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Tristin K. Green

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INTRODUCTION

Discrimination in the workplace today is increasingly less a problem of overt employer policies or targeted discriminatory animus than it is a problem of subtle, often unconscious, bias creeping into everyday social interactions and judgments on the job.[1] In fact, modern discrimination, both in the workplace and in other areas of social life, is often described as a cognitive problem, a problem of persistent biased categories and schemas in our minds.[2] And yet, individuals do not act in isolation. Individuals discriminate, but they do so in situated context. Their discriminatory decisions take place as part of a complex web of interrelated social expectancies and taken-for-granted institutionalized practices that influence their interpretations, constrain their options, and normalize their outcomes. Even as we recognize its complex human dimensions at the individual level, then,

* Associate Professor of Law, Seton Hall University School of Law. I presented an earlier version of this paper at the 2003 Stanford/Yale Junior Faculty Forum. I am indebted to the Forum's participants—particularly Deborah Hensler and Judith Resnik—for their helpful feedback. I also received invaluable comments at various stages of the project from Michelle Adams, Carl Coleman, Howard Erichson, Rachel Godsil, Solangel Maldonado, and Charles Sullivan, as well as from the participants in the summer lunch series at Seton Hall. Thanks also to Stacy Manobianca and John Nachlinger for research assistance and to the Seton Hall University School of Law Summer Research Stipend Program for financial support.

1. A number of scholars have detailed various aspects of the shifting nature of discrimination from the overt to the more subtle. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. Rev. 519 (2001); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001); *see also* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 Harv. C.R.-C.L. L. Rev. 91 (2003).

2. *See* Confronting Racism: The Problem and the Response (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998); Prejudice, Discrimination, and Racism (John F. Dovidio & Samuel L. Gaertner eds., 1986); Krieger, *supra* note 1, at 1186-1211.

we must also recognize that discrimination is equally an institutional and organizational problem.

In the past decade, courts have seen an increase in the filing of private class action lawsuits under Title VII of the Civil Rights Act[3] that allege widespread employment discrimination facilitated by organizational structures, workplace cultures, and institutionalized practices. In this Article, I argue that these lawsuits represent the emergence of an important new form of private institutional reform litigation in which plaintiffs seek organizational change that will reduce the incidence of discrimination by individuals and groups in the workplace by altering the context in which decisions are made. I outline some of the basic characteristics of this litigation and consider its potential to effect meaningful antidiscrimination reform. By focusing primarily on the procedural and remedial contours of these lawsuits rather than on the particular doctrinal formulation of substantive legal theories, I seek to consider the implications of the complexity inherent in the problem of modern workplace discrimination for the task of identifying its sources and of devising programs for reform.[4]

The Article is organized into three main parts. I begin in Part I with a brief discussion of the importance of identifying and remedying sources of discrimination at the institutional and organizational as well as at the group and individual level. Drawing from the recent work of organizational and socio-legal scholars, I argue that the complex, situated nature of human action has tremendous consequence for the way that we think about and attempt to solve the problem of modern workplace discrimination. Individuals still serve as an important point of inquiry, but larger organizational decision-making structures, workplace cultures, and informal, institutionalized practices become equally important. Without attention to the context and complexity of decision making, an individual instance of discrimination may be resolved while the structures, cultures, and practices that facilitated that discrimination in the first place remain unchanged.

In Part II of the Article I turn more specifically to Title VII lawsuits as a mechanism for generating the type of institutional, and/or

3. Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2000e-15 (2000) [hereinafter Title VII].

4. This Article builds on my earlier work, with a shift in emphasis. In *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, I argued that existing Title VII doctrine fails adequately to address much of modern workplace discrimination. *See* Green, *supra* note 1. I suggested that, particularly given ongoing changes in the nature of discrimination and in the nature of the employment relationship, the substantive legal inquiry should move toward recognizing the interplay between individuals and the organizations and environments within which they work. Specifically, I proposed a structural form of disparate treatment theory aimed at holding employers responsible for the organizational structures, institutional practices, and workplace dynamics that enable discrimination in their workplaces.

organizational inquiry needed for meaningful change. I begin this part by tracing the public and private dimensions of the early Title VII civil rights enforcement regime, the individualization/privatization of Title VII litigation over time, and the recent rise in private class actions seeking widespread institutional reform. I then take these recent class actions as a starting point for an effort to define the basic characteristics of modern institutional reform litigation under Title VII. I suggest that these lawsuits, although similar to earlier Title VII institutional reform efforts, differ in significant ways that may affect their ability to effect meaningful reform.

In Part III, I move from the descriptive to the evaluative to consider the potential of these lawsuits for broadening the legal inquiry to include organizational sources of harm. The large money stakes involved in many recent cases make it tempting to view the cases as just another form of mass tort, wherein the parties bargain to place a price on the risk of workplace discrimination. It would be a mistake, however, to ignore the institutional reform dimension of these lawsuits. Indeed, it is the search for institutional reform that helps make clear that the organization itself, and not just individual decision makers, can be a cause of even some of the more subtle forms of discrimination found in the modern workplace. Once understood as attempts to identify and address organizational sources of discrimination, these lawsuits fit nicely within the existing class action paradigm, for the organizational cause of the discrimination rather than the precise nature of the injury suffered forms the common question for class treatment.

In Part IV of the Article, I then turn to consider some of the hazards of this new form of institutional reform litigation. Again, the complexity of the problem surfaces to inform the analysis, this time revealing the multi-dimensional, collaborative nature of the remedial process needed for change, and raising concern about private co-option of larger public antidiscrimination goals. I argue in this part that, unlike some of the more traditional, early Title VII efforts at institutional reform, the contextual nature of the problem of modern workplace discrimination requires a similarly contextualized solution. There simply is no single answer that will work in all organizations to eliminate institutionalized forms of discrimination. This is true to some extent for all organizational reform, but I suggest that it is particularly true in the modern employment discrimination context, where the legal objective is, in large part at least, to change the structures, cultures, and practices of the workplace in ways that will reduce the operation of subtle, often unconscious, discriminatory bias in the decision making of individuals. This interrelation between organizational structures, institutionalized practices, and individuals adds a layer of complexity that is not equally apparent in early Title VII institutional reform, where efforts were aimed primarily at

structural changes with immediate, easily observable rather than secondary or indefinite effect. Drawing once again on socio-legal research and theory, I argue that the need for a flexible, contextualized, ongoing remedial process leads to an increased risk of private co-option of larger public goals that may be exacerbated by a purely private resolution of lawsuits like the ones recently filed.

I. COMPLEXITY AND CAUSATION: THE PROBLEM

The importance of recent Title VII class action litigation lies in its ability to reach some of the more subtle forms of discrimination common in the modern workplace by altering the context in which decisions are made. In this part, I draw on a variety of interdisciplinary research and scholarship to highlight the role of institutions and other organizational context in perpetuating workplace inequity and to illustrate the need for an antidiscrimination inquiry that extends beyond individual decision makers to include larger intra- and inter-organizational practices and structures.

A. *Organizational Influence on Decision Making*

Research and theory in the disciplines of sociology and social psychology have long emphasized the situated nature of human thought and action. At the micro-level, cognitive psychologists have amassed a large body of evidence that suggests contextual influences on cognitive biases and stereotyping.[5] People perceive, categorize, and

5. Social cognition theory, one area of study within cognitive psychology, focuses on how people make sense of themselves and the social world. *See, e.g.*, Susan T. Fiske & Shelley E. Taylor, Social Cognition (1991); *see also* Culture in Mind: Toward a Sociology of Culture and Cognition (Karen A. Cerulo ed., 2002) (compiling efforts to analyze cognition in its sociocultural context). Some research in social cognition has focused specifically on the cognitive and contextual aspects of discrimination. *See, e.g.*, William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 Contemp. Soc. 120 (2000) (reviewing recent studies of contextual influence on decision making); Marilynn B. Brewer et al., *Diversity and Organizational Identity: The Problem of Entrée after Entry*, *in* Cultural Divides: Understanding and Overcoming Group Conflict 337 (Deborah A. Prentice & Dale T. Miller eds., 1999) (exploring the influence of group and organizational dynamics on success of newcomers); Jason P. Mitchell et al., *Contextual Variations in Implicit Evaluation*, 132 J. of Exp. Psych. 455 (2003) (exploring the influence of context on attitudes); Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice*, *in* Confronting Racism: The Problem and the Response 33 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (discussing the influence of power on stereotypic thinking and perceived intergroup differences); Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 Contemp. Soc. 319 (2000) (reviewing research on the ways in which organizational context can activate or suppress social psychological and cognitive processes). This growing understanding of the cognitive aspects of modern discrimination has provided a solid empirical foundation for legal scholars who argue that an intent-based antidiscrimination doctrine is increasingly misplaced. *See, e.g.*, Krieger, *supra* note 1; Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 Cornell J.L. & Pub. Pol'y 415 (2000); *see also* Green, *supra* note 1, at 895-

evaluate information differently depending on, for example, the ways in which information is presented,[6] the salience of in-group and out-group boundaries,[7] and the degree of power held in relation to others.[8] In addition, at the macro-level, sociologists and organizational theorists have examined the role of culture, environment, and institutions in shaping organizational and individual behavior.[9] This work suggests that workplace culture and informal institutions, the webs of interrelated, taken-for-granted rules and norms that govern social relationships, serve as important points of inquiry in understanding individual and group action.[10]

99.

6. *See, e.g.*, Virginia Valian, Why So Slow? The Advancement of Women 139-42 (1999) (describing research on the effect of minority group size on perception and evaluation); Krieger, *supra* note 1, at 1193-94 (describing research on the consequences of a minority group member's being a "token" or "solo" in a group).

7. *See, e.g.*, Samuel L. Gaertner et al., *Across Cultural Divides: The Value of a Superordinate Identity*, *in* Cultural Divides: Understanding and Overcoming Group Conflict 173 (Deborah A. Prentice & Dale T. Miller eds., 1999) (describing the effect of group boundaries on bias and group-based techniques for reducing intergroup bias); Krieger, *supra* note 1, at 1191-95 (reviewing research on in-group and out-group distinctions and the effect of salience).

8. *See, e.g.*, Operario & Fiske, *supra* note 5, at 49-52.

9. Sociologists and sociological thinkers have long emphasized the importance of understanding the relationship between the individual act and its social context. *See, e.g.*, Key Sociological Thinkers (Rob Stones ed., 1998) (describing the work of Talcott Parsons, emphasizing the role of norms and social values in guiding human conduct, Erving Goffman, emphasizing structures of interaction, and Harold Garfinkle, emphasizing background knowledge, among others). More recently, sociological scholars have begun to cross boundaries between macro- and micro-viewpoints to consider the ways in which behavior, both individual and organizational, is influenced by culture, *see, e.g.*, Paul DiMaggio, *Culture and Cognition*, 23 Ann. Rev. Soc. 263, 264 (1997) (reviewing the literature to "lay a foundation for a view of culture as working through the interaction of shared cognitive structures and supra-individual cultural phenomena . . . that activate those structures to varying degrees"), and by institutions, *see, e.g.*, Paul J. DiMaggio & Walter W. Powell, *Introduction*, *in* The New Institutionalism in Organizational Analysis 1-38 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (describing new institutionalism as a sociological discipline that embraces cognitive models of thought in which action is influenced by taken-for-granted paths and scripts). For a discussion of some of these and other recent developments, see generally Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 Law & Soc'y Rev. 23, 31-33 (1998). The ideas from some of this work have also been used to criticize a purely intent-based antidiscrimination doctrine. *See, e.g.*, Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717 (2000).

10. Institutions from this sociological perspective have been defined as "web[s] of interrelated norms—formal and informal—governing social relationships." Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, *in* The New Institutionalism in Sociology 19 (Mary C. Brinton & Victor Nee eds., 1998) (emphasis omitted). Institutions, as they are currently understood, have both normative and cognitive aspects, combining value-laden beliefs about the way things should or ought to be with process-driven accounts of how they are or what they might become. *See* DiMaggio & Powell, *supra* note 9 (describing "old" versus "new" institutionalism). For an informative essay providing an introduction to new

One could draw on any number of areas of research and theory in these disciplines to illustrate that modern workplace discrimination is a problem of context as well as of individual motivation and cognition. I draw here at the outset, however, on work in the area of organizational wrongdoing, specifically the work of Professor Diane Vaughan concerning the context of decision making at NASA that shaped the disastrous launching of the 1986 space shuttle *Challenger*. Vaughan's extensive ethnographic study of the context underlying the decision to launch the *Challenger* pulls together many related micro- and macro-ideas and provides a particularly vivid illustration of the importance of looking to organizational structures, cultures, and institutionalized practices when assessing causation in decision making. After a brief review of some of the relevant aspects of Vaughan's work, I consider how her work might inform the modern antidiscrimination project.

The disaster of January 28, 1986, remains marked in the memories of many Americans who watched in horror via national television as the space shuttle *Challenger*, just 73 seconds after blast-off from Cape Canaveral, Florida, erupted into a fiery white and yellow explosion.[11] All seven crew members on board perished, including a schoolteacher whose assignment it was to teach elementary school children from space.[12] After an extensive inquiry, a presidentially appointed investigative commission identified the failure of the space shuttle's O-rings in the right rocket booster, which provided thrust to the shuttle at liftoff, as the technical cause of the disaster.[13] The O-rings, designed to seal the gap created by pressure in the rocket booster at ignition, were impaired by uncharacteristically cold weather in Florida on the morning of takeoff.[14] The commission also reported that NASA had contributed to the technical failure.[15] The investigation revealed that NASA had had difficulties with O-rings since 1977.[16] Moreover, the night before the *Challenger* launch, NASA managers had engaged in a teleconference discussion with engineers and managers at Morton Thiokol, Inc., the manufacturer of the *Challenger*'s rocket boosters.[17] During that teleconference, Morton

institutionalism in organizational analysis and an exploration of the possibilities for an intellectual exchange between law and society scholarship and new institutionalism in organizational analysis, see Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 Law & Soc. Inquiry 903 (1996).

11. *See* Diane Vaughan, The Challenger Launch Decision: Risky Technology, Culture, and Deviance at NASA 7 (1996).

12. *See id.*

13. *See id.* at 10-11. For a detailed description of the role of the O-rings in the rocket boosters, see *id.* at 2-7.

14. *See id.* at 10.

15. *See id.*

16. *See id.*

17. *See id.* at 5-6.

Thiokol engineers recommended against launch, citing concern about the possibility that the predicted cold weather would compromise the booster O-rings.[18] After a thirty-minute break in the conference, however, Morton Thiokol managers overrode engineer concerns and recommended launch, and NASA managers proceeded with the launch without relaying the specifics of the teleconference to upper-level NASA administrators. These managers, according to various accounts, violated industry and internal NASA safety standards in response to economic, political, and public pressure to launch; in other words, they "took a calculated risk—and lost."[19]

Over the course of years of research, a book, and several articles, Vaughan embarked upon a critical examination of the decision making at NASA and an in-depth consideration of the implications of context for social control.[20] In her work, she characterizes the decision to launch the *Challenger* not, as popular explanation would portray it, as a calculated managerial decision to ignore existing safety rules in the face of production deadlines, but as the tragic result of earlier normalization of deviance through cultural development and organizational choices. The individuals who decided to launch the *Challenger* were not violating NASA rules; they were acting pursuant to institutionalized cultural belief systems within NASA that shaped their interpretation of data, assignment of meaning, and action. As Vaughan explains, "[t]he story begins, not on the eve of the *Challenger* launch, when managers and engineers argued about whether to go forward or not, but nearly 10 years earlier. The past—previous engineering analysis, conclusions, and launch decisions—was an all-important context for decisionmaking on the eve of the launch."[21]

Vaughan identifies a number of contextual factors that she suggests made the decision to launch normal and acceptable within NASA. I highlight just a few of those factors here. First, Vaughan points to the

18. For a detailed description of the teleconference discussion, see *id.* at 2-7.

19. *Id.* at 32; *see also* Vaughn, *supra* note 9, at 36 (asserting that "[t]he conjunction of competitive pressures, scarce resources, rule violations, and overriding of the objections of engineers suggested intent: managerial decisionmaking as violative behavior—a calculated, amoral, consequentialist, rational choice"). For a discussion of various popular accounts of the launch decision in terms of amoral calculation, see generally Vaughn, *supra* note 11, at 7-32.

20. *See* Vaughan, *supra* note 11; Diane Vaughan, *Autonomy, Interdependence, and Social Control: NASA and the Space Shuttle* Challenger, 35 Admin. Sci. Q. 225 (1990); Diane Vaughan, *Boundary Work: Levels of Analysis, the Macro-Micro Link, and the Social Control of Organizations*, *in* Social Science, Social Policy, and the Law 291 (Patricia Ewick et al. eds., 1999); Vaughan, *supra* note 9; Diane Vaughan, *The Dark Side of Organizations: Mistake, Misconduct, and Disaster*, 25 Ann. Rev. Soc. 271 (1999). Vaughan relied on data from archival documents from the Presidential Commission that investigated the disaster as well as on personal interviews, government investigation reports and hearing transcripts, publications by historians, scientists, engineers, and journalists. *See* Vaughan, *supra* note 9, at 34-35.

21. Vaughan, *supra* note 9, at 36.

institutionalized cultural belief systems that shaped the interpretation of and assignment of meaning to the rocket booster performance data by the engineers and managers associated with the launch.[22] Social scientific study of engineers and the engineering profession shows that engineers come to the design table with certain taken-for-granted understandings about the nature of the job of innovation and design.[23] In addition to valuing rule-following and scientific objectivity over intuition, engineers working on complex tasks like the *Challenger* project tend to expect a certain degree of uncertainty and learning-by-experience and to accept as routine the compromising of optimal design options to practical cost and safety trade-offs.[24] The engineers and managers at NASA, in other words, were accustomed to experimentation and had confidence that strict adherence to engineering methods and routines would result in acceptably safe diagnosis of problems.[25]

Within NASA, moreover, organizational changes in the years leading up to the *Challenger* launch undermined a traditional culture of technical excellence. NASA had long cultivated a culture where top administrators and technicians alike were involved in the technical aspects of engineering and design of sophisticated machinery.[26] But, as NASA became more cost- and production-driven, it began to contract more work to outside sources and to add layers of bureaucracy to its internal structure.[27] Accordingly, NASA's engineers were increasingly compartmentalized and their decisions normalized. Evaluations of booster performance, once made by the engineer work groups,[28] were seen as correct and irreversible, despite uncertainties at each level of analysis.

Over time, the design culture at NASA and corresponding

22. *See id.* at 39-41. Despite the title distinction, project managers at NASA were all trained engineers and worked closely with the hands-on work group engineers, making "the distinction between managers and engineers . . . not as clear as the dichotomy suggests." Vaughan, *supra* note 11, at 80.

23. *See* Vaughan, *supra* note 9, at 39. Vaughan calls the broader context framing decision making within NASA a "culture of production." Vaughan, *supra* note 11, at 198. For a detailed account of this culture, comprised of the institutionalized belief systems of the aerospace industry, the engineering profession, and the NASA organization, see *id.* at 196-237.

24. This compromise of design options is sometimes called "satisficing." *See* Vaughan, *supra* note 9, at 39 (citing earlier social science work).

25. *See* Vaughan, *supra* note 11, at 234 (describing "can do" attitude of engineers and confidence in procedural rigor).

26. Vaughan calls this the "dirty hands approach," explaining: "Contractors were only used occasionally, and most work was done in house so that top administrators and technicians alike got their hands 'dirty' by staying in close touch with the technology." Vaughan, *supra* note 9, at 40.

27. *See id.* at 40-41.

28. Vaughan uses the term "work groups" to refer to the engineers and managers who were responsible for daily technical decision making for a particular shuttle component. *See* Vaughan, *supra* note 11, at 80.

institutionalized practices of rule-following and design compromise combined with internal structural changes to normalize decisions about booster performance. Before each shuttle launch, work groups were required to determine that any technical anomalies were an "acceptable risk."[29] Each determination of acceptable risk, however, expanded the amount of technical deviation that was acceptable so that launching with technical anomalies became commonplace.[30] Moreover, each determination of acceptable risk tended to transform uncertainty into certainty, as rules were followed and debates about O-ring performance in prior post-flight analyses were resolved.

