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ANTIDISCRIMINATION LAW IN THE WORKPLACE: MOVING BEYOND THE IMPASSE

DALE LARSON*

I. INTRODUCTION

Workplace antidiscrimination law sits at an impasse. Many legal observers agree that the present fault-based legal regime does not adequately account for discrimination as it occurs in the modern workplace. These observers, however, continue to disagree on an appropriate set of solutions.¹ This article seeks to expand on the current dialogue by summarizing the state of the conversation, highlighting the challenges confronting those in the antidiscrimination project,² and advocating for the adoption of a set of guiding principles that can be used by practitioners to create action plans tailored to individual circumstances and designed to meet the complex challenges posed by employment discrimination in the modern workplace. These action plans, taken in the aggregate, can help establish a new normative theory that is more consistent with the realities of modern discrimination.

The first guiding principle is that any action plan should operate under the normative theory that the facilitation of

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1. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 4 (2006); Gary Blasi, *Default Discrimination: Law, Science, and Unintended Discrimination in the New Workplace*, 3 NYU SELECTED ESSAYS ON LAB. & EMP. L. 3 (Mitu Gulati & Michael J. Yelnosky eds., 2007); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92–94 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–66 (1995); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 525–26 (2001); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462–65 (2001).

2. The term “antidiscrimination project” refers to the ongoing dialogue among academics and practitioners striving to reduce discrimination in American society.

discriminatory bias in organizational decision making is itself a form of discrimination. The practical effect of this theory is that employers should be legally obligated to ensure that its systems and structures do not facilitate this kind of discriminatory decision making. Second, an action plan should seek to minimize the role of the courts by using the law only as an incentive for the employer to reform. This is important for three reasons: (1) to avoid the shortcomings of the courts in implementing a structural solution; (2) to prevent attorneys from resorting to resolutions such as monetary settlement or consent decrees that are familiar yet disfavored because they do not fully achieve structural reform; and (3) to maintain a working partnership among all parties involved.³ Third, because minimizing the role of the courts by using the law solely as an incentive for employer reform removes traditional court-based forms of leverage, selecting a target defendant susceptible to other forms of leverage is an important part of the plan. Fourth, it is critical to actively engage market pressures, rather than passively waiting for the market to encourage reform. Finally, any action plan should be dynamic and flexible, emphasizing partnerships and problem solving and avoiding a rules-driven solution, whether it is in the form of government regulations or otherwise.

In practice, once the appropriate target defendant is selected and a potential plaintiff is available, leverage can be applied in the form of organizing, lobbying, and threatening a media campaign and litigation. Most action plans developed under these guiding principles would presumably incorporate this basic set of actions in some form. Ideally, the target defendant would be a high-profile private employer that relies heavily on the government for business. Leverage would be used to persuade the employer to adopt a set of best practices, including establishing an affirmative action program designed to reduce the effects of subtle bias in the workplace. This process would circumvent existing roadblocks and serve to establish the appropriate norms. This course of action should be viewed as an iteration of a

3. Later in this article, I refer to this as avoiding the "Home Depot problem," referring to the high-profile Home Depot class action consent decree, regarding which various commentators have expressed mixed reviews. In this article, I argue that it is best to use litigation as a last resort to eliminate certain familiar and comfortable resolution options, such as monetary settlements and consent decrees. See *infra* Part IV.C. For more on the "Home Depot problem," compare Sturm, *supra* note 1, at 509–19 (using a class action lawsuit resulting in a consent decree against Home Depot as an example of a successful structural and regulatory solution) with Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1285–89 (2003) (arguing that the consent decree did not result in successful reform at Home Depot).

potentially cumulative process that, taken in the aggregate, could move workplace antidiscrimination law beyond its current impasse.

In Part II of this article, I briefly discuss the current and seemingly widely accepted⁴ argument that discrimination in the workplace today is no longer the result of overt and intentional animus, but is instead the result of implicit and subtle bias. This bias is exacerbated by changes in the workplace that have flattened hierarchical structures, spread decision-making responsibility, and placed greater weight on frequent, subjective decisions. This argument raises important normative questions. I adopt the normative position of Professor Tristin Green that “the facilitation of discriminatory bias in workplace decisionmaking” is itself a form of discrimination, which establishes both “a normative—and corresponding—legal obligation on the employers not to facilitate this kind of discriminatory decision making in the workplace.”⁵ My objective is to expand and establish this normative position. I conclude Part II by elaborating upon the hypothetical example first introduced by Professor Gary Blasi⁶ of an African American female attorney named “Patricia,” working in a private law firm. The hypothetical describes the subtle discrimination Patricia experiences along with the negative effects of that discrimination. In subsequent parts of this article, I continue her story beyond its current diagnostic usage and use it prescriptively to help propose a next step.

In Part III of this article, I describe what arguably is the best hypothetical solution to workplace discrimination resulting from implicit and subtle bias: a structural approach⁷ utilizing best practices. This requires multiple actors working together in collaboration in a trial-and-error fashion guided by agreed-upon principles. While others advocating such an approach have placed less weight on affirmative action, I advocate for it enthusiastically because of the multiple benefits it has as one possible antidote to the negative effects of implicit bias. I conclude Part II by revisiting Patricia’s workplace and imagining what these best practices might look like at her law firm.

In Part IV, I consider the many difficulties that face implementation of the strategies described in Part III. I begin Part IV

4. It at least appears that the argument is widely accepted among those who have actively engaged in this dialogue. It is less clear that the argument is widely held among those who do not think this dialogue is worth participating in or even having.

5. Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 852–53 (2007).

6. Blasi, *supra* note 1, at 5–6.

7. For more on the benefits and shortcomings of a structural approach, see *infra* Part III.

by discussing the limitations of relying upon the marketplace to encourage private employers to adopt these practices on their own. I then briefly explain the shortcomings of utilizing a purely legislative or regulatory approach with emphasis given to Professor Susan Sturm's argument that a traditional rules-driven approach will fail. Finally, I explore the many inherent problems in attempting to bring about these practices in the courts by discussing the unwillingness and lack of expertise of judges as well as the problems associated with bringing in actors driven by interests that potentially conflict with each other and with the goal of structural reform.

In Part V, I propose a set of guiding principles gleaned from the lessons of the first three parts of this article. I use these principles to provide an overview of a hypothetical action plan to address subtle and structural discrimination. The action plan is designed to circumvent obstacles and set a precedent to engender a normative theory within the larger antidiscrimination community.

I conclude the article by discussing briefly ways to institutionalize the results of the proposed course of action, and by stressing the importance of scientific evaluation of the results. Because the hypothetical actions are as much a means as an end, this process of institutionalizing lessons learned is just as important as any steps taken to make the initial actions successful.

