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The Restorative Workplace: An Organizational Learning Approach to Discrimination

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On the fiftieth anniversary of Title VII of the Civil Rights Act, many employers continue to search for ways to implement the law's antidiscrimination and equal opportunity mandates into the workplace. The current litigation-based approach to employment discrimination under Title VII and similar laws focuses on weeding out "bad apples" who are explicitly prejudiced. This "victim-villain" paradigm may fail to correct the complex, nuanced causes of workplace discrimination, or exacerbate the problem. This article explores an alternative approach—restorative practices—that may integrate the policy goals of antidiscrimination laws into the practical realities of managing an organization. Restorative practices engage everyone in the organization with a sense of ownership in and commitment to the mission of building an inclusive, egalitarian workplace.

Merging research from the fields of employment law, organizational management, and cognitive psychology, this article analyzes how restorative practices can facilitate an organizational learning approach to workplace discrimination. Proactively, restorative dialogue helps to build social capital, reduce explicit and implicit biases, and cultivate a shared commitment to egalitarian norms. Reactively, restorative practices can manage defensive routines often triggered by discrimination complaints and provide a process that can transform conflict into greater understanding and change. A restorative approach makes it more likely that the individuals involved—and the larger organization—can repair the harms caused by discrimination, correct systemic issues underlying the problem, and learn to prevent inequities in the future.

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THE RESTORATIVE WORKPLACE

INTRODUCTION3

I. THE DYNAMICS OF EMPLOYMENT DISCRIMINATION9

 A. Sources of Workplace Inequities9

 B. Employer Approaches to Workplace Discrimination12

II. THEORETICAL FOUNDATIONS OF A RESTORATIVE APPROACH.....20

 A. Restorative Justice20

 B. Organizational Learning21

 1. Double-loop learning22

 2. Restorative practices.....23

 C. Social Capital.....28

 D. Dialogue and Voice30

 E. Innate Psychological Affects.....33

III. TYPOLOGIES OF A RESTORATIVE APPROACH TO DISCRIMINATION38

 A. The Social Discipline Window38

 B. Organizational Change Window.....42

 C. Typology of Employer Approaches to Antidiscrimination Laws44

 1. Avoidance and Neglect45

 2. Zero Tolerance, Adversarial Approach45

 3. Human Relations or “Best Practices” Approach.....46

 4. Restorative Approach.....46

 5. Challenges and Practical Considerations47

CONCLUSION50

*Law alone cannot make men see right.*¹

John F. Kennedy

*First of all, if you can learn a simple trick, Scout, you'll get along a lot better with all kinds of folks. You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.*²

Atticus Finch

¹ Radio and Television Report to the American People on Civil Rights, 1963 PUB. PAPERS 468, 469 (June 11, 1963).

² HARPER LEE, TO KILL A MOCKINGBIRD 33 (1995 ed.) (attorney Atticus Finch, talking to his daughter, Scout).

INTRODUCTION

As Title VII of the Civil Rights Act of 1964 turns fifty,³ many employers continue to search for effective ways to integrate its rights-based antidiscrimination mandates into the practical realities of managing an organization. Title VII and related laws⁴ have two core purposes. The “primary objective” is an antidiscrimination or egalitarian goal: “to achieve equality of employment opportunities and remove” discriminatory barriers in the workplace.⁵ In the words of one federal court, Title VII aimed “to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.”⁶

The second key purpose of antidiscrimination laws is remedial or restorative: “to make persons whole for injuries suffered on account of unlawful employment discrimination.”⁷ Title VII “requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, *restored* to a position where they would have been were it not for the unlawful discrimination.”⁸

Most employers today would likely express support for the policy goals of antidiscrimination laws.⁹ Many organizations now have zero-tolerance discrimination and harassment policies that encourage employees to report such conduct immediately.¹⁰ Of course, adopting a policy is easy to do—employers can simply copy a template available from the Internet and paste it into their employee handbooks.¹¹ It is more difficult to maintain a work

³ Title VII makes it unlawful for an employer “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.” 42 U.S.C. § 2000e-2 (2012). President Lyndon Johnson signed Title VII into law on July 2, 1964. David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 645 (1995).

⁴ Other employment discrimination laws include, for example: the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2012), the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2012), and the Equal Pay Act, 29 U.S.C. § 206(d) (2012).

⁵ *Griggs v. Duke Power*, 401 U.S. 424, 429–30 (1971).

⁶ *King v. Hillen*, 21 F.3d 1572, 1582 (Fed. Cir. 1994).

⁷ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

⁸ 118 CONG. REC. 7168 (1972) (statement of Sen. Williams) (emphasis added). Congress added compensatory and punitive damages to Title VII in 1991. See, e.g., H.R. REP. NO. 102-40(I) at 64–65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602, 603 (Report of Committee on Education and Labor) (“Monetary damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity.”).

⁹ See U.S. CHAMBER OF COMMERCE, A REVIEW OF ENFORCEMENT AND LITIGATION DURING THE OBAMA ADMINISTRATION—A MISUSE OF AUTHORITY 16 (June 2014), *available at* https://www.uschamber.com/sites/default/files/documents/files/021449_LABR%20EEOC%20Enforcement%20Paper.pdf (“Combating discrimination in the workplace is a worthy goal and one that the Chamber supports.”).

¹⁰ Under the *Faragher/Ellerth* affirmative defense, an employer will not be vicariously liable for harassment by a supervisor if the employer shows: “(a) that the employer exercised reasonable care to prevent and correct promptly any . . . 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.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). See also *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

¹¹ See, e.g., *Nondiscrimination/Anti-Harassment Policy and Complaint Procedure*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (May 23, 2014), http://www.shrm.org/templatestools/samples/policies/pages/cms_000551.aspx.

culture that values and practices the principles of inclusiveness, human dignity, and equality on a daily basis.

Over the past fifty years, blatant employment discrimination has been significantly reduced. Nevertheless, complaint statistics from the Equal Employment Opportunity Commission (EEOC) suggest that the perception of discriminatory treatment continues to flourish in American workplaces.¹² The problem is likely underreported.¹³ Studies have shown that social pressures—including the risk of termination and fear of “being perceived as a hypersensitive complainer”¹⁴—prevent some employees from reporting discrimination.¹⁵ Employment discrimination is a complex issue, arising from a variety of factors. A substantial body of cognitive and social science research shows that, even among well-intentioned individuals who profess egalitarian beliefs, implicit biases can lead to decisions that unfairly disadvantage women and people of color.¹⁶ In addition, issues of race and gender are emotionally and politically charged issues that can affect intergroup relations in the workplace.¹⁷

Discrimination impacts organizations in profound ways. If employees do not feel valued or respected, or if they believe they are being treated unfairly because of discrimination, they may quit,¹⁸ file a claim, miss work because of health problems triggered by discrimination,¹⁹ or

¹² The number of discrimination charges filed with the EEOC has increased over time: 88,778 charges were filed in FY 2014, as compared to 80,680 in FY 1997. *Charge Statistics, FY 1997 through FY 2014*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 6, 2015). The EEOC enforces Title VII and other employment discrimination laws.

¹³ See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988) (reporting findings of interviews of eighteen people who experienced discrimination but did not object and concluding that efforts to challenge discrimination through law “usually end in defeat . . . because the bonds of victimhood inhibit challenges against the perpetrators”); Martha Minow, *Speaking of Silence*, 43 U. MIAMI L. REV. 493 (1988) (discussing the reasons victims of discrimination may not complain); Jean R. Sternlight, *Placing the Reality of Employment Discrimination Claims in a Comparative Context*, 11 EMP. RTS. & EMP. POL’Y J. 139, 208 (2007) (noting that “the financial, emotional, and reputational costs of pursuing a legal claim can exceed any projected gains from bringing a lawsuit”).

¹⁴ Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1147–51 (2008) (discussing studies).

¹⁵ The number of retaliation charges filed with the EEOC, which enforces Title VII and other workplace discrimination statutes, is now higher than any other charge category. In 2014, the EEOC received 37,955 retaliation charges, 31,073 racial discrimination charges, and 26,027 sex discrimination charges. *Charge Statistics, FY 1997 through FY 2014*, EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 6, 2015).

¹⁶ See *infra* Part I.A.

¹⁷ Tristin K. Green, *Racial Emotion in the Workplace*, 86 S. CAL. L. REV. 959 (2013).

¹⁸ For example, women may leave the workplace because of disrespectful environments where they do not feel valued, lack of promotional opportunities, or inflexible work structures. See LISA A. MAINIERO & SHERRY E. SULLIVAN, *THE OPT-OUT REVOLT: WHY PEOPLE ARE LEAVING COMPANIES TO CREATE KALEIDOSCOPE CAREERS* 38–44 (2006). See also JOAN C. WILLIAMS ET AL., “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT – THE UNTOLD STORY OF WHY WOMEN LEAVE THE WORKFORCE 3 (2006), available at <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>; Marilyn Gardner, *The Truth Behind Women “Opting Out,”* CHRISTIAN SCI. MONITOR, Oct. 30, 2006, <http://www.csmonitor.com/2006/1030/p13s02-wmgn.html> (reporting that weak labor market and inflexible work policies are main reasons women are leaving the workplace).

¹⁹ Brenda Major & Laurie T. O’Brien, *The Social Psychology of Stigma*, 56 ANN. REV. PSYCHOL. 393, 406–11 (2005) (describing psychological effects of social stigma and discrimination, including stress responses that can affect self-esteem, academic achievement, and health); Elizabeth A. Pascoe & Laura Smart Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 PSYCHOL. BULL. 531 (2009) (providing comprehensive,

simply stay put but feel unmotivated about their work. For the employer, any of these results may be detrimental to the productivity and bottom line of the organization. Having an employee raise a concern or, even worse, file a lawsuit alleging discrimination or harassment can be a frightening, highly disruptive, and expensive prospect. Corporate counsel report that “workplace litigation—and especially class action and multi-plaintiff lawsuits—remains one of the chief exposures driving corporate legal budget expenditures, as well as the type of legal dispute that causes the most concern for their companies.”²⁰ Business groups complain that the cost of defending discrimination cases is so astronomical that “even when employers win, they lose.”²¹ A study by the Center for American Progress estimated the costs of workplace discrimination at \$64 billion, “represent[ing] the annual estimated cost of losing and replacing more than 2 million American workers who leave their jobs each year due to unfairness and discrimination.”²²

Given these concerns, the development of internal workplace alternative dispute resolution (ADR) methods paralleled the growth in antidiscrimination laws.²³ As Congress passed landmark individual rights statutes, employers worried about the impact of workplace discord and the risk of costly litigation developed various internal approaches to resolve claims and promote smooth operations. Workplace ADR programs also grew because of dramatic changes in the structure of many organizations.²⁴ Rather than top-down, command-and-control hierarchies, many companies now rely on team-based work, with more dispersed and discretionary decision making.²⁵ To attract and retain highly skilled employees, many employers have developed conflict management systems that give employees a greater sense of empowerment, voice, and self-determination in addressing workplace issues.²⁶

The fiftieth anniversary of Title VII is an opportune time for employers to take stock of their internal conflict management strategy, particularly as related to the goal of discrimination prevention. Does the organization have a strategy, other than avoidance and panicked calls to legal counsel? Does the organization’s approach support the normative goal of building a work culture that values and practices equality and dignity norms? When concerns or complaints are

meta-analysis that shows that perceived discrimination has significant negative effect on mental and physical health).

²⁰ SEYFARTH SHAW, LLP, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 3 (2014 ed.), *available at* <http://www.seyfarth-classaction.com/2014/2014wcar/index.html>.

²¹ U.S. CHAMBER OF COMMERCE, *supra* note 9, at 18.

²² CROSBY BURNS, CENTER FOR AMERICAN PROGRESS, THE COSTLY BUSINESS OF DISCRIMINATION 1 (2012), *available at* http://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf. Management professor Peter Hom estimates that the cost of replacing a departing employee is somewhere between 93 and 200 percent of the departing employee’s salary. *Id.* at 10. *See* RODGER W. GRIFFETH & PETER W. HOM, RETAINING VALUED EMPLOYEES 1–2 (2001) (describing how turnover can be costly to organizations).

²³ David B. Lipsky & Ariel C. Avgar, *Toward a Strategic Theory of Workplace Conflict Management*, 24 OHIO ST. J. ON DISP. RESOL. 143, 143 (2008).

²⁴ *Id.* at 152.

²⁵ *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 174–83 (2004).

²⁶ Lipsky & Avgar, *supra* note 23, at 153–54; DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 68 (2003) (noting that many firms “have come to realize that delegating responsibility for controlling work to teams is consistent with delegating authority for preventing or resolving conflict to the members of those teams”).

raised, does the organization reflect on lessons learned and make changes to prevent future problems—or simply try to get rid of the claim as quickly and quietly as possible?

There is reason to be skeptical about the effectiveness of the approaches many organizations use to prevent and address discrimination internally. Most employers default—typically without any forethought or planning—to a legalistic, zero sum response.²⁷ A legalistic approach to anti-discrimination seeks to weed out and punish “bad apple” actors motivated by animus or explicit prejudice.²⁸ The goal of a legalistic approach is to reduce the risk of litigation and resolve claims—through settlement or hard-fought litigation.²⁹ On its face, this seems to be prudent and rational. Indeed, it may be the only option after a lawsuit has already been filed in court.

While an adversarial approach may win cases in court, or make them “go away” through settlements, managing *internal* workplace conflict with a reactive, zero sum mindset may be destructive to the organization’s culture and undermine the objectives of antidiscrimination laws. Some employment law scholars have criticized workplace ADR programs as cosmetic, arguing that they either fail to address discrimination and harassment adequately or unintentionally make it worse.³⁰ Few companies view discrimination concerns as constructive learning opportunities to identify and correct systemic dysfunctions in its employment practices that may have contributed to the problem in the first place.³¹

This article explores an alternative approach—restorative practices—that may cultivate a learning infrastructure to prevent and address workplace discrimination. Restorative practices provide a continuum of proactive dialogic processes to promote stronger relationships or “social capital.” Restorative practices are founded on the basic proposition that “human beings change their behavior based on the bonds that they form.”³² Those bonds can be developed through

²⁷ A study of ADR programs at Fortune 1,000 companies found that “many companies continue to employ ad hoc approaches to some or all kinds of conflict, and devote little time to deliberating on the choices they make—often by default—with regard to dispute resolution, both at the time of contracting and after disputes arise.” Thomas Stipanowich & J. Ryan Lamare, *Living with ‘ADR’: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 68 (2013).

²⁸ David Brooks, Op-Ed., *Beware Stubby Glasses*, N.Y. TIMES, Jan. 10, 2013, http://www.nytimes.com/2013/01/11/opinion/brooks-beware-stubby-glasses.html?_r=0 (“[M]any of our anti-discrimination policies focus on finding the bad apples who are explicitly prejudiced. In fact, the serious discrimination is implicit, subtle and nearly universal.”) See also *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 257 (1981) (describing that the ultimate inquiry in disparate treatment cases is whether conduct was motivated by “discriminatory animus”). Many scholars argue that Title VII already prohibits discriminatory actions that are motivated by implicit bias. See, e.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009); Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1072–89 (2009) (arguing that Title VII covers conscious and unconscious bias); Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1146–52 (1999) (same).

²⁹ Lipsky & Avgar, *supra* note 23, at 145.

³⁰ See Susan Bisom-Rapp et al., *A Critical Look at Organizational Responses to and Remedies for Sex Discrimination*, in *SEX DISCRIMINATION IN THE WORKPLACE: MULTIDISCIPLINARY PERSPECTIVES* 273, 274–78 (Faye J. Crosby et al. eds., 2007).

³¹ See *infra* Part I.B.

³² This philosophy undergirds the teaching of the International Institute for Restorative Practices. See M. Diane McCormick, *Susquehanna Township School District Adopts Anti-Bullying Program*, PENNLIVE, May 27, 2012, http://www.pennlive.com/midstate/index.ssf/2012/05/susquehanna_township_school_di_18.html (quoting IIRP instructor Steve Korr).

regular opportunities for interaction and dialogue, grounded in principles of respect, reciprocity, and accountability. Based on cognitive science and psychological research, the proactive elements of restorative practices may be effective in reducing explicit and implicit biases and promoting commitment to egalitarian norms.

Instead of focusing primarily on the evil of discrimination and the risk of litigation (which may breed defensiveness, resentment, and backlash), a restorative approach fosters a work culture that values and practices equality norms. Instead of framing equal opportunity in negative terms (avoiding discrimination against protected groups and punishing bad apple discriminators), a restorative approach frames the goal in positive, universal terms (workplaces that honor dignity and opportunity for everyone). Instead of a negative vision of “getting away from what we don’t want,”³³ a restorative approach articulates a positive vision of what organizations want to create. Studies have shown that framing antidiscrimination goals in more positive, universal terms may cause individuals to internalize norms of egalitarianism and develop empathy for differences.³⁴

In addition to the proactive community-building elements, restorative practices provide managers and employees with a range of reactive options to address discrimination complaints. These processes are designed to minimize defensive routines that may provoke retaliation and get in the way of addressing the problem. Rather than punishing the alleged wrongdoer or decision maker, a restorative approach focuses on understanding the impact of the perceived harm, repairing it, and preventing it in the future.³⁵

This article blends the fields of organizational management, conflict resolution, and antidiscrimination law. It also examines cognitive science and psychological research to analyze how restorative practices may reduce biases and prevent discrimination from occurring in the first place. When discriminatory harm occurs, restorative practices promote organizational learning to identify and correct practices that may have led to inequitable treatment. Restorative practices offer a holistic approach that may merge strategic organizational goals—such as building high performance teams, promoting cultures of mutual respect and trust, reducing turnover, decreasing conflicts, and avoiding costly lawsuits—with the policy goals of employment discrimination laws.³⁶ A restorative approach is not simply a “process” but a set of values that become integrated into the “DNA” of the organization.³⁷ The values of respect, dignity, transparency, relationships, trust, and accountability guide a restorative approach.³⁸

³³ PETER M. SENGE, *THE FIFTH DISCIPLINE: THE ART & PRACTICE OF THE LEARNING ORGANIZATION* 146 (2006) (observing that most social movements operate through “negative vision,” focusing on getting away from what we don’t want, rather than on creating what we do want”).

³⁴ See Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715 (2011)

³⁵ Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161 (2007) (noting that restorative justice seeks to “repair, restore, reconcile, and reintegrate the offenders and victims to each other and to their shared community”).

³⁶ Conflict management scholarship examines how an employer’s approach to conflict and use of ADR relate to the organization’s mission and “strategic goals and objectives.” Lipsky & Avar, *supra* note 23.

³⁷ John Braithwaite & Heather Strang, *Introduction: Restorative Justice and Civil Society*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY 2* (Heather Strang & John Braithwaite eds., 2001) (“[I]t is best to see restorative justice as involving a commitment to both restorative processes and restorative values.”).

