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## Article

# Organizational Justice and Antidiscrimination

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### INTRODUCTION

Despite nearly eighty years of governmental attempts to stamp it out, discrimination in the workplace has proven unrelenting.<sup>1</sup> The news is littered with stories of xenophobia, misogyny, and racism.<sup>2</sup> In addition to these clear examples of explicit

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1. The governmental effort to address employment discrimination can be dated as far back as the executive order FDR signed in 1941 to prevent defense contractors from discriminating on the basis of “race, creed, color, or national origin.” Exec. Order No. 8802, 3 C.F.R. § 957 (1938–1943).

2. See, e.g., DeNeen L. Brown, *Allegations of Racism That Divided a Maryland Town Remain Unresolved*, WASH. POST (Jan. 6, 2019, 5:00 PM), [https://www.washingtonpost.com/local/allegations-of-racism-that-divided-a-maryland-town-remain-unresolved/2019/01/04/df042c48-049f-11e9-9122-82e98f91ee6f\\_story.html](https://www.washingtonpost.com/local/allegations-of-racism-that-divided-a-maryland-town-remain-unresolved/2019/01/04/df042c48-049f-11e9-9122-82e98f91ee6f_story.html) [https://perma.cc/BGG8-ATTA]; Sam Dean, *Allegations of Sexism and Harassment Roil Riot Games, the Developer of ‘League of Legends,’* L.A. TIMES (Oct. 14, 2018, 7:00 AM), <https://www.latimes.com/business/technology/la-fi-tn-riot-games-culture-20181014-story.html> [https://perma.cc/QXE2-5XTH]; Lauren Hepler, *Menial Tasks, Slurs and Swastikas: Many Black Workers at Tesla Say They Faced Racism*, N.Y. TIMES (Nov. 30, 2018), <https://www.nytimes.com/2018/11/30/business/tesla-factory-racism.html> [https://perma.cc/W2R9-QK6H]; Douglas Jacobs, *We’re Sick of Racism, Literally*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/11/opinion/sunday/sick-of-racism-literally.html> [https://perma.cc/8P5L-BX6J]; *Silicon Valley’s Sexism Problem*, ECONOMIST (Apr. 15, 2017), <https://www.economist.com/leaders/2017/>

bias, we also know more than we once did about implicit bias<sup>3</sup> and the way in which it can, for example, predict racial disparities in employment.<sup>4</sup> In nearly every industry there are striking imbalances in professional achievement along protected class lines.<sup>5</sup> Such incongruities suggest that, in the American work experience, a person's success is impacted by forces beyond just hard work. One reason for that has been the shortcomings of antidiscrimination law.<sup>6</sup> The last decade has spawned an extensive amount of legal and social science research that helps explain the failure of such laws and discrimination's persistence.

Legal scholars have responded to the failures of employment discrimination law by proposing changes to these laws—often

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04/15/silicon-valleys-sexism-problem [https://perma.cc/2QUC-YSA]; Heidi Stevens, *It's Official: 2016 Is the Year of Xenophobia*, CHI. TRIB. (Nov. 29, 2016, 11:53 AM), <https://www.chicagotribune.com/columns/heidi-stevens/ct-xenophobia-word-of-the-year-balancing-1129-20161129-column.html> [https://perma.cc/GJH4-5878].

3. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995) (arguing that many biased employment decisions are cognitive, rather than motivational, in origin); see also MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 34–52 (2013) (detailing findings of the Implicit Association Test).

4. See L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 876 (2017) (“[A] meta-analysis of 122 implicit bias studies found evidence that implicit racial biases predict racial disparities in employment and healthcare.”).

5. See, e.g., Katherine T.U. Emerson & Mary C. Murphy, *Identity Threat at Work: How Social Identity Threat and Situational Cues Contribute to Racial and Ethnic Disparities in the Workplace*, 20 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 508, 512–13 (2014) (identifying racial disparities in high-status positions in Fortune 100 companies, among others); Karen I. Fredriksen-Goldsen et al., *Support of Sexual Orientation and Gender Identity Content in Social Work Education: Results from National Surveys of U.S. and Anglophone Canadian Faculty*, 47 J. SOC. WORK EDUC. 19, 25–27 (2011) (identifying gender discrimination in the field of social work); Aasim I. Padela et al., *Religious Identity and Workplace Discrimination: A National Survey of American Muslim Physicians*, 7 AJOB EMPIRICAL BIOETHICS 149, 149 (2016) (identifying religious identity discrimination among medical practitioners); Damon J. Phillips, *Organizational Genealogies and the Persistence of Gender Inequality: The Case of Silicon Valley Law Firms*, 50 ADMIN. SCI. Q. 440, 440 (2005) (identifying gender disparities in Silicon Valley law firms); Ming-Te Wang & Jessica L. Degol, *Gender Gap in Science, Technology, Engineering, and Mathematics (STEM): Current Knowledge, Implications for Practice, Policy, and Future Directions*, 29 EDUC. PSYCHOL. REV. 119, 128 (2017) (identifying gender disparities in science, engineering, technology and mathematics education and workplaces).

6. See *infra* notes 40–47 and accompanying text.

doctrinal reforms that would enable more plaintiffs to survive summary judgment motions and reach the trial stage.<sup>7</sup> These approaches are understandable, and even laudable. However, in light of the compelling evidence showing that people are generally unwilling to attribute workplace outcomes to discrimination,<sup>8</sup> it stands to reason that neither judges nor legislators are likely to view discrimination as widespread enough to justify implementing such reforms.<sup>9</sup> There are other challenges too, such as many legislators' commitment to protecting business interests and the difficulty of achieving the political will needed for any major action in the realm of antidiscrimination law.<sup>10</sup> Unsurprisingly, most legal scholars advocating legislative or interpretive reform are quick to acknowledge the political difficulty of actually achieving such reforms.<sup>11</sup> Moreover, even if antidiscrimination laws were construed to give plaintiffs better odds of reaching trial, the psychological account of discrimination attrib-

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7. See, e.g., Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1061–62 (2006) (proposing courts employ psychological science when considering the consequences of doctrinal decisions); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 115 (2011) (advocating abandoning current frameworks in Title VII cases); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 238 (2009) (arguing courts should allow comparator proof as an alternative to the *McDonnell Douglas* framework); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 92 (2005) (advocating for courts to interpret antidiscrimination statutes consistent with their transformative objectives).

8. This general tendency is discussed in greater depth in Parts I.A.1–2.

9. See Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1330 (2012).

10. One example of this dynamic is found in the oft-proposed, never-passed “Employment Non-Discrimination Act,” which would prohibit employment discrimination on the basis of sexual orientation or gender identity. Some version of this statute has been introduced in almost every Congress since 1974, but even when the Democrats have had control, it failed to pass. *Employment Non-Discrimination Act*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Employment\\_Non-Discrimination\\_Act](https://en.wikipedia.org/wiki/Employment_Non-Discrimination_Act) [https://perma.cc/N8CQ-ETRZ] (last updated Jan. 10, 2020). Or consider the Genetic Information Nondiscrimination Act of 2008, which did eventually pass, but took thirteen years, during which all of “the controversial provisions were either deleted, revised, or clarified.” Mark A. Rothstein, *GINA at Ten and the Future of Genetic Nondiscrimination Law*, 48 HASTINGS CTR. REP. 5, 5 (2018).

11. E.g., SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* 168 (2017) (acknowledging the “difficult, if not impossible” prospects for Congressional reform of antidiscrimination law).

ution casts doubt on whether decision-makers would ultimately resolve critical questions of fact in a way that benefits plaintiffs.<sup>12</sup>

The law is positioned largely to *react* to discrimination—not to *prevent* or even *reduce* it.<sup>13</sup> But legal recourse is a distant second to the ultimate goal: preventing discrimination in the first place. Surprisingly, workplace policy measures that might seem beneficial for prevention—such as antibias training, limiting managerial discretion in hiring, and harassment reporting mechanisms—are failing and, in some cases, are actually *worsening* bias.<sup>14</sup> An increasing number of scholars have observed the limited potential to effect norm change in the workplace through legal or policy coercion.<sup>15</sup> Well-intentioned strategies like diversity or antibias training may have the perverse effect of actually

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12. Eyer, *supra* note 9, at 1331–32 (“If, however—as the findings of psychology scholars suggest—most people are predisposed to minimize the likelihood of discrimination, the ‘close calls’ are likely to predominantly be made in a manner unfavorable to discrimination litigants. Over time, the accretive nature of the law means that results—even if originally bolstered by a particular doctrinal reform—will ultimately come to resemble roughly the state of affairs that we currently face, with discrimination litigants facing extremely difficult odds.”).

13. TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 47–48 (2017) (showing how employer liability revolves largely around a system of “complaint and response”).

14. See, e.g., LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 155–56 (2016) (observing that symbolic structures can “mask” discrimination by creating an illusion of fairness); GREEN, *supra* note 13, at 112–13 (observing that “diversity trainings can reinforce stereotypes,” “trivialize discrimination,” “engender anger,” and reduce the numbers of women and minorities in management); Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail and What Works Better*, HARV. BUS. REV., July–Aug. 2016, at 55 [hereinafter Dobbin & Kalev, *Diversity Fail*] (“Trainers tell us that people often respond to compulsory courses with anger and resistance—and many participants actually report more animosity toward other groups afterward.”); Frank Dobbin & Alexandra Kalev, *Why Doesn’t Diversity Training Work? The Challenge for Industry and Academia*, 10 ANTHROPOLOGY NOW 48, 49–51 (2018) [hereinafter Dobbin & Kalev, *Diversity Challenge*] (“[T]rainees often leave ‘confused, angry, or with more animosity toward’ other groups.”).

15. See, e.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1903 (2009) (suggesting aggressive legal strategies may backfire when it comes to implicit bias); Eyer, *supra* note 9, at 1279–80 (noting proposals to broaden the legal doctrines of antidiscrimination laws may “exacerbate the documented tensions between prevailing public views and available

activating stereotypes and increasing “moral licensing,” a phenomenon in which doing something positive allows one to worry less about subsequently doing something negative.<sup>16</sup> Trainings for diversity or harassment can also undermine people’s senses of “autonomy, competence, relatedness, and basic goodness”—causing such programs to backfire.<sup>17</sup> There has been a leap in logic from understanding discrimination as a problem to assuming the prevailing treatments will succeed; but “[u]nderstanding the cause of malaria and understanding its treatment are two different things.”<sup>18</sup> What is needed to address the situation today are less coercive, empirically-verified approaches to inequality.

This Article argues that one promising way forward is found in the principles of Organizational Justice, a body of literature that stems from equity theory.<sup>19</sup> Organizational Justice emphasizes moral propriety regarding how employees are treated.<sup>20</sup> Its founders have defined it as “the extent to which an aspect of the organizational environment is perceived as fair, according to a

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claims”); Lisa Legault et al., *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (But Also Increase) Prejudice*, 22 PSYCHOL. SCI. 1472, 1476 (2011) (demonstrating “that strategies urging people to comply with antiprejudice standards are worse than doing nothing at all” and that “social control elicited a reflexive, reactive effect that increased prejudice”).

16. Dobbin & Kalev, *Diversity Challenge*, *supra* note 14, at 49–51 (showing antibias training can activate and reinforce stereotypes, as well as increase “moral licensing,” which can in turn make workers less likely to self-censor and more likely to act badly).

17. Bartlett, *supra* note 15, at 1961; *see also infra* notes 282–84 and accompanying text (explaining in detail why diversity programs are prone to fail).

18. Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 591 (2006); *see also* Legault et al., *supra* note 15, at 1472 (observing “[p]olicymakers in North America spend billions of dollars annually on prejudice interventions, yet very few of these are actually based on sound evidence”).

19. Equity theory generally posits that judgments of inequity or injustice derive from comparing oneself to others based on the ratio of “inputs and outcomes.” *Organizational Justice*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Organizational\\_justice](https://en.wikipedia.org/wiki/Organizational_justice) [<https://perma.cc/3LEV-FTTV>] (last updated Jan. 6, 2020). For more discussion of equity theory and related theoretical models for better understanding Organizational Justice, see Kjell Törnblom & Ali Kazemi, *Distributive Justice: Revisiting Past Statements and Reflecting on Future Prospects*, in OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE 15, 26–29 (Russell S. Cropanzano & Maureen L. Ambrose eds., 2015).

20. *See* Russell Cropanzano et al., *The Management of Organizational Justice*, 21 ACAD. MGMT. PERSPECTIVES 34, 34 (2007).

certain rule or standard.”<sup>21</sup> The field of Organizational Justice is generally thought to sub-divide into three sets of work-related concerns: (1) what people receive (distributive justice); (2) the standards, rules, and processes under which people receive (procedural justice); and (3) how people are treated along the way (interactional justice).<sup>22</sup> Ultimately, Organizational Justice is not concerned with *positive* or *negative* outcomes at work, but rather with whether the outcomes or treatments are *fair*.<sup>23</sup> Organizational Justice asks whether members of an organization have been treated justly and whether they have received what they deserve.<sup>24</sup>

More specifically, it is the position of this Article that Organizational Justice can do the work of antidiscrimination. When workers feel their organization is unfair, they are likely to feel resentful or envious, producing “action tendencies”<sup>25</sup> that

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21. Carolina Moliner et al., *Challenges for an Organizational Justice Research Agenda*, in ORGANIZATIONAL JUSTICE: INTERNATIONAL PERSPECTIVES AND CONCEPTUAL ADVANCES 1, 1 (Carolina Moliner et al. eds., 2017).

22. *Id.* Interactional justice is often further divided into *interpersonal justice*, which concerns the treatment of employees by supervisors or managers, and *informational justice*—a concern characterized by the “quality of information employees obtain from communications with their supervisors or managers.” Yoon Jik Cho & Na Sai, *Does Organizational Justice Matter in the Federal Workplace?*, 33 REV. PUB. PERSONNEL ADMIN. 227, 230–31 (2012).

23. Russell S. Cropanzano & Maureen L. Ambrose, *Organizational Justice: Where We Have Been and Where We Are Going*, in OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE, *supra* note 19, at 3, 3–4.

24. Organizational Justice was first developed as a focus of academic inquiry in the 1980s and has since grown into a robust field of research. See Jerald Greenberg, *A Taxonomy of Organizational Justice Theories*, 12 ACAD. MGMT. REV. 9, 10–15 (1987) (categorizing fields of research that have informed organizational justice as a field); *infra* note 48 (listing recent anthologies devoted to organizational justice).

25. See NICO H. FRIJDA, THE EMOTIONS 71 (1986) (“Emotions are action tendencies. More fully: Emotions are tendencies to establish, maintain, or disrupt a relationship with the environment.”); James J. Gross & Ross A. Thompson, *Emotion Regulation: Conceptual Foundations*, in HANDBOOK OF EMOTION REGULATION 3, 5 (James J. Gross ed., 2007) (“[E]motions not only make us feel something, they make us feel like *doing* something.”); see also Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1979–84 (2001) (describing the role of emotions and how they produce action tendencies).

make workers more likely to discriminate,<sup>26</sup> sexually harass others,<sup>27</sup> and engage in unethical practices as a way to “right” their perceived wrongs.<sup>28</sup> The most direct way that Organizational Justice advances nondiscrimination goals is through changing the workplace climate, which can help prevent both discrimination and harassment. Additionally, when policies are structured to be just, they have the potential to excise the subjective (and often discriminatory) components of decision-making.<sup>29</sup> Instead of centering on *individuals*—the focus of most failing antidiscrimination efforts—Organizational Justice targets the *organization*. Enhancing justice in the workplace can also help prevent retributive motives from taking shape and manifesting as discrimination.<sup>30</sup> Moreover, increasing justice perceptions can

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26. Niels van de Ven et al., *Leveling Up and Down: The Experiences of Benign and Malicious Envy*, 9 EMOTION 419, 426 (2009) (discussing how unchecked envy, when it arises in an unjust environment, can drive discrimination or harassment against others); Robert P. Vecchio, *It's Not Easy Being Green: Jealousy and Envy in the Workplace*, 13 RES. PERSONNEL HUM. RESOURCES MGMT. 201, 205–06 (1995) (same).

27. There is empirical evidence showing men who feel treated unfairly by a supervisor at work are more likely to sexually harass other employees. Franciska Krings & Stéphanie Facchin, *Organizational Justice and Men's Likelihood To Sexually Harass: The Moderating Role of Sexism and Personality*, 94 J. APPLIED PSYCHOL. 501, 507 (2009) (demonstrating perceptions of organizational injustice increased sexual harassment); see Anne M. O'Leary-Kelly et al., *Sexual Harassment as Aggressive Behavior: An Actor-Based Perspective*, 25 ACAD. MGMT. REV. 372, 375–77, 384–85 (2000) (observing perceived injustices may lead one to sexually harass as a means of pursuing retributive justice); see also SABOTAGE IN THE AMERICAN WORKPLACE: ANECDOTES OF DISSATISFACTION, MISCHIEF, AND REVENGE (Martin Sprouse ed., 1992) (chronicling the way in which emotions such as envy can lead to harassment).

28. Shai Davidai & Thomas Gilovich, *The Headwinds/Tailwinds Asymmetry: An Availability Bias in Assessments of Barriers and Blessings*, 111 J. PERSONALITY & SOC. PSYCHOL. 835, 837 (2016) (observing that feeling injustice at work can cause people to “cut corners” or “engage in ethically questionable practices” to obtain the benefits obstructed by obstacles); Julia J. Lee & Francesca Gino, *Envy and Interpersonal Corruption*, in ENVY AT WORK AND IN ORGANIZATIONS 347, 353 (Richard H. Smith et al. eds., 2017) (noting envy can help “rationalize one's unethical actions toward others”); Christopher M. Sterling et al., *The Two Faces of Envy: Studying Benign and Malicious Envy in the Workplace*, in ENVY AT WORK, *supra*, at 57, 73 (observing that malicious envy may cause people to “morally disengage”).

29. *Infra* notes 201–06 and accompanying text.

