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The Structural Turn and the Limits of Antidiscrimination Law

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INTRODUCTION

Although we often think of the notion of “institutional” racism or sexism as a recent development, in fact the idea has been around for a long time.¹ Many of the original drafters of the Civil Rights Act of 1964 expressed a desire to address what Senator Humphrey called the “many impersonal institutional processes which nevertheless determine the availability of jobs for nonwhite workers.”² Although the statute Congress ultimately enacted fell short of Senator Humphrey’s hopes on that score,

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1. See, e.g., INSTITUTIONAL RACISM IN AMERICA (Louis L. Knowles & Kenneth Prewitt eds., 1969); JOE R. FEAGIN & CLAIRECE BOOHER FEAGIN, DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM 12-14 (1978). The term “institutional racism” was popularized by Charles Hamilton and Stokely Carmichael in CHARLES HAMILTON & STOKELY CARMICHAEL, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA (1967).

2. William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 713 (2000) (quoting Senator Hubert Humphrey, testifying in 1963 before the Senate Labor Committee) (internal quotation marks omitted).

hints of a structural approach to discrimination live on (if perhaps on life support) in doctrines such as disparate impact.³

In the past decade, a number of academics have sought to revive the structural emphasis urged by Senator Humphrey in the original 1964 debates. These scholars have turned toward developments in regulatory theory to address the pathology of today's structural discrimination. Their efforts have been fueled by the empirical and experimental findings of social psychologists on the persistence of unconscious bias and informed by the proliferation of flexible workplace structures that have made traditional tools of antidiscrimination law less effective.⁴

This "structural turn" in antidiscrimination scholarship responds to real problems. Although most Americans' overt attitudes toward race and gender have become increasingly egalitarian over the past four decades, severe employment inequalities persist. Wage disparities, glass ceilings, and other barriers remain in place. In part, that is because workplace structures facilitate conduct—often driven by subtle or unconscious bias—that operates as a drag on the achievements of members of historically excluded groups.⁵ Professor Susan Sturm has labeled this phenomenon "second generation" discrimination,⁶ and it is a phenomenon to which any effective workplace equality policy must attend.

In this Article, I examine the recent proposals for a structural approach to employment discrimination law. But, unlike much of the

3. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). For accounts of the current vitality (or lack thereof) of the disparate impact theory, see John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 (1991) (concluding that disparate impact theory "appears to have had only an extremely modest influence on the volume of litigation"); Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1204-07 (2000) (discussing "the decline of disparate impact"); George Rutherglen, *Discrimination and its Discontents*, 81 VA. L. REV. 117, 136 (1995) (asserting that "the theory of disparate impact has not been used frequently in litigation, even after the Civil Rights Act of 1991"); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 597 (2004) ("Despite the heroic effort of Congress to keep the theory from destruction by the Supreme Court through its express codification in 1991, disparate impact litigation is not making a major impact in this new century."); Charles A. Sullivan, *Disparate Impact: The Path Out of the Desert?* 43-49 (2005) (unpublished manuscript, on file with author) (discussing limits courts have placed on disparate impact litigation since codification of the disparate impact doctrine in the Civil Rights Act of 1991).

4. See *infra* Part I.

5. Of course, these inequalities also persist because of a whole constellation of deeper inequalities—in wealth, educational opportunities, and so forth—that come into play well before individuals apply for jobs with particular employers. Any just social policy should attack those deeper inequalities. But as I suggest in Part III, *infra*, the difficulties with using antidiscrimination law to address problems of subtle bias in the modern workplace would apply to the same or to a greater extent to any effort to use that body of law to attack such deeper structural inequalities. Cf. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 23 (2004) (arguing that antidiscrimination law cannot eliminate structural inequalities that operate before an individual is in a position to seek a job).

6. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

existing literature, my story is not an optimistic one. To the contrary, I believe that the structural turn in employment discrimination scholarship is best understood as highlighting the limits of antidiscrimination law. Perhaps paradoxically, I believe so in part because I find the case for a structural approach to employment discrimination law so compelling. Unconscious bias, interacting with today's "boundaryless workplace,"⁷ generates inequalities that our current antidiscrimination law is not well equipped to solve. In spite of its limits, a structural approach to employment discrimination law may be the best hope for addressing those inequalities.

But there are significant obstacles to the success of a structural approach to antidiscrimination law. In spite of doctrines that already seem to impose on courts the obligation to police workplace structures that might facilitate discrimination, judges have proven unwilling or unable to discharge that responsibility with rigor. The new proposals seek to sidestep that history, but they do so largely by urging judicial deference to professional communities—such as those of human relations professionals and lawyers—that are as likely to subvert as to promote norms of workplace equality.

These difficulties are mere symptoms of a deeper problem: structural employment inequalities cannot be solved without going beyond the generally accepted normative underpinnings of antidiscrimination law. Because courts and legislatures have proven unable or unwilling to take that step, structural discrimination advocates essentially proceed by indirection. They seek to develop rules that will empower workplace constituencies who will internalize and advance the correct vision of equality. But unless courts have some normative idea of what workplace equality should mean, they will be unable to ensure that those workplace constituencies will serve the purposes of antidiscrimination law.

The argument in this Article is in many ways an extension of my earlier work in the disability discrimination area. I have previously argued, for example, that political attacks on the Americans with Disabilities Act's (ADA) accommodation requirement portend a more general challenge to antidiscrimination law. I contended that "any attempt to defend *either* anti-discrimination or accommodation law will soon be forced to confront directly the costs imposed by the law and its distributive effects."⁸ In this Article, I elaborate on that theme by showing how proposals for a structural approach to employment discrimination law highlight the limited political support for extending antidiscrimination law beyond the widely

7. Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 553-54 (2001).

8. Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 914-15 (2003).

accepted class of cases involving employer fault. In a related vein, I have also argued that courts resist interpreting the ADA to hold employers liable for inequalities that are not readily perceived as the employer's responsibility—even if the employer failed to exercise available opportunities to alleviate those problems.⁹ As I argue below, a similar dynamic is likely to undercut a structural approach to other areas of employment discrimination law.

My argument proceeds as follows. Part I offers a “restatement” of the case for a structural approach to employment discrimination law. In that Part, which brings together work by a number of scholars—not all of whom would necessarily consider themselves participants in the structural turn—I hope to show the power of the arguments for a structural approach. In Part II, however, I argue that there is little reason to believe that a structural approach to employment discrimination law will actually be successful. In Part III, I contend that the likely failure of a structural approach is just one example of a broader challenge that employment discrimination law faces: today's problems of workplace bias may lie beyond the reach of not just the doctrinal tools but also the normative resources of antidiscrimination law. The challenge for civil rights advocates, then, is not to devise new doctrines so much as it is to convince judges and the broader political community that employers should be held responsible for structural problems of workplace inequality when they are not taking sufficient steps to counteract those problems. There may be ways of doing this, and a structural approach may be helpful in suggesting some means of facilitating collaborative workplace reform, but the task is much more difficult than the existing literature seems to assume. In the end, social and not legal change is what will be necessary to eliminate structural workplace inequalities.

I

THE EMERGING CASE FOR STRUCTURAL EMPLOYMENT DISCRIMINATION LAW: A RESTATEMENT

In this Part, I offer a “restatement” of the case for a structural approach to employment discrimination law. In doing so, I attempt to construct the best possible argument for such an approach based on the existing literature. My effort in this Part sets the stage for Part II, where I highlight the limitations of the structural endeavor. Before I get to the limits, however, I hope readers will see the strengths and importance of the argument for a structural approach.

The recent scholarship urging a structural approach to employment discrimination law makes three basic arguments, which are two parts diagnosis and one part prescription. First, relying on the findings of social

9. See Bagenstos, *supra* note 5, at 50-54.

scientists (particularly social psychologists), many scholars contend that modern-day employment discrimination is characterized less by overt, intentional discrimination than by unconscious or subtle biases. Second, a number of scholars observe that changes in the nature and organization of work over the past few decades have made employment discrimination less a problem of discrete, harmful management decisions and more a problem arising from workplace interactions among workers at all levels of an occupational hierarchy. Third, some of those scholars point to emerging developments in regulatory theory that suggest ways in which employment discrimination law could be retooled to address structural problems of discrimination. Taken together, these three arguments represent the pillars of the emerging case for a structural approach to employment discrimination law.

A. *The Diagnosis: The Need for a Structural Approach*

1. *The Importance of Unconscious and Subtle Bias*

In an influential article published in 1987, Professor Charles Lawrence urged the legal system to “[r]eckon[] with [u]nconscious [r]acism.”¹⁰ His article relied on both Freudian psychoanalytic theory and the findings of cognitive psychologists to argue that unconscious bias is a pervasive aspect of everyday life.¹¹ In the past decade, a number of scholars have taken up Professor Lawrence’s project and given added momentum to the notion that unconscious or subtle bias is a major contributor to today’s problems of workplace inequality.

Social psychologists have demonstrated that implicit biases against women and racial minorities remain widespread.¹² Their findings may be surprising. After all, surveys consistently report that expressed attitudes of racism and sexism have declined substantially over the years.¹³ Those

10. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 317 (1987).

11. *See id.* at 331-44.

12. For a recent review of this literature by a psychologist, see Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004). For a recent review by a legal scholar, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); *see also* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 750-59 (1995) (reviewing social-psychological literature on unconscious bias); Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 602-12 (2000) (same); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415, 421-46 (2000) (same); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 902-15 (1993) (same); Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 321-23 (2000) (same).

13. *See* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA 103-18 (rev. ed. 1997); John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3, 4 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) [hereinafter Dovidio & Gaertner,

surveys accord with common experience, in which there seems to be a great deal more social and economic integration of minority and majority racial groups, and of women and men, than existed before the civil rights era.¹⁴ Nonetheless, measures of *implicit* bias—such as the implicit association test (IAT), which assesses bias by measuring the speed with which an individual associates a categorical status (such as black or white) with a given characteristic or description (such as good or bad)—show that such bias is widespread.¹⁵

As Professor Nilanjana Dasgupta summarizes the research,

By now almost a hundred studies have documented people's tendency to *automatically* associate positive characteristics with their ingroups more easily than outgroups (i.e., ingroup favoritism) as well as their tendency to associate negative characteristics with outgroups more readily than ingroups (i.e., outgroup derogation).¹⁶

On the Nature]; John F. Dovidio & Samuel L. Gaertner, *Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches*, in PREJUDICE, DISCRIMINATION, AND RACISM 1, 3-8 (John F. Dovidio & Samuel L. Gaertner eds., 1986); David O. Sears, *Racism and Politics in the United States*, in CONFRONTING RACISM, *supra*, at 76, 80; see also Howard Schuman & Maria Krysan, *A Historical Note on Whites' Beliefs About Racial Inequality*, 64 AM. SOC. REV. 847, 854 (1999) ("[A]n important trend over the past half century . . . is the liberalization of the racial attitudes of white Americans."). For a powerful argument that racial attitudes really have not improved, see MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 36-43 (2003). That argument finds some support in data reported by Professor Schuman and his colleagues that fewer whites express support for *policies* implementing general principles of equality than express support for the *principles* themselves. See SCHUMAN ET AL., *supra*, at 137; see also JAMES M. JONES, PREJUDICE AND RACISM 94 (2d ed. 1997) ("Whereas the trends in white's [sic] attitudes toward general principles of racial equality were uniformly positive, attitudes toward implementation showed a growing belief that the government should do *less* to achieve the principles of racial equality."); Schuman & Krysan, *supra*, at 854 (describing whites' "increased blaming of blacks for black disadvantage").

14. See, e.g., ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999, at 20-23 (2002) (discussing improvement in job opportunities for minorities and women between 1975 and 1999); Sears, *supra* note 13, at 80 ("[T]here has been very real progress in race relations in the United States, incorporating blacks much more thoroughly as equals into U.S. society. There has been much successful integration of the workplace, higher education, and political life."). Even some of the biggest skeptics about America's progress on these matters agree with this point. See BROWN ET AL., *supra* note 13, at 69 ("No doubt labor market discrimination has diminished in the past sixty years, and whites are clearly less prejudiced today than they were in 1940.").

15. For a recent review of studies employing the IAT to measure bias, see Mahzarin R. Banaji, *The Opposite of a Great Truth is Also True: Homage to Koan #7*, in PERSPECTIVISM IN SOCIAL PSYCHOLOGY: THE YIN AND YANG OF SCIENTIFIC PROGRESS 127, 130-38 (John T. Jost et al. eds., 2004).

16. Dasgupta, *supra* note 12, at 146 (emphasis added); see also Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 242 (2002) (stating that "over 100 studies have documented that Whites have automatic negative associations with Blacks (or other non-White groups), young adults have automatic negative associations with the elderly, and both men and women automatically associate males and females—as well as a variety of occupational and societal groups—with stereotypic attributes"); Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 383-409 (2000) (discussing a range of

Professor Dasgupta points to several findings of the experimental literature that have particular importance for employment discrimination law:

White Americans, on average, show strong implicit preference for their own group and relative bias against African Americans.... Similar results have been obtained in terms of White Americans' implicit attitudes toward other ethnic groups such as Latinos, Jews, Asians, and non-Americans... [and there is] plenty of evidence for the pervasiveness of stereotypic beliefs about outgroups especially when those outgroups are racial minorities, the elderly, and women.¹⁷

Notably, even people who express strongly egalitarian attitudes often show significant implicit biases.¹⁸ These implicit biases have been shown to affect both the ways in which individuals evaluate the conduct of others and a range of behaviors, including friendliness toward members of minority groups, the questions asked in job interviews, and decisions about who should be hired for a job¹⁹—though those findings arise from experimental settings rather than real-world observations.²⁰

Relying on this work, a number of legal scholars have emphasized the way that stereotypes, operating through the ordinary cognitive processes of categorization, interact with broadly held societal attitudes.²¹ “In a culture

theories explaining pervasive sympathy toward members of one's own “in-group”); see generally Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 7, 13 (Stephen Worchel & William G. Austin eds., 2d ed. 1986) (citing a number of studies suggesting “that in-group bias is a remarkably omnipresent feature of intergroup relations”).

17. Dasgupta, *supra* note 12, at 147-48 (citing approximately forty studies) (citations omitted). Interestingly, members of less advantaged groups (*viz.*, minorities and women) often harbor implicit outgroup preferences—that is, they often harbor the same stereotypes about their own groups as white men harbor about them. See *id.* at 149.

18. See Kang, *supra* note 12, at 1512 (noting “overwhelming evidence that implicit bias measures are *dissociated* from explicit bias measures” (emphasis added)). In part, of course, this differential may be attributable to insincere responses to surveys of explicit racial attitudes. See BROWN ET AL., *supra* note 13, at 41 (“Because most surveys tap only surface commitment or verbal adherence to ideals, polling data may reveal more about the correlation between self-presentation and socioeconomic class than about the persistence of racism.”); SCHUMAN ET AL., *supra* note 13, at 306 (“It seems to us highly likely that at least some number of white responses to survey questions today are affected by social pressure to give racially liberal answers.”). But that is not the whole story. Even political liberals who support broad-ranging civil rights measures can show significant implicit bias on the IAT. See, e.g., IAN AYRES, *PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 427 (2001) (reporting Professor Ayres's own IAT results).