Vaughan provides the following description that accounts for some of the organizational structures, institutionalized practices, and cultures at play in the years leading up to the decision to launch the *Challenger*:

> Post-flight analyses of the [earlier] Space Shuttle missions produced quantitative evidence . . . convincing [the work group] that the booster design was officially an "Acceptable Risk." Although the work group understood that the boosters were working, they did not understand why they were working as they were. Growing doubt, uncertainty, and anxiety about the unknown notwithstanding, concern about cost and schedule inhibited . . . the work group from halting missions for the lengthy period necessary for additional tests. Following the rules, which they unfailingly did, had a social-psychological effect. Conforming to every rule and procedure—going by the book—assured them that their official risk assessments were correct, sustaining the cultural belief that the design was an "Acceptable Risk." Repeatedly and officially, they recommended "Go." As the problem unfolded in the years prior to *Challenger*, each decision seemed logical, correct, and rational.[31]

According to this account, rather than taking a calculated risk to ignore internal safety rules in the face of cost and production schedules, the managers who overrode engineers' concerns about the rocket boosters on the eve of the *Challenger* launch, like the engineers with whom they were trained and worked closely,[32] were guided by a larger organizational context that included institutionalized patterns and norms of evaluating risk and interpreting information as well as cost- and production-driven pressures and organizational changes created by higher policy makers. Within this context, "engineers and managers together developed a definition of the situation that allowed them to carry on as if nothing were wrong when they continually faced evidence that something *was* wrong."[33] In other words, within situated

29. *See* Vaughan, *supra* note 9, at 37.
30. *See id.*
31. *Id.* at 41 (parentheticals omitted).
32. See Vaughan, *supra* note 11, at 80.
33. Vaughan, *supra* note 9, at 36.

context, the managers who decided to launch the *Challenger* made a perfectly rational decision that was, albeit in retrospect tragically flawed, entirely consistent with NASA safety rules and standards.

Vaughan's work, which places individual and group decision makers within a larger social and organizational context, is helpful not only for understanding the decision to launch the ill-fated *Challenger*, but also for portraying the complex nature of discrimination in the modern workplace. Like the engineers at NASA, individuals making judgments and decisions about others on a day-to-day basis in the workplace do so within larger organizational context. Culture, institutionalized practice, and organizational structure and systems combine to provide a complex backdrop to individual decision making. Individuals bring to and obtain from the workplace institutionalized belief systems that affect their perception and evaluation. And, like the engineers at NASA, individuals in the workplace are often consciously unaware of organizational influence and of the role that bias can play in everyday perceptions, evaluations, and decisions. Individuals may know that discrimination is not formally permissible, but, acting within particular organizational and social context, they may make discriminatory decisions that are considered acceptable and normal.

Indeed, it may be possible to draw some initial rudimentary parallels between the ways in which context and normalization of deviance may have influenced engineering decisions at NASA and the ways in which these same elements may facilitate ongoing discrimination in any workplace. When a manager makes a decision to promote a white worker over a black worker, for example, that decision is often based in large part on a history of earlier decisions, both formal and informal, about these and other workers. Some of these earlier decisions may have been made by the manager making the promotion decision; others may have been made by co-workers and lower management. Regardless of the source, these earlier decisions are likely to attain an aura of certainty, despite uncertainties and possible operation of discriminatory bias at every level of evaluation. Moreover, earlier decisions about these and other workers are likely to become normalized over time so that, to the extent discriminatory bias is at play in isolated decisions, merit and success may begin to be defined along categorical lines. In the end, the manager's decision to choose the white worker over the black worker for a promotion may be natural and rational given the historical context of decision making within the organization, even if discriminatory bias played a role in the decision.

Vaughan's work is most helpful to the antidiscrimination pursuit, however, not to suggest that the organizational context influencing individual decision making in *all* workplaces is similar to that at play at NASA, but rather to highlight the need more generally to consider

particular organizational context as a causal source of workplace discrimination. Viewing decision making from Vaughan's broader causal perspective, one can begin to see how organizational structures, cultures, and institutionalized practices might facilitate discrimination depending on the social and organizational context of a particular workplace. In the financial services industry, for example, access to accounts and clients may be determined primarily by managers picking "superstars" from incoming classes of recruits.[34] The informality of this system of allocating opportunity, favoring intuitive impressions over detailed consideration of individuated differences, increases the likelihood that decision makers will rely on stereotypes in evaluating candidates.[35] At the same time, individuals making decisions about recruits are likely to do so within a culture historically and currently dominated by white males, a culture that encourages individuals to define success in terms of traditionally masculine characteristics,[36] and to view women as inherently unsuitable for competitive positions.[37] Individual managers who choose men over women as superstars in this scenario may themselves be acting on discriminatory preferences and bias, whether conscious or unconscious, but their tendency to do so is influenced by the larger culture and practice of the organization within which they work.[38]

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34. This example is based on a recent lawsuit filed against American Express. *See infra* notes 118-28 and accompanying text.

35. *See* Bielby, *supra* note 5, at 123 (citing research suggesting that informal, subjective personnel practices increase the risk of reliance on stereotyping); Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know*, 10 J. of Soc. Behav. & Personality 3, 11-12 (1995) (same); Barbara F. Reskin & Debra Branch McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 Am. Soc. Rev. 210, 214 (2000) (same).

36. Rosabeth Kanter first brought this issue to the forefront in her ethnology of the large, bureaucratic firm in which she stressed the significance for women of defining merit according to dominant, male characteristics. *See* Rosabeth Moss Kanter, Men and Women of the Corporation (1977). Other, more detailed, social scientific research has followed. *See, e.g.,* Judy Wajcman, Managing Like a Man: Women and Men in Corporate Management 41-51 (1998) (discussing the gendering of white-collar work); Heilman, *supra* note 35, at 7-10 (reviewing research on stereotypically male characteristics considered essential for success in managerial jobs and consequences for women in the workplace); Reskin & McBrier, *supra* note 35, at 211-12 (citing studies suggesting that the cognitive schema for managers resembles that for men more closely than that for women).

37. *See* Krieger, *supra* note 1, at 1193-98 (summarizing studies suggesting that token out-group members are likely to be judged more harshly and according to stereotypes than their in-group majority counterparts); Kanter, *supra* note 36, at 211 ("[T]okens are . . . both highly visible as people who are different and yet not permitted the individuality of their own unique, non-stereotypical characteristics.").

38. *See, e.g.*, Robert L. Nelson & William P. Bridges, Legalizing Gender Inequality: Courts, Markets, and Unequal Pay for Women in America 244-306 (1999) (describing organizational bases of "male, profit-making club" at a banking institution); Reskin & McBrier, *supra* note 35 (showing link between personnel practices such as use of informal recruitment networks and subjective selection processes and sex-based ascription).

Moreover, sociologists have explained that the racial or gendered character of taken-for-granted, institutionalized practices is often rendered invisible to current incumbents of organizational positions. Current decision makers did not invent the institutionalized practices that guide their decisions; as far as they can tell, "[t]hey merely are working within a set of taken-for-granted understandings that do not explicitly concern [race or] gender."[39]

Social science research provides additional empirical support for the position that workplace discrimination has causal sources beyond identifiable bad actors. This research suggests that recruitment methods,[40] personnel decision-making practices,[41] heterogeneity of work groups,[42] accountability structures,[43] wage structures,[44] and, of

39. Nelson & Bridges, *supra* note 38, at 9. A vivid example of the taken-for-granted nature of institutionalized discriminatory decision making is provided by Professor Ian Haney López in his work on the judicial appointment of grand jurors in California. *See* Haney López, *supra* note 9. Drawing from judicial testimony and statistics taken from the East Los Angeles Thirteen trial, Haney López documents the process used by California superior court judges to choose grand jurors and the discriminatory pattern that developed as a result of that process. Judges, who were primarily socially elite white males, overwhelmingly nominated their friends, social and business acquaintances, and neighbors as grand jurors. *See id.* at 1732-43. Although there was no formal requirement that judges rely on acquaintances and friends for appointments, and in fact the Supreme Court and state legislature had encouraged judges to make efforts to appoint a diverse range of jurors reflective of the community, *see id.* at 1792, the judges learned from each other that this name-your-friends nomination process was "the way it was done," *id.* at 1791. As Haney López explains:

> [T]he judges subscribed to a nominating system dictated by group dynamics. Judges learned from one another, sometimes directly, but also at a nonconscious level. They learned that the appropriate manner of selecting nominees involved selecting from among their friends. They learned that those they personally knew described the world of potential nominees.

Id. When asked to explain their reliance on this process, the judges invariably fell back on their intent to appoint the best "qualified" jurors. *See id.* at 1803-04. This intent to appoint the best qualified jurors both served to legitimate their process of appointment and to reinforce their cultural assumptions about what it takes to be a qualified juror. *See id.* at 1804-06.

40. *See* Reskin & McBrier, *supra* note 35, at 213-15 (reviewing research suggesting that reliance on informal networks tends to perpetuate segregation, while formal recruitment procedures and advertisment tend to facilitate integration).

41. *See* Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 Contemp. Soc. 319 (2000).

42. *See id.*; John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, *in* Confronting Racism: The Problem and the Response, *supra* note 2, at 26-28 (reviewing studies on intergroup perceptions and the effects of recategorization of groups on bias).

43. *See* Reskin & McBrier, *supra* note 35, at 325 (reviewing research on the effect of accountablity on stereotype reliance and cognitive distortions).

44. *See* David Charny & G. Mitu Gulati, *Efficiency-wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 Harv. C.R.-C.L. L. Rev. 57 (1998) (analyzing the ways in which "efficiency-wage" and "tournament" models adopted by elite firms can perpetuate discrimination).

course, the overall environment or culture of the organization,[45] may all contribute in interrelated ways to the operation of discriminatory bias and unequal treatment in the workplace. As discriminatory bias becomes embedded in structures and informal practices, it becomes customary rather than remarkable to see white males dominate in positions of power.[46] Institutionalized practices provide normalizing scripts for "the way it is done" within the organization and, often without even noticing, individuals acting pursuant to these practices perpetuate discrimination and inequity.

B. *Implications for Change*

A recognition that individual decision making is influenced by larger organizational context necessarily alters the way one thinks about change. Implementing meaningful reform that reduces incidences of fatal error at NASA will require more than mere discipline of those individuals who convened on the eve of the *Challenger* launch. It will require an understanding of the complex ways in which institutionalized practices and organizational structures facilitate disaster through normalization of risk and secrecy; it will require efforts to counteract the work group tendencies to rely on rules over intuitive concerns.[47]

Similarly, in the workplace, meaningful antidiscrimination reform will require a sensitivity to and understanding of the ways in which individuals are influenced by larger organizational environments and structures. It will require an inquiry that is broad enough to recognize larger patterns of discrimination and to identify the possible organizational sources of that discrimination. It is no longer either

45. The culture or environment of the workplace can enable discriminatory decision making in a variety of ways, both within and without the dominant group. *See* Brewer et al., *supra* note 5 (summarizing research results that suggest that newcomer socialization into large organizations is facilitated by shared social category membership and poses greater demands on minority newcomers); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 Cornell L. Rev. 1259 (2000) (describing extra constraints that outsiders face in signaling involvement and competence); Barbara Reskin, *Sex Segregation in the Workplace*, 19 Ann. Rev. Soc. 241, 261 (1993) (reviewing research concerning more extreme attempts to drive out interlopers).

46. Equating certain jobs with stereotypically racial or gendered characteristics may lead to organizational practices that institutionalize the customary conception in job requirements or career ladders. *See* Reskin & McBrier, *supra* note 35, at 211-12.

47. *See* Vaughan, *supra* note 9, at 34-35 (discussing implications of organizational causation for social control). Indeed, the Columbia Accident Investigation Board Report suggests that many of the same contextual influences may have played a role in the more recent space shuttle *Columbia* disaster. *See* The CAIB Report (Aug. 26, 2003), *available at* http://www.caib.us (tracing possible organizational sources of the disaster). Other recent reports remind us, however, that context should not be emphasized to the exclusion of human agency. *See, e.g.*, James Glanz & John Schwartz, *Dogged Engineer's Effort to Assess Shuttle Damage*, N.Y. Times, Sept. 26, 2003, at A1 (reporting active resistance by NASA managers to engineer requests for outside imagery of *Columbia* damage).

possible or sensible to search exclusively for an identifiable bad actor at a discrete moment in time. Instead, the causal inquiry must include questions about decision-making practices, culture, and internal organization and structures that may continue to facilitate discrimination beyond a single, identifiable instance.

At the same time, the complex, contextual nature of the problem of workplace discrimination calls for a correspondingly innovative, contextualized solution. There is no single answer that can be applied to all organizations that will reduce discrimination in the workplace. Rather, the contours of the solution to a problem of institutionalized or organizationally enabled discrimination will depend on the specifics of the particular organizational context as well as on an understanding of the relevant social science and organizational research and literature on the ways in which context interacts with individuals and groups to produce discrimination.[48] This means that devising strategies for and implementation of meaningful organizational change will require intensive self-assessment and a commitment to reform, in many cases a commitment that must be sustained over a long period of time.[49]

Yet employers are unlikely to undertake this task without some outside incentive to do so. Even assuming that companies respond rationally to market pressures in implementing antidiscrimination reform and that these companies would prefer to eliminate irrational and inefficient forms of discrimination that prevent capable workers from reaching their full potential, there are several reasons why market pressures are unlikely to trigger the type of change necessary to resolve organizational sources of discrimination. First, the immediate costs involved in evaluating organizational structures and practices and implementing change may make current executives reluctant to take on the task.[50] These immediate costs could take a variety of forms, from relatively straightforward monetary and time

48. Case studies of some of the seemingly successful efforts to implement organizational change aimed at reducing workplace inequity reflect a variety of approaches. *See, e.g.*, Susan E. Jackson et al., Diversity in the Workplace: Human Resource Initiatives (1992) (presenting three case studies of employers who took structural measures to increase workplace equity); David A. Thomas & John J. Gabarro, Breaking Through: The Making of Minority Executives in Corporate America (1999) (providing case studies of three organizations and their diversity management strategies); Debra E. Meyerson & Joyce K. Fletcher, *A Modest Manifesto for Shattering the Glass Ceiling*, Harv. Bus. Rev., Jan.-Feb. 2000, at 126 (illustrating how three companies used incremental change and problem-solving techniques in organizational structure and practices to bring about systemic change).

49. The organizational literature has long emphasized the need for efforts at change to coincide with the core values of an organization. *See, e.g.*, Thomas & Gabarro, *supra* note 48, at 198-209.

50. *See generally* Lawrence E. Mitchell, Corporate Irresponsibility: America's Newest Export (2001) (arguing that the American corporate structure encourages managers to aim for short-term maximization of stock prices).

investment to more subtle reductions in productivity due to backlash and resentment from dominant groups. Research suggests a long-term economic benefit to companies willing to manage diversity in ways that reduce inequity and discriminatory bias in decision making,[51] but short-term costs may seem more significant to current executives than any long-term benefits.

Second, thinking about market pressure more broadly, one might expect some employers to respond to negative consumer reaction to ongoing workplace discrimination. Evidence suggests that most Americans subscribe to an egalitarian ideal that might translate into public pressure for large organizations to reform their discriminatory practices.[52] Again, however, it seems unlikely that employers will face substantial public pressure in the current market without some outside trigger. Consumers tend to know very little about companies' employment practices, and the subtle nature of modern workplace discrimination means that these structural forms of discrimination may be less likely to appear problematic to outside observers than the more overt forms of discrimination of the past. Litigation, and particularly the class action device, brings with it increased publicity and public pressure for organizational reform that might not exist otherwise.[53]

There is also reason to believe that the entrenched, taken-for-granted nature of institutionally enabled discrimination renders it particularly resistant to market-induced reform. Research suggests that employers may continue to discriminate even when they attempt

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51. *See, e.g.*, Jackson et al., *supra* note 48, at 13-28 (suggesting that meeting "challenges" of diversity will lead to greater workforce productivity); Carsten K.W. De Dreu, *Productive Conflict: The Importance of Conflict Management and Conflict Issue*, *in* Using Conflict in Organizations 10 (Carsten K.W. De Dreu & Evert Van de Vliert eds., 1997) (discussing some benefits of managing diversity and conflict on worker performance).

52. *See, e.g.*, James M. Jones, Prejudice and Racism 93-100 (detailing studies showing an overall trend toward endorsement of the principle of racial equality in the 1970s); John F. Dovido & Samuel L. Gaertner, *Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches, in* Prejudice, Discrimination, and Racism, *supra* note 2, at 3 (summarizing findings of studies based on responses to public opinion polls and surveys from the 1940s to the late 1970s); Reskin, *supra* note 45, at 248-49 (citing studies reflecting a change in attitude concerning sex equality). For a closer look at the complexity of modern racial attitudes, see Katherine Tate & Gloria J. Hampton, *Changing Hearts and Minds: Racial Attitudes and Civil Rights*, *in* Legacies of the 1964 Civil Rights Act (Bernard Grofman ed., 2000), and for studies seeking to measure implicit race and gender attitudes, see Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice*, *in* The Psychology of Prejudice: The Ontario Symposium 55 (Mark P. Zanna & James M. Olson eds., 1994).

53. A number of the recent class actions were widely publicized, making the pages of national news media. *See, e.g.*, Paul Davidson, *Microsoft Faces Largest Racial Bias Lawsuit Ever*, USA Today, Jan. 4, 2001, at B9; Tim Lempke, *Home Depot Faces Class-Action Suit*, Wash. Times, July 10, 2001, at B7; Melody Peterson, *Two Employees File Bias Suit Against Johnson and Johnson*, N.Y. Times, Nov. 16, 2001, at C6.

to respond to the market. Robert L. Nelson and William P. Bridges, in their work analyzing wage disparities at several public and private organizations, illustrate that employers may maintain or create wage inequity in ways that neither follow the market nor maximize efficiency.[54] Despite an ideological commitment to paying market rates and merit-based compensation, these firms structured paths of advancement and definitions of merit so that women and minorities were intrinsically disadvantaged.[55] Recruitment and personnel advancement systems, male-dominated construction of wage surveys and job evaluations, and general resistance to change in institutionalized practices and organizational cultures all contributed in various ways to wage disparities at the firms that could not be explained by market forces or efficiency considerations.[56]

Finally, assuming that we could quantify the exact costs and benefits of remedying organizational causes of discrimination in economic terms, it may be that the economic costs of identifying and remedying organizational sources of discrimination will outweigh any long-term market benefits. If this is so, companies will make a rational choice to maintain the status quo even in the face of market pressure. That antidiscrimination efforts may involve costs, however, does not mean that changes should not be made. Scholars have identified a number of ways in which discrimination may represent a rational or efficient choice for employers.[57] Statistical discrimination is one example of a practice that arguably benefits the discriminating employer.[58] And yet, the law has long recognized that complying with the prohibition not to discriminate may entail costs borne by employers; indeed it holds them liable for statistical discrimination, even if the inability to engage in this type of discrimination imposes additional transaction

54. *See* Nelson & Bridges, *supra* note 38, at 11 (summarizing findings); *id.* at 51 (concluding that "a significant portion of the wage gap between male and female jobs arises inside or is perpetuated by employing organizations and is not dictated by market or efficiency principles"). For a detailed explanation of the conceptual and methodological foundations for the empirical project undertaken by Nelson and Bridges, see *id.* at 1-22.

55. *See id.* at 300 (describing study of *Glass v. Coastal Bank*).

56. *See id.* at 321-23.

57. *See, e.g.*, Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws 59-76 (1992) (suggesting that discrimination can facilitate the selection and management of a more productive workforce and/or satisfy customer, worker, or owner preferences); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 Harv. L. Rev. 1003, 1033-63 (1995) (providing a status-production explanation of discrimination and suggesting that the value obtained from status production accounts for the persistence of discrimination even in the face of market competition); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 Geo. L.J. 1619, 1639-43 (1991) (explaining persistence of statistical discrimination in the face of market pressure).