30. *Infra* Parts II.B–C (discussing studies); see also Zinta S. Byrne & Russell Cropanzano, *The History of Organizational Justice: The Founders Speak*, in 2 JUSTICE IN THE WORKPLACE: FROM THEORY TO PRACTICE 3, 3–22 (Russell Cropanzano ed., 2001) (discussing the evolution of organizational justice theories).

catalyze internal reports of harassment, which can further deter discrimination.<sup>31</sup>

Organizational Justice offers the benefit, over many current policy efforts, of being an indirect (i.e., non-identity-conscious) means of achieving antidiscrimination. Identity-conscious reforms often engender controversy and feelings of exclusion among majority group members, both of which can impede social norm change.<sup>32</sup> Further, the kinds of policies that Organizational Justice warrants enjoy stronger empirical and scientific support than most Equal Employment Opportunity (EEO) policies.<sup>33</sup> Finally, as the #MeToo and #TimesUp movements have illustrated, justice can be a powerful framing device.<sup>34</sup> As the work of both sociologists and legal scholars has shown, people are receptive to arguments voiced in the register of fairness.<sup>35</sup> The breadth of a justice frame can thus facilitate coalition building.<sup>36</sup> By contrast, advancing antisubordination values through a protected class frame is a perpetual challenge: there are identity politics with which to grapple,<sup>37</sup> and a limit to how much

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31. Andrea M. Butler & Greg A. Chung-Yan, *The Influence of Sexual Harassment Frequency and Perceptions of Organizational Justice on Victim Responses to Sexual Harassment*, 20 EUR. J. WORK & ORGANIZATIONAL PSYCHOL. 729, 747–50 (2011) (arguing perceptions of procedural justice predict reports of sexual harassment).

32. Dobbin & Kalev, *Diversity Challenge*, *supra* note 14, at 49–50.

33. By “Equal Employment Opportunity,” or the more frequently used EEO, I usually refer to the policies, practices, or offices that are the outgrowth of a cottage industry that sprung up in the 1970s to help companies avoid running afoul of antidiscrimination laws. FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 10–11 (2009); *see also infra* Part III (discussing effective forms of organizational justice).

34. *Cf.* Lesley Wexler et al., *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 50–53 (describing the impact of the #MeToo movement).

35. *See* Eyer, *supra* note 9, at 1347 (discussing research on employees’ “expansive beliefs” on fairness in the workplace); *infra* Part I.A.2 (summarizing the research on meritocracy beliefs).

36. Eyer, *supra* note 9, at 1358 (arguing that extra-discrimination remedies, such as just-cause legislation may “allow the building of broad coalitions around a single movement for change”).

37. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20 (1990) (writing about “the dilemma of difference” in which “[t]he stigma of difference may be recreated both by ignoring and by focusing on it”); Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in LEFT LEGALISM/LEFT CRITIQUE 38, 57 (Wendy Brown & Janet Halley eds., 2002) (writing about the “double bind” for identity politics: on the one hand, wanting to have others recognize one’s identity as



support individuals will give to civil rights causes.<sup>38</sup> Advocating for more just organizations with specific policy recommendations in tow may be precisely the broad advocacy strategy needed to target organizations and further antistatutory values in a way that is both politically and socially palatable.<sup>39</sup>

Organizational Justice is particularly needed given the failings of antidiscrimination law. There has been a well-documented proliferation of judge-made rules and doctrines that work against plaintiffs in employment discrimination cases.<sup>40</sup> Some of these are procedural, such as heightened pleading standards,<sup>41</sup> more stringent class action requirements,<sup>42</sup> or mandatory arbitration agreements.<sup>43</sup> Other rules are substantive, such as those requiring a plaintiff to prove she is a member of

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unique and distinctive, but on the other hand, needing to “make valid generalizations about social groups” while avoiding demeaning or inaccurate stereotypes).

38. See RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 175–76 (2008) (analyzing the limited goodwill for civil rights causes); cf. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747–49 (2011) (discussing “pluralism anxiety”).

39. While this might sound like a version of interest convergence—whereby the interests of a subordinated minority must converge with majority group concerns—the reality is that antidiscrimination efforts require social buy-in and support in order to achieve lasting social change. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

40. *Infra* notes 41–45.

41. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–63 (2007) (sanctioning new “plausibility standard” which requires plaintiffs to show that claims are legally viable and factually plausible); *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (applying new plausibility standard to all types of civil claims). Empirical work shows dismissal rates in Title VII cases rose sharply after this tandem of cases was decided. EDELMAN, *supra* note 14, at 65–66.

42. ELLEN BERREY ET AL., *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY* 37–38 (2017) (explaining how courts have increasingly required more factual substantiation from class action plaintiffs prior to certification); EDELMAN, *supra* note 14, at 68–70 (same).

43. See EDELMAN, *supra* note 14, at 63–65, 134 (explaining how mandatory arbitration agreements are regressive for would-be employment discrimination litigants); Joint Statement from Law Women’s Associations Regarding Mandatory Arbitration Agreements (Dec. 3, 2018), [https://docs.google.com/document/d/1nSU-Lif9AxXoKY1p8DSD\\_g7sn0TMXQFsvHv7uL2NlBs/edit](https://docs.google.com/document/d/1nSU-Lif9AxXoKY1p8DSD_g7sn0TMXQFsvHv7uL2NlBs/edit) [https://perma.cc/C5LY-WFEL] (“Mandatory arbitration agreements prevent employees from seeking justice in court and limit the enforcement of substantive employment rights.”)

the protected class<sup>44</sup> or those allowing the judge to disregard evidence of bias.<sup>45</sup> For the two percent of plaintiffs who ultimately overcome these hurdles and prevail at trial, the wins are relatively modest<sup>46</sup>—and nearly half of those wins are later reversed on appeal.<sup>47</sup>

Although Organizational Justice is an established and robust area of research,<sup>48</sup> it has played only a minor role in legal scholarship.<sup>49</sup> Only a handful of legal articles have enlisted its principles, and typically for limited purposes.<sup>50</sup> Even within the social sciences there has been very little effort to examine the

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44. See Jessica Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 119–40 (2017) (exploring systematically the ways in which judges require that employment discrimination plaintiffs prove their membership in a protected class).

45. See generally SPERINO & THOMAS, *supra* note 11 (chronicling the various judge-made rules and doctrines, such as the same-actor inference or stray remarks doctrine, that are used to disregard evidence of bias). These rules and doctrines are discussed in greater depth in the “Dispositive Motions” section below. *Infra* Part I.B.2.

46. BERREY ET AL., *supra* note 42, at 13, 63 (discussing damages caps); see also *infra* note 164 and accompanying text (discussing monetary caps for individual lawsuits).

47. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 131 (2009) (observing, in a study that spanned seventeen years, that employee trial wins were reversed more than forty percent of the time on appeal, where only about nine percent of employer wins were reversed).

48. See, e.g., ORGANIZATIONAL JUSTICE, *supra* note 21; JUSTICE IN THE WORKPLACE, *supra* note 30; OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE, *supra* note 19.

49. For example, a search in Westlaw’s “Law Reviews & Journals” database conducted on December 18, 2018 for “ATLEAST10(“organizational justice”)” returns only nine law review articles, five of which concern organizational justice in the context of criminal law.

50. See, e.g., Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 27 (enlisting organizational justice to argue in favor of “due process rights designed to enhance worker voice and provide incentives for voluntary employer accommodation of caregiving”); Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 37–40 (2008) (observing that organizational justice is the primary frame through which dispute system designs are evaluated, but arguing it is insufficient in that it does not address “the actual, objective outcome”); John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 632–37 (2005) (positing organizational justice as one value that may conflict with a business person’s other legal and ethical obligations).

relationship between Organizational Justice and workplace discrimination<sup>51</sup> or harassment.<sup>52</sup> As such, this Article's chief contribution is to systematically consider how Organizational Justice might function as a tool of antidiscrimination.

This Article proceeds in three parts. Part I of this Article takes stock of the latest social science and legal research to provide a sweeping account of how employment discrimination law and policy is failing victims. Considering the cumulative barriers to securing legal recourse provides a unique vantage point for understanding the uphill climb for would-be discrimination plaintiffs. Part II systematically builds the case for Organizational Justice as a tool of antidiscrimination, exploring the relationship both in theory and in practice. There, I show how Organizational Justice has the potential to decrease discrimination and sexual harassment, moderate the effects of discrimination, and increase internal reporting. Part III then theorizes the hallmark values of policies that further Organizational Justice as well as identifies specific approaches that can help advance fairness within the workplace. It also collects and criticizes the arguments against "new governance" approaches, in which organizations voluntarily self-govern in lieu of top-down regulation.

## I. THE FAILURE OF EMPLOYMENT DISCRIMINATION LAW AND POLICY

For decades, scholars have lamented the legal difficulties faced by employment discrimination plaintiffs.<sup>53</sup> New research

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51. Stephen Wood et al., *Discrimination and Well-Being in Organizations: Testing the Differential Power and Organizational Justice Theories of Workplace Aggression*, 115 J. BUS. ETHICS 617, 618 (2013) (noting the literature has generally failed to consider how justice perceptions mediate workplace discrimination).

52. See Cristina Rubino et al., *And Justice for All: How Organizational Justice Climate Deters Sexual Harassment*, 71 PERSONNEL PSYCHOL. 519, 520 (2018) (observing that most social science studies on sexual harassment have "focus[ed] on gender-related antecedents and fail[ed] to explore more general organizational factors"). While the research within the social sciences drawing a line between organizational justice and discrimination is nascent, it is compelling.

53. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Anti-discrimination Law*, 94 CAL. L. REV. 1, 43 (2006) (noting that the law is unlikely to sanction discrimination that stems from implicit biases); 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) (arguing Title VII is inadequate to address unconscious forms of bias); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*,

indicates, however, that the long odds faced by such plaintiffs are even longer than previously thought.<sup>54</sup> Here, I bring together findings from a variety of disciplines to provide a sweeping account of how, at each stage, the law's capacity to deter discrimination or give adequate recompense is thwarted. This Part proceeds chronologically, from the initial stage of rights mobilization all the way to a fully litigated outcome. Most legal scholarship is understandably focused on, at most, one or two of the barriers outlined here.<sup>55</sup> Moreover, legal scholars have devoted relatively little attention to the psychological impediments to claiming antidiscrimination rights.<sup>56</sup> But considering the cumulative psychological and doctrinal barriers to securing legal recourse in one place provides a unique perspective on the challenges for victims of employment discrimination.

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101 COLUM. L. REV. 458, 460 (2001) (noting discriminatory behavior often results from "cognitive or unconscious bias, rather than deliberate, intentional exclusion"); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 993–95 (2005) (noting that even though disparate impact liability is the most promising way of dealing with subtler forms of bias, such litigation is more costly (primarily because of expert testimony) and expressly allows a defendant to justify any disparities). *See generally* SPERINO & THOMAS, *supra* note 11 (discussing the varied flaws in employment discrimination doctrine).

54. *See generally* BERREY ET AL., *supra* note 42.

55. *See, e.g.*, Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 523–47 (2018) (noting that "many courts have categorically excused, erased, or ignored evidence of biased remarks rather than considering their relevance on a case-by-case basis"); Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 637 (2003) ("Neither the statutory language of Title VII nor current Supreme Court precedent justifies the onerous burden that lower courts are imposing on employees who are subjected to discriminatory or retaliatory treatment."); Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias*, 104 CAL. L. REV. 1, 7 (2016) ("By providing employers with a virtually irrebuttable defense to charges of discrimination in this context, the same-actor doctrine converts this moral credential into a legal privilege to engage in bias, thus licensing workplace discrimination."). *But see* SPERINO & THOMAS, *supra* note 11 (offering a more sweeping account in their book-length treatment).

56. The most thorough exploration by a legal scholar to date is Katie Eyer's article *That's Not Discrimination*. Eyer, *supra* note 9.

## A. PEOPLE DON'T FILE EMPLOYMENT DISCRIMINATION CLAIMS

Traditionally, legal scholars have focused their efforts on the procedure and doctrine of law, even though rights mobilization—which is more sociological than legal in nature—is arguably the most important stage for discrimination recourse. After all, if people fail to see an act at work as illegal discrimination (or they see it but will not file a claim), the most doctrinally aggressive laws in the world cannot help. While it appears that employees have become more willing to assert claims of sexual harassment in the current social environment,<sup>57</sup> most workers are still generally resistant to advancing claims of discrimination.<sup>58</sup> In fact,

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57. See, e.g., Associated Press, *Kevin Spacey Apologizes After Joliet Native Anthony Rapp Accuses Him of Sexual Advance*, CHI. TRIB. (Oct. 30, 2017), <https://www.chicagotribune.com/entertainment/ct-anthony-rapp-kevin-spacey-sexual-advance-20171029-story.html> [<https://perma.cc/F6K6-TQDR>]; Brooks Barnes & Cara Buckley, *From Time's Up to Inclusion Riders: Women Take Charge at the Oscars*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/movies/women-oscars-me-too.html> [<https://perma.cc/B755-XAFR>]; Joe Coscarelli, *R. Kelly Faces a #MeToo Reckoning as Time's Up Backs a Protest*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/arts/music/r-kelly-timesup-metoo-muterkelly.html> [<https://perma.cc/JQC9-LFES>]; Sheryl Gay Stolberg et al., *Al Franken To Resign from Senate Amid Harassment Allegations*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/politics/al-franken-senate-sexual-harassment.html> [<https://perma.cc/V85M-QZFK>]; Will Graves, *Gymnast McKayla Maroney Alleges Sexual Abuse by Team Doctor*, CHI. TRIB. (Oct. 18, 2017), <https://www.chicagotribune.com/sports/breaking/ct-mckayla-maroney-larry-nassar-metoo-20171018-story.html> [<https://perma.cc/WF5J-FJTE>]; Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/LWH7-RRY2>]; Stephanie McCrummen et al., *Woman Says Roy Moore Initiated Sexual Encounter When She Was 14, He Was 32*, WASH. POST (Nov. 9, 2017), [https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0\\_story.html](https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0_story.html) [<https://perma.cc/5NFZ-REZY>]; Stephanie Zacharek et al., *Person of the Year 2017: The Silence Breakers*, TIME (Dec. 6, 2017), <https://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/4958-JRKH>].

58. See *infra* Parts I.A.3–4. The evidence that relates to actual charges filed is mixed. There is some evidence that rates of federal antidiscrimination lawsuits are declining. For example, over a 12-month period ending in March of 2003, nearly 21,000 civil rights employment cases were filed. SPERINO & THOMAS, *supra* note 11, at 143. That number declined to 12,665 over the same period in 2013. *Id.* It is hard to know exactly what to make of this. Charge statistics from the EEOC over a 20-year period have remained fairly steady. See *Charge Statistics (Charges Filed with EEOC), FY 1997 Through FY 2017*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/>

one recent study estimated that 1 in 100 possible African American grievants files a charge with the EEOC and just 13 in 10,000 file a federal lawsuit.<sup>59</sup> This Section argues that potential plaintiffs do not file claims for four reasons: (1) their disbelief of discrimination; (2) their belief in meritocracy values; (3) their fear of retaliation; and/or (4) their fear of poor outcomes.

### 1. Disbelief of Discrimination

People are unlikely to believe that discrimination is the culprit for any particular outcome at work. In particular, most people have a narrow mental paradigm of what constitutes discrimination.<sup>60</sup> As we confront ambiguous situations in life, we assess these situations through a type of mental shortcut: by comparing these new situations with existing mental templates of potential explanations.<sup>61</sup> For example, if someone is denied a job promotion and the reason for the denial is not straightforward, the person could hypothesize that the reason was discrimination, merit, nepotism, or a personality clash. In order to settle on a reason, that person would likely compare the facts of the situation to existing prototypes of discrimination, merit, nepotism, or personality conflicts. "The process of making judgments thus becomes one of comparing salient features of an existing template and the situation currently demanding interpretation, and judging the extent of similarity."<sup>62</sup> Templates vary from person to person, of course, but most people's templates of discrimination are quite narrow, requiring strong evidence of invidious intent and clear harm before they will attribute a result to discrimination.<sup>63</sup> Thus, outside of exceptional circumstances, people are unlikely to identify discrimination as the cause of a workplace outcome.

Another reason that people disbelieve discrimination as the cause for any particular outcome at work pertains to the high visibility of EEO policies found in the modern workplace. Such

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enforcement/charges.cfm [<https://perma.cc/T7HP-M5WC>]. So, the decrease in lawsuits filed could indicate that people are experiencing less reasonably actionable discrimination (unlikely), that people are simply less willing to pursue justice through the courts (more likely), or something else with an administrative explanation.

59. BERREY ET AL., *supra* note 42, at 264.

60. *See generally* Eyer, *supra* note 9.

61. *Id.* at 1312–13.

62. *Id.* at 1312.

63. *Id.* at 1330.

policies have the potential to signal that the employer is generally nondiscriminatory. Employment policies such as affirmative action, antiharassment policies, or diversity training have proliferated over the last fifty years and are now ubiquitous.<sup>64</sup> These policies have been termed “structurally symbolic civil rights.”<sup>65</sup> Such policies symbolize an organization’s good-faith efforts to avoid discrimination and comply with statutory mandates—regardless of whether such policies are actually effective in helping racial minorities or women achieve good outcomes at work. These policies can thus inadvertently keep people from exercising their rights by causing some employees to see an organization as affirmatively nondiscriminatory, even when the facts don’t bear that out.<sup>66</sup> This perception, in turn, weakens the likelihood that employees will take formal action to redress perceived violations of antidiscrimination laws.<sup>67</sup> These structures also lower the possibility that plaintiffs’ lawyers will take on a particular lawsuit because judges and juries are less likely to find that discrimination occurred when such structures are present.<sup>68</sup>

## 2. Belief in Merit

Connected to people’s tendency to disbelieve narratives of discrimination is the fact that, when tasked with analyzing employment decisions, people tend to believe explanations that emphasize talent over other possible explanations. There is evidence that “the overwhelming majority of Americans” subscribe to meritocracy beliefs, which makes them more likely to understand discrimination as aberrational.<sup>69</sup> Two very thoughtful books published since 2014 take aim at a pure notion of talent or

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64. The reasons for this proliferation are beyond the scope of this Article, but are comprehensively explored in DOBBIN, *supra* note 33.

65. EDELMAN, *supra* note 1441, at 216 (arguing that “we live not in a post-civil rights society but rather in a symbolic civil rights society”).

66. See, e.g., *id.* at 157 (detailing a series of experiments that, taken cumulatively, “show that the presence of symbolic structures in organizations causes most people to view organizations as fair, irrespective of actual injustices, inequalities, and discrimination”); Anna-Maria Marshall, *Idle Rights: Employees’ Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC’Y REV. 83, 84 (2005) (examining rights at work in a grievance procedure and concluding that “women complain about only the most serious or most troubling forms of sexual conduct”).

67. EDELMAN, *supra* note 14, at 161.

68. *Id.* at 38; accord BERREY ET AL., *supra* note 42, at 264.