19. See Dasgupta, *supra* note 12, at 151-57.

20. See Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1139-41 (1999). For a general critique of the implicit bias literature, see Philip E. Tetlock & Hal R. Arkes, *The Implicit Prejudice Exchange: Islands of Consensus in a Sea of Controversy*, 15 PSYCHOL. INQUIRY 311 (2004).

21. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-217 (1995). On the connection between social stigmas and cognitive stereotypes, see Monica Biernat & John F. Dovidio, *Stigma and Stereotypes*, in *THE SOCIAL PSYCHOLOGY OF STIGMA* 88, 91-92 (Todd F. Heatherton et al. eds., 2000); see also Armour, *supra* note 12, at 755-56 (“[T]he black stereotype is established in

in which race, gender, and ethnicity are salient,” Professor Linda Krieger concludes, “even the well-intentioned will inexorably categorize along racial, gender, and ethnic lines.”²² These invisible cognitive processes affect the way individuals perceive the world and judge events within it. They can therefore have a direct effect on hiring, evaluation, and promotion decisions²³—though there remains substantial controversy regarding just how much of an effect they have on those decisions, or even how frequently they operate.²⁴

Recognition of the pervasiveness of implicit bias lends support to a structural approach to antidiscrimination law. There is some question whether existing antidiscrimination law even prohibits actions driven by unconscious bias.²⁵ But even assuming those actions violate the law as a formal matter, such violations are extremely difficult to prove. Unconscious biases “sneak up” on a decisionmaker.²⁶ They affect perceptions and evaluations of an employee in innumerable encounters that occur well before any discrete moment of work-assignment, promotion, or discharge.²⁷ By the time the manager actually makes such a decision, the die may have already been cast by the earlier, biased perceptions. At that point,

children’s memories before children develop the cognitive ability to critically evaluate and decide on the stereotype’s acceptability. Further, the social environment, including the mass media, incessantly reactivates this stereotype.”) (footnotes omitted); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1561-62 (1989) (discussing how broader social stereotypes about race affect the cognitive processes of categorization in individuals); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1808 (2000) (discussing mechanisms by which “understanding[s] of race” become “so widely shared within a community that [they] operate[] as an unexamined cognitive resource for understanding one’s self, others, and the-way-the-world-is”).

22. Krieger, *supra* note 21, at 1217; *see also* Armour, *supra* note 12, at 759 (concluding that “we are all prone to stereotype-congruent or prejudice-like responses to blacks and other stereotyped groups”).

23. *See* Krieger, *supra* note 21, at 1199-211. For good discussions from the psychological literature, *see* JONES, *supra* note 13, at 190-95; Biernat & Dovidio, *supra* note 21, at 96-98. Along similar lines, Professor Barbara Flagg has emphasized the degree to which white decisionmakers are unconscious of the ways in which behaviors and norms associated with whiteness drive their decisionmaking. *See* Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Barbara J. Flagg, “Was Blind, But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

24. *See* Wax, *supra* note 20, at 1141.

25. *See, e.g., id.* at 1146-52 (citing sources on both sides of the dispute and concluding that the better reading of Title VII is that the statute prohibits actions motivated by unconscious bias, but that “current doctrine and practice are stacked against recovery in many cases”); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 498-99 (2001) (stating that “Title VII *should* be interpreted, and the Supreme Court’s decisions can and *should* be read, as rejecting a requirement of conscious intent,” but that in the lower courts “[i]t is the unusual case, to say the least, in which a supervisor’s unconscious bias has resulted in disparate treatment liability”).

26. Krieger, *supra* note 21, at 1188.

27. *See id.* at 1211.

a supervisor—unaware of the degree to which the inputs to her decision are biased—can believe quite sincerely that she is making a “neutral” decision “on the merits.”²⁸ And according to “aversive racism” theory, the supervisor’s belief that she acted on the merits will be reinforced by the desire to believe that she treats minorities in an equitable fashion.²⁹

In this context, it may be difficult, if not impossible, for a court to go back and reconstruct the numerous biased evaluations and perceptions that ultimately resulted in an adverse employment decision. The cognitive biases of the actors involved—not to mention the cognitive biases of judges and juries—will themselves pose a barrier to such reconstruction.³⁰ Moreover, the effort to scrutinize all of these decisions for signs of bias may in the end *exacerbate* the “aversive racism” that leads people of subjective good will to act in a discriminatory fashion.³¹

A structural approach attempts to respond to these conditions. As Professor Dasgupta explains in her summary of the psychological literature on implicit biases, those biases will not *invariably* affect an individual’s conduct. “[E]ven when stereotypes and prejudices are automatically activated, whether or not they will bias behavior depends on how *aware*

28. This is particularly true where the “merits” are subjective. See Wax, *supra* note 20, at 1170 (“The absence of adequate, non-subjective methods for assessing workplace performance makes it almost impossible to assess the claims that subjective evaluations are biased.”).

29. “Aversive racism” theory posits that individuals who hold egalitarian views feel discomfort around minorities because of the cognitive dissonance between their sincere belief in equality and their unconscious biases. This discomfort, the theory goes, leads people (if unconsciously) to rationalize what are in fact biased decisions as being driven by some neutral motivation. See Dovidio & Gaertner, *On the Nature*, *supra* note 13, at 7; Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 13, at 61, 62-66. For a general exploration of the ways in which people rationalize what may seem like biased decisions, see Michael I. Norton et al., *Casualty and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 828-29 (2004).

30. Cf. Krieger, *supra* note 21, at 1214-15 (discussing studies “demonstrat[ing] that people are actually quite poor at identifying the effects of various stimuli on their evaluations, judgments, choices, and predictions”). This is particularly true, Professor Wax argues, given the “erratic and inconstant” nature of unconscious bias—which will not affect all decisions in the same way (or at all), and “may not be ‘determinative’ of a harmful outcome in every case in which it can be said to play a part.” Wax, *supra* note 20, at 1174-75. The available psychological literature seems clear, for example, that aversive racism primarily manifests itself “when a candidate’s qualifications for the position [are] ambiguous.” John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 318 (2000); see *id.* (“When a black candidate’s credentials clearly qualified him for the position, or when his credentials clearly were not appropriate, there was no discrimination against him.”); see also Gordon Hodson et al., *Processes in Racial Discrimination: Differential Weighting of Conflicting Information*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 460, 469 (2002) (similar findings with respect to college applicants).

31. See Krieger, *supra* note 21, at 1240 (“A colorblindness-centered interpretation of the nondiscrimination principle, coupled with people’s awareness that they do categorize along racial and ethnic lines, may well account for much of the intergroup anxiety and ambivalence which various social psychologists have posited as the underlying cause of ‘aversive racism.’ As these theorists have observed, racial ambivalence, normative ambiguity, and fear of one’s own potential prejudice all serve to amplify whites’ discrimination against blacks in the giving and requesting of assistance, the evaluation of behavior, physical distancing, and the selection of sanctions for social transgressions.”).

people are of the possibility of bias, how *motivated* they are to correct potential bias, and how much *control* they have over the specific behavior.”³² As explained in Part I.B, a structural approach might aim to enhance decisionmakers’ awareness, motivation, and control of these matters and thus mitigate the effects of implicit bias.

2. *Changes in Workplace Organization*

The case for a structural approach finds further support in the significant changes that have occurred in the organization of many workplaces over the past several decades. As detailed most extensively in the legal literature by Professor Katherine Stone,³³ American workplaces have changed significantly since the 1960s. When the Civil Rights Act of 1964 was enacted, many workplaces were organized in hierarchical structures with relatively defined promotion ladders under circumstances of long-term job security. Unionization bolstered these practices, both in the workplaces employing union members (whose proportion of the workforce peaked at about 36% in the 1950s)³⁴ and in a host of other workplaces where employers, partially motivated by the desire to stave off unionization, adopted welfare-capitalist practices.³⁵

Today, union membership has declined substantially, to the point where the impact of unionization is largely confined to particular industries and economic sectors.³⁶ Competitive pressures, moreover, have driven

32. Dasgupta, *supra* note 12, at 157; see McGinley, *supra* note 12, at 430-31 (discussing similar evidence); see also Armour, *supra* note 12, at 759-72 (discussing ways to help decisionmakers “resist falling [unconsciously] into the discrimination habit”); Blair, *supra* note 16, at 255 (reviewing evidence showing “that automatic stereotypes and prejudice can be moderated by a wide variety of events, including, (a) perceivers’ motivation to maintain a positive self-image or have positive relationships with others, (b) perceivers’ strategic efforts to reduce stereotypes or promote counterstereotypes, (c) perceivers’ focus of attention, and (d) contextual cues”).

33. See Stone, *supra* note 7; see also Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 99-104 (2003); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1919-28 (2000).

34. For a comprehensive source of U.S. union density statistics, see Union Membership and Coverage Database from the CPS, <http://www.unionstats.com> (last visited Apr. 18, 2005).

35. On the effect of unions on nonunion workplaces during this period, see RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 151 (1984) (“[E]nough large nonunion companies appear to offer desirable employment packages for the purpose of deterring unionism to suggest that the nonunion blue-collar employees of these companies are among the greatest beneficiaries of unionism.”).

36. In 2003, 12.9% of all United States workers were union members, but some industries and types of workplaces were far more unionized than others. For example, 37.2% of public-sector workers were union members, as were 34.2% of transportation and warehousing workers and 30.4% of workers for utilities (categories that may overlap somewhat with the public-sector employee category). By contrast, only 2.3% of agriculture and forestry workers were union members (and those were concentrated in the forestry and logging parts of the industry), as were 2.3% of accommodation and food service workers, 1.8% of finance and insurance workers, 5.1% of wholesale trade workers, and 6.5% of retail trade workers. For the statistics in this note, see Union Membership and Coverage Database from the CPS, <http://www.unionstats.com> (last visited Apr. 18, 2005).

large employers to abandon implicit promises of long-term job security.³⁷ In many modern-day workplaces, particularly those in the knowledge and service industries, flexibility is the operative word.³⁸ Hierarchies are flatter,³⁹ much work occurs in teams,⁴⁰ and what is most important to a worker is often the development of skills and experience that can be marketed to other employers rather than advancing to the next steps on the promotion ladder of her current employer.⁴¹ In these circumstances, passing over an employee for a particular assignment—or assigning that employee to a team with whom she has personality conflicts—can be as consequential as passing over that employee for a promotion.⁴²

It is important not to overstate the impact of these changes. As Professor Estlund emphasizes, “there are plenty of Old Workplaces left.”⁴³ But the spread of the “boundaryless workplace” magnifies the problems for civil rights law caused by unconscious or subtle bias. In such workplaces, there are innumerable situations in which unconscious bias may limit an individual’s opportunities. Such bias may affect supervisors when they assign tasks among employees; it may affect supervisors, coworkers, and even subordinates in making judgments under flexible work-evaluation procedures; and it may affect other team members in their ability to work cooperatively with a fellow employee.⁴⁴ Because the development of skills and expertise take on prime importance for workers, the operation of bias at any of these interim points may be devastating to an individual’s career. As day-to-day interactions among employees become more significant, acts of managerial and coworker harassment become more harmful.⁴⁵

To be sure, the implications of these developments are not all negative for workplace equality. The decline of long-term employment and hierarchical work may open up new opportunities for members of historically

37. See Stone, *supra* note 7, at 541. To similar effect, see Alan Hyde, *A Closer Look at the Emerging Employment Law of Silicon Valley’s High-Velocity Labour Market*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 233, 234-35 (Joanne Conaghan et al. eds., 2002); Schultz, *supra* note 33, at 1919, 1924.

38. See Schultz, *supra* note 33, at 1920 (“The hallmark of the new order is flexibility—the capacity to change quickly to new product demands and changing business conditions.”).

39. See Green, *supra* note 33, at 101-02; see also Schultz, *supra* note 33, at 1920; Stone, *supra* note 7, at 554-55.

40. See Green, *supra* note 33, at 102-03; Schultz, *supra* note 33, at 1921.

41. See Stone, *supra* note 7, at 569-71; Schultz, *supra* note 33, at 1921.

42. See, e.g., Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 669 (1998) (“Discrete decisions about advancement blur into decisions about day-to-day roles and responsibilities that are made by the group. Assessments of performance, which determine opportunities for more challenging work and advancement, are more likely to be embedded in day-to-day interactions and decisions.”).

43. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 71 (2000).

44. For a good discussion of these possibilities, see Green, *supra* note 33, at 105-08.

45. See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1760-66 (1998) (describing the ways in which gender-based harassment erodes the job opportunities of women).

excluded groups. Professor Alan Hyde's study of Silicon Valley shows that Chinese and Indian engineers, who perceive themselves as subject to significant employment discrimination as they seek to enter the managerial ranks, have taken advantage of organizational flexibility to create identity-based professional networks that support entrepreneurship within their ethnic communities.⁴⁶ Professor Hyde suggests that similar identity-based networks could improve the job prospects of other groups who are subject to discrimination.⁴⁷

But identity-based networks cannot completely solve the employment equality problems caused by the reorganization of workplace hierarchies. To the extent that workplace integration is essential to reducing cognitive biases,⁴⁸ Professor Hyde's solution to discrimination in the "high-velocity" workplace will merely entrench the problem by facilitating segregated workplaces.⁴⁹ Moreover, while such networking may thrive in highly educated close-knit immigrant ethnic communities, it is far less likely to succeed when expanded beyond such communities.

In many of today's workplaces, then, employment discrimination law is faced with the daunting task of policing innumerable daily encounters between employees at all levels of the occupational hierarchy. Yet the current tools of employment discrimination doctrine are poorly matched to such a task.⁵⁰ The problem with the current doctrine is most evident in the rules governing claims of disparate treatment. The burden-shifting approach elaborated by the Supreme Court in cases from *McDonnell Douglas*⁵¹ to *Reeves*,⁵² which has long been the most important way of proving disparate treatment, is not triggered until a supervisor makes a discrete choice with direct consequences for the terms and conditions of an individual's employment, such as a choice to fire someone or a choice not to hire or promote a person into an open position. Even the "mixed-motives" analysis, which may become the primary form of analysis in disparate treatment cases after the Supreme Court's 2003 decision in *Desert Palace*,⁵³ focuses on such discrete, consequential managerial

46. See Hyde, *supra* note 37, at 243-44.

47. See *id.* at 244-47.

48. See, e.g., Estlund, *supra* note 43, at 24-29, 77-94.

49. Cf. Hyde, *supra* note 37, at 240 ("It is no paradox to assert that Silicon Valley is both a highly segregated labor market and simultaneously one of the least discriminatory yet observed.").

50. See Sturm, *supra* note 42, at 670 ("In contrast to this embedded and interactive approach to employment decision making, case law rests on the assumption that identifiable and discrete moments of decision produce outcomes that determine economic and organizational status.").

51. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

52. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

53. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); see Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1124-28 (2004) (discussing the precedential effect of *Desert Palace*); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1914-33 (2004) (same).

choices. However, “[d]iscrimination in today’s workplace may frequently hinder opportunity and development without resulting in an identifiable decision to exclude.”⁵⁴ When, as in many of today’s job settings, “discriminatory bias operates at multiple stages of interaction and in the context of greater organizational structures of the workplace,” the current disparate treatment proof structure is a poor fit.⁵⁵

One might think that disparate impact doctrine, which aims to eliminate the “built-in headwinds” that hinder opportunities for members of protected groups even in the absence of intentional discrimination,⁵⁶ avoids these limitations. But it does not. As codified in the Civil Rights Act of 1991, disparate impact doctrine also focuses predominantly on discrete employment practices. Thus, a plaintiff must show that the employer “uses a particular employment practice that causes a disparate impact.”⁵⁷ If the plaintiff can show “that the elements of [the employer’s] decisionmaking process are not capable of separation for analysis,” the entire “decisionmaking process may be analyzed as one employment practice.”⁵⁸ But that burden has proven difficult for employees to sustain as many decisionmaking processes can plausibly be separated into constituent elements.⁵⁹ Even when it is not possible to break down the steps of the process leading to a particular decision for purposes of determining the existence of an unjustified disparate impact, a discrete decision (to hire, to fire, to promote) remains the focus of analysis.⁶⁰ These features of disparate impact doctrine make it a poor tool for addressing discrimination that does its

54. Green, *supra* note 33, at 105.

55. *Id.* at 116-17. To similar effect, see Stone, *supra* note 7, at 606.

56. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

57. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000); see Garcia v. Women’s Hosp. of Texas, 97 F.3d 810, 813 (5th Cir. 1996) (stating that disparate impact plaintiff must “isolate and identify a particular employment practice which is the cause of the disparity and provide evidence sufficient to raise an inference of causation”).

58. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000).

59. See, e.g., Stout v. Potter, 276 F.3d 1118, 1124 (9th Cir. 2002) (“We doubt that the overall screening process should be treated as one employment practice for purposes of disparate impact analysis.”).

60. See, e.g., Meacham v. Knolls Atomic Power Lab., 185 F. Supp. 2d 193, 208 (N.D.N.Y. 2002) (stating that “various factors and criteria” determining who would be subject to a reduction in force were not reasonably separable for purposes of analysis), *aff’d*, 381 F.3d 56 (2d Cir. 2004); see also Graffam v. Scott Paper Co., 870 F. Supp. 389, 395 (D. Me. 1994) (same), *aff’d*, 60 F.3d 809 (1st Cir. 1995); Stender v. Lucky Stores, Inc., No. C-88-1467 MHP, 1992 WL 295957, at *2 (N.D. Cal. Apr. 28, 1992) (determining that subjective system for deciding on promotions was not separable into discrete criteria for purposes of analysis). For partial exceptions, see McClain v. Lufkin Indus., Inc., 187 F.R.D. 267, 272-75 (E.D. Tex. 1999) (treating employer’s pervasive subjective employment practices as a single, inseparable practice, but focusing primarily on use of subjective processes in making hiring, placement, layoff, and rehire decisions); Butler v. Home Depot, Inc., Nos. C-94-4335 SI, C-95-2182 SI, 1997 WL 605754, at *13 (N.D. Cal. Aug. 29, 1997) (same); see also Kozlowski v. Fry, 238 F. Supp. 2d 996, 1013-14 (N.D. Ill. 2002) (holding that elements of hiring and promotion decisions were, at least for summary judgment purposes, “not capable of separation for analysis”).

work through an accumulation of small, repeated instances of biased perception and evaluation.⁶¹

And even the area of employment discrimination law that directly addresses day-to-day interactions among workers—the harassment doctrine—also focuses on discrete and consequential workplace decisions. Harassment is actionable only when it becomes “sufficiently severe or pervasive to alter the conditions of the victim’s employment.”⁶² This standard, which has proven difficult to satisfy, leaves most daily interactions below the law’s radar screen.⁶³ The liability rules that govern harassment law also target discrete and consequential decisions. When a supervisor carries out an act of harassment in the course of undertaking “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,” liability will follow.⁶⁴ But when a supervisor engages in harassing conduct that does not culminate in such an action, there will be no liability if the employer had a reasonable policy in place to prevent and remedy harassment by employees and the plaintiff unreasonably failed to take advantage of that policy.⁶⁵ In practice, courts have accorded broad deference to employer policies under that standard; in the absence of a “tangible employment action,”⁶⁶ a finding of liability is unlikely even if the employer’s policy is demonstrably ineffective in preventing harassment.⁶⁷ And where it is not a manager but a coworker who

61. See Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 36-46 (2005). I understand this to be Professor Green’s criticism when she argues that disparate impact doctrine improperly “focus[es] on the unequal effect or consequence of neutral application of given job requirements or practices on groups with protected characteristics rather than on the ways in which institutional structure, systems, and dynamics enable the operation of discriminatory bias.” Green, *supra* note 33, at 138. *But cf.* Sullivan, *supra* note 3, at 52-53 (suggesting that disparate impact doctrine is not as constraining as I portray it to be).

62. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotation marks and alterations omitted).

63. See Green, *supra* note 33, at 134-35.

64. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761, 760-63 (1998).

65. See *Penn. State Police v. Suders*, 124 S. Ct. 2342, 2353-57 (2004); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); *Burlington Indus.*, 524 U.S. at 765.

66. *Faragher*, 524 U.S. at 807.

67. See 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. L. 1, 4-6, 27-28 (2001); see also David Sherwyn et al., *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1266-67 (2001) (concluding, based on a study of the first eighteen months of implementation of *Faragher* and *Ellerth*, “that many of the judicial opinions are result-oriented,” that “courts often find that the complaining employee acted ‘unreasonably’ as a matter of law, even when such a determination may merit a more thorough review of the facts of the case,” and that these holdings may “establish a perverse incentive for employers seeking to avoid liability, and create unacceptable barriers and requirements for employees who may need to seek redress for compensable behavior at the workplace”). See generally Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 708-15 (2000); Anne Lawton, *Operating in*

engages in discriminatory conduct—an important problem in workplaces with flattened hierarchies⁶⁸—liability will not result unless the plaintiff shows that the employer was negligent.⁶⁹

B. A Structural Solution?

The developments noted above—the increasing importance of unconscious or subtle bias, interacting with changes in workplace organization—seem to demand a structural solution. Such a response would focus not on identifying and providing remedies for discrete acts of discrimination, but rather on reorganizing workplace structures to minimize the risk that biases will limit opportunities for historically disadvantaged groups.

1. Structural Aspects of Existing Law

A structural approach is in fact immanent in some existing tools of civil rights law.⁷⁰ As a number of commentators have recognized, the disparate impact doctrine might be seen as incorporating such an approach. In Professor Dasgupta's terms,⁷¹ that doctrine gives employers a clear motivation to become aware of the racial and gender patterns of workplace decisionmaking and to create structures to control that behavior.⁷² The rules governing employer liability for workplace harassment also focus on the institutional structures set up by employers. Courts in harassment cases frequently require employers to evaluate the adequacy of the structures employers create to prevent and provide remedies for workplace discrimination.⁷³

an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense, 13 COLUM. J. GENDER & L. 197, 212-16 (2004).

68. See Stone, *supra* note 7, at 607 ("A related problem for women and minorities in the new workplace stems from the trend toward delegating major employment decisions to peers. Several sociologists of work have focused on the role of networks in perpetuating sex and racial segregation in employment.").

69. See *Faragher*, 524 U.S. at 776 (noting, with apparent approval, that lower courts have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard"); see also Stone, *supra* note 7, at 611 (discussing how this rule limits the effectiveness of employment discrimination law in today's workplaces).

70. Cf. Oppenheimer, *supra* note 12, at 917-67 (arguing that prohibition of negligent discrimination is immanent in many existing employment discrimination doctrines).

71. See Dasgupta, *supra* note 12, at 157.

72. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 104-10 (2000) (describing possibilities of using disparate impact doctrine to challenge a variety of structural barriers to the employment and advancement of women); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1226-27 (1989) (same); Green, *supra* note 33, at 137 ("[B]y recognizing systems as legitimate subjects for legal regulation, the *Griggs* Court opened the door for a structural approach to combating discrimination more broadly."); Sturm, *supra* note 6, at 484-85 (arguing that the application of disparate impact to subjective employment practices can be viewed through a structural lens).

73. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 778, 807-08 (1998) (providing for employer liability in cases of supervisory sexual harassment that does not result in a "tangible employment action," but providing a defense to such liability where "the employer exercised

One of the strongest justifications for affirmative action in the employment context proceeds along similar lines. Affirmative action forces employers to identify and redress the subtle and unconscious discrimination, as well as the overt and deliberate discrimination, that occurs within their enterprises.⁷⁴ In addition—though this is a more controversial point—beyond simply mitigating the effects of unconscious bias, affirmative action regimes may actually reduce the biases themselves. Studies of implicit bias have found that people appear to have less severe biases when they are in the presence of authority figures who are members of minority groups.⁷⁵ Based on that research, Professors Christine Jolls and Cass Sunstein conclude that company policies that seek to achieve racial and gender diversity in supervisory ranks should have a “debiasing” effect.⁷⁶ More generally, affirmative action policies may help to bring people of different races together under conditions of cooperation and equality that will reduce intergroup biases⁷⁷—though their overt use of race may exacerbate those biases in some circumstances.⁷⁸

Although the point has not been appreciated in the structural discrimination literature, the ADA’s “reasonable accommodation” requirement⁷⁹ might also be justified in structural terms. Indeed, many disability rights advocates believe that the major purpose of the ADA’s accommodation mandate is to overcome unconscious or subtle workplace bias. Those advocates contend that employers provide accommodations to nondisabled workers all the time; it is only when employees with disabilities seek

reasonable care to prevent and correct promptly any sexually harassing behavior”—such as by “promulgat[ing] an antiharassment policy with complaint procedure”—and the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer”); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998) (same); see also Sturm, *supra* note 6, at 481–83 (arguing that the *Faragher/ Ellerth* focus on workplace structures is a model for a broader structural approach to antidiscrimination law).

74. See generally BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION (1996); CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES (1996); Krieger, *supra* note 21, at 1246; Reskin, *supra* note 12, at 325–26; Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1296–98 (1995).

75. See, e.g., Blair, *supra* note 16, at 247.

76. See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law* 23–25 (2004) (unpublished manuscript, on file with author). Professors Jolls and Sunstein also suggest encouraging employers to adopt such measures as posting portraits in the workplace that portray minorities and women as well as white men; this proposal relies on studies suggesting that frequent exposure to expressions and images that value diversity may reduce unconscious bias. See *id.* at 28.

77. See Estlund, *supra* note 43, at 24–29, 77–94.

78. See Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1259 (1998).

79. See 42 U.S.C. 12112(b)(5)(A) (2000) (requiring employers to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless [the employer] can demonstrate that the accommodation would impose an undue hardship”).

accommodations that such requests become salient to employers.⁸⁰ Thus, valued nondisabled employees might be free to arrive late to work to accommodate a doctor's appointment or a child-care emergency, and employers will not even think of the employees as having requested an "accommodation." But when an employee with a disability seeks to arrive late for some reason associated with her disability,⁸¹ employers often consider that request an unfair demand for a special privilege.⁸² Similarly, an employer may spend large sums of money to provide a valued nondisabled employee with a desk, chair, and computer that meet her preferences and maximize her productivity. But when an employee with a disability seeks an accessible desk or chair, or accessible computer hardware or software, employers frequently regard the request as a demand for "special" treatment.⁸³ In this view, the ADA's accommodation requirement presumes that employers routinely accommodate nondisabled employees and simply requires employers to do the same thing for employees with disabilities. In so doing, the statute seeks to correct the unconscious bias that leads employers to conclude that disability-related accommodations are "special" and therefore undeserved.

2. *The New Proposals*

The structural aspects of existing law described above have had only limited success in solving problems of workplace inequality. Disparate impact and workplace harassment law have been constrained by their focus on discrete, clearly adverse employment decisions.⁸⁴ Accommodation law has been similarly undermined.⁸⁵ Aggressive affirmative action programs are too politically contested and not widely enough adopted to solve

80. See Bagenstos, *supra* note 8, at 867 & nn.133-34 (citing sources). This problem is structurally quite similar to the "leniency bias" that has been identified in workplace gender relations, where men, but not women, get "leeway" or the "benefit of the doubt" in respect to their compliance with work rules. Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 415 (2003).

81. See, e.g., *Humphrey v. Memorial Hosps. Ass'n*, 239 F.3d 1128, 1131 (9th Cir. 2001) (describing plaintiff's requests for accommodations, such as a flexible start time, to address her obsessive-compulsive disorder).

82. See Bagenstos, *supra* note 8, at 867 & nn.133-34 (citing sources).

83. For an excellent discussion of this point, see Robert L. Burgdorf Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 530-32 (1997).

84. See *supra* text accompanying notes 62-69.

85. See Bagenstos, *supra* note 5, at 34-54 (showing how courts have used the "access/content distinction" and the "'job-related' rule" to limit the scope of the accommodation requirement); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 332-33 (2001) (arguing that courts have employed restrictive understandings of the ADA's definition of "disability" to avoid imposing accommodation costs on employers).

workplace equality problems (and might impose undue costs if they were more widely adopted).⁸⁶

Against this backdrop, a number of scholars have proposed substantial reforms to existing doctrine. Instead of focusing on discrete biased acts, these reforms would direct the law's attention to workplace structures that can facilitate or ameliorate bias. Professor Tristin Green, for example, argues for a "structural account of disparate treatment theory" that "would hold employers directly liable under Title VII for organizational choices, institutional practices, and workplace dynamics that enable the operation of discriminatory bias on the basis of protected characteristics."⁸⁷ If a plaintiff established "that the employer's institutional structures or practices *unreasonably* enabled the operation of discriminatory bias in the workplace,"⁸⁸ she would be entitled to an injunction requiring the employer to change its organizational structures to reasonably minimize bias.⁸⁹ "The employer might, for example, be required to alter its decisionmaking processes . . . and/or to implement monitoring systems for identification of patterns in progress and allocation of opportunity."⁹⁰ A number of other commentators hint at a similar approach.⁹¹

In an influential article, Professor Susan Sturm takes this approach a step further.⁹² To Professor Sturm, what is necessary is a system that provides for flexibility in problem solving at the level of the particular employer but promotes a broader structure to assure that antidiscrimination norms evolve and are institutionalized in a progressive fashion. Drawing on the work of other scholars at the Columbia Law School who have elaborated a "democratic experimentalist" approach to regulation—an approach that melds insights of early twentieth century American pragmatism

86. See *supra* note 74.

87. Green, *supra* note 33, at 145.

88. *Id.* at 147 (emphasis added).

89. *Id.* at 148.