58. Statistical discrimination is typically described as the use of minority group membership "as a proxy for characteristics that are legitimate employment qualifications." Strauss, *supra* note 57, at 1621.

costs.[59] Efficiency, in other words, is not the only or even the primary justification for antidiscrimination laws; equality in employment is.[60]

Discrimination in the modern workplace remains a human problem, but a human problem with organizational dimensions. Vaughan's work on the context of decision making underlying the NASA decision to launch the space shuttle *Challenger*, by illustrating the complexity of individual and group decision making within organizations, sheds light on the problem of modern workplace discrimination and reveals the breadth of inquiry needed to trigger meaningful reform. It illustrates that a legal inquiry that focuses exclusively on identification of discrete bad actors discriminating in isolation and in calculated contravention to well-established egalitarian ideals fails to account for the complex ways in which decisions are influenced by larger organizational and social context. As she explains, such an approach "decontextualizes decisions to violate, neglecting the social context that leads people to make the choices that they do."[61] Progress in the project toward equity and nondiscrimination in the workplace, then, just like progress in the project to reduce the incidence of fatal disasters at NASA, requires an impetus for employer institutional reform that will alter the organizational dynamics of everyday decision making.

II. TITLE VII AND INSTITUTIONAL REFORM: PAST AND PRESENT

Title VII of the Civil Rights Act holds the potential to expand the dimensions of organizational concern, opening up dialogue and awareness in ways that encourage employers to look for patterns of discrimination and to seek meaningful institutional change.[62] In fact, a

59. *See, e.g.,* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) (holding that Title VII prohibits generalization by protected characteristic, even if true generalization).

60. Of course, the definition of equality is highly debated. Although this Article does not depend on a particular construction of the term, equality may mean much more than formal equality or characteristic blindness. *See, e.g.,* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986); Richard Delgado, *Recasting the American Race Problem*, 79 Cal. L. Rev. 1389 (1991); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988).

61. Vaughan, *supra* note 9, at 49.

62. Title VII provides in relevant part:

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

number of recent private class action lawsuits have arguably begun to reshape the antidiscrimination inquiry to include modern organizational sources of harm. In this part, I examine the features of this new form of enforcement litigation. I begin by placing recent efforts at institutional reform in some historical context by providing a brief account of the individualization and privatization of Title VII enforcement efforts since the statute's inception in 1964. I then lay out some of the basic characteristics of the recent Title VII class action lawsuits seeking institutional reform. I suggest that these lawsuits both share similarities with and exhibit differences from early attempts at institutional reform through Title VII, and in Parts III and IV of the Article I explore how these similarities and differences may affect the lawsuits' collective capacity to trigger meaningful institutional change.

A. *Early Reform and Individualization of Enforcement*

Although institutional reform has always been an important goal of Title VII, the scope of the enforcement inquiry has narrowed over time. A brief look at the history of Title VII enforcement, both public and private, reveals a shift in focus toward the isolated individual discriminator and away from larger institutional or organizational sources of discrimination.

From the outset, Title VII provided for a combination of public and private enforcement. Until Title VII was amended in 1972, the Equal Employment Opportunity Commission ("EEOC"), the regulatory agency created by the statute, had no enforcement powers.[63] Instead, it was charged with an investigative and conciliative role, limited to negotiation, adoption of record-keeping and reporting regulations, and formulation of interpretive guidelines.[64] The U.S. Attorney General, however, had authority from the start to bring suit to challenge "pattern[s] or practice[s]" of discrimination,[65] and private individuals had the power to file suit challenging individual instances as well as broader practices of discrimination.[66]

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or national origin.
42 U.S.C. § 2000e-2(a) (2000).

63. *See* Alfred W. Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity 47-49 (1993) (explaining that the decision to limit enforcement authority of the EEOC was used to break a filibuster on the bill).

64. *See id.*

65. *See* 42 U.S.C. § 2000e-6(a) (1964). A "pattern or practice" is typically considered "something more than an isolated, sporadic incident." 110 Cong. Rec. 14,270 (1964) (remarks of Senator Humphrey), *quoted in* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.16 (1977).

66. Title VII includes a provision allowing attorneys fees to be paid to the "prevailing party." 42 U.S.C. § 2000e-5(k). The Supreme Court has interpreted this provision to require that a prevailing plaintiff be awarded attorneys fees in all but special circumstances, but that a prevailing defendant be awarded fees only in cases in which the action brought is found to be unreasonable, frivolous, meritless, or

The early years of Title VII enforcement saw a number of attempts to change organizational structures and practices through litigation or threat of litigation. On the public side, the Department of Justice brought a series of enforcement suits that challenged the discriminatory practices of large corporations, even entire industries.[67] These suits often sought to re-work the seniority systems in place at companies that had traditionally segregated job categories. In the early 1970s, for example, the Department of Justice sued Bethlehem Steel[68] and United States Steel,[69] challenging that their seniority and transfer systems perpetuated past discrimination. After success in those suits, the Department of Justice brought suit against nine additional major steel companies, representing almost 75% of the steel industry, in a single action.[70] That suit resulted in a reorganized system of transfer and seniority across the industry. In 1974, the government also sued seven major trucking companies for failing to hire minorities for higher paying jobs and for maintaining discriminatory seniority and transfer systems.[71] Again, the government sought major institutional reform, and ultimately succeeded.[72]

The EEOC similarly exercised its investigatory powers in the early days of Title VII to conduct broad investigations into company-wide discriminatory practices.[73] The EEOC regularly used the individual charges filed with the agency as springboards for investigations into larger company practices.[74] As Alfred Blumrosen, the first Chief of

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vexatious. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

67. Despite the breadth of enforcement inquiry in these early suits, the Department of Justice was criticized for not bringing enough suits, *see, e.g.*, *Procedure Under Title VII*, 84 Harv. L. Rev. 1195, 1230-31 (1971), a criticism that sparked the 1972 amendment providing the EEOC with power to file suit. A total of 57 pattern or practice suits were brought from the effective date of Title VII, July 2, 1965, through January 8, 1971. *See id.* at 1230 n.206.

68. United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

69. United States v. United States Steel Corp., 5 Emp. Prac. Dec. (CCH) ¶ 8619 (N.D. Ala. 1973).

70. United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 834 n.1 (5th Cir. 1975) (approving proposed consent decree). The EEOC was also a plaintiff in this action. *See id.* at 834. The NAACP Legal Defense Fund and National Organization for Women opposed the settlement on the ground that the monetary relief provided was inadequate. *See id.*

71. *See In re* Trucking Indus. Employment Practices Litig., 384 F. Supp. 614 (J.P.M.L. 1974). The suit originally named a defendant class of 349 trucking companies across the nation, with seven defendant trucking companies as named representatives. *See id.* at 614-15.

72. The case was ultimately resolved pursuant to a consent decree. *See Allegheny-Ludlum Indus.*, 517 F.2d at 826 (approving proposed consent decree).

73. Blumrosen, *supra* note 63, at 61-62. During this time, the EEOC also issued guidelines interpreting the substantive law broadly, including practices that have a discriminatory effect within the statute's prohibition. *See id.* at 71-76.

74. *See id.* at 79-80. In the course of investigating an individual charge, it is well understood that the EEOC may seek to vindicate a public interest as well as to obtain relief for an individual claimant. *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 296

Conciliations for the Commission, explains it, the EEOC would examine the company's practices "to see if there was a pattern of restriction of blacks from the type of job the complainant sought .... The individual victim remained important, but the victim's situation became the lens which focused on the harm to other group members with similar employment characteristics."[75] Recognizing the need for systemic change, the EEOC directed its conciliation efforts during this period at institutional reform. The agency was instrumental, for example, in a 1966 conciliation decree involving the Newport News Shipyard, the largest employer in Virginia at the time.[76] The conciliation decree focused on reform of basic employment practices at the shipyard in an effort to eliminate system-wide discrimination against minorities.[77] The decree required, among other things, the retention of an expert, approved by the EEOC, to prepare job descriptions and to identify proper pay and promotion rates.[78]

The private lens of enforcement was equally broad in the early years of Title VII. Private litigants, suing on behalf of themselves and others, regularly used the federal class action device to challenge wide-spread systems and policies of discrimination. Individuals theoretically can seek institutional reform without use of the class action device, but courts are often unwilling to implement organizational solutions for individual discriminatory decisions.[79] The use of the class action device, therefore, becomes important for privately triggered institutional change; by broadening the number of complainants, the class action triggers inquiry about institutional and organizational sources of harm and encourages development of solutions aimed at systemic reform. The 1966 amendments to Federal Rule of Civil Procedure 23, which governs class actions in federal courts, facilitated the certification of civil rights suits for class treatment.[80] Moreover, in the first decade of Title VII enforcement

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(2002). The EEOC may also instigate an investigation by charge filed by a Commissioner. *See* 42 U.S.C. § 2000e-5(b) (2000).

75. Blumrosen, *supra* note 63, at 80, 82-83. This focus on broader institutional change as one aspect of the remedy to discrimination paralleled an ideological movement toward recognition of group as well as individual interests. *See id.* at 79-85.

76. *See id.* at 86-88.

77. *See id.* at 87 (reproducing EEOC summary of Newport News Shipyard Agreement).

78. *See id.*

79. *See, e.g.*, Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 766-67 (4th Cir. 1998) (limiting prevailing non-class plaintiffs to individualized injunctive relief), *vacated on other grounds*, 527 U.S. 1031 (1999). *See generally* George Rutherglen, *Title VII Class Actions*, 47 U. of Chi. L. Rev. 688, 688 (1980) (describing benefits of class actions to plaintiffs, including achievement of "broader goals of institutional reform").

80. Prior to the 1966 amendments, civil rights cases were classified as "spurious," which meant that if a class action was unsuccessful, an unnamed plaintiff was permitted to bring an identical suit against the same institution. *See* Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights*

courts readily certified "across-the-board" class actions in employment discrimination cases, without much attention to the requirements of Rule 23.[81] By the mid-1970s, more than one thousand private employment discrimination class actions were being filed in federal courts each year.[82] Many of the plaintiffs in these early suits were represented by public interest groups like the NAACP Legal Defense Fund, and, like their government-initiated counterparts, the cases often alleged discrimination on a company-wide scale and sought significant institutional reform, including elimination of entry requirements and reorganization of seniority systems in addition to back pay for individual victims and affirmative action plans to remedy past discrimination.[83]

On a number of fronts, however, by the early 1980s, the scope of Title VII enforcement had begun to narrow. The EEOC continues to play an important role in challenging patterns or practices of discrimination through litigation and conciliation.[84] Yet, hampered by a backlog of administrative charges, the agency has significantly narrowed its investigative inquiry to focus on individual incidents of discrimination rather than on larger organizational sources of harm, and has tended to expend its litigative resources on individual rather than systemic challenges.[85] Since the 1970s, the EEOC has struggled

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Act of 1964, 31 Vand. L. Rev. 905, 932-33 (1978).

81. *See infra* notes 146-47 and accompanying text.

82. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 1020, Fig. 9 (1991). According to the Administrative Office of the U.S. Courts' statistics, 1,174 "Civil Rights-Jobs" class actions were commenced in federal courts in 1976 and 1,138 were filed in 1977. *See* 1977 Ann. Rep. of the Dir. of the Admin. Off. of the U.S. Cts. 239 (Table 32: Civil Class Actions Commenced in the U.S. District Courts by Basis of Jurisdiction and Nature of Suit Statistical Year 1977).

83. The NAACP Legal Defense Fund was the organization most involved in the early litigation, but others, such as the Lawyers Constitutional Defense Committee, Employment Rights Project of Columbia Law School, and the Lawyer's Committee for Civil Rights Under Law, also contributed to early enforcement through litigation. *See* Belton, *supra* note 80, at 924 n.101. Early NAACP Legal Defense Fund litigation sought institutional reform in the tobacco industry, the textile and paper industries, and the steel industry, *see id.* at 930 n.125, and was instrumental in the early development of class action litigation, *see id.* at 924-34.

84. Section 706 of Title VII authorizes the EEOC to bring a civil action against a private employer reasonably believed to be engaged in unlawful employment practices. *See* 42 U.S.C. § 2000e-5(a)-(f) (2000). Although, prior to 1991, the EEOC could only seek equitable relief through a § 706 enforcement action, it is now empowered to seek compensatory and punitive damages in addition to equitable relief. *See* 42 U.S.C. § 1981a(a)-(d) (2000). The number of systemic cases litigated by the EEOC reached a low in 1996 of 32 cases, but it increased to 84 in 1997, 83 in 1998, 110 in 1999, and 105 in 2000. *See* Nancy Kreiter, *Equal Employment Opportunity: EEOC and OFCCP*, *in* Rights at Risk: Equality in an Age of Terrorism, 153, 155 (2002) (EEOC litigation statistics combine direct suits and interventions), *available at* http://www.cccr.org/chapter12.pdf (last visited Oct. 17, 2003).

85. An increasing backlog of charges has long plagued the EEOC. During its first fiscal year, the EEOC received 8,854 charges, well over the 2,000 estimated. *See*

to implement various procedural reforms aimed at quickly resolving individual claims of discrimination.[86] In addition, by the late 1970s, the Commission had adopted an internal directive precluding its investigators from examining the broader implications of a charge unless the charge was designated for systemic investigation or early litigation, thus narrowing the investigative inquiry for most charges.[87]

Private enforcement under Title VII during this same period also began to experience a shift from lawsuits aimed at institutional reform to lawsuits aimed at resolution of individual instances of discrimination. The use of the class action device by private litigants dropped significantly in the late 1970s, and the decline continued steadily into the early 1990s.[88] At the same time, individual lawsuits challenging isolated employment decisions rose dramatically.[89] Although this procedural trend may be attributable in part to decisions of the Supreme Court in the late 1970s and early 1980s that

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Belton, *supra* note 80, at 921. By 1974, the EEOC faced a backlog of 98,000 charges. *See* Blumrosen, *supra* note 63, at 396 n.2. Of course, the focus of EEOC enforcement efforts can vary from one presidential administration to the next, but the backlog of individual charges hampers efforts to emphasize systemic change. *See* Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 Yale L. & Pol'y Rev. 219 (1995).

86. *See* Blumrosen, *supra* note 63, at 161-65.

87. *See* General Accounting Office, Further Improvements Needed, *in* EEOC Enforcement Activities 8-10 (April 9, 1981) (describing implementation of the "rapid charge process" and the creation of systemic discrimination units); *see generally* David L. Rose, *Twenty-five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 Vand. L. Rev. 1121, 1147-53 (1989) (describing enforcement activity of the EEOC). EEOC enforcement was further restricted by a narrowing definition of "reasonable cause." Settlements can be negotiated by the EEOC at any time during investigation of the complaint, but the agency will not begin formal conciliation efforts until after it has determined that there is "reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). The regulations provide for efforts at conciliation "[w]here the Commission determines that there is reasonable cause to believe *that an unlawful employment practice has occurred or is occurring*." EEOC Procedural Regulations, 29 C.F.R. § 1601.24 (1991) (emphasis added). From 1965 to 1977, the EEOC defined reasonable cause to include "'any evidence' which might lead to a conclusion that discrimination had taken place." Blumrosen, *supra* note 63, at 62. By 1977 reasonable cause was defined as "litigation worthy" and by 1981 it meant "likely to prevail in court." *Id.* at 270. In 1994, the standard was again changed to mean "whether it is more likely than not that the statute was violated." Alfred W. Blumrosen, *The EEOC at the End of the First Clinton Administration*, *in* The Continuing Struggle: Civil Rights and the Clinton Administration 75 (1997), *available at* http://www.cccr.org/reports.htm (last visited Oct. 17, 2003).

88. Class action lawsuits filed in federal courts went from 1,174 in 1976 to 323 in 1980, to 156 in 1983, and to only 30 in 1991. *See* Ann. Rep. of the Dir. of the Admin. Off. of the U.S. Cts., Table X-5, U.S. District Courts Class Action Civil Cases Commenced, *available at* http://www.uscourts.gov/library.html. Even taking into account the questionable accuracy of specific numbers on class actions reported in the Administrative Office Report, *see* Thomas E. Willging et al., Empirical Study of Class Actions in Four Federal District Courts (1996), a general trend can be discerned.

89. *See* Donohue & Siegelman, *supra* note 82, at 1019-21 (documenting a rise in individual claims and a decline in class action claims).

tightened the requirements for class certification in employment discrimination suits, doing away with "across-the-board" class actions,[90] it emerges as part of a larger trend toward the individualization of the substantive law, a trend that has focused efforts on identification of discrimination by isolated individuals without attention to larger organizational influences.[91]

The enforcement inquiry has been further narrowed by the increasing use of internal dispute resolution systems and arbitration to resolve workplace discrimination complaints. Internal dispute resolution ("IDR") systems and outside arbitration can pose a barrier to detecting discrimination in the workplace by individualizing and personalizing conflict in ways that inhibit recognition of broader patterns or institutional sources of discrimination. Social science research in a number of contexts suggests that informal processes of out-of-court dispute resolution, including IDR systems that resolve disputes within the organizations themselves, tend to redefine social problems as personal problems by deemphasizing legal rights and emphasizing party interests and needs.[92] Research on IDR in the employment discrimination area in particular suggests that IDR complaint handlers tend to recast legal issues as interpersonal issues, identifying management problems or personality clashes rather than discrimination as the source of workplace difficulties.[93] Although this recasting of conflict in personal and individual terms may not affect a particular complainant's satisfaction with resolution of the dispute,[94] it does have significant consequences for identification of and attention to larger organizational sources of discrimination. Internal dispute resolution systems, by individualizing the conflict, also tend to provide individualized solutions aimed at smoothing over relations between certain employees or changing the behavior of isolated employees through punishment or education rather than at changing larger organizational structures and institutional practices that may have resulted in the discriminatory behavior in the first place.[95]

In these ways, Title VII enforcement efforts, both public and

90. *See infra* notes 148-60 and accompanying text.

91. *See* Green, *supra* note 1, at 91 (describing individualized conception of discrimination that underlies much of existing Title VII doctrine).

92. *See* Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 Law & Soc'y Rev. 497, 503-05 (1993). For a general discussion about the transformation from rights to interests and needs in alternative dispute resolution, see Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 Denv. U. L. Rev. 437, 472-96 (1989).

93. *See* Edelman et al., *supra* note 92, at 515-16.

94. For a discussion of some of the benefits of private procedures, see Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 Temp. Pol. & Civ. Rts. L. Rev. 1, 45-47 (1997).

95. *See* Edelman et al., *supra* note 92, at 522-28 (describing remedies provided in internal dispute resolution systems).

private, have, over time, shifted to focus on remedying individual instances of discrimination rather than on remedying larger problems of discrimination through institutional reform. Correspondingly, this tendency to search for the isolated discriminator at a discrete moment in time inhibits an inquiry into organizational causes of discrimination, burying organizational influence behind the motivations of individual actors. Individuals are identified as the source of workplace discrimination while larger organizational influences are left unchecked.

B. *Recent Shift: New Class Actions*

In the last decade, courts have seen renewed efforts at privately instituted organizational reform through the use of class action lawsuits.[96] The plaintiffs in many of these lawsuits have alleged widespread discrimination in workplaces with highly decentralized decision-making systems and largely subjective decision-making practices that leave white males, who predominate in positions of power, to exercise their discretion in biased ways.[97] Institutional

96. While only 30 private employment discrimination class action lawsuits were filed in federal courts in 1992, 67 were filed in 1997, 77 were filed in 2000, and 70 were filed in 2001. *See* Ann. Rep. of the Dir. of the Admin. Off. of the U.S. Cts., Table X-5, U.S. District Courts Class Action Civil Cases Commenced, *available at* http://www.uscourts.gov/library.html. The increase in privately instituted employment discrimination suits is attributable in part to an increase in the amount of monetary recovery permitted under Title VII, for in 1991, Title VII was amended to add compensatory and punitive damages to existing equitable remedies of back and front pay. *See* 42 U.S.C. § 1981(a) (2000). Although other commentators have noticed this shift, *see, e.g.*, Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 Lab. Law. 415 (2000); Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 Tex. L. Rev. 1249 (2003), none has presented a comprehensive look at the features of recent lawsuits as compared to earlier attempts at Title VII-triggered institutional reform. For an examination of the effect of large monetary settlements in some recent class actions on the stock prices of publicly held companies and an argument that the recent lawsuits have produced little substantive change within the targeted corporations, see Selmi, *supra*.

