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ARTICLES

THE RESTORATIVE WORKPLACE: AN ORGANIZATIONAL LEARNING APPROACH TO DISCRIMINATION

Deborah Thompson Eisenberg *

"[L]aw 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

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

2.   HARPER LEE, TO KILL A MOCKINGBIRD 33 (Harper Collins 2006) (1960).

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 laws[4] 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

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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(a)(1) (2012). President Lyndon Johnson signed Title VII into law on July 2, 1964. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

4. Other employment discrimination laws include, for example: the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012), the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012), and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012).

5. Griggs v. Duke Power Co., 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. 7166, 7168 (1972) (statement of Sen. Williams) (emphasis added). Congress added compensatory and punitive damages to Title VII in 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977A, 105 Stat. 1071, 1072 (codified as amended at 42 U.S.C. § 1981a); *see* EDUC. & LABOR COMM., H.R. REP. NO. 102-40(I), at 64–65 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 602–03 ("Monetar[]y 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 STRATEGY DURING THE OBAMA ADMINISTRATION—A MISUSE OF AUTHORITY 16 (2014),

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 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

https://www.uschamber.com/sites/default/files/documents/files/021449_LABR%20EEOC%2 0Enforcement%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); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

11.   *See, e.g.*, *Nondiscrimination/Anti-Harassment Policy and Complaint Procedure*, SOC'Y FOR HUM. RES. MGMT. (May 23, 2014), http://www.shrm.org/templatestools/samples /policies/pages/cms_000551.aspx.

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 [hereinafter *Charge Statistics*], http://www. eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Dec. 1, 2015). The EEOC enforces Title VII and other employment discrimination laws. *See Laws Enforced by EEOC*, EEOC, http://www.eeoc.gov/laws/statutes/index.cfm (last visited Dec. 1, 2015).

13.   *See* KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 3 (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"); Jean R. Sternlight, *Placing the Reality of Employment Discrimination Cases in a Comparative Context*, 11 EMPLOYEE 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"); Martha Minow, *Speaking of Silence*, 43 U. MIAMI L. REV. 493 (1988) (reviewing KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988)).

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 is now higher than any

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, 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 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] Busi-

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other charge category. *Charge Statistics, supra* note 12. In 2014, the EEOC received 37,955 retaliation charges, 31,073 racial discrimination charges, and 26,027 sex discrimination charges. *Id.*

16. *See infra* Part I.A.

17. *See* Tristin K. Green, *Racial Emotion in the Workplace*, 86 S. CAL. L. REV. 959, 970–81 (2013).

18. For example, women may leave the workplace because of disrespectful environments where they do not feel valued, a 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), 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 a weak labor market and inflexible work policies are the main reasons women are leaving the workplace).

19. *See* 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). *See generally* Elizabeth A. Pascoe & Laura Smart Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 PSYCHOL. BULL. 531 (2009) (providing comprehensive 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), http://www.seyfarth-classaction.com/2014/2014wcar/index.html.

ness 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 it relates to the goal of discrimination

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

22.   CROSBY BURNS, CTR. FOR AMERICAN PROGRESS, THE COSTLY BUSINESS OF DISCRIMINATION: THE ECONOMIC COSTS OF DISCRIMINATION AND THE FINANCIAL BENEFITS OF GAY AND TRANSGENDER EQUALITY IN THE WORKPLACE 1 (2012), https://cdn.ameri canprogress.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% of the departing employee's salary. *Id.* at 10; *see also* 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); Lipsky & Avgar, *supra* note 23, at 153.

26.   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"); Lipsky & Avgar, *supra* note 23, at 153–54.

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 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 antidiscrimination 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 destruc-

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27.   A study of ADR programs at Fortune 1000 companies found that "many companies continue to employ ad hoc approaches in 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 J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 68 (2014).

28.   David Brooks, Opinion, *Beware Stubby Glasses*, N.Y. TIMES (Jan. 10, 2013), http:// www.nytimes.com/2013/01/11/opinion/brooks-beware-stubby-glasses.html ("[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* Texas 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.*, 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); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1899 (2009) (noting that "Title VII has significantly reduced workplace discrimination . . ."); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1146–52 (1999) (arguing that the statutory language of Title VII is ambiguous enough to cover both deliberate and inadvertent forms of discrimination).

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

tive 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 "[h]uman beings change their behavior based upon the bonds" that they form.[32] Those bonds can be developed through 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

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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: MULTI-DISCIPLINARY PERSPECTIVES 273, 274–78, 280 (Faye J. Crosby et al. eds., 2007).

31. *See infra* Part I.B.

32. M. Diane McCormick, *Susquehanna Township School District Adopts Anti-Bullying Program*, PENNLIVE (May 27, 2012, 6:13 PM), http://www.pennlive.com/midstate /index.ssf/2012/05/susquehanna_township_school_di_18.html (quoting International Institute for Restorative Practices instructor Steve Korr). This philosophy undergirds the teaching of the International Institute for Restorative Practices. *See id*.

33. PETER M. SENGE, THE FIFTH DISCIPLINE: THE ART & PRACTICE OF THE LEARNING ORGANIZATION 146 (Doubleday 2006) (1990) (observing that most social movements oper-

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 rather 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]

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ate 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, 738–39 (2011).

35.   Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 162 (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 & Avgar, *supra* note 23, at 145.

37.   John Braithwaite & Heather Strang, *Introduction: Restorative Justice and Civil Society*, *in* RESTORATIVE JUSTICE AND CIVIL SOCIETY 1–2 (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.* at 12 (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, Schön, 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 inter-

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39.　*See generally* SENGE, *supra* note 33.

40.　*Id.* at 6, 224.

41.　David A. Garvin et al., *Is Yours a Learning Organization?*, HARV. BUS. REV. (Mar. 2008), https://hbr.org/2008/03/is-yours-a-learning-organization.

42.　Joann S. Lublin, *The High Cost of Avoiding Conflict at Work*, WALL ST. J. (Feb. 14, 2014, 10:05 AM), http://www.wsj.com/articles/SB100014240527023043150045793827800 60647804.

43.　See Jim Tierney, *Ford Motor Company: Employee Engagement Sparks Customer Engagement*, LOYALTY360 (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), https://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 things that affect them").

group 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 utilizing 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 of 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. Additionally, this part 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 it remains a problem.[44] Antidiscrimination laws are most suc-

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44. *See Significant EEOC Race/Color Cases,* U.S. EQUAL EMP. OPPORTUNITY COMMISSION, www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm (providing examples of recent cases involving outright exclusion of or blatant hostility towards individuals based on race and color) (last visited Dec. 1, 2015); *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, 2:30 AM), http://www.nydailynews.com/new-york/queens-bakery-hit-25-000-fines-penalties-discrimination-case article-1.1470612 (describing a bakery that told an African American woman that she could not be hired to work the front counter because she was black and "would scare away

cessful 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 characteristics, such as race, gender, disability, and other factors.[50] "[T]he science of implicit cognition suggests that actors do not always have conscious,

customers").

45.   *See generally* Susan Sturm, *Second Generation Employment Discrimination*: *A Structural Approach*, 101 COLUM. L. REV. 458 (2001) [hereinafter Sturm, *Second Generation Employment Discrimination*].

46.   *Id.* at 460.

47.   Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 256 (2006); *see* Sturm, *Second Generation Employment Discrimination*, *supra* note 45, at 460.

48.   Sturm, *Second Generation Employment Discrimination*, *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, 39, 45 (2009); *see also* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (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), http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf.

50.   *See* PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/ (last visited Dec. 1, 2015); *see also* IMPLICIT MEASURES OF ATTITUDES 4–6 (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. 435, 435 (2001) (describing an 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).

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 Jerry Kang and Mahzarin Banaji make the "conservative estimate" that "[s]eventy-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 names[54] and Swedish names over Arab names,[55] pay working fathers higher wages than working mothers,[56] interrupt women who are speaking in meet-

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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, at 16 (Oct./Nov. 2008) (interview with Eric Kandel); *see also* ERIC R. KANDEL, IN SEARCH OF MEMORY: THE EMERGENCE OF A NEW SCIENCE OF MIND (2006).

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., AND 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 generally* Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (arguing that implicit prejudice should not be used for legislative reforms or as litigation evidence).