90. *Id.*

91. See Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2398 (1994) ("I imagine that under a structuralist approach the plaintiff's prima facie case would consist of a showing of dramatic underrepresentation of the plaintiff's group, satisfactory performance by the plaintiff on objective measures, and evidence of a subjective, largely standardless selection process. In such a case, an employer would be held liable unless it could show that it had taken adequate measures to guard against stereotyping."); Oppenheimer, *supra* note 12, at 970 ("Where an employer has created job screening procedures which fail to correct for unconscious discrimination, and such discrimination influences the process, the employer ought to be subject to negligence liability. The same standard should apply to employee evaluations, where stereotypes can easily influence subjective evaluations critical to job or career advancement."); see also Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459, 488-91 (2003) (making a similar argument, though focusing on the analogy between unconscious bias in the workplace and dangerous conditions on land that owners must take reasonable steps to abate).

92. Sturm, *supra* note 6.

and late twentieth century Japanese approaches to management⁹³—Professor Sturm sketches “a multi-sector regulatory system” that she believes is emerging through “interplay among the judiciary, workplaces, and nongovernmental actors playing an intermediary role.”⁹⁴ As Professor Sturm describes it, “The structural approach to second generation problems calls for a dynamic and reciprocal relationship between judicially elaborated general legal norms and workplace-generated problem-solving approaches, which in turn elaborate and transform the understanding of the general norm.”⁹⁵

In Professor Sturm’s view, the role of law is to set forth general norms, provide incentives for employers to reflect on and adopt means of serving those norms, and empower constituencies within workplaces that can implement and adapt those means while at the same time further developing the applicable norms.⁹⁶ For Professor Sturm, as for Professor Green, the role of courts is to police employer processes that may facilitate (or inhibit) discrimination, rather than to police particular acts of discrimination themselves.⁹⁷ Thus, Professor Sturm argues that courts

93. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 284-88 (1998). For other work that can fairly be described as elaborating the democratic experimentalist model, see Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000) [hereinafter Dorf & Sabel, *Drug Treatment Courts*]; Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Michael C. Dorf, *The Domain of Reflexive Law*, 103 COLUM. L. REV. 384 (2003); Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998); Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL’Y REV. 261 (2004); Bradley C. Karkkainen, Reply, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004); Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943 (2003); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2001-2002); Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903 (2002); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003); James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837 (2004); James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703 (2003) [hereinafter Liebman & Sabel, *No Child Left Behind*]; James S. Liebman & Charles F. Sabel, *The Fragile Promise of Provisionality*, 28 N.Y.U. REV. L. & SOC. CHANGE 369 (2003); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

94. Sturm, *supra* note 6, at 479.

95. *Id.* at 522.

96. See *id.* at 479-89, 556-64.

97. Similarly, Professor Kathy Stone focuses on employer procedures rather than particular acts of discrimination. See Stone, *supra* note 7, at 612 (arguing for “a system of workplace-specific alternative dispute resolution that uses a neutral outsider to scrutinize workplace conduct and apply equal opportunity norms.”). Professor Cindy Estlund contends that a regime of “monitored self-

should focus on imposing accountability standards on employers. Those standards would be created in the first instance not by courts, but by employers and experts, based on experience developed in previous iterations of the same process at workplaces across the country.⁹⁸ Courts would then measure an employer's internal processes and their outcomes against those accountability standards.⁹⁹ The result of such an assessment, she contends, would be both to encourage employers to develop their own effective problem-solving processes and to generate "information about patterns, problems, and practices that could enrich the understanding of the normative issues, and enable the articulation of rolling standards when there is enough information to justify the interim conclusion that such a standard is warranted."¹⁰⁰ These rolling standards would "establish a floor of acceptable conduct" that would "rise as the capacity to address problems increases."¹⁰¹ Because the "goal and standard would be to improve each time a conflict arises," an employer would be "in compliance" when it is "continually improving."¹⁰²

II

REASONS FOR SKEPTICISM

As the previous Part should demonstrate, a number of scholars have contributed to the argument for a structural approach to antidiscrimination law. They have made a powerful case. But significant reasons for skepticism remain. These reasons highlight the inherent limitations of antidiscrimination law.

As I argue in Part II.A, it is doubtful that courts have the capacity or inclination to police the structures employers adopt to promote workplace equality. Experience in the two areas in which courts already have responsibility for policing those structures is sobering. Although advocates of structural approaches are aware of that experience, the new proposals seek

regulation"—internal dispute resolution policed by "some actor or set of actors with enough independence, expertise, and accountability to employee interests"—may offer the best hope for enforcing individual employee rights. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 396 (2005).

98. See Sturm, *supra* note 6, at 560. Professor Sturm notes:

Courts would thus not unilaterally construct or articulate standards for effective internal conflict resolution mechanisms to be adopted or followed by employers as a basis for avoiding liability. Instead, they would participate in creating a structure for employers, with the assistance of mediating actors, to develop and evaluate the effectiveness of the employers' internal systems. Coercion would be used not to enforce predefined compliance standards, but rather to induce employers to participate in the development of effective internal systems that give meaning to the general . . . norm in context.

Id.

99. See *id.* at 559-60.

100. *Id.* at 562-63.

101. *Id.* at 560

102. *Id.*

to overcome these problems by urging broad deference to human resources professionals and other professional constituencies who, presumably, are more likely to promote workplace equality. But, as I argue in Part II.B, a consistent body of work in legal sociology suggests that those constituencies are as likely to subvert as to promote workplace equality. In Part II.C, I argue that these difficulties are symptoms of a deeper problem: proponents of the structural turn fail to articulate any normative understanding of what kinds of workplace conduct constitute wrongful discrimination. To the extent that such a normative view is implicit in their arguments, it is a deeply controversial numbers-focused principle, with proportional representation as its baseline.

A. *Problems of Judicial Competence and Inclination*

The proposals for a structural approach to antidiscrimination law envision a significant role for courts in assuring that employers adopt workplace structures that reduce the incidence and consequences of workplace bias. But courts have already had a similar responsibility in important pockets of employment discrimination law for a number of years, and the results are not auspicious for a broader structural approach. Participants in the structural turn know about this record, of course, but they are too optimistic about the prospect that it can be overcome.

In two areas of employment discrimination law, courts are currently charged with policing the structures employers adopt (or fail to adopt) to minimize discrimination and its effects. In neither area have judges demonstrated any serious inclination to scrutinize those structures. The first area involves disparate impact challenges to subjective employment practices. Since *Watson v. Fort Worth Bank & Trust*,¹⁰³ a plaintiff can assert a disparate impact challenge to an employer's decision to use subjective criteria for hiring, promotion, and similar decisions.¹⁰⁴ Such a challenge does not allege that an employer has used subjective criteria to cover intentional discrimination—that would be a claim of disparate treatment. Instead, it asserts that the use of a subjective employment practice has a disparate impact on minorities or women¹⁰⁵ and that the practice lacks a sufficiently strong business justification.¹⁰⁶ Once a plaintiff establishes such a disparate impact, the employer must show that the practice is “job related for the position in question and consistent with business necessity.”¹⁰⁷ In addition, there must be no available alternatives to the employer's practice that

103. 487 U.S. 977 (1988).

104. See *id.* at 989-91.

105. For an interesting discussion of the possibility that the disparate impact doctrine can be invoked on behalf of white men, see Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004).

106. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

107. *Id.*

would mitigate the disparate impact at an acceptable cost, though just what kind of cost is acceptable in this context is unclear.¹⁰⁸

Taken as a whole, this disparate impact inquiry asks whether some aspect of the employer's structural arrangement facilitates or reflects biased decisionmaking, and whether the employer could reasonably structure things differently to avoid that result. For that reason, Professor Sturm has highlighted the subjective-practice doctrine as an example of a structural approach to employment discrimination law.¹⁰⁹ She points to a handful of cases, none decided more recently than 1997, in which the court carefully scrutinized whether an employer's subjective employment practices contained sufficient structural safeguards to limit the possibility of bias.¹¹⁰ The leading employment discrimination treatise points to a number of other cases that tend in the same direction, though virtually all of them were decided in the 1970s and 1980s.¹¹¹

The subjective-practices doctrine has hardly proved a robust front of structural reform in employment discrimination litigation, however. As Professor Green summarizes the case law, "although several courts have indicated a willingness to evaluate an employer's modern decisionmaking practices . . . few, if any, have actually engaged in a contextualized

108. See § 2000e-2(k)(1)(A)(ii) (2000) (providing that even if the challenged practice satisfies the business necessity test, the plaintiff can still prevail if she "makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice"); § 2000e-2(k)(1)(C) (providing that "[t]he demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'"). June 4, 1989, was the day before the Supreme Court decided *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). As the leading treatise explains, however, "The difficulty . . . is that it is not altogether clear what the pre-*Wards Cove* law was on this issue." 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 111 (3d ed. 1996); see also Sullivan, *supra* note 105, at 1521 (stating that "it is unclear precisely what a plaintiff must show to win a disparate impact claim using [the 'alternative employment practice'] route").

109. See Sturm, *supra* note 6, at 484-89. Other structural-discrimination advocates are more tepid in their endorsement of using the disparate impact doctrine for these purposes. See, e.g., Green, *supra* note 33, at 143 (finding both "practical" and "conceptual" problems "in using disparate impact theory to combat the operation of discriminatory bias in the modern workplace"); Krieger, *supra* note 21, at 1236-37 (finding both "practical" and "political problems" in "applying disparate impact theory to subjective decisionmaking").

110. See Sturm, *supra* note 6, at 487-88, n.92 (discussing a number of safeguards including criteria for subjective decisionmaking, proportion of minorities and women among the decisionmakers, and transparency in the hiring and promotion process; and citing *Butler v. Home Depot, Inc.*, No. C-95-2182SI, 1997 U.S. Dist. LEXIS 16296, at *47 (N.D. Cal. Aug. 28, 1997); *Shores v. Publix Super Markets, Inc.*, No. 95-1162-CIV-T-25(E), 1996 WL 407850, at *5-6 (M.D. Fla. Mar. 12, 1996); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 335 (N.D. Cal. 1992); *Green v. USX Corp.*, 896 F.2d 801, 805 (3d Cir. 1990); and *Allen v. Seidman*, 881 F.2d 375, 381 (7th Cir. 1989)).

111. See 1 LINDEMANN & GROSSMAN, *supra* note 108, at 209-16 (collecting cases that indicate that objective job analyses, specific standards and guidelines for evaluation, reliance on observable behaviors in evaluation, participation of protected-group members in decisionmaking, and provision of notice of job opportunities will assist in defending against disparate impact challenges to subjective employment practices).

inquiry” like the one Professor Sturm urges.¹¹² Indeed, courts appear to go out of their way to avoid entertaining disparate impact challenges to subjective employment practices.¹¹³ Professor Sturm herself acknowledges that “some courts have deferred to highly arbitrary, unstructured, and exclusionary employee selection practices.”¹¹⁴ Where courts have not deferred, the cases have generally addressed old-style, hierarchical workplaces, rather than the modern “boundaryless workplace”¹¹⁵ that is the focus of much of the argument for a structural approach to antidiscrimination law.¹¹⁶ With rare exceptions, the overall picture in subjective-practices litigation since the Civil Rights Act of 1991 is one of a reluctant judiciary working assiduously to avoid scrutinizing workplace structures that may impede employment equality.

In part, judges’ unwillingness to engage in rigorous scrutiny of these business structures may be an artifact of the way disparate impact doctrine developed in its formative years of the 1970s. Courts fleshed out the doctrine in a series of cases involving employers’ use of written tests to assess employee aptitude. In determining whether tests with a disparate impact were justified, courts readily turned to a requirement of rigorous professional “validation.”¹¹⁷ There is a great deal of debate about whether employment tests can ever truly satisfy a rigorous requirement of validation,¹¹⁸ but at least that requirement was developed with testing in mind. When validation is applied to employment practices other than testing,

112. Green, *supra* note 33, at 143 n.252.

113. See *id.* at 142 & nn.249-50 (citing cases where courts took claims that plaintiffs had characterized as systemic disparate impact challenges to subjective employment practices and recast them as alleging disparate treatment in individual applications of those practices). This development is analytically parallel to the efforts of courts to avoid deciding reasonable accommodations claims under the ADA by applying a very restrictive definition of “disability.” See *supra* note 80.

114. Sturm, *supra* note 6, at 538.

115. Stone, *supra* note 7, at 605.

116. See 1 LINDEMANN & GROSSMAN, *supra* note 108, at 202-08 (citing cases indicating that “[p]laintiffs have had considerable success in challenging the use of subjective criteria in selecting candidates for hourly rated, ‘blue-collar’ jobs,” but that “[c]ourts are more likely to accept subjective determinations in cases involving white-collar jobs” or other positions with “no visible or individually allocable output that can be measured objectively”—a description that might apply to much if not all work that is done in teams).

117. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432-36 (1971) (challenge to, *inter alia*, use of intelligence test as a job qualification); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 427-36 (1975) (challenge to use of “general ability” tests as a job qualification). For a general discussion of the case law that developed on these issues, see 1 LINDEMANN & GROSSMAN, *supra* note 108, at 135-62.

118. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 212-22 (1992); Kingsley R. Browne, *The Civil Rights Act of 1991: A “Quota Bill,” a Codification of Griggs, a Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 300 (1993); see also George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1314 (1987) (“[S]oon after *Griggs*, it became apparent that most employment tests currently in use could not be scientifically validated. This fact was unknown to Congress when it enacted title VII, just as it was unknown to the Supreme Court when it decided *Griggs*.”).

such as the decision to maintain subjective selection criteria, that requirement seems impossible to satisfy.¹¹⁹ Courts naturally seek a way to avoid imposing such rigorous standards in the subjective-practices context. They may do so by broadly deferring to employers' decisions.¹²⁰ Or they may seek to avoid disparate impact claims altogether, whether by coercively recharacterizing disparate impact claims as "really" being disparate treatment claims,¹²¹ or by adopting rules that arbitrarily constrict the domain of the disparate impact theory.¹²²

The inclination to avoid the ill-fitting requirement of validation may explain courts' unwillingness to engage in rigorous scrutiny of employers' subjective employment practices. But there is no similar excuse for courts' conduct in the second area of employment discrimination doctrine that demands scrutiny of workplace structures that facilitate bias: the law of workplace harassment. After the Supreme Court's twin decisions in *Faragher v. City of Boca Raton*¹²³ and *Burlington Industries v. Ellerth*,¹²⁴ courts in many workplace harassment cases must determine whether an "employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and whether "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."¹²⁵ The Supreme Court specifically directed district courts addressing these questions to examine the adequacy of the employer's "antiharassment policy" and "complaint procedure."¹²⁶

As implemented, however, the *Faragher* and *Ellerth* rules have hardly lived up to the hope that they might "set[] the stage for institutional self-reflection that can enable organizations to address new problems . . . and to learn from the problem-solving efforts of others."¹²⁷ Instead, as a number of commentators have now documented, the lower courts have been satisfied by mere paper compliance. Under the prevailing approach, employers can avoid liability for harassment simply by adopting and distributing policies that formally prohibit harassment and creating a

119. See, e.g., Krieger, *supra* note 21, at 1232 ("Validating subjective decisionmaking systems in accordance with professionally acceptable standards is neither empirically nor economically feasible, especially for jobs where intangible qualities, such as interpersonal skills, creativity, and the ability to make sound judgments under conditions of uncertainty, are critical.").