II. SUBTLE AND STRUCTURAL RATHER THAN OVERT AND INDIVIDUAL

Many legal scholars have documented the wide chasm that exists between how the law assumes discrimination occurs in the workplace and how it actually takes place.⁸ Presently, most discrimination in the workplace is not the result of overt discrimination by an individual with animus, but of subtler forms of discrimination, driven by unconscious, or implicit, bias. Moreover, modern workplaces often rely heavily on informal interactions and subjective measures of performance, thereby increasing opportunities for subtle discrimination to take place and harmfully affect employees. Meanwhile, the law continues to assume that discrimination is only the result of individual, explicit animus reflected clearly in the evidence of the discriminatory act.⁹ Unfortunately, much disagreement persists

8. See, e.g., Bagenstos, *supra* note 1, at 3; Blasi, *supra* note 1, at 3–4; Green, *supra* note 1, at 91–94; Krieger, *supra* note 1, at 1164; Stone, *supra* note 1, at 597; Sturm, *supra* note 1, at 460–61.

9. Blasi, *supra* note 1, at 4.

among legal scholars regarding how to close this chasm. Each of the suggested solutions I propose implicates numerous obstacles.

I begin with a brief overview of the science of implicit bias and an explanation of the impact this science has on our understanding of discrimination in the workplace. I will then continue with a brief exploration of how places of employment have changed since the creation of our current antidiscrimination law and how these changes exacerbate the negative effects of implicit bias in today's work environment. Lastly, I use Professor Gary Blasi's Patricia hypothetical to illustrate the above mentioned arguments.

A. Subtle Discrimination Resulting from Implicit Bias

It is generally accepted that much of our decision making and behavior is affected not only by our conscious thought and belief systems, but also by our unconscious, or implicit bias.¹⁰ Implicit bias is made up of attitudes—likes or dislikes towards someone or something—and stereotypes—traits associated with someone or something.¹¹ Implicit bias can be seen as an unconscious range of associations, either favorable or unfavorable, that we have towards individuals or groups of individuals.¹² Because the idea of implicit bias has been very well documented by legal scholars in recent years, I will not go into detail about how implicit bias works or how it affects our daily lives. Instead, I will only mention a few characteristics of implicit bias that are particularly relevant to the antidiscrimination project.

First, implicit bias is very pervasive in our society. Our implicit attitudes and stereotypes start forming at a very young age and are used by our brains as a way to process the vast amounts of information that we come into contact with each day.¹³ Testing supports the theoretical notion that implicit bias is prevalent, showing high incidence rates of implicit bias towards many different groups,

10. See generally SUSAN T. FISKE & SHELLY E. TAYLOR, *SOCIAL COGNITION* (2d ed. 1991) (discussing generally the area of social cognition and the working of conscious and unconscious thought); Mahzarin R. Banaji, Jerry Kang & Kristin A. Lane, *Implicit Social Cognition and Law*, 3 ANNU. REV. L. SOC. SCI. 427, 427 (2007); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1508 (2003).

11. See Banaji, Kang, & Lane, *supra* note 10, at 429.

12. See Greenwald & Krieger, *supra* note 10, at 950–51.

13. See Krieger, *supra* note 1, at 1187–88.

including racial groups and sex.¹⁴ Bias against “out-group”¹⁵ members and in favor of “in-group”¹⁶ members is especially prevalent.¹⁷ For example, white individuals frequently show bias against individuals from racial minority groups and, similarly, males frequently show a preference for males over females.¹⁸ Aside from its prevalence, implicit bias is important in the antidiscrimination context because it affects our decision making and other behavior,¹⁹ even though science indicates that an individual can take steps to reduce those effects.²⁰ Finally, we can change or even remove our implicit bias through the use of de-biasing agents—people or objects that decrease an individual’s bias²¹—but debate exists as to the validity and effectiveness of this process.²²

Because our contemporary society exhibits relatively fewer incidences of overt discrimination based on explicit animus than in the past, some observers have declared that discrimination no longer exists in the modern workplace.²³ Yet the opposite is true: Discrimination is still extremely prevalent and typically takes the form of subtle actions or decisions in which the actor or decision maker is unaware that bias is playing any role at all.²⁴ Indeed, numerous field studies utilizing

14. See Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2007).

15. Out-group members are those not belonging to the individual’s own identity groups.

16. In-group members are those belonging to the individuals same identity groups.

17. Nearly one hundred studies have documented “people’s tendency to automatically associate positive characteristics with their in-groups more easily than out-groups,”—a phenomenon known as “in-group favoritism.” See Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 146 (2004). In-group favoritism is so strong that people report a preference to a group even when randomly assigned to that group. See Banaji, Kang & Lane, *supra* note 10, at 433.

18. See Nosek, *supra* note 14.

19. For a succinct overview of many interesting studies on this topic, see Banaji, Kang & Lane, *supra* note 10, at 1514–28.

20. Banaji, Kang & Lane, *supra* note 10, at 437–39. This idea of debiasing also plays a role in this Article’s advocacy for affirmative action discussed *infra* Part III.B.

21. A de-biasing agent is a counterexample brought to an environment, either as an individual or as some physical feature, designed to positively alter the implicit bias of those who work in that environment. In effect, they operate by presenting a biased individual with an example that runs counter to the individual’s existing associations and stereotypes, thereby eroding those associations and stereotypes. See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CAL. L. REV. 1063, 1109 (2006) (“A debiasing agent is an individual with characteristics that run counter to the attitudes and/or the stereotypes associated with the category to which the agent belongs.”).

22. *Id.* at 437–39.

23. See, e.g., DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (The Free Press) (1995).

24. Blasi, *supra* note 1, at 3, 8–10.

tester methodology have resulted in social scientific evidence overwhelmingly demonstrating that discrimination, including racial discrimination, is still widespread.²⁵

B. Changes in the Workplace

Because modern discrimination is typically the result of frequent and subtle interactions, it is especially harmful to employees in the contemporary workplace where changes in structure have placed greater importance on casual interactions and subjective measures of success. From approximately World War I through the late 1970s, the workplace environment was typically hierarchical with rigid roles, objective measures of productivity, and decision-making power clustered at the top of the management structure.²⁶ Beginning in the 1980s, however, three types of change developed in workplaces. First, there was a “flattening of hierarchies” resulting in the “blurring of job boundaries” and the diminishment of management authority in organizations.²⁷ Second, workplaces saw an increase in the use of work teams,²⁸ including both formal work teams and informal communities of practice within and between institutions.²⁹ Third, the evaluation of work performance has moved from objective to “decentralized, subjective, and contextual” measures, which are inherently more dependent on social interaction and personal observation.³⁰ New measures value traits such as “creativity” and the “ability to collaborate with others.”³¹

In the old workplace, there were fewer chances for subtle discrimination because casual interactions played less of a role in evaluations, and, therefore, there was generally less interaction necessary to accomplish goals and lower-level managers and staff had less decision-making authority.³² Now, as casual interactions are both more common and carry more weight in evaluations, employers must continuously guard against their own implicit biases—a feat that borders on impossible.³³ Professor Green, author of *Discrimination in*

25. *Id.* at 6.

26. Green, *supra* note 1, at 99–100.

27. *Id.* at 101.

28. *Id.* at 102.

29. *Id.* at 103.

30. *Id.*

31. Blasi, *supra* note 1, at 14.

32. *Id.* at 13.

33. *Id.* at 15.

Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory, observes that the “increased use of group work and importance of social interaction also heighten the ability of discriminatory bias to adversely affect the opportunity and professional development of women and minorities.”³⁴

Furthermore, Professor Blasi, author of *Default Discrimination: Law, Science, and Unintended Discrimination in the New Workplace* (“Default Discrimination”), explains that because of the changes in the workplace, an employee’s fate may be sealed long before the employee’s performance is formally reviewed because countless casual workplace interactions, each possibly tainted by the presence of unconscious bias, may have led to a loss of valuable professional opportunities.³⁵ In today’s workplace, there are daily decisions made as to who will work on which projects and it is likely that members of outgroups will often be overlooked in those decisions.³⁶ When a manager is slightly uncomfortable around an employee, even if the employer cannot determine why, this discomfort may result in the manager finding another employee with whom to work on an important team project.

C. A Hypothetical Example

In *Default Discrimination*, Professor Blasi contrasts the experiences of two hypothetical African American associates in a law firm from two different eras.³⁷ The first associate is the victim of overt discrimination in the form of racist comments and dismissal in an old-style hierarchical workplace in 1965.³⁸ The second associate, named “Patricia,” is an associate at the same firm in 2004.³⁹ I use Patricia’s story to explore a possible remedy to reduce the subtle discrimination she experienced.

Patricia’s modern-day law firm has adopted many of the characteristics common in a new workplace: Work is conducted in teams, evaluation emphasizes subjective criteria such as creativity and the ability to work well with others, rather than “per-unit productivity,” and “projects are undertaken by ad hoc networks of

34. Green, *supra* note 1, at 105.

35. Blasi, *supra* note 1, at 5.

36. *See id.*

37. *Id.* at 5–13.

38. *Id.* at 5.

39. *Id.*

lawyers and firms.”⁴⁰ As a result, Patricia works in an environment where she is vulnerable to many of the effects of unconscious bias. The numbers reflect this reality: While the number of minority and female associates in Patricia’s hypothetical modern-day law firm reflects the firm’s professed commitment to diversity, the partners are overwhelmingly white males.⁴¹ Even though the partners may be aware of this incongruity, they do not know what to do about it because they see no direct cause of it, and they have little incentive to drastically alter the very status quo that put them in their positions of power.⁴²

Like her 1965 counterpart, Patricia is discharged from the firm, but under markedly different conditions.⁴³ In her final meeting, the partners who let her go believe that they are “leaning over backward” to avoid being biased, but cannot ignore the fact that Patricia has not played a large role on many large cases and projects.⁴⁴ To explain how Patricia and her firm got to this point, Professor Blasi writes that “a[n] observer with perfect information” would have seen “500 interactions in the hallways and offices of the firm in which the daily decisions about who works on what get made.”⁴⁵ In those interactions, the other person was never consciously aware of negative feelings about Patricia, but Patricia was frequently on the losing end of those decisions.⁴⁶

Noted is Patricia’s “234th Hallway Encounter.”⁴⁷ In this encounter, a white male partner named Frank “is quite certain that he is neither racist nor sexist,” and is looking for an associate to help out on a major project.⁴⁸ Thinking of who has impressed him the most in the past, he inadvertently makes a mental list of all white males.⁴⁹ While seeking out one of those males, he passes Patricia in the hallway, but as in the past, “feels vaguely uneasy around her” because

40. *Id.* at 5–6.

41. This hypothetical situation is based on actual statistics of contemporary law firms. *See, e.g.*, Building a Better Legal Profession, <http://www.betterlegalprofession.org> (last visited Oct. 14, 2009); and Catalyst, *Women in Law* (2009), http://www.catalyst.org/file/208/qt_women_in_law.pdf (last visited Oct. 14, 2009).

42. *See* Blasi, *supra* note 1, at 5.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 7.

48. *Id.*

49. *Id.*

“he has the sense that she is judging him” and seems “rigid.”⁵⁰ As a result, he gives a quick greeting and continues on his way seeking the young white men on his mental list.⁵¹ Patricia is aware of Frank’s stiff behavior, which she has sensed since the beginning of her employment, but neither actor thinks much of this “234th Hallway Encounter.”⁵²

After being discharged, Patricia brings a Title VII claim against the firm, but she faces huge obstacles with her litigation. While there is statistical evidence that workplace dynamics within the firm have a disparate impact on women and minorities, there is no specific decision-making process that can be proven to be a source of this impact.⁵³ From an evidentiary standpoint, she cannot show a jury each of the five hundred interactions referenced above, and even if she could, she cannot compare her interactions with those of another associate.⁵⁴ Even if the interactions could be described perfectly, it would show that none of the parties ever had anything but the best of intentions, and that if they were prejudiced, they were unaware of it.⁵⁵ Consequently, there is a concern that a judge or jury could not get past “the psychology of blame,”⁵⁶ a term used to describe the reality that fact finders in our current judicial system are reluctant to impose liability for unintended or unconscious actions.⁵⁷ In this reality, these actions are simply not blameworthy. This, as commentators have noted, raises important normative questions such as whether these actions *should* be blameworthy, and, if so, whether there should be legal remedies for these actions.⁵⁸ The next section grapples with these normative questions and establishes a normative foundation for the remainder of this article.

50. *Id.*

51. *Id.*

52. *Id.*

53. Green, *supra* note 1, at 136.

54. Blasi, *supra* note 1, at 5.

55. *Id.*

56. *Id.* at 6.

57. *Id.*

58. Compare Bagenstos, *supra* note 1, at 34–40 (arguing that antidiscrimination law currently suffers from the absence of normative principles that determine what is considered wrongful and unlawful behavior in the workplace) with Green, *supra* note 5, at 854–65 (striving to set a normative foundation for a structural approach by imposing a normative and corresponding legal obligation on employers not to facilitate decision-making processes in the workplace that result in discriminatory actions of any kind).

D. Normative Implications

Some commentators have noted that because the law does not clearly define unlawful behavior, a lack of guiding normative principles is the primary barrier preventing antidiscrimination law from being consistent with the realities of workplace discrimination.⁵⁹ Scholars can deduce what action an employer could take that would be more or less helpful to reduce discrimination, but this does not necessarily indicate what behavior should be considered wrongful or unlawful.⁶⁰ Consistent with this critique, “[T]he best the law can do in such circumstances is set up a process that assures that... those lessons will be progressively incorporated into the law.”⁶¹ Even this approach, however, is problematic because different people take different lessons from the same experiences.⁶² If the lack of normative principles is the primary barrier to modernizing antidiscrimination law, the best solution may be to rely on “politics and social change rather than the narrow confines of legal doctrine.”⁶³ Such an approach is designed to create and establish norms within the political and social realms, and allow them to permeate the courts over time.

Professor Green argues that it is important to establish a particular working normative theory that we can refine and promote.⁶⁴ His theory “identifies the facilitation of discriminatory bias in workplace decisionmaking as a form of discrimination.”⁶⁵ The result is that we should “impose a normative and corresponding legal obligation on employers not to facilitate discriminatory decisionmaking in the workplace.”⁶⁶ The emphasis is on the employer as a collective entity, rather than on an individual. The normative weight comes from the resulting effect on the employees. “If an employer’s undisciplined system of subjective decision making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s

59. See Bagenstos, *supra* note 1, at 35 (“Unless we have an operating theory of what is wrongful about discrimination, we cannot know what kinds of ‘second generation’ conduct . . . should count as unlawful or improper discrimination.”).