54.   *See* 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, 991 (2004) (finding that applicants with white-sounding names are 50% 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, 97 (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), 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, 274 (2003) (finding motherhood wage penalty of approximately 2% to 10% for one child and 5% to 13% for two or more children); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 219 (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 7% per child); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1316–17 (2007) (finding that work-

ings more frequently than they interrupt 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.[59] 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."[60] 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.[61]

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ing 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).

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. 12, 2015), http://www.nytimes.com/2015/01/11/opinion/sunday/speaking-while-female.html. 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. SCI. 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); *see also* 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 Communality Deficit*, 92 J. APPLIED PSYCHOL. 81 (2007).

59. Bartlett, *supra* note 28, at 1895–97.

60. *Id.* at 1896–97.

61. *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"); *see also* Hannah Riley Bowles et al., *Constraints and Triggers: Situational Mechanics of Gender in Negotiation*, 89 J.

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.[62] Organizational management scholars Chris Argyris and Donald A. Schön distinguish between what we *think* we do, which they called "theories of action," and what we *actually* do, which they called "theories-in-use."[63] Theories of action are our predictions about how we typically would act in a given situation.[64] Theories-in-use can only be learned through observations of behavior.[65] Many may not realize the incompatibility between our theories of action (espoused beliefs) and our theories-in-use (actions).[66] 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."[67]

Building on the work of Argyris and Schön, MIT business theorist Peter Senge developed practice principles for the "learning organization."[68] Senge uses the term "mental models" to describe the unexamined, automatic motivators of our conduct.[69] 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 they have on our behavior."[70] 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.

PERSONALITY & SOC. PSYCHOL. 951, 952, 962–63 (2005).

    62.   MICHAEL POLANYI, THE TACIT DIMENSION 4–7 (1983).

    63.   CHRIS ARGYRIS & DONALD A. SCHÖN, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS 6–7 (1st ed. 1974). 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, 402–03 (2000).

    64.   ARGYRIS & SCHÖN, *supra* note 63, at 6–7.

    65.   *Id.* at 7.

    66.   *See id.*

    67.   *Id.* at viii.

    68.   *See generally* SENGE, *supra* note 33.

    69.   *Id.* at 8.

    70.   *Id.*

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.[71] 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."[72] A growing body of social science research about racial emotion[73] 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."[74] 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.[75]

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*

Many scholars have noted the limited ability of litigation-based remedies to address second generation discrimination.[76] Some

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

72. *Id.* at 961–62.

73. *See* Linda R. Tropp & 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 Wayne Leach eds., 2004) (summarizing study suggesting importance of affective or emotional dimensions of prejudice and contact over cognitive dimensions).

74. Green, *supra* note 17, at 964.

75. *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 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," while African Americans and historically disadvantaged groups are 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 the same encounters in different ways). *See generally* Robinson, *supra* note 14.

76. *See* Sturm, *Second Generation Employment Discrimination*, *supra* note 45, at 460–61 (noting limitations of litigation in addressing structural features in the workplace that

have argued for the imposition of harsher penalties and expanded legal protections.[77] Others have urged more structural approaches within organizations.[78] Professor Sturm has defined a structural approach as one that "encourages the development of institutions and processes to enact general norms in particular contexts."[79] 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.[80] Mediation has been recommended as a way to allow disputants to voluntarily resolve their conflicts on their own terms and perhaps transform their relationships as well.[81] Empirical studies have found work-

permit discrimination); *see also* 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 primary, means of reform.").

77. *See, e.g.*, 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); 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 might not").

78. Abrams, *supra* note 76, at 1196 ("[L]itigation imposes enormous costs, in hostility and in ostracization, on the women involved. Lingering resentment fostered by litigation can penalize women external to the suit itself."); Bartlett, *supra* note 28, at 1900 (describing how aggressive legal strategies may be counterproductive at eliminating implicit bias in the workplace); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2070 (2003) (stating that "we should strive to create structurally egalitarian work settings in which employees can work with management to forge their own norms about sexual conduct"); Sturm, *Second Generation Employment Discrimination*, *supra* note 45, at 460–61 (noting limitations of litigation in addressing structural features in the workplace that permit discrimination).

79. Sturm, *Second Generation Employment Discrimination*, *supra* note 45, at 463.

80. 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/aboutme diation.html (last visited Dec. 1, 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).

81. *See* Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145, 146 (2004) (summarizing studies about employment dispute resolution and concluding that "[t]he evaluation and field research literature suggests that

place 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.[82] 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,[83] the Supreme Court has upheld pre-dispute mandatory arbitration in employment matters.[84]

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

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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: THE TRANSFORMATIVE APPROACH TO CONFLICT 53, 65–72 (rev. ed. 2005).

82.   *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 dispute processing for employer and employee alike"); *see also* 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 (2014), http://www.professionalmediator.org/Resources/Documents/Win-Win_%20A%20study%20into%20the%20impact%20of%20mediation%20within%20Local%20Government.pdf (presenting a study that found positive results—including improved relationships—of various workplace mediation programs in local government agencies); Ellen Waxman & Michael Roster, *Alternative Approaches to Solving Workplace Disputes*, 18 NO. 2 ACCA DOCKET 36, 42–44 (2002) (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).

83.   *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*, 35 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.").

84.   *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123–24 (2001) (holding that employment discrimination claims can be subject to mandatory arbitration); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–27 (1991) (holding that an age discrimination claim was subject to mandatory arbitration).

accountability and outcome measures.[85] Professor 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.[86] 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."[87]

Unfortunately, many organizations promulgate conflict management programs without any input from stakeholders such as employees and unions.[88] 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.[89] A tough-sounding policy prohibiting discrimination is laudable, but this approach may provoke resentment and even exacerbate workplace discrimination.[90] As Law Professor Vicki Schultz has written in the sexual harassment context: "Training sessions that tell male supervisors and employees to curtail sexual 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."[91]

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85.   Sturm, *Second Generation Employment Discrimination*, *supra* note 45, at 519–20.

86.   Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 4–5, 62 (describing the Center for Cooperative Resolution/Office of the Ombudsman at the National Institutes of Health).

87.   *Id.* at 62.

88.   David B. Lipsky & Ariel C. Avgar, *The Conflict over Conflict Management*, DISP. RESOL. J. 11, 39 (May/October 2010) [hereinafter Lipsky & Avgar, *Conflict*].

89.   Employers adopt such policies because they may provide an affirmative defense to harassment claims. For a description of the *Faragher/Ellerth* defense, see *supra* note 10.

90.   *See generally* Bartlett, *supra* note 28, at 1900–02 (analyzing how zero-tolerance harassment codes and training can cause backlash and exacerbate discrimination and harassment); 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) (discussing the interplay between judicial decisions effectively requiring companies to institute discrimination educational programs to prevent litigation and how those programs are not entirely effective).

91.   Schultz, *supra* note 78, at 2185.

An interdisciplinary team of scholars likewise concluded: Rather than examining and addressing the root causes of the problem, a zero-tolerance approach has the potential to "(a) increase backlash against [historically disadvantaged groups], (b) undermine an organization's credibility when actions inevitably fail to meet [zero-tolerance] standards, and (c) direct greater attention to form rather than substance."[92]

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."[93]

Employment discrimination cases tend to be highly adversarial, expensive,[94] long,[95] 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."[96] The careers and reputation of the parties can be at stake. Employment conflicts involve "the very personal core issues of validation and self-esteem."[97] For many, a job is not only a means of earning a living;

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92. Margaret S. Stockdale et al., *Coming to Terms with Zero Tolerance Sexual Harassment Policies*, 4 J. FORENSIC PSYCHOL. PRAC. 65, 69 (2004).

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

94. 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").

95. *See* Parker, *supra* note 94, at 173.

96. PETER REUTER, THE INSTITUTE FOR CIVIL JUSTICE, THE ECONOMIC CONSEQUENCES OF EXPANDED CORPORATE LIABILITY: AN EXPLORATORY STUDY 23 (1988).

