

# Discrimination-Reducing Measures at the Relational Level

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Social science research has revealed that discriminatory biases and reliance on stereotypes in the workplace are not always conscious or motivated by animus, and that the degree and effect of bias on employment decisions are influenced by the work environment. Legal scholars have accordingly taken a “cognitive turn” in their understanding of discrimination, with landmark articles such as Linda Hamilton Krieger’s *The Content of Our Categories*<sup>1</sup> and Susan Sturm’s *Second Generation Employment Discrimination*<sup>2</sup> recognizing a shift in the nature of discrimination from mostly egregious exclusion to decisions contaminated by implicit biases. Social scientists, legal scholars, and practitioners have begun to identify some of the organizational practices that can facilitate, or limit, such discriminatory decision making at work. Researchers have found, for example, that formalization of personnel procedures and accountability can reduce gender and racial biases in personnel decisions.<sup>3</sup> This research gives employers a starting point for

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1. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995).

2. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459 (2001).

3. Barbara M. Reskin & Debra B. McBrier, *Why Not Ascription? Organizations’ Employment of Male and Female Managers*, 65 AM. SOC. REV. 210, 214 (2000); Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 227 (1985); see also William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120, 121 (2000) (discussing the research for changing workplace practices); *infra* note 13 and accompanying text. Notably, other researchers find that ascription can persist even with formalization. See Matt L. Huffman & Steven C. Velasco, *When More is Less: Sex Composition, Organizations, and Earnings in U.S. Firms*, 24 WORK & OCCUP’ S 214, 234 (1997) (finding lower rewards for work done by women, even when formalized personnel systems exist); see also Susan Bisom-Rapp, *Bulletproofing the Workplace:*

reducing discriminatory decision making at work. It also makes clear—to employers, lawyers, judges, and consultants—that employers have a significant role to play in reducing discrimination, even when that discrimination is driven by implicit biases and unconscious reliance on stereotypes.

In this Article, we argue that these efforts are focused too narrowly on individuals and that discrimination-reducing measures should be broadened to address the *relational* sources of discrimination. By relational sources we refer to social interactions and relations at work that operate to reinforce stereotypes and bias. We present social science research showing that bias and stereotypes are executed and reinforced not only in moments of ultimate decision making, like hiring or promotion, but also in day-to-day intergroup interactions and relations (or lack thereof) at work. We also present research showing that employers can reduce discrimination and workplace inequality by organizing work in ways that change the context of workplace relations and interactions from stereotype reinforcing to stereotype challenging. We draw on this research to advance the “cognitive turn” a step further, broadening the locus of implicit biases and stereotypes to include interactions, what we call the relational level of discrimination.

Despite a substantial body of research supporting the existence of discrimination at the relational level and the idea that employers can reduce such discrimination, efforts by the legal and business communities to devise measures to reduce employment discrimination share a common emphasis on individuals.<sup>4</sup> Formalization of personnel decision making, accountability, diversity training, attention to demographics, even formal networking and mentoring programs, are measures aimed primarily at individuals. Some of these programs try to limit the discretion of decision makers, or increase their awareness of their own biases; others try to expand women’s and minorities’ strategic social ties.<sup>5</sup> What is common to these measures is that they tend to miss the interactional, relational level of discrimination, leaving large swaths of workplace inequality unaddressed.

The Article is organized in three parts. Part I reviews the measures currently proposed for reducing workplace discrimination. Although we cite conflicting evidence on the efficacy of some of these measures, our aim is not to undermine these existing efforts. Our critique is more limited. We argue that the antidiscrimination measures promoted by

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*Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 961–62 (1999) (arguing that a formalized system of performance evaluations can be used to bulletproof discriminatory decisions).

4. *See infra* Part II.

5. *See infra* Part II.

legal scholars and practitioners are too narrowly focused at the individual level. Part II makes clear why it is important to focus efforts at the relational level and presents supporting evidence showing that women and minorities have more equal career opportunities and better career outcomes when work is organized in ways that provide more opportunities for interactions in nonstereotypical contexts. Part III offers preliminary consideration of some of the legal implications of our position.

### I. EXISTING ANTIDISCRIMINATION EFFORTS: A FOCUS ON THE INDIVIDUAL

In this Part, we uncover the individualism that underlies existing measures for reducing discriminatory bias in employment decisions. These measures are found in on-the-ground efforts at institutional change, whether in direct response to litigation or other counseling, in social science research on employment discrimination, and as proposals in the legal scholarship on employment discrimination. Some of the measures are aimed primarily at debiasing individuals (whether directly by motivating them to correct for their biases or indirectly by altering the context of decision making) and others at insulating decisions and information paths from the influence of discriminatory biases.<sup>6</sup> Yet, as we discuss below, both types of measures are designed to address discrimination at the individual level rather than at the relational or interactional level.

#### A. REDUCING BIAS IN DECISION MAKERS

Stereotyping is a naturally occurring cognitive mechanism that helps people make sense of themselves and the world around them.<sup>7</sup> Nonetheless, ample evidence demonstrates that implicit biases and reliance on stereotypes are malleable; they can, in some circumstances, be self-controlled, and they are also influenced by the larger context in which decisions are made.<sup>8</sup> One way existing measures seek to reduce discrimination is by reducing decision makers' biases. Diversity training aims to increase awareness and invoke self control, while measures of formalization, accountability, and attention to demographics aim to alter the context in which decisions are made.

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6. Professors Jolls and Sunstein label these System II and System I responses, respectively. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 973-75 (2006) (exploring ways that the law currently triggers (or might trigger) measures for reducing discrimination).

7. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

8. Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERS'LTY & SOC. PSYCHOL. REV. 242, 243 (2002).

### I. Diversity Training

Many employer efforts to reduce discrimination have concentrated on education aimed at increasing people's awareness of their own biases and urging them to control for their biases. Although evidence on whether diversity training actually works to reduce bias is mixed, and some studies suggest that it may activate rather than reduce bias,<sup>9</sup> diversity training is the most popular discrimination-reducing measure. It has been widely adopted by organizations,<sup>10</sup> is sought by plaintiffs in litigation,<sup>11</sup> and has been incorporated into sexual harassment law as part of an affirmative defense to employer liability.<sup>12</sup> Some diversity training sessions focus on making employees aware of what counts as discrimination under the law; others focus on making employees aware of cultural differences and of their own biases.<sup>13</sup>

Diversity training as a measure for reducing discrimination is grounded in the social psychological research on implicit bias that shows that in order for individuals to correct for their biases, they must be aware of those biases and motivated to correct for them.<sup>14</sup> It also builds on research showing that giving people information about out-group

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9. Fiske, *supra* note 7; Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 513–16 (2003); Thomas E. Nelson et al., *Irrepressible Stereotypes*, 32 J. EXPMT'L SOC. PSYCHOL. 13, 14 (1996). In their survey of the perceived success of diversity training programs, Rynes and Rosen found that men were significantly less likely than women to see diversity training as successful. Sara Rynes & Benson Rosen, *A Field Survey of Factors Affecting the Adoption and Perceived Success of Diversity Training*, 48 PERSONNEL PSYCHOL. 247, 258 (1995). Another study found that whites responded negatively to news of a diversity program. See Deborah L. Kidder et al., *Backlash Toward Diversity Initiatives: Examining the Impact of Diversity Program Justification, Personal and Group Outcomes*, 15 INT'L J. CONFLICT MGMT. 77, 91 (2004).

10. See MARK J. BENDICK ET AL., *THE DOCUMENTATION AND EVALUATION OF ANTIDISCRIMINATION TRAINING IN THE UNITED STATES II* (1998); Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AMER. SOC. REV. 589, 599 (2006) (39% of establishments studied).

11. See, e.g., *Abdallah v. Coca-Cola Co.*, 133 F. Supp. 2d 1364, 1368–71 (N.D. Ga. 2001) (order approving consent decree); see also Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 685–87 (2003) (reviewing consent decrees and basic characteristics of recent class action employment discrimination lawsuits).

12. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998) (creating an affirmative defense under which the employer can avoid liability for sexual harassment if it can prove that “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise”); see also Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 T. JEFFERSON L. REV. 125, 129 (2002) (arguing that legal and human resources professionals shaped the legal standard through an emphasis on training).

13. BENDICK ET AL., *supra* note 10; see also Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1090 (2006) (proposing that “those who admit, hire, select, and evaluate should volunteer to experience their bias directly” by taking a test like the Implicit Association Test (IAT)).

