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CORE DIVERSITY

by REBECCA K. LEE[*]

INTRODUCTION

Diversity is touted as something we ought to promote in the modern workplace, but we are missing the mark on why diversity actually matters. Supporting diversity at work requires an involved effort, yet the diversity approaches taken by contemporary organizations are misguided and overly simple, and hence ineffective. Employers tend to think about diversity mostly at the recruitment stage and either ignore or exploit their diverse employees after hiring them.[1] Achieving diversity at work, however, entails more than bringing diverse groups into the organization's ranks and employing them for particular purposes. Employers fail to maximize opportunities when they do not value their workers for who they fully are and for what they can fully offer, and this common failure contributes to ongoing discrimination at work.

In this age of "diversity talk,"[2] it may seem that the issue of workplace discrimination is somewhat passé, or at least not as much of the problem it was in the past. Employers have shifted their focus from antidiscrimination goals to diversity goals and generally seem less concerned with bias in the work setting.[3] Discrimination's roots, however, are many and deep, and are not easy to discern and eradicate. While overt forms of prejudice have not yet been entirely weeded out, much of the discrimination that persists today is less commonly expressed in

1. *See* Jill Schachner Chanen, *Early Exits: Women of Color at Large Law Firms Tell ABA Researchers They Are Being Overlooked and Undervalued—Maybe That's Why They Are Leaving in Droves*, 92 A.B.A. J. 33, 35 (2006) (noting that after recruitment, significant percentages of minority women report feeling denied the same career-development opportunities as their male or nonminority counterparts).

2. *See, e.g.*, Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 6-7 (2005) (noting the increased attention given to diversity and diversity initiatives in the workplace); Hannah Hayes, *Sign of the Times: Will Corporate Budget Restraints Affect In-House Diversity Initiatives?*, 17 PERSP. 8, 8-9 (2009), *available at* http://www.abanet.org/women/perspectives/Spring09_corporate_budgets.pdf (discussing the same).

3. *See, e.g.*, Chanen, *supra* note 1, at 36 (describing instances of workplace discrimination faced by minority women lawyers at large firms across the U.S. despite the firms' supposed commitment to diversity).

ways that the relevant laws were created to address.[4] Rather, as the literature has shown, discrimination's enduring qualities are "relational,"[5] "subtle,"[6] "unconscious,"[7] and involve "cognitive bias"[8] and work practices located within institutional cultures and structures.[9] Building on these insights, in this Article I argue that these indirect forms of discrimination also are found in organizational norms that continue to stand in the way of attaining meaningful equality and diversity at work. To bring attention to the important relationship between diversity and equity, I develop a theory of workplace reform that advances a different conceptualization of diversity that will help to achieve substantive equality. I first show that dominant norms in organizational cultures that appear unbiased in fact create hidden discriminatory disadvantages for women and people of color.[10] By "dominant norms," I am referring to the rules of the institution, both spoken and unspoken, and the standard operating procedures that determine what the organization's work will be and how it will be carried out—in other words, the prevailing customs of thought, action, and reference points in day-to-day practice established by historically dominant groups in the workplace.[11]

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4. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459-61 (2001).

5. *See* Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1436 (2008) (explaining relational sources of discrimination as "social interactions and relations at work that operate to reinforce stereotypes and bias").

6. *See generally* Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. HUM. RTS. L. REV. 657 (2003) (exploring this concept and pointing out its problems); Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613 (2007) (proposing strategies for addressing unconscious gender biases at individual, institutional, and societal levels).

7. "[R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent . . . . disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious." Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

8. *See generally* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (positing that biased employment decisions often result not from discriminatory motivations, but from a variety of unintentional categorization-related judgment errors typical of human cognitive functions).

9. *See generally* Sturm, *supra* note 4 (addressing employment discrimination claims that "involve patterns of interaction among groups within the workplace that, over time, exclude non-dominant groups"); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006) (outlining a framework for developing more inclusive institutions); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005) (identifying work culture as a source of discrimination in the modern workplace).

10. *See* Susan Bisom-Rapp, *Diversity, Equality and Integration: A Workplace Perspective from the U.S.*, *in* DIVERSITY, EQUALITY AND INTEGRATION: BEYOND THE LAW – A COMPARATIVE STUDY 331, 347 (Roger Blanpain ed., 2008) (explaining that organizational policies and practices which have become entrenched within a firm's culture are seen as neutral but put women and minority groups at a distinct disadvantage); Bonita London et al., *Studying Institutional Engagement: Utilizing Social Psychology Research Methodologies to Study Law Student Engagement*, 30 HARV. J.L. & GENDER 389, 394 (2007) (arguing that organizational "policies, regulations, and formal or informal structures may create static and inflexible systems that make [members] from historically excluded groups feel marginalized from the mainstream institutional culture").

11. *See* Lani Guinier & Martha Minow, *Preface to Responses in Dynamism, Not Just Diversity*, 30 HARV. J.L. & GENDER 269, 270 (2007) (referring to the "incentive structures and peer pressure,

To achieve substantive equity, employers must attend to these embedded forms of discrimination by rethinking and remaking the central norms that make up the culture within a particular workplace. As things currently stand, organizations tend not to scrutinize their practices and protocol precisely because these are accepted as a matter of course and seen as part of the organization's long-established ways.[12] To move toward meaningful equality, however, I argue that we need to re-conceptualize the purpose and value of diversity in organizations.[13]

Most employers implement models of diversity that promote only what I call "surface diversity" and "marginal diversity," both of which focus on diversifying the organization's ranks but which stop short of valuing diversity in full form, thus inhibiting substantive equity. The surface and marginal diversity paradigms neglect to treat the malady of embedded discrimination because they emphasize demographic diversity rather than diversity in a substantive sense. A focus on numerical parity alone, however, will not bring about racial and gender equity.[14] Although women and people of color have been entering various workplaces in increasing numbers, the way in which work gets done has not changed much.[15] This is because simply adding more members of previously excluded groups to the organization may not change dominant organizational practices that remain biased against such groups.[16] While advancing equity in terms of numerical representation undoubtedly is essential, I nonetheless maintain that this objective is only one step

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dominant rituals, and unspoken habits of thought that construct and then define the interpersonal, institutional, and cognitive behaviors and beliefs of members of the institutional community").

12. Debra Meyerson & Megan Tompkins, *Tempered Radicals as Institutional Change Agents: The Case of Advancing Gender Equity at the University of Michigan*, 30 HARV. J.L. & GENDER 303, 303 (2007).

13. *See* Lizzie Barmes & Sue Ashtiany, *The Diversity Approach to Achieving Equality: Potentials and Pitfalls*, 32 INDUS. L. J. 274, 275 (2003) (recognizing that diversity goals can advance equality at work).

14. I have made a similar argument in my previous work. *See* Rebecca K. Lee, *The Organization as a Gendered Entity: A Response to Professor Schultz's The Sanitized Workplace*, 15 COLUM. J. GENDER & L. 609, 611-12 (2006) (advancing the idea that mere numerical balance in terms of gender is inadequate where institutional norms impose masculine notions of work culture on women and gender-nonconforming men); *see also* Chanen, *supra* note 1, at 39 (reporting the need for serious institutional changes in large law firms to decrease rates of attrition involving female minority lawyers); Lyn Kathlene, *In a Different Voice: Women and the Policy Process*, *in* WOMEN AND ELECTIVE OFFICE: PAST, PRESENT, & FUTURE 188, 196 (Sue Thomas & Clyde Wilcox eds., 1998) (finding that even where women achieve greater numerical parity in the workplace, they still work within the larger confines of gendered institutions and socially prescribed roles).

15. *See* Debra E. Meyerson & Robin J. Ely, *Using Difference to Make a Difference*, *in* THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP 129, 130-31 (Deborah L. Rhode ed., 2003) (arguing that women who are successful at work tend to conform to, rather than change, the organizations within which they work).

16. *See* Sturm, *The Architecture of Inclusion*, *supra* note 4, at 250 ("The project of achieving inclusive institutions is not only about eliminating discrimination or even increasing the representation of previously excluded groups. It is about creating the conditions enabling people of all races and genders to realize their capabilities as they understand them."); Cheryl Simrell King, *Sex-Role Identity and Decision-Styles: How Gender Helps Explain the Paucity of Women at the Top*, *in* GENDER POWER, LEADERSHIP, AND GOVERNANCE 67, 67 (Georgia Duerst-Lahti & Rita Mae Kelly eds., 1995) (stating that the mere presence of women in the workplace does not alleviate male dominance).

along the path to full equality.[17] The next stride employers must tread involves evaluating their organizational cultures to support equality goals in everyday practice.

To move toward substantive equity, organizations need to directly rethink their conventions by advancing what I term "core diversity." Under the core diversity model, the organization would actively question its norms concerning its core work, and incorporate the knowledge and perspectives of its diverse members to eliminate embedded bias and enhance organizational efficacy. Core diversity aims to benefit the institution's members as well as the institution itself.[18] I also contend that organizational leaders in their leadership capacities often either reinforce or challenge dominant workplace norms depending on how they view equity and diversity. Consequently, core diversity will not flourish without dedicated and empathetic leadership.

This core diversity project is informed in part by the law; however, because it is unlikely, as a practical matter, to be embraced by legal rule-makers in the very near future and may not even be best advanced in this way, this project looks to private market actors rather than to legal actors to generate equality-producing norms. I should state at the outset that although I have reservations about seeking to advance substantive equality by relying mostly on a market-based regime, I still argue it is worthwhile to explore ways in which businesses and other employers can become partners in the antidiscrimination movement by considering economic arguments for their participation.[19]

In Part I of this Article, I examine the source of organizational traditions and the harms of what I refer to as embedded discrimination in creating impediments to full equality at work. In Part II, I discuss why legal institutions currently are not well positioned to adequately address embedded forms of discrimination and how market institutions may better prompt change by linking the need for workplace reform to their economic interests. In Part III, I urge employers to move past surface and marginal diversity and move toward core diversity, in light of both equality and economic arguments to do so. Finally, in Part IV, I explain the significant relevance of organizational leadership in advancing core diversity.

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17. London et al., *supra* note 11, at 390-91.

18. *See infra* Part III.C.

19. To be clear, I view equality and diversity interests as grounded in substantive individual rights, and thus I am not entirely comfortable making business arguments using the language of efficiency and profitability to promote such rights-based interests. At the same time, from a standpoint of practical idealism, I believe it is preferable to explore rather than eschew a market-dependent approach to encouraging social change. For an instructive discussion on the potential usefulness of economic methodologies for feminist legal scholars, see Douglas A. Kysar, *Feminism and Eutrophic Methodologies, in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, & SOCIETY 94, 94-116 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

I. DOMINANT WORKPLACE TRADITIONS AND EMBEDDED DISCRIMINATION

Discriminatory norms are found in organizational cultures because modern workplaces follow long-standing practices that disadvantage those who were historically outside the organization's membership and leadership ranks.[20] Institutions are products of a society that has been dominated by white men and accordingly were designed to accommodate their lives, views, and expectations.[21] Following societal patterns, organizations have continued to reproduce larger trends of racial and gender inequality within their walls.[22] Organizations' initial white male members determined the values they would prioritize and rules they would follow, and given that white men continued to wield power in institutional settings, their practices became the everyday habits of many institutions.[23]

Despite changes in organizational membership, contemporary institutions still follow earlier established routines that became entrenched as the "rational" way to organize the organization's work, regardless of whether these rituals were effective.[24] This is particularly the case for organizations that function within a broader and highly structured system, such as law schools and large law firms.[25] In the legal academy, for instance, the long predominance of the Socratic teaching method demonstrates how organizational conventions can generate constancy and adherence. This pedagogical practice, historically seen as logical and objective, in recent decades has been directly challenged as harming the participation of female and minority students who tend to view this learning tool more negatively than their white male peers,[26] and a number of law teachers have modified their use of the Socratic dialogue as a result.

When homogeneous institutions first opened their doors to previously excluded groups, they did not think the new admits would change the institution's customs; on the contrary, they expected the newcomers to adapt to the organization

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20. *See* Meyerson & Tompkins, *supra* note 12, at 306 (for example, explaining the development of the tenure system at a time when academics were almost entirely male, and how the tenure clock disadvantages women); Rita Mae Kelly & Georgia Duerst-Lahti, *Toward Gender Awareness and Gender Balance in Leadership and Governance, in* GENDER POWER, LEADERSHIP, AND GOVERNANCE 259, 261 (Georgia Duerst-Lahti and Rita Mae Kelly eds., 1995) (discussing how men have controlled and thus shaped social and political institutions).