³⁸ See *id.* (listing restorative justice values).

The term “restorative” may strike some as “touchy-feely.” But the basic precepts of restorative practices are not new ideas in the business arena. Restorative processes can be conceptualized as tools that facilitate “organizational learning”—a well-established management theory developed by business professors Chris Argyris and Donald A. Schön and enhanced by best-selling management author Peter Senge.³⁹ Argyris, Schon, and Senge were not talking about restorative practices, but their organizational management theory shares many of the same fundamental principles. Like restorative practices, a learning organization encourages strong connections and trust among members of the team, robust dialogue that “explores complex difficult issues from many points of view,” and scrutiny of “mental models” or unconscious assumptions that can cause misunderstandings and disrupt productivity, innovation, and change.⁴⁰ Learning organizations “cultivate tolerance, foster open discussion, and think holistically and systemically.”⁴¹ For example, some companies, like Southwest Airlines, promote middle managers to executive positions partly based on their ability to spark vigorous but respectful internal debates.⁴² The global automaker Ford has transformed its work culture—and dramatically improved company profitability—with an initiative that relies on high levels of employee engagement and is guided by the values of trust, respect, and strong relationships.⁴³

Restorative practices dovetail with these emerging business models that emphasize engagement, relationships, and intergroup dialogue to generate diverse perspectives, encourage reflective analysis, and improve decision making. Discrimination is a complex, nuanced problem that is not always easy to detect and correct. A restorative model recognizes that an organization—and the people who work for it—must *learn* not to discriminate. This does not mean the traditional legalistic conception of weeding out “bad apple” biased individuals and “teaching them a lesson.” Rather, proactive restorative processes engage everyone in the organization with a sense of ownership in and commitment to the mission of building an egalitarian workplace.

The Article proceeds as follows: Part I provides a brief overview the complex dynamics of workplace discrimination and a snapshot of common employer responses to the problem. Part II constructs a theoretical foundation to examine how restorative practices could be used by employers to reduce bias, build relationships across categorical divides, and manage defensive routines which might otherwise lead to hostility, retaliation, and a continuing cycle of discrimination. Part III presents a typology of employer approaches to discrimination prevention, juxtaposing a restorative approach with other common strategies. This Part also

³⁹ SENGE, *supra* note 33.

⁴⁰ *Id.* at 3–11.

⁴¹ David A. Garvin et al., *Is Yours a Learning Organization?* HARV. BUS. REV., Mar. 2008, at 109, 109.

⁴² Joann S. Lublin, *The High Cost of Avoiding Conflict at Work*, WALL ST. J. (Feb. 14, 2014), <http://www.wsj.com/articles/SB10001424052702304315004579382780060647804>.

⁴³ See Jim Tierney, *Ford Motor Company: Employee Engagement Sparks Customer Engagement*, LOYALTY 360.ORG (Nov. 20, 2014), <http://loyalty360.org/resources/article/ford-motor-company-employee-engagement-sparks-customer-engagement> (describing how Ford engaged employees to build a corporate culture of “trust, being in control, respect, and relationships”); Joshua Wachtel, *IIRP Graduate Beth Alosi Applies Restorative Practices at Ford Motor Company*, RESTORATIVE WORKS LEARNING NETWORK (Feb. 10, 2014), <http://restorativeworks.net/2014/02/iirp-graduate-beth-alosi-applies-restorative-practices-ford-motor-company/> (describing how Ford’s Consumer Experience Movement is similar to restorative practices because it operates “on a philosophy of building relationships based on respect, having trust, and giving people control over the things that affect them”).

discusses some challenges and potential criticisms of a restorative approach to workplace discrimination.

I. THE DYNAMICS OF EMPLOYMENT DISCRIMINATION

A. Sources of Workplace Inequities

Over the past half-century since Title VII was enacted, a significant body of research has provided a more sophisticated and nuanced understanding of the complex dynamics that may generate workplace inequities. Blatant animus towards and outright exclusion of particular groups is not as prevalent as it was in 1964, but remains a problem.⁴⁴ Antidiscrimination laws are most successful at reaching this type of “first generation” discrimination. A more pervasive, complex, and less easily addressed issue is what has been dubbed “second generation discrimination.”⁴⁵ As Professor Susan Sturm has explained, “[c]ognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality.”⁴⁶ Structural inequality results from “institutional and cultural dynamics that reproduce patterns of underparticipation and exclusion.”⁴⁷ As Sturm explains, applying the remedies developed for “first generation discrimination” and explicit prejudice does not “examine or directly encourage revision of the intra-organizational culture and decision processes that entrench bias, stereotyping, and unequal access.”⁴⁸

Substantial cognitive science research shows that even well-intentioned people may behave in ways that inadvertently disadvantage certain groups.⁴⁹ The most well-known research on implicit bias derives from the computer-based Implicit Association Test (IAT), which measures time-response differentials to various associations relating to a variety of

⁴⁴ For examples of recent cases involving outright exclusion of or blatant hostility towards individuals based on race and color, see the EEOC’s E-Race Initiative case list at www.eeoc.gov/eeoc/initiatives/e-race/case-list.cfm. See also Nathan Place & Erin Durkin, “*Because You’re Black*”: *Framboise Patisserie in Middle Village, Queens Hit with \$25,000 in Fines, Penalties in Discrimination Case*, N.Y. DAILY NEWS (Sept. 29, 2013), <http://www.nydailynews.com/new-york/queens-bakery-hit-25-000-fines-penalties-discrimination-case-article-1.1470612> (describing bakery that told African-American woman that she could not be hired to work the front counter because she was black and “would scare away customers”).

⁴⁵ Susan P. Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

⁴⁶ *Id.* at 460.

⁴⁷ Susan P. Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006); Sturm, *supra* note 45, at 460.

⁴⁸ Sturm, *supra* note 45, at 467–68.

⁴⁹ See John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. IN ORGANIZATIONAL BEHAV. 39 (2009); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006). For a compilation and summary of recent studies about implicit bias, see CHERYL STAATS, KIRWAN INSTITUTE, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014 (2014), available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf>.

characteristics, such as race, gender, disability, and other factors.⁵⁰ “[T]he science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”⁵¹ In other words, our unconscious may be running the show more than our expressed beliefs.⁵² Research shows that implicit biases are pervasive. For example, Professors Kang and Banaji make the “conservative estimate” that “seventy-five percent of Whites (and fifty percent of Blacks) show anti-Black bias, and seventy-five percent of men and women” associate female with family more easily than they do with career.”⁵³

Individuals may have sincere beliefs in equal opportunity and fair treatment. Nevertheless, they may hire individuals who have white-sounding names over black-sounding names⁵⁴ and Swedish names over Arab names,⁵⁵ pay working fathers higher wages than working mothers,⁵⁶ interrupt women who are speaking in meetings more frequently than they interrupt

⁵⁰ See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited Feb. 9, 2015); see also IMPLICIT MEASURES OF ATTITUDES (Bernd Wittenbrink & Norbert Schwarz eds., 2007) (describing various research methodologies used to measure implicit attitudes); Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 436 (2001) (describing experiment in which those who revealed stronger negative attitudes towards black individuals on the IAT had more negative social interactions with a black versus white experimenter).

⁵¹ Greenwald & Krieger, *supra* note 49, at 946.

⁵² Eric Kandel, a world-renowned neuroscientist who won the Nobel Prize for his work about learning and memory, estimates that “between 80 and 90 percent of what we do is unconscious.” Steve Ayan, *Speaking of Memory*, SCIENTIFIC AMERICAN MIND, Oct./Nov. 2008, at 16 (interview with Eric Kandel). See also ERIC R. KANDEL, IN SEARCH OF MEMORY: THE EMERGENCE OF A NEW SCIENCE OF THE MIND (2007).

⁵³ Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1072 (2006); see also Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 101, 112 (2002) (finding that all social groups hold implicit biases). Some scholars have criticized the scientific validity of implicit bias research and argued that it should not be used to alter antidiscrimination laws. See Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1023 (2006) (arguing that implicit prejudice should not be used for legislative reforms or as litigation evidence).

⁵⁴ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (finding that applicants with white-sounding names are 50 percent more likely to get invited for an interview than applicants with African-American-sounding names; see also Marianne Bertrand et al., *Implicit Discrimination*, 95 AM. ECON. REV. 94 (2005) (finding that scores on implicit stereotyping tests correlated with likelihood of selection of African American names, especially when selectors felt rushed).

⁵⁵ Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence* (IZA Discussion Paper No. 2764, 2007), available at <http://ftp.iza.org/dp2764.pdf> (finding that employment recruiters were three times more likely to offer interviews to individuals with Swedish names than Arab names).

⁵⁶ For studies about the “motherhood penalty” for wages, see Deborah J. Anderson et al., *The Motherhood Wage Penalty Revisited: Experience, Heterogeneity, Work Effort, and Work-Schedule Flexibility*, 56 INDUS. & LAB. REL. REV. 273, 273–76 (2003) (finding motherhood wage penalty of approximately five percent for one child and seven percent for two or more children); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 219–20 (2001) (finding that interruptions from work, working part-time, and decreased seniority/experience collectively explain no more than about one-third of the motherhood penalty of approximately seven percent per child); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1297 (2007) (finding that working mothers were judged as less competent and received salary offers that were 7.4% less than nonmothers, and that working fathers were rated as more committed to their jobs and received higher salaries than nonfathers).

men,⁵⁷ penalize women who are outspoken, competitive and ambitious (and reward men for similar behaviors),⁵⁸ or exhibit negative behaviors around members of a different racial or ethnic group. Studies have shown that “people often respond to members of other groups with lack of eye contact and warmth, tensing of facial muscles, increased blinking, anxious voice tone, embarrassing slips of the tongue, awkward social interactions, and maintenance of physical distance and formality.”⁵⁹ The more rushed or discretionary the decision making process is, the more likely hidden factors or implicit biases will influence decision making in a way that disadvantages certain groups.⁶⁰

The idea that our behavior may be motivated by factors that are automatic and invisible to us—and counter to our espoused beliefs—is not a new concept. Philosopher and scientist Michael Polanyi developed the concept of “tacit knowledge:” we may have hunches, or be able to do something, but not be able to articulate how we know it.⁶¹ Organizational management scholars Chris Argyris and Donald A. Schön distinguish between what we *think* we do, which they called “theories-in-action,” and what we actually *do*, which they called “theories-in-use.”⁶² Theories-in-action are our predictions about how we typically would act in a given situation. Theories-in-use can only be learned through observations of behavior.⁶³ Most of us do not realize the incompatibility between our theories-in action (espoused beliefs) and our theories-in-

⁵⁷ Sheryl Sandberg, the Chief Operating Officer of Facebook, and Wharton business school Professor Adam Grant observed: “We’ve both seen it happen again and again. When a woman speaks in a professional setting, she walks a tightrope. Either she’s barely heard or she’s judged as too aggressive. When a man says virtually the same thing, heads nod in appreciation for his fine idea. As a result, women often decide that saying less is more.” Sheryl Sandberg & Adam Grant, *Speaking While Female*, N.Y. TIMES, Jan. 11, 2015, Sunday Review, at 3. For studies showing that women may experience negative consequences when they talk more in the workplace, see Victoria L. Brescoll, *Who Takes the Floor and Why: Gender, Power, and Volubility in Organizations*, 56 ADMIN. SCIENCE Q. 622 (2011) (describing studies showing that powerful women may experience backlash if they talk more in the workplace).

⁵⁸ For research suggesting that women who violate the stereotypical prescription for female “niceness” can be penalized in the workplace, see Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743 (2001); Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573 (2002); Madeline E. Heilman et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. APPLIED PSYCHOL. 416 (2004); Madeline E. Heilman & Tyler G. Okimoto, *Why are Women Penalized for Success at Male Tasks? The Implied Communitarity Deficit*, 92 J. APPLIED PSYCHOL. 83–85 (2007).

⁵⁹ Bartlett, *supra* note 28, at 1897 & n.5 (summarizing psychological research).

⁶⁰ See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (reviewing cognitive psychology scholarship regarding the roles played by cognition and motivation in decision making). For example, women are more likely to receive lower salary offers than similarly qualified men when the wage-setting process is more ambiguous and not guided by explicit criteria. See Hannah Riley Bowles & Kathleen L. McGinn, *Gender in Job Negotiations: A Two-Level Game*, 24 NEGOT. J. 393, 396 (2008) (finding “significant gender differences” between the salaries accepted by similarly situated male and female MBA students in “high-ambiguity industries”); Hannah Riley Bowles et al., *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J. PERSONALITY & SOC. PSYCHOL. (2005).

⁶¹ MICHAEL POLANYI, THE TACIT DIMENSION 11 (1966).

⁶² CHRIS ARGYRIS & DONALD A. SCHÖN, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS (4th ed. 1977). The work of Argyris and Schön has been influential in developing clinical legal education pedagogy that emphasizes the “reflective practitioner.” See Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401 (2000).

⁶³ SENGE, *supra* note 33, at 7.

use (actions).⁶⁴ Likewise, “most people tend to be unaware of how their attitudes affect their behavior and also unaware of the negative impact of their behavior on others.”⁶⁵

Building on the work of Argyris and Schön, MIT business theorist Peter Senge developed practice principles for the “learning organization”. Senge uses the term “mental models” to describe the unexamined, automatic motivators of our conduct. Senge defines mental models as “deeply ingrained assumptions, generalizations, or even pictures or images that influence how we understand the world and how we take action. Very often, we are not consciously aware of our mental models or the effects that they have on our behavior.”⁶⁶ Thus, both organizational learning theory and cognitive science research teach that our beliefs may differ from our actions. We may be unaware of the harm these implicit biases or mental models inflict on other individuals, or on the larger organization.

Compounding the complexities of implicit social cognition and mental models, issues such as race and gender have emotional and relational dimensions that can affect intergroup workplace relations.⁶⁷ As law professor Tristin Green explains, “[r]acial emotion is the emotion or emotions related to race that people experience when they engage in interracial interaction.”⁶⁸ A growing body of social science research about racial emotion⁶⁹ suggests “that reducing negative emotion experienced by members of all racial groups in interracial interaction at work may be an important key to reducing prejudice and intergroup inequality.”⁷⁰ In addition, perception plays a key role in discrimination. An individual’s past experiences may make them more likely to perceive certain actions as disrespectful or discriminatory, or to perceive that someone who complains about discrimination is overreacting.⁷¹

In sum, workplace inequities can arise from a complex array of factors, including explicit and implicit biases, unconscious assumptions or mental models, and differing perceptions of the same event.

B. Employer Approaches to Workplace Discrimination

⁶⁴ *Id.* at 6–7.

⁶⁵ *Id.* at vii.

⁶⁶ *Id.* at 9.

⁶⁷ See Green, *supra* note 17, at 970–78 (reviewing research about emotion in interracial interactions).

⁶⁸ *Id.* at 961–62.

⁶⁹ See Linda R. Troop & Thomas F. Pettigrew, *Intergroup Contact and the Central Role of Affect in Intergroup Prejudice*, in *THE SOCIAL LIFE OF EMOTIONS* 246, 250 (Larissa Z. Tiedens & Colin Way Leach eds., 2004) (summarizing study suggesting importance of affective or emotional dimensions of prejudice and contact over cognitive dimensions).

⁷⁰ Green, *supra* note 17, at 964.

⁷¹ See Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Laws*, 96 *MINN. L. REV.* 1275, 1303–18 (2012) (analyzing cognitive psychology research that shows that individuals have differing perceptions of discrimination, with majority group members (white males) highly likely to believe that “discrimination is rare,” African Americans and historically disadvantaged groups more likely to believe that “discrimination is common”); Samuel L. Gaertner & John F. Dovidio, *Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common Ingroup Identity Model*, 61 *J. SOC. ISSUES* 615, 625 (2005) (reviewing research showing that white and black individuals perceive of the same encounters in different ways); Robinson, *supra* note 14, at 1093.

Many scholars have noted the limited ability of litigation-based remedies in addressing second-generation discrimination.⁷² Some have argued for the imposition of harsher penalties and expanded legal protections.⁷³ Others have urged more structural approaches within organizations.⁷⁴ Susan Sturm has defined a structural approach as one that “encourages the development of institutions and processes to enact general norms in particular contexts.”⁷⁵ The most sophisticated of the existing employer approaches to addressing discrimination and harassment complaints are internal mediation or integrated conflict management programs.

In mediation, a third-party neutral facilitates a conversation or negotiation between parties who are in conflict.⁷⁶ Mediation has been recommended as a way to allow disputants to voluntarily resolve their own conflicts on their own terms and perhaps transform their relationships as well.⁷⁷ Empirical studies have found workplace mediation programs to be generally effective, especially when the disputing parties have the ability to communicate directly to better understand each other’s perspectives or when a sincere apology is given.⁷⁸

⁷² Sturm, *supra* note 45, at 460–61 (noting limitations of litigation in addressing structural features in the workplace that permit discrimination). Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1215 (1989) (“[I]t would be unwise to rely on litigation as the sole, or even the primary, means of reform.”).

⁷³ See, e.g., Robinson, *supra* note 14, at 1167 (proposing intermediate liability for unconscious bias when “a reasonable outsider would find the claim compelling, although an insider judge may not.”); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 851–53 (2007) (proposing liability for workplace procedures that inadvertently facilitate discrimination); Ann C. McGinley, *!Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415, 481–82 (2000) (arguing for mandatory presumption of discrimination after plaintiff makes prima facie showing of discrimination and demonstrates that defendant’s reason for the action is a pretext); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993) (proposing tort-like duty on employer to take all reasonable, affirmative precautions to prevent discrimination).

⁷⁴ Bartlett, *supra* note 28, at 1893 (describing how aggressive legal strategies may be counterproductive at eliminating implicit bias in the workplace); Sturm, *supra* note 45, at 460–61 (noting limitations of litigation in addressing structural features in the workplace that permit discrimination); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2070 (2002) (“[W]e should strive to create structurally egalitarian work settings in which employees can work with management to forge their own norms about sexual conduct.”); Abrams, *supra* note 72, at 1196–97 (noting that “litigation imposes enormous costs, in hostility and in ostracization, on the women involved. Lingering resentments fostered by litigation can penalize women external to the suit itself”).

⁷⁵ Sturm, *supra* note 45, at 463.

⁷⁶ Although there are different practice styles of mediation, the Maryland Judiciary has a generally applicable definition: “Mediation is a process in which a trained neutral person, a ‘mediator,’ helps people in a dispute to communicate with one another, to understand each other, and if possible, to reach agreements that satisfy everyone’s needs.” *About Mediation*, MARYLAND JUDICIARY, <http://www.courts.state.md.us/macro/aboutmediation.html> (last visited Feb. 20, 2015). For a primer on mediation, see Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty*, 95 IOWA L. REV. 747, 779–80 (2010).