14. See Fiske, *supra* note 7, at 363.

members and about stereotyping can reduce bias.<sup>15</sup> The emphasis in each of these lines of research is on reducing bias in individuals by increasing information about others, about one's self, and about social and legal nondiscrimination norms.

## 2. *Accountability and Responsibility Structures*

Establishing accountability procedures is another popular measure for reducing bias in individuals. Some firms tie managers' performance evaluations or annual bonuses to progress on diversity;<sup>16</sup> others require various divisions to report on progress in implementing a diversity initiative.<sup>17</sup> Accountability is thought to reduce bias by increasing attention to detail and motivation to correct for biases.<sup>18</sup> Studies show that when evaluators know that their decisions will be reviewed, they exhibit lower levels of bias.<sup>19</sup> These studies are consistent with research on self-correction of biases showing that evaluators must be motivated to correct their biases.<sup>20</sup>

Recent research suggests that organizational structures establishing responsibility, such as diversity staff positions, diversity committees, and affirmative action plans—implemented in some firms and commonly included in consent decrees<sup>21</sup>—may be more successful in reducing workplace inequality than individually focused initiatives. In a recent analysis of EEO-1 reports<sup>22</sup> and survey data on changes in the management ranks of a national sample of private sector firms in the last thirty years, researchers found significant increases in the share of women and minorities in management ranks after organizations instituted such measures.<sup>23</sup> The study showed that these responsibility structures also catalyzed the effectiveness of some of the other common

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15. See Fiske, *supra* note 7; Nelson et al., *supra* note 9, at 30; see also Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 265 (1993).

16. See generally EVREN ESEN, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, 2005 WORKPLACE DIVERSITY PRACTICES SURVEY REPORT (2005) (describing the various processes used for diversity training and the statistical breakdown by employer).

17. See *id.* at 6; Douglas M. McCracken, *Winning the Talent War for Women: Sometimes It Takes a Revolution*, HARV. BUS. REV., NOV.–DEC. 2000, at 159–60 (discussing Deloitte & Touche efforts).

18. Barbara Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 325 (2000).

19. Tetlock, *supra* note 3, at 227–36.

20. See Fiske, *supra* note 7, at 363.

21. Kalev et al., *supra* note 10; see also Court Approves \$15 Million Class Settlement of Sex Bias Lawsuit Against Freight Company, 27 EMP. DISCRIM. REP. (BNA) 401 (Oct. 4, 2006) (describing a recent consent decree requiring appointment of an equal employment opportunity director and two EEO specialists) (on file with authors).

22. The EEOC requires that employers subject to Title VII with 100 or more employees file a yearly "equal information report EEO-1" providing employment data on race/ethnicity, gender, and job category. See 29 C.F.R. §§ 1602.7–14 (2007).

23. Kalev et al., *supra* note 10.

measures, such as training, performance evaluations, and networking and mentoring programs.<sup>24</sup>

This latter research is grounded in organizational theory, which maintains that structures establishing responsibility make it less likely that equality efforts will be decoupled from daily practice.<sup>25</sup> By emphasizing the role of organizational structures in reducing discrimination, this research challenges the methodological individualism that underlies most efforts to devise discrimination-reducing measures. Nonetheless, responsibility structures focus neither on relational patterns of inequality nor on the context of intergroup interaction; they leave intact the structures of work that shape intergroup relations.<sup>26</sup>

### 3. *Demographics and Affirmative Action*

Legal scholars have also begun to rethink affirmative action as a discrimination-reducing measure, proposing that the presence of women and minorities will reduce discriminatory bias and reliance on stereotypes in others.<sup>27</sup> This relatively recent move builds on several lines of social science research on the effect of demographic composition on stereotyping and implicit bias.

In her foundational work, *Men and Women of the Corporation*, Rosabeth Moss Kanter highlighted the effect of “tokenism” on women in corporate America.<sup>28</sup> She argued that when members of groups are tokens—substantially underrepresented in the workplace or work group—they are likely to be judged in more extreme ways and according to stereotypes.<sup>29</sup> More recent social science research buttresses this account.<sup>30</sup>

Research on decision making suggests that the presence of a woman or African American in a decision-making setting can reduce the level of implicit biases among whites. In one prominent study, whites tended to

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24. *Id.*

25. *Id.* at 591–92.

26. Some scholars argue that decoupling occurs because, without an office or expert to monitor progress, individual managers do not perceive it as in their interest, or do not view it as high on the company’s agendas, to promote equality. *See generally* Kalev et al., *supra* note 10. In this view, responsibility structures reduce discrimination by crystallizing individual incentives to control for biases in decision making. *Id.* It is not impossible that responsibility structures would reduce discrimination at the relational level as well by facilitating organizational egalitarian and collaborative structures. However, existing evidence, although scarce, suggests that they have not been addressing diversity in this way so far. *See, e.g.,* Sturm, *supra* note 2, at 492 (reviewing Deloitte & Touche diversity measures).

27. Kang & Banaji, *supra* note 13, at 1109; *see also* Michael J. Yelnosky, *The Prevention Justification for Affirmative Action*, 64 OHIO ST. L.J. 1385 (2003).

28. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION II* (1977).

29. *See id.* at 211.

30. *See* Krieger, *supra* note 1, at 1193–95 (exploring the cognitive bases for tokenism); *see also* Barbara M. Reskin et al., *The Determinants and Consequences of Workplace Sex and Race Composition*, 25 ANN. REV. SOC. 335, 354–55 (1999) (discussing the effect of composition).

exhibit less implicit bias on the Implicit Association Test (IAT)<sup>31</sup> when the test was administered by an African American;<sup>32</sup> in another, they exhibited less implicit bias when they were paired with an African American.<sup>33</sup> Along similar lines, other research focuses on the effect of countertypical exemplars in the environment. This research shows that implicit attitudes can be changed by exposing people to pictures of particular individuals.<sup>34</sup> In one study, when participants were exposed to positive black exemplars, such as Martin Luther King, Jr. or Denzel Washington, and negative white exemplars, such as Jeffrey Dahmer or Howard Stern, their measures of implicit bias decreased.<sup>35</sup> When they were exposed to negative black exemplars and positive white exemplars, in contrast, their measures of implicit bias increased.<sup>36</sup>

Taken together, these lines of research suggest that increasing demographic diversity in workplaces will reduce the level of implicit biases and stereotyping.<sup>37</sup> Based on this research, law professor Jerry Kang and social psychologist Mahzarin Banaji argue that employers should hire “debiasing agents,” women and people of color who will serve as countertypical exemplars in the work environment.<sup>38</sup> They and others maintain that race or sex consciousness in employment decisions is consistent with a “prevention justification” for affirmative action (a

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31. The IAT measures differences in the speed of cognitive processing to identify implicit attitudes. See generally Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: the Implicit Association Test*, 74 J. PERS'LTY & SOC. PSYCHOL. 1464 (1998) (discussing use of the IAT to measure implicit attitudes).

32. See Brian S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERS'LTY & SOC. PSYCHOL. 842, 844–47 (2001). See generally Jolls & Sunstein, *supra* note 6, at 980–82.

33. Jennifer A. Richeson & Nalini Ambady, *Effects of Situational Power on Automatic Racial Prejudice*, 39 J. EXPMT'L SOC. PSYCHOL. 177, 179–81 (2003).

34. Kang & Banaji, *supra* note 13, at 1105–06.

35. *Id.* at 1106.

36. For a brief review of some of the counterstereotype research, see Blair, *supra* note 8, at 248–49.

37. Attention to demographics as a meaningful discrimination-reducing measure requires more than just ensuring the presence of women and minorities. Some studies find, for example, that demographic diversity in work groups leads to higher levels of conflict and lower levels of satisfaction. See, e.g., Anne S. Tsui et al., *Being Different: Relational Demography and Organizational Attachment*, 37 ADMIN. SCI. Q. 549, 571–73 (1992); Katherine Y. Williams & Charles A. O'Reilly, *Demography and Diversity in Organizations*, in RESEARCH IN ORGANIZATIONAL BEHAVIOR 77–140 (Barry M. Staw & L.L. Cummings eds., 1998); see also *infra* notes 122–24 and accompanying text (discussing moderating factors).