21. Edward Rubin et al., *A Conversation Among Deans from "Results: Legal Education, Institutional Change, and a Decade of Gender Studies," Harvard Journal of Law and Gender Conference, March 2006,* 29 HARV. J.L. & GENDER 465, 469 (2006).

22. CINDY SIMON ROSENTHAL, WHEN WOMEN LEAD: INTEGRATIVE LEADERSHIP IN STATE LEGISLATURES 30 (1998); *see* Debra E. Meyerson & Joyce K. Fletcher, *A Modest Manifesto for Shattering the Glass Ceiling,* HARV. BUS. REV., Jan. – Feb. 2000, at 127, 129 (noting that institutions are products of broader society).

23. *See* London et al., *supra* note 10, at 393-94 (using the academy as an example); Duerst-Lahti & Kelly, *supra* note 20, at 261.

24. Meyerson & Tompkins, *supra* note 12, at 305.

25. *See id.* (providing other examples of how institutions continue to follow long-established customs, regardless of whether these practices are an effective means of organization).

26. *See* Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School,* 143 U. PA. L. REV. 1, 3-5 (1994).

rather than the other way around.[27] Since white men had first occupied institutions and determined the rules to be followed within them, they set the standard against which every other group then was measured.[28] This preservation of the homosocial culture continues in contemporary workplaces, as white male decision-makers frequently like to hire minorities and women who resemble them in values and behavior.[29] Female and minority workers are well aware of this preference and respond by attempting to make those in power comfortable when around them.[30] Subordinated groups have discovered that they need to adjust their identities at work to ease the perception that their presence will bring friction instead of the "grease" that white male advantage bestows.[31]

The organization's everyday norms and standard operating procedures were generally white, male-centered norms. While these dominant norms may have worked well for the organization for a long time and perhaps were not designed with the intent to discriminate, these norms continued to largely suit white males rather than the other groups that followed them into the workplace.[32] Developed at a time when organizations were homogeneous, these white male norms tended to harm those who later joined the institutional ranks because the new admits had not helped to create or shape these codes of conduct.

Organizational leaders today may not recognize that these conventions still favor dominant groups[33] and that the relative lack of power of traditionally subordinated groups contributes to the lasting strength of embedded discriminatory norms.[34] To demonstrate that they belong, new entrants may adhere to the organization's customs in certain respects with greater loyalty than existing members.[35] For instance, new members considered to be token hires often find themselves thrust into the spotlight, and because their performance is more closely observed than that of non-tokens, they may strive to satisfy organizational demands with heightened zeal.[36] Tokens, however, remain unnoticed in other ways: they are "*hypervisible* as members of their 'category'" while also "completely *invisible* as individuals."[37]

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27. Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change,* 100 YALE L.J. 1731, 1763 (1991).

28. Devon Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory,* 112 YALE L.J. 1757, 1777-78 (2003).

29. MICHAEL S. KIMMEL, THE GENDERED SOCIETY 187 (2000).

30. *See* Helen Cooper, *Meet the New Elite, Not Like the Old,* N.Y. TIMES, July 25, 2009, at Week in Review (recounting the author's experiences as a minority woman and how she learned to conduct herself so that whites would feel at ease around her).

31. *See* Carbado & Gulati, *supra* note 28, at 1778 (positing that white privilege comes from not having to negate racial presumptions).

32. Meyerson & Tompkins, *supra* note 12, at 306.

33. KIMMEL, *supra* note 29, at 190.

34. Meyerson & Tompkins, *supra* note 12, at 306.

35. KIMMEL, *supra* note 29, at 189.

36. *See* Rhode, *supra* note 6, at 620 (noting the special scrutiny that women are placed under when they work in settings with token levels of female representation and that professional women report being held to higher standards than their male counterparts).

37. KIMMEL, *supra* note 29, at 189.

Regardless of whether or not they are token employees, women and people of color (including women of color) typically are required to aspire to an ideal vision of a worker that is not their own. This is not to say the interests of women and minorities are entirely different from the interests of white men, or even that workers within the same demographic category necessarily share the same behavioral preferences. Minority women in particular are specially situated because of their intersecting identities but the consequences of this intersection are largely ignored or misunderstood.[38] Individuals have multiple and intersecting cultural identities as members of "socioculturally distinct" groups, and traits associated with race, ethnicity, nationality, sex, sexual orientation, gender identity, class, and religion all help to form a person's cultural identity.[39] How strongly an individual identifies with any one of her many cultural identities differs across and within groups.[40] One also may express an identity in different forms depending on the specific context, and one's identities may change over time.[41]

Although people possess differences based on a range of characteristics that contribute to their self identities,[42] I maintain that the opportunities and experiences of socially subordinated groups vary in important ways from those of dominant groups due to the former's unequal position in society and their initial exclusion from institutional life. As a result of this early nonadmission, people of color and women do not enter the workplace on the same plane as white men who have already shaped how the workplace should operate.

Modern-day discrimination manifests itself less often in the form of overt prejudice that first plagued the workplace.[43] Rather, it is embedded within an organization's norms that are part of everyday conduct, and therefore is hard to discern, often appearing neutral and harmless.[44] These norms may be formal or informal workplace practices, including: long working hours;[45] last-minute work

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38. For a more detailed discussion on the theory of intersectionality, see Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies,* 1989 U. CHI. LEGAL. F. 139 (1989).

39. David A. Thomas & Robin J. Ely, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes,* 46 ADMIN. SCI. Q. 229, 230-31 (2001) [hereinafter *Cultural Diversity*]. *See generally* Crenshaw, *supra* note 38.

40. Thomas & Ely, *Cultural Diversity, supra* note 39, at 230-231.

41. *Id.*

42. *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law,* 89 GEO. L.J. 1, 83 (2000) (stating that "there are undeniably group differences in attitudes and experiences" but that the "more individualized the employment decision, the more possible and sensible it may seem to make individualized inquiries into the actual experiences and attitudes of the applicant, rather than to use the proxy of racial [and gender] identification").

43. *Contra* Selmi, *supra* note 6, at 658-59 (asserting that what is understood as subtle discrimination should not be broadened to include "all forms of discrimination that rely on circumstantial proof").

44. Meyerson & Fletcher, *supra* note 22, at 72. *See generally* Rhode, *supra* note 6, at 637-42 (discussing subconscious bias in the workplace).

45. It is worth noting that the tradition of working long hours can be traced to the norms of white-collar male workers rather than blue-collar male workers. The shorter-hours movement in the nineteenth and early twentieth centuries was driven by skilled and unskilled blue-collar workers, without involvement or interest by white-collar workers, who did not question their long workdays as part of the demands of their upwardly mobile careers. *See generally* Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation,* 96 MICH. L. REV. 2212 (1998).

deadlines; extended work travel; assumptions about one's level of ambition and career focus depending on one's gender or family situation;[46] expectations regarding how one should look, talk, and act to be taken seriously;[47] beliefs about what types of activities one ought to engage in or with whom one ought to associate;[48] and rewarding certain types of work accomplishments over others.[49] While all institutions are not set in the same cultural cast, many of their practices were created by and for a homogeneous workforce.[50] Embedded discrimination exists through everyday conduct that is fluid and cumulative, rather than discrete in duration or scope. Discrimination and its effects come about from many small behaviors that accumulate to restrict the opportunities of a particular subordinated group. As a result, I contend that these customs stand in the way of full equality for historically excluded workers. Traditional organizational practices, then, must be reconsidered for substantive equity to reign. Toward this end, I advocate for a new organizational model grounded in legal antidiscrimination principles and implemented through the creation of new business norms.

II. LEGAL PRINCIPLES AND MARKET STRATEGY

The legal rule of nondiscrimination and equality in the workplace is firmly established under Title VII of the Civil Rights Act of 1964,[51] in addition to other federal and local antidiscrimination statutes.[52] But legal remedies alone may be ill-suited to unearth and untangle deeply-planted forms of discrimination that are difficult to recognize as discriminatory conduct.[53] Judicial solutions undoubtedly are important to rectify blatant examples of discrimination, and individual lawsuits, along with class action suits that result in consent decrees in workplace bias cases, can help to reduce the worst forms of discrimination.[54] But as Susan Sturm has

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46. *See* Joanne Cronrath Bamberger, *Where are the Women in the Top Tiers?*, LEGAL TIMES, June 26, 2006, at 32 (discussing how partners in large firms make incorrect assumptions about female associates' career goals and level of dedication in deciding to whom to assign complex legal work).

47. *See, e.g.*, Green, *supra* note 9, at 646 (illustrating how African-American "appearance signals" such as the style of one's hair, style of one's clothing, and manner of speaking, can limit an employee's opportunities at work).

48. *See id.* at 645 (discussing the common male-oriented forms of informal socializing that women are expected to engage in if they want to obtain favored work assignments).

49. Rewarding rainmaking work over teambuilding work is an example of rewarding certain work accomplishments over others. *See* Meyerson & Fletcher, *supra* note 22, at 82-83 (discussing how women often are commended for their excellent teamwork but are passed over for promotions in favor of those who "assertively promote[] their own ideas").

50. *See* Carbado & Gulati, *supra* note 28, at 1759.

51. 42 U.S.C. §§ 2000e to 2000e-17.

52. Other federal antidiscrimination statutes include § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, *amended by* the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. Also, a number of states and localities have antidiscrimination statutes that offer greater protection than Title VII provides.

53. *See* Rhode, *supra* note 6, at 634 (referring to the law's ineffectiveness in addressing cultural forms of bias that contribute to gender inequity); Carbado & Gulati, *supra* note 28, at 1761 (discussing how "in the shadow of law, workplace structures and norms affect racial identity—and vice versa").

54. *See* Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate*

pointed out in her work on "second generation discrimination,"[55] the legal principles of nondiscrimination and equality need to be placed into context in terms of everyday workplace behavior by having employers pay attention to institutional policies and practices.[56]

Court-made rulemaking may not be the best way to bring about sociocultural change, especially change concerning broad-based conduct that is neither easily identifiable nor attributable to specific bad actors and does not lend itself well to a case-by-case analysis based on individual facts.[57] Even if such cases were to be litigated, judicial interpretation concerning equality and diversity norms could result in bad precedent by conservative judges who may be less apt to recognize the harms of embedded discrimination without clear precedent on the issue.[58] The few federal court decisions that discuss diversity refer to it in terms of demographic diversity,[59] whereas the U.S. Supreme Court in *Grutter v. Bollinger*[60] recognized some of the more substantive benefits of diversity, stating that the "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[61] The Court, while endorsing the market value of diversity in action, nonetheless did not explain how these skills would be nurtured through exposure to a range of individuals and perspectives. To fill this gap, I argue that a new understanding of diversity needs to be adopted by market leaders to fully capture the benefits of having a diverse workforce.

Additionally, courts may not be ideally situated to articulate specific rules and address complicated social behavior that instead calls for problem-solving at the

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Diversity Programs, 30 HARV. J.L. & GENDER 279, 297-98 (2007) (finding that U.S. Equal Employment Opportunity Commission (EEOC) charges, lawsuits, and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) compliance reviews, can aid in diversity efforts); *see generally* Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367 (2008) (examining consent decrees in employment discrimination cases and the factors that contribute to the success of the decrees).

55. *See* Sturm, *supra* note 4, at 468-75 (defining and analyzing second generation discrimination).

56. *Id.* at 475 ("[S]econd generation problems cannot be reduced to a fixed code of specific rules or commands that establishes clear boundaries governing conduct. Instead, their resolution requires a different process, namely problem solving. That process identifies the legal and organizational dimensions of the problem, encourages organizations to gather and share relevant information, builds individual and institutional capacity to respond, and helps design and evaluate solutions that involve employees who participate in the day-to-day patterns that produce bias and exclusion.").

57. *See id.* at 470-71 (arguing that problems of bias in the workplace result from ongoing patterns of interaction among groups that cannot be easily traced to a single "bad actor").

58. *See* Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 987-88 (1993) (arguing that binding judicial review can be problematic because most judges are elite, white men who may be out of touch in understanding the experiences of minorities and women who bring such discrimination claims).

59. *See, e.g.*, Lutheran Church-Missouri Synod v. Fed. Communication Comm'n, 154 F.3d 494, 499 (D.C. Cir. 1998) (referring to diversity in terms of programming diversity and racial and gender diversity); Johnson v. City of Charlotte, N.C., No. 88-3031, 1989 WL 14276, at *5-6 (4th Cir. 1989) (speaking about diversity in terms of racial diversity).

60. 539 U.S. 306 (2003).

