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## The Role of Law and Myth in Creating a Workplace that 'Looks Like America'

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ARTICLES

The Role of Law and Myth in Creating  
a Workplace that ‘Looks Like America’

Susan Bisom-Rapp\*

*Equal employment opportunity (EEO) law has played a poor role in incentivizing effective diversity, equity, and inclusion (DEI) and harassment prevention programming. In litigation and investigation, too many judges and regulators credit employers for maintaining policies and programs rather than requiring employers to embrace efforts that work. Likewise, many employers and consultants fail to consider the organizational effects created by DEI and harassment programming. Willful ignorance prevents the admission that some policies and programming harm those most in need of protection.*

*This approach has resulted in two problems. One is a doctrinal dilemma because important presumptions embedded in antidiscrimination law are tethered to employer practices, many of which do not promote EEO. Simultaneously, society faces an organizational predicament because employer practices are driven by unexamined myths about how to achieve bias and harassment-free environments. Neo-institutional theory explains how this form-over-substance approach to EEO law and practice began and has evolved. This Article builds upon that theory by arguing that favorable conditions exist for a shift from a cosmetic to an evidence-based approach to legal compliance. Three developments mark the way forward: (1) a pathbreaking Equal Employment Opportunity Commission (EEOC) report; (2) the EEOC’s call for better research on DEI and harassment prevention program efficacy; and (3) new social science research discussing which DEI efforts are most likely to succeed and those most likely to prompt backlash.*

*To facilitate evidence-based EEO compliance, this Article advocates changes in liability standards. It also recommends the creation of a supervised research safe harbor for employers willing to work with researchers and regulators to assess and continuously improve their DEI and harassment prevention efforts. Finally, the Article urges lawyers to more frequently employ Brandeis briefs in litigation to place social science research directly in front of jurists. Solving the twin problems wrought by cosmetic compliance requires taking seriously the findings of social scientists. An evidence-based approach to DEI and harassment prevention would assist in restoring the promise of EEO law to create healthy, diverse, and bias-free U.S. workplaces.*

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We need a workplace that creates a sense of belonging for everyone.  
 —Google Diversity Annual Report 2020<sup>1</sup>

Corporate practices thought to quell discrimination have frequently activated it.  
 —Frank Dobbin, Daniel Schrage, and Alexandra Kalev<sup>2</sup>

INTRODUCTION

President Joe Biden famously promised to assemble a cabinet that “looks like America,” a pledge especially important in light of the scarcity of minorities and women on his predecessor’s team.<sup>3</sup> Given the ubiquity of diversity rhetoric and programming in the corporate world, this goal was in line with the ethos of many firms.<sup>4</sup> President Biden succeeded in building a remarkably diverse cabinet, including several appointment firsts.<sup>5</sup> Indeed,

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1. Google Diversity Annual Report 2020, at 6, <https://diversity.google/annual-report> [<https://perma.cc/ZM84-HAKY>].

2. Frank Dobbin, Daniel Schrage & Alexandra Kalev, *Rage Against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity*, 80 AM. SOC. REV. 1014, 1036 (2015).

3. Alisha Haridasani Gupta, *Fulfilling a Promise: A Cabinet that ‘Looks Like America’*, N.Y. TIMES, Jan. 21, 2021, <https://www.nytimes.com/2021/01/21/us/biden-cabinet-diversity-gender-race.html> [<https://perma.cc/5UPB-DVUD>]. One day after President Biden’s inauguration, his cabinet nominees were 52 percent people of color and 48 percent female. In comparison, President Donald Trump’s cabinet was 17 percent people of color and 21 percent female. *Id.*

4. See Brent K. Nakamura & Lauren B. Edelman, *Baake at 40: How Diversity Matters in the Employment Context*, 52 U.C. DAVIS L. REV. 2627, 2639 (2019) (“Virtually every organization now has a public commitment to diversity and inclusion as well as policies that purport to prohibit discrimination and harassment and complaint procedures that allow employees to complain about instances of discrimination or harassment.”).

5. President Biden’s cabinet includes the first: female Secretary of the Treasury (Janet Yellen); Black Secretary of Defense (Lloyd Austin); Native American in the cabinet (Deb Haaland, Secretary of the Interior); and Latinx/immigrant to serve as Secretary of Homeland Security (Alejandro Mayorkas). Lindsay Chervinsky & Kathryn Dunn Tenpas, *The Changing Faces of Cabinet Diversity*: George

while there are groups that likely feel their interests are not represented,<sup>6</sup> Biden's selections appear congruent with the professed commitments of many U.S. employers.<sup>7</sup> Unlike many employers, however, the President made good on his promises. Biden's laudable and consequential efforts to place a diverse group of people in powerful executive branch positions represent a symbolic and substantive turning of the page after a period in which equal employment opportunity (EEO) suffered significant setbacks. This historical episode was marked by two features: the Trump administration's well-documented and widely known hostility to the cause of workplace civil rights,<sup>8</sup> and the EEO losses and impacts precipitated by the COVID-19 pandemic.

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Washington through Joe Biden, Brookings (Apr. 13, 2021), <https://www.brookings.edu/blog/fixgov/2021/04/13/the-changing-faces-of-cabinet-diversity-george-washington-through-joe-biden/> [<https://perma.cc/DD4A-LRL2>]. President Biden's cabinet also includes the first Latinx Secretary of Health and Human Services (Xavier Becerra) and first openly gay cabinet secretary (Secretary of Transportation Pete Buttigieg). See *Biden Progress Report*, INCLUSIVE AMERICA (Apr. 23, 2021), <https://inclusiveamerica.org/bidenprogress/> [<https://perma.cc/6FKM-5PLU>].

6. White evangelical Christians, from whose membership the Trump administration frequently drew for high posts, were noticeably absent from the list of Biden cabinet nominees. See Yonat Shimron, *A Look at Joe Biden's Religiously and Ethnically Diverse Cabinet Nominees*, *America Mag.* (Jan. 20, 2021), <https://www.americamagazine.org/politics-society/2021/01/20/president-joe-biden-cabinet-catholics-239767> [<https://perma.cc/LF95-2W5B>] (“One group not represented [among Biden's cabinet nominees]? White evangelicals, the group most loyal to President Donald Trump. Trump not only won an overwhelming majority of white evangelical support, both in 2016 and 2020, he also appointed many to his Cabinet, well beyond their demographic representation.”).

7. See Nakamura & Edelman, *supra* note 4, at 2639.

8. Referencing the Trump administration's civil rights agenda underscores the importance of President Biden's appointments. Assembling a diverse cabinet signals “broader initiatives . . . inextricably tied to policy” and an administration's “spirit . . . and values . . . and who [the administration is] interested in connecting with in the American public.” See Rita Prasad, *Biden Cabinet: Does this Diverse Team Better Reflect America?*, *BBC NEWS* (Jan. 25, 2021), <https://www.bbc.com/news/world-us-canada-55080344> [<https://perma.cc/L9WD-4V92>] (quoting *Ohio State University political science and gender studies Professor Wendy Smooth*). This Article will not dwell further on the “anti-antidiscrimination agenda” of the Trump administration. See David B. Oppenheimer, *Donald Trump, Ronald Reagan, and Administrative Enforcement of Antidiscrimination Law: What Happens when Civil Rights Agencies Are Sabotaged?*, 170 *REVUE FRANÇAIS D'ADMINISTRATION PUBLIQUE* 345, 356 (2019) (noting that President Trump has an “anti-anti-discrimination” agenda). For further information see Bryce Covert, *The Trump Administration Gutted the EEOC*, *THE NATION* (Jan. 28, 2021) <https://www.thenation.com/article/society/janet-dhillon-eeoc/> [<https://perma.cc/H5S9-AT3A>], (detailing the deleterious changes instituted by Trump's chair of the Equal Employment Opportunity Commission Janet Dhillon); Ben Penn & Paige Smith, *Trump Agencies Aim to Reshape Workplace Anti-bias Enforcement*, *DAILY LAB. REP. (BLOOMBERG LAW)* (Oct. 26, 2020), <https://news.bloomberglaw.com/daily-labor-report/trump-agencies-aim-to-reshape-workplace-anti-bias-enforcement> [<https://perma.cc/XMG7-SZSC>] (describing the Trump administration's efforts to “restrict[] the Labor Department's ability to refer complaints from individual workers to the Equal Employment Opportunity Commission and giving the Justice Department heightened oversight”); Fabiola Cineas, *Critical Race Theory, and Trump's War on It, Explained*, *VOX* (Sept. 24, 2020), <https://www.vox.com/2020/9/24/21451220/critical-race-theory-diversity-training-trump> [<https://perma.cc/82D4-28TT>], (discussing Trump's executive order banning federal contractors from conducting racial sensitivity training); Sadie Gurman & Jess Bravin, *Justice Department Seeks to Limit Scope of Landmark LGBT Rights Decision*, *WALL STREET J.* (Jan. 20, 2021), <https://www.wsj.com/articles/justice-department-seeks-to-curtail-workplace-protections-for-gay-transgender-people-11611091426> [<https://perma.cc/G5JG-56VV>] (discussing a last ditch effort to curtail

Regarding the pandemic, Black and Latinx people, in addition to facing health disparities, are overrepresented among essential workers, and hence have borne elevated risks of serious illness and death.<sup>9</sup> Likewise, the popular press extensively covered the disproportionate job losses suffered by women following the shuttering of large swaths of the economy, including the significant rise in unemployment among women of color.<sup>10</sup> There was similar coverage about working women shouldering a disproportionate burden of supervising children as schooling went online—a phenomenon that has hampered and even ended careers.<sup>11</sup> Experts predict that these aspects of the pandemic will have a long lasting impact on EEO.<sup>12</sup>

Fewer may be aware, however, that workplace harassment and discrimination proliferated during the global health emergency.<sup>13</sup>

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the reach of the U.S. Supreme Court’s ruling in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) that the sex discrimination prohibition of Title VII of the Civil Rights Act prohibits discrimination on the basis of sexual orientation and gender identity).

9. Professor Catherine Powell noted that the pandemic did “not affect us all equally” and that “the viruses of sexism and racism” interacted with COVID-19 and amplified its harms disparately. Catherine Powell, *Color of Covid and Gender of Covid: Essential Workers, Not Disposable People*, 33 YALE J.L. & FEMINISM 1, 3–4 (2021). In the two-tier American labor market, essential workers, among whom Black and Latinx people were overrepresented, shouldered an elevated risk of contracting COVID-19. *Id.* at 10. Yet Powell notes that racial and ethnic minorities were ironically also “more likely to suffer from job loss” caused by the pandemic. *Id.* at 11. Additionally, factors such as diminished access to healthcare and dense residential conditions contribute to the greater risk from COVID-19 shouldered by racial and ethnic minorities. See *Health Equity Considerations and Racial and Minority Groups*, CTR. FOR DISEASE CONTROL & PREVENTION (Apr. 19, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/K78T-Y6XU>].

10. See Linda C. McClain & Naomi Cahn, *Gendered Complications of Covid-19: Towards a Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 4 (2021).

11. See generally Jessica Fink, *Sidelined Again: How the Government Abandoned Working Women Amidst a Global Pandemic*, 2022 UTAH L. REV. (forthcoming 2022).

12. See Claire Cain Miller, *Shorter Hours, No Promotions: How the Pandemic Stalled Some Parents’ Careers*, N.Y. TIMES (THE UPSHOT) (July 21, 2021), <https://www.nytimes.com/2021/07/21/upshot/coronavirus-careers.html> [<https://perma.cc/YBX7-F5S8>] (noting that working shorter hours due to care obligations during the pandemic “could have long-term effects on [parents’] careers,” especially those of mothers).

13. One survey revealed that more than half of mothers working as food servers reported an increase in “unwanted sexualized comments from customers” during the pandemic. See ONE FAIR WAGE & UC BERKELEY FOOD LABOR RESEARCH CTR., IT’S A WAGE SHORTAGE, NOT A WORKER SHORTAGE: WHY RESTAURANT WORKERS, PARTICULARLY MOTHERS, ARE LEAVING THE INDUSTRY, AND WHAT WOULD MAKE THEM STAY 3 (May 2021), [https://onefairwage.site/wp-content/uploads/2021/05/OFW\\_WageShortage\\_F.pdf](https://onefairwage.site/wp-content/uploads/2021/05/OFW_WageShortage_F.pdf) [<https://perma.cc/494U-PTXH>]. A recent study of the technology industry found the shift to remote work during the pandemic worsened harassment of and hostility towards “Asian, Black Indigenous, and Latinx [workers], especially women and non-binary people, and transgender and non-binary people generally, and people over 50.” YANG HONG, MCKENSIE MACK, ELLEN PAO & CAROLINE SINDERS, REMOTE WORK SINCE COVID-19 IS EXACERBATING HARM 6 (Mar. 2021), <https://projectinclude.org/assets/pdf/Project-Include-Harassment-Report-0321-F3.pdf> [<https://perma.cc/VP52-4XMH>]. A global survey of five-thousand women in ten countries during the pandemic, found, *inter alia*, 52 percent of respondents reported experiencing “some form of harassment or non-inclusive behavior at work in the past year.” MICHELE PARMELEE & EMMA CODD, DELOITTE, WOMEN@WORK: A GLOBAL OUTLOOK 13 (May 2021), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-women-at-work-global-outlook-report.pdf> [<https://perma.cc/2TBW-SHGF>].

Underscoring the pandemic's exacerbation of workplace inequality, the Equal Employment Opportunity Commission (EEOC) held a hearing on April 28, 2021 on the COVID-19 "civil rights crisis" experienced by many workers.<sup>14</sup> One expert testified about an "onslaught of anti-Asian hate" directed at "Asian Americans who are wrongly blamed for . . . COVID-19."<sup>15</sup> Testimony also revealed that pregnant workers were denied workplace accommodations and that there was widespread caregiving discrimination.<sup>16</sup> Witnesses additionally discussed workers disabled with long-term COVID symptoms in need of accommodations,<sup>17</sup> and significant age discrimination affecting older workers displaced from their jobs due to the pandemic.<sup>18</sup> The experts' statements at the EEOC hearing did not cover the difficulties faced by all vulnerable groups. For example, the pandemic exacerbated the vulnerabilities of LGBTQ workers, who were more likely than the general population to be employed in jobs with high exposure to COVID-19 or work in industries that shuttered because of the pandemic.<sup>19</sup>

These ills highlight the need to create a workplace hospitable to all, or at least most, Americans and make plain the wisdom of President Biden's commitment to make his team reflect the country. Creating healthy and inclusive organizational climates requires effective diversity, equity, and inclusion (DEI)<sup>20</sup> and harassment prevention efforts. Antidiscrimination law,

14. See Press Release, Equal Employment Opportunity Commission, *EEOC Examines Connections Between COVID-19 and Civil Rights* (Apr. 28, 2021), <https://www.eeoc.gov/newsroom/eeoc-examines-connections-between-covid-19-and-civil-rights> [<https://perma.cc/UH5Q-CNFT>].