120. See, e.g., *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 997-99 (1988); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979). Both *Watson* (subjective promotion standards) and *Beazer* (refusal to hire methadone users) involved disparate impact challenges to employment practices other than testing.

121. See Green, *supra* note 33, at 142 & nn.249-50.

122. See Sullivan, *supra* note 3, at 43-49; Travis, *supra* note 61, at 26-33.

123. 524 U.S. 775 (1998).

124. 524 U.S. 742 (1998).

125. *Faragher*, 524 U.S. at 807; accord *Burlington*, 524 U.S. at 765.

126. *Faragher*, 524 U.S. at 807; accord *Burlington*, 524 U.S. at 765.

127. Sturm, *supra* note 6, at 483.

grievance process that allows an employee to file a complaint with someone other than the individual who harassed her. This is true even absent any indication that the process set up by the employer has been effective at that or any other workplace.¹²⁸

Participants in the structural turn are aware of this experience,¹²⁹ but they nonetheless appear confident that courts can be trusted to implement a doctrine that requires them to assess the adequacy and effectiveness of employers' internal procedures.¹³⁰ There is no particular reason to be optimistic, however. In both the workplace harassment and subjective practices areas, courts have had ample opportunity to engage in rigorous scrutiny of the procedures employers adopt to limit the occurrence and effects of bias. Indeed, at least in the workplace harassment area, controlling Supreme Court precedent seems, on its face, to require lower courts to engage in rigorous scrutiny. The failure of lower courts to satisfy that obligation does not appear to be a problem that can be solved simply by telling judges that they (really, *really*) should scrutinize employer practices.

This experience should hardly be surprising. Judges are not management experts. They lack the local knowledge to craft effective responses to the deep and complex equality problems that arise in individual workplaces. And judges are aware of those limitations. As Professor Sullivan recently noted, "literally hundreds of [lower court] cases recite some version of the slogan that courts do not sit as 'super-personnel departments.'"¹³¹ This is true even in cases in which plaintiffs seek reasonable accommodations under the ADA,¹³² a statute that directly commands courts to second-guess the manner in which employers currently structure their enterprises.¹³³ Some judges also object to the burden employment discrimination litigation places on their dockets; judges who hold that view "may be predisposed to sign off on [employers'] internal procedures without close scrutiny."¹³⁴

128. See sources cited *supra* note 67.

129. See, e.g., Green, *supra* note 33, at 150; Sturm, *supra* note 6, at 539.

130. See *supra* Part I.B.2.

131. Sullivan, *supra* note 53, at 1115-16 & n.337.

132. See, e.g., *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1122 (10th Cir. 2004); see also Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me, Inc." World*, 12 TEX. J. WOMEN & L. 345, 364 (2003) ("Requested accommodations that target more systemic obstacles to disabled employees, such as work pace, bundling of job functions, and hours and attendance requirements, have frequently been unsuccessful where they touch on business judgment about the nature of work."). To similar effect, see Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 20 (2005).

133. See, e.g., Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1283 (2003) ("The ADA goes beyond Title VII by requiring employers to restructure the jobs themselves.").

134. Estlund, *supra* note 97, at 338.

Judges can be made comfortable with targeted interventions that challenge discrete workplace practices, such as individual acts of intentional discrimination or particular work rules that have an unjustified disparate impact. They balk, however, at inserting themselves deeply into how employers structure their workplaces or regulate day-to-day interactions among workers. This attitude is well captured in the Supreme Court's vehement assertion that civil rights laws merely "prohibit[] discrimination" without limiting employers' "prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees."¹³⁵ Other Supreme Court cases have similarly disclaimed any desire to intrude deeply into managerial prerogatives.¹³⁶ A structural-discrimination jurisprudence would run directly contrary to those tendencies. It would require judges to engage in a task that they may be unable—and have shown themselves to be unwilling—to perform. The prospects for success of such an approach are therefore weak.

B. *The Problematic Role of Professional Intermediaries*

Participants in the structural turn seek to avoid this problem by relieving courts of the obligation to dictate workplace structures to employers. They urge a dialogic approach, which would (in Professor Sturm's words) create "a dynamic and reciprocal relationship between judicially elaborated general legal norms and workplace-generated problem-solving approaches, which in turn elaborate and transform the understanding of the general norm."¹³⁷ This dialogic approach to antidiscrimination law raises an obvious problem: If antidiscrimination norms are to be developed and implemented through a conversation between courts and employers, how can we expect them to do anything but talk past each other? Courts lack the local knowledge to develop prescriptive rules that adequately account for varied workplace conditions, but employers often have interests that are in conflict with workplace equality norms. Under these conditions, how can a dialogue between courts and employers ever be successful?

135. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995). For good general discussions of the ways the background rule of employment at will, which underlies the judicial attitude discussed in this Article, has led courts to interpret antidiscrimination laws narrowly, see Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1996); Richard Michael Fischl, *'A Domain Into Which the King's Writ Does not Seek to Run': Workplace Justice in the Shadow of Employment-at-Will*, in LABOUR LAW IN AN ERA OF GLOBALIZATION, *supra* note 37, at 253; Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996).

136. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80-81 (1998) (disclaiming the notion that the Court's sexual harassment doctrine imposes a "general civility code for the American workplace"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion) ("Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice.").

137. Sturm, *supra* note 6, at 522. For a similar dialogic approach, see Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 720 (2003).

Professor Sturm has offered the most sophisticated solution to this dilemma (though other supporters of structural approaches to antidiscrimination law echo parts of her argument in slightly different terms¹³⁸). Her solution relies heavily on the role of “intermediaries”—individuals and entities such as lawyers, consultants, and human resources professionals who are close enough to the workplace under scrutiny to possess relevant local knowledge, but who have sociologically powerful connections to broader professional communities.¹³⁹ Their connections may give intermediaries an interest in pursuing workplace equality goals even when doing so conflicts with the individual employer’s bottom-line interests. Their broader professional network also gives intermediaries the opportunity “to pool information within and across contexts; to identify problems without directly triggering punitive legal action; and to navigate the challenges of sharing information about best practices without revealing trade secrets to business competitors or breaching confidentiality in individual cases.”¹⁴⁰

In Professor Sturm’s view, a key role of courts should be to encourage these intermediaries to participate in workplace problem-solving.¹⁴¹ Intermediaries, in conjunction with employers, would then use the results of their cross-workplace information-pooling to develop benchmarks to assess the performance of particular workplaces, as to both the processes employers adopt and the outcomes employers achieve. Courts, in turn, would adopt those benchmarks and evaluate employers’ practices against them. Professor Sturm is optimistic about the effectiveness of such a process: “This interactive, tiered system provides the infrastructure for identifying patterns within and across particular workplace contexts, earmarking effective problem solving and dispute resolution processes as benchmarks, and elaborating norms that emerge over time through this cumulative process.”¹⁴²

But reliance on an “interactive, tiered system”¹⁴³ merely displaces the problem of judicial deference. It does not eliminate that problem. Empowering intermediaries can serve the law’s goals of workplace equality only if the intermediaries can be trusted to internalize and pursue those goals.¹⁴⁴ Otherwise, the “best practices” that would underlie judicial

138. See, e.g., Green, *supra* note 137, at 721-22 (suggesting heavy reliance on “organizational and social scientific experts who can provide advice on directions for meaningful change”); Green, *supra* note 33, at 147 (suggesting that courts should “draw from social scientific and organizational experiments and studies,” as well as “[c]ase studies of some successful approaches to diversity management,” in “evaluating an employer’s practices”).

139. See Sturm, *supra* note 6, at 524.

140. *Id.*

141. *Id.* at 560, 564-65.

142. *Id.* at 555.

143. *Id.*

144. I bracket here the question of just what “the law’s goals of workplace equality” are. As succeeding Parts make clear, the question does not admit of an easy answer. For present purposes, what

interventions would merely be the practices that are "best" for employers or the intermediaries themselves. While professional cultures can sometimes be enlisted to effect changes within organizations,¹⁴⁵ there are good reasons to doubt the wisdom of a strategy that broadly empowers intermediaries to set workplace equality norms and the means of achieving them.

Work by the sociologist Lauren Edelman highlights the dangers of such an approach. Professor Edelman argues generally that "[l]aws that are ambiguous, procedural in emphasis, and difficult to enforce invite symbolic responses—responses designed to create a visible commitment to law, which may, but do not necessarily, reduce employment discrimination."¹⁴⁶ In a series of articles extending over more than a decade,¹⁴⁷ she and her colleagues have carefully examined the ways in which various intermediaries—management lawyers and consultants, human resources professionals, and equal employment opportunity officers—have responded to legal antidiscrimination mandates and helped to internalize them within workplaces. Professor Edelman's work reveals that, as a general matter, these intermediaries "tend to subsume legal goals under managerial goals."¹⁴⁸ This does not mean that intermediaries ignore workplace equality goals, only that broader managerial interests dampen their commitment to those goals.¹⁴⁹ Focusing on employers' internal

is important is that intermediaries are likely to have interests and inclinations that diverge from whatever workplace-equality norms we might wish to attribute to the law.

145. See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 136-37 (1983); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 64-65 (1989). For an argument that deference to professionals in any given context must be justified by an essentially political argument that the professionals who will receive deference will serve the interests that we normatively wish to serve in that context, see Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479 (2001).

146. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1542 (1992).

147. In addition to the sources cited in the next few paragraphs, see Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 LAW & POL'Y 73 (1991); Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401 (1990); Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992); Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479 (1997).

148. Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 511 (1993); cf. Frank Dobbin & John R. Sutton, *The Strength of a Weak State: The Rights Revolution and the Rise of Human Resource Management Divisions*, 104 AM. J. SOCIOL. 441, 443 (1998) ("Middle managers soon retheorized these [employment law compliance] offices with business and market rationales, describing them not as means to compliance with federal regulation but as cost-effective administrative solutions to problems of worker loyalty and productivity."). See generally Edelman, *supra* note 146, at 1535-36 (describing the "process of response to law in which organizations test, negotiate, and collectively institutionalize forms of compliance that, to the greatest extent possible, maximize both [legitimacy and managerial] interests").

149. Professor Edelman's findings are therefore consistent with Professor Catherine Albiston's general observation that "the institutional embeddedness of rights mobilization creates both constraints on and opportunities for change." Albiston, *supra* note 132, at 44.

dispute resolution procedures—which are a key element of structural-discrimination proposals¹⁵⁰—Professor Edelman and her colleagues observe:

[O]rganizational forums tend to recast grievances in ways that downplay legal issues and that focus instead on more typically managerial concerns, such as communication, problem solving, teamwork, and leadership; disputes that originate as rights violations (e.g., safety hazards, discrimination, environmental degradation) are likely to be handled as interpersonal difficulties, administrative problems, or psychological pathologies.¹⁵¹

The result is often—though not always—“to draw attention away from both violations of law and from the class basis of discrimination.”¹⁵²

For example, management lawyers and consultants have frequently urged employers to adopt internal dispute resolution procedures, zero-tolerance policies, and diversity and sexual harassment training programs. These responses serve the interests of employers by making them appear to be invested in achieving workplace equality, and perhaps by promoting happier interpersonal relations among workers. They also serve the interests of the intermediaries themselves, by promoting a market for their own services.¹⁵³ But there is scant evidence that the responses urged by intermediaries actually result in equal treatment or unbiased decisionmaking.¹⁵⁴

None of this is to say that the evidence demonstrates that these techniques fail to promote equality. The point is that both the material interests of employers and intermediaries and the sociological context in which they

150. See *supra* Part I.B.2.

151. Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 967 (1999).

152. Edelman et al., *supra* note 148, at 519; see also Anna-Maria Marshall, *Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC’Y REV. 83, 84 (2005) (concluding, based on a study of one workplace, “that management interpretations shape the way supervisors implement [a sexual harassment] policy” and that employees, “anticipat[ing] skeptical treatment by their supervisors,” are moved to “complain about only the most serious or most troubling forms of sexual conduct, thus enacting a legal consciousness that reflects a narrow meaning for ‘sexual harassment’”).

153. For a suggestion that these self-interested considerations are what drives the adoption of internal dispute resolution procedures, see Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

154. See Bisom-Rapp, *supra* note 67, at 29-44; 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, 161-65 (2001); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 432 (1999); Margaret S. Stockdale et al., *Coming to Terms with Zero Tolerance Sexual Harassment Policies*, 4 J. FORENSIC PSYCHOL. PRAC. 65, 67 (2004). Professor Alexandra Kalev and her colleagues conclude that diversity training combined with numbers-focused affirmative action policies can improve diversity among the managerial ranks, but that diversity training alone may be counterproductive. ALEXANDRA KALEV ET AL., *TWO TO TANGO: AFFIRMATIVE ACTION, DIVERSITY PROGRAMS AND WOMEN AND AFRICAN-AMERICANS IN MANAGEMENT* (unpublished manuscript, available at <http://www.si.umich.edu/ICOS/dobbin.pdf>).

operate often combine to make the evidence irrelevant to decisions to adopt structural responses. As stories about the effectiveness of particular structural responses "are told and retold in the professional journals, the stories tend to become widely accepted in organizational fields and to influence ideas about organizational rationality across organizational, professional, and legal realms."¹⁵⁵ Eventually, these success stories result in the development of conventional wisdom among professionals that particular techniques work to reduce discrimination, even if the evidence is actually weak or conflicting. Dissenting professionals may then find it socially and politically difficult to challenge that consensus.¹⁵⁶ As those techniques become internalized across workplaces, courts, "look[ing] to the organizational world for viable models of social responsibility and sound management practice,"¹⁵⁷ begin to incorporate such norms into controlling legal doctrine.¹⁵⁸ This cycle, led and maintained by the practices of intermediaries, is especially troubling because it "can actually colonize state law itself by effectively redefining what is seen as 'normal,' 'reasonable,' 'rational,' and 'compliant.'"¹⁵⁹

Note that Professor Edelman's *descriptive* story of how employment discrimination law operates is almost identical to that implied by Professor Sturm's *normative* proposal for a structural approach to employment discrimination law. But the spin is entirely the opposite. Where Professor Sturm sees employers using antidiscrimination law as a tool to respond to more broad-ranging management pathologies, Professor Edelman sees employers domesticating legal norms to serve their own managerial imperatives.¹⁶⁰ Where Professor Sturm sees an "interactive, tiered system,"¹⁶¹ in

155. Edelman et al., *supra* note 154, at 408. To similar effect, see Edelman, *supra* note 146, at 1546.

156. See Edelman & Suchman, *supra* note 151, at 979 ("[W]hen the internalization of law is occurring simultaneously in many firms throughout an organizational field—and, indeed, is buttressed by supportive intraorganizational structures at the level of the field itself—even the most disgruntled participants may have trouble enunciating persuasive counterarguments or describing plausible alternatives.").

157. *Id.* at 964.