97. Joe Epstein, *Effective Mediation for Employment Cases*, 19 PREVENTIVE L. REP.,

it can be central to one's identity, self-worth, and sense of dignity.[98]

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 the morality and motives of the other side.[99] Indeed, the "victim-villain" paradigm is baked into the *McDonnell Douglas* burden-shifting scheme,[100] used to prove disparate treatment based on circumstantial evidence. First, the plaintiff alleges disparate treatment in the terms and conditions of employment based on a protected characteristic like race or sex, which the manager or decision maker involved may perceive as a personal attack in which he or she is 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 bears the ultimate burden of proving that the employer's proffered excuse is a mere "pretext" for discrimination—in other words, a lie.[101]

29, 29 (2000).

98. *See generally* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000).

99. *See* Krieger, *supra* note 61, 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://eeolegalsolutions.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).

100. 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. *Id.* The employer then bears the burden of producing a non-discriminatory reason for the adverse employment action. *Id.* 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* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981) (explaining the *McDonnell Douglas* burden-shifting standard).

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

Under this standard, one party not only loses the case, but is deemed deceitful or evil.[102] 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.[103] 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, and 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."[104] 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.

Employees who report discrimination are rarely made whole or "restored" in economic terms. Those who file discrimination charges typically lose their cases[105] and their jobs.[106] 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."[107] Even if the employee wins, a le-

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102. *See* Krieger, *supra* note 61, 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").

103. Minow, *supra* note 13, at 494.

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

105. 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%).").

106. *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).

107. Penelope Lemov, *What It Takes to Win an Age Discrimination Suit*, FORBES (Apr. 30, 2013, 10:06 AM), http://www.forbes.com/sites/nextavenue/2013/04/30/what-it-takes-to-

gal 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,[108] health,[109] career,[110] and sense of self-worth.[111] 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*,[112] wrote that she never achieved psychological closure: "[F]ifteen years after leaving the City of Boca Raton, I am still embarrassed and humiliated and angry about the incidents of harassment I suffered."[113]

Individual Respondent. Employment law scholarship tends to pay little attention to the ramifications of discrimination claims

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win-an-age-discrimination-suit/ (quoting executive coach Paul Bernard).

108.   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.").

109.   *See, e.g.*, Ash v. Tyson Foods, Inc., 664 F.3d 883, 899–900 (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); Tuli v. Brigham & Women's Hosp., 656 F.3d 33, 44 (1st Cir. 2011) (plaintiff could not sleep or eat, lost weight, and suffered from anxiety, fear, and nervousness which resulted in abdominal pain); 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).

110.   Lawton, *supra* note 106, 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).

111.   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 F. 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 (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.").

112.   524 U.S. 775 (1998).

113.   Faragher, *supra* note 108, at 422.

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.[114] 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."[115] 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.[116] 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.[117] 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.[118] They may blame or lash out at the complain-

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114. *See* Bartlett, *supra* note 28, at 1956; *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").

115. *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. & EMP. L. 49, 81 (1998) (observing that a discrimination claim "puts the moral reputation of the employer and its agents on the line").

116. *See* Krieger, *supra* note 61, at 1164 (describing the "offended, defensive decisionmakers accused of discrimination" that she encountered while an employment lawyer).

117. *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. 59 (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, 10:15 AM) http://www.industryweek.com/labor-employment-policy/workforce-eeoc-retaliation-charges-rise.

118. 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: "While the wrongly accused might feel stigmatized, angry and humiliated, the justly accused might feel betrayed and fearful of losing either their job or reputation." Epstein, *supra* note 97.

ant.[119] In other words, legal coercion may backfire, increasing stereotypes and discriminatory behavior and undermining the internalization of antidiscrimination norms.[120] 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.[121] This can leave employees who are accused of discrimination feeling 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 make any meaningful changes to their employment practices.[122] The companies invested more in publicity and damage control than reflective analysis to identify and correct root causes of the problem.[123] Similarly, Business Professors Lynn Wooten and Erika James studied fifty-three Americans with Disabilities Act ("ADA") cases to determine whether organizations changed their underlying policies and practices in re-

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119. *See* 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).

120. *See* Bartlett, *supra* note 28, at 1930–41.

121. Katharine H. Parker, *Best Practices for Conducting Internal Investigations*, *in* COMPLYING WITH EMPLOYMENT REGULATIONS: LEADING LAWYERS ON ANALYZING LEGISLATION AND ADAPTING TO THE CHANGING STATE OF EMPLOYMENT LAW 141, 160 (Thomson Reuters rev. ed. 2013), (recommending separation of complainant and the accused); Eric B. Meyer, *Best Practices for Investigating Internal Employee Complaints of Unlawful Harassment*, BLOOMBERG L. REP. (2010), http://www.dilworthlaw.com/portalre source/lookup/wosid/cp-base-4-12802/media.name=/dilworth_paxson_meyer_article_2.pdf (recommending that interaction between the complainant and respondent be limited by completely separating them).

122. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1250 (2003) ("[S]ettlements 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.").

123. *Id.*

sponse to ADA lawsuits.[124] 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 "[p]retense or surface commitment to disabled employees").[125] Because of these learning barriers, organizations may be sued repeatedly for the same violation.[126]

Scholars have argued that employment discrimination laws may make some organizations less inclined to hire historically disadvantaged individuals.[127] When hired, women, people of color, and people with disabilities may be viewed as potential litigation threats.[128] 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.[129]

Part II of this article explores how restorative practices may be better-suited than a coercive, litigation-based model at addressing the complex psychological dynamics underlying 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.

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124. Lynn Perry Wooten & Erika Hayes James, *Challenges of Organizational Learning: Perpetuation of Discrimination Against Employees with Disabilities*, 23 BEHAV. SCI. & L. 123 (2005).

125. *Id.* at 129.

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

127. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991).

128. *See id.* at 1032–33.

129. *See* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 967–70 (1999) (describing human resource publications that advise employers to document and maintain careful files to avoid potential liability).

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,[130] 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.[131] 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 to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible."[132]

In a seminal article, Norwegian sociologist and criminologist Nils Christie described conflicts as "social fuel."[133] He contended that our society does not have too many conflicts, but too few.[134] 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."[135] 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*."[136] In Christie's view, conflicts "represent *a potential*

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130. *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. SOCIOLOGY & SOC. WELFARE 7, 7–8 (2004) (discussing the importance of Braithwaite's work).

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

132. HOWARD ZEHR WITH ALI GOHAR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 40 (2003).

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

134. *Id.* at 1.

135. *Id.*

136. *Id.* at 5.

for activity, for participation" by all parties involved in the incident.[137] In addition, he wrote, conflicts raise "opportunities for norm-clarification" for the community.[138]

Christie's vision led to the development of restorative diversionary alternatives to criminal prosecution, such as conferencing or victim-offender mediation.[139] Restorative processes focus not on blame or punishment of the offender, but on the harm resulting from the conduct at issue.[140] 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.[141] 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.[142] Rigorous studies have also found that restorative processes reduce recidivism, especially for crimes involving personal victims rather than property.[143] 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 ad-

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137. *Id.* at 7.

138. *Id.* at 8.

139. *See* John M. McDonald & David B. Moore, *Community Conferencing as a Special Case of Conflict Transformation*, *in* RESTORATIVE JUSTICE AND CIVIL SOCIETY 130 (Heather Strang & John Braithwaite eds., 2001).

140. *See generally* Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15 (noting that restorative justice frowns on "repairing and preventing the harm of crime, rather than on exacting a just measure of pain from offenders").

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

142. *See, e.g.*, Strang & Sherman, *supra* note 140, at 15 (summarizing empirical evidence that restorative justice does better from a victim perspective than the criminal justice system).

143. *See* LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 8 (2007); MARK S. UMBREIT ET AL., CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, THE IMPACT OF RESTORATIVE JUSTICE CONFERENCING: A REVIEW OF 63 EMPIRICAL STUDIES IN 5 COUNTRIES (2002), http://www.cehd.umn.edu/ssw/RJP/Projects/Victim-Offender-Dialogue/Restorative_Group_Conferencing/Impact_RJC_Review_63_Studies.pdf; 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").

dress serious harms, such as human rights abuses[144] and sexual assault.[145]

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" to 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*

1. Double-Loop Learning

Restorative practices can be conceptualized as an organizational learning approach to discrimination. Professors Argyris and Schön identified two types of learning: single-loop learning, which they call Model I, and double-loop learning, or Model II.[146] They define learning as the detection and correction of error.[147] In single-loop learning, the organization corrects a discrete presenting problem without solving "the more basic problems of *why* these problems existed in the first place."[148] The goals in Model I organ-

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144. *See* Chris Cunneen, *Reparations and Restorative Justice: Responding to the Gross Violation of Human Rights*, *in* RESTORATIVE JUSTICE AND CIVIL SOCIETY 83 (Heather Strang & John Braithwaite eds., 2001).

