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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

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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

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I'd like to teach the world to sing/In perfect harmony
—1971 advertisement for Coca-Cola

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I.
INTRODUCTION

In 1999 a group of current and former Coca-Cola employees filed a class action race discrimination suit against the soft drink maker.[1] One month later, the company announced the creation of a "Diversity Advisory Council" that would begin meeting with small groups of employees.[2] Describing Coke as long supporting a diverse work force, Chairman M. Douglas Ivester said that "there must be and will be no room for discrimination in any form or of any kind against any employee."[3] Cyrus Mehri, the plaintiffs' attorney, characterized the Council's formation as a welcome, albeit greatly overdue, development.[4]

Coca-Cola's executives and employee advocate Mehri, though adversaries in that litigation, share a conviction worthy of careful scrutiny: that employee education can prevent or at least greatly curb invidious employment discrimination prohibited by Title VII of the Civil Rights Act of 1964 ("Title VII")[5] and other civil rights statutes. This belief, widely held and rarely questioned, has spawned a multi-billion dollar sexual harassment and diversity training industry staffed by consultants, management attorneys, and human resource professionals who offer

1. Dan Morse, *Coca-Cola Co. Plans to Form Diversity Panel*, WALL ST. J., May 27, 1999, at A8. The suit ultimately settled for a record $192.5 million. Barney Tumey, *Race Discrimination: Coca-Cola Agrees to Pay $192.5 Million, Make HR Policy Changes to Settle Lawsuit*, DAILY LAB. REP., Nov. 17, 2000, at AA1.

2. Morse, *supra* note 1.

3. *Id.*

4. *Id.* Mehri also voiced concern that the Council's work could intimidate employees who are considering joining the law suit. *Id.*

5. 42 U.S.C. §§ 2000e to 2000e-17 (1994). Title VII prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.

programs aimed at litigation prevention.[6] Yet, while much money is being made by trainers and spent by employers,[7] there is no empirical support for the premise behind the instruction—that it fosters employee tolerance and greatly alters workplace culture.

Even more troubling is the Supreme Court's recent embrace of anti-discrimination training as a doctrinal and jurisprudential component of Title VII's substantive law. In two landmark sexual harassment cases decided in 1998,[8] both of which created an employer affirmative defense to suit,[9] the Court characterized the preventative purpose of Title VII as encouraging employers to promulgate new policies, such as employee grievance procedures. Grievance procedures, the Court noted, could prevent discrimination by "encourag[ing] employees to report harassing conduct before it becomes severe and pervasive."[10] In 1999, the Court made clear that its vision of Title VII as expressly encouraging personnel policy creation encompasses an educational component as well. In *Kolstad v. American Dental Ass'n* the Court created a safe harbor from punitive damages for employers if they "adopt anti-discrimination policies and . . . educate their personnel on Title VII's prohibitions."[11]

In short, the Court has elevated the common corporate practice of anti-discrimination training to the level of an affirmative defense in sexual harassment cases and a mechanism for limiting damages in discrimination cases where punitive damages are sought.[12] The Court has justified these doctrinal changes in the name of discrimination prevention. However, as will be discussed below, there is no reason to believe that an educational approach to discrimination deterrence can succeed in eliminating discrimination.

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6. One study indicates that an increasing number of employers are conducting training on employment-related litigation matters for the purpose of litigation prevention. A survey of human resource managers conducted jointly by the Society for Human Resource Management and the management law firm of Jackson, Lewis, Schnitzler & Krupman found that 55 percent of 353 survey respondents reported that "their organizations provide training on employment-related matters to both managers and supervisors." *See More Employers Taking Actions to Address Threat of Lawsuits, Says HR Manager Survey*, DAILY LAB. REP., June 29, 1999, at A2.

7. It is estimated that at least $10 billion is spent annually on corporate diversity training designed to alter employee attitudes deemed incompatible with increasingly multi-cultural work environments. Seth Lubove, *Damned if You Do, Damned if You Don't*, FORBES, Dec. 15, 1997, at 122. Consultants' annual revenue from sexual harassment training is thought to be similarly great. Stuart Silverstein, *Fear of Lawsuits Spurs the Birth of New Industry*, L.A. TIMES, June 27, 1998, at A1.

8. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

9. *See infra* notes 52-59 and accompanying text.

10. *Ellerth*, 524 U.S. at 764.

11. Kolstad v. American Dental Ass'n, 527 U.S. 526, 545 (1999).

12. Of course, training will typically be asserted as merely one facet of an employer's defense. Employers will also note, for example, that they maintained express policies against discrimination and harassment.

The introduction of employee education into the realm of civil rights jurisprudence signals the need for a thorough understanding of the impact of such programs. Focusing on what little is known of the effects of sexual harassment and diversity training on employees, this Article questions the wisdom of a reflexive and undiscerning view of these employer efforts by the Court and the legal profession as a whole. Management attorneys proclaim the virtues of diversity and sexual harassment training when there is almost no evidence that it is effective.[13] Plaintiffs' attorneys are helping to make diversity training a common component of discrimination law suit settlements and consent decrees, simply assuming that it will bring about cultural change as a matter of course.[14] Without paying much attention to program details, judges increasingly treat sexual harassment training as evidence that the employer acted reasonably to remedy harassment or to maintain a discrimination-free work environment and thus conclude the employer should not be held vicariously liable for the actions of its supervisors.[15]

Unlike the legal profession, social scientists, disturbed by a glaring lack of empirical research on the effects of anti-discrimination training, urge caution in the endorsement of such programs.[16] Brief or "one shot" training efforts may not affect employee attitudes or actions in the least.[17] Moreover, mounting anecdotal evidence indicates that at least some programs produce a polarizing effect on employee attitudes. For example, training may reinforce stereotypes about groups and inspire animosity between employees who, as part of the course, are encouraged to reveal their true feelings.[18] And despite the dearth of data on training outcomes,

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13. *E.g.*, C. Geoffrey Weirich et al., *Employer Strategies for Avoiding the Mega-Verdict: Learning from Recent High-Profile Employment Discrimination Lawsuits*, *in* 26TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 31, 41 (Practicing Law Institute, 1997) (advocating diversity training); Gary R. Siniscalco & Jeffrey D. Wohl, *Discrimination Can be Costly: Avoiding the "Texaco" Problem*, CAL. LAW., Nov. 1997, at 27 (advocating diversity training); Garry G. Mathiason & Mark A. de Bernardo, *The Emerging Law of Training*, FED. LAW., May 1998, at 24, 31 (recommending sexual harassment training); Charles A. Shanor & Leslie A. Dent, *Sexual Harassment in the Workplace*, *in* ALI-ABA COURSE OF STUDY MATERIALS: ADVANCED EMPLOYMENT LAW AND LITIGATION 485, 511-12 (1994) (recommending sexual harassment training); Eric Wallach & Stacey Creem, *Handling Sexual Harassment Charges in the Workplace*, WRONGFUL DISCHARGE REP., Oct. 1996, at 16 (advising that employers develop a comprehensive sexual harassment education program); Greenebaum Doll & McDonald PLLC, *Tips to Avoid Litigation for Workplace Harassment*, 3 KY. EMPL. L. LETTER 5 (1998) (recommending periodic training sessions on harassment).

14. *See infra* notes 195-211 and accompanying text.

15. *See infra* notes 214-15 and accompanying text.

16. *See infra* notes 223-34 and accompanying text.

17. *See* Catherine Ellis & Jeffrey A. Sonnenfeld, *Diverse Approaches to Managing Diversity*, 33 HUM. RESOURCE MGMT. 79, 83 (1994) (noting that brief programs can actually cause tension among employee groups).

18. Michael Delikat, *The Texaco Case and Lessons to Learn: How Can Corporations Manage Diversity Effectively?* *in* LITIGATING EMPLOYMENT DISCRIMINATION CASES 1997 181, 203-06 (Practicing Law Inst. 1997).

one study did identify sexual harassment seminars as prompting fears on the part of senior men about offering crucial mentoring to young professional women.[19]

Beyond these important concerns, however, is the larger question of the significance of the developing jurisprudence of education and prevention in employment discrimination law. There is a disturbing trend in civil rights law toward acceptance of legal compliance in form rather than substance. Several recent studies illustrate this phenomenon. Sociologists Lauren Edelman, Christopher Uggen, and Howard Erlanger, for example, demonstrate that corporate equal employment opportunity ("EEO") grievance procedures are presently accepted by courts as "the primary symbol of nondiscrimination."[20] Yet these procedures, long touted as mechanisms for avoiding liability by personnel professionals and defense attorneys, may actually undermine the legal rights of employees.[21] More specifically, the willingness of some courts to defer to procedures that lack due process protections and the full panoply of remedies existing under Title VII raises grave concerns about the ability of grievance procedures to vindicate employee rights.[22]

Moreover, this author has described the tendency of those reviewing employment decisions for possible discrimination—including courts, agencies, and plaintiffs' lawyers—to accept employer created performance documentation at face value.[23] The increasing sophistication of employers in safeguarding their employment decisions from challenge, however, may mask subtle forms of discrimination and adversely impact Title VII's overall effectiveness.[24]

Finally, a recent study of lower courts' interpretation and application of the Supreme Court's 1998 landmark sexual harassment affirmative defense established in *Burlington Industries v. Ellerth*[25] and *Faragher v. City of Boca Raton*,[26] revealed a judiciary rigidly and narrowly construing the Supreme Court's directive.[27] Linda Hamilton Krieger, Shawna Parks, and

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19. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 376-77 (1995).

20. Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407 (1999).

21. *See id.* at 448-49.

22. *See id.* at 449.

23. *E.g.*, Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMPL. POL'Y J. 1, 7 (1999).

24. *See id.* at 4.

25. 524 U.S. 742 (1998).

26. 524 U.S. 775 (1998).

27. *See* Linda Hamilton Krieger, et al., *Employer Liability for Sexual Harassment: Normative, Descriptive, and Doctrinal Interactions* (paper presented at Law & Society Association Annual Meeting, Miami, 2000), at 30-52.

Priya Sridharan found that establishment of a sexual harassment complaint procedure coupled with a plaintiff's failure to report harassment virtually ensures an employer "victory at the summary judgment stage."[28] The courts' uninformed, form-over-substance approach stands in sharp contrast to empirical data indicating that victims of harassment are unlikely to lodge formal complaints.[29]

An uncritical embrace of anti-discrimination training likewise runs the risk of further facilitating the trend exposed by those recent studies. At stake is the ultimate shape and composition of the post-affirmative action workplace. If equality is to be more than cosmetic—indeed, if Title VII's preventative purpose is to be fulfilled—courts must look beyond symbols to determine whether the environment in which a plaintiff worked was actually discriminatory. In the case of training, it therefore follows that meaningful evaluation of the quality and effects of a training regimen is necessary before judicial approval is bestowed upon the program. The symbolic gestures of employers in providing diversity and sexual harassment training, no matter how well intentioned, are poor substitutes for searching inquiry into the particulars of a given workplace.

This Article proceeds in four parts. Part II traces the evolution of the jurisprudence of education and prevention from its roots in 1970s Supreme Court case law. Part II reveals a dramatic shift in judicial philosophy by comparing the Court's early activist-oriented descriptions of Title VII's prophylactic purpose to the Court's recent expressions of the law's preventative aim.[30] Part III places the shift in Title VII jurisprudence in context. Using Lauren Edelman's theory of legal endogeneity, which posits that organizations subject to Title VII have actively constructed the terms of legal compliance, Part III details the extensive training efforts undertaken by employers over the last two decades. It then discusses the ready embrace of training programs by the legal profession.

Part IV demonstrates that the Supreme Court's faith in discrimination education and prevention may well be misplaced. It describes the possible negative effects of such educational efforts as indicated by empirical studies and anecdotal accounts.[31] The Article concludes in Part V by urging attorneys and judges to develop a sophisticated appreciation for the uses and limitations of anti-discrimination training. Employers, in order to use

28. *Id.* at 32-33.

29. *See id.* at 52; It is possible, of course, to provide a more optimistic assessment of these employment practices. Susan Sturm, for example, sees great promise in the emerging, private regulatory approach taken by some employers to the problems of sexual harassment and glass ceiling issues. *See generally*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, COLUMBIA L.R. (forthcoming 2001).

30. *See infra* notes 60-76 and accompanying text.

31. *See infra* notes 223-349 and accompanying text.

employee training as a mechanism for avoiding or limiting punitive damages, should be required to demonstrate the effectiveness of their programs.

II.

EVOLUTION OF THE JURISPRUDENCE OF EDUCATION AND PREVENTION

The roots of the new jurisprudence of education and prevention lie in the Supreme Court's 1975 decision in *Albemarle Paper v. Moody*.[32] That decision, which set forth the standards trial courts should use in deciding whether to award back pay to Title VII plaintiffs, described two objectives of anti-discrimination law: compensation and prevention. Regarding compensation, the Court held that Congress, by granting to courts equitable remedial powers, clearly envisioned that discrimination victims would be made whole for their injuries.[33]

Title VII's "primary objective," however, was "prophylactic."[34] Workplace equality was to be achieved by employers proactively scrutinizing their employment policies to identify and eliminate those of "dubious legality."[35] As a potential remedy, back pay advanced this goal instrumentally by acting as a stimulus for employer self-evaluation. Thus, discrimination was to be prevented by employers purging their own workplaces of biased policies without the necessity of litigation or judicial intervention.

For over two decades, the basic understanding of anti-discrimination law's deterrent goal remained markedly unchanged. For example, in *International Brotherhood of Teamsters*,[36] the Court described retroactive seniority as a remedy consonant with Title VII's prophylactic objective because it would catalyze employers' examination of potentially illegal policies.[37] In *Connecticut v. Teal*[38] the Court rejected an employer's so-called "bottom line" defense to a suit challenging its use of a promotion exam that disproportionately screened out minority candidates[39] on the grounds that allowing the biased exam to stand would offend the statute's

32. 422 U.S. 405 (1975).

33. *Id.* at 418 (referencing Griggs v. Duke Power, 401 U.S. 424, 429-30 (1971)).

34. *Id.* at 417.

35. *Id.* at 417-18.

36. 431 U.S. 324 (1977).

37. *Id.* at 364-65.

38. 457 U.S. 440 (1982).