⁷⁷ See Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145 (2004) (summarizing studies about employment dispute resolution and concluding that “[t]he evaluation and field research literature suggests that mediation produces better organizational outcomes than either no intervention or an adjudicatory one like arbitration”). See also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: A TRANSFORMATIVE APPROACH TO CONFLICT* (rev. ed. 2005) (describing transformative approach to mediation).

⁷⁸ See, e.g., Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 1–2 (2009) (reviewing “results of a longitudinal study of employment mediation for discrimination cases” at the United States Postal Services and arguing “that the design of this program, which entails voluntary mediation in the transformative model . . . furthers goals of justice at the workplace while preserving worker access to traditional remedies and producing substantial benefits in efficiency of

Another common approach that employers have used to limit potential liability for workplace discrimination is pre-dispute, mandatory arbitration clauses. These contracts of adhesion require employees to waive their right to a jury trial in any employment matter as a condition of receiving a job or other benefits. Although heavily criticized,⁷⁹ the Supreme Court has upheld pre-dispute mandatory arbitration in employment matters.⁸⁰

The most successful internal dispute resolution programs typically involve employees in developing systems that relate to the specific workplace culture, are continually updated based on data about systemic patterns of dysfunction or success, and build in accountability and outcome measures.⁸¹ Law professor Susan Sturm and federal ombudsman Howard Gadlin recommend that informal conflict resolution systems include a “feedback loop” to identify systemic problems that need to be addressed.⁸² For example, the Center for Cooperative Resolution/Office of the Ombudsman at the National Institutes of Health both “resolves individual, private disputes *and* generates systemic solutions and public norms.”⁸³

Unfortunately, many organizations promulgate conflict management programs without any input from stakeholders such as employees and unions.⁸⁴ They may adopt programs considered to be “best practices,” without any strategic analysis of whether and how the plan integrates with the company’s mission, culture, and operations. With respect to discrimination specifically, many employers adopt zero-tolerance discrimination and harassment policies and mandate that employees attend training programs.⁸⁵ A tough-sounding policy prohibiting discrimination is laudable, but this approach may provoke resentment and even exacerbate

dispute processing for employer and employee alike”). *See also* Ellen Waxman & Michael Roster, *Alternative Approaches to Solving Workplace Disputes*, ACCA DOCKET, Feb. 2000, at 36, 43–44 (describing Stanford University’s Internal Mediation Program for workplace disputes as “quite successful” in resolving employee grievances and finding that mediation allowed discussions of workplace problems that typically would not occur); LOCAL GOV’T ASS’N & THE PROFESSIONAL MEDIATORS’ ASS’N, WIN-WIN: A STUDY INTO THE ROLE AND IMPACT OF WORKPLACE MEDIATION WITHIN LOCAL GOVERNMENT 25 (Jan. 2014), *available at* http://www.professionalmediator.org/uploads/textareas/file/Win-Win_%20A%20study%20into%20the%20impact%20of%20mediation%20within%20Local%20Government.pdf (presenting studies that found positive results, including improved relationships, of various workplace mediation programs in local government agencies in the United Kingdom).

⁷⁹ *See, e.g.*, Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014); Michael Z. Green, *Retaliatory Employment Arbitration*, 25 BERKELEY J. EMP. & LAB. L. 201 (2014); Jean R. Sternlight, Tsunami, AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) (“By permitting companies to use arbitration clauses to exempt themselves from class actions, *Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued.”).

⁸⁰ *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (holding that employment discrimination claims can be subject to mandatory arbitration); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that age discrimination claim was subject to mandatory arbitration).

⁸¹ Sturm, *supra* note 45, at 519–20.

⁸² Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 62 (describing the Center for Cooperative Resolution/Office of the Ombudsman at the National Institutes of Health).

⁸³ *Id.*

⁸⁴ David B. Lipsky & Ariel C. Avgar, *The Conflict over Conflict Management*, DISP. RESOL. J., May/July 2010, at 11, 39.

⁸⁵ Employers adopt such policies because they may provide an affirmative defense to harassment claims. *See supra* note 10 (describing *Faragher/ Ellerth* defense).

workplace discrimination.⁸⁶ As Vicki Schultz has written in the sexual harassment context: “Training sessions that tell male supervisors and employees to curtail sex talk and conduct in order to avoid insulting women’s sexual sensibilities do nothing to solve the underlying structural problems, and risk reinforcing stereotypes of women as ‘different’ and more easily offended.”⁸⁷ An interdisciplinary team of scholars likewise concluded: “Rather than examining and addressing the root causes of the problem, a zero tolerance approach ‘runs the risk of increasing backlash against [historically disadvantaged groups], obfuscating proactive organizational climates, and emphasizing a form over substance approach to eradicating harassment.’”⁸⁸

In a zero tolerance approach, complaints are often resolved through a legalistic frame, the goal of which is either to punish the alleged wrongdoer or prove that the concern raised does not constitute unlawful discrimination. Approaching discrimination complaints through a retributive, zero-sum lens rarely leaves anyone—the complainant, the alleged wrongdoer, the employer, or the larger workforce—feeling like the problem that led to the complaint has been solved. If the complaint makes it into court, litigating a discrimination case can leave all parties feeling like they “lost” more than they gained, regardless of the actual outcome. Voltaire captured a similar sentiment long ago when he said: “I was never ruined but twice: once when I lost a lawsuit, and once when I won one.”⁸⁹

Employment discrimination cases tend to be highly adversarial, expensive,⁹⁰ long,⁹¹ and polarizing experiences for everyone involved. Of course, that could be said about litigation generally. But employment litigation is uniquely emotional given the highly personal matters involved, “more closely resembling divorce actions than classic corporate liability issues.”⁹² The careers and reputation of the parties can be at stake. Employment conflicts involve “the very personal core issues of validation and self-esteem.”⁹³ For many, a job is not only a means of earning a living; it can be central to one’s identity, self-worth, and sense of dignity.⁹⁴

Employment law practice tends to be grounded in a “villain-victim” paradigm, with management (and their counsel) and employees (and their attorneys) demonizing and mistrusting

⁸⁶ 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 BERKELEY J. EMP. & LAB. L. 1 (2001); Bartlett, *supra* note 28, at 1900 (analyzing how zero tolerance harassment codes and training can cause backlash and exacerbate discrimination and harassment).

⁸⁷ Schultz, *supra* note 74, at 2185.

⁸⁸ Margaret S. Stockdale et al., *Coming to Terms with Zero Tolerance Sexual Harassment Policies*, 4 J. FORENSIC PSYCHOL. PRAC. 65, 65 (2004).

⁸⁹ Joseph G. Bisceglia, *ADR and the Image of Lawyers*, 96 ILL. B.J. 8 (2008).

⁹⁰ BURNS, *supra* note 22, at 1, 3 (estimating that workplace discrimination costs businesses \$64 billion in annual turnover costs and that the top ten private plaintiff employment discrimination lawsuits in 2010 cost firms more than \$346 million). Douglas L. Parker, *Escape from the Quagmire: A Reconsideration of the Role of Teamsters Hearings in Title VII Litigation*, 10 INDUS. REL. L.J. 171, 173 (1988) (explaining that back pay remedies in Title VII cases are often “complicated, time consuming, and expensive”).

⁹¹ Parker, *supra* note 90, at 173.

⁹² Peter Reuter, *The Economic Consequences of Expanded Corporate Liability: An Explanatory Study*, N-2807 INST. FOR CRIM. JUST. 21, 23 (1988).

⁹³ Joe Epstein, *Effective Mediation for Employment Cases*, PREVENTIVE L. REP., Winter 2001, at 29.

⁹⁴ See, e.g., Vicki Shultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000).

the morality and motives of the other side.⁹⁵ Indeed, the “victim-villain” paradigm is baked into the *McDonnell-Douglas*⁹⁶ burden-shifting scheme, used to prove disparate treatment based on circumstantial evidence: First, the plaintiff alleges disparate treatment in the terms and conditions of employment based on protected characteristic like race or sex, which the manager or decision maker involved may perceive as a personal attack in which they are being labeled as a racist or misogynist. Second, the employer must proffer a reason other than discrimination for the alleged conduct, which often comes across to the complainant as an accusation that he or she is delusional or incompetent. Finally, the complainant then bears the ultimate burden of proving that the employer’s proffered excuse is a mere “pretext” for discrimination—in other words, a lie.⁹⁷

Under this standard, one party not only loses the case, but is deemed deceitful or evil.⁹⁸ This standard provides little incentive for reflection and learning from incidents of discrimination, and strong impetus for denial, defensiveness, self-protection, and blame. So much is at stake beyond the merits of the claim. Consider the typical experience of the parties involved in an employment discrimination matter:

Complainant. Given the enormous potential repercussions, many employees who perceive discrimination or harassment remain silent.⁹⁹ Those who muster up the courage to report discrimination internally may simply want the problem solved—for the harassing conduct to stop, for pay rates to be made equitable, to be respected and rewarded fairly for their work. For some, “the very act of reporting is an effort to regain some control over the situation and to reclaim some of the dignity that they have lost.”¹⁰⁰ They may also want an explanation, or perhaps an apology, but they often do not get it, even if they eventually get a monetary settlement or court victory.

⁹⁵ Krieger, *supra* note 60, at 1167 (“Every successful disparate treatment story needs a villain.”). An attorney who once worked at the EEOC representing employees, and then became a management attorney representing employers, described the “victim/villain melodrama of discrimination litigation,” with plaintiffs’ attorneys viewing Human Resource managers as “boobs” or “haters” and management attorneys as the “Dark Side” and the “Forces of Evil.” *Dismantling the Villain/Victim Paradigm*, EEO LEGAL SOLUTIONS (Oct. 9, 2013), <http://eoelegalsolutions.com/dismantling-the-villainvictim-paradigm/>. At the same time, this attorney characterized plaintiffs’ attorneys as greedy and dishonest, writing that they “steer employees toward claims and theories with the highest potential recovery.” *Id.* As David Yamada has observed, employment cases even take overtones of a legendary Biblical battle: “Modern employment litigation all too often encompasses the David versus Goliath scenario of an aggrieved worker and a small plaintiffs’ law firm vying against a large company armed with an overstaffed team of attorneys.” David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 535 (2009).

⁹⁶ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under the *McDonnell Douglas* standard, the plaintiff bears the initial burden of showing that he or she is a member of a Title VII protected class and suffered an adverse employment action. The employer then bears the burden of producing a non-discriminatory reason for the adverse employment action. The burden of production and ultimate burden of proof then shifts to the plaintiff to show that the employer’s reason is unworthy of credence or a mere “pretext” for discrimination. *See also* *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 248 (1981) (explaining the *McDonnell Douglas* burden-shifting standard).

⁹⁷ I am indebted to Professor Michael Fischl for this observation.

⁹⁸ *See* Krieger, *supra* note 60, at 1177–78 (describing *McDonnell-Douglas* model of disparate treatment proof and observing that “finding against an employer at the third stage of proof is, in essence, finding that the employer has lied to the plaintiff and the court”).

⁹⁹ *See* note 13 *supra*.

¹⁰⁰ Brianne J. Gorod, *Rejecting Reasonableness: A New Look at Title VII’s Anti-Retaliation Provisions*, 56 AM. U. L. REV. 1469, 1513–14 (2007).

Employees who report discrimination are rarely made whole or “restored” in economic terms. Those who file discrimination charges typically lose their cases,¹⁰¹ and their jobs.¹⁰² As one executive coach said, a discrimination case is “a vampire lawsuit—an emotional energy eater” that can be like “playing Russian roulette with your career and future.”¹⁰³ Even if the employee wins, a legal remedy can provide only monetary damages or equitable relief (such as reinstatement). It cannot make a target of discrimination feel “whole” with respect to the profound harms that discrimination can cause to one’s dignity,¹⁰⁴ health,¹⁰⁵ career,¹⁰⁶ and sense of self-worth.¹⁰⁷ These effects can linger long after the case ends, even if the complainant wins. For example, Beth Faragher, who won the landmark Supreme Court case *Faragher v. City of Boca Raton*,¹⁰⁸ wrote that she never achieved psychological closure: “[F]ifteen years after

¹⁰¹ Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 127 (2009) (“Over the period of 1979-2006 in federal court, the plaintiff win rate for jobs cases (15%) was much lower than that for non-jobs cases (51%).”).

¹⁰² See Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1177 (2000) (explaining and providing stories about how women who complain about sexual harassment experience negative impacts on their careers, and may be “blackballed” or “transferred” or not promoted as quickly). See also Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 818–19 (2005) (describing negative impacts of filing a harassment complaint on her career as a professor).

¹⁰³ Penelope Lemov, *What It Takes to Win an Age Discrimination Suit*, FORBES (Apr. 30, 2013), <http://www.forbes.com/sites/nextavenue/2013/04/30/what-it-takes-to-win-an-age-discrimination-suit/> (quoting executive coach Paul Bernard).

¹⁰⁴ As Beth Faragher wrote about the sexual harassment she experienced: “When these incidents occurred, I was upset, humiliated, embarrassed, afraid, and angry. The other female lifeguards and myself were treated as objects, less than animals, with absolutely no respect. My self-esteem suffered due to the behavior of these two supervisors.” Beth Ann Faragher, *Faragher v. City of Boca Raton: A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 417, 422 (2005). See also Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1423 (2004) (“[L]itigation usually will not offer plaintiffs a good means to ease the emotional wounds they suffered at work, nor an opportunity to obtain or make apologies. Moreover, the public aspect of litigation may also be detrimental to plaintiffs’ emotional wellbeing and future job prospects.”).

¹⁰⁵ See, e.g., *Tuli v. Brigham & Women’s Hosp.*, 656 F.3d 33, 44–47 (1st Cir. 2011) (plaintiff could not sleep or eat, lost weight, and suffered from anxiety, fear and nervousness which resulted in abdominal pain); *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 890–900 (11th Cir. 2011) (plaintiff was physically ill, could not eat or sleep, was nauseated, suffered chest pains and digestive problems, lost approximately forty pounds in five months, and often vomited before reporting to work); *Brady v. Gebbie*, 859 F.2d 1543, 1558 (9th Cir. 1988) (plaintiff suffered severe insomnia, anxiety, suicidal fantasies, severe depression and anxiety, and permanent psychological damage that would require treatment).

¹⁰⁶ Lawton, *supra* note 102, at 818–19 (describing how she was forced to leave her job as a business school professor after she filed a discrimination complaint); see also Anne Lawton, *The Emperor’s New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM 75, 126–28 (1999) (citing studies that show that women who file formal harassment claims are more likely to experience negative career impacts).

¹⁰⁷ Discrimination can destroy the sense of identity or self-respect that one derives from work. See, e.g., *McInerney v. United Air Lines, Inc.*, 463 Fed. App’x 709, 723 (10th Cir. 2011) (noting that plaintiff viewed her eleven-year career as “part of [her] identity” and she was devastated, humiliated, and could not stop crying after being terminated); *Lowery v. WMC-TV*, 658 F. Supp. 1240, 1266–67 (W.D. Tenn. 1987) (“The ultimate in humiliation” was when plaintiff news anchor “was forced from his on-air responsibilities in the wake of his filing of his Title VII lawsuit. Such action shamed [plaintiff] before his coworkers and the community and had an obvious devastating effect on him.”).

¹⁰⁸ 524 U.S. 775 (1998).

leaving the City of Boca Raton, I am still embarrassed and humiliated and angry about the incidents of harassment I suffered.”¹⁰⁹

Individual Respondent. Employment law scholarship tends to pay little attention to the ramifications of discrimination claims on the alleged individual or corporate wrongdoers. Professor Katherine Bartlett has argued that more attention should be given to the potential negative impact of coercive legal strategies in overcoming implicit biases and to strategies that, based on implicit cognition research, may be better able to motivate people to internalize and practice antidiscrimination norms.¹¹⁰ If meaningful social change is Title VII’s ultimate goal, changing the hearts and minds of those who may be prejudiced—and educating those who may not understand the inequities that can be caused by unexamined implicit stereotypes—is a critical component of achieving equal employment opportunity.

Few desire the label of “discriminator” or “harasser.”¹¹¹ Managers accused of discrimination or harassment may not understand the basis of the complaint. They may react defensively, thinking that their actions were justified or innocuous.¹¹² Given that their careers and reputations may be on the line, even those who intentionally discriminated may be defensive or blame the person who raised a concern.¹¹³ Studies have shown that rather than having their attitudes or behavior changed in a positive way, those accused of discrimination may feel resentful, shameful, defensive, or misunderstood.¹¹⁴ They may blame or lash out at the complainant.¹¹⁵ In other words, legal coercion may backfire, increasing stereotypes and discriminatory behavior and undermining the internalization of antidiscrimination norms.¹¹⁶ Or, they may want a chance to talk about what happened, clear the record, apologize, or make amends to erase the label of “discriminator” that has been assigned to them. Yet, they may be instructed by counsel not to have any interactions with the complainant during the investigation or litigation of the claim.¹¹⁷ This can leave employees who are accused of discrimination feeling

¹⁰⁹ Faragher, *supra* note 104, at 422.

¹¹⁰ Bartlett, *supra* note 28. See also Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. REV. 333, 334 (2008) (examining how employment discrimination litigation “may actually be exacerbating such biases”).

¹¹¹ See Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMPL. L. 49, 81 (1998) (observing that a discrimination claim “puts the moral reputation of the employer and its agents on the line”).

¹¹² See Krieger, *supra* note 60, at 1164 (describing the “offended, defensive decisionmakers accused of discrimination” that she encountered while an employment lawyer).

¹¹³ See generally Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the “Pretext-Plus” Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991). Many lawyers and commentators have remarked that the increase in the number of retaliation claims is not surprising because it is “human nature” to lash out at someone who has accused you of discrimination. See Jill Jusko, *Workforce: EEOC Retaliation Charges on the Rise*, INDUSTRYWEEK, May 9, 2013, <http://www.industryweek.com/labor-employment-policy/workforce-eeoc-retaliation-charges-rise>.

¹¹⁴ Bartlett, *supra* note 28, at 1901; see *infra* Part III.D (discussing shame and defensive responses that can be triggered by discrimination complaints). An employment mediator observed: “The wrongly accused may feel stigmatized, angry and humiliated. Even the justly accused may feel betrayed and fearful of losing their job and or their reputation.” Epstein, *supra* note 93.

¹¹⁵ Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP REL. 227, 236 (2003).

¹¹⁶ Bartlett, *supra* note 28, at Part III.

¹¹⁷ Eric B. Meyer, *Best Practices for Investigating Internal Employee Complaints of Unlawful Harassment* (2010), <http://www.dilworthlaw.com/portalresource/lookup/wosid/cp-base-4->

angry and marginalized, and perhaps even more hateful towards the complainant and the group to which he or she belongs.

