amounts to a legally recognized hostile work environment and in which a particular employee has complained.²³⁶ Relatedly, the scope of inquiry may be too narrow to be effective. If the employer's obligation to inquire into discriminatory work culture is tied directly to a particular incident of harassment, the employer is less likely to engage in the type of systemic, ongoing attention to patterns of segregation needed for meaningful change.²³⁷

Nonetheless, even recognizing these limitations, the benefits of this alternative lie in its ease of implementation (it could be implemented by judicial interpretation, without statutory amendment or administrative ruling), and in its potential to establish norms in a grievance process that might cross over into other efforts to mediate employee conflict. Recognition of work culture as an organizational source of harassing behavior may lead to consideration of work culture as a source of discrimination more broadly. Even without a formal legal right to be free from discrimination by work culture, mediation of employee complaints in other contexts—in allocation of promotion opportunities, for example—might trigger employee awareness of and employer attention to behavioral expectations and work culture demands as a problem of intergroup conflict within a larger organizational setting rather than as simply a problem of interpersonal difference.²³⁸

change in their organizational structures); David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Diversity Management*, HARV. BUS. REV. 79 (Sept.-Oct. 1996) (presenting case studies reflecting different approaches to managing diversity). Like the corporate culture literature, however, the diversity management literature should be viewed critically as one part of a multifaceted search for meaningful measures for reform rather than adopted wholesale.

235. In *The Sanitized Workplace*, *supra* note 1, Professor Vicki Schultz makes a similar proposal, albeit one implemented through the contours of a substantive legal right. Specifically, she proposes that the risk of liability for sexual harassment be tied to "the degree to which the employer has achieved sex integration and equality in the relevant positions." *Id.* at 2174. Although I agree with Professor Schultz that desegregation is probably the most crucial contextual influence on the shape of work culture, at least given current research, I think an exclusive focus on desegregation is a mistake, for it tends to conceptualize the problem and its possible solutions too narrowly, without adequate emphasis on structural sources of segregation and organizational change.

236. If it is true that traditional forms of sexual harassment are likely to be less prevalent in work environments in which work cultures, at least nonsexual ones, are strong, *see supra* note 159, then incorporating work culture into the corrective and protective obligation of sexual harassment law would make little direct headway in combating discriminatory work cultures more broadly.

237. *See* Bielby, *supra* note 1, at 126 (2000) (citing the importance of regular monitoring and analysis of segregation patterns in reducing workplace bias).

238. *See, e.g.,* Anne Donnellon & Deborah M. Kolb, *Constructive for Whom? The Fate of Diversity Disputes in Organizations*, in USING CONFLICT IN ORGANIZATIONS 161 (Carsten K.W. De

2. *An Administrative Alternative*

Another possible alternative is to require that employers file an annual report with the Equal Employment Opportunity Commission (EEOC) documenting structural efforts taken to prevent or reshape potentially discriminatory work cultures.²³⁹ This alternative would have the advantage of focusing employer attention directly on work culture as a source of discrimination and, specifically, on changing contextual influences, without the doctrinal constraints of hostile work environment theory and uncertainties of judicial interpretation.

Although stopping short of establishing a legal right to be free from discriminatory work culture, an administrative obligation might tie into existing legal theories, particularly systemic disparate treatment theory. The EEOC could use the work culture report for investigative purposes and as a tool in conciliation efforts and prelitigation negotiation. Ultimately, an employer's failure to take adequate measures to combat a potentially discriminatory work culture might even be used as evidence of intent to discriminate in a systemic disparate treatment case.²⁴⁰ In several recent large-scale class action lawsuits, in fact, plaintiffs have argued that an employer's failure to adequately follow through with diversity initiatives suggests intent to discriminate.²⁴¹

Dreu & Evert Van de Vliert eds., 1997) (arguing that organizations often suppress diversity discourse in conflict resolution and suggesting widening the scope of diagnosis as one way to open diversity discourse); Emily M. Calhoun, *Workplace Mediation: The First-Phase Private Caucus in Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187 (2004) (arguing in favor of a first-phase private caucus in mediation to cultivate a group presence in individual disputes).