39. The employer in that case argued that it should not be liable for discrimination caused by the disparate impact of a promotional examination on minority candidates because the "bottom line" of its selection process was an appropriate racial balance between those who applied and those who were promoted. 457 U.S. at 440-41.

deterrent aim.[40] Similarly, in *McKennon v. Nashville Banner Publishing*[41] the Court held that after-acquired evidence of a discrimination victim's misconduct cannot bar recovery in every instance because such a result is antithetical to the deterrence policy of anti-discrimination law.[42] In other words, if subsequently discovered victim wrongdoing always prohibited victim recovery, the incentive for employer self-evaluation would be undermined.

In 1986, however, the Court decided a sexual harassment case that laid the groundwork for the recent shift in the jurisprudence of deterrence under Title VII. In *Meritor Savings Bank v. Vinson*,[43] the Court for the first time recognized that unwelcome sexual advances that create a hostile work environment violate Title VII.[44] As important as that ruling is, it is actually dicta in the opinion that provides the basis for a new understanding of the prophylactic purpose of anti-discrimination law. Justice Rehnquist, in a section of the opinion discussing employer liability for hostile work environment harassment, directly addresses an interesting argument posited by the defense. The bank argued that its anti-discrimination policy and the victim's failure to use an established employee grievance procedure to complain about her supervisor's harassment should insulate it from liability.[45]

Justice Rehnquist rejected the employer's argument, noting that the bank's anti-discrimination policy did not specifically discuss sexual harassment. Moreover, the grievance procedure required that the employee complain directly to her supervisor, an action most victims would be reluctant to take when the harassment perpetrator is that very same supervisor.[46] Rehnquist did note, however, that the bank's defense would be far "stronger if its procedures were better calculated to encourage victims of harassment to come forward. . . ."[47] This observation implicitly suggests that employers can deter discrimination by doing something other than eliminating discriminatory policies: employers can adopt affirmative policies that make clear their abhorrence of discrimination and provide mechanisms for preventing or minimizing it when it occurs.

After *Vinson* many courts referenced sexual harassment policies and grievance procedures in the decisions they rendered, but few acknowledged that the Court's nudge toward policy and procedure promulgation

40. *Id.* at 448-49.
41. 513 U.S. 352 (1995).
42. *Id.* at 358-59.
43. 477 U.S. 57 (1986).
44. *See id.* at 65.
45. *See id.* at 70-73.
46. *See id.* at 73.
47. *Id.*

constituted a new conceptualization of the prophylactic aim of Title VII. One exception was the Third Circuit's decision in *Bouton v. BMW of North America.*[48] In *Bouton,* the Third Circuit characterized the "choice whether to permit a grievance procedure to alleviate liability" as one directly tied to the goal of "deterrence."[49] An employer's ability to rely on a grievance procedure as a liability shield, stated the court, is justified by an expected decrease in aggrieved employees resorting to litigation.[50] This perceptive opinion notwithstanding, after the Supreme Court's twin sexual harassment decisions in 1998, it is clear that a new understanding of *Vinson* and a new direction in employment discrimination jurisprudence has emerged.[51]

The Supreme Court's opinions in *Ellerth*[52] and *Faragher*[53] were hailed by employer and employee advocates alike.[54] Both cases addressed an issue that had long vexed the lower courts. Specifically, the *Ellerth* and *Faragher* opinions answered the question of how to determine employer liability for harassment perpetrated by a supervisor.

Using principles of agency law, the Court divided sexual harassment cases into two categories: those in which a supervisor has taken a "tangible employment action against the subordinate"[55] and those in which no such action has occurred.[56] In the former category, vicarious liability is always appropriate because the ability to change a subordinate's employment status is by definition aided by the existence of the agency relationship between the supervisor and the employer.

In the latter case, if there has been no definitive action like a firing or demotion, the assistance a supervisor receives by virtue of the authority delegated to him or her by the employer is less clear. Vicarious liability for the supervisor's harassment, stated the majorities in both cases, should therefore be more limited. To facilitate that limitation, the Court fashioned an affirmative defense for employers faced with claims in this category. Justice Kennedy, writing for the majority in *Ellerth,* notes:

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48. 29 F.3d 103 (3d Cir. 1994).

49. *Id.* at 110.

50. *See id.*

51. For example, after the Supreme Court's 1998 decisions, the Fifth Circuit, citing one of them, described *Meritor's* approach to employer liability as "further[ing] the twin deterrent and compensatory aims of Title VII." Indest v. Freeman Decorating, 164 F.3d 258, 266 (5th Cir. 1999).

52. 524 U.S. 742 (1998).

53. 524 U.S. 775 (1998).

54. *E.g.,* Rebecca Ganzel, *What Sexual Harassment Training Really Prevents,* TRAINING, Oct. 1, 1998, at 86, (noting "many corporations hailed with relief the Supreme Court's June 26 rulings") *available in* 1998 WL 14109043, at *2; Linda Greenhouse, *Court Spells Out Rules for Finding Sex Harassment,* N.Y. TIMES, June 27, 1998, at A1 (noting "[t]he rulings won praise across a broad spectrum of both management and civil rights groups . . .").

55. *Ellerth,* 524 U.S. at 760; *Faragher,* 524 U.S. at 808.

56. *Ellerth,* 524 U.S. at 763; *Faragher,* 524 U.S. at 808.

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.[57]

Employers need not always prove that they had an anti-harassment policy and complaint procedure to claim the defense. The necessity for such prophylactic devices, however, "may be appropriately addressed when litigating the first element of the defense."[58] Moreover, while the plaintiff employee's failure to use a complaint procedure is not the only way to establish the second prong of the defense, "a demonstration of such failure will normally suffice to satisfy the employer's burden."[59]

While agency principles form part of the justification for the new affirmative defense, Justice Kennedy found additional considerations implicit in *Vinson*. Elucidating a new understanding of the preventative aim of Title VII, Kennedy notes in a striking passage that the statute "is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms."[60] To the extent these policies act as incentives for employees to report harassment before it becomes severe or pervasive, Kennedy notes that limiting vicarious liability advances "Title VII's deterrent purpose."[61]

This conceptualization of discrimination prevention is a far cry from that offered by the *Albemarle* Court. Under *Albemarle* and its progeny, the fear of money damages inspires employers to *purge* the workplace of discriminatory policies and practices.[62] Under *Ellerth*, fear of liability motivates employers to *create* policies that victims must use or forfeit their right to recover for harm caused by discrimination. The term "prevention" is thus aligned with the kinds of litigation prevention techniques long recommended by defense attorneys and human resource professionals. Indeed, these professionals began recommending grievance procedures as litigation avoidance mechanisms beginning in the early 1980s, before *Vinson* was decided.[63]

Justice Souter, writing for the majority in *Faragher*, likewise referenced anti-discrimination law's deterrent aim in discussing the new affirmative defense.[64] Citing *Albemarle,* Justice Souter re-characterized the

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57. *Ellerth*, 524 U.S. at 765; see also *Faragher*, 524 U.S. at 807.
58. *Ellerth*, 524 U.S. at 765; see also *Faragher*, 524 U.S. at 807.
59. *Ellerth*, 524 U.S. at 765; see also *Faragher*, 524 U.S. at 808.
60. *Ellerth*, 524 U.S. at 764.
61. *Id.*
62. *See supra* notes 34-35 and accompanying text.
63. Edelman et al., *supra* note 20, at 412-13.
64. *Faragher*, 524 U.S. at 806.

prophylactic purpose of Title VII, stating that the primary objective of the statute is "to avoid harm."[65] This rather anemic assertion of statutory purpose stands in stark contrast to the Supreme Court's earlier declaration that the "'primary objective' of Title VII is to bring employment discrimination to an end. . . ."[66]

Gone is the image from *Albemarle* of employers stamping out workplace discrimination when it occurs. In its stead, Souter provides the figure of a benevolent employer "informing employees of their right to raise and how to raise the issue of harassment."[67] Like Kennedy, Souter's vision of prevention focuses on policy creation. Unlike Kennedy's vision, it appears also to incorporate instruction. It is not enough for an employer to promulgate a sexual harassment policy. The policy must also be disseminated and its contents communicated to employees. In fact failure to distribute an existing policy precluded the defendant in *Faragher* from raising the affirmative defense on remand.[68]

Late in the 1998-1999 term, Justice O'Connor provided the clearest articulation to date of the new jurisprudence of education and prevention. In *Kolstad v. American Dental Ass'n*[69] the Court grappled with the standards under which employers may be liable for punitive damages in discrimination cases.[70] Providing a literal interpretation of the language of the Civil Rights Act of 1991, which made available to intentional discrimination victims compensatory and punitive damages,[71] the majority held that Title VII plaintiffs must show that an employer acted with malice or reckless indifference before obtaining punitive damages.[72] The Court rejected the D.C. Circuit's interpretation that egregious misconduct by the employer must be shown before a jury may consider a punitive damage award.[73]

In a portion of the opinion joined by four other justices, however, O'Connor provided employers with a shield from punitive damages if they "engage in good faith efforts to comply" with Title VII.[74] Moreover, she specifically referenced anti-discrimination policies and programs as the

65. *Id.*

66. Ford Motor Company v. EEOC, 458 U.S. 219, 228 (1982).

67. *Faragher*, 524 U.S. at 806 (quoting 29 CFR § 1604.11(f)(1997)).

68. *See id.* at 806-09.

69. 527 U.S. 526 (1999).

70. For interesting discussions of *Kolstad*, see Robert Belton, *The Employment Law Decisions of the 1998-99 Term of the Supreme Court: A Review*, 3 EMPLOYEE RTS. & EMPL. POL'Y J. 183, 199-207 (1999); Ann M. Anderson, Note, *Whose Malice Counts?: Kolstad and the Limits of Vicarious Liability for Title VII Punitive Damages*, 78 N.C. L. REV. 799, 828 (2000).

71. 42 U.S.C. § 1981a (a)(1) & (b)(1).

72. *Kolstad*, 527 U.S. 534 (1999).

73. *Id.*

74. *Id.* at 544.

kind of good faith efforts a court may look to in deciding whether the shield should apply. A liability rule that reduces the incentive for employers to undertake such preventative steps, noted O'Connor, is contrary to the prophylactic purpose of Title VII.[75] Just as the law promotes effective sexual harassment policies and grievance procedures, so too does it encourage employers "to adopt anti-discrimination policies and to educate their personnel on Title VII's prohibitions."[76] Thus, the new approach to punitive damage liability aims to deter discrimination by promoting preventative efforts, specifically, policy promulgation and employee education.

That O'Connor's articulation of the prophylactic purpose of Title VII pays such homage to employer anti-discrimination policies and educational programs is not surprising. Amicus curiae briefs were filed in *Kolstad* by three organizations with huge stakes in anti-discrimination training: the Society for Human Resource Management ("SHRM"),[77] the Chamber of Commerce,[78] and the Equal Employment Advisory Council ("EEAC").[79] The last organization, the EEAC, describes its members as "firmly committed to training, awareness, and compliance programs designed to ensure that all their employment actions are carried out in accordance with Title VII. . . ."[80]

The EEAC brief forcefully notes that most large corporations "provide regular, ongoing training to ensure that their managerial, supervisory, and in appropriate instances even non-supervisory personnel, are aware of Title VII and other employment related laws" and describes as "anomalous" any interpretation of Title VII that would subject such employers to punitive damages.[81] Similar support for the "safe harbor proposal" is found in the SHRM brief. That brief advocates the safe harbor because it "rewards employers that take preventative measures" such as "effective EEO training."[82] The views and practices of litigation avoidance professionals were before the Court, and O'Connor's rendition of Title VII's preventive aim places on those practices a judicial stamp of approval.

The ultimate effect of the Court's new approach is of course not yet known. One might safely assume, however, that the new jurisprudence of

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75. *Id.* at 545 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)).

76. *Id.*

77. Brief of Amicus Curiae Society for Human Resource Management, Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) (No. 98-208).

78. Brief of Amicus Curiae Chamber of Commerce of the United States of America, Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) (No. 98-208).

79. Brief of Amicus Curiae Equal Employment Advisory Council , Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) (No. 98-208).

80. *Id.* at *1.

81. *Id.*

82. SHRM brief, *supra* note 77, at *12.

education and prevention will find application beyond the issue of whether employers should be liable for punitive damages. Thus, it is both interesting and important to analyze the turn that the jurisprudence has taken. As noted above, the Court's sense of the preventative purpose of anti-discrimination law did not develop in a vacuum. Indeed, it is the product of decades of efforts by those organizations subject to employment laws to produce compliance practices that help them avoid running afoul of Title VII. Whether and when these practices actually deter and eliminate discrimination will be discussed herein. Initially, however, it is necessary to examine the training programs undertaken by employers, as well as the legal profession's hearty embrace of them.

III.

THE NEW JURISPRUDENCE IN CONTEXT: REGULATION BY THE REGULATED

Understanding the turn taken by civil rights jurisprudence toward education and prevention requires looking at the responses of those subject to civil rights law. It simply is not the case, as Elinor Schroeder suggests, that the Supreme Court has sua sponte decided to engage in "regulation by personnel policy."[83] Rather, it is the organizations covered by civil rights law that have devised legal compliance strategies, like anti-discrimination training programs, that the Supreme Court has subsequently incorporated into Title VII doctrine.

Sociologists have been able to document an impressive range of employer-initiated policy innovations since the passage of Title VII in 1964.[84] Responding to the ambiguity in civil rights legislation, which prohibits discrimination but does not require specific employment actions beyond that, organizations acted to demonstrate their adherence to principles of equality and to the law itself.[85] The compliance structures created include: nonunion grievance procedures,[86] EEO and affirmative action offices,[87] formal promotion mechanisms,[88] and employment at-will clauses designed to forestall wrongful discharge suits.[89] Anti-

83. *See* Elinor P. Schroeder, *Regulating the Workplace Through Mandated Personnel Policies*, 48 U. KAN L. REV. 593, 600 (2000).

84. Lauren B. Edelman & Stephen M. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 RES. IN SOC. STRATIFICATION AND MOBILITY 107, 108 (1999).

85. *See id.* at 107-08.

86. Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401 (1990).

87. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992).