69. Eyer, *supra* note 9, at 1304.

merit: Joseph Fishkin's *Bottlenecks* and Robert Frank's *Success and Luck*.<sup>70</sup> While it is tempting to view outcomes as part nature, part nurture, Fishkin believes that all behavioral outcomes are 100 percent nature *and* 100 percent nurture.<sup>71</sup> Neither is a sufficient causal mechanism; neither does any work by itself.<sup>72</sup> Fishkin seeks a more pluralistic model of opportunities, in part because of his philosophical orientation that there is "no such thing as 'natural' talent or effort, unmediated by the opportunities the world has afforded us, which include our circumstances of birth."<sup>73</sup> Similarly, Frank notes that it is both one's genes and one's environment that determine how smart one is, which in turn informs whether one is likely "to perform well at the tasks rewarded most lavishly by society."<sup>74</sup> But the factor that bears most on workplace success is who one's parents happen to be—a fact for which no one can rightly take credit.<sup>75</sup> There are a host of specific advantages (or disadvantages) that parents pass along to their children, and in the end, this is a fundamental constraint on equal opportunity.<sup>76</sup> Indeed, the correlation between parents' income and their children's later income is approximately the same as the correlation for height.<sup>77</sup> A robust critique of merit—

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70. JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014); ROBERT H. FRANK, *SUCCESS AND LUCK: GOOD FORTUNE AND THE MYTH OF MERITOCRACY* (2016).

71. FISHKIN, *supra* note 70, at 95.

72. Fishkin offers an illustration: The conventional understanding of nature/nurture is that each contributes to the person separately, in the way that two people, say Billy and Suzy, might partly fill a bucket with water. One might ask about Billy and Suzy's contributions to the bucket of water and the answer might be that Billy is 60% responsible, while Sally provided 40% of the water. Fishkin says natural and environmental forces are, rightly understood, much more synergistic and offers a revised picture: Suzy brings the hose and Billy turns on the water. Now, the question of how much of the filled bucket is due to Billy and Suzy, respectively, makes little sense. The bucket of water is due 100% to both of their unique and complementary contributions. *Id.* at 95–96.

73. *Id.* at 83.

74. FRANK, *supra* note 70, at 8.

75. *Id.* ("[I]f you want to be smart and highly energetic, the most important single step you could take is to choose the right parents. But if you have such qualities, on what theory would it make sense for you to claim moral credit for them? You didn't choose your parents, nor did you have much control over the environment in which you were raised. You were just lucky.")

76. FISHKIN, *supra* note 70, at 48–56 (discussing incisively "the problem of the family" as it relates to equal opportunity).

77. FRANK, *supra* note 70, at 8 (citing economist Alan Krueger).



which is developed by both Fishkin and Frank, and has been previously advanced by esteemed philosophers such as Ronald Dworkin—seems like it would cause many to moderate their beliefs about deservingness.<sup>78</sup> Meritocracy beliefs persist, however, and there are at least three reasons why.

The first reason is perhaps the most obvious: people overplay effort and downplay chance because it makes them look more impressive. The academic explanation for this phenomenon is that people seek to manage their image in such a way that others will attribute their successes to internal traits, such as talent or perseverance, and attribute their failures to external factors, such as sickness or death in the family.<sup>79</sup> For example, someone running a race would likely prefer that an impressive time be attributed to her ability or grit; conversely, if she does not run the race well, she might say the course was particularly difficult. People who are the most successful are thus psychologically primed to rationalize their success as the inevitable by-product of hard work.<sup>80</sup> Even when no one else is watching, it is more internally palatable to credit successes to one's own industriousness rather than to chalk them up to fate or foul play.

The second reason is slightly less obvious, but centers on the notion that merit and results often have a high degree of correlation. Those at the high end of the economic food chain are almost invariably driven and talented.<sup>81</sup> This strong correlation can cause people to believe that talent alone drives success.<sup>82</sup> The people who are in the news for having succeeded are usually

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78. Dworkin argues that it is unjust for people to have less means when it is due to "brute bad luck." RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 347 (2000). He further claims "[i]t is bad luck to be born into a relatively poor family or a family that is selfish." *Id.* Luck, according to Dworkin, includes "what might be thought to be matters of identity as well as accidents that happen once identity is fixed, and the situation and properties of one's parents or relatives are as much a matter of luck, in that sense, as one's own physical powers." *Id.* He enlists these characterizations in part to argue in favor of a "system of tax and welfare provision" based on a counterfactualized insurance market, in which people could theoretically purchase insurance to preemptively hedge against the risk of inequality of resources. Ronald Dworkin, *Sovereign Virtue Revisited*, 113 *ETHICS* 106, 107–09 (2002).

79. Edward R. Hirt et al., *Self-Reported Versus Behavioral Self-Handicapping: Empirical Evidence for a Theoretical Distinction*, 61 *J. PERSONALITY & SOC. PSYCHOL.* 981, 981 (1991).

80. FRANK, *supra* note 70, at xiv.

81. *Id.* at 67.

82. *Id.* at 66–68.

gifted and ambitious. CEOs are unusually shrewd, famous actors are exceptional thespians, professional athletes are able to accomplish amazing feats with their bodies, and so on. In short, many people harbor meritocracy beliefs because much of what they see in the media or in their own personal lives is meritocracy-confirming. What is less visible, however, is the role of luck—as embodied in the families to which people were born or the geographic location in which they grew up. Thus, the enormous number of driven and talented people who were not lucky enough—by way of genes or environment—to find success remain hidden from public view and largely unconsidered.<sup>83</sup>

A third reason that people subscribe to meritocracy beliefs is hidden in plain sight: because sustaining these beliefs is fundamentally adaptive. There is robust evidence that downplaying luck through a belief that only talent and effort matter leads to better outcomes.<sup>84</sup> For example, in one study, students were much more likely to persist with difficult academic tasks if they harbored strong meritocracy beliefs.<sup>85</sup> If one's worldview of success centers on talent and effort, then one may naturally be motivated to work hard, which in turn makes success more likely. In this way, people might be strict adherents to meritocracy beliefs in part because it is instrumentally useful, which also makes it more likely that such beliefs will survive and pass to the next generation.<sup>86</sup>

### 3. Fear of Retaliation

Fear of retaliation is perhaps the most obvious reason that people choose not to file discrimination claims, and such fears are justified. One study found that two-thirds of employees who

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83. *See id.* at 151–57 (showing through simulations the way in which luck plays a critical role in whether talented people achieve material success).

84. *Id.* at 69–78.

85. *See* Bernard Weiner, *Attribution Theory, Achievement Motivation, and the Educational Process*, in *ACHIEVEMENT MOTIVATION AND ATTRIBUTION THEORY* 185 (Bernard Weiner, ed. 1974) (showing that internal attributions, such as ability or effort, rather than external ones, such as luck, suits one better for future successes).

86. FRANK, *supra* note 70, at 73–77 (observing a Darwinian flare to meritocracy beliefs by acknowledging that “[p]arents who teach their children that luck doesn’t matter may for that very reason be more likely to raise successful children than parents who tell their children the truth”).

spoke up against workplace mistreatment faced some form of retaliation.<sup>87</sup> As a result, every antidiscrimination law features antiretaliation provisions, which are intended to ensure that employees cannot be fired for lodging a complaint.

Even though legal protection for retaliation is built into antidiscrimination laws, it is far from adequate. Specifically, those who complain internally are not protected from retaliation unless they can show their belief of illegality was objectively reasonable.<sup>88</sup> While it may sound sensible to require that grievants limit their complaints to conduct which is reasonably understood as illegal, the law of employment discrimination often does not track with lay understandings of discrimination or harassment.<sup>89</sup>

The fear of retaliation, coupled with the complexity of discrimination law, can erode the adequacy of legal protections. If an employee complains too early, the conduct may not yet be severe enough to be objectively illegal; but if they complain too late, it may vitiate their legal claim either by falling outside of the limitations period or by allowing the employer to invoke the affirmative defense that the employee failed to utilize its internal investigation process.<sup>90</sup> Doctrines such as the same-actor infer-

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87. See Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003) (noting that only 34% did not experience retaliation in response to speaking up against sexual harassment or incivility).

88. *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001); see Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 83 (2005) (“Since *Breeden*, courts have required plaintiffs bringing retaliation claims under the opposition clause to demonstrate a good faith, reasonable belief that the underlying conduct amounted to unlawful discrimination.”).

89. Studies have shown that employees frequently overestimate the employment protections afforded to them by law. Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 730 (2018) (citing Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1558 & n.236 (2014)).

90. The Supreme Court established a two-part affirmative defense by which employers may insulate themselves from liability for harassment that does not result in a tangible employment action. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). Under the first part of the defense, an employer must prove it “exercised reasonable care to prevent and correct promptly any harassing behavior.” *Ellerth*, 524 U.S. at 765. An employer will typically meet this requirement by having in place an “effective internal investigation process that” is set up to address complaints of harassment. Alex B. Long, *The Troublemaker’s Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L.

ence,<sup>91</sup> stray remarks doctrine,<sup>92</sup> and adverse action doctrine<sup>93</sup> further increase the likelihood that an employee could mistakenly believe certain conduct violates the law.

But even if plaintiffs were fully versed in the law and the law was more protective than it is, fear of retaliation would likely remain a significant consideration for employees. Many employers would still retaliate and, just like with the issue of discrimination, the goal is to prevent retaliation—not only give proper recourse. Moreover, there are many forms of low-level retaliation, e.g., managers or other co-workers are no longer friendly toward you, that are not actionable,<sup>94</sup> but matter quite a bit to most people.

#### 4. Fear of Poor Outcomes

One final reason people do not report discrimination is that they decide the costs of doing so exceed the benefits. One prime benefit is a material recovery from the employer. But the odds of “winning” discrimination claims are bleak.<sup>95</sup> Many fail to exhaust their administrative remedies, which in the context of an employment discrimination claim means filing a complaint with the EEOC or an equivalent state agency within the requisite time period, giving the agency sufficient notice of the claim and

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REV. 931, 952 (2007). To satisfy the second part of the defense, an employer must show that the employee “unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

91. Under this inference, courts resist allegations of discrimination if the alleged discriminator is the same person who made the original hiring decision. *See* Quintanilla & Kaiser, *supra* note 55 (discussing same-actor inference in article-length treatment); *see infra* note 147 and accompanying text.

92. Under this doctrine, courts exclude words or statements that could be used to show bias if they are unrelated to the employment decision, too remote in time, or too ambiguous. *See* Clarke, *supra* note 55 (discussing stray remarks doctrine in article-length treatment); *infra* note 148 and accompanying text.

93. Under this doctrine, actions are often not considered serious enough to be actionable as discrimination. Actions that are often not considered serious enough include giving an employee negative evaluation, assigning additional work, or even threatening to fire a worker. *See infra* note 149 and accompanying text.

94. *See infra* note 149 and accompanying text (explaining the adverse action doctrine, under which courts often judge retaliatory actions that fall short of termination as not serious enough to be actionable under employment discrimination law).

95. *See supra* notes 46–47 and accompanying text.

time to investigate, and ultimately receiving a “right to sue” letter.<sup>96</sup> Unless all of these requirements are met, a plaintiff does not have standing in court.<sup>97</sup> Additionally, the odds of finding an attorney to take an employment discrimination case are long.<sup>98</sup> One result is that about one-fifth of all such plaintiffs proceed *pro se*, which impairs the chances of success.<sup>99</sup> Even assuming one finds an attorney willing to take the case, the old model of going to trial against the company and prevailing in a way that puts the pinch on a big corporation is outdated. Just six percent of employment discrimination cases make it to trial, and only in one-third of those cases does the plaintiff prevail.<sup>100</sup> In the two percent of filings in which a plaintiff ultimately succeeds at trial, the award is “typically about \$150,000.”<sup>101</sup>

A rational person will also assess the costs of bringing a discrimination claim. The costs are far more certain than any benefits and come in many forms. Chief among the costs is the possibility of social backlash. The psychological literature shows that coworkers tend to denigrate those who complain of discrimination, even when there is evidence that the claim is true.<sup>102</sup>

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96. *Filing a Charge of Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N <https://eeoc.gov/employees/charge.cfm> [<https://perma.cc/4T6W-A78U>].

97. *Id.*

98. BERREY ET AL., *supra* note 42, at 264 (“Our interviews with plaintiffs’ attorneys reveal that they take only about one in ten cases for which they are approached.”).

99. *Id.* at 68 (observing one in five plaintiffs litigates *pro se*).

100. *Id.* at 61 fig.3.4. The 6% is actually a fairly rosy finding. In one of the most comprehensive studies of employment discrimination suits (all federal cases from fiscal year 1970 to 2001), the authors found a steady decline in employment discrimination claims reaching trial, culminating in 3.7% for 2001. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 438 (2004). Another study from the Southern District of New York over four years (1997–2001) showed an employment discrimination trial rate of 3.8%, with a plaintiff win rate at trial of 33.6%. See Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISP. RESOL. J., 56, 56–57 (2003). A more recent study, focused only on the District of Maryland between 2007 and 2008, found employment discrimination plaintiffs reached trial in less than 2% of cases. Charles A. Brown, Note, *Employment Discrimination Plaintiffs in the District of Maryland*, 96 CORNELL L. REV. 1247, 1259 tbl.1 (2011) (showing bench trials at 0.73% and jury trials at 1.17% of all outcomes).

101. BERREY ET AL., *supra* note 42, at 264.

102. Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP REL. 227, 234–36 (2003). Reporting discrimination may

Workers who sue are also often vilified by their employers and sometimes badmouthed more widely within the industry.<sup>103</sup> A multi-decade, qualitative study of discrimination plaintiffs found that litigation imposes a “high personal cost,” with many of the litigants experiencing one or more of the following as by-products of their lawsuit: joblessness, depression, alcoholism, or divorce.<sup>104</sup>

Finally, even if employees do eventually decide to file a claim, it may be too late. Employment discrimination laws have “internal limits” that require claims to be filed with the EEOC or a similar state agency within 180 or 300 days<sup>105</sup>—a short deadline when compared to the limitation periods for tort or contract claims.<sup>106</sup> Similarly, once the EEOC has worked through the charge and issued a “right to sue” letter, the plaintiff has only 90 days from then to file in court.<sup>107</sup> Any employee will naturally require time to mull the potential consequences of filing a legal claim, but by the time they have considered all of them, the limitations period may have run. Employees may also be reluctant to bring claims while still employed, for fear of poisoning the well or encountering interpersonal hostility. But after being terminated, it is usually too late to go back and complain about earlier years of problematic decisions and treatment.<sup>108</sup>

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also put one’s coworkers in the position of having to give information or testimony they may not want to give.

103. BERREY ET AL., *supra* note 42, at 19, 265.

104. *Id.* at 266. They open their book with the example of a “successful” employment discrimination litigant. This plaintiff sued his employer for racial harassment, settled his claim for \$50,000, and even won back his job. Statistically speaking, he “won.” But he also suffered many harms. Tensions from the lawsuit led to a divorce; he felt cheated by the settlement; he paid 20% of the settlement to his lawyer; his ex-wife claimed half of the remaining payment; and finally, though he regained his job, he lost seniority, which may have played a role in his layoff one year later due to downsizing. *Id.* at 3–5.

105. The general requirement is to file a charge within 180 calendar days from the date of discrimination, but the deadline is extended to 300 days “if a state or local agency enforces a law that prohibits employment discrimination on the same basis.” *Time Limits for Filing a Charge*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/timeliness.cfm> [<https://perma.cc/8SBJ-9FJ5>].

106. SPERINO & THOMAS, *supra* note 11, at 10–12.

107. 42 U.S.C. § 2000e-5(f)(1) (2018).

108. The exception to this is hostile work environment and pay discrimination claims. In the former, the idea is that a hostile work environment can build over years and so it is appropriate to consider all of the acts that constitute a full-grown hostile workplace. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S.

## B. PEOPLE DON'T "WIN" EMPLOYMENT DISCRIMINATION CLAIMS

Employment discrimination plaintiffs are derailed by the law at every stage of litigation. Procedurally, many plaintiffs are forced to arbitrate their claims—a phenomenon that disadvantages employment discrimination plaintiffs. Additionally, the barriers for class actions have risen to the point that only one percent of filings are certified, chilling the prospects for those with claims that only make sense in aggregated form.<sup>109</sup> Among cases filed in court, about one-third are disposed of by motion, but virtually all of these successful motions are ones filed by the employer.<sup>110</sup> In the few cases that actually reach trial, plaintiffs rarely win and the odds of that decision being reversed on appeal are nearly a coin flip.<sup>111</sup> Finally, most cases settle for small amounts and silence victims through nondisclosure agreements.<sup>112</sup> While this section on legal barriers will be compressed—in part due to the volume of prior coverage and in part due to constraints of length<sup>113</sup>—it will provide a survey of these impediments.

### 1. Mandatory Arbitration and Class Relief

Procedurally, there are several different ways that plaintiffs are derailed from pursuing litigation. One such way is found in the law surrounding class actions. Class actions have long been understood as indispensable for antidiscrimination: class actions generate publicity and can better deter future discrimination;<sup>114</sup>

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101, 115 (2002). Regarding the latter, the Lilly Ledbetter Fair Pay Act of 2009 modified the law to say that the discriminatory act renews itself with each new inequitable paycheck. Pub. L. No. 111-2, 123 Stat. 5.

109. BERREY ET AL., *supra* note 42, at 264.

110. *Id.* at 60–65.

111. *Supra* notes 46–47 and accompanying text. Another comprehensive study found that plaintiffs win at trial between 20 and 40% of the time upon reaching trial—depending upon whether the trial is in front of a judge (19.29%) or jury (37.77%). Clermont & Schwab, *supra* note 100, at 457 app. (analyzing employment discrimination outcomes over a period of time between 1979 and 2000).

112. BERREY ET AL., *supra* note 42, at 19.

113. Entire books have been devoted to the limits and nuances of employment discrimination procedure and substantive doctrine, including two excellent ones published just last year. *See, e.g.*, JOSEPH A SEINER, *THE SUPREME COURT'S NEW WORKPLACE: PROCEDURAL RULINGS AND SUBSTANTIVE WORKER RIGHTS IN THE UNITED STATES* (2017); SPERINO & THOMAS, *supra* note 11. Exploring all of these nuances is beyond the scope of this Article.

