

Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory

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INTRODUCTION

In the nearly forty years since Title VII of the Civil Rights Act was enacted to combat discrimination in employment, we have seen a shift in the ways in which discrimination operates in the workplace. As traditional social norms permitting overt racism and segregation give way to a modern norm of egalitarianism, and as well-defined, hierarchical, bureaucratic structures delineating clear paths for advancement within institutions give way to a globalized workplace of flexible governance and movement between institutions, discrimination often operates in the workplace today less as a blanket policy or discrete, identifiable decision to exclude than as a perpetual tug on opportunity and advancement. It often takes form in a fluid process of social interaction, perception, evaluation, and disbursement of opportunity. It creeps into everyday impressions of worth and assignment of merit on the job, lurking constantly behind even the most honest belief in equality, perpetuating the very injustice that we decry.

A number of legal scholars have documented this shift in the nature of discrimination and have identified its significance to the project of achieving equity in the workplace.¹ Some scholars have gone further to critique the ability of various aspects of Title VII doctrine to account for

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¹ See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Barbara Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319 (2000); Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001); Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639 (1998) [hereinafter Sturm, *Race, Gender, and the Law*]; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) [hereinafter Sturm, *Second Generation Discrimination*].

more complex, often unconscious, forms of discrimination.² Few, however, have attempted to provide an independent conceptualization of these modern forms of discrimination,³ and even fewer still have attempted such a conceptualization with an eye toward the relevant legal inquiry to be used in identifying and combating these forms of discrimination.⁴

This Article endeavors to provide such a conceptualization and to lay the groundwork for a legal theory that accounts for discrimination in the modern workplace. It suggests that regulation of some of the more complex, subtle forms of discrimination common in today's workplace requires a focus on the operation of discriminatory bias as influenced, enabled, and even encouraged by the structures, practices, and dynamics of the organizations and groups within which individuals work. In other words, it posits the need to conceptualize discrimination in terms of *workplace dynamics*⁵ rather than solely in existing terms of an identifiable actor's isolated state of mind, a victim's perception of his or her work environment, or the job-relatedness of a neutral employment practice with adverse consequences. Conceptualizing a form of discrimination in terms of discriminatory bias in workplace dynamics places much-needed emphasis on structural factors while making clear that both conscious and unconscious bias operate at multiple levels of social interaction, often resulting in decreased opportunity for disfavored groups without producing a single, identifiable discriminatory decision or a perceptibly hostile work environment.⁶ I argue that conceptualization of dis-

² See, e.g., Krieger, *supra* note 1; Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587 (2000).

³ See, e.g., Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313 (2000); Ian F. Haney-Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000); Sturm, *Second Generation Discrimination*, *supra* note 1.

⁴ Although scholars have considered the disconnect between various aspects of modern discrimination and existing law, see, e.g., David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57 (1998); Krieger, *supra* note 1; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998), none have yet provided an independent legal theory that aims more generally to capture the interplay between individuals and the organizations within which they work.

⁵ I choose the term discrimination in "workplace dynamics" in an effort to capture the fluid, interactive, and situational nature of some of the modern forms of discrimination. The term "dynamics" is commonly used to refer to "the pattern of change or growth of an object or phenomenon" and is sometimes defined as "the social, intellectual, or moral forces that produce activity and change in a given sphere." AMERICAN HERITAGE DICTIONARY 558 (4th ed. 2000). My use of the term parallels that of other scholars, see Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994); Sturm, *Second Generation Discrimination*, *supra* note 1, and it is intended to convey the systemic and structural bases of these types of discrimination as well as to impart a sense of optimism about the possibility of change.

⁶ This emphasis on structural factors that contribute to inequity in the workplace is

crimination in workplace dynamics is essential to the pursuit of equity in the modern workplace, that we can have little hope of transforming existing power differentials without an adequate conceptualization of the modern forms of discrimination that is independent from, though naturally coexistent with, prevailing conceptions of workplace discrimination.

Further, I suggest that this conceptualization should take legal form in a structural account of disparate treatment theory, an account that holds employers directly liable for organizational structures and institutional practices that unreasonably enable the operation of discriminatory bias in the workplace. A structural account of disparate treatment theory would fill a gap in existing Title VII doctrine and would reflect an understanding of discrimination in the modern workplace as a problem of overlapping individual and institutional dimensions, providing practical incentive as well as conceptual perspective for progress.

This Article is divided into four main parts. In Part I of the Article, I review some of the existing legal and social scientific literature demonstrating that the nature of discrimination in employment has changed since the early days of the civil rights regime and that more subtle, complex forms of discrimination are likely to play a significant role in future employment relations. I begin this discussion with evidence suggesting that although public attitudes have shifted over the past forty years, bias continues to operate in the workplace, albeit in more subtle forms. I then explore a number of changes in the organization of the workplace and the nature of the employment relationship, part of a broader trend of corporate restructuring. In particular, I focus on three largely interrelated workplace changes that have special importance to the antidiscrimination pursuit: the flattening of hierarchies and blurring of job boundaries, the allocation of work on a team rather than an individual basis, and the adoption of more skill-based, individualistic, and flexible methods of evaluation. Finally, reviewing several recent studies of diversity in work teams and bias in appraisal systems, I tie these organizational changes to social scientific knowledge about group interaction and the operation of

part of a larger, interdisciplinary, academic movement toward conceptualizing discrimination in the context of organizational structures. See, e.g., Devon W. Carbado & G. Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (describing process by which outsiders are burdened by identity performance); Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 672-74 (1997) (providing an empirical study of the effect of organizational characteristics of elite law firms on the integration of the firms' workforces); Charny & Gulati, *supra* note 4 (considering ways in which low-information wage and promotion structures lead to discrimination); Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621 (1993) (describing research and advocating a focus on the influence of social structure on bias); Reskin, *supra* note 1, at 323 (noting that "the proximate causes of discrimination are the contextual factors that permit or counter the effects of the [] habits of the brain"); Sturm, *Race, Gender, and the Law*, *supra* note 1, at 663-69 (calling for attention to the "intermediate level" of group decisionmaking).

bias to illustrate that there is good reason to be concerned about discrimination in this context.

After laying an empirical foundation for the problem, in Part II of the Article, I sketch a few brief examples of the types of discrimination that I have identified. One example provides a familiar account of discriminatory bias that operates through institutional practices to allocate opportunity even in traditionally organized firms. A second provides an illustration of how discriminatory bias might operate to hinder opportunity and employability for women and minorities in more modern organizational structures.⁷

With these examples as reference points, in Parts III and IV, I attempt to lay the conceptual foundation for a structural approach to discrimination in the modern workplace. Examining the dominant conceptions that underlie existing Title VII theories, I argue that current Title VII jurisprudence, although recognizing the importance of structural factors in some contexts, is ill-equipped to identify and address the more subtle forms of discrimination that operate to limit opportunity in the modern workplace. It is ill-equipped, I argue, largely because the legal doctrine is driven at one end by an individualistic conception of discrimination and at the other end by an institutional conception of discrimination, while often ignoring the interplay between the two.

In Part IV, I then turn to consider the positive role of an independent conceptualization of discrimination in workplace dynamics for the project of combating inequity in the modern workplace. I suggest that conceptualizing discrimination in terms of the operation of discriminatory bias facilitated by group dynamics, organizational structure, and institutional practices is necessary not only because such a conceptualization holds normative and expressive value, but also because it permits the development of an approach to legal regulation that is specially designed to combat discrimination in its modern forms. Indeed, I suggest that this independent conceptualization of discrimination in workplace dynamics should take legal form in a structural account of disparate treatment theory. Drawing from existing theories of liability under Title VII, a structural disparate treatment theory would focus on the ways in which organizational choices can engender difference in treatment, and would place an affirmative obligation on employers to manage diversity within their institutions to minimize the operation of discriminatory bias.

⁷ Although this Article focuses on race and sex discrimination in the workplace, the concept of bias operating within larger organizational contexts is applicable to discrimination based on other protected characteristics as well.

I. EMPIRICAL FOUNDATION: CHANGES IN THE NATURE OF
EMPLOYMENT DISCRIMINATION

Title VII of the Civil Rights Act of 1964,⁸ enacted as part of a social movement against discrimination in all aspects of life, sought equal treatment in employment, and it continues in this endeavor to this day. But neither the operation of bias nor the organization of work structures is static; each has evolved in conjunction with shifting social and economic forces. In fact, a mounting body of evidence indicates that a number of social and structural changes in the workplace have affected the ways in which discrimination operates. In this Part, I review some of the empirical evidence concerning changes in the operation of bias and in the organization of employment institutions that make clear the need to account for discrimination in workplace dynamics in Title VII jurisprudence.

A. *Changes in the Operation of Bias*

Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, but it does not define “discriminate.”⁹ In the early days of Title VII, discrimination was often the result of blatant racism and conscious reliance on stereotypes.¹⁰ Dominant individuals and groups systematically and deliberately excluded minorities and women from certain jobs.¹¹ But as it became less socially acceptable to harbor overtly racist beliefs, and as antidiscrimination laws targeted

⁸ Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

⁹ The statute provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

¹⁰ See, e.g., *Slack v. Havens*, 522 F.2d 1091, 1092–93 (9th Cir. 1975) (describing a supervisor’s alleged statements that “Colored people should stay in their places” and “Colored people are hired to clean because they clean better”).

¹¹ See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* (1977) (exploring basic institutional resistance, by both employers and unions, to early civil rights laws); Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 248–49 (1993).

actions based upon those beliefs, incidents of blatantly discriminatory exclusion decreased significantly.¹²

It is well known, however, that although minorities and women have gained entry into much of the workforce, inequities in advancement and wages persist.¹³ For example, in 1995, fewer than 1% of the top-level executives in Fortune 1000 industrial and Fortune 500 service firms were black.¹⁴ Although white men made up 43% of the workforce, they held 95 to 97% of the senior manager, vice-president, and higher positions in these firms.¹⁵ Moreover, women managers with the same human capital as their male counterparts in terms of training and experience continue to receive lower wages.¹⁶

These trends in attitudes toward discrimination and barriers to advancement parallel a shift in psychologists' thinking about intra- and inter-group bias, and a movement generally in social science research toward understanding how subtle forms of racism continue to operate to the detriment of minorities and women. Two well-known social scientists, John F. Dovidio and Samuel L. Gaertner, have spent over twenty years investigating a modern type of bias that they call "aversive racism."¹⁷ According to Dovidio and Gaertner, aversive racism "represents

¹² Numerous studies have documented this shift in public attitude as norms of bigotry, racism, and sexism gave way to an endorsement of egalitarian values. The expressed social attitudes of whites have become consistently more positive, tolerant, and accepting. See John F. Dovidio & Samuel L. Gaertner, *Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches*, in PREJUDICE, DISCRIMINATION, AND RACISM 3 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (summarizing findings of studies based on responses to public opinion polls and surveys from the 1940s to the late 1970s); see also JAMES M. JONES, PREJUDICE AND RACISM 93-100 (2d ed. 1997) (detailing studies showing an overall trend toward endorsement of the principle of racial equality in the 1970s); Reskin, *supra* note 11, at 249 (citing studies reflecting a change in attitude concerning sex equality).

¹³ These persistent disparities have been well documented, and I cite only a few examples here. For a more detailed examination, see David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 966-73 (1996).

¹⁴ FED. GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 9 (1995).

¹⁵ *Id.* at 12.

¹⁶ See VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 189-214, 217-49 (1998) (describing research that reveals disparities in pay between men and women in a variety of professions and discussing research on the limited progress of women in academia). For a detailed account of continued sex segregation in the workplace and discussion of possible causes, see Reskin, *supra* note 11.

¹⁷ Dovidio and Gaertner, together with other colleagues, have produced multiple works on aversive racism. See, e.g., PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 12; John F. Dovidio & Samuel L. Gaertner, *Changes in the Expression and Assessment of Racial Prejudice*, in OPENING DOORS: PERSPECTIVES ON RACE RELATIONS IN CONTEMPORARY AMERICA 119 (Harry J. Knope et al. eds., 1991); 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 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) [hereinafter Dovidio & Gaertner, *Contemporary Prejudice*]; John F. Dovidio & Samuel L. Gaertner, *The Effects of Race, Status, and Ability on Helping Behavior*, 44 SOC. PSYCH. Q. 192 (1981). In some respects, their work builds on even earlier work by Joel Kovel. See JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY

a subtle, often unintentional, form of bias that characterizes many white Americans who possess strong egalitarian values and who believe that they are nonprejudiced.”¹⁸ Aversive racists do not wish to discriminate against members of minority groups; in fact, quite the opposite, they honestly believe in equality in employment. The problem, say Dovidio and Gaertner, is that aversive racism is rooted in normal, often adaptive, psychological processes involving cognitive categorization, the desire to maintain power, and a largely automatic internalization of societal values and beliefs.¹⁹ Their research suggests that aversive racists act on unconscious negative feelings when they are able to justify their actions in non-racial terms. As a result, aversive racists continue to discriminate, but in ways that insulate them from having to believe that their behavior was racially motivated.²⁰

The impact of this subtle operation of bias has not gone unnoticed in the legal scholarship. A number of scholars have documented the ways in which unconscious motivations and bias can lead to discrimination in employment and other contexts. In his landmark article *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, Professor Charles R. Lawrence argues that much discrimination today results from subconscious instincts and motivations rather than from conscious, deliberate decisions to exclude or to harm.²¹ Drawing from psychoanalytic and cognitive theory, Lawrence’s insights, although not set specifically within the employment context, shed much-needed light on the relationship between unconscious beliefs and racially discriminatory practices.

More recently, legal scholars have taken the teachings of social cognition and related theories into the employment context.²² Social science research into the operation of unconscious motivational and cognitive bias has amassed a large body of evidence that informs this more recent legal analysis. In her article *The Content of Our Categories: A Cognitive*

54–61 (1970) (contrasting the personality type of the “aversive racist” with that of the “dominative racist” and arguing that the decline of dominative racism and ascent of aversive racism are products of the industrial state).

¹⁸ Dovidio & Gaertner, *Contemporary Prejudice*, *supra* note 17, at 5.

¹⁹ *Id.* at 5–6.

²⁰ *Id.* at 7. This modern form of racism has been conceptualized by social scientists and theorists in a variety of ways. *See, e.g.*, JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 135 (1997) (describing racism as a type of habit); Irwin Katz et al., *Racial Ambivalence, Value Duality, and Behavior*, in PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 12, at 35, 56 (describing modern racism as “ambivalent,” resulting from the conflict between humanitarian sympathy for blacks’ plight and the Protestant ethic’s emphasis on self-reliance and discipline); David O. Sears, *Racism and Politics in the United States*, in CONFRONTING RACISM, *supra* note 17, at 76, 83 (comparing “old-fashioned racism” to modern “symbolic racism”).

²¹ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331–36 (1987).

²² *See* Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415 (2000); VALIAN, *supra* note 16, at 215–16; Krieger, *supra* note 1.

Bias Approach to Discrimination and Equal Employment Opportunity, Professor Linda Hamilton Krieger draws extensively from social cognition theory to illustrate that categories and categorization are a natural and even inevitable part of human processing.²³ As she explains it: “Categories are guardians against complexity. Their purpose is to simplify the perceptual field by distorting it, so that we experience it as less complex and more predictable than it actually is.”²⁴

Of particular importance to the antidiscrimination project, Krieger details social scientific studies demonstrating that these categories affect our perception and evaluation of others in a number of ways. She describes several studies suggesting that stereotypes often operate as “implicit expectancies” as well as normative constructs.²⁵ These studies reveal that stereotypes can “influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory.”²⁶ In other words, stereotypes can cause discrimination by biasing how we process information about other people as well as by informing our beliefs about social roles. When an aggressive woman is denied a promotion because the promoting decisionmaker thinks that women should be demure and soft-spoken or that women should spend time with their families instead of traveling for their jobs, this is discrimination on the basis of sex; the decisionmaker’s normative stereotypes about the ways in which women should behave and their proper role in society has motivated his decision to deny promotion. When an aggressive woman is denied a promotion because the promoting decisionmaker has perceived her as being too soft-spoken, this too is discrimination on the basis of sex; here, however, the decisionmaker’s cognitive stereotypes about the nature of women has influenced his perception and evaluation of the candidate. The decision-

²³ Krieger, *supra* note 1, at 1189. Social cognition theory focuses primarily on the cognitive structures and processes involved in categorization and information processing. Social cognition theory in the discrimination context is often traced to the work of Gordon Allport and his book, *The Nature of Prejudice*. GORDON ALLPORT, *THE NATURE OF PREJUDICE* (1954). For a general overview of cognitive analysis of stereotypes and stereotyping, see David L. Hamilton & Tina K. Troler, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, in *PREJUDICE, DISCRIMINATION, AND RACISM*, *supra* note 12, at 127. For a more intensive, yet still approachable, treatment of study in the area of social cognition, see SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (1991).

²⁴ Krieger, *supra* note 1, at 1189.

²⁵ *Id.* at 1199.

²⁶ *Id.* Race and sex, as easily perceived and socially relevant characteristics, form ready bases for categorization. For additional recent reviews of studies concerning the subtle operation of racial and gender bias as influenced by cognitive processes, as well as by affect and motivation to retain power, see Ann McGinley, *supra* note 22, at 425–46, and VALIAN, *supra* note 16, at 125–44. There is also a wealth of research studying the effect of race on memory and identification. See generally Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 *PSYCHOL., PUB. POL’Y & L.* 3 (2001).

maker in the latter scenario may be entirely unaware of the influence of his stereotypes on his ultimate decision.

There is also evidence that modern forms of discrimination derive from in-group favoritism as well as from out-group exclusion or devaluation.²⁷ People have a fundamental need to feel positive about themselves and often favor members of their own group to raise their self-esteem.²⁸ Moreover, recent research and theory suggests that in certain contexts out-group members may conform to in-group negative stereotypes²⁹ or otherwise adopt self-defeating strategies that serve to further entrench existing disparities.³⁰

In short, over the past several decades, we have realized the complexity of discrimination as a human process that derives from much more than a simple, conscious motivation to exclude on the basis of race or sex. Discrimination can and does continue to perpetuate inequity in the modern workplace, despite our common and honest belief in an egalitarian norm.

B. Reorganization of the Workplace

This shift in the operation of bias from the blatant to the more subtle and complex takes on particular significance in light of changes in both the nature of the employment relationship and the structure of the workplace. A number of recent studies document an ongoing reorganization of the American workplace.

From World War I until the late 1970s, an era dominated by mass production and the rise of mega-corporations, the structure of the American workplace was largely hierarchical and bureaucratic, “characterized by job ladders, limited ports of entry, and implicit contracts for long-term

²⁷ See Samuel L. Gaertner et al., *Does White Racism Necessarily Mean Antiblackness? Aversive Racism and Prowhiteness*, in OFF WHITE: READINGS ON RACE, POWER, & SOCIETY 167 (Michelle Fine et al. eds., 1997). See generally Clark Freshman, *Whatever Happened to Anti-semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313, 387–409 (1999) (reviewing social scientific studies of in-group preference).

²⁸ See Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, in THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 33, 40–43 (William G. Austin & Stephen Worchel eds., 1979) (exploring social identity theory, which posits that individuals favor members of their own group to raise self-esteem). See generally Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice: A Social Psychological Equation for Racial Oppression*, in CONFRONTING RACISM, *supra* note 17, at 46.

²⁹ See Mark Chen & John A. Bargh, *Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541 (1997); see also Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 955–59 (1999) (discussing studies conducted by Chen and Bargh).

³⁰ See Charny & Gulati, *supra* note 4 (identifying self-defeating strategies that may arise in jobs where performance is difficult to monitor).

job security.”³¹ Driven in part by Fredrick Winslow Taylor’s theory of scientific management, companies constructed detailed bureaucratic structures and then fit their employees into those structures.³² Companies often hired unskilled, inexperienced recruits for entry-level work and provided them training for advancement from one job to the next within the firm.³³ Each job tended to have a clearly specified description, with tasks broken down into their simplest components.³⁴ Careers were defined in terms of advancement up vertical ladders or pyramids within institutions, with increased autonomy and decisionmaking concentrated at the top.³⁵

In the early 1980s, however, employment practices began to change. Production jobs began to move to low-wage countries as information technology, knowledge, and service took center stage in the American economy.³⁶ Companies began searching for new ways to be competitive in an increasingly globalized, information-based market. One way of staying competitive in this emerging market was to increase receptivity to rapidly shifting consumer demand by creating a more flexible institution.³⁷ Temporary agencies grew, and the number of part-time employees

³¹ See Stone, *supra* note 1, at 535.

³² *Id.* at 529–35 (describing the era of scientific management). Edward Lawler, a prominent organizational theorist, calls the approach to organizational structure dominant in this era the “control-oriented approach,” which he contrasts with the later “involvement-oriented approach.” See EDWARD E. LAWLER III, *THE ULTIMATE ADVANTAGE: CREATING THE HIGH-INVOLVEMENT ORGANIZATION* 25 (1992). Although concentrated in the blue-collar manufacturing sector, theories of scientific management also dominated the white-collar managerial sector. See Rosemary Batt, *From Bureaucracy to Enterprise? The Changing Jobs and Careers of Managers in Telecommunications Service*, in *BROKEN LADDERS*, *supra* note 32, at 55, 62–63 (describing the internal labor market for managers in the telecommunication industry in the early to middle 1900s); Paul Osterman, *Introduction*, in *BROKEN LADDERS: MANAGERIAL CAREERS IN THE NEW ECONOMY* 4 (Paul Osterman ed., 1996) (describing the “old” internal labor market for managers).