15. Testimony of John C. Yang, President and Executive Director, Asian Americans Advancing Justice, *EEOC Examines Connections Between COVID-19 and Civil Rights* (Apr. 28, 2021), <https://www.eeoc.gov/meetings/meeting-april-28-2021-workplace-civil-rights-implications-covid-19-pandemic/yang> [<https://perma.cc/F5DS-S2E8>].

16. Testimony of Fatima Goss Graves, President and CEO, National Women's Law Center, *EEOC Examines Connections Between COVID-19 and Civil Rights* (Apr. 28, 2021), <https://www.eeoc.gov/meetings/meeting-april-28-2021-workplace-civil-rights-implications-covid-19-pandemic/graves> [<https://perma.cc/V56H-D4M9>].

17. Testimony of Damon Hewitt, Acting President and Executive Director/Executive Vice President, Lawyers Committee for Civil Rights Under Law, *EEOC Examines Connections Between COVID-19 and Civil Rights*, (Apr. 28, 2021) <https://www.eeoc.gov/meetings/meeting-april-28-2021-workplace-civil-rights-implications-covid-19-pandemic/hewitt> [<https://perma.cc/6XP9-GC37>].

18. Testimony of Laurie McCann, Senior Attorney, AARP, *EEOC Examines Connections Between COVID-19 and Civil Rights*, (Apr. 28, 2021) <https://www.eeoc.gov/meetings/meeting-april-28-2021-workplace-civil-rights-implications-covid-19-pandemic/mccann> [<https://perma.cc/2WB8-44DE>].

19. See Craig Konnoth, *Supporting LGBTQ Communities in the COVID-19 Pandemic*, in *COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE* 204–09 (Scott Burris, Sarah de Guia, Lance Gable, Donna Levin, Wendy E. Parmet & Nicolas P. Terry eds., 2021), <https://www.publichealthlawwatch.org/covid19-policy-playbook> [<https://perma.cc/EEH9-62E3>].

20. While different organizations may embrace different notions of diversity, equity, and inclusion, the University of Michigan's discussion of the terms is instructive. The University of Michigan is known for its effective implementation of the national ADVANCE program, which promotes gender diversity in science and engineering. See generally Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006). Additionally, the university's affirmative action efforts in admissions are known for having drawn the scrutiny of the Supreme Court in twin cases in 2003. See Nakamura & Edelman, *supra* note 4, at 2632. The university defines its commitment to DEI as "key to individual flourishing, educational excellence and the advancement of

however, has played a poor role in incentivizing DEI and harassment prevention programming that works. As explained below, in litigation and investigation, too many judges and regulators credit employers for maintaining DEI and harassment policies and programs rather than requiring employers to embrace efforts that deliver measurable improvements.<sup>21</sup> Many legislators, consultants, and employers fail to assess the effects of mandated or voluntary DEI and harassment programming.<sup>22</sup> This willful ignorance prevents us from admitting that some policies and programming harm those we most want to assist.<sup>23</sup>

How has such a situation come about? Sociologist Lauren Edelman's theory of legal endogeneity posited, and her research confirmed, that the terms of EEO law compliance were created by the entities subject to regulation rather than by government authorities.<sup>24</sup> Decades of sociological research by Edelman and other neo-institutional organizational scholars has revealed that, in response to the passage of federal antidiscrimination law, firms' compliance experts recommended EEO policies and programs that appeared rational and have since become widespread.<sup>25</sup> Included among these policies and programs are: "affirmative action offices or affirmative action officer positions, diversity training programs, antiharassment policies, grievance procedures, equal opportunity statements, and the like."<sup>26</sup> These

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knowledge." University of Michigan, *Defining Diversity, Equity and Inclusion*, <https://diversity.umich.edu/about/defining-dei/> [<https://perma.cc/37XX-AXXN>]. Diversity is referenced by way of personal characteristics, including "race and ethnicity, gender and gender identity, sexual orientation, socioeconomic status, language, culture, national origin, religious commitments, age, (dis)ability status and political perspective." *Id.* Equity refers to maintaining a culture that challenges "bias, harassment, and discrimination" in order to secure "equal opportunity for all persons." *Id.* Inclusion refers to efforts to ensure "differences are welcomed, different perspectives are respectfully heard and where every individual feels a sense of belonging." *Id.*

21. See discussion *infra* Parts I.B & II.A.

22. Employers resist careful examination of their policies and programs for fear of creating evidence that might be used against them in litigation. See discussion *infra* Part II.B.

23. The culture war surrounding DEI provides additional impetus for a long overdue change of course. Examples of the culture war surrounding DEI instruction include President Trump's Executive Order banning the use of federal funds for diversity training, President Biden's rescinding of that order on his first day in office, and the efforts of conservative states to pass laws prohibiting the teaching of critical race theory. See generally Barbara Sprunt, *The Brewing Political Battle Over Critical Race Theory*, NAT'L PUB. RADIO (June 29, 2021), <https://www.npr.org/2021/06/02/1001055828/the-brewing-political-battle-over-critical-race-theory> [<https://perma.cc/H9NU-ZYTY>]; Jennifer Steinhauer, *As Military Addresses Diversity, Republicans See Culture War Target*, N.Y. TIMES (June 11, 2021), <https://www.nytimes.com/2021/06/10/us/politics/military-diversity.html>. [<https://perma.cc/W7KK-UHGJ>]; Valerie Strauss, *The Culture War Over Critical Race Theory Looks Like the One Waged 50 Years Ago Over Sex Education*, WASH. POST (July 25, 2021), <https://www.washingtonpost.com/education/2021/07/25/critical-race-theory-sex-education-culture-wars/> [<https://perma.cc/CKD9-NCH8>].

24. See LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 12–14, 39 (2016) [hereinafter WORKING LAW].

25. See discussion *infra* Part I.B.

26. EDELMAN, WORKING LAW, *supra* note 24, at 101.



so-called “symbolic legal structures”<sup>27</sup> did not focus on EEO outcomes and measures. Instead, many firms administered and interpreted them in ways that preserved managerial flexibility and the status quo.<sup>28</sup> Over time, courts began to look at firms’ compliance efforts as factors in determining liability under antidiscrimination law without carefully assessing program or policy efficacy.<sup>29</sup> This undiscerning acceptance of symbolic legal structures created endogenous law; the firms subject to the law set the legal terms of compliance.<sup>30</sup>

This form-over-substance approach to compliance has resulted in two problems. First, we face a doctrinal dilemma because, as will be expanded upon below, important presumptions embedded in antidiscrimination law are tethered to employer practices, many of which do not promote EEO.<sup>31</sup> Second, we confront an organizational predicament because employer practices are driven by unexamined myths about how to achieve bias and harassment-free environments.<sup>32</sup> These presumptions and myths—for example, that diversity training changes employee behavior or that sexual harassment grievance procedures will decrease the incidence of harassment—reify cosmetic compliance and hinder the transformative potential of EEO law.

Even so, this Article demonstrates that favorable conditions exist for a shift from a cosmetic to an evidence-based approach to legal compliance. To facilitate that shift, I advocate not only a change in liability standards,<sup>33</sup> but also the creation of a research safe harbor for innovative employers willing to work with researchers and regulators to assess and continuously improve their DEI and harassment prevention efforts.<sup>34</sup> I also recommend that, as a matter of litigation strategy, lawyers make more frequent use of Brandeis briefs to place social science research directly in front of jurists.<sup>35</sup> The way to solve the doctrinal dilemma and the organizational predicament is to take seriously the findings of social scientists.

To address this pressing topic, Part I draws from neo-institutional organizational scholarship to provide historical information on employers’

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27. *Id.* Edelman defined a “legal structure” as “[a]ny [employer] policy or practice designed to implement a law or legal principle or that is created in response to law or by an officer with compliance responsibilities, or is a statement that pertains to law . . . .” *Id.* She described “symbolic” as evoking “a notion of legality and compliance, usually because the structure resembles a form . . . that already enjoys legitimacy and connotes legality.” *Id.* While a symbolic legal structure is not necessarily substantively ineffective, some policies and practices “do little or nothing to advance the status of minorities or women.” *Id.* Such structures are “merely symbolic.” *Id.*

28. *See* discussion *infra* Part I.A.

29. *See* discussion *infra* Part I.B.

30. *Id.*

31. *See* discussion *infra* Part II.A.

32. *See* discussion *infra* Part I.A.

33. *See* discussion *infra* Part III.A.

34. *See* discussion *infra* Part III.B.

35. *See* discussion *infra* Part III.C.

organizational responses to antidiscrimination law. Part I then discusses how corporate EEO compliance efforts, in particular DEI and anti-harassment policies and programming, were incorporated into legal doctrine through a process described by Edelman as legal endogeneity.<sup>36</sup> Like the organizations themselves, most courts have not carefully assessed the utility of symbolic structures proffered by employers as evidence in employment discrimination lawsuits.<sup>37</sup> Part I also explains how in EEO cases, courts are generally loath to interrogate employer decision-making, a reluctance evident in several judicially created rules, presumptions, and inferences.<sup>38</sup> These doctrines amplify the evidentiary advantage that employers enjoy in litigation and reward bulletproofing and discrimination laundering.<sup>39</sup>

In Part II, I argue that our understanding about such programming has changed, creating favorable conditions for a move to an evidence-based approach to legal compliance. More specifically, Part II examines three developments: (1) a pathbreaking 2016 EEOC report, which concluded that harassment is prevalent and underreported due to fear of retaliation, and that present forms of harassment prevention training cannot be proven effective; (2) the EEOC's recommendation that opportunities for research on policy and program efficacy involving employers, researchers, and regulators should be explored; and (3) new social science research distinguishing between the kinds of harassment prevention and DEI efforts that are likely to succeed and those more likely to prompt backlash.<sup>40</sup>

Part III maintains that judges' and regulators' form-over-substance approach to EEO compliance is not sustainable given recent social science research and shifting public awareness. Like recent commentators, I agree that the employer liability standards in employment discrimination law must change.<sup>41</sup> There is also a role for carefully considering changes in what employers may use as competent evidence in EEO cases. A change in liability

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36. See EDELMAN, WORKING LAW, *supra* note 24, at 12–14. I call the phenomenon spurred on by the U.S. Supreme Court “the jurisprudence of education and prevention.” See Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the New Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 7–13 (2001) [hereinafter Bisom-Rapp, *An Ounce of Prevention*].

37. See *infra* notes 171–172 and accompanying text.

38. See Sandra F. Sperino, *Disbelief Doctrines*, 39 BERKELEY J. EMP. & LAB. L. 231 (2018) [hereinafter Sperino, *Disbelief Doctrines*].

39. See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 964 (1999) [hereinafter Bisom-Rapp, *Bulletproofing the Workplace*]; TRISTIN GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 2 (2017) [hereinafter GREEN, DISCRIMINATION LAUNDERING].

40. See discussion *infra* Part II.

41. See, e.g., Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155, 195–96 (2021) (recommending strict vicarious liability for employers in cases involving supervisor and co-worker hostile environment harassment); see GREEN, DISCRIMINATION LAUNDERING, *supra* note 39, at 151 (recommending, in cases of individual discrimination, a system of vicarious liability holding employers strictly liable).

and evidentiary standards, however, is a necessary but insufficient corrective to conditions we face in our post-pandemic workplace. In addition to a change in liability standards, I recommend programming incentives for employers who take DEI and the concept of the respectful workplace to heart. I advocate for creating a research safe harbor for employers willing to engage with researchers and regulators on EEO and DEI.<sup>42</sup> Finally, in Part III, I argue for more frequent use of Brandeis briefs in EEO suits to challenge the mythology about how best to achieve bias-free workplaces.

Part IV then provides a short conclusion. The doctrinal law of equal opportunity should not stand when it is based on falsehoods and wishful thinking. This is especially true as we emerge from a period when EEO gains were under political and viral attack. A fresh, evidence-based approach to DEI and bias eradication would assist in reclaiming the EEO ground lost during the last several years and help employers build workplaces that look like America.

#### I. ORGANIZATIONAL RESPONSES TO EEO LAW AND DOCTRINAL RESPONSES TO ORGANIZATIONS' COMPLIANCE PROGRAMMING

Scholars from many disciplines have explored why EEO law has proven to be a less transformative force than its strongest supporters hoped.<sup>43</sup> Title VII of the Civil Rights Act of 1964 (Title VII) outlaws discrimination based on race, color, religion, sex, and national origin.<sup>44</sup> The Age Discrimination in Employment Act of 1967 (ADEA) offers protection from age bias for those forty-years-old and older.<sup>45</sup> The Americans with Disabilities Act of 1990 (ADA) prohibits disability discrimination.<sup>46</sup> In 1975, the Supreme Court described Title VII's primary goal as "prophylactic."<sup>47</sup> According to the Court, the law was a stimulus for employer self-evaluation, a process that would identify and eliminate policies of "dubious legality."<sup>48</sup> A few years later, the Court declared that the "'primary objective' of Title VII is to bring employment discrimination to an end."<sup>49</sup> Despite EEO law's prohibitions, however, a number of measures, including labor force participation, wage

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42. See discussion *infra* Part III.B.

43. Indeed, many years ago, I suggested that those who teach Employment Discrimination Law embrace a multidisciplinary approach by incorporating readings from economics, psychology, sociology, as well as critical race and feminist legal theory. See Susan Bisom-Rapp, *Contextualizing the Debate: How Feminist and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law*, 44 J. LEGAL EDUC. 366, 393 (1994) ("By contextualizing the debate, we can help students gain an appreciation for the complexity of the problem of employment discrimination, and the law's approach to it.").

44. 42 U.S.C. §§ 2000e–2000e-17 (2018).

45. 29 U.S.C. §§ 621–634 (2018).

46. 42 U.S.C. §§ 12101–12213 (2018).

47. *Albemarle Paper v. Moody*, 422 U.S. 405, 417 (1975).

48. *Id.* at 417–18.

49. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982).

gaps, representation in management, and occupational segregation, indicate that employment discrimination is far from vanquished.<sup>50</sup>

Neo-institutional organizational theory is helpful in explaining why antidiscrimination law has failed to remedy continuing racial, gender, and other disparities in the labor market. Focusing on “the process through which common systems of meaning, values and norms develop among . . . organizations,”<sup>51</sup> the picture painted by neo-institutional research is one of regulation by the regulated through processes that are subtle, taken for granted, and sweeping in their impact. Extensive research by neo-institutionalist scholars over the last thirty-five years has revealed how employers reacted to the passage of the EEO statutes beginning in the 1960s. Employers’ embrace of symbolic legal structures—for example, adopting EEO policies and grievance procedures, introducing harassment and diversity training, and opening affirmative action (AA) offices—shaped the definition of legal compliance.<sup>52</sup> Such scholarship also illuminates how legal authorities increasingly deferred to symbolic structures as evidence of non-discrimination irrespective of the substantive effects of those structures.<sup>53</sup> This form-over-substance approach to compliance restricts EEO law’s capacity to end employment discrimination. A neo-institutionalist description of how these changes transpired appears in Parts I.A and I.B below.