88. Frank Dobbin et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 AM. J. SOC. 396 (1993).

89. John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Uncertainty in U.S. Firms, 1955-1985*, 61 AM. SOC. REV. 794 (1996).

discrimination training has long been a part of the organizational response.[90]

Lauren Edelman and her colleagues recently provided strong support for the theory that the process of regulation in the civil rights area is endogenous.[91] Rather than view law as an outside force imposed upon organizations, their theory of legal endogeneity posits that the "content and meaning of law is determined by [the organizations] it is designed to regulate."[92] Edelman and her colleagues argue that employers and their advocates actively create the definition of legal compliance with anti-discrimination law and that courts, over time, legitimate those efforts by making them relevant to the determination of liability.[93] The authors use EEO grievance procedures, a common litigation prevention tool, as an example of this process.

The study's review of business and professional journals revealed that in the late 1970s and early 1980s human resource professionals and management attorneys began making claims that grievance procedures would shield employers from liability for discrimination.[94] At that time, however, there was almost no legal support for such an assertion.[95] In fact, few discrimination cases before the mid-1980s even mention grievance procedures.[96]

Justice Rehnquist's discussion in *Vinson* of the grievance procedure defense proffered by the bank provided a big boost for the claim that a grievance procedure could forestall liability.[97] From that point on, employers began increasingly to raise grievance procedures as a bar to liability, and lower courts increasingly began to defer to their arguments.[98] Twelve years after the Court's decision in *Vinson*, the grievance procedure defense was fully incorporated into sexual harassment doctrine in the *Ellerth* and *Faragher* decisions discussed above.[99] Thus, those subject to anti-discrimination law, through their responses to it, defined a form of legal compliance ultimately recognized and legitimated by the judiciary.[100]

There are problems however, with allowing those parties constrained by a law to define its terms. Grievance procedures, for example, may actually undercut the legal rights of the employees who use them.[101]

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90. Edelman, *supra* note 86, at 1435.
91. Edelman, *supra* note 20, at 406-07.
92. *Id.* at 407.
93. *Id.* at 409.
94. *Id.* at 412-13.
95. *Id.* at 432.
96. *Id.*
97. *See id.* at 434-35.
98. *Id.* at 439.
99. *Id.* at 435-36.
100. *See id.* at 436.
101. *Id.* at 449.

Edelman and her colleagues warn that the absence of due process protections, the lack of the full panoply of remedies available in litigation, and the propensity of complaint handlers to recast complaints as managerial problems rather than instances of discrimination may adversely affect the claims of grievants.[102] Moreover, employees may be legitimately concerned about retaliation or decision maker bias and decide not to use such procedures.[103] If courts uncritically accept grievance procedures, without understanding the subtle organizational context in which they are located, "legal ideals may be compromised."[104]

Anti-discrimination training nicely fits the endogeneity model because it is an example of organizations actively creating the terms of legal compliance and judicial deference to those efforts. Employee education has been promoted as a litigation prevention mechanism for at least two decades[105] and has found its ultimate approval in the *Kolstad* decision. The Supreme Court has accepted on faith the claims of legal and personnel professionals that classroom techniques can eliminate or greatly curb invidious discrimination. Whether those claims are well founded will be taken up below. First, however, Subsection A extends the discussion by describing the extensive training efforts made by employers. Subsection B then reviews the ready embrace of such programs by the legal profession as a whole. Two popular forms of anti-discrimination education are considered: sexual harassment training and diversity training.

A. *The Sum and Substance of Anti-Discrimination Training Programs*

Anti-discrimination training has been considered part of the employer's litigation prevention arsenal for at least twenty years. As one early training advocate noted, "[t]he key to reducing an employer's exposure to unjust dismissal and other employment-related litigation is supervisor training."[106] By 1990 anti-discrimination seminars were quite common, a fact noted in Lauren Edelman's seminal study of the spread of formal grievance procedures for non-union employees.[107] Two ubiquitous types of anti-discrimination training, sexual harassment workshops and diversity training, are the focus of this section.

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102. *Id.* at 448-49; see also Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993).

103. Edelman, *supra* note 20, at 448-49; see also Krieger, *supra* note 27, at 19.

104. Edelman, *supra* note 20, at 449.

105. *See infra* note 106 and accompanying text.

106. Susan G. Tanenbaum, *Advanced Strategies in Employment Law*, *in* LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK 483, 515 (Practicing Law Inst., 1987).

107. Edelman, *supra* note 86, at 1435 (noting that respondents in the study "repeatedly emphasized the value of . . . workshops" that "demystify" Title VII and teach supervisors techniques that make it more likely that an organization "will prevail in lawsuits.").

Sexual harassment training typically has three integrated components. First and foremost, the workshops are designed to educate employees about applicable law.[108] Next, the programs also function to disseminate information about the particular employer's sexual harassment policy and grievance procedure.[109] Finally, training often aims to sensitize employees about permissible and prohibited behavior.[110] Those attending sexual harassment seminars are frequently shown videotaped vignettes and engage in role-playing and discussions of the course material.[111]

Diversity training programs vary greatly in format. Nonetheless, two basic approaches exist. The first approach focuses on laws and policies.[112] Typically aimed at managers, these workshops explain and provide compliance instruction on applicable civil rights laws.[113]

The second approach focuses on increasing trainees' sensitivity to issues of "difference." Seminars attempt to raise consciousness on "what it's like to be misunderstood, undervalued and stereotyped at work."[114] Many such programs begin with an "audit" or "scan" of the company's culture.[115] The audit involves interviewing or surveying employees and reviewing corporate data to determine the values perpetuated by the organization's formal and informal practices. Trainers sometimes administer standard personality tests to employees as well.[116]

Following the audit, training sessions are conducted during which employees watch videos, play games, and discuss their feelings about subjects such as race and gender stereotyping.[117] The sessions are supposed

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108. *See* Wallach & Creem, *supra* note 13, at 16; Mathiason & de Bernardo, *supra* note 13, at 31.

109. *See* Wallach & Creem, *supra* note 13, at 16, Mathiason & de Bernardo, *supra* note 13, at 31.

110. *See* Donald R. Livingston, *Current Developments in Sexual Harassment Law*, *in* THE TWELFTH ANNUAL EQUAL EMPLOYMENT OPPORTUNITY UPDATE 211, 229-30 (Georgetown Univ. Law Center, 1994); Jay W. Waks, *Curbing Sexual Harassment in the Firms*, *in* THE THIRD ANNUAL EMPLOYMENT LAW & LITIGATION CONFERENCE 131, 135 (Law Journals Seminars-Press, 1994) (reprinted from Natl. L.J., Aug. 2, 1993) (discussing basic elements of a comprehensive sexual harassment policy); Wallach & Creem, *supra* note 13, at 16.

111. Brigid Moynahan, *Creating Harassment-Free Zones*, TRAINING & DEV., May 1, 1993, at 67; Carol Kleiman, *Companies Dragging Feet on Training*, CHI. TRIB., Sept. 20, 1998, at 1; Hellen Hemphill & Ray Haines, *Confronting Discrimination in Your Workplace*, HR FOCUS, July 1, 1998, at S5; Joanne Cole, *Legal Sexual Harassment: New Rules, New Behavior*, HR FOCUS, Mar. 1, 1999, at 1; Jennifer J. Laabs, *Sexual Harassment*, PERSONNEL J., Feb. 1, 1995, at 36.

112. *See* H.B. Karp & Nancy Sutton, *Where Diversity Training Goes Wrong*, TRAINING AND HUM. RESOURCES DEV., July 1993, at 31.

113. *See id.*

114. *Id.*

115. Delikat, *supra* note 18, at 197-98; Lena Williams, *Companies Capitalizing on Worker Diversity*, N.Y. TIMES, Dec. 15, 1992, at A1; Heather MacDonald, *The Diversity Industry: Cashing in on Affirmative Action*, NEW REPUBLIC, July 5, 1993, at 22.

116. Williams, *supra* note 115, at A1.

117. *Id.*; Lubove, *supra* note 7, at 122.

to prompt participants to confront their own biases,[118] and to recognize and value cultural differences.[119] To accomplish these goals, some trainers actively seek to "cause discomfort,"[120] and to "ruffl[e] feathers."[121]

1. Sexual Harassment Training in Context

Many of the first anti-discrimination training programs were designed to educate management on the subject of sexual harassment.[122] Such workshops were likely prompted in great part by the Equal Employment Opportunity Commission's ("EEOC") 1980 *Guidelines on Discrimination Because of Sex*.[123] First, the Guidelines define sexual harassment as a violation of Title VII.[124] A subsection then rather chillingly states that employers are strictly liable for supervisor harassment regardless of whether the acts were forbidden by the employer and whether or not the employer knew or should have known of their occurrence.[125] The Guidelines also reference the issue of harassment prevention:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.[126]

There are a few important points to note about this provision in particular and the Guidelines in general. First, while the section on prevention does not specifically mention educational programs, training is one obvious method by which a workforce can be sensitized and information can be conveyed about sexual harassment. Thus, while employers had to make an inferential leap to settle on training as a preventative technique, that leap was a small one.

Second, as one early commentator correctly noted, the provision

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118. MacDonald, *supra* note 115, at 22; Delikat, *supra* note 18, at 200.

119. Delikat, *supra* note 18, at 200.

120. Kathleen Murray, *The Unfortunate Side Effects of 'Diversity Training,'* N.Y. TIMES, Aug. 1, 1993, at C5.

121. Williams, *supra* note 115, at A1.

122. Sally Jacobs, *Sexual Harassment*, 7 NEW ENG. BUS. 25 (1985), *available in* 1985 WL 2254793, *5.

123. *Id.*

124. 29 CFR § 1604.11(a) (1980). Sexual harassment was judicially recognized as a form of sex discrimination in 1976. Williams v. Saxbe, 413 F. Supp. 54 (D.D.C. 1976), *rev'd on other grounds sub nom.*, Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

125. 29 CFR § 1604.11(c). This provision of the Guidelines was rescinded after the decisions in *Ellerth* and *Faragher*.

126. *Id.* § 1604.11(f).

"do[es] not imply, much less guarantee, the adoption of affirmative steps will immunize an employer from liability."[127] Yet the underlying logic of the provision is apparent: the best way to avoid liability is to decrease the incidence of harassment, which may perhaps be accomplished by taking the affirmative steps recommended. Indeed, the commentator himself recommended supervisory training in sexual harassment law as a necessary component of a preventative program.[128]

Third, it was understood at the time of the issuance of the Guidelines that they were not binding on the courts.[129] Rather, the rulings, interpretations, and opinions issued by the EEOC were and continue to be considered "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[130] Thus, although it was possible that the courts might ultimately disregard the Guidelines, the risk that they might be judicially embraced certainly existed. One would therefore expect that the ambiguity in the law would prompt many employers to take action by promulgating sexual harassment policies and developing training programs in the wake of the Guidelines' publication.[131]

Sexual harassment training has in fact become a routine feature of the American workplace, with annual revenue for the training industry estimated to be in the billions.[132] Management attorneys and human resource specialists regularly counsel employers to train employees in all aspects of sexual harassment.[133] Training advocates typically make two important claims about the effectiveness and need for sexual harassment training. Trainers say that education can alter behavior by making employees aware of actionable conduct.[134] Advocates also increasingly say

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127. Fred W. Suggs, Jr., *Advising Your Corporate Client on Avoiding Charges of Sexual Harassment*, 46 ALA. LAW. 176, 180 (1985).

128. *Id.* at 181.

129. *See* General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (noting that the EEOC does not have authority under Title VII to promulgate binding, substantive regulations).

130. *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

131. *See* Horace A. Thompson III, *Employer Liability for Sexual Harassment After Vinson: The Regulation of 'Romance' in the Workplace*, *in* ADVANCED EMPLOYMENT LAW AND LITIGATION 239, 249 (1989); Jacobs, *supra* note 122, at *5.

132. Silverstein, *supra* note 7, at A1.

133. Thompson, *supra* note 131, at 256 (noting that written policies are ineffective without "training of supervisors regarding prohibited conduct"); Rebecca A. Thacker & Haidee Allerton, *Preventing Harassment in the Workplace*, TRAINING & DEV., Feb. 1, 1992, at 50 ("Keep harassment incidents at bay by training employees in how to respond to them."); Barry J. Baroni, *Unwelcome Advances: Sexual Harassment in the Workplace*, TRAINING & DEV., May 1, 1992, at 19, *2 (noting that "education and training can be an effective prevention tool"); Howard G. Ziff & Donald G. Cherry, *Clear Policies Prevent Claims of Harassment*, N.Y.L.J., Apr. 4, 1994, at S1 ("Supervisors must be trained about sexual harassment.").

134. *E.g.*, Baroni, *supra* note 133, at 19 (stating that employees who are taught about actionable conduct tend to avoid it); Thacker & Allerton, *supra* note 133, at 50 (arguing that sexual harassment "training can be the first step toward eliminating the behavior"); Cole, *supra* note 111, at 1 (quoting

that training, in conjunction with an anti-harassment policy and detailed investigative procedure, can limit an employer's liability for sexual harassment.[135]

Litigation prevention remains the primary objective of sexual harassment training.[136] Important legal cases, like the1986 *Vinson* decision, thus appear to fuel the training trend.[137] Indeed, demand for training has reportedly increased since the *Ellerth* and *Faragher* decisions.[138]

Moreover the claim that training can limit employer liability for harassment has become quite specific since *Ellerth* and *Faragher.* For example, a little less than a year before the *Kolstad* decision created a punitive damage safe harbor for employers who take steps to educate their employees, attorney Margaret McCausland stated that sexual harassment training would likely keep a "jury [from] awarding punitive damages."[139] Additionally, some training advocates represent *Ellerth* and *Faragher* as expressly mandating sexual harassment training, even though the decisions say absolutely nothing of the kind. Susan Meiseinger, of the Society for Human Resource Management, put it this way: "The [C]ourt said . . . [i]f you don't provide some kind of sexual harassment training to your employees, you're going to be liable."[140] Christine Amalfe, an attorney who regularly conducts sexual harassment training, noted that "[t]he Supreme Court has clearly indicated that employers . . . need to send a

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consultant Darlene Orlov, who says that her work involves "changing behavior"); Mindy Friedler, *Sexual Harassment: Prevention is Best Cure*, N.Y. L.J., Jan. 11, 1994, at 5 (implying that training can help employees become aware that some behavior is objectionable).