97. *See, e.g.*, Clayborne v. Omaha Pub. Power Dist., 211 F.R.D. 573, 592 (D. Neb. 2002) (alleging that a "policy of permitting subjective decision making by individual managers . . . resulted in racial discrimination"); McReynolds v. Sodexho Marriott Servs., Inc., 208 F.R.D. 428, 433 (D.D.C. 2002) (alleging widespread discrimination by predominately white high-level managers exercising "virtually total discretion in their promotion decisions"); Reap v. Cont'l Cas. Co., 199 F.R.D. 536, 544 (D.N.J. 2001) (alleging that policy of "delegating discretionary authority to subordinate managers and supervisors to make employment decisions . . . without sufficient oversight" resulted in discrimination); Abram v. UPS, Inc., 200 F.R.D. 424, 425 (E.D. Wis. 2001) (challenging highly subjective performance rating and compensation systems); Wright v. Circuit City Stores, Inc., 201 F.R.D. 526, 532 (N.D. Ala. 2001) (alleging that decentralized decision making and subjectivity, among other practices, results in discrimination); Lott v. Westinghouse Savannah River Co., 200 F.R.D. 539, 543 (D.S.C. 2000) (alleging discrimination in evaluation for promotion conducted by "predominately white decision makers who rely on subjective, race-based factors");

reform as well as money damage awards, including compensatory and punitive damages, have been sought as remedies.[98] A closer examination of some of these lawsuits reveals that they share a marked resemblance to their early Title VII counterparts, providing a useful lens for broadening the enforcement inquiry to include organizational sources of discrimination, but that they also differ in important ways, raising concerns about the ability of this recent litigation to trigger meaningful institutional reform.

I begin this section by presenting a brief account of several of the recent cases as examples of this new form of Title VII litigation. I then use these cases as a starting point for an outline of the basic characteristics of this recent litigation before turning in Parts III and IV to examine the potential of these lawsuits to effect meaningful institutional change that reduces the incidence of discrimination in the modern workplace.

1. Examples

Many of the Title VII class action lawsuits filed in federal courts over the past several years have alleged widespread discrimination at major corporations through largely decentralized, highly subjective decision-making systems, lacking in specific or objective criteria or oversight.[99] The plaintiffs in these cases often allege that white males, who predominate in positions of power, are left to exercise their discretion in biased ways, leading to disparities in hiring, work assignments, training, discipline, promotion, and/or pay.[100] Courts have been inconsistent in their willingness to certify the claims for class treatment.[101] A few examples from those courts that have certified these cases for class treatment, however, whether for

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McClain v. Lufkin Indus., Inc., 187 F.R.D. 267, 273 (E.D. Tex. 1999) (alleging discrimination through subjective discretion); Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 235 (W.D. Tex. 1999) (attacking defendant's job evaluation and promotion system as being too subjective and leading to denial of training and promotion on the basis of race); Shores v. Publix Super Mkts., No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381, at *18-*19 (M.D. Fla. Mar. 12, 1996) (challenging defendant's policy of "delegating hiring and promotion decisions to managers, who make . . . decisions on the basis of subjective criteria"). Some similar lawsuits predate the recent numerical trend. *See, e.g.*, Barnhart v. Safeway Stores, No. CIV S-92-0803, 1992 U.S. Dist. LEXIS 22572, at *15 (E.D. Cal. Dec. 14, 1992) (alleging discrimination through use of "unweighted subjective and arbitrary criteria in making assignment, training and promotional decisions" (internal quotation marks omitted)); Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 319 (N.D. Cal. 1992) (alleging that subjective hiring and promotion criteria lead to discrimination).

98. *See, e.g.*, *McReynolds*, 208 F.R.D. at 448; *Reap*, 199 F.R.D. at 541; Smith v. Texaco, Inc., 88 F. Supp. 2d 663, 679 (E.D. Tex. 2000). *But see Zachary*, 185 F.R.D. at 235 (seeking injunctive relief and back pay but not compensatory damages or punitive damages).

99. *See supra* note 97.

100. *See supra* note 97.

101. *See infra* Part III.

adjudication or upon approval of a consent decree, should help illustrate the basic characteristics of this new form of institutional reform litigation.

i. Butler v. Home Depot, Inc.

In *Butler v. Home Depot, Inc.*, seven female employees and applicants of Home Depot's West Coast Division, covering ten states, filed a class action lawsuit in the district court for the Northern District of California.[102] The plaintiffs were represented by three private law firms.[103] The plaintiffs alleged that Home Depot, a national do-it-yourself home improvement retailer, had discriminated against women in hiring, job assignment, training, promotions, and compensation by maintaining an entirely subjective decision-making system that left broad discretion to male management with hostile and stereotypical attitudes toward women.[104] The district court certified a class that included female applicants and employees in the Home Depot West Coast Division.[105]

On the eve of trial, the parties settled, and in January 1998, the court approved a proposed consent decree.[106] The consent decree provided for a $65 million settlement fund and an additional $22.5 million in attorneys fees.[107] The decree also provided for injunctive relief, including implementation of a job preferences process that enables employees and applicants to enter job preferences and qualifications into a computerized database.[108] Based on information entered into the computer, qualified applicants then are automatically placed into a pool of applicants for interviews.[109] Managers must interview at least three applicants for each position, following a set of structured interview questions for the interview process. The consent decree also required that internal positions be created for monitoring aggregate data acquired by the new computer system, and, for the duration of the decree, the company was required to report regularly

102. *See* Butler v. Home Depot, Inc., No. C-94-4335, 1996 U.S. Dist. LEXIS 3370 (N.D. Cal. Mar. 25, 1996).

103. *See id.*

104. *See id.* at *4.

105. *See id.*; *see also* Butler v. Home Depot, Inc., No. C-94-4335, 1997 U.S. Dist. LEXIS 16296 (N.D. Cal. Aug. 29, 1997) (denying motion for decertification of applicant and employee classes).

106. *See* Nadya Aswad, *Court Approves $65 Million Settlement of Sex Bias Suit Against Home Depot*, 11 Daily Lab. Rep. (BNA), at D19 (Jan. 16, 1998), *available at* LEXIS, News Library, DLR File.

107. *See id.*

108. *See id.* For a detailed account of some of the structural reforms implemented at Home Depot, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 509-19 (2001).

109. *See* Sturm, *supra* note 108, at 513-14.

to class counsel.[110] On June 24, 2002, the court lifted the consent decree, more than a year in advance of its expiration.[111]

ii. Abdallah v. Coca-Cola Co.

In *Abdallah v. Coca-Cola Co.*, four African-American salaried employees filed a class action lawsuit against Coca-Cola alleging widespread discrimination on the basis of race in evaluation, compensation, promotion, and discharge.[112] The plaintiffs were represented by two private law firms.[113] The plaintiffs alleged in part that Coca-Cola's performance evaluation system and word-of-mouth promotion recommendation system provided for undue discretion that led to biased decisions by white managers.[114] During early stages of the litigation, the parties engaged in court-ordered mediation and agreed to settle.[115] The resulting consent decree provided for a settlement fund of $113 million with an additional $20.7 million to be paid to class counsel.[116] The decree included injunctive relief that required diversity training, the hiring of an industrial psychologist to undertake a review of the company's human resources practices, and the establishment of an outside task force to evaluate and monitor the effectiveness of the decree.[117]

iii. Kosen v. American Express Financial Advisors, Inc.

In *Kosen v. American Express Financial Advisors, Inc.*, after two years of negotiation and mediation, fifteen women who worked as financial advisors at various American Express financial offices across the country filed a class action lawsuit against their employer and, one day later, filed a proposed consent decree.[118] The plaintiffs were

110. *See id.* at 517.

111. *See* Joyce E. Cutler, *Court Terminates Home Depot Sex Discrimination Consent Decree*, 125 Daily Lab. Rep. (BNA), at A5 (June 28, 2002), *available at* LEXIS, News Library, DLR File. The court cited evidence of effective implementation as evidence supporting its decision to lift the decree. *See id.*

112. *See* Amended Complaint, Abdallah v. Coca-Cola Co., ¶¶ 28-30 (Jan. 12, 2000) (No. 1-98-CV-3679).

113. *See id.*

114. *See id.*

115. Coca-Cola moved to dismiss the plaintiffs' class allegations before discovery, *see infra* Part III.B. (discussing holding by some courts that class certification of a Title VII class action is improper if plaintiffs seek money damages as well as equitable relief); the motion was denied. *See* Abdallah v. Coca-Cola Co., No. 1-98-CV-3679, 1999 U.S. Dist. LEXIS 23211 (N.D. Ga. July 16, 1999).

116. *See* Abdallah v. Coca-Cola Co., 133 F. Supp. 2d 1364, 1371-74 (N.D. Ga. 2001).

117. *See id.* at 1368-71.

118. *See* Order Approving Consent Decree, Kosen v. Am. Express Fin. Advisors, Inc., at 1 (No. 1: 02CV0082) (D.D.C. June 16, 2002) [hereinafter Order Approving Consent Decree]. The plaintiffs had worked in offices in New Jersey, Minnesota, New York, Michigan, Pennsylvania, North Carolina, and Florida. *See* Complaint, Kosen v. Am. Express Fin. Advisors, Inc., at 3-5 (No. 1: 02-CV0082) [hereinafter Complaint].

represented by two private law firms.[119] The complaint alleged that American Express had "adopted and maintained a systematic practice of denying equal employment opportunities to women."[120] Specifically, the plaintiffs alleged discrimination on the basis of sex and age in promotion from the position of financial advisor to more prestigious, higher paying positions, in compensation, and in assignment of lucrative accounts and valuable leads.[121] In their complaint, they alleged, among other things, that American Express maintained an informal system of choosing "superstars" from incoming recruits for training allotment, mentoring selection, and assignment of important leads and accounts that, together with a pervasive stereotype "both inside [American Express] and throughout the industry" that "women do not have what it takes to succeed in the financial planning business," resulted in discrimination against women.[122]

Before filing the complaint and consent decree, plaintiffs and defendants retained a private mediator who facilitated negotiations leading to the consent decree.[123] During the period of mediation, defendants turned over to plaintiffs data and other information about the makeup of and practices in their workplace, and counsel for the plaintiffs retained a consultant to conduct a statistical analysis of the data.[124] The consent decree, approved by the court on June 16, 2002, provided for a settlement fund of $31 million.[125] Class counsel together received $10.85 million, or 35% of the total settlement amount.[126] The decree also provided for various injunctive relief measures, including the creation of a central database for distribution of leads and client accounts, establishment of objective criteria for assignment of client accounts, and implementation of a diversity training program.[127] At the parties' request, the court appointed a

119. *See* Complaint, *supra* note 118, at 33.

120. *Id.* at 9.

121. *Id.* at 9-10. The complaint also included allegations of discrimination in hiring in the position of financial advisor, *see id.* at 5-6, but applicants were not included within the scope of the settlement classes, *see* Order Approving Consent Decree, *supra* note 118, at 2.

122. Complaint, *supra* note 118, at 9-10; *see generally id.* at 9-20.

123. The parties retained Linda Singer, a mediator with ADR Associates experienced in the facilitation of negotiations in complex litigation, to mediate the case. *See* Consent Decree, Kosen v. Am. Express Fin. Advisors, Inc., at 3-4 (No. 1: 02CV00082) (D.D.C. Jan. 17, 2002) [hereinafter Consent Decree] (describing information exchange and negotiation process).

124. *See id.* Although released to the parties, the information exchanged was otherwise kept confidential. *See id.* at 41.

125. *See* Consent Decree, *supra* note 123, at 24; *see generally id.* at 23-37 (providing details of monetary relief).

126. *See id.* at 25.

127. *See id.* at 13-23 (providing details of injunctive relief).

private attorney as a special master to oversee implementation of the decree.[128]

2. Basic Characteristics

From these brief examples, one can begin to sketch some of the basic characteristics of this recent litigation alongside the characteristics of the private class action lawsuits brought in the early days of Title VII enforcement:

Basic Characteristics of Early Title VII Class Action Lawsuits	
Goals:	Institutional Reform; Compensation
Scope:	Organizations; Industries
Plaintiffs:	Employee/Applicant Class Members; Membership Organizations
Plaintiff Attorneys:	Public Interest Firms
Plaintiff Attorney Fees:	Court-ordered Statutory Award to Prevailing Party
Remedies:	Organizational Changes to Remove Structures that Lock in Place Stratification; Affirmative Action; Back Pay
Method of Resolution:	Adjudication/Negotiation
Enforcement:	Judicial Enforcement

Basic Characteristics of Recent Class Action Lawsuits:	
Goals:	Institutional Reform; Compensation
Scope:	Organizations
Plaintiffs:	Employee/Applicant Class Members
Plaintiff Attorneys:	Private Firms
Plaintiff Attorney Fees:	Agreement in Settlement Subject to Court Approval
Remedies:	Organizational Changes to Improve Hostile Work Environment and to Reduce Discrimination by Individuals; Compensatory and Punitive Damages
Method of Resolution:	Negotiation
Enforcement:	Private Enforcement (With Court as Last Resort)

128. *See* Order and Stipulation of Reference, Kosen v. Am. Express Fin. Advisors (No. 1: 02CV00082) (D.D.C. 2002).

In some respects, these recent lawsuits are no different from earlier attempts to alter workplaces in ways that fulfill an employer's obligation not to discriminate on the basis of protected characteristics. Plaintiffs in these suits, just as in earlier Title VII litigation, seek class action status to help broaden the inquiry to include organizational sources of discrimination, only this time the problem being addressed is one of decision-making context rather than institutional policy or individual animus. Moreover, once seen as efforts to change organizational context to reduce future discrimination (as well as to obtain monetary redress for past harm caused), these lawsuits sit squarely within the long history of Title VII institutional reform litigation. In other words, these lawsuits are more than just another mass tort;[129] they are a means of making antidiscrimination enforcement litigation relevant to some of the more subtle forms of discrimination common in the modern workplace.

In a number of respects, however, these recent lawsuits differ from their earlier counterparts. In particular, at least three largely interrelated differences raise concern for the ability of these lawsuits to trigger meaningful institutional reform. The first of these differences stems from changes in the nature of the problem and remedy sought; the other two stem from more obvious changes in the features of the lawsuits and processes for resolution and implementation of solutions. First, unlike many of the early attempts at structural reform under Title VII, the recent class action lawsuits typically seek the type of organizational change that is intended to reduce the incidence of discriminatory decisions based on subtle, often unconscious bias in individuals rather than to remove systems or structures that themselves perpetuate past segregation or discrimination. These lawsuits, like their earlier counterparts, still seek institutional reform, but they seek a type of reform that is more complex than earlier reform attempts.[130] Second, while plaintiffs in early privately instituted Title VII lawsuits were often represented by public interest firms with highly developed institutional agendas,[131] the

129. In a recent article, Professor Michael Selmi suggests that employment discrimination class action litigation has become "just another tort." Selmi, *supra* note 96, at 1300-01. Although Selmi is correct that many of the recent consent decrees provide monetary funds without individualized injunctive relief, such as jobs or promotions, many of the recent lawsuits do provide for systemic prospective relief aimed at reducing future discrimination. This systemic prospective relief distinguishes the recent cases from mass torts, wherein money damages are typically the primary remedy for past harm and the defendant is not ordered to alter its business practices in ways that will alleviate future harms. *But see* Deborah R. Hensler, *The New Social Policy Torts: Litigation as Legislative Strategy*, 51 De Paul L. Rev. 493, 498 (2001) (describing research project that examines the use of mass tort class actions to "change the rules that govern industry-wide business practices").

130. *See infra* Part IV.A.

131. *See supra* note 83 and accompanying text (describing early reform efforts undertaken by the NAACP LDF and other public interest firms). Public interest firms

plaintiffs in recent class action lawsuits have been primarily represented by private law firms, albeit sometimes private firms specializing in public interest or employment litigation.[132] Third, while early Title VII institutional reform litigation tended to proceed to some degree through adjudication, resulting in judicial involvement in formulation of remedy and oversight, the recent lawsuits have tended to settle, sometimes before a complaint is even filed, resulting in consent decrees between the parties that provide primarily for outside rather than judicial oversight.[133] As I will discuss in greater detail in Part IV, the complexity of this recent effort, coupled with the privatization of the problem-solving process, raises particular concern about the risk of private co-option of larger public antidiscrimination goals.

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are typically membership organizations that derive financial support primarily from foundation grants or other private donations and/or governmental assistance. *See* Edward Berlin et al., *Public Interest Law*, 38 Geo. Wash. L. Rev. 675 (1970).

132. Saperstein, Goldstein, Demchak & Baller, a private law firm that specializes in civil rights class actions, has represented plaintiffs in a number of these cases. *See, e.g.*, Butler v. Home Depot, Inc., No. C-94-4335, 1996 U.S. Dist. LEXIS 3370 (N.D. Cal. Mar. 25, 1996); Shores v. Publix Super Mkts., No. 95-1162-CIV-T-25E, 1996 U.S. Dist. LEXIS 3381 (M.D. Fla. Mar. 12, 1996); Barnhart v. Safeway Stores, No. S-92-0803, 1992 U.S. Dist. LEXIS 22572 (E.D. Cal. Dec. 14, 1992); Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992). Lieff Cabraser Heimann & Berstein, a law firm well known for its representation of plaintiffs in securities class actions and mass tort litigation, has also been involved in recent cases. *See, e.g.*, *Home Depot*, 1996 U.S. Dist. LEXIS 3370. A variety of other private law firms have also represented plaintiffs in recent actions. *See, e.g.*, Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466 (S.D. Ohio 2001); Cooper v. Southern Co., 205 F.R.D. 596 (N.D. Ga. 2001); Reap v. Cont'l Cas. Co., 199 F.R.D. 536 (D.N.J. 2001); Beckmann v. CBS, Inc., 192 F.R.D. 608 (D. Minn. 2000). For a discussion of the decline of public law firms and the rise of practice of public interest law in private law firms, see Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. Va. L. Rev. 293 (1993).

133. Consent decrees were common even in earlier institutional reform efforts under Title VII. *See, e.g., supra* notes 70-72 and accompanying text; *see also* Maimon Schwarzschild, *Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887 (discussing earlier use of consent decrees). However, earlier institutional reform suits were also adjudicated, *see, e.g.*, United States v. Sheet Metal Workers Int'l Ass'n, Local 36, 416 F.2d 123 (8th Cir. 1969) (requiring employer to modify employment-referral systems and undertake effective public information programs); United States v. Bethlehem Steel Corp., 312 F. Supp. 977, 995-96 (W.D.N.Y. 1970) (adopting extensive plan for ending discriminatory seniority system); United States v. United Ass'n of Journeymen & Apprentices, 314 F. Supp. 160 (D. Ind. 1969) (requiring revision of union's apprenticeship program and retaining continued jurisdiction to insure compliance), whereas almost all of the recent lawsuits like those that I have described have been resolved by consent decrees that place implementation oversight primarily with nonjudicial entities. *But see* Stender v. Lucky Stores, 803 F. Supp. 259, 335-36 (N.D. Cal. 1992). The parties in this case, too, subsequently agreed to a settlement. *See* Elaine Tassy, *Lucky Stores Agrees To Settle Sex Bias Suit*, L.A. Times, Dec. 17, 1993, at D1.

III. RECENT CASES: TARGETING WORKPLACE CONTEXT

The recent Title VII private class action lawsuits hold the potential to address modern forms of discrimination by broadening the antidiscrimination inquiry beyond discrete, identifiable bad actors to target larger organizational sources of harm. Care must be taken, however, not to let the large money stakes at issue in these cases obscure the nature of the problem being addressed.[134] At the outset, the capability of these lawsuits for triggering meaningful reform depends on their suitability for class treatment. Without class certification, plaintiffs in these cases will be required to bring individual lawsuits, which, as a practical matter, will tend to focus on the state of mind of discrete decision makers rather than on larger organizational influence. Although, as the examples illustrate, some courts have been willing to certify recent cases for class treatment, many have denied certification. In this part, I shift gears a bit to consider in some detail the principal objections raised by those courts denying certification, objections that I suggest are driven in part by an overemphasis on the damages dimension of these lawsuits. In doing so, I seek to lay a conceptual foundation for placing lawsuits that seek to identify organizational sources of modern discrimination within the existing class action paradigm.

A. *Common Question and Scope of Class for Class Treatment*

In order to be certified for class action treatment under Federal Rule of Civil Procedure 23, a proposed private class action must satisfy the four requirements of Rule 23(a), numerosity, commonality, typicality, and adequacy of representation,[135] and the lawsuit must fall within one or more of the categories of class suits described in Rule 23(b).[136] A number of courts that have denied class certification in

134. Unlike their earlier counterparts, plaintiffs alleging discrimination in violation of Title VII today can seek compensatory and punitive damages in addition to the traditionally available equitable forms of relief. *See infra* note 175.