145. 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 Intimate Partner Abuse*, 42 FLA. ST. U. L. REV. 707, 724 (2015) (proposing use of restorative justice for intimate partner abuse).

146. CHRIS ARGYRIS, OVERCOMING ORGANIZATIONAL DEFENSES: FACILITATING ORGANIZATIONAL LEARNING 12–13, 108–110 (1990); ARGYRIS & SCHÖN, *supra* note 63, at 18–19, 82–84.

147. ARGYRIS, *supra* note 146, at xi, 104.

148. ARGYRIS, *supra* note 146, at 92.

izations are: "(1) maximize winning and minimize losing; (2) save face (others' and your own); (3) suppress negative feelings, and (4) strive to be rational."[149]

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.[150]

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."[151] Double-loop learning comes from the "discovery or surfacing of dilemmas."[152] 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."[153]

Building on the theory of double-loop learning, Peter Senge developed practice principles for "the learning organization."[154] Senge describes learning organizations as those "where people continually expand their capacity to create the results they truly desire, where new and expansive patterns of thinking are nur-

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149. ARGYRIS & SCHÖN, *supra* note 63, at 101.

150. *See* Selmi, *supra* note 122, at 3.

151. ARGYRIS & SCHÖN, *supra* note 63, at 101.

152. CHRIS ARGYRIS & DONALD A. SCHÖN, ORGANIZATIONAL LEARNING: A THEORY OF ACTION PERSPECTIVE 3 (1978).

153. ARGYRIS & SCHÖN, *supra* note 63, at 99.

154. SENGE, *supra* note 33; *see also* Garvin et al., *supra* note 41, at 1, 3–4 (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).

tured, where collective aspiration is set free, and where people are continually learning how to learn together."[155] 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.[156] 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."[157]

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155.   SENGE, *supra* note 33, at 3.
156.   *Id.* at 8–9.
157.   Ted Wachtel, *Restorative Practices in Business: Building a Community for Learning and Change Within Organizations*, INT'L INST. FOR RESTORATIVE PRAC. (Feb. 18, 1999), http://www.iirp.edu/article_detail.php?article_id=NTA4.

informal   **formal**

affective   affective   small impromptu   group   formal
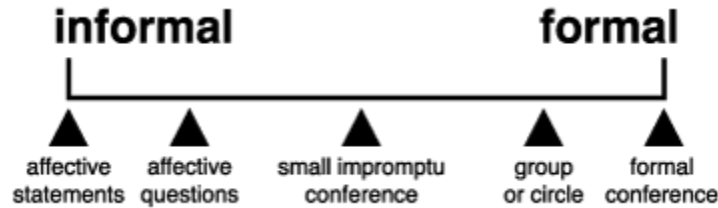statements   questions   conference   or circle   conference

Figure 1: IIRP Continuum of Restorative Practices[158]

Affective statements and questions. At their most informal, re-
storative practices include a method of communication called "af-
fective statements." Simply put, an affective statement expresses
how something affected you—in a positive or negative way.[159] Af-
fective statements and questions give employees and managers a
non-accusatory, non-defensive language for clarifying assump-
tions and educating others about the impact of conduct (that may
or may not have been intended to be harmful).[160] Some companies
that have implemented organizational learning have used a simi-
lar communication device to promote non-defensive inquiry, test
tacit mental models, and improve decision making.[161] Harley-
Davidson President Jeff Bluestein, for example, reported that af-
ter 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.'"[162]

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 successful
because one joke is insufficient to state a claim for "hostile envi-
ronment" harassment).[163] By contrast, an affective statement

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158.   *Id.*

159.   *See* BOB COSTELLO ET AL., THE RESTORATIVE PRACTICES HANDBOOK FOR
TEACHERS, DISCIPLINARIANS AND ADMINISTRATORS 12–13 (2009).

160.   *See* Wachtel, *supra* note 157.

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

162.   *Id.* at 187.

163.   *See* Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) ("Conduct that is not severe or
pervasive enough to create an objectively hostile or abusive work environment—an envi-
ronment that a reasonable person would find hostile or abusive—is beyond Title VII's pur-
view.").

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 inadvert. 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 . . . ."[164] 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."[165] The goal of a dialogue is to sharpen thinking and understanding, rather than to produce a result or "win" an argument:

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164. COSTELLO ET AL., *supra* note 159, at 23.
165. SENGE, *supra* note 33, at 224.

> A unique relationship develops among team members who enter into 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.[166]

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.[167]

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166. *Id.* at 230–31.

167. BRAITHWAITE, *supra* note 130, at 15. As Braithwaite explains, "[c]reating 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 objec-

Although not yet widely used in employment settings, some organizations report significant improvements in their workplace "conflict culture"[168] 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 with offenders in a restorative way until they had more healthy and respectful relationships with each other.[169] 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.[170]

In sum, the staff felt "helpless, powerless, [and] never listened to."[171] Pranis worked with them to develop restorative processes, such as problem-solving circles to talk through various workplace issues.[172] 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.'"[173] After a year, one unit that had used monthly circles "experienced a complete turnaround in the workplace climate."[174] Throughout

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tive." *Id.* Likewise, "[f]orgiveness is a gift victims can give. We destroy its power as a gift by making it a duty." *Id.*

    168.   Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases Is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLINE 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.").

    169.   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).

    170.   *Id.* at 661.

    171.   *Id.* at 663.

    172.   *Id*. at 673.

    173.   *Id.* at 666.

    174.   *Id.*

the prison, staff "began to see new attitudes or hear expressions of satisfaction from those who participated in [circle] processes."[175] 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."[176] Restorative practices encouraged more openness and problem-solving, with staff more "willing to make admissions of something wrong and grow from them."[177]

The only study to date of a workplace that has implemented restorative practices concerned the Goodwin Development Trust ("GDT") in the United Kingdom.[178] The GDT is a complex organization comprised of over 300 employees operating across thirty-eight sites.[179] The company implemented restorative practices over a two-year period.[180] 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.[181] 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]."[182] One manager said: "[T]he thing about restorative practice is that you can solve an issue before it becomes a problem."[183] 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."[184] The researchers found that positive outcomes emerged slowly, but

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175. *Id.*

176. *Id.* at 667.

177. *Id.* (quoting staff comments).

178. *See* Craig Lambert et al., Goodwin Development Trust, Building Restorative Relationships for the Workplace: Goodwin Development Trust's Journey with Restorative Approaches 2, 35 (2011), http://eprints.soton.ac.uk/360370/1/hf76_building_restorative_relati onships_in_the_workplace_goodwin_development_trusts_journey_with_restorative_approa ches%20%282%29.pdf.

179. *Id*. at 35.

180. *Id.* at 2, 43.

181. *Id.* at 41, 46, 48–49.

182. *Id.* at 48–49.

183. *Id.* at 49.

184. *Id.*

dramatically.[185] After two years, teams within the organization were using restorative practices for "human resources issues . . . [t]o collaborate and solve team or departmental problems," "[t]o share ideas," and "to solve inter-personal problems such as arguments between members of staff."[186] Managers also felt like they were communicating better with staff and had developed stronger working relationships with them.[187] They also were dealing with "fewer problems in the team as colleagues were now resolving issues between themselves."[188]

Other anecdotal reports about the use of restorative practices in workplace settings highlight themes such as 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 Robertses report that circle processes build a sense of trust and community in the workplace.[189] Over time, as the organization becomes comfortable with—and comes to value—the dialogue process, circles can provide venues to examine more sensitive topics.[190] 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.[191]

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

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185. *Id.* at 51.

186. *Id.* at 52.

187. *Id.* at 53.

188. *Id.*

189. Telephone Interview with Tracy Roberts and Leigh Ann Roberts, Co-Founders of Circle Center Consulting, LLC (Dec. 11, 2013) (notes on file with author).

190. *Id.*

191. *Id.*

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.[192]

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.