#### A. *Organizational Symbolic Compliance or Mythic Compliance?*

Neo-institutionalist scholars note that the civil rights and social movements of the 1950s and 1960s ushered in a revolution in personnel and human resources policies and practices.<sup>54</sup> The Equal Pay Act of 1963<sup>55</sup> was the first piece of EEO legislation. It was closely followed by Title VII, which passed the following year. Most civil rights legislation is ambiguous; the law

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50. See EDELMAN, WORKING LAW, *supra* note 24, at 6–10. See generally SUSAN BISOM-RAPP & MALCOLM SARGEANT, LIFETIME DISADVANTAGE DISCRIMINATION AND THE GENDERED WORKFORCE (2016) (describing how factors such as stereotyping, intersectional discrimination, caregiving responsibility, pay inequality, glass ceilings, occupational segregation, part-time work, and pension schemes disadvantage women over the course of their working lives and lead to a greater incidence of poverty for women in retirement).

51. Lauren B. Edelman & Shauhin A. Talesh, *To Comply or Not to Comply—That Isn’t the Question: How Organizations Construct the Meaning of Compliance*, in EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 103, 104 (Edward Elgar ed., 2011) [hereinafter Edelman & Talesh, *To Comply or Not to Comply*].

52. See discussion *infra* Parts I.A & I.B.

53. See discussion *infra* Part I.B.

54. See Frank Dobbin & Alexandra Kalev, *Are Diversity Programs Merely Ceremonial? Evidence-Free Institutionalization*, in THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 808, 810 (Royston Greenwood, Christine Oliver, Thomas B. Lawrence, & Renate E. Meyer eds., 2017) [hereinafter Dobbin & Kalev, *Evidence-Free Institutionalization*]. See generally FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY (2009).

55. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2018)).

prohibits discrimination on various grounds, but does not detail any particular set of steps employers must take to be legally compliant.<sup>56</sup> Employers responded to the uncertainty in the changing legal environment by creating structures—policies and programs—that communicated their support for the new social norms demanded by the civil rights and women’s movements and new EEO legislation.<sup>57</sup> Among the structures created were grievance procedures,<sup>58</sup> EEO and AA offices,<sup>59</sup> formal promotion mechanisms,<sup>60</sup> anti-harassment policies,<sup>61</sup> and employee and manager training programs.<sup>62</sup>

According to leading neo-institutionalist Lauren Edelman, for the first twenty-five years of Title VII, compliance experts, particularly HR managers, promoted the creation and diffusion of compliance structures. These compliance structures are what neo-institutionalists call symbolic structures.<sup>63</sup> They signaled the employer’s attention to EEO, but did “not guarantee the substantive achievement of civil rights.”<sup>64</sup> The actions of compliance professionals were responsive to the “compliance dilemma” faced by employers.<sup>65</sup> On one hand, new EEO legislation, initial government pressure during the administrations of Presidents Kennedy and Johnson, lawsuits, and social movements created normative pressure on employers to bring organizations in line with changing expectations.<sup>66</sup> Countering that pressure, however, was some managers’ and trade unionists’ resistance to change. The former were concerned that hiring minorities and women ran counter to meritocracy, while the latter saw tension between EEO mandates and the concepts of seniority and negotiated work rules.<sup>67</sup>

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

57. See Dobbin & Kalev, *supra* note 54, at 810–11.

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

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

60. See Frank Dobbin, John R. Sutton, John W. Meyer & Richard Scott, *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 AM. J. SOC. 396 (1993).

61. See Lauren B. Edelman & Jessica Cabrera, *Sex-Based Harassment and Symbolic Compliance*, 16 ANN. REV. L. & SOC. SCI. 361, 373 (2020); Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, 116 PROC. NAT’L ACAD. SCI. 12255 (2019) [hereinafter Dobbin & Kalev, *Promise and Peril*].

62. *Id.*

63. EDELMAN, *WORKING LAW*, *supra* note 24, at 100. It is possible for a policy or program to be *symbolic* and produce *substantive* EEO gains. *Id.* at 101. The substantive effectiveness of symbolic structures functions on a continuum. *Id.* at 102. Some may be substantively effective, others neutral in EEO impact, and still others may harm those they ostensibly were designed to help.

64. *Id.* at 100.

65. *Id.* at 102–06.

66. *Id.*

67. *Id.*

Policies and programs that operated symbolically and with minimal organizational disruption proved an attractive solution. Implementation of EEO policies and non-union grievance procedures conveyed employers' commitment to non-discrimination and due process while preserving managerial prerogatives and flexibility.<sup>68</sup> These symbolic policies and programs spread broadly across U.S. organizations in the decades after the passage of the first modern civil rights statutes.<sup>69</sup> HR professionals, AA and diversity managers, and in-house counsel argued in favor of such structures because they offered forms of litigation and liability prevention.<sup>70</sup> EEO policies and programs eventually acquired a veneer of rationality<sup>71</sup> and wide acceptance.<sup>72</sup>

While the spread of symbolic EEO structures was wide, the efficacy of the adopted policies and programs went unquestioned by those advocating their embrace.<sup>73</sup> Over time, however, and as will be explored in more detail in Part II below, researchers determined that many of the actions taken by organizations are ineffective, if not counterproductive.<sup>74</sup> As noted by one group of scholars:

[O]rganizations adopt antidiscrimination policies, but decouple their formal policies from their informal practice. They create special EEO compliance offices and affirmative action managers, but give those offices and managers no real authority to change discriminatory organizational behavior. They institute performance evaluation procedures and progressive discipline policies, but fail to discern when managers use these policies to cover up discrimination rather than to prevent it. . . . [M]any of the most common structures, such as diversity evaluations, diversity training, and minority networking programs, do little to improve the status of women and minorities and may even harm minority groups.<sup>75</sup>

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68. *Id.* at 107–08.

69. See Linda Hamilton Krieger, Rachel Kahn Best & Lauren B. Edelman, *When "Best Practices" Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 L. & SOC. INQ. 843, 846 (2015).

70. Edelman & Talesh, *To Comply or Not to Comply*, *supra* note 51, at 108.

71. *Id.* As Edelman and Talesh noted, "Neo-institutionalists argue that rationality is socially constructed by non-market factors (such as widely accepted norms and patterns of behavior) that come to be taken for granted and institutionalized through organizational fields." *Id.* at 104.

72. See Krieger, et al., *supra* note 69, at 846; Anna Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 L. & SOC. REV. 83 (2005); John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794 (1996).

73. See Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Active and Diversity Policies*, 71 AM. SOC. REV. 589, 590 (2006) ("Whereas there has been a great deal of research on the sources of inequality, there has been little on the efficacy of different programs for countering it. At best, 'best practices' are best guesses. We know a lot about the disease of workplace inequality, but not much about the cure.")

74. Krieger et al., *supra* note 69, at 846.

75. *Id.* at 846–47. Citations were removed from the quote. The following are the citations that were removed: on decoupling formal antidiscrimination policies from informal practices, see Karl E. Weick, *Educational Organizations as Loosely Coupled Systems*, 21 ADMIN. SCI. Q. 1–19 (1976); Edelman, *Legal*

That EEO policies and practices were widely embraced by organizations,<sup>76</sup> management and employee-side lawyers,<sup>77</sup> government regulators,<sup>78</sup> and courts<sup>79</sup> is certain. Neo-institutionalists, however, debate the motives behind the advocacy for these structures.

Most neo-institutionalists focus on the prevalence of *symbolic* EEO structures, implicitly suggesting that employers' compliance efforts are driven by ceremonial shows of fidelity to law rather than a desire for *substantive* change.<sup>80</sup> Some legal scholars have described neo-institutionalist research as skeptical of the aims of compliance efforts.<sup>81</sup> Lauren Edelman prudently noted that “[s]ymbolic structures may be merely symbolic, may be both symbolic and substantive, or may fall somewhere in between merely symbolic and substantive.”<sup>82</sup> Even so, when legal authorities such as courts, legislatures, or administrative agencies “infer legality from the mere presence of symbolic structures”<sup>83</sup> a cosmetic approach to EEO is advanced that rewards effective, ineffective, and harmful efforts alike and “undermines legal ideals.”<sup>84</sup>

Recently, neo-institutional scholars Frank Dobbin and Alexandra Kalev set their views apart from those of most neo-institutionalists. They characterized the proponents of EEO structures as civil rights crusaders and

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*Ambiguity and Symbolic Structures*, *supra* note 59. On organizations failing to give affirmative action officers and compliance managers authority to address discriminatory behaviors, see CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975); Edelman, *Legal Environments and Organizational Governance*, *supra* note 58. On instituting formal performance evaluation procedures and discipline policies but failing to discern where managers cover up discrimination, see Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 39. ; On common DEI structures doing little to improve the status of women and minorities, see Kalev et al., *supra* note 73, at 590.

76. See *supra* notes 54–62 and accompanying text.

77. See generally Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 39, (discussing views of defense and plaintiff-side lawyers); see also Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3–75 (2003) (noting that defense attorneys in harassment cases reference compliance structures in their arguments before judges).

78. See Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1586 (2014) (noting in a study of the EEOC's systemic litigation and remedial efforts that the remedies pursued mirror those long advocated by HR professionals).

79. See discussion *infra* Part I.B1.

80. Dobbin & Kalev, *Evidence-Free Institutionalization*, *supra* note 54, at 808–09. Dobbin and Kalev cite the following scholars for this proposition: John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977); Edelman, *Legal Environments and Organizational Governance*, *supra* note 58; Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 59.

81. See, e.g., Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 244 (2018) (describing the skeptical stance taken by some sociologists to harassment complaint procedures and harassment prevention policies).

82. EDELMAN, *WORKING LAW*, *supra* note 24, at 32.

83. *Id.* at 39.

84. *Id.*

innovators who sought to vanquish discrimination.<sup>85</sup> Among the individuals who helped broadly disseminate common EEO practices were women and minority corporate leaders, human resources professionals, and “crusading regulators and liberal litigators.”<sup>86</sup> Neither the EEO champions, nor the executives who sought to retain managerial prerogatives, knew whether the efforts would succeed.<sup>87</sup> Rather, these actors were motivated by myths, such as the belief that “diversity training reduces bias, and promotes workforce diversity.”<sup>88</sup> Such corporate myths are resistant to evidence to the contrary, which explains the persistence of ineffective or counterproductive EEO policies and practices.<sup>89</sup>

Dobbin and Kalev encouraged neo-institutionalists to study the effects of EEO compliance structures. By providing data on efficacy, this research might advance a form of diversity management that is evidence-based.<sup>90</sup> Parts II and III below will flesh out and build on their insights by arguing that the time is ripe not only for a change in compliance structures but also a change in how doctrinal law treats them. Before that, however, one must consider Lauren Edelman’s theory of legal endogeneity, and how EEO policies and practices inspired the creation of a jurisprudence of education and prevention.

#### *B. Legal Endogeneity and the Jurisprudence of Education and Prevention*

Lauren Edelman’s theory of legal endogeneity posits and demonstrates how standards for legal compliance can be constructed not by state authorities but by those subject to legal regulation. Regarding EEO law, the process began with compliance professionals recommending the creation of symbolic structures: EEO policies, programs, and procedures that generally did not focus on substantive outcome measures.<sup>91</sup> Once created, when legal rules appeared to conflict with “business norms and values,” the structures were interpreted and administered in a way that preserved “traditional management prerogatives.”<sup>92</sup> Over time, the structures signaled fealty to antidiscrimination law while preserving the ability of organizations to operate with minimal disruption.<sup>93</sup>

Problematically, in EEO litigation, defense lawyers began to use symbolic structures, such as EEO policies and programs, as evidence of non-

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85. Dobbin & Kalev, *Evidence-Free Institutionalization*, *supra* note 54, at 811.

86. *Id.* at 809, 812.

87. *Id.*

88. *Id.* at 809.

89. *Id.* (“The myth that diversity training reduces bias . . . remains strong despite hundreds of studies finding that bias is resistant to training.”).

90. *Id.* at 823.

91. See EDELMAN, *WORKING LAW*, *supra* note 24, at 123.

92. *Id.* at 124.

93. *Id.* at 124–25.



liability.<sup>94</sup> Through a process Edelman has referred to as “judicial deference,” many judges eventually agreed that employer EEO policies and programs are relevant to liability and probative on the issue of bias.<sup>95</sup> Edelman noted that when courts reference symbolic structures in their decisions, assuming their relevance without interrogating efficacy, formal law becomes endogenous; thus, the subjects of civil rights legislation establish the terms of legal compliance.<sup>96</sup>

There are at least two areas where what I call the “jurisprudence of education and prevention” is operative: harassment doctrine and the rules regarding punitive damages in EEO cases.<sup>97</sup> Additionally, judges’ general unwillingness to second guess employer decision-making amplifies the evidentiary advantages enjoyed by employers in EEO cases.<sup>98</sup> These two sides of the same coin—one a hat tip to organizations’ preventative policies and practices, the other an admission that courts are not otherwise interested in interrogating employer processes—reinforce a cosmetic approach to antidiscrimination law that has crippled its transformative potential. These matters are described below.

### *1. The Jurisprudence of Education and Prevention Begins with Harassment and is Elaborated in Punitive Damages Doctrine*

Harassment prevention training, policies, and grievance procedures elegantly illustrate Edelman’s legal endogeneity theory, and my identification of an EEO jurisprudence of education and prevention. While the Supreme Court initially interpreted Title VII’s primary purpose as ending employment discrimination,<sup>99</sup> the statute does not mandate the tools for accomplishing that aim. More specifically, Title VII does not mention harassment policies, grievance procedures, or harassment training. Beginning in the late 1970s, however, soon after district courts started finding harassment actionable,<sup>100</sup> human resources professionals began recommending that special harassment grievance procedures be created<sup>101</sup>

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94. *Id.* at 165–66.

95. *Id.* at 5.

96. *Id.* at 39.

97. See discussion *infra* Part I.B.1.

98. See discussion *infra* Part I.B.2.

99. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982).