60. *Id.* at 36.

61. *Id.*

62. *Id.*

63. *Id.* at 45.

64. See Green, *supra* note 5, at 851.

65. *Id.* at 852–53.

66. *Id.*

proscription against discriminatory actions should not apply.”⁶⁷ Therefore, “structural discrimination is a workplace wrong,” and “employers, as organizational actors, are active, causal participants in the problem of structural discrimination,” which creates a normative and legal obligation.⁶⁸

This is, of course, only a normative theory and requires further elaboration over time. Courts do not currently adopt this normative view, although some scholars opine that the public at large and courts generally have been receptive to this theory.⁶⁹ Certain data indicates that the public holds organizations accountable when their “policies and operations. . . suggest an internal decision structure that leads to acts of wrongdoing.”⁷⁰ While some argue that the Supreme Court and lower courts have been willing to hold employers responsible for the problem of structural antidiscrimination under a similar normative theory, at least in the context of class actions,⁷¹ others contend that the key decisions in this area are outdated and lower courts have been reluctant to take this approach.⁷² A lengthy valuation of the merits of each position is not needed here, as I advocate for immediate steps to avoid workplace discrimination that do not rely on the current norms espoused by either the courts or the public. Instead, I recommend adopting a working normative theory and taking steps independent of the realities of what norms are currently prevalent in the courts in order to entrench that working normative theory.

This process of elaborating and entrenching norms is a vital but highly difficult component of the overall goal of getting the law to treat discrimination as it actually occurs. There is debate as to whether norms can be “pushed” at all: “[N]ormative elaboration occurs through a fluid, interactive relationship between problem solving and problem definition within specific workplaces and in multiple other arenas,

67. *Id.* at 896 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990–91 (1988)).

68. *Id.* at 884.

69. *Id.* at 895 (arguing that even the Supreme Court has shown a willingness to hold employers responsible for structural discrimination and that individuals are willing to hold organizations accountable for internal decision structures that lead to acts of wrongdoing).

70. *Id.* at 895 (quoting Joseph Sanders & V. Lee Hamilton, *Distributing Responsibility for Wrongdoing Inside Corporate Hierarchies: Public Judgments in Three Societies*, 21 L. SOC. INQ. 815, 853 (1996)).

71. See generally Tristin Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659, 692–98 (2003) (arguing that both lower courts and the Supreme Court have accepted the view that organizational structures that perpetuate past segregation as well as organizational structures that facilitate present discrimination can provide a common ground for class treatment).

72. See Bagenstos, *supra* note 1, at 21–24.

including but not limited to the judiciary.”⁷³ A fluid process like this would seemingly be difficult to control and predict as various actors may work to entrench the wrong normative lessons. Professor Bagenstos notes that “the norms of managers and human resource professionals exert a powerful influence over actors who have no formal connection to management.”⁷⁴ The reason for this is that the human resource professionals try certain practices and document them in journals without proper scientific inquiry, which then influences the managers and entrenches bad practices.⁷⁵

The set of actions I propose does not seek to control the fluid process that governs norms, but instead to provide a concrete example of a successful set of actions that promote the normative theory either as an academic lesson or as a blueprint for future similar actions. One key, which I will discuss later in this article, is to deploy adequate scientific inquiry into the process and solution used to avoid the harmful cycle of documenting and reinforcing bad practices. Thus, the goal is a fairly conservative one: to influence the fluid process of normative elaboration as described by Professor Bagenstos by starting with a working normative theory, taking and documenting actions that assume the existence of the proposed norms, and hoping that the actions and documentation serve as an example that promotes the existence of the normative theory.

Another normative issue commonly raised when discussing subtle and implicit bias is the psychology of blame.⁷⁶ The argument is that if discriminatory actions result from something beyond the conscious control of the employer, then it would be wrong to hold that employer legally liable or even consider him to be normatively at fault.⁷⁷ As Professor Green notes, however, this argument is the result of conflating individual culpability with employer wrong.⁷⁸ As noted earlier, the normative theory asserted here focuses on the employer as an organizational entity and posits that the wrong is committed in the facilitation of subjective practices that result in discrimination, rather than in the individual act itself. In the current political climate, it may be wise from an advocacy point of view to promote this structural normative view rather than to move towards an individual causation

73. Sturm, *supra* note 1, at 462–63.

74. Bagenstos, *supra* note 1, at 34.

75. *Id.* at 30.

76. See Blasi, *supra* note 1, at 6.

77. *Id.*

78. Green, *supra* note 5, at 897–98.

requirement.⁷⁹ With the proposed structural normative theory in place, we can discuss possible practical solutions.

III. POSSIBLE SOLUTIONS

With an updated understanding of how discrimination takes place in the workplace, it becomes clear that a regime based on individual liability is insufficient. The tort-like model currently used in antidiscrimination law is outdated and does not reflect the fact that discrimination today is pervasive and not always the result of intentional behavior.⁸⁰ “If we treat discrimination as a fact of American life. . . employment discrimination looks less like a personal tort and more like water pollution or widespread tobacco smoking.”⁸¹ Accordingly, we should look to how the law has dealt with those analogous problems. When we do so, we see that rather than relying only on individual tort remedies⁸² to combat discrimination, we should move to structural solutions akin to the regulatory schemes associated with pollution or tobacco smoking, and the voluntary or forced adoption of employer best practices and affirmative action policies.

A. Best Practices

Employers can take many actions to reduce the likelihood that subtle discrimination will play a harmful role in the workplace. While there is no one set of actions that fits all workplaces,⁸³ core principles can guide employers committed to creating a workplace with less subtle and structural discrimination. We can view these best practices as doing two things: (1) working at the individual actor level to reduce implicit bias and curb the harmful effects of implicit bias through self correction; and (2) working at the structural level to reduce the likelihood that employees will be subjected to discrimination of any kind.

Best practices aimed at individual self-correction should strive to manage norms of egalitarianism. It has been shown that

79. *Id.* at 898.

80. Blasi, *supra* note 1, at 4.

81. *Id.*

82. Nevertheless, it is clear that tort-like remedies should still be available to address discrimination resulting from explicit animus. *See id.* at 17.

83. *See* Green, *supra* note 71, at 672; *see also*, Sturm, *supra* note 1, at 461 (arguing that specific and detailed rules will not work in this context and will inevitably prove to be either under- or overinclusive).