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.[193] 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.[194] 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.[195]

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192. *Case Study: Conflict in a Health Care Facility*, PROACTIVE RESOLUTIONS (2012), http://proactive-resolutions.com/wordpress/wp-content/uploads/2012/04/Conflict-in-a-Health-Care-Facility.pdf.

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

194. *See, e.g.,* Nate Cohn, *Polarization is Dividing American Society, Not Just Politics,* N.Y. TIMES (June 12, 2014), http://www.nytimes.com/2014/06/12/upshot/polarization-is-dividing-american-society-not-just-politics.html?_r=0 (describing how political polarization is dividing society). The Pew Research Center 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, POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTIPATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE 7 (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. *Id.*

195. *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 9 (2003) (arguing that "the workplace yields far more *social* integration—actual interracial interaction and friendship—than any other domain

Social capital, in simple terms, is the connections among individuals.[196] 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."[197]

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."[198] 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."[199] Cohen and Prusak argue that "[t]his kind of connection supports collaboration, commitment, ready access to knowledge and talent, and coherent organizational behavior."[200]

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."[201] Cohen and Prusak were not talking about restorative practices, although they encouraged employers to have informal and formal opportunities for interaction, not only for specific work tasks, but also to foster stronger bonds.[202]

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 de-

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of American society").

196. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 67 (1995).

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

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

partment 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."[203] Similarly, 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.[204] Senge calls these "organizational learning disabilities": the inability of an organization to explore and learn from different views, perspectives, and experiences.[205]

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."[206] 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 understand-

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203. Leslie Perlow & Stephanie Williams, *Is Silence Killing Your Company?*, HARV. BUS. REV., May 2003, at 54.

204. ARGYRIS, *supra* note 146, at 43.

205. SENGE, *supra* note 33, at 17–19.

206. Debra Jopson, *Stage Frights,* SYDNEY MORNING HERALD (Mar. 18, 1999) (interviewing David Moore), http://newsstore.smh.com.au/apps/viewDocument.ac?page=1&sy=smh&kw=%22stage+frights%22&pb=all_ffx&dt=selectRange&dr=entire&so=relevance&f=headline&rc=10&rm=200&sp=nrm&clsPage=1&docID=news990318_0388_9918.

ing 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.[207] A theory in social psychology known as Common Ingroup Identify Model predicts that "[b]y redefining group boundaries, one may create a superordinate group, resulting in better treatment of individuals within the larger group."[208] In other words, developing a shared sense of community has been shown to reduce racism and intergroup tensions.[209]

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.[210] 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 of

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207. *See* Gaertner & Dovidio, *supra* note 75, at 631 (finding that creating a common identity reduces tensions between groups).

208. Brooke & Tyler, *supra* note 34, at 741.

209. Marilynn B. Brewer et al., *Diversity and Organizational Identity: The Problem of Entrée After Entry*, *in* CULTURAL DIVIDES: UNDERSTANDING AND 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).

210. SENGE, *supra* note 33, at 220.

> one's own views. By contrast, in discussion different views are presented and defended and there is a search for the best view to support decisions that must be made at this time.[211]

Organizations need both modes of communication, but tend to use discussion more frequently than dialogue.[212]

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."[213] When faced with conflict, "team members frequently either 'smooth over' differences or 'speak out' in a no-holds-barred, 'winner take all' free-for-all of opinion. . . ."[214]

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.[215] Bohm set forth three basic conditions for meaningful dialogue.[216] First, participants must suspend their assumptions.[217] This does not mean ignoring or suppressing one's view, but rather holding it in front of oneself—ready for exploration.[218] Second, participants in a dialogue must view each other as colleagues or peers; in other words, as "equals."[219] Third, Bohm recommends that a facilitator be used to unobtrusively hold the context of dialogue, pointing out sticking points for the group.[220]

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.[221] Restorative circles typically are facilitated by someone who proposes the question or issue for discussion and ensures that everyone has

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211. *Id.*

212. *See id.*

213. *Id.*

214. *Id.*

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

216. *Id.*

217. *Id*.

218. *Id.*

219. *Id.*

220. *Id.*

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

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."[222]

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.[223]

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."[224] 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.[225] 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's 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.[226]

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222. *Id.*

223. *Id.*

224. 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).

225. *Id.* at 341–42; *see* JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION VOLUME 2—LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 9–15, 37 (Thomas, McCarthy, trans. 1987).

226. Barrett, *supra* note 224, at 342.

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.[227] Likewise, research has shown that engaging in deliberative processing can reduce the impact of implicit biases.[228]

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.[229] Allport explained that "[o]nly the type of contact that leads people to *do* things together is likely to result in changed attitudes."[230] 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 provided it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.[231]

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

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227. Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 335 (2008); Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 J. PERSONALITY & SOC. PSYCHOL. 708, 708 (2000); Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027, 1027 (2011).

228. *See* GEOFFREY BEATTIE, OUR RACIST HEART? AN EXPLORATION OF UNCONSCIOUS PREJUDICE IN EVERYDAY LIFE 22 (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, 248 (2010); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1177 (2012); Leslie Richards-Yellen, *Removing Implicit Bias from the Hiring Process*, 17 YOUNG LAW. 1, 4 (2013).

229. GORDON W. ALLPORT, THE NATURE OF PREJUDICE 268 (1954).

230. *Id.* at 276.

231. *Id.* at 281.

variety of contexts.[232] Their research provided strong empirical support that mere contact across any type of group divide—racial, ethnic, disability, religious, economic, or social—will mitigate prejudice and conflict.[233]

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.[234] Of course, working together does not always magically erase discrimination and harassment, especially given the unconscious biases and structural issues that may cause inequities.[235] Some legal scholars have referred to the contact hypothesis as a "failed theory."[236] There is a big difference, however, between passing someone in the hallway at work and knowing someone well.

Consider the back story of the case of Ann Hopkins, lead plaintiff in the landmark sex-stereotyping case, *Price Waterhouse v. Hopkins*.[237] 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.[238] The three partners who knew her well strongly supported her admission to the partnership.[239] The partners who did not know her well, however, evaluated her based on sex stereotypes rather than merit.[240] As Ms. Hopkins explained: "My downfall was negative comments from 26 partners who didn't know me

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232. THOMAS F. PETTIGREW & LINDA R. TROPP, WHEN GROUPS MEET: THE DYNAMICS OF INTERGROUP CONTACT 8–9 (2011).

233. *See id.* at vii–viii, 13.

234. 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: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 11–12 (2003) [hereinafter ESTLUND, WORKING].

235. *See* ESTLUND, WORKING, *supra* note 234, at 76–78, 81–83.

236. McGinley, *supra* note 77, at 486 n.364 (referring to the contact hypothesis as a "failed theory"). *But see* ESTLUND, WORKING *supra* note 234, 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)).

237. 490 U.S. 228 (1989).

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

239. *Id.*

240. *Id.*

well . . . ."[241] 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."[242]

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.[243] As John Enright observed in the context of same-sex relationship stereotyping:

> [S]torytelling 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.[244]

Restorative processes can harness personal stories to provoke empathy and shatter stereotypes. Pranis explains how the storytelling that happens in restorative processes makes it more difficult to characterize 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."[245]

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241. *Id.*

242. *Id.*

243. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989) (examining the use of stories in the struggle for racial reform); 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); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1575–76 (1987) (arguing that storytelling can induce empathy); 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).

244. Enright, *supra* note 243, at 2866–67.

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

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 our psychological survival instincts. Renowned psychologist Silvan Tomkins conducted an 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.[246] Each affect can be experienced on a continuum from mild to strong.[247] Tomkins observed that there are two positive affects: enjoyment-joy and interest-excitement.[248] 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."[249] There are six negative affects: shame-humiliation; distress-anguish; disgust; fear-terror; anger-rage; and dissmell (a reaction to noxious smells).[250] In Tomkins's view, affects are the primary motivational system that ensures our survival as human beings.[251] Each affect motivates us to behave in a very particular way to help us survive.[252]

According to restorative justice 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.[253] In particular, humans are hardwired to minimize negative affects or emotions that can generate and escalate conflict, and maximize positive affect and emotions

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246. SILVAN S. TOMKINS, AFFECT IMAGERY CONSCIOUSNESS: THE COMPLETE EDITION, at xiii (Bertram P. Karon ed., 2008).