100. Abigail Saguy noted that “[t]he first feminist victory in the courts dates to 1977 . . . . The decision in this case was informed by an early draft of [Catharine] MacKinnon’s *Sexual Harassment of Working Women*, which the author herself had given to a law clerk on the case.” Abigail C. Saguy, *WHAT IS SEXUAL HARASSMENT: FROM CAPITOL HILL TO THE SORBONNE* 31 (2003). See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

101. Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1209 (2007) [hereinafter Dobbin & Kelly, *How to Stop Harassment*].

and harassment training programs initiated.<sup>102</sup> Adding urgency to their recommendations, compliance professionals at the time inflated the risk of lawsuits by referencing surveys indicating that a majority of women had experienced harassment.<sup>103</sup> In 1980, the EEOC, the federal agency responsible for enforcing Title VII, published its *Guidelines on Discrimination Because of Sex*,<sup>104</sup> which set forth a recipe for creating harassment-free environments. Stating that “[p]revention is the best tool” to eradicate harassment, the EEOC recommended employers strongly condemn harassment, create penalties for engaging in harassment, communicate to employees “how to raise the issue of harassment . . . and develop methods to sensitize all concerned.”<sup>105</sup>

Although not mentioned by those guidelines, educational programming and employee training is a readily available means for discussing harassment, expressing disapproval, and sensitizing the workforce.<sup>106</sup> Indeed, as a pathbreaking 2016 EEOC report noted, after the 1980 guidelines were issued, many employers created training programs in hopes of preventing harassment.<sup>107</sup> Employers may have been influenced by erroneous claims by personnel professionals “suggesting that the law required [harassment] training.”<sup>108</sup> Human resources professionals in the late 1970s and early 1980s similarly and inaccurately claimed that harassment grievance procedures were legally mandatory and could stave off liability.<sup>109</sup>

The Supreme Court first addressed sexual harassment as a Title VII violation in 1986 in *Meritor Savings Bank, FSB v. Vinson*.<sup>110</sup> Although the case is a landmark decision because it recognized that the creation of a hostile environment based on sex is actionable under EEO law,<sup>111</sup> dicta in the opinion set the stage for what I call the jurisprudence of education and prevention.<sup>112</sup> The employer in the case argued plaintiff Mechelle Vinson’s claim should be barred because of the employer’s antidiscrimination policy and Vinson’s failure to file a complaint about her supervisor via the employee grievance procedure.<sup>113</sup> Justice William Rehnquist, writing for the majority, rejected

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102. *Id.* at 1212.

103. *Id.* at 1209.

104. 29 CFR §§ 1604.1–.11 (1980).

105. *Id.* at § 1604.11(f).

106. Bisom-Rapp, *An Ounce of Prevention*, *supra* note 36, at 17.

107. CHAI R. FELDBLUM & VICTORIA LIPNIC, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 44, Section III.C. para. 1 (2016) [hereinafter EEOC TASK FORCE REPORT].

108. Dobbin & Kelly, *How to Stop Harassment*, *supra* note 101, at 1212.

109. *Id.* at 1211.

110. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

111. *Id.* at 65.

112. See Bisom-Rapp, *An Ounce of Prevention*, *supra* note 36, at 8; see also EDELMAN, WORKING LAW, *supra* note 24, at 202 (noting that the dicta, while not creating an employer affirmative defense, indicated that the Court might well do so in a future case).

113. *Vinson*, 477 U.S. at 70–73.

that argument but provided guidance on how employers might fashion a policy and procedure that would serve as a defense. He noted that the bank's "general nondiscrimination policy did not address sexual harassment in particular," and that the "grievance procedure . . . required an employee to complain first to her supervisor, [who] in this case" Vinson had identified as the perpetrator.<sup>114</sup> That the bank should be insulated "from liability might be [a] substantially stronger [contention] if its procedures were better calculated to encourage victims of harassment to come forward."<sup>115</sup>

As Lauren Edelman noted, the *Vinson* dicta was promising for employers yet ambiguous.<sup>116</sup> After the decision, personnel professionals more forcefully asserted that harassment policies and grievance procedures would provide employers with a liability shield.<sup>117</sup> In court, defense attorneys stepped up their assertions that the policies and grievance procedures should preclude employer liability.<sup>118</sup> As an empirical matter, despite the lack the doctrinal clarity, "[l]ower courts were increasingly deferring to these symbolic structures."<sup>119</sup> Educational programming also increased; Dobbin and Kelly dated the explosive growth in harassment training to the period following the *Vinson* decision.<sup>120</sup>

Twelve years later, in 1998, an EEO jurisprudence of education and prevention was articulated by the Supreme Court in twin harassment cases: *Burlington Industries, Inc. v. Ellerth*<sup>121</sup> and *Faragher v. City of Boca Raton*.<sup>122</sup> A year after that, the Supreme Court firmed up its new jurisprudence in an EEO case involving punitive damages, *Kolstad v. American Dental Ass'n*.<sup>123</sup> Together, the cases transformed jurists' prior articulation of the primary purpose of Title VII, which the Court had noted in 1975 was "prophylactic."<sup>124</sup>

As noted above, this earlier understanding of the objectives of EEO law focused on, inter alia, the potential of employer liability to catalyze employer self-evaluation.<sup>125</sup> Concern about backpay<sup>126</sup> and other potential remedies

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114. *Id.* at 72–73.

115. *Id.* at 73.

116. EDELMAN, WORKING LAW, *supra* note 24, at 202.

117. *Id.*

118. *Id.*

119. *Id.* at 203.

120. Dobbin & Kelly, *How to Stop Harassment*, *supra* note 101, at 1216, 1220. An additional boost to training occurred when Congress passed the Civil Rights Act of 1991, which, among other things, made compensatory and punitive damages available to discrimination plaintiffs. Civil Rights Act of 1991, Pub. L. No. 102-166, tit. I, §102, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a).

121. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

122. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998).

123. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544–46 (1999).

124. *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975) (noting that the twin goals of Title VII are prevention and compensation).

125. *Id.*

126. *Id.*

would cause employers to scrutinize their policies and practices proactively, and eliminate those that were biased without the necessity of litigation.<sup>127</sup> The purpose of deterrence in this view is outcome driven; the aim is to rid the workplace of discrimination. In contrast, the new jurisprudence of education and prevention, created by *Ellerth*, *Faragher*, and *Kolstad*, places the emphasis on symbolic demonstrations of fealty to EEO law rather than requiring bias elimination.

*Ellerth* and *Faragher* established the corporate liability standards for harassment perpetrated by a supervisor. In quid pro quo cases, where a tangible employment action is taken against the plaintiff, the Court held vicarious liability is always appropriate because a superior's ability to adjust a subordinate's employment status is aided by the agency relationship between the employer and the supervisor.<sup>128</sup> On the other hand, in hostile environment cases, where no tangible employment action is taken, employers may assert a two-element affirmative defense. That defense requires the defendant to demonstrate: (1) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior,"<sup>129</sup> and (2) that the plaintiff unreasonably declined to avail themselves of "preventative or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>130</sup> While employers are not required to adopt harassment policies and grievance procedures, the existence of those structures is relevant to the first element.<sup>131</sup> And though the plaintiff's failure to use a grievance procedure is not the only way to satisfy the second element, "a demonstration of such failure will normally suffice to satisfy the employer's burden."<sup>132</sup>

By the late 1990s, when *Ellerth* and *Faragher* were decided, nineteen out of twenty large employers had adopted harassment grievance procedures.<sup>133</sup> This is not surprising because compliance experts began recommending harassment grievance procedures in the late 1970s and

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127. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364–65 (1977) (holding that retroactive seniority is a remedy in harmony with Title VII's prophylactic purpose because it will encourage employers to examine potentially illegal policies). The Court also rebuffed employer affirmative defenses, which would allow some biased decisions to stand, on the grounds that the proffered defense would undermine EEO law's deterrence goals. *See Connecticut v. Teal*, 457 U.S. 440, 448–50 (1982) (rejecting, as contrary to Title VII's deterrent aim, an employer's "bottom line" defense that would have allowed use of a promotion exam that disproportionately screened out minority candidates so long as the ultimate outcome of the multi-step promotion process was not racially discriminatory); *McKennon v. Nashville Banner Publ'g*, 513 U.S. 352, 358–59 (1995) (holding that it would be antithetical to EEO law's deterrence goal to allow after-acquired evidence of plaintiff's misconduct to bar a discrimination suit in every case).

128. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760–62 (1998); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

129. *Ellerth*, 524 U.S. at 765.

130. *Id.*

131. *Id.*

132. *Id.* *See also Faragher*, 524 U.S. at 807–08 (mirroring the elements and legal principles set forth in the *Ellerth* decision).

133. *Dobbin & Kelly, How to Stop Harassment*, *supra* note 101, at 1204.

continued to do so with increasing confidence over time.<sup>134</sup> In line with this advocacy, employer and business-friendly organizations filed amicus briefs in support of the defendants in *Ellerth* and *Faragher*. Those briefs argued that the Court should create an affirmative defense based solely on the existence of a harassment policy and grievance procedure.<sup>135</sup> The EEOC also filed amicus briefs in *Ellerth* and *Faragher* supporting creation of an affirmative defense in hostile environment cases but with a crucial distinction: the EEOC advocated a fact-sensitive inquiry into the efficacy of the policy and grievance procedure at issue.<sup>136</sup>

The Supreme Court ruled in harmony with employer interests. In *Ellerth* and *Faragher*, the Court not only approved an affirmative defense for hostile environment harassment cases where the perpetrator is a supervisor but also refashioned the preventative aim of EEO law. Justice Anthony Kennedy, writing for the majority in *Ellerth*, used the symbolic structures recommended for two decades by compliance professionals as a touchstone for the Court's analysis. He noted that Title VII "is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."<sup>137</sup> Justice Kennedy's statement was surprising, since the statute says no such thing. In line with that conception of Title VII, however, the Court concluded that, because these symbolic structures provide employees with incentives to report harassment before it becomes severe or pervasive, limiting vicarious liability through the affirmative defense advances "Title VII's deterrent purpose."<sup>138</sup>

Justice David Souter, writing for the majority in *Faragher*, similarly recharacterized EEO law's prophylactic purpose. He stated that Title VII's main objective is "to avoid harm."<sup>139</sup> Rather than assert boldly, as the Court had in earlier cases, that the "'primary objective' of Title VII is to bring employment discrimination to an end,"<sup>140</sup> the reformulated version of deterrence focuses anemically on human resources policy creation and "informing employees of their right to raise and how to raise the issue of harassment."<sup>141</sup> Neither Justice Souter nor Justice Kennedy elaborated on the subject of what might make a grievance procedure effective. Indeed, so long as the policy is distributed to employees, the implication is that it is effective. As Edelman noted, "[B]y 1998, symbolic structures had come to be understood not just as a means of achieving civil rights but also as the

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134. See *supra* notes 100–120 and accompanying text.

135. EDELMAN, WORKING LAW, *supra* note 24, at 203–04.

136. *Id.* at 205–06.

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

138. *Id.*

139. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

140. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982).

141. *Faragher*, 524 U.S. at 806 (quoting 29 C.F.R. § 1604.11(f) (1997)).

achievement of civil rights.”<sup>142</sup> Lower courts certainly understood this. After creation of the *Ellerth/Faragher* affirmative defense, judicial deference to harassment policies and grievance procedures increased substantially. In fact, district court deference in the twelve years prior to the *Ellerth/Faragher* decisions was identified in 24 percent of district court opinions; after the *Ellerth/Faragher* decisions, deference was found in 58 percent of district court opinions.<sup>143</sup>

In 1999, the Court added to its new jurisprudence of education and prevention in *Kolstad v. American Dental Ass’n*.<sup>144</sup> *Kolstad* established the standards under which employers may be held liable for punitive damages in Title VII cases. To obtain punitive damages, plaintiffs must demonstrate that the employer acted with malice or reckless indifference.<sup>145</sup> Justice Sandra Day O’Connor, however, in a portion of the opinion joined by four other justices, created a safe harbor from punitive damages for employers who “engage in good faith efforts to comply” with EEO law.<sup>146</sup> She expressly mentioned EEO policies and programs as evidence of good faith. Just as the law promotes effective sexual harassment policies and grievance procedures, so too does it encourage employers “to adopt antidiscrimination policies and to educate their personnel on Title VII’s prohibitions.”<sup>147</sup> Although Justice O’Connor noted that a liability rule that reduces incentives for employers to implement preventative measures contravenes the prophylactic purpose of Title VII,<sup>148</sup> the safe harbor she created ironically increases the odds that employers will favor symbolic rather than substantive fealty to EEO law.

That the new jurisprudence of education and prevention conflates symbolic structures with good faith is significant but unsurprising. Several groups allied with employers filed amicus briefs in *Kolstad*, including the Society for Human Resource Management (SHRM),<sup>149</sup> the Chamber of Commerce,<sup>150</sup> and the Equal Employment Advisory Council (EEAC).<sup>151</sup> The

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142. EDELMAN, WORKING LAW, *supra* note 24, at 208.

143. *Id.* at 185. Judicial deference is not a guarantee that an employer will win an employment discrimination suit. Edelman explained that this is due to a myriad of factors that determine case outcome. Nonetheless, judicial deference to symbolic structures “makes it much more likely that employers will win the case.” *Id.* at 194 (citing Linda Hamilton Krieger, Rachel Best & Lauren Edelman., *When Best Practices Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 L. & SOC. INQUIRY 843, 857–58 (2015)).

144. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999).

145. *Id.* at 534.

146. *Id.* at 544.

147. *Id.* at 545.

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

149. Brief of Amicus Curiae, Society for Human Resource Management, *Kolstad v. Am. Dental Ass’n*, 527 US. 526 (1999) (No. 98-208) [hereinafter SHRM brief].

150. Brief of Amicus Curiae, Chamber of Commerce of the United States, *Kolstad v. Am. Dental Ass’n*, 527 US. 526 (1999) (No. 98-208).

151. Brief of Amicus Curiae, Equal Employment Advisory Council, *Kolstad v. Am. Dental Ass’n*, 527 US. 526 (1999) (No. 98-208).

EEAC brief noted that large employers typically provided EEO training to supervisors and even non-supervisory employees, and argued that any doctrinal rule that would subject such employers to punitive damages would be “anomalous.”<sup>152</sup> The SHRM brief argued in favor of creating a liability shield because it “rewards employers that take preventative measures” such as “effective EEO training.”<sup>153</sup> The Court agreed, but it is important to recognize that its jurisprudence did not develop in a vacuum. Instead, the Court’s approach was the outcome of two decades of efforts by organizations subject to EEO law to create compliance practices that would protect them from running afoul of the law.

Meanwhile, regulators signaled their endorsement of education and prevention. Specifically, in 1999, the EEOC published enforcement guidance interpreting *Ellerth* and *Faragher*, recommending employers provide all employees with harassment training “to ensure that they understand their rights and responsibilities.”<sup>154</sup> The enforcement guidance also suggested that employers “establish, disseminate, and enforce an anti-harassment policy and complaint procedure.”<sup>155</sup> The latter steps would help establish that an employer took reasonable care under the affirmative defense. The work of compliance experts had reached a valuable target: the regulators.