³³ See CAPPELLI ET AL., *CHANGE AT WORK* 17–21 (1997) (identifying principal characteristics of traditional system).

³⁴ *Id.* at 19.

³⁵ *Id.*

³⁶ See EILEEN APPELBAUM & ROSEMARY BATT, *THE NEW AMERICAN WORKPLACE: TRANSFORMING WORK SYSTEMS IN THE UNITED STATES* 15 (1994); PETER F. DRUCKER, *THE NEW REALITIES* 207–16 (1989) (describing modern information-based organization); Edward E. Lawler III, *From Job-Based to Competency-Based Organizations*, 15 *J. ORG. BEHAV.* 3, 4–5 (1994).

³⁷ See CAPPELLI ET AL., *supra* note 33, at 29–32; see also LAWLER, *supra* note 32, at 14–21. Some of these changes may have been driven at least in part by employer attempts to avoid the requirements of a variety of labor legislation, including civil rights laws. See CAPPELLI ET AL., *supra* note 33, at 25–26 (discussing incentives for employers to use leased employees from temporary agencies). They may also have been driven in part by exposure to alternative models for organizing work and an intellectual shift in organizational theory away from the scientific model. See *id.* at 28 (citing a survey of large companies revealing that the larger the proportion of the company’s workforce outside the United States, the more likely the company was to have downsized its employment ranks and redesigned its work system); APPELBAUM & BATT, *supra* note 36, at 18–23 (discussing early attempts to reform mass production to compete internationally). Other factors, such as investor pressures and financial restructuring, may have also played a role. See CAPPELLI

and independent contractors increased.³⁸ In addition, businesses began restructuring the organization of the internal workplace.³⁹

Although no one model of organization dictates these changes, and organizational theorists disagree on the degree to which organizations have been able or willing to undergo complete formal restructuring of their workplaces, there is general agreement that the employment relationship in both white- and blue-collar sectors of the American workplace is on the whole becoming more contingent, flexible, and individualized than in years past.⁴⁰ At least three interrelated organizational trends of particular significance for the antidiscrimination project can be identified: the flattening of hierarchies and blurring of job boundaries, the allocation of work on a team basis, and the adoption of more skill-based, individualistic, and flexible methods of evaluation.

As part of the attempt to increase flexibility and institutional receptivity to consumer demand, companies have been flattening hierarchies and pushing management and decisionmaking authority lower. According to one report, three-fourths of Fortune 1000 companies reduced the number of management layers during the 1980s while two-thirds both downsized and reduced layers.⁴¹ Lower-level employees in these organizations are often given substantial responsibility and decisionmaking authority. At the same time, traditional job categories are expanding and becoming more skill-based and individualized. In 1992, fifty-one percent of Fortune 1000 companies reported using a skill-based pay system.⁴² In such a system, pay is tied less to a person's position or tenure in an organization and more to the market value of his or her particular skills.⁴³ The em-

ET AL., *supra* note 33, at 32–38.

³⁸ Some firms responded to the pressures for change by reducing their permanent full-time work forces. These firms generally retained hierarchical management structures but turned to outsourcing, subcontracting, and contingency contracts to create flexibility. See APPELBAUM & BATT, *supra* note 36, at 21; see also Stone, *supra* note 1, at 539–41 (detailing evidence of rise in temporary and part-time employment).

³⁹ “Corporate restructuring” is the term commonly used to refer to change in financial structure and organizational form. CAPPELLI ET AL., *supra* note 33, at 44. Although these two components are often intertwined, I concentrate here on organizational restructuring, as that component has the greatest effect on the nature of discrimination in the workplace.

⁴⁰ Data on the extent of reorganization is still somewhat limited. Evidence comes primarily from several national surveys, a number of smaller, nonrepresentational surveys, and case studies. See APPELBAUM & BATT, *supra* note 36, at 57–58; see also Maury Gitelman et al., *Flexible Workplace Practices: Evidence from a Nationally Representative Survey*, 52 INDUS. & LAB. REL. REV. 99 (1998) (using Bureau of Labor statistics to explore extent of change). Most studies focus on blue-collar manufacturing sectors of the workforce, but evidence suggests similar shifts in white-collar management areas. See APPELBAUM & BATT, *supra* note 36, at 98–120. For a recent discussion of this emerging employment relationship and some of the implications for labor and employment law, see Stone, *supra* note 1.

⁴¹ Lawler, *supra* note 36, at 5.

⁴² LAWLER, *supra* note 32, at 160.

⁴³ See Lawler, *supra* note 36, at 8–11; Walter Kiechel III, *How We Will Work in the Year 2000*, FORTUNE, May 17, 1993, at 38–52.

ployee in this type of system is valued for knowledge, skills, and adaptability rather than for ability to complete specific, well-defined job tasks.

As hierarchies flatten, employees move more frequently between institutions as well as within institutions. Researchers have documented a substantial increase in the frequency of job changes since the 1970s.⁴⁴ Although data on job tenure presents a complex and often conflicting picture,⁴⁵ there is reason to believe that the employment relationship is becoming more fluid and that vertical movement is no longer the sole determinant of success. In their recent ethnology on the careers of technicians, Professors Stacia E. Zabusky and Stephen R. Barley predict a resurgence of horizontally organized work typically characterized by professions.⁴⁶ They estimate that at least a quarter of all Americans in 1996 were working in horizontally structured lines of work.⁴⁷ Their study of technicians of various kinds, including medical, engineering, science, microcomputer support, and photocopier repair, reveals a commitment to learning over formal credentials, evaluations, and even positions of authority.⁴⁸ According to Zabusky and Barley, these technicians “measured career success in terms of accumulated expertise, accomplishment in the face of a new challenge, and the gradual acquisition of a reputation for skill.”⁴⁹ The technicians’ careers were almost devoid of vertical movement up an organizational hierarchy and were often characterized by lateral movement across or within institutions.⁵⁰

Work is also more likely than in years past to be accomplished in work teams.⁵¹ Sometimes these teams are led by a management employee as a coach or facilitator; other times the teams are self-directed. By 1990, 47% of large, Fortune 1000 firms reported having at least one self-directed team, and of those firms, 10% reported that at least 20% of their workers participated in formal, self-directed work teams.⁵² In addition to

⁴⁴ See CAPPELLI ET AL., *supra* note 33, at 178.

⁴⁵ There is some disagreement among researchers on the issue of job stability. See generally *id.*; Stone, *supra* note 1, at 541–49.

⁴⁶ See Stacia E. Zabusky & Stephen R. Barley, *Redefining Success: Ethnographic Observations on the Careers of Technicians*, in BROKEN LADDERS, *supra* note 32, at 188, 189; see also LAWLER, *supra* note 32, at 153 (explaining that professional and high-technology work organizations need individuals who master technical excellence and who prefer to make horizontal or lateral career moves that permit them to develop a broad-based understanding of an industry or technology).

⁴⁷ Zabusky & Barley, *supra* note 46, at 191.

⁴⁸ *Id.* at 197–202.

⁴⁹ *Id.* at 202.

⁵⁰ *Id.* at 196–97.

⁵¹ See Susan E. Jackson & Marian N. Ruderman, *Introduction: Perspectives for Understanding Diverse Work Teams*, in DIVERSITY IN WORK TEAMS: RESEARCH PARADIGMS FOR A CHANGING WORKPLACE 1 (Susan E. Jackson & Marian N. Ruderman eds., 1995); Susan E. Jackson, *Preview of the Road to Be Traveled*, in DIVERSITY IN THE WORKPLACE: HUMAN RESOURCE INITIATIVES 1, 16–17 (Susan E. Jackson et al. eds., 1992) (noting movement toward work teams).

⁵² See APPELBAUM & BATT, *supra* note 36, at 60. In a 1992 survey of a random sample of all U.S. establishments with fifty or more employees, 55% reported using self-directed

these formal work teams, informal “communities of practice” are forming both within and between institutions.⁵³ These communities of practice are typically ad hoc, self-selected networking and information- or knowledge-exchange groups, composed of individuals with common expertise or interests.⁵⁴ Some are recognized and encouraged by employers, who pay for time spent organizing and participating in the groups, and often require formal invitation either from appointed employer facilitators or from members of the group.⁵⁵ Others are formed entirely outside of formal organizational structures, through e-mail listservs and informal after-work gatherings.⁵⁶

Finally, evaluation of work performance is becoming more decentralized, subjective, and contextual. As jobs are redefined in terms of skills sets and customer satisfaction, evaluation becomes more amorphous, both less easily measured in objective terms and more dependent on social interaction and firsthand observation.⁵⁷ In response to new difficulties in evaluation, some firms have adopted a “360-degree” feedback approach that relies on input from multiple sources, including peers, supervisors, customers, and subordinates.⁵⁸ A growing number of companies have also moved to requiring rankings of employees from best to worst, or grading them on a bell curve, and then using that ranking to help make pay and layoff decisions.⁵⁹

Of course, many American firms remain traditionally organized, having downsized without taking other steps toward reorganization or having

work teams. *See id.* app. A.12 (summarizing Osterman survey).

⁵³ *See* Etienne C. Wenger & William M. Snyder, *Communities of Practice: The Organizational Frontier*, HARV. BUS. REV., Jan.–Feb. 2000, at 139; *see also* THOMAS A. STEWART, INTELLECTUAL CAPITAL: THE NEW WEALTH OF ORGANIZATIONS 102 (1997) (encouraging firms to develop communities of practice). Firms also report using “quality circles,” structured employee-participation groups in which groups of volunteers from particular work areas meet regularly to identify and suggest improvements for work-related problems. *See* APPELBAUM & BATT, *supra* note 36, at 60 (stating that 32% of large firms reported that more than 20% of their workers participated in quality circles).

⁵⁴ Wenger & Snyder, *supra* note 53, at 142.

⁵⁵ *Id.* at 144–45.

⁵⁶ *Id.* at 139–40.

⁵⁷ *See* Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 17–19 (1987). This is one way in which problems once associated with high-end jobs are moving lower. *See* Charny & Gulati, *supra* note 4 (analyzing problems for application of existing antidiscrimination law to elite law firms and other knowledge-intensive jobs); *see also* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982) (identifying problems associated with discretionary, subjective decisionmaking common in high-end jobs).

⁵⁸ One report states that ninety percent of the top thousand companies used the 360-degree method in 1998. Carol Kleiman, *Performance Reviews are Turning into Broader, More Useful Tools*, ST. LOUIS POST-DISPATCH, July 16, 1998, at C8.

⁵⁹ *See* Reed Abelson, *Companies Turn to Grades, and Employees Go to Court*, N.Y. TIMES, Mar. 19, 2001, at A1. For an argument that 360-degree evaluations work to the advantage of women in the workplace, *see* Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117 (2002).

taken steps only on a piecemeal basis, looking for those measures that increase flexibility without upsetting traditional notions of organization. It will take more study and more time before we know the true contours of the modern workplace and employment relationship. Nonetheless, the evidence gathered suggests that the nature of the employment relationship is indeed shifting, whether piecemeal or through broader corporate reorganization, from a scientific, job-based, long-term employment relationship to a more flexible, fluid, individualized one.

*C. Significance of Changes in the Operation of Bias and
Reorganization of the Workplace*

These organizational changes have significant implications for the pursuit of equity in the workplace. On the one hand, they offer promise that employers will finally see what women and minorities can accomplish with a more flexible account of individual strengths and weaknesses. On the other hand, these changes pose tremendous danger of entrenchment of disparity as discriminatory bias, whether conscious or unconscious, operates to exclude women and minorities from opportunity and power. The operation of unconscious discriminatory bias has wide-ranging implications for all aspects of social progress and the future of group relations, but it takes on particular significance in the employment context, where power differentials have created systemic obstacles to professional progress.⁶⁰ Organizational structures and institutional practices, although not themselves discriminatory, may facilitate the subtle, often unconscious, operation of discriminatory bias in individuals, leading to differences in access to opportunity based on group status rather than on individual merit.⁶¹ For a number of reasons, as hierarchies flatten, team-based work increases, and evaluation and decisionmaking processes decentralize, minorities and women may find themselves at a standstill while their white male counterparts take full advantage of the flexible, interactive, inter-institutional workplace.

To start, the fluid nature of the modern employment relationship, the flattened hierarchies, and the broadened job categories emphasizing knowledge and skills rather than specific job descriptions affect the nature of employment discrimination by removing the multi-stepped hierarchy and other intra-institutional markers by which to judge progress. Rather than monitoring progress on the vertical, within one institution,

⁶⁰ For a recent, compelling case for the importance of paid work to self-worth, identity, and equality, see Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

⁶¹ I include here both organizational structures—the relatively formal and deliberate choices about how to organize a company and its decisionmaking practices—and institutional practices—the more informal, often taken-for-granted practices that operate across as well as within organizations. See generally Paul J. DiMaggio & Walter W. Powell, *Introduction*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 1 (Walter W. Powell & Paul J. DiMaggio eds., 1991).

we begin to monitor progress on the diagonal, and even on the horizontal. This means that discrimination in today's workplace may frequently hinder opportunity and development without resulting in an identifiable decision to exclude, such as a denial of promotion within a single institutional hierarchy.

In addition, as team-based work replaces individual-based work, the number of individuals who make decisions about others' work opportunities increases. A single supervisor no longer holds the only key to advancement. Although managers and supervisors still carry influence, exclusivity of power is diffused through informal groups and networks that decide who receives coveted assignments, mentoring, networking, and training. Groups of individuals become the gatekeepers to opportunity through decisions that are made on a social, interactive, day-to-day basis. This is a positive development for the fight against the kinds of discrimination that derive from individuals placed at strategic points along a hierarchical ladder, but it raises new concerns about the law's ability to combat the kinds of discrimination that build more subtly at the group and institutional level.

The increased use of group work and importance of social interaction also heighten the ability of discriminatory bias to adversely affect the opportunity and professional development of women and minorities. For the past half-century, psychologists have largely subscribed to a "contact hypothesis," positing that "if members of different ethnic groups interact with each other on an equal-status basis in pursuit of common goals, positive intergroup relations will result."⁶² Since the inception of the hypothesis, however, we have realized that simply requiring employers to hire members of minority groups on an equal basis as members of majority groups is not sufficient to attain equity in workplace conditions, opportunity, and advancement. Indeed, a growing body of social scientific research highlights the importance of organizational conditions in accounting for patterns of gender and race stratification in the workplace.⁶³

Minorities and women, often pioneers in predominately white male workplaces, are likely to be judged in more extreme ways and according to stereotypes.⁶⁴ In her famous ethnology of the large, hierarchical, bureaucratic firm of the 1970s, Rosabeth Moss Kanter explored the dynam-

⁶² Deborah A. Prentice & Dale T. Miller, *The Psychology of Cultural Contact*, in CULTURAL DIVIDES: UNDERSTANDING AND OVERCOMING GROUP CONFLICT 1 (Deborah A. Prentice & Dale T. Miller eds., 1999). See generally H. D. FORBES, ETHNIC CONFLICT: COMMERCE, CULTURE, AND THE CONTACT HYPOTHESIS (1997); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 22–29 (2000) (examining the contact hypothesis in the context of workplace interaction).

⁶³ See, e.g., Chambliss, *supra* note 6; Reskin, *supra* note 1.

⁶⁴ See Krieger, *supra* note 1, at 1193–95 (exploring the cognitive bases for persistent bias).

ics of tokenism as it affected women in corporate America.⁶⁵ Members of a majority group, she argued, are more likely to notice tokens, to exaggerate their differences, and to distort their characteristics to fit generalized stereotypes. As Kanter explains it, “[T]okens are, ironically, both highly visible as people who are different and yet not permitted the individuality of their own unique, non-stereotypical characteristics.”⁶⁶ Social scientific studies, both old and new, buttress Kanter’s account.⁶⁷ The same person, these studies show, is often perceived and judged differently depending on whether he or she is one of few in a skewed group or one of many in a balanced group.

The move toward team-based work takes the contact hypothesis one step further, for it assumes that groups can use a diversity of information, backgrounds, and values to increase group creativity and efficiency.⁶⁸ In order to achieve these results, however, the group must be able to channel conflict created by individual differences into a benefit for the group as a whole. Conflict researchers have found that although some types of conflict are often beneficial to group performance, other types are detrimental. In her article *Managing Workteam Diversity*, Professor Karen Jehn divides work-team diversity into three primary types: “informational diversity,” which refers to differences among individuals in education level, work experience, and tenure; “value diversity,” which refers to differences related to underlying work values and goals pertaining to team projects; and “social category diversity,” which refers to differences in visible demographic characteristics like race, sex, and age.⁶⁹ According to Jehn, informational and value diversity tend to increase task conflict, which is beneficial to group performance, while social category diversity tends to increase relationship conflict, which is detrimental to group performance.⁷⁰ Jehn’s studies suggest that “teams that focus on differences in gender, race, and age . . . are more likely to stereotype and interpret [events] in a personal manner that is often destructive” to the group.⁷¹ Without any constructive management of this type of conflict, minority group members are likely to come away from the group work experience worse off than their majority counterparts. Often the odd-one-out in

⁶⁵ See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977).

⁶⁶ *Id.* at 211.

⁶⁷ See KANTER, *supra* note 65, at 211 (describing a study by Shelley E. Taylor and Susan Fiske); VALIAN, *supra* note 16, at 139–42; *see also* Krieger, *supra* note 1, at 1193–94. There is some evidence that the effects of token status may vary across demographic groups. See Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter’s Legacy*, 25 L. & SOC. INQUIRY 41, 43 (2000).

⁶⁸ See Marilyn B. Brewer, *Managing Diversity: The Role of Social Identities*, in DIVERSITY IN WORK TEAMS, *supra* note 51, at 47, 52; Karen A. Jehn, *Managing Workteam Diversity, Conflict, and Productivity: A New Form of Organizing in the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 473 (1998).

⁶⁹ Jehn, *supra* note 68, at 475–76.

⁷⁰ *Id.* at 482.

⁷¹ *Id.* at 486.

terms of visible characteristics, a minority team member will often be perceived by the majority members to be troublesome and difficult, rather than presumed to share the same values and given the benefit of the doubt in times of conflict.⁷²

There is also evidence that highly unstructured evaluation processes, lacking in specified criteria, may lead to decisions that are tainted by the motivational and cognitive biases of decisionmakers.⁷³ Increasingly, social scientists criticize the use of performance appraisal systems as assessment mechanisms tied to promotions and pay.⁷⁴ Studies suggest that discriminatory bias tends to influence perception and judgment when decisionmakers are not required to articulate the reasons for their decisions and when they lack the time and/or attention to consider the role that their biases may play in those decisions.⁷⁵

The new employment relationship marks an important ideological shift toward freedom and individualism over control. The reorganized workplace focuses on people as individuals rather than simply as laborers, permitting them the opportunities to capitalize on their differences to make themselves useful to the firm. Careers are defined more flexibly, with an eye toward achievement over advancement, skill enhancement and expertise over movement up a vertical ladder. The new workplace accordingly places responsibility with the individual employee to define his or her own career path and to seek out the training, networking, and mentoring needed for achievement. Placing such faith in the individual is highly congruent with American democratic values and makes an involvement-centered approach to corporate organization potentially as beneficial to employees as it is efficient for the companies for which they

⁷² See Marilyn B. Brewer et al., *Diversity and Organizational Identity: The Problem of Entrée after Entry*, in CULTURAL DIVIDES, *supra* note 62 (exploring psychological reasons why the transition from entry to entrée of minority group members in large institutions may be unsuccessful); Gregory B. Northcraft et al., *Diversity, Social Identity, and Performance: Emergent Social Dynamics in Cross-Functional Teams*, in DIVERSITY IN WORK TEAMS, *supra* note 51, at 69, 80.

⁷³ See generally Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOLOGIST 1049 (1991); Krieger, *supra* note 1.

⁷⁴ See Clive Fletcher, *New Directions for Performance Appraisal: Some Findings and Observations*, 3 INT'L J. SELECTION & ASSESSMENT 191 (July 1995); Veronica F. Nieva & Barbara A. Gutek, *Sex Effects on Evaluation*, 5 ACAD. MGMT. REV. 267 (1990).