158. See Edelman et al., *supra* note 154, at 436.

159. Edelman & Suchman, *supra* note 151, at 963.

160. Compare Sturm, *supra* note 6, at 520-21 (describing as successful three employers' structural approaches to reducing workplace bias and noting that "[l]iability avoidance certainly provided crucial incentives to change, but economic and ethical motivations figured prominently as well," and that these structural approaches provided an opportunity not only to reduce bias but also to address "[r]elated problems that did not themselves constitute legal violations"), and *id.* at 500 (explaining that Intel's structural approach to reducing workplace bias helps to avoid "potential legal liability" as well as to address "destructive interpersonal relationships" that inhibit productivity), with Edelman et al., *supra* note 148, at 511 ("[C]omplaint resolution is seen as synonymous with the traditional managerial goal of smooth employment relations, and allegations of rights violations are often recast as typical managerial problems. The result is that, as in the case of ADR, the focus is more on the *resolution* of conflict than on the realization or definition of legal rights or ideals, and conflicts over rights are often transformed into interpersonal problems.").

161. Sturm, *supra* note 6, at 555.

which the “floor of acceptable conduct” will continually “rise as the capacity to address problems increases,”¹⁶² Professor Edelman sees another means by which the “haves” will come out ahead.¹⁶³ The difference lies in their assessments of the forces and incentives operating on intermediaries. To Professor Sturm, the connection between intermediaries and broader professional communities (she favors the term “communit[ies] of practice”) insulates intermediaries from the pressure to conform their actions to the bottom-line business goals set by corporate managers.¹⁶⁴ As Professor Edelman and her colleagues show, however, things are more complicated than that. Although professionals occasionally employ their own norms to transform workplaces,¹⁶⁵ a professional’s own interests and milieu necessarily constrain and mold those norms. And when a professional works for management, she must heed managers’ interests as well.¹⁶⁶

Indeed, by urging lawyers and other workplace intermediaries to reach across disciplinary boundaries and engage in a pragmatic, problem-solving practice that is not limited by traditional professional models,¹⁶⁷ structural-discrimination proposals may place intermediaries in a weaker position to resist the pressures imposed by the managers for whom they work. It is, after all, their professional status—their responsiveness to a self-defined professional community that extends beyond and has interests distinct from any particular employer—that gives intermediaries whatever power they have to stand up to employer pressures when managerial interests and workplace equality norms conflict.¹⁶⁸ To remove the source of that power creates a powerful risk of cooption.¹⁶⁹

162. *Id.* at 560.

163. See Edelman & Suchman, *supra* note 151, at 980-83. The allusion, of course, is to Professor Marc Galanter’s classic article. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

164. Sturm, *supra* note 6, at 524; Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 305-06 [hereinafter Sturm, *Workplace Equity*].

165. See Edelman & Suchman, *supra* note 151, at 962-63 (describing how “infusing external legal values into internal organizational practices” tends “to constrain traditional managerial prerogatives” by “subtly shift[ing] the organizational agenda,” “expand[ing] the ‘rights consciousness’ of organizational stakeholders,” and creating “internal advocates for the values that the practices symbolize, giving the law an indirect voice in organizational decisionmaking”).

166. See Edelman et al., *supra* note 148, at 501 (“Although professionals within organizations who handle discrimination issues are often considerably more committed to the goals of civil rights laws than are the top administrators who hire them, their structural position as part of management operates as a serious constraint on their ability to advocate and achieve significant reform.”).

167. See Sturm, *supra* note 6, at 527-30; Sturm, *Workplace Equity*, *supra* note 164, at 297.

168. See, e.g., Edelman & Suchman, *supra* note 151, at 972 (discussing how “the lay/professional interface can be a source of substantial professional discretion and agenda-setting power”).

169. Professors Edelman and Suchman make a similar point in discussing the limited ability of in-house counsel to impose their professional norms on their employers. See *id.* (“When legal capacity moves to inside the organization, society risks losing whatever leverage an autonomous outside counsel system might otherwise provide.”).

Particularly striking in this regard is the practice of some plaintiff-side employment discrimination lawyers, notably those associated with the prominent Saperstein, Goldstein firm, who approach employers that are potential litigation targets before any complaint is filed and agree to represent those employers in efforts to achieve compliance with the law. In their compliance efforts, these lawyers typically focus on urging adoption and improvement of workplace structures that aim at preventing discrimination and mitigating its harmful effects. Professor Sturm has endorsed this blurring of traditional adversary boundaries as an emerging model for a structural employment discrimination law.¹⁷⁰

Plaintiffs' lawyers, however, already face a conflict of interest that makes them less-than-reliable advocates of workplace equality.¹⁷¹ Professor Selmi's recent empirical work suggests the nature of the problem. Observing that neither the filing nor the settlement of an employment discrimination class-action lawsuit typically has a significant effect on a defendant corporation's stock price, he concludes that such lawsuits typically do not lead to meaningful reform of employer practices.¹⁷² He bolsters this conclusion with case studies of particular employment discrimination settlements in which he concludes that plaintiffs' lawyers opted for money over reform.¹⁷³ Notably, one of Professor Selmi's examples of failed employment discrimination class-action litigation is the sex discrimination case against Home Depot—one of Professor Sturm's key *success* stories of the emerging structural approach.¹⁷⁴ Professor Selmi is particularly critical of the work of the Saperstein, Goldstein firm—the plaintiffs' firm whose innovative structural-discrimination efforts Professor Sturm views as a model.¹⁷⁵

These points suggest that Professor Sturm is too sanguine in her assumption that plaintiffs' lawyers' concern for their "reputation" within their "historical and professional community" will provide a reliable source of accountability that aligns those lawyers' interests with the law's norms

170. See Sturm, *supra* note 6, at 529; Sturm, *Workplace Equity*, *supra* note 164, at 303-04.

171. Professor Green recognizes this point. Green, *supra* note 137, at 717.

172. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects*, 81 TEX. L. REV. 1249, 1265-69 (2003).

173. *Id.* at 1268-89.

174. Compare Sturm, *supra* note 6, at 509-19 (lauding the structural approach taken by Home Depot to eliminate sex discrimination in response to a class action lawsuit), with Selmi, *supra* note 172, at 1285-89 (stating that "the essence of the Home Depot settlement was money," that women have made only "small gains within the company's employment structure since the suit was settled," that Home Depot was allowed to set its own compliance goals, that "[e]ven so," the company "failed to meet half of its own benchmarks," and that "the parties jointly moved to terminate the consent decree eighteen months before it was due to expire" notwithstanding the failure to meet those benchmarks).

175. Compare Sturm, *Workplace Equity*, *supra* note 164, at 299-307 (praising the work of Saperstein, Goldstein lawyer Barry Goldstein for his structural efforts to eliminate discrimination), with Selmi, *supra* note 172, at 1325 ("In their litigation, the Saperstein law firm has not required the creation of diversity task forces, and in fact requires very little reporting from its defendants at all.").

of workplace equality.¹⁷⁶ To the contrary, the structure of their compensation already gives plaintiffs' lawyers an incentive to accept monetary settlements—large to them, but small when compared to the bottom line of defendants' businesses—at the expense of systemic reform. To weaken the norms of professionalism that create one of the few checks on their conduct would only exacerbate the problem.

These difficulties are not limited to new-fangled innovations in law practice. They are inherent in any regime that calls upon courts to evaluate the adequacy of the structures employers adopt to promote workplace equality. Courts lack the ability to evaluate those structures on their own, so they naturally want to defer to someone else. But intermediaries are no more fitting recipients of deference than are employers themselves. As the discussion in this section should demonstrate, intermediaries operate in a professional setting that—for both material and sociological reasons—limits their perception of the tools available to promote workplace equality. Although a number of scholars who endorse a structural approach to anti-discrimination law have proposed methods of generating external accountability, none of these proposals addresses this basic problem. Professor Sturm's most concrete proposal in this regard is that government agencies should encourage information pooling among intermediaries, in the hopes that publicity will generate accountability.¹⁷⁷ But as Professor Edelman's work shows, such information pooling already occurs; far from providing a check on intermediaries, such pooling has merely entrenched their power in workplaces.¹⁷⁸

Professors Selmi and Green go farther than does Professor Sturm. They propose that court-appointed, independent experts oversee the implementation of remedies in institutional-reform employment discrimination cases.¹⁷⁹ One could easily extend this proposal to earlier stages of litigation by requiring independent experts to testify regarding defendants' liability. In a related vein, Professor Estlund urges an institutionalized role for independent actors, "accountab[le] to employee interests," to monitor employers' self-regulatory structures.¹⁸⁰ Reliance on such independent actors may well remove intermediaries' immediate pressures to conform to employer interests. But the pool of individuals who will be called upon to serve as court-appointed experts is likely to consist of those with professional experience in relevant fields such as human resources and diversity management.¹⁸¹ In other words, they are likely to be individuals who take

176. Sturm, *Workplace Equity*, *supra* note 164, at 305-06.

177. Sturm, *supra* note 6, at 566.

178. See *supra* text accompanying notes 152-156.

179. Green, *supra* note 137, at 721-22; Selmi, *supra* note 172, at 1327-28.

180. Estlund, *supra* note 97, at 396.

181. Moreover, plaintiffs' and defense counsel are likely to be the ones who direct the court to possible candidates for appointment. See THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., SPECIAL

for granted the same tools, solutions, and limitations that are taken for granted by intermediaries who work for employers.

It bears emphasis, in this regard, that management-side intermediaries are not the only ones who have enthusiastically promoted diversity training as a means of resolving workplace equity problems. Plaintiffs' lawyers have done so as well, despite the lack of evidence that such training is effective.¹⁸² That sobering fact suggests that the norms of managers and human resource professionals exert a powerful influence over actors who have no formal connection to management.

This problem might be soluble if courts, or government agencies exercising oversight power,¹⁸³ had some clear normative understanding of just what sorts of subtle discriminatory conduct employers should be trying to eliminate in their workplaces. If, for example, employers could simply look at statistics and conclude that their techniques of promoting equality were failing if their workforces remained imbalanced on race or gender lines, courts would have an easier job of monitoring the effectiveness of those techniques. As I show in the next Subpart, however, there is no generally accepted understanding—even among proponents of the structural turn—of what forms of subtle discrimination are wrongful. Without such an understanding, deference to intermediaries cannot be expected to work as a strategy for addressing structural discrimination problems.

C. *The Absence of Normative Principles*

As I have just suggested, the difficulties posed by deference to intermediaries are symptoms of a deeper problem. Advocates of a structural approach to employment discrimination law believe that courts should scrutinize the procedures employers adopt to promote workplace equity. Those advocates do not, however, articulate any substantive workplace-equity principles against which those procedures should be judged for adequacy. The lack of substantive principles is overt and quite deliberate in Professor Sturm's work; Professor Sturm urges that the "problem-solving process" she advocates cannot seek to serve any *a priori* norm that describes what sorts of workplace conduct constitute wrongful discrimination. In her view, any attempt to "[e]laborat[e] a general norm in context" will lead to a process that "deepens and even alters the understanding of

MASTERS' INCIDENCE AND ACTIVITY 35-36 (2000) (finding that most special masters are chosen based on nominations from the parties to litigation).

182. See Bisom-Rapp, *supra* note 67, at 2-3; see also *id.* at 25 (stating that "plaintiff's attorneys and EEOC lawyers are no doubt the parties most strenuously advocating training components in settlement agreements").

183. See Green, *supra* note 137, at 722 (arguing that the EEOC "may have a significant role to play in reviewing programs for reform" of particular workplace structures that allegedly facilitate discrimination); Selmi, *supra* note 172, at 1330 (advocating "a role for the government in monitoring [employment discrimination] class action settlements").

the aspirational norm.”¹⁸⁴ Because we, in some sense, discover workplace discrimination problems in the process of trying to solve them, Professor Sturm believes that we must leave it to the problem-solving process to come up with the relevant norms in a bottom-up fashion. Although other structural-discrimination advocates are not as explicit about this point, they too tend to elide normative questions of what kinds of conduct are wrongful by advocating very general doctrines of “negligent discrimination,”¹⁸⁵ or requirements of “reasonable”¹⁸⁶ or “adequate”¹⁸⁷ efforts to avoid discrimination.

But the normative question cannot be so readily deferred. Unless we have an operating theory of what is wrongful about discrimination, we cannot know what kinds of “second generation” conduct—decisionmaking actuated by unconscious bias, harassment, unequal distribution of favorable work assignments, and so forth—should count as unlawful or improper discrimination. Without such a theory, courts have no ground on which to stand in assessing whether employers have done enough to mitigate the operation and effect of impermissible discrimination within their workplaces. To know whether an employer has done enough to eliminate workplace harassment, for example, we must have some idea of what makes harassment wrongful and what kinds of seemingly abusive workplace conduct come within that rationale. Only then can we think about whether the employer has taken the kinds of steps that are likely, as an empirical matter, to reduce forbidden harassment. The question whether the employer has done enough requires still another layer of normative judgment. What is the “reasonable” balance between the costs of additional internal workplace processes and the harm of continuing discrimination? In practice, such a question raises a serious problem of commensurability.

These problems render almost nonsensical the task that participants in the structural turn would impose on the judiciary. Professor Sturm argues that courts should “participate in creating a structure for employers, with the assistance of mediating actors, to develop and evaluate the effectiveness of the employers’ internal systems.”¹⁸⁸ Coercive judicial

184. Sturm, *supra* note 6, at 474 n.51.

185. Oppenheimer, *supra* note 12, at 967-72; cf. Krieger, *supra* note 21, at 1245 (agreeing with Professor Oppenheimer “that a negligence approach to discrimination and equal employment opportunity would further Title VII’s purpose,” but expressing skepticism that it is possible under current knowledge “to translate such a duty into workable legal rules”).

186. E.g., Green, *supra* note 33, at 148 (“[I]f the plaintiff or plaintiffs were to succeed in establishing that the employer had unreasonably enabled discriminatory bias in allocation of opportunity, the plaintiffs would be entitled to appropriate injunctive relief.”); see also Poirier, *supra* note 91, at 488 (arguing for a “reasonableness” standard, but stating that “what is ‘reasonable’ has to be revisited and reexamined periodically, instead of being allowed to ossify into an unquestioning custom”).

187. Chamallas, *supra* note 91, at 2398 (employer would be liable “unless it could show that it had taken adequate measures to guard against stereotyping”).

188. Sturm, *supra* note 6, at 560.

intervention, she says, should be limited to cases where that process falls short: "Judicial coercion would sanction those employers who have not undertaken the process of internal problem solving, and whose capacity to address problems of harassment or discrimination remains ineffectual."¹⁸⁹ A court cannot, however, know whether an employer's "capacity to address problems of harassment or discrimination" is "ineffectual" without having some understanding of what counts as improper harassment or discrimination.¹⁹⁰ Similarly, a court cannot know whether an employer has "unreasonably enabled discriminatory bias in allocation of opportunity"¹⁹¹—Professor Green's test—without knowing what is improper discriminatory bias and how severe that bias is. Mechanisms for "information pooling" and "the articulation of rolling standards"¹⁹² cannot solve this problem. Although those kinds of mechanisms can help to identify what kinds of internal workplace processes can help to avoid what kinds of harms, they cannot answer the fundamentally normative question of what kinds of harms are wrongful and should be prevented.