135. Rule 23(a) provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

136. Rule 23(b) provides:

> Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the

recent cases have done so on the ground that there exists no issue of law or fact common to all members of the proposed class.[137] Conceptualizing the problem of modern workplace discrimination purely in terms of discrete decisions made by individual decision makers, these courts fail to recognize the broader structural influences potentially at play across the organization.[138]

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party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b).

137. It is well understood that the initial requirements for class certification delineated in Rule 23(a), particularly the commonality, typicality, and adequacy of representation requirements, overlap significantly. *See* Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982).

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

Id. Therefore, although many courts deny certification for lack of commonality, these courts often will also find a lack of typicality and inadequacy of representation. *See, e.g.*, Clayborne v. Omaha Pub. Power Dist., 211 F.R.D. 573 (D. Neb. 2002); Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466 (S.D. Ohio 2001); Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230 (W.D. Tex. 1999); *see also* Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655 (N.D. Ga. 2001) (finding plaintiffs failed to establish commonality and typicality requirements).

138. *See, e.g., Bacon*, 205 F.R.D. at 479 (holding that "commonality is not established where the decisions allegedly constituting discrimination were made by different supervisors and decisionmakers"); Allen v. Chi. Transit Auth., No. 99-C7614, 2000 U.S. Dist. LEXIS 11043, at *26 (N.D. Ill. July 28, 2000) ("Because promotion and pay decisions are made in different ways by different people throughout the various departments of the CTA, there is no common nucleus of facts and plaintiffs cannot establish commonality."); Betts v. Sundstrand Corp., No. 97-C50188, 1999 U.S. Dist. LEXIS 9743, at *22 (N.D. Ill. June 21, 1999) ("The lack of a centralized hiring decisionmaker, the sheer number of managers who hire applicants, and the wide range of jobs included in the prospective class, indicate the lack of a common nucleus of operative fact between class members."); *Zachery*, 185 F.R.D. at 239 (holding that subjectivity in evaluation and promotion decisions across geographical units "would be useful evidence in an individual's claim of intentional discrimination by that supervisor, [but] it does not lend itself readily to class treatment where there are 523 autonomous supervisors in locations spread across the

The court's reasoning in *Zachery v. Texaco Exploration and Production, Inc.*, provides a vivid example of this individualized conception of the antidiscrimination inquiry.[139] In that case, the plaintiffs sought to obtain certification of a class of African-Americans who were employed as hourly fieldworkers at a certain pay grade by Texaco Exploration and Production and who held or had tried to obtain a managerial, supervisory, or professional position, or who had been otherwise affected by Texaco's allegedly racially discriminatory policies and practices.[140] The plaintiffs alleged that Texaco's job evaluation system resulted in discrimination because it left decision making to the discretion of low-level supervisors without sufficient guidance or stability.[141] The district court denied class certification, concluding that the plaintiffs' claims lacked the commonality required for class treatment.[142] In doing so, the court explained that the proposed class was spread across fifteen states in seventeen separate business units and that the allegedly discriminatory decisions, "by the Plaintiffs' own complaint," were often made by the lowest level supervisor based on subjective criteria.[143] According to the court, "[w]hile this would be useful evidence in an individual's claim of intentional discrimination by that supervisor, it does not lend itself readily to class treatment where there are 523 autonomous supervisors in locations spread across the United States."[144]

On the contrary, the question of fact or law common to all members of a class in a case like this one should be whether the employer's organizational structures, culture, and/or institutionalized decision-making practices together facilitate or permit discriminatory decisions by individual decision makers against members of the class. A decentralized decision-making process that leaves employment decisions to the subjective discretion of local managers in a white, male-dominated workplace might enable discrimination in a wide range of jobs. So long as the named plaintiffs were subjected to similar organizational structures and practices that allegedly resulted in discrimination against class members, they should share a common question of law or fact suitable for class treatment, even if the

United States"); EEOC v. McDonnell Douglas Corp., 17 F. Supp. 2d 1048, 1054 (E.D. Mo. 1998) ("[The] decentralized and subjective nature of the decisionmaking process undermines the claim that age discrimination was [the defendant's] 'standard operating procedure.'"); Abrams v. Kelsey-Seybold Med. Group, Inc., 178 F.R.D. 116, 129 (S.D. Tex. 1997) ("A class may not be based on discrimination occurring in different departments, involving different decisionmakers.").

139. *Zachery*, 185 F.R.D. at 230.

140. *Id.* at 234.

141. *Id.* at 235.

142. *Id.* at 246.

143. *Id.* at 239.

144. *Id.*

discrimination manifests itself at a variety of levels within an organizational hierarchy or across geographical units.

This identification of organizational sources of discrimination as a common ground for class treatment is consistent with the Supreme Court's principal decision in this area, *General Telephone Co. of the Southwest v. Falcon*.[145] Decided in 1982, *Falcon* is often considered largely responsible for the sharp decline in class action filings in the 1980s, and many courts in recent cases rely heavily on the decision when denying class certification for lack of commonality or typicality. Prior to *Falcon*, some courts had permitted any victim of discrimination to maintain an "across-the-board" attack on all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination, with little or no analysis of the Rule 23 requirements.[146] This meant that a plaintiff who was denied a promotion could sue on behalf of himself and others denied promotions as well as on behalf of applicants denied initial employment so long as the named plaintiff alleged a larger policy of discrimination. Plaintiffs in these cases were not required to make a showing of a policy or practice of discrimination; mere allegations of widespread discrimination were enough to qualify the case for class action treatment.[147]

Falcon involved allegations of discrimination against Mexican-Americans by General Telephone. Mariano Falcon had been hired in July 1969 as a groundman as part of a special recruitment and training program for minorities.[148] Shortly thereafter, he was promoted to lineman and then to lineman-in-charge.[149] In 1972, he was denied a promotion to the job of field inspector, while two white employees

145. 457 U.S. 147 (1982).

146. *See, e.g.*, Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); *see also* Judith J. Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 Colum. Hum. Rts. L. Rev. 1, 9-15 (1987) (describing the development of the across-the-board class action); George Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688, 706-13 (1980) (same). An earlier Supreme Court decision had rejected an extreme application of the prevailing presumption in favor of certification, *see* E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977), but courts did not uniformly pull away from across-the-board certification until the Supreme Court issued its opinion in *Falcon*. *See generally* Rutherglen, *supra*, at 721-24 (explaining *Rodriguez* and reaction by lower courts).

147. In some cases, plaintiffs did not even allege class-wide discrimination and courts still treated their actions as representative of a broader class issue. *See, e.g.*, Senter v. Gen. Motors Corp., 532 F.2d 511, 521 (6th Cir. 1976) (stating that "it is not essential that an action under Title VII be labeled a class action since it is 'perforce a sort of class action for fellow employees similarly situated'" (quoting Tipler v. E.I. duPont deNeMours & Co., 443 F.2d 125, 130 (6th Cir. 1971))).

148. *Falcon*, 457 U.S. at 149.

149. *Id.*

with less seniority were granted the promotion.[150] Falcon filed suit against General Telephone alleging that it discriminated against Mexican-Americans in transfers and promotions.[151] Relying on earlier decisions sanctioning "across-the-board" attacks, the district court certified a class that included both employees, who were allegedly denied transfers and promotions, and applicants, who were allegedly denied positions to begin with.[152] After a trial on the merits, the district court found that General Telephone had engaged in a practice of discrimination against Mexican-Americans in hiring, but not in transfer or promotion.[153] On appeal, the court of appeals affirmed the class certification, and the Supreme Court granted certiorari to decide "whether the class action was properly maintained on behalf of both employees who were denied promotion and applicants who were denied employment."[154]

The Supreme Court reversed, holding that a class including both applicants and employees was improper without any presentation identifying questions of law or fact that were common to the claims of Falcon and members of the class he sought to represent.[155] The district court had erred in presuming that Falcon's claim was typical of other claims.[156] Employment discrimination class actions must meet the requirements of Rule 23, cautioned the Court, and in this case there was nothing to indicate that the requirements of Rule 23(a) were met.[157] Unless he could show otherwise, on the facts presented, Falcon simply did not "possess the same interest and suffer the same injury" as the applicant class members.[158]

With its decision in *Falcon*, the Supreme Court eliminated the certification of "across-the-board" attacks brought by any victim of discrimination based on mere allegations of systemic discrimination. It did not, however, eliminate certification of a class simply because the named plaintiff suffered a different manifestation of discrimination from other class members. In a footnote, the Court provided several examples of circumstances under which applicants and employees might be part of the same class. It explained:

> If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an

150. *Id.*
151. *Id.*
152. *Id.* at 152.
153. *Id.*
154. *Id.* at 155.
155. *Id.* at 158-59.
156. *Id.*
157. *Id.* at 160.
158. *See id.* at 156 (internal quotations omitted).

> employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.[159]

Even after *Falcon*, therefore, class members will share a common issue when the organizational context within which they work facilitates discrimination that hinders their employment opportunities in similar ways. As the Court's footnote reflects, organizational structures that perpetuate past segregation as well as organizational structures that facilitate present discrimination can provide a common ground for class treatment.[160] In this way, the organizational cause of the discrimination rather than the precise nature of the economic injury suffered is the common question for the class.

The scope of the class in these cases, then, will be defined by the reach of the organizational sources at issue. In some cases, the organizational sources will include an array of practices that operate together to facilitate discrimination at a number of levels within the workplace, such as promotions, transfers, work assignments, and even hiring. In those cases, a broadly defined class would be suitable. In the *Home Depot* case, for example, the plaintiff class properly included applicants as well as employees, for broad discretion in hiring, job assignment, training, and evaluation, together with a male-dominated management force holding stereotypical views about the suitability of women for hands-on home improvement work, allegedly led to discriminatory decision making in all levels of employment opportunity.[161] In other cases, in contrast, a more definite problem

159. *Id.* at 159 n.15.

160. Some courts have relied on the Court's reference to "entirely subjective decision-making practices" to preclude certification in cases which involve both subjective and objective factors. *See, e.g.*, Vuyanich v. Republic Nat'l Bank of Dallas, 723 F.2d 1195, 1199-1200 (5th Cir. 1984) ("The district court's finding that the Bank relied on two objective inputs—education and experience—in its necessarily subjective hiring process ... precludes reliance on th[e] 'general policy of discrimination' exception"); Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466, 477 (S.D. Ohio 2001) (finding no commonality because defendant did not employ "entirely subjective" criteria); Betts v. Sundstrand Corp., No. 97-C50188, 1999 U.S. Dist. LEXIS 9743, at *21 (N.D. Ill. June 21, 1999) (stating that "where there are objective factors, even a generally subjective process will not satisfy Rule 23's commonality and typicality requirements"); Abrams v. Kelsey-Seybold Med. Group, Inc., 178 F.R.D. 116, 132 (S.D. Tex. 1997) ("Where ... there are objective factors, even a generally subjective process will not satisfy the typicality and commonality requirements."). Subjectivity in decision making is problematic, however, not because it is entirely devoid of objective elements, but because research shows that people are more likely to rely on stereotypes and to act on discriminatory bias when decision-making processes lack guidance or repercussion. *See supra* notes 37-45 and accompanying text. Even practices that are not entirely subjective, therefore, may facilitate discrimination within an organization.

161. Butler v. Home Depot, Inc., No. C-94-4335, 1996 U.S. Dist. LEXIS 3370 (N.D. Cal. Mar. 25, 1996).

will be identified. In the *American Express* case, plaintiffs argued that the choosing of "superstars," together with a male workforce culture biased against women, resulted in discrimination against women in training, mentoring, and promotion.[162] And in the *Coca-Cola* case, the plaintiffs identified a performance evaluation system and word-of-mouth promotion recommendation system that allegedly enabled discrimination against African-Americans.[163] Applicants for employment would not be included within the plaintiff class in either of these cases, for neither choosing superstars from recruits nor performance and promotion systems would reasonably extend to hiring decisions.

One might expect plaintiffs in cases like *Coca-Cola* and *American Express*, in order to obtain a broader class, to simply expand their allegations to include more generalized subjective decision making. However, mere allegation of widespread subjectivity should not be enough to warrant certification of a broad class. Rather, class certification in cases where the plaintiffs allege organizational sources of discrimination should require some evidentiary showing that the organizational structures, institutionalized practices, and/or culture within the defendant's workplace exist and enable discrimination in individuals against members of the class.[164] In addition to evidence of relevant statistical disparities, this showing might include evidence obtained from the employer concerning its structures and practices of decision making, anecdotal evidence from employees concerning informal practices that enable discrimination, and/or expert testimony concerning the operation of bias within a particular organizational context.[165] Together, this evidence should suggest organizational sources of discrimination that would apply across the proposed class. So long as the evidence provides a reasonable basis for believing that discrimination is enabled by organizational context throughout the proposed class, however, the class members should share a common issue sufficient to meet the requirements of Rule 23(a).

In certain circumstances, of course, variations among class members may require certification of subclasses. For example, some courts

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162. *See supra* notes 118-28 and accompanying text.

163. *See* Amended Complaint, Abdallah v. Coca-Cola Co., No. 98-CV-3679, 1999 U.S. Dist. LEXIS 23211 (N.D. Ga. July 16, 1999).

164. Although the Supreme Court has cautioned that a class certification analysis is not an evaluation of the merits of the case, *see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974), most courts require some precertification evidence showing the existence of a class, *see, e.g.*, Nelson v. United States Steel Corp., 709 F.2d 675, 679-80 (11th Cir. 1983). Moreover, requiring some showing of organizational sources of discrimination that apply across the proposed class is consistent with *Falcon*. *See Falcon*, 457 U.S. at 159 n.15.

165. *See, e.g.*, McReynolds v. Sodexho Marriott Servs., Inc., 208 F.R.D. 428, 441-42 (D.D.C. 2002) (presenting evidence of decentralized, subjective promotion practices and statistical evidence showing under-representation of African Americans in higher-paying jobs).

have declined to certify recent cases for class treatment in part because the plaintiffs relied on statistical disparities across geographical units to support an allegation that the employers' decision-making practices resulted in discrimination against members of a protected group.[166] While it is true that evidence of company-wide disparities does not necessarily mean that each geographic unit will have experienced similar disparities, evidence of statistical disparities, whether generalized or specific, should be sufficient to support a reasonable inference at the class certification stage that organizational structures are enabling discrimination against members of the class as a whole. To the extent the employer can show that certain units do not exhibit disparities, the court might create subclasses for those areas (or, depending on the circumstances, exclude those areas from the class altogether),[167] but the common issue is the same: whether the employer's organizational structures and/or institutionalized practices enable discrimination against members of the class.[168]

Subclasses might also be required in some cases to protect the interests of plaintiffs seeking only systemic change in the form of injunctive relief. Lawsuits alleging widespread discrimination enabled by organizational context are likely to involve some plaintiffs who cannot point to specific injury compensable with monetary damages as well as plaintiffs who can point to monetarily compensable injury. To the extent that plaintiffs seeking substantial monetary relief have interests that diverge from their injunctive-only counterparts, subclasses may be warranted.

That plaintiffs seek monetary damages as well as injunctive relief in

166. *See, e.g.*, Abram v. UPS, Inc., 200 F.R.D. 424, 431 (E.D. Wis. 2001); Robinson v. Metro-North Commuter R.R. Co., 175 F.R.D. 46, 48-49 (S.D.N.Y. 1997), *rev'd sub nom.* Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 293 (2d Cir. 1999); Boykin v. Viacom Inc., No. 96-CIV.8559, 1997 U.S. Dist. LEXIS 17872, at *11-*12 (S.D.N.Y. Nov. 12, 1997).

167. A finding that an employer did not discriminate with respect to certain geographical units might also affect the scope of the remedy. *See* Hodgson v. Corning Glass Works, 474 F.2d 226, 236-37 (2d Cir. 1973).

168. This understanding that variation among geographical or business units might warrant creation of subclasses illustrates the overlap between the commonality, typicality, and adequacy of representation requirements of Rule 23(a). Certainly, if organizational context in a particular unit so diverges from the context of the organization as a whole that it requires a separate subclass or exclusion from the class, employees of that unit would not have claims typical of employees from other units and would not be able to adequately represent their interests. This is not to say, however, that any variation in organizational context across units will require separate subclasses and named representative plaintiffs, for organizational context will naturally vary to some degree from one workplace unit to the next. Rather, it is simply to recognize that in those cases where the organizational context in a particular unit is so different from the class as a whole that it either falls outside the class altogether or requires a separate subclass, then employees working within that distinct organizational context would not have claims typical of the class as a whole.

these cases, though, should not be permitted to obscure the commonality of the underlying problem. Individuals may be harmed by discrete discriminatory decisions in a variety of ways, but it is the organizational cause of the discrimination rather than the specifics of individualized circumstances that provides the common question for class treatment in these cases.

B. *Beyond Commonality: Damages and Class Certification*

Courts have also denied class treatment in recent employment discrimination cases on the ground that certification is not proper under any category or combination of categories of Rule 23(b). Several of these courts carry over into their Rule 23(b) analysis a conceptualization of the problem of discrimination posed by recent cases as one of individuals acting in isolation rather than in larger organizational context.[169] The reasoning provided by these courts differs little from the reasoning provided with respect to commonality under Rule 23(a). Other courts, however, relying primarily on the Fifth Circuit Court of Appeals' decision in *Allison v. Citgo Petroleum Corp.*,[170] raise distinct concerns about the propriety of class treatment when employment discrimination plaintiffs seek money damages as well as injunctive relief as remedies. A look at some of the issues raised under Rule 23(b) should reveal the propriety of class certification in recent cases, even when plaintiffs seek substantial monetary as well as injunctive relief.

Before 1991, it was well established that employment discrimination lawsuits were suitable for certification as class actions under Rule 23(b)(2), which provides for class treatment when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[171] Although Title VII plaintiffs during the pre-1991 period could recover money in the form of back pay and front pay, those remedies, traditionally considered equitable, were permitted as part of a 23(b)(2) employment discrimination class, despite the individual issues thereby created. Typically, where members of an employment discrimination class sought individualized relief, the court would bifurcate the proceedings into a "liability" phase and a "remedial"

169. *See, e.g.*, Reap v. Cont'l Cas. Co., 199 F.R.D. 536, 549 (D.N.J. 2001); Robinson v. Metro-North Commuter R.R. Co., 197 F.R.D. 85, 88 (S.D.N.Y. 2000), *rev'd*, 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002).

170. 151 F.3d 402 (5th Cir. 1998).

171. Fed. R. Civ. P. 23(b)(2). The Advisory Committee Notes to the Rule confirm that civil rights actions "where a party is charged with discriminating unlawfully against a class" qualify for class treatment under Rule 23(b)(2), for injunctive and declaratory relief to the class as a whole is often a principal remedy in these cases. Fed. R. Civ. P. 23(b)(2) Advisory Committee Note, 1966 Amendments.

phase. If the plaintiffs could show that the employer had discriminated against the class as a whole, then class-wide liability attached and class members received generalized injunctive and/or declaratory relief as well as a presumption of discrimination for individualized relief.[172] The employer could avoid providing individualized relief in the remedial stage only if it could establish a lawful reason for an adverse employment action against a member of the class.[173] Because back pay and front pay were considered equitable remedies, both stages of the lawsuit were tried to the judge rather than to a jury. After making a determination as to liability with respect to the class as a whole, the judge (or an appointed special master) would hear individualized issues in the remedial phase of the litigation.[174]

In 1991, Congress amended Title VII to allow, for the first time, legal as well as equitable relief. Specifically, as noted earlier, Title VII now provides plaintiffs with the right to seek compensatory and punitive damages.[175] In addition, seeking legal relief triggers the right to a jury trial in Title VII cases, which means that a jury rather than a judge will decide issues of liability and remedy tied to the legal claims.[176] These remedial and procedural changes in the Civil Rights Act immediately raised concerns in the courts about the propriety of Rule 23(b) certification of employment discrimination lawsuits in which plaintiffs seek compensatory and/or punitive damages in addition to equitable relief.

The Fifth Circuit in *Allison* was the first court of appeals to address class action issues raised by the 1991 amendments to the Civil Rights Act.[177] In that 1998 decision, the court held that as a general rule

172. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361-62 (1977).

173. *See id.*

174. *See* Herbert Newberg & Alba Conte, Newberg on Class Actions §§ 24.119-24.121 (3d ed. 1992).