135. *E.g.*, Laabs, *supra* note 111, at 36 ("When you combine a strong policy, regular training and a detailed and timely investigation procedure into your sexual harassment strategy, experts agree that you may have a fighting chance in limiting your liability . . . ."); Eric Wallach & Stacey B. Creem, *Handling Sexual Harassment Charges in the Workplace*, N.Y.L.J., July 16, 1996, at 1 (describing a "comprehensive education program" as the first step employers can take "to insulate themselves from liability"); Mathiason & de Bernardo, *supra* note 13, at 31 ("[I]t is now very clear that employers face significant liability if they fail to thoroughly train employees in all aspects of sexual harassment. . . . ").

136. *See* Joann Keyton & Steven C. Rhodes, *Organizational Sexual Harassment: Translating Research into Application*, 27 J. OF APP. COMMUN. RES. 158, 161 (1999).

137. *See* D.J. Petersen & D.P. Massengill, *Sexual Harassment Cases Five Years After Meritor Savings Bank v. Vinson*, 18 EMP. RELS. L.J. 489, 514 (1992-1993) (concluding harassment training is an important measure in preventing costly litigation).

138. Peter Aronson, *Justices' Sex Harassment Decisions Spark Fears*, NATL. L.J., Nov. 9, 1998, at A1 (noting that since the decisions "employment law specialists are reporting a dramatic increase in inquiries and requests for training . . ."); Ganzel, *supra* note 54, at 86 (describing the recent attention generated by *Ellerth* and *Faragher* as a "bonanza for independent trainers and employment lawyers alike"); Robert Mullins, *Law Firms Sell Acumen in Harassment Policy*, BUS. J.-MILWAUKEE, Aug. 7, 1998, at 21; Kathy Robertson, *Sex Talk Keeps Ex-FBI Agents Busy*, BUS. J.-SACRAMENTO, Feb. 5, 1999, at 3; *but cf.* Kleiman, *supra* note 111, at 1 (claiming that the increase in demand for sexual harassment training has been small).

139. Aronson, *supra* note 138, at A1 (quoting Margaret McCausland).

140. Ganzel, *supra* note 54, at *6 (quoting Susan Meisinger).

message to employees" and that trainers are the "messengers."[141] Perhaps the increased opportunity to sell their services, generated by employer concern about the harassment decisions, prompted such comments.

Interestingly, the EEOC recently issued a policy document interpreting the *Ellerth* and *Faragher* decisions that specifically references sexual harassment training.[142] Published in 1999, the guidance suggests that employers provide all employees with training "to ensure that they understand their rights and responsibilities."[143] The EEOC further recommends periodic supervisory training to "explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of the alleged harassment; and the prohibition against retaliation."[144] These suggestions will no doubt provide further impetus for the training trend.

The evolution of sexual harassment training described above seems a classic example of Edelman's theory of legal endogeneity.[145] Sexual harassment training was initially undertaken by employers as an attempt to evidence fair treatment in the face of ambiguities about the law.[146] Subsequently, the judiciary recognized this extensive corporate practice through its articulation of a new jurisprudence of education and prevention.[147] Edelman's theory then posits that the "professions, sometimes with greater enthusiasm than is perhaps warranted, filter and disseminate court decisions" in a way that reinforces and legitimates the initial organizational response to the law.[148] The comments of training advocates in the wake of *Ellerth* and *Faragher* are filtering those decisions for the trainers' constituents—employers subject to anti-discrimination law—thereby bolstering the practice of conducting sexual harassment training.

2. *Diversity Training in Context*

Popular commentators trace the roots of modern diversity training to a 1987 Hudson Institute study entitled "Workforce 2000."[149] The study,

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141. *Id.* at *3-4 (quoting Christine Amalfe).

142. *See* EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (6/18/99), EEOC Compliance Manual (BNA), N:4075 [Binder 3].

143. *Id.* at § V(C)(1).

144. *Id.* at § V(C)(2).

145. *See supra* notes 91-93 and accompanying text.

146. *See supra* note 85 and accompanying text.

147. *See supra* notes 74-82 and accompanying text.

148. Edelman et al., *supra* note 20, at 447.

149. Joel Makower, *Managing Diversity in the Workplace*, BUS. & SOC'Y REV., Winter 1995, at 48 (noting that the Hudson Institute study "stunned corporate America"); Murray, *supra* note 120, at C5 (noting that some diversity programs "were inspired" by the Hudson Institute report).

which projected that the U.S. workforce would increase by over twenty-five million workers by the year 2005, predicted that eighty-five percent of the new workers would be minorities, women, and immigrants.[150] This report, according to conventional wisdom, galvanized corporate America, prompting recognition that training was necessary to integrate the new workers into the existing workforce.[151] Enterprising consultants rose to the challenge, offering programs that promised increased productivity, employee flexibility, and innovation.[152]

While it is highly improbable that one report created a revolution, employers over the last decade have propelled diversity training into a multi-billion dollar business.[153] By one estimate, forty percent of all U.S. companies engage in some form of diversity training.[154] Another estimate pegs diversity training saturation at fifty percent of all American companies employing over one-hundred employees.[155]

Situating diversity training within the larger organizational response to civil rights law can help one understand the form and function of those programs. As noted above, Title VII was the impetus for employers' development of a host of organizational programs and policies intended to signal compliance with EEO law.[156] Until recently, little was known about whether those practices produced substantive gains for women and minorities or, in the alternative, functioned as "merely ceremonial gestures."[157] The issue is an important one, for if legal compliance can be effectuated symbolically rather than substantively, the transformative potential of civil rights law is greatly reduced.

A recent study by Lauren Edelman and Stephen Petterson assessed the substantive impact of four types of EEO structures: EEO offices,[158] affirmative action plans,[159] affirmative action recruitment programs,[160] and affirmative action training programs.[161] Edelman and Petterson found that

150. Williams, *supra* note 115, at A1.

151. *See* L.A. Kauffman, *The Diversity Game*, VILLAGE VOICE, Aug. 31, 1993, at 29, 30.

152. Michael Mobley & Tamara Payne, *Backlash! The Challenge to Diversity Training*, TRAINING & DEV., Dec. 1, 1992, at 45.

153. *See* Lubove, *supra* note 7, at 122.

154. MacDonald, *supra* note 115, at 22.

155. Lubove, *supra* note 7, at 122.

156. *See supra* notes 85-90 and accompanying text.

157. Edelman & Petterson, *supra* note 84, at 107.

158. These small departments are generally created to address legal concerns and a range of personnel functions. *Id.* at 117.

159. Affirmative action plans are written documents that analyze the representation of women and minorities throughout an organization and typically establish goals and timetables to improve deficiencies in representation. *Id.*

160. These programs seek to recruit women and minorities for positions in which those groups are not well represented. *Id.*

161. Training programs are designed to train women and minorities for jobs in which the groups

programs characterized by general rather than specific purposes were likely to fail to produce substantive results.[162] The output of these generalized structures was difficult to evaluate, and therefore they were easily "decoupled from day-to-day organizational activities."[163] Of the four systems studied, only one—affirmative action recruitment programs—had a statistically significant positive effect on the workforce representation of women and minorities.[164] Notably, the study concluded that affirmative action plans do not improve the status of underrepresented groups unless they are tied to recruitment programs.[165] Even more disturbing is the additional finding that affirmative action plans "actually harm the employment status of women."[166]

Edelman and Petterson's results regarding affirmative action programs are important because academics believe that diversity initiatives arose as a response to the limitations of affirmative action.[167] Organizations found that affirmative action programs had a divisive effect on the workforce. White males generally perceived such efforts with anxiety and resentment.[168] Minorities were impatient with the rate of organizational integration and the resistance of some whites to the initiatives.[169] In response, employers sought to mend the racial divide by hiring consultants to conduct sensitivity training.[170] The earliest such efforts appeared in the mid 1970s.[171]

Employers undertake diversity training for a number of reasons. Three motivating factors are typically acknowledged: the moral imperative, business profitability, and legal pressures.[172] From a moral perspective, organizations conduct diversity training because they sense that increasing

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are not well represented. *Id.*

162. *Id.* at 113-14.

163. *Id.* at 114.

164. *Id.* at 126-29.

165. *Id.* at 129.

166. *Id.*

167. *See* Linda S. Gottfredson, *Dilemmas in Developing Diversity Programs*, *in* DIVERSITY IN THE WORKPLACE: HUMAN RESOURCE INITIATIVES 279, 280 (Susan E. Jackson, ed., 1992); Colin Cooper & Chalmer E. Thompson, *Managing Corporate Racial Diversity*, *in* RACIAL IDENTITY THEORY: APPLICATIONS TO INDIVIDUAL, GROUP, AND ORGANIZATIONAL INTERVENTIONS 181 (Chalmer E. Thompson & Robert T. Carter, eds., 1997).

168. Gottfredson, *supra* note 167, at 281.

169. *Id.*

170. *Id.*

171. *Id.*

172. Bernardo M. Ferdman & Sari Einy Brody, *Models of Diversity Training*, *in* HANDBOOK OF INTERCULTURAL TRAINING 282, 284-90 (2d ed., Dan Landis & Rabi S. Bhagat, eds., 1996); see also Rose Mary Wentling & Nilda Palma-Rivas, *Current Status and Future Trends of Diversity Initiatives in the Workplace: Diversity Experts Perspective*, 9 HUM. RESOURCES DEV. Q. 235 (1998) (listing four major reasons for diversity programs as: improving productivity and competitiveness, forming better employee relationships, enhancing social responsibility, and addressing legal concerns).

the workforce participation of under-represented groups is the right thing to do.[173] Diversity programs also seek to boost corporate profits by creating organizational inter-group harmony.[174] In other words, the training purports to improve employee retention, skills, and performance, which in turn influence an organization's bottom line.[175]

For purposes of this Article, however, the most interesting motivator is that of legal pressures. The existence of civil rights law prompts many employers to conduct diversity training as a form of litigation prevention.[176] One study, which involved interviews of human resource specialists, found that EEO "guidelines and the potential for litigation" were the most frequently cited reasons for undertaking diversity training.[177] Recently, management attorneys have begun recommending the implementation of diversity and sensitivity training as a strategy for avoiding discrimination suits.[178] Employers, perhaps frightened by several recent and well-publicized discrimination class actions,[179] may be paying heed to that advice.

The objectives of diversity training are quite broad and general. Goals include: providing information about EEO laws and societal demographic changes, increasing participant awareness of cultural and other differences, developing skills to enable employees to work well together, and changing the culture of the organization.[180] Sometimes the training itself is treated as an organizational objective.[181] The very generality of the goals makes measuring training outcomes problematic. In fact, program evaluations are rarely conducted.[182] Recalling Edelman and Petterson's conclusion that

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173. Ferdman & Brody, *supra* note 172, at 285; *see also* Sheryl Lindsley, *Organizational Interventions to Prejudice*, *in* COMMUNICATING PREJUDICE 302, 303 (Michael L. Hecht, ed., 1998) (noting that organizations engage in diversity training to address "humanitarian concerns").

174. Lindsley, *supra* note 173, at 303; Kauffman, *supra* note 151, at 31; Williams, *supra* note 115, at A1.

175. Ferdman & Brody, *supra* note 172, at 288-89.

176. *Id.* at 287; see also Lindsley, *supra* note 173, at 303 (noting that one motivation for implementing training is the need to comply with EEO guidelines); Wentling & Palma-Rivas, *supra* note 172, at 243 ("Legal concerns were another frequently mentioned motive for managing diversity, with the experts citing reduction or prevention of discrimination lawsuits. . . .").

177. Katrina Jordan, *Diversity Training in the Workplace Today: A Status Report*, 58 J. OF CAREER PLANNING & EMP. 46, 51 (1998).

178. Weirich, *supra* note 13, at 41; Siniscalco & Wohl, *supra* note 13, at 27.

179. *See* Weirich, *supra* note 13, at 34-38 (describing suits brought against Texaco, Shoney's Inc., Publix Super Markets, Mitsubishi, and Home Depot).

180. Ferdman & Brody, *supra* note 172, at 292-94; see also Deborah L. Plummer, *Approaching Diversity Training in the Year 2000*, 50 CONSULTING PSYCH. J. 181, 182-83 (1998) (stating training goals as: heightening awareness of cultural identity, helping participants understand the sociopolitical implications of diversity, opening up dialogue, teaching cultural competence skills, and examining the organization's cultural norms).

181. Lindsley, *supra* note 173, at 308.

182. Sara Rynes & Benson Rosen, *A Field Survey of Factors Affecting the Adoption and Perceived*

generalized EEO structures are likely to produce merely symbolic rather than substantive results, it may well be that diversity training is mere window dressing.[183]

Window dressing aside, the process of legal endogeneity regarding these programs is quite apparent following the Supreme Court's decision in *Kolstad*. That case, as noted above, legitimated the long-standing employer practice of anti-discrimination training by creating a safe harbor from punitive damages for employers who make good faith efforts to educate employees about Title VII's prohibitions.[184] In the short time since the case was decided, management attorneys have rushed to interpret and disseminate its message of employee education to their clients.[185]

Stating that the Court "explicitly recognized 'training' as another form of reducing potential liability in discrimination and harassment lawsuits," one pair of advocates recently stressed that "employees must be sensitized to diversity issues and trained to avoid, and recognize, conduct which may be perceived as inappropriate. . . ."[186] Another pair of advocates stated that "clear cut policies, procedures, and training programs . . . is the strongest possible evidence of good faith efforts to prevent discrimination, which is key to disavowing liability for supervisory and other misconduct."[187] Thinking ahead to future defense arguments, another attorney noted that anti-discrimination policies and training may ultimately be used to avoid the imposition of liability in all Title VII actions.[188] Such comments make clear the legal profession's acceptance of training as an antidote for workplace discrimination. Two other ways in which that support manifests

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Success of Diversity Training, 48 PERSONNEL PSYCH. 247, 253 (1995); Pushkala Prasad & Albert J. Mills, *From Showcase to Shadow, in* MANAGING THE ORGANIZATIONAL MELTING POT: DILEMMAS OF WORKPLACE DIVERSITY 3, 13 (Pushkala Prasad et al., eds., 1997).

183. *See supra* notes 162-63 and accompanying text.