The Supreme Court perfected its jurisprudence of education and prevention in 2013 in *Vance v. Ball State University*.<sup>156</sup> *Vance* clarified that the *Ellerth/Faragher* affirmative defense is a hostile environment harassment liability shield only for supervisor conduct. Justice Samuel Alito, writing for the majority, defined the term “supervisor” as a person with the authority to “take tangible employment actions” such as discipline or discharge.<sup>157</sup> Thus, managers who lack authority to discipline and discharge are treated as the victim’s coworkers, which places the burden on the plaintiff to demonstrate the employer knew or should have known about the harassment and failed to take corrective action.<sup>158</sup> Where the perpetrator has supervisory authority, employers avoid hostile environment harassment liability by asserting the *Ellerth/Faragher* affirmative defense and demonstrating that: (1) they were not negligent in handling harassment complaints and, (2) that the alleged victim failed to complain or delayed in doing so.<sup>159</sup>

Keith Cunningham-Parmeter described the resulting doctrine as a “harassment loophole,” which—regardless of whether the perpetrator is

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152. *Id.* at 12–13.

153. SHRM brief, *supra* note 149, at 13.

154. EQUAL EMP’T OPPORTUNITY COMM’N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, at § V(C)(1) (1999).

155. *Id.* at § V(C).

156. *See generally* *Vance v. Ball State Univ.*, 570 U.S. 421, 450 (2013).

157. *Id.* at 424, 429.

158. *Id.* at 427–28.

159. *See* Cunningham-Parmeter, *supra* note 41, at 195–96; ANNA-MARIA MARSHALL, *CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE* 48 (2016).

deemed a supervisor or a coworker—exonerates employers from hostile environment liability if they have policies against harassment and maintain a process for receiving and investigating harassment complaints.<sup>160</sup> The Court’s great faith in symbolic structures is evident in the majority decision. Attempting to rebut the dissent’s characterization of the decision as excessively “employer-friendly,”<sup>161</sup> the majority rattled off a list of relevant evidence a plaintiff might proffer to establish employer liability when the harasser is a coworker. The list included evidence of the employer failing to “monitor the workplace, . . . [failing to] respond to complaints, . . . [neglecting to] provide a system for registering complaints, or . . . discourag[ing] complaints from being filed.”<sup>162</sup> Given the vast dispersion of harassment policies and procedures, however, it would be a rare employee who could muster such evidence. Many courts interpreting the *Ellerth/Faragher* affirmative defense misapply it; courts fail to scrutinize harassment grievance procedure efficacy and absolve employers so long as they respond to victim complaints that are filed.<sup>163</sup> It is unlikely that courts would take a different approach in cases of coworker harassment.

Justice Ruth Bader Ginsburg’s dissent in *Vance* correctly noted that the constructive or actual notice standard for coworker harassment advantages employers, yet she too exhibited extraordinary faith in education and prevention:

Inevitably, the Court’s definition of supervisor will hinder efforts to stamp out discrimination in the workplace . . . . When employers know they will be answerable for the injuries a harassing jobsite boss inflicts, their incentive to provide preventative instruction is heightened. If vicarious liability is confined to supervisors formally empowered to take tangible employment actions, however, employers will have diminished incentive to train those who control their subordinates’ work activities and schedules . . . .<sup>164</sup>

Justice Ginsburg’s earnest belief that training would vanquish harassment is noteworthy. Harassment training has been ubiquitous in the American workplace for decades. Despite this, the continuing high incidence of workplace harassment demonstrates that the phenomenon is relatively impervious to training.<sup>165</sup> Why, then did Ruth Bader Ginsburg, one of the Supreme Court justices most committed to equality, embrace employers’ preventative practices?<sup>166</sup> Perhaps her embrace is best understood the way

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160. See Cunningham-Parmeter, *supra* note 41, at 189.

161. *Vance*, 570 U.S. at 466 (Ginsburg, J. dissenting).

162. *Id.* at 449 (majority opinion).

163. See Cunningham-Parmeter, *supra* note 41, at 195–96.

164. *Vance*, 570 U.S. at 466 (Ginsburg, J. dissenting).

165. See Cunningham-Parmeter, *supra* note 41, at 190–92 (noting that harassment remains a “widespread problem and that harassers often work at companies with well-developed train-and-report systems”).

166. Jill Lepore, *Ruth Bader Ginsburg, The Great Equalizer*, NEW YORKER (Sept. 18, 2020), <https://www.newyorker.com/news/postscript/ruth-bader-ginsburg-supreme-court-the-great-equalizer>



Dobbin and Kalev suggest we understand the beliefs of the crusading human resources practitioners who helped widely disperse symbolic EEO structures in the first place. According to Dobbin and Kalev, these practitioners' advocacy was motivated by corporate myths such as the belief that diversity training eliminates bias.

Clearly, Justice Ginsburg put her faith in a corporate myth. That myth, in turn, resides in what I have called the jurisprudence of education and prevention. Ultimately, turning away from an era of cosmetic compliance requires nothing short of myth-busting. Before examining evidence to that end, the next Section will situate the jurisprudence of education and prevention—usually specifically identified with the law of harassment and punitive damages in EEO cases—within a judicial ethos of non-intervention in employer decision-making.

## 2. *The Jurisprudence of Education and Prevention Nests Comfortably with Judicial Reluctance to Second-Guess Employers*

The jurisprudence of education and prevention described above is in harmony with the non-interventionist judicial ethos of EEO law.<sup>167</sup> Judges are generally not comfortable evaluating employer decision-making.<sup>168</sup> Nor, in many cases, are judges willing to allow juries to do so. Judges frequently keep cases from juries by granting employers' motions for summary judgment.<sup>169</sup> Indeed, a study by Kent Nakamura and Lauren Edelman found that “since 1990 . . . a significant increase in the proportion of [federal] civil rights cases terminated through grants of employers' motions for summary judgments and, in the circuit courts, denials of appeals of district court grants of summary judgment.”<sup>170</sup> They also found increasing judicial deference to

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obituary%20 [https://perma.cc/XDH2-F5J6], (“Aside from Thurgood Marshall, no single American has so wholly advanced the cause of equality under law.”).

167. See Nakamura & Edelman, *supra* note 4, at 2676 (noting a general “judicial reticence to review employers' personnel decisions”).

168. *Id.*

169. *Id.* at 2652–54.

170. Nakamura & Edelman, *supra* note 4, at 2652 (“Summary judgment is an increasingly important and frequent manner of case disposition in employment discrimination cases.”). Summary judgment motions determine whether there are any material questions of fact for a jury to determine. If not, the moving party's motion is granted. Nancy Gertner noted that employment discrimination “[p]laintiffs rarely move for summary judgment . . . [because] [t]hey bear the burden of proving all elements of the claim, particularly intent, and must do so based on undisputed facts.” Nancy Gertner, *Loser's Rules*, 122 YALE L.J. ONLINE 109, 113–14 (2012). In contrast, employers need only demonstrate “facts in their favor on one element of the plaintiff's claim.” *Id.* at 114. Employment discrimination cases also fail frequently due to successful employer motions to dismiss for failure to state a claim upon which relief can be granted. In such cases, the sufficiency of the complaint is being challenged by the employer. See Joseph A. Seiner, *Plausible Harassment*, 54 U.C. DAVIS L. REV. 1295, 1298 (2021) (noting that the Supreme Court's “plausibility standard” for evaluating motions to dismiss applies to employment discrimination plaintiffs, who “have faced difficulty in overcoming this . . . pleading bar.”).

symbolic diversity structures without careful evaluation in EEO cases.<sup>171</sup> Indeed, their study determined that by 2014, judges were deferring to diversity structures “without adequate scrutiny [of those policies and procedures] in about 75% of district court cases and 49% of circuit court cases.”<sup>172</sup>

A powerful example of such deference was the Supreme Court’s express reference to Wal-Mart’s formal policy against discrimination in an expansive class action brought on behalf of approximately 1.5 million women who were working, or had formerly worked, for Wal-Mart. In *Wal-Mart Stores, Inc. v. Dukes*,<sup>173</sup> the plaintiffs alleged that a corporate culture of gender bias, and their supervisors’ use of subjective criteria in awarding pay and deciding on promotions, constituted disparate treatment on the basis of sex.<sup>174</sup> Writing for the majority, and arguing that there was no evidence that the employer maintained a general policy of discrimination, Justice Antonin Scalia noted, “Wal-Mart’s announced policy forbids sex discrimination . . . and . . . the company imposes penalties for denials of equal employment opportunity.”<sup>175</sup> He continued with a wholly unsubstantiated theory that “left to their own devices, most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion.”<sup>176</sup> As one group of researchers observed, even though there was substantial statistical and expert testimony to the contrary, the existence of an EEO policy helped win the case for Wal-Mart.<sup>177</sup>

Judges who avoid evaluation of employer actions, policies, and practices are assisted by what Sandra Sperino has called judicial disbelief doctrines, which often are applied by jurists considering employer motions for summary judgment.<sup>178</sup> These judicially created EEO doctrines are analytical frameworks that support unthinking deference to employer decision-making

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171. Nakamura & Edelman, *supra* note 4, at 2651. Nakamura and Edelman defined a diversity structure as any policy or procedure that might be interpreted as evidence of fair treatment, including “diversity or equal employment opportunity policies or complaint procedures[,] . . . progressive discipline policies, [performance] evaluation procedures, and multi-person decision-making structures.” *Id.* at 2649.

172. *Id.* at 2651.

173. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). The Supreme Court was deciding whether under Federal Rule of Civil Procedure 23 there were common questions of law or fact that would permit the plaintiffs to bring a class action. The Court held that the commonality requirement was not satisfied. *Id.* at 360.

174. *Id.* at 342, 354.

175. *Id.* at 353.

176. *Id.* at 355.

177. Lauren B. Edelman, Linda H. Krieger, Scott R. Eliason, Catherine R. Albiston & Virginia Mellema, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888–89 (2011).

178. See Sperino, *Disbelief Doctrines*, *supra* note 38, at 31 (noting that EEO law “is riddled with doctrines that tell courts to believe employers and not workers”).

and undercut employees' evidence of bias.<sup>179</sup> For example, judges often justify decisions favoring employers by noting that jurists do not serve as "super-personnel departments."<sup>180</sup> As Sperino noted, this doctrine may block a challenge to the employer's stated rationale for an adverse action where: (1) the employer lies about one of several reasons for a termination; (2) ignores posted criteria when hiring or promoting or fails to follow its own policies; or (3) the employee attempts to demonstrate they are the best qualified candidate for the job.<sup>181</sup> While such circumstantial evidence might otherwise be a method for demonstrating illegal discrimination, some judges use the "super personnel department justification" to exclude such proof.<sup>182</sup>

Nakamura and Edelman's study found that by 2014, the term *super personnel department* had been used in "2,855 district court opinions involving grievance procedures, anti-harassment policies, or diversity policies."<sup>183</sup> They noted that while the term is not present in most of the cases where judicial deference to symbolic structures is evident, the doctrine nonetheless underscores the reluctance of judges to intervene in employers' decision-making and propensity to avoid delving deeply into the efficacy of EEO policies and practices.<sup>184</sup>

Disbelief doctrines, like the super personnel department justification, do not have a statutory basis,<sup>185</sup> and violate the rules for summary judgment which require judges to evaluate facts and "draw all reasonable inferences in favor of the non-moving party,"<sup>186</sup> who in these cases is the employee.<sup>187</sup> The employer-friendly, non-interventionist bent of the judiciary in EEO cases also disregards and amplifies the evidentiary advantages held by employers. The preventative techniques developed by compliance professionals were developed with potential litigation in mind. Creating evidence, whether via performance review, disciplinary documentation, formal promotion and hire procedures, or EEO policies and grievance procedures, is an activity routinely engaged in by employers rather than employees.<sup>188</sup> Tristin Green has termed these practices "discrimination laundering" and decried judges' presumption of organizational innocence that is tied to it.<sup>189</sup> Through their

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179. See generally, Linda Hamilton Krieger, *Message in a Bottle*, 39 BERKELEY J. EMP. & LAB. L. 53, 60 (2018) (criticizing several of the rules and noting that one "might justifiably wonder whether Title VII was an employment discrimination law, or an employment discrimination exoneration law").

180. See Sperino, *Disbelief Doctrines*, *supra* note 38, at 240–42. Sperino referred to the intonation that courts do not sit as super personnel departments as a mantra. *Id.* at 240.

181. *Id.* at 241.

182. *Id.* at 240.

183. Nakamura & Edelman, *supra* note 4, at 2677.

184. *Id.*

185. See Sperino, *Disbelief Doctrines*, *supra* note 38, at 232.

186. Nakamura & Edelman, *supra* note 4, at 2654.

187. *Id.*

188. See Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 39, at 988–90.

189. See generally GREEN, DISCRIMINATION LAUNDERING, *supra* note 39.

deference to symbolic structures and employer decision-making, courts signal that these systems may inoculate organizations from liability under our EEO laws.<sup>190</sup>

In sum, organizational responses to EEO law and the judiciary's responses to organizations' compliance programming produce a sharply tilted, employer-advantaged litigation playing field which preserves the status quo and props up the hierarchies that EEO law was designed to dismantle.<sup>191</sup> This system, which favors cosmetic compliance and fails to incentivize substantive change, will not remedy the intractable problem of workplace inequality in the U.S. workplace. Part II will detail how our understanding of harassment prevention and diversity efforts has begun to change and provides a basis for ending an era of cosmetic compliance.

## II. CHANGING CONCEPTIONS ABOUT HARASSMENT PREVENTION AND DEI PROGRAMMING

For years, as researchers theorized about organizations' responses to EEO law,<sup>192</sup> and scholars questioned the form-over-substance direction of judicial interpretations,<sup>193</sup> government regulators and the courts remained supportive and unquestioning of the symbolic structures that were supposed to guarantee due process, fairness, and the elimination of unlawful bias. Courts, as noted in Part I, increasingly deferred to symbolic structures over time.<sup>194</sup> For its part, the EEOC followed, rather than led, in developing the shape that compliance mechanisms took. The agency advised employers to create harassment policies and grievance procedures only after such structures were widespread among organizations.<sup>195</sup> Likewise, the agency recommended judicial deference to symbolic structures "after lower courts began deferring to them."<sup>196</sup>

Margo Schlanger and Pauline Kim studied the EEOC's systemic litigation and remedial efforts from 1997 to 2006.<sup>197</sup> They found the relief obtained by the agency to be "routinized, bureaucratic solutions—the kinds of 'best practices' endorsed by human resources professionals . . . as a rational (if not necessarily effective) response to antidiscrimination mandates."<sup>198</sup> Of the cases brought, the vast majority settled.<sup>199</sup> The remedies

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190. *Id.* at 47.

191. ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 11 (2017).

192. *See* discussion *supra* Part I.

193. *Id.*

194. *See supra* note 170–172 and accompanying text.

195. *See* EDELMAN, WORKING LAW, *supra* note 24, at 211.

196. *Id.*

197. *See* Schlanger & Kim, *supra* note 78.

198. *Id.* at 1566.

199. *Id.* at 1568, tbl.4.

sought were not designed to transform the employers in question; rather, they were incidental to the organizations' core activities. Tellingly, 87 percent of the remedial orders mandated EEO training.<sup>200</sup> Schlanger and Kim characterized the EEOC's remedial efforts as managerialist in that they mirror the compliance efforts long advocated by personnel professionals. They warned that beyond being ineffective, such efforts might even harm the women and minority employees they were meant to help.<sup>201</sup>

Three developments, however, set the stage for abandoning a cosmetic approach to DEI programming and harassment prevention. The first involves a courageous multidisciplinary examination of harassment prevention by the EEOC. Second is the EEOC's suggestion that opportunities be found to engage employers in EEO program efficacy research with the participation of social scientists and regulators. Finally, social scientists are beginning to discover why certain DEI and harassment prevention efforts succeed and others fail. Each development will be addressed in turn below. In Part III, this Article suggests that a change in liability standards, creating space for employer innovation, and continued use of social science evidence in litigation, would help catalyze substantive EEO in the American workplace.

A. *The 2016 Report of the Co-chairs of the Select Task Force on the Study of Harassment in the Workplace*

The EEOC created a Select Task Force on the Study of Harassment in the Workplace in January 2015.<sup>202</sup> Chaired by EEOC Commissioners Chai Feldblum and Victoria Lipnic, the task force embarked on a searching inquiry aimed at understanding why, decades after employer liability for harassment was established, and despite thirty years of compliance and training efforts, workplace harassment continues to be so prevalent.<sup>203</sup> Assisting Feldblum and Lipnic were sixteen task force members drawn from academia, legal practice (representing the plaintiff and defense bar), employer and employee advocacy groups, and labor unions.<sup>204</sup> Importantly, the university professors on the task force represented a number of disciplines including: law, psychology, management, and sociology.<sup>205</sup> Over the course of a year, the task force held numerous meetings, listened to the testimony of over thirty witnesses, and reviewed public comments. With the spotlight on prevention,

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200. *Id.* at 1574.

201. *Id.* at 1586 (the warning about backlash effects was in reference to EEO training). Years earlier, I similarly warned about uncritical endorsement of educational and preventative efforts by courts and the legal profession. See Bisom-Rapp, *An Ounce of Prevention*, *supra* note 36, at 6, 29.

202. See Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 70 (2018) (discussing the importance of the EEOC task force report).

203. See EEOC TASK FORCE REPORT, *supra* note 107 at Preface paras. 2–3. The task force was the brainchild of Jenny Yang, who at the time chaired the EEOC. *Id.* at para. 8.

204. See *id.* at Executive Summary para. 2.

205. See *id.*

the members sought to understand harassment from the perspective of a wide range of experts and stakeholders.

In June 2016, the co-chairs released a lengthy report with some startling admissions.<sup>206</sup> Chief among them is that workplace harassment is an enduring, and often unreported, problem.<sup>207</sup> The co-chairs observed that about one-third of the charges received by the EEOC in fiscal year 2015 contained an allegation of harassment.<sup>208</sup> Yet the report also reviewed studies on common employee reactions to harassment, finding that the “least common response of either men or women to harassment is to take some formal action—either to report the harassment internally or file a formal legal complaint.”<sup>209</sup>

Acknowledging underreporting while noting receipt of almost 35,000 harassment charges in a single year<sup>210</sup> is significant; in fact, the report demonstrates that harassment is even more prevalent than is commonly believed. Buttressing this point, the co-chairs explained that based on studies, 87 to 94 percent of those experiencing harassment decline to file a complaint.<sup>211</sup> The report also examined why so many employees are loath to use the complaint procedures that the agency recommends employers adopt. Here, too, the co-chairs made a noteworthy declaration: employees fear reporting and those fears—including of retaliation—are well-founded.<sup>212</sup> This is an astounding point for a government report to make.

Although the report did not make this point explicitly, the admission of underreporting undercuts the rationale for the *Ellerth/Faragher* affirmative defense. More specifically, the affirmative defense does not catalyze early reporting of incidents before harassment becomes severe or pervasive, as Justice Kennedy opined, because many employees reasonably fear retaliation.<sup>213</sup> Justice Kennedy’s hunch lacks an empirical basis. Thus,

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206. See generally *id.* The co-chairs emphasized that the document “is not a consensus report.” *Id.* at Preface para. 9. Rather, it is a report by the task force co-chairs, which is based on all the information the task force reviewed. *Id.* This aspect of their report enabled Commissioners Feldblum and Lipnic to make bold pronouncements on harassment prevalence and the state of common harassment prevention efforts.

207. *Id.* at Executive Summary paras. 6–7.

208. *Id.* at Executive Summary para. 6. This represents approximately 28,000 charges received in fiscal year 2015 from private sector, state, or local government employees and another 6,741 charges filed by federal employees. *Id.* The report acknowledged that these numbers may be both overinclusive since not every charge alleges actionable conduct and underinclusive due to lack of formal action. *Id.* at B. para. 6.

209. *Id.* at C. para. 5.

210. See *supra* note 208 and accompanying text.

211. EEOC TASK FORCE REPORT, *supra* note 107, at C. para. 7.

212. *Id.* at C. para. 10–11.

213. A recent study found that victims of supervisor harassment are much more likely to suffer retaliation than victims of coworker harassment. Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671, 713 (2021). The study author argued that this finding provides additional evidence “that courts must move away from treating [the] failure [of victims] to report as determinative of the *Faragher/Ellerth* affirmative defense.” *Id.* See generally Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 110 (2018) (discussing the legal

considering a failure to report harassment as “normally suffic[ient] to satisfy the employer’s burden”<sup>214</sup> on the second element of the defense is profoundly misguided.

Another surprising finding of the 2016 report involves harassment training. The task force undertook an ample review of the social science literature on anti-harassment educational programming, yet could not determine whether standalone training “is or is not an effective tool in preventing harassment.”<sup>215</sup> The co-chairs noted that “it appears that training can increase the ability of attendees to understand the type of conduct that is considered harassment . . . [but] it is less probable that training programs, on their own, will have a significant impact on changing employees’ attitudes, and they may sometimes have the opposite effect.”<sup>216</sup> According to Commissioner Lipnic, it was “jaw-dropping” that the task force examined thirty years of research and failed to find that harassment training prevents harassment.<sup>217</sup>

The co-chairs’ recommendations included how training should be structured and delivered. They advised that training be provided to all employees, presented live if possible, be interactive, and held regularly but in a varied manner.<sup>218</sup> Training should be developed around scenarios relevant to the particular workplace to clarify acceptable and prohibited conduct, help employees comprehend their rights and responsibilities, and highlight the formal process for complaints and investigations.<sup>219</sup> The instruction should also communicate support for the training effort by top management.<sup>220</sup>

Additionally, the report advised trainers to move beyond conventional compliance training and explore incorporating civility (anti-bullying) training and bystander intervention instruction.<sup>221</sup> The former would be used to promote respectful workplaces, and the latter for helping supervisors and coworkers provide assistance when they witness harassment.<sup>222</sup> In explaining these recommendations at a public forum, Commissioner Feldblum noted, “[W]e need different types of training. Employers must move beyond what

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hurdles for retaliation claims and the connection between harassment and retaliation); Deborah L. Brake, *Coworker Harassment in the #MeToo Era*, 49 U. BALT. L. REV. 1 (2019) (focusing on retaliation as a key site of inquiry in exploring the transformative potential of #MeToo).

214. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *see also* *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

215. EEOC Task Force Report, *supra* note 107, at C. para. 3.

216. *Id.* at C. para. 12.

217. Christina Folz, *No Evidence that Training Prevents Harassment, Finds EEOC Task Force*, SOC’Y FOR HUM. RESOURCE MGMT. (June 19, 2016), <https://www.shrm.org/hr-today/news/hr-news/pages/eoc-harassment-task-force.aspx> [<https://perma.cc/Y29F-YR7K>].

218. EEOC TASK FORCE REPORT, *supra* note 107, at C. para. 31.

219. *Id.* at C. para. 21.

220. *Id.* at C. para. 29.

221. *Id.* at D.

222. *Id.*

we call in the report, ‘compliance training,’ training designed to teach employees what is unacceptable conduct [in the workplace] and how to report it.”<sup>223</sup> At the same public event, Commissioner Lipnic summarized the research findings concerning training in stark terms:

[I]t became clear to us that too much of what we’ve been doing in the last 30 years hasn’t worked. The fact is empirically evident in the academic literature and was echoed by witnesses and Task Force members who have devoted their careers to working on these issues. Training may be helpful in satisfying an employer’s legal compliance or making out an affirmative defense to liability. But as a standalone to prevent and reduce harassment in the workplace, it has not proven to be effective. In simplest terms, training must change.<sup>224</sup>

The co-chairs’ candor in discussing their findings on training is laudable and the enormity of their conclusions should not be overlooked. Harassment training, as noted above, is omnipresent.<sup>225</sup> Training also serves a public relations or signaling purpose; educational programs communicate to the world that an organization has zero tolerance for harassment,<sup>226</sup> especially but not only when serious harassment allegations are made against an employer.<sup>227</sup>

Additionally, training can be persuasive evidence in litigation. One researcher found that harassment training is commonly cited in two contexts.<sup>228</sup> First, employers reference training in hostile environment cases as evidence relevant to both prongs of the *Ellerth/Faragher* affirmative defense.<sup>229</sup> In other words, employers point to training to show they acted

223. Equal Emp’t Opportunity Comm’n, *Rebooting Harassment Prevention Transcript* (June 20, 2016), <https://www.eeoc.gov/meetings/24095/transcript> [<https://perma.cc/6UBK-H9TV>] (comments of EEOC Commissioner Chai Feldblum).

224. *Id.* (comments of EEOC Commissioner Victoria Lipnic).

225. As noted above, training was embraced by most large employers long before it was recommended by the EEOC. *See supra* note 152 and accompanying text. Additionally, six states require at least some private employers to provide harassment training: California, Connecticut, Delaware, Illinois, Maine, and New York. *See* Project WHEN, *Harassment Training Requirements by State: An Updated List of State-Specific Harassment Training Requirements*, <https://projectwhen.org/harassment-training-requirements-by-state/> [<https://perma.cc/LLH3-7VCC>] (last accessed Aug. 2, 2021). Others states strongly recommend harassment training. *Id.*

226. *See* Margaret S. Stockdale, Susan Bisom-Rapp, Maureen O’Connor & Barbara A. Gutek, *Coming to Terms with Zero Tolerance Sexual Harassment Policies*, 4 J. FORENSIC PSYCH. PRAC. 65, 69 (2004) (noting that zero tolerance policies run the risk of backlash, emphasize a form-over-substance approach to gender equity, and obfuscate the ways in which respectful organizational climates can be promoted).

227. I thank my colleague Jessica Fink for making this point after reading an earlier draft of this Article. *See also* Frank Dobbin & Alexandra Kalev, *Why Doesn’t Diversity Training Work?*, 10 ANTHROPOLOGY NOW 48, 49 (2018) (making the same point about diversity training as “the go-to solution for corporate executives and university administrators facing public relations crises, campus intolerance and slow progress on diversifying the executive and faculty ranks”).

228. *See* JoAnna Suriani, *‘Reasonable Care to Prevent and Correct’: Examining the Role of Training in Workplace Harassment Law*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 801, 823–28 (2018).

229. *Id.* at 824–27.



reasonably to prevent and correct harassment; and defendants also note that the victim unreasonably failed to avail themselves of corrective opportunities, which the victim knew about due to training.<sup>230</sup> Second, training is cited in cases where punitive damages are at issue both by employers hoping to place themselves within *Kolstad*'s good faith safe harbor and employees, arguing that failure to train makes punitive damages appropriate.<sup>231</sup>

Those findings suggest an important question. With such damning conclusions about training efficacy, should training be used as evidence in litigation? In 2001, and again in 2018, I argued that a practice of speculative value, such as harassment training, should not be relevant to employer liability for compensatory damages.<sup>232</sup> As will be explained below, I no longer believe training or prevention efforts should be relevant evidence where punitive damages are concerned either.<sup>233</sup>

For its part, after the 2016 report, the EEOC has continued to encourage innovation in harassment prevention policies and programming. In 2017, it released a guidance document, *Promising Practices for Preventing Harassment*,<sup>234</sup> and launched two new training programs for supervisors and employees, which incorporate civility and bystander training.<sup>235</sup> Following a tumultuous period when the #MeToo movement was much in the news, the EEOC in June 2018 held a hearing on *Transforming #MeToo into Harassment Free Workplaces*.<sup>236</sup> Testimony covered issues ripe for legal reform and “innovative strategies that employers, unions, and others” are using to vanquish harassment.<sup>237</sup> Nonetheless, these efforts, while encouraging, do not sufficiently catalyze change in either harassment prevention or DEI programming. Given judicial deference to symbolic

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230. *Id.*

231. *Id.* at 827–28.

232. See Bisom-Rapp, *An Ounce of Prevention*, *supra* note 36, at 44–45; Bisom-Rapp, *Sexual Harassment Training Must Change*, *supra* note 202, at 68.

233. In those earlier articles, I argued that careful scrutiny of harassment training efficacy was appropriate to evaluate employer good faith where punitive damages are sought. Bisom-Rapp, *An Ounce of Prevention*, *supra* note 36, at 44–47; Bisom-Rapp, *Sexual Harassment Training Must Change*, *supra* note 202, at 68.

234. See U.S. Equal Emp't Opportunity Comm'n, *Promising Practices for Preventing Harassment* (Nov. 21, 2017), <https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment> [<https://perma.cc/G2AQ-8FZG>].

235. See Kathy Gurchiek, *New EEOC Training Helps Employers Create Respectful Workplaces*, Society for Human Resource Management (Oct. 6, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/new-eeoc-training-focuses-on-fostering-respectful-workplaces.aspx> [<https://perma.cc/5X3U-FUEE>].

236. Press Release, Equal Employment Opportunity Commission, EEOC Select Task Force on Harassment Hears from Experts on How to Prevent Workplace Harassment (June 11, 2018) <https://www.eeoc.gov/newsroom/eeoc-select-task-force-harassment-hears-experts-how-prevent-workplace-harassment> [<https://perma.cc/6S52-E9GJ>].