38. Kang & Banaji, *supra* note 13, at 1109 (“A debiasing agent is an individual with characteristics that run counter to the attitudes and/or the stereotypes associated with the category to which the agent belongs.”). The authors provide the following examples: women construction workers, male nurses, black intellectuals, white janitors, Asian CEOs, gay boxers, and elderly marathon runners. *Id.* Kang and Banaji also propose breaking “ties” between candidates in favor of women and people of color on the ground that they, on average, are targets of implicit bias. *Id.* at 1098–1101. This form of affirmative action differs dramatically from the “debiasing agent” proposal in that, rather than reducing discrimination by decreasing bias, it seeks to reduce the effect of discriminatory bias by offsetting for “inaccurate measurement” at the moment of ultimate decision. *Id.* at 1100.

justification based on the notion that race and sex consciousness can reduce on-going discrimination, rather than simply make up for past discrimination) and is therefore permissible under current law, which otherwise limits employer discretion to make employment decisions based on protected characteristics.<sup>39</sup> Law professors Christine Jolls and Cass Sunstein rely on much the same body of research to argue that employers should be encouraged to “display . . . positive exemplars” in the workplace by “treat[ing] an employer’s positive effort to portray diversity as an express factor weighing against vicarious employer liability under Title VII.”<sup>40</sup>

Displaying countertypical exemplars and hiring debiasing agents—at least as they have been framed so far—focus on the individual rather than the relational level of discrimination.<sup>41</sup> These measures are seen as ways of reducing stereotypes and biases in decision makers through “exposure” to members of minority groups at the time of decision making.<sup>42</sup> But attention to race and sex in constructing work or decision-making groups can also address discrimination at the relational level. Research shows that everyday interactions are influenced by implicit bias and perceptions of whether discrimination is occurring. Studies reveal that the higher the implicit bias of an interviewer, the more awkward the social interaction between the target interviewee and the interviewer.<sup>43</sup> Importantly, not only does the interviewer exhibit greater discomfort and more unfriendly behavior toward the interviewee, but also the interviewee is likely to replicate the unfriendly behavior.<sup>44</sup> Further research on perception of bias and discrimination suggests that diversity on a panel of interviewers, for example, may reduce perceptions of bias

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39. *Id.* at 1111–15; Yelnosky, *supra* note 27.

40. Jolls & Sunstein, *supra* note 6, at 984.

41. For an effort to refocus attention at the relational level, see Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005). Even here, however, the measures proposed tend to linger at the individual level. *See id.* at 679 (suggesting that, depending on the circumstances, “the employer might devise measures to diversify the work group, reallocate organizational authority, or impose formal authority structures to disestablish long-standing informal power bases” (citations omitted)); *id.* at 682 (describing an employer’s “work culture report” to include diagnostic efforts and remedial efforts, such as “the establishment of benchmarks and other measures to increase demographic diversity within work groups, the alteration of decision-making systems to disentrench existing power structures, and the use of formal rewards to offset informal demands for conformity with white, male behavioral norms”).

42. Kang & Banaji, *supra* note 13, at 1107–08 (discussing the bias-reducing benefits on individuals of “exposure” to countertypical exemplars); *see also* Jolls & Sunstein, *supra* note 6, at 973–90.

43. *See* Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPMT’L SOC. PSYCHOL. 435, 441 (2001) (eye contact, forward body lean, arm positioning, speech errors, etc.); *infra* notes 59–71, and accompanying text.

44. Mark Chen & John H. Bargh, *Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPMT’L SOC. PSYCHOL. 541, 542 (1997).

on the part of the interviewee,<sup>45</sup> which alters the behavior of the interviewee, at the same time that it reduces the influence of bias on the interviewer deliberations.<sup>46</sup> Diversity in this scenario reduces individual biases in decision making, and it also affects the interaction between members of different groups in the interview itself. This research suggests that the effects of diversity—and the benefit of attention to demographics—might extend beyond precise moments of decision making, such as hiring or promotion, and into day-to-day interactions between members of different groups. In Part II, we therefore include attention to demographics as one of several measures that can reduce bias at the relational level.

## B. INSULATING DECISIONS AND INFORMATION PATHS FROM BIAS

Another way existing measures seek to reduce discrimination is by insulating key employment decisions and information paths from discriminatory biases and stereotypes. Beyond “cloaking” or hiding the sex or race of an applicant from the decision maker, which is rarely practical,<sup>47</sup> efforts to insulate decisions from bias have focused primarily on formalization of decision making and transparency of process. Mentoring and networking similarly seek to remove biases from decisions about whom to mentor or whom to provide access to networking by formalizing those otherwise soft, relational decisions.

### I. Formalization and Transparency in Decision Making

Formalization of decision making and greater transparency of process tend to go hand-in-hand as measures for reducing discrimination. A number of recent class action lawsuits have alleged widespread discrimination through largely decentralized, highly subjective decision-making systems, and the resulting consent decrees have required formalization of the decision-making process.<sup>48</sup> In *Butler v. Home Depot, Inc.*, for example, the plaintiffs alleged that Home Depot “had discriminated against women in hiring, job assignment, training, promotions, and compensation by maintaining an entirely subjective

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45. See Russell R. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (reviewing research on the effect of perceptions of bias on interaction).

46. See Samuel Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS'LTY & SOC. PSYCHOL. 597, 609–10 (2006) (measuring the effect of a black juror on white co-jurors). See generally Robinson, *supra* note 45.

47. *But see* Kang & Banaji, *supra* note 13, at 1094–95 (proposing that employers discount interviews in the selection process to insulate employment decisions from awkward interactions in interviews).

48. See generally Green, *supra* note 11 (describing these lawsuits). For another recent case, see Second Amended Complaint at 6, 14, *Ellis v. Costco Wholesale Corp.*, 99 Fair Empl. Prac. Cas. (BNA) 1079 (N.D. Cal. Mar. 23, 2005) (No. C-04-3341) (alleging discrimination in promotion based on a “tap on the shoulder” system and seeking “objective promotion standards” and a “transparent . . . job posting and application process”) (on file with The Hastings Law Journal).

decision-making system that left broad discretion to male management with hostile and stereotypical attitudes toward women.”<sup>49</sup> The resulting consent decree required implementation of a computerized job preferences process that allowed applicants to enter job preferences into a database, which then placed applicants into pools for interviews.<sup>50</sup> Managers were required under the decree to interview at least three applicants for each position, and were required to follow a set of structured interview questions.<sup>51</sup> Similarly, in *Kosen v. Am. Express Fin. Advisors, Inc.*, plaintiff female financial advisors alleged widespread discrimination through an informal system of choosing “superstars” from incoming recruits and pervasive stereotyping that “women do not have what it takes to succeed in the financial planning business.”<sup>52</sup> The resulting consent decree required the creation of a central database for distribution of leads and client accounts and establishment of objective criteria for assignment of client accounts.<sup>53</sup>

These measures derive from research showing that formalized personnel systems can reduce reliance on stereotypes and favoritism.<sup>54</sup> The research suggests both that highly subjective decision-making systems render decisions vulnerable to bias and stereotypes,<sup>55</sup> and that highly discretionary internal selection systems favor those who are similar to or have personal ties with the decision makers, usually white males.<sup>56</sup> Formalizing the system and criteria for decision making, according to this research, insulates the decision from the biases and stereotypes of the decision maker. As one prominent social scientist in this area explains, “the task is not to eliminate ‘stereotypical thinking’ (it can’t be done), but rather to minimize its *impact* on personnel decisions.”<sup>57</sup>

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49. Green, *supra* note 11, at 684 (citing *Butler v. Home Depot, Inc.*, No. C-94-4335, 1996 U.S. Dist. LEXIS 3370, at \*4 (N.D. Cal. Mar. 25, 1996)).

50. *Id.* at 684–85.

51. *Id.*

52. *Id.* at 686 (citing Complaint at 9–10, *Kosen v. Am. Express Fin. Advisors, Inc.*, No. 1: 02-CV0082 (D.D.C. June 16, 2002)).

53. *Id.* at 686.

54. Reskin, *supra* note 18 (“Organizations should be able to minimize race and sex bias in personnel decisions by using objective, reliable, and timely information that is directly relevant to job performance.”).

55. Marta M. Elvira & Christopher D. Zatzick, *Who’s Displaced First? The Role of Race in Layoff Decisions*, 41 INDUS. REL. 329, 353 (2002); Reskin & McBrier, *supra* note 3.

56. Bielby, *supra* note 3, at 124 (recommending objective criteria and transparency in process so that potential candidates can “make their interests and qualifications known”); Herminia Ibarra, *Race, Opportunity, and Diversity of Social Circles in Managerial Networks*, 38 ACAD. MGMT. J. 673, 693 (1995).

57. Bielby, *supra* note 3, at 122. Yet some scholars point to the persistence of ascription even when formal personnel procedures are put in place. See sources cited *supra* note 3.