184. *See supra* note 74 and accompanying text.

185. *E.g.*, Stephen T. Lindo & Rose M. Corbett, *Faragher and Ellerth Tale Hold: EEOC and U.S. Supreme Court Reinforce the Benefits to Employers of Good Faith Efforts to Maintain Discrimination-Free Workplaces*, METRO. CORP. COUNS., Oct. 1999, at 11 ("[An]employer[] should make every effort to properly train and educate its workforce about its anti-discrimination policies."); John A. Beranbaum, *Kolstad v. American Dental Association: Punitive Damages Under Title VII*, N.Y.L.J., Aug. 18, 1999, at 1 (noting that good faith compliance efforts need to include "equal employment opportunity training of staff"); Peter N. Hillman, *Employers Can Limit Discrimination Liability, as Recent Decisions Applying Supreme Court Rulings Make Clear*, METRO. CORP. COUNS., Jan. 2000, at 19 (noting that "all hands training sessions . . . are part of good preventive medicine."); Susan K. Krell, *Monitoring E-Mail and Internet Use*, CONN. L. TRIB., Dec. 13, 1999, at 15 ("Protection against [discrimination] litigation is available through supervisory training. . . .").

186. Edward A. Brill & Frank F. Martinez, *Avoid Employment Liability Risks: Five Crucial Preventative Measures for Start-Up Companies*, N.Y.L.J., June 19, 2000, at S4.

187. Laura H. Allen & Jodi E. Divak, *Protecting Yourself: What Employers Should Do To Avoid Punitive Damages Award in Title VII Actions*, METRO. CORP. COUNS., Nov. 1999, at 24.

188. Margo L. Ely, *Ruling on Punitive Damages May Go Beyond Bias Cases*, CHI. DAILY L. BULL., July 12, 1999, at 6.

itself will be discussed below.

B. Anti-Discrimination Training and the Legal Profession

The legal profession, by and large, has turned to anti-discrimination training as a quick and easy method for correcting discriminatory work environments. To gauge the profession's implicit endorsement of instruction as a weapon against workplace inequality, this section reviews references to training programs in discrimination suit settlements and judicial decisions.

1. Training in Settlements and Consent Decrees

Recent well-publicized discrimination lawsuit settlements and consent decrees reveal the legal profession's support for anti-discrimination training. In a number of these cases, the employer defendants agreed not only to provide compensation for aggrieved plaintiffs, but also to allocate significant sums for diversity and sexual harassment training. Although plaintiff's attorneys and EEOC lawyers are no doubt the parties most strenuously advocating training components in settlement agreements,[189] employers consent to these agreements with the advice of defense counsel.

Examples of these settlements are worth consideration. For instance, in 1995, the EEOC brought suit against Sears on behalf of eight former employees, claiming that these workers had been sexually harassed, constructively discharged, and retaliated against.[190] Under a court approved settlement agreement, Sears promised to provide its employees with two years of sexual harassment training.[191] Additionally, in June of 1998, Mitsubishi settled a sexual harassment class action brought by the EEOC for $34 million.[192] That settlement included a plan to provide sexual harassment training for 4,000 employees at Mitsubishi's Normal, Illinois plant.[193] Finally, Ford Motor Company settled a sexual harassment suit with the EEOC in 1999. The settlement agreement in that case allocated $10 million for sexual harassment training.[194]

In addition to sexual harassment training, diversity training also crops up in settlement agreements. For example, such training was a component

189. *See* Lubove, *supra* note 7, 122 (quoting plaintiff's attorneys James Finberg and Cyrus Mehri and discussing the increasing frequency with which the EEOC proposes training as part of settlement).

190. Mathiason & de Bernardo, *supra* note 13, at 27.

191. *Id.*

192. Joann Muller, *Ford: The High Cost of Harassment*, BUS. WK, Nov. 15, 1999, at 94.

193. *Plan to Distribute Mitsubishi Settlement is Approved by Judge*, WALL ST. J., June 29, 1999, *available in* 1999 WL-WSJ 5458102.

194. Muller, *supra* note 192, at 94.

of a recent settlement agreement between female dock workers in Tacoma, Washington and the shipping companies and labor unions that the women sued for discrimination and harassment.[195] Diversity training emphasizing religious tolerance was part of a settlement between Wal-Mart and its former sales associate, who alleged that the company engaged in religious discrimination.[196] Not long ago, lawyers for Boeing and three race discrimination plaintiffs filed a proposed consent decree providing, *inter alia*, that the company will implement extensive equal opportunity and diversity training programs.[197] As part of a settlement between Campbell University and a physical education instructor stricken with AIDS, the University agreed to provide AIDS awareness and sensitivity training to its employees.[198]

Texaco's landmark settlement with a class of employees suing the company for race discrimination is perhaps the most widely recognized of the recent cases involving Title VII claims. Plaintiffs in that suit contended that Texaco engaged in an entrenched pattern and practice of wage and promotion discrimination that favored whites over minority employees.[199] The case is notorious for the publicity surrounding the release of a tape recording of executives allegedly discussing document destruction[200] and using racial epithets.[201] In particular, several Texaco executives referred to African-American employees as "black jelly beans," a metaphor they ironically picked up in a diversity training lecture at an oil industry conference.[202]

The company ultimately settled the suit for a whopping $176 million[203] in addition to agreeing to a variety of unprecedented terms.[204] A $35 million, court monitored, independent "Equality and Tolerance Task Force" was created to revamp the company's human resource policies and

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195. Mathiason & Bernardo, *supra* note 13, at 27.

196. *See id.*; Hamby v. Wal-Mart Stores Inc., No. 93-3444-CV-S (W.D. Mo. July 28, 1995); see also Mathiason & Bernardo, *supra* note 13, at 27.

197. Nan Netherton, *Boeing Agrees to Settle Race Discrimination Suits*, DAILY LAB. REP., Jan. 26, 1999, at A15.

198. *See Instructor with AIDS Nets Return to Job and $325,000 in Bias Suit Settlement*, EMPL. LIT. REP., June 13, 1995, at 18632; see also Mathiason & Bernardo, *supra* note 13, at 27.

199. Weirich, *supra* note 13, at 34.

200. A federal jury acquitted two former Texaco executives of conspiracy and obstruction of justice charges in the matter. John Herzfeld, *Race Discrimination: Jury Acquits Former Texaco Executives in Criminal Obstruction of Justice Case*, DAILY LAB. REP., May 14, 1998, at A9.

201. Kurt Eichenwald, *Texaco Executives, on Tape, Discussed Impending Bias Suit*, N.Y. TIMES, Nov. 4, 1996, at A1.

202. Hanna Rosin, *Cultural Revolution at Texaco*, NEW REPUBLIC, Feb. 2, 1998, at 15.

203. Nadya Aswad & John Herzfeld, *Texaco Corp. Agrees to Spend $176 Million to Settle Race Bias Suit*, DAILY LAB. REP., Nov. 18, 1996, at AA1.

204. Rosin, *supra* note 202, at 16.

practices.[205] Texaco also agreed to transform its corporate culture by redesigning and expanding its sensitivity awareness and diversity training programs.[206]

Texaco's revamped diversity program consists of a two-day seminar.[207] On the first day, Awareness Day, employees are encouraged to uncover the negative assumptions they have of others and how their own behavior influences those around them.[208] Games and exercises help each trainee with the process of self-evaluation. The day ends with trainees writing a personal action plan to facilitate their behavioral change.[209] Day two focuses on diversity issues. Among other activities, employees are shown a video cartoon entitled "A Peacock in the Land of Penguins." Although the video is designed to promote cultural understanding, one commentator described it as filled with stereotypical assumptions about women and minorities.[210] All of Texaco's 20,000 employees are required to complete the training program.[211]

2. *Training in Judicial Decisions*

References to sexual harassment and diversity training are not limited to discrimination lawsuit settlements. Training is also mentioned in judicial decisions, most often opinions considering employer motions for summary judgment. The decisions usually cite training as a fact favorable to the employer and almost never consider the content of the training program.[212] Indeed, it is rare to find a judge who has anything negative to say about educational efforts.[213]

In sexual harassment suits, training is frequently cited as evidence that an employer acted reasonably to prevent harassment and thus satisfies the first prong of the *Ellerth/Faragher* affirmative defense.[214] Moreover, sexual

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205. Cyrus Mehri, *Agreeing to Cultural Change*, LEGAL TIMES, May 12, 1997, at S30.

206. Mathiason & de Bernardo, *supra* note 13, at 28; Weirich, *supra* note 13, at 34.

207. Rosin, *supra* note 202, at 17.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. A notable exception is *Cadena v. The Pacesetter Corp.*, 30 F. Supp. 2d 1333, 1339 (1998). In that case the court refused to take "at face value" employer evidence of due care, including the provision of sexual harassment training. *Id.*

213. One judge did, however, speculate about the potential for backlash prompted by diversity training programs. Blanken v. Ohio Dept. of Rehab. and Corr., 944 F. Supp. 1359, 1370 (S.D. Ohio, 1996).

214. Shaw v. AutoZone, Inc., 180 F.3d 806, 812 (7th Cir. 1999) (noting that in "addition to distributing a [sexual harassment] policy to its employees, [the employer] regularly conducted training sessions on sexual harassment"); Hetreed v. Allstate Insurance Co., 1999 WL 311728, at *5 (N.D. Ill. 1999) (noting with approval that the employer had a detailed sexual harassment policy and provided

harassment training undertaken subsequent to an investigation of an employee complaint is typically viewed as a prompt remedial response enabling an employer to avoid liability.[215] Similarly, one recent racial harassment and discrimination decision held that the implementation of mandatory diversity training was evidence of the employer's efforts to prevent future harassment, supporting the employer's motion for summary judgment.[216]

Judicial acceptance of anti-discrimination training is also evident in cases where the failure to conduct harassment or diversity training is cited to support denials of employer motions for summary judgment in discrimination suits.[217] Although these cases do not represent favorable outcomes for employers, they do indicate the evidentiary value of providing sexual harassment and diversity training.

Training is likewise portrayed as a valuable undertaking in decisions considering whether a prayer for punitive damages is appropriate. Courts in two recent cases granted employer motions for summary judgment on the

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managers with training); DeWitt v. Lieberman, 48 F. Supp. 2d 280, 287, 290 (S.D.N.Y. 1999) (noting that the defendant had "an anti-sexual harassment training program" and then concluding that the policy was effective); EEOC v. Barton Protective Services, 47 F. Supp. 2d 57, 60 (D.D.C. 1999) (noting that the employer provided "EEO training"); Maddin v. GTE of Florida, Inc., 33 F. Supp.2d 1027, 1032 (M.D. Fla. 1999) (citing favorably the fact that the employer "provided training about sexual harassment for its employees and supervisors"); Fiscus v. Triumph Group Operations, 24 F. Supp. 2d 1229, 1240 (D. Kan. 1998) (stating that the company "conducted anti-harassment workshops/training for its supervisors"); Landrau Romero v. Caribbean Restaurants, 14 F. Supp. 2d 185, 191-92 (D.P.R. 1998) (noting that the plaintiff received training in sexual harassment).

215. *E.g.*, Mirakhorli v. DFW Management. Co., 1999 WL 354226, at *5 (N.D. Tex. 1999) (citing as favorable evidence fact that company renewed harassment training after investigating plaintiff's complaint); Kohler v. Inter-Tel Technologies, 1999 WL 226208, at *3 (N.D. Cal. 1999) (noting that after investigating plaintiff's complaint, "the company conducted mandatory sexual harassment training for all employees"); Garcia v. ANR Freight System, Inc., 942 F. Supp. 351, 358 n.6 (N.D. Ohio 1996) (noting that employer had sexual harassment perpetrator watch a sensitivity training video).

216. Walker v. Thompson, No. 97-CV-2437-R, 1999 U.S. Dist. LEXIS 219, at *30 (N.D. Tex. 1999) (granting the employer's motion for summary judgment) *rev'd on other grounds*, 214 F.3d 615; see also Bolden v. N.Y.C. Housing Authority, No. 96-CIV-2835 (AGS), 1997 WL 666236, at *2 (S.D.N.Y. Oct. 27, 1997) (noting that once plaintiff made employer aware of perpetrator's use of racial epithets, it sent him for diversity training and counseling).

217. *E.g.*, Mortenson v. City of Oldsmar, 54 F. Supp. 2d 1118, 1124 (M.D. Fla. 1999) (noting that main perpetrators did not attend sexual harassment training); Powell v. Morris, 37 F. Supp. 2d 1011, 1020 (S.D. Ohio 1999) (noting that the court has neither seen the employer's sexual harassment policy nor been provided with details on its training program); Miller v. D.F. Zee's, Inc., 31 F. Supp. 2d 792, 803, 808 (D. Or. 1998) (noting that neither diversity nor sexual harassment training was conducted); Snapp-Foust v. National Construction, L.L.C., 1 F. Supp. 2d 773, 778-79 n. 9 (M.D. Tenn. 1997) ("Defendant has produced no evidence of any further dissemination of the [sexual harassment] policy or of any training of personnel regarding complaint procedures."); *but cf.* Jones v. USA Petroleum Corp., 20 F. Supp. 2d 1379, 1386 (S.D. Ga. 1998) (granting employer motion for summary judgment where harassment grievance procedure found legally sufficient despite a lack of training); Paton v. Dallas County Community College Dist., 1996 WL 722056, at *8 (N.D. Tex. 1996) (noting that "lack of seminars and 'sensitivity training' does not outweigh the fact" that the employer responded effectively to a harassment complaint).

issue of punitive damages, holding that sexual harassment training was evidence of employer good faith.[218] The Tenth Circuit recently held that an employer's failure to provide a manager with "training in employment discrimination" demonstrated a failure "to educate its employees" and "to prevent discrimination in the workplace," making an award of punitive damages appropriate.[219]

The review above indicates that the legal profession's support for anti-discrimination training is widespread. Most members of the profession, however, appear to lack a sophisticated appreciation of the potential pitfalls of training. For example, few attorneys write or speak about the fact that training may reinforce stereotypes and produce attitude polarization.[220] Similarly, few judges acknowledge that poorly conducted training can do more harm than good.[221] Yet this type of discussion has been taking place in the business community in the last few years.[222] Additionally, social scientists are beginning to turn their attention to anti-discrimination training in an attempt to discern its possible effects on workplace dynamics. These topics are taken up in the next section.