247. *Id.* at 185.

248. *Id.*

249. COSTELLO ET AL., *supra* note 159, at 68.

250. TOMKINS, *supra* note 246, at 185; s*ee* TOMKINS INST., *Affects Evolved as the System of Motivation for Human Beings*, http://www.tomkins.org/what-tomkins-said/introduction/affects-evolved-so-we-could-learn-what-to-seek-and-what-to-avoid/ (last visited Dec. 1, 2015).

251. TOMKINS, *supra* note 246, at 4.

252. *Id.* at 15.

253. Lauren Abramson & David Moore, *The Psychology of Community Conferencing, in* RESTORATIVE JUSTICE: REPAIRING COMMUNITIES THROUGH RESTORATIVE JUSTICE 123, 123–24, 133–37 (John G. Perry ed., 2002).

that promote cooperation.[254] As a scientist, Dr. Abramson studied neuroscience and the effects of suppressed emotions on health and illness.[255] She eventually founded the Community Conferencing Center in Baltimore, Maryland, where she has facilitated hundreds of restorative conferences for criminal, juvenile, and workplace matters.[256] 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.[257]

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.[258] "Shame" in this sense is not a stigmatizing sanction,[259] 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's affect theory, focusing on the affect of "shame to humiliation."[260] He described shame as a natural, physiological reaction that we all experience when there is a partial impediment to a positive bond or connection.[261] 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," "avoidance," or "attack other."[262] Nathanson plotted these four responses on a "compass of shame," which appears below in Figure

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254. Lauren Abramson, *Being Emotional, Being Human: Creating Healthy Communities and Institutions by Honoring Our Biology, in* THE PSYCHOLOGY OF EMOTION IN RESTORATIVE PRACTICE, HOW AFFECT SCRIPT PSYCHOLOGY EXPLAINS HOW AND WHY RESTORATIVE PRACTICE WORKS 84, 86, 97 (Vernon C. Kelly, Jr. & Margaret Thorsborne eds., 2014); Abramson & Moore, *supra* note 253, at 123.

255. *See* Abramson, *supra* note 254, at 86.

256. *See* COMMUNITY CONFERENCING CTR., http://www.communityconferencing.org/index.php/about/how_started/ (last visited Dec. 1, 2015).

257. *See* Abramson, *supra* note 254, at 86–104 (describing biology of emotions and presenting case studies of sexual harassment incident and community conflict that had repeated police involvement).

258. *See, e.g.*, JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 100–01 (1989).

259. 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, 1883–84 (1991); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1056–59 (1998).

260. DONALD L. NATHANSON, SHAME AND PRIDE: AFFECT, SEX, AND THE BIRTH OF THE SELF 134 (1992).

261. *Id.* at 135.

262. *Id.* at 312.

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 four points" on the compass of shame as a defense mechanism.[263]

Figure 2: Compass of Shame[264]

In restorative justice theory, shame must be managed constructively or it will lead to negative behaviors. According to John Braithwaite, "[s]hame will become complicated, chronic, and more likely to descend into rage if it is not fully confronted."[265] 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."[266] Put more simply, a restorative

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263. *Id.*

264. TED WACHTEL, INT'L INST. FOR RESTORATIVE PRACTICES, DEFINING RESTORATIVE 5 (2013), http://www.iirp.edu/what-is-restorative-practices.php.

265. BRAITHWAITE, *supra* note 130, at 79.

266. *Id.* at 74.

process "[s]eparate[s] the deed from the doer."[267] Restorative processes condemn the harmful act, 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.[268] He argued: "[W]e are programmed to create defensive routines and to cover them up with further defensive routines . . . . This programming, by the way, occurs early in life."[269] Defensive routines are "entrenched habits we use to protect ourselves from the embarrassment and threat that come with exposing our thinking."[270]

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.[271] Victims may "attack self" by putting themselves down or "withdraw" by isolating themselves or avoiding the workplace. Those accused of discrimination may "avoid" by denying the behavior or the intent to discriminate, or

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267. TED WACHTEL, INT'L INST. FOR RESTORATIVE PRACTICES, RESTORATIVE JUSTICE IN EVERYDAY LIFE: BEYOND THE FORMAL RITUAL 4 (1999), http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/RJInEverydayLife.pdf.

268. *See generally* CHRIS ARGYRIS, STRATEGY, CHANGE AND DEFENSIVE ROUTINES (1985).

269. *Id.* at 3.

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

271. Billie Wright Dziech et al., *'Consensual' or Submissive Relationships: The Second-Best Kept Secret*, 6 DUKE J. GENDER L. & POL'Y 83, 106–07 (1999) (concluding, based on a study of workplace sexual harassment, that "[n]ot 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, Comment, *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.").

"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.[272] 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."[273]

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."[274]

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 workplace issues 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—whether intentional or inadvertent—that may have caused harm. In addition, the victim-centric nature of restorative practices may provide more complete

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272. *See* Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 961–70 (8th Cir. 1999) (alleging retaliation after plaintiff's 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) (alleging retaliation after plaintiff 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, Note, *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, Note, *Common Sense v. The EEOC: Co-Worker Ostracism and Shunning as Retaliation Under Title VII*, 30 J. CORP. L. 627, 630 (2005).

273. ROBERT M. SHEA, MORSE BARNES-BROWN PENDLETON PC, AVOIDING EMPLOYEE CLAIMS OF UNLAWFUL RETALIATION 3 (2013), http://www.mbbp.com/resources/employment/retaliation_claims.html.

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

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.[275]

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 externalising reactions is associated with higher levels of bullying."[276] In other words, if shame is not properly managed, it "damages interpersonal relationships."[277] Braithwaite and Ahmed advise that raising awareness of "emotional intelligence" may help to promote healthy shame management and reduce harassing behavior in the workplace.[278]

Restorative processes may raise an organization's level of "emotional intelligence."[279] 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."[280] Employment discrimination scholar Tristin Green has recognized that "improving emotional competence and

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275.   *See supra* Part I.B.

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

277.   *Id.* at 55.

278.   *Id.* at 69.

279.   *See* John D. Mayer & Peter Salovey, *The Intelligence of Emotional Intelligence*, 17 INTELLIGENCE 433, 433 (1993) ("Emotional intelligence is a type of social intelligence that involves the ability to monitor one's own and others' emotions, to discriminate among them, and to use the information to guide one's thinking and actions."). For a scholarly overview of studies about emotional intelligence, see DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (Banton Books 10th anniversary ed. 2006) (1995); John D. Mayer et al., *Human Abilities: Emotional Intelligence*, 59 ANN. REV. PSYCHOL. 507 (2008). 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 [emotional intelligence] in the workplace").

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

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."[281] By providing structures that allow for reflection and dialogue, restorative processes can help workforces develop socioemotional 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.[282]

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, this is typically a requirement.[283] 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.[284] 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 man-

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281. Green, *supra* note 17, at 1000.

282. *See* Abramson, *supra* note 254.

283. *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."); *see also* 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.").

284. Interview with Lauren Abramson, Exec. Dir. of Balt. Cmty. Conferencing Ctr., (Sept. 12, 2013) (notes on file with author).

agement 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.[285] 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.[286] 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 positions of authority do things *with* them, rather than *to* them or *for* them."[287]
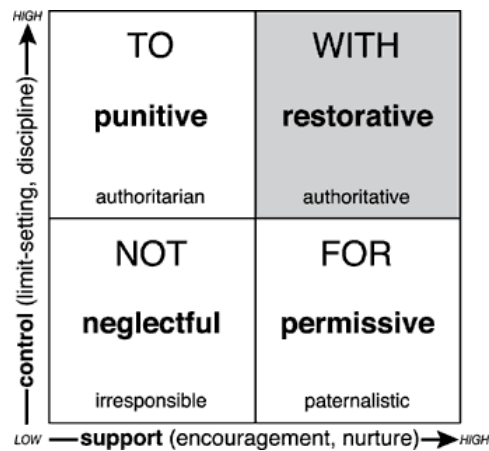

Figure 3: Social Discipline Window[288]

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,

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285. *See* Wachtel, *supra* note 157 (adapting the theory of WILLIAM GLASSER, SCHOOLS WITHOUT FAILURE (1969)) .