175. *See* 42 U.S.C. § 1981a(b)(3) (2000) (allowing compensation for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses"); *id.* § 1981a(b)(1) (allowing for punitive damages if the employer discriminated "with malice or with reckless indifference to the federally protected rights of an aggrieved individual"). Total recovery for compensatory and punitive damages is capped at a maximum of $300,000 per plaintiff. *See id.* § 1981a(b)(3). The legislative history suggests that Congress intended to "confirm that the principle of antidiscrimination is as important as the principle that prohibits assaults, batteries and other intentional injuries to people," H.R. Rep. No. 102-40(I), at 15 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 553, to "ensure compensation commensurate with the harms suffered by victims of intentional discrimination," *id.* at 18, and to "encourage citizens to act as private attorneys general" in enforcement, *id.* at 65. For a discussion of the legislative history of the damages provision more generally, see Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. Rev. 305, 306-09.

176. 42 U.S.C. § 1981a(c).

177. Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998).

employment discrimination lawsuits in which plaintiffs seek compensatory or punitive damages cannot be certified for class treatment.[178] In doing so, the court limited Rule 23(b)(2) class actions to those claims seeking to recover only "incidental" damages, defined as "damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief" and that are "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances."[179] Because compensatory damages (and punitive damages) require individualized proof, said the court, employment discrimination claims seeking these remedies cannot be certified under Rule 23(b)(2).[180] Interestingly, for much the same reason, the court also rejected a "hybrid" approach under which the plaintiffs' claims for compensatory and punitive damages would be certified under Rule 23(b)(3), with the remainder certified under Rule 23(b)(2).[181] According to the court, the requirement that common issues predominate for Rule 23(b)(3) treatment was not satisfied when money damages were sought, for individualized issues concerning monetary relief to particular individuals would overwhelm any common issues concerning the class as a whole.[182] Although the court's decision rested largely on its narrow construction of the language of Rule 23(b), the court also voiced concerns about diverging interests that might violate class members' due process rights, the potential for violating the Seventh Amendment prohibition on jury reexamination, and the difficulty in managing individualized issues to be tried by juries.[183]

A number of commentators have debated the merits of the *Allison* court's construction of Rule 23(b),[184] and I will not revisit those arguments in detail here. Instead, I seek to highlight the problems of the *Allison* approach from a practical perspective and to lay the groundwork more generally for an approach to class certification in

178. *Id.*

179. *Id.* at 415.

180. *See id.* at 415-18.

181. *See id.* at 418-21. The court suggested that plaintiffs in these cases might obtain certification under Rule 23(b)(2) by foregoing claims for monetary damages in the class suit. *See id.* at 418 n.13. At least one other court, however, has denied certification in cases in which plaintiffs have refrained from seeking monetary damages on the ground that unnamed class members might be bound by that decision and unable to seek individual damages in later suits. *See* Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 242-45 (W.D. Tex. 1999).

182. *See Allison*, 151 F.3d at 419-20.

183. *See id.*

184. *See, e.g.*, Kramer, *supra* note 96, at 415; Harvey S. Bartlett III, Comment, *Determining Whether a Title VII Plaintiff Class's "Aim is True": The Legacy of* Allison v. Citgo Petroleum Corp. *for Employment Discrimination Class Certification Under Rule 23(b)(2)*, 74 Tul. L. Rev. 2163 (2000); Lesley Frieder Wolf, Note, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 Colum. L. Rev. 1847 (2000).

employment discrimination cases like those recently filed, an approach that addresses concerns raised by the 1991 Act without preventing class certification altogether. The Fifth Circuit starts from the premise that "the class action device exists primarily, if not solely, to achieve a measure of judicial economy, which benefits the parties as well as the entire judicial system,"[185] but class actions in the discrimination context do more than advance judicial efficiency; they have long been used to highlight systemic problems, to expand the legal inquiry and remedial formulation to address sources of discrimination that may otherwise go unaddressed.[186] In this way, recent privately-instituted class action lawsuits seeking significant structural reform are a crucial part of the modern antidiscrimination project, for, as I have argued, they serve to trigger change in the organizational structures that continue to perpetuate discrimination in the modern workplace. Without class certification, courts are faced with a problem of individualized discrimination, a problem for which they are often unwilling or even unable to consider structural sources or solutions.

Moreover, increased involvement of private attorney firms in enforcement litigation can serve as a much-needed supplement to public enforcement efforts. The 1991 amendments authorizing compensatory and, in some circumstances, punitive damages, in addition to providing individuals with full relief, provide an incentive for privately-instituted class-wide litigation. Increased settlement or judgment awards typically result in increased attorneys fees.[187] Accordingly, private attorneys are more willing to spend the money required to litigate a complex case of widespread employment discrimination, taking on a task long left largely to the government and other public interest entities.

With careful attention to underlying concerns about due process, jury reexamination, and manageability raised by claims seeking monetary damages, Title VII lawsuits like those recently filed are suitable for class treatment. To begin with, the due process rights of class members in these cases can be protected by providing notice and an opportunity to opt out on all claims for monetary relief. Due

185. *Allison*, 151 F.3d at 410.

186. In theory, a single plaintiff's claim should be capable of exposing structural, systemic causes of workplace discrimination. Group-based claims, however, are more readily recognized as efforts to target organizational causes and have historically been more useful for effecting institutional solutions. *See supra* note 79 and accompanying text.

187. Attorneys fees in class action litigation are calculated using two methods: the percentage of recovery method and/or the hourly or "lodestar" method. Even the lodestar calculation can take into account degree of success. *See, e.g.*, Spegon v. Catholic Bishop, 175 F.3d 544, 557 (7th Cir. 1999) ("Once the district court reaches an amount using the lodestar determination, it may then adjust that award in light of the plaintiff's 'level of success.'").

process concerns arise when class members' interests diverge. Where class-wide injunctive or declaratory relief is sought for an alleged group harm, there is a presumption of cohesion and unity between absent members and the class representatives such that adequate representation will generally safeguard absent class members' interests. In these circumstances, a right to opt out of the class action makes no sense. In fact, in these circumstances it is difficult to identify an individual cause of action that could be sued upon independently from the class.[188] Although class members may disagree about the form that injunctive relief should take, they cannot achieve an alternate solution by suing separately. Rather, the finding of liability and corresponding remedy will necessarily involve the collective group.

Where relief is sought for specific damage incurred by individuals within the class, in contrast, the class members' interests begin to diverge, for now individuals have a right to litigate their cases separately and to achieve remedies independent of the collective action.[189] In these circumstances, the class action is an aggregation of individual actions, and due process arguably requires an opportunity to opt out of aggregated class resolution.[190] Class members still share a common interest in achieving organizational reform in these cases, but they have a right to litigate their damage claims individually. Although due process arguably requires an opportunity to opt out of the class resolution of damage claims, this due process right should not preclude class treatment in cases where plaintiffs seek both significant institutional reform and monetary relief for their injuries. Rather, courts can satisfy these due process concerns by providing

188. For a similar point made in the context of considering the need for notice and opt out in class actions generally, see Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1058-62 (2002).

189. In fact, Rule 23 requires that members of a class certified under Rule 23(b)(3), the category that usually encompasses suits for money damages, be provided notice and an opportunity to opt out of the class. *See* Fed. R. Civ. P. 23(c)(2).

190. *See* George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 Va. L. Rev. 11, 26 (1983) (noting that some individual class members may have claims for monetary relief "stronger than [those] of most other class members, or worth more, or in other respects sufficiently distinctive" such that "[n]otice and the right to opt out" may be warranted); Eubanks v. Billington, 110 F.3d 87, 95 (D.C. Cir. 1997) (noting that the underlying premise of the (b)(2) class—that its members suffer from a common injury properly addressed by class-wide relief—"begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries"); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 845-47 (1999) (suggesting that damage class actions require notice and opportunity to opt out); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 Ariz. L. Rev. 461, 472 (1997) (arguing that "the right to assert one's own rights" requires opt-out); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum. L. Rev. 1148, 1174 (1998).

notice and an opportunity to opt out for claims seeking monetary relief. Some courts have done this by certifying a class under Rule 23(b)(2) and providing notice and opt out for monetary relief,[191] while others have certified a hybrid class action, with claims for injunctive and declaratory relief falling under Rule 23(b)(2) and claims for monetary relief under Rule 23(b)(3).[192]

Nor should the Seventh Amendment prevent certification in these cases. The Seventh Amendment provides in relevant part that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States."[193] Under Title VII, parties now have a right to a jury trial when plaintiffs seek compensatory or punitive damages. This will mean that a jury must decide liability as well as legal remedies. Moreover, because it is highly unlikely that the same jury will sit for both the liability and remedial phases of an employment discrimination class action lawsuit, successive juries may be involved in cases that do not settle before the remedial phase. However, although the Reexamination Clause of the Seventh Amendment forbids reexamination of issues by separate, successive juries, it does not forbid successive juries from deciding separate factual issues. In fact, courts have long bifurcated claims for determination by separate juries, and it is well settled that these separate juries meet constitutional requirements so long as the juries do not decide overlapping factual issues.[194]

The key to Seventh Amendment concerns in these cases, then, is in delineating factual issues for separate jury determination in a way that provides no overlap. In the employment discrimination context this task should be relatively straightforward, for the liability phase typically involves the question of whether the employer has engaged in discrimination against the class as a whole, and the remedial phase typically involves questions particular to individual plaintiffs: whether the employer has a nondiscriminatory reason for adverse action taken

191. *See, e.g.*, Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147 (2d Cir. 2001); Robinson v. Sears, Roebuck & Co., 111 F. Supp. 2d 1101, 1127 (E.D. Ark. 2000).

192. *See* Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 899 (7th Cir. 1999) (suggesting possibility of bifurcation into 23(b)(2) and 23(b)(3) class action). Courts adopting this hybrid approach regularly defer the decision whether to certify a damages class under Rule 23(b)(3) until after liability is established. *See, e.g.*, Beck v. Boeing Co., 60 Fed. Appx. 38, 39 (9th Cir. 2003) (reversing district court's certification of punitive damages class under Rule 23(b)(3) as premature); Shores v. Publix Super Mkts, Inc., No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381 (M.D. Fla. Mar. 12, 1996) (deferring decision on treatment of damages stage).

193. U.S. Const. amend. VII.

194. See Steven S. Gensler, *Bifurcation Unbound*, 75 Wash. L. Rev. 705, 729-40 (2000) (examining constitutional limits on bifurcation and detailing a variety of uses of bifurcation). For an argument that even some overlap of issues in a bifurcated trial does not violate the Seventh Amendment, see Patrick Wooley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 Iowa L. Rev. 499 (1998).

against a particular plaintiff, and, if not, whether and to what extent the plaintiff has suffered compensable harm. Juries should be able to make these determinations in most cases without confusion or uncertainty about the factual issues presented for resolution by each.

There remains the problem of manageability in the remedial phase of the litigation. If the remedial phase requires separate juries for individual plaintiffs or small groups of plaintiffs, the argument goes, the case may become unmanageable for the court.[195] As a practical matter, of course, recent cases illustrate that it is unlikely that adjudication will proceed to this stage. Rather, the parties are likely to settle, devising remedies that take shape in agreed-upon consent decrees. Even assuming that some cases will reach the remedial stage, though, as courts must do when considering class certification at the outset of the suit, manageability concerns should not preclude certification. In fact, it seems highly unlikely that these cases will be any less manageable than some of the mass tort class actions that have proceeded through the remedial stage of litigation.[196] Substantial issues of liability will have already been decided, leaving only questions about particular instances of discrimination and amount of damages for the jury to determine when considering remedies. Recognizing the importance of recent cases for private attempts to address organizational sources of discrimination, courts should, in most cases, be able to devise ways to manage multiple juries, for example, by grouping plaintiffs for jury consideration and/or using special masters to assist with jury management at the remedial phase without undermining either individual interests in fair adjudication of their claims or the larger public interest in addressing organizational sources of discrimination.

These recent Title VII lawsuits hold the capacity to trigger an antidiscrimination inquiry that includes organizational as well as individual sources of discrimination. Once understood as efforts to address institutional or organizational sources of discrimination, much like their earlier Title VII public and private counterparts, the usefulness and propriety of class certification in these cases becomes

195. Some courts have used manageability concerns as a basis for denying certification altogether, *see, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419-20 (5th Cir. 1998); others have reserved judgment on certification of damage claims until after liability has been determined, *see, e.g.*, Morgan v. UPS, Inc., 169 F.R.D. 349, 358 (E.D. Mo. 1996) (certifying Rule 23(b)(2) class with respect to liability and deferring certification regarding damages until establishment of liability); Shores v. Publix Super Mkts., Inc., No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381, at *28-*29 (M.D. Fla. Mar. 12, 1996) (same); Butler v. Home Depot, Inc., No. C-94-4335, 1996 U.S. Dist. LEXIS 3370, at *16-*18 (N.D. Cal. Mar. 25, 1996) (same).

196. *See* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1826 (1995) (describing categories of mass torts in which courts have had relatively little management difficulty). For a discussion of some of the variations on aggregating individual tort claims, see Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296 (1996).

clear. Class certification provides private Title VII enforcement efforts with a procedural mechanism for considering causes and solutions to modern discrimination at the organizational as well as at the individual level.

IV. RECENT CASES: EFFECTING MEANINGFUL CHANGE

Accepting that class action treatment is useful and proper to broaden the inquiry to include organizational sources of discrimination, however, does not mean that Title VII lawsuits like those that I have described will trigger meaningful institutional reform. On the contrary, as a number of socio-legal scholars have emphasized for years, law does not simply act upon organizations. Rather, it both interacts with and is shaped by various intermediaries in a complex process of organizational implementation. In this part, I turn to evaluate the potential of recent class action lawsuits to trigger change in organizational context that has some real impact on the incidence of discrimination in the workplace.

A. *Potential for Co-Option*

Enforcement litigation can provide a foundation from which to build meaningful compliance measures. Judicial decrees requiring certain behavior by employers delineate boundaries of lawful conduct and may provide examples of appropriate compliance strategies.[197] By the same token, consent decrees like those recently agreed upon can provide valuable foundational information for other organizations seeking to avoid Title VII liability.[198] The shape of the organizational changes in these consent decrees becomes important, therefore, not just from the perspective of the organization immediately affected pursuant to the decree, but also from the perspective of larger organizational fields, where organizations search for compliance mechanisms.

And yet, enforcement litigation can also lead to the adoption of merely symbolic reform. Research on the process of implementation of civil rights laws in the workplace reveals the influence of intermediaries both on the forms of institutional change triggered by the law and on the development of the law itself. There is reason to

197. *See Special Project: The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 795 (1978) (explaining that institutional reform orders sometimes serve as models for later court orders).

198. Information concerning compliance mechanisms in consent decrees can reach other organizations through the news media and through personnel and EEO management professionals. *See supra* note 53 (citing news reports of consent decrees); Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 Am. J. of Soc. 1401, 1410, 1434-35 (1990) (discussing the role of personnel professionals in diffusion of organizational compliance mechanisms).

believe, in other words, that through the process of implementation antidiscrimination law is "mediated" by the organizations it seeks to regulate as well as by members of the managerial, personnel, and legal professions,[199] who interpret, inform, and frame its meaning and compliance requirements.[200] Because these intermediaries, particularly the organizations being regulated, often have interests that conflict with the substantive goals of civil rights laws,[201] intermediary mediation can result in changes in formal organizational structures that symbolize compliance, but that fail to effectuate improvements for women and minorities in the workplace.[202] Moreover, over time, as other organizations adopt similar strategies, irrespective of their technical value, these intermediary-mediated changes become institutionalized and can lead to legal definitions of compliance that incorporate the merely symbolic changes into formal legal doctrine, thereby completing the cycle of mediation of the law.[203]

Sociologist Lauren Edelman describes this process as exhibiting the "endogeneity" of law, and in her work she, together with various colleagues, has documented the influence of intermediaries on the development of Title VII law. In her article, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, for example, Edelman traces the use of internal grievance procedures as a Title VII compliance mechanism from professional personnel networks to organizations to legal acceptance.[204] She shows that when

199. *See* Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 Am. J. of Soc. 1589 (2001) (examining the role of professionals in reframing understandings of law and legal constructs) [hereinafter Edelman et al., *Diversity*]; Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 Law & Soc'y Rev. 47 (1992) (examining professional construction of the doctrine of wrongful discharge).

200. Sociologist Lauren Edelman identifies three characteristics of equal employment law that make it particularly susceptible to intermediary mediation: the meaning of compliance is ambiguous, leaving ample room for interpretation; it tends to focus on procedural change rather than change in outcome, making merely symbolic reform more difficult to detect; and its enforcement mechanisms are relatively weak. *See* Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Laws*, 97 Am. J. of Soc. 1531, 1536 (1992).

201. Organizations have an interest in symbolizing compliance without upsetting managerial structures. *See id.* at 1535; Chambliss, *supra* note 201 (examining displacement of conflict inherent in legal regulation of the employment relation and employers' interests in deciding whom to hire, fire, and promote).

202. It is possible, of course, for formal structural changes in response to law to have symbolic value and substantive effect. *See, e.g.*, Lauren B. Edelman & Stephen M. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Laws*, 17 Res. in Soc. Stratification and Mobility 107, 109 (1999) (noting that all EEO structures have symbolic value, "symboliz[ing] attention to the law," but that some symbolic structures also have substantive effects, producing "real improvements in the workforce status of women and minorities"); *see id.* at 116-35 (examining impact of generalized and specialized EEO structures on workforce representation).

203. *See* Edelman et al., *Diversity*, *supra* note 199, at 1595-97 (describing process by which law is shaped by institutional compliance mechanisms).

204. *See* Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance*

personnel professionals first started framing grievance procedures as a mechanism to avoid legal liability in sexual harassment lawsuits in the late 1970s and early 1980s, their assertions had little legal foundation.[205] As organizations began to implement grievance procedures and to present a grievance-procedure defense in the courts, however, the law began to recognize those procedures as a source of protection from liability.[206] Today, grievance procedures are part of an established affirmative defense in certain hostile work environment cases.[207]

In a recent article, Professor Susan Bisom-Rapp provides a particularly useful illustration of how institutional reform embodied in consent decrees may constitute part of a larger process of organizational mediation of law.[208] Specifically, she documents the increasing reliance on diversity and sexual harassment training by employers seeking to avoid Title VII liability, with settlements and consent decrees regularly including diversity training as one element of agreed-upon institutional reform.[209] Some management attorneys, she relates, have suggested that diversity training will eventually become a defense to liability under Title VII;[210] indeed, the Supreme Court has already implicitly embraced training as a way in which to avoid punitive damages under Title VII[211] and as a way to avoid

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Procedures as Rational Myth, 105 Am. J. of Soc. 406-54 (1999).

205. *See id.* at 413-14, 432-33.

206. *See id.* at 435-44. The authors conducted a content analysis of cases from 1964-1997 to determine when the law began to recognize grievance procedures as a source of protection for employers. *See id.* This analysis supports their contention that "judicial deferral to organizational grievance procedures [took] place primarily in the 1990s, quite a few years after the personnel profession's initial claims of the value of internal grievance procedures." *Id.* at 444.

207. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 70-72 (1986), the Court suggested in dicta that an employer might avoid liability if plaintiff failed to use an established internal grievance procedure. More recently, in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), the Court articulated an affirmative defense such that when a supervisor creates a hostile work environment but does not take any tangible employment action, a defending employer may avoid liability if it can show "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." For a discussion of this doctrinal development as evincing a shift in conceptualization of the deterrent role of Title VII liability, see Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 Berk. J. Emp. & Lab. L. 1, 7-13 (2001).

208. *See* Bisom-Rapp, *supra* note 207, at 25-27.

209. *See id.* Both the *American Express* and *Coca Cola* Consent Decrees provided for "diversity training." *See supra* notes 118 & 123 and accompanying text.

210. *See* Bisom-Rapp, *supra* note 208, at 23.

211. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544-45 (1999) (providing a shield from punitive damages if the employer "engage[s] in good faith efforts to comply with Title VII," encouraging employers to "adopt antidiscrimination policies

liability in certain hostile work environment cases.[212] At first glance, diversity training seems an obvious way for an employer to inform its workforce about its commitment to equal opportunity and about the dangers of subtle forms of discriminatory bias, but, as Bisom-Rapp points out, the specific form of diversity training can greatly influence its effectiveness.[213] Some forms of diversity training, social science research suggests, can actually reinforce existing stereotypes, create new stereotypes, and/or increase hostility and misunderstanding between employees.[214] Simply because diversity training becomes a common compliance mechanism, therefore, does not mean that all diversity training efforts will result in real workplace reform.