Employer. One might expect that employers sued for discrimination would learn valuable lessons and change their employment practices accordingly. But this typically does not happen. Professor Michael Selmi found in a case study of employment discrimination class action lawsuits filed over a ten-year period that publicly-traded companies—even those that settled cases for millions of dollars—failed to adopt any meaningful changes in their employment practices.¹¹⁸ The companies invested more in publicity and damage control than reflective analysis to identify and correct root causes of the problem.¹¹⁹ Similarly, business professors Lynn Wooten and Erika James studied 53 Americans with Disabilities Act cases to determine whether organizations changed their underlying policies and practices in response to ADA lawsuits.¹²⁰ They found a variety of “learning barriers” that prevented organizations from internalizing norms that would prevent discrimination against employees with disabilities including: discriminatory organization routines (such as negative behavior towards, or negative images of, disabled employees); organizational defensive routines (such as denying that discrimination existed or justifying discriminatory practices); reliance on reactive learning (focusing myopically on immediate cost minimization and not on addressing the underlying causes of discrimination); and “window dressing” (publicity campaigns that show a “pretense or surface commitment to disabled employees”).¹²¹ Because of these learning barriers, organizations may be sued repeatedly for the same violation.¹²²

Scholars have argued that employment discrimination laws may make some organizations less inclined to hire historically disadvantaged individuals.¹²³ When hired, women, people of color, and people with disabilities may be viewed as potential litigation threats. Companies may seek ways to “bulletproof” the workplace from discrimination lawsuits, turning the workplace into what may feel like a surveillance state as every tiny infraction is “documented”.¹²⁴

The next Part explores how restorative practices may be better-suited than a coercive, litigation-based model at addressing the complex psychological dynamics underlying

12802/media.name=/dilworth_paxson_meyer_article_2.pdf (recommending that interaction between the complainant and respondent be limited by completely separating them); Katharine H. Parker, *Best Practices for Conducting Internal Investigations*, COMPLYING WITH EMPLOYMENT REGULATIONS 12 (2013 ed.), available at 2013 WL 4188230 (recommending separation of complainant and the accused).

¹¹⁸ Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1250 (2003) (“Settlements frequently produce little to no substantive change within the corporations. Moreover, many of the changes that are implemented tend to be cosmetic in nature and are primarily designed to address public relations problems.”).

¹¹⁹ *Id.*

¹²⁰ Lynn Perry Wooten & Erika Hayes James, *Challenges of Organizational Learning: Perpetuation of Discrimination Against Employees with Disabilities*, 28 BEHAV. SCI. & L. 123 (2005).

¹²¹ *Id.* at 129.

¹²² *Id.* at 132, 134 (discussing Wal-Mart’s repeated ADA violations).

¹²³ See John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 938 (1991).

¹²⁴ See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbols and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 967–71 (1999) (describing human resource publications that advise employers to “document” and maintain careful files to avoid potential liability).

discrimination at the grassroots, workplace level. It blends together and adapts cognitive psychology and organizational management theory to explain how restorative practices may support a learning infrastructure that encourages reflective analysis, reduces bias, and cultivates internal commitment to egalitarian norms.

II. THEORETICAL FOUNDATIONS OF A RESTORATIVE APPROACH

A. Restorative Justice

The term “restorative practices” derives from restorative justice in criminal law. Restorative justice is based on the idea that conflicts, even those that cause serious harm, present opportunities for reflection and meaningful change. Rooted in the social practices of many ancient and indigenous societies,¹²⁵ restorative justice is a nascent concept in the United States. “Restorative justice” has been defined as both a process and a philosophy or values system.¹²⁶ Howard Zehr, one of the founders of the restorative justice movement, offers a working definition of restorative justice as “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”¹²⁷

In a seminal article, Norwegian sociologist and criminologist Nils Christie described conflicts as “social fuel.”¹²⁸ He contended that our society does not have too many conflicts, but too few.¹²⁹ In particular, he challenged: “Conflicts ought to be used, not only left in erosion. And they ought to be used, and become useful, for those originally involved in the conflict.”¹³⁰ Christie’s focus was the criminal justice system, in which “[c]riminal conflicts have either become other people’s property—primarily the property of lawyers—or it has been in other people’s interests to define conflicts away.”¹³¹ In Christie’s view, conflicts “represent a potential for activity, for participation” by all parties involved in the incident.¹³² In addition, he wrote, conflicts raise “opportunities for norm-clarification” for the community.¹³³

Christie’s vision led to the development of restorative diversionary alternatives to criminal prosecution, such as conferencing or victim-offender mediation.¹³⁴ Restorative processes focus not on blame or punishment of the offender, but on the harm resulting from the

¹²⁵ See JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 3 (2002) (tracing ancient influences that led to restorative justice); see also Gale Burford & Paul Adams, *Restorative Justice, Responsive Regulation and Social Work*, 31 J. SOC. & SOC. WELFARE 7 (2004).

¹²⁶ Braithwaite & Strang, *supra* note 37, at 1.

¹²⁷ HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 37 (2002).

¹²⁸ Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 13 (1977).

¹²⁹ *Id.*

¹³⁰ *Id.* at 1.

¹³¹ *Id.* at 5.

¹³² *Id.* at 7.

¹³³ *Id.* at 8.

¹³⁴ See John M. McDonald & David B. Moore, *Community Conferencing as a Special Case of Conflict Transformation*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY, *supra* note 37, at 130.

conduct at issue.¹³⁵ Through a facilitated dialogue or conference, the stakeholders involved discuss the impact of the conduct at issue for each of them and collaboratively develop a plan to repair or heal the harm, reconcile the parties, and reintegrate everyone back into the community.¹³⁶ Empirical studies of restorative justice processes have shown that both victims and offenders are generally satisfied with the experience as compared to individuals who proceeded through the criminal justice system.¹³⁷ Rigorous studies have also found that restorative processes reduce recidivism, especially for crimes involving personal victims rather than property.¹³⁸ These studies have an inherent selection bias because restorative processes are voluntary and offenders typically must admit to the wrongdoing as a condition of the conference. Nevertheless, restorative justice shows promise for many types of offenses. Restorative justice has also been used to address serious harms, such as human rights abuses¹³⁹ and sexual assault.¹⁴⁰

Building on restorative justice, “restorative practices” provide proactive and responsive processes to build shared community norms and hold people accountable for violating those norms. The proactive components of restorative practices use dialogue-based processes to foster social capital and stronger relationships. As explained below in Parts II.C. and II.D, these processes can reduce bias, promote empathy for difference, and prevent discrimination. The reactive components range from informal, immediate interventions to address concerns “in the moment,” and formal group conferencing for more serious incidents. These processes are designed to lessen defensive reactions to claims—clearing the way for reflection, learning, and change.

B. Organizational Learning

¹³⁵ See generally Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15.

¹³⁶ Menkel-Meadow, *supra* note 35, at 164.

¹³⁷ See, e.g., Strang & Sherman, *supra* note 135, at 15 (summarizing empirical evidence that restorative justice does better from a victim perspective than the criminal justice system).

¹³⁸ See Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 167 (reviewing seven evaluation studies that found that “restorative justice outperformed court procedures on almost every variable for victims and offenders”); LAWRENCE W. SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* 8 (2007); MARK S. UMBREIT ET AL., *THE IMPACT OF RESTORATIVE JUSTICE CONFERENCING: A REVIEW OF 63 EMPIRICAL STUDIES IN 5 COUNTRIES* (2002), available at

http://www.cehd.umn.edu/ssw/rjp/resources/rj_dialogue_resources/Restorative_Group_Conferencing/Impact_RJC_Review_63_Studies.pdf.

¹³⁹ See Chris Cunneen, *Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY*, *supra* note 37, at 83.

¹⁴⁰ Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN* 218 (James Ptacek ed., 2010); Mary P. Koss et al., *Expanding a Community’s Justice Response to Sex Crimes Through Advocacy, Prosecutorial and Public Health Collaboration: Introducing the RESTORE Program*, 19 J. INTERPERSONAL VIOLENCE 1435 (2004). See also Leigh Goodmark, “Law and Justice are not Always the Same”: *Creating Community-Based Justice Forums for People Subjected to Partner Abuse*, 41 FLA. ST. U. L. REV. __ (forthcoming 2015) (proposing use of restorative justice for intimate partner abuse).

1. Double-loop learning

Restorative practices can be conceptualized as an organizational learning approach to discrimination. Professors Argyris and Schön identified two types of organizational learning: single-loop learning, which they call Model I, and double-loop learning, or Model II.¹⁴¹ They define learning as the detection and correction of error.¹⁴² In single-loop learning, the organization corrects a discrete problem without questioning or changing underlying policies or patterns of behavior that may have contributed to the problem. “Single-loop learning is like a thermostat that learns when it is too hot or too cold and turns the heat on or off. The thermostat can perform this task because it can receive information (the temperature of the room) and take corrective action.”¹⁴³ The goals in Model I organizations are: “(1) maximize winning and minimize losing; (2) save face (others’ and your own); (3) suppress negative feelings, and (4) strive to be rational.”¹⁴⁴

Many organizations respond to discrimination complaints with a single-loop learning model. They seek a quick fix to resolve isolated complaints. They either defend the claim vigorously in court—denying that any discrimination occurred—or settle the claim for as little as possible. Many organizations do not subject their employment policies and practices to more systemic scrutiny to identify and correct systemic dysfunctions that may have contributed to the problem. They may invest in “damage control” or publicity campaigns to repair harm to their reputation. But they typically do not develop and internalize reforms that would prevent similar problems in the future.¹⁴⁵

In double-loop or Model II learning, an organization would subject current practices and governing variables to more critical scrutiny. The goal of double-loop learning is to detect and correct errors more systemically. As Argyris and Schön describe: “Double-loop learning occurs when error is detected and corrected in ways that involve the modification of an organization’s underlying norms, policies and objectives.”¹⁴⁶ Double-loop learning comes from the “discovery or surfacing of dilemmas.”¹⁴⁷ These dilemmas can include: “(1) incongruency between espoused theory and theory-in-use; (2) inconsistency among the governing variables and action strategies; and (3) the degree of self-sealing, nonlearning processes that lead to behavioral ineffectiveness.”¹⁴⁸

Building on the theory of double-loop learning, Peter Senge developed practice principles for “the learning organization.”¹⁴⁹ Senge describes learning organizations are those “where people continually expand their capacity to create the results they truly desire, where new and expansive patterns of thinking are nurtured, where collective aspiration is set free, and where

¹⁴¹ ARGYRIS & SCHÖN, *supra* note 62, at 2.

¹⁴² *Id.*

¹⁴³ *Id.* at 2–3.

¹⁴⁴ *Id.* at 101.

¹⁴⁵ *See supra* Selmi, *supra* note 118.

¹⁴⁶ ARGYRIS & SCHÖN, *supra* note 62, at 101.

¹⁴⁷ *Id.* at 99.

¹⁴⁸ *Id.*

¹⁴⁹ SENGE, *supra* note 33; *see also* Garvin et al., *supra* note 41 (describing the building blocks of learning organization as a supportive learning environment, concrete learning processes and practices, and leadership that reinforces learning through engagement, active dialogue, and willingness to entertain alternative points of view).

people are continually learning how to learn together.”¹⁵⁰ Senge was not talking about restorative practices, but organizational learning shares a similar emphasis on the use of dialogue—what Senge calls “learningful conversations” that “turn the mirror inward” to scrutinize mental models—deeply ingrained, hidden assumptions or generalizations that influence our actions, often without our awareness.¹⁵¹ As described below, restorative practices offer a range of dialogic processes that could be helpful in developing and practicing equal opportunity and antidiscrimination in the workplace.

2. Restorative practices

Restorative practices can facilitate individual and organizational learning to prevent discrimination. Restorative dialogic processes “turn the mirror inward”—subjecting assumptions, stereotypes, and implicit biases to greater scrutiny. In contrast to the typical single-loop learning response to discrimination—which focuses myopically on settling individual cases and publicity control—a restorative approach to discrimination encourages systemic thinking. In contrast to adversarial approaches to discrimination—which can divide the workforce into categories—restorative processes engage everyone in the organization with a sense of ownership of and commitment to egalitarian and dignity norms.

The continuum of restorative practices is shown below in Figure 1. “The more an organization systematically relies on informal restorative practices from the left side of the continuum, the less need for the more formal restorative processes like the ‘conference’ on the right.”¹⁵²

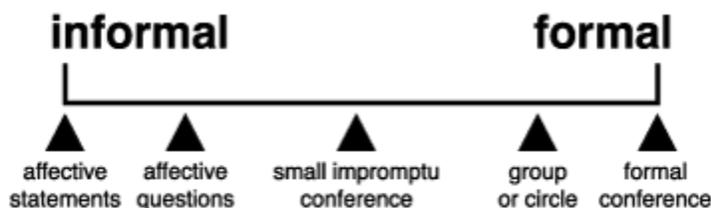


Figure 1: IIRP Continuum of Restorative Practices¹⁵³

Affective statements and questions. At their most informal, restorative practices include a method of communication called “affective statements.” Simply put, an affective statement expresses how something affected you—in a positive or negative way.¹⁵⁴ Affective statements

¹⁵⁰ SENGE, *supra* note 33, at 3.

¹⁵¹ *Id.* at 8.

¹⁵² Ted Wachtel, *Restorative Practices in Business: Building a Community for Learning and Change within Organizations*, INT’L INST. FOR RESTORATIVE PRACTICES (Feb. 2, 1999), http://www.iirp.edu/article_detail.php?article_id=NTA4.

¹⁵³ *Id.*

¹⁵⁴ See BOB COSTELLO ET AL., *THE RESTORATIVE PRACTICES HANDBOOK FOR TEACHERS, DISCIPLINARIANS AND ADMINISTRATORS* (2009).

and questions give employees and managers a non-accusatory, non-defensive language for clarifying assumptions and educating others about the impact of conduct (that may or may not have been intended to be harmful).¹⁵⁵ Some companies that have implemented organizational learning have used a similar communication device to promote non-defensive inquiry, test tacit mental models, and improve decision making.¹⁵⁶ Harley-Davidson President Jeff Bluestein, for example, reported that after his company implemented organizational learning, he heard more people say: “‘This is the way I am seeing things’ rather than ‘This is the way things are.’”¹⁵⁷

Consider, for example, someone who overhears a joke in the workplace that he or she perceives to be racist. One option is to ignore it and say nothing, which is not likely to stop the conduct. Another option may be to file a claim reporting that the joke-teller engaged in harassment (which is unlikely to be unsuccessful because one joke is insufficient to state a claim for “hostile environment” harassment).¹⁵⁸ By contrast, an affective statement would state how the listener experienced the joke. Affective statements do not accuse or state something as “fact” (e.g., “You are a racist”). Rather than judging the *intent* of the individual who engaged in the conduct, an affective statement communicates the *impact* or harm arising from the conduct (e.g., “That joke makes me feel disrespected.”).

Affective statements do not blame, thereby reducing the chance of a defensive or angry response. Affective or restorative statements and questions increase the likelihood of more self-reflection, especially if the harm was inadvertent. For many individuals, hearing how something impacted another person may make them more likely to change their behavior or even apologize. Affective statements and questions may also be useful tools to lessen blame and defensiveness when discussing unfair treatment, work performance, or other sensitive issues.

Circles. A cornerstone of proactive restorative practices is dialogue conducted in a circle format. Circles are flexible processes that can be used for a variety of reasons, such as brainstorming, problem-solving, debriefing, or team building. Circles do not mean that everyone sits around talking about their feelings or uncomfortable topics. Rather, trust, respect, and empathy emerge organically from the process. “Just sitting in a circle creates the feeling that a group of people is connected . . .”¹⁵⁹ The basic idea is to create a climate in which everyone is engaged and feels safe to speak up, express dissent, and consider differing perspectives. Everyone in the circle is given the opportunity to articulate their views or reactions on a particular topic or question, without interruption, or they may pass and say nothing. As trust and a sense of shared community builds over time, circles can be used to solve interpersonal problems, explore deeper issues, and develop community norms about respectful, egalitarian treatment.

In the business context, Senge has explained how dialogue is critical in creating strong teams. “In dialogue, a group explores complex difficult issues from many points of view.”¹⁶⁰ The goal of a dialogue is sharpen thinking and understanding, rather than to produce a result or “win” an argument:

¹⁵⁵ Wachtel, *supra* note 152.

¹⁵⁶ See SENGE, *supra* note 33, at 186–87.

¹⁵⁷ *Id.* at 187.

¹⁵⁸ See *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abuse—is beyond Title VII’s purview.”).

¹⁵⁹ COSTELLO ET AL., *supra* note 154, at 23.

¹⁶⁰ SENGE, *supra* note 33, at 224.

A unique relationship develops among team members who enter dialogue regularly. They develop a deep trust that cannot help but carry over to discussions. They develop a richer understanding of the uniqueness of each person's point of view. Moreover, they experience how larger understandings emerge by holding one's own point of view "gently." They learn to master the art of holding a position, rather than being "held by their positions." When it is appropriate to defend a point of view, they do it more gracefully and with less rigidity, that is without putting "winning" as a first priority.¹⁶¹

The article returns to an analysis of the importance of dialogue in overcoming workplace discrimination in Part II.C. below.

Conferences. In addition to proactive dialogue, restorative practices include reactive processes like conferences to address more serious incidents. A conference is a collaborative dialogue led by a trained, neutral facilitator. Anyone who has been impacted by the conduct may be invited to participate in a conference. This could include, for example, other employees who witnessed an incident or co-workers who have been affected in some way. Any supporters of the complainant and respondent are invited to participate as well. A conference process is voluntary and should not be held unless all parties agree to participate.

A restorative framework focuses on the *harm caused* rather than the *intent* of the person who caused the harm—a critical advantage. Under the current legalistic, punitive framework, demeaning conduct could go unaddressed if the perpetrator, in essence, "didn't mean it that way." A conference can explore differing perceptions of an incident for which a legal remedy might be unavailable. The process can unpack unexamined mental models, assumptions, or implicit biases that led to perceived inequities—perhaps unintentionally. In a restorative dialogue, the alleged wrongdoer is being held accountable in a direct and powerful way. At the same time, the conference gives the respondent a chance to "set things right," to apologize, or make amends. Although apologies and forgiveness should never be forced in a restorative conference, they often occur as a natural by-product of the process.¹⁶²

Although not yet widely used in employment settings, some organizations report significant improvements in their workplace "conflict culture"¹⁶³ after integrating restorative practices. Kay Pranis, a long-time restorative practitioner and former Restorative Justice Planner for the Minnesota Department of Corrections, tells a powerful story about how the staff at the Minnesota Department of Corrections transformed their work culture using restorative practices. The initiative started when the prison employees at one facility objected that they could not work

¹⁶¹ *Id.* at 230.