61. *Id.* at 330.

institutional level to create lasting change.[62] Courts may not want to get into the details of reordering the workplace because such a task may be seen as falling within the purview of management rather than the judiciary.[63] Although there is evidence that court-imposed penalties prompt employers to discontinue discriminatory practices, such sanctions merely produce short-lived effects if organizational structures are not created to facilitate ongoing diversity efforts.[64] Further, many employees may not pursue the path to court since it is costly for them to bring risky discrimination suits and individuals generally do not like to cast themselves in the position of victim.[65]

Possible agency interpretation regarding embedded bias and substantive equality likewise raises concerns. The U.S. Equal Employment Opportunity Commission (EEOC), the federal agency that issues interpretive guidelines regarding Title VII's provisions, lacks rulemaking power; thus, the courts are not required to defer to the agency's guidelines in deciding discrimination cases.[66] While the EEOC still could produce guidelines recognizing the problem of hidden discrimination, whether its guidelines would be adopted would remain subject to judges' individual policy preferences.

As for potential change through legislative means, large businesses likely would use their considerable capital to lobby against proposed legislation for broader antidiscrimination protection in the workplace if they believe such statutory requirements would burden their economic interest.[67] Therefore, I assert that the most practical strategy at this juncture is to persuade big companies and other large employers to create a type of private legal or private governance system within the business arena by internally embracing and enforcing a substantive notion of nondiscrimination and diversity.[68]

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62. *See* Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 323 (2007) (noting that courts are not well suited to address problems that call for institutional reform).

63. *See* Green & Kalev, *supra* note 5, at 1460.

64. *See* Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855, 890-91 (2006). *See generally* Levit, *supra* note 54 (examining the effectiveness of consent decrees and class action lawsuits in addressing workplace discrimination).

65. Rhode, *supra* note 6, at 635; *see* Carle, *supra* note 62, at 324 (pointing out that plaintiffs have a more difficult time prevailing in Title VII lawsuits compared with other causes of action).

66. Rebecca Hanner White, *The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 61-62 (1995).

67. *See* Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 154 (2009) (arguing that the monetary and organizational resources of businesses allow them to enjoy significant advantages in influencing the legislative process).

68. *See id.* at 162-64 (discussing how businesses can establish private legal systems and the advantages of such a system). For additional discussion on the business industry's creation of private legal systems, see generally Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) (analyzing the ways in which the cotton industry has opted out of the public legal system and instead relies on a complex system of private commercial law) and Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (analyzing the development of reputational bonds, customary business practices, and arbitration proceedings that

This market approach would foreclose neither judicial nor legislative reform that could track the development of business norms, and, in the meantime, serve to fill existing legal and regulatory gaps.[69] Since business responds to consumer demand,[70] this effort should be coupled with creating both employee and client demand for business organizations that adopt a meaningful culture of diversity. This demand could be generated by informing and shaping the preferences of employees and clients regarding the workplace processes by which services are delivered and products are made, preferences which then help to determine whether they choose to work in a particular workplace or choose to purchase a particular service or product.[71] This pressure likely will have to be applied initially by workers on the upper end of the occupational hierarchy rather than workers on the lower end, since higher-status employees will have greater choice in deciding between employers and can continue to exert leverage after joining a particular workplace. Similar to the successful green consumer movement and commercial strategies used by organized groups that have spurred the national growth of environmentally-conscious initiatives and products, I argue that employee and client demand for a new understanding of diversity can be cultivated by building on the current interest in diversity and by demonstrating the compatibility between core diversity and business concerns.[72]

Such demand is likely to grow as the U.S. population and workforce continue to become more diverse,[73] rendering it increasingly urgent that American businesses harness all that diverse workers have to offer to remain competitive in our fast-moving global economy. Furthermore, core diversity as a business model will better enable large companies with offices or outposts around the world to build on the differences and strengths of their global employees, who may need to interact and work with internal company counterparts in various regions to carry

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have facilitated the development of a set of rules and institutions within the diamond industry as a preferable substitute to the existing legal system). *See also* Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 915-16 (2007) (discussing global private governance in the environmental arena, carried out through activities such as collective private standard setting and compliance certification).

69. *See* Vandenbergh, *supra* note 68, at 916 (arguing that private governance can serve as an interim form of regulation pending government regulation).

70. *See* Nicole C. Kibert & Charles J. Kibert, *Sustainable Development and the U.S. Green Building Movement: Profitable Development Projects Can Be Good for the Planet, Too*, 22 APR PROB. & PROP. 21, 21 (2008) (discussing consumer demand behind the growth of the green building movement).

71. *See* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 529 (2004) (noting that consumer preferences may be shaped by informing them of the manner in which goods are produced).

72. *See* Robert C. Illig, *Al Gore, Oprah, and Silicon Valley: Bringing Main Street and Corporate America into the Environmental Movement*, 23 J. ENVTL. L. & LITIG. 223, 229-31 (2008) (noting that due to the consumer interest in the environmental movement, businesses began to view the demand for green goods as an opportunity rather than as a constraint); Vandenbergh, *supra* note 68, at 947 (stating that consumer pressure provides an important incentive for firms to incorporate supply-chain environmental requirements).

73. *See, e.g.*, Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950-2050*, 125 MONTHLY LAB. REV. 15, 15-16 (2002) (stating that the population growth and increasing employment participation rates will result in a more diverse workforce).

out essential business tasks.[74] In the case of multinational corporations, core diversity as a business norm rather than as a U.S.-based legal rule can be used to govern organizational cultures that extend to company offices not subject to U.S. law or enforcement.[75]

Studying institutions and encouraging institutional change via the market as a starting point thus may be a better approach than immediately focusing on judicial or legislative change to achieve substantive equality and diversity, which require a highly contextual understanding of organizational and business practices.[76] I recognize that some may feel uncomfortable about championing diversity as a business interest and may fear that companies will exploit all things diversity-related as a hollow marketing tool rather than advance diversity for its substantive value.[77] I share these same concerns, and that is precisely why I have developed a model of workplace reform that aims to connect diversity to a vision of substantive equality. As explained more fully in the next Part, the common reality is that employers already are engaging in and touting diversity efforts as a business model, but doing so in superficial forms. Although they also may be motivated by more laudable reasons that matter to the people who run the firms and support them, companies respond to profit-driven incentives and market norms.[78] By re-engaging businesses to think about workplace diversity differently, employers who want to promote core diversity will have the business rationale to back their efforts, while employers who otherwise are not so inclined nevertheless will follow suit if the market and normative imperative can be shown.[79]

III. UNDERSTANDING DIVERSITY IN ORGANIZATIONS

The meaning of diversity has been diluted by companies who misunderstand its value. To promote equality in meaningful form, I contend that businesses and organizations generally need to rethink the purpose of having diverse employees. In addition to ensuring that female and minority workers are equitably represented, employers ought to reconsider routine assumptions that disadvantage historically subordinated groups by eliciting and incorporating new perspectives from those individuals who originally were not seated at the decision-making table. Yet the

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74. I thank Paul Steven Miller for sharing his observations on this point gained through his work experiences, including his long tenure on the EEOC.

75. *See* Shaffer, *supra* note 67, at 154 (noting that "binding legal norms" may not be effective "at the transnational level where public institutions are weak and may seek allies with business").

76. *See* Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1429 (1996) ("The microanalysis of institutions can be applied to an analysis of rights, but it can also be applied to legislatures, executive agencies, and private firms, all of which are potentially equal or superior mechanisms to the courts for achieving specified social purposes.").

77. *See* Illig, *supra* note 72, at 229-30 (describing similar concerns with respect to the business response to consumer interest in green products).

78. *Id.* at 235-36; Vandenbergh, *supra* note 68, at 917 ("The pressure on a firm to impose supply-chain requirements may arise from the preferences of customers, investors, employees, or managers.").

79. *See* Illig, *supra* note 72, at 236 (noting that business leaders who do not support the environmental agenda may be forced nonetheless to do so in order to remain competitive).

common approaches to diversity taken by many employers focus on diversifying their organizations' ranks without a concurrent focus on changing the culture. In doing so, I argue, these models neglect to appropriately address the problem of biased work cultures.

A. Surface Diversity

Presently, most businesses pursue a narrow view of diversity by promoting one of two common approaches. The first approach is what I call the "surface diversity" paradigm. Under this model, the organization makes an effort to recruit diverse employees, but after they have been hired, the organization then disregards any differences among its employees and expects them to act in identical ways.[80] This model focuses on fairness and equal treatment by resting on the assumption that to achieve these goals, workers' differences must be viewed as irrelevant or unhelpful to the work at hand.[81]

Given an organization's history of workplace rituals, women and minorities are expected to step in line and simply do as their white male predecessors have done. Thus, while a wider array of individuals may join the work organization and change the demographic makeup of the workplace, the organizational culture itself does not change.[82] This model supports formal rather than substantive equality, encouraging assimilation based on the white male template.[83] It values some degree of diversity at the recruitment and hiring stage, but ignores the deeper benefits of having a diverse workforce.[84] Although it aims to eradicate conspicuous forms of discrimination and to minimize intergroup conflict due to clear instances of bias, the surface diversity paradigm does not deal with the embedded discrimination that prevents full equality from flourishing.[85]

Surely promoting heterogeneous work environments will diminish the prevalence of group stereotyping because it is more likely that coworkers will be known as individuals rather than as anonymous members of a certain racial or gender group.[86] Yet even in mixed workplaces, some level of bias may infiltrate the

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80. *See* David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.-Oct. 1996, at 5-7, 9-10 (discussing the discrimination-and-fairness paradigm and companies' reluctance to link discrimination and diversity issues with other organizational culture issues) [hereinafter *Managing Diversity*]; Guinier & Minow, *supra* note 11, at 270 (stating that institutional programs that receive public aid try to avoid discrimination by treating all employees on fair and identical terms).

81. *See* Matteo Borzaga, *Accommodating Differences: Discrimination and Equality at Work in International Labor Law*, 30 VT. L. REV. 749, 768-69 (2006) (describing the same type of earlier antidiscrimination approach in international labor law called the "procedural or individual justice model" which focuses on equal treatment of all workers) (internal quotation omitted).

82. *See* Carle, *supra* note 62, at 347-48 ("Increasing diversity in only superficial respects does not inherently produce deeper changes at a structural level.").

83. Borzaga, *supra* note 81, at 769.

84. Chanen, *supra* note 1.

85. *See* Thomas & Ely, *Managing Diversity*, *supra* note 80, at 81-82 (describing how the discrimination-and-fairness paradigm poses similar limitations).

86. Barbara Reskin, *Imagining Work Without Exclusionary Barriers*, 14 YALE J.L. & FEMINISM 313, 324 (2002).

dynamics between traditionally advantaged and disadvantaged groups.[87] And residual discrimination, particularly the less-than-conscious type, can lead to preferential treatment for same-group or in-group members that exacerbates the unequal position and prospects of out-group members.[88]

Employers promote surface diversity when they send cues that women and racial minorities need to assimilate by conforming to dominant group standards.[89] Organizations follow the surface diversity approach when they try to erase gender and racial differences by insisting upon a conventional white male model—for instance, by prodding women to take lessons in being more forceful or suggesting that people of color adopt white-associated activities.[90] In short, the company message conveyed is that employees should not upset the status quo.[91] By encouraging such behavior, however, employers do not question the organizational culture which privileges norms that contribute to inequity.

To further illustrate how the surface diversity model functions, let us look at the experience of an economic development consulting firm that hired a number of minority employees for managerial positions.[92] This firm carefully aimed to treat all of its employees fairly and equally, as the surface diversity approach emphasizes.[93] The company had a tradition of anchoring its consulting work in quantitative techniques, but a number of the minority managers, who could perform the quantitative work as expected, believed that conducting qualitative research could improve their services for their clients and suggested that the company consider incorporating qualitative methods into its work.[94] Their idea, however, instantly was met with doubt by others within the firm because the suggestion conflicted with the company's long-standing view that its work should be done using a quantitative approach.[95] The minority managers detected that the firm did not take their input seriously and were troubled by the absence of dialogue on the issue.[96] As this example demonstrates, the surface diversity approach can serve to exclude and silence traditionally subordinated groups rather than foster a sense of inclusivity.