⁷⁵ See Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice*, in CONFRONTING RACISM, *supra* note 17, at 42 (citing studies suggesting that automatic use of stereotypes can be controlled, but only with motivation, effort, and attention); VALIAN, *supra* note 16, at 308–09 (discussing studies suggesting that attention and accountability are important for reducing bias in evaluation); Susan T. Fiske, *supra* note 6, at 627 (citing studies suggesting that people in positions of power are less likely to pay attention to the effect of their biases on decisionmaking and are more likely to rely on stereotypes); Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 Soc. PSYCHOL. Q. 227 (1985) (describing a study suggesting that accountability can be effective in “de-biasing” social judgment when people are made aware of their accountability before automatic processing routines are activated).

work.⁷⁶ The danger lies, however, in ignoring the continuing operation of discriminatory bias in the workplace. Many Americans believe that discrimination in employment is a thing of the past and that any differences in outcome result not from discrimination but from lack of individual merit, interest, or motivation.⁷⁷ As Part III will illustrate, existing Title VII jurisprudence tends to reinforce this belief by focusing its antidiscrimination efforts primarily at the level of individual motivation and neglecting an approach aimed at discriminatory bias that builds at the organizational, institutional, or group level. It should be apparent by now that decisions made by individuals are made only in the context of the opportunities and limitations posed by the overall structure and practices of the organizations in which they work. Discretion and subjectivity in evaluation can be desirable in a workplace that values individual skills sets over uniform job descriptions, just as team-based work can open up constructive opportunities for learning from difference and enhancing social connections in work. But only by recognizing and accounting for the role of organizational structure and institutional practices in enabling discriminatory bias and perpetuating inequity in the workplace will we realize the benefits offered by a restructured workplace.

II. DISCRIMINATION IN WORKPLACE DYNAMICS: A FEW EXAMPLES

It is not difficult to imagine the ways in which organizational structures, institutional practices, and workplace dynamics can influence the operation of bias and equity of disbursement of opportunity within the workplace, whether traditional or reorganized. The “old (white) boys’ network” is the prime example of a workplace that is structured in a way that enables the perpetuation of a male dominated workplace. Only those employees who “fit” within that network are provided with opportunities for advancement and professional development. With greater numbers of women and minorities in all areas of the workforce today, of course, the rigidly enforced “old (white) boys’ network” may be largely a thing of the past. But without some exploration of continuing influence of organizational structures, a “new (white) boys’ network” may be taking its place.

Several simple factual scenarios should serve to illustrate at the outset the role that organizational structures can play in enabling the subtle operation of discriminatory bias to the detriment of women and minorities in a traditional as well as a reorganized workplace. Additional factual scenarios will emerge from the cases that are examined in Part III. The first of the following examples recaps a familiar story of how discriminatory bias operates through institutional practices to allocate opportunity

⁷⁶ See LAWLER, *supra* note 32, at 43.

⁷⁷ See Lawton, *supra* note 2, at 594–97.

in high-end jobs at traditionally organized firms. The second example shows how these same types of subtle bias operate to allocate opportunity in firms with a more modern organizational structure.

Example # 1: Firm A is a 180-person law firm in a major metropolitan city. Jamal was one of seven black associates hired by the firm in the mid-1990s. Four of those seven have left the firm. Jamal will come up for partnership next year. Of the thirty-nine associates made partner this year, one was a member of a racial minority group. Attaining partnership at the firm depends in part on ability to form relationships with important clients and to bring new business. The firm assigns work on an informal basis, with partners choosing their own associates for each project. Partner and associate relationships are also developed on a purely informal basis. The firm has a number of important clients that regularly refer new business and complex cases, but, although his white co-associates have worked on several large cases with these clients, Jamal has not been invited by a partner to work with them.⁷⁸

Example # 2: Firm B is a software development firm at which one-third of the workforce is female. Sheila has been assigned to a work team in which she is the only female. The team meets every afternoon for group contributions and discussions. Twice a year, the team members are asked to evaluate each other on a scale from 1 to 5 on a variety of team aspects, including willingness to participate in discussions, value to the team as a whole, and value of contributions. The appraisals are reviewed by the unit coordinator and used for employee development and feedback. Sheila contributes regularly to group discussions, but she has received several low scores for team participation on her appraisals. At least two evaluators have commented that Sheila seems overly sensitive to group criticism and that she tends to dwell on procedural matters over substantive concerns, leading to inefficiency in use of team time. The team decides which of the team members should be sent to software de-

⁷⁸ This example draws from a recent *New York Times* article reporting low numbers of minority partners at major law firms. See Jonathan D. Glater, *Law Firms Are Slow in Promoting Minority Lawyers to Partnerships*, N.Y. TIMES, Aug. 7, 2001, at A1. Minority lawyers interviewed pointed to the lack of mentors and lack of access to the best work as factors contributing to the low numbers; others cited a perceived lack of opportunity more generally. See *id.* at C2. One black female associate explained that although dissatisfaction was common among all low-level associates, she was “less willing to ride it out” because she didn’t feel confident that she would ultimately be made a partner. *Id.* There is a rich body of scholarship examining patterns of advancement for women and minorities in elite law firms. See Renée M. Landers et al., *Human Resources Practices and the Demographic Transformation of Professional Labor Markets*, in *BROKEN LADDERS*, *supra* note 32, at 215 (developing a theory of work norms as a means of screening out those who want to work reduced work hours); Chambliss & Uggen, *supra* note 67; Chambliss, *supra* note 6; Charny & Gulati, *supra* note 4; Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291 (1995); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 *CAL. L. REV.* 496 (1996).

velopment shows as a spokesperson for the group. Sheila has never been chosen by the team to represent the group at a software show.⁷⁹

Although neither Sheila nor Jamal can pinpoint a single decision-maker who has deliberately excluded them because of race or sex, there are a number of ways in which the organizational structures and institutional practices of the firms in which Sheila and Jamal work may have enabled discriminatory bias that has hindered their opportunities for work development and advancement. At both organizations, white males predominate in positions of power, and opportunity is allocated through a process of informal social interaction and personal preferences. Decisions are made without the benefit of self-reflection or awareness about group differences, stereotypes, and the influence of subtle, often unconscious, biases on perception, memory, and evaluation of even those who subscribe to an egalitarian ideal.⁸⁰ At Jamal's firm, the systems through which work is assigned and mentoring relationships are established serve to reinforce white male dominance because partners are likely to choose to associate with those who are more familiar and visibly similar.⁸¹ At Sheila's firm, the group decisionmaking processes through which opportunities are allocated and individual team members are evaluated neither require deliberation on the part of decisionmakers nor specify relevant criteria on which to base those decisions. Majority group members, accordingly, are likely to view Sheila according to gender schemas, judging her more harshly for her mistakes and perceiving her behavior to confirm their expectations.⁸²

⁷⁹ This example draws on a number of sources, including Professor Virginia Valian's recent book recounting experiences in meetings with male colleagues. See VALIAN, *supra* note 16, at 4–6.

⁸⁰ See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 *PSYCHOL. BULL.* 117, 119–20 (1994) (suggesting that, in order for contamination of judgments to be avoided, the decisionmaker “must be aware of the unwanted mental process” and be “motivated to correct the error”); see also Margo J. Monteith et al., *Prejudice & Prejudice Reduction: Classic Challenges, Contemporary Approaches*, in *SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY* 323 (Patricia G. Devine et al. eds., 1994) (discussing studies concerning reduction of prejudice and stressing importance of increasing peoples' awareness of their subtle, prejudiced responses in prejudice reduction strategies); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 *CAL. L. REV.* 733 (1995) (reviewing social science research and arguing in favor of informing jurors about the operation of stereotypes). For a recent review of the literature on the possibility of control of stereotypes, see Patricia G. Devine & Margo J. Monteith, *Automaticity and Control in Stereotyping*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 339 (Shelley Chaiken & Yaacov Trope eds., 1999).

⁸¹ See DAVID A. THOMAS & JOHN J. GABARRO, *BREAKING THROUGH: THE MAKING OF MINORITY EXECUTIVES IN CORPORATE AMERICA* 27 (1999) (citing studies). Not only do people tend to prefer those who are most like themselves, particularly in mentoring relationships, but whites often feel that sponsoring a person of color is riskier than sponsoring whites because minority protégés will be scrutinized more closely. See *id.* at 27–28.

⁸² See *supra* notes 64–75 and accompanying text.

Jamal and Sheila each face a form of discrimination that limits their access to opportunity and achievement in employment. Jamal's access to important clients and mentors and Sheila's access to networking opportunities and her development as a team player were likely hindered by the operation of discriminatory bias enabled by the organizations within which they work. Yet, as the next Part will demonstrate, the theories of discrimination embraced by current Title VII jurisprudence fall short of addressing the subtle operation of bias through organizational structure and institutional practice potentially at issue in each of these examples.

III. TITLE VII JURISPRUDENCE: NEGLECTING A CONCEPTION OF DISCRIMINATION IN WORKPLACE DYNAMICS

Title VII as originally enacted stated simply that it was an unlawful employment practice to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin" or "to limit, segregate, or classify . . . employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."⁸³ Early on, the Supreme Court declared that Title VII was intended to eradicate all forms of discrimination in employment, the subtle as well as the overt.⁸⁴ Examining the various theories and their underlying conceptions of discrimination, however, it becomes clear that existing Title VII doctrine, although it recognizes the importance of structural factors in some contexts, is ill-equipped to address the forms of discrimination that derive from organizational structure and institutional practice in the modern workplace.

Title VII jurisprudence is typically divided into two main theories: disparate treatment theory, which, simply put, makes unlawful different treatment of individuals based on protected group characteristics, and disparate impact theory, which makes unlawful use of employment practices that have an adverse effect on members of particular groups and that are not justified by business necessity. To these, we might add a third theory: hostile work environment theory. Although a variant of disparate treatment, hostile work environment theory, at least as originally conceived, arguably embraces a less individualistic account of discrimination than does its traditional disparate treatment counterpart, making it worthy of separate consideration.

⁸³ Civil Rights Act of 1964 § 703, Pub. L. 88-352, 78 Stat. 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a) (2000)).

⁸⁴ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

From this exploration of the conceptual underpinnings and doctrinal formulations of existing theories of discrimination emerge two distinct but interrelated concerns about the adequacy of the existing legal regulatory regime. The first is a practical concern that incidences of discrimination in the modern workplace will slip through the cracks of the legal doctrine. The doctrine that has developed around existing theories of discrimination is premised largely on a stable, hierarchical employment relationship and thus fails to address the types of discrimination that may arise in an employment relationship that takes on a more fluid form. The second is a much broader and far-reaching concern about the ability of the dominant conceptions of discrimination that underlie existing theories to generate advances in equity in the modern workplace. Even if existing theories are reformulated to mend doctrinal holes, without an adequate conceptualization of discrimination that re-directs debate toward the interplay between organizational structures and the operation of discriminatory bias, discrimination in the workplace risks becoming increasingly viewed as an individualized, societal, and largely intractable problem rather than as an institutional problem over which employers have some significant control.

A. *Traditional Disparate Treatment Theory*

Traditional disparate treatment theory conceptualizes discrimination as individual, measurable, and static, looking into the state of mind of a particular decisionmaker at a discrete point in time. Disparate treatment doctrine has long been understood to require a showing of intentional discrimination, often defined in terms of conscious motivation to discriminate.⁸⁵ This requirement, together with the social reality of blatant racism regularly expressed in the early days of Title VII, led to a conception of discrimination as an adverse decision made by a single actor who holds overtly racist or consciously stereotypical beliefs about members of the victim's group. Like a surgeon with a scalpel, we uncover discrimination through traditional disparate treatment theory by dissecting the mind of the decisionmaker, searching for signs that discriminatory animus or conscious bias motivated the decisionmaker to take a particular action at a precisely defined moment in time.

The Supreme Court's description of the relevant inquiry in *United States Postal Service Board of Governors v. Aikens* vividly illustrates this

⁸⁵ See *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 153 (2000) ("The ultimate question in every discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (describing disparate treatment as the "most easily understood type of discrimination" for which "[p]roof of discriminatory motive is critical").

focus on state of mind characteristic of traditional disparate treatment theory:

There will seldom be “eyewitness” testimony as to the employer’s mental processes. But . . . the law often obliges finders of fact to inquire into a person’s state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago: “The state of a man’s mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.”⁸⁶

This conception of discrimination as deriving exclusively from an isolated state of mind can be seen in judicial resolution both of claims brought by individuals alleging that they were treated differently because of a protected group characteristic and of claims brought by groups alleging that an employer subjected an entire class of individuals to discriminatory treatment.

1. Individual Disparate Treatment Theory

The Court’s reasoning in its recent decision in *Reeves v. Sanderson Plumbing* illustrates this conception of discrimination in the individual context.⁸⁷ In that case, the plaintiff, Roger Reeves, alleged that he had been terminated because of his age in violation of the Age Discrimination in Employment Act (ADEA).⁸⁸ He won a judgment after a jury verdict in his favor at trial, but the Court of Appeals for the Fifth Circuit reversed, holding that Reeves had not introduced sufficient evidence to sustain the jury’s finding of discrimination. The Supreme Court, reviewing the Fifth Circuit’s decision, found that there was indeed sufficient evidence to support a verdict in Reeves’ favor. In addition to submitting evidence that the reason given by the employer for the termination was false, the Court pointed out that Reeves had submitted evidence that Powe Chestnut, the director of manufacturing, husband of the company president, and one of three superiors who had recommended to that president that Chestnut be fired, was the “actual decisionmaker” behind Reeves’ discharge and that Chestnut’s action was motivated by conscious age-based bias.⁸⁹

⁸⁶ 460 U.S. 711, 716–17 (1983).

⁸⁷ *Reeves*, 530 U.S. at 133.

⁸⁸ Although *Reeves* was an age discrimination case brought under the ADEA, the Court applied the same legal analysis that would be applied to a claim brought under Title VII. *See id.* at 142.

⁸⁹ *See id.* at 151–52. There was evidence that Chestnut had told Reeves that he “was so

Because evidence of a person's state of mind is often difficult to attain, in 1972 the Supreme Court devised a method of proof, sometimes called the "pretext" model of disparate treatment, under which a plaintiff can prove that an actor intentionally discriminated in making a particular decision by calling into question the reason given for the decision.⁹⁰ Presuming that individuals know the real reason for their actions, the pretext model of disparate treatment provides that an employer can be held to have discriminated when the plaintiff establishes a minimal prima facie case and shows that the reason given for the adverse decision is unworthy of credence.⁹¹ The plaintiff in *Reeves* utilized this method of proof, submitting evidence that the reasons given for his termination, that he had failed to discipline late workers and had falsified company pay records, were a "cover up" for Chestnut's discriminatory motive.⁹²

This conception of discrimination as deriving from action motivated by an individual or entity with a particular state of mind also underlies the "mixed-motives" model of traditional disparate treatment theory developed by the Court more recently in *Price Waterhouse v. Hopkins*.⁹³ In that case, the plaintiff, Ann Hopkins, sued the accounting firm Price Waterhouse, alleging that the firm had denied her partnership because of her sex in violation of Title VII. Partnership decisions at Price Waterhouse were informed by written comments submitted by various partners about applicants.⁹⁴ Hopkins had been highly successful in developing new clients for the firm and was widely praised for her work, but several

old [he] must have come over on the Mayflower" and, on one occasion when Reeves was having difficulty starting a machine, that he "was too damn old to do [his] job." *Id.* at 151.

⁹⁰ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972) (creating the pretext tripartite method of proof).

⁹¹ Pretext analysis permits an inference from a proffered reason that is merely unworthy of credence to a finding of intentional discrimination through a presumption of rationality in employment settings and invidiousness of discrimination. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978):

A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

Id. (internal citations omitted).

⁹² See *Reeves*, 530 U.S. at 147 ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.").

⁹³ 490 U.S. 228, 247 n.12 (1989) (suggesting that a case of disparate treatment can be a "pretext" case or a "mixed-motives" case).

⁹⁴ *Id.* at 232-33.

partners objected to her managerial style and her treatment of staff.⁹⁵ In addition, Hopkins received a number of comments from partners suggesting their expectations that she conform to gendered stereotypes. One of her supporters explained that she had “matured from a tough-talking somewhat masculine hard-nosed mgr [sic] to an authoritative, formidable, but much more appealing lady ptr [sic] candidate.”⁹⁶ The written comments of partners also criticized Hopkins for being “overly aggressive,” described her as “macho,” and suggested that she “overcompensated for being a woman.”⁹⁷ The firm’s Admissions Committee, after reviewing these comments, recommended that Hopkins not be offered partnership.⁹⁸ After the decision, one of the partners counseled Hopkins to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” if she wanted to increase her chances of attaining partnership.⁹⁹

The Supreme Court ruled that Price Waterhouse could be held liable for discrimination under Title VII if it based its decision to deny Hopkins partnership on gendered stereotypes of how a woman should behave, even if other reasons, such as a lack of interpersonal skills, might also have motivated the decision.¹⁰⁰ As this articulation of the Court’s holding implies, much of the Court’s decision, and indeed the issue that drove the wedge between the plurality opinion, joined by Justices White and O’Connor, and the dissenting opinion, involved the question of which party should bear the burden of proving causation.¹⁰¹ Despite their differences, however, each of the opinions in *Price Waterhouse* reflects an underlying conception of discrimination as deriving from a particular state of mind at a discrete moment in time, the moment of an identifiable, ad-

⁹⁵ *Id.* at 233–35.

⁹⁶ *Id.* at 235.

⁹⁷ *Id.*

⁹⁸ The Committee initially recommended that her partnership application be put on hold for one year. Before she was reconsidered, however, two partners withdrew support for Hopkins, and she was informed that she would not be reconsidered for partnership. *Id.* at 233 n.1.

⁹⁹ *Id.* at 235.

¹⁰⁰ A plurality of the Court held that once a plaintiff shows that discriminatory bias played a role in the decision, the defendant could avoid liability only if it could show by clear and convincing evidence that it would have made the same decision anyway. *See id.* Congress superseded that part of the decision through enactment of a provision of the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(m) (2000).

¹⁰¹ The plurality believed that once the plaintiff proved that her sex played a part or was a motivating factor in the challenged decision, she would be entitled to a verdict in her favor unless the defendant could prove that it would have made the same decision anyway. *See Price Waterhouse*, 490 U.S. at 242. Justice White and Justice O’Connor, concurring in the plurality, would have required that the plaintiff prove that her sex was a substantial factor in the challenged burden before shifting the burden of proving causation to the employer. *See id.* at 260–61 (White, J., concurring); *id.* at 265–66 (O’Connor, J., concurring). The dissent would have required that the plaintiff retain the burden of proving that sex was the but-for cause of the challenged decision. *See id.* at 281–82 (Kennedy, J., dissenting).

verse decision. Focusing on the firm's ultimate decision not to offer Hopkins partnership, Justice Brennan, speaking for a plurality, explained:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.¹⁰²

In the early years of Title VII enforcement, when firms were largely hierarchical and bureaucratic, this conception of discrimination may have been adequate to identify and address at least the most prevalent forms of discrimination manifested in blatantly exclusionary individual decisions made at identifiable points on a hierarchical ladder. As the governance structures of the workforce shift, however, this exclusively individualistic conception of discrimination becomes increasingly problematic. A look at the case law in the individual disparate treatment context illustrates the theory's limitations for addressing some of the more subtle, complex forms of discrimination operating in the modern workplace.

Of particular practical significance, courts applying the traditional individual disparate treatment paradigm often require that the allegedly discriminatory action be a "materially adverse action," such as a rejection in hiring, a discharge, a pay disparity, or a promotion denial, in order to be actionable under Title VII.¹⁰³ A poor evaluation,¹⁰⁴ a change of job ti-

¹⁰² *Id.* at 250.

¹⁰³ See *McNair v. Computer Data Sys., Inc.*, No. 98-1110, 1999 U.S. App. LEXIS 1017, at *9 (4th Cir. Jan. 26, 1999) (change of job title not actionable); *Dollis v. Rubin*, 77 F.3d 777, 799 (5th Cir. 1995) (denial of desk audit and denial of training not actionable); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (reassignment to more inconvenient job not actionable); *Mitchell v. Carrier Corp.*, 954 F. Supp. 1568, 1579 (M.D. Ga. 1995) (failure to train considered an "interlocutory or mediate decision[] having no immediate effect upon employment condition" (quoting *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981))), *aff'd* 108 F.3d 343 (11th Cir. 1997); *Kauffman v. Kent State Univ.*, 815 F. Supp. 1077, 1083 (N.D. Ohio 1993) (intradepartmental transfer that lessened responsibilities and chance for promotion did not rise to the level of an adverse employment action), *aff'd* 21 F.3d 428 (6th Cir. 1994). Courts are inconsistent in their articulation and application of this requirement. Some courts purport to apply a stricter standard to claims of retaliation than to general discrimination claims, see *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997), while others apply the same standard in all contexts, see *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) (rejecting distinction between retaliation and other claims, but holding that "downgrade" in performance and reassignment were not adverse employment actions actionable under Title VII). For a thorough discussion of this requirement, see Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

¹⁰⁴ See *Brown v. Brody*, 199 F.3d 446, 458 (D.C. Cir. 1999) (lower than usual performance rating not actionable).

tle,¹⁰⁵ a failure to train,¹⁰⁶ and an intra-department transfer,¹⁰⁷ for example, have each been held legally insufficient to support a Title VII claim. This requirement is particularly problematic given the fluidity of the modern employment relationship. Employees who are judged more harshly in internal evaluations or excluded from key informal social networks because of protected characteristics must nonetheless await an event that constitutes a “materially adverse action” within a single institution before challenging the discriminatory denial of opportunity. As hierarchies flatten, movement between institutions increases, and the employment relationship is redefined in terms of individual achievement over hierarchical advancement, employees will find it more difficult to satisfy this requirement, and discrimination against these individuals will go unaddressed.