## 2. *Mentoring/Networking Programs*

Most of the measures discussed above target implicit bias and reliance on stereotypes in decision makers. In contrast, mentoring and networking programs derive from literature that points to women's and minorities' limited social capital as a causal factor in continued inequality.<sup>58</sup> Formal networking programs provide a place for members to share information and advice, while mentoring programs typically match more senior women or minorities with lower-level members of a similar group for regular one-on-one meetings. Both of these measures formalize systems for generating social capital, at least for women and minorities. In doing so, they aim to provide information to those people who otherwise tend to be left out of the "old-boy network" and, accordingly, to miss out on important job opportunities, such as openings for promotions or training. Although these measures are aimed at creating much-needed social ties, they operate largely by fixing the individual: by increasing the social capital of members of outsider groups. They do little, if anything, to disrupt the existing day-to-day relationships between members of different groups.

Because these existing efforts focus primarily at the individual level of discrimination, they are likely to leave large swaths of workplace discrimination unaddressed. In the next Part, we highlight research showing that biases and stereotypes operate to reproduce inequality in day-to-day interactions at least as much as in moments of ultimate decision. This research reveals the importance of altering the context of interaction in ways that will disrupt discrimination-reproducing relational patterns.

## II. DEVELOPING DISCRIMINATION-REDUCING MEASURES AT THE RELATIONAL LEVEL

In this Part we review research on the relational sources of discrimination and argue that in most contemporary workplaces the context of intergroup relations and interactions (interactions between whites and minorities, men and women) perpetuates stereotypes and biases. We then review evidence showing that organizations can adopt programs that facilitate the type of intergroup relations that minimize those stereotypes and biases. In particular, we look at status differentials as an (almost universal) organizational feature that facilitates gender and racial stereotypes and biases in interactions. We then present research showing that when employers adopt programs that alleviate status differentials, women and minorities have better career outcomes. We

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58. See Herminia Ibarra, *Homophily and Differential Returns: Sex Differences in Network Structure and Access in an Advertising Firm*, 37 ADMIN. SCI. Q. 422, 441 (1992); Gail McGuire, *Gender, Race, Ethnicity, and Networks: The Factors Affecting the Status of Employees' Network Members*, 27 WORK & OCCUP.'S 501, 517 (2000). See generally Kalev et al., *supra* note 10, at 594 (discussing studies).

conclude with a discussion of other steps employers can take to facilitate stereotype-negating, rather than stereotype-confirming, intergroup relations.

A. STEREOTYPES AND BIASES AND THE RELATIONAL LEVEL OF DISCRIMINATION

Sociologists have long understood social interactions to involve the mutual coordination of one's behavior with that of the other. This requires at minimum a definition of who you and the other are, and what role each actor is to play in the situation.<sup>59</sup> Actors draw on salient categories of similarities and differences to define each other during interaction, and gender and race are two such categories.<sup>60</sup> These interpersonal status definitions and expectations affect participants' behavior in ways that can perpetuate negative stereotypes.<sup>61</sup> "[W]hen persons from different status groups interact, members of both groups expect higher-status group members to outperform lower status-group [sic] members. These expectations act as self-fulfilling prophecies."<sup>62</sup> For example, in mixed-sex interactions, men have more opportunities to perform than women and their performance is evaluated more positively.<sup>63</sup> Similarly, in a study on mixed-race interactions, white interviewers sat farther from black interviewees, made more speech errors, and held shorter interviews with black interviewees than with white interviewees.<sup>64</sup> This behavior caused black interviewees to be more nervous, and therefore less effective, than their white counterparts.<sup>65</sup> In another study, subjects who were subliminally primed with pictures of black faces showed higher hostility toward unseen task partners, compared to subjects primed with white faces.<sup>66</sup> This hostility affected their task partner as well; task partners of subjects who were primed with black faces were rated as more hostile than task partners of subjects who

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59. See Susan T. Fiske, *Thinking is for Doing: Portraits of Social Cognition from Daguerreotype to Laserphoto*, 63 J. PERSONALITY & SOC. PSYCHOL. 877, 877 (1992) (on perception); Cecilia L. Ridgeway, *Interaction and the Conservation of Gender Inequality: Considering Employment*, 62 AM. SOC. REV. 218, 219 (1997); see also ERVING GOFFMAN, *INTERACTION RITUAL* 3 (1967).

60. See generally Cecilia L. Ridgeway, *Linking Social Structure and Interpersonal Behavior: A Theoretical Perspective on Cultural Schemas and Social Relations*, 69 SOC. PSYCHOL. Q. 5, 6 (2006) (describing the coordination problem of interaction).

61. See Barbara F. Reskin, *Including Mechanisms in Our Models of Ascriptive Inequality*, 68 AM. SOC. REV. 1, 9 (2003).

62. *Id.* (citations omitted).

63. *Id.*

64. *Id.* at 10.

65. Notably, the negative effect of behaviors exhibited when interviewing black applicants was observed even when the interviewee was white. *Id.* at 10 (citing Carl O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109 (1974)).

66. See Chen & Bargh, *supra* note 44.

were primed with pictures of white faces.<sup>67</sup> In sum, because social interactions are based on mutual categorization and expectations, interactions become a fertile locus for the perpetuation of stereotypes and biases.

Social scientists have established that the environmental features of the interaction can make salient particular categories of self and others, and can encourage or discourage the use of gender and racial stereotypes.<sup>68</sup> Researchers have identified formal and informal power and status differentials as key structural features of interaction that affect whether stereotypes and biases will be activated. Sociologists Cecilia Ridgeway and Lynn Smith-Lovin explain that when men and women interact, “status and power differences create very real interaction effects, which are often confounded with gender. Beliefs about gender difference[s] combine with structurally unequal relationships to perpetuate status beliefs, leading men and women to recreate the gender system in everyday interaction.”<sup>69</sup> When power differentials exist, men and women are more likely to enact gender-typical behavior during interactions; for example, men are more likely to interrupt, and women are more likely to qualify their statements.<sup>70</sup> Similar dynamics likely apply to race. This finding is corroborated by cognition research showing that people are more likely to use stereotypes when assessing subordinates and less likely to stereotype those on whom they depend.<sup>71</sup>

Studies find lower levels of stereotyping and biases when power and status differentials are *not* a central feature of the intergroup relations. Studies of interactions among peers with equal power and status show fewer gender differences in behavior compared to interactions in the context of power differentials.<sup>72</sup> Cognition research also finds that priming those in power with egalitarian values leads them to pay closer attention to information that contradicts stereotypes of outgroup members.<sup>73</sup> Furthermore, a long line of research on the “contact hypothesis” finds that prejudice reduction in intergroup contact (such as contact between men and women, white people and minorities) is

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67. The task partner's hostility was rated by both experimental subjects and experimenters. Reskin, *supra* note 61, at 9–10 (citing Chen & Bargh, *supra* note 44).

68. Ridgeway, *supra* note 60, at 9.

69. Cecilia L. Ridgeway & Lynn Smith-Lovin, *The Gender System and Interaction*, 25 ANN. REV. SOC. 191, 191 (1999).

70. *Id.*

71. Reskin, *supra* note 18, at 323 (citing Stephanie A. Goodwin, *Situational Power and Interpersonal Dominance Facilitate Bias and Inequality*, 54 J. SOC. ISSUES 677 (1998) and Susan T. Fiske et al., *The Continuum Model: Ten Years Later*, in DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY 231 (Shelly Chaiken & Yaacov Trope eds., 1999)).

72. Ridgeway & Smith-Lovin, *supra* note 69.

73. Reskin, *supra* note 18, at 323 (citing Don Operario et al., *Power Is Everywhere: Social Control and Personal Control Both Operate at Stereotype Activation, Interpretation, and Inhibition*, in STEREOTYPE ACTIVATION AND INHIBITION 163, 172–73 (Robert S. Wyer ed., 1998)).

enhanced when participants within the situation are of equal status, when they have common goals, and when there is institutional support for such contact.<sup>74</sup>

#### B. STATUS DIFFERENTIALS AND INTERACTIONS AT WORK

While social scientists highlight the importance of equal-status interaction for reducing the activation of discriminatory biases and reliance on stereotypes, most workplaces are not organized this way. The modern workplace is usually organized around a hierarchical division of labor that runs consistently along gender and racial lines, with women and minorities concentrated in low-level, under-valued, dead-end positions.<sup>75</sup> Even within the same occupations, women and minorities are more likely than their white and male counterparts to hold the least valued jobs.<sup>76</sup> In law or financial firms, women and minorities are passed over for large commercial clients, and in manufacturing firms they hold the most menial jobs and receive the least training.<sup>77</sup> When women and minorities do reach managerial ranks, they are heavily represented in support and service jobs, such as human resources, legal compliance, and public relations.<sup>78</sup>

This hierarchical division of labor—whereby women and minorities are overrepresented in the lower level and under-valued jobs—facilitates stereotype-enhancing interaction and limits opportunities for stereotype-negating interaction. Kanter's *Men and Women of the Corporation* provides a classic example.<sup>79</sup> Kanter demonstrates that secretarial support jobs are dead-end jobs not only because they are attached to a short and unattractive promotion ladder,<sup>80</sup> but also because of the patrimonial nature of the relations between secretaries and their bosses.<sup>81</sup> Women are perceived as deriving their status from their bosses and as needing love and emotional attention more than monetary rewards and promotions.<sup>82</sup> In such relations, women's caring contributions (consistent with the typical feminine role) are praised while their technical skills and professional contributions go unnoticed.<sup>83</sup>

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74. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 281 (1954); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. PERS'LTY & SOC. PSYCHOL.* 751, 752 (2006).