Several differences between recent class action institutional reform efforts and earlier Title VII reform efforts raise particular concern about the risk of implementing merely symbolic change without any meaningful impact on the incidence of discrimination in the workplace. First, the contextualized, ambiguous, ongoing nature of the problem presented in recent cases renders efforts at institutional reform more susceptible to mediation by various intermediaries than Title VII institutional reform efforts of the past several decades. Second, the private nature of the problem-solving process in these recent cases tends to discourage a broader institutional agenda and to insulate solutions from public oversight. In the next subsection, I examine these differences and consider their significance for the capacity of recent class action lawsuits to effect meaningful reform, before turning to explore the judiciary's role in protecting against private co-option of larger public antidiscrimination goals.

1. Complexity of the Problem and the Solution

Title VII reform efforts have long been located within the "public law" paradigm of adjudication.[215] Remedies are not always dictated by rights;[216] remedial implementation requires ongoing supervisory

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and to educate their personnel on Title VII's prohibitions").

212. *See Ellerth*, 524 U.S. at 765 (creating affirmative defense for employers when supervisor engaged in harassing conduct).

213. *See* Bisom-Rapp, *supra* note 207, at 38-44 (reviewing some of the social science research on the effects of diversity training).

214. *See id.*

215. The distinction between public law and private law models of adjudication is often traced to Abram Chayes and his article, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976). Chayes included employment discrimination as well as school desegregation and prisoners' or inmates' rights cases as "avatars of this new form of litigation." *Id.* at 1284.

216. *See id.* at 1293-94 ("The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc."); *id.* at 1298-1302; Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 Va. L. Rev. 43, 50 (1979) ("Pronouncing [public law] rights, however, does nothing to illuminate the remedy.").

relationships;[217] change is aimed at prospective alteration of conditions of wrongdoing as well as retrospective attempts to remedy past wrongs.[218] Recent efforts at Title VII-triggered institutional change also fall within this paradigm, but they present an even greater remedial complexity than that involved in past Title VII institutional reform efforts. This remedial complexity suggests the need for a collaborative, flexible process of remedial design that may increase the risk that these lawsuits will trigger symbolic rather than meaningful organizational reform.

The type of organizational change sought in recent lawsuits differs significantly from that of most earlier Title VII reform efforts. Recent efforts typically seek the type of organizational change that will reduce the incidence of subtle, often unconscious, day-to-day forms of discrimination by individuals in the workplace. This effort at organizational change naturally reflects the complexity of the problem being addressed. Organizational change triggered by recent cases like those that I have identified will result in greater equity and reduced workplace discrimination only if the operation of discriminatory bias in individual decision making is minimized. In this way, the Title VII aim, reduction in workplace discrimination, is one step removed from the method of attaining that aim, change in organizational context.

In earlier Title VII institutional reform suits, in contrast, plaintiffs tended to seek and courts tended to implement types of organizational change that immediately and directly opened up opportunities for minorities and women. More specifically, institutional reform efforts have tended to focus on three main methods of increasing workplace equality: removing barriers to attainment of and movement between jobs through restructuring of seniority systems and elimination of discriminatory test and educational requirements; increasing the pool of minority applicants through broadened recruitment efforts and dissemination of information regarding job openings; and increasing numbers of women and minorities in previously segregated work areas through imposition of numerical outcome goals. Each of these remedial efforts seeks to change the makeup of the workforce or to alter the organizational practices and structures in important ways, but, unlike the reforms of recent cases, they are not specifically intended to reduce the incidence of ongoing discrimination by individuals and/or groups.

One way in which Title VII organizational reform efforts have sought to increase equity in the workplace is by eliminating those

217. *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 28 (1979).

218. *See id.* at 22 (describing structural reform as focusing "on a social condition, not incidents of wrongdoing, and also on the bureaucratic dynamics that produce that condition").

organizational structures that serve to lock in job segregation. Along these lines, organizations have been required to restructure seniority systems and to eliminate testing and educational requirements that are not shown to be job related and justified by business necessity.[219] This type of remedial reform was instrumental in the early Title VII era in opening opportunities for minorities in otherwise all-white areas of the workforce,[220] and it continues to serve an important role in limiting structural barriers to advancement of women and minorities in the workplace.[221] The focus of this type of reform, however, is on the direct structural causes of continuing inequity rather than on the interplay between individual decision makers and the structures within which they work. Once the discriminatory tests and/or diploma requirements are eliminated and the seniority systems restructured, minorities should immediately gain greater access to jobs that they had been denied on the basis of these systems.

Expanded recruitment efforts and dissemination of information are additional ways in which Title VII enforcement litigation has opened up opportunities for minorities and women.[222] Here, too, however, the structural reform imposed typically has an immediate impact on the makeup of the workplace, or at least on the makeup of the applicant pool. Although it is true that the number of minority applicants will increase as a result of publicity or expanded recruitment efforts only if targeted individuals actually choose to apply for open positions, information dissemination as a remedy

219. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (requiring elimination of testing and diploma requirements); United States v. Allegheny-Ludlum Indus., 517 F.2d 826 (5th Cir. 1975) (restructuring seniority system); Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant, 491 F.2d 1364 (5th Cir. 1974) (requiring elimination of diploma and testing requirements, residency requirement, and loss of seniority in transfer); United States v. N.L. Indus., 479 F.2d 354 (8th Cir. 1973) (restructuring seniority and rate impediments to transfer).

220. *See, e.g.*, Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (describing segregation of the workplace and finding education and testing requirements, seniority, posting, and bidding procedures disproportionately excluded African-Americans from predominantly white sectors of the workplace); *Johnson*, 491 F.2d at 1368-69 (describing workplace segregation and finding education and testing requirements served to maintain that segregation).

221. *See, e.g.*, Melendez v. Ill. Bell Tel. Co., 79 F.3d 661 (7th Cir. 1996) (upholding successful challenge to employer's use of cognitive ability test); Green v. Town of Hamden, 73 F. Supp. 2d 192 (D. Conn. 1999) (challenging employer's use of written examination); Fickling v. N.Y. State Dep't. of Civil Serv., 909 F. Supp. 185 (S.D.N.Y. 1995) (same).

222. *See, e.g.*, Thomas v. Wash. County Sch. Bd., 915 F.2d 922, 926 (4th Cir. 1990) (requiring posting of job openings and elimination of nepotism); *N.L. Indus.*, 479 F.2d at 378 (requiring circulation of job orders to ensure equality of notice); United States v. Ga. Power Co., 474 F.2d 906, 925-26 (5th Cir. 1973) (requiring change in word-of-mouth hiring practices to "break through the currently circumscribed web of information"); United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36, AFL-CIO, 416 F.2d 123, 139-40 (8th Cir. 1969) (requiring additional means to publicize union apprenticeship training programs).

provides a relatively immediate way of increasing diversity in applicant pools. Remedial success does not depend, in other words, on influencing individual decision makers in ways that minimize reliance on discriminatory biases.

Similarly, outcome goals and affirmative action plans have served as effective methods of directly opening workplace opportunities for minorities and women; they do not, however, alter the specific organizational structures or institutional practices that may continue to enable ongoing discrimination within the workplace. In fact, affirmative action plans are typically designed to redress past unlawful discrimination (or its present effects) against women or minorities by requiring or permitting consideration of race or sex in allocating job opportunities.[223] Affirmative action does not alter the underlying structures of decision making or prevailing definitions of merit in ways that will reduce discrimination in the future; at best, it attempts to offset discrimination in future decision making by identifying race or sex as a positive factor to be given some degree of weight.[224]

Unlike the institutional reform efforts of recent cases, none of these earlier measures is specifically aimed at influencing the decision making of individuals and groups in the workplace, for the problem of discrimination has not been defined in terms of subtle biases and entrenched stereotypes operating in individuals and groups through institutionalized practices and decision-making structures. Over the past several decades, discrimination has been confined largely to a problem of conscious motivation, a search for bad actors that neglects the more subtle organizational influences on everyday decision making.[225] Measures that increase the representation of women and minorities in top positions might result in a long-term benefit of fewer decisions based on discriminatory bias, for as women and minorities achieve a critical mass within the workplace, there is reason to believe that the power structure will shift and certain forms of bias will become less prevalent.[226] However, the remedies devised in earlier

223. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

224. *See, e.g.*, Johnson v. Transp. Agency, Santa Clara County, Cal., 480 U.S. 616 (1987) (involving affirmative action plan that attempted to offset inequity in system rather than efforts to invoke change in the system itself). For this reason, affirmative action has been criticized as implicitly legitimizing biased selection processes that define merit along racial and gender lines. *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953 (1996).

225. *See* Green, *supra* note 1 (discussing need for a conceptualization of discrimination that accounts for the more subtle operation of discrimination on a day-to-day basis in workplace dynamics).

226. *See* Rosabeth Moss Kanter, Men and Women of the Corporation (1977) (exploring the dynamics of tokenism as it affected women in corporate America); *id.* at 281-82 (suggesting "batching" as means of reducing the impact of tokenism); *see also* Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 Law & Soc. Inquiry 41 (2000) (reviewing research

Title VII lawsuits were not framed with this secondary influence on individual decision making in mind.

Recent Title VII class actions, on the other hand, seek to identify organizational sources of harm and to formulate remedies that will reduce the incidence of discriminatory bias in everyday decision making. Some of the more straightforward, traditional structural reform remedies do surface in recent cases. For example, as part of its consent decree, Home Depot agreed to create a computerized system for disseminating information about open positions.[227] Like earlier institutional reform efforts, this systemic change should have a direct effect on the number of women who are aware of and willing to apply for open positions. However, recent cases also reflect more complex efforts to remedy organizational sources of ongoing discrimination. The *Home Depot* consent decree, for example, required managers to interview at least three applicants for each position and to follow structured interview questions in the interview process.[228] These measures are arguably designed to control discriminatory bias, whether subtle or overt, in managerial decision making. Similarly, in the *Coca-Cola* consent decree, Coca-Cola agreed to hire an industrial psychologist to undertake a review of the company's human resources practices, part of an effort to uncover entrenched organizational sources of bias against African-Americans.[229]

Even when earlier courts faced allegations of discrimination involving subjectivity in decision-making systems, they tended to conceptualize the problem in terms that led to relatively clear-cut solutions. To some courts, subjectivity was a mask for intentional discrimination on the part of the employer and its employees; to others, subjectivity was a problem of employer resort to unnecessary employment practices that had a disparate impact on blacks.[230] In line with either of these views, solutions in these early cases tended to focus on the elimination of the subjective requirement altogether[231] or on the replacement of subjective evaluations with objectifiable, specified criteria.[232]

The problem of subjectivity in the modern workplace cannot be so easily compartmentalized. First, it is well understood that subjectivity

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concerning Kanter's theory and testing her hypothesis using data of elite law firms).

227. *See supra* notes 102-11 and accompanying text.

228. *See supra* notes 108-11 and accompanying text.

229. *See supra* notes 116-17 and accompanying text.

230. For a more detailed discussion of the judicial attempts to analyze claims involving subjectivity in decision making, see Green, *supra* note 1, at 140-44.

231. *See, e.g.*, Rowe v. Gen. Motors Corp., 457 F.2d 348, 361 (5th Cir. 1972) (endorsing a proposed decree providing that the employer would not require recommendation of immediate supervisor for promotion).

232. *See, e.g.*, United States v. N.L. Indus., 479 F.2d 354, 377 (8th Cir. 1973) (ordering foreman selection based on merit "as judged by reasonably objective written standards").

cannot be entirely eliminated, particularly in higher-end jobs.[233] Second, subjectivity in the modern workplace is increasingly a problem of cognition and unconscious motivation than of conscious intent. Rather than serving as a mask for intentional discrimination, subjectivity in the modern workplace is problematic for its failure to place constraints on the operation of more subtle forms of discriminatory bias.[234] There will always be some workplace decisions that are driven by express animus or desire to exclude, but evidence suggests that modern-day organizations do not subscribe to decentralized, subjective decision-making systems to discriminate; nor do most individuals set out to discriminate when working within these systems.[235] Rather, discrimination takes place within these systems because workers are influenced more subtly on a day-to-day basis by forms of cognitive and motivational bias that are left unchecked by highly subjective decision making. Studies suggest that ambiguous criteria are more likely to lead to decisions that rely on stereotypes,[236] and that discriminatory bias tends to influence perception and judgment when decision makers are not required to articulate the reasons for their decisions and when they lack the time and/or attention to consider the role that their biases may play in those decisions.[237]

Subjectivity in decision making in the modern workplace must be seen as part of a larger problem of organizational influence on decisions made by individuals and groups. Litigants in recent cases continue to lean toward formalization of practices and criteria, and

233. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982) (calling for validation of selection systems in higher-end jobs, but recognizing that new validation techniques may be necessary). There is also reason to believe that subjectivity is becoming more prevalent in lower-end jobs as the market shifts from blue-collar to information-based jobs and employers focus on skill sets and customer satisfaction rather than on quantifiable job tasks. *See* Green, *supra* note 1, at 100-05.

234. *See* Green, *supra* note 1, at 95-100 (describing a shift in the nature of discrimination); Krieger, *supra* note 1; Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. Pa. J. Lab. & Emp. L. 639 (1998).

235. Studies document a shift in expressed public attitude from overt racism and sexism to an endorsement of egalitarian values. *See, e.g.*, John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, *in* Prejudice, Discrimination, and Racism, *supra* note 2, at 3-8 (summarizing findings of studies based on responses to public opinion polls and surveys from 1940s to late 1970s); Reskin, *supra* note 45, at 249 (citing studies reflecting change in attitude concerning sex equality).

236. *See supra* note 35.

237. *See* Heilman, *supra* note 35, at 14-15; Reskin, *supra* note 45, at 325-26. Research suggests that automatic use of stereotypes can be controlled, but only with motivation, effort, and attention. *See* Operario & Fiske, *supra* note 5, at 43-44; *see also* Valian, *supra* note 6, at 308-09 (discussing studies suggesting that attention and accountability are important for reducing bias in evaluation).

some research supports movement in that direction,[238] but formalization alone is not the answer.[239] Rather, in order to resolve the problem of discrimination enabled by subjective decision-making systems, subjectivity needs to be understood as a contextual problem that depends on cultural and structural variables that may vary from institution to institution. In some contexts, subjectivity in decision making may be particularly problematic, while in other contexts it may not.

It is possible to overstate the precision of the delineation between early Title VII reform efforts and those of recent cases, for some earlier cases evince more complex efforts at institutional reform,[240] and some recent cases arguably do not go far enough in recognizing the need for identifying and remedying organizational sources of discrimination in the modern workplace.[241] Nonetheless, recent class action lawsuits represent an important trend toward recognizing and attempting to address organizational and structural influences on continuing discrimination in the workplace. At the same time, however, the complexity of the problem of institutionally enabled discrimination requires an equally complex, contextual remedial process for devising meaningful organizational reform. It requires an understanding of the culture of the particular organization as well as its decision-making structures, and it requires an understanding of social science research and literature on the processes of perception and evaluation in context.

In turn, this added layer of complexity and uncertainty in remedial formulation widens the opportunity for intermediaries to shape change in ways that may undermine its substantive impact. As

238. *See, e.g.*, Reskin, *supra* note 45, at 325 (suggesting that formalization of evaluation criteria reduces discrimination); Valian, *supra* note 6, at 308-09 (discussing studies suggesting that attention and accountability are important for reducing bias in evaluation).

239. In fact, there is some reason to believe that if discriminatory bias can be kept in check, movement toward a decentralized, subjective decision-making system that values individual skills and achievements over more objective criteria like test scores and placement on a hierarchical job ladder will result in greater advancement for women and minorities in the workplace. *See* Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. Colo. L. Rev. 117 (2002) (arguing that use of full-circle evaluations may be helpful to women in the corporate sector); Green, *supra* note 1, at 104-08 (describing corporate movement toward flexible, decentralized, subjective decision making and considering possible benefits to minorities and women).

240. *See, e.g.*, Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 619, 626 (5th Cir. 1983) (affirming district court's award of injunctive relief for discriminatory channeling in which the court appointed a special master to structure a plan for institutional reform that included validation of job criteria as well as the institution of guidelines for discretionary decision making).

241. Attempts to objectify criteria, for example, like in the *American Express* Consent Decree, *see supra* note 123 and accompanying text, will fall short of addressing the organizational problems unless attention is also paid to larger cultural influences at play in definitions of success and evaluation of merit.

compliance requirements become increasingly vague and contextual, and the relationship between reform efforts and the substantive aim of reducing workplace discrimination less direct, intermediaries become more influential, their solutions more difficult to monitor.[242] Professionals may seize upon certain types of organizational change, such as provision of diversity training, and employers may be willing to implement those changes as compliance mechanisms without the required corresponding commitment to implementation that actually reduces the incidence of discrimination in the workplace. Finding their way into consent decrees, these compliance measures gain an imprimatur of public legitimacy. Moreover, other organizations are likely to adopt similar measures without undertaking a contextualized inquiry about problems particular to their own workplaces.[243] Over time, courts may shape the law around the types of professionally and organizationally accepted institutional changes that symbolize efforts to rid more entrenched forms of discrimination from their workplaces without actually doing so.

2. Private Nature of the Problem-Solving Process

The increased risk of private co-option by intermediaries of larger public antidiscrimination goals through adoption of symbolic rather than substantive reform may be exacerbated by the private nature of the problem-solving process involved in recent lawsuits. Private resolution of these lawsuits, with plaintiffs represented by private attorney firms and remedial formulation by negotiated settlement, facilitates the sort of flexible, interactive, ongoing process needed for development of contextualized solutions. At the same time, however, it removes the problem-solving process almost entirely from public view.

In several recent articles, Professor Susan Sturm describes the way in which lawyers have begun to blur the boundaries between plaintiffs' lawyers and organizational consultants.[244] One of the firms

242. *See* Edelman et al., *supra* note 204, at 407 ("The more ambiguous and politically contested the law, the more open it is to social construction."); *see also* Edelman, *supra* note 200, at 1536-38 (pointing to ambiguity of Title VII law as a factor that widens opportunity for organizational mediation). The focus on procedural changes rather than changes in substantive outcome also makes it more difficult to discern whether organizational reforms are meaningful. *See id.* at 1538.

243. Rather than competing for the best, contextually specific resolution of the problem, research suggests that organizations tend to develop isomorphically, seeking legitimacy through adoption of apparently successful compliance strategies of other organizations in their fields. *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, *in* The New Institutionalism in Organizational Analysis 63 (Walter W. Powell & Paul J. DiMaggio eds., 1991); Edelman, *supra* note 200, at 1545-46.

244. Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 Wis. L. Rev. 277; Sturm, *supra* note 108, at 527-30.

that represented the plaintiffs in the *Home Depot* West Coast Division litigation has traditionally specialized in plaintiffs' discrimination cases (one of the lead partners at the firm, Barry Goldstein, is a former attorney for the NAACP Legal Defense Fund).[245] In addition to representing plaintiffs in class action lawsuits like *Home Depot*, the firm has been retained by companies who are potential defendants in similar litigation.[246] These companies, seeking to improve their selection practices and to avoid employment discrimination lawsuits, hire Goldstein's firm for an evaluation of practices and advice. Sometimes, according to Sturm, this arrangement with corporations is made as part of an out-of-court settlement of potential class action litigation.[247] Much like the consent decrees in recent cases, the plaintiffs' law firm in these cases is appointed with oversight and implementation authority, retained by the corporation "to advise the Company regarding compliance [with the] Agreement and to participate in the confidential fact finding and resolution process . . . with the goal of ensuring [the company] that it has in fact complied with [the] Agreement."[248] Both the firms and the original potential plaintiffs waive conflict of interest claims.[249]

Sturm's work highlights the importance of an antidiscrimination problem-solving process that encourages collaboration and information exchange among not only lawyers, but also professional networks and employee groups, executives, and managers within the organizations or industries being reformed.[250] Because the solutions to institutionally enabled discrimination must be tailored to the specific enterprises and cultures of organizations, their success requires an ongoing analysis of patterns and in-depth consideration of context and decision-making practices that is not easily performed by the courts or other outside regulatory entities. In this way, recent private class action lawsuits like those that I have described represent an important trend toward complex problem solving aimed at organizational change in response to the threat of legal sanction and the strength of social norms associated with Title VII without judicial inhibition of flexible, contextualized solutions.