“foregrounding widely held egalitarian norms can counter automatic stereotyping.”⁸⁴ In other words, if a workplace succeeds in promoting the idea that egalitarianism is best, then individuals operating under that permeated norm will be less likely to act on their implicit bias.⁸⁵ Also, employers can take steps to de-bias individuals through the use of de-biasing agents and training.⁸⁶ These solutions remain largely theoretical, and there is some evidence to suggest that they can be harmful.⁸⁷ Due to what some have called a rebounding effect, individuals may react with increased animus towards a group after attempts have been made to decrease that individual’s bias towards the group.⁸⁸ Reactance theory suggests that people will react against threats that limit their personal sense of behavioral freedom. Correction theory takes this one step further to posit “that people do not simply resist attempts at control[;] . . . they assess the direction and extent of potential influence and then adjust and calibrate their responses to compensate for this impact.”⁸⁹ Because of this possible outcome, it is important that solutions not be limited to self-correction at the individual level, but instead should strive “to minimize the operation of discriminatory bias by altering the workplace context in which day-to-day perceptions and judgments are made.”⁹⁰ This, then, is why best practices focused on structural solutions are also vital.

At the structural level, an important component to a best-practices regime is to require employers to report on the practices they have adopted to combat subtle and structural discrimination, as well as

84. Blasi, *supra* note 1, at 21.

85. The jury context has produced interesting results that support this idea. For example, in the days of Jim Crow, Clarence Darrow successfully argued to a white jury that it must resist being discriminatory when he was defending a black man charged with killing white man. See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decision Makers Break the Prejudice Habit*, in *CRITICAL RACE REALISM* 11, 26–27 (Gregory S. Parks et al, eds., 2008); Blasi, *supra* note 1, at 21.

86. Because our implicit bias is malleable, some believe that de-biasing agents—people or objects used to reduce implicit bias in an individual—can be used in an employment setting. This could be in the form of simply hanging up pictures of famous and well-regarded African American or women, leaders, for example, or in raising self-awareness of the possibility of bias in decision making in the workplace. This latter example can be achieved through improved training. See generally Banaji, Kang, & Lane, *supra* note 10, at 437–39. Other options would be career planning and ongoing workshops.

87. Green, *supra* note 5, at 859.

88. *See id.*

89. *Id.* at 859 (quoting Kerry Kawakami et al., *Kicking the Habit: Effects of Nonstereotypic Association Training and Correction Processes on Hiring Decisions*, 41 *J. EXP. SOC. PSYCHOL.* 68, 73 (2005)).

90. *Id.* at 860.

the results of those efforts.⁹¹ This process promotes accountability, self-reflection, and recalibration. In addition to this ongoing commitment to monitoring and evaluation, there are several experimental safeguards that employers could put in place. First, an employer could implement “heterogeneous work and decision-making groups.”⁹² Similarly, an employer should create “interdependence among in-group and out-group members. . .”⁹³ Employers should also consider “providing structure and guidance for appraisal and evaluation, and making decisionmakers accountable for their decisions.”⁹⁴ Finally, in addition to the self-reporting mentioned above, employers should practice “monitoring for systemic patterns that may develop from seemingly individualized internal conflicts.”⁹⁵ Again, the specific ways that each of these practices would be adopted in any given workplace will vary from employer to employer, or even from office to office within one employer.

Professor Susan Sturm emphasizes collaborative problem solving processes that bring in a number of actors who can help identify organizational dimensions of a problem, encourage different organizations to gather and share information, build both individual and institutional capacity to respond to the problem, and design and evaluate solutions that involve “employees who participate in the day-to-day patterns that produce bias and exclusion.”⁹⁶ According to Professor Sturm, a solution that is either entirely externally imposed or internally generated will likely prove to be problematic because it will either clash with the organization’s context or be insufficiently attentive to normative implications.⁹⁷ Noting a growing trend towards implementing this type of problem solving,⁹⁸ Professor Sturm underscores the “pivotal role of intermediaries” to bridge “conventional dichotomies such as public/private, legal/nonlegal, general/contextual, coercive/cooperative.”⁹⁹ As I note *infra*, the use of intermediaries may be cause for concern regarding the likelihood of success of this type of structural approach.

91. Blasi, *supra* note 1, at 22.

92. Green, *supra* note 1, at 147.

93. *Id.*

94. *Id.*

95. *Id.* at 148.

96. Sturm, *supra* note 1, at 475.

97. *Id.* at 475–76.

98. *Id.* at 462.

99. *Id.* at 522–24. The potential problems of relying so heavily on these types of intermediaries are explored in Part IV, *infra*.

B. Affirmative Action

Affirmative action should also be a part of an employer's antidiscrimination practices because it plays three distinct roles in combating the harmful effects of implicit bias. The first and most commonly understood role of affirmative action is remedial in nature, in that it is simply a tool to compensate members of disadvantaged groups that have lost opportunities as a result of implicit bias.¹⁰⁰ The second role is based on contact theory, which holds that the more an individual interacts with members of a disadvantaged group, the more likely that individual will suppress stereotypes and bias against that group.¹⁰¹ This effect may be more pronounced when the members of a disadvantaged group are in a managerial role, as studies have found that bias is mitigated when people "are in the presence of authority figures who are members of minority groups."¹⁰²

The third role is to compensate for the fact that out-group bias is generally stronger among whites than other groups.¹⁰³ A rarely discussed¹⁰⁴ controversial theory is that one way to "reduce the automatic and unconscious effects of particular stereotypes in decision makers" is by placing more members of the groups that whites tend to stereotype in management positions.¹⁰⁵ The theory is that because a black individual is less likely to possess strong out-group implicit bias, a black manager with equal qualifications will be less likely to harbor unknowing bias that would affect his or her employees than a similarly situated white manager. It seems that a simpler and fairer solution would be to use a test that measures implicit bias, such as the Implicit Association Test (IAT)¹⁰⁶ on all managers, regardless of their race, to ensure that decision-makers in the organization are not highly

100. See generally Banaji, Kang & Lane, *supra* note 10. See also Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 984–85 (2006).

101. See Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 ANNU. REV. PSYCHOL. 65, 66–67 (1998).

102. Bagenstos, *supra* note 1, at 16.

103. See Nosek, *supra* note 14.

104. Blasi, *supra* note 1, at 20.

105. *Id.* at 19–20.

106. The IAT, developed in 1998, is a web-based test that can test either implicit attitudes or implicit stereotypes in an individual by measuring automatic group-valence (implicit attitudes) and group-trait (implicit stereotypes) associations. The IAT works by measuring response time to various stimuli. The amount of time it takes to make an association between two stimuli corresponds to their associational strength in the individual's brain. Banaji, Kang, & Lane, *supra* note 10, at 431. Anybody can take an IAT to measure their own implicit bias. See Project Implicit, <http://www.projectimplicit.org> (last visited Nov. 20, 2009).

biased.¹⁰⁷ Even without use of the IAT, however, affirmative action may help to reduce the number of biased decision makers in management positions.

C. Applying These Solutions to the Hypothetical Example

Going back to the hypothetical situation involving Patricia, what practices could Patricia's firm implement to repair the structural deficiencies that caused a seemingly fair person such as Frank, the white partner, to contribute to the ongoing pattern of preferential treatment of white males? The firm could start with the basic recognition that the discrepancy in the percentage of minority partners as compared to associates might present a potential problem and may indicate that the disparate impact is a result of its policies. This should alert the firm that there may be structural shortcomings that it needs to address. The firm should then examine its procedures in light of the possibility that subtle discrimination is present, develop a set of practices to improve its procedures, and find a way to monitor its efforts going forward.