286. Ted Wachtel & Paul McCold, *Restorative Justice in Everyday Life*, *in* RESTORATIVE JUSTICE AND CIVIL SOCIETY 114, 117 (Heather Strang & John Braithwaite eds., 2001).

287. *What Is Restorative Practices?*, INT'L INST. FOR RESTORATIVE PRACTICES, http://www.iirp.edu/what-is-restorative-practices.php (last visited Dec. 1, 2015).

288. WACHTEL, *supra* note 264, at 3. Wachtel adapted the social discipline theory originally developed by William Glasser. *See* WILLIAM GLASSER, SCHOOLS WITHOUT FAILURE (1969).

the "to" quadrant is the traditional command-and-control approach to business management. Ted Wachtel characterizes this as the "punitive" or "authoritarian" approach, high on control and low on support for employees. Max Weber and Frederick Winslow Taylor advocated for the punitive approach to organizational management. 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.[289] Taylor posited that work should be designed "scientifically," to minimize the influence of the "human element," like emotions, on production.[290]

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."[291] Wachtel likens the permissive approach to the humanistic or human relations approach to management.[292] This approach, advocated by Elton Mayo and Rensis Likert, holds that employers should resolve workers' social problems to increase their productivity and provide inspiration and motivation.[293]

Wachtel compares the "punitive" and "permissive" quadrants to Douglas McGregor's theories of worker productivity.[294] McGregor set forth Theory X and Theory Y as opposite ends of the organizational management continuum.[295] Under Theory X—the equivalent of the punitive approach—management must continually control, punish, and manipulate employees to ensure optimum

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289. *See* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 56, 327–28 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., First Free Press 1964) (1947).

290. *See* Frederick Winslow Taylor, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT 114, 140–43 (1947).

291. Wachtel, *supra* note 157.

292. *Id.*

293. *Id.*; *see also* RENSIS LIKERT, NEW PATTERNS OF MANAGEMENT 1–3 (1961) (reflecting on the relationship between management practices and worker productivity); RENSIS LIKERT, THE HUMAN ORGANIZATION: ITS MANAGEMENT AND VALUE 14–15 (1967) (discussing how managers can use motivational techniques to increase worker productivity); GEORGE ELTON MAYO, THE HUMAN PROBLEMS OF AN INDUSTRIALIZED CIVILIZATION (1933).

294. *See* Wachtel, *supra* note 157.

295. *Id*. *See generally* DOUGLAS MCGREGOR, THE HUMAN SIDE OF ENTERPRISE (1960) (explaining the principles behind Theory X and Theory Y, and how they operate in practice).

productivity.[296] Under Theory Y—the permissive approach—management must provide sufficient motivators for employees to be productive.[297] 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."[298] 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.[299] 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.[300] 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."[301]

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: (1) concern for production or getting the job done and (2) concern for the people doing the work.[302] 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 produc-

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296. Wachtel, *supra* note 157.

297. *Id.*

298. *Id.*

299. *See* WILLIAM G. OUCHI, THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE 81–83 (1981); Wachtel, *supra* note 157.

300. Wachtel, *supra* note 157.

301. *Id.*

302. ROBERT R. BLAKE & JANE SRYGLEY MOUTON, THE MANAGERIAL GRID: KEY ORIENTATIONS FOR ACHIEVING PRODUCTION THROUGH PEOPLE, at vi (1964); Wachtel, *supra* note 157.

tivity).[303] Blake and Mouton argued that leaders that use a "team style" are most likely to be successful in accomplishing their goals.[304]

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.[305] Studies found that zero-tolerance policies in schools did not improve school safety and disproportionately punished students of color.[306] 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 criminal justice system.[307] To overcome this "school-to-prison pipeline," many schools have implemented restorative practices, which focus on building 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.

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303. BLAKE & MOUTON, *supra* note 302, at 18–19, 57, 85, 110, 142; Wachtel, *supra* note 157.

304. BLAKE & MOUTON, *supra* note 302, at 142.

305. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, JOINT "DEAR COLLEAGUE" LETTER (Jan. 8, 2014), 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).

306. BRENDA MORRISON, RESTORING SAFE SCHOOL COMMUNITIES: A WHOLE SCHOOL RESPONSE TO BULLYING, VIOLENCE AND ALIENATION 56–58 (2007) (arguing that zero-tolerance discipline policies fail to work and promote intolerance and discrimination against a minority of students); Cecil R. Reynolds et al., AM. PSYCHOLOGICAL ASS'N ZERO TOLERANCE TASK FORCE, *Are Zero Tolerance Policies Effective in the Schools?*: *An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 860 (2008) (concluding that zero-tolerance policies have "not been shown to improve school climate or school safety. Its application in suspension and expulsion has not proven an effective means of improving student behavior").

307. TONY FABELO ET AL., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT, at ix–x, xii (2011), http://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf (discussing a six-year longitudinal study in Texas that found "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).

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.[308] One school in Oakland, California, for example, lowered its suspension rate by 87% and its expulsions to zero.[309] 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.[310] Restorative practices have helped some students to develop empathy for differences in others.[311] Studies

308. *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 1, 39–40 (2013), http://www.legalrightscenter.org/uploads/2/5/7/3/25735760/lrc_umn_report-final.pdf (finding after a three-year evaluation that restorative practices increased student attendance, decreased disciplinary incidents, and improved school climate); MICHAEL D. SUMNER ET AL., SCHOOL-BASED RESTORATIVE JUSTICE AS AN ALTERNATIVE TO ZERO-TOLERANCE POLICIES: LESSONS FROM WEST OAKLAND 31 (2010), https://www.law.berkeley.edu/files/thcsj/10-2010_School-based_Restorative_Justice_As_an_Alternative_to_Zero-Tolerance_Policies.pdf (finding that restorative practices decreased average suspension rate at school by 87% and reduced expulsions to zero); David Simson, *Restorative Justice and its Effects on (Racially Disparate) Punitive School Discipline* 33, 35 (May 12, 2012) (7th Annual Conference on Empirical Legal Studies Paper, UCLA School of Law), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107240 (finding that restorative programs reduced school reliance on punitive disciplinary measures and reduced the disproportionate number of suspensions of African American students).

309. SUMNER ET AL., *supra* note 308, at 31; *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?_r=1 (discussing the 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.").

310. Douglas M. DeWitt & Lori J. DeWitt, *A Case of High School Hazing: Applying Restorative Justice to Promote Organizational Learning*, 96 NASSP BULL. 228, 232–33 (2012).

311. *See* Robert Rettmann & Patrice Vossekuil, *Enhancing Respectfulness Through Restorative Practices*, CRISIS PREVENTION INST. (Apr. 16, 2012), http://www.crisisprevention.com/Blog/April-2012/Enhancing-Respectfulness-Through-Restorative-Pract (reporting that elementary and middle school teachers of Horicon School District in Wisconsin 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, at 8 (2008), 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

show that restorative practices have reduced bullying and harassment of "outgroup" students.[312]

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 in and commitment to workplace norms and polices—even if they disagree with them—if they are engaged in the process of developing them and have clarity about the expectations that apply to them.[313] Management scholars W. Chan Kim and Renée 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.[314] 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

planning").

312. FRAN THOMPSON & PETER K. SMITH, U.K. DEP'T FOR EDUC., RESEARCH REPORT DFE-RR098, THE USE AND EFFECTIVENESS OF ANTI-BULLYING STRATEGIES IN SCHOOLS 140–41 (2010), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/182421/DFE-RR098.pdf (finding that the majority of schools in a British school district found that the whole-school restorative practices approach was effective in reducing bullying incidents, including sexual harassment and cyber bullying); *see* Kathy Bickmore, *Location, Location, Location: Restorative (Educative) Practices in Classrooms*, at 14–15 (Feb. 16, 2011), http://www.educ.cam.ac.uk/research/projects/restorativeapproaches/seminarfour/BickmoreSemianr4.pdf.

313. *See* W. Chan Kim & Renée Mauborgne, *Fair Process: Managing in the Knowledge Economy*, HARV. BUS. REV., Jan. 2003, at 127, 131–32.

314. *Id*. at 131, 136.