114. SEINER, *supra* note 113, at 59.

discriminatory people or policies often harm more than just one employee in the organization;<sup>115</sup> and the damages are often low enough that aggregation is necessary to incentivize lawyers to bring such suits.<sup>116</sup> Indeed, the advisory notes on Rule 23(b)(2) specifically mention civil rights lawsuits as ones where class action status may be particularly appropriate.<sup>117</sup> Even so, it has become substantially harder to bring (and win) class action cases. Courts have increasingly applied more stringent interpretations of the commonality requirement,<sup>118</sup> as well as required more in the way of merits before certifying the class.<sup>119</sup> These changes culminated in *Wal-Mart Stores v. Dukes*, where the Supreme Court declined to certify a class in an employment discrimination case in which the female plaintiffs alleged they were paid unequally, disproportionately excluded from management, and frequently encountered bias.<sup>120</sup> Nevertheless, the Court concluded that the discriminatory actions of local managers across the country were not enough to establish a company-wide “pattern and practice” of discrimination.<sup>121</sup> In light of the fact that the Court would not allow this meticulously-litigated case out of the starting gate, plaintiffs’ lawyers are far less apt to bring such lawsuits in the future.<sup>122</sup>

Another procedural impediment is found in mandatory arbitration agreements (MAAs). Mandatory arbitration has long been derided by scholars as a way in which employers tilt the odds further in their favor.<sup>123</sup> Nevertheless, MAAs are more popular than ever, with an estimated sixty million workers being subject to such agreements.<sup>124</sup> Companies like Google, Star-

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115. *Id.* at 13.

116. *Id.* at 59 (noting class actions are critical for those with “smaller monetary claims, who might not otherwise have been able to obtain representation” to access their statutory rights); *id.* at 158.

117. FED. R. CIV. P. 23(b)(2) advisory committee’s note to 1966 amend.

118. BERREY ET AL., *supra* note 42, at 37.

119. EDELMAN, *supra* note 41, at 69.

120. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

121. *Id.* at 69.

122. SEINER, *supra* note 113, at 64.

123. See, e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1649–50 (2005) (recognizing that MAAs allow employers to utilize a variety of methods to gain an advantage over employees).

124. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More than 60 Million American Workers*, ECON. POLICY INST. (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf> [<https://perma.cc/6MWT-8R6K>].



bucks, and Uber all require workers to sign MAAs.<sup>125</sup> The problems with mandatory arbitration are varied, but can be distilled into three essential concerns: (1) it unfairly favors employers, (2) it is opaque and nonreviewable, and (3) it further erodes class actions.

First, employers are systematically favored by arbitration. While employees rarely “win” in litigation and recover only modest amounts when they do,<sup>126</sup> employees win even less frequently and in smaller amounts when arbitrating.<sup>127</sup> This is in part because employers, as “repeat players,” can choose arbitrators that have been known to rule in favor of other employers.<sup>128</sup> Arbitrators likewise have a built-in incentive “to favor employers, who unlike employees, are in a position to hire the arbitrator again in the future.”<sup>129</sup> Thus employers begin arbitration with a thumb on the scale.

Second, arbitration is a private form of resolution that is unaccountable to the public. This opacity implicates substantive justice, as even if an arbitrator’s decision is decided incorrectly as a matter of law, it is nearly impossible to appeal the outcome under federal law.<sup>130</sup> Furthermore, arbitrators are more likely to conserve rather than expand the law, a tendency that owes

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125. Alexia Fernandez Campbell & Alvin Chang, *There’s a Good Chance You’ve Waived the Right To Sue Your Boss*, VOX (Sep. 7, 2018), <https://www.vox.com/2018/8/1/16992362/sexual-harassment-mandatory-arbitration> [<https://perma.cc/TB3G-WQP6>].

126. *Supra* notes 46–47 and accompanying text.

127. Zev J. Eigen & David Sherwyn, *Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System*, 26 CORNELL J.L. & PUB. POL’Y 217, 259 (2016); David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 478–79 (2016) (analyzing arbitration win rates through statistics); Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 185 (2019).

128. See, e.g., Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMP. LEGAL STUD. 1, 15 (2011) (finding a strong “repeat-employer-arbitrator pairing effect” and concluding we ought to be concerned about possible “arbitrator bias” or an employer’s ability to select more pro-employer arbitrators).

129. Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463, 507–08 (2018).

130. David Seligman, *The National Consumer Law Center’s Model State Consumer and Employee Justice Enforcement Act: Protecting Consumers, Employees, and States from the Harms of Forced Arbitration Through State-Level Reforms*, 19 J. CONSUMER & COM. L. 58, 59 (2016).

partly to the need to appease employers who can rehire the arbitrator in the future.<sup>131</sup> This inherent secrecy starkly disadvantages employees.

Third, the Supreme Court's 2018 ruling in *Epic Systems Corp. v. Lewis*, which allows companies to require workers to accept *individual* arbitration, further undermines the possibility of class relief.<sup>132</sup> The most recent evidence shows that nearly half of employees covered by arbitration clauses have waived their right to be part of a class action.<sup>133</sup> As a result, employees must proceed individually through the arbitration process, further increasing the likelihood that their claims will fail to spur systemic change within the organization. All three of these concerns have coalesced in the recent very public criticism of MAAs, which has spanned from law students at elite schools protesting against law firms<sup>134</sup> to victims of sexual harassment protesting the unavailability of a judicial forum.<sup>135</sup>

## 2. Dispositive Motions

Another reason plaintiffs don't "win" discrimination claims lies in the increasing use of dispositive motions. Judges have adopted a host of rules and doctrines that they use to dismiss employment discrimination cases. Among federal employment discrimination cases, approximately thirty-seven percent are resolved by dispositive motions.<sup>136</sup> Among those cases that achieve a fully litigated outcome, i.e., those that are not settled, eighty-six percent are dismissed via motion.<sup>137</sup> Further, the result in dismissals is almost completely one-sided, with recent studies

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131. Sternlight, *supra* note 127, at 186–93 (arguing that employment arbitrators are less likely to issue progressive decisions than courts).

132. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (stating arbitration agreements with class and collective waivers are enforceable under the FAA).

133. Colvin, *supra* note 128, at 2.

134. See, e.g., Alexia Fernandez Campbell, *Female Law Students Pressure Firms To Stop Banning Sexual Harassment Suits*, VOX (Dec. 3, 2018), <https://www.vox.com/2018/12/3/18123798/womens-student-association-mandatory-arbitration> [<https://perma.cc/PE49-4RZE>].

135. Nuñez, *supra* note 129, at 467.

136. BERREY ET AL., *supra* note 42, at 60–65 (basing its conclusion on combining the dismissal rates for several procedures yielding involuntary disposal without a trial).

137. Of the author's quantitative dataset of 1672 cases, 833 were settled at some stage in the litigation. Of the 710 remaining cases that reached a fully litigated outcome, 610 (or 86%) of those were dismissed. *Id.* at 68.

finding that three-quarters of summary judgment motions are resolved in favor of the employer.<sup>138</sup>

For motions to dismiss, the *Twombly* and *Iqbal* cases—decided by the Supreme Court in 2007 and 2009, respectively—have starkly increased dismissal rates in antidiscrimination suits.<sup>139</sup> Historically, courts employed a generous standard and only dismissed complaints if it was “beyond doubt” the plaintiff could prove “no set of facts” that would establish liability.<sup>140</sup> But *Twombly* and *Iqbal*, taken together, require plaintiffs’ pleadings in all civil claims to be “facially plausible” in order to survive a motion to dismiss.<sup>141</sup> This new standard might generally seem reasonable, but factual development is particularly difficult in employment discrimination cases where the touchstone is often intent—something that is nearly impossible to establish without access, often through discovery, to the employer’s personnel and policies.<sup>142</sup> Heightened pleading standards thus result in a catch-22: the plaintiff’s claim cannot survive to the discovery phase without having sufficient facts, but the plaintiff cannot *obtain* sufficient facts without discovery. The plausibility standard has been a devastating phenomenon for employment discrimination

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138. Sperino and Thomas cite two studies, one from 2007 and one from 2013, which found that employers consistently win on summary judgment in discrimination cases. SPERINO & THOMAS, *supra* note 11, at 23. Specifically, one study found employers winning such motions 83% of the time and the other around 70%. *Id.*

139. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 608–09 (2010). Studies of *Twombly* and *Iqbal* (Twiqbal) have been legion, but also criticized for their indeterminacy. See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013) (noting the proliferation of empirical studies of limited determinative value following the *Twombly* and *Iqbal* decisions).

140. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

141. *Ashcroft v. Iqbal*, 556 U.S. 678, 681 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546–47 (2007).

142. SEINER, *supra* note 113, at 30. Consider hiring discrimination cases, where applicants frequently fail to hear back from the employer or are rejected with little accompanying information. It might be impossibly difficult for such a plaintiff to allege “plausible” hiring discrimination. *Id.* Seiner contrasts this inside information problem with tort claims, for example, where typical plaintiffs “would have the same access to photos, police investigation reports, and insurance information.” *Id.* at 31.

plaintiffs, increasing the rates at which motions to dismiss are granted in Title VII cases from forty-two to fifty-three percent.<sup>143</sup>

For summary judgment motions, there are two trends—one general and one specific—that undercut employment discrimination suits. The *general* tendency has been the increased granting of motions for summary judgment (MSJs) in resolving disputes. Courts were at one point cautious about such motions. But then in a trio of cases referred to as the “*Celotex* trilogy,” the Court flipped the conventional wisdom on MSJs. In particular, the *Celotex* Court ruled that the party moving for summary judgment need not offer evidence to negate the other side’s claim, but can instead simply point to the absence of evidence offered by the other side.<sup>144</sup> The Court also explicitly endorsed the use of MSJs, noting their utility in securing “the just, speedy and inexpensive determination of every action.”<sup>145</sup> The result has been an uptick in cases resolved by summary judgment in almost every subject matter area, but especially employment discrimination cases.<sup>146</sup>

The *specific* trend undercutting employment discrimination suits has been the proliferation of rules and doctrines—most heavily criticized—that all work in favor of employers. In particular, these doctrines allow judges to minimize, or disregard altogether, possible evidence of employment bias. Three key rules are: (1) the *same-actor inference*, under which courts resist allegations of discrimination if the alleged discriminator is the same person who made the original hiring decision;<sup>147</sup> (2) the *stray remarks doctrine*, under which words or statements that could be

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143. Hatamyar, *supra* note 139, at 608–09; see SEINER, *supra* note 113, at 25 (calling *Twombly* and *Iqbal* “the two most devastating cases for employment plaintiffs in the last decade”).

144. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

145. *Id.* at 327 (citing FED. R. CIV. P. 1).

146. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1048–53 (2003) (citing studies that show courts granted summary judgment more often after the *Celotex* trilogy and noting the effect has been pronounced in the areas of “civil rights” and “age discrimination,” among others).

147. *Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126, 1130 (4th Cir. 1995) (determining the company’s failure to promote the plaintiff was not due to bias on basis of national origin—even though the worker was harassed on account of his Iranian descent almost daily—since the people who made the decision to hire him were the ones who later made the decision not to promote him).

used to show bias are excluded if they are unrelated to the employment decision, too remote in time, or too ambiguous;<sup>148</sup> and (3) the *adverse action doctrine*, under which actions such as giving a negative evaluation, assigning additional work, or even threatening to fire a worker are not considered serious enough to be actionable as discrimination.<sup>149</sup> As a complement to these bias-minimizing rules, courts typically exclude evidence of discrimination experienced by other employees, sometimes called “me-too” evidence, on the theory that it is more prejudicial than probative.<sup>150</sup> The tenor of these doctrines is that antidiscrimination laws do not make it illegal to treat employees unfairly. But such laws *do* proscribe treating an employee unfairly because of a protected trait.<sup>151</sup> Accordingly, Title VII expressly requires that courts second-guess unfairness of a certain kind when it manifests in personnel decisions.<sup>152</sup> Nevertheless, courts frequently invoke the sentiment that they do not sit as a “super-personnel department” to second-guess the employer’s decisions—even when the employer’s actions could be interpreted as pretextual in nature.<sup>153</sup>

While any one of these bias-minimizing rules or inferences might be justified within the confines of a particular case, taken

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148. *E.g.*, Sweezer v. Mich. Dep’t of Corr. No. 99-1644, 2000 WL 1175644, at \*5 (6th Cir. Aug. 11, 2000) (determining that even though plaintiff was called “nigger” and “bitch,” supervisor’s “comments were brief and isolated, and are more indicative of a personality conflict than of racial animus”).

149. *E.g.*, Myers v. Maryland Auto. Ins. Fund, No. CCB-09-3391, 2010 WL 3120070, at \*5 (D. Md. Aug. 9, 2010) (finding that even though termination was threatened, there was no “tangible detrimental effect to the terms or conditions of his employment”); *see also* Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2036 (2015) (showing that courts construe the adverse action requirement narrowly and routinely dismiss cases in which workers allege, e.g., that employers subjected them to negative evaluations, disciplinary write-ups, shift changes, and removal from an office).

150. GREEN, *supra* note 13, at 105; *see, e.g.*, Jones v. St. Jude Med. S.C., Inc., 823 F. Supp. 2d 699, 734 (S.D. Ohio 2011) (“‘Me too’ evidence is typically inadmissible under Rule 403 of the Federal Rules of Evidence because it prejudices the defendant by embellishing the plaintiff’s own evidence of alleged discrimination and typically confusing the issue of whether the plaintiff, and not others, was discriminated against.”).

151. SPERINO & THOMAS, *supra* note 11, at 78.

152. *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, 2000e-5(g) (2018).

153. SPERINO & THOMAS, *supra* note 11, at 78–83 (surveying the various ways in which the phrase “super-personnel department” is used to believe the employer’s stated reason, even when the evidence suggests the reason is untrue, the employer did not follow its posted qualifications, or the employer did not follow its own policies).

together they often make it prohibitively difficult for plaintiffs to prevail. Specifically, judges use these doctrines to “slice and dice” specific pieces of evidence from the case.<sup>154</sup> This evidentiary sidelining of biased statements or pretext-implying decisions can transform a plaintiff’s colorable case into a legal nonstarter. Entire articles and book chapters have been devoted to these bias-minimizing doctrines,<sup>155</sup> so I merely flag them here. The critical point is that, cumulatively, these doctrines as well as others like them have amalgamated into a major barrier for employment discrimination plaintiffs seeking justice in the courts.

### 3. Settlements, Trials, and Appeals

The final reason employment discrimination plaintiffs do not “win” their claims is discovered through analyzing what actually constitutes a “win.” Leading up to trial, the majority of cases are settled and the best evidence to date indicates the median settlement is around \$30,000.<sup>156</sup> Even if one is lucky enough to settle for more—the seventy-fifth percentile settlement is closer to six figures<sup>157</sup>—the result may still be unfulfilling. The attorney will take a cut, the company will likely not make any major structural changes, and the claimant will almost surely be forced to sign a confidentiality agreement promising not to say anything that would besmirch the company’s reputation.<sup>158</sup> In short, the material benefits of litigating or negotiating a discrimination claim are routinely trifling.

If the claim is not settled and actually proceeds to trial, employment discrimination plaintiffs face yet another obstacle: proving the causal relationship between a protected trait and an adverse employment decision. Proving causation is difficult in any context,<sup>159</sup> but discrimination cases present unique challenges. Cause as a concept is derived largely from the law of torts, which is frequently geared toward understanding the

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154. See generally Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001) (illustrating this phenomenon through examination of cases).

155. *Supra* note 55.

156. BERREY ET AL., *supra* note 42, at 63.

157. *Id.* (noting a 75th percentile settlement value of \$92,458).

158. *Id.* at 1–10 (providing several illustrative anecdotes).

159. For example, on the one end of causation is the butterfly effect and on the other side is sole causation, but either could be reasonably understood as causal in nature. SPERINO & THOMAS, *supra* note 11, at 102.

physical causes of physical events.<sup>160</sup> Nevertheless, “but for” causation is frequently invoked within the corpus of antidiscrimination law: it is the legal causation standard for retaliation and age discrimination claims, and it is frequently invoked in disparate treatment cases.<sup>161</sup> Causation presents challenges for antidiscrimination law since the event of discrimination is often imperceptible. It is one thing to unpack cause and effect for a dented bumper or broken leg. It is quite another to recognize the cause for why one person out of eight applicants was not hired or promoted. Employment discrimination cases are thus challenging to prove in large part because they revolve around nonphysical and nonconcrete states of mind.<sup>162</sup>

As noted earlier, the odds of reaching trial and succeeding are low,<sup>163</sup> and the chances of succeeding at trial are further stunted by the built-in limits of damage caps. The 1991 Civil Rights Act capped compensatory and punitive damages for all employers; the liability for the largest employers (500+ employees) is capped at \$300,000 while the smallest covered employers (15–100 employees) are capped at \$50,000.<sup>164</sup> These limited financial judgments curtail the ability of laws like Title VII or the Americans with Disabilities Act to deter discrimination. When

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160. *Id.* at 107. There are of course torts that do not fit this mold, such as the intentional or negligent infliction of emotional distress.

161. In disparate treatment cases, a plaintiff can prevail by showing either that the protected trait was the “but for” (or sole) cause of the adverse employment action (a “single motive” claim, which allows one to recover economic damages) or that the trait merely “motivated” the action (a mixed motive claim, which does not allow one to recover economic damages). *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 703, 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2(k) (2018)) (indicating a plaintiff may prevail by showing a trait was a “motivating factor” for any employment decision, but also creating an affirmative defense where the employer can show it would have made the same decision “in the absence of the impermissible motivating factor”).

162. SPERINO & THOMAS, *supra* note 11, at 107.

163. *See supra* notes 95–101 and accompanying text.

164. 42 U.S.C. § 1981a(b)(3) (applying caps only to damages for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses and the amount of punitive damages”). The caps do not apply to back pay or front pay. *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848–49 (2001). These caps have not been adjusted since the Civil Rights Act was passed, and the caps are fixed—no matter how egregious the conduct. SPERINO & THOMAS, *supra* note 11, at 13. Finally, the caps do not apply to the Age Discrimination in Employment Act (ADEA), under which compensatory and punitive damages are not available, but liquidated damages are (in effect, a doubling of back pay and front pay). SEINER, *supra* note 113, at 11–13.

employers do not have to worry about multimillion-dollar verdicts, discrimination may become part of the normal cost of doing business.<sup>165</sup>

When cases are mishandled at trial, there is of course the promise of righting the result through appeal. But an appeal presents no guarantee—just another bite at the apple. In fact, the appellate process disproportionately favors employers. One study found that when employers appeal a jury verdict for the plaintiff, the appellate court reverses those wins forty-two percent of the time.<sup>166</sup> In contrast, when the worker appeals a jury's defense verdict, the appellate court reverses the employer's win only seven percent of the time.<sup>167</sup> Further, appealing a case is expensive and, as with trials, it will likely take years to complete the appeal. Those facts both cut in favor of employers, who usually have deeper pockets and a greater tolerance for delay.