For the fact-finding portion of this plan, the firm can rely on existing models. Professor Sturm documented the success of the fact-finding portion of a best practices implementation at the accounting and consulting firm Deloitte & Touche ("Deloitte").¹⁰⁸ Deloitte created a task force to conduct a thorough investigation into the trend that women were not being promoted at the rate at which men were being promoted.¹⁰⁹ Deloitte "was careful to include a cross-section of the organization that was diverse based on age, sex, geography, department, and family status."¹¹⁰ Also, there was complete buy-in from the top, as was evidenced by the fact that the CEO chaired the task force and attended all of its meetings.¹¹¹ It would be important to get buy-in from the top ranks at Patricia's firm, and obtaining that buy-in should be a goal of any plan undertaken. Once that buy-in is present, Patricia's firm could create a task force similar to that used by Deloitte.

The next step would be to develop a solution that is specifically tailored to Patricia's firm. Again, the case study of Deloitte is

107. Of course determining what constitutes "highly biased" is a difficult proposition, making this solution quite complex.

108. See Sturm, *supra* note 1, at 492-93.

109. *Id.*

110. *Id.* at 493.

111. *Id.*

illustrative. Deloitte created a joint internal and external task force to develop a proposed solution.¹¹² The external advisory group included highly visible figures from the business community and the public.¹¹³ The internal and external task force developed a series of guiding principles to implement a solution.¹¹⁴

Perhaps the biggest lesson here is that the solution implemented at Deloitte, along with the solutions implemented in other case studies that Professor Sturm analyzed, was designed to capitalize on the strengths of the organization.¹¹⁵ At Deloitte, the management consultants were able to effectively leverage local management personnel to implement procedures, and were also able to create an efficient means of reporting. The method fit the firm's "project-oriented work ethic."¹¹⁶ At Patricia's firm, the lawyers also have a project-oriented work ethic, but may be less adept at determining the most efficient ways to tap into management personnel. The firm should be skilled at tracking and reporting, and could emphasize that as a part of their solution. In addition, any solution that efficiently incorporates the attorneys' natural aptitude at problem solving and analysis is probably likely to be successful. Patricia's firm may also consider implementing career-planning workshops for its career-oriented employees. Although these examples are only generalities, they are designed to show the thought process that should be involved with these decisions.

It will be crucial for Patricia's firm to monitor progress made towards reaching its goals and to always investigate signs that certain processes are not working. For instance, at Deloitte, when the firm was having trouble assigning women to projects on par with those given to male employees, it required managers at all levels to create annual assignment reviews, which raised the awareness of potential and previously undetected bias among officers.¹¹⁷ Similarly, Patricia's firm should not only monitor all processes that have been put in place for this project, but should also require partners to document all assignment decisions for cases and projects and to explain discrepancies between different groups wherever they exist.

To implement internal affirmative action, a firm may adopt a policy that partners are required to create teams that are as racially and

112. *Id.* at 494–95.

113. *Id.* at 495.

114. *Id.* at 495–96.

115. *Id.* at 498.

116. *Id.*

117. *Id.* at 496.

gender diverse as reasonably possible, and to create greater interdependencies between in-group and out-group members. A firm could also provide training on how to conduct evaluations, both for short-term and long-term team performance and more formal annual reviews and promotion considerations. A firm may consider adopting more objective standards where subtle discrimination is less likely to play a role, such as number of hours worked, although even this metric could be affected by what work partners assign to different associates. A firm should make it clear that decision makers will be held accountable for their decisions and that discrimination, even unconscious discrimination, will not be tolerated. This will reinforce egalitarian norms and increase self-awareness. Unfortunately, it is unlikely that Patricia's firm will implement all of these changes without incentives. In Part IV, I discuss the difficulties in getting employers to implement these structural solutions.

PART IV: DIFFICULTIES IN ENACTING THE PROPOSED SOLUTIONS

When talking about difficulties in implementing a structural approach, one could assert as a bar the lack of a guiding normative theory.¹¹⁸ In this article, I hope to move beyond this problem, however, and instead imagine a solution that serves as a practical example of the normative theory I propose. Even after eliminating normative concerns, however, there are still a host of practical concerns to overcome.

A. Relying on the Marketplace

One possible approach to the problem of employer resistance to implementing solutions is to rely on the market to exert pressure on employers to adopt best practices. This strategy presupposes, however, that consumers would avoid employers who fail to adopt such practices. Aside from the fact that this solution would not work in the government context, commentators have argued that market pressures alone are insufficient.¹¹⁹ First, immediate costs to adopting best practices will often be substantial, and even if there are long-term financial benefits to creating a discrimination-free workplace, an employer may place more weight on the short-term costs than the long-term financial benefits.¹²⁰ A second concern with relying on

118. *See supra* Part II.D.

119. Green, *supra* note 71, at 672.

120. *Id.* at 672–73.

market pressures is that it is unlikely that the public will generate much market pressure in the absence of high-profile litigation, which serves a role of informing the public about an employer's current employment practices.¹²¹ Without the litigation, which I noted earlier is difficult under current legal norms, the public is likely to remain blissfully unaware of problematic employment structures, and therefore not generate much market pressure to reform.¹²² Finally, there will be times when economic costs will simply outweigh market benefits, even considering potential long-term financial benefits of reducing discrimination in the workplace.¹²³

B. Relying on Legislation or Executive Regulations

Another method for achieving the implementation of best practices is to rely on legislation or executive regulation to force employers to adopt antidiscrimination best practices. However, there are two major problems with such a strategy. First, in today's political and social climate, under existing norms, it would be difficult to pass meaningful reform legislation. Second, even if passed, it is highly unlikely that such an approach would prove to be successful because an effective solution must be tailored to the situation and to the context of any given organization, which neither specific nor ambiguous laws can do.

Regarding the passage of legislation, Professor Blasi writes that changing Title VII law will require withstanding "significant political and doctrinal obstacles. . ."¹²⁴ Professor Blasi concludes that this is tied to the prevalence of psychology of blame in our society: people are not willing to hold individual actors liable for behavior resulting from unconscious bias.¹²⁵ I hope that progress based on a series of actions like the ones I propose in this article will help people to see organizational liability as separate from the concept of individual liability. Another potential barrier is that in periods of deep economic recession like the one the United States is currently experiencing, the government may be reluctant to pass measures that place a financial burden on employers.

121. *Id.*

122. As we will see later, however, using litigation in this context is fraught with plenty of concerns.

123. Green, *supra* note 71, at 674.

124. Blasi, *supra* note 1, at 6.

125. *Id.*

Even if legislation was enacted or regulations were promulgated, it is unlikely that these measures would be successful because a rule-enforcement model “encourages lawyers to see issues as potential legal claims, rather than as problems in need of systemic resolution.”¹²⁶ This “narrow focus on avoiding liability diverts attention from the structural dimensions underlying the legal violations.”¹²⁷ Inevitably, specific and detailed rules prove to be either over- or underinclusive, or both.¹²⁸ On the other hand, “laws that are ambiguous. . . invite symbolic responses. . .”¹²⁹ As we have already seen, an effective solution must be tailored to the situation and to the context of any given organization, and the solution must be flexible in order to adapt as lessons are learned. Relying on legislation or regulation would make it too easy for employers to comply without doing real work to solve systemic problems.