¹⁶² BRAITHWAITE, *supra* note 125, at 15. As Braithwaite explains, "Creating spaces where wrongdoers might be persuaded of the need for remorse is a good institutional objective. Demanding, coercing, or even expecting remorse or apology may be a bad objective." *Id.* Likewise, "[f]orgiveness is a gift victims can give. We destroy its power as a gift by making it a duty." *Id.*

¹⁶³ Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective in Resolving Disputes*, 21 *HAMLIN L. REV.* 261, 267–68 (1998) ("[T]he conflict culture of an organization can be seen as ideologies about conflict and patterns of behavior which have been shown to be reasonable ways of addressing conflicts. In other words, conflict culture can be seen as the acceptable, normal or expected ways of coping with conflict when it arises within a specific organization between management and labor or between co-workers.").

with offenders in a restorative way until they had more healthy and respectful relationships with each other.¹⁶⁴ She described the pain and anger that the staff expressed about their workplace:

They hated their jobs. They hated the Department of Corrections. They dreaded going to work every day. They counted the days to retirement from their early thirties.

They also felt completely trapped. There was no other job in that rural community that would allow them to keep their house and their truck. They told me that their anger and frustration had nothing to do with the inmates—it was about the structure and climate of the workplace.¹⁶⁵

In sum, the staff felt “helpless, powerless, never listened to.”¹⁶⁶ Pranis worked with them to develop restorative processes, such as problem-solving circles to talk through various workplace issues. A core group of staff was excited about restorative practices, but “[m]ost staff initially were wary and often dismissive about these processes, characterizing them as ‘touchy-feely.’”¹⁶⁷ After a year, one unit that had used monthly circles “experienced a complete turnaround in the workplace climate.”¹⁶⁸ Throughout the prison, staff “began to see new attitudes or hear expressions of satisfaction from those who participated in [circle] processes.”¹⁶⁹ After five years, restorative processes became “normalized in the institution” and the staff reported dramatic improvements, with more open communication, an “atmosphere of team work,” and a “willingness to sit together and talk about things.”¹⁷⁰ Restorative practices encouraged more openness and problem-solving, with staff more willing to “make admissions of something wrong and grow from them.”¹⁷¹

The only study to date of a workplace that has implemented restorative practices concerned the Goodwin Development Trust (“GDT”) in the United Kingdom.¹⁷² The GDT is a complex organization comprised of over 300 employees operating across thirty-eight sites. The company implemented restorative practices over a two-year period.¹⁷³ In a study conducted in collaboration with the University of Hull, GDT found positive outcomes, including stronger relationships within teams and departments and fewer interpersonal conflicts.¹⁷⁴ The most “striking experience” reported by senior management groups “was the gradual reduction in the number of complaints they dealt with over the [two-year period].”¹⁷⁵ One manager said: “the thing about restorative practice is that you can solve an issue before it becomes a problem.”¹⁷⁶

¹⁶⁴ Kay Pranis, *Healing and Accountability in the Criminal Justice System: Applying Restorative Justice Processes in the Workplace*, 8 CARDOZO J. CONFLICT RESOL. 659, 659 (2007).

¹⁶⁵ *Id.* at 661.

¹⁶⁶ *Id.* at 663.

¹⁶⁷ *Id.* at 666.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (quoting staff comments).

¹⁷² See CRAIG LAMBERT ET AL., GOODWIN DEVELOPMENT TRUST, BUILDING RESTORATIVE RELATIONSHIPS FOR THE WORKPLACE: GOODWIN DEVELOPMENT TRUST’S JOURNEY WITH RESTORATIVE APPROACHES 35 (2011), available at http://eprints.soton.ac.uk/360370/1/hf76_building_restorative_relationships_in_the_workplace_goodwin_development_trusts_journey_with_restorative_approaches%20%282%29.pdf.

¹⁷³ *Id.* at 43.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 49.

¹⁷⁶ *Id.*

In addition to reducing complaints, managers reported that “team members were coming forward to see them more often about issues related to work that in 2008 [prior to the implementation of restorative practices] would not have been raised.”¹⁷⁷ The researchers found that positive outcomes emerged slowly, but dramatically.¹⁷⁸ After two years, teams within the organization were using restorative practices for “human resources issues,” to collaborate and solve team or departmental problems, to share ideas, and “to solve inter-personal problems such as arguments between members of staff.”¹⁷⁹ Managers also felt like they were communicating better with staff and had developed stronger working relationships with them. They also were dealing with “fewer problems in the team as colleagues were now resolving issues between themselves.”¹⁸⁰

Other anecdotal reports about the use of restorative practices in workplace settings highlight themes such trust, respect, community, and valuing each other’s humanity. Circle Center Consulting, LLC in Nashville, Tennessee has introduced circles at many non-profits, corporations, and executive groups. Led by Tracy Roberts (a social worker by training) and his wife Leigh Ann Roberts (an attorney and mediator), the Roberts report that circle processes build a sense of trust and community in the workplace.¹⁸¹ Over time, as the organization becomes comfortable with—and comes to value—the dialogue process, circles can provide venues to examine more sensitive topics.¹⁸² Circles can be empowering for introverts and other employees who typically feel “unheard” in the company. For example, Mr. Roberts shared a story about warehouse workers who used circle processes to share their concerns with executive management. The warehouse workers wanted to continue using the process because they found “voice” in circles.¹⁸³

Another hospital that instituted restorative practices reported improved relationships, increased cooperation, and better communication among co-worker groups:

Since undergoing training in restorative practices internal relationships within the hospital have improved dramatically. Prior to training, communication problems forced management to reschedule shifts frequently as staff could not work cooperatively in groups for long periods of time. The hospital has since reported groups are working together for several months at a time, effectively communicating to achieve better outcomes for their clients.¹⁸⁴

Although these examples do not focus specifically on discrimination, they demonstrate that restorative practices in the workplace may forge stronger bonds, promote more open and effective communication, and stimulate a learning approach to workplace problems. As described in the next section, psychological research suggests that these building blocks may help to reduce bias and increase commitment to egalitarian norms.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 52.

¹⁸⁰ *Id.*

¹⁸¹ Interview with Tracy and Leigh Ann Roberts (notes on file with author).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See *Restorative Practice at Work - Building Stronger Teams*, RESTORATIVE JUSTICE COUNCIL (Jan. 24, 2011), http://www.restorativejustice.org.uk/resource/restorative_practice_at_work__building_stronger_teams/.

C. Social Capital

Proactive restorative practices build trust and social capital in a structured, intentional way. Some argue that American society has become more socially disconnected. As political science scholar Robert Putnam puts it, we are increasingly “bowling alone,” and are less engaged in heterogeneous civic associations and groups.¹⁸⁵ Some worry that, as a society, we have become more polarized, less tolerant of opposing ideas, less willing to compromise, and deeply mistrustful of others.¹⁸⁶ The workplace remains the one social environment in which individuals must interact with people who have different backgrounds, races, nationalities, ethnicities, religions, sexual orientations, political beliefs, and cultures.¹⁸⁷

Social capital, in simple terms, is the connections among individuals.¹⁸⁸ In the business context, social capital has been defined by Don Cohen and Laurence Prusak as “the stock of active connections among people: the trust, mutual understanding, and shared values and behaviors that bind the members of human networks and communities and make cooperative action possible.”¹⁸⁹

Strong social capital provides many benefits to an organization: “Social capital makes an organization, or any cooperative group, more than a collection of individuals intent on achieving their own private purposes. Social capital bridges the space between people.”¹⁹⁰ Social capital is characterized by “high levels of trust, robust personal networks and vibrant communities, shared understandings, and a sense of equitable participation in a joint enterprise—all things that draw individuals together into a group.”¹⁹¹ Cohen and Prusak argue that “[t]his kind of connection supports collaboration, commitment, ready access to knowledge and talent, and coherent organizational behavior.”¹⁹²

To develop social capital, Cohen and Prusak recommend “giving people space and time to connect, demonstrating trust, effectively communicating aims and beliefs, and offering the equitable opportunities and rewards that invite genuine participation, not mere presence.”¹⁹³ Cohen and Prusak were not talking about restorative practices, although they encouraged

¹⁸⁵ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

¹⁸⁶ See, e.g., Nate Cohn, *Polarization is Dividing American Society, Not Just Politics*, N.Y. TIMES, June 12, 2014. The Pew Research Center for the People and the Press found that partisan animosity in the American public has more than doubled since 1994, with the most partisan individuals believing that the opposing party’s policies “are so misguided that they threaten the nation’s well-being.” PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, *POLITICAL POLARIZATION IN THE AMERICAN PUBLIC*, June 12, 2014. The study found that these partisan divides created “ideological silos” in everyday life, with those who are most ideological segregating themselves with like-minded individuals.

¹⁸⁷ CYNTHIA ESTLUND, *WORKING TOGETHER* 9 (2003) (arguing that workplaces “yield far more social integration—actual interracial interaction and friendship—than any other domain of American society”).

¹⁸⁸ Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

¹⁸⁹ DON COHEN & LAURENCE PRUSAK, *IN GOOD COMPANY: HOW SOCIAL CAPITAL MAKES ORGANIZATIONS WORK* 4 (2001).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

employers to have informal and formal opportunities for interaction, not only for specific work tasks, but also to foster stronger bonds.¹⁹⁴

Restorative practices allow workplace social capital to be built more intentionally, rather than relying on the happenstance of water cooler or hallway conversations. Dialogue circles in the workplace, for example, give members of a particular team or department a safe, respectful forum in which to express and hear divergent perspectives and ideas, deconstruct assumptions, and analyze problems. Circles are not hierarchical. Managers and employees sit in an equal position, on the same level. Everyone is engaged in the conversation and is given the opportunity, if they wish, to provide feedback, reactions, or ideas. The goal is to foster a culture in which the workforce becomes comfortable with raising, discussing, and solving problems together.

In this way, restorative dialogue can break through the veil of silence that can sometimes prevent individuals within organizations from appreciating and learning from each other's differences. Leslie Perlow and Stephanie Williams, organizational behavior scholars at Harvard Business School, found that there is a "reign of silence" in many organizations that typically starts "when we choose not to confront a difference."¹⁹⁵ Similarly, Chris Argyris argues that teams often exhibit "skilled incompetence" when they engage in collective inquiry about complex issues because of defensive routines that get in the way of open communication and exploration of differences in assumptions and experiences.¹⁹⁶ Senge calls these "organizational learning disabilities": the inability of an organization to explore and learn from different views, perspectives, and experiences.¹⁹⁷

Circle dialogue can help to break down the wall of silence and learning barriers that sometimes leave second generation discrimination unaddressed. Empathy for differences is not forced, but organically emerges from the open communication and shared sense of identity encouraged by the process. As restorative practices proponent David Moore has argued: "There is something about getting a group of humans together in a circle which tends to make them more dignified than they would otherwise be."¹⁹⁸ By offering a respectful structure for dialogue, individuals learn how to express more freely and listen more openly and deeply to diverse viewpoints. The conversation seeks to sharpen understanding rather than "winning" an argument. In addition, team members begin to recognize and appreciate each other's humanity, rather than seeing each other through the lens of stereotyped categories. More trustful and mutually supportive relationships can be formed. With that foundation of trust, substantive work issues—and complex, difficult problems—can be discussed less defensively, examined more rigorously, and resolved more strategically.

By building social capital and shared identity, restorative practices may help to prevent discrimination. Social science research has shown that discriminatory attitudes may be reduced if a shared common identity is developed.¹⁹⁹ A theory in social psychology known as Common Ingroup Identify Model predicts that "[b]y redefining group boundaries, one may create a

¹⁹⁴ *Id.*

¹⁹⁵ Leslie Perlow & Stephanie Williams, *Is Silence Killing Your Company?*, HARV. BUS. REV., May 2003, at 3.

¹⁹⁶ CHRIS ARGYRIS, *OVERCOMING ORGANIZATIONAL DEFENSES* (1990).

¹⁹⁷ SENGE, *supra* note 33, at 17–18.

¹⁹⁸ SYDNEY MORNING HERALD, Mar. 18, 1999, at 15, *quoted in* BRAITHWAITE, *supra* note 125, at 154.

¹⁹⁹ *See* Gaertner & Dovidio, *supra* note 71, at 631 (2005) (finding that creating a common identity reduces tensions between groups).

superordinate group, resulting in better treatment of individuals within the larger group.”²⁰⁰ In other words, developing a shared sense of community has been shown to reduce racism and intergroup tensions.²⁰¹

D. Dialogue and Voice

Dialogue is a cornerstone of both restorative practices and organizational learning. This section explores how properly-structured dialogue can promote empathy, encourage reflective thinking, and reduce second generation discrimination. Senge explains how dialogue helps organizations recognize and overcome patterns of interaction and defensiveness that can undermine organizational learning.²⁰² Dialogue differs from discussion: “In dialogue, there is the free and creative exploration of complex and subtle issues, a deep ‘listening’ to one another and suspending one’s own views. By contrast, in discussion different views are presented and defended that there is a search for the best view to support decisions that must be made at this time.”²⁰³ Organizations need both modes of communication, but tend to use discussion more frequently than dialogue.²⁰⁴

The chief barrier to productive dialogue is what Argyris called “‘defensive routines’: habitual ways of interacting that protect us and others from threat or embarrassment, but which also prevent us from learning.”²⁰⁵ When faced with conflict, “team members frequently either ‘smooth over’ differences or ‘speak out’ in a non-holds-barred, ‘winner take all’ free-for-all of opinion.”²⁰⁶

Organizational learning principles rely on the dialogue theory of David Bohm, a leading physicist and quantum theorist. According to Bohm, “the purpose of dialogue is to reveal the incoherence in our thought.”²⁰⁷ Bohm set forth three basic conditions for meaningful dialogue.²⁰⁸ First, participants must suspend their assumptions. This does not mean ignoring or suppressing one’s view, but rather “holding it in front of us”—ready for exploration.²⁰⁹ Second, participants in a dialogue must view each other as colleagues or peers; in other words, as “equals.”²¹⁰ Third,

²⁰⁰ Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715, 741 (2011).

²⁰¹ Marilyn B. Brewer et al., *Diversity and Organizational Identity: The Problem of Entrée After Entry*, in CULTURAL DIVIDES: UNDERSTANDING & OVERCOMING GROUP CONFLICT 337, 357–58 (Deborah A. Prentice & Dale T. Miller eds., 1999); see also John F. Dovidio et al., *Social Inclusion and Exclusion: Recategorization and the Perception of Intergroup Boundaries*, in THE SOCIAL PSYCHOLOGY OF INCLUSION AND EXCLUSION 246, 248–49 (Dominic Abrams et al. eds., 2005) (reviewing studies that show that recategorizing two separate groups into one group reduced bias and increased the attractiveness of the former members of the outgroup).

²⁰² SENGE, *supra* note 33, at 220.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ David Bohm et al., *Dialogue-A Proposal* (1991), reprinted at http://infed.org/archives/e-texts/bohm_dialogue.htm.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

Bohm recommends that a facilitator be used to unobtrusively “hold the context” of dialogue, pointing out sticking points for the group.

Restorative practices satisfy Bohm’s conditions for meaningful dialogue. The circle dialogue format creates a spatial atmosphere in which everyone participates as equal colleagues. In fact, Bohm recommends a circle shape for dialogue to be effective.²¹¹ Restorative circles typically are facilitated by someone who proposes the question or issue for discussion and ensures that everyone has the opportunity to talk. Sometimes a “talking piece” is circulated so that the person holding it can speak without interruption. Restorative processes are similar to Bohm’s characterization of dialogue as “an arena in which collective learning takes place and out of which a sense of increased harmony, fellowship and creativity can arise.”²¹²

Bohm argues that dialogue that meets these conditions may have transformational effects in groups that regularly engage in it:

As sensitivity and experience increase, a perception of shared meaning emerges in which people find that they are neither opposing one another, nor are they simply interacting. Increasing trust between members of the group—and trust in the process itself—leads to the expression of the sorts of thoughts and feelings that are usually kept hidden.²¹³

Like Bohm, German philosopher Jürgen Habermas posited that language gives us the power “to relate to and influence others; establish interpersonal relationships; come to understanding about the world, others, and ourselves; and coordinate action.”²¹⁴ Habermas explained that as we mature, we have the ability to reflect not only on our own perspective, but to see the world through another’s eyes.²¹⁵ This is a guiding principle in restorative practices, especially in reactive processes after a harmful incident has occurred. As restorative justice scholar Audrey Barrett explains, Habermas’ discourse theory is consistent with the underlying emphasis in restorative justice on developing empathy for another person’s perspective:

This ability to take various perspectives or “take the attitude of the other” is an important mechanism within the restorative process. It is what allows parties to empathize with others, and metaphorically stand in the shoes of another when the different parties are ‘telling their stories.’ This in turn has been linked to the ability to come to understanding with another.²¹⁶

Restorative dialogue processes provide venues for the consideration of different perspectives through deliberative processing—two strategies proven to reduce bias. Implicit bias research has shown that taking the perspective of the other—considering differing viewpoints and being exposed to multiple perspectives—is a promising debiasing strategy.²¹⁷ Likewise,

²¹¹ *Id.* (stating that a dialogue “works best with between twenty and forty people seated facing one another in a single circle”).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Audrey L. Barrett, *The Structure of Dialogue: Exploring Habermas’ Discourse Theory to Explain the “Magic” and Potential of Restorative Justice Processes*, 36 DALHOUSIE L.J. 335, 340 (2013).

²¹⁵ *Id.*; JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996).

²¹⁶ Barrett, *supra* note 214, at 342.

²¹⁷ Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311 (2008); Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 J. PERSONALITY & SOC.

research has shown that engaging in deliberative processing can reduce the impact of implicit biases.²¹⁸

This idea of “standing in another’s shoes” is similar to the “contact hypothesis” developed by psychologist Gordon Allport in the 1950s. Allport theorized that close intergroup contact between different races can overcome negative stereotypes and biased attitudes.²¹⁹ Allport explained that “[o]nly the type of contact that leads people to *do* things together is likely to result in changed attitudes.”²²⁰ Allport theorized that prejudice

may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports. . . , and if it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.²²¹

More recent studies of the contact hypothesis have shown that *any* contact among different groups can overwhelmingly reduce prejudice and conflict, even in the absence of the optimal conditions of “equal status” described by Allport. Thomas Pettigrew and Linda Tropp, international experts on racism, performed a meta-analysis of 515 international studies on contact theory in a variety of contexts. Their research provided strong empirical support that mere contact across any type of group divide—racial, ethnic, disability, religious, economic, social—will mitigate prejudice and conflict.²²²

Professor Cynthia Estlund has analyzed how “working together” tends to result in respectful, close relationships across racial, ethnic, gender, and other boundaries. Estlund reviewed empirical and historical support for the “mediating function” of intergroup workplace relations in reducing prejudice.²²³ Of course, working together does not always magically erase discrimination and harassment, especially given the unconscious biases and structural issues that may cause inequities.²²⁴ Some legal scholars have referred to the contact hypothesis as a “failed theory.”²²⁵ There is a big difference, however, between passing someone in the hallway at work and knowing someone well.

PSYCHOL. 708 (2000); Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011).