The conception of discrimination as deriving from a single decisionmaker at an identifiable, discrete point in time also leads to a narrow factual inquiry, one that often ignores the reality that discriminatory bias operates at multiple stages of interaction and in the context of greater organizational structures of the workplace. In many individual disparate treatment cases, courts focus exclusively on the state of mind of a particular decisionmaker at the precise moment that the allegedly discriminatory decision was made, discounting evidence of discriminatory bias operating at any other time.¹⁰⁸ For example, in *Simmons v. Océ-USA, Inc.*, Wayne Simmons sued his employer, Océ-USA, alleging that it had discriminated against him on the basis of race.¹⁰⁹ Simmons worked for Océ as a “high-end” copier service person from 1990 until 1997, when he was discharged.¹¹⁰ Océ used a performance-based, partially subjective evaluation system under which employees were rated by their supervisors on ability to reach national performance targets.¹¹¹ Simmons received satisfactory performance ratings and steady pay increases until 1994, when

¹⁰⁵ See *McNair*, 1999 U.S. App. LEXIS 1017, at *9 (change of job title not actionable).

¹⁰⁶ See *Mitchell*, 954 F. Supp. at 1579 (delayed job training not actionable).

¹⁰⁷ See *Kauffman*, 815 F. Supp. at 1083.

¹⁰⁸ See *Simmons v. Océ-USA, Inc.*, 174 F.3d 913 (8th Cir. 1999); *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326 (5th Cir. 1998) (affirming a judgment in favor of an employer on the ground that the plaintiff failed to present sufficient evidence of discrimination, despite a lower-than-usual evaluation by a supervisor who had referred to the plaintiff as “Buckwheat” and “Porch Monkey”); *Rhone v. Tex. Dep’t of Transp.*, No. CA3: 96-CV-1147-BC, 1997 U.S. Dist. LEXIS 22911 (N.D. Tex. Aug. 29, 1997) (finding supervisor’s racist remarks did not constitute direct evidence of discrimination). I highlight these judicial responses not to show that courts are misinterpreting existing doctrine but to illustrate that the conception of discrimination that drives traditional individual disparate treatment theory is ill-suited to addressing the more subtle, ongoing, often unconscious, institutionally enabled forms of discrimination operating in the modern workplace. For an argument that federal courts are erecting hurdles for plaintiffs at summary judgment and interpreting the traditional individual disparate treatment theory too narrowly, see Lawton, *supra* note 2.

¹⁰⁹ *Simmons*, 174 F.3d at 915.

¹¹⁰ *Id.*

¹¹¹ *Id.*

John Curless became his supervisor.¹¹² Curless ranked Simmons's job performance as below target levels from 1994 until Simmons's discharge in 1997.¹¹³ During this period, Curless made derogatory racial comments to Simmons. He told racial jokes and referred to Simmons as "Buck-wheat."¹¹⁴ Simmons argued that the low performance ratings given by Curless were biased and that his termination, which was based on those ratings, was discriminatory.¹¹⁵ The Court of Appeals for the Eighth Circuit affirmed the district court's grant of summary judgment in favor of Océ.¹¹⁶ In doing so, it reasoned that the derogatory comments made by Curless in 1995, two years prior to the decision to terminate Simmons, were "unrelated to the decisional process" and therefore were insufficient to support an inference of discrimination.¹¹⁷ By focusing exclusively on a single moment of decision, the termination, the court neglected to consider this additional evidence of discriminatory bias that may have influenced Curless's earlier evaluation of Simmons.

Courts deciding claims of individual disparate treatment are also increasingly hesitant to question employment decisions that involve multiple criteria or subjectivity on the part of the decisionmaker. One court recently announced that it would permit an inference of intentional discrimination from evidence that the rejected applicant for a position was the better qualified applicant only when "disparities [in qualifications] are so apparent as virtually to jump off the page and slap you in the face."¹¹⁸ This court explains that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."¹¹⁹ Other courts require that plaintiffs provide evidence that they were "clearly" or "overwhelmingly" better qualified than the person chosen for the job.¹²⁰ Characterizing the inquiry

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 916.

¹¹⁸ *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280 (5th Cir. 1999).

¹¹⁹ *Id.* at 280–81.

¹²⁰ *See* *Byrnie v. Cromwell Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) (requiring evidence that plaintiff's credentials were "so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question'" (citations omitted)); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1179–80 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 117 (2002) (same); *Lee v. GTE Fla., Inc.*, 226 F.3d 1249, 1254–55 (11th Cir. 2000) (requiring evidence that plaintiff was "clearly" more qualified than chosen applicant), *cert. denied*, 532 U.S. 958 (2001); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999) (requiring evidence that plaintiff was "overwhelmingly better qualified"); *see also* *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1329–30 (10th Cir. 1999) ("Our role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second guesses employers' business

in terms of an employer's honesty, these courts dismiss as irrelevant evidence of problems with the employer's decisionmaking process or of its employees' lack of compliance with that process. In *Stewart v. Henderson*,¹²¹ for example, the plaintiffs pointed to evidence that decisionmakers had not followed the United States Postal Service evaluation system when making promotion decisions. The court described its role as follows:

The focus of [the] inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise, or well-considered In order to demonstrate that the reasons given for the decision were pretextual, [plaintiffs] would have to provide evidence not just that the STAR method was poorly implemented, but that the USPS lied about using the STAR method and that we should infer from that a discriminatory reason for the decision.¹²²

These judicial responses in the individual disparate treatment context illustrate the inadequacy of a conception of discrimination that focuses on a particular decisionmaker's state of mind at a discrete point in time to address the subtle, ongoing operation of discriminatory bias common in the modern workplace. Discriminatory bias in the modern workplace often operates to disempower, exclude, and hinder the opportunities of women and minorities without resulting in a single, identifiable decision along a hierarchical ladder. Under existing individual disparate treatment doctrine, these forms of discrimination go unaddressed, and the decisionmaking systems themselves escape any meaningful examination.

2. Systemic Disparate Treatment Theory

In the systemic disparate treatment context, the conceptual focus shifts from the individual decisionmaker to the employer as an entity, but the ultimate inquiry remains framed in terms of state of mind. To succeed on a claim of systemic disparate treatment, a plaintiff must show that the employer intentionally discriminated, either by acting pursuant to an express policy of treating members of different groups differently or, in the absence of an express policy, by engaging in a "pattern or practice" of discrimination. Since employers rarely adopt expressly discriminatory policies in the face of Title VII,¹²³ most systemic disparate treatment claims today are pattern or practice cases.

judgments.") (citations omitted).

¹²¹ 207 F.3d 374 (7th Cir. 2000).

¹²² *Id.* at 378.

¹²³ See *supra* notes 10–12 and accompanying text.

Pattern or practice cases take on a structural hue by considering disparities between the makeup of the employer's workforce and the makeup of the pool from which the employer draws its employees as evidence of discrimination. Significant disparities are evidence of discrimination on the theory that, absent explanation, "it is ordinarily to be expected that nondiscriminatory hiring [and promotion] practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are [drawn]."¹²⁴ *International Brotherhood of Teamsters v. United States* represents the paradigmatic systemic disparate treatment pattern or practice case. Brought by the government soon after Title VII's enactment, the suit alleged that a trucking company had engaged in a pattern and practice of discriminating against blacks and Latinos in hiring and promotions with respect to line-driving positions.¹²⁵ In support of its case, the government submitted statistics showing a significant disparity between the percentage of minorities in the company's workforce and the percentage of minorities in line-driving positions, as well as a disparity between the percentage of minorities in the populations surrounding the company's driving terminals and the percentage of minorities in line-driving positions in those terminals.¹²⁶ The government also introduced testimony of individuals who recounted over forty specific instances of discrimination, many of which involved overt attempts to exclude black and Latino individuals from line-driving positions.¹²⁷ The Supreme Court held that this evidence could support a finding of system-wide disparate treatment in violation of Title VII.¹²⁸

By accepting numerical disparities in the workplace as evidence of a system-wide pattern or practice of discrimination, the Supreme Court in *Teamsters* opened the door for a structural account of disparate treatment, one in which such disparities might trigger an examination of an employer's institutional practices and organizational structures rather than solely one that focuses on the employer's state of mind. Ultimately, however, statistics were considered relevant to the *Teamsters* Court only inasmuch as they supported an inference of the employer's state of mind. As the Court explained, "Statistics showing racial or ethnic imbalances are probative [in systemic disparate treatment cases] only because such imbalance is often a telltale sign of purposeful discrimination."¹²⁹

An immediate practical problem inherent in this focus on the intent or state of mind of the employer as an entity lies in the prevailing requirement that plaintiffs present evidence of statistically significant dis-

¹²⁴ *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977).

¹²⁵ *See id.* at 328–29.

¹²⁶ *See id.* at 337–38.

¹²⁷ *See id.* at 338.

¹²⁸ *Id.* at 337–38.

¹²⁹ *Id.* at 339 n.20.

parities to succeed on a systemic disparate treatment claim.¹³⁰ The modern movement toward defining jobs according to skills sets rather than job descriptions means that individuals are less easily categorized into quantifiable groups for statistical comparison. In addition, a less hierarchically organized workplace and more frequent movement of workers between institutions make it increasingly difficult for plaintiffs to attain statistics sufficient to support a finding of “purposeful discrimination” on the part of the employer. Statistical significance becomes harder to attain as the sample size shrinks.¹³¹ A problem long associated with high-end jobs therefore moves lower and spreads to other sectors of the workforce.¹³²

The emphasis on employer intent also means that some of the same problems identified with traditional disparate treatment theory in the individual context carry over into the systemic context. Traditional disparate treatment theory, even in the systemic context, conceptualizes discrimination as operating at the moment of a specific, identifiable adverse decision rather than as an ongoing disempowerment and hindrance to opportunity and development. Accordingly, discriminatory bias that operates through organizational structures and institutional practices to limit opportunities or to impair interest often goes unaddressed by traditional disparate treatment theory. Employers have successfully argued, for example, that stark disparities in the racial or gender makeup of the

¹³⁰ Statistical significance in employment discrimination suits is often determined using a binomial distribution analysis, which measures the probability that a certain outcome is due to chance. The Supreme Court in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), held that if the difference between the expected value and observed value exceeds two or three standard deviations, then the hypothesis that a protected characteristic was not a factor in an employment decision is suspect. *See id.* at 308 n.14. Courts have since concluded that if the number of standard deviations, sometimes called a Z score, is less than two, then the statistical evidence is not probative of discrimination. *See, e.g., Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade County*, 122 F.3d 895, 917 (11th Cir. 1997) (affirming district court's conclusion that a standard deviation of less than two was not probative of discrimination); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277 (5th Cir. 1994) (holding that plaintiffs did not establish a prima facie case of discrimination in promotions with a standard deviation of 1.84).

¹³¹ *See* DAVID C. BALDUS & JAMES W. COLE, STATISTICAL PROOF OF DISCRIMINATION § 9.221, at 309 (1980) (“All other things being equal, the test statistic and level of significance rise as the sample size increases.”); RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES § 12.03 (1994) (discussing problems of significance and statistical power in small samples).

¹³² *See, e.g., Segar v. Smith*, 738 F.2d 1249, 1283 (D.C. Cir. 1984) (affirming district court's finding that statistics alone would not permit an inference of discrimination in promotions to positions above the G-12 level of U.S. Drug Enforcement Agency because sample size resulted in statistically insignificant disparity); *Gray v. Robert Plan Corp.*, 991 F. Supp. 94, 104 (E.D.N.Y. 1998) (holding that a sample size of thirteen was too small to create inference of discrimination); *see also* Bartholet, *supra* note 57 (discussing difficulty in obtaining statistically significant results for high-end positions). *See generally* Ramona L. Paetzold & Rafael Gelu, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1540 (1995) (discussing problems of small sample size for plaintiffs in an internal labor market seeking to use statistics to show discrimination in promotion to high level positions).

work force are “virtually meaningless” as evidence of discrimination when there is also evidence that employees lacked interest in attaining the more prestigious or lucrative positions.¹³³ These courts have accepted the notion that employees form their interests and attain their qualifications independently of employer conduct. Accordingly, the courts perform no meaningful inquiry into the ways in which the employer has created the workplace structures and relations out of which preferences arise.

The *Sears* case is probably the most famous example of this limitation of traditional disparate treatment theory and its underlying individualistic conception of discrimination for addressing the subtle operation of bias enabled by institutional practices.¹³⁴ In that case, the EEOC claimed that Sears had engaged in a system-wide practice of discrimination in the hiring and promotion of women into commission sales jobs, relegating them to lower-paying, non-commission sales jobs.¹³⁵ In support of its case, it submitted statistical studies showing a stark disparity in the numbers of women and men hired or promoted into commission sales positions.¹³⁶ Commission sales jobs at Sears were concentrated in traditionally male product areas, such as automotive, plumbing, furnaces, roofing, and fencing.¹³⁷ Hiring decisions for the jobs were made primarily on the basis of interviews in which applicants were judged on fitness for commission sales by interviewers with no formal instruction on the qualities to look for in a commission sales candidate.¹³⁸ Interviewers were supposed to learn the appropriate commission salesperson characteristics from observing past successful commission salespeople, who were predominately male.¹³⁹ The Sears Retail Testing Manual, which contained the only written description of the desirable characteristics of a commission salesperson, described that person as a “special breed of cat,” as a person who is “active,” “has a lot of drive,” possesses “considerable physical vigor,” and “likes work which requires physical energy.”¹⁴⁰ In

¹³³ See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (documenting employer attempts to avoid liability for disparities in the workplace by arguing that women or minorities are not interested in certain positions and describing courts’ willingness to attribute segregation to preferences rather than discrimination).

¹³⁴ See *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d* 839 F.2d 302 (7th Cir. 1988).

¹³⁵ See *id.* at 1289.

¹³⁶ The EEOC presented numerous multiple regression analyses based on information from employment applications of rejected sales applicants and Sears’ computerized payroll records from 1973 to 1980, many of which resulted in Z values that exceeded three. See *id.* at 1294–1300.

¹³⁷ See *id.* at 1288.

¹³⁸ *Id.* at 1290–92 (describing qualifications and hiring process).

¹³⁹ *Id.* at 1300.

¹⁴⁰ Until 1953, the manual described a commission salesperson as a “man” with those characteristics, but references to males were eliminated in the 1960s. *Id.* at 1300.

addition, applicants for sales positions were regularly given a test of Mental Alertness and a Mental Temperament Schedule in which they were asked a number of questions, including: “Do you have a low pitched voice?”; “Do you swear often?”; “Have you ever done any hunting?”; and, “Have you played on a football team?”¹⁴¹

Sears responded to the EEOC’s case by arguing that the observed disparity between males and females in the higher-paying commission sales jobs was attributable not to discrimination on the part of Sears but to the work preferences of women.¹⁴² The trial court accepted this argument.¹⁴³ Pointing to Sears’ affirmative efforts to hire women into commission sales positions, together with Sears’ evidence that female sales applicants were less interested in the commission sales positions than in the non-commission sales positions, the court held that the EEOC had failed to prove that Sears had intentionally discriminated against women.¹⁴⁴ By framing the relevant inquiry in terms of Sears’ purposeful intent to discriminate at the moment of hiring or assignment, the court could arrive at this conclusion without considering the role that job structuring, workplace environment, and/or testing and interview practices may have played in influencing female interest in Sears’ higher-paying commission sales positions.¹⁴⁵

Courts have also relied explicitly on a narrow, individualistic conception of discrimination in rejecting a number of recent attempts to challenge employer decisionmaking systems as enabling the operation of discriminatory bias on a system-wide basis. These courts, like the court in *Sears*, construe the plaintiffs’ challenges purely in terms of individualized employer or decisionmaker intent, foreclosing any meaningful examination of the ways in which the employer’s organizational systems and structures may have enabled the operation of discriminatory bias to the detriment of women and minorities. For example, in *Abram v. United Parcel Service of America, Inc.*, plaintiffs were denied class certification in a suit brought against the United Parcel Service (UPS) for an alleged pattern or practice of discrimination in promotion and pay of black full-time supervisors.¹⁴⁶ At the time of the decision, UPS, a nationwide pack-

¹⁴¹ *Id.* at 1300 n.29.

¹⁴² *Id.* at 1324–27.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1305, 1324–27 (finding the statistics introduced by the EEOC “virtually meaningless” because they were based on the “faulty assumption” that women sales applicants were interested in the more lucrative commission positions).

¹⁴⁵ Sociological research reveals a number of ways in which the workplace structures and environments created by employers can influence and shape the aspirations of workers. See Schultz, *supra* note 133 (exposing flaws in the judicial response to the lack-of-interest argument raised by employers in systemic disparate treatment cases like *Sears* by exploring some of the sociological research suggesting that work aspirations are affected both by the limits and opportunities of the workplace).

¹⁴⁶ 200 F.R.D. 424 (E.D. Wis. 2001). In order to be certified for class treatment, a proposed class must meet the requirements of Federal Rule of Civil Procedure 23(a) and (b).

age delivery service that employs roughly 300,000 people, was divided into eleven regions, which in turn were divided into sixty-five districts.¹⁴⁷ The districts were each managed by a single “district manager” and a number of “central managers,” who supervised the full-time supervisors of that district.¹⁴⁸ UPS had standardized personnel procedures that applied to all districts, including establishment of performance appraisal forms that were used to evaluate full-time supervisors.¹⁴⁹ Decisionmaking itself, however, was decentralized. Central managers evaluated the performance of full-time supervisors.¹⁵⁰ Those evaluations were reviewed only as far as the district manager level.¹⁵¹

In 1999, ten black full-time supervisors at UPS filed suit and sought certification of a class of black full-time supervisors.¹⁵² They alleged that UPS maintained “highly subjective . . . performance rating and compensation systems which result[ed] in discriminatorily lower ratings and pay for African American supervisors than for their white counterparts.”¹⁵³ The plaintiffs argued that UPS’s policy of delegating highly subjective decisionmaking to central managers permitted discriminatory bias in individual decisionmakers to influence performance ratings and compensation decisions of blacks.¹⁵⁴ The court denied certification of the suit for class treatment.¹⁵⁵ Even if, as plaintiffs’ alleged, UPS’s performance ratings were “tainted by bias” and “some managers allow[ed] racial bias to affect their performance evaluations,” the court explained that “[s]uch discrimination, if it occurs, is one step removed from UPS’s decision to

Fed. R. Civ. P. 23. Class certification is often crucial to any suit that attempts to make a systemic rather than an individual challenge to an employer’s practices. Access to evidence of larger patterns of discrimination may be limited without class certification. *See, e.g., Earley v. Champion Int’l. Corp.*, 907 F.2d 1077, 1084–85 (11th Cir. 1990) (limiting discovery to the “employing unit”). Moreover, some courts hold that plaintiffs can use statistics to create an inference of discrimination only upon class certification, *see, e.g., Celestine v. Petroleos de Venez. SA*, 266 F.3d 343, 356 n.4 (5th Cir.) (“As the plaintiffs are before us in their individual capacities, due to their failure to obtain class certification, the *Teamsters* method is not available to them.”), *reh’g and reh’g en banc denied*, 275 F.3d 48 (5th Cir. 2001); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760, 766–67 (4th Cir. 1998), *vacated on other grounds by* 527 U.S. 1031 (1999); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866 n.6 (7th Cir. 1985) (“Plaintiffs’ use of ‘pattern-or-practice’ language . . . seems misplaced, since such suits, by their very nature, involve claims of classwide discrimination, and the five plaintiffs, while attacking policies that would have affected all of [defendant’s] women employees as a class, have stated only their individual claims, not a class action.”) (citations omitted), and limit the prevailing non-class action plaintiffs to individualized injunctive relief, *see, e.g., Lowery*, 158 F.3d at 766–67.

¹⁴⁷ *See Abram*, 200 F.R.D. at 425.

¹⁴⁸ *See id.*

¹⁴⁹ *See id.* at 426.

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² *See id.* at 425.

¹⁵³ *Id.*

¹⁵⁴ *See id.* at 426.

¹⁵⁵ *See id.* at 433–34.

allow consideration of subjective factors in the first instance.”¹⁵⁶ Moreover, said the court, the decentralized nature of the system of decision-making at UPS, placing responsibility for individual decisions with district and central managers rather than at corporate headquarters, weighed heavily against class certification and systemic analysis.¹⁵⁷ According to the court, plaintiffs’ claims were properly litigated only as isolated incidences of individual disparate treatment perpetuated by discrete decisionmakers.¹⁵⁸

The *Abram* court is not alone in refusing to recognize claims alleging widespread operation of discriminatory bias facilitated by organizational systems as anything other than claims of individualized disparate treatment. Like the court in *Abram*, these courts typically perceive plaintiffs’ claims as searches for the discriminatory state of mind of particular decisionmakers rather than as systemic challenges to the institutional structures that enable the operation of discriminatory bias.¹⁵⁹ As one court explained, “Plaintiffs do not and cannot allege that subjective decision-making itself is a practice that discriminates. Rather, they can only allege that it allows a situation to exist in which several different managers are able to discriminate intentionally. The focus of the claim remains the individual employment decisions.”¹⁶⁰ Similarly, in *Zachery v. Texaco Exploration and Production, Inc.*, plaintiffs alleged that Texaco’s job evaluation and promotion system lacked safeguards to protect against the operation of discriminatory bias.¹⁶¹ The court held that class certification was improper, providing the following reasoning:

In this case, the proposed class is spread across fifteen states in seventeen separate business units, each of which, until 1998, had varying degrees of autonomy over evaluation and promotion

¹⁵⁶ *Id.* at 430.