Professor Sturm's response to this issue is thoughtful and appealing. We simply cannot know, she says, what kind of discrimination is wrong or how much employers should be required to do to prevent it until we actually get down to cases.¹⁹³ We must see both how discrimination operates in context and what avenues are available to reduce its incidence and effects depending on that context. The best the law can do in such circumstances is to set up a process that assures that, as we learn more about what discrimination is wrong and how it can be prevented, those lessons will be progressively incorporated into the law.¹⁹⁴ Here, Professor Sturm's argument resonates especially strongly with the American pragmatist tradition, in which there are no *a priori* normative absolutes, but we discover normative truths by engaging in the effort to solve real problems as they arise.¹⁹⁵

As the "interactive, tiered system"¹⁹⁶ of iterative learning proceeds, however, different constituencies will predictably take different positions on the ultimate values that should be served and the balance that should be struck between them. The pragmatist model, as incorporated by democratic-experimentalist scholars like Professor Sturm, seems to rest on the premise that if we all were fully informed about the nature of the problems

189. *Id.*

190. *Id.*

191. Green, *supra* note 33, at 148.

192. Sturm, *supra* note 6, at 563.

193. *See id.* at 473-74 & n.51.

194. *See id.* at 562-63.

195. For an effort to connect democratic-experimentalist proposals like Professor Sturm's with this aspect of John Dewey's thought, see Simon, *supra* note 93, at 177-81.

196. Sturm, *supra* note 6, at 555.

we face, we would agree on normatively appropriate responses.¹⁹⁷ But consensus is unlikely to emerge in many disputes about how employers should seek to promote workplace equality. And in the absence of consensus, the legal system must choose.¹⁹⁸ The choice might be framed as an authoritative declaration of prescriptive rules that govern workplace institutions or decisionmaking systems. It might instead be framed as a rule of deference to particular workplace intermediaries. But in deciding *what* rules to adopt (or not to adopt), or in deciding *which* intermediaries deserve deference, the legal system explicitly or implicitly elaborates a normative vision of employment discrimination law.¹⁹⁹ Absent such a normative vision, these choices will be incoherent or worse.

Although this nagging problem of the normative might plausibly be asserted as an objection to democratic-experimentalist proposals generally, it is especially salient in the employment discrimination context. In other areas where scholars have advocated democratic-experimentalist approaches, such as in studies of the emerging drug court movement²⁰⁰ and standards-and-accountability education reform,²⁰¹ we can start with widely accepted outcome measures that everyone agrees can reveal whether a given policy is successful. Whatever we may decide is the best way to address addiction-induced criminality, for example, a policy that reduces recidivism and increases the rate at which addicts complete drug rehabilitation programs can certainly be judged to have beneficial outcomes.²⁰² And whatever we may think are the ultimate goals of education, virtually everyone agrees that reducing gaps in achievement between members of different races or socioeconomic classes is a good thing.²⁰³ These outcome-based measures can provide the kind of focal point necessary to make the democratic-experimentalist process of information pooling and benchmarking operate. They can do so precisely because they are so widely accepted.

But how do we measure success in reducing structural employment discrimination? Professor Sturm's examples imply that the proper test is a numerical one: are women and minorities integrated into all job

197. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 455 (2004) (criticizing the assumption of some democratic-experimentalist scholars "that comprehensive and widespread information on an issue will eventually lead people to converge normatively on the same positions").

198. Thoughtful advocates of democratic experimentalism have recognized that they have not, as Professor Bill Simon acknowledges, identified any "entirely satisfactory" solution to this problem. Simon, *supra* note 93, at 210.

199. For an illustration of the point from the perspective of a slightly different employment discrimination context, see Bagenstos, *supra* note 145, at 1489-509.

200. See Dorf & Sabel, *Drug Treatment Courts*, *supra* note 93.

201. See Liebman & Sabel, *No Child Left Behind*, *supra* note 93.

202. See, e.g., Dorf & Sabel, *Drug Treatment Courts*, *supra* note 93, at 849-50.

203. See, e.g., Liebman & Sabel, *No Child Left Behind*, *supra* note 93, at 1715.

classifications and at all levels of an employer's hierarchy to a degree that approaches their proportion of the population? In every example Professor Sturm provides of a "successful" response to structural discrimination, the employer makes heavy use of numbers to track the hiring, job assignments, and promotions of minority and female employees.²⁰⁴ To these employers, progress moves in the direction of proportional representation across the workforce. Such numerical benchmarks seem to be implicit in other proposals for structural approaches to employment discrimination²⁰⁵—and in some proposals, the numerical benchmark is explicit.²⁰⁶

If the benchmark is proportional representation—or even a "critical mass"²⁰⁷—it is easy to see how a pragmatic, democratic-experimentalist structural approach can work: courts can simply tell employers that they must figure out a way to get their numbers up. Perhaps that is what Professor Sturm means when she says, "Employers who are continually improving are in compliance."²⁰⁸ But unlike the notion that a good drug policy decreases recidivism and addiction rates or even the notion that a good education policy decreases the black-white achievement gap, the notion that a good employment policy results in proportional racial and gender representation in all workplace positions is extraordinarily

204. Deloitte & Touche is one employer that Sturm uses as such an example. Sturm, *supra* note 6, at 496 (noting that each office was required annually to report "its status in relation to a set of benchmarks such as number of women, gender gap, female promotions, female partner promotions, and flexible work arrangements") (internal quotation marks omitted). For Sturm's description of Intel's program, see *id.* at 506 (noting that in response to a claim of managerial bias, a human relations professional will "look[] at the personnel statistics of this manager's group over a period of time" and, if "the numbers and aggregate interviews reveal a pattern," will take steps "to equalize access and promotion opportunities"). For her summary of Home Depot's policies, see *id.* at 516 ("Home Depot has established Benchmarks for each position. The Benchmarks 'are not quotas; they are Benchmarks designed to afford guidance as to whether Home Depot is making selection decisions in such a way as to afford equal employment opportunity.' Failure to achieve a Benchmark triggers further inquiry and a 'constructive dialogue' aimed at understanding whether a problem exists and if so, how to correct it.") (footnote omitted). See also KALEV ET AL., *supra* note 154 (pointing to numbers-focused programs as successful examples of diversity promotion).

205. See, e.g., Green, *supra* note 33, at 146 ("Numerical disparities in outcome would be important to a claim of structural disparate treatment . . . as a signal that discriminatory bias may be operating in workplace dynamics.").

206. See *supra* note 74 (citing authors who propose affirmative action plans as a structural approach to eliminating discrimination); see also Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2174-76, 2180-81 (2003) (proposing that employers whose workforces evidence a high degree of sex segregation should be subject to enhanced liability for gender-based harassment, while employers whose workforces are largely integrated by sex should be subject to lesser liability, and setting forth specific numerical benchmarks for determining whether workplaces are segregated or integrated).

207. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003); see also *id.* at 329-30 (approving University of Michigan Law School's affirmative action admissions program, which was designed to assure that each entering class contained a "critical mass" of minority students).

208. Sturm, *supra* note 6, at 560.

controversial. To a large extent, “hiring by the numbers”²⁰⁹ is the very thing modern-day employment discrimination law seeks to avoid. Fear of by-the-numbers hiring and promotion—what Professor Richard Ford calls “quota-phobia”²¹⁰—has increasingly shaped employment discrimination case law and legislation.²¹¹ Although there is at least tenuous acceptance of employers’ voluntary efforts to achieve numerical balance in their workforces,²¹² virtually no mainstream voice overtly defends an interpretation of the law that would *require* employers to engage in such efforts. Courts have frequently expressed doubt that there is anything wrong with disproportionate representation of minorities and women at various levels of the workforce. Even in workplaces where employment patterns clearly seem to reflect a structure of subordination—with whites or men overrepresented in the “best” jobs and underrepresented in the “worst”—judges (including majorities of the Supreme Court) often believe that such patterns reflect real differences in qualifications or voluntary choices of individual workers.²¹³

209. Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043, 1071 (1993).

210. RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 194 (2005) (“Quota-phobia has ensured that anti-discrimination law—including the logically group-focused notion of disparate impact—retains an exclusively individualist orientation that is ill suited to the compelling policy imperative to dismantle social practices of segregation and hierarchy—practices best understood and addressed at a societal level.”).

211. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989) (seeking to avoid the risk that employers will feel pressure to adopt quotas and therefore imposing a relatively lenient burden of justification on employers who maintain practices with a disparate impact); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992-93 (1988) (opinion of O’Connor, J.) (same); see also Leibold et al., *supra* note 209, at 1071 (noting that the Bush Administration opposed the stringent “business necessity” standard in the early versions of the Civil Rights Act of 1991 and that Administration officials “argued that industry would respond by hiring by the numbers (i.e., impose quotas) to avoid the statistical imbalances which could form the basis for disparate impact suits”). This is not to say that those who argue that disparate impact liability leads to “hiring by the numbers” are correct. For strong arguments that they are incorrect, see Paul Oyer & Scott Schaefer, *Sorting, Quotas, and the Civil Rights Act of 1991: Who Hires When It’s Hard to Fire?*, 45 J.L. & ECON. 41 (2002); Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487 (1996).

212. For a good discussion of the possibilities *Grutter* opens up in this regard, see Cynthia Estlund, *Taking Grutter to Work*, 7 GREEN BAG 2D. 215 (2004).

213. *Wards Cove* is a prime example. As Justice Stevens noted in dissent, “Some characteristics of the Alaska salmon industry described in this litigation—in particular, the segregation of housing and dining facilities and the stratification of jobs along racial and ethnic lines—bear an unsettling resemblance to aspects of a plantation economy.” *Wards Cove*, 490 U.S. at 663 n.4 (Stevens, J., dissenting) (citation omitted). In particular, the evidence revealed a remarkable degree of racial segregation within the employer’s workforce, with “nearly all” of the lower-status cannery workers being nonwhite, in an industry in which only “about 47% to 50%” of the overall workforce was nonwhite. *Id.* at 675 (Stevens, J., dissenting) (citation omitted). But the Court found that statistical comparison largely irrelevant; instead, Justice O’Connor’s majority opinion concluded that the percentage of nonwhites in the lower-status cannery jobs told us nothing about the percentage of nonwhites who were qualified and willing to perform the higher-status noncannery jobs. See *Wards Cove*, 490 U.S. at 651-52. For a discussion of courts’ frequent determinations that workplace gender

It is possible to say that these courts are wrong. But to do so is to make a normative choice—and one that is deeply controversial. Advocates of structural approaches have generally failed to own up to this problem. Any structural response to employment discrimination necessarily rests on a theory of wrongful discrimination. As the foregoing discussion should suggest, that theory may well be one that would not be embraced by most participants in the legal discourse. This point reflects a deeper problem, to which I now turn.

III

THE LIMITS OF ANTIDISCRIMINATION LAW

My discussion in the previous two Parts should be unsettling, if not depressing. The recent calls for a structural approach to employment discrimination law respond to real concerns. But the proposals that have been offered are deeply flawed. The proponents of the structural turn have identified phenomena that contribute significantly to ongoing problems of workplace inequality, but they have not offered any effective way of addressing those problems. In this Part, I want to suggest that the difficulties with a structural approach to employment discrimination law may reflect yet a deeper problem: we may be asking antidiscrimination law to do too much of the work of responding to society's inequalities.

My argument here is more suggestive than conclusive, but I hope it serves to put my reservations with the structural approach into context. Like unconscious bias and subtle discrimination, many of the problems that lead to workplace inequalities are problems of society-wide scope for which many legal actors will find it difficult to attribute blame to any particular employer. Just as it has in the past, judicial resistance is likely to undercut any effort to use antidiscrimination law to attack those problems.

Employment discrimination law has always served two different purposes. The first, captured in the antistatutory theory that is so popular among academics, reflects a broad goal of social change to eliminate group-based status inequalities.²¹⁴ The second, captured in the so-called

stratification reflects the voluntary choices of women, 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, 1777 (1990) (“[A]lmost half the courts considering the issue have attributed sex segregation to women’s own work preferences.”); see also Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1081-82 (1992) (finding that “the courts have been considerably more likely to credit the lack of interest defense in sex discrimination cases than in race discrimination cases” since 1964, but that even “race discrimination plaintiffs’ success against the lack of interest defense plummeted after 1977”).

214. For examples of discussions of antistatutory theory, see J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2353-58 (1997); Christopher A. Bracey, *Adjudication, Antistatutory Theory, and the Jazz Connection*, 54 ALA. L. REV. 853, 858-62 (2003); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1014-15 (1986); Owen M. Fiss, *Groups*

antidiscrimination principle, reflects a more narrow objective of eliminating the unfairness particular individuals experience when they are the victims of wrongful employer conduct.²¹⁵ Many scholars, myself included, believe that the antistatutory principle offers the best explanation for why we think that discrimination based on forbidden grounds is unfair to its victims.²¹⁶ But that is largely an academic view. In the courts, the antidiscrimination principle dominates. This is particularly true in constitutional cases, in which the Supreme Court has formally rejected a number of key elements of the antistatutory program.²¹⁷ But even in cases interpreting antidiscrimination statutes, judicial resistance to doctrines such as disparate impact is manifest. Particularly in cases where it seems unlikely that the employer's adoption of a practice with a disparate impact served as a cover for intentional discrimination, judges are hesitant to find liability under the disparate impact doctrine.²¹⁸

and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107, 157 (1976); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 251 (1983); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428-33 (1994). For my own previous invocations of antistatutory theory in analyses of employment discrimination law, particularly in the disability discrimination context, see Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 452-56 (2000); Bagenstos, *supra* note 8, at 839-44.

215. For examples of work in this tradition, see Morris Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986); Charles Fried, *The Supreme Court, 1989 Term—Comment: Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990).

216. See sources cited *supra* note 214; cf. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistatutory?*, 58 U. MIAAMI L. REV. 9, 13 (2003) ("[A]ntistatutory values have played and continue to play a key role in shaping what the anticlassification principle means in practice."); Reva B. Siegel, *Equality Talk: Antistatutory and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1477 (2004) (arguing that "antistatutory values live at the root of the anticlassification principle"); *id.* at 1538 ("One cannot understand the shape and movement of anticlassification discourse in modern equal protection law without appreciating how and why it expresses, masks, and limits antistatutory concerns.").

217. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 273 (1979); *Washington v. Davis*, 426 U.S. 229, 248 (1976). For scholarly discussion of the point, see Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1009-10 (2002) ("Current Supreme Court doctrine understands equal protection as an antidiscrimination principle rather than an antistatutory principle by subjecting affirmative action programs to the same level of scrutiny as government policies that disadvantage traditionally subordinated groups, and by requiring a showing of purposeful discrimination before subjecting a neutral law with a disparate impact on a protected class to heightened scrutiny.") (footnote omitted); Siegel, *supra* note 216, at 1473 & n.10 ("Scholars debate what our constitutional understanding of equality ought to be, but most would agree that American equal protection law has expressed anticlassification, rather than antistatutory, commitments as it has developed over the past half-century.").