75. DONALD TOMASKOVIC-DEVEY, *GENDER AND RACIAL INEQUALITY AT WORK: THE SOURCES AND CONSEQUENCES OF JOB SEGREGATION* 3 (1993); Reskin, *supra* note 15.

76. Reskin, *supra* note 15, at 247.

77. *See id.*

78. Sharon M. Collins, *Black Mobility in White Corporations: Up the Corporate Ladder But out on a Limb*, 44 *SOC. PROBS.* 55, 55–56 (1997).

79. KANTER, *supra* note 28.

80. *Id.* at 72–73.

81. *Id.* at 73–74.

82. *Id.* at 85–87.

83. *Id.* at 86.

Additional research supports the idea that gender and racial categorization and stereotyping are a typical outcome of allocating jobs along racial and gender lines. The overrepresentation of women and minorities in a job has been shown to trigger a process of gender and racial priming, which activates gender and racial stereotypes.<sup>84</sup> Sociological research shows that as jobs become identified as “women’s work” or “a minority position” they tend to be devalued,<sup>85</sup> and this low status of women’s and minorities’ jobs further perpetuates the activation of stereotypes and biases against them in intergroup interactions.<sup>86</sup>

Social identity theory<sup>87</sup> and small groups research<sup>88</sup> show that cooperative interdependence (as opposed to a rigid division of labor) can reduce the salience of demographic intergroup boundaries by fostering a common group goal and identity.<sup>89</sup> Based on these insights, researchers in organizational behavior have found that demographic differences are less salient for workers and intergroup relations are more supportive when organizations emphasize collaborative relations rather than individualism and distinctiveness.<sup>90</sup> Notably, because women and minorities are often funneled into different functions than men and white people, collaboration across functional divisions is central for eroding gender and racial boundaries.<sup>91</sup>

### C. REDUCING RELATIONAL DISCRIMINATION THROUGH NETWORK-BASED WORK

Employers cannot be expected to eliminate gender and racial status differentials; nor can they be expected to remove structural or cultural constraints entirely from interaction at work.<sup>92</sup> Nonetheless, employers

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84. Reskin, *supra* note 18 (citing Galen V. Bodenhausen et al., *Stereotypes in Thought & Deed: Social & Cognitive Origins of Intergroup Discrimination*, in INTERGROUP COGNITION & INTERGROUP BEHAVIOR 311, 317 (Constantine Sekides et al. eds., 1998)).

85. TOMASKOVIC-DEVÉY, *supra* note 75.

86. See *supra* notes 70–76 and accompanying text.

87. Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. Soc. ISSUES 79 (1969).

88. See MUZAFER SHERIF, UNIVERSITY OF OKLAHOMA INSTITUTE OF GROUP RELATIONS, INTERGROUP CONFLICT AND COOPERATION: THE ROBBERS CAVE EXPERIMENT (1961).

89. See generally SAMUEL L. GAERTNER & JOHN F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL (2000); Roderick M. Kramer, *Intergroup Relations and Organizational Dilemmas: The Role of Categorization Process*, 13 RES. ORG. BEHAV. 191, 215 (1991); see also Reskin, *supra* note 18, at 324.

90. Samuel B. Bacharach et al., *Diversity and Homophily at Work: Supportive Relations Among White and African-American Peers*, 48 ACAD. MGMT. J. 619, 620 (2005).

91. See ROSABETH MOSS KANTER, THE CHANGE MASTERS: CORPORATE ENTREPRENEURS AT WORK 146 (1983); Shelley Brickson, *The Impact of Identity Orientation on Individual and Organizational Outcomes in Demographically Diverse Settings*, 25 ACAD. MGMT. REV. 82, 83 (2000).

92. See Ridgeway, *supra* note 60, at 9 (“All social relational encounters take place in a preexisting context of established structures and other material constraints.”) (citing Edward J. Lawler et al., *Structural Social Psychology and the Micro-Macro Problem*, 11 SOCIO. THEORY 268 (1993)); see also Cecilia L. Ridgeway & Shelley J. Correll, *Limiting Inequality Through Interaction: The Ends of*

can adopt programs that will undermine the negative (and discriminatory) relational effects of status differentials on women and minorities. In this section, we present research showing that employers can reduce discrimination at the relational level, and improve women's and minorities' career outcomes, by introducing network-based work practices that emphasize collaboration between workers from lower level jobs (filled mostly by women and minorities) and workers from higher level jobs (filled mostly by men and white people).

Studies show that in organizations with network collaborations, where power and status differentials are less salient, stereotypes devaluing women and minorities are less likely to be activated. For example, a study of teamwork in an engineering firm found that patterns of intergroup interaction between more valued (mostly men) and less valued (mostly women) workers changed and were less demeaning when workers were placed on collaborative teams.<sup>93</sup> One of their interviewees, an administrative assistant, attests, "non-exempts like us can now feel like we are not demeaned; we are treated as an equal part of the team."<sup>94</sup> Similarly, Scandinavian researchers Elin Kvande and Bente Rasmussen observed more alliances between men and women in dynamic network organizations, where cross-job collaborative work was encouraged, than in organizations with more traditional, rigidly distinct task structures.<sup>95</sup>

Other research provides evidence that network structures create much-needed opportunities for women and minorities to come into contact with supervisors and other evaluators in non-stereotypical contexts.<sup>96</sup> In his study of a job rotation program in a textile mill, Ian Taplin noticed that supervisors appreciated their low-skill workers (mostly women and minorities) more after observing their performance in a job rotation program.<sup>97</sup> In another example, Vicki Smith studied teams of white-collar workers.<sup>98</sup> She reports from her interview with Anita, an African American, low-level, white-collar worker, who had worked in the same job for eleven years: "it was only recently, in the

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*Gender*, 29 CONTEMP. SOC. 110, 113 (2000) (describing gender beliefs, the cultural rules for enacting gender, as "one of the twin pillars (along with resources) on which the gender system rests").

93. Gerhard Daday & Beverly Burris, *Technocratic Teamwork: Mitigating Polarization and Cultural Marginalization in an Engineering Firm*, 10 RES. SOC. WORK 241, 257 (2001).

94. *Id.* at 254.

95. Elin Kvande & Bente Rasmussen, *Men in Male Dominated Organizations and Their Encounter with Women Intruders*, 10 SCANDINAVIAN MGMT. J. 163, 172 (1994).

96. ELLA J. BELL ET AL., OUR SEPARATE WAYS: BLACK AND WHITE WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY 150 (2001); DAVID A. THOMAS & JOHN J. GABBARO, BREAKING THROUGH: THE MAKING OF MINORITY EXECUTIVES IN CORPORATE AMERICA 222 (1999); Sheila Wellington et al., *What's Holding Women Back?*, HARV. BUS. REV., June 2003, at 18-19.

97. Ian Taplin, *Flexible Production, Rigid Jobs: Lessons from the Clothing Industry*, 22 WORK & OCCUP.'S 412, 430 (1995).