C. Relying on the Courts and Litigation

Another way to ensure the implementation of best practices is to rely on the courts and litigation. However, two high hurdles confront a strategy that relies upon the courts to realize a structural solution. First, judges are unwilling and lack the expertise to order this type of arrangement, and to oversee its successful implementation.¹³⁰ According to Professor Bagenstos, courts have a track record of engaging in this type of contextualized inquiry under two areas of antidiscrimination law, and have a discouraging track record in both areas.¹³¹ In the context of disparate impact challenges to subjective employment practices and in workplace harassment cases,¹³² courts have been unwilling to engage in the necessary contextualized inquiry.¹³³ The result is similar to the likely outcome of a strategy that relies upon legislative or regulatory solutions: Employers have found ways to easily circumvent requirements without actually fixing systemic problems.¹³⁴ In both types of cases, judges are aware of their lack of knowledge and feel the effects of immense docket pressures.¹³⁵

126. Sturm, *supra* note 1, at 476.

127. *Id.*

128. *Id.* at 461.

129. See Bagenstos, *supra* note 1, at 28.

130. *Id.* at 21–26

131. *Id.* at 21–25.

132. *Id.*

133. *Id.* at 22–23.

134. *Id.* at 24–25.

135. *Id.* at 25.

Judicial shortcomings are the primary reason that litigation should be avoided.

Second, relying on attorneys and other human resources professionals within a litigation context is problematic because it is doubtful that we can trust intermediaries to internalize and pursue structural and systemic goals.¹³⁶ Frequently, other goals of intermediaries, such as managerial goals, trump the goals of structural reform.¹³⁷ In practice, even when intermediaries do a good job of urging employers to adopt certain procedures, “there is scant evidence that the responses urged by intermediaries actually result in equal treatment or unbiased decisionmaking.”¹³⁸ As mentioned previously, there is also a legitimate fear that intermediaries will document bad practices in journals without scientific inquiry, and that these bad practices will then become entrenched as best practices.¹³⁹

The third reason to avoid litigation is to minimize the harmful effects of attorney self-interest. If it is true that plaintiffs’ lawyers will take the option of money over structural reform,¹⁴⁰ then by not engaging in actual litigation, and by using litigation to gain collective leverage, plaintiffs’ attorneys will be stripped of certain familiar and comfortable resolution options, such as monetary settlements or consent decrees. Monetary settlements would arguably not lead to a sound structural solution. A consent decree may be somewhat successful, but it is fraught with potential problems. First, a consent decree is more likely to lead to a relationship characterized by the “narrow focus of avoiding liability [that] diverts attention from the structural dimensions underlying the legal violations. . .”¹⁴¹ This presents the same pitfalls inherent in a strategy that relies on compliance with rules and regulations noted earlier.

In addition, consent decrees bring with them a long history of reluctant defendants. Professor Sturm cites the Home Depot class action as an example of a consent decree that successfully resulted in structural reform, but Professor Michael Selmi¹⁴² effectively refutes this account. Professor Selmi maintains that money played too large a role in the settlement process and that the resulting large sum of the settlement clouded the fact that the “agreement did not provide for any

136. *Id.* at 27.

137. *Id.* at 28.

138. *Id.* at 29.

139. *Id.* at 30.

140. *Id.* at 33.

141. Sturm, *supra* note 1, at 476.

142. Selmi, *supra* note 3, at 1285–89.

specified jobs for class members, nor did it require any specific goals.”¹⁴³ The long-term structural gains were not the focus. In order to avoid this “Home Depot problem,” in which money is the primary focus of settlement, I advocate for eliminating monetary settlements and consent decrees by not entering into direct litigation unless other sources of leverage fail entirely.

Asking plaintiffs’ attorneys to spend many hours on a case like this without entering into formal litigation raises questions about attorney compensation. Without litigation, neither fee shifting nor contingency compensation is an option. While this is a desirable effect in terms of controlling for attorney self-interest, in reality, it will greatly limit the number of attorneys willing and able to engage in this kind of work.¹⁴⁴ As long as some attorneys are still able to undertake this type of project by financing it with earnings from other cases, this may be a good thing, since only those motivated by the desire to see real reform of discriminatory employment practices will involve themselves in the process. This limitation might even act as an effective filter to ensure that the ideal lawyers are working on these cases.

If eliminating litigation restricts an attorney’s ability to fall back on a comfortable monetary settlement, it does not completely remove money as a competitor for the attorney’s time and resources. Because of the limited options to make money on a case like this, an attorney may find that other paying cases necessarily take priority, possibly reducing the effectiveness of the attorney’s counsel on a case such as this. This is a very real concern, and as a result, more thought should go into the issue of attorney compensation in these types of situations.

These recommendations are not meant to suggest that the courts will never play an active role in holding employers liable for facilitating subtle and systemic discrimination or in getting employers to adopt best practices. The point here is two-pronged: Courts do not currently appear ready for this role, and we do not have to wait for the courts to be ready in order to motivate employers to adopt best practices and to begin to establish the proposed working normative theory.

143. *Id.* at 1285.

144. *See id.* at 1327, 1330.

V. A PROPOSED SET OF ACTIONS

A. Guiding Principles

The limitations I discuss in Part IV should not deter efforts to achieve meaningful structural reform and reduce discrimination in the workplace. Instead, there is no easy path and that creative lawyering is necessary to achieve real results.¹⁴⁵ Based upon the lessons discussed above, I assert several guiding principles designed to generate a set of actions that might help modernize workplace antidiscrimination law.

It is worth repeating that these actions are based on the premise that an employer should be held liable for the facilitation of subtle discrimination in the workplace.¹⁴⁶ Beyond that normative foundation, the actions taken should minimize the role of courts for the three reasons discussed in Part IV.¹⁴⁷ This does not mean that the law plays no role; instead, liability avoidance should serve both as an incentive and an organizational justification for reform.¹⁴⁸ Other sources of leverage, therefore, must be found. The primary way to apply additional leverage will be to actively engage market forces. This can be done most effectively where a high-profile private employer relies heavily on one large consumer—the local or state government—for a substantial amount of business. In this case, simply lobbying the right government official or officials can impose great financial pressure on the employer. Our solution must also be dynamic and flexible, emphasizing partnerships and problem solving and avoiding a rules-driven solution, whether it is in the form of government regulations or otherwise.

B. A Sample Action Plan

As noted above, it is important to find a potential defendant who is a private employer relying heavily on the government for income.¹⁴⁹ This employer should exhibit the characteristics of a

145. *See supra*, Part IV.

146. *See supra*, Part I.

147. *See supra*, Part IV.

148. *Id.* These two roles that the law plays were prominent in all three of Professor Sturm's cases studies. *See Sturm, supra* note 1, at 520.