On the other hand, the private nature of the remedial formulation process in these recent lawsuits raises concern about the potential of private co-option of larger public antidiscrimination goals. Private intermediaries may settle upon implementation of symbolic change without substantive reform of the larger organizational practices and

245. *See* Sturm, *supra* note 244, at 299-300.
246. *See id.* at 301-04.
247. *See id.* at 304.
248. *See* Sturm, *supra* note 108, at 529-30 n.264 (quoting Saperstein, Goldstein, Demchack, & Baller Settlement and Release).
249. *See id.* at 529.
250. *See id.* at 524-35 (describing the role of various intermediaries in devising solutions).

cultures that continue to facilitate discrimination in the workplace. These private intermediaries are often driven by financial and other self-interested incentives that may conflict with larger public antidiscrimination goals. Moreover, the organizational changes embodied in consent decrees obtain the imprimatur of public oversight through court approval without any real assurance that the public's interest in reducing discrimination in the workplace is being served.

A preliminary concern stems from the increased involvement of the private bar in representing plaintiffs in discrimination class action lawsuits.[251] The possibility of large money damage awards since the 1991 amendments increases the likelihood both that private firms will take on employment discrimination class actions and that some firms will view employment discrimination class actions primarily in monetary terms.[252] Without the institutional commitment to civil rights enforcement and nondiscrimination of earlier public interest groups, these private law firms may lack the incentive to invest the resources needed for devising the type of long-term institutional reform needed for meaningful change. Moreover, the difficulty in attaching monetary value to institutional reform means that private attorneys may be tempted to compromise organizational change for larger money settlement funds with the hope of signaling greater success and leading to judicial approval of larger attorneys' fees.[253] Even if we are confident that private firms can adequately represent the interests of a non-monetary subclass in these cases, the type of organizational reform obtained may focus on short-term gains for members of the plaintiff class rather than long-term change, leaving in place the organizational practices, structures, and cultures that led to the discrimination in the first place.

Perhaps most important, however, the private nature of the resolution process in recent cases provides little foundation upon which to build an understanding of organizational sources of discrimination and possible methods of reform. We have no way of knowing, without judicial inquiry or other public safeguards, whether

251. Professor Sturm identifies without resolution this problem of accountability raised by the relationships that she describes. *See* Sturm, *supra* note 200, at 305-07. She locates accountability for a firm like Saperstein, Goldstein primarily in its reputation in the historical and professional community, but, as she concedes, reputation will not provide the same accountability for "less visible lawyers with fewer long-standing relationships to the advocacy community." *See id.* at 305-06.

252. This is not to say that no private law firm will be motivated by a commitment to nondiscrimination. Indeed, the line between public interest firms and private firms is not always clear. *See* Katz & Bernabei, *supra* note 132.

253. Recently, the Court of Appeals for the Ninth Circuit held that attorney fees cannot be based on a percentage of a common fund that includes a monetary valuation of injunctive relief. *See* Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003). For several proposals aimed at checking fee abuse in employment discrimination class actions, see Selmi, *supra* note 129, at 1328-30.

the reforms implemented pursuant to recent consent decrees are supported by social scientific research or even derive from a context-specific evaluation of the workplace instituting change. And yet, the basic compliance mechanisms laid out in recent consent decrees may, before long, become accepted as ways of satisfying Title VII's nondiscrimination obligation. Without public oversight that provides some assurance that these changes are meaningful rather than merely symbolic, we may find widespread implementation of types of organizational change that make no actual headway in eliminating the structural, cultural, and institutionally systemic sources of ongoing workplace discrimination.

B. *Possible Safeguards*

There is no obvious answer to this tension in devising solutions for reform of organizational sources of discrimination, with the need for private flexibility on the one hand, and the need for public accountability on the other. Drawing on experience in the public law arena, it seems clear that the complexity of the task of remedial formulation in most of these cases will mean that courts are ill-suited to provide either detailed decrees imposing organizational change or extensive substantive review of changes proposed by parties.[254] It may be necessary, however, for courts to play more than a wholly deferential role.[255] Courts can serve as important public safeguards in Title VII reform litigation even when the specific details of reform are devised by private intermediaries and embodied in consent rather than judicial decrees.

At the outset, the complexity of the remedial task raises the question whether courts should be involved at all in formulating or even reviewing detailed prospective injunctive relief that seeks to reduce organizational sources of discrimination. One might argue that monetary damage awards, together with generalized prohibitions against discrimination, should serve as adequate incentive for self-study and organizational change to be undertaken by employers in

254. In most institutional reform litigation, courts place some degree of responsibility for devising solutions in the hands of the parties; the degree to which the parties, particularly the defendants, are given responsibility for remedial formulation tends to vary according to degree of cooperation and capability. *See* Chayes, *supra* note 215, at 1298-302 (describing judicial role in public law litigation); *Special Project*, *supra* note 197, at 797-813 (discussing judicial approaches to remedial formulation in various institutional reform contexts). Professor Colin Diver likens institutional reform litigation to a bargaining process, with the judge as the "political powerbroker." *See* Diver, *supra* note 216.

255. Although I focus here more discretely on the role of the courts as a means of public oversight in lawsuits like those recently filed, non-legal avenues for effecting meaningful change may also exist. *See, e.g.*, Restorative Justice and Civil Society (Heather Strang & John Braithwaite eds., 2001) (exploring the potential of restorative justice to reduce crime).

these types of cases.[256] There are several reasons, however, why more directed institutional reform efforts are needed. On a political level, reliance solely on money damages tends to bury rather than to highlight the importance of organizational sources of discrimination in the modern workplace. To the extent that the law operates to frame public debate and ongoing conversation about broader social problems, it seems important to focus directly on the ways in which organizational change can affect the incidence of discrimination.[257] On a practical level, moreover, taking the judiciary out of the process of structural remedial formulation does little to reduce the risk of adopting symbolic over meaningful reform. In the area of hostile work environment law, for example, courts and litigants have focused primarily on remedies that take monetary form,[258] leaving to employers the task of devising forward-looking solutions to the problem of workplace harassment; yet, in this area mechanisms have developed that signal legal compliance without necessarily effecting environmental change.[259] Similarly, reliance on money damages in cases like those recently brought would serve to remove the imprimatur of legitimacy that attaches to judicial involvement in remedial formulation or approval, but at the same time it would leave in place the organizational sources of discrimination without any assurance that organizations would undertake the task of evaluation and problem solving needed for meaningful change.[260]

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256. The Supreme Court has suggested that monetary awards are intended to deter future conduct as well as compensate for past conduct. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977):

> [A] primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees. The prospect of retroactive relief for victims of discrimination serves this purpose by providing the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of their discriminatory practices.

Id. at 364 (internal citations and quotation marks omitted).

257. There is some reason to believe that by introducing a new causal story, the law may influence behavior indirectly through creation of new social norms as well as directly through imposition of liability. *See* Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 Or. L. Rev. 339 (2000) (describing the process through which law can influence behavior by causing individuals to update beliefs about social approval); Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 Pol. Sci. Q. 281 (1989) (placing causal argument at the heart of the political problem definition); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996) (exploring the role of law in controlling behavior indirectly through expression of norms).

258. The 1991 amendments authorizing compensatory and punitive damages were the result, in part, of concern about the inadequacy of existing remedies for victims of a hostile work environment. *See* H.R. Rep. No. 102-40(I), at 64-74 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602-12.

259. *See supra* notes 202-05 and accompanying text.

260. *See supra* notes 50-53 and accompanying text (discussing the costs of self-

Accepting the need for some judicial involvement in overseeing the formation of structural reform embodied in remedial consent decrees, the task then becomes one of shaping a proper judicial role. In the past, concerns about the public law remedial process have focused on the issue of participation, emphasizing the court's role in ensuring adequate representation of all interested groups.[261] Formulation of the precise means of institutional reform will often implicate divergent interests within the beneficiary, minority group as well as emergent interests of the majority group, interests that were not triggered in the same way by a determination of liability.[262] Accordingly, as commentators have emphasized, participation of various interest groups in formulating a remedy in the institutional reform context is crucial to the design of fair and effective methods of change.

Participation and adequacy of representation remain equally important to modern Title VII institutional reform efforts, but the increased potential for private co-option of larger public antidiscrimination goals in recent litigation suggests the need for a judicial role that extends beyond facilitation of participation. In addition to facilitating participation of various interests, courts reviewing consent decrees like those proposed in recent cases might take on a role as public safeguard, guiding institutional reform in ways that increase the likelihood that proposed and implemented reforms will actually reduce the incidence of workplace discrimination rather than merely signal Title VII compliance without any real change in

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evaluation and the entrenched nature of organizational sources that make unlikely meaningful employer response to market forces). In fact, in a recent article, Professor Michael Selmi presents a statistical study that suggests that recent monetary awards have little financial deterrent effect. Selmi, *supra* note 96, at 1258-68.

261. *See, e.g.*, Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. Ill. L. Rev. 579 (emphasizing the judge's role in protecting the rights of absent class members); Susan P. Sturm, *The Promise of Participation*, 78 Iowa L. Rev. 981 (1993) (proposing a nonadversarial approach to participation in the institutional reform remedial context); *Special Project*, *supra* note 197, at 78 (detailing concerns about the adequacy of representation in the institutional reform context and proposing a new approach to participation).

262. The Supreme Court's decision in *Martin v. Wilks*, as well as the congressional response to that decision in the Civil Rights Act of 1991, to a large extent reflect this concern about non-party interests in the formulation and implementation of structural reform. *See* Martin v. Wilks, 490 U.S. 755 (1989) (holding that third parties affected by terms of a consent decree may challenge the terms of the decree as unlawful under Title VII); 42 U.S.C. § 2000e-2(n)(1)(B) (2000) (limiting challenges to employment practices implementing litigated or consent judgments in circumstances where the objecting non-party had notice of the judgment and a reasonable opportunity to present objections or where that non-party's interests were adequately represented). *See generally* Samuel Issacharoff, *When Substance Mandates Procedure:* Martin v. Wilks *and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 Cornell L. Rev. 189 (1992); Sturm, *supra* note 261. The beneficiary group's interests may also diverge when it comes to formulation of structural reform. *See* Schwarzschild, *supra* note 133, at 909-10 (discussing interests at stake in negotiation of structural consent decrees).

organizational sources of discrimination. To this end, an inquiry into the fairness of a proposed remedial plan should include consideration of whether the particular reforms suggested will have some meaningful impact on the incidence of discrimination.

There are a variety of ways in which courts could satisfy this obligation. At the very least, courts should require the parties to present reasons for particular reform strategies that are supported by social scientific and/or organizational research on the operation of discrimination and on study of the particular workplace context at issue. This would mean as a practical matter that in most cases the parties would hire experts to review the relevant social science and organizational research and to provide a particularized evaluation of the employer's workplace, and that the parties would present the findings of these experts in publicly available court documents.[263] Such a requirement, without locking employers into specific reform efforts or placing courts in a position of extensive substantive review of chosen programs, would encourage a response to organizationally enabled discrimination that takes into account particular organizational context and would provide a much-needed foundation for intermediary, if not public, discussion and debate.

Courts might also require the appointment of panels of individuals external to the organization and knowledgeable in the fields of organizational change and discrimination dynamics to oversee and monitor implementation of reform measures, thereby encouraging knowledge-based reform measures and minimizing the risk of organizational co-option in implementation.[264] Several consent decrees in recent cases, including the *Coca Cola* consent decree, have provided for external panel oversight of remedial implementation.[265] Many, however, have not, instead assigning implementation responsibility to a single court-appointed master or to a group or single individual within the organization.[266] Moreover, even external

263. Of course, social science evidence is not conclusive. For that reason, the court should require support to encourage debate and discussion about proper reform efforts rather than to identify uniform reform measures that will necessarily effectuate meaningful change across organizational settings.

264. *See* Chambliss, *supra* note 94, at 20-34 (describing difficult bind in which internal equal employment opportunity officers find themselves).

265. The consent decrees in the *Texaco* and *Coca Cola* cases each required appointment of a panel with some members external to the organization to oversee implementation. *See* Thomas S. Mulligan & Chris Kraul, *Texaco Settles Race Bias Suit for $176 Million*, L.A. Times, Nov. 16, 1996, at A1 (discussing details of *Texaco* consent decree); *supra* note 118 and accompanying text (discussing details of *Coca Cola* consent decree).

266. *See, e.g.*, Heather Bodell, *Sex Discrimination: Grocery Chain Starts Complying with Terms of $16 Million Settlement of Sex Bias Suit*, Daily Lab. Rep. (BNA), at A7 (June 17, 1999), *available at* LEXIS, News Library, DLR File (noting *Ingles Markets* decree requiring the creation of a human resources committee on the board of directors and the appointment of an internal compliance official); Aswad, *supra* note 106 (*Home Depot* decree requiring internal positions for monitoring implementation);

panels should be designed to include and/or encourage consultation of organizational and social scientific experts who can provide advice on directions for meaningful change.[267]

In some circumstances, courts might also tie a percentage of attorneys fees to some showing of long-term substantive outcome, providing an incentive for attorneys to devise meaningful organizational solutions in addition to achieving substantial individual monetary awards. A similar check on class counsel incentives has been proposed in the mass tort context in cases involving coupon settlements.[268] There, some courts have required that class counsel fees be based in part on the amount of coupon redemption within a specified period.[269] Although there may be lingering difficulties with evaluating substantive change in the discrimination context, this or a similar approach of tying attorney fees to substantive results would serve to better align the class counsel's financial interest with the class members' and the public's interest in meaningful organizational reform.[270]

Finally, recognizing the potential limits of courts in assessing the substance of proposed programs for reform and the less-than-adversarial nature of the relationship between the parties on presentation of a consent decree to the court for approval, non-judicial public oversight should be encouraged. The EEOC, for example, may have a significant role to play in reviewing programs for reform.[271] Agency review of recent social scientific evidence, production of basic problem-solving protocols, and, perhaps most important, intervention in privately-instituted litigation on behalf of the public interest are all ways in which the EEOC could provide

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Consent Decree, *supra* note 118.

267. Instead of rubber-stamping employer efforts, external panels must be required to provide independent review and guidance regarding organizational change. The external task forces in recent cases have been criticized as "little more than a public relations cheerleader." Selmi, *supra* note 96, at 1324.

268. *See* Janet Cooper Alexander, *The Agency Problem: Some Procedural Suggestions*, 41 N.Y.L. Sch. L. Rev. 359 (1997); Note, *In-Kind Class Action Settlements*, 109 Harv. L. Rev. 810 (1996); *see also* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. Rev. 991 (2002) (proposing a variation in which attorneys would be paid in coupons). Proposed changes to Rule 23 contemplate a waiting period for payment of attorneys fees in some class action settlements. *See* Amendments to the Federal Rules of Civil Procedure, Fed. R. Civ. P. 23(h) Advisory Committee Notes (2003) (submitted to Congress March 2003).

269. *See, e.g.*, Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375 (D. Mass. 1997), *aff'd*, 183 F.3d 1 (1st Cir. 1999) (postponing or "staging" fee award).

270. For additional proposals concerning attorney fees in recent employment class action lawsuits, see Selmi, *supra* note 96, at 1328-30.

271. Of course, the EEOC is also an active intermediary in the mediation of law with its own institutional interests and political limits. *See* Bisom-Rapp, *supra* note 207, at 25 (noting EEOC's role in promoting diversity training); Sturm, *supra* note 108, at 550-53 (discussing challenges facing administrative agencies in developing structural solutions to modern employment discrimination problems).

some oversight without hampering the flexibility of the private problem-solving process.[272] Similarly, public interest groups should be permitted to present objections to programs for reform, alerting the court to areas in which the parties may be providing signals of compliance without real efforts at meaningful reform. By expanding the locus of responsibility for oversight in this way, courts can facilitate substantive review of proposed reforms without themselves becoming experts in social science or organizational research.

All of these measures would aim to provide public safeguards for institutional reforms undertaken pursuant to consent decrees without inhibiting the flexibility of the private problem-solving process driving recent Title VII case resolutions. The key to meaningful Title VII-triggered institutional reform in these cases lies in a multi-disciplinary effort to uncover ways in which employers can best devise and implement structural changes that reduce ongoing discrimination in their workplaces. Social and organizational scientists, governmental agencies, public interest groups, private litigants, and private law firms are each valuable players in the problem-solving process needed for the type of institutional change sought in recent cases, but the court plays a facilitative and oversight role that must be taken seriously if these lawsuits are to effect meaningful rather than merely symbolic institutional reform.

CONCLUSION

Individuals simply do not make decisions in isolation. Whether NASA managers deciding to launch the space shuttle *Challenger*, or financial services firm managers deciding whom to favor for valuable client leads, individuals are influenced by the social and organizational contexts within which they live and work. Accordingly, it makes sense

272. *See Gender: Tentative $47 Million Sex Bias Agreement at Rent-A-Center Supersedes Earlier Decree*, 18 Emp. Discrim. Rep. 306 (BNA) (2002), *available at* LEXIS, News Library, Emp. Discrim. Rep. File (private settlement agreement replaced by new agreement after EEOC objection); Kurt Eichenwald, *Texaco to Let U.S. Monitor Bias-Law Compliance*, N.Y. Times, Jan. 4, 1997, at A36 (settlement agreement between Texaco and EEOC provides EEOC with monitoring authority after EEOC attempt to intervene to object to private settlement). Title VII provides that the court may permit the EEOC to intervene in a civil action "upon certification that the case is of general public importance." 42 U.S.C. § 2000e-5(f)(1) (2000). Some courts in recent cases, however, have denied the EEOC's request to intervene. *See, e.g.*, *Race Discrimination: Judge Rejects EEOC's Intervention Request in Race Bias Case Against Lockheed Martin*, Daily Lab. Rep. (BNA), at A2 (Feb. 26, 2001), *available at* LEXIS, News Library, DLR File. Moreover, some commentators have suggested that the EEOC should limit interventions. *See, e.g.*, Nancy Krieter, *Equal Employment Opportunity: EEOC and OFCCP*, *in* Rights at Risk: Equality in an Age of Terrorism 153 (2002), *available at* http://www.cccr.org/reports.html (last visited on October 16, 2003); *EEOC: Fawell Questions EEOC Litigation Strategy, Reasons to Intervene in High-Profile Cases*, Daily Lab. Rep. (BNA), at D17 (Apr. 10, 1997), at D17, *available at* LEXIS, News Library, DLR File (Congressman Harris Fawell questions EEOC intervention policies).

to recognize that modern workplace discrimination is a problem of organizational as well as individual dimensions. Attempts to identify and punish discrete bad actors without attention to larger organizational context will not resolve the problem of workplace discrimination, for these efforts leave in place the structures, cultures, and practices that may have facilitated that discrimination in the first place.

Title VII of the Civil Rights Act holds the capacity to trigger change in the organizational structures, cultures, and taken-for-granted institutionalized practices that continue to engender unequal treatment in the workplace. And yet, as I have argued, realization of that capacity requires careful attention to the tools available for addressing all sources of discrimination and to the processes for devising meaningful programs for reform. Private class action lawsuits like those recently brought represent an important trend in the antidiscrimination project, a shift away from individualization of the antidiscrimination inquiry and toward an inquiry that includes broader organizational as well as individual sources of discrimination. Once understood as attempts to identify and address organizational sources of discrimination, these lawsuits fit nicely within the existing class action paradigm, for the organizational cause of the discrimination, rather than the precise nature of the injury suffered, forms the common question for the class. At the same time, however, these cases raise particular concern about the potential for co-option of public antidiscrimination goals by private intermediaries that will result in symbolic change without any meaningful reduction in the incidence of ongoing discrimination. As the law develops in light of compliance mechanisms devised by private intermediaries, there is a risk that we will come full circle to a legal inquiry that fails to address organizational sources of discrimination in any meaningful way. These concerns, however, should not serve as a barrier to recent enforcement efforts; rather, they should serve as a starting point for the type of interdisciplinary research and in-depth academic, judicial, and professional conversation needed for devising contextual programs for meaningful institutional reform.