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.[315]
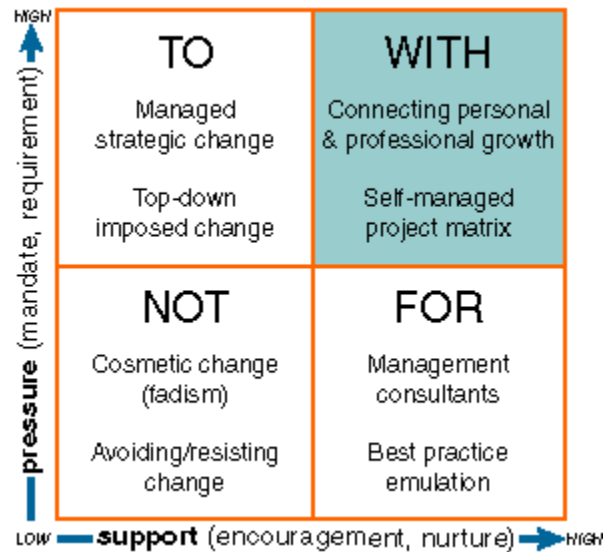

Figure 4: Organizational Change Window[316]

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."[317]

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 an unhealthy dependency on others and keeps employees

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315. *Id.* at 134–35.
316. Wachtel, *supra* note 157.
317. *Id.*

from taking responsibility."[318] The "best practice" "may provide only a superficial change that does not really solve the problem."[319] 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.[320]

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."[321] This could also mean avoiding any change, which "may threaten the very existence of a business organization."[322]

In the restorative or "with" approach to organizational change, principles of fair process—engagement, explanation, and expectation clarity—are observed. Out of this engagement, "a learning ecology" is created.[323] 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*

Building 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:

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318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*

Figure 5: Employer Approaches to Antidiscrimination Laws

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."[324] 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-

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324. *See* Sturm, *Second Generation Employment Discrimination, supra* note 45, at 478.

discriminatory behavior, but do little to engage employees in developing and reinforcing those values as a workplace community.[325] These employers may also mandate that employees attend antidiscrimination training programs.[326] Such policies—standing alone—may result in *more* resentment, backlash, and disparate treatment towards women and minority groups.[327]

"Zero-sum" managers believe that if conflicts or discrimination complaints arise, managing them means prevailing. Zero-sum managers attach great value to "winning" and dislike compromise.[328] 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 have the best chance of winning the battle.[329] They may also believe that arbitration is less costly than court litigation.[330] Regardless of the reason employers 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,

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325. *See supra* Part I.B.

326. *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 3, 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*, 24.2 HUM. RESOURCE PLAN. 10, 14 (2001) (reporting that 34.3% survey respondents indicated that their employer mandated diversity training).

327. *See* Bartlett, *supra* note 28, at 1936.

328. *See* LIPSKY ET AL., *supra* note 26, at 41.

329. *See, e.g.*, Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 88–97 (2003) (discussing corporations' preference for arbitration because of their fear of large jury verdicts and costs and concern for their privacy); 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.").

330. *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); *see also* A. Michael Weber, *Rise of ADR for Workplace Disputes: Deciding Whether to Adopt Mandatory Arbitration,* 240 N.Y. L.J 24, 24–25 (2008) (discussing the advantages of arbitration). *But see* Thomas J. Stipanowich, *Arbitration: The "New Litigation*,*"* 2010 U. ILL. L. REV. 1, 5 (2010) (noting "frequent complaints regarding delay and high cost" of arbitration).

documenting even the tiniest infractions to build a record that can be used as a defense in any eventual legal case.[331] 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 employment operations" rather than egalitarian and dignity norms.[332]

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

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331. *See generally* Iron Mountain, Records Management Best Practices Guide: A Practical Approach to Building a Comprehensive and Compliant Records Management Program (2005), https://www.agnesscott.edu/facultyservices/files/documents/bestpracticesguide.pdf (explaining benefits of successful records management practices); D. Scott Crook, Arnold & Crook PLLC, Best Practices for Employee Recordkeeping, http://www.rickarn oldlaw.com/PDF/Best_Practices_for_Employer_Recordkeeping__Brochure___2011.04.15_. pdf (last visited Dec. 1, 2015) (discussing why employers should protect themselves with recordkeeping).

332. Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 511 (1993) (finding that complaint handlers in workplaces emphasize the managerial goal of smooth operations rather than the realization or definition of legal rights or ideals).

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 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.[333] 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.[334] 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.[335] By building strong relationships and a sense of common identity and vision, the proactive elements of restorative practices hold the most promise in

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   333. *See* Sturm & Gadlin, *supra* note 86, at 10.
   334. *See* Bingham et al., *supra* note 82, at 22–23 (describing empirical study of U.S. Postal Service REDRESS mediation program).
   335. Telephone Interviews with Kay Pranis, Tracy Roberts, and Leigh Ann Roberts (Nov. 12, 2013) (interview notes on file with author).

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 when 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, restorative conferences may be effective in working through second generation discrimination situations, unpacking implicit bias,[336] and addressing other workplace 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.[337] A restorative framework will work only if it aligns with the

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336. Professor Elayne Greenberg recommends that a reconciliation approach like restorative justice be used to address cases involving implicit bias in the workplace. *See generally* Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and the 'Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75 (2015).

337. James W. Reeves & Karen Tokarz, *Resolving Workplace Conflict Through Employment Dispute Resolution Programs*, 52 ST. LOUIS B.J., Winter 2006, at 20, 25 (noting that companies should not "succumb to the temptation to use an off-the-shelf, one-size-fits-all program that another company has implemented"); *see* Lipsky & Avgar, *supra* note 23, at 145 (emphasizing the importance of matching conflict management approach with organizational culture and objectives).

organization's dominant culture and objectives.[338] 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.[339] The organization also must have an infrastructure that can process greater employee engagement and voice.[340] 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.

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338. *See* Lipsky & Avgar, *supra* note 23, at 148, 166 (urging organizations to adopt a "strategic approach to conflict management").

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

340. Lipsky & Avgar, *supra* note 23, 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.").

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"[341] 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 to help students develop empathy for others. It holds promise for working adults as well.[342]

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 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, strong relationships, and asking hard questions and listening deeply to the answers.[343] As William O'Brien, former 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."[344]

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, and 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."[345] A restorative strategy helps to facilitate that goal.

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

342. Susan Hanley Duncan, *Workplace Bullying and the Role Restorative Practices Can Play in Preventing and Addressing the Problem*, 32 INDUS. L.J. 2331, 2332 (2011) (proposing the use of restorative practices to address workplace bullying).

343. *See* Tierney, *supra* note 43.

344. SENGE, *supra* note 33, at 134 (quoting O'Brien).

345. *Id.* at 312 (quoting Galloway).

b. The Adjudication Versus ADR Debate

Some critics 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.[346] On the one hand, "litigation romanticists"[347] contend that a public, judicial-based litigation process is necessary to raise public consciousness and ensure that social justice issues are adjudicated by courts.[348] These scholars also fear the potential for power imbalances in more informal, private processes, like mediation. On the other hand, ADR proponents, whom some have dubbed "ADR evangelists,"[349] 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.[350]

Given the dismal outlook for most plaintiffs in employment discrimination litigation,[351] a restorative framework may offer a

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346. *See, e.g.,* Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989) (summarizing the competing arguments surrounding adjudication and mediation through an imaginary conversation); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that ADR rests on questionable premises and that adjudication is preferable to settlement).

347. *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 Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 605–06 n.58 (1994)).

348. *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).

349. Moffitt, *supra* note 347, at 1204.

350. *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").

351. Clermont & Schwab, *supra* note 105, at 103 (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 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) (collection of articles by

more accessible and complete remedy. The restorative 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.[352] 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 defen-

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legal scholars and judges examining the overuse of summary judgment in employment discrimination cases).

352.   *See* Bisom-Rapp, *supra* note 129, at 972 (calling the use of internal dispute resolution procedures by employers a "buffer" from outside intrusion and more formal redress); Lipsky & Avgar, *supra* note 23, at 40–41 (noting that civil rights progressives criticize conflict management programs as charades, rhetoric, or "lip service"). 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, *Conflict*, *supra* note 88, at 40 (noting that unions have skeptically viewed conflict management systems as a "means of avoiding unionization").

sive 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 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. The current 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.