IV.
THE POTENTIAL PITFALLS OF ANTI-DISCRIMINATION TRAINING

Given the legal profession's embrace of anti-discrimination training and the ubiquity of such educational efforts, one might assume that their utility is beyond dispute. Yet very little empirical research has been done on the effects of these programs. Although the lack of hard evidence has generally failed to capture the attention of attorneys and judges, ignorance about these matters is disturbing to social scientists.

Calling the gap in the sexual harassment literature "alarming," John Pryor and Kathleen McKinney note that "we really are not sure about what,

218. Hull v. APCOA/Standard Parking Corp., 2000 WL 198881, at *15 (N.D. Ill. 2000); Woodward v. Ameritech Mobile Communications, Inc., 2000 WL 680415, at *16 (S.D. Ind. 2000); *but cf.* Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 445-46 (4th Cir. 2000) (punitive damages appropriate notwithstanding anti-discrimination training due to evidence of top executives' racial animosity).

219. EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1248-49 (10th Cir. 1999).

220. Management attorneys Jonathan Segal and Stephen Paskoff are exceptional in this regard. Jonathan A. Segal, *Sexual Harassment Prevention: Cement for the Glass Ceiling?* HR MAGAZINE, Nov. 1, 1998, at 129 (discussing at length the potential adverse effects of sexual harassment training); Stephen M. Paskoff, *Ending the Workplace Diversity Wars*, TRAINING, Aug. 1, 1996, at 42 (discussing the negative effects of traditional diversity training); see also Delikat, *supra* note 18, at 203-06 (discussing the potential backlash effects of diversity training).

221. *But see* Hartman v. Pena, 914 F. Supp. 225, 228-30 (N.D. Ill. 1995)(refusing to grant employer's motion for summary judgment in case where air traffic controller argued that FAA sexual harassment training constituted hostile environment harassment).

222. *E.g.*, Lubove, *supra* note 7, at 122.

if anything, works to educate people about sexual harassment [and to] reduce incidents of harassment."[223] Robert Moyer and Anjan Nath recently described the problem this way: ". . . [T]he unpleasant truth is that almost nothing is known about the effects of sexual harassment education and training programs." [224] Catherine Ellis and Jeffrey A. Sonnenfeld voice similar sentiments about diversity training noting that ". . . information on whether [diversity] programs are effective in meeting their goals is sparse."[225]

Some might view the scarcity of program outcome research as benign. Elizabeth O'Hare Grundmann and her colleagues, however, point out that the dearth of information is potentially dangerous for two reasons.[226] First, preventative programs, even when adopted with the best of intentions, can have negative effects.[227] For example, a seminar that indicates that sexual harassment is an underreported phenomenon may give some employees the message that "the likelihood is good that they can get away with harassing" others.[228] Second, providing training "gives the impression that 'something is being done,'" lulling managers and others into a false sense of security.[229] Yet an ineffective program may not affect the bottom line in the least; that is it may not "reduce the incidence of sexual harassment" in the organization.[230]

In line with these problems, Grundmann and her colleagues find particularly worrisome the motivation behind the adoption of many anti-discrimination training programs: litigation prevention.[231] This understandable impetus for training can eclipse what should be the purpose of such programs—to have "a significant impact on an important social problem."[232] To accomplish that aim through training, an institution must

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223. John B. Pryor & Kathleen McKinney, *Research on Sexual Harassment: Lingering Issues and Future Directions*, 17 BASIC & APP. SOC. PSYCH. 605, 609 (1995).

224. Robert S. Moyer & Anjan Nath, *Some Effects of Brief Training Interventions on Perceptions of Sexual Harassment*, 28 J. OF APP. SOC. PSYCH. 333, 334 (1998); see also Barbara A. Gutek, *Sexual Harassment Policy Initiatives, in* SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 195, 196 (William O'Donahue ed. 1997)(describing current research on harassment training as scant yet promising).

225. Ellis & Sonnenfeld, *supra* note 17, at 84.

226. Elizabeth O'Hare Grundmann et al., *The Prevention of Sexual Harassment, in* SEXUAL HARASSMENT THEORY, RESEARCH AND TREATMENT 175, 182 (William O'Donohue ed., 1997).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 176; see also Keyton & Rhodes, *supra* note 136, 161 (1999) ("Unfortunately, the primary objective of many [sexual harassment] training programs is to reduce the organization's legal and fiduciary responsibility.").

232. Grundmann, *supra* note 226, at 176; see also Gutek, *supra* note 224, at 196 (warning that "[i]n their eagerness to show that they are doing something" employers may be selecting trainers who lack knowledge about harassment).

strive to implement a "demonstrably effective program" that is "systematically evaluated."[233] Unfortunately, employers typically do not evaluate their anti-discrimination training programs.[234]

The sections below review what little is known about sexual harassment and diversity training. Since scientific studies are sparse, anecdotal information about the programs is also presented. Data on attitude polarization, a possible negative effect of anti-discrimination training, is discussed thereafter.

A. The Possible Effects of Sexual Harassment Training

Employers offering sexual harassment training likely do so with several ends in mind: increasing knowledge about harassment, eliminating inappropriate behavior, and changing the attitudes of those who may be predisposed to harass others.[235] In the last several years, a few studies have addressed the ability of training to accomplish those aims. Most of the studies focus on the first goal, knowledge acquisition and its effects. Although each study asks the question somewhat differently, the thrust of the investigations is whether training increases a subject's tendency to perceive harassment when presented with hypothetical situations.

All of the studies found, at least in part, that training increases the sensitivity of trainees to possible instances of sexual harassment.[236] Robert Moyer and Anjan Nath's work, however, makes an important distinction between increasing the tendency to perceive harassment and boosting expertise in identifying harassment.[237] One of their experiments determined that although video-trained subjects were better than untrained subjects at detecting hypothetical instances of harassment, this gain was offset by a comparable increase in false positives; that is, the trainees were also significantly more likely to perceive hypothetical harassment when it had

233. *See* Grundmann, *supra* note 226, at 176.

234. *Id.*

235. Elissa L. Perry et al., *Individual Differences in the Effectiveness of Sexual Harassment Awareness Training,* 28 J. OF APP. SOC. PSYCH. 698, 699 (1998) (discussing study of whether training affects these goals).

236. Blakely et al., *The Effects of Training on Perceptions of Sexual Harassment Allegations,* 28 J. OF APP. SOC. PSYCH. 71, 78-79 (1998) (noting that [i]ndividuals who saw a training video rated severe hypothetical harassment as "significantly more harassing than did those who had not seen the video"); Moyer & Nath, *supra* note 224, at 344 (noting that "trained participants perceived sexual harassment more often than did untrained participants"); Perry, *supra* note 235, at 715-16 (finding that a sexual harassment training video more greatly affected the knowledge of subjects with a high propensity to harass than those with a low propensity to harass); York et al., *Preventing Sexual Harassment: The Effect of Multiple Training Methods,* 10 EMPLOYEE RESPONSIBILITIES & RTS. J. 277, 285 (1997) (presenting case problems before showing training videos "sensitizes subjects to the occurrence of sexual harassment behavior. . .in the videos").

237. Moyer & Nath, *supra* note 224, at 336.

not occurred.[238]

A second experiment performed by the pair found that training via written materials in a packet—an informational poster and harassment policy statement—boosted the expertise of men in identifying harassment while failing to affect the expertise of women.[239] The study authors interpreted this result as leveling the perceptual expertise of men and women, since untrained women performed more expertly than untrained men did.[240] While the second experiment holds out the hope that sexual harassment training can positively affect the ability of at least male trainees to correctly discern impermissible behavior, Moyer and Nath confess that they are not sure which of several differences between the studies accounts for their differing results.[241] Thus, they recommend that more work be done to evaluate the effectiveness of specific kinds of training programs.[242] Obviously, some training efforts will promote real, lasting gains while others will not.

The work of Kenneth York and his colleagues takes up the challenge of evaluating different sexual harassment training methods.[243] Their study assessed the utility of a combination of two different training modes. A harassment training video provided subjects with examples of behavior to be avoided.[244] Case studies for participant consideration offered subjects the chance to practice the concepts being taught.[245] The question posed was whether some mixture of the two training modes would make subjects "more sensitive to behaviors that might be interpreted as sexual harassment."[246]

One group of subjects in the York study viewed a sexual harassment training video. Participants were then asked to determine whether each of five short episodes in the video constituted sexual harassment.[247] Before watching the training video, a second group of subjects was asked to read one of two case studies and then to answer in writing a number of questions about both the case and sexual harassment in general.[248] The study authors found that subjects who had read either case study before watching the

238. *Id.* at 340-41. A false positive was defined as identifying harassment in any of seven hypothetical scenarios that an expert panel had defined as failing to constitute harassment. *Id.* at 340.

239. *Id.* at 343.

240. *Id.* at 348.

241. *Id.* at 344.

242. *Id.* at 348. Blakely and his colleagues also note the need for empirical investigation of specific kinds of training programs. Blakely, *supra* note 236, at 80.

243. York, *supra* note 236, at 277.

244. *Id.* at 278-79.

245. *Id.* at 279.

246. *Id.* at 279.

247. *Id.* at 280.

248. *Id.* at 281.

video were more likely to view the video episodes as instances of sexual harassment than were their counterparts who had only seen the video.[249]

Unlike the Moyer and Nath study, York and his colleagues did not assess whether greater subject sensitivity represented an increase in subject expertise. Nonetheless, their work points out that combined training methods, which permit subjects to actively apply the concepts that they learn passively, may represent the best way to conduct educational programs. Indeed, the authors recommend a program that provides general information about the law, allows participants to watch a video and analyze case problems, and then requires discussion of the materials and sexual harassment in the participants' organization.[250]

As noted above, employers who conduct training may wish to do more than simply increase their employees' knowledge about sexual harassment. They might also hope to reduce objectionable behavior and alter the attitudes of employees with a propensity to engage in harassment.[251] A study conducted by Elissa Perry and her colleagues sought to gauge the impact of a harassment training video on all three indices: knowledge, behavior, and attitudes.[252] The study also examined whether video training similarly affects individuals with differing propensities to harass others.[253]

The subjects for the Perry study, all males, were first asked to complete a survey that measured each individual's likelihood to sexually harass ("LSH").[254] Participants with differing LSH scores were then asked to watch either a harassment or a sign language training video.[255] Following the initial video viewing, all participants watched a golf video and were subsequently asked to teach a female confederate how to putt.[256] The putting session was unobtrusively videotaped and later watched and rated by two female coders.[257]

After the putting session, the male subjects were asked to complete a post-study questionnaire to gauge their knowledge about sexual harassment.[258] They were also asked to complete a survey that once again measured each individual's LSH in order to determine whether video harassment training impacted the attitudes of the participants.[259]

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249. *Id.* at 283.

250. *Id.* at 286.

251. *See supra* note 235 and accompanying text.

252. Perry, *supra* note 235, at 699.

253. *Id.*

254. *Id.* at 706. Study subjects did not, while actively participating in the study, know the actual purpose of the survey or the experiment as a whole.

255. *Id.* at 707.

256. *Id.*

257. *Id.* at 708-09.

258. *Id.* at 708.

259. *Id.* at 709.

Interestingly, the study determined that the harassment training video did not increase the knowledge level of the participants overall.[260] Nor did the harassment video make them less likely to engage in sexually inappropriate behavior or to change their long term attitudes about harassment.[261]

Significantly, however, when the study authors tested for the effects of the video training on subjects scoring high in the "propensity to harass" category, they found different results. The sexual harassment video had a greater impact on high LSH subjects' knowledge than their low LSH counterparts. While untrained high LSH subjects were less accurate in their sexual harassment knowledge than untrained low LSH subjects, after training the knowledge level of the high and low LSH subjects was equivalent.[262]

Moreover, the training video affected the touching behavior of high LSH subjects. Without training, high LSH subjects were more likely than low LSH subjects to engage in inappropriate touching of the female confederate during the putting session.[263] Those high LSH subjects who viewed the harassment training video, however, were no more likely than their low LSH counterparts to engage in such touching behavior.[264]

Finally, the study tested for the effects of the training video on the long term attitudes of those with a high propensity to harass. Unfortunately, viewing the harassment video did not affect long term attitudes associated with the propensity to harass.[265]

These mixed results are thought provoking and instructive. On the one hand, it is heartening to learn that a training video may positively affect the knowledge and, at least in the short term, the touching behavior of those individuals most likely to harass others. Such news is tempered, however, by the inability of the video to alter entrenched attitudes associated with the propensity to harass. To truly eliminate workplace harassment in the long term, it may be necessary to use alternative training methods.[266] Perry and her colleagues suggest that experiential techniques such as role playing and group discussion may prove effective in bringing about attitude change.[267]

Another recent study, however, casts some doubt on the ability of those participating in experiential programs to translate the training into their own

260. *Id.* at 712.
261. *Id.*
262. *Id.* at 714.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 716.
267. *Id.*

organizational interactions.[268] Joann Keyton and Steven Rhodes' study sought, among other things, to confirm a central conceptual foundation of most training programs: that participants in anti-discrimination training will rely on their empathic skills and apply what they experience in training to their subsequent encounters with others in the workplace.[269] Since empathic ability is the key to an experiential approach to training, Keyton and Rhodes posited that those subjects in their study with high empathic abilities would identify the greatest "percentage of flirting and sexually harassing verbal and nonverbal cues" in the four videotaped scenarios they were shown.[270] If correct, noted the study authors, such a finding could validate the use of role playing and other experiential techniques in sexual harassment training programs.[271]

Keyton and Rhodes examined the degree to which empathy scores predicted the proper identification of four types of social-sexual behaviors depicted in the videotapes: verbal flirting cues, non-verbal flirting cues, verbal harassment cues, and non-verbal harassment cues.[272] Empathic ability significantly predicted identification of only one type of cue—verbal harassment cues.[273] In contrast, empathic ability was not a statistically significant factor in the identification of verbal flirting, non-verbal flirting, and non-verbal harassment.[274] Keyton and Rhodes describe these results as weak support for their hypothesis.[275]

These findings challenge the commonly held training assumption that employees will translate what they view or hear in seminars to their organizational encounters.[276] The study authors note that "[e]mpathy does not appear to enable employees to identify sexual harassment."[277] Thus, in developing programs, trainers should not rely on role playing to inform or instruct trainees about sexual harassment. Role plays, if enlisted as a pedagogical tool, should only be used to provide examples of harassment and "to describe what to do if harassed."[278]

Similarly weak support for the notion that trainees will retain and translate what they learn in sexual harassment training is found in another recent study.[279] James Wilkerson's research examined, *inter alia*, the effect

268. Keyton & Rhodes, *supra* note 136, at 170.
269. *Id.* at 162.
270. *Id.*
271. *Id.*
272. *Id.* at 166-67.
273. *Id.* at 167.
274. *Id.*
275. *Id.* at 170.
276. *Id.* at 167.
277. *Id.* at 170.
278. *Id.* at 168.
279. *See* James M. Wilkerson, *The Impact of Job Level and Prior Training on Sexual Harassment*

of prior training on the ability or tendency to label behavior as harassment.[280] Wilkerson hypothesized that if trainees assimilate what they learn in training, they should be able to label sexual harassment more readily than the untrained.[281]

One fourth of the study participants reported that they had previously attended formal, sexual harassment training.[282] Thus, Wilkerson's research differs from the studies described above. The subjects in Wilkerson's study were not trained as part of the research, and those who were trained previously had attended programs some time before they participated in his study.