¹⁵⁷ *See id.* at 432.

¹⁵⁸ *Id.* at 430.

¹⁵⁹ *See, e.g.*, *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541–42 (N.D. Ala. 2001) (characterizing plaintiffs’ challenges as individual claims of disparate treatment); *Allen v. Chi. Transit Auth.*, No. 99 C 7614, 2000 U.S. Dist. LEXIS 11043, at *28 (N.D. Ill. July 28, 2000) (requiring a “centralized or completely subjective decision-making policy” to meet commonality requirement); *Abrams v. Kelsey-Seybold Med. Group, Inc.*, 178 F.R.D. 116, 129 (S.D. Tex. 1997) (“A class may not be based on discrimination occurring in different departments, involving different decision makers.”); *Boykin v. Viacom Inc.*, No. 96 CIV. 8559, 1997 U.S. Dist. LEXIS 17872, at *11 (S.D.N.Y. Nov. 12, 1997) (“[T]he hiring and promotion decisions [at issue] are entirely decentralized and reflect no overarching company policy or practice. Instead, there are at least 15 different supervisors who were separately responsible for filling one or more of the 105 positions at issue. Consequently, any inquiry into this matter at trial would have to explore the policies and practices of at least 15 different decision-makers.”).

¹⁶⁰ *Brooks v. Circuit City Stores, Inc.*, Civil Action No. DKC 95-3296, 1996 U.S. Dist. LEXIS 9869, at *12 (D. Md. June 17, 1996), *rev’d in part on other grounds*, 148 F.3d 373 (4th Cir. 1998).

¹⁶¹ 185 F.R.D. 230 (W.D. Tex. 1999).

decisions. These decisions, by the Plaintiffs' own complaint, were often made by the lowest level supervisor based on subjective criteria. While this would be useful evidence in an individual's claim of intentional discrimination by that supervisor, it does not lend itself readily to class treatment where there are 523 autonomous supervisors in locations spread across the United States.¹⁶²

Other courts have expressly required allegations that the employer consciously intended to use a policy of subjectivity in decisionmaking to discriminate. According to one court, "[D]isparate treatment claims alleging that a company's policy of delegating discretionary employment decisions to local supervisors are not appropriate for class certification absent an allegation that the company intended to use this policy to discriminate against a protected class."¹⁶³

These examples illustrate some of the limits of existing theories of discrimination as currently interpreted for addressing more subtle forms of discrimination common in the modern workplace, where day-to-day social interactions take on a heightened importance for worker development and achievement. Traditional disparate treatment theory, in the individual as well as the systemic context, currently conceptualizes discrimination in terms of isolated, purposeful states of mind at precise moments in time within a single institution. This conceptualization, as well as the corresponding legal doctrine, ignores the role that institutional choices and workplace dynamics play in shaping decisions both within and without dominant groups on an ongoing basis.

3. Attempted Reformulations of Traditional Disparate Treatment Theory

A number of legal scholars have questioned the conscious motivational foundation underlying traditional disparate treatment theory. These scholars have presented overwhelming evidence that the search for discriminatory animus or conscious reliance on stereotypes that dominates current traditional disparate treatment doctrine is fundamentally misplaced.¹⁶⁴ For example, Professor Krieger critiques several assumptions of the existing disparate treatment paradigm, including its assumption that discrimination takes place by corruption at the moment of decision rather than by distortion at the moment of perception or inferential process,¹⁶⁵ and its assumption that decisionmakers are aware of the influence

¹⁶² *Id.* at 239.

¹⁶³ *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 544 (D.N.J. 2001).

¹⁶⁴ See Krieger, *supra* note 1; McGinley, *supra* note 22; David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

¹⁶⁵ See Krieger, *supra* note 1, at 1182.

of bias on their minds, in other words, that they possess “transparency of mind.”¹⁶⁶ She ultimately suggests a reformulation of individual disparate treatment theory to focus on causation rather than on conscious motivation.¹⁶⁷ She proposes that to establish liability for disparate treatment discrimination of any kind, a Title VII plaintiff would “simply be required to prove that his group status *played a role* in causing the employer’s action or decision.”¹⁶⁸

Understanding disparate treatment theory in terms of differences in treatment rather than merely conscious motivation to discriminate is critical to the project of achieving equity in employment. However, it is doubtful that a reformulation of disparate treatment theory to focus on causation, standing alone, is sufficient to address discrimination in the modern workplace. Such a reformulation simply fails to provide a conceptual foundation for addressing the role that organizational structure and institutional practices play in enabling discriminatory bias and perpetuating inequity in the modern workplace.

Krieger and others make out an undeniable case that stereotypes and unconscious motivation can lead to the operation of discriminatory bias in the mind of an individual at any point from perception to ultimate decision. As Krieger explains, “[A] person’s group status can bias a decision maker’s perceptions, judgments, and actions through processes that are quite independent of any invidious intention.”¹⁶⁹ This cognitive approach, however, tends to reinforce a conception of discrimination as largely individualistic, as something that derives from individuals in isolation rather than from individuals in the context of organizational structure, dynamics, and group interaction.¹⁷⁰ We have seen that, particularly in the restructured organization, discriminatory bias often takes on a dy-

¹⁶⁶ See *id.* at 1185.

¹⁶⁷ See *id.* at 1242.

¹⁶⁸ See *id.* at 1242; see also Linda Hamilton Krieger & Rebecca Hanner White, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 498 (2001) (“Intent . . . is best understood not as animus but as a causation concept, one that asks whether the plaintiff’s race, sex, etc. caused the decision to occur.”). Other commentators have made similar suggestions, both in the systemic and individual contexts. See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 289 (1997) (“What the Court means by intent is that an individual or group was treated differently because of race. Accordingly, a better approach is to concentrate on the factual question of differential treatment. In this way, the key question is whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states.”); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 957 (1989) (“A court applying the discriminatory intent standard should ask: suppose the adverse effects of the challenged government decision fell on whites instead of blacks, or on men instead of women. Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent.”).

¹⁶⁹ Krieger, *supra* note 1, at 1243.

¹⁷⁰ See *infra* Part IV for additional reasons that an independent conceptualization of discrimination in workplace dynamics is valuable in the effort to eradicate workplace discrimination in its more modern, subtle forms.

dynamic, interactive quality, hindering opportunity on a day-to-day basis. Identification of these more complex, institutionally enabled types of discrimination requires an openness to structural factors and sensitivity to patterns of social interaction that cannot be adequately explored under an individualistic conception of discrimination—even one that includes unconscious as well as conscious motivation.

An independent conceptualization of discrimination in terms of workplace dynamics tells a certain and important causal story about how discrimination continues to operate in the modern workplace.¹⁷¹ Significantly, it recognizes the role that discriminatory bias, even in individuals who subscribe to an egalitarian ideal, continues to play in the allocation of opportunity and perpetuation of stratification. This story tells individual employees that they do not stand as innocent bystanders to inequity and discrimination simply because they believe that all employees should be judged equally according to merit rather than race- or sex-based characteristics.¹⁷² But it also recognizes that discrimination today rarely operates in isolated states of mind; rather, it is often influenced, enabled, and even encouraged by the structures, practices, and opportunities of the organizations within which groups and individuals work.

The First Circuit's recent decision in *Thomas v. Eastman Kodak Co.* illustrates the limits of even a reformulated traditional disparate treatment paradigm.¹⁷³ The court in that case, receptive to many of the ideas of modern commentators, managed to move beyond the conscious motivational construct underpinning traditional disparate treatment doctrine, but nonetheless remained anchored in an individualistic conception of discrimination. The case resulted from a company-wide reduction in force at Eastman Kodak that led to the discharge of Myrtle Thomas, a customer service representative at Kodak's Wellesley, Massachusetts, office.¹⁷⁴ Kodak selected employees for layoff using a "Performance Appraisal Ranking Process" under which a numerical score was derived

¹⁷¹ See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) (describing the process through which law can influence behavior by causing individuals to update beliefs about societal approval); Deborah A. Stone, *Causal Stories and Policy Agendas*, 104 POL. SCI. Q. 281 (1989) (placing the causal argument at the heart of political problem definition); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (exploring the role of law in controlling behavior indirectly through expression of norms).

¹⁷² The need for a modern story of discrimination seems particularly acute in light of research that highlights awareness as a crucial factor in combating the operation of bias in low-prejudice individuals. See Margo J. Monteith et al., *supra* note 80; see also Dovidio & Gaertner, *supra* note 12, at 28–31 (citing additional studies suggesting the importance of raising individual awareness of inconsistencies between egalitarian self-conceptions and the operation of subtle bias).

¹⁷³ 183 F.3d 38 (1st Cir. 1999).

¹⁷⁴ *Id.* at 43–46.

from yearly performance appraisal scores.¹⁷⁵ Thomas's score was second lowest of the customer service representatives at the Wellesley office, and since Kodak had decided to cut two Wellesley customer service representative positions, Thomas was discharged.¹⁷⁶

Thomas brought suit against Kodak alleging that it had discriminated against her in violation of Title VII.¹⁷⁷ Thomas had been the only black customer service representative in Kodak's Wellesley office, and she argued that the decision to lay her off was discriminatory because her ranking score was based on racially biased performance appraisals prepared in the three years prior to her discharge.¹⁷⁸ Kodak followed a pay-for-performance compensation system, stating that the company's goal was to "reward each individual's job performance appropriately" and to provide monetary reward for high performance.¹⁷⁹ In line with this goal, Kodak required supervisors to conduct yearly appraisals that evaluated "basic performance measures," with categories for quality of results, quantity of results, job skills and teamwork, and evaluations of "additional performance measures," including dependability, versatility, communications, and leadership.¹⁸⁰ The evaluation form required each supervisor to give the employee a ranking from one to seven for each applicable category, as well as an overall rating.¹⁸¹ Kodak intended the appraisal scores to be ranked on a curve, company-wide.¹⁸² The compensation plan suggested that appraisers attempt to validate their distribution of appraisal ratings by rank-ordering employees in the same grade and job category.¹⁸³

From 1988 to 1989, Thomas consistently received above-average appraisal ratings of fives and sixes from several different managers.¹⁸⁴ In 1989, Kodak created the position of customer support manager and promoted Claire Flannery, then a secretary in another office, to the position.¹⁸⁵ Although Thomas stated that she and Flannery "were on a professional basis," and Flannery denied having any problems with Thomas's job performance, Thomas alleged that Flannery treated her differently from the other five Wellesley office customer support representatives, all of whom were white.¹⁸⁶ In her complaint, Thomas described a number of occasions on which she claimed that Flannery damaged her professional standing and opportunity, undermining her competence in front of cus-

¹⁷⁵ *Id.* at 46.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 43.

¹⁸⁰ *Id.* at 44.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

tomers and preferring other employees over her.¹⁸⁷ In addition, she alleged that Flannery gave her inaccurately low scores on her annual performance appraisals.¹⁸⁸ In the years following Flannery's arrival, Thomas, who had earlier received only fives and sixes, received much lower scores, including a two and several threes and fours.¹⁸⁹

The district court granted summary judgment to Kodak on the ground that, although Thomas had supplied sufficient evidence from which a reasonable jury could conclude that Flannery treated her unfairly, she had failed to provide sufficient evidence from which a reasonable jury could determine that Flannery's reasons for lowering Thomas's ratings were motivated by racial animus.¹⁹⁰ The Court of Appeals for the First Circuit reversed.¹⁹¹ In doing so, the court explained that Title VII does not require plaintiffs to prove that a decision was motivated by racial animus. "The ultimate question," it explained, "is whether the employee has been treated disparately 'because of race.' This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."¹⁹² The court concluded that Thomas had presented sufficient evidence from which a reasonable jury could determine that the performance ratings were unfair and might reasonably infer that Flannery's evaluations of Thomas "were affected by some form of conscious animus or less conscious bias,"¹⁹³ thus tainting the overall Performance Appraisal Ranking System used to select Thomas for discharge.

Thomas is significant for the court's willingness to formulate the conception of discrimination underlying traditional disparate treatment theory to include differences in treatment based on unconscious bias as well as conscious animus. The court framed the legal issue in terms of causation rather than conscious motivation, an important step in recognizing modern forms of discrimination. But the decision also shows why traditional disparate treatment theory standing alone, even as reformulated, is inadequate to address some of the more systemic, structural, and dynamic forms of discrimination that have been identified. The individualistic conception of discrimination embraced by traditional disparate treatment theory led the *Thomas* litigants as well as the court to frame the relevant inquiry in terms of Flannery's state of mind, foreclosing consideration of Kodak's institutional role in facilitating discriminatory bias or its efforts to identify, prevent, or redress subtle forms of exclusion and

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Thomas v. Eastman Kodak Co.*, 18 F. Supp. 2d 129, 138 (D. Mass. 1998), *rev'd*, 183 F.3d 38 (1st Cir. 1999).

¹⁹¹ *Thomas*, 183 F.3d at 38.

¹⁹² *Id.* at 58.

¹⁹³ *Id.* at 64.

bias. Kodak's performance evaluation system provided few safeguards against the operation of discriminatory bias. Although Kodak established some general criteria to guide decisionmaker discretion, it did not require Flannery to articulate reasons for the scores that she assigned, nor did it monitor evaluations for patterns of possible bias or institute an informal investigation into the possibility of bias when Thomas refused to sign two of her poor evaluations.¹⁹⁴ For at least three years, Thomas's work evaluations may have been tainted and her training opportunities hindered by discriminatory bias. Had she not been laid off and instead sought employment elsewhere within those three years, under current traditional disparate treatment doctrine she would have had no legal recourse for the adverse effect of those evaluations on her job prospects. Moreover, had she not been able to identify a single, discrete actor in whom the court could search for a discriminatory state of mind, she would have had no cause of action for discriminatory treatment that decreased her development and access to opportunity.

As the court's decision in *Thomas* illustrates, reformulation of disparate treatment doctrine to focus on causation leaves in place the dominant conception of discrimination as stemming solely from individuals rather than from the larger organizational context within which they work. It is possible that reformulation of existing disparate treatment theory in terms of causation will be adequate to address those forms of discrimination that derive from individual, identifiable decisionmakers whose decisions culminate in a materially adverse action within a single institution. The difficulties inherent in requiring a materially adverse action within a single institution in a modern, fluid workplace aside, however, framing the problem solely in terms of Flannery's state of mind and the individual conflict between Flannery and Thomas has significant drawbacks. Such a conceptualization tends to inhibit recognition of more systemic, organizational sources of ongoing discrimination. Discrimination remains an individual problem, with individualized solutions, rather than an organizational one. Particularly given the increased use of internal and alternative dispute resolution systems to resolve individual workplace conflicts, a conception of discrimination that focuses more broadly on the systemic problems within the organization and that requires attention to the systemic aspects of seemingly individual or personal conflicts seems crucial to the modern antidiscrimination project.¹⁹⁵

¹⁹⁴ See *id.* at 46. Although Thomas did not file a formal complaint with the Human Resources Department, she did complain informally to Flannery and to others at Kodak, including the Regional Vice President for Office Imaging and a Human Resources Representative, and she refused to sign two out of three evaluations conducted by Flannery. See *id.*

¹⁹⁵ See Anne Donnellon & Deborah M. Kolb, *Constructive for Whom? The Fate of Diversity Disputes in Organizations*, in *USING CONFLICT IN ORGANIZATIONS* 161 (Carsten K.W. De Dreu & Evert Van de Vliert eds., 1997) (arguing that organizations often suppress diversity discourse in conflict resolution and suggesting widening the scope of diagnosis as one way to open diversity discourse); Lauren Edelman et al., *Internal Dispute Resolution:*

B. Hostile Work Environment Theory

Some scholars suggest that hostile work environment theory might be capable of addressing some of the more subtle forms of discrimination common in the modern workplace.¹⁹⁶ Hostile work environment theory protects individuals from having to endure a hostile work environment that is created by discriminatory conduct. A variant of disparate treatment more generally, hostile work environment theory, as the name suggests, conceptualizes discrimination as a work environment that is reasonably perceived as hostile or abusive. This form of disparate treatment violates the antidiscrimination edict of Title VII by forcing the victim to work in an abusive environment because of protected group membership.

The first decision to articulate the concept of a hostile work environment, *Rogers v. EEOC*, involved an optometrist's segregation of patients along lines of national origin and race.¹⁹⁷ The Court of Appeals for the Fifth Circuit held that segregation of patients could violate an *employee's* rights under Title VII, explaining that "employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase 'terms, conditions, or privileges of employment' [in Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a work environment heavily charged with ethnic or racial discrimination."¹⁹⁸

Hostile work environment theory, by focusing on the environment created by discriminatory conduct rather than exclusively on the state of mind of an individual actor, arguably embraces a less individualistic conception of discrimination than does traditional disparate treatment theory. A work environment can be hostile, and therefore amount to discrimination in violation of Title VII, even when the plaintiff cannot point to an identifiable, single discriminator. For example, in a workplace dominated

The Transformation of Civil Rights in the Workplace, 27 LAW & SOC'Y REV. 497, 502–08 (1993) (arguing that the "individualization of conflict inhibits social reform by making similar experiences by other members of a social group . . . irrelevant"). This focus on patterns of inequity and the institutional role in fostering bias that perpetuates inequity also seems particularly important given the recent movement toward arbitration over judicial resolution of Title VII suits brought by private individuals. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Arbitration, as an alternative dispute resolution system, tends to de-emphasize legal rights and to personalize solutions. See Edelman et al., *supra*, at 504.

¹⁹⁶ See Theresa Beiner, *Do Reindeer Games Count as Terms, Conditions, or Privileges of Employment under Title VII?*, 37 B.C. L. REV. 643, 667–80 (1996) (suggesting that exclusion from golf outings and other "reindeer games" might be addressed by hostile work environment theory); Schultz, *supra* note 4, at 1764–65 (suggesting that any conduct that subverts a woman's competence creates a hostile work environment, including conduct that "den[ies] a woman adequate training, assignments, or other opportunities to learn a job fully, refusing to mentor her, or ostracizing her from the informal networks through which crucial job skills are passed on").

¹⁹⁷ 454 F.2d 234 (5th Cir. 1971).

¹⁹⁸ *Id.* at 238.

by men, pornographic photographs and “pinup” calendars with pictures of nude or partially nude women displayed throughout the work environment can amount to employment discrimination against women, even if the sexualized images did not target a single woman and were not displayed for the purpose of harming women.¹⁹⁹ Such an environment is discriminatory because it functions as a tool of exclusion; by entrenching masculine norms, it tells women that they do not belong.²⁰⁰

Much of the scholarly work exploring the structural aspects of hostile work environment theory focuses on sexual harassment in the workplace. Although *Rogers v. EEOC* set the groundwork for a broad-based theory to be used in combating all forms of discrimination, even those that did not result in firing or denial of promotion, it took some time for sexual harassment to be recognized as a form of discrimination prohibited by Title VII. Early courts facing claims of sexual harassment often reasoned that the women’s adverse treatment occurred because of their refusal to engage in sexual affairs with their supervisors and not “because of sex” within the meaning of Title VII.²⁰¹ Sexual relations and sexually charged or hostile behavior were considered part of the private realm, outside the purview of antidiscrimination legislation.

In her pathbreaking book *Sexual Harassment of Working Women*, Professor Catharine MacKinnon laid out her case that sexual harassment was a form of sex discrimination because it institutionalized the sexualized subordination of women to men in the workplace.²⁰² According to MacKinnon, “Sexual harassment is . . . one dynamic which reinforces and expresses women’s traditional and inferior role in the labor force.”²⁰³ MacKinnon looked to the structure of the workplace to argue that sexual harassment is a byproduct of women’s traditionally inferior position.²⁰⁴ As women enter the male-dominated arena of the workplace, moving out of the traditionally pink-collared secretarial pool and into the boardrooms and corner offices, she argued, males respond with sexual harassment as one means of protecting the male turf.²⁰⁵ In this way, as another prominent scholar in the area recently explained it, sexual harassment functions not only as a means of subordination and male control, but as a means of “expressing or perpetuating masculine norms in the workplace.”²⁰⁶

¹⁹⁹ See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

²⁰⁰ For an account of some of the ways in which structuralist theory has made its way into legal doctrine of sex discrimination, including an account of *Robinson*, see Chamallas, *supra* note 5, at 2394–2402 (1994).

²⁰¹ See Schultz, *supra* note 4, at 1701 (documenting rejection of early sexual harassment cases).