149. This Article originally envisioned a government employer such as the Office of the City Attorney as a target defendant, but upon further contemplation, it seemed as though there were too many obstacles to overcome. The biggest obstacle is that it seemed unlikely that the City Attorney would care much about our organizing campaign given that issues more important to the public would have trumped the electoral significance of this campaign.

modern workplace that have been discussed,¹⁵⁰ and a potential plaintiff or class of plaintiffs must be identified in order to maintain the threat of litigation, and thereby retain liability avoidance as an incentive. The plaintiff would have to be willing to be a part of an effort to achieve structural reform at the firm knowing that there are no material benefits to participation. The plaintiff should know that litigation is a possibility down the road but that the goal is to avoid it. For purposes of this article, I will assume that Patricia and her firm fit this description of an ideal plaintiff and defendant, respectively.

Once the target defendant has been identified, a multi-pronged plan should be enacted. In order for the employer to be a serious partner in this reform, the employer must feel strongly motivated to begin the process of structural reform, even if the initial costs are substantial. The multi-pronged plan is designed to motivate the employer through organizing, lobbying, an actual or threatened media campaign, and the threat of litigation.

The organizing component could begin with outreach to identity organizations such as the Mexican American Legal Defense & Education Fund (MALDEF), the National Association for the Advancement of Colored People (NAACP), and the National Organization for Women (NOW). The goal would be for these organizations to contact the employer to let the employer know that their constituents are subjected to disparate treatment at the firm, and that steps should be taken to remedy this problem. The next stage of organizing could include organizations that monitor diversity at various law firms, such as "Building a Better Legal Profession."¹⁵¹ Even more effective would be the threat of going to the actual law schools themselves or to websites read by law firm recruits¹⁵² to organize an awareness campaign for potential new hires that the firm in question engages in systemic practices that disadvantage women and people of color, thus impacting their recruiting ability. The goal of these measures would be to help the firm realize that structural reform is beneficial to their ongoing recruiting efforts.¹⁵³

150. *See supra*, Part II.

151. Started in 2007 by Stanford Law Students, Building a Better Legal Profession states that its mission is to seek "market-based workplace reforms in large private law firms by publicizing firms' self-reported data on billable hours, pro bono participation, and demographic diversity." Building a Better Legal Profession, <http://www.betterlegalprofession.org/mission.php> (last visited on November 20, 2009).

152. One example would be AboveTheLaw.com.

153. This was also the case in Professor Sturm's case study of Deloitte & Touche. *See Sturm, supra* note 1, at 492-93.

These steps alone may be enough to encourage the firm to get serious about structural reform, but if not, the next step would be to engage in lobbying efforts. In terms of lobbying strategy, it would be important to identify a member of the city council or a county commissioner who has power over which government contracts are awarded and who is committed to racial and gender equality. Once facts have been gathered as to the specific workings of the firm and the resulting statistical disparities, a visit and presentation to the official, together with a potential plaintiff who has been harmed by the discriminatory practices, might inspire the official to actively engage the employer in a dialogue. The goal would be for the official to indicate to the employer that the government will only work with employers that do not condone discriminatory decisionmaking.¹⁵⁴ It is possible, of course, that no such official will be available. If this is the case, it may be best to go back to the identity organizations to see if they have better contacts in the government with which to work. These organizations may even be able to offer campaign support to an otherwise disinterested official in exchange for the official's support for the anti-discrimination efforts.

Another potentially powerful tool is the threat of a media campaign, especially if the employer has a high profile and, therefore, has substantial reputational interests. Waging an actual media campaign may be much more difficult than threatening one. Because of the psychology of blame issue, it may be the case that the media does not view this as a story of interest, and even if published, it may be a story that generates little to no pressure on the firm to change their practices.¹⁵⁵ If this is the case, advocates could find a hook to make the story timely. For example, if the target firm has recently laid off employees, and if those employees are disproportionately women or people of color, advocates could tie the story to the recession by showing that employers like the firm in question are using the bad economy as an excuse to engage in discriminatory practices.

Applying the threat of litigation in the current jurisprudential climate is difficult because the employer may not regard the threat with much concern.¹⁵⁶ If the goal is to obtain a consent decree, most

154. If looking for a historical parallel, a fitting example that may provide valuable lessons learned would be local governments being pressured into working only with union workers. This idea is discussed further in RALPH K. WINTER, JR. & HARRY H. WELLINGTON, *THE UNIONS AND THE CITIES* (The Brookings Institution 1971); and DAVID T. STANLEY, *MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE* (The Brookings Institution 1972).

155. See *supra* Part II.C.

156. See *supra* Part II.D. If it is nearly impossible to bring legal action against subtle or structural discrimination in present-day courts, the threat of doing so lacks muscle.

private employers would likely fight the effort to the end, and would probably be successful.¹⁵⁷ Were the proposed set of actions to rely exclusively on this threat, it would likely fail, which is why these actions incorporate other stronger sources of leverage. In this situation, liability avoidance is more likely to serve as an internal justification for spending resources on reform than it is to serve as an externally driven incentive. It may be the case that maintaining the threat of litigation causes more harm than good and should not be a part of the solution. By maintaining a traditional adversarial posture, it may be difficult to form the partnership necessary for a flexible problem solving approach. This, however, will be a concern for all of the faces of this multi-pronged approach and is an issue that deserves further attention.

During all of these steps, the plaintiffs' attorneys who will in all likelihood drive this campaign must have all of the appropriate actors in place in anticipation of the employer's eventual cooperation. For example, if external organizational or managerial consultants are needed, these consultants should be ready to act. This, like the other steps outlined above, can only be described here in general terms because each case would require a unique plan. These plans, however, can and should be driven by guiding principles that would be relatively consistent from employer to employer.

VI. CONCLUSION

Stakeholders can and should undertake certain specific actions to make workplace antidiscrimination law more consistent with the realities of modern discrimination. While I recommend one sample action plan, this should not be seen as the only desirable approach. The primary point of the proposed actions, in addition to reforming an individual employer, is to help entrench the normative theory on which they are based: the notion that the employer facilitation of discrimination in the workplace is itself a normative and legal wrong. In order to achieve institutionalized gains, multiple steps need to be taken.

First, this type of action plan would need to be repeated many times before any institutional effect would likely be seen. This would necessitate carrying out a similar plan in multiple high-profile

157. This Article originally envisioned a consent decree as being important, but because of the evidence suggesting that the Home Depot consent decree was less than successful and because of the drawn-out contentious legal battle that would likely be associated with this particular target, it became clear that a consent decree is not an ideal solution.

environments with multiple high-profile employers. Second, there must be a thorough evaluation of which practices were successful and which were ineffective. It is crucial that this process is based upon an accepted model of scientific inquiry. The actions I propose in this article are resource-intensive and carry a relatively high risk of failure. Even if successful in the short term, the efforts can be largely wasted or even prove to be harmful in the long term if the lessons learned are not properly documented. Indeed, an entire article or book could be written on the process of institutionalizing these gains.

None of this, including the actions I propose in Part V, are likely to be easy in practice, but I argue that by examining the current dialogue on this problem, certain guiding principles can be identified that would inform a series of actions with significant potential for success. Perhaps more importantly, these resulting actions have the potential to institutionalize knowledge and reinforce a normative theory that holds employers accountable for condoning discrimination resulting from implicit bias and other characteristics of the modern workplace.