Despite its objectives, surface diversity reinforces asymmetric relationships of power present in broader society and recreated within organizations. The problem with surface diversity speaks to the problem of assimilation that Kenji Yoshino identifies as the phenomenon of "covering"—that is, de-emphasizing aspects of one's identity that deviate from the assimilation ideal.[97] As he explains, the assimilation demand is not value-neutral but is founded upon the privileged characteristics of the dominant group, such as being white, male, and

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87. Estlund, *supra* note 42, at 28.
88. Reskin, *supra* note 86, at 330.
89. *See* Meyerson & Fletcher, *supra* note 22, at 130 (describing how some companies encourage women to assimilate by teaching them to become more assertive).
90. *Id.*
91. *Id.*
92. Thomas & Ely, *Managing Diversity, supra* note 80, at 82-83.
93. *Id.* at 82.
94. *Id.*
95. *Id.*
96. *Id.* at 82-83.
97. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 1 (2006).

heterosexual.[98] The mandate to assimilate, in my view, is what makes surface diversity questionable because the value of diversity is kept at the surface and merely affects the organization's outward appearance without reaching its inner discriminatory practices. To put it another way, surface diversity views employee diversity as a form of window dressing.[99] The surface diversity model inhibits both workplace equality and organizational progress because it does not encourage women and people of color to fully take part in and contribute to organizational life.

By having diverse employees restrain their differences that relate to their work, surface diversity makes it harder for them to personally connect with what they do and detracts from their motivation and focus.[100] Feeling out of place in one's work environment and feeling removed from one's work projects then could lead to underperformance, which may be misunderstood by employers as resulting from workers' limited capabilities rather than from malaise associated with the job.[101]

B. Marginal Diversity

The other common approach to diversity is what I call the "marginal diversity" model, under which employers seek to acknowledge and apply employees' cultural differences, but do so in restrictive fashion.[102] This is a model of differentiation, whereby employers assign employees to certain projects, functions, or client and constituent groups based on workers' particular demographic and cultural characteristics.[103] Thus, for instance, women and people of color may be directed into certain niche areas because of a presumed fit based on gender, race, or other traits, rather than encouraged to make use of their full range of competencies and interests in shaping the organization's central work.[104]

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98. *Id.* at 20-22.

99. *See, e.g.*, June K. Inuzuka, *Women of Color and Public Policy: A Case Study of the Women's Business Ownership Act*, 43 STAN. L. REV. 1215, 1219 (1991) (discussing the role of women of color in mainstream feminist organizations and the organizations' focus on merely "colorizing" their images).

100. Thomas & Ely, *Managing Diversity, supra* note 80, at 82-83.

101. *See* Guinier & Minow, *supra* note 11, at 274.

Bringing people from previously excluded or underrepresented groups into an institution can prove frustrating and disappointing for those individuals; they may feel alienated by a culture that is not welcoming or by individuals who doubt their worth. That alienation in turn can lead some of the people . . . to feel disaffected and disengaged.

Id.

102. *See* Thomas & Ely, *Managing Diversity, supra* note 80, at 7-9 (describing the "access-and-legitimacy paradigm"); Meyerson & Ely, *supra* note 15, at 134-35 ("In most cases, feminine attributes are valued only in the most marginal sense, since they stand in contrast to the organization's traditional norms, values, and practices, which remain intact.").

103. *See* Thomas & Ely, *Cultural Diversity, supra* note 39, at 243 ("Work groups in which this perspective prevails use their diversity only at the margins, to connect with a more diverse market. . . ."); Meyerson & Fletcher, *supra* note 22, at 130 (describing how some managers "eagerly put women's assumed differences to work by channeling them into jobs where they market products to women or head up HR initiatives").

104. Thomas & Ely, *Cultural Diversity, supra* note 39, at 243-45. To the extent that employers may attempt to defend such a practice under the "bona fide occupational qualification" (BFOQ) defense in

To give an example of the marginal diversity model followed at one workplace: a financial services firm that operated two sales divisions decided to match its employees to clients according to race and class, so that the division providing banking services to a mostly black, working-class customer base was staffed by also mostly black, working-class employees, and the other division serving the banking needs of a mostly white, wealthy clientele likewise was staffed by mostly white, upper-class employees.[105] While the black employees understood that their cultural knowledge of the black community would allow them to effectively reach out to and gain legitimacy with their black clientele, they nevertheless were distressed by their status vis-à-vis their white division counterparts, who appeared to be valued more highly by the firm and held more power in influencing the firm's broader goals.[106] The black employees became resentful that their division was seen as engaged in less important work and their sense of marginalization fell along racial and class lines.[107] Unsurprisingly, marginal diversity also may exist along gender lines; employers do the same thing with respect to gender when they assign female employees to female clients or to female-associated projects at work.[108]

As the above illustration shows, the marginal diversity approach can leave female and minority workers feeling exploited, particularly if their differences are only valued for profitable ends rather than for the larger betterment of the business.[109] Even if the employer's purpose in adopting marginal diversity is to paint a picture of legitimacy by enlisting diverse employees to work with diverse clients or customers with similar backgrounds, these employees likely will sense that their value to the employer is bounded and predetermined, dampening their motivation and ambition.[110] Additionally, employees may worry that because they are recruited to do work in specialized areas, they then may not be able to branch out into other areas of the company and develop broad sets of skills.[111] Making job assignments according to gender and race further contributes to the stereotyping of women and racial minorities, whose work may be underpaid and undervalued by virtue of the fact that it is performed either exclusively or predominately by members of subordinated groups.[112]

The marginal diversity paradigm also may function as a model of accommodation. To accommodate nontraditional workers, employers may offer mentoring programs specifically for minority employees, or offer substitute career

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cases of intentional discrimination under Title VII, the BFOQ defense is available only "in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2. The BFOQ defense does not shield against race discrimination. *Id.*

105. Thomas & Ely, *Cultural Diversity, supra* note 39, at 244.

106. *Id.* at 244–45.

107. *Id.* at 245.

108. Meyerson & Fletcher, *supra* note 22, at 130.

109. Thomas & Ely, *Managing Diversity, supra* note 80, at 6-7.

110. *Id.*

111. *Id.*

112. Green & Kalev, *supra* note 5, at 1449.

paths or flexible work schedules for female workers.[113] The problem with the accommodation approach is that it yields limited success because employees are hesitant to take advantage of some of its programs—such as reduced work schedules—due to their concern that doing so may set back their career or fuel indignation by their colleagues.[114] While these accommodation-based arrangements may aid diverse groups in the short-term, this approach continues to view the female and minority worker as something other than the typical, or "authentic," worker—in other words, the white male worker—and therefore in need of special modifications.[115] Simply providing accommodations thus does not change the way the workplace is fundamentally structured.

I call this the "marginal diversity" model because although this approach extends beyond the surface to recognize that diverse employees possess different skill sets and knowledge bases that could enhance the organization's work, their contributions are incorporated only at the periphery, preventing them from influencing the organization's central functions and output. Trumpeting the benefits of difference while at the same time cabining its potential to shape the business as a whole will not significantly improve the workplace experience for traditionally subordinated employees and will not maximally enhance the company's products or services. The marginal diversity model, by focusing on diversity's short-term gains, avoids a profound engagement with diversity that can lead to greater, long-term advantages.

Similar to the surface diversity approach, the marginal diversity model neglects to reach the heart of the problem. Both models fall short because they ignore the discriminatory norms that lie deeper within the organization; hence, they miss the mark in bringing about full equality, diversity, and business productivity. These approaches fail to expose embedded biased norms because they fail to elicit and incorporate employees' full range of ideas regarding the organization's main work.

C. Core Diversity

To move closer to full equality for previously excluded groups, I assert that an increase in their organizational presence needs to be accompanied by opportunities to exert greater influence in the workplace.[116] Embedded discrimination results from dominant group assumptions and practices that suppress and disempower historically subordinated groups. Therefore, firms must take steps to challenge these assumptions and power differentials in direct ways. Inclusionary work cultures need to be actively fostered; they will not come about on their own.[117]

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113. Meyerson & Fletcher, *supra* note 22, at 130.

114. Meyerson & Ely, *supra* note 15, at 132.

115. *See* Meyerson & Fletcher, *supra* note 22, at 130 (explaining it this way: "It gives women stilts to play on an uneven playing field, but it doesn't flatten out the field itself.").

116. Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 LAW & SOC. INQUIRY 41, 62 (2000).

117. Michele Coleman Mayes, *Did I Forget to Tell You I'm in Control?*, *in* THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP 172, 172 (Deborah L. Rhode ed., 2003).

I contend that to dislodge embedded forms of discrimination, businesses must re-conceptualize the purpose and value of having a diverse membership by adopting what I term the "core diversity" model, which seeks to apply people's differences to concretely improve the organization's practices at its core.[118] The core diversity approach counsels institutions to question the traditions and power dynamics that have exclusionary effects, and provides an antidote in the form of drawing out and incorporating diverse members' various ideas concerning the organization's central work.[119] Institutions should encourage employees' full development by enabling them to share their complete repertoire of information, experiences, and skills that relate to their work and to the organization's primary endeavors.[120] By developing a reputation for being committed to core diversity, a reputational distinction that job candidates would learn about through word-of-mouth and public information channels, the organization then would better attract and retain women and minorities.[121] Additional tangible benefits include reduced hiring and training costs for the employer and learning about new ways to advance the employer's mission and improve its business practices. For instance, the accounting and consulting firm of Deloitte and Touche (Deloitte) implemented an involved Initiative for the Retention and Advancement of Women in the 1990s to carefully explore ways in which the company could better retain its female professionals, and this investment consequently saved the firm $250 million in hiring and training costs as well as contributed to the company's fast growth when compared with other large professional services companies.[122] Today, Deloitte remains on Fortune Magazine's *List of 100 Best Companies to Work For.*[123] By

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118. *See* Sturm, *supra* note 4, at 301-02 (explaining the efficacy of the National Science Foundation's ADVANCE program in promoting gender equality in higher education, and the program's reliance on a framework that "maintains gender (and race) as distinct evaluative categories and at the same time connects them to core institutional values and goals"); Borzaga, *supra* note 81, at 773 (discussing the goal of "transforming the workplace culture" to support workplace equality without assimilation).

119. *See* Thomas & Ely, *Cultural Diversity, supra* note 39, at 240 (discussing the "integration-and-learning" perspective).

120. Thomas & Ely, *Managing Diversity, supra* note 80, at 13.

121. For instance, various media outlets and periodicals such as *Fortune Magazine* and the Vault career information website rank employers on diversity measures. *See, e.g., Fortune's 100 Best Companies to Work For* (2010), http://money.cnn.com/magazines/fortune/bestcompanies/2010/full_list/ (last visited Apr. 6, 2010); Vault's Employer Rankings by Category, http://www.vault.com (last visited Apr. 6, 2010). Focusing on large law firms, a group of Stanford Law students founded the organization Building a Better Legal Profession, which publicizes demographic diversity data at firms (in addition to other firm-related information) and has received considerable media attention. For further information, see Building a Better Legal Profession, http://www.betterlegalprofession.org (last visited Apr. 6, 2010). This student-run organization also could include information on law firms that adopt a model of core diversity. *Id.*

122. Douglas M. McCracken, *Winning the Talent War for Women: Sometimes It Takes a Revolution, in* HARV. BUS. REV., Nov.–Dec. 2000 at 159, 160; *see also* Lauren Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1618 (2001) ("One of the most prominent themes in the diversity literature is the idea that diversity management . . . is not only necessary . . . it is also a profitable resource for organizations.").

123. *Fortune's 100 Best Companies to Work For* (2010), http://money.cnn.com/magazines/fortune/bestcompanies/2010/full_list/ (last visited Apr. 6, 2010).

providing opportunities for the exercise of employee voice, employers could see a 2-5% increase in productivity.[124] The core diversity approach highlights the importance of supporting socially subordinated workers to contribute to their full potential, which in turn helps the organization operate at its fullest extent.[125]

This model is one of integrated problem-solving, using workers' diverse cultural competencies to correct inequities and inefficiencies found in how the organization carries out its main work. Core diversity aims to reap the full advantages of diversity by connecting economic interests to substantive equality and inclusivity, all of which should help improve organizational efficacy and morale.[126] This model does more than simply provide equal opportunity (as is the case with surface diversity) or view people's differences narrowly (as is the case with marginal diversity). Core diversity goes further by creating workplace norms that actively help workers share what they know to rethink how the business does business. The core diversity approach appreciates diverse members for more than their demographic diversity or links they may have to specific communities; it values them for what they have to offer based on their varied experiences and viewpoints, and encourages them to tap into their reserves of knowledge to better inform the organization's practices. Under the core diversity system, the firm thoroughly mines for the deeply buried obstacles that prevent women and minorities from fully contributing to the firm's projects.