237. *Id.*

structures,<sup>238</sup> a reluctance of judges to second-guess employers,<sup>239</sup> and employer-friendly liability standards,<sup>240</sup> employers lack incentives to innovate and examine the effects of their programming and policies.<sup>241</sup>

A true shift by the EEOC from promoting managerial solutions to an evidence-based approach to compliance would be an enormously consequential step towards promoting substantive bias elimination. Several other adjustments are necessary to end an era of cosmetic compliance. One is to change liability standards so that employers are no longer shielded from liability merely by adopting symbolic structures. A modification of liability standards, however, must provide space for innovative employers to experiment. Such experimentation could be incentivized through a supervised research safe harbor. Those topics will be addressed before the Article concludes.

Additionally, new research into harassment prevention and DEI program efficacy must be conducted in actual workplaces. The EEOC has suggested the kind of empirical study that is necessary but rarely undertaken. New efforts would be augmented by what already is known from recent social science research on the types of harassment prevention and DEI programs that are likely to succeed and those that are not. Those subjects will be taken up next in Parts II.B and II.C.

#### *B. The EEOC's Plea for Employer Cooperation into Research Efforts*

The EEOC's 2016 task force report repeatedly explained that we need better empirical research on harassment prevention and DEI efforts. This is an important acknowledgement, which might be used to pivot towards evidence-based EEO compliance. The co-chairs identified harassment

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238. See *supra* notes 171–172 and accompanying text.

239. See *supra* note 168 and accompanying text.

240. See *supra* notes 156–163 and accompanying text.

241. Elizabeth Tippett's study of over thirty-five years of harassment training concluded that instructional content "solidified into a genre sometime in the mid-1990s." Elizabeth C. Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 486 (2018). That genre consists of an authoritative narrator, who summarizes the law, gives examples of proscribed behavior, and provides advice. *Id.* Examples overwhelmingly emphasize sexual conduct rather than harassment on other bases, such as race, ethnicity, religion, sexual orientation, gender identity, disability, or age. They also present relatively minor examples of supposedly forbidden conduct such as "jokes, teasing, and comments about an employee's appearance." *Id.* Tippett noted that the training implies that complex legal rules prohibit a broad range of conduct. *Id.* Such an implication about liability is wrong. The rules are not complex and much abhorrent conduct is not actionable. In fact, Sandra Sperino and Suja Thomas have observed that courts analyzing the "severe or pervasive" element of the plaintiff's case in hostile environment harassment cases frequently find shocking behavior not serious enough to constitute harassment, including brushing up against the victim's breasts or buttocks, trying to kiss the victim on several occasions, and repeatedly asking the victim on a date. SANDRA SPERINO & SUJA THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 33–40 (2017).

reporting system efficacy as a matter ripe for real world investigation.<sup>242</sup> They also singled out harassment training effectiveness.<sup>243</sup> As the co-chairs explained, most research on training efficacy is researcher-designed rather than employer-designed, and is tested on university students rather than employees.<sup>244</sup> This is because employers are generally reluctant to work with researchers for fear of adverse findings, liability risks, and harm to their public image.<sup>245</sup> Indeed, employers generally “resist performing [their own] internal studies to assess the effects of their antidiscrimination policies . . . for fear of creating evidence that will be used against them.”<sup>246</sup>

Interestingly, the co-chairs suggested that EEOC tools for resolving charges and lawsuits be marshalled to advance empirical case studies.<sup>247</sup> More specifically, the report recommended the EEOC build into “its settlement agreements, conciliation agreements, and consent decrees,”<sup>248</sup> agreement by employers that researchers will be permitted to evaluate all “policies, reporting systems, investigative procedures, and corrective actions” implemented as remedial measures. Such a recommendation starkly contrasts with the managerialist approach Schlanger and Kim identified in the EEOC’s remedial efforts from 1997–2006.<sup>249</sup>

The report also suggested that research be undertaken in settings outside of the EEOC’s remedial efforts. The co-chairs encouraged groups of employers to collaborate with researchers across firms to allow data on harassment procedures and policy efficacy to be aggregated and analyzed anonymously.<sup>250</sup> A similar recommendation was made regarding training efficacy.<sup>251</sup> Additionally, along with their recommendation that employers embrace workplace civility (anti-bullying) and bystander intervention

242. EEOC TASK FORCE REPORT, *supra* note 107, at III.B para. 22 (“[W]e need better research on what type of reporting systems are effective. Many witnesses told us it would be extraordinarily valuable for employers to allow researchers into their workplaces to conduct empirical studies . . .”).

243. *Id.* at III.C para. 18 (“Indeed, our most important conclusion is that we need better empirical evidence on what types of training are effective and what components, beyond training, are needed to make the training itself most effective . . . [I]t would be extraordinarily valuable for employers to allow researchers into their workplace to conduct empirical studies to determine what makes training effective.”).

244. *Id.* at III.C paras. 4-7.

245. *Id.* at III.B para. 22 (“[W]e are cognizant of the concerns employers may have in welcoming researchers into their domains. For example, we recognize that employers will want to have control over how data derived from its workplace will be used, and equally important, not used.”); *see also* Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 L. & CONTEMP. PROBS. 47, 47 (2020) [hereinafter Garrett & Mitchell, *Testing Compliance*] (“[W]hat makes the compliance effort deeply uncertain and problematic is that the information generated . . . is simultaneously useful and dangerous. . . . [D]ocumenting problematic behaviors creates a record that may be used against the corporation in future administrative, criminal or civil proceedings, or may become the subject of a media exposé.”).

246. Garrett & Mitchell, *Testing Compliance*, *supra* note 245, at 68.

247. EEOC TASK FORCE REPORT, *supra* note 107, at III.B para. 23.

248. *Id.*

249. *See* Schlanger & Kim, *supra* note 78, at 1526.

250. EEOC TASK FORCE REPORT, *supra* note 107, at III.B para. 23.

251. *Id.* at III.C para. 31.

training, the co-chairs advised that these educational programs be evaluated by researchers.<sup>252</sup>

Beyond working with researchers, the co-chairs recommended that employers self-assess their organizational climate and programming in several ways. First, they suggested that employers evaluate their organizations to identify, and then ameliorate potential risk factors that make harassment more likely.<sup>253</sup> These risk factors include: homogenous workforces; the non-conformance of some employees to general workplace norms; diverse cultural or linguistic characteristics among workers; periods when outside social interaction has coarsened or become polarized; the presence of young employees; the existence of rainmakers or high value employees; large power differentials among and between groups of employees; excessive reliance on customer satisfaction; monotonous work tasks; workplaces that are isolated; work cultures that allow alcohol use; and worksites that are decentralized.<sup>254</sup> Second, the co-chairs suggested that employers regularly “test” their harassment reporting system to assess its utility,<sup>255</sup> and routinely evaluate harassment training so programs can be modified when necessary.<sup>256</sup>

Finally, the EEOC report made clear that the agency would like greater empirical evidence on harassment prevalence, not only based on sex—which includes pregnancy, sexual orientation, and gender identity—but also on other bases, including race, national origin/ethnicity, religion, age, disability, and genetic information.<sup>257</sup> The co-chairs recommended that the EEOC collaborate with either private or government entities to create a national poll on the subject; they recommended researchers examine harassment prevalence on their own; they suggested the Merit Systems Protection Board launch a new study based on federal workers; and they stated that the EEOC should add queries on harassment to the Federal Employee Viewpoint Survey.<sup>258</sup>

The EEOC’s signaling, via the task force report, that American society must embrace harassment prevention and DEI efforts that are effective coincides with recent social science research on the effects of common symbolic structures. This research has shown that some DEI efforts work, some have no impact, and that others create backlash effects. The next

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252. *Id.* at III.D para. 24.

253. *Id.* at IV para. 6.

254. *Id.* at II.E paras. 5-16.

255. *Id.* at III.B para. 22.

256. *Id.* at III.C para. 30.

257. *Id.* at IV para. 5. Research on intersectional forms of harassment must also be undertaken. *See* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. FORUM 105 (2018) (arguing that the #MeToo movement failed to account for “the contributions and experiences of women of color” and that harassment doctrine must incorporate standards geared toward “intersectional and multidimensional identities.”).

258. EEOC TASK FORCE REPORT, *supra* note 107, at IV para. 5.

Section will briefly review some of these findings. This research sets the stage for moving beyond cosmetic compliance.

### C. *New Research on DEI and Harassment Prevention Practices*

Those committed to creating healthy and inclusive work environments can draw from two important forms of social scientific knowledge about DEI and harassment prevention programs. First, numerous studies have illuminated the empirical reality of such programming. Specifically, the studies have revealed data about which efforts produce changes in the representation of minority men, women of color, and White women in organizations; which structures have no effect; and which initiate backlash.<sup>259</sup> Second, social scientists have theorized about why these empirical effects are produced. Understanding the “why” of program efficacy assists in the interpretation of results and may guide future efforts in organizations. Both types of knowledge—the empirical and the theoretical—may be useful in dislodging the long-standing corporate myths that drive a symbolic approach to EEO and the jurisprudence of education and prevention. In an ideal world, government regulators and judges would refuse to assign legal significance to EEO policies, procedures, and programs, which social scientists have found do not work. And advocates of organizational change would want to reform or jettison programming that is ineffective at best and harmful at worst.

#### 1. *Empirical and Theoretical Insights About DEI Programming*

In their recent work, sociologists Frank Dobbin and Alexandra Kalev considered the body of empirical and theoretical research on DEI programming in three instructive areas: (1) efforts aimed at preventing managerial bias, (2) efforts promoting managerial engagement, and (3) efforts demanding managerial accountability.<sup>260</sup> Examining their own empirical work and that of many other social scientists, they find programming in the first category unhelpful, while efforts in the latter categories produce significant diversity gains.<sup>261</sup>

Dobbin and Kalev reviewed psychological and sociological studies of DEI efforts aimed at preventing managerial bias, finding them to be ineffective.<sup>262</sup> These common programs include diversity training, diversity

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259. Social scientists examine the representation of these groups (minority men, women of color, white women) over time because the purpose of DEI efforts is to increase workforce diversity and catalyze integration. Note that this list is underinclusive. Most of the research on DEI and harassment prevention programming focuses on these groups rather than on those who are sexual minorities, members of the disabled community, and older workers. As noted above, the EEOC has recommended study, at least regarding harassment, on less traditionally examined groups. See *supra* Part II.B.

260. See Dobbin & Kalev, *Evidence-Free Institutionalization*, *supra* note 54, at 815–17.

261. *Id.* at 823.

262. *Id.* at 815–17.

performance evaluations (which provide feedback to managers on their efforts to promote diversity), bureaucratic hiring and evaluation programs (tests, performance reviews, merit scoring systems), and EEO grievance procedures.<sup>263</sup> Diversity training and diversity performance evaluations aim to instruct people about their implicit and explicit biases, and provide techniques for suppressing bias. The hope is that if decision-makers can control bias, discrimination will be reduced.<sup>264</sup> Bureaucratic hiring and evaluation efforts are supposed to reduce biased errors in attribution through performance data collection and standard setting.<sup>265</sup> Grievance procedures seek to resolve complaints about and rehabilitate managers who engage in discrimination.<sup>266</sup>

Despite their ubiquity, Dobbin and Kalev argued that corporate educational efforts to quash bias are generally not successful. One review of 985 studies of anti-bias interventions found scant support that training decreases bias.<sup>267</sup> Other studies have found that diversity training triggers rather than eliminates bias.<sup>268</sup> Typical diversity training efforts are relatively short, and even the best programs produce effects that do not last.<sup>269</sup> Moreover, several studies have found that diversity training produces no effect on “women’s or minorities’ careers or on managerial diversity.”<sup>270</sup> Indeed, Dobbin and Kalev’s longitudinal study of 708 firms found that diversity training and diversity performance evaluations produced declines in the representation of Black women and Black men in management.<sup>271</sup>

Bureaucratic hiring and evaluation efforts—also aimed at eliminating managerial bias—are similarly unimpressive. Dobbin and Kalev noted that managerial resistance can result in biased performance evaluation scoring, subjective interpretation of scoring, or, for hiring tests, selective administration of the exams.<sup>272</sup> Not surprisingly, Dobbin and Kalev deemed EEO grievance procedures ineffective not only due to the high incidence of

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263. *Id.* at 815–16.

264. *Id.* at 815.

265. *Id.*

266. *Id.* at 816.

267. *Id.* at 815 (citing Elizabeth L. Paluck & Donald Green, *Prejudice Reduction: What Works? A Review and Assessment of Research and Practice*, ANN. REV. PSYCH. 60, 360 (2009)).

268. *Id.* (“Resistance has been documented in a number of studies. They suggest that anti-bias training can activate rather than suppress bias.”).

269. See Alexandra Kalev & Frank Dobbin, *Companies Need to Think Bigger Than Diversity Training*, HARV. BUS. REV., Oct. 20, 2020, \*3 [hereinafter Kalev & Dobbin, *Companies Need to Think Bigger*] (“The research is consistent and clear. You can’t significantly affect bias in training that lasts an hour, a day, or a week.”).

270. See Dobbin & Kalev, *Why Doesn’t Diversity Training Work?*, *supra* note 227, at 49.

271. Kalev & Dobbin, *Companies Need to Think Bigger*, at \*2 (“We analyzed data from hundreds of employers, across dozens of years, to assess how different equity measures work. And what we’ve found is that the typical diversity training program doesn’t just fail to promote diversity, it actually leads to declines in management diversity.”); Kalev & Dobbin, *Best Practices or Best Guesses*, *supra* note 73, at 604.

272. Dobbin & Kalev, *Evidence-Free Institutionalization*, *supra* note 54, at 815–16.

retaliation against complainants,<sup>273</sup> but also because they found that companies adopting such procedures “see significant declines in White women managers, and all minority groups except Hispanic men.”<sup>274</sup>

Why do tools to constrain bias fail? Dobbin and Kalev pointed to the social science literature on job autonomy and self-determination. As they explained:

Everything we know from psychological and sociological studies of work suggests that efforts to control managerial bias through rules and rehabilitation will fail . . . . [S]uch control strategies typically backfire . . . . Rules elicit rebellion . . . . [M]anagers appear to rebel against grievance systems, which threaten their autonomy by opening them up to rebuke . . . . Obligatory diversity training backfires because it signals that the company is trying to control employees’ thoughts . . . . Companies that provided feedback to managers on their diversity performance appear to elicit resistance as well . . . . [M]anagerial resistance to mandatory job tests has been shown to take several forms—managers can test only some applicants, or ignore test results, for instance . . . . People resist obtrusive controls on their behavior in order to maintain autonomy in decision-making.<sup>275</sup>

We must take great care in understanding these results. These findings do not mean, for example, that EEO educational efforts will never work. In fact, training can work if coupled with other diversity programs “that engage rather than alienate managers.”<sup>276</sup> Some of the most effective programming will be described below. Nor do the results here indicate anything about courses taught in higher education, or at the secondary or primary level, examining the subject of race, ethnicity, gender, or other identity categories in American society.<sup>277</sup> Rather, the study outcomes indicate that corporate EEO programming designed to prevent managerial bias, as implemented by firms during the period studied, did not produce positive diversity outcomes. In my view, the results underscore the wrongheadedness of judges and regulators who treat tools to prevent managerial bias as evidence that discrimination was not present or that an employer should not be liable for harassment or punitive damages.<sup>278</sup> Similarly, these findings should encourage organizations to assess the effects of their own programming and make any changes necessary for improvement.