98. Vicki Smith, *Employee Involvement, Involved Employees: Participative Work Arrangements in a White-Collar Service Occupation*, 43 SOC. PROBS. 166, 167 (1996).

course of participating in a few problem-solving groups, that she [Anita] felt other people had ‘brought her into focus,’ recognizing about her, ‘Oh, she *does* have a mouth, and, oh, she *does* have thought.’”<sup>99</sup>

These reports suggest that there is less relational discrimination in places where work is done in collaborative networks because stereotypes and biases are less likely to taint performance and evaluations in interactions. It is important to note, however, that we do not expect gender and racial stereotypes to vanish with the introduction of collaboration at work.<sup>100</sup> Stereotypes are powerful and resilient, and there is evidence that even in collaborative networks, women and minorities can find it difficult to negate stereotypes. In one study, for example, researchers looked at interactions in a bank that had adopted collaborative structures, including network project teams and job rotation programs, and they found that men continued to treat women as secretaries responsible for filing and making copies.<sup>101</sup> Nonetheless, even in this organization, some women resisted devaluation and demanded to be treated as an equal part of the team.<sup>102</sup>

Three recent studies using statistical analysis of large quantitative datasets have also shown that women and minorities have better career outcomes in organizations where work is organized in network, rather than hierarchical, structures. In 2004, Laurel Smith-Doerr compared the careers of more than 2000 women scientists, some who worked in universities or pharmaceutical companies and others who worked in biotechnology firms.<sup>103</sup> Unlike scientists in academia and pharmaceutical firms, which adhere to rigid job categories, scientists in bio-tech firms are less involved in a minutely defined division of labor and are not dependent on one principal investigator as a powerful sponsor.<sup>104</sup> Instead, they work in a peer-like status with multiple collaborators who evaluate their performance.<sup>105</sup> Network workplaces also promote a collectivist culture in which the entire team, not just the principal investigator, is rewarded for achievement.<sup>106</sup>

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99. *Id.* at 173.

100. *See, e.g.*, Ridgeway & Smith-Lovin, *supra* note 69, at 211.

101. Marjukka Ollilainen & Joyce Rothschild, *Can Self-Managing Teams be Truly Cross-Functional?: Gender Barriers to a “New” Division of Labor*, 10 RES. SOC. WORK 141, 149–52 (2001).

102. *Id.* at 155. This suggests that the formal equality within the team thus provides grounds for legitimating women’s and minorities’ inclusion.

103. *See generally* LAUREL SMITH-DOERR, *WOMEN’S WORK: GENDER EQUALITY VS. HIERARCHY IN THE LIFE SCIENCES* (2004).

104. *Id.* at 106.

105. *Id.*

106. The benefit of a collectivist culture is consistent with findings of Chatman. *See infra* note 122 and accompanying text.

Smith-Doerr found that women had significantly better career outcomes in the bio-tech firms.<sup>107</sup> Her multivariate statistical analysis shows that, controlling for education and experience, women were eight times more likely than men to reach supervisory positions in bio-tech firms, while in academia women's odds to hold a supervisory position were 60% lower than men's.<sup>108</sup>

The women interviewed by Smith-Doerr attributed their greater success in the bio-tech firms to the flexibility afforded by the permeable job boundaries and team structures.<sup>109</sup> These structures, they maintained, helped women (and minorities) avoid the type of relations at work that perpetuates their disadvantage.<sup>110</sup> The "incentives at the team level change the predisposition to stereotypical roles," explains Smith-Doerr,<sup>111</sup> echoing a long tradition in social-psychology research.<sup>112</sup> The outcome, as Smith-Doerr finds, is lower levels of gender disparities in career outcomes.<sup>113</sup>

These findings were corroborated by a more recent study finding that women life scientists also have higher patenting productivity in organizations with network-based, collaborative work structures.<sup>114</sup> Since productivity gaps are central for explaining pay and promotion gaps,<sup>115</sup> these findings further illuminate the importance of undermining status differentials and checking relational sources of discrimination at work.

Another quantitative study of non-science workplaces examined the effects of network-based, collaborative work structures on gender and racial disparities in management ranks.<sup>116</sup> This study looked at a national sample of firms across nine industries.<sup>117</sup> It found that the adoption of cross-job work teams and job rotation programs leads to increases in the share of women and minorities in management.<sup>118</sup>

Taken together, the qualitative and the quantitative studies reviewed in this section provide striking evidence that relational sources of

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107. SMITH-DOERR, *supra* note 103, at 107.

108. *Id.*

109. *Id.* at 133.

110. *Id.*

111. *Id.* at 106.

112. *See supra* notes 59–91 and accompanying text.

113. SMITH-DOERR, *supra* note 103, at 107.

114. Kjersten Bunjer Whittington & Laurel Smith-Doerr, *Women Inventors in Context: Disparities in Patenting Across Academia and Industry*, 22 GENDER & SOC'Y 194 (2008).

115. Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 221 (2001).

116. Alexandra Kalev, *Cracking the Glass Cages? Job Segregation, the Restructuring of Work and Managerial Diversity* (Aug. 16, 2004) (unpublished paper presented at the annual meetings of the American Sociological Association in San Francisco, California, on file with authors).

117. *Id.* at 21.

118. *Id.* at 5, 8.

discrimination are undermined when workplaces are organized with network-based, collaborative work structures.

#### D. OTHER ORGANIZATIONAL MEASURES

With the relational level of discrimination in mind, we can draw on the social-psychological and sociological research on the operation of stereotypes and biases in intergroup interactions to suggest other organizational changes that may lessen the stereotype-enhancing features of interactions in the workplace. Employers might, for example, create structured opportunities for stereotype-negating intergroup contact by designing mentoring programs that do not focus only on formal meetings where the mentor is showing the ropes to the mentee, but also on on-going work collaboration. In this context, the mentors will have more opportunities to observe their mentees and interact with them in stereotype-negating ways, which should reduce their own stereotypes and biases<sup>119</sup> and will help them promote their mentees in other contexts.<sup>120</sup>

We can also revisit attention to demographics as a discrimination-reducing measure at the relational level. In many workplaces, there is a physical segregation between women and men, minorities and whites. Research shows that intergroup contact significantly reduces stereotypes,<sup>121</sup> and reducing physical segregation should be a positive step toward that goal. Similarly, improving the demographic balance of jobs and work groups can expand opportunities for peer-like contact and collaboration with workers from different demographic groups.

Network structures and demographic diversity complement each other as discrimination-reducing measures. Increasing demographic diversity at the workplace is more likely to improve intergroup relations when peer-like collaboration and supportive relations are emphasized.<sup>122</sup> In addition, research indicates that overarching organizational norms regarding collaborative work, in conjunction with demographic diversity, can help to reduce discrimination at the relational level. For example, sociologist Samuel Bacharach and colleagues find that a peer-support

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119. David A. Thomas, *The Truth About Mentoring Minorities: Race Matters*, HARV. BUS. REV., Apr. 2001, at 8–11 (arguing that cross-race mentoring is less effective than same-race mentoring).

120. Some ADVANCE programs, sponsored by the National Sciences Foundation, have put in place such formal collaboration programs. See Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J. L. & GENDER 247, 277–87 (2006) (describing the ADVANCE programs).

121. See, e.g., ALLPORT, *supra* note 74; Pettigrew & Tropp, *supra* note 74, at 757.

122. Bacharach et al., *supra* note 90; Brickson, *supra* note 91; Jennifer A. Chatman et al., *Being Different Yet Feeling Similar: The Influence of Demographic Composition and Organizational Culture on Work Processes and Outcomes*, 43 ADMIN. SCI. Q. 749, 749 (1998); see also Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229 (2001).

climate, where workers feel they can rely on their co-workers for emotional and instrumental support, improves cross-racial relations in work units.<sup>123</sup> Similarly, Robin Ely and David Thomas find that an organization's "diversity perspective"—the set of "normative beliefs and expectations about cultural diversity and its role in their work group" conveyed to workers—affects the level of individual satisfaction and group efficacy in demographically diverse work groups.<sup>124</sup>

Along these same lines, increasing workplace democracy should also have a positive effect on reducing discrimination. As we discussed above, research shows that gender and racial stereotyping and biases are less likely to be activated in organizations with less emphasis on formal and informal power relations and greater emphasis on egalitarian and collaborative relations.<sup>125</sup> From this research, we can expect that introducing democratic decision-making processes should lead to lower levels of discrimination.<sup>126</sup>

### III. LEGAL IMPLICATIONS

Broadening efforts to devise discrimination-reducing measures to include relational sources of bias gives rise to questions about the law's role as an intermediary in the implementation of those measures. Equal opportunity law, embodied in the Equal Protection Clause of the Constitution<sup>127</sup> and in Title VII of the Civil Rights Act,<sup>128</sup> has the potential to serve both as an inhibitor and a facilitator of some of the relational discrimination-reducing measures that we identify.

#### A. THE LAW AS INHIBITOR OF DISCRIMINATION-REDUCING MEASURES AT THE RELATIONAL LEVEL

On the inhibitor side, with a strong nondiscrimination norm and growing arguments for the business case for diversity, we can expect that some employers will voluntarily take on discrimination-reducing measures aimed at relational sources of discrimination.<sup>129</sup> Most of the measures that we identify do not require consideration of race or sex. To the extent that some discrimination-reducing measures require

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123. Bacharach et al., *supra* note 90.