1. Core Diversity in Practice

To better explain how the core diversity approach would work in practice, I propose several steps an organization should take. The first step involves organizational leaders making it clear that members are encouraged to raise concerns regarding organizational norms, particularly core traditions and procedures that appear to burden women and minority groups. For members to raise such issues, they need to be aware that everyday assumptions and practices can have disadvantageous effects on traditionally subordinated groups. If there is a general lack of awareness or if employees find it difficult to articulate their concerns, then workshops crafted to stimulate and guide candid conversations using case studies and videos may help.[127] Deloitte, for example, held a required multi-day training session for its U.S.-based senior executives to alert them to the gender inequities ailing the firm and to help them voice and examine their gender-based

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124. *See* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 105, 108, 113-14 (1999).

125. *See* Barmes & Ashtiany, *supra* note 13, at 276 (describing a vision of diversity by the UK-based Work Foundation as "aiming to create a positive work environment in which everyone benefits and can work to their full potential in pursuit of organizational goals, aims and objectives. This may involve changes in core values, mindsets and behaviours - supported by policies and strategies").

126. *See* Thomas Kochan et al., *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 HUM. RES. MGMT. 3, 19 (2003) (stressing the importance of having organizational policies and practices that support shared learning); London et al., *supra* note 10, at 395 (discussing how day-to-day interactions can affect people's feelings of belonging within an institutional environment).

127. *See* McCracken, *supra* note 122, at 162 (describing the type of workshops held at Deloitte to raise awareness around the issue of gender inequality at the company).

assumptions.[128] Although some managers dismissed the utility of these workshops and some sessions produced resentment and skepticism, more importantly "the workshops converted a critical mass of Deloitte's leaders" and served to bring about "a turning point, a pivotal event in the life of the firm" that led to tangible changes in company practices.[129] As done at Deloitte, these workshops should be clearly connected to the larger effort of working toward awareness and accountability, rather than offered as a type of stand-alone diversity training that stresses only legal liability concerns, since law-focused training has been shown to be ineffective in improving measures of equity.[130] From a legal perspective, however, employers should not ignore the law entirely in offering such trainings. Further, although Deloitte required its executives to attend the workshops, employers may want to make diversity-related trainings voluntary rather than compulsory, particularly if the organization is not in dire straits with respect to diversity, because elective training sessions have been found to produce better results than required sessions.[131]

The next step would involve having members within the organization, either individually or as a group, identify specific practices that contribute to inequality at work, an exercise which will help employees name the obstacle at issue and give them a shorthand way of referring to the problematic practice when it occurs.[132] In doing this, all employees should feel comfortable raising issues that seem to disadvantage a socially subordinated group, including things that do not necessarily stem from people's own experiences or cultural identities but which they notice nevertheless. Therefore, men should feel free to raise "women's" issues, non-minorities should feel free to raise "minority" issues, and so on. In fact, workplace policies that affect women of course affect men, too. For example, an employer's policy that offers a longer maternal leave compared with its paternal leave restricts the options of both women and men, and unequally stacks the weight of their

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128. *See id.* (describing the positive results from intensive two-day workshops held for nearly all of its U.S. management professionals as part of Deloitte's initiative on gender).

129. *Id.* at 161-62. Furthermore, the firm's turnover rate appreciably decreased over time, leading to a savings of $250 million and contributing to the company's fast growth when compared with other large professional services companies. *Id.* at 160; *see* Hayes, *supra* note 2, at 8 (discussing DuPont's similar approach in providing an intensive training for its senior executives as part of its diversity initiative, and the training's positive effect).

130. *See* Alexandra Kalev et al., *Best Practices or Best Guesses?: Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies,* 71 AM. SOC. REV. 589, 611 (2006) (finding that diversity practices that focus on educational training sessions do not produce increases in diversity); 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, 38-41 (2001) (discussing the uncertain effects of diversity training); Frank Dobbin et al., *Diversity Management in Corporate America,* CONTEXTS, Fall 2007, at 26 (finding that diversity trainings that stress the threat of lawsuits have negative effects in the workplace).

131. *See* Dobbin et al., *supra* note 130, at 26 (finding that optional training programs have positive effects while mandatory training has negative effects on enhancing diversity at the management levels, also noting that most managers remain male and white and are not very receptive to trainings that make them feel they are being blamed); *see also* McCracken, *supra* note 122, at 162 (stating that some of Deloitte's managers were reluctant to participate in the firm's mandatory diversity workshops).

132. Meyerson & Fletcher, *supra* note 22, at 131.

opportunities at work relative to their responsibilities at home.[133]

To facilitate the process of raising concerns, employers should establish clear structures and channels through which individuals and groups can bring problems to the attention of organizational decision-makers so that items of interest can be properly flagged. For this to be a real option for employees whose footing in the workplace is already insecure, employers must foster a culture of strong trust and receptivity to employees' concerns. Given the difficulty of organizing at-will employees in nonunionized work settings, the mechanism in place should not require collective action on the part of workers to articulate issues, although employees may prefer to speak in a collective voice or find allies who support their interests.[134]

Once an issue is brought to light, members who are affected by it would be invited to discuss ways in which to modify or replace the inequity-producing norm, and then proceed to make a change by experimenting with possible solutions and trying different modifications if necessary to reach the source of the problem.[135] In making reform, organizational leaders must remain mindful of the interests of the least powerful; otherwise, they ultimately may replicate trends that continue to benefit the advantaged.[136] It is critical to couple this organizational mechanism with clear accountability measures on the part of decision-makers to ensure this process brings about tangible differences in organizational practices.[137]

To minimize opposition from those who may be unreceptive toward or skeptical about making change, modifications likely will need to be implemented at an incremental rate.[138] Modest triumphs that create positive results can encourage

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133. Rhode, *supra* note 6, at 628.

134. Moreover, if nonunion employees choose to engage in concerted activity, they would be protected by Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1). The NLRA gives nonunion employees the right to act collectively for their "mutual aid and protection," including the right to discuss their working conditions. *See generally* Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673 (1989) (discussing the rights of employees to engage in concerted activity for mutual aid and protection and providing a methodology for interpreting and applying the language of Section 7). One commentator has argued that collective employee representation is indeed needed to negotiate for public goods that would benefit more than one employee, since an incentive would exist for an individual employee to benefit as a free rider by waiting for a co-worker to raise the issue. Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 610 (discussing the public goods problem in relying on individual mediation in resolving discrimination disputes). I argue that under the core diversity approach, however, workers should be encouraged to raise concerns either individually or collectively (before any actual dispute with the employer may arise) because it may be detrimental or costly for individual workers to continue bearing disadvantages at work by indefinitely waiting for others to act.

135. *See* Meyerson & Fletcher, *supra* note 22, at 131-32 (describing the process by which problems that have been identified may be resolved).

136. Rubin et al., *supra* note 21, at 484.

137. *See* Kochan et al., *supra* note 126, at 17 ("One clear implication of our work is that organizations need to do a better job of tracking and evaluating the impact of their strategies for managing a diverse workforce."); Levit, *supra* note 54, at 372 (noting that settlements of discrimination suits that emphasize accountability offer the most promise of real change).

138. *See* Meyerson & Fletcher, *supra* note 22, at 132-36 (discussing the "small-wins strategy"). *But see* Ruth B. Mandel, *A Question About Women and the Leadership Option, in* THE DIFFERENCE

further small-scale changes, as the process ought to help reveal the extent to which inequity and inefficiency may reside broadly in the workplace culture and signify that larger reform is in order.[139]

2. Organizational Examples

The following case study demonstrates how a core diversity-type approach can bring about new thinking and positive results. An investment firm that wanted to address gender inequity in hiring learned that it had to make incremental changes to accomplish its goal of making more employment offers to women.[140] This particular firm first had tried adding more female candidates to its interview roster, but when this did not lead to a higher offer rate, the company next evaluated its traditional interview protocol and instituted further small changes.[141] The firm's interviewers, many of them male, began conducting longer interviews to lessen the effect of initial impressions, which tended to advantage male candidates who better resembled those conducting the interview.[142] The interviewers also began asking questions that focused less on a candidate's background in deal work and more on how the candidate would advance the firm's work in a broad sense.[143] These changes in interview methods resulted in better performance by female candidates in the interview process and ultimately in more employment offers made to women.[144] By changing its interview practices and hiring more women, the firm also quickly developed a positive reputation among business school students that boosted the firm's efforts in its recruitment process. [145]

Using a similar approach, Deloitte implemented changes on a trial basis to ease the burdensome travel requirements of its consultants, who regularly were away from home five days a week for many consecutive months at a time.[146] Recognizing the toll this had on its female (and male) consultants, the company tried implementing the "3-4-5 program" on some of its projects, whereby consultants would be away from home for only three nights each week, visit with the client four days a week, and return to their own office on the fifth day of the week.[147] Deloitte was worried that an abbreviated travel schedule might jeopardize the level of service it would be able to provide to its out-of-town clients, but the company discovered that its clients in fact applauded the change because they also were overextended in needing to meet with the consultants during all five days of

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"DIFFERENCE" MAKES 66, 69 (Deborah L. Rhode ed., 2003) ("Skepticism about incremental gains inside traditional systems is a familiar and understandable stance for those who believe that real, progressive change requires a radical restructuring of society that cannot take place by numbers alone.").

139. *See* Meyerson & Fletcher, *supra* note 22, at 135-36 (explaining why the "small-wins strategy" can be successful).

140. *Id.* at 133.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Meyerson & Fletcher, *supra* note 22, at 133.

146. McCracken, *supra* note 122, at 166.

147. *Id.*

each week.[148] As a result of this successful intervention initially implemented on a trial basis, Deloitte decided to permanently expand the 3-4-5 program to most of its consulting projects.[149]

The core diversity model aims to bring about business change by understanding that employee diversity encompasses both cultural and cognitive diversity, and by meaningfully valuing this by drawing out new perspectives concerning how the organization should accomplish its principal goals in the marketplace.[150] It seeks to make the work environment a more productive place for all of its employees by making it a more innovative and inclusive place in ways that matter most to how the organization functions.[151] Groups that consist of people with varied experiences, backgrounds, and perspectives are more likely to come up with novel ways of doing things than are groups consisting of people who are alike.[152] Diversity within work groups helps to produce more options that then may lead to better decisions.[153] History and research have shown that people make discoveries in a variety of disciplines by drawing from a range of viewpoints or by looking at problems in new ways.[154]

Core diversity recognizes that marginalized groups, such as women and people of color, have long had their perspectives excluded from mainstream organizational thought. An organization that creates an atmosphere where all individuals can perform well is an organization that performs well overall.[155] By linking the goal of diversity to the organization's core, diversity concerns more likely will be kept at the fore and less likely be seen as disposable when the organization may be faced with difficult choices or economic limitations,[156] although serious fiscal constraints admittedly may limit core diversity efforts. At the same time, organizations that continue to take diversity seriously by pursuing a core diversity agenda will maintain a long-term edge over their competitors in attracting and retaining valuable employees. These organizations will be more creative in achieving their goals and thus better situated to adapt to changing

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148. *Id.*

149. *Id.*

150. *See* SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 13-15 (2007) (showing that cognitive diversity increases group innovation and problem-solving capacity).

151. *See* Ramirez, *supra* note 152, at 95-96 ("[F]irms that excel at managing diversity will outperform diversity laggards.").

152. *See* Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 99 (2000) (explaining that heterogeneous groups are more creative because they are less likely to be stifled by groupthink). *See generally* PAGE, *supra* note 150 (discussing the benefits of cognitive diversity).

153. Estlund, *supra* note 42, at 27.

154. PAGE, *supra* note 150, at 24.

155. *See* London et al., *supra* note 11, at 391-92 (stating that an inclusive environment that engages all members, particularly those who have been historically excluded, breeds individual and organizational success).