239. The EEOC should have the authority to require such a report, by regulation, as part of its powers under 42 U.S.C. § 2000e-8(c). That regulation states:

[E]very employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder.

Id. For administrative simplicity, I expect that the procedural requirements of a work culture report might mirror those of the existing EEO-1 filing requirement. See 29 C.F.R. §§ 1602.7-.14 (2004) (requiring that all employers subject to Title VII with 100 or more employees file an "Equal Information Report EEO-1" providing employment data on race/ethnicity, gender, and job category). Making willfully false statements on an EEO-1 report is punishable by fine or imprisonment. See 29 C.F.R. § 1602.8 (2004).

240. Failure to take adequate measures to reshape discriminatory work cultures might be considered evidence of an organizational intent to discriminate, see *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) (emphasizing that the ultimate inquiry in a systemic disparate treatment case is whether the employer engaged in "purposeful discrimination"), or of a failure to undertake "good faith efforts at Title VII compliance," see *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999) (establishing the standard for holding an employer vicariously liable for punitive damages).

241. See, e.g., *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1261-62 (N.D. Cal. 1997) (permitting the testimony of Dr. Mary Gentile that Home Depot knew of and refused to implement

Again, the precise contours of employer measures to prevent or re-shape potentially discriminatory work cultures would necessarily vary from institution to institution. As a general matter, though, an employer's work culture report would be expected to reflect both diagnostic efforts, such as systemic analyses of workplace demographics and conversations with employees about the specific contours of expected behaviors, and remedial efforts, such as the establishment of benchmarks and other measures to increase demographic diversity within work groups, the alteration of decision-making systems to disentrench existing power structures, and the use of formal rewards to offset informal demands for conformity with white, male behavioral norms.²⁴² The EEOC reporting requirement might also lead employers to establish diversity committees or hire diversity staff or outside experts to formulate context-specific plans.²⁴³ The EEOC, in turn, might compile information from the reports for use in highlighting best practices, which other employers could then use to devise and implement their own programs.²⁴⁴

This administrative alternative, too, has its limitations. There is an obvious risk in leaving enforcement to the vagaries of changing administration budgets and policies. As enforcement of the affirmative action mandate of Executive Order 11246 illustrates, administrations vary considerably in their willingness and ability to enforce their stated commands.²⁴⁵ This risk is not peculiar to the particular proposal, for EEOC enforcement of Title VII also waxes and wanes with administration turnover, but without private litigant enforcement, a reporting obligation will be even more susceptible to administrative capture. Indeed, EEOC use of existing reporting requirements has been criticized as too limited.²⁴⁶

essential features of an effective diversity plan as evidence that Home Depot intentionally discriminated against women in hiring, initial assignment, promotion, and compensation); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (citing Wal-Mart's alleged failure to follow through with its diversity efforts as an issue common to all plaintiffs' claims of intentional discrimination).

242. See *supra* notes 233-34 and accompanying text. In the engineering firm with a work culture that favors frequent displays of tinkering, for example, the employer might formally reward excellent engineers who do not engage in those displays, but who achieve other measures of success.

243. See Kalev et al., *supra* note 105 (showing a link between the creation of diversity plans, diversity staff positions, and diversity committees and change in vertical and horizontal demographics).

244. See Michael C. Dorf, *The Domain of Reflexive Law*, 103 COLUM. L. REV. 384, 398-99 (2003) (describing the role of the EEOC in "ratchet[ing] up" performance standards).

245. See Bernard E. Anderson, *The Ebb and Flow of Enforcing Executive Order 11246*, 86 AM. ECON. REV. 51 (1996) (detailing shifts in enforcement of affirmative action requirement over a thirty-year period).