²⁰² CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

²⁰³ *Id.* at 4.

²⁰⁴ See *id.*

²⁰⁵ See *id.* at 9–10.

²⁰⁶ Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L.

The Supreme Court accepted sexual harassment as a form of discrimination in *Meritor Savings Bank v. Vinson*, adopting the reasoning of *Rogers* to cover sex-based hostile work environments.²⁰⁷ In so doing, the Court explained that the phrase “terms, conditions, or privileges of employment” in Title VII “evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment,” including sexual harassment.²⁰⁸ More recently, in *Oncale v. Sundowner Offshore Service, Inc.*, the Court reaffirmed this reasoning, holding that workplace harassment can amount to a hostile work environment because of sex in violation of Title VII even when the harasser and the harassed are of the same sex.²⁰⁹

Despite its structural underpinnings, however, hostile work environment theory, like its more traditional disparate treatment counterparts, fails to provide an adequate avenue for addressing the more subtle forms of discrimination that hinder opportunity in the modern workplace. As it has played out in practice, courts have tended to focus on the state of mind of a particular, identifiable harasser rather than on the institutional environment as a whole.²¹⁰ Moreover, to succeed on a hostile work environment claim under Title VII, the Court has explained that a plaintiff must show that the discriminatory conduct is “sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.”²¹¹ An employee’s terms and conditions of employment are altered, according to the Court, “[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive.”²¹²

This insistence that a work environment is discriminatory only if it is pervasively hostile and abusive renders the theory particularly unsuitable for addressing some of the subtle forms of discrimination that hinder

REV. 1169, 1205 (1998); see also Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 772 (1997) (describing sexual harassment as “a tool or instrument of gender regulation”).

²⁰⁷ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

²⁰⁸ *Id.* at 64 (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

²⁰⁹ 523 U.S. 75 (1998).

²¹⁰ See Schultz, *supra* note 4 (showing that courts have tended to separate sexual from nonsexual conduct, placing nonsexual conduct outside the realm of hostile work environment, based on a “sexual desire-dominance paradigm”). Along these lines, *Oncale* might be seen as a retreat from the structural aspects of hostile work environment theory, for there the Court defined sexual harassment as discrimination under Title VII by focusing on formal equality and the state of mind of the harasser rather than on the power structure of the institution within which individuals work. See *Oncale*, 523 U.S. at 80–81.

²¹¹ *Meritor Sav. Bank*, 477 U.S. at 67 (citations omitted).

²¹² *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). This inquiry requires consideration of “all the circumstances” from the standpoint of a reasonable person as well as from the standpoint of the victim. *Id.* at 23. To succeed on a claim under hostile work environment theory, a plaintiff must also prove that the employer is legally responsible for the abusive environment. See *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) (establishing standards for determining legal responsibility).

opportunity in the modern workplace. As Dovidio and Gaernter's research suggests, discrimination in the modern workplace often operates in spite of an honest belief in equality and can hinder a person's opportunities without creating a perceptibly hostile or abusive work environment.²¹³ For example, a female employee who is assigned to work on an all-male work team may enjoy working with her teammates and in fact may not sense or be reasonably expected to sense any overt hostility from her co-workers, but nonetheless she may be judged more harshly and denied opportunities by those co-workers on the basis of her sex.²¹⁴ Undertaking this doctrinal inquiry into the victim's and a reasonable victim's perception of the environment, courts as well as litigants analyzing claims under a hostile work environment theory are unlikely to recognize forms of discriminatory treatment that affect opportunity or professional development but that do not create a perceptibly hostile or abusive work environment.²¹⁵

Of course, denial of training or work assignments, exclusion from informal networks, and refusal to mentor are all forms of workplace conduct that can contribute to or, depending on the circumstances, amount to a perceptibly hostile work environment.²¹⁶ In this way, hostile work environment theory provides a foundation for broader recognition of the role that organizational structure plays in the perpetuation of inequity in the workplace. Nonetheless, given the focus of hostile work environment theory on victim perception of environment and on the state of mind of an identifiable harasser rather than on allocation of opportunity more generally, the theory ultimately fails to provide an adequate foundation

²¹³ See *supra* notes 17–20 and accompanying text.

²¹⁴ See *supra* discussion Part II, ex. 2.

²¹⁵ See, e.g., *Borgren v. Minnesota*, 236 F.3d 399, 407 (8th Cir. 2000) (supervisors' conclusions that plaintiff was evasive and unaccountable did not amount to hostile work environment), *cert. denied*, 122 S. Ct. 44 (2001); *Buwana v. Regents of Univ. of Colo.*, No. 98-1325, 1999 U.S. App. LEXIS 25959 (10th Cir. June 29, 1999) (reassignment that did not result in reduction in pay, rank, or responsibility, amounted neither to adverse treatment actionable under traditional disparate treatment theory nor to hostile work environment). Courts evaluating allegations of hostile work environment also tend to require racial or sexual comments or other conduct that directly reflects a race- or sex-based animus. See, e.g., *Narvarte v. Chase Manhattan Bank*, No. 96 Civ. 8133, 2000 WL 547031, at *10 (S.D.N.Y. May 4, 2000) (claims of overzealous monitoring of plaintiff's arrival times and negative performance evaluations did not demonstrate discrimination on account of race); *Montgomery v. City of Birmingham*, No. 98-AR-2100-5, 2000 WL 1608620 (N.D. Ala. Jan. 20, 2000) (low performance appraisal and denial of vacation leave did not amount to a hostile work environment on the basis of race or sex without racially or sexually derogatory comments), *aff'd*, 237 F.3d 636 (11th Cir. 2000); *Murray-Dahnir v. Loews Corp.*, No. 99 Civ. 9057, 1999 WL 639699 (S.D.N.Y. Aug. 23, 1999) (allegations that the plaintiff was required to work longer work hours than white employees without adequate support staff and was subject to admonishment could not constitute a hostile work environment without racial comments).

²¹⁶ See *Schultz*, *supra* note 4, at 1764–65 (listing cases involving competence-undermining conduct).

for addressing everyday operation of discriminatory bias in the modern workplace.

C. Disparate Impact Theory

Disparate impact theory presents a monumentally different conceptualization of discrimination than that embraced by traditional disparate treatment jurisprudence. Defining discrimination in terms of consequence rather than purpose or motive, disparate impact theory interprets Title VII to require that members of protected groups not be unnecessarily harmed in employment because of group differences.²¹⁷ Under disparate impact theory, use of employment practices that have a disparate impact on groups with protected characteristics is unlawful unless the employer can show that the practices are job related and justified by business necessity.²¹⁸ The employer need not intend to discriminate in these circumstances; it is enough that the employer uses an employment practice that, although facially neutral and neutral in application, disqualifies a disproportionate percentage of a particular group of applicants from consideration. Disparate impact theory marks a significant departure from the purely individualistic conception of discrimination underlying existing disparate treatment doctrine. For several reasons, however, both theoretical and practical, disparate impact theory too is fundamentally ill-suited to the task of combating the operation of discriminatory bias common in the modern workplace.

Disparate impact theory arose soon after the enactment of Title VII in response to employers' substitution of ability tests and other ostensibly neutral job requirements for the blatant race-based classifications used in the pre-Title VII era.²¹⁹ *Griggs v. Duke Power Co.*, the landmark case in

²¹⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("Congress directed the thrust of [Title VII] to the consequences of employment practices, not simply the motivation.") (emphasis in original). See generally Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

²¹⁸ This justification often takes the form of scientific validation. Validation is a statistical method used to determine whether a particular selection device actually predicts successful performance of a particular activity. See Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1–1607.7 (2002). The EEOC's Uniform Guidelines state that any selection device with a disparate impact will be considered discriminatory unless it has been validated in accordance with the guidelines of professionally accepted statistical procedures. See *id.*; see also *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977) (invalidating a height and weight requirement for lack of evidence showing correlation between the requirement and job performance); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (holding an employer's validation study inadequate).

²¹⁹ As Alfred Blumrosen, the head of the Office of Conciliations for the EEOC in the 1960s, explained, "We knew that many companies had introduced tests in the early 1950s and early 1960s when they could no longer legally restrict opportunities of blacks and other minority workers and that the tests had proved to be major barriers to minority advancement." Blumrosen, *supra* note 217, at 59–60.

which the Supreme Court first articulated a disparate impact theory, involved a claim by a black plaintiff against an employer with a history of blatantly exclusionary practices.²²⁰ Following the passage of the Civil Rights Act in 1964, the Duke Power Company replaced those practices with two facially neutral job requirements: a high school diploma and a satisfactory score on a standardized aptitude test.²²¹ Despite facial neutrality and neutrality in application, these two requirements disqualified a disproportionate percentage of black applicants from consideration for desirable positions.²²² The district court, after concluding that there was no showing of a racial purpose or invidious intent in the adoption of the two requirements, held the employer's use of the requirements lawful under Title VII, and the Court of Appeals affirmed.²²³ The Supreme Court reversed. In so doing, it explained that "[t]he objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."²²⁴ Accordingly, said the Court, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."²²⁵

As *Griggs* illustrates, disparate impact theory conceptualizes discrimination in terms of institutional barriers to equal opportunity for women and minorities. Accordingly, disparate impact theory has proven an invaluable tool for reducing employer reliance on job requirements that are unrelated to job performance but that stand in the way of minority progress. Without such a tool, employers would have been free to adopt facially neutral job requirements that maintained the exclusion of blacks and minorities from vast areas of employment. In addition, by recognizing systems as legitimate subjects for legal regulation, the *Griggs* Court opened the door for a structural approach to combating discrimination more broadly. Disparate impact theory breaks free of the individualistic conception of discrimination that dominates existing disparate treatment doctrine. It recognizes the role that institutional choices, even those that are neutral in design and in application, can play in perpetuating stratification in the workplace.

Nonetheless, despite its importance to the antidiscrimination project, disparate impact theory is also ill-suited to the task of combating the op-

²²⁰ 401 U.S. 424, 426–27 (1971).

²²¹ *Id.* at 427–28.

²²² Almost three times as many whites as blacks could meet the high school diploma requirement; almost ten times as many whites as blacks passed the standardized aptitude test requirement. *Id.* at 430 n.6.

²²³ *Id.* at 428–29. The court of appeals reversed the district court in part on another issue. *See id.*

²²⁴ *Id.* at 429–30.

²²⁵ *Id.* at 430.

eration of discriminatory bias in the modern workplace. This is true at least in part because disparate impact theory conceptualizes discrimination solely at the institutional level, neglecting an exploration of the interplay between institutional choices and the operation of discriminatory bias in individuals and groups at multiple levels of interaction in the workplace. Disparate impact theory seeks to limit the perpetuation of racial and gender stratification in employment by reducing employer reliance on practices that have an unintended adverse and unnecessary effect on particular groups. The operation of discriminatory bias, in contrast, whether cognitive or motivational, is a human problem, one that inheres in people, albeit in the larger social context in which they work.²²⁶ In discussing the limits of existing disparate treatment theory to account for some of the subtle forms of discrimination in the modern workplace, I have emphasized that individuals, particularly those who subscribe to an egalitarian ideal, do not discriminate in isolation, that the operation of discriminatory bias is heavily influenced by the dynamics, systems, and structures within which individuals work. I have argued that the purely individualistic conception of discrimination that underlies existing disparate treatment doctrine fails to capture the influence of the larger organizational structures and institutional dynamics created by the employer. Disparate impact theory also fails to capture this interplay between individuals and the organizations within which they work, but it does so by taking a purely structural account of discrimination, focusing 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.

A look at some of the judicial attempts to analyze claims involving subjectivity in decisionmaking helps make clear the limitations of disparate impact theory for combating the operation of discriminatory bias in the modern workplace. Disparate impact theory is most readily applicable to challenges of objective job requirements, such as the high school diploma and test score requirements at issue in *Griggs*. Not long after *Griggs* was decided, however, courts began struggling with the question of whether an employer's reliance on subjective criteria, which, unlike objective criteria such as a high school diploma requirement, necessitate some degree of personal feeling or judgment, could also be analyzed using disparate impact theory.

In the early days after enactment of the Civil Rights Act, courts were skeptical of employers' use of subjectivity in employment decisions. Two strains of analysis emerged concerning subjective decisionmaking prac-

²²⁶ The human element of discrimination in disparate impact theory presumably lies in the employer's choice to utilize a job requirement that has the consequence of impeding the progress of minorities.

tices. One strain saw subjective decisionmaking as a mask for intentional discrimination.²²⁷ This made sense at the time for at least two reasons. First, in the late 1960s and early 1970s, some companies appeared to turn to subjectivity in decisionmaking as a facially neutral but easily manipulable substitute for blatant, sex- or race-based classifications.²²⁸ Second, until the early 1980s, the Taylorist model of scientific decisionmaking and organizational structure remained dominant.²²⁹ Taylorism stressed the importance of objective, consistent, rational criteria for employment decisions.²³⁰ This made employers' reliance on subjective criteria, which are determined by emotion as much as by reason, particularly suspect.

The other strain saw the use of subjective decisionmaking as part of a larger problem of employers resorting to employment practices that had a disparate impact on blacks. An employer's use of highly subjective decisionmaking practices in these early cases was often tied to its use of other suspect but facially neutral employment practices, such as word-of-mouth hiring and promotion systems or requirements of experience within certain areas of the organization where blacks had traditionally been excluded.²³¹ Many of the companies involved in these early suits had only recently integrated their workforces, yet they continued to use, or had recently adopted, promotion systems that required recommenda-

²²⁷ See, e.g., *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 481 (9th Cir. 1983) ("Subjective hiring systems provide a convenient pretext for discriminatory practices, and are thus well suited to the disparate treatment focus on intentional discrimination.") (citations omitted); *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) ("Non-objective evaluation systems may be probative of intentional discrimination . . . because such systems operate to conceal actual bias in decisionmaking."); *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975) ("Nonobjective hiring standards are always suspect because of their capacity for masking racial bias.").

²²⁸ See, e.g., *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 865–68 (9th Cir. 1982) (finding subjectivity in promotion decisions to be evidence of intentional discrimination), *overruled by* *Antonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987); *United States v. Hazelwood Sch. Dist.*, 534 F.2d 805, 809–10 (8th Cir. 1976) (noting that lack of standards for hiring criteria in school system with history of discrimination "may well be the crux of the problem"), *vacated on other grounds*, 433 U.S. 299 (1977). Subjective decisions were suspect in the individual as well as the systemic context. See, e.g., *Barnett*, 518 F.2d at 549 (finding that statistics supporting a claim of disparate treatment were strengthened by evidence that the employer lacked objective criteria for hiring supervisors); *Smith v. Union Oil Co. of Cal.*, No. C-73-1636, 1977 WL 77, at *25 (N.D. Cal. Aug. 22, 1977) (finding that subjectivity in decisionmaking was evidence of a broader practice of intentional discrimination).

²²⁹ See *supra* note 32 and accompanying text.

²³⁰ See *id.*

²³¹ See *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1010–11 (2d Cir. 1980) (superintendents were given uncontrolled discretion in hiring of foremen and located potential employees through word-of-mouth before jobs became available); *Crawford v. Western Elec. Co.*, 614 F.2d 1300, 1310, 1318 (5th Cir. 1980) (index review system based on subjective decisions of supervisors); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 340–47 (5th Cir. 1977) (testing, age, educational requirements and system of selection for craft positions based on subjective decisions of supervisors); *Rowe v. General Motors Corp.*, 457 F.2d 348, 353, 358–59 (5th Cir. 1972).

tion by white men in positions of power.²³² For example, in one of the most well-known early subjective decisionmaking cases, *Rowe v. General Motors Corp.*, General Motors required a foreman's recommendation for promotion or transfer from hourly to salaried jobs.²³³ Hourly employees were not notified of promotion opportunities, nor were they informed of the qualifications necessary for those jobs.²³⁴ The required recommendations were based primarily on the foreman's subjective evaluation of the hourly employee's "ability, merit and capacity."²³⁵ Although General Motors had ended its policy of segregation in 1962 and had taken a number of affirmative efforts to increase hiring of blacks, the Court of Appeals for the Fifth Circuit, relying on *Griggs*, held that the promotion/transfer system was discriminatory because it operated to freeze blacks out of salaried positions.²³⁶ The court stressed that "under the social structure of the times and place, Blacks may very well have been hindered in obtaining recommendations from their foremen since there is no familial or social association between these two groups."²³⁷

These two strains of decisions led to an inter-circuit conflict over the appropriateness of the disparate impact theory for claims involving subjectivity in decisionmaking. The Supreme Court granted certiorari to resolve this conflict in the case of *Watson v. Fort Worth Bank & Trust*.²³⁸ In that case, Clara Watson sued her employer, Fort Worth Bank and Trust, for discrimination because of race. Watson had been hired by the Fort Worth Bank and Trust in 1973 as a proof operator.²³⁹ In 1976, she was promoted to a teller position.²⁴⁰ Before filing suit in 1981, she was denied promotion to the position of supervisor of tellers on four separate occasions.²⁴¹ The bank, which had about 80 employees, relied on the subjective judgment of its supervisors to evaluate candidates, both for hiring and promotion.²⁴²

²³² See *Grant*, 635 F.2d at 1010 (noting long history of discriminating in hiring of black ironworkers); *James*, 559 F.2d at 319–29 (describing near-total segregation before 1965 and continued segregation in some areas until 1973 and 1974); *Rowe*, 457 F.2d at 351 (General Motors was wholly segregated, with blacks limited to custodial jobs until 1962). For a discussion of disparate impact theory as a response to employer adoption of practices that played on pre-Act segregation, see Blumrosen, *supra* note 57, and Blumrosen, *supra* note 217.

²³³ *Rowe*, 457 F.2d at 352–54, 358–59.

²³⁴ See *id.* at 353.

²³⁵ *Id.*

²³⁶ See *id.* at 356.

²³⁷ *Id.* at 359.

²³⁸ 487 U.S. 977 (1988).

²³⁹ *Id.* at 982.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* Watson alleged discrimination against blacks in hiring and in evaluation for promotion. See *id.* at 983. Of 533 whites and 144 blacks who applied for employment during a period of more than four years, 16.7% of the whites and 4.2% of the blacks received offers of employment. See *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 810–13 (5th Cir. 1986) (Goldberg, J., dissenting), *vacated by* 487 U.S. 977 (1988). Over a pe-

Framing the issue as whether disparate impact analysis could be applied to hiring or promotion systems that involve the use of “discretionary” or “subjective” criteria, a unanimous Supreme Court held that it could.²⁴³ Significantly, in doing so the Court recognized the subtle operation of discriminatory bias as one of the evils targeted by Title VII.²⁴⁴ However, it missed the opportunity to provide an adequate conceptual foundation for that project. Taking a narrow view of disparate treatment theory, one premised on an individualistic conception of discrimination, the Court saw no choice but to place challenges to employment systems that enable the operation of discriminatory bias within the disparate impact paradigm. The Court understood disparate treatment theory to accommodate only discrimination by individuals acting with conscious discriminatory purpose.²⁴⁵ Concerned that employers would avoid liability for job requirements that had a disparate impact by adding elements of subjectivity to their decisionmaking processes, the Court explained that “disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests,” and held that the district court erred in failing to apply disparate impact theory to Watson’s case.²⁴⁶

In principle, of course, the *Watson* Court was correct that disparate impact theory is no less applicable to subjective employment criteria than to objective, standardized tests. If one were to point to an employer’s use of identifiable subjective criteria, such as “friendliness” or “leadership ability,” which, even when applied neutrally to all individuals, has a disparate impact on members of certain groups, the employer should be required under proper application of disparate impact theory to justify those criteria as job-related and consistent with business necessity.²⁴⁷ In this way, employers are forced to consider the impact of their job criteria and to ensure that those criteria were valid indicators of success on the job. In practice, however, the larger problem with subjectivity in decisionmaking for the antidiscrimination project is its tendency to enable,

riod covering four annual evaluations, blacks rated an average of eleven to fifteen points lower than their non-black coworkers. *Id.*

²⁴³ Justice Kennedy took no part in the decision. The remaining Justices issued three separate opinions, but all agreed that disparate impact theory is applicable in cases challenging subjective job criteria. *See Watson*, 487 U.S. 977.

²⁴⁴ *See id.*

²⁴⁵ *See id.* at 990 (stating that “even if one assumed that any such discrimination [by particular supervisors to whom discretion is delegated] can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain”).