156. *See* Hayes, *supra* note 2, at 14 (quoting Mary Snapp, Microsoft's deputy general counsel and corporate vice president: "I think we broadly think of the economy and how we prioritize in the legal department when it comes to budget adjustments, but we have to absolutely sustain the core mission . . . . We cannot be a quality, first-class legal department without diversity, and while we don't know if there will be a reduction in programs, we do have to sustain the core.").

conditions in our diverse national and international economies.[157] To further encourage core diversity business practices, market-based incentives such as tax credits or other subsidies could be provided by federal or local government.[158]

3. Diversity and Discord

Core diversity undoubtedly requires institutional investment in terms of time and effort because such investment is needed to implement a problem-solving model that actively aims to reconsider the organization's traditions.[159] This investment must be made for the long term because the benefits of diverse work teams may take some time to be realized.[160] Admittedly, employers may find it difficult to direct resources toward core diversity efforts during an economic recession when many jobs are being shed.[161] But organizations that prioritize core diversity may continue to invest in such efforts despite financial constraints in order to be better off when the economy rebounds and better off in the long-term.[162]

Despite the rewards to be gained, group diversity is associated with difficult group relations and frequent changes in membership, as critics and skeptics will point out.[163] While diversity in groups may enhance decision-making by introducing more ideas and leaving behind the problem of groupthink, studies also have shown that it can contribute to group dissension and hamper the group's smooth functioning.[164] To remedy this, effective management is needed to bring out and maximize the group's innovation and wisdom, as well as to constructively guide the group in navigating potential disharmony.[165]

Managers who keep group discussions centered on specific goals connected to the organization's mission can avoid the problem of getting mired in group disagreements that stray from the bigger picture.[166] While on the one hand tensions may arise in the process of identifying biased norms and formulating possible solutions, I maintain it is still better to acknowledge these tensions openly and constructively rather than have them simmer and intensify under the surface. The alternative is to not change the status quo, which only would keep in place business

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157. Ramirez, *supra* note 152, at 94-95.

158. *See* Kibert & Kibert, *supra* note 70, at 23 (discussing the federal government's role in supporting the green movement by providing tax credits to builders and designers to develop energy-saving technologies).

159. Thomas & Ely, *Cultural Diversity, supra* note 39, at 242.

160. *See* Carbado & Gulati, *supra* note 28, at 1793 ("There is evidence . . . to suggest that, in the long run, heterogeneous teams are better problem solvers and more creative than homogenous teams.").

161. *See* David Leonhardt, *Broader Measure of U.S. Unemployment Stands at 17.5%*, N.Y. TIMES, Nov. 6, 2009 (stating that unemployment rates have most likely risen to their highest levels since the Great Depression).

162. *See* Hayes, *supra* note 2, at 8 (suggesting that diversity in the workplace remains a viable business objective in the current global economy despite the recent economic recession).

163. Estlund, *supra* note 42, at 84.

164. Kochan et al., *supra* note 126, at 6.

165. *Id.* at 7. *See* Estlund, *supra* note 42, at 28 (asserting that because diversity can have negative effects on group performance, counteractive measures need to be taken to promote constructive group interaction).

166. Thomas & Ely, *Managing Diversity, supra* note 80, at 87.

structures that have long prevented or made it difficult for historically excluded groups to thrive.[167]

The discord that is likely to accompany diversity efforts may give businesses a reason to opt for an easy form of diversity—specifically, employee homogeneity in terms of racial and gender performance.[168] Employers may assume it is the minority employee, rather than the nonminority employee, who does not or will not cooperate while working with others, and assumptions such as this serve to reinforce the expectation for dominant group conformity.[169] Employers whose workplaces are structured heavily around teams commonly want to maintain working conditions based on "trust, fairness, and loyalty" (TFL) because these characteristics are known to contribute to efficient and optimal teamwork.[170] Hence, firms may aim to create groups that behave uniformly because such teams are more likely to produce TFL.[171] Although employers are legally restricted from hiring demographically identical workers, they can achieve a similar kind of workplace homogeneity by hiring women and racial minorities who present themselves as less outsider and as more insider, people who can and are willing to conform to the dominant work culture.[172] Put differently, this is the managerial pursuit of surface diversity.

While organizations may believe homogeneity in practice tends to improve the level of TFL, minority (and majority) groups in the workplace likely will feel distrust toward employers who appear solely focused on meeting profitability and efficiency objectives while ignoring their employees' well-being and ability to flourish at work.[173] Even female and minority workers who fully step into the white

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167. Mandel, *supra* note 138, at 69. The process for filling law school deanships demonstrates that the usual way of doing things must change if the goal is to alter the status quo. In selecting a pool of candidates for a law school deanship, most dean search committees advertise for the position as well as seek nominations from legal academics. Search committees, however, noticed that using these two methods tended to not yield a diverse pool of dean candidates. Thus, the American Association of Law Schools eventually created the Women and Minority Deans' Databanks to allow more women and people of color to be considered for such positions. Laura M. Padilla, *A Gendered Update on Women Law Deans: Who, Where, Why, and Why Not?*, 15 AM. U. J. GENDER SOC. POL'Y & L. 443, 454-58 (2007); The Association of American Law Schools, Women and Minority Deans' Databanks, http://www.aals.org/services_databanks.php (last visited Apr. 9, 2010).

168. *See* Carbado & Gulati, *supra* note 28, at 1790-93 (discussing employers' preference for employee homogeneity).

169. *See* Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 649 (1998) (discussing the claims of black workers, who alleged that their employer's team-based management approach harmed their opportunities for job advancement because this system of decision-making relied on group judgments of primarily white coworkers that produced biased outcomes); Carbado & Gulati, *supra* note 28, at 1778 (remarking that "[w]hiteness is presumptively grease," meaning that whites, unlike racial minorities, do not have to "perform their race in ways that negate the presumptions that their race will engender discomfort and cause disruptions").

170. Carbado & Gulati, *supra* note 28, at 1789-90.

171. *Id.* at 1790.

172. *Id.* at 1791-92.

173. *See* Barmes & Ashtiany, *supra* note 13, at 284 ("Where the justification for valuing each person's distinctive contribution is economic, it is, quite simply, hard to believe that it is genuine."). Certainly the concept of employee loyalty in the contemporary labor market is limited in the sense that

male character may find that their assimilation will take them only so far; as they climb, they may see that the most sought-after rungs are not open to them or are reserved for the very few in their particular group.[174] On the other hand, in a culture of core diversity, trust would be prioritized in the employer-employee relationship, and employees would view themselves as critical partners in carrying out the organization's mission to improve the company's performance on many levels.[175]

4. Connecting Core Diversity to Organizational Learning, Integration, and Values

Given that individuals possess various cultural identities, employers ought to be attentive to members' intersecting identities and not assume that a shared characteristic with the majority group eliminates all inequity. Take, for example, the case of a female-run organization where racial and ethnic differences rose to the surface but were effectively addressed and drawn inward such that these differences helped shape the organization's central work.[176] This case involved a public-interest law firm, initially staffed by all white attorneys, that wanted to represent the rights of all women but could not attract women clients of color.[177] To address this concern, the firm hired a Latina lawyer and several additional female lawyers of color to reach out to minority communities.[178] The new hires drew upon their knowledge of and experience with these communities to urge the firm to take on cases challenging English-only policies in the workplace.[179]

The previously all-white firm had not viewed English-only cases as relevant to its traditional Title VII employment discrimination practice and had not handled such cases before, but the firm's senior management was open to learning about the need to pursue this line of litigation to better help its women of color clients, a number of whom were recent immigrants.[180] The firm fostered learning on both an individual and organizational level, in the end broadening its core work by rethinking what its mission should encompass.[181] Although the firm had hired the

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many employees no longer exhibit loyalty to a single employer but frequently change employers in search of better, or different, career opportunities. *See generally* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001) (describing the demise of the "old psychological contract" under which employers implicitly promised training and long-term job security in exchange for employee longevity and productivity, and the rise of the "new psychological contract" that comes without any implied promise of a long-term relationship between a given employer and employee).

174. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 879-84 (2002) (recounting the story of a black male lawyer who, despite downplaying his racial identity to fit in, still lacked the support needed to make partner at his firm).

175. *See* Barmes & Ashtiany, *supra* note 13, at 284 (stating that only in a "high trust work environment" will "each individual's potential [ ] have the possibility of being realized [sic]").

176. Thomas & Ely, *Managing Diversity*, *supra* note 80, at 85-86.

177. *Id.* at 85.

178. *Id.*

179. *Id.*

180. *Id.*

181. *See id.* at 85-86 (explaining that the firm's minority lawyers redefined what issues were relevant and framed them in new and creative ways).

minority lawyers to help with immigrant outreach efforts, the firm effectively moved beyond a model of marginal diversity to one of core diversity by bringing its minority members into the fold of central decision-making as full participants.[182] As a result, the firm benefited from improved business as well as from low turnover of its diverse employees.[183]

It makes business sense that the nature of the input process in a given workplace would affect employees' interactions, relations, and performance in significant respects. People form networks at their places of work by interacting with and building relationships with their colleagues.[184] Since the workplace helps to link people together and serves as a forum for exchanges of thought and feeling, employers should proactively promote the sharing of knowledge and new information.[185] To facilitate the expression and debating of ideas, organizations should be structured to better allow employees to interact in equal and nonhierarchical ways.[186] Toward this end, Tristin Green and Alexandra Kalev argue that employers should use a "network-based" system in which people work in teams to help break down relational forms of discriminatory behavior.[187] They emphasize that differences in position and power within the workplace tend to revive stereotyped notions about gender and race that contribute to uneven intergroup interactions, whereas reducing such status-based differences enhances people's receptivity to information that dispels stereotypes.[188] It is therefore important for employers to create more cooperative and balanced work settings.

Establishing less bureaucratic structures also would further core diversity by making it easier for workers to provide their input and learn from one another. Indeed, under the type of positive conditions that core diversity seeks to create, work can be, as Cynthia Estlund explains, a site of "social integration" among people of different backgrounds[189] and help undo gender and racial stereotypes that otherwise dominate people's perceptions when minority groups are not known as distinguishable individuals.[190]

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182. *But see* Inuzaka, *supra* note 99, at 1220-23 (discussing the integration difficulties faced by women of color performing policy work "on the staffs of white female- or male-dominated public interest organizations").

183. *See* Thomas & Ely, *Managing Diversity, supra* note 80, at 86-87.

184. Estlund, *supra* note 42, at 4-5; Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2164 (2003).

185. *See* Estlund, *supra* note 42, at 3-5 (arguing that the workplace "is where most employed adult[s] converse most often, outside of the family, about political, social, and personal matters" and that it "foster[s] communication, connectedness, and empathy among individuals from different racial and ethnic groups in a diverse citizenry").

186. *See* Carbado & Gulati, *supra* note 28, at 1799 (discussing the kind of conditions needed for positive intergroup contact, including "equal status, opportunities for self-revelation, egalitarian norms, and tasks that require cooperative interdependence").

187. Green & Kalev, *supra* note 5, at 1451-53.

188. *Id.* at 1447.

189. Estlund, *supra* note 42, at 4.

190. *See* Green & Kalev, *supra* note 5, at 1454 (citing research showing that "gender and racial stereotyping and biases are less likely to be activated in organizations with less emphasis on formal and informal power relations and greater emphasis on egalitarian and collaborative relations").

While an organization's customs may need to change because they are rooted in discriminatory traditions, this does not necessarily mean the institution's values must be entirely discarded. Rather, the change needed may be consonant with the organization's values when viewed on a broad level or when understood as an extension or evolution of the organization's original purpose, rather than as a complete attack on all that the organization knows and has done.[191] In fact, connecting the need for change to the institution's broad mission can more effectively facilitate the buy-in of the organization's loyalists and custom-bound adherents, thus smoothing the initial road to core diversity. This is an especially relevant consideration for institutions with exceptionally long and storied reputations, as these entities may be much more resistant to changing course.[192] It must be emphasized, however, that tradition and transformation may not be mutually exclusive or inescapably opposing things; transformation can happen while continuing to preserve some sense of tradition. Furthermore, organizational leaders should keep in mind that apart from the positive things to be gained through transition and progress, change is inevitably accompanied by some sort of loss, and depending on the type of loss involved, institutional members may need time to properly part with what has been for them a longtime source of familiarity and identification.

5. Norms and Organizational Behavior

To be clear, my argument is not simply that all dominant norms should be replaced with new norms in remaking organizational cultures. Rather, my goal is to highlight how traditional dominant-group assumptions have significantly dictated the conduct of female and minority workers in ways that harm them, and obstruct full equality and business innovation. Core diversity has the potential to benefit not only minority groups but also majority groups, because it seeks to highlight the social constraints placed on various groups in making useful contributions to the organization's work. Dominant norms constrain the behavior of majority as well as minority employees, and although the former may have an easier time garnering work's rewards by virtue of their membership in the majority group, they too may

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191. For example, Drew Gilpin Faust, President of Harvard University, has articulated this point:
> [C]hange often happens most easily if it can be shown to be embedded in long-held beliefs, values, traditions, rather than being just a total assault on everything everybody thought they were and wanted. So it seems to me that part of moving through change effectively is making it seem seamless, or as seamless as possible, with what has gone before—of identifying continuities that can serve as bridges over the chasm of differences, building understanding and transparency about purpose and shared commitments, and using those as the fuel of change.