Wilkerson's subjects, employees of various ranks in a janitorial services company, watched two videotaped scenarios. One scene depicted a weak harassment situation; the other modeled a strong harassment incident. After each depiction, the participants filled out a labeling scale.[283] The study found that prior training did not significantly affect participants' labeling of behaviors as sexual harassment when the ratings of both scenarios were considered together.[284] When the scenario ratings were analyzed separately, "trained participants did not distinguish themselves from the untrained in identifying sexual harassment in the weak scenario and, in fact, had a lower mean labeling score."[285] Training was a significant rating factor, however, in the rating of the strong scenario.[286] Wilkerson concluded that his hypothesis therefore received only partial support.[287] Indeed, the results "were variable enough to raise questions about sexual harassment training's retention and transfer."[288]

The studies discussed thus far examined the ability of sexual harassment training to bring about positive responses from trainees. There remains the question, however, of whether such training can cause backlash effects in participants. One study provides some evidence that sexual harassment training can produce effects that are far from affirmative.

In a study analyzing the problems confronting women attorneys in eight large New York City law firms, Cynthia Fuchs Epstein and her colleagues found that sexual harassment training produced a chilling effect

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Labeling and Remedy Choice, 29 J. OF APP. SOC. PSYCH. 1605 (1999).

280. *Id.* at 1607.

281. *Id.*

282. *Id.* at 1610.

283. *Id.*

284. *Id.* at 1611-12.

285. *Id.* at 1613.

286. *Id.*

287. *Id.* at 1617.

288. *Id.* at 1619.

on senior male partners.[289] The study authors discovered that sensitivity training made the men wary of contacts with the young women associates with whom they work. This caution, in turn, served to restrict mentoring opportunities for the new lawyers that are essential to the development of legal skills.[290]

Anecdotal evidence provides support for a different type of harassment training backlash: anger about having been made to participate in the program. The Federal Aviation Administration's sexual harassment training program so upset one male traffic controller that he brought a sexual harassment suit against the agency.[291] In that case the participants were required to engage in a role reversal exercise wherein male employees were made to walk a gauntlet of female employees, some of whom touched the men's bodies.

In another case, a man who was fired for refusing to attend mandatory sexual harassment training sued his employer for religious and sex discrimination.[292] A third discrimination suit was brought by several women, two of whom argued in part that they were "subjected to sexist cartoons" during mandatory sexual harassment sensitivity training.[293]

These anecdotes and the scant empirical evidence described above should give pause to those who wholeheartedly endorse training as a foolproof antidote to workplace sexual harassment. An undiscerning view of the value of such programs may stymie the achievement of workplace equality. In other words, seeing all such training as positive may make the goal of these programs—the elimination of harassment—that much harder to achieve.

Social scientists have only in the last few years begun to assess the effects of sexual harassment training programs. The results of these early studies are highly inconclusive. While there is some slim evidence that training increases the sensitivity of trainees to possible instances of harassment,[294] the conclusion that trainees become more expert at identifying harassment is debatable.[295] While there is slim evidence that training, at least in a laboratory setting, may positively affect inappropriate touching behavior by men with a high propensity to harass, that same

289. Epstein, *supra* note 19, at 376-77.

290. *Id.*

291. Hartman v. Pena, 914 F. Supp. 225 (N.D. Ill. 1995); see also Gutek, *supra* note 224, at 195 ("[O]ne problem with mandatory training is that it creates resentment and may result in very little learning.").

292. Wolff v. City of N.Y. Fin. Svcs. Agency, 939 F. Supp. 258 (S.D.N.Y. 1996).

293. Gates v. City of Dallas, No. Civ.A.3:96-CV-2198-D, 1998 WL 133004 (N.D. Tex. Mar. 18, 1998).

294. *See supra* notes 236-42 and accompanying text.

295. *See supra* notes 236-42 and accompanying text.

training did not affect their long term attitudes.[296] Finally, that trainees will be able to retain knowledge and transfer it to their workplace encounters is entirely uncertain.[297] There is, in light of currently available research, absolutely no scientific basis for concluding that harassment training fosters employee tolerance and greatly alters workplace culture.

Moreover, the risks associated with ineffective training programs—backlash, sending the wrong message, and creating the erroneous impression that "something is being done about harassment"—are too potentially destructive to tolerate. Thus, as will be discussed in Section V, no training program should be considered relevant in litigation unless, in the context of a given dispute, it is demonstrably effective.

B. The Possible Effects of Diversity Training

There is even less empirical data on the effects of diversity training than there is on sexual harassment training programs. As one of the rare recent studies noted, "there have only been a few empirical evaluations of the outcomes of diversity training . . . . [and t]he research in this area is both inconsistent and incomplete."[298] Additionally, most of those isolated empirical efforts are rather dated.[299] Indeed, the most comprehensive of the studies was published in 1982 before the Hudson Institute's "Workforce 2000" report ushered in the modern era of diversity training.[300] That early study concluded that a three-day workshop designed to combat sexist attitudes had little measurable impact.[301]

Jeanne Hanover and Douglas Cellar recently published a revealing field study on the effects of a diversity training workshop on middle managers at a consumer products corporation.[302] More specifically, the investigation sought to assess the workshop's impact on trainees' perceptions of their own behavior, as well as their ratings of the importance of diversity-related management practices.[303] Ninety-nine middle managers participated in the study, with approximately half attending the workshop and the other half serving as the control group.[304] All the study subjects

296. *See supra* notes 252-65 and accompanying text.

297. *See supra* notes 268-78 and accompanying text.

298. Jeanne M. B. Hanover & Douglas Cellar, *Environmental Factors and the Effectiveness of Workforce Diversity Training*, 9 HUMAN RES. DEV. Q. 105, 107 (1998).

299. *See, e.g.*, J.H. Katz & A. Ivey, *White Awareness: The Frontier of Racism Awareness Training*, 55 PERS. & GUIDANCE J. 485 (1977).

300. *See* M.D. Dunnette & S.J. Motowidlo, *Estimating Benefits and Costs of Antisexist Training Programs in Organizations, in* WOMEN IN THE WORKFORCE 156 (H.J. Bernardin, ed. 1982).

301. *Id.*

302. Hanover & Cellar, *supra* note 298, at 105.

303. *Id.* at 109.

304. *Id.* at 110.

completed a pre- and post-training questionnaire, which asked them to evaluate the extent to which they performed thirty-eight diversity-related behaviors and to rate the importance of each behavior.[305] Hanover and Cellar's hypothesis that trainees would see themselves as engaging in diversity-related management practices to a greater extent than the control group was supported.[306] Similarly, trainees rated the importance of diversity-related management practices higher than did those in the control group.[307]

While their results appear encouraging, Hanover and Cellar acknowledge a number of limitations of the study.[308] One striking limitation was the study authors' use of self-report measures of behavior.[309] As compared with the reviews of others, self-reports tend to be inflated, have less variability, and are influenced by what subjects consider to be socially desirable responses.[310] Stated simply, the study results cannot tell us whether the trainees' behavior really changed or they simply thought and/or said it did.[311]

Moreover, given the differences in both diversity training programs themselves and the reasons why organizations opt for such training, Hanover and Cellar caution that "[i]t would be unfounded. . .to assume that the results obtained in this study could be expected from all diversity programs."[312] Thus, while the study is an important first step in diversity research, it can hardly be said to constitute empirical support for the premise that diversity training prevents or curbs invidious workplace discrimination. In fact, a recent field survey of 785 human resource professionals, a group heavily invested in the promotion of diversity training, found only modest assessments of the long-term success of their programs.[313] Only thirty-three percent of the respondents described their programs as either quite or extremely successful.[314] About half of the programs were believed to produce a neutral or mixed effect.[315] Eighteen

305. *Id.*

306. *Id.* at 114-15.

307. *Id.* at 113-14.

308. These limitations include the nonrandom assignment of participants to training groups and a small sample size. *Id.* at 119; see also Ruby L. Beale, *Invited Reaction: Response to Environmental Factors and the Effectiveness of Workforce Diversity Training*, 9 HUMAN RES. DEV. Q. 125-26 (1998) (reviewing the Hanover and Cellar study and raising concern about how participants were assigned to training sessions).

309. Hanover & Cellar, *supra* note 298, at 120.

310. *Id.*

311. *Id.* Hanover & Cellar note that they designed the study to try to minimize the problems associated with self-reports. *Id.*

312. *Id.* at 121.

313. Rynes & Rosen, *supra* note 182, at 258, 263.

314. *Id.*

315. *Id.* at 258.

percent of the respondents reported that their training was largely or extremely ineffective.[316] Of course, these subjective assessments, while interesting, are subject to the same potential self-reporting bias noted in the Hanover and Cellar study, and may not at all reflect reality.[317]

Two other recent academic articles also merit consideration. Both are instructive in raising concerns that poorly conducted diversity training can do more harm than good. In the first study, Catherine Ellis and Jeffrey Sonnenfeld examined three corporate diversity training programs.[318] As part of their general analysis of such programs, the authors offer some important warnings. First they counsel against the all too common brief or "one shot" program.[319] Training that raises controversial issues, and that takes place in just a few hours or over the course of one day, can actually increase employee hostility and misunderstanding.[320]

Next, they caution that efforts to increase cultural understanding can unintentionally bolster pre-existing group stereotypes or produce new stereotypes.[321] This effect is especially likely to occur where trainers attempt, in a positive fashion, to illuminate the differences between groups. Ellis and Sonnenfeld also note that poorly executed programs can inspire the resentment of white males.[322]

Finally, Ellis and Sonnenfeld bemoan the fact that employers that engage in diversity training rarely conduct studies of the effects of their efforts.[323] While employers may ask training participants to complete workshop evaluations, seldom are post-training worker attitudes assessed organization-wide.[324] Nor do employers usually examine the effect of diversity training on the career mobility of members of protected groups.[325] The authors call for study of the relationship between diversity interventions and actual organizational change and argue that monitoring is essential to an effective program.[326]

In another article, Deborah Plummer outlines the objectives that can

316. *Id.*

317. *Id.* at 266.

318. Ellis & Sonnenfeld, *supra* note 17, at 80.

319. *Id.* at 83. The Rynes and Rosen field survey found that "the vast majority of [diversity] training programs (72%) last a day or less. . . ." Rynes & Rosen, *supra* note 182, at 257.

320. Ellis & Sonnenfeld, *supra* note 17, at 80; see also Lindsley, *supra* note 173, at 308 (warning that "one shot" training increases the occurrence of backlash).

321. *Id.* at 86-87.

322. *Id.* at 87.

323. *Id.* at 102; see also Lindsley, *supra* note 173, at 308 ("Developing measurable criteria for program evaluation often is neglected."); Wentling & Palma-Rivas, *supra* note 172, at 250 (noting that long term follow-up evaluation is necessary if training is to succeed).

324. The assessment of worker attitudes is subject to the same self-reporting limitations that were discussed above. *See supra* notes 309-11 and accompanying text.

325. Ellis & Sonnenfeld, *supra* note 17, at 102.

326. *Id.* at 102.

and cannot be achieved through diversity programs.[327] Plummer advocates diversity training as a way to promote awareness of different cultural identities, to open dialogue about diversity issues, and to facilitate examination of the cultural norms of an organization.[328] She frankly admits, however, that diversity training cannot make members of culturally diverse groups like one another. Nor can it eradicate racism, sexism, or bias against members of protected groups.[329]

These warnings, issued by academics, echo the thoughts of some in the business community, including a number of professional diversity trainers.[330] Moreover, anecdotes recounted in the popular press also indicate that some diversity training can produce negative effects. In one reported instance, for example, white male managers, in a diversity training session, were encouraged to articulate stereotypes about women.[331] Female and minority participants were, in this same case, asked to express their feelings about workplace exclusion.[332] One day after the session, this particular office was in an uproar. The men were taunting the women about their comments in the session, and the women were angry and upset about what the men had said during the training program.[333]

Given the problems associated with diversity training, members of the legal profession should be circumspect about the place of such training in legal practice. Incorporating diversity training into a settlement agreement, for example, may not be the best way to promote cultural change in an organization. In addition, the fact that an employer has provided diversity training to its employees may not tell us much about the work environment the employees confront. Finally, training should not, without a careful analysis of the particular program and its effects, be accepted as evidence that a given work environment was non-discriminatory or that the employer made good faith efforts to eradicate bias.

C. *Attitude Polarization as a Possible Byproduct of Anti-Discrimination Training*

In addition to studies examining the specific effects associated with

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327. Plummer, *supra* note 180, at 183-85.

328. *Id.* at 182-83.

329. *Id.* at 184.

330. *E.g.*, Karp & Sutton, *supra* note 112, at 33 (noting that poorly conceptualized diversity training can produce "polarization" between groups); Mobley, *supra* note 152, at 45 (noting that an "incompetent or unqualified practitioner can create backlash"); Hemphill, *supra* note 111, at S5 ("Diversity training, in fact, fueled the fires of a national backlash."); Murray, *supra* note 120, at C5 (discussing the resentment and backlash engendered by some diversity training programs).