²⁴⁶ *Id.*

²⁴⁷ Commentators disagree about the practical difficulties that arise from requiring formal, scientific validation of subjective criteria. *Compare* Barthelet, *supra* note 57 (arguing in favor of formal validation), *with* Krieger, *supra* note 1, at 1232–37 (discussing difficulty of requiring formal validation), *and* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987) (arguing against requirement of scientific validation of subjective criteria for “complex” jobs).

facilitate, or permit the operation of discriminatory bias in decisionmakers. In other words, the discrimination is not typically in the requirement of friendliness or leadership ability itself; the employer's search for applicants with that characteristic may indeed be job related and justified by business necessity. Rather, the discrimination arises in the application of that criterion by members of the white majority according to dominant definitions of the term.²⁴⁸

Despite the Supreme Court's holding in *Watson*, some lower courts have continued to construe allegations of disparate impact based on subjectivity in decisionmaking as individualized claims of discriminatory treatment.²⁴⁹ Although these courts seem to understand that the underlying antidiscrimination concern lies in the potential operation of discriminatory bias in individual decisionmakers within broader institutional practices and decisionmaking systems, they fail to recognize the structural aspects of the plaintiffs' claims. As with systemic disparate treatment, courts have declined to certify challenges to systems of decentralized, subjective decisionmaking for class treatment on the ground that the claims should be litigated as individual disparate treatment claims.²⁵⁰

The difficulty in using disparate impact theory to combat the operation of discriminatory bias in the modern workplace, though, is a practical as well as a conceptual one. Disparate impact doctrine, with its focus on neutral barriers with adverse consequence, tends to present litigants and

²⁴⁸ Other practices sometimes described as "subjective" exhibit this same duality. A practice of word-of-mouth hiring, for example, might be challenged as having a disparate impact on the ground that all existing workers live in one geographically isolated town, where all potential applicants are white; the more likely allegation, however, is that use of word-of-mouth hiring perpetuates stratification and exclusion because of the biases of the existing workers in choosing friends and coworkers.

²⁴⁹ See, e.g., *Wright v. Circuit City Stores*, 201 F.R.D. 526, 540-41 & n.22 (N.D. Ala. 2001); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 552-54 (D.S.C. 2000); *Zachery v. Texaco*, 185 F.R.D. 230, 238 (W.D. Tex. 1999); *Abrams v. Kelsey-Seybold Med. Group, Inc.*, 178 F.R.D. 116, 131 (S.D. Tex. 1997); *Brooks v. Circuit City Stores, Inc.*, Civil Action No. DKC 95-3296, 1996 U.S. Dist. LEXIS 9869 (D. Md. June 17, 1996), *rev'd in part on other grounds*, 148 F.3d 373 (4th Cir. 1998).

²⁵⁰ See, e.g., *Wright*, 201 F.R.D. at 541-42 (characterizing plaintiffs' disparate impact claim as individual disparate treatment claims); *Lott*, 200 F.R.D. at 552-54 ("Although [p]laintiffs have valiantly attempted to couch this putative class action in terms of a 'pattern and practice' disparate impact case attacking general employment policies that adversely affect African Americans, the court finds that the true nature of the suit is a consolidation of ninety-nine separate accounts of individualized disparate treatment."); *Zachery*, 185 F.R.D. at 238 ("The fact that promotion decisions are handled by one's immediate supervisor based on subjective criteria would be useful evidence in an *individual* disparate treatment claim, but works against *class certification* of a disparate impact claim when the proposed class is subject to the same local autonomy in geographically dispersed facilities."); see also *Caridad v. Metro-North Commuter R.R. Co.*, 191 F.3d 283, 297 (2d Cir. 1999) (Walker, J., dissenting) ("Plaintiffs have never argued that Metro-North, at the highest levels, has a hidden policy of discrimination that could be smoked out by showing disparate impact throughout the company. Plaintiffs have conceded that Metro-North does not have a policy of discrimination. Indeed, it is undisputed that the company has written anti-discrimination policies applicable to all departments.").

courts with a dichotomous decision. Either the job requirement or employment practice that has an adverse impact can be justified in terms of business necessity, and thus its use does not amount to unlawful discrimination and can be retained, or the job requirement cannot be so justified, and thus its use amounts to unlawful discrimination and must be eliminated.²⁵¹ It is neither realistic nor sensible, however, to combat the operation of discriminatory bias in the modern workplace along such dichotomous lines.²⁵² Instead, we need to begin exploring the ways in which employers can be held accountable for managing diversity within modern structures and practices to minimize the operation of discriminatory bias. The complex, contextual nature of the problem requires a correspondingly innovative, problem-based, collaborative solution that does not fit easily within the existing disparate impact remedial paradigm.

²⁵¹ As discussed above, early disparate impact cases tended to challenge the use of certain practices that perpetuated stratification based on earlier segregation or disadvantage, and the cases often resulted in the elimination of the challenged practices, leaving to the employer the task, if it chose to do so, of reconfiguring the practices to meet the business necessity standard. *See, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (test score and diploma requirement eliminated); *Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (nepotism rule eliminated); *Local 189, United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969) (mill seniority system eliminated); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) (promotion system based on departmental seniority eliminated). Even in cases involving subjective decision-making, courts and litigants have tended to frame the debate along dichotomous lines, seeking to resolve problems of disparate impact through elimination of supervisor discretion and subjectivity. *See, e.g.*, *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977) (stating that the district court should enjoin the use of high school education and age requirements for apprenticeship training until the requirements are validated); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972) (endorsing a proposed decree providing that General Motors would not require recommendation of immediate supervisor for promotion). *See generally* Bartholet, *supra* note 57 (arguing that disparate impact theory as interpreted to require use of objective standards with respect to blue-collar workers should be applied equally to those employed in white-collar and other high-end jobs).

²⁵² Professor Susan Sturm suggests in her recent article that disparate impact theory is capable of supporting a contextualized examination of an employer's decisionmaking processes. *See* Sturm, *Second Generation Discrimination*, *supra* note 1, at 486–89. However, although several courts have indicated a willingness to evaluate an employer's modern decisionmaking practices using a disparate impact theory, few, if any, have actually engaged in a contextualized inquiry. In the case of *Butler v. Home Depot*, for example, plaintiffs argued that Home Depot's policy of giving discretion to store-level supervisors to make decisions based on vague, subjective criteria had a disparate impact on women. The court certified the claim for class treatment, *see* *Butler v. Home Depot, Inc.*, No. C-94-4335, 1996 U.S. Dist. LEXIS 3370 (N.D. Cal. Mar. 25, 1996), and denied in part Home Depot's motion for summary judgment. *See* *Butler v. Home Depot*, Nos. C-94-4335, C-95-2182, 1997 WL 605754, at *12–*14 (N.D. Cal. Aug. 29, 1997). Shortly thereafter, the case settled. For a detailed discussion of the terms and process of settlement, *see* Sturm, *Second Generation Discrimination*, *supra* note 1, at 509–19. In *Stender v. Lucky Stores*, 803 F. Supp. 259 (N.D. Cal. 1992), the court issued findings of fact and conclusions of law in which it found that Lucky Stores' policy of "discretionary, subjective and frequently unreviewed decision making" had a disparate impact on women. *See id.* at 335–36. The parties subsequently agreed to a settlement. *See* Elaine Tassy, *Lucky Stores Agrees to Settle Sex Bias Suit*, L.A. TIMES, Dec. 17, 1993, at D1.

Nor is there reason to suspect (without evidence to suggest otherwise) that modern firms are turning to subjectivity in decisionmaking to mask an underlying intent to discriminate. Rather, as we have seen, many employers are turning to subjectivity in decisionmaking as part of a larger movement away from a hierarchical, job-centered workplace and toward a decentralized, flexible, individualized one. It makes economic sense for employers to emphasize skills sets rather than static job descriptions in order to create flexibility in the workforce to meet increasingly globalized demands. Moreover, it may make political and social sense to encourage the trend toward an involvement-centered workplace that values individual skills and achievement over prescribed hierarchical status. As discussed earlier, this movement is highly consistent with American democratic values, and it holds great promise for the antidiscrimination project by emphasizing individual strengths over group status or hierarchy.

This is not to say, however, that employers need take no responsibility for the operation of discriminatory bias in their workplaces. On the contrary, an employer's decision to rely on subjectivity in decisionmaking, among other organizational choices, must be evaluated in light of the employer's overriding obligation not to discriminate. Subjectivity in decisionmaking is problematic only to the extent that, without proper safeguards and institutional commitment to equal opportunity, it enables the operation of discriminatory bias and perpetuates inequity.

As the workforce moves toward more flexible, decentralized, subjective decisionmaking and team-based work, the antidiscrimination project must begin to focus on the ways in which institutional choices influence the operation of discriminatory bias in the workplace, resulting in disparate treatment on the basis of protected characteristics. This focus, in turn, requires a contextualized rather than a dichotomous inquiry. Moreover, it requires a flexibility in regulatory approach that is not readily available under existing disparate impact theory; it requires an approach that permits employers to adopt practices that are efficient and beneficial to individuals and businesses alike so long as they manage diversity within those structures, setting up safeguards to minimize the operation of discriminatory bias.

IV. TOWARD A STRUCTURAL ACCOUNT OF DISPARATE TREATMENT THEORY

Up to this point, I have argued that both the individualistic conception of discrimination that underlies existing disparate treatment doctrine and the institutional conception of discrimination that underlies disparate impact doctrine are inadequate to address some of the subtle forms of discrimination common in the modern, restructuring workplace. Moreover, I have suggested that a project to combat discrimination in its modern forms requires a conceptualization of discrimination in workplace

dynamics, a conceptualization that focuses on the ways in which discriminatory bias, whether conscious or unconscious, operates in the larger context of group dynamics, organizational structure, and institutional practices rather than solely in isolated individual states of mind. In this Part, I turn to explore the ways in which such a conceptualization can aid in the antidiscrimination project. I suggest that this conceptualization should take legal form in a structural account of disparate treatment theory that requires employers to manage diversity within their organizations and to minimize the operation of discriminatory bias. Although I do not attempt to set forth the precise details of a complete legal regulatory regime in this Article, I do sketch some broad contours of a possible legal theory of structural disparate treatment, and I attempt to illustrate how such a theory would clarify analytical confusion surrounding challenges to decentralized, subjective decisionmaking systems while establishing a conceptual foundation for recognizing a structural account of disparate treatment theory more broadly.

*A. A Structural Account of Disparate Treatment Theory:
Institutionally Enabled Discrimination*

A structural account of disparate treatment theory 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. Although conceptually systemic in nature, a structural disparate treatment theory would permit individual plaintiffs to challenge particular organizational systems or dynamics that hinder employment opportunities as well as permit groups of plaintiffs to challenge entire systems of decisionmaking and disbursement of opportunity.

A structural account of disparate treatment draws from disparate impact theory its emphasis on systems and practices, while sharing with traditional disparate treatment theory its understanding of discrimination as a human problem and its aim of eradicating differences in treatment in the workplace. It falls within Title VII's general antidiscrimination provision that makes it an unlawful employment practice for an employer to discriminate in terms, conditions, or privileges of employment on the basis of protected characteristics,²⁵³ and it furthers the broader antidiscrimination project by focusing directly on the employer's role in enabling the forms of discriminatory bias that hinder opportunities of women and minorities in the modern workplace.

Numerical disparities in outcome would be important to a claim of structural disparate treatment not as evidence from which to infer purposeful discrimination by employers or specific individuals, but as a sig-

²⁵³ 42 U.S.C. § 2000e-2(a) (2000).

nal that discriminatory bias may be operating in workplace dynamics. In addition to (or instead of) numerical disparities in outcome, plaintiffs might rely on firsthand anecdotal testimony as well as on testimony of social scientists, psychologists, or other experts to demonstrate that the employer's particular workplace environment facilitates the operation of discriminatory bias. The anecdotal testimony of employees might concern the environment and dynamics of the workplace as well as more specific social interactions reflecting the operation of discriminatory bias, while the expert testimony might highlight the racial or gender makeup of the decisionmaking group, the environment of the workplace, and/or the safeguards in the processes of decisionmaking as evidence of the operation of institutionally enabled discriminatory bias.²⁵⁴ In this way, numbers might matter in a claim of structural disparate treatment because they often say something about the structure and dynamics of the workplace and can serve as a warning of discriminatory bias operating in disbursement of opportunity.

But numbers alone should not establish liability under a structural account of disparate treatment. Rather, the plaintiff's evidence should trigger an examination of the employer's organizational structures and/or institutional practices and workplace dynamics for the enabling of discriminatory bias in allocation of opportunity. This examination would consider the employer's institutional efforts to maximize equity and minimize the operation of discriminatory bias. Social scientific and organizational studies illustrate that there is no single approach to effective management of workplace diversity,²⁵⁵ and recognition of a structural

²⁵⁴ The plaintiffs in one recent case presented at least four experts to testify at trial on issues of: diversity management techniques and operation of stereotypes, *see* *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1260–62 (N.D. Cal. 1997) (describing qualifications and proposed testimony of Dr. Mary Gentile); subconscious processes of stereotyping, *see id.* at 1262–65 (describing qualifications and proposed testimony of Dr. Susan Fiske); the interplay of stereotyping and subjective employment practices, *see id.* at 1265 (describing qualifications and proposed testimony of Dr. William Bielby); and difficulties in the process of determining level of interest in particular positions, *see id.* at 1266 (describing qualifications and proposed testimony of Dr. Carl Hoffman). These types of expert testimony would be relevant to a claim of structural disparate treatment not because they are indicative of a discriminatory attitude on the part of the employer, *cf. id.* at 1261, 1264 (articulating theory of relevance in terms of Home Depot's intent to discriminate), or because they are indicative of a disparate impact caused by a neutral employment practice, *see id.* at 1264 (articulating theory of relevance in terms of disparate impact of subjective decisionmaking), but because these types of expert testimony are directly relevant to an inquiry into whether the employer's institutional practices unreasonably enable the operation of discriminatory bias.

²⁵⁵ *See, e.g.,* Donnellon & Kolb, *supra* note 195, at 161–76 (encouraging diversity discourse through broadened scope of problem diagnosis, legitimization of the diversity lens, anticipation of consequences for power distribution, and support of collective action within organizations); Debra E. Meyerson & Joyce K. Fletcher, *A Modest Manifesto for Shattering the Glass Ceiling*, HARV. BUS. REV. 127, Jan.–Feb. 2000, at 127 (encouraging problem-solving approach focusing on “small wins”); David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Diversity Management*, HARV. BUS. REV., Sept.–Oct. 1996, at 79 (advocating learning-and-effectiveness paradigm over assimilation or

disparate treatment theory should not be misconstrued to create a judicial personnel department. Quite to the contrary, the theory seeks to provide employers with flexibility in organizational design while at the same time instilling a legal incentive to develop solutions to the ongoing problem of institutionally enabled inequity in the workplace.

Recognizing the potential limits on institutional control over the operation of discriminatory bias and the need for flexibility in approach from one organization to another, this structural disparate treatment theory would incorporate a mechanism, like a reasonableness inquiry, to restrict employer liability to those situations in which there is reason to believe that the employer has some meaningful degree of influence over the operation of discriminatory bias. An employer would be held liable under the theory only upon a showing that the employer's institutional structures or practices unreasonably enabled the operation of discriminatory bias in the workplace. This reasonableness inquiry would focus, at least in part, on the availability of institutional safeguards that could be implemented to protect against or minimize the operation of discriminatory bias.

Courts as well as potential litigants would be able to draw from social scientific and organizational experiments and studies in evaluating an employer's practices for the unreasonable facilitation of discriminatory bias. Experimental research points to a number of safeguards that appear to minimize the likelihood of stereotyping and its biasing effects, including constructing heterogeneous work and decisionmaking groups, creating interdependence among in-group and out-group members, providing structure and guidance for appraisal and evaluation, and making decisionmakers accountable for their decisions.²⁵⁶ Case studies of some successful approaches to diversity management can be used for further guidance.²⁵⁷ These case studies highlight, for example, the importance of

differentiation in guiding diversity management efforts); *see also* DIVERSITY IN THE WORKPLACE, *supra* note 51 (describing a variety of approaches); THOMAS & GABARRO, *supra* note 81 (providing case studies of three organizations and their diversity management strategies).

²⁵⁶ *See* Reskin, *supra* note 1 (summarizing some of the existing experimental research on contextual factors that may minimize the operation of discriminatory bias and calling for additional research in sociology and social psychology in the organizational context).

²⁵⁷ In her recent book *Why So Slow? The Advancement of Women*, Professor Virginia Valian presents a case study of one such successful effort at the Johns Hopkins Medical School. *See* VALIAN, *supra* note 16, at 319–20. Professor Susan Sturm also documents the problem-solving approach of several firms in her recent article *Second Generation Employment Discrimination: A Structural Approach*. *See* Sturm, *Second Generation Discrimination*, *supra* note 1. Other recent case studies provide similar insight. *See, e.g.*, DIVERSITY IN THE WORKPLACE, *supra* note 51 (presenting three case studies of employers who took structural measures to manage diversity within their institutions); ANN M. MORRISON, *THE NEW LEADERS: GUIDELINES ON LEADERSHIP DIVERSITY IN AMERICA* (Leonard & Zeace Nadler eds., 1992) (providing case-based research and suggestions for successful management of diversity); THOMAS & GABARRO, *supra* note 81 (deriving lessons from recent case studies); Meyerson & Fletcher, *supra* note 255 (illustrating how three companies used

commitment at the top of the firm to developing an institutional environment that limits the operation of discriminatory bias.²⁵⁸ They also emphasize the need for ongoing monitoring for systemic patterns that may develop from seemingly individualized internal conflicts.²⁵⁹ These experiments and studies provide neither scientifically definitive nor reassuringly talismanic answers to the problems of inequity and disempowerment in the modern workplace. They do, however, provide a basic foundation from which to begin to move forward in attempting to resolve the lingering problem of discrimination in employment.

Under this structural account of disparate treatment theory as I imagine it, if 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. The employer might, for example, be required to alter its decision-making processes, to institute safeguards against bias in its evaluation processes, and/or to implement monitoring systems for identification of patterns in progress and allocation of opportunity. Given the amorphous, fluid, ongoing nature of the injury in these cases, this type of injunctive relief would regularly be the plaintiffs' principal remedy. However, in addition to broader systemic, prospective relief, the defendant's liability for the unreasonable institutional enabling of discriminatory bias should create a presumption of individualized hindrance of opportunity such that if an individual plaintiff could point to a specific opportunity lost or damage incurred, the employer would be liable for individualized relief, including money damages where appropriate, unless the employer could show that the employee's missed opportunity was not due to the operation of discriminatory bias.²⁶⁰

incremental change and problem-solving techniques to bring about systemic change in their organizational structures); Thomas & Ely, *supra* note 255 (presenting case studies reflecting different approaches to managing diversity). Many of these case studies represent what some sociologists have termed the "managerialization of law." See Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 *AM. J. SOC.* 1589 (2001). In their recent article, Edelman and colleagues document a shift in organizational management rhetoric from civil rights law to diversity management, identifying costs and benefits associated with this shift. See *id.*

²⁵⁸ See, e.g., THOMAS & GABARRO, *supra* note 81, at 215; VALIAN, *supra* note 16, at 316–18.

²⁵⁹ See, e.g., Donnellon & Kolb, *supra* note 195.

²⁶⁰ In this way, availability of individualized relief under a structural disparate treatment claim would parallel the remedial structure of traditional systemic disparate treatment theory. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976). In addition, cases might arise in which the employer's institutional facilitation of discriminatory bias against members of certain groups is so blatant and reckless that punitive damages would be available. See 42 U.S.C. § 1981a(b)(1) (2000) (permitting punitive damages upon finding that the employer engaged in intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual"); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999).

I suggest this particular legal approach to the problem of discrimination in workplace dynamics for a number of reasons. First, a theory of discrimination that focuses on the operation of discriminatory bias in workplace dynamics and on the interplay between individuals and/or groups and the greater structures and environments within which they work would provide an avenue for redress of forms of discrimination that do not result in an identifiable, materially adverse employment decision within the hierarchical structure of a single institution. Thus, a structural account of disparate treatment theory would solve a practical problem inherent in the fluid nature of the modern employment relationship. It would work together with the existing theories to combat all forms of discrimination that contribute to stratification in modern employment by providing impetus for structural change and increased equity of opportunity even in the absence of specific harm capable of individualized relief.

Perhaps more importantly, however, this structural theory of disparate treatment would direct conversation and debate toward solving the particular problem of aversive racism and sexism and the subtle forms of discrimination common in the modern workplace by emphasizing the institutional as well as the individual aspects of the problem. It would identify the operation of discriminatory bias in allocation of opportunity in the modern workplace as a form of discrimination over which employers have some degree of control. As a result, the legal, societal, and academic debate would begin to focus on the systemic causes and effects of what are now often seen as individual or personal conflicts.²⁶¹ By highlighting the institutional contribution to the subtle operation of discriminatory bias and perpetuation of inequity in the modern workplace, a structural account of disparate treatment might serve to counteract the prevailing tendency to consider modern forms of discrimination in individualized, psychological, intractable terms.²⁶²

At the same time, a structural account of disparate treatment theory, focusing on employers' organizational choices and workplace dynamics, would recognize that there may be some real limits on the ability of employers to control for individual bias. The goal would be to create incen-

²⁶¹ See Donnellon & Kolb, *supra* note 195 (noting the dangers of individualizing conflicts through internal dispute resolution processes for broader gains in the antidiscrimination project); Edelman et al., *supra* note 195.