124. Ely & Thomas, *supra* note 122.

125. See *supra* notes 122–24 and accompanying text.

126. Joyce Rothschild, *Creating a Just and Democratic Workplace: More Engagement, Less Hierarchy*, 29 CONTEMP. SOC. 195, 205 (2000).

127. U.S. CONST. amend. XIV, § 1.

128. 42 U.S.C. § 2000e (2006).

129. The fact that a substantial number of firms have adopted cross-boundary work teams and training programs also suggests that, at least for some organizations, these ways of organizing work and building skills make business sense. See Arne L. Kalleberg et al., *Beyond Profit? Sectoral Differences in High-Performance Work Practices*, 33 WORK & OCCUP'S 271, 294 (2006) (documenting the spread of cross-boundary work teams and training programs).

consideration of race or sex in making employment decisions, however, the law may prohibit implementation of those measures.<sup>130</sup> This is one reason why the emerging scholarship laying out the “prevention justification” for affirmative action is so important.<sup>131</sup> By redefining affirmative action as a means for reducing discrimination rather than solely for correcting past wrongs, it develops a foundation on which equal opportunity advocates can depend in arguing that attention to race and sex in employment decisions is consistent with the Title VII and Equal Protection Clause nondiscrimination obligations.

It is also possible that the law as inhibitor will pose less of a barrier to consideration of racial and gender demographics in the “softer” employment decisions involving the organization of work, work teams, and the work environment than it does to consideration of race and sex in hiring and promotion decisions.<sup>132</sup> Most courts have held that a plaintiff must suffer an “adverse employment action” in order to succeed in a discrimination suit under Title VII,<sup>133</sup> and many courts have defined an adverse employment action as one that involves an “ultimate employment decision” (e.g., hiring, discharge, or promotion)<sup>134</sup> or, at the very least, as one that has an immediate material or economic effect.<sup>135</sup> If courts apply this requirement to reverse discrimination claims as consistently as they do to traditional discrimination claims, then it is

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130. The Supreme Court has held that Title VII prohibits discrimination against white and black people alike, *see* *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–79 (1976), and that, in the Equal Protection context, all racial classifications are reviewed under a strict scrutiny standard, *see* *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995), and all sex classifications are reviewed under an intermediate scrutiny standard, *see* *United States v. Virginia*, 518 U.S. 515, 534 (1986).

131. *See supra* note 39 and accompanying text.

132. Attention to race and sex in these “softer” workplace decisions may also generate less hostility and resistance on the part of members of the majority, and it is unlikely to generate the same stigma and self-derogation effects as more traditional uses of affirmative action. *See* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1259–65 (1998) (reviewing studies).

133. *See, e.g.,* *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (noting that “hundreds if not thousands of decisions say that an ‘adverse employment action’ is essential to the plaintiff’s prima facie case”).

134. *See, e.g.,* *McCoy v. City of Shreveport*, 492 F.3d 551, 559–60 (5th Cir. 2007) (holding that only “ultimate employment decisions,” such as hiring and firing decisions, meet the “adverse employment action” requirement); *Earle v. Aramark Corp.*, No. 06-10483, 2007 WL 2683821 at \*5 (5th Cir. Sept. 12, 2007) (holding that “being denied administrative support, being denied access to training and leadership courses, [and] being denied mentoring and training opportunities” were not adverse actions under Title VII). Although the Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. White* held that an “ultimate employment decision” is not required for retaliation claims under § 704, it left open whether such a requirement (or something similar) is proper for discrimination claims under § 703(a). 548 U.S. 53, 61 (2006).

135. *See, e.g.,* *Minor*, 457 F.3d at 634 (requiring a “material difference in the terms and conditions of employment” and explaining that the requirement was met in the case because the decision to require the plaintiff to visit all of her sales accounts twice a month and her major accounts more frequently, without a raise in pay, was “functionally the same as a 30% reduction in . . . hourly pay”).

possible that attention to racial and gender demographics in the organization of work, work teams, and the work environment will fall beneath the radar of antidiscrimination law because those decisions are not considered “so central to the employment relation that they amount to discriminatory terms or conditions.”<sup>136</sup> Of course, women and minorities must be hired in the first place to be considered as part of the workplace demographic, but attention to demographics in the dynamics of the workplace might be more politically palatable (and legal) than the same attention in decisions that are perceived as key employment decisions, such as hiring and promotion.<sup>137</sup>

#### B. THE LAW AS FACILITATOR OF DISCRIMINATION-REDUCING MEASURES AT THE RELATIONAL LEVEL

On the facilitator side, how might the law encourage discrimination-reducing measures at the relational level? As a starting point, we should recognize the possibility that the best way to attain the benefits of some of the discrimination-reducing measures that we identify is to keep the law out of it, at least in the short term. In other words, if, as some of the organizational research shows,<sup>138</sup> employers are currently turning to more collaborative work structures for business reasons, it may be that we will do more harm than good by legalizing those efforts. Moreover, assuming that we do want to use the law to facilitate these discrimination-reducing measures, the process of implementation is unquestionably more complex than simply recognizing a legal right to be free from discrimination.<sup>139</sup>

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136. *Id.* That attention to race and sex may fall underneath the radar of employment discrimination law in this way is somewhat ironic because the requirement of a “materially adverse action” has been identified as one of several limitations of individual disparate treatment theory for addressing discrimination in the modern workplace. See Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 116–17 (2003). The research on the bias-facilitating effect of segregation and rigid job boundaries adds further support for that critique. See *supra* notes 75–91 and accompanying text.

137. Consideration of race and sex in assigning members of work teams is also less likely to “trammel the interests” of the majority. See *Johnson v. Transp. Agency of Santa Clara County*, 480 U.S. 616, 634 (1987) (requiring that for affirmative action plan to be valid under Title VII that it not unnecessarily trammel the interests of the majority).

138. See, e.g., Kalleberg et al., *supra* note 129; Paul Osterman, *Work Reorganization in an Era of Restructuring: Trends in Diffusion and Effects on Employee Welfare*, 53 INDUS. & LAB. REL. REV. 179, 182, 184 (2000).

139. See, e.g., Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11 (2005) (examining how social institutions influence the mobilization of rights provided by the Family Medical Leave Act); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Laws*, 97 AM. J. SOC. 1531 (1992) (discussing the features of equal opportunity law that make it particularly susceptible to intermediary mediation); see also Christine Jolls, *Antidiscrimination Law's Effect on Implicit Bias*, in BEHAVIORAL ANALYSES OF WORKPLACE DISCRIMINATION (Mitu Gulati & Michael Yelnosky eds., 2008) (pointing out that the law can effect change indirectly and illustrating that individual disparate treatment law reduces discrimination

We can expect, however, that if the law defines discrimination in a way that imposes liability for failing to address relational sources of discrimination, then one way of avoiding liability will be to implement measures to reduce those sources of discrimination.<sup>140</sup> Equal opportunity advocates might draw on existing Title VII law to promote discrimination-reducing measures at the relational level. Under disparate impact theory, extreme rigidity and segregation in job categories, for example, could be challenged as having a disparate impact on a protected group, or, under disparate treatment theory, the same rigidity might be challenged as a means of facilitating disparate treatment against that group.<sup>141</sup> Indeed, a challenge to excessive rigidity and segregation on the ground that it facilitates biases and stereotypes in interaction is similar in important ways to recent challenges to excessive subjectivity in decision-making systems.<sup>142</sup> The recent class actions alleging widespread discrimination in workplaces with highly subjective decision-making systems that leave white males to exercise their discretion in biased ways may therefore prove useful as a model.<sup>143</sup> As documented elsewhere, courts are inconsistent in their approach to these cases—and have not been uniformly receptive—but plaintiffs have had at least some degree of

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indirectly by increasing the numbers of women and minorities in the workplace).

140. Although our focus in these preliminary considerations is on the legal definition of discrimination, associated with a legal right to be free from discrimination under Title VII, there may be other, less court-centered ways to use the law to facilitate some of the measures that we have identified. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (calling for a new regulatory approach to employment discrimination); see also Green, *supra* note 41, at 674–83 (advancing a non-legal-rights-based approach to the problem of discriminatory work culture).