246. See Alfred W. Blumrosen & Ruth G. Blumrosen, *Intentional Job Discrimination: New Tools for Our Oldest Problem*, 37 U. MICH. J.L. REFORM 681, 698-700 (2004) (calling for expanded EEOC use of EEO-1 data and release of the data for research use); Alfred W. Blumrosen & Ruth G. Blumrosen, *The Reality of Intentional Job Discrimination in Metropolitan America* (2002), available at <http://www.rci.rutgers.edu>, at 4-5 (criticizing administrative use of EEO-1 reports); *id.* at 31 (noting that one-third of the employers required to file an EEO-1 report failed to do so).

Despite the challenges, these alternatives hold the potential to tie existing diversity management efforts to civil rights concerns. Inserting some public oversight and monitoring into what is now framed as a purely private endeavor increases the likelihood that diversity management efforts will result in meaningful reform, and emphasizing structural measures aimed at organizational influences on relational dynamics broadens the focus of diversity management beyond education aimed directly at reducing individual biases. At the same time, leaving room for employers to devise context-specific programs for reform acknowledges the complexity of the problem of discriminatory work cultures and its interrelation to business-driven diversity concerns.²⁴⁷

Still, beyond the specifics of either of these possible alternatives, and skepticism more generally about the efficacy of a problem-solving approach, I expect that some will object to the sheer ambition of my endeavor. At a time when women and people of color face a number of more easily identifiable barriers to success, such as formal work requirements and lack of child care options, it may seem somewhat unrealistic to undertake the admittedly complex task of influencing social relations. To this objection, I have a definite response. Employers *already are* influencing social relations, whether through overt efforts aimed at shaping work culture or more indirect efforts to restructure work and the employment relationship. Accordingly, they should be required to consider the ways that those decisions (as well as other organizational choices) can perpetuate, enable, or, on the positive side, break down segregation and subordination in the workplace.

CONCLUSION

We cannot continue to ignore the role that work culture plays in shaping expectations and measuring merit in the workplace. As employers focus on culture as a means of employee control and pull back from formal job descriptions, individual work assignments, and clearly delineated, hierarchical paths for success, social relations, and the willingness and ability to engage in the behavioral expectations associated with work culture, become crucial to job success. A move toward work culture over more formal

One way to strengthen enforcement of an administrative reporting requirement might be to make the reports available to the public. Even without this additional oversight, though, recent empirical research suggests that an administrative obligation, even one rarely enforced, can have a positive effect. See Kalev et al., *supra* note 105.

247. In this way, concern about work culture as a source of discrimination becomes part of, and benefits from, the business case for diversity. See Krawiec, *supra* note 216; see also Debra E. Meyerson & Robin J. Ely, *Using Difference to Make a Difference*, in *THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP* 136 (Deborah L. Rhode ed., 2003) (describing an approach to understanding women and leadership that is driven "not only by concerns about equity and justice but also by concerns about the relatively limited knowledge and experience base on which organizations have traditionally operated").

methods of control is not necessarily harmful from an antidiscrimination perspective, for it is possible that an increased emphasis on workplace social relations will enhance employees' lives and build bridges for meaningful social change. By failing to account for the tendency of work cultures to develop along racial and gender lines, however, we risk entrenching inequality in the guise of ability and personal choice.

In this Article, I have framed an expanded antidiscrimination discourse that isolates work culture as a source of discrimination and puts legal pressure on employers to devise meaningful programs for reform. Understanding the complexities of work culture, including its relational and organizational dimensions, both exposes the difficulties in the endeavor for change and facilitates the development of workable legal incentives. At the same time, I have purposefully pushed our conception of law beyond legal rights to explore alternatives for combating some of the more subtle, ongoing forms of discrimination that operate alongside those that are traditionally recognized. By opening our eyes to the various ways in which discrimination operates and opening our minds to a broader range of legal incentives, it is my hope that we can begin to build a comprehensive scheme for regulating discrimination in employment.