²⁶² This tendency can be seen in academic debate as well as in public opinion polls and legal doctrine. In a recent article, Professor Amy L. Wax declares that "the nature and the phenomenon of unconscious bias is such that there are no known steps that employers can reliably take to control biases that may distort the kinds of discretionary or subjective social judgments that must inevitably be made in the course of managing personnel in the modern workplace," and she concludes that the "intransigence" of the problem of discriminatory bias in the modern workplace means that we should not hold employers liable for discriminatory decisions by individuals who are unaware of the operation of their biases. Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1133 (1999). *But see* Michael Selmi, *Response to Professor Wax: Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999).

tives for problem solving within institutions without delegitimizing the task by holding employers liable for forms of discrimination over which they have no realistic means of control.²⁶³ Holding employers liable for the unreasonable institutional enabling of discriminatory bias in allocation of opportunity would serve that goal.

Of course, this proposal leaves a number of questions unanswered and is vulnerable to criticism from both sides of the political spectrum. There is a very real danger in providing employers a defense of reasonableness, permitting an escape from liability through successful argument of helplessness or institution of formal procedural structures that symbolize diversity management efforts without any real movement toward equity in allocation of opportunity.²⁶⁴ This concern has some basis in hostile work environment case law, where courts have been hesitant to conduct meaningful review of employer anti-harassment efforts.²⁶⁵ It will therefore be important to construe the meaning of reasonableness carefully in order to sustain the employer's substantive obligation to minimize the operation of discriminatory bias. As we learn more about the ways in which organizational choices and structured environments affect the operation of discriminatory bias in the assignment of merit and disbursement of opportunity, it seems likely that we will conclude that employers have more rather than less control over subtle forms of discrimination in the workplace. This understanding should be reflected in our assignment of responsibility to employers to minimize discrimination in their workplaces. However, it is also possible that as we learn more about the operation of discriminatory bias and begin to institute the most obvious institutional safeguards, we will come to consensus that employers have little additional control over the subtle operation of bias in their work-

²⁶³ I should stress here that my proposal for a structural account of disparate treatment theory is not intended to replace existing theories of discrimination. It is, instead, to provide an independent basis for liability. Depending on the factual circumstances, a plaintiff might proceed, for example, under both an individual disparate treatment theory and a structural disparate treatment theory, pointing to an identifiable decision within the institution that was motivated by race or sex and also challenging the broader institutional practice or organizational structure as unreasonably enabling discriminatory bias. This plaintiff might ultimately succeed on either one or both theories. *See supra* Part III.A.3 (discussing suggested reformulation of individual disparate treatment theory in terms of causation).

²⁶⁴ *See* Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992) (emphasizing the symbolic value of Equal Employment Opportunity and Affirmative Action offices); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959 (1999).

²⁶⁵ *See* Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999) (exploring the ways in which organizations shape the law that is applied to them); *see also* Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147 (2001) (calling for empirical research on the effects of diversity training programs on sexual harassment).

places. To the extent that this is so, it too should be reflected in our understanding of reasonableness.

On the other side, critics may fear that adoption of a structural form of disparate treatment theory would open the floodgates to additional antidiscrimination litigation. I do not profess to know in advance the exact ways in which this theory would play out in practice. There seem, however, to be at least as many advantages to defendants and court dockets as to plaintiffs from this redirected legal inquiry and conceptualization of discrimination in its modern forms. The problem of discriminatory bias enabled by institutional practices and workplace dynamics in the modern, reorganizing workplace will not go away simply because we are unwilling to formulate a theory of discrimination that expressly recognizes and attempts to address the problem. Indeed, the current confusion surrounding claims alleging system-wide discriminatory bias operating through decentralized, highly subjective decisionmaking processes highlights the difficulty for litigants as well as courts in attempting to resolve modern problems of discrimination using theories designed with more traditional forms of discrimination in mind.²⁶⁶ In the next section, I attempt to illustrate how application of a structural disparate treatment theory to these types of claims would clarify current confusion and pave the way for application of the theory more broadly.

B. Toward Implementation of a Structural Account of Disparate Treatment Theory

The continuing confusion surrounding claims involving decentralized, subjective decisionmaking systems makes these claims a good starting point for the application of a structural account of disparate treatment theory. Over the past several years, a number of lawsuits have been filed in which plaintiffs have sought to challenge organizational structures and systems on a class-wide basis, invoking what I suggest are at core claims of structural disparate treatment. The plaintiffs in these cases typically allege that the decisionmaking system of the defendant institution is largely decentralized and highly subjective, lacking in specific or objective criteria or oversight.²⁶⁷ They assert that white males, who predomi-

²⁶⁶ This confusion may have contributed to defendants' willingness to settle these types of claims upon class certification. *See infra* note 274. One might expect that as courts and litigants are provided a coherent legal framework within which to analyze these claims, the numbers of traditional disparate impact and disparate treatment claims will decline. In addition, given the interrelationship between existing theories and a structural disparate treatment theory, it might make sense to require employees to register complaints of structural disparate treatment before an ultimate employment decision takes place, thereby avoiding substantial economic harm. *Cf. Thomas v. Eastman Kodak Co.*, 183 F.3d 38 (1st Cir. 1999) (rejecting the defendant's argument that potential plaintiffs should be required to file an administrative charge upon suspicion that poor evaluations were race-based).

²⁶⁷ *See, e.g., Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536 (D.N.J. 2001) (alleging that policy of "delegating discretionary authority to subordinate managers and supervisors to make

nate in positions of power, are left to exercise their discretion in biased ways, leading to disparities in hiring, work assignments, training, discipline, promotion, and/or pay.²⁶⁸ Some plaintiffs frame their complaints in terms of systemic disparate treatment theory; others in terms of disparate impact theory; and many plaintiffs allege discrimination under both theories.²⁶⁹ The courts are equally inconsistent in their receptivity to and treatment of these types of claims. Some courts have certified class actions to proceed under systemic disparate treatment theory as well as disparate impact theory;²⁷⁰ others have classified these claims solely as claims of disparate impact;²⁷¹ and, as discussed in Part III, many courts

employment decisions . . . without sufficient oversight” results in discrimination); *Abram v. United Parcel Serv. of Am., Inc.*, 200 F.R.D. 424, 425 (E.D. Wis. 2001) (challenging highly subjective performance rating and compensation systems); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 532 (N.D. Ala. 2001) (alleging that decentralized decision-making and subjectivity, among other practices, results in discrimination); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 543 (D.S.C. 2000) (alleging discrimination in evaluation for promotion conducted by “predominantly white decisionmakers who rely on subjective, race-based factors”); *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 235 (W.D. Tex. 1999) (attacking defendant’s job evaluation and promotion system as being too subjective and leading to denial of training and promotion on the basis of race); *Betts v. Sundstrand Corp.*, No. 97 C 50188, 1999 U.S. Dist. LEXIS 9743, at *10 (N.D. Ill. June 21, 1999) (challenging subjectivity in hiring); *Butler v. Home Depot, Inc.*, No. C-94-4335, 1996 U.S. Dist. LEXIS 3370, at *4 (N.D. Cal. Mar. 25, 1996) (“[Plaintiffs] allege that there are no specific, objective hiring criteria, nor are there objective criteria used to set pay levels, and that local gender biased male managers are therefore left broad discretion to make decisions that have an adverse effect upon women.”); *Shores v. Publix Super Mkts.*, No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381, at *18–*19 (M.D. Fla. Mar. 12, 1996) (challenging defendant’s policy of “delegating hiring and promotion decisions to managers, who make . . . decisions on the basis of subjective criteria”).

²⁶⁸ See, e.g., *Beck v. Boeing Co.*, 203 F.R.D. 459, 461 (W.D. Wash. 2001) (alleging discrimination in job assignment, promotions, pay, overtime, tenure, and bonuses); *Reap*, 199 F.R.D. at 54 (alleging discrimination in hiring, assignments, promotions, transfers, salary, and disciplinary actions); *Butler*, 1996 U.S. Dist. LEXIS 3370, at *4 (alleging discrimination in hiring, training, transfer, and pay).

²⁶⁹ See, e.g., *Beck*, 203 F.R.D. at 459 (framing claims under disparate treatment theory); *Lott*, 200 F.R.D. at 539 (framing claims under disparate impact theory); *Abram*, 200 F.R.D. at 426 (framing claims under both disparate treatment and disparate impact theories); *Zachery*, 185 F.R.D. at 234 (framing claims under both disparate treatment and disparate impact theories); *Betts*, 1999 U.S. Dist. LEXIS 9743, at *10–*11 (framing claims under disparate impact theory).

²⁷⁰ See, e.g., *Caridad v. Metro-North Commuter R.R. Co.*, 191 F.3d 283 (2d Cir. 1999) (reversing the district court’s denial of certification for a claim challenging the delegation of authority to make subjective decisions under both disparate impact theory and disparate treatment theory); *Butler*, 1996 U.S. Dist. LEXIS 3370, at *27 (certifying class for claims under disparate treatment and disparate impact theories); *Shores*, 1996 U.S. Dist. LEXIS 3381, at *31 (certifying class without specifying theory); *Stender v. Lucky Stores*, No. C 88-1467, 1990 WL 192734 (N.D. Ca. June 8, 1990) (approving stipulation for class treatment and defining the scope of the plaintiff class for claims under both disparate treatment and disparate impact theory).

²⁷¹ See, e.g., *McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267 (E.D. Tex. 1999) (certifying class action challenging subjective discretion in hiring, training, promotion, discipline, and demotion under disparate impact theory).

have refused to certify these types of claims to proceed on a systemic rather than an individual basis at all.²⁷²

Once understood as claims of structural disparate treatment, involving allegations that an employer's organizational structure and decision-making practices unreasonably facilitate or enable the operation of discriminatory bias to the detriment of women and/or minorities, the systemic nature of the claims and the contextual nature of the required legal inquiry become clear. The plaintiffs' claim in the case of *Abram v. United Parcel Service of America, Inc.*, discussed earlier, for example, should be analyzed by examining UPS's decentralized, highly subjective performance rating and compensation systems for the unreasonable enabling of discriminatory bias.²⁷³ Plaintiffs would present their evidence of disparities in outcome and inadequacies in the decisionmaking processes as evidence that UPS failed to satisfy its obligation to minimize the operation of discriminatory bias against black full-time supervisors, and UPS would be held liable for its role in perpetuating inequity in its workforce even if responsibility for individual decisions rests with district and central managers rather than with corporate headquarters.

Similarly, the EEOC's claim against Sears might be reconceptualized under a structural disparate treatment theory.²⁷⁴ Rather than searching exclusively for an individualized state of mind, either in the form of intent or purpose on the part of a decisionmaker or entity or in the form of lack of interest on the part of an applicant as the determining cause of an apparent disparity in commission sales jobs, the legal inquiry would focus on the ways in which Sears' traditional job structuring and sex-

²⁷² Most of these courts have denied certification for lack of commonality required by Rule 23(a), reasoning that the suit is properly one of multiple individual claims of disparate treatment by particular decisionmakers rather than a systemic challenge common to a group. See, e.g., *Abram*, 200 F.R.D. at 433–34 (denying class certification for lack of commonality); *Allen v. Chi. Transit Auth.*, 198 F.R.D. 495 (N.D. Ill. 2000) (same); *Betts*, 1999 U.S. Dist. LEXIS 9743, at *18–*19 (denying class certification for lack of commonality on ground that although practice involved some subjectivity, it was not “completely unfettered”); *Zachery*, 185 F.R.D. at 329–40 (denying class certification on ground that claims lacked commonality because of decentralized nature of decisionmaking); *Boykin v. Viacom, Inc.*, No. 96 Civ. 8559, 1997 U.S. Dist. LEXIS 17872 at *18–*22 (S.D.N.Y. Nov. 12, 1997) (denying class certification because decentralized decisions meant claims did not meet commonality requirement); *Abrams v. Kelsey-Seybold Med. Group, Inc.*, 178 F.R.D. 116, 132 (S.D. Tex. 1997) (denying class certification for lack of commonality, stating that “[p]laintiffs have not alleged or shown a class-wide discriminatory procedure or policy that is properly analyzed under the disparate impact model, but rather individualized claims of discriminatory treatment”); *Brooks v. Circuit City Stores, Inc.*, Civil Action No. DKC 95-3296, 1996 U.S. Dist. LEXIS 9869 (D. Md. June 17, 1996) (denying motion to amend complaint to state class claim on ground that “decentralized and subjective nature of the decisionmaking process undermines the claim that age discrimination was MDC’s ‘standard operating procedure’”), *rev’d in part on other grounds*, 148 F.3d 373 (4th Cir. 1998).

²⁷³ 200 F.R.D. 424 (S.D. Tex. 1997); see also *supra* notes 146–158 and accompanying text.

²⁷⁴ See *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988); see also *supra* notes 134–145 and accompanying text.

based job descriptions, subjective decisionmaking processes, and gender-oriented testing questions may have enabled subtle forms of discriminatory bias that influenced decisionmakers as well as affected applicant interest. In this way, Sears would be held liable for its institutional role in perpetuating inequity in allocation of the more lucrative sales positions under a theory that recognizes the influence of structural factors on individuals both within and without the dominant group.

Litigants on both sides of the table would benefit from the analytic clarity offered by a structural account of disparate treatment in this area. Plaintiffs would clear a significant hurdle to treatment of their claims on a class-wide basis as courts recognize that these claims indeed are systemic challenges to employers' management of diversity in light of organizational choices rather than individualized challenges to specific, isolated employment decisions.²⁷⁵ Defendants would benefit from a contextualized inquiry into employers' efforts to manage diversity and minimize the operation of discriminatory bias.²⁷⁶ This contextualized inquiry would provide defendants the flexibility of adopting modern organizational structures while requiring them to examine the ways in which those structures may facilitate the operation of discriminatory bias to the detriment of women and minorities.

Finally, both sides would benefit from a clear legal mandate that requires information gathering and conversation directed at combating inequity in the workplace. A look at the terms of some of the recently negotiated settlement agreements and consent decrees in a number of these cases provides some early insight into the types of efforts that might be

²⁷⁵ Recognition of these claims under a structural disparate treatment theory would provide the conceptual foundation for satisfaction of the commonality requirement of Rule 23(a). See Fed. R. Civ. P. 23. Additional procedural requirements, of course, must also be met. *Id.* Although a thorough analysis of the additional procedural hurdles to class certification is beyond the scope of this piece, it seems that this conceptual foundation, with its focus on institutional change, might have at least some bearing on the current circuit split over the propriety of certifying discrimination claims under Rule 23(b) when plaintiffs seek compensatory and/or punitive damages. Compare *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) (holding certification of class in antidiscrimination suit improper for failure to satisfy Rule 23(b) requirements), with *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 1349 (2002) (holding certification of class for liability phase in antidiscrimination suit proper under Rule 23(b)(2)).

²⁷⁶ Commentators have criticized class action treatment of these types of claims for purportedly forcing settlement by defendants. See Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415 (2000). A contextualized legal inquiry focusing on organizational structures, institutional practices, and workplace dynamics that enable discriminatory bias would not only provide clarity to legal analysis but would provide defendants with a better basic understanding of their obligation under antidiscrimination legislation. Moreover, defendants might recognize an added benefit from reduced moral reprehensibility of this form of discriminatory conduct. See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 970 (1993) (discussing benefits of recognizing a form of negligent discrimination).

required to satisfy an employer's obligation under a structural disparate treatment theory. In addition to monetary sums distributed to plaintiffs, employers have agreed to implement a number of programs, including revision of management selection processes and increased availability of information regarding promotion decisions,²⁷⁷ adoption of benchmarks based on systems of "registration of interest,"²⁷⁸ dissemination of information about job opportunities and promotion procedures,²⁷⁹ and implementation of systems of monitoring the rate at which minorities and/or women are promoted.²⁸⁰ These agreements might be used as a starting point by employers in developing tailored problem-solving approaches as well as by courts in evaluating future cases and in framing relief.²⁸¹

These recent suits involving system-wide allegations of organizational structures and decisionmaking practices that enable the operation of discriminatory bias provide a strong foundation for application of a structural disparate treatment theory, but the theory should not be limited to challenges of entire systems of decisionmaking. Individual plaintiffs might allege under the same theory that specific workplace structures, environment, or institutional practices, such as informal networking systems or team decisionmaking dynamics and processes, unreasonably enable the operation of discriminatory bias. Both Jamal and Sheila in the factual scenarios laid out in Part II, for example, might state a claim of structural disparate treatment that would trigger an examination of the

²⁷⁷ See Nan Netherton, *Boeing Agrees to Settle Race Discrimination Suits*, 1999 Daily Lab. Rep. (BNA) No. 16, at A15 (Jan. 26, 1999); Nan Netherton, *Judge Approves \$14.2 Million Accord in African Americans' Suits Against Boeing*, 1999 Daily Lab. Rep. (BNA) No. 192, at A2 (Oct. 5, 1999) [hereinafter Netherton, *Judge Approves \$14.2 Million*].

²⁷⁸ See Nadya Aswad & Drew Douglas, *Publix Markets Agrees to Pay \$81.5 Million to Settle Sex Bias Suit*, 1997 Daily Lab. Rep. (BNA) No. 17, at D5 (Jan. 27, 1997); Heather Bodell, *Grocery Chain Starts Complying with Terms of \$16 Million Settlement of Sex Bias Suit*, 1999 Daily Lab. Rep. (BNA) No. 116, at A7 (June 17, 1999) (implementation of recruiting program and benchmarks); Vera Titunik, *Facing Hammer, Home Depot Decides to Deal*, AM. LAW., Nov. 1997, at 38.

²⁷⁹ See, e.g., Nadya Aswad & Joyce Cutler, *Home Depot Agrees to Pay \$65 Million to Settle Sex Discrimination Class Action*, 1995 Daily Lab. Rep. (BNA) No. 183, at A11 (Sept. 22, 1997); Barney Tumey, *UPS Agrees to Settle Bias Suit Filed by African American Employees*, 1999 Daily Lab. Rep. (BNA) No. 12, at A10 (Jan. 20, 1999).

²⁸⁰ See, e.g., Tumey, *supra* note 279.

²⁸¹ Many of these consent decrees provide for outside oversight and/or backup judicial oversight. See, e.g., Heather Bodell, *Amtrak Agrees to Pay \$8 Million to Settle African American Managers' Class Action*, 1999 Daily Lab. Rep. (BNA) No. 128, at A7 (July 6, 1999) (labor economist to be hired to keep track of improvements); Paul Connolly, *Utility to Pay \$17.5 Million to \$65 Million to Settle Race Discrimination Class Action*, 1998 Daily Lab. Rep. (BNA) No. 28, at D5 (Feb. 11, 1998) (independent monitoring committee headed by former circuit court judge to oversee implementation of long-term programs for career development and job opportunities for minority employees); Nan Netherton, *Judge Approves \$14.2 Million*, *supra* note 277 (consultant to review and assess the company's changes to complaint and selection procedures). It is possible that over time, once a clear legal mandate is established, this oversight might be conducted primarily by non-judicial entities. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (describing a new form of governance that fosters localized problem solving).

organizational structures and workplace dynamics in which discriminatory bias may operate to hinder their opportunities for professional development and success in the firms in which they work. Jamal might allege that the informal system for allocation of work assignments and client development used by his firm unreasonably enables the operation of discriminatory bias that affects his opportunities. Sheila, by contrast, might allege that the particular group dynamics of the team in which she works unreasonably enable the operation of discriminatory bias that hinders her opportunity and development. She might focus on the skewed makeup of her work group and the arguably gendered reaction to her participation in group meetings as support for her claim. Success in either case might result in reconsideration of the systems and dynamics through which work and opportunity are allocated, resulting in increased prospective equity for all employees as well as redress for the individuals harmed by discrimination in workplace dynamics.

In this way, a theory of structural disparate treatment, targeted at the interplay between workers and the institutions within which they work, would generate the type of contextualized, multifaceted problem-solving process needed for change. The recent cases brought to challenge system-wide institutional structures involving subjective, decentralized decisionmaking mark a beginning of that process, but without an adequate legal structure within which to frame these challenges, inconsistency and uncertainty will inevitably impede any real potential for progress. Only by recognizing and accounting for the role of organizational structure and institutional practice in enabling discriminatory bias and perpetuating inequity in the workplace will we begin to realize the possibilities offered by the modern employment relationship.

CONCLUSION

We cannot afford to continue to conceive of discrimination exclusively as an individual problem of intent isolated in discrete, identifiable points in time or as an institutional problem removed from the operation of discriminatory bias in individuals and groups. Changes in the nature of discrimination and employment relationships require us to embrace a conceptualization of discrimination that recognizes the complexity of bias in each of us as it operates on a day-to-day basis in the larger structural contexts in which we work. In this Article, I have stressed the importance of an independent conceptualization of discrimination in workplace dynamics for the modern employment antidiscrimination project, and I have laid the basis for a legal theory that embraces such a conceptualization, placing an affirmative obligation on employers to consider the ways in which their organizational structures, institutional practices, and workplace dynamics enable the discriminatory bias that operates to perpetuate inequity and disempowerment in their workplaces. Recogniz-

ing that there is simply no single solution that can be applied by all employers to eradicate the often self-perpetuating power differential that results in the subtle exclusion of women and minorities in the modern workplace, a structural account of disparate treatment theory would provide the necessary conceptual and legal foundation for the type of ongoing conversation, information gathering, and problem solving crucial to the antidiscrimination project of today.