218. In *Ward's Cove*, for example, the Court held that an employer can defend against a claim of disparate impact by showing that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). The Court imposed this relatively lenient burden of justification—instead of the more stringent "business necessity" defense urged by many civil rights advocates and (largely) codified in the Civil Rights Act of 1991—because the "legitimate employment goals" test was all that was necessary to prevent "discrimination [from] be[ing] practiced through the use of spurious, seemingly neutral

To be sure, some cases that formally reject the antisubordination theory reach results that are difficult to explain without relying on that theory.²¹⁹ Both the social-change and the individual-fairness purposes of antidiscrimination law thus continue to influence the development of that law in the courts. But the latter purpose has the upper hand. The easier it is to characterize an employer's conduct as wrongful and the plaintiff's injury as unfair, the more likely judges are to find liability.

As the structural turn illustrates, many of today's employment equality problems stretch the fault-based understanding of antidiscrimination law to its limit. The problem of implicit bias, which drives the calls for a structural approach to employment discrimination law, is a prime example. Discrimination actuated by implicit bias is not rooted in a set of objectionable values so much as it is built into the structure of how people's brains make sense of the avalanche of information they must process.²²⁰ If antidiscrimination law is to respond to such bias effectively, the concept of wrongful discrimination must expand to embrace not only the deviant acts of especially immoral people but also the everyday actions of virtually all

employment practices." *Id.* See generally J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1402 (2003) (stating that most disparate impact cases "are best explained" as eliminating hidden animus or irrational employer conduct, and that "[o]nly a vanishingly small proportion of the overall caseload can realistically be characterized" as resting on a broader understanding of the disparate impact doctrine). Cf. *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001) (holding that agency regulations that prohibited actions with an unjustified racially discriminatory impact did not implement Section 601 of the Civil Rights Act of 1964, which prohibits intentional racial discrimination by recipients of federal financial assistance).

219. As Professor Siegel explains, even the Court's University of Michigan affirmative action decisions, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), are examples of this point. Those decisions seem to reject the antisubordination theory by insisting on individualized consideration of applicants and by "repeatedly distanc[ing themselves] from group-based justifications for affirmative action." Siegel, *supra* note 216, at 1539. However, they rest on an understanding of "diversity"—the idea that "the path to leadership [should] be visibly open to talented and qualified individuals of every race and ethnicity," *Grutter*, 539 U.S. at 332—that "explicitly embraces antisubordination values." Siegel, *supra* note 216, at 1538. Professor Siegel concludes that "*Grutter* fervently warns against interpreting the Equal Protection Clause in terms of the very values the decision in fact vindicates. Protestations to the contrary notwithstanding, *Grutter* embodies an antisubordination understanding of the clause." *Id.* at 1540. Much antidiscrimination doctrine follows a similar pattern. See, e.g., *id.* at 1537-40; David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 120-26.

220. See, e.g., Krieger, *supra* note 21, at 1244 ("Categorization-related and other cognitive biases in intergroup judgment are unintended and, for many people, earnestly undesired byproducts of essential mental processes and strategies. Attaching moral opprobrium or the risk of substantial financial liability to cognitive intergroup judgment errors can only serve to heighten intergroup anxieties and make racial, ethnic, and gender distinctions more salient."); see also Wax, *supra* note 20, at 1198 ("If disparate treatment is best understood as an inadvertent byproduct of long-ingrained habits of human thought, then discrimination need bring no immediate psychic or economic benefits at all and those benefits are not needed to explain its persistence. Rather, the main obstacle to a discrimination-free workplace may simply be the difficulty of altering the mind's tendency to employ stereotypes and mental categories in social judgment.").

of us.²²¹ In the end, because implicit biases draw on widely shared cultural understandings, any effort to eliminate those biases requires a massive, society-wide effort to change the significance of race and gender in our culture.²²² Courts are likely to balk at undertaking such a colossal task;²²³ they are particularly unlikely to conclude that particular employers are at fault for failing to police conduct that has been programmed into our brains by overarching societal influences.

Implicit bias is only one example of the limits of a fault-based antidiscrimination law. In previous work, I have shown that courts resist a broad reading of the ADA's reasonable accommodation requirement that would require employers to dismantle deep-rooted structural barriers to employment for people with disabilities. Even when an employer could, without undue expense, overcome barriers such as lack of available health insurance or accessible transportation for a particular employee with a disability, courts rarely require the employer to do so. Those barriers to employment are too readily seen as society's, rather than the individual employer's, responsibility.²²⁴

Many racial minority groups also face deep-rooted structural barriers to employment. Many of these barriers stem from the significant wealth disparities and environmental inequalities between whites and non-whites, inequalities and disparities that themselves reflect the legacy of discrimination.²²⁵ Even if individual employers could mitigate the effects of these

221. Thus, Professor Banaji, who has participated in some of the most important psychological research into implicit bias, titles one article summarizing her findings *Ordinary Prejudice*. See Mahzarin R. Banaji, *Ordinary Prejudice*, PSYCHOL. SCI. AGENDA, Jan./Feb. 2001, at 8, 8-10.

222. See Krieger, *supra* note 21, at 1246-47 ("[N]o single employer can integrate a community, alter the depiction of minorities in the media, or transform the tone or content of our cultural discourse on race."); see also Haney López, *supra* note 21, at 1828 ("Individual reliance on racial scripts or paths pervades our society. Yet background patterns and understandings are difficult to deinstitutionalize, particularly in organized settings."); Wax, *supra* note 20, at 1196 ("[S]tereotypical patterns of thought will be eroded, if at all, not through measures effected at the level of the individual workplace, but rather through a gradual sea change on multiple cultural fronts.").

223. See Balkin & Siegel, *supra* note 216, at 25 & n.58 (suggesting that judges consciously avoid using antidiscrimination law as a means of transforming broad-scale social norms and quoting one court that rejected the notion "that Title VII was designed to bring about a magical transformation in the social mores of American workers") (internal quotation marks omitted); cf. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2260 (1995) (arguing that "antidiscrimination law is at risk when its premises deviate from public perceptions of discrimination"); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 31-32 (2000) (arguing that antidiscrimination law acts to change, but at the same time is constrained by, social norms governing race and gender).

224. Cf. Bagenstos, *supra* note 5, at 42 (discussing ways in which courts have resisted requiring employers to provide accommodations for disability-related obstacles to employment that result from "factors that go beyond any particular employer's workplace or work rules").

225. See generally, JAMES J. HECKMAN & ALAN B. KRUEGER, *INEQUALITY IN AMERICA: WHAT ROLE FOR HUMAN CAPITAL POLICIES?* (2004); MICHAEL MARMOT, *THE STATUS SYNDROME: HOW SOCIAL STANDING AFFECTS OUR HEALTH AND LONGEVITY* (2004); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1997).

barriers (by, for example, relaxing certain job qualifications for members of minority groups),²²⁶ the barriers themselves are beyond the control of any particular employer. Judges who are committed to an individualized, fault-based understanding of employment discrimination law are likely to resist a reading that holds employers responsible for those barriers.

As overt bias recedes and workplaces change, structural problems like these are likely to become even more significant contributors to workplace equality problems.²²⁷ That fact poses a challenge for employment discrimination law: how can we persuade judges to use employment discrimination law to attack these structural problems when their prevailing understanding of the law is based on a model of individualized employer fault? There are a number of possible responses to this challenge, but each has serious problems.

One possible response, which is implicit in calls for a structural approach to employment discrimination law, is that once judges are forced to attend to the choices employers make that "enable the operation of discriminatory bias," their consciousness will be raised and they will come to hold employers responsible for those choices.²²⁸ But experience suggests that this task is not as easy as it may sound. Unless judges are persuaded that the unconscious or subtle bias of employees is their employer's fault, they are not likely to hold the employer responsible simply because the employer chose to adopt structures that failed to anticipate or check that bias.

Another possible response would be to attempt to divorce attacks on structural discrimination from any notion of employer fault. In this vein, Professor Charles Sullivan argues that litigants and courts should turn to the disparate impact doctrine to attack structural discrimination. He contends that courts would be more willing to be forthright in rejecting a

226. For an intriguing suggestion of how employers could be required to do that—by applying the ADA's reasonable accommodation model to the race context—see Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 38-41 (1996). Given that courts have been unwilling to order disability accommodations that would overcome deep-rooted structural barriers to employment, any demand that they order such accommodations in the race context would likely meet serious resistance.

227. Professor Ian Ayres suggests something to the contrary: "There may come a time when race-contingent behavior as an empirical matter recedes to such an extent that institutional discrimination becomes the dominant source of racial disability. But it is my sense that this time has not yet come." AYRES, *supra* note 18, at 426. But this "sense" is as much a political calculation as an empirical conclusion, for Professor Ayres makes clear that it rests on his view that "institutional discrimination" does not "provide as firm a moral basis for political organizing." *Id.* at 426; see also Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 659 (2003) (arguing that "the last decade or so of legal scholarship has concentrated on how discrimination is now more frequently subtle in form rather than overt in nature" but that "this concentration has failed to capture much support either in the courts or in our social conscience, where we continue to be fixated on overt claims of discrimination").

228. Green, *supra* note 33, at 145.

requirement of employer fault under a doctrine that dispenses with any showing of intent to discriminate.²²⁹ But that prediction seems entirely too optimistic. Disparate impact doctrine has been in a massive decline over the past few decades.²³⁰ Although Professor Sullivan attributes that decline to a few lower-court missteps that could be overcome,²³¹ the problem is more likely that the vagueness of the Civil Rights Act of 1991 gives courts ample opportunity to translate their hostility toward disparate impact into restrictive doctrine.²³² Courts are hostile to disparate impact law for precisely the same reason that they hesitate to read disparate treatment doctrine as embracing implicit bias—because actions taken without a conscious intent to discriminate do not fit the paradigm of a fault-based understanding of “discrimination.” To remit claims involving structural discrimination to disparate impact doctrine, then, does not solve the problem so much as highlight it.

There may be ways out of these problems, and I certainly do not mean to reject efforts to find them. But it strikes me that experience does not leave much room for optimism. The answer, in the end, may lie within the broad realm of politics and social change rather than the narrow confines of legal doctrine. And this may be where the democratic-experimentalist approach that informs employment discrimination scholarship’s structural turn may prove helpful. By bringing together individuals with a variety of interests and focusing them on localized efforts to address aspects of a particular social problem, democratic experimentalism holds the promise of creating a new politics in which people see beyond their initial interests and come to understand problems in new ways—or even to understand facts that did not previously seem troubling as social problems. This process, in turn, might help to develop solutions to problems of employment discrimination and simultaneously build the political constituency for implementing those solutions.²³³

Understood in this way, structural approaches to employment discrimination problems may have a significant role to play. An employer implementing a structural approach would, as Professor Sturm’s examples suggest, place heavy reliance on numerical measures of employment equality. But what numerical imbalances would trigger is a process of self-examination, as various constituencies within the firm worked to identify

229. See Sullivan, *supra* note 3.

230. See *supra* note 3.

231. See Sullivan, *supra* note 3, at 58.

232. On the vagueness of the 1991 Act, see I LINDEMANN & GROSSMAN, *supra* note 108, at 107, 111 (noting that the 1991 Act purported to incorporate pre-*Wards Cove* law on key issues involving the application of the disparate impact doctrine, but that it was unclear what pre-*Wards Cove* law required on those issues). On judicial hostility, see Sullivan, *supra* note 3, at 43-49; see also, e.g., Shoben, *supra* note 3, at 599 (noting that “disparate impact theory is under attack in some judicial quarters”).

233. See generally Simon, *supra* note 93 (arguing that a pragmatic, democratic experimentalist process promises to achieve these results).

workplace equality problems and respond to them. Such a process might lead to the conclusion that proportional representation is an unrealistic or improper benchmark in a particular workplace, or that a numerical imbalance does not actually reflect a deficit of workplace equity. What would be important, at that point, would not be the results of the self-examination process, but the process itself. Ideally, the process would mobilize a diverse array of constituencies to confront and identify solutions for workplace equality problems.

In many respects, this account of a structural approach to employment discrimination is congruent with that offered by Professor Sturm. But the case for such an approach must necessarily be far more modest. "Information pooling," "communit[ies] of practice,"²³⁴ and "interactive, tiered system[s]"²³⁵ will not magically solve workplace equality problems. Indeed, they may not solve those problems at all. To the extent that they do, legal doctrine may be at their trailing rather than their leading edge.

For example, it is probably unavoidable that structural approaches will rely significantly on numerical benchmarks. Even if those benchmarks do not operate as quotas in fact, "quota-phobia" will lead many judges to resist any effort to impose such approaches on employers.²³⁶ The best way to implement a structural approach in the near term is thus not through the top-down apparatus of law, but through the bottom-up process of encouraging individual employers to adopt structural antidiscrimination measures voluntarily. As the work of Professor Edelman and her colleagues makes clear, once enough employers have adopted structural approaches, courts may *then* be more receptive to incorporating them in law.²³⁷ But it seems premature at best to call, as do participants in the structural turn, for "judicial coercion" of employers who have not yet adopted such approaches.²³⁸

More fundamentally, we cannot assume that even widespread adoption of a structural approach to employment discrimination will lead to "continu[ous] improv[ement]," in which the "floor of acceptable conduct" will inevitably "rise as the capacity to address problems increases."²³⁹ The import of Professor Edelman's work is that the implementation of structural approaches in particular workplaces, and the pooling of information through professional networks, could as readily spark a race to the bottom as a race to the top—and, more insidiously, that managers, employees, and intermediaries could believe that their race to the bottom was in fact a race

234. Sturm, *supra* note 6, at 524.

235. *Id.* at 555.

236. *See supra* Part II.C.

237. *See* Edelman et al., *supra* note 154.

238. *E.g.*, Sturm, *supra* note 6, at 560.

239. *Id.*

to the top.²⁴⁰ The risk of cooption is ever present here, and it cannot be avoided by simply invoking the language of American pragmatism or Japanese management principles.

CONCLUSION

The argument for a structural approach to antidiscrimination law must therefore be a more modest one than the participants in the structural turn would like. It must run something like this: We have reached, or will soon reach, the limits of what our current conception of employment discrimination law can do to solve the persistent problems of workplace inequity. Many of today's most significant problems are structural and are widely understood to lie beyond the responsibility of individual employers. It is only by generating a new politics of employment equity that judges can be persuaded to require employers to address these structural problems. A pragmatic, democratic-experimentalist approach may offer the best hope of achieving that end. Such an approach should engage diverse constituencies, starting locally but hopefully expanding in scope and ambition from there, to confront and address important workplace equality problems at their societal source. In the end, that process will make judges more comfortable in requiring employers to address today's workplace equality problems.

To be sure, there is risk in such an approach. It could well entrench instead of uproot inequalities. But advocates of a structural approach could forcefully contend that the alternative is even less tenable, for it would remit workplace inequities to the increasingly outmoded tools of an employment discrimination law designed in the 1960s and based on a very different model of discrimination, of the workplace, and of regulation than that which prevails today.

For reasons discussed in Part II, I do not find the argument for a structural approach, even stated in these terms, entirely persuasive. But participants in the structural turn are surely on to something. I hope I have shown that their proposals make sense less as a call for new legal doctrine than as a call for new politics of workplace equality. Without such a new politics, it is doubtful that the doctrinal proposals that have emerged from the structural turn will ever have a meaningful effect on employment discrimination.

240. See *supra* Part II.B.