## II. ORGANIZATIONAL JUSTICE AS ANTIDISCRIMINATION

The concept of justice has consumed theorists for millennia. Aristotle argued that justice requires rewards and punishments be distributed according to "merit."<sup>168</sup> John Rawls averred that justice is "the first virtue of social institutions."<sup>169</sup> Legal theorists also write incessantly about various formulations of justice. Sometimes the focus is on the treatment of people within a legal system, e.g., "juvenile justice" or "access to justice."<sup>170</sup> Other times the focus is on the rationale for how a law is structured, e.g., "corrective justice" or "distributive justice."<sup>171</sup> Accordingly,

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165. See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1301, 1322–23 (2003) (arguing the damage caps place such a low price on discrimination that businesses might naturally treat it as a "controllable cost of doing business").

166. Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 552 (2003).

167. *Id.*

168. THE NICOMACHEAN ETHICS OF ARISTOTLE, bk. V, ch. III (R.W. Browne trans., H.G. Bohn 1853) (c. 384 B.C.E.).

169. JOHN RAWLS, A THEORY OF JUSTICE 3 (1971).

170. *E.g.*, Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001).

171. *E.g.*, Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 988–95 (1988) (discussing these iterations of justice).



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discussing justice in a coherent way often requires focus on a specific domain, such as the court system or workplace.

Despite all of its philosophical trappings, justice is quite a pragmatic lens through which to view the workplace. Nearly everyone has at some point felt that a work situation was unfair; indeed, the workplace naturally foments feelings of injustice in several ways. First, the fact that employers typically distribute finite goods and compensation based upon some notion of merit means that some workers will necessarily enjoy more goods than others; inequality is built in. Second, any distribution of outcomes in the workplace typically happens according to some set of rules and standards and employees are likely to form judgments about the fairness of these criteria. Third, most workplaces are socially dynamic organizations, requiring people to interact. The quality of these interactions can stir up thoughts that a particular person has acted in ways that are biased or unjust. Organizational Justice, as a field of study, is thus a natural extension of the way in which the workplace produces feelings oriented around whether compensation, policies, and people are just.

As noted in the Introduction, Organizational Justice is generally thought to sub-divide into three sets of work-related concerns: (1) what people receive (distributive justice); (2) the standards, rules, and processes under which people receive (procedural justice); and (3) how people are treated along the way (interactional justice).<sup>172</sup> While all three subdivisions are valuable, this Article focuses on *general* perceptions of justice. There has been a recent shift toward focusing on “overall justice climate perceptions”—a generalized measure of distributive, procedural, and interactional justice.<sup>173</sup> There is compelling evidence that *overall* justice perceptions are what drive behavior within organizations, more so than any one specific sub-dimensions.<sup>174</sup>

Of course, there is no way to document the precise level of justice in any particular organization. One might productively think about Organizational Justice through the metaphor of oil

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172. *Id.* Interactional justice is often further divided into *interpersonal justice*, which concerns the treatment of employees by supervisors or managers, and *informational justice*—a concern characterized by the “quality of information employees obtain from communications with their supervisor or managers.” Cho & Sai, *supra* note 22.

173. Rubino et al., *supra* note 52, at 523.

174. *Id.*

for the workplace's smooth operation. When the emotional heat is low, the gears of the workplace are well-lubricated and employees can work comfortably and productively toward a shared mission.<sup>175</sup> But when people's feelings turn up the emotional heat in the workplace, individuals can readily ignite and engage in workplace aggression, such as invidious discrimination or harassment.<sup>176</sup> Importantly, workers' perceptions of justice may "fully mediate the effects of changes in the workplace on aggression."<sup>177</sup> In other words, when people view the workplace as principally fair, they are far less likely to lash out when policies change or they otherwise face negative outcomes at work.

Many observers have, quite naturally, deduced that the connection between justice and discrimination is that discrimination is unjust. Indeed, some scholars have made this connection explicit: that fairness or justice is the touchstone of antidiscrimination law.<sup>178</sup> This Part will explore the relationship from the other vantage point, which is perhaps less straightforward: how the relative amount of justice in an organization might either prevent or contribute to discrimination. Specifically, my claim is that Organizational Justice has a previously-unexplored role to play, both in fending off harassment and discrimination, and in fostering the willingness of workers to internally report such behaviors.

#### A. ORGANIZATIONAL JUSTICE CAN PREVENT DISCRIMINATION

Legal scholarship typically does not examine *why* people discriminate or harass others.<sup>179</sup> Even most social science scholarship overlooks why people choose to discriminate, by focusing on victims in lieu of perpetrators.<sup>180</sup> Yet when people differentiate

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175. Cho & Sai, *supra* note 22, at 245 (discussing Organizational Justice as a "lubricant" for smoothing out employee development programs in the workplace).

176. I.M. Jawahar, *A Model of Organizational Justice and Workplace Aggression*, 28 J. MGMT. 811, 814 (2002).

177. *Id.* at 814.

178. Jessica L. Roberts, *Protecting Privacy To Prevent Discrimination*, 56 WM. & MARY L. REV. 2097, 2116 (2015).

179. That said, scholars have gradually and increasingly built a persuasive case for considering the general relationship between emotions and the law. See, for example, Susan Bandes's early, seminal book tying emotions to law. *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999) (chronicling the place of emotions in the law through a series of essays on different legal subjects).

180. *E.g.*, Krings & Facchin, *supra* note 27, at 501 ("Most research [on sexual harassment] has focused on prevalence, on targets' reactions and perceptions,

between persons, they surely do so for a reason—a fact that antidiscrimination doctrine expressly acknowledges.<sup>181</sup> Two conventional explanations for why people discriminate is stereotyping and in-group preference,<sup>182</sup> but there is a third, more recently-discovered reason: acute injustice.

Employees are more likely to experience feelings such as injustice, anger, or envy when they perceive that a policy or course of action is fundamentally unjust.<sup>183</sup> These feelings serve as “action tendencies,” prompting certain employees to act unethically or to discriminate against others.<sup>184</sup> Moreover, even when perceived injustices do not result in workers enacting full-blown discrimination, there are a variety of less severe ways that perceived injustices may cause employees to interfere with the opportunities of others. Such actions may include gossip, favoritism, or sabotaging others’ work efforts.<sup>185</sup> Discrimination may thus be understood, in some instances, as an act of aggression in response to perceived injustices.<sup>186</sup>

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and on prevention. Little is known about why and when actors engage in harassing behavior.”). Of course, the paucity of research on people who discriminate is in part due to the research difficulties in obtaining adequate samples of actual discriminators. *Id.*

181. Courts presume that people do not act in an arbitrary manner. So, if discrimination is alleged, and the employer cannot provide a legitimate reason for the adverse employment action, courts will generally assume the employer based its decision on an impermissible consideration. *See, e.g.,* *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (“[W]e 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.”).

182. Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 593 (2006).

183. Russell Cropanzano et al., *Entity Justice and Entity Injustice: A Review and Conceptual Extension*, in JUSTICE IN THE WORKPLACE, *supra* note 30, at 224 (citing studies); Davidai & Gilovich, *supra* note 28, at 837 (noting felt injustices can produce envy); Christine A. Henle & Megan Naude, *An Eye for an Eye: Counterproductive Work Behavior as an Emotional Reaction to Injustice in the Workplace*, in ORGANIZATIONAL JUSTICE, *supra* note 21, at 140, 145 (citing studies).

184. *Supra* notes 25–28 and accompanying text.

185. *See generally* SABOTAGE IN THE AMERICAN WORKPLACE, *supra* note 27.

186. Wood et al., *supra* note 51, at 618.

In fact, when an employee perceives multiple forms of injustice, or if the inequity is felt to be particularly severe, the response may *sometimes* culminate in one person choosing to verbally or physically harass another person.<sup>187</sup> Imagine that an employee feels he was unjustly denied a critical promotion. Social science research shows that an employee who perceives such an injustice may then attempt to punish the decision-maker or the person who actually received the promotion via sexual or racial harassment.<sup>188</sup> Or, this employee might choose to harass *other people* by directing his frustration or aggression toward someone else in the organization who is less able to impose job-related costs upon him.<sup>189</sup> Researchers refer to this phenomenon as “displacement,” because the injustice-induced aggression is displaced onto a convenient, and often safer, target.<sup>190</sup>

This Article is not suggesting that *most* people discriminate or harass others because they face unfairness in the workplace. Even so, compelling new evidence indicates that an organizationally just climate can serve as a strong deterrent to—and predictor of—discrimination and harassment.<sup>191</sup> Specifically, an organizational focus on fairness through policies and rewards can cause all employees to feel respected, establish expectations for how employees should treat coworkers, and foster the value of

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187. Jawahar, *supra* note 176, at 819.

188. Krings & Facchin, *supra* note 27, at 507 (demonstrating perceptions of organizational injustice increased sexual harassment); see O’Leary-Kelly et al., *supra* note 27, at 375–77, 384 (observing perceived injustices may lead one to sexually harass as a means of pursuing retributive justice); see also SABOTAGE IN THE AMERICAN WORKPLACE, *supra* note 27, at 24–35 (chronicling the way in which emotions such as envy can lead one to harass others); Niels van de Ven et al., *supra* note 26, at 426 (discussing how unchecked envy, when it arises in an unjust environment, can drive discrimination or harassment against others); Vecchio, *supra* note 26, at 205 (same).

189. O’Leary-Kelly et al., *supra* note 27, at 376.

190. *Id.* (observing the employee who feels unfairly treated might displace their harassment onto “those who are perceived as similar to the individual who caused the goal frustration but are less powerful socially”); see also MELINDA JONES, SOCIAL PSYCHOLOGY OF PREJUDICE 132 (2002) (“History is replete with examples of political figures in times of economic contraction affixing economic blame onto minority groups.”).

191. *E.g., id.* at 524, 539–40 (finding support for “collective justice climate as an independent predictor of harassment and a moderator of the effectiveness of objectively measured sex similarity and harassment climate on sexual harassment”).

evenhanded treatment among workers.<sup>192</sup> Fair managerial practices cause workers to feel “valued, respected, and integrated within the work domain.”<sup>193</sup> When workplaces and their constituent policies are just, employees are less likely to lash out toward coworkers or the organization.<sup>194</sup> Thus, hewing to the normative values of Organizational Justice, discussed further below,<sup>195</sup> has the potential to increase equality of opportunity by depressing the negative emotions and the negative actions that most affect marginalized groups and individuals.<sup>196</sup>

Even when injustice is not perpetrated by another person, such as when employees feel that a policy or rule is unfair, the felt inequity can still increase discrimination. For example, imagine that the employee who was denied the promotion feels that an organization’s promotion criteria are biased and fundamentally unfair. The employee might seek retribution against other people—more concrete scapegoats—rather than the organization.<sup>197</sup> This approach is part of a subordinating, historical pattern in which individuals may direct aggression for distressing events toward vulnerable third parties who bear no responsibility.<sup>198</sup>

Organizational Justice can also decrease discrimination by advancing nondiscrimination as a guiding workplace value. Where decisions are not consistently based upon accurate, job-related information, it becomes more likely that decisions will turn instead on group-based heuristics—something legal scholars have termed “statistical discrimination.”<sup>199</sup> That is, when

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192. *Id.* at 520, 524.

193. Rubino et al., *supra* note 52, at 526.

194. *Supra* notes 175–77 and accompanying text.

195. *Infra* Part III.A (discussing the normative values of just workplaces).

196. See Henle & Naude, *supra* note 183, at 137 (observing one form of counterproductive work behavior is political deviance, in which one seeks to “disadvantage others personally or politically (e.g., favoritism, gossiping or blaming coworkers, unproductive competition”).

197. Krings & Facchin, *supra* note 27, at 502. If the perceived unfairness is severe enough, he might discriminate or degrade others in an attempt to achieve the instrumental and expressive aims outlined above.

198. In one particularly stark example, researchers found that as the economy declined between 1882 and 1930 the numbers of black lynchings increased. JONES, *supra* note 190, at 132.

199. See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 842–43 (1991) (observing that “statistical discrimination” derives from people making “rational statistical inferences about average differences among [] groups”); Cass R. Sunstein, *The*

employers lack clear information, they often use group stereotypes to sort out characteristics that are seen as costly or otherwise undesirable, e.g., criminal convictions or bankruptcies.<sup>200</sup>

For example, in one study, economists concluded that employers frequently discriminate against African American males by using race as a proxy for involvement in the criminal justice system.<sup>201</sup> The authors of that study then made a startling finding: employers who actually used criminal background checks were over fifty percent *more likely* to hire African Americans than employers who did not.<sup>202</sup> That study illustrates that employers who are not making decisions according to set criteria or information are more likely to rely on group-based heuristics that may harm disadvantaged populations. Having data or other metrics in place for employment decision-making—a form of procedural justice—can help steer decision-makers away from discriminatory biases or favoritism.<sup>203</sup> For instance, the ability to draw on factual information about criminal backgrounds prevented many employers from instead drawing discriminatory inferences based on race and acting upon them.<sup>204</sup> Lior Strahilevitz has argued that having access to more relevant information, and actually making use of it pursuant to set criteria, can keep employers from overemphasizing “readily discernible facts like race or gender.”<sup>205</sup> In this way, Organizational Justice provides a

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*Anticaste Principle*, 92 MICH. L. REV. 2410, 2417 (1994) (arguing “statistical discrimination” occurs when generalizations about a group are seen as “less costly to use than any subclassifying device”).

200. Lior Jacob Strahilevitz, *Privacy Versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 365 (2008).

201. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 453 (2006) (concluding that in the absence of background checks, employers use race “and other perceived correlates of criminal activity to assess the likelihood of an applicant’s previous felony convictions and factor such assessments into the hiring decision”).

202. Strahilevitz, *supra* note 200, at 367 (citing Holzer et al., *supra* note 201, at 464).

203. Henle & Naude, *supra* note 183, at 137 (noting that organizational injustice may lead to personal aggression, sexual harassment, and favoritism); Paul E. Levy et al., *The Role of Due Process in Performance Appraisal: A 20-Year Retrospective*, in OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE, *supra* note 19, at 605, 605–06.

204. Holzer et al., *supra* note 201, at 464.

205. Strahilevitz, *supra* note 200, at 372 (arguing for the government to subsidize “information clearinghouses” for employers that store people’s past em-

structural framework within which all individuals—and especially those from less-privileged backgrounds—can avoid instances of discrimination and, in turn, pursue their full potential.<sup>206</sup>

#### B. ORGANIZATIONAL JUSTICE CAN MODERATE THE EFFECTS OF DISCRIMINATION

There is a second way—other than preventing discrimination—that Organizational Justice may advance nondiscrimination goals: by moderating the effects of discrimination. Social psychologists have documented that the effect of negative treatment is uneven, with more privileged groups being less affected.<sup>207</sup> For example, when women perceive discrimination, their psychological well-being is likely to be harmed; in contrast, men report that perceived discrimination has little to no effect on their internal wellness.<sup>208</sup> This observation seems to illuminate the resiliency of privilege—a phenomenon that Nancy DiTomaso poignantly describes as “an invisible knapsack” that majority group members carry around.<sup>209</sup> This knapsack is, in her words, “filled with institutional social resources to use whenever necessary,” and it also provides “a cognitive experience of goodwill and affective preference that allows [majority group members] to feel confident, secure, and capable as they make decisions and encounter choices throughout their lives.”<sup>210</sup> This metaphor helps explain why many workers who are deprived of fairness in the workplace, and especially those who belong to underprivileged groups, can “lose their sense of belonging and existence in a given context and tend to become lonely, depressed

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ployee evaluations, involvement in bankruptcy or criminal justice systems, military records, and educational credentials). Strahilevitz concludes that statistical discrimination is “often more troubling than overt discrimination on the basis of criminal or bankruptcy history.” *Id.* at 380.

206. *Id.*

207. Michael M. Harris et al., “*I Think They Discriminated Against Me*”: Using Prototype Theory and Organizational Justice Theory for Understanding Perceived Discrimination in Selection and Promotion Situations, 12 INT’L J. SELECTION & ASSESSMENT 54, 62 (2004).

208. *Id.*

209. NANCY DITOMASO, THE AMERICAN NON-DILEMMA: RACIAL INEQUALITY WITHOUT RACISM 7 (2013).

210. *Id.* (citations omitted).

and anxious and, over time, withdraw.”<sup>211</sup> In short, discrimination has its most profound effects on the least privileged constituencies, reproducing hierarchies and the privilege of the status quo.

But, research shows that Organizational Justice can moderate the effects of bias in the workplace. When employees see their workplaces as fair, they are less likely to emotionally suffer from discriminatory decisions—at least those decisions that stop short of termination.<sup>212</sup> In other words, these employees may still face bias in the workplace, but they may be better emotionally equipped to weather the effects. Specifically, studies show that when employees have strong perceptions of Organizational Justice, those workers are less likely to feel anxiety, depression, and emotional exhaustion due to discrimination.<sup>213</sup> This effect is amplified when the source of discrimination is not a manager but is instead a coworker or a customer.<sup>214</sup> Put another way, employees may see discrimination by a coworker or customer as less troubling within a just organization—which can in turn mitigate the emotive effects of bias, such as depression. When managers enact Organizational Justice principles, therefore, it can mitigate the effects of discrimination even when the discrimination cannot be prevented altogether.

Of course, one might question whether moderating the effects of discrimination is a good thing. Some might think it best for victims to fully feel the exclusionary effects of discrimination, which in turn could make them more likely to litigate such claims. This argument has merit, but is misplaced for a few key reasons. First, and most importantly, it is not mutually exclusive for an organization’s culture to moderate the effects of depression and emotional exhaustion and simultaneously be a place

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211. Yuka Fujimoto et al., *Toward a Diversity Justice Management Model: Integrating Organizational Justice and Diversity Management*, 9 SOC. RESP. J. 148, 150 (2013).

212. In the case of termination, it stands to reason both that the employee is likely to think the organization has inflicted a distributional injustice upon her and that this perception of injustice is unlikely to be mitigated much by past thoughts or feelings that her former workplace was a fair one.

213. Wood et al., *supra* note 51, at 628 (“[O]rganizational justice perceptions are important ingredients in any explanation of the effect of discrimination on employees’ well-being . . .”).

214. *See id.* at 628 (“[M]anagers’ role as custodians and inventors of organizational policies may be crucial in explaining why their acts of discrimination are perceived as reflecting badly on the organization procedures and allocation of rewards . . .”).



where workers feel free to raise claims of discrimination or harassment. As the Section below shows, Organizational Justice actually increases the likelihood that workers will report behavior that they perceive to be discriminatory. Second, even if Organizational Justice theoretically made it less likely for employees to litigate their grievances, that opportunity cost currently does not seem very high. As previously described, the typical experience of employment discrimination litigants is not very empowering: the chances of actually reaching trial are low, the median settlement is inadequate, and the litigation process exacts a great personal cost.<sup>215</sup> I am not claiming that the calculus of whether to sue is generally clear one way or another, only that it is contestable whether more litigation will increase the well-being for minority groups.