²¹⁸ GEOFFREY BEATTIE ET AL., *OUR RACIST HEART? AN EXPLORATION OF UNCONSCIOUS PREJUDICE IN EVERYDAY LIFE* (2013); Diana J. Burgess, *Are Providers More Likely to Contribute to Healthcare Disparities Under High Levels of Cognitive Load? How Features of the Healthcare Setting May Lead to Biases in Medical Decision Making*, 30 MEDICAL DECISION MAKING 246 (2010); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); L. Richards-Yellen, *Removing Implicit Bias from the Hiring Process*, 17 YOUNG LAW. 7 (2013).

²¹⁹ GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1958).

²²⁰ *Id.* at 264.

²²¹ *Id.* at 267.

²²² THOMAS F. PETTIGREW & LINDA R. TROPP, *WHEN GROUPS MEET: THE DYNAMICS OF INTERGROUP CONTACT* (2011).

²²³ Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 30 (2000); see also CYNTHIA ESTLUND, *WORKING TOGETHER* (2003).

²²⁴ See ESTLUND, *supra* note 223, at 76–83.

²²⁵ McGinley, *supra* note 73, at 486 n.364 (referring to the contact hypothesis as a “failed theory”); but see ESTLUND, *supra* note 223, at 74–75 (noting that it may be time to “give the contact hypothesis another chance” and noting that the theory has been proven empirically robust) (quoting John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1121 (1998)).

Consider the back story of the case of Ann Hopkins, lead plaintiff in the landmark sex-stereotyping case, *Price Waterhouse v. Hopkins*.²²⁶ Ms. Hopkins was not admitted to the partnership at the firm, despite her record of good work, largely because of negative comments by partners with whom she had little interaction. The three partners who knew her well strongly supported her admission to the partnership. The partners who did not know her well, however, evaluated her based on sex stereotypes rather than merit. As Ms. Hopkins explained: “My downfall was negative comments from 26 partners who didn’t know me well.”²²⁷ Because they did not know her, these partners viewed Ms. Hopkins through the lens of sex stereotypes and penalized her for seeming too “macho” and not sufficiently feminine to be a “lady partner candidate.”²²⁸

Restorative processes provide structures for intergroup dialogue and storytelling that can reduce stereotypical thinking and implicit biases. Critical legal theory scholars and civil rights advocates have explored the importance of voice and narrative in humanizing “outgroups” and overcoming discriminatory attitudes.²²⁹ As John Enright observed in the context of same-sex relationship stereotyping:

storytelling has the ability to persuade ingroups, and other individuals who are normally blind to what outgroups have to say, to become more empathetic. Once a dominant ingroup understands that differing experiences exist, and then listens to them, the ingroup may be able to change its ways. Storytelling thus allows outgroups to persuade, change mindsets and chip away at prejudices.²³⁰

Restorative processes can harness personal stories to provoke empathy and shatter stereotypes. Restorative practitioner Kay Pranis explains how the storytelling that happens in restorative processes makes it more difficult to hold people as the “other”:

By sharing our individual stories we open places for others to connect to us, to find common ground with us, and to know us more completely. . . It becomes much harder to hold someone as the distant ‘other’ and not feel connected to that person through our common humanity.²³¹

E. Innate Psychological Affects

Restorative theorists posit that restorative justice processes work more effectively than traditional retributive practices (which focus on punishing the wrongdoer) because they tap into

²²⁶ Ann Hopkins, *Price Waterhouse v. Hopkins: A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 357, 361 (2005).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See, e.g., John O. Enright, Comment, *New York’s Post-September 11, 2001 Recognition of Same-Sex Relationships: A Victory Suggestive of Future Change*, 72 FORDHAM L. REV. 2823, 2866–67 (2004); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 516–22 (1992) (arguing that storytelling has an “inclusive” and “persuasive” function); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989) (examining “use of stories in the struggle for racial reform”); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (arguing that storytelling can induce empathy).

²³⁰ Enright, *supra* note 229, at 2866–67.

²³¹ KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES: A NEW/OLD APPROACH TO PEACEMAKING* 40 (2005).

our psychological survival instincts. Renowned psychologist Silvan Tomkins conducted extensive study of the natural reactions of human infants. He theorized that all human beings have nine innate “affects” that form the basis of our emotions, motivate our behavior, and contribute to our survival.²³² Each affect can be experienced on a continuum from mild to strong. Tomkins observed that there are two positive affects: enjoyment-joy and interest-excitement. There is one neutral affect: surprise-startle, which “is analogous to a restart button on a machine, clearing our mind of whatever we were thinking and allowing it to focus on whatever comes next.”²³³ There are six negative affects: shame-humiliation; distress-anguish; disgust; fear-terror; anger-rage; and dissmell (a reaction to noxious smells). In Tomkins’ view, affects are the primary motivational system that ensures our survival as human beings. Each affect motivates us to behave in a very particular way to help us survive.

According to restorative scholars and practitioners Lauren Abramson and David Moore, the conflict transformation that often occurs during a restorative justice process can be explained by the psychology of affect. In particular, humans are hard-wired to minimize negative affects or emotions that can generate and escalate conflict, and maximize positive affect and emotions that promote cooperation.²³⁴ As a scientist, Dr. Abramson studied neuroscience and the effects of suppressed emotions on health and illness.²³⁵ She eventually founded the Community Conferencing Center in Baltimore, Maryland, where she has facilitated hundreds of restorative conferences for criminal, juvenile, and workplace matters.²³⁶ Dr. Abramson explains how she has observed the progression in hundreds of restorative conferences from initial negative affects (anger, rage, fear, disgust) to more positive affects and cooperation.²³⁷

Many restorative justice scholars focus in particular on the affect of “shame.” They argue that restorative processes reduce the shame and humiliation that individuals naturally feel when accused of wrongdoing.²³⁸ “Shame” in this sense is not a stigmatizing sanction,²³⁹ but one of the innate physiological “affects” that humans have that can lead to destructive behaviors if not properly addressed. Psychologist Donald Nathanson built on Tomkins’ affect theory, focusing on the affect of “shame to humiliation.”²⁴⁰ He described shame as a natural, physiological reaction that we all experience when there is a partial impediment to a positive bond or connection. Nathanson explained that humans learn “defensive scripts” to shame as children and become conditioned to react to shame in one of four ways: “withdrawal, attack self,

²³² SILVAN TOMKINS, AFFECT/IMAGERY/CONSCIOUSNESS, VOL. 1, THE POSITIVE AFFECTS (1962); AFFECT/IMAGERY/CONSCIOUSNESS, VOL. 2, THE NEGATIVE AFFECTS (1963).

²³³ COSTELLO ET AL., *supra* note 154, at 68.

²³⁴ See Lauren Abramson, *Being Emotional, Being Human: Creating Healthy Communities and Institutions by Honoring our Biology* in RESTORATIVE JUSTICE AND AFFECT (V. Kelly & M. Thorsborne, Eds. 2014); Lauren Abramson & David Moore, *The Psychology of Community Conferencing in RESTORATIVE JUSTICE: REPAIRING COMMUNITIES THROUGH RESTORATIVE JUSTICE* 123-40 (J. Perry, Ed. 2002).

²³⁵ Abramson, at 86-87.

²³⁶ See <http://www.communityconferencing.org/>.

²³⁷ Abramson, *Being Emotional*, *supra* note __, at 86-104 (describing biology of emotions and presenting case studies of sexual harassment incident and community conflict that had repeated police involvement).

²³⁸ See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989).

²³⁹ Restorative justice is not the same as “shaming” punishments that some scholars have criticized. See, e.g., Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991); James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?* 107 YALE L.J. 1055 (1988).

²⁴⁰ DONALD L. NATHANSON, SHAME AND PRIDE: AFFECT, SEX, AND THE BIRTH OF SELF (1992).

avoidance, or attack other.”²⁴¹ Nathanson plotted these four responses on a “compass of shame,” which appears below in Figure 2. When we do something wrong, or are accused of doing something wrong, the shame affect is triggered. This causes us to “fly to one of the points” on the compass of shame as a defense mechanism.²⁴²



Figure 2: Compass of Shame²⁴³

In restorative justice theory, shame must be managed constructively or it will lead to negative behaviors. According to John Braithwaite, “shame will become complicated, chronic, and more likely to descend into rage if it is not fully confronted.”²⁴⁴ Braithwaite’s theory of reintegrative shaming claims that stigmatizing, outcasting, and shaming offenders can make crime worse and that “reintegrative shaming, or disapproval of the act within a continuum of respect for the offender and terminated by rituals of forgiveness, prevents crime.”²⁴⁵ Put more simply, a restorative process “separates the deed from the doer.”²⁴⁶ Restorative processes condemn the harmful action, but respect the humanity and dignity of everyone in the process by giving them a role in repairing the harm caused by the conduct. Instead of punishing the offender, reactive restorative processes seek to learn from the experience, fix the problem, and reintegrate everyone back into the community.

Another way to conceptualize “shame” in the organizational context is “defensive routines.” Argyris’s research shows that smart, capable managers often fail to lead teams effectively because of defensiveness and ineffective responses to conflict. He argued: “We are programmed to create defensive routines and cover them up with further defensive routines. . .

²⁴¹ *Id.* at 312.

²⁴² *Id.*

²⁴³ Ted Wachtel, *Defining Restorative*, INT’L INST. FOR RESTORATIVE PRACTICES (2013).

²⁴⁴ BRAITHWAITE, *supra* note 125, at 79.

²⁴⁵ *Id.* at 74.

²⁴⁶ Ted Wachtel & Paul McCold, *Restorative Justice in Everyday Life*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY, *supra* note 37, at 114, 127–28.

This programming occurs early in life.”²⁴⁷ Defensive routines are “entrenched habits we use to protect ourselves from embarrassment and threat that come with exposing our thinking.”²⁴⁸

These defensive routines and shame responses are observable in employment discrimination matters. Those who experience discrimination may be reluctant to identify as a “victim” or blame themselves for what happened.²⁴⁹ Victims may “attack self” by putting themselves down or “withdrawal” by isolating themselves or avoiding the workplace. Those accused of discrimination may “avoid” by denying the behavior or the intent to discriminate, or “attack other” by blaming the victim or retaliating. Indeed, employees who raise concerns about discrimination are frequently punished with harsher treatment or shunned as a “troublemaker” by the workplace community.²⁵⁰ This is often characterized as “human nature”; as one business attorney observed: “[A]nti-retaliation laws require almost super-human restraint.’ And juries know that supervisors are not superhuman, and that it is only natural for them to want to strike back at people who attack them and accuse them of wrongdoing.”²⁵¹

Based on social science research, legal coercion and threats can exacerbate discriminatory attitudes. As Professor Bartlett explains: “threat and confrontation about race and gender bias, which people do not want to possess or exhibit, may inadvertently provoke shame, guilt, and resentment, which lead to avoidance and resistance, and ultimately to more stereotyping. In other words, pressure and threat will often deepen bias rather than correct it.”²⁵²

A restorative response to discrimination seeks to lessen the defensiveness and shame involved in discussing an especially complex, difficult, and emotional topic like discrimination. Although egregious cases of discrimination undoubtedly exist, many issues at the workplace level involve ambiguity and differing perceptions about what occurred and why. A restorative conference permits joint exploration of the “shades of grey.” The process balances advocacy of one’s own experience with joint inquiry into the implicit assumptions, structures, and conduct—

²⁴⁷ CHRIS ARGYRIS, *STRATEGY, CHANGE, AND DEFENSIVE ROUTINES* (1985).

²⁴⁸ SENGE, *supra* note 33, at 232–33.

²⁴⁹ Billie Wright Dziech et al., “*Consensual*” or *Submissive Relationships: The Second-Best Kept Secret*, 6 DUKE J. GENDER L. & POL’Y 83, 106–07 (2000) (concluding, based on a study of workplace sexual harassment, that, “not only are most women in subordinate positions and thus fearful of retaliation, but research also indicates that they are often likely to blame themselves, to view harassment as an inevitability, and to endure it without significant protest”); Robinson, *supra* note 14, at 1145 (noting that “studies show that targets of discrimination commonly blame themselves for perceived discrimination”); Vanessa Ruggles, *The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence*, 6 CONN. PUB. INT. L.J. 143, 149 (2006) (“Victims often blame themselves for their injury. They may feel shameful or embarrassed, especially if the discrimination points to the victim’s disability as a socially-perceived weakness, or if the victim experiences so much degradation that he or she loses self-confidence. . . . These victims are less likely to bring discrimination suits against their employers, and the employers will escape liability.”).

²⁵⁰ See *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 961–70 (8th Cir. 1999) (plaintiff alleged retaliation after co-workers shunned her, keyed her car, slammed doors, and made rude comments); *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1257–58 (10th Cir. 1998) (plaintiff alleged retaliation after she filed a notice of discrimination against her employer and then her job duties changed, her co-workers made false accusations against her, she was ignored by people in her office, and her employer instructed her co-workers not to talk to her). See also Elana Olson, *Beyond the Scope of Employer Liability: Employer Failure to Address Retaliation by Co-Workers After Title VII Protected Activity*, 7 WM. & MARY J. WOMEN & L. 239, 270 (2000); Howard Zimmerle, *Common Sense v. The EEOC: Co-Worker Ostracism and Shunning as Retaliation Under Title VII*, 30 J. CORP. L. 627, 630 (2005).

²⁵¹ Robert M. Shea, *Avoiding Employee Claims of Unlawful Retaliation*, MORSE BARNES-BROWN PENDLETON (Mar. 2013), http://www.mbbp.com/resources/employment/retaliation_claims.html.

²⁵² Bartlett, *supra* note 28, at 1901.

whether intentional or inadvertent—that may have caused harm. In addition, the victim-centric nature of restorative practices may provide more complete restoration and healing of individuals who may have been harmed by inequitable treatment. A litigation remedy by its very nature cannot remediate the multiple, profound psychological, health-related, and professional ramifications of discrimination.²⁵³

Reactive restorative practices are designed to manage emotions like shame and defensiveness in a more constructive fashion. Restorative theorists John Braithwaite and Eliza Ahmed studied the effect of shame on workplace bullying. They found that “shame acknowledgement is associated with lower levels of bullying, and that shame displacement into anger, blaming and other externalizing reactions is associated with higher levels of bullying.”²⁵⁴ In other words, if shame is not properly managed, it “damages interpersonal relationships.”²⁵⁵ Braithwaite and Ahmed advise that raising awareness of “emotional intelligence” may help to promote healthy shame management and reduce harassing behavior in the workplace.²⁵⁶

Restorative processes may raise an organization’s level of “emotional intelligence.”²⁵⁷ Psychologists John Mayer and Peter Salovey define emotional intelligence as “an ability to recognize the meanings of emotions and their relationships, and to reason and problem-solve on the basis of them. Emotional intelligence is involved in the capacity to perceive emotions, assimilate emotion-related feelings, understand the information of those emotions, and manage them.”²⁵⁸ Employment discrimination scholar Tristin Green has recognized that “improving emotional competence and emotional understanding in self and others seems like it could go a long way toward improving racial emotions experienced in interracial interactions and ultimately interracial relationships at work.”²⁵⁹ By providing structures that allow for reflection and dialogue, restorative processes can help workforces to develop socio-emotional skills, including self-awareness and empathy for differences. At the same time, restorative processes reduce innate negative responses—like anger, fear, and shame—that often get in the way of meaningfully preventing and addressing discrimination. A restorative approach provides a process in which negative emotions and affect may be transformed into understanding, positive affects, cooperation, and change.²⁶⁰

There is considerable debate in the restorative justice field about whether the alleged wrongdoer must admit to the “wrong” as a condition of the conference. In the criminal context,

²⁵³ See *supra* Part I.B.

²⁵⁴ Eliza Ahmed & John Braithwaite, *Shame, Pride and Workplace Bullying*, in *EMOTIONS, CRIME AND JUSTICE* 55, 56 (Susanne Karstedt et al. eds., 2011).

²⁵⁵ *Id.* at 55.

²⁵⁶ *Id.* at 69.

²⁵⁷ John D. Mayer & Peter Salovey, *The Intelligence of Emotional Intelligence* 17 *INTELLIGENCE* 433 (1993). For a scholarly overview of studies about emotional intelligence, see John D. Mayer et al., *Human Abilities: Emotional Intelligence*, 59 *ANN. REV. PSYCHOL.* 507 (2008). See also DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1995). For criticisms of emotional intelligence, see Moshe Zeidner et al., *Emotional Intelligence in the Workplace: A Critical Review*, 53 *APPLIED PSYCHOL.* 371, 372 (2004) (pointing out the “scant, and sometimes highly controversial, empirical evidence used to support the importance of EI in the workplace”).

²⁵⁸ John D. Mayer et al., *Emotional Intelligence Meets Traditional Standards for Intelligence*, 27 *INTELLIGENCE* 267, 267 (2000).

²⁵⁹ Green, *supra* note 17, at 1000.

²⁶⁰ See Abramson, *Being Emotional*, *supra* note ____.

this is typically a requirement.²⁶¹ In the employment discrimination context, this should not be an essential component. So long as everyone agrees that “something” happened, no one should be forced to admit that he or she intended to discriminate.²⁶² Indeed, this is one of the problems identified above with the current litigation-focused approach to employment discrimination claims. Being labeled as a “discriminator” may provoke resentment and retaliation, and shut down many managers from any meaningful conversation about what happened and what can be done to fix the problem.

III. TYPOLOGIES OF A RESTORATIVE APPROACH TO DISCRIMINATION

With the above theoretical grounding about how restorative practices may reduce bias and promote organizational learning, this Part connects restorative practices to organizational management theory and introduces a typology of employer approaches to discrimination prevention.

A. *The Social Discipline Window*

A foundational framework for restorative practices is the Social Discipline Window, which is based on other typologies of organizational management.²⁶³ The social discipline window, shown below in Figure 3, examines the interplay of two axes or continua: control or limit-setting and support or nurturing.²⁶⁴ The “fundamental premise of restorative practices is that people are happier, more cooperative and productive, and more likely to make positive changes when those in authority do things *with* them, rather than *to* or *for* them.”²⁶⁵

²⁶¹ See Dena M. Gromet et al., *A Victim-Centered Approach to Justice? Victim Satisfaction Effects on Third-Party Punishments*, 36 LAW & HUM. BEHAV. 375, 376 (2012) (“Before a restorative justice procedure can be initiated, offenders must admit their guilt.”); Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 312 (“[A]n offender who enters a restorative justice process has, at least formally, already admitted his guilt before that process gets under way.”).

²⁶² Interview with Lauren Abramson, Executive Director of Baltimore Community Conferencing Center (Sept. 12, 2013) (notes on file with author).

²⁶³ See Wachtel, *supra* note 152 (adapting theory of WILLIAM GLASSER, *SCHOOLS WITHOUT FAILURE* (1969)).

²⁶⁴ Wachtel & McCold, *supra* note 246, at 117.