141. The tendency for courts to see the organization of work as natural or outside of the employer's realm of decision, despite substantial evidence to the contrary, may present a problem for plaintiffs attempting to use disparate impact theory. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (that employer “uses a particular employment practice that causes a disparate impact”) (emphasis added); *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292 (7th Cir. 1991) (holding that an employer's word-of-mouth recruiting was a form of “passive reliance” and not an employer policy subject to challenge under disparate impact theory). See generally Michelle Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3 (2005) (arguing that “workplace essentialism” hinders efforts to transform the way in which work gets done). Conceptually, the challenge here is also different from the paradigmatic disparate impact case. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court's foundational disparate impact decision, for example, the testing and education requirement had a disparate impact because black people had been deprived of educational opportunities. The argument here, in contrast, is that the employer's use of extreme rigidity and segregation in job categories facilitates stereotype-reinforcing interactions (and different treatment) at work. See generally Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007).

142. The measures that we identify need not be incorporated in the law as bases of liability per se, such that failure to institute cross-boundary work teams, for example, would itself establish employer liability. Rather, they can be included as measures for consideration in developing consent decrees that meaningfully address a variety of sources of discrimination, both at the individual and the relational level.

143. See *supra* notes 48–52 and accompanying text.

success in framing their challenges under disparate impact theory and disparate treatment theory, or a combination of both.<sup>144</sup>

The research showing that segregation and stratification trigger bias in interaction also provides foundation for a reevaluation of the relevance and power of segregation/stratification evidence. Courts historically have been largely unimpressed by plaintiffs' evidence of stratification within a workforce as proof of on-going discrimination, on the theory that without a showing that members of the lower-paying job category comprise the relevant labor pool, disparities within a workforce do not establish either a claim of systemic disparate treatment or disparate impact.<sup>145</sup> The well-known decision in *EEOC v. Sears, Roebuck & Co.*<sup>146</sup> illustrates a similar willingness on the part of courts to assume that stratification is simply the result of outside forces, such as a lack of interest on the part of lower-paid workers, and not part of a broader system of discrimination within the employer's workplace.<sup>147</sup> The research showing that segregation and stratification enhance bias could be useful for combating this reluctance. It could be used, for example, in a case like *Sears* to highlight the employer's role in reinforcing stereotypes and perpetuating inequality. It could also be used in an individual disparate treatment case to support a sex stereotyping argument.<sup>148</sup> A woman who is denied partnership at an accounting firm where women are concentrated in groups that handle small, traditional, family-owned businesses, while men are concentrated in groups that handle large, publicly-owned, and emerging hi-tech businesses, might introduce expert testimony that stereotypes are more likely to play a role in a partnership decision in that context than in a partnership decision in a firm where women and men collaborated on cases with a range of business profiles. Even if this testimony, standing alone, is unlikely to prove the plaintiff's case, it should be considered as one piece of evidence that sex was a motivating factor in the promotion decision.

Along similar lines, evidence that segregation enhances bias also supports efforts to shape the law to take more notice of segregated/highly rigid work environments as evidence of discrimination.

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144. See Green, *supra* note 136, at 151-52.

145. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (involving allegation of disparate impact); *AFSCME v. County of Nassau*, 799 F. Supp. 1370 (E.D.N.Y. 1992) (involving allegation of disparate treatment). See generally Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447, 457-65 (2008) (describing the courts' response to plaintiffs' use of segregation evidence).

146. 839 F.2d 302 (7th Cir. 1988).

147. 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, 1750-54 (1990).

148. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1998) (holding that sex stereotyping violates Title VII).

Professor Vicki Schultz has argued, for example, that the liability rules for sexual harassment should vary according to the degree of integration at the defendant firm.<sup>149</sup> In an effort to draw attention to the problem of workplaces in which immigrant, Hispanic workers are concentrated in low-wage jobs, Professor Leticia Saucedo has urged courts to infer subordination from the overrepresentation of a protected group in a particular job, what she calls “the inexorable 100%.”<sup>150</sup> Although an examination of these specific proposals is beyond the scope of this Article, similar doctrinal changes could be relevant for devising discrimination-reducing measures at the relational level.

There are undoubtedly concerns associated with our effort to broaden discrimination-reducing measures to include relational sources of discrimination and, even more so, with our suggestion that equal opportunity advocates use the law to facilitate those measures. One concern is that attempting to reduce discrimination at the relational level will weaken the “normative underpinnings of antidiscrimination law.”<sup>151</sup> A conception of discrimination that includes interactions and relations is even further removed from the paradigmatic image of discrimination as the product of evil wrongdoers making discrete decisions to exclude. Discrimination becomes not just a problem of implicit biases and unconscious reliance on stereotypes at various moments of decision, but also of implicit biases and unconscious reliance on stereotypes in everyday interaction. This shift may pose normative difficulties on two fronts. First, it makes it easier for individuals to disavow responsibility for discrimination.<sup>152</sup> Decision makers in this view are nothing more than “cultural (and structural) dopes,” whose actions are determined by structural factors beyond their control.<sup>153</sup> And because the “target” of discrimination at the relational level also takes part in the interaction that reproduces the inequality, she may be perceived as complicit in the discrimination and less worthy of protection. Second, employers

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149. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2174–75 (2003); see also THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 204, 205 (2005) (proposing that factfinders be required to consider structural factors, including whether the workplace is segregated along gender lines, in determining whether a harassing environment is “because of sex”). For an effort to take segregated environments into account in the law of affirmative action, see Yelnosky, *supra* note 27, at 1417–19 (arguing that stratification/segregation should satisfy the “manifest imbalance” requirement of *Johnson v. Transp. Agency of Santa Clara County*, 480 U.S. 616 (1987)).

150. Saucedo, *supra* note 145, at 449.

151. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 3 (2006) (arguing that “structural employment inequalities cannot be solved without going beyond the generally accepted normative underpinnings of antidiscrimination law”). For a response to this argument, and an effort to lay the normative foundation for a structural approach to employment discrimination law, see Green, *supra* note 141.

152. HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* 68 (1967).

153. *Id.*

emphasizing the relational nature of discrimination might argue that they are not responsible for the inequalities that are perpetuated by interaction in the workplace or, relatedly, that they have no control over day-to-day relations between workers. The research presented here, together with a long history of organizational efforts to shape intergroup relations in the workplace,<sup>154</sup> refutes this latter argument, and we are doubtful that either of these positions will ultimately prevail as a basis for absolving employers of their nondiscrimination obligation.<sup>155</sup> More importantly, we believe that facing the complexity of discrimination is preferable to ignoring the role that discrimination continues to play in perpetuating workplace inequality and the role of employers in creating organizational structures that can facilitate or disrupt these processes.

The challenges of implementation also accompany any legal change. The organization of work has long been considered a matter of business concern, rather than a potential source of discrimination, and it may be difficult to convince courts otherwise.<sup>156</sup> This reality reaffirms the importance of advocating change on a number of fronts, both inside and outside of the courts and the law. Without careful attention to the integrity of implementation, efforts to use antidiscrimination law to address relational sources of workplace discrimination are also likely to face problems of decoupling (the separation of the nondiscrimination obligation from day-to-day organizational practice)<sup>157</sup> and bulletproofing (the adoption of structural changes that provide protection under the law but have little-to-no effect on workplace equality).<sup>158</sup> These difficulties with implementation, although substantial and worthy of further examination, in our view do not justify abandoning the effort to understand the nature of discrimination in the modern workplace or the project of devising meaningful measures for change.

#### CONCLUSION

We have argued in this Article that discrimination-reducing measures should be expanded to address the relational as well as the

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154. See Brickson, *supra* note 91, at 82 (presenting a model of organizational, task, and reward structures that would encourage relational identity orientation and promote benefits associated with diversity); Kramer, *supra* note 89, at 191 (presenting a model of intergroup relations showing that organizational structures shape intergroup conflict or cooperation). See generally Bacharach et al., *supra* note 90 (studying factors contributing to supportive intergroup relations that contribute to information sharing and improved dividends from employee diversity).

155. See Green, *supra* note 141.

156. Indeed, if the connection between organization of work and business concerns is perceived as tighter than the one between personnel decision-making practices, for example, plaintiffs may have a difficult time succeeding under existing theories. See *supra* note 141 and accompanying text.

157. John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 357 (1977).

158. Bisom-Rapp, *supra* note 3.

individual sources of discrimination. In several ways that we have identified, discrimination-reducing measures can begin to address relational sources of discrimination. Research on this topic is promising, yet nascent. Researchers should continue to explore the ways in which organizations facilitate, or limit, discriminatory biases and stereotypes in workplace interactions. Based on the evidence already accumulating on the existence and malleability of relational sources of discrimination, however, we can be sure that existing efforts by the legal and business communities to devise discrimination-reducing measures that focus only on individuals will not be enough.