### C. ORGANIZATIONAL JUSTICE CAN INCREASE REPORTING OF DISCRIMINATION

When harassment occurs within an organization, it must be reported or an employee's claim may later be doomed in the legal process.<sup>216</sup> In the late 1980s, the Supreme Court decided two cases that, in certain instances,<sup>217</sup> give employers an affirmative defense against sexual harassment claims when there is an investigative protocol in place to address sexual harassment and the employee does not take full advantage of it.<sup>218</sup> The market response to these decisions included the proliferation of anti-harassment policies, grievance procedures, and sexual harassment training.<sup>219</sup> While on the surface this spread of antidiscrimination policies looks like progress, the evidence indicates that most such policies have not worked to deter sexual harassment.<sup>220</sup> Further, research indicates that most women who are

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215. *Supra* notes 95–101 and accompanying text.

216. *See* *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

217. *Faragher/Ellerth* is the affirmative defense for *supervisor* harassment only; in cases alleging coworker harassment, there is a similar, but slightly different standard lower courts have devised, which is part of the employee's affirmative burden to prove.

218. In *Faragher*, 524 U.S. 775, and *Ellerth*, 524 U.S. 742, the Supreme Court established a two-part affirmative defense by which employers may insulate themselves from liability for harassment that does not result in a tangible employment action. *See supra* note 90.

219. DOBBIN, *supra* note 33, at 5–8.

220. Rubino et al., *supra* note 52, at 520. Perhaps most damning of all, when the EEOC reviewed the empirical literature on harassment training in 2016, it

harassed will not label the behavior as “sexual harassment,” which will often prevent them from taking any action at all.<sup>221</sup> Of those who do label the behavior as harassment, most still will not report the treatment to an authority.<sup>222</sup> In fact, somewhere around seventy percent of those who experience harassment do not talk to anyone in charge at work and a greater number still refuse to file a formal complaint.<sup>223</sup> Non-reporting persists even though nearly every medium-to-large company has installed anti-harassment protocols over the last several decades.<sup>224</sup>

One of the great challenges in addressing discrimination and harassment is getting people to speak up—an enduring obstacle that the #MeToo era has illuminated.<sup>225</sup> When an employee fails to report harassment, the organization does not receive notice about a person’s bad behavior, which increases the

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refused to say whether such training was effective in preventing harassment. Elizabeth C. Tippett, *Adapting to the New Risk Landscape*, HARV. BUS. REV. (Feb. 1, 2018), <https://hbr.org/2018/02/adapting-to-the-new-risk-landscape> [<https://perma.cc/AW4N-9UK8>]; see also Dobbin & Kalev, *Diversity Fail*, *supra* note 14, at 60 (2016) (observing “strategies for controlling bias . . . have failed spectacularly since they were introduced . . . . The problem is that we can’t motivate people by forcing them to get with the program and punishing them if they don’t”).

221. Vicki J. Magley et al., *Outcomes of Self-Labeling Sexual Harassment*, 84 J. APPLIED PSYCHOL. 390, 390 (1999).

222. See generally Laurie A. Rudman et al., *Suffering in Silence: Procedural Justice Versus Gender Socialization Issues in University Sexual Harassment Grievance Procedures*, 17 BASIC & APPLIED SOC. PSYCHOL. 519, 520 (1995) (observing “most studies reveal that the majority of [sexual harassment] offenses remain unreported”).

223. See Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, in 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 485 tbl.2 (J. Barling & C.L. Cooper eds., 2008) (citing two studies that show only 26% and 17–36%, respectively spoke to someone in authority about the harassment, and citing four studies that show somewhere between 2–20% of people who suffer harassment file a formal complaint).

One may naturally wonder if change lies around the corner now that there is seemingly greater support for victims of sexual harassment. See *supra* note 57. But even with greater social empathy, there are still tremendous costs to reporting harassment—especially when the alleged perpetrator is a person in a position of power. Further, all of the reasons why people do not file discrimination claims—fear of being disbelieved, fear of retaliation, and fear of poor outcomes—apply in the sexual harassment context as well.

224. DOBBIN, *supra* note 33, at 1–11.

225. See, e.g., Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCHOL. 401, 406–07 (1997) (showing women who are sexually harassed typically do not report harassment).

likelihood that it will continue. In considering how to galvanize reports of harassment, there has recently been a cultural rallying cry around the phrase “believe women.”<sup>226</sup> But what does it mean to believe women, and how exactly can that be accomplished? In the organizational context, we could understand “believe women” to mean fostering an expectation among employees that their voice will be heard and also fairly and fully considered.<sup>227</sup> But to support women’s claims in a way that is responsible to all parties requires fairness in process, or what Organizational Justice theorists describe as procedural justice.

Research shows that Organizational Justice is a strong predictor for whether employees will make the decision to report harassment.<sup>228</sup> Specifically, when employees believe that an organization is even-handed, they are more likely to utilize a grievance procedure—in part because they believe they will be “heard” and in part because fairness perceptions can be an antidote to the fear of retaliation.<sup>229</sup> In fact, social science demonstrates empirically that procedural justice concerns are more influential when it comes to whether victims file harassment complaints than even gender socialization issues<sup>230</sup>—a traditional explanation for why so few women report sexual harassment.<sup>231</sup>

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226. See generally *Believe Women*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Believe\\_women](https://en.wikipedia.org/wiki/Believe_women) [<https://perma.cc/NUN8-QPSM>].

227. See Sady Doyle, *Despite What You May Have Heard, “Believe Women” Has Never Meant “Ignore Facts,”* ELLE, (Nov. 29, 2017) <https://www.elle.com/culture/career-politics/a13977980/me-too-movement-false-accusations-believe-women/> [<https://perma.cc/7PG5-94HD>] (observing that “believe women” means “don’t assume women as a gender are especially deceptive or vindictive, and recognize that false allegations are less common than real ones”).

228. See Butler & Chung-Yan, *supra* note 31, at 750–51 (“The current study also indicated that justice perceptions are especially important for predicting reporting and confrontation responses when women have experienced frequent sexual harassment.”); Rudman et al., *supra* note 222, at 534 (analyzing results of research to conclude that procedural justice concerns are a “superior explicator of the reliably low reporting rate for sexual harassment”). *But see* Yoon Jik Cho, *Organizational Justice and Complaints in the US Federal Workplace*, 22 INT’L REV. PUB. ADMIN. 172, 186–87 (2017) (concluding that “federal employees are less likely to file complaints when they perceive” that the workplace is organizationally just).

229. Butler & Chung-Yan, *supra* note 31, at 750–51; Rudman et al., *supra* note 222, at 537–38.

230. Rudman et al., *supra* note 222, at 537.

231. See Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCHOL. 497 (1991) (observing that women may, due

It might seem counter-intuitive that perceptions of Organizational Justice can inspire reporting of discrimination and harassment. As Lauren Edelman has documented, certain types of workplace policies that are oriented around nondiscrimination—such as diversity training, affirmative action, and EEO offices—can symbolize an employer's good faith and chill litigation.<sup>232</sup> Further, if an organization is actually fair and attentive to the needs of its employees, it might mollify workers who would otherwise raise claims.<sup>233</sup> But two responses to these points are in order. First, research indicates that a truly just organizational climate, not merely one with certain policies in place, is what facilitates reporting.<sup>234</sup> An employer cannot merely install certain policies and achieve Organizational Justice or nondiscrimination. In the next Section, I will explore the values that cause people to feel their organization is just. Second, the research on Organizational Justice is more specific than the general claim that EEO policies often amount to structurally symbolic civil rights;<sup>235</sup> this research indicates that an organizationally just climate facilitates *internal* reporting of sexual harassment—a much more particular claim.<sup>236</sup> Edelman is instead concerned with the general possibility of employee cooption through policies that merely symbolize, but do not effectuate, a commitment to antidiscrimination.<sup>237</sup> In the final Section of Part III, I will directly address Edelman's claim as it might relate to all of my arguments; for now, it suffices to say that Organizational Justice can support employees, and especially women, as they move through the internal processes for reporting sexual harassment.

### III. ORGANIZATIONAL JUSTICE IN ACTION

This Article has thus far been concerned with building the case for how Organizational Justice may further antidiscrimination values. In this Part, I outline the underlying normative values of Organizational Justice, which allow us to discern what types of employment policies will produce more just workplaces.

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to how they are socialized, emphasize caring (over justice) and nonconfrontation in their responses to sexual harassment).

232. See *supra* notes 64–68 and accompanying text.

233. Cho, *supra* note 228, at 186–87.

234. *Supra* notes 228–31.

235. EDELMAN, *supra* note 41, at 216.

236. *Supra* notes 228–31.

237. EDELMAN, *supra* note 41, at 11 (discussing this concern).

I also consider in greater detail what employers can do to advance fairness in the workplace. Finally, this Part considers several specific counterarguments that might be raised against my thesis.

#### A. THE NORMATIVE VALUES OF ORGANIZATIONAL JUSTICE

It is tempting to try to spell out the specific policies that, if implemented, will increase justice in the workplace—a checklist of sorts.<sup>238</sup> But to do so would risk a version of “Goodhart’s Law,” in which once “a measure becomes a target, it ceases to be a good measure.”<sup>239</sup> As antidiscrimination law has already shown, once the installation of certain policies becomes the target, rather than the underlying value of antidiscrimination, many employers start to “game the system” or behave in ways that make the implementation of those EEO policies less effective.<sup>240</sup> The most helpful thing is not to gin up a “list of ready to go, discrete measures that can be implemented across all organizations,”<sup>241</sup> but rather to identify the hallmark values of Organizational Justice that transcend specific programs and provide a meta-guide for future legal policies.

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238. The counsel of Organizational Justice may naturally invite certain managerial interventions, such as structuring the hiring process to be fairer and more transparent for applicants, giving employees a voice when it comes to changing workplace policies, and employing socially sensitive managers. See Henle & Naude, *supra* note 183, at 155 (advocating structural processes for employees to voice their “justice concerns”); Debra L. Shapiro & Elad N. Sherf, *The Role of Conflict in Managing Injustice*, in OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE, *supra* note 19, at 443, 453–54 (citing studies that prove the role of “interpersonal sensitivity” in impacting justice perceptions); Donald M. Truxillo et al., *Applicant Fairness Reactions to the Selection Process*, in OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE, *supra* note 19, at 621, 629–32 (chronicling insights related to the types of selection tools that will maximize perceptions by applicants of fairness and validity).

239. *Goodhart’s Law*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Goodhart%27s\\_law](https://en.wikipedia.org/wiki/Goodhart%27s_law) [<https://perma.cc/J8VV-7885>].

240. Lauren Edelman has written about the role of organizations in affecting nondiscrimination norms. She writes that organizations have instituted a variety of Equal Employment Opportunity (EEO) structures—such as diversity training, affirmative action, and EEO offices—largely to “comply” with antidiscrimination laws. EDELMAN, *supra* note 41, at 3–18. She laments that many such policies are “merely symbolic,” or ineffective. *Id.* at 11. Worse, they may actually “mask” discrimination both internally (as workers view employers as nondiscriminatory) and externally (as lawyers and judges view employers as nondiscriminatory). *Id.* at 5, 155–56, 171.

241. GREEN, *supra* note 13, at 136.

### 1. Transparency

Scholars have long celebrated transparency and enlisted it as a guiding principle for legal and policy reform.<sup>242</sup> One might see transparency's intuitive allure as owing in part to its bond with U.S. democracy, specifically, that governmental transparency fosters an accessible government and informed citizens who can make better decisions to hold the regime accountable.<sup>243</sup> In the context of the workplace, transparency is one of the most critical determinants of whether a system is seen as fair.<sup>244</sup> Transparency naturally implicates both material employment outcomes (distributive justice) and the way in which decisions at work are made (procedural justice).

For transparency to be accomplished in the workplace, it is critical that employees have both notice and knowledge of the applicable rules or standards.<sup>245</sup> This insight borrows from "fairness heuristic theory," under which people have a tendency to make fairness judgments from the information that is readily available to them.<sup>246</sup> Within this vein, workers who feel that they understand a performance appraisal process are much more likely to rate the system as fair.<sup>247</sup> Of course, for transparency to truly facilitate justice, employees' understandings of how the rules and standards will be applied must also match up with how they are actually applied.

Transparency can foster both justice itself and perceptions of justice. One of the best examples is found in hiring. When employers resolve to hire someone, they must make decisions around both advertising the job and providing criteria for the position. For current employees, the decision to advertise the job widely and to be detailed about specific job requirements is a show of transparency, which belies nepotism and encourages

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242. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 958–63 (2006) (arguing for more transparency in criminal procedure); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 533 (1999) ("It has long been a value in liberal constitutional regimes that regulation be transparent."); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1207 (1999) (making the case for "corporate social transparency").

243. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 894 (2006).

244. Levy et al., *supra* note 203, at 609–10.

245. *Id.*

246. Fujimoto et al., *supra* note 211, at 157.

247. Levy et al., *supra* note 203, at 610.

perceptions of fairness. Moreover, transparency in job openings and eligibility encourages nondiscrimination by “operat[ing] as a shortcut around biased information networks.”<sup>248</sup> In contrast, when job criteria are less explicit, decision-makers are more likely to “shift job criteria to fit the qualifications of the candidate who best fits gendered (or racial) expectations for a job.”<sup>249</sup>

Or consider again the study involving criminal background checks.<sup>250</sup> Actually having information about applicants’ criminal backgrounds resulted in less discrimination against African Americans given that the factual information was more favorable than the inferences employers otherwise drew.<sup>251</sup> In other words, transparency in the specific area of criminal history decreased discrimination by cutting out the application of racial stereotypes.

One notable adjunct to transparency is *voice*: when employees are given a chance for their voices to be heard regarding workplace policies, they are less likely to view the employer’s systems as opaque and more likely to see them as fair.<sup>252</sup> Increasing voice increases interactional justice, which is one of the most difficult sub-dimensions of Organizational Justice to ensure.<sup>253</sup> One simple and costless system for facilitating voice is to have a complaint or suggestion process. Even if a particular complaint does not lead to any change, simply allowing the complaint to be made increases the perception that the workplace’s policies are fair.<sup>254</sup> In a similar vein, allowing employees to give input into

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248. GREEN, *supra* note 13, at 137.

249. *Id.* at 114. Of course, this still happens with explicit criteria, where people may emphasize or deemphasize certain criteria to favor certain groups. See Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 404 (2011) (showing that greater workplace transparency can lead to greater compliance with employment discrimination laws).

250. *Supra* notes 201–05 and accompanying text.

251. *Id.*

252. See Henle & Naude, *supra* note 183, at 155 (advocating structural processes for employees to voice their “justice concerns”).

253. Specifically, it is hard to ensure through policy that managers treat people with dignity and easier to simply implement certain policies or adjust compensation. Social psychologists have observed that when employees are allowed to provide input or feedback, it is one of the most effective ways to increase interactional justice. Juan Diego Vaamonde & Alicia Omar, *Perceptions of Organizational Justice and Ambivalent Sexism: The Moderating Role of Individualism-Collectivism*, 35 REVISTA DE PSICOLOGÍA 31, 52 (2017).

254. Henle & Naude, *supra* note 183, at 155.

the appraisal process increases justice perceptions—even if their resulting performance review is negative.<sup>255</sup>

But transparency is not always simple. Scholars have been quick to critique transparency, especially where it is valorized in the abstract or where its unintended consequences are not fully appreciated.<sup>256</sup> Consider applicants who are rejected for a job. On the one hand, information that is provided to applicants may enhance fairness perceptions and could make them less likely to sue;<sup>257</sup> indeed, the strength of this effect has been shown to apply to applicants with both positive and negative outcomes.<sup>258</sup> On the other hand, human resource professionals are almost always counseled not to give applicants specific reasons for the decision because the reason provided could intensify the feelings they have about being rejected.<sup>259</sup> So, if the applicants object to the specific explanation, it could make them even more likely to sue.<sup>260</sup> In this specific context, there are risks either way, but it stands to reason that providing some explanation can give the company greater control over the situation. In short, transparency can foster both justice and justice perceptions, even if the road to organizational transparency is sometimes a bumpy one.

## 2. Accountability

At the outset, it is worth noting that accountability can flow naturally from transparency. For example, when an employer is transparent about its decision-making processes or compensation structure, it can cause other employees or third parties to seek justice. In one field study, a firm had a discriminatory record of giving black workers smaller raises than white workers

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255. Shapiro & Sherf, *supra* note 238, at 453.

256. See Fenster, *supra* note 243, at 885 (arguing that open government laws have failed to achieve transparency in part because in “relying on the assumptions of ‘transparency,’ they typically operate at exceptionally high levels of abstraction”); David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100 (2018) (illustrating, through historical examples, how transparency has no set political valence).

257. Truxillo et al., *supra* note 238, at 632 (citing various studies for this proposition).

258. *Id.*

259. *E.g.*, Paula Ancona, *Part of Hiring Is Telling Others They Didn’t Get Job*, HOUS. CHRON., Mar. 31, 1991, at 5.

260. Providing explanations to unsuccessful candidates would run afoul of the conventional advice for human resource professionals. *E.g.*, *id.* (“Don’t feel obligated to give specific reasons for not choosing an applicant.”).



with equal performance scores.<sup>261</sup> The researcher then had the firm post each unit's average performance rating and average pay raise by race and gender.<sup>262</sup> Once decision-makers knew that internal constituencies were watching, the pay gap nearly disappeared overnight;<sup>263</sup> transparency mediated by accountability produced a more just result.

In this Section I am focused on something slightly different: how creating formal structures of accountability endogenous to the workplace can produce just outcomes. Social psychologists have focused on accountability in the specific area of antidiscrimination and diversity. Empirical research demonstrates that when decision-makers are enlisted in problem-solving, it has much better returns on actually increasing managerial diversity.<sup>264</sup> In this way, structural accountability can both increase the perception that hiring and promotion is just, and produce outcomes that reflect a just state of affairs.

One specific example of structural accountability is corporate diversity task forces. The initial idea is to invite department heads to volunteer<sup>265</sup>—not compel anyone's participation—to participate in a committee formulated around a charge of corporate diversity.<sup>266</sup> Once composed, task force members periodically review diversity numbers for the company, determine which departments need attention, and brainstorm solutions to achieve their diversity-based goals.<sup>267</sup> Other examples of structural accountability include diversity staff positions, such as a diversity manager, and mentoring and training programs that pair existing managers with people from different demographic groups who hope to ascend the ranks of management.<sup>268</sup> While most of the EEO policies that companies have implemented to spur justice in the form of diversity and antidiscrimination have

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261. Dobbin & Kalev, *Diversity Fail*, *supra* note 13, at 58.