John S. Rosenberg, *A Scholar in the House: President Drew Gilpin Faust*, HARV. MAGAZINE, July-Aug. 2007, at 31.

192. *See* Kalev et al., *supra* note 130, at 591-92 (noting "the old ways of doing things [can be] imbued with meaning and value over time"); *see also* Mike Anton, *UCI Law Has Status, Not Tradition*, L.A. TIMES, Aug. 21, 2009 (reporting on the freedom the new law school at the University of California-Irvine has in establishing change in legal learning because the school's dean is not constrained by years of tradition).

feel restricted in their freedom to depart from intra-group expectations. Accordingly, white men may not optimally thrive even under the rules that members of their own group have established.[193]

The experience of male workers at a male-dominated oil rig illustrates how men also may feel the pressure to conform.[194] As is the case on most oil rigs, the men who labored in this hyper-masculinized environment needed at all times to display a tough, macho image despite the dangerous and unnerving nature of their work.[195] The pressure to always appear secure and in control compromised the safety of their work, and in response, the rig's parent company decided to make safety a top priority by conveying the clear message that workers should openly express their fears on the job so that they could explore ways to make their work safer.[196] This safety initiative eventually changed the culture of the oil rig from one of macho bravado to an environment of care and cooperation, relieving the male workers from their previous worry that they would be ridiculed for appearing weak or helpless while on duty.[197]

In addressing workplace discrimination embedded within a particular institution's conventions, the core diversity model recognizes that problem-solving primarily needs to take place on a local, organizational level. Charging non-governmental players with regulatory responsibility in fashioning and reinforcing antidiscrimination norms is an example of the new governance approach in the workplace.[198] The new governance scheme relies less on top-down governmental bodies and more on various on-the-ground market actors to advance societal values and objectives.[199] Applying this idea to the workplace, businesses can engage in private local governance by collaborating with their employees as well as with industry partners toward producing and enforcing bias-free norms within their work settings.[200] The new governance approach appears well suited to deal with the complex and diffuse nature of embedded discrimination, as it demonstrates the

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193. *See, e.g.*, Kim Campbell, *Different Rulers—Different Rules*, *in* THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP 121, 124 (Deborah L. Rhode ed., 2003) ("[T]he presence of women . . . make[s] it possible for men to be more of the things they want to be. Many men are not at their best in male-dominated organizations.").

194. Debra Meyerson et al., *Disrupting Gender, Revising Leadership*, *in* WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 453, 458-59 (Barbara Kellerman & Deborah L. Rhode eds., 2007).

195. *Id.* at 459-60.

196. *Id.* at 461-62.

197. *See id.* at 461 ("Rather than demonstrating how tough, proficient, and cool-headed they were, as is the norm in traditional masculine workplaces, the employees on these platforms readily acknowledged their doubts and physical limitations, asked for help, and openly attended to their own and others' feelings.").

198. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 420 (2004); *see* Cynthia Estlund, *Something Old, Something New: Governing the Workplace by Contract Again*, 28 COMP. LAB. L. & POL'Y J. 351, 354-55 (2007) (noting that typical regulatory systems "must give way to systems that energize and motivate regulated actors themselves to collaborate in both the shaping and the enforcement of regulatory norms").

199. Estlund, *supra* note 198, at 354-55.

200. Lobel, *supra* note 198, at 420.

advantages of using a decentralized, participatory process to bring about substantive equality and core diversity that would be adaptable to a given organization's varying circumstances and needs.[201]

The organization's biased practices need to be directly questioned, I maintain, in order to seriously rethink and transform how the organization does its work, and moving toward core diversity would encourage the organization to do just this. This approach to reconsidering the organization's norms is expected to especially benefit women and people of color, whose experiences and perspectives initially had not been taken into account when these norms were established. Altering normative behavior at either an individual or organizational plane, I concede, is not an easy task. But norms can and do change, and modifying business norms, even without direct legal intervention, can be a powerful starting point.[202] According to the interest-convergence theory posited by critical race scholars, companies will be motivated to pursue diversity practices that appear aligned with their self-interest— in other words, aligned with their market-based interests.[203] But there is evidence that employers also are prompted to act because they believe supporting diversity is the fair thing to do.[204]

The core diversity model gives these socially-conscious employers a business design through which to pursue equity goals in tandem with economic objectives. Creating pressure on companies to strive for core diversity in the workplace can give rise to new diversity norms because employers, whether self-motivated or not, may feel obligated to respond to employee and client demand for both business and reputational reasons.[205] While it may be the case that this pressure will be directed mostly toward big-name employers, larger organizations can influence the actions of smaller firms through their direct business dealings or by simply modeling new business behavior in their industry or sector.[206] Norms emerge when people engage

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201. Estlund, *supra* note 198, at 354-55.

202. *See generally* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (suggesting that "norm management" and shifting social norms can be an effective strategy for accomplishing legal objectives, including the goal of reducing racial and gender inequality); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (studying norms to explain behavior and to predict the effect (or lack of effect) of legal rules); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986) (analyzing how rural landowners in Shasta County, California resolve disputes by relying on a system of informal norms rather than on formal law).

203. *See* Ramirez, *supra* note 152, at 97-98 (stating that businesses are embracing diversity because they believe it is profitable to do so); Carbado & Gulati, *supra* note 28, at 1764 (explaining that employers will look for some diversity when hiring as long as it does not interfere with efficiency gains created by preserving employee homogeneity).

204. *See* Estlund, *supra* note 2, at 7 ("Many corporate executives and human relations managers are motivated by a desire to do right . . . ."); Edelman et al., *supra* note 122, at 1619 (stating that while fifty percent of the literature on diversity stress the profit motive, thirty percent discuss fairness as a reason for promoting diversity).

205. *See* McAdams, *supra* note 202, at 350, 355 (explaining norms as "obligations" and arguing that "norms arise because people seek the esteem of others").

206. *See* Vandenbergh, *supra* note 68, at 947 (highlighting the role of consumer pressure on large firms such as Wal-Mart to use their contracting power to impose environmental conditions on suppliers; also observing that some smaller firms appear to be following suit in adopting environmental supply-chain requirements, even without direct consumer pressure).

in certain behavior because they want others to think highly of them.[207] In addition to seeking admiration, people want to avoid shame, and as a result, they will follow socially-approved norms when the anticipated cost of losing others' high regard or inviting shame is greater than the anticipated cost of abiding by the norms.[208] Organizations that are among the first to embrace core diversity as a workplace norm can achieve "heroic" status by initially incurring the cost of engaging in publicly-valued but uncommon activity.[209] These early-acting employers likely will include those who wish to think of their organizations as being committed to diversity and those who want to project their businesses as progressive places in which to work.[210]

Unlike the surface and marginal diversity models which keep women and people of color on the periphery and out of focus, the core diversity paradigm ushers them to the forefront where they can be clearly seen and known as distinct individuals with ideas to offer.[211] Because business leaders adopt one of these diversity models according to how they understand equality and diversity, I further argue that organizational management plays an essential role in either perpetuating dominant norms or in generating new norms.[212] For the core diversity model to work, top management must be involved and all institutional leaders and members at every level must help set the example.[213]

IV. CORE DIVERSITY AND ORGANIZATIONAL LEADERSHIP

Organizations will not adopt the core diversity model unless organizational leaders understand the problem of embedded discrimination and how it detracts from both workplace equality and market opportunities. The increased presence of women and minorities in leadership positions is important to achieve a more democratic society, but having diverse leaders will not necessarily improve the overall participation and success of diverse members if these leaders are not interested in changing institutional practices that suppress equality and diversity.[214]

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207. McAdams, *supra* note 202, at 355.

208. *See id.* (positing that people "can costlessly punish norm violators by withholding from them the esteem they seek" and if there is a high likelihood that a commonly agreed-upon norm violation will be detected, "then the pattern of disapproval itself creates costs to the behavior"). *See also* Sunstein, *supra* note 202, at 915 (noting that the negative social consequences from violating social norms include embarrassment or shame).

209. *See* McAdams, *supra* note 202, at 369-70 (making this argument with respect to individuals who act first and assume the cost of engaging in certain "idealized behavior").

210. *See* Sunstein, *supra* note 202, at 916 (discussing the effect of choosing a specific norm on one's self-conception).

211. *See* Green & Kalev, *supra* note 5, at 1450-51 (discussing a black woman's experience of having her co-workers clearly notice her for the first time: "it was only recently, in the course of participating in a few problem-solving groups, that she felt other people had 'brought her into focus'").

212. *See* Edelman et al., *supra* note 122, at 1632-33 (arguing that reconstructing legal mandates into managerial strategies will help them become a part of organizational practice).

213. *See* Thomas & Ely, *Managing Diversity, supra* note 80, at 88-89 (emphasizing the importance of organizational leadership in supporting diversity efforts); Rhode, *supra* note 6, at 640-41 (stressing the commitment needed by the organization's top decision-makers to ensure accountability).

214. *See* Mandel, *supra* note 138, at 69-70 (positing that women who step into leadership positions

Notably, members of underrepresented groups may prefer to join organizations with more diverse representation in management, since they may look to these leaders as role models and view their leadership positions as a positive sign that one's gender, race, or ethnicity will not impede one's chances of advancing in the organization.[215]

Evidence shows that having more women and minorities in the top tier of leadership helps to effectively increase the numbers of women and minorities in leadership positions generally, especially when compared with other diversity programs such as diversity training, diversity performance evaluations for managers, and networking and mentoring programs.[216] Further, the presence of diverse leadership may have a positive effect on the way other diverse groups are hired or evaluated, further opening the way for historically disadvantaged workers to be noticed and rewarded.[217] The opposite, however, also can occur, especially where few women and people of color make it to the top. These individuals may be seen as the rare exceptions and inadvertently set a higher standard for other diverse employees.

In keeping with core diversity objectives, employers and business leaders need to recognize and actively value the range of knowledge people bring to the organization, especially individuals belonging to groups that were historically excluded from membership when the organization was formed. Leaders should be alert to the possibility that newer members of the organization, who usually wield little influence in the lower ranks, actually may have more innovative or pioneering perspectives to offer because they are the least entrenched in the ways of the particular organization.[218] As the core diversity paradigm shows, the information that people have can be relevant in reconsidering the organization's core work and habits. Understanding this, leaders should question their assumptions and be open to new ways of thinking and doing to capture what diversity truly should be about.[219]

Visible and committed top leadership is essential, I further argue, to promote core diversity and earn the potential rewards it promises.[220] Once organizational leaders adopt core diversity as a workplace model, they must demonstrate an unflagging commitment to the effort by staying involved with and overseeing its

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may adhere to old ways of leading that limit gains for women as a whole); Carbado & Gulati, *supra* note 28, at 1813 (arguing that because employers seek homogeneity in employee performance, they encourage outsiders at work "to disidentify with, and disassociate from, the collective interests of the outsider group"); Chanen, *supra* note 1, at 36-37 (describing the need for more mentoring of junior minority female lawyers).

215. Chambliss & Uggen, *supra* note 116, at 63; Dobbin & Kalev, *supra* note 54, at 285.

216. *See* Dobbin & Kalev, *supra* note 54, at 294 (looking at the effects of different diversity efforts on white women, black women, and black men).

217. Chambliss & Uggen, *supra* note 116, at 63.

218. *See* Rhode, *supra* note 27, at 1760-61 (examining, for example, the experiences of women in male-dominated organizations).

219. Thomas & Ely, *Managing Diversity*, *supra* note 80, at 89-90.

220. *See* Felice N. Schwartz, *Women As a Business Imperative*, HARV. BUS. REV, Mar.-Apr. 1992, at 105, 113 (proposing that top management must be involved in making the corporate culture more conducive to women's success).

implementation.[221] Deloitte, for instance, successfully carried out its initiative on gender equality in the early 1990s because its CEO at the time was directly involved with the long-term project and widely communicated that he took it seriously and personally.[222] He enlisted the managing partners to help with the effort, but he never abandoned his own attention to it and continued to actively support the initiative.[223]

In making the long-term investment in core diversity, leaders should be prepared to face the challenges that can accompany the process and not retract support for core diversity when difficulties arise.[224] It bears stressing that core diversity will not flourish without patience, persistence, and follow-through. Moreover, as discussed earlier, this approach does not call for leaders to dismantle all, or perhaps even most, organizational practices in the service of change. Practically speaking, top leaders in their managerial roles must continue to run the organization with some continuity in carrying out necessary tasks, but this can be done as changes are implemented in various corners of the organization in small-step fashion.[225]

To let members know it is safe for them to question the organization's traditions that produce inequality and ineffectiveness, it is critical that leaders engage in unmistakable organizational re-signaling,[226] clearly indicating that the institution aspires to establish a culture of core diversity. Organizational re-signaling, to be more than just symbolic, should be supported by internal systems designed to produce changes in core practices and ensure that employees do not slip into their old ways or work toward other divergent goals.[227] Thus, the mechanisms that leaders institute to promote core diversity must be aligned with the messages conveyed.