²⁶⁵ *Id.*

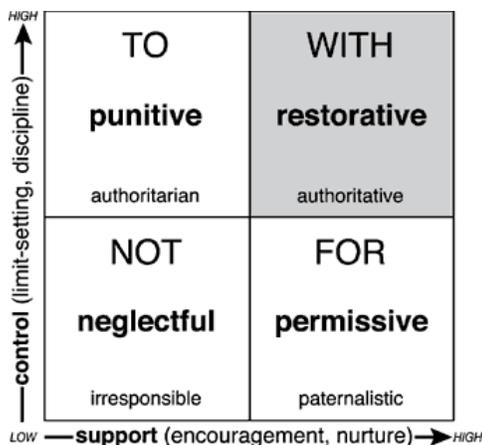


Figure 3: Social Discipline Window²⁶⁶

The “not” or neglectful quadrant is characterized by low degrees of both limit-setting and encouragement or support. These may be organizations that attempt to avoid or suppress conflict, hoping that it will go away if they simply ignore it. Above that, the “to” quadrant is the traditional command-and-control approach to business management. Wachtel characterizes this as the “punitive” or “authoritarian” approach, high on control and low on support for employees. The punitive approach to organizational management was advocated by Max Weber and Frederick Winslow Taylor. Weber assumed that people were essentially lazy and untrustworthy and that the employer therefore needed to maintain order and discipline through clear lines of authority and strictly enforced rules, with punishments and rewards.²⁶⁷ Taylor posited that work should be designed “scientifically,” to minimize the influence of the “human element,” like emotions, on production.²⁶⁸

The diagonally opposite, “for” quadrant of the grid is the “permissive” approach to discipline, which is comprised of low control and high support, “a scarcity of limit-setting and an abundance of encouragement.”²⁶⁹ Wachtel likens the permissive approach to the humanistic or human relations approach to management. This approach, advocated by Elton Mayo and Rensis Likert, holds that employers should resolve social problems faced by workers to increase their productivity and provide inspiration and motivation.²⁷⁰

Wachtel compares the “punitive” and “permissive” quadrants to Douglas McGregor’s theories of worker productivity.²⁷¹ McGregor set forth Theory X and Theory Y as opposite ends of the organizational management continuum. Under Theory X—the equivalent of the punitive approach—management must continually control, punish and manipulate employees to ensure optimum productivity. Under Theory Y—the permissive approach—management must provide

²⁶⁶ Wachtel, *supra* note 243. Wachtel adapted the social discipline theory original developed by William Glasser. See WILLIAM GLASSER, *SCHOOLS WITHOUT FAILURE* (1969).

²⁶⁷ MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (1947).

²⁶⁸ Frederick Winslow Taylor, *The Principles of Scientific Management*, *SCIENTIFIC MANAGEMENT* (Harper & Row 1947).

²⁶⁹ Wachtel, *supra* note 152.

²⁷⁰ *Id.*; see also RENSIS LIKERT, *NEW PATTERNS OF MANAGEMENT* (1961); RENSIS LIKERT, *THE HUMAN ORGANIZATION* (1967); GEORGE ELTON MAYO, *THE HUMAN PROBLEMS OF INDUSTRIALIZED CIVILIZATION* (1933).

²⁷¹ DOUGLAS MCGREGOR, *THE HUMAN SIDE OF ENTERPRISE* (1960).

sufficient motivators for employees to be productive. Motivators include, for example, “the work itself, a friendly work atmosphere, personal recognition and acknowledgement of achievement, professional growth, work challenge, accomplishments, responsibility and discretion.”²⁷² In other words, management must arrange conditions optimally for the individuals who work for them.

Building on McGregor’s scholarship, business professor William Ouchi developed Theory Z, which is comparable to the restorative or “with” quadrant.²⁷³ A restorative approach to discipline combines high degrees of both control and limit-setting and engages the entire community in developing and enforcing norms. Under Theory Z, the manager remains the ultimate decision maker and clearly articulates expectations, but does not use punitive, command-and-control management.²⁷⁴ Rather, “[i]n the Theory Z organization every effort is made to replace hierarchical direction with self-direction. The most significant organizational attributes are egalitarianism, trust, open communications and commitment.”²⁷⁵

The social discipline window is similar to the “managerial grid” developed by management scholars Robert Blake and Jane Mouton. Blake and Mouton identified two fundamental drivers of managerial behavior: concern for production or getting the job done, and concern for the people doing the work.²⁷⁶ They conceptualized five leadership styles: 1) authoritarian or compliance (high concern for production and low concern for people); 2) country club (high concern for people and low concern for production), 3) impoverished (low on both), 4) middle of the road (medium on both, but the needs of production and people may not be fully met), and 5) team style (high concern for employees and productivity).²⁷⁷ Blake and Mouton argued that leaders that use a “team style” are most likely to be successful in accomplishing their goals.²⁷⁸

To understand how the social discipline window operates in practice, consider the implementation of restorative practices in K-12 schools. The U.S. Department of Education and state education systems have recommended positive discipline models like restorative practices as an alternative to “zero-tolerance” disciplinary policies.²⁷⁹ Studies found that zero tolerance policies in schools did not improve school safety and disproportionately punished students of color.²⁸⁰ African-American youth were more likely to be suspended than their similarly-situated white peers, which increased the likelihood that they would become involved with the juvenile or

²⁷² Wachtel, *supra* note 152.

²⁷³ WILLIAM OUCHI, *THEORY Z: HOW AMERICAN MANAGEMENT CAN MEET THE JAPANESE CHALLENGE* (1981).

²⁷⁴ Wachtel, *supra* note 152.

²⁷⁵ *Id.*

²⁷⁶ ROBERT R. BLAKE & JANE MOUTON, *THE MANAGERIAL GRID* (1964).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, JOINT “DEAR COLLEAGUE” LETTER (Jan. 8, 2014), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> (summarizing racial disparities in administration of school discipline and recommending, among other things, more positive discipline models).

²⁸⁰ Russell J. Skiba et al., Am. Psychol. Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. 852, 860 (2008) (concluding that zero tolerance policies have “not been shown to improve school climate or school safety . . . [and] its application in suspension and expulsion has not proven an effective means of improving student behavior”); BRENDA MORRISON, *RESTORING SAFE SCHOOL COMMUNITIES: A WHOLE SCHOOL RESPONSE TO BULLYING, VIOLENCE AND ALIENATION* (Federation Press 2007) (arguing zero tolerance discipline policies fail to work and promote intolerance and discrimination against a minority of students).

criminal justice system.²⁸¹ To overcome this “school to prison pipeline,” many schools have implemented restorative practices. The focus of restorative practices in schools is to build a climate of mutual respect, strong relationships, and accountability. The goal is to combine high level of control and limit-setting, with high levels of support and nurturing for students so they can satisfy expectations.

Schools that have implemented restorative practices have experienced empirically impressive results, including improved school climate, dramatically decreased suspension and expulsion rates, and reductions in conflicts, bullying, and fighting.²⁸² One school in Oakland, California, for example, lowered its suspension rate by 87% and its expulsions to zero.²⁸³ Another Midwestern high school applied a restorative justice response to serious student hazing incidents that had become an ingrained “tradition” at the school for decades.²⁸⁴ Restorative practices have helped students develop empathy for differences in others.²⁸⁵ Studies show that restorative practices have reduced bullying and harassment of “outgroup” students.²⁸⁶

²⁸¹ TONY FABELO ET AL., *BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT*, at x (July 2011), *available at* http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf (six-year longitudinal study in Texas finding that “African-American students and those with particular educational disabilities were disproportionately likely to be removed from the classroom for disciplinary reasons” and that students who were suspended or expelled had a significantly increased likelihood of being involved in the juvenile justice system).

²⁸² *See, e.g.*, BARBARA J. MCMORRIS ET AL., *APPLYING RESTORATIVE PRACTICES TO MINNEAPOLIS PUBLIC SCHOOLS STUDENTS RECOMMENDED FOR POSSIBLE EXPULSION: A PILOT PROGRAM EVALUATION OF THE FAMILY AND YOUTH RESTORATIVE CONFERENCE PROGRAM (2013)*, *available at* http://www.legalrightscenter.org/LRC_UMN_Report-Final.pdf (finding after three-year evaluation that restorative practices increased student attendance, decreased disciplinary incidents, and improved school climate); David Simson, *Restorative Justice and its Effects on (Racially Disparate) Punitive School Discipline* (7th Annual Conference on Empirical Legal Studies paper, May 12, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107240 (finding restorative programs reduced school reliance on punitive disciplinary measures and reduced the disproportionate numbers of suspensions of African-American students); MICHAEL D. SUMNER ET AL., *SCHOOL-BASED RESTORATIVE JUSTICE AS AN ALTERNATIVE TO ZERO-TOLERANCE POLICIES: LESSONS FROM WEST OAKLAND*, THELTON E. HENDERSON CENTER FOR SOCIAL JUSTICE (2010), *available at* http://www.law.berkeley.edu/files/11-2010_School-based_Restorative_Justice_As_an_Alternative_to_Zero-Tolerance_Policies.pdf (finding that restorative practices decreased average suspension rate at school by 87 percent and reduced expulsions to zero).

²⁸³ *See* SUMNER ET AL., *supra* note 282. *See also* Patricia Leigh Brown, *Opening Up, Students Transform a Vicious Circle*, N.Y. TIMES, Apr. 3, 2013, <http://www.nytimes.com/2013/04/04/education/restorative-justice-programs-take-root-in-schools.html?pagewanted=all> (discussing restorative approach in urban schools as one that “tries to nip problems and violence in the bud by forging closer, franker relationships among students, teachers and administrators. It encourages young people to come up with meaningful reparations for their wrongdoing while challenging them to develop empathy for one another through ‘talking circles’ led by facilitators”).

²⁸⁴ Douglas M. DeWitt & Lori J. DeWitt, *A Case of High School Hazing: Applying Restorative Justice to Promote Organizational Learning*, 96 NASSP BULL. 228 (2012).

²⁸⁵ *See* Patrice Vossekui & Robert D. Rettmann, *Enhancing Respectfulness Through Restorative Practices*, CRISIS PREVENTION.COM (Apr. 16, 2012) <http://www.crisisprevention.com/Resources/Article-Library/Nonviolent-Crisis-Intervention-Training-Articles/Enhancing-Respectfulness-Through-Restorative-Pract> (reporting that elementary and middle school teachers Horicon District, California found that restorative practices “have helped students develop a sense of empathy and respond to the feelings of others” and noting that one student who had been previously subjected to constant bullying now “felt safer at school, and appreciated that students take time to listen to [her] point of view.”); *See also* Myriam L. Baker, *Skinner Middle School Restorative Justice Project: Executive Summary 2007-2008* (Sept. 25, 2008),

Some may wonder how a discipline framework being used to transform school discipline applies in the business context. But the opposite is occurring: ideas from organizational management theory are being successfully deployed as alternatives to “command and control” discipline in schools. As described in the next section, similar concepts apply to organizational change.

B. Organizational Change Window

Under the Organizational Change Window, shown below in Figure 4, organizations are more likely to be successful in implementing change if everyone in the organization feels engaged in the process. This model incorporates the notion of fair process: that individuals are more likely to have a sense of ownership and commitment to workplace norms and policies—even if they disagree with them—if they are engaged in the process and have clarity about the expectations that apply to them.²⁸⁷ Management scholars Kim and Mauborgne studied strategic decision making at a wide range of multinational corporations. They found that when organizations used fair process, employees voluntarily went above and beyond the call of duty because they felt respected and valued. As Kim and Mauborgne explain:

Fair process builds trust and commitment, trust and commitment produce voluntary cooperation, and voluntary cooperation drives performance, leading people to go beyond the call of duty by sharing their knowledge and applying their creativity. In all the management contexts we’ve studied, whatever the task, we have consistently observed this dynamic at work.²⁸⁸

http://www.rjcolorado.org/_literature_55813/Restorative_Justice_Pilot_Program_at_Skinner_Middle_School_-_Summary (reporting significant improvements in culture of Denver Public Schools after implementation of restorative practices, with parents noting students’ demonstration of good listening skills, empathy, anger control, respect, and appropriate reparative action planning).

²⁸⁶ FRAN THOMPSON & PETER K. SMITH, U.K. DEP’T OF EDUC., RESEARCH REPORT DFE-RR098, THE USE AND EFFECTIVENESS OF ANTI-BULLYING STRATEGIES IN SCHOOLS (May 11, 2010), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/182421/DFE-RR098.pdf (finding that majority of schools in British school district found that the whole-school restorative practices approach was effective in reducing bullying incidents, including sexual harassment and cyber bullying); Kathy Bickmore, *Location, Location, Location: Restorative (Educative) Practices in Classrooms* (Feb. 16, 2011), <http://www.educ.cam.ac.uk/research/projects/restorativeapproaches/seminarfour/BickmoreSemianr4.pdf>.

²⁸⁷ W. Chan Kim & Renée Mauborgne, *Fair Process: Managing in the Knowledge Economy*, HARV. BUS. REV., Jan. 2003, at 6.

²⁸⁸ *Id.*

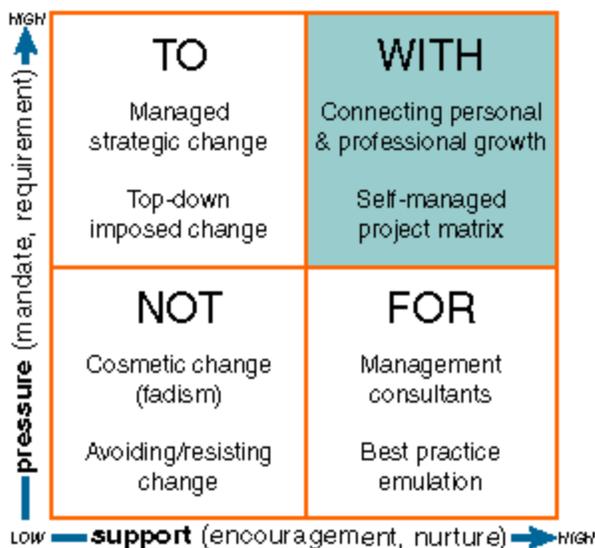


Figure 4: Organizational Change Window²⁸⁹

In the managed strategic change or top-down imposed change quadrant, leadership imposes solutions on the organization. This approach risks lack of “buy-in” or feelings of alienation throughout the organization. “Unless employees are presented with the problem and engaged in implementing the solution, doing things TO employees fosters an unhealthy dependency on the leadership. They will perceive problems presented in this context as unrelated to them, someone else’s responsibility rather than their own.”²⁹⁰

In the lower right “for” quadrant, an organization brings in management consultants or copies “best practices” from other companies to solve problems. According to Wachtel, “[m]inimizing the hassle and pain of change may seem helpful, but again it fosters and unhealthy dependency on others and keeps employees from taking responsibility.”²⁹¹ The “best practice” “may provide only a superficial change that does not really solve the problem.”²⁹² Consultants can be helpful in sharing information about innovative strategies, but simply implementing their recommendations is not likely to be successful unless the stakeholders who are expected to use the system have input into its development.²⁹³

In the “not” quadrant, there is no pressure or commitment from leadership for change, nor support for employees to facilitate the implementation of change. These are cosmetic changes or fads, which can cause “endemic cynicism.”²⁹⁴ This could also mean avoiding any change, which “may threaten the very existence of a business organization.”²⁹⁵

In the restorative or “with” approach to organizational change, principles of fair process—engagement, explanation, and expectation clarity—are observed. Out of this

²⁸⁹ Wachtel, *supra* note 152.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

engagement, “a learning ecology” is created.²⁹⁶ Individuals in the organization appreciate how their personal and professional growth are connected. Because they feel engaged and respected in the process, they are more likely to form internal commitment for the desired organizational changes.

C. Typology of Employer Approaches to Antidiscrimination Laws

Based on the restorative social discipline and organizational change windows, and the theoretical foundation provided in Part II, the approaches that employers use to comply with antidiscrimination obligations can be conceptualized in the following typology:

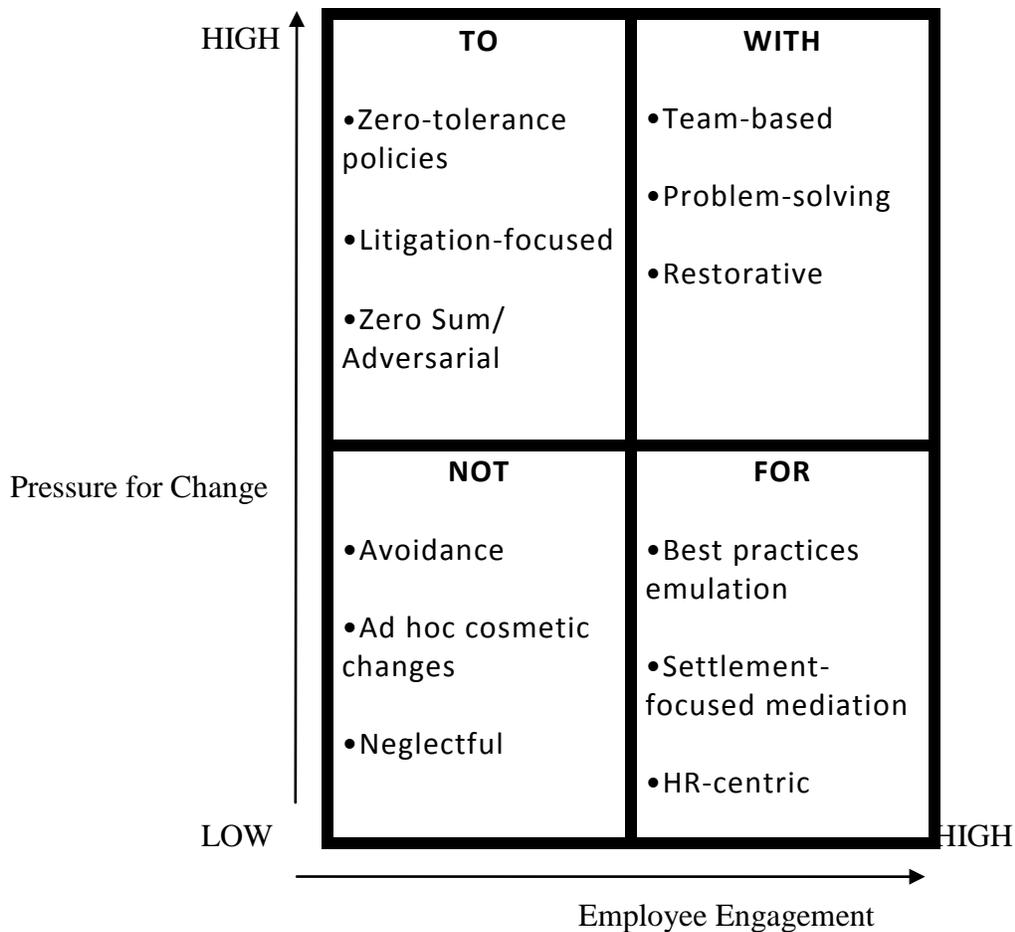


Figure 5: Employer Approaches to Antidiscrimination Laws

²⁹⁶ *Id.*

1. Avoidance and Neglect

The avoidance or “not” quadrant in the lower left corner is characterized by low levels of employee engagement and low levels of pressure for change. These employers do not develop any systems or procedures for dealing with conflict generally or discrimination complaints more specifically. These firms “avoid addressing the messy problems of managing human relationships until those problems surface as crises.”²⁹⁷ Employers may think that they are saving time and money by avoiding the issue until a crisis arises. But the avoidance approach is likely to suppress conflicts temporarily, only to have them waste time and distract from productivity, and likely reemerge as formal complaints. This may also reflect cosmetic changes—such as hanging a poster that celebrates diversity on a wall.