331. Murray, *supra* note 120, at C5.

332. *Id.*

333. *Id.*

sexual harassment and diversity training, there are studies of general social psychological phenomena that may be relevant when considering the utility of anti-discrimination training. One particularly interesting phenomenon is attitude polarization, which is defined as the tendency to harden and become more extreme in one's views after thinking about and evaluating evidence on a particular subject.[334] For example, in one widely acclaimed study opponents and proponents of the death penalty were presented with evidence both supporting and undermining the argument for capital punishment.[335] After reviewing the mixed evidence, the study subjects reported that their attitudes had strengthened in the direction of their initial views, further increasing the gap between death penalty supporters and opponents.[336] The obvious question is whether this phenomenon might be operative regarding information presented during sexual harassment and diversity training.

One recent study sheds light on whether attitude polarization might constitute a byproduct of anti-discrimination training programs. Geoffrey Munro and Peter Ditto examined the reactions of their study subjects to fictitious scientific information both confirming and negating stereotypes about homosexuality.[337] In their first experiment, persons pre-selected as high and low in their bias toward gays were presented with two fake studies of homosexuality: one study concluded that homosexuality was associated with psychopathology, and the other demonstrated that homosexuality was not associated with psychopathology.[338]

Munro and Ditto sought to measure their subjects' *actual* and *perceived* attitudes. Actual attitudes were assessed both before and after exposure to the information by a survey that evaluated the subjects' beliefs about homosexuality. A measure of the participants' *perceived* attitudes was obtained by asking the subjects to self-report on the issue of whether the fictitious scientific information had changed or altered their attitudes.

Interestingly, Munro and Ditto concluded that no *actual* attitude polarization had occurred; that is the authors found the subjects' initial attitude assessment of homosexuality to be consistent with their post-exposure attitude assessment.[339] Nonetheless, participants *perceived* their

334. Arthur G. Miller et al., *The Attitude Polarization Phenomenon: Role of Response Measure, Attitude Extremity, and Behavioral Consequences of Reported Attitude Change*, 64 J. OF PERS. & SOC. PSYCH. 561 (1993).

335. Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. OF PERS. & SOC. PSYCH. 2098 (1979).

336. *Id.* at 2105.

337. Geoffrey D. Munro & Peter H. Ditto, *Biased Assimilation, Attitude Polarization, and Affect in Reactions to Stereotype-Relevant Scientific Information*, 23 PERS. & SOC. PSYCH. BULL. 636 (1997).

338. *Id.* at 639.

339. *Id.* at 641. This result is in accordance with a study done by Arthur Miller and his colleagues, whose experiments studied polarization regarding the presentation of materials on capital punishment

initial attitudes as becoming more extreme after exposure to the fictitious studies on homosexuality.[340] The perceived polarization was operative, however, only with respect to the subjects' general attitudes about gays—whether or not they were accepting of homosexuality generally—and not their specific beliefs on whether homosexuality is associated with psychopathology.[341]

In a second experiment, Munro and Ditto replicated the format of the first experiment but conducted it using subjects representing the entire range of biased attitudes toward gays, not just those deemed high and low in prejudice. Again, *actual* attitude polarization was not discerned.[342] Experiment two did reveal, however, an interesting phenomenon with respect to perceived attitude. As the prejudice level of the subjects increased from low to high, participants self-reported that their exposure to the fictitious studies produced "more change toward unaccepting attitudes about homosexuality."[343] In other words, the higher the prejudice level of the subject, the more likely that subject was to perceive that the information presented precipitated a negative change in attitude.

Munro and Ditto note that while *actual* attitude polarization was not produced by exposure to the mixed scientific information, "neither were preexisting attitudes moderated in any way."[344] The subjects came through both experiments with their views firmly entrenched and, in some cases, feeling that those attitudes were strengthened. This conclusion may bode ill for the ability of anti-discrimination training to ameliorate stereotypical attitudes toward members of protected groups. Whether and how these attitudes might translate into conduct that employers seek to eliminate through educational programs is an open question. Thus, field studies of the effects of training are desperately needed.

A variant of the polarization phenomenon is group polarization, a phenomenon that occurs when an individual's attitude polarizes during discussion with people who hold like views.[345] Some two-hundred laboratory and field studies demonstrate this effect. Individual attitudes about a particular subject become more extreme during group discussion so long as all discussants are similarly inclined.[346]

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and affirmative action. Miller, *supra* note 334, at 572. Miller's study found no polarization regarding actual attitude change. *Id.*

340. Munro & Ditto, *supra* note 337, at 641.

341. *Id.* at 643.

342. *Id.* at 645.

343. *Id.* at 646.

344. *Id.* at 649.

345. *See generally* Markus Brauer et al., *The Effects of Repeated Expressions on Attitude Polarization During Group Discussions*, 68 J. of PERS. & SOC. PSYCH. 1014 (1995).

346. *Id.* at 1015.

Explanations for this phenomenon tend to be group oriented. Polarization occurs in part because group discussion leads to a sharing of arguments that enlarges each individual's pool of supportive arguments that justify his or her views.[347] Additionally, when individuals realize that others share their attitudes, they typically want their colleagues to view them as more committed to those views than the average supporter.[348]

Recent work by Markus Brauer and his colleagues provides a third explanation. Their experiments demonstrated that an individual's repeated attitude expression alone can produce a polarization effect.[349] Thus, the more an individual repeats an attitude, the more firmly the person comes to believe what he or she is saying.

These studies bring into question a not uncommon practice in diversity training: separating training groups by gender, race and other ethnicity. To the extent that members of a homogenous group share attitudes antithetical to anti-discrimination training, they may, through discussion, harden the beliefs that employer-sponsored training endeavors to eliminate.

V.
CONCLUSION: FACING THE TRUTH ABOUT TRAINING

The empirical and anecdotal evidence discussed in the last section renders the legal profession's reflexive and undiscerning endorsement of anti-discrimination training highly suspect. While the desire to find a "quick fix" for the problem of employment discrimination is understandable, that educational efforts positively affect entrenched bias is a hypothesis that has yet to be proven. Moreover, the negative byproducts of incompetently performed training—backlash, misinformation, and the illusion that discrimination is being meaningfully addressed—make the recent turn in Title VII jurisprudence, away from compensation and towards educational efforts, a matter of great concern.

Until we know much more about anti-discrimination training and its effects, the existence of sexual harassment or diversity programs should not be considered a fact relevant to employer liability for compensatory damages in any discrimination suit.[350] To allow a corporate practice with

347. *Id.*

348. *Id.*

349. *See id* at 1026.

350. Theresa Beiner makes a similar suggestion about employer preventative efforts in sexual harassment cases, arguing that such efforts are only relevant at the punitive damage stage. *See* Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability for Sexual Harassment* 78-80 (paper presented at Law & Society Association Annual Meeting, Miami, 2000). Professor Beiner notes that her approach "strikes a balance between the compensatory nature of Title VII and the policy of encouraging employers to address and correct sexual harassment." *Id.* at 79.

only speculative value to influence the make whole recovery of, for example, an employee injured by a racially hostile environment, is too destructive of employee rights to be countenanced. Sexual harassment and diversity programs are general preventative efforts undertaken by employers, easily "decoupled from day-to-day organizational activity."[351] Thus, the existence of anti-discrimination training tells us little about the particular workplace conditions encountered by discrimination plaintiffs.

On the other hand, evidence of training efforts may be relevant to the issue of punitive damages.[352] Specifically, educational efforts may bear upon whether "the employer's good-faith efforts to prevent discrimination in the workplace" prohibit the imposition of vicarious liability for punitive relief, the standard adopted by the Supreme Court in *Kolstad*.[353] Those considering such evidence, however, must be exceedingly careful. Indeed, in reviewing the relevancy of educational programs, or, for that matter, considering the incorporation of training into settlement agreements, three principles must be kept in mind.

First, conducting training cannot be equated with fostering cultural change. Social scientists note that employers that want to rectify discriminatory environments must tie training to specific organizational policies and systems designed to accomplish the task.[354] For example, an employer that wishes to eliminate glass ceilings would carefully analyze and perhaps revise career paths, train supervisors about the issue, and institute a system of rewards for achieving diversity goals.[355] Judges and juries should be reluctant to credit employers for educational efforts that are not "reinforced by policies, activities, and incentives within the organization."[356]

Second, no training regimen should be wholeheartedly embraced or considered relevant before a meaningful assessment of its features and purported impact has been conducted. The training literature has begun to detail characteristics that should be incorporated into all training programs.[357] Common recommendations include obtaining a "visible

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351. Edelman & Petterson, *supra* note 84, at 114.

352. Professor Beiner likewise finds training programs to be highly relevant at the punitive damage phase. Beiner, *supra* note 350, at 79-80.

353. *Kolstad*, 527 U.S. at 546.

354. Lee Ann Hollister et al., *Diversity Programs: Key to Competitiveness or Just Another Fad?*, 11 ORGANIZATION DEV. J. 49, 58 (1993).

355. *Id.*

356. Beale, *supra* note 308, at 126-27. It should be noted that the *Kolstad* Court failed to describe the good faith safe harbor as an affirmative defense that must be proven by the employer. Belton, *supra* note 70, at 205-06. Nonetheless, the discussion in this Article assumes that it is the employer, and not the employee, who has the burden of proof on the good faith issue.

357. *E.g.*, Anne Perkins Delatte & Larry Baytos, *Guidelines for Successful Diversity Training*, TRAINING, Jan. 1993, at 55; Herff L. Moore et al., *Eight Steps to a Sexual Harassment-Free Workplace*,

commitment [to training] from top leaders," eschewing one shot training courses, selecting qualified facilitators, and carefully assembling participant groups to avoid both homogeneity and tokenism.[358] Also vitally important are mechanisms for long-term program evaluation.[359] Employers proffering evidence of educational efforts should be required to describe their courses' designs and the methods by which they gauge program outcomes.[360]

Finally, training, in order to be relevant to the issue of employer good faith, must be considered in context with the events that give rise to the suit. An employer may conduct training that appears successful on an organization-wide basis and yet is obviously ineffective as applied to the part of the organization in which the plaintiff works. The training, in such a case, should not be dispositive evidence of good faith. Similarly, a corporate educational program may appear effective overall but the employer's response to the plaintiff's discrimination complaint may nevertheless be defensive and inappropriate. The program, in this example, should not bar the imposition of punitive damages.[361]

A good example of a contextual analysis of training relevancy can be found in a recent Fourth Circuit opinion. In *Lowery v. Circuit City Stores, Inc.*, the Fourth Circuit considered the propriety of an award of punitive damages in a race discrimination case.[362] Circuit City proffered evidence of its good faith efforts to educate its employees about its anti-discrimination policy, focusing specifically on a week-long managerial and supervisory training seminar entitled "Managing Through People," a small portion of which covered federal anti-discrimination laws.[363] Those efforts proved

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TRAINING AND DEV., Apr. 1. 1998, at 12; Ellis & Sonnenfeld, *supra* note 17, at 101-02; Mobley, *supra* note 152, at 45; Paskoff, *supra* note 220, at 42; Segal, *supra* note 220, at 129.

358. Ellis & Sonnenfeld, *supra* note 17, at 101.

359. Rynes & Rosen, *supra* note 182, at 253; Wentling & Palma-Rivas, *supra* note 172, at 246; see also Grundmann et al., *supra* note 226, at 182 (offering a list of methodological considerations for evaluating training programs).

360. One reason employers are reluctant to evaluate their training programs is fear that the findings could be used against them in subsequent discrimination litigation. Indeed my colleagues working in the social sciences note that it has become incredibly difficult to convince employers to open their doors to professional researchers. Creating an evidentiary safe harbor for employers and providing an academic research privilege for social scientists could ameliorate the concerns of employers and encourage professional field research on anti-discrimination training. *See generally* Kathleen M. Blee, *The Perils of Privilege*, 24 LAW & SOC. INQUIRY 993 (1999); Felice J. Levine & John M. Kennedy, *Promoting a Scholar's Privilege: Accelerating the Pace*, 24 LAW & SOC. INQUIRY 967 (1999); Robert H. McLaughlin, *From the Field to the Courthouse: Should Social Science Research be Privileged?* 24 LAW & SOC. INQUIRY 927 (1999); Robert H. McLaughlin, *Privilege and Practice in Social Science Research*, 24 LAW & SOC. INQUIRY 999 (1999); Rebecca Emily Rapp, *In Re Cusumano and the Undue Burden of Using the Journalist Privilege as a Model for Protecting Researchers from Discovery*, 29 J.L. & EDUC. 265 (2000); Sudhir Venkatesh, *The Promise of Ethnograhic Research: The Researcher's Dilemma*, 24 LAW & SOC. INQUIRY 987 (1999).

361. I owe these examples and my thinking on this subject to the insights of Linda Krieger.

362. 206 F.3d 431 (2000).

363. *Id.* at 445.

unavailing to the employer due to evidence that the company was permeated by racism at the highest levels and that African-American employees feared reprisal for complaining about discrimination.[364] The court noted that this latter evidence "called into question" the "sincerity of Circuit City's commitment to a company-wide policy against racial discrimination."[365]

Some may argue that observing the three principles described above imposes too great a burden on employers. To do otherwise, however, is not only to refuse to face the truth about anti-discrimination educational programs; it is to endorse a form over substance approach to effectuating Title VII's preventative purpose. In *Kolstad,* the Supreme Court adopted the safe harbor concept to avoid "[d]issuading employers from implementing programs or policies to prevent discrimination."[366] If we really seek to encourage such efforts, only those employers interested in meaningfully addressing employment bias should be granted shelter from punitive damages. [367]

364. *Id.*

365. *Id.* at 446.

366. *Kolstad*, 527 U.S. at 545.

367. The warnings in this Article about misplaced faith in anti-discrimination training echo the cautionary words of Craig Haney and Aida Hurtado in another context. They argue that excessive faith in standardized employment tests diverts "public and political attention away from the structural legacies of slavery and racism." *See* Craig Haney & Aida Hurtado, *The Jurisprudence of Race and Meritocracy*, 18 LAW & HUM. BEHAV. 223, 244 (1994).