It is worth reiterating that employees naturally will be very hesitant and wary of articulating their honest concerns because of the unequal employer-employee relationship and the associated risk involved in voicing any kind of criticism against an employer's practices. Therefore, in moving toward core diversity, leaders must establish an open culture and a high level of trust to ensure that workers feel adequately secure in sharing aspects of themselves that relate to their work.[228] This prerequisite must be satisfied for there to be constructive exploration regarding how the organization's rituals and work can be improved.[229]

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221. *See* Barmes & Ashtiany, *supra* note 13, at 278-79 (discussing case studies where diversity programs seemed to succeed because the top management's decision to focus on diversity was prioritized throughout the organization).

222. McCracken, *supra* note 122, at 160.

223. *Id.* at 160-62.

224. Kochan et al., *supra* note 126, at 18.

225. Thomas & Ely, *Managing Diversity*, *supra* note 80, at 88-89.

226. *See* Lee, *supra* note 14, at 657-58 (discussing the importance of "institutional re-signaling" by leaders when trying to change institutional norms).

227. Kalev et al., *supra* note 130, at 591-92; Lauren B. Edelman & Stephen M. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 107, 114 (1999)

228. Thomas & Ely, *supra* note 80, at 90.

229. *Id.* at 89-90.

In pursuing core diversity, leaders also need to create an atmosphere where everyone is expected to succeed, particularly women and minority groups who have had fewer opportunities to develop a record of success.[230] This does not mean that minority and female members should be judged against different or more relaxed standards; high measures of performance ought to be maintained for everyone. But female employees and employees of color should feel that the organization expects them to do well and will support them in reaching their goals, allaying any concerns on their part that the employer may be anticipating failure rather than accomplishment and advancement.[231] Employers who understand and think about the challenges to workplace equity will be more attuned to factors in the work setting that affect the experiences and achievement levels of female and minority workers.[232]

Organizational commitment also needs to be demonstrated through organizational accountability, by concretely laying out the organization's goals and measuring progress against these goals.[233] Leaders must understand that "organizations get what they measure."[234] To inform the assessment tools to be used, diversity objectives should be anchored in the mission of the organization.[235] In addition, employers may want to partially base their evaluation and compensation of supervisory personnel according to whether they achieve diversity benchmarks to make diversity goals more tangible.[236]

Through the implementation of incentive structures, organizational leaders can help bring about gender-equalizing and race-equalizing behavior in measurable terms.[237] To track their progress, institutional leaders should regularly collect key measures of improvement in areas such as recruitment, hiring, advancement, retention, and employee well-being.[238] In organizations where employment decisions are made through their component departments rather than in a centralized fashion, it is particularly important for employers to know how the divisions are faring with respect to diversity and to bring some uniformity to the effort so that diversity concerns are not de-prioritized in any organizational unit or office.[239] The collected information should be shared among division management

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230. *Id.* at 86.

231. *Id.* at 90.

232. *See* Green & Kalev, *supra* note 5, at 1447.

233. Rhode, *supra* note 6, at 640-41. *See* Levit, *supra* note 54, at 419-20 (discussing accountability structures as a crucial feature of successful consent decrees in class-action employment discrimination cases).

234. Rhode, *supra* note 6, at 641.

235. William M. Tabb, *Reflections on Diversity*, 55 J. LEGAL EDUC. 28, 31 (2005).

236. *See* Rhode, *supra* note 6, at 640-41 ("An organization's leadership needs to both acknowledge the importance of diversity and equality and make progress in achieving them a factor in employee evaluations and compensation."). *But see* Kalev et al., *supra* note 130, at 602, 604 (finding that diversity evaluations of managerial bias are the least effective in increasing the numbers of white women, black women, and black men in management positions, compared with other diversity programs such as affirmative action plans, diversity committees, diversity staff positions, mentoring, and networking).

237. Barbara Reskin, *What's the Difference?: A Comment on Deborah Rhode's "The Difference 'Difference' Makes"*, in THE DIFFERENCE "DIFFERENCE" MAKES 59, 63-64 (Deborah Rhode ed., 2003).

238. Rhode, *supra* note 6, at 641.

239. *See* Dobbin & Kalev, *supra* note 54, at 282 (discussing how decentralized decision-making

to encourage internal comparison and even internal competition between departments.[240] Furthermore, studies of diversity initiatives in the private sector indicate that having a diversity task force or committee, consisting of leaders throughout the organization with responsibility for meeting diversity benchmarks, produces positive effects on white women, black women, and black men in the workplace.[241] Having unit leaders work in concert also ensures that individual units do not pursue division-specific goals that run against the objectives of the larger organization.[242]

Additionally, institutional leaders can spread the core diversity approach to its industry network, for example by choosing to only contract or do business with other companies that satisfy diversity measures, as a number of corporations currently do in deciding which outside counsel to hire.[243] To further signal the importance of core diversity to an organization's mission and operations for reputational and accountability purposes, an employer could appoint external experts to advise the firm and monitor the firm's diversity efforts.[244]

I contend that market leaders who work toward implementing core diversity will be regarded as effective leaders generally. As Daniel Goleman has shown in his research on leadership, successful leaders share a critical characteristic: they possess an impressive level of "emotional intelligence."[245] In fact, Goleman found that while also having cognitive and technical abilities is important, having emotional intelligence matters considerably more in determining leadership ability.[246] A component of emotional intelligence is empathy, which refers to taking into account what employees may be thinking or feeling from where they stand and considering how this factors into the decision-making process at work.[247] The

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processes in academia can set back diversity goals).

240. McCracken, *supra* note 122, at 63.

241. Dobbin & Kalev, *supra* note 54, at 293; Kalev et al., *supra* note 130, at 611.

242. Edelman & Petterson, *supra* note 227, at 114-15.

243. *See* Hayes, *supra* note 2 (referring to strategies used by DuPont, BellSouth, and Shell Oil in working only with law firms that meet diversity yardsticks). To give another example, the influence of private contracting has been shown in the area of environmental protection, where more than half of the biggest companies in various retail and industrial sectors insert environmental requirements into their contracts with domestic and foreign suppliers. *See* Vandenbergh, *supra* note 68, at 927 ("Of the ten largest firms, half (representing $495 billion in sales) state that they impose environmental requirements on suppliers.").

244. *See* McCracken, *supra* note 122, at 56-57 (describing Deloitte's initiative to improve women's retention and advancement within the firm, and the naming of an external advisory council as part of this initiative). Outside pressure also can come from regulatory bodies; for instance, government oversight in the form of compliance reviews has been shown to be effective. *See* Kalev & Dobbin, *supra* note 64, at 890-91 (examining the effects of the Department of Labor's OFCCP compliance reviews). In addition, the EEOC could continue to publish its best practices guide as a resource for employers and to make the levels of progress made in comparable institutions transparent. *See generally* EEOC, "BEST" EQUAL EMPLOYMENT OPPORTUNITY POLICIES, PROGRAMS, AND PRACTICES IN THE PRIVATE SECTOR (1998), *available at* http://archive.eeoc.gov/abouteeoc/task_reports/practice.html (listing and discussing a number of noteworthy policies, programs, and practices that span a range of private sector fields, used by employers to meet their equal employment obligations and diversity goals).

245. Daniel Goleman, *What Makes a Leader?*, HARV. BUS. REV., Nov.-Dec. 1998, 93, at 94.

246. *Id.* at 94.

247. *Id.* at 100. Furthermore, President Obama emphasized the importance he places on empathy

empathetic and emotionally-aware qualities needed for effective leadership, I posit, are the same ones needed for effective leadership on core diversity.

In evaluating a leader's efficacy, we also must consider the path leaders take in their leadership role.[248] Leaders who perceive the importance of their actions in a larger sense are visionaries: they are able to view their mandate as larger than the present moment and larger than themselves or their institutions, and by understanding that their responsibility is connected to the broader community and world, they think about how their place and role within it can advance the common good.[249] I argue that pursuing core diversity is an important example of the type of expansive vision that organizational leaders must embrace, as both a current and an ongoing aspiration.

I further contend that we need to expand our notion of whom we view as leaders for core diversity to take hold. Leaders at the helm of organizations necessarily play a special role because they are highly visible figures and are responsible for articulating the institution's mission and goals. But top leaders cannot lead alone, and they need to charge others with the task of leading.[250] To support the implementation of core diversity principles throughout an institution, organizational players charged with the greatest responsibility over such efforts cannot be divorced from the power needed to make change happen, meaning they must come from the organization's highest ranks.[251] The role of leading, however, should not be concentrated in the hands of a few. I posit that we should think of leaders broadly as a group, which would include anyone who works with others at any level within the organization, and not just at the management levels, because people at all levels serve as role models for others in shaping the organizational culture.

Effective leaders must be willing to lead, but they need to nurture an environment that encourages others to lead as well. Leaders should aim to bring out the "collective genius" by distributing power and allowing others to lead.[252] This

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when picking a Supreme Court nominee:

> I said earlier that I thought empathy was an important quality, and I continue to believe that. You have to have not only the intellect to be able to effectively apply the law to cases before you, but you have to be able to stand in [somebody else's] shoes and see through their eyes and get a sense of how the law might work or not work in practical day-to-day living.

Alec MacGillis, *Obama Expands on Criteria for New Justice*, WASH. POST, May 24, 2009.

248. *See Educating Professionals*, HARV. MAGAZINE, Jan.-Feb. 2009, 58, at 59 (address by Harvard University's President Drew Faust at Harvard Business School's centennial global business summit on October 14, 2008).

249. *Id.* at 59-61.

250. *See* Susan Sturm, *Conclusion to Responses to the Architecture of Inclusion*, 30 HARV. J.L. & GENDER 409, 419 (2007) (asserting the importance of using networks for change by distributing leadership among formal and informal leaders).

251. *See id.* at 420-21 (noting that individuals must be equipped with the power and resources needed to effectuate change within their organizations); Dobbin and Kalev, *supra* note 54, at 280 (finding that fusing the roles of corporate leadership with equity leadership will most effectively improve measures of diversity in the corporate arena).

252. Linda A. Hill, *Are We Preparing Ourselves to Lead?*, in THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP 144, 161 (Deborah L. Rhode ed., 2003).

requires that leaders be very secure in themselves so that they can fully support others—particularly members of socially subordinated groups who may not view themselves as typical leaders—in realizing their own leadership potential, and in this way further advance the goals of core diversity.

CONCLUSION

Workplace equality and business innovation cannot be fostered without addressing the embedded forms of discrimination that persist as part of organizational traditions and practices. These conventions, mostly established when work institutions were all male and all white, have become entrenched within institutional cultures and place discriminatory burdens on women and people of color, who frequently step into preordered workplaces designed not with them in mind. Simply having more women and people of color present will not, on its own, address embedded patterns of bias. As I have shown, discriminatory organizational practices will not change unless they are brought directly under the light for critical examination and creative modification.

To address discriminatory norms in the workplace and move toward substantive equality, employers also need to move toward substantive diversity as a business norm. But the common models of diversity in place today in many organizations—what I call the "surface diversity" model and the "marginal diversity" model—fall short because they only seek to add women and people of color into the organizational mixture while leaving intact the organization's damaging practices. Therefore, I assert that market leaders need to re-conceptualize the purpose and value of having a diverse membership by adopting what I call the "core diversity" model, which encourages institutions to rethink and remake its central customs by incorporating the perspectives of previously excluded groups. Core diversity strives for a deeper engagement with diversity which will better allow both the institution and its members to thrive. By drawing out dormant sources of potential within the organization, core diversity will help renew the organization from the center outward. For the core diversity model to work, I further emphasize the role of effective organizational leadership, which calls for an empathetic and expansive view of the management process.

By creating employee and client demand for core diversity, businesses will have to set themselves to the task of remaking their cultures and consequently produce new business norms. The core diversity approach seeks to better translate antidiscrimination principles into everyday practice, and alerts organizations of the need to carefully reconsider entrenched business practices that inhibit equity and market opportunities. Adopting equalizing norms in support of core diversity, I maintain, will meaningfully bring us closer to achieving our workplace and social ideals. In sum, core diversity aims to show that while organizations may be sites of tradition, they also can become sites of new learning and transformation.