2. Zero Tolerance, Adversarial Approach

The zero tolerance or “to” approach in the upper left quadrant represents employers that have policies that mandate non-discriminatory behavior, but do little to engage employees in developing and reinforcing those values as a workplace community.²⁹⁸ These employers may also mandate that employees attend antidiscrimination training programs.²⁹⁹ Such policies—standing alone—may sometimes result in *more* resentment, backlash, and disparate treatment towards women and minority groups.³⁰⁰

“Zero sum” managers believe that if conflicts or discrimination complaints arise, “managing them means prevailing. Zero sum managers attach great value to ‘victory’ and dislike compromise.”³⁰¹ Mandatory pre-dispute arbitration clauses are an extension of the adversarial approach. Fearing that juries may favor employees, zero sum employers want to select the venue in which they may have the best chance of winning the battle.³⁰² They may also believe that arbitration is less costly than court litigation.³⁰³ Regardless of the reason employers

²⁹⁷ See Sturm, *supra* note 45, at 478.

²⁹⁸ See *supra* Part I.B.

²⁹⁹ See, e.g., AM. MGMT. ASS’N, SEXUAL HARASSMENT: POLICIES AND PROCEDURES 1 (1996) (reporting that 89% of firms surveyed had formal sexual harassment policies and 65% had training programs); SOC’Y FOR HUMAN RES. MGMT., SEXUAL HARASSMENT SURVEY 6, 8 (1999) (reporting that 97% of the 496 members that responded to a faxed survey indicated that they had written sexual harassment policies and 62% indicated that they had training programs); Marc Bendick, Jr. et al., *Workforce Diversity Training: From Anti-Discrimination Compliance to Organizational Development*, 24 HUM. RESOURCE PLAN. 10, 13–24 (2001) (reporting that majority of survey respondents indicated that their employer mandated diversity training).

³⁰⁰ See Bartlett, *supra* note 28.

³⁰¹ LIPSKY ET AL., *supra* note 26, at 41.

³⁰² See, e.g., David T. Lopez, *Realizing the Promise of Employment Arbitration*, 69 TEX. B.J. 862, 862 (2006) (“Employers have opted for mandatory, binding arbitration of employment disputes as a way to avoid the fear of disproportionate jury awards or jury bias, among other reasons.”); Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 88–98 (2003) (discussing corporations’ preference for arbitration because of their fear of large jury verdicts and costs and concern for their privacy).

³⁰³ See David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1560 (2005) (stating that mandatory arbitration is less expensive and faster than litigation); A. Michael Weber, *Rise of ADR for Workplace Disputes: Deciding Whether to Adopt Mandatory Arbitration*,

impose mandatory arbitration clauses, this strategy does little to prevent or manage discrimination in the workplace.

Employers that adopt an adversarial approach to antidiscrimination laws also may turn the workplace into a surveillance state, documenting even the tiniest infractions to build a record that can be used as a defense in any eventual legal case.³⁰⁴ This can make the workplace feel like a toxic environment, in which trust between management and the workforce is low or non-existent. In the long run, this approach is likely to be ineffective—indeed, counterproductive—in creating respectful, equal opportunity work cultures.

3. Human Relations or “Best Practices” Approach

The lower right or “for” quadrant represents the human relations approach to antidiscrimination laws. These organizations may espouse strong support for antidiscrimination laws. But the job of complying is ferreted off to the human resources department. Although perhaps well-intentioned, this approach does not engage the organization’s leadership or the larger workforce in proactive processes to develop egalitarian norms, nor reactive processes to promote organizational learning. Discrimination concerns become messy “HR problems.” When complaints are raised, the goal is typically to stamp them out at the lowest level, for the least amount of money. The goal is to promote “smooth operations” rather than egalitarian and dignity norms.³⁰⁵

Internal dispute resolution systems might expediently resolve claims, but may also be less effective in accomplishing antidiscrimination goals. If success is measured simply in terms of whether the complainant drops the issue, the systemic causes of inequity may not be eradicated in a meaningful way. Rather than promoting reflection, learning and change at the individual and organizational level, systems focused primarily on litigation avoidance and settlement may not repair the harm done to the complainant, help the wrongdoer understand the harm caused and be held accountable, and address the root causes of the problem.

4. Restorative Approach

The “with” or restorative quadrant reflects what has been discussed in this article. The theoretical foundation and psychological research set forth above suggests that restorative practices may be an effective way for organizations to internalize the norms of inclusiveness, dignity, and equal opportunity. In addition, reactive restorative processes may better manage the

N.Y.L.J., July 17, 2008, at 24 (discussing the advantages of arbitration). *But see* Brent Benoit, *Transcending Disciplines: What Every Transactional Lawyer Should Know About Litigation*, TEX. J. BUS. L., Spring 2013, at 143, 164 (“While generally less expensive, arbitration is not necessarily the cheaper alternative to litigation.”).

³⁰⁴ See generally D. SCOTT CROOK, BEST PRACTICES FOR EMPLOYEE RECORDKEEPING, http://www.arnoldcrook.com/PDF/Best_Practices_for_Employer_Recordkeeping__Brochure__2011.04.15_.pdf (last visited Feb. 20, 2015); IRON MOUNTAIN, RECORDS MANAGEMENT BEST PRACTICES GUIDE: A PRACTICAL APPROACH TO BUILDING A COMPREHENSIVE AND COMPLIANT RECORDS MANAGEMENT PROGRAM (2005), available at http://www.noplanenogain.org/images/1255960726.pdf_copy3.pdf.

³⁰⁵ Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497 (1993) (finding that complaint handlers in workplaces emphasize the managerial goal of smooth operations rather than racial and gender equality).

natural defensive responses, like shame, that can lead to backlash against individuals who raise discrimination complaints, and the groups to which they belong. The restorative quadrant could include problem-solving systems, such as ombuds programs that have “feedback loops” about systemic problems that are causing inequitable treatment.³⁰⁶ It also may include mediation programs, like that of the United States Postal Service, for which settlement is not the primary goal of the process.³⁰⁷ But because these systems are mostly reactive in nature—reliant on employees to report discrimination—they may not be as effective as restorative practices in preventing discrimination from occurring in the first place. The proactive, dialogic elements of restorative practices may more effectively cultivate the internalization of equality norms and provide communication tools to help individuals work through concerns about unfair or inequitable treatment.

To be most effective at remediating discrimination, a restorative approach to workplace discrimination should include both proactive and reactive components. A reactive-only system might seem overly punitive to individuals who are not accustomed to a process that involves open dialogue.³⁰⁸ By building strong relationships and a sense of common identity and vision, the proactive elements of restorative practices hold the most promise in overcoming implicit biases and mental models that can generate inequitable treatment.

A word of caution: this typology reflects potential over-arching governing philosophies to discrimination prevention. It is designed to help employers think more strategically about the type of culture they want to create, how their organizational objectives connect to antidiscrimination and diversity goals, and the best way to accomplish sustained change. Organizations may need to move around this grid in responding to particular contexts. For example, there may be situations that seem so petty that investing too much energy beyond informal responses like affective statements and questions will not be worth the time involved. In addition, in cases of blatant first generation discrimination—especially if assault is involved—the employer needs to ensure everyone’s safety before exploring whether a restorative conference is appropriate for the situation. Restorative processes are especially helpful in proactively engaging the organization to prevent discrimination on the front-end. At the reactive level, it may be effective in working through second generation discrimination situations and other concerns that may be more ambiguous.

5. Challenges and Practical Considerations

a. Which employers?

To be successful as a discrimination prevention strategy, employers should not simply take restorative processes—or any conflict management model—“off the shelf” and adopt them.³⁰⁹ A restorative framework will work only if it aligns with the organization’s dominant

³⁰⁶ See Sturm, *supra* note 45; Sturm, *supra* note 47.

³⁰⁷ See Bingham, *supra* note 78 (describing empirical study of U.S. Postal Service REDRESS mediation program).

³⁰⁸ Interviews with Kay Pranis, Tracy Roberts, and Leigh Ann Roberts (interview notes on file with author).

³⁰⁹ James W. Reeves & Karen Tokarz, *Resolving Workplace Conflict through Employment Dispute Resolution Programs*, ST. LOUIS B.J., Winter 2006, at 20, 25 (noting that companies should not “succumb to the temptation to

culture and objectives.³¹⁰ Restorative practices are a “whole workplace” strategy, embedded into the organization’s values-system and way of doing business. Restorative practices are not a top-down policy that can be imposed on employees, or handled only by the human resources department. It requires engagement from the entire organization.

Obviously, organizations in which the leadership prefers a “command-and-control,” punitive management style—or is itself abusive and explicitly prejudiced—are not good candidates for a restorative paradigm. A restorative approach is appropriate only if the organization’s leadership is strongly committed to both a restorative or organizational learning philosophy and to the policy goals of antidiscrimination laws.³¹¹ The organization also must have an infrastructure that can process greater employee engagement and voice.³¹² A restorative model may be effective for organizations in which the leadership is well-meaning and espouses egalitarian beliefs, but current practices are failing to achieve the type of culture they desire. Some readers—especially those accustomed to thinking about employment discrimination law through the “victim-villain” lens described earlier—may wonder if such employers exist. Nevertheless, with the right commitment and support from leadership, a restorative approach could be appropriate for any employer.

Organizations that adopt a restorative approach must be comfortable with the idea that ensuring equal opportunity is a dynamic and constant learning process. This requires a level of openness and vulnerability—a willingness to analyze one’s mental models and learn from mistakes. This is especially important given the subtle and complex ways that inequalities can arise. The intergroup, dialogic processes in a restorative framework may create environments most conducive to the deconstruction of implicit stereotypes and the internalization of egalitarian and dignity norms.

A restorative approach may seem overly naïve or optimistic about the fundamental goodness and malleability of human nature. Restorative processes may not “produce the desired internal, moral changes”³¹³ in those who might otherwise discriminate or harass. But the social science research described above suggests that a restorative framework may more effectively address the human dynamics—like shame, anger, and defensiveness—that can get in the way of repairing the harms of discrimination and systemic causes of inequities. A similar framework has worked successfully in schools to transform violent, high conflict cultures, reduce bullying, and help students develop empathy for others. It holds promise for working adults as well.³¹⁴

One may argue that a restorative lens does not comport with the wealth-maximization mission of corporations. Many companies recognize, however, that engaging and investing in its

use an off-the-shelf, one-size-fits-all program that another company has implemented”); Lipsky & Avgar, *supra* note 23 (emphasizing importance of matching conflict management approach with organizational culture and objectives).

³¹⁰ Lipsky & Avgar, *supra* note 23 (urging organizations to adopt a “strategic approach to conflict management”).

³¹¹ Bartlett, *supra* note 28, at 1970 (“For institutional goals to have salience and credibility, the institution must reflect those values from the top.”).

³¹² Lipsky & Avgar, *supra* note 84, at 42 (noting that not all organizations have the “structures and corporate culture to metabolize workplace voice.” When that happens, providing voice through the conflict management system is unlikely to lead to meaningful discussion and potential change.”).

³¹³ Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 765 (2000).

³¹⁴ Susan Hanley Duncan, *Workplace Bullying and the Role Restorative Practices Can Play in Preventing and Addressing the Problem*, 32 INDUS. L.J. 2331 (2011) (proposing use of restorative practices to address workplace bullying).

human capital can make profitability soar. For example, Ford Motor Company dramatically transformed its culture and improved its earnings with a “people first” commitment that emphasized employee engagement, asking hard questions and listening deeply to the answers, and strong relationships.³¹⁵ As William O’Brien, CEO of Hanover Insurance and proponent of organizational learning, once described: “In the type of organization we seek to build, the fullest development of people is on an equal plane with financial success.”³¹⁶ Another executive from Intel, Ilean Galloway, pointed out that the traditional approach to diversity—putting people into categories—is no longer sufficient: “The real issues here are much more personal, more developmental, than the way most corporations have been looking at diversity. It is about our ability to understand and appreciate how [others] think, communicate, and relate. It’s about living together.”³¹⁷ A restorative strategy helps to facilitate that goal.

b. The adjudication vs. ADR debate

Some may be skeptical about using internal organizational management approaches to protect civil rights in the workplace. For nearly four decades, an academic debate has raged about whether litigation or alternative dispute resolution processes are preferable for legal claims that implicate important public values, like civil rights.³¹⁸ On the one hand, “litigation romanticists”³¹⁹ contend that a public, judicial-based litigation process is necessary to raise public consciousness and ensure that social justice issues are adjudicated by courts.³²⁰ These scholars also fear the potential for power imbalances in more informal private processes, like mediation. On the other hand, alternative dispute resolution proponents, whom some have dubbed “ADR evangelists,”³²¹ argue that the parties are likely to be in the best position to determine the outcome of their conflict, and that self-determined—rather than court-imposed—outcomes are more likely to result in lasting, durable agreements and just results.³²²

Given the dismal outlook for most plaintiffs in employment discrimination litigation,³²³ a restorative framework may offer a more accessible and complete remedy. The restorative

³¹⁵ See *supra* note 43.

³¹⁶ SENGE, *supra* note 33, at 134 (quoting O’Brien).

³¹⁷ *Id.* at 312 (quoting Galloway).

³¹⁸ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that ADR rests on questionable premises and that adjudication is preferable to settlement); see also Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 1 (1990) (summarizing arguments for adjudication and mediation through an imaginary conversation of the proponents of each).

³¹⁹ See Michael Moffitt, *Three Things to Be Against (“Settlement” Not Included)*, 78 FORDHAM L. REV. 1203, 1203 n.3 (2009) (attributing the creation of the phrase to Menkel-Meadow).

³²⁰ See John O. Calmore, *Social Justice Advocacy in the Third Dimension: Addressing the Problem of “Preservation-Through-Transformation,”* 16 FLA. J. INT’L L. 615, 623 (2004).

³²¹ Moffitt, *supra* note 319, at 1204.

³²² See, e.g., *id.*; Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881 (2004) (arguing that negotiation is preferable to litigation when disputes involve deep moral disagreement).

³²³ Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL’Y REV. 103, 103 (2009) (finding that, compared to other plaintiffs, employment discrimination plaintiffs “win a lower proportion of cases during pretrial and at trial”). Many scholars and judges have lamented the “judicial hostility” and overuse of summary judgment in employment discrimination cases. See, e.g., Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the*

approach outlined here is not a substitute for strong antidiscrimination laws or court processes. Employees retain the option of refusing a restorative conference—which should always be voluntary—and filing a claim with the EEOC. Nevertheless, what happens in the day-to-day life of the workplace is where “the rubber meets the road” in promoting the policy goals of antidiscrimination laws. Most employees undoubtedly would prefer not to sue their employers to be treated fairly. And many organizations are hungry for ways to lessen intergroup tension and prevent discrimination (or, in their view, at least reduce the risk of messy “human relations” problems or lawsuits). In addition, unlike settlement-focused mediation, the goal of restorative practices is to learn from instances of discrimination and effect systemic changes, not to settle and avoid liability (although it might accomplish that as well).

Many employment discrimination scholars have criticized internal dispute resolution programs as merely symbolic—an extension of employer defensive strategies to liability rather than meaningful ways to reduce discrimination.³²⁴ If employers view restorative practices simply as litigation avoidance mechanisms—rather than on-going, dynamic learning processes that engage the entire workforce in developing egalitarian and dignity norms—they are likely to fail both in preventing discrimination and reducing the risk of litigation. If not implemented properly, there is a danger that restorative practices could become a symbolic “program” rather than an integrated workplace philosophy and culture. Nevertheless, a large body of social cognition research teaches us about the varied, often subtle causes of discrimination and the ineffectiveness of coercive strategies in correcting the problem. This research also instructs that building social capital, promoting intergroup contact and dialogue, and reducing defensive routines are important aspects of reducing bias (explicit or implicit) and overcoming second generation discrimination. Perhaps it is time to think about the equal opportunity, human dignity, and restoration goals of Title VII and related laws through a new, restorative lens.

CONCLUSION

Although antidiscrimination laws have prompted extraordinary social change over the past half century, the current coercive, settlement-focused approaches to employment discrimination sometimes fail to eradicate many of the root causes of bias and inequities. Social science research has given us a more sophisticated and nuanced understanding of the complex cognitive, relational, and emotional dynamics that can lead to discrimination, sometimes inadvertently. Restorative practices show great potential in reducing and addressing these forms of “second generation discrimination” at the grassroots, workplace level. Its proactive dialogic

Detrimental Effect of Iqbal on Civil Rights Cases, 14 LEWIS & CLARK L. REV. 65, 95 (2010) (“Recent studies indicate that judicial hostility to Title VII claims in particular continues.”); Symposium, *Trial by Jury or Trial by Motion?: Summary Judgment, Iqbal, and Employment Discrimination*, 57 N.Y.L. SCH. L. REV. 659 (2012-2013) (collection of articles by legal scholars and judges examining the overuse of summary judgment in employment discrimination cases).

³²⁴ See Lipsky & Avgar, *supra* note 84, at 48–49 (noting that civil rights progressives criticize conflict management programs as charades, rhetoric, or “lip service”); Bisom-Rapp, *supra* note 124, at 972. I save for another day a more thorough analysis of the opportunities and potential criticisms of restorative practices in the union context. See Lipsky & Avgar, *supra* note 84, at 48 (noting that unions have skeptically viewed conflict management systems as a “means of avoiding unionization”).

components build social capital and empathy for differences and engage the entire organization in taking ownership of egalitarian and human dignity norms. Reactive restorative processes manage defensive routines and shame responses that can be triggered by discrimination claims. This can help to reduce retaliation and overcome learning barriers that can get in the way of identifying and repairing the harms caused by discriminatory conduct, and ameliorating patterns of workplace inequality.

A restorative approach to discrimination prevention would be a major paradigm shift from the current “victim-villain” paradigm prevalent in the employment discrimination field. A coercive, litigation-based strategy incentivizes organizations to deny that discrimination exists at all (lest they be sued), and to adopt a “whack-a-mole” response to deny or stamp out individual claims as quickly and quietly as possible. In a restorative approach, however, organizations would cultivate a learning infrastructure. A restorative strategy recognizes that maintaining a workplace that values and practices equality and dignity norms is a constant, dynamic learning process for which everyone is responsible. We all have much to learn.