262. *Id.*

263. *Id.* (citing study).

264. GREEN, *supra* note 13, at 136–38; Dobbin & Kalev, *Diversity Challenge*, *supra* note 14, at 52 (observing that the “antidiscrimination measures that work best are those that engage decision makers in solving the problem themselves”); Dobbin & Kalev, *Diversity Fail*, *supra* note 14, at 58; Fujimoto et al., *supra* note 211, at 159.

265. Dobbin & Kalev, *Diversity Fail*, *supra* note 14, at 58.

266. *See infra* Part III.A.3 (discussing the importance of freedom of choice).

267. Dobbin & Kalev, *Diversity Fail*, *supra* note 14, at 58.

268. *See generally* Dobbin & Kalev, *Diversity Challenge*, *supra* note 14 (discussing these examples); Dobbin & Kalev, *Diversity Fail*, *supra* note 14 (same); Fujimoto et al., *supra* note 211 (same); Kalev et al., *supra* note 182 (same).

“failed spectacularly,” structural accountability, as embodied in diversity task forces, diversity staff positions, mentoring programs, and management training, has been effective as an empirical matter.<sup>269</sup>

The general success of structural accountability stems from several basic phenomena. First, these programs all facilitate contact among women, racial minorities, and white men—some of whom might not otherwise interact.<sup>270</sup> This contact alone is valuable in mitigating the effects of in-group preference and because it further humanizes people who might be seen as different. Second, these programs will naturally enlist people who might otherwise not care about diversity, but who enjoy solving problems and have access to resources, such as time, money, and personnel.<sup>271</sup> Building broader coalitions of these kinds is critical to fighting discrimination.<sup>272</sup> Third, having policies and people in place that foster corporate accountability helps to actually halt some amount of discrimination. The studies on accountability are clear that people are less likely to exercise bias when they expect their decisions will be reviewed.<sup>273</sup> Curbing discrimination frequently takes purposeful effort, and structural accountability makes it much more likely that people will be self-conscious enough to make that purposeful effort. In sum, accountability is one of the most promising values for ensuring justice due in part to its demonstrated potential to deter discrimination in the managerial ranks.

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269. Dobbin & Kalev, *Diversity Fail*, *supra* note 14, at 60. For example, companies that implemented diversity task forces have seen increases of 9% to 30% in the representation of white women and racial minority group members in management over the next five years. *Id.*

270. See Jared B. Kenworthy et al., *Intergroup Contact: When Does It Work and Why?*, in *ON THE NATURE OF PREJUDICE, FIFTY YEARS AFTER ALLPORT* 279 (John Dovidio et al. eds., 2005) (noting the elements of “remedial contact” as involving equal status, common goals, institutional support, and a perception of similarity between the two groups); Chad Trulson & James M. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 *L. & SOC'Y REV.* 743, 745 (2002) (discussing the contact hypothesis).

271. Dobbin & Kalev, *Diversity Fail*, *supra* note 14, at 60; Fujimoto et al., *supra* note 211, at 159.

272. See Lisa Legault et al., *supra* note 15, at 1476 (profiling aggressive campaigns to stamp out bias and showing that such strategies are prone to elicit “a reflexive, reactive effect that increase[s] prejudice”).

273. GREEN, *supra* note 13, at 137.

### 3. Freedom of Choice

Whether it is wellness programs, diversity training, or committee assignments, employees' freedom to choose will dramatically influence how they will feel about the activity. This feeling stems from what behavioral economists call a "choice-supportive bias," in which people tend to feel positively about the things they have chosen and less positively about things they have not chosen.<sup>274</sup> Similarly, people often rebel against perceived efforts to control them.<sup>275</sup> When employees are free to choose, they are more likely to feel that the resulting state of affairs is a just one.<sup>276</sup> Simply put, there is a clearly defined relationship both between choice and fairness as well as one between no choice and unfairness.<sup>277</sup>

The potential problem with freedom of choice is that an employer will naturally tend to direct the activities of its employees when they are at work. The employer may need one employee on a particular committee, feel it is necessary for another employee to attend diversity training, or expect a third employee to participate fully in the wellness program. Nevertheless, behavioral science on the topic of choice is clear: failure to give employees a choice about whether to participate will make them feel worse

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274. See Kristen Stoll Benney & Linda A. Henkel, *The Role of Free Choice in Memory for Past Decisions*, 14 MEMORY 1001, 1002 (2006) (recounting studies that validate "choice-supportive memory distortion").

275. Dobbin & Kalev, *Diversity Challenge*, *supra* note 14, at 50; see, e.g., GREEN, *supra* note 13, at 114 (noting that "requiring supervisors to rely on detailed rubrics for selecting promotion candidates can backfire as managers rebel against perceived bureaucratic control").

276. See Dobbin & Kalev, *Diversity Challenge*, *supra* note 14, at 50–51; Legault et al., *supra* note 15, at 1476 (observing that workplace interventions that eliminate choice "may incite hostility toward the perceived source of the pressure").

277. See, e.g., Edward L. Deci & Richard M. Ryan, *Facilitating Optimal Motivation and Psychological Well-Being Across Life's Domains*, 49 CANADIAN PSYCHOL. 14, 19 (2008) (summarizing a variety of field experiments in which the autonomy of employees was predictive of their trust in the organization). The importance of choice also helps explain the robust literature that has developed around nudges over the last twenty years. See, e.g., Dan M. Kahn, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–08 (2000) (arguing lawmakers can use nudges to overcome the difficulty of changing social norms); Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1829–36 (2013) (arguing market failures justify legal paternalism in the form of nudging).

about the organization.<sup>278</sup> If “you catch more flies with honey than vinegar,” perceived choice is honey to employees, making them more likely to embrace whatever decision or task it is they have selected.

The issue of choice is so important that even policies that are intended to help employees can feel unjust if the workers do not perceive an option regarding whether to participate. Take wellness programs, for example. An employer-provided wellness plan is a programmatic effort to encourage employees to make healthier choices.<sup>279</sup> But when wellness programs are required, or the financial incentive to participate is too substantial to pass up, workers resist.<sup>280</sup> Even if the incentive ought to rationally compel everyone to participate and achieve better health, some will inevitably feel that a wellness plan is overbearing or unjust.<sup>281</sup>

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278. Dobbin & Kalev, *Diversity Challenge*, *supra* note 14, at 50 (“Job-autonomy research finds that people resist external controls on their thoughts and behavior and perform poorly in their jobs when they lack autonomy.”).

279. Jessica L. Roberts & Leah R. Fowler, *How Assuming Autonomy May Undermine Wellness Programs*, 27 HEALTH MATRIX: J. L.-MED. 101, 102 (2017). Wellness programs implement various strategies, such as individual and group challenges, that promote healthy behaviors and produce a “positive herd mentality.” Jessica L. Roberts, *Nudge-Proof: Distributive Justice and the Ethics of Nudging*, 116 MICH. L. REV. 1045, 1055 (2018).

280. In fact, a group of older workers who were concerned largely about privacy and civil rights challenged the amount of incentive (30% of the cost of coverage under the plan) that was allowed under the EEOC’s regulations sanctioning voluntary wellness programs. *AARP v. EEOC*, 267 F. Supp. 3d 14, 37 (D.D.C. 2017), *on reconsideration*, 292 F. Supp. 3d 238 (D.D.C. 2017). The EEOC officially rescinded these regulations, which had expressly permitted the voluntary incentive of up to 30%, in December of 2018. Ryan Golden, *EEOC Rescinds Wellness Regulations Ahead of Sunset Date*, HR DIVE (Dec. 20, 2018), <https://www.hrdiver.com/news/eec-rescinds-wellness-regulations-ahead-of-sunset-date/544866/> [<https://perma.cc/E9DH-G4FW>].

281. *See, e.g.*, Press Release, AARP, Statement by AARP Exec. Vice President Nancy LeaMond on EEOC Workplace Wellness Program Rules (May 16, 2016), <https://press.aarp.org/2016-05-16-Statement-by-AARP-EVP-Nancy-LeaMond-on-EEOC-Workplace-Wellness-Program-Rules> [<https://perma.cc/2CT4-C7Y5>] (“Older workers in particular are more likely to have the very types of less visible medical conditions and disabilities—such as diabetes, heart disease, and cancer—that are at risk of disclosure by wellness questionnaires and exams. By financially coercing employees into surrendering their personal health information, these rules will weaken medical privacy and civil rights protections.”).

Consider, as well, the idea of diversity training. Diversity training may intuitively seem as though it can produce both justice and perceptions of justice. After all, such trainings often help employees value difference and, when done well, can foster the sentiment that each employee is uniquely valuable and worthy of equitable treatment. Nonetheless, *mandatory* diversity training—a common stratagem—is unhelpful.<sup>282</sup> Not only is such training generally unsuccessful in broadening perspectives,<sup>283</sup> it also causes majority group members to fear they will be treated unfairly.<sup>284</sup> In short, mandating participation or involvement can cause employees to resist, undercutting their sense that the workplace is fair; in contrast, allowing employees to select their involvement in non-essential policies or programs is a low-cost way of furthering an organizationally just climate.

#### B. IMPLEMENTING ORGANIZATIONAL JUSTICE

This Article's contention is that legal and policy mandates have failed to effectively deter discrimination—and in part for this reason, we must consider alternative, non-coercive approaches.<sup>285</sup> One might then naturally wonder: what exactly can be done to ensure and measure Organizational Justice? As explained above, it is beyond the scope of this Article to detail *particular* policies that ought to be adopted by all employers.<sup>286</sup> While the values set out in the previous section lay the groundwork for the types of policies that will further justice in the workplace, they do not tell any particular actor what specifically to

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282. See Dobbin & Kalev, *Diversity Challenge*, *supra* note 14, at 52 (“Employers mandate training in the belief that people hostile to the message will not attend voluntarily, but if we are right, forcing them to come will do more harm than good.”).

283. See *id.* at 49 (showing through a meta-analysis of 426 studies on anti-bias training that any effects were weak and dissipated within days).

284. *Id.* at 50 (noting “[w]hites generally feel they will not be treated fairly in workplaces” that emphasize or compel diversity).

285. See, e.g., Bartlett, *supra* note 15, at 1903 (showing aggressive legal strategies may backfire when it comes to implicit bias); Eyer, *supra* note 9, at 1279–80 (noting proposals to broaden the legal doctrines of antidiscrimination laws may “exacerbate the documented tensions between prevailing public views and available claims”); Legault et al., *supra* note 15, at 1476 (demonstrating “that strategies urging people to comply with antiprejudice standards are worse than doing nothing at all” and that “social control elicited a reflexive, reactive effect that increased prejudice”).

286. *Supra* notes 238–41 (explaining why it might be unhelpful to gin up a “list of ready to go, discrete measures that can be implemented across all organizations”).

do. Nevertheless, this Section will consider the relative merits of pay transparency. Additionally, Organizational Justice provides important clues about how employers may be persuaded to create more just workplace climates.

### 1. Firm Interest

An indispensable part of educating employers must involve convincing them that it is in their own best interest to make workplaces more just. Fortunately, there is compelling evidence that policies advancing justice perceptions not only serve the public interest, but also the interests of the firm; evidence indicates that an organizationally just climate increases retention, efficiency, and productivity.<sup>287</sup> But why exactly do just organizations advance the bottom line?

The answer lies at least partly in social exchange theory, in which parties calculate how to behave toward one another in light of the anticipated costs and benefits.<sup>288</sup> In the work context, there is evidence that when individuals “receive economic and socioemotional resources from their organization, they feel obliged to respond in kind and repay the organization.”<sup>289</sup> In particular, one of the most profound ways for an employee to respond to an organization is to vary their level of engagement and job performance.<sup>290</sup> When the engagement is high, an employee will devote greater amounts of cognitive, emotional, and physical resources to their job.<sup>291</sup>

One of the many social exchanges or inputs that can influence employees is perceived fairness in managerial practices. Fair treatment signifies respect and communicates support for employees.<sup>292</sup> Thus, when employees perceive an organization’s

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287. E.g., Andrew Li et al., *Fairness at the Unit Level: Justice Climate, Justice Climate Strength, and Peer Justice*, in OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE, *supra* note 19, at 137; Devon Proudfoot & E. Allan Lind, *Fairness Heuristic Theory, the Uncertainty Management Model, and Fairness at Work*, in OXFORD HANDBOOK OF JUSTICE IN THE WORKPLACE, *supra* note 19, at 371.

288. *Social Exchange Theory*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Social\\_exchange\\_theory](https://en.wikipedia.org/wiki/Social_exchange_theory) [<https://perma.cc/GS6M-P8TY>].

289. Alan M. Saks, *Antecedents and Consequences of Employee Engagement*, 21 J. MANAG. PSYCH. 600, 603 (2006).

290. *Id.*

291. *Id.*

292. Gauri S. Rai, *Organizational Justice and Quality of Working Life: A Road That Leads to a Virtuous Organization*, 41 J. SOC. SERV. RES. 269, 287 (2015).

management and policies are just or fair, they reciprocate or repay the employer with better job performance and commitment.<sup>293</sup> The logical extension of such repayment is greater productivity, and less absenteeism and turnover.<sup>294</sup> As such, there are profit-serving reasons for employers to actively seek justice in the workplace.

## 2. Educating Employers

Employers must also be educated about the antidiscrimination benefits of an organizationally just climate, and advocacy groups are likely in the best position to do that work. In particular, advocacy groups might develop specific policy recommendations that are based upon empirical evidence and urge employers to adopt them.<sup>295</sup> In the current political climate, we see instances of this already happening. One example is the National Women's Law Center, which has effectively pressured employers to adopt reforms in the areas of fairer work schedules, pay equity, and sexual harassment.<sup>296</sup> In the Organizational Justice space, human resource professionals and organizations like the Society for Human Resource Management (SHRM) are likely the most effective actors to transmit justice-laden, workplace reforms to the national business community.<sup>297</sup> As alluded to already, one of the possible benefits to Organizational Justice is

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293. Cho, *supra* note 228, at 177; *see supra* note 287.

294. Rai, *supra* note 292, at 287.

295. Sturm, *supra* note 53, at 463, 520–21, 565.

296. *See Workplace*, NAT'L WOMEN'S LAW CTR., <https://nwlc.org/issue/workplace/> [<https://perma.cc/FH9V-CPMG>] (providing an overview of their advocacy efforts); *see, e.g.*, Press Release, Nat'l Women's Law Ctr., NWLC Calls To Investigate Sexual Assault Allegations Against Justin Fairfax (Feb. 22, 2019), <https://nwlc.org/press-releases/nwlc-calls-to-investigate-sexual-assault-allegations-against-justin-fairfax/> [<https://perma.cc/R2AH-2UJF>]; Press Release, Nat'l Women's Law Ctr., NWLC Applauds Introduction of the Raise the Wage Act (Jan. 16, 2019), <https://nwlc.org/press-releases/nwlc-applauds-introduction-of-the-raise-the-wage-act/> [<https://perma.cc/786Z-WQPL>]; Press Release, Nat'l Women's Law Ctr., Wage Gap for Women Does Not Budge for Two Years in a Row, Being a Woman Still Increases the Odds of Being Poor in America, and Number of People Insured Holds Steady (Sept. 12, 2018), <https://nwlc.org/press-releases/wage-gap-women-does-not-budge-being-woman-increases-odds-of-being-poor-america/> [<https://perma.cc/27G9-58FN>]; Press Release, Nat'l Women's Law Ctr., Walmart Must Face Pregnancy Discrimination Class Action (Mar. 29, 2018), <https://nwlc.org/press-releases/walmart-must-face-pregnancy-discrimination-class-action/> [<https://perma.cc/7J3E-EART>].

297. *See* SOC'Y FOR HUMAN RES. MGMT., <https://www.shrm.org> [<https://perma.cc/G2GG-M3TC>].

that it is a broad enough frame to serve the interests of diverse constituencies, such as groups advocating on behalf of women, racial minorities, and the LGBTQ community. More than that, justice is a “big tent” that even majority group members can get behind—especially when the justice-oriented policies are identity-neutral. In this way, the research on Organizational Justice provides a way to transcend the culture wars—after all, who’s opposed to justice?—and still seek change in the workplace that will benefit disadvantaged populations the most.<sup>298</sup>

Employers could likely be persuaded, based upon the data marshalled by this Article, that Organizational Justice is a useful approach to a seemingly intractable set of problems flowing from bias and patterns of discrimination. In particular, Organizational Justice offers two prime advantages as a tool of antidiscrimination. First, and most fundamentally, Organizational Justice intervenes *before* people engage in discrimination. This early stage of intervention means that it targets both conscious and unconscious biases,<sup>299</sup> and that it can deter the exercise of bias before people are actually injured. By preventing discrimination, Organizational Justice avoids altogether such cognitive barriers as disbelieving discrimination or an unwillingness to label behavior as “harassment.”

Legal scholars are often fixated on whether antidiscrimination laws are “working,” by which we mean that people can sue, survive summary judgment, and prevail upon their claims. But securing settlements or winning lawsuits is not the goal of antidiscrimination laws—the point is to reduce or even prevent discrimination from occurring in the first place. Further to the point, most plaintiffs do not want a lawsuit; they want to not experience discrimination.<sup>300</sup> Given the data showing that Organizational Justice can help deter discrimination, employers ought to embrace strategies that maximize justice.

Second, Organizational Justice advances nondiscrimination in a way that avoids the usual detriments that accompany explicit efforts to address bias for a whole host of reasons.<sup>301</sup> As

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298. See *supra* Part II.A (discussing how workplace injustices disproportionately impact women and racial minorities).

299. Cf. Roberts, *supra* note 178, at 2155 (making a similar argument about privacy).

300. Thanks to Katie Eyer for raising several of these incisive points.

301. See *supra* notes 64–68, 220, 282–84 and *infra* note 325 and accompanying text (detailing the various ways in which industry efforts to advance diversity or address bias have failed).



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noted in the introduction, strategies such as diversity or antibias training may have perverse effects, such as activating stereotypes, increasing “moral licensing,” and undermining people’s senses of “autonomy, competence, relatedness, and basic goodness”—causing such programs to backfire.<sup>302</sup> Organizational Justice thus offers a menu of “cooler” policies that can operate in the background and foster justice without generating the animosity that can sometimes undermine progress for disadvantaged groups.<sup>303</sup>

### 3. Measuring Success

A critical piece in implementing Organizational Justice involves measuring success. One might naturally wonder how an employer will know when it has achieved a more just climate. One way to measure Organizational Justice is to systematically and periodically survey employees on measures of distributive, procedural, and informational justice. There are a number of empirical studies on Organizational Justice that provide a window into the types of questions one might raise. For example, consider the statements and questions in Figure 1 (below), taken from a study on managerial efforts to establish fair practices. The statements and questions are non-exhaustive, but provide a useful starting point in considering how employers might attempt to measure change in the amount of perceived justice within an organization.

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302. See *supra* notes 16–17 and accompanying text.

303. Eyer, *supra* note 9, at 1361 (advocating a “cooler” approach—by its nature designed to avoid the pursuit of moral victories” as the best means to “improv[e] outcomes for individual victims of discrimination”).

**Figure 1.**  
**Survey Questions and Statements that Measure the Managerial Dimension of Organizational Justice<sup>304</sup>**

**Distributive justice**

- Promotions in my work unit are based on merit.
- Pay raises depend on how well employees perform their jobs.
- Awards in my work unit depend on how well employees perform their jobs.

**Procedural justice**

- Complaints, disputes, or grievances are resolved fairly in my work unit.
- Arbitrary action, personal favoritism, and coercion for partisan political purposes are not tolerated.
- Prohibited personnel practices are not tolerated.
- I can disclose a suspected violation of any law, rule, or regulation without fear of reprisal.

**Informational justice**

- Managers communicate the goals and priorities of the organization.
- Managers promote communication among different work units (for example, about projects, goals, needed resources).
- How satisfied are you with the information you receive from management on what's going on in your organization?

One might naturally question whether there is a problematic tension between what people perceive as just and what is *actually* just.<sup>305</sup> For example, one might perceive that a state of affairs is just, but in fact it is not. Conversely, an unfair situation may be overlooked or go unrecognized. This is a natural tension between certain sub-species of organizational justice. For example, there might not be distributive justice (by any reasonable measure), but an organizational environment might be high on procedural justice, producing a general perception of fairness. The question is ultimately not whether there is true justice, in

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304. Cho, *supra* note 228, at 181.

305. Of course, this concern begs the question of what one might consider to be true or actual justice—or how we might measure it. “Justice” is both a fraught and contested term.

some epistemic sense, but whether people within an organization believe there is justice across distributive, procedural, and informational factors. Organizational Justice cannot solve all problems, which may include not producing actual justice in some instances. Even so, this Article has contended that procedural justice is often a strong start toward the justice produced by successful antidiscrimination efforts. Procedural justice can, as explained in Part II, prevent discrimination and increase internal reports of harassment in many instances.

#### 4. An Example: Pay Transparency

One specific policy extension of Organizational Justice is found in making wages more transparent. In recent years, there has been a push by both politicians and activists for mandated pay transparency.<sup>306</sup> The basic idea is that Congress could pass an omnibus federal law that requires employers to make wages more transparent and provide better remedies and protections for employees who oppose pay discrimination.<sup>307</sup> But Organizational Justice may be challenging to achieve through legal mandates of this sort.<sup>308</sup> Many state entities are already required by

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306. The Paycheck Fairness Act, which would require employers to make wages more transparent and prohibit retaliation for employees who raise concerns about discriminatory compensation, has been reintroduced in every Congress dating back to 1997. *Paycheck Fairness Act*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Paycheck\\_Fairness\\_Act](https://en.wikipedia.org/wiki/Paycheck_Fairness_Act) [<https://perma.cc/FM8N-NVUK>]. For more analysis on the merits of pay transparency, see BERREY ET AL., *supra* note 42, at 272 (arguing for a system of mandated disclosure of demographic and wage data) and Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781 (2014) (analyzing the potential costs and benefits of pay transparency and concluding, on balance, that such transparency would result in a fairer and less discriminatory economy).

307. *Paycheck Fairness Act*, *supra* note 306.

308. This Article has contended that coercive approaches to addressing discrimination have generally been unsuccessful and are not the best path forward. *Supra* Part I (discussing the failure of antidiscrimination law); *see also supra* notes 283–84 and *infra* note 325 and accompanying text (discussing the failure of EEO policies that require employees to do something). The approach of simply trying to legislate change evokes the “Law of the Instrument,” under which people tend to rely on familiar instruments in lieu of searching out the best tools for intractable problems. *See generally Law of the Instrument*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Law\\_of\\_the\\_instrument](https://en.wikipedia.org/wiki/Law_of_the_instrument) [<https://perma.cc/8S9C-YWLN>]. Since point source-style legislation has been generally ineffective, we ought to instead focus on seeking justice in the workplace by attacking discrimination *indirectly*.

law to disclose salary information to the public. A public employee may be more likely to see this disclosure as legal compliance than as evidence that their employer is particularly just.

A more tailored approach would be the rule that President Obama advanced in 2016, requiring companies with 100 or more employees to report their pay scales broken down by sex and race.<sup>309</sup> The EEOC has always required large companies to report the job titles of their workers by sex and race; Obama simply expanded these existing requirements to include pay data. Nonetheless, the rule was subsequently stayed by the Trump Administration.<sup>310</sup> In March of 2019, a federal judge gave the proposed rule life again, finding that the stay was unwarranted and that the pay scale disclosure rule could go forward.<sup>311</sup> But critics have argued that this rule does not go far enough because the data will only be disclosed to regulators and not the public.<sup>312</sup>

A more promising, and less coercive, alternative would be for federal or state legislatures to create economic incentives. For example, instead of legislating pay transparency, Congress could craft tax inducements for companies that make compensation data publicly available. This might accomplish less overall transparency, but it would increase the likelihood that something actually gets passed. After all, few companies currently provide pay transparency,<sup>313</sup> which suggests they would prefer not to do

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309. Daniel Wiessner, *Judge Says Trump Administration Improperly Blocked Sex, Race Pay Data Rule*, REUTERS (Mar. 5, 2019, 10:57 AM), <https://www.reuters.com/article/us-usa-lawsuit-paydata/judge-says-trump-administration-improperly-blocked-sex-race-pay-data-rule-idUSKCN1QM224> [<https://perma.cc/65NE-NK8D>].

310. *Id.*

311. Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget, 358 F. Supp. 3d 66, 71 (D.D.C. 2019).

312. *Employers Must Now Release Data To Close Race-Gender Pay Gap*, NPR (Sept. 30, 2019), <https://one.npr.org/?sharedMediaId=765674633:765685778>.

313. Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERK. J. EMP. & LAB. L. 41, 47–48 (2005). Some companies, such as Whole Foods and Verve, have taken the step of voluntarily adopting salary transparency policies, but they are in the extreme minority of companies. See Kim Elsesser, *Pay Transparency Is the Solution to the Pay Gap: Here's One Company's Success Story*, FORBES (Sept. 5, 2018, 12:47 PM), <https://www.forbes.com/sites/kimelsesser/2018/09/05/pay-transparency-is-the-solution-to-the-pay-gap-heres-one-companys-success-story/#684959350100> [<https://perma.cc/3YFW-SX2X>] (discussing Verve's policy); Tanza Loudonback, *More Tech Companies Have Stopped Keeping Employee Salaries Secret—And They're Seeing Results*, BUS. INSIDER (May 3, 2017, 11:07 AM), <https://www.businessinsider.com/why>

so.<sup>314</sup> Coaxing—instead of mandating—pay transparency would also engender less resentment from the business community and those on the high end of the salary scale, whose salaries are most likely to be affected, by disguising the prod as a carrot. It is also more likely that employees will admire such a step if it is not taken under the duress of legal mandate.

Still, to talk about justice flowing from pay transparency is complicated. Transparency in earnings would certainly give employees a chance to assess whether they are victims of pay discrimination, which could also deter future sex- or race-based compensation disparities.<sup>315</sup> However, laying bare employment compensation in the private sector would also cause jealousy and resentment—at least in the short term.<sup>316</sup> It could even elevate the overall amount of felt injustice,<sup>317</sup> especially since wage compression is often a byproduct of salaries being made public.<sup>318</sup> However, the argument about transparency's effect on justice perceptions is knotty. To answer that question, one would have to counter-factualize how employees will feel after learning actual salaries and compare that information to what they currently suspect or fear.<sup>319</sup> Perceptions of injustice could be greater under the current, more secretive state of affairs.<sup>320</sup>

All told, the argument that pay transparency would increase justice through antidiscrimination is compelling. Some commentators have even argued that pay transparency is the most direct route to closing the gender wage gap.<sup>321</sup> After all, when salaries

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-companies-have-open-salaries-and-pay-transparency-2017-4/commerce-on-business-insider [https://perma.cc/4H2G-KDXR] (discussing Whole Foods' policy).

314. See Estlund, *supra* note 306, at 791–99 (canvassing employer objections to pay transparency).

315. Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L. J. 951, 982–1006 (2011) (making this case); Estlund, *supra* note 306, at 786.

316. Estlund, *supra* note 306, at 797.

317. The impact of pay transparency on perceptions of fairness is mixed. *Id.* at 794 n.72.

318. *Id.* at 795–96.

319. *Id.* at 794.

320. *Id.*

321. Elsesser, *supra* note 313 (touting pay transparency as the solution to the pay gap); Kristin Wong, *Want To Close the Pay Gap? Pay Transparency Will Help*, N.Y. TIMES (Jan. 20, 2019) <https://www.nytimes.com/2019/01/20/smarter-living/pay-wage-gap-salary-secrecy-transparency.html> [https://perma.cc/B3T6-MMZW].

are kept secret, pay inequity between sexes or races is typically undetectable. Countries such as Denmark and Britain have found that pay transparency reduced the gender wage gap in part by slowing men's salary growth and in part by compressing employees' wages.<sup>322</sup> In the United States, both unions and the public sector—where compensation is typically transparent and reveals smaller disparities between different races and sexes—provides more evidence of this relationship.<sup>323</sup> Moreover, a pay scale disclosure rule would give the public access to industry-wide phenomena—data that could arm victims of wage discrimination with robust evidence for litigation.<sup>324</sup> The issue of pay transparency is just one example of an Organizational Justice-minded policy, and it illustrates how an employer can increase justice, and fight discrimination, without hewing to the well-worn and frequently ineffectual EEO industry path.<sup>325</sup>

### C. Addressing Counter-Arguments and Concerns

One general argument that might be leveled against Organizational Justice is that it is just another form of “new governance,” in which organizations are encouraged to self-govern in

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322. Bryce Covert, *Even Google Can No Longer Hide Its Gender Pay Gap*, N.Y. TIMES (Mar. 7, 2019) <https://www.nytimes.com/2019/03/07/opinion/google-pay-gap.html> [<https://perma.cc/4GK6-ZYBV>].

323. Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1063 (2012) (“Pay transparency is more common in state employment and at unionized workplaces than in non-unionized private employment, and many studies have documented reduced wage disparities on the basis of race and gender in such workplaces.”).

324. Covert, *supra* note 322.

325. EEO policies such as those installing diversity task forces or EEO offices are understandable courses of action. But scholars have documented that many such policies are ineffective, or worse, counterproductive. First, they often fail to increase the raw number of women and racial minorities in the workplace and/or in management positions. EDELMAN, *supra* note 41, at 137. Second, if the policies require that employees attend certain meetings or make certain decisions, employees may react negatively to what they perceive as attempts to control them. *See* Dobbin & Kalev, *Diversity Challenge*, *supra* note 14, at 50. Third, if the policies prod managers to prefer groups that have been historically excluded, that pressure may cause majority group members to feel sidelined and undervalued. *Id.* Finally, if the policies are built around reducing bias, they will likely activate and reinforce stereotypes by increasing their cognitive availability. Kalev et al., *supra* note 182, at 593 (citing studies for this proposition); *see also* Dobbin & Kalev, *Diversity Challenge*, *supra* note 14, at 50 (“Try not thinking about elephants. Diversity training typically encourages people to recognize and fight the stereotypes they hold, and this may simply be counterproductive.”).

lieu of top-down regulation.<sup>326</sup> Some legal scholars have noted the utility of governance-based approaches to social issues. For example, Cynthia Estlund has observed that the turn to governance is a by-product of two realities: that “powerful dynamics and incentives operating within regulated organizations and networks can either frustrate or advance societal objectives; and that direct regulation is not always the best way of channeling those organizational dynamics in a socially productive direction.”<sup>327</sup> But others have argued against governance-based approaches, worrying that organizations will engage in a type of symbolic compliance that treats legal objectives as business goals instead of moral imperatives.<sup>328</sup> These arguments have merit and warrant response. In the civil rights context, the argument against new governance can be distilled into three risks: (1) the risk that without legal enforcement, businesses will not self-police; (2) the risk that the policies employers choose will be ineffective; and (3) the risk that such policies will “managerialize” moral imperatives.<sup>329</sup>

One concern with “new governance” policies is that when employers are not forced to act, they may well do nothing. First, as detailed above, advancing justice simultaneously advances the firm’s interest through increasing the level of employees’ engagement, which in turn, can increase workplace efficiency and reduce workplace absenteeism and turnover. The empirical data is strong that just organizations persuade employees to remain loyal and engage in productive behaviors. Moreover, as discussed in Part II, policies that foster justice can decrease discrimination and increase the representation of disadvantaged constituencies, which in turn may help organizations rightly avoid legal liability.<sup>330</sup> Organizational Justice is thus a partial answer to legal scholars like Susan Sturm and Tristen Green, who have called for organizations to get more creative in devising solutions that minimize discrimination and further the promotion of

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326. *E.g.*, EDELMAN, *supra* note 41, at 223 (expressing skepticism about more organizational self-governance).

327. Estlund, *supra* note 249, at 404.

328. *Id.*

329. EDELMAN, *supra* note 41, at 223 (worrying about the tendency to “managerialize the law in ways that render it more consistent with business goals and less consistent with legal goals”).

330. *Supra* Part II.B.

women and minorities.<sup>331</sup> Ultimately, as noted above, justice can be a powerful framing device, making Organizational Justice both a politically and socially agreeable means of furthering antisubordination.<sup>332</sup>

A second argument against “new governance” approaches is that the policies a business enacts such as grievance procedures or diversity trainings may turn out to be wholly ineffective, and yet the organization is nonetheless credited by courts and the public as being attentive to antidiscrimination values.<sup>333</sup> Scholars have argued that the presence of symbolic structures may have an “anchoring effect” for judges: once they learn that these structures are in place, they are more likely to form an initial assessment that the employer is complying with civil rights laws and are less likely to give weight to subsequent evidence showing otherwise.<sup>334</sup> One elegant feature of Organizational Justice is that it does not directly relate to discrimination and is thus not an obvious EEO reform. Accordingly, judges would be unlikely to deem reforms flowing from a commitment to fairness as relevant to antidiscrimination litigation. Further, *any* time an organization installs policies—of any kind—they may turn out to be ineffective. But all of these facts form an argument in favor of distinguishing between those policies that achieve substantive justice versus those that are merely symbolic—not an argument against implementing justice-oriented reforms altogether.<sup>335</sup>

A third possible concern is that Organizational Justice may function as a shortcut *around* bias in which the moral focus on eliminating prejudice gets lost. The idea is that indirect approaches can minimize the “moral valence” of fighting discrimination.<sup>336</sup> For example, instead of using their inherent influence

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331. GREEN, *supra* note 13, at 154–55 (calling for organizations to be more creative in devising solutions to reduce discrimination); Sturm, *supra* note 53, at 463 (encouraging “experimentation with respect to information gathering, organizational design, incentive structures, measures of effectiveness, and methods of institutionalizing accountability as part of an explicit system of legal regulation”).

332. *Supra* notes 34–39 and accompanying text.

333. EDELMAN, *supra* note 41, at 223.

334. *Id.* at 171.

335. *See id.* at 238 (acknowledging that when legal institutions actually “distinguish between organizational practices that are substantive and those that are merely symbolic . . . legal endogeneity promotes social change”).

336. Eyer, *supra* note 9, at 1356 (considering the “lost moral valence of moving away from claims of discrimination towards an increased focus on claims” that are “designed to be less morally and socially charged”). *Cf.* Roberts, *supra*



to act on a positive moral duty, organizations may relegate such duties to policy; that is, they create a space for antidiscrimination apart from appreciating it as a moral imperative. The best response to this argument is that employment discrimination law as currently constituted offers few victories—moral, economic, or otherwise.<sup>337</sup> Given that most legal policies are failing to combat discrimination, innovative approaches to furthering antidiscrimination should be embraced—even while advocates simultaneously campaign for legal reform. Additionally, as explained above, most policy efforts that are focused directly on bias are, according to empirical research, failing.<sup>338</sup> More to the point, organizations could still adopt Organizational Justice reforms with antidiscrimination goals in mind—and an awareness that traditional civil rights reforms have not worked. Organizational Justice need not signal a lack of commitment to fighting discrimination, and indeed could become a hallmark of commitment to antidiscrimination values if it comes to be seen as more effective.<sup>339</sup> Accordingly, employers should be quick to adopt and embrace policies that can further substantive equality—and benefit both worker and firm alike—through an emphasis on justice.

### CONCLUSION

Workplace discrimination is persistent, and current employment discrimination law and policy do not sufficiently address it. The best available evidence shows that most people who are discriminated against at work do not file discrimination claims due to a variety of psychological, social, and pragmatic factors. Furthermore, even when people do file claims, most are never fully litigated, and employers win most of the small percentage that are. To address the shortcomings of antidiscrimination law, activists need new tools to prevent and reduce discrimination. Recent empirical studies have shown that Organizational Justice may be just the type of meaningful solution needed. Organizational Justice presents an innovative framework for remaking

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note 178, at 2171–72 (acknowledging that privacy may preempt discrimination “without thinking deeply about the meaning of difference and the values we may attach to it”).

337. Eyer, *supra* note 9, at 1356.

338. *Supra* notes 64–68, 220, 282–84, 325 and accompanying text (detailing the various ways in which industry efforts to advance diversity or address bias have failed).

339. Thanks to Katie Eyer for this great insight.

the workplace climate with an eye toward enhancing fairness in the workplace. Perhaps most importantly, where current employment discrimination law and policy's focus is backward—on righting wrongs already done—Organizational Justice aims forward to stop discrimination before it even begins, by addressing one of its underlying causes.

Organizational Justice is a useful addition to the antidiscrimination toolbox. An organizationally just climate can both decrease discrimination and moderate its effects—especially with regard to women and minorities, who are disproportionately harmed by workplace discrimination. Organizational Justice can also help to decrease instances of harassment in the workplace and, in the event that harassment still occurs, can increase the likelihood a victim will report it.

With a problem as complicated as discrimination, there are no easy solutions. Employers should take proactive steps to increase employees' perceptions of justice through implementing policies that focus on transparency, accountability, and freedom of choice. Crafting policies, practices, and rules with a bent toward fostering justice and perceptions of justice may be just the innovative, heterodox approach needed for more adequately addressing employment discrimination.