Unlike bias control programming, Dobbin and Kalev found that managerial engagement is a useful tool for diversifying the workforce.

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273. *Id.* at 816 (noting that in 2015, 45 percent of discrimination complaints to the EEOC included a charge of retaliation).

274. *Id.* at 817.

275. *Id.* at 815–17.

276. Dobbin & Kalev, *Why Doesn't Diversity Training Work?*, *supra* note 227, at 52–53 (“The key to improving the effects of training is to make it part of a wider program of change. . . . The trick is to couple diversity training with the right complementary measures.”).

277. *See supra* note 23.

278. *See supra* Section I.B.

Programming in this category includes “mentoring programs, special college recruitment programs . . . , and skill and management training with special nomination procedures for underrepresented groups.”<sup>279</sup> One key element of such programming is its voluntary rather than mandatory nature. Managers sign up if they are interested. As Dobbin and Kalev noted, the “programs encourage managers to help address the problem rather than labeling them as the cause of the problem.”<sup>280</sup> In other words, these efforts are framed as problem-solving efforts. Drawing from cognitive dissonance and self-perception theories, Dobbin and Kalev surmised that managers participating in the programs come to see themselves as change-agents.<sup>281</sup> This role fits well with what managers do: they work on solutions to problems. Numerous studies, including those by Dobbin and Kalev, have demonstrated that these efforts increase diversity in the firms that adopt them.<sup>282</sup>

Finally, Dobbin and Kalev reviewed programs that promote social accountability by holding managers answerable for their decisions produce diversity returns.<sup>283</sup> Examples of such efforts are diversity taskforces, diversity managers, and federal oversight of federal contractors who are answerable to the U.S. Department of Labor. Accountability theory from psychology predicts that managers asked to explain their decisions will suppress bias; the same is true of evaluation apprehension theory.<sup>284</sup> Dobbin and Kalev reported that “[s]tudies show positive effects of all three types of accountability [structures] on workforce diversity.”<sup>285</sup>

Ironically, the structures with the biggest impact on law and regulatory practice are those that either do little or produce adverse effects on diversity. Grievance procedures and training, for example, are not only deferred to by judges; they are part of EEO doctrinal law.<sup>286</sup> Moreover, those structures are far more common than those that engage managers or promote accountability.<sup>287</sup> The next Section reviews research on the impact of harassment programming and comes to similar conclusions. Along with the EEOC’s 2016 report, the body of social science research on diversity training and harassment prevention sets the stage for a doctrinal course correction and a shift to an evidence-based approach to EEO.

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279. Dobbin & Kalev, *Evidence-Free Institutionalization*, *supra* note 54, at 818.

280. *Id.*

281. *Id.*

282. *Id.* at 819 (“Our longitudinal studies of a national sample of firms, over the course of 30 years, suggest these engagement activities typically promote diversity, even in the hard-to-change ranks of management.”).

283. *Id.* at 820.

284. *Id.*

285. *Id.* at 821.

286. See *supra* Part I.B (describing the *Ellerth/Faragher* affirmative defense to vicarious liability for supervisor harassment and the *Kolstad* safe harbor from punitive damages in all discrimination cases).

287. Dobbin & Kalev, *Evidence-Free Institutionalization*, *supra* note 54, at 824.



## 2. *Empirical and Theoretical Insights About Harassment Prevention Policies and Programming*

As noted above, the 2016 EEOC report examined decades of social science research on harassment grievance procedures and training. Grievance procedures are rarely used, and when complainants do file grievances, they frequently face retaliation.<sup>288</sup> Additionally, social scientists have been unable to demonstrate that harassment training reduces harassment; in fact, some studies have found that training could make workplace conditions worse.<sup>289</sup>

Until recently, we did not know how harassment grievance procedures, manager training, and employee training impact the gender composition of management in firms. If the programming is effective, we might see not only a diminishment of harassment, but also increases in the representation of women of color and White women in management.<sup>290</sup> A recent longitudinal study published by Dobbin and Kalev provides a complicated picture. Dobbin and Kalev examined a data set of 805 private sector firms covering the years 1971–2002.<sup>291</sup> Surveys were conducted to determine when companies adopted anti-harassment policies and programs.<sup>292</sup> That information was compared against EEOC annual census data, which is collected from private sector companies with more than one hundred workers.<sup>293</sup>

Introducing grievance procedures was associated with declines of “[B]lack women, Hispanic women, and Asian-American women” in the managerial ranks.<sup>294</sup> By contrast, adopting grievance procedures did not affect the share of White women in management.<sup>295</sup> Recall Dobbin and Kalev’s explanation for why EEO grievance procedures fail more generally. Grievance procedures are bias control policies, which threaten managers’ autonomy, open them up to rebuke, and trigger retaliation.<sup>296</sup> Why was managerial representation for women of color adversely affected while that of White women was not? The researchers noted that minority women are

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288. See *supra* Part II.A.

289. *Id.*

290. See Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire: And What to do About it*, HARV. BUS. REV., 45, 46 [hereinafter Dobbin & Kalev, *Harassment Programs Backfire*].

291. See Dobbin & Kalev, *Promise and Peril*, *supra* note 61, at 12256.

292. *Id.* Dobbin and Kalev note that by 2002, 98 percent of the employers in the study had adopted harassment grievance procedures, 82 percent conducted harassment training for managers, and 64 percent had employee harassment training. *Id.*

293. *Id.* The EEOC census data is reported by occupational category and “provides the gender, race, and ethnic composition for surveyed workplaces.” *Id.*

294. *Id.* at 12258.

295. *Id.*

296. Dobbin & Kalev, *Evidence-Free Institutionalization*, *supra* note 54, at 815–17.

more likely to be harassed and file grievances,<sup>297</sup> and perhaps White women are better protected from retaliation by occupying more senior roles.<sup>298</sup> Negative effects were moderated for women of color, however, in firms with more women managers.<sup>299</sup> Indeed, the negative effects disappeared at firms with the most women managers.<sup>300</sup>

Interestingly, in contrast to non-managerial employee training, which is described below, harassment training programs for managers are associated with an increase in managerial representation of women of color and White women.<sup>301</sup> The researchers believe this is because the training engages managers in problem-solving. Managers are taught how to spot harassment “and what to do when they see it.”<sup>302</sup> Male managers are placed in heroic roles as the parties who will stop harassment rather than be labeled as potential perpetrators. Troublingly, Dobbin and Kalev found that the positive effects of managerial training disappear for White women in firms where women’s managerial representation exceeds 12 percent.<sup>303</sup> In other words, regarding White women, “when women’s gains in management threaten men’s dominance, group threat can lead men to resist efforts to accommodate women.”<sup>304</sup> This effect was not present for minority women.<sup>305</sup>

Finally, the study determined that non-managerial employee harassment training programs are correlated with significant declines of White women in management.<sup>306</sup> These programs, which are often framed in terms of forbidden behavior, appear to trigger backlash against White women.<sup>307</sup> Dobbin and Kalev noted that this finding is consistent with studies finding various adverse effects of traditional harassment training, including that it increases the likelihood that men will “blame [harassment] victims and to think that women . . . are making it up.”<sup>308</sup> Indeed, the men who are most

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297. Dobbin & Kalev, *Harassment Programs Backfire*, *supra* note 290, at 48.

298. Dobbin & Kalev, *Training Programs and Reporting Systems Won't End Sexual Harassment. Promoting More Women Will*, HARV. BUS. REV. (“[P]erhaps [white women] . . . are better protected from retaliation because, on average, they are in more senior roles. But overall, women who file harassment complaints end up more likely to leave their jobs either involuntarily or of their own accord—and others may follow them when they see complaints badly handled, with the harassers still in their jobs.”).

299. *Id.*

300. *Id.*

301. See Dobbin & Kalev, *Promise and Peril*, *supra* note 61, at 12258. In the study, companies that launched harassment training for managers “saw significant gains in the percentage of women in their managerial ranks, with white women rising by more than 6%, African American and Asian American women by 5%, and Latinas by 2%.” Dobbin & Kalev, *Harassment Programs Backfire*, *supra* note 290, at 47.

302. Dobbin & Kalev, *Harassment Programs Backfire*, *supra* note 290, at 47–48.

303. Dobbin & Kalev, *Promise and Peril*, *supra* note 61, at 12259.

304. *Id.*

305. *Id.*

306. *Id.* at 12258.

307. *Id.*

308. Dobbin & Kalev, *Harassment Programs Backfire*, *supra* note 290, at 47.

likely to harass may “become more accepting of such behavior after training.”<sup>309</sup>

In sum, the study results, and the social science findings from other studies referenced above, show that the symbolic structures developed by firms and endorsed by courts to vanquish discrimination do not deliver as promised. Some, specifically grievance procedures and traditional employee harassment training, negatively impact people in the groups one most hopes might be helped. At the same time, current research points to the promise of reform. Changing the law is necessary as is transforming the culture and practices of organizations. Accomplishing the latter requires safe but accountable space for earnest employers to experiment. How that might be accomplished will be taken up next in Part III.

### III. TOWARDS AN EVIDENCE-BASED APPROACH TO COMPLIANCE

This Article has highlighted two significant problems plaguing EEO law and organizational practice. The first is a doctrinal dilemma. More specifically, EEO law incorporates, and judges defer to, symbolic structures long recommended by compliance experts as liability shields and discrimination antidotes. Legal endogeneity, where those subject to regulation set the terms of legal compliance, is most evident in the harassment and punitive damages doctrines. In those areas, grievance procedures and EEO training are the symbolic structures of choice.<sup>310</sup> Researchers also find judicial deference to other DEI policies and programs in EEO case law more generally.<sup>311</sup> No one could object to the status quo if we had confidence that symbolic structures positively affect workplace environments and reduce bias.<sup>312</sup> It is clear, however, that at most common policies and programming, fail in that regard.<sup>313</sup>

The second is an organizational problem. Employer DEI and harassment prevention practices, including but not limited to grievance procedures and training, are driven by unexamined corporate myths about how to create work environments free from discrimination. Many of those myths, such as the utility of diversity training, are not empirically valid.<sup>314</sup> As Dobbin and Kalev noted, employers frequently lack knowledge of program efficacy because “they operate in a faith-based, evidence-free zone.”<sup>315</sup> Employers rationally

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309. *Id.*

310. *See supra* Part I.B.1.

311. *See supra* Part I.B.2.

312. *See* Nakamura & Edelman, *supra* note 4, at 2677 (“If diversity structures were uniformly effective, [that these programs and policies are to judges symbols of diversity] . . . would not be problematic.”).

313. *See supra* Part II.C.

314. Dobbin & Kalev, *Evidence-Free Institutionalization*, *supra* note 54, at 809.

315. *Id.* at 823.

hesitate to examine their EEO compliance efforts for fear of creating evidence that might be used against the firm in litigation.<sup>316</sup>

A pandemic-related civil rights crisis<sup>317</sup> and new social science research on program efficacy<sup>318</sup> underscore the urgency of a compliance course correction. Creating diverse and inclusive work environments requires a move from a cosmetic to an evidence-based approach. While simple solutions will not solve this complex problem, an obvious place to begin is to change the liability standards for harassment and punitive damages. After all, it is in those areas where legal endogeneity is most evident. Limiting the types of evidence that can be used by employers in cases involving harassment and punitive damages is advisable as well.

Altering the legal incentives that reward a cosmetic approach, however, is necessary but insufficient. Ultimately, an evidence-based approach to compliance requires innovative employers to collaborate with researchers and regulators. I recommend an evidentiary safe harbor as a supervised space for organizational experimentation. And I recommend continued use of social science evidence in litigation to defeat the myths that stymie a substantive approach to EEO. Those topics—a change in liability and evidentiary standards, a supervised research safe harbor for employers, and continued use of Brandeis briefs in EEO litigation—will be discussed below.

#### A. *Changing Liability Standards and What Counts as Relevant Evidence*

Two decades ago, Linda Hamilton Krieger described the affirmative defense in *Ellerth* and *Faragher* as premised on defective descriptive accounts of how organizations and people behave.<sup>319</sup> The first prong of the affirmative defense, which requires employers to use care to prevent and correct harassment, implies that “by promulgating policies against harassment, establishing harassment complaint procedures, and conducting anti-harassment trainings, employers *will* prevent harassment from occurring, or at least greatly reduce its incidence.”<sup>320</sup> The implicit assumption of the second prong, which requires the employer to show lack of care by the victim employee, is that “rational harassment victims necessarily utilize available internal grievance procedures.”<sup>321</sup> Research then, though formative, pointed to the folly of both assumptions.

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316. Garrett & Mitchell, *Testing Compliance*, *supra* note 245, at 68.

317. *See supra* Introduction.

318. *See supra* Part II.C.

319. *See* Linda Hamilton Krieger, *Employer Liability for Sexual Harassment – Normative, Descriptive, and Doctrinal Interactions: A Reply to Professors Beiner and Bisom-Rapp*, 24 U. ARK. LITTLE ROCK L. REV. 169, 198 (2001) [hereinafter Krieger, *Normative, Descriptive, and Doctrinal Interactions*]. For a discussion of the *Ellerth/Faragher* defense and what I call the jurisprudence of education and prevention, *see supra* Part I.B.

320. Krieger, *Normative, Descriptive, and Doctrinal Interactions*, *supra* note 319, at 174.

321. *Id.*

Krieger then posed a question: does the divergence between the Court's descriptive accounts and empirical reality matter?<sup>322</sup> Yes, it does, she answered. The disjunction was important because the Court was using legal doctrine to deter discrimination by creating incentives aimed at the parties' behavior.<sup>323</sup> A project aimed at incentivizing conduct cannot succeed if the descriptive accounts of behavior are faulty. Indeed, in the case of hostile environment harassment, an affirmative defense based on flawed descriptive accounts may, instead of reducing discrimination, "increase the rates of unremedied discriminatory harms" and undercut the aims EEO law.<sup>324</sup> Today the divergence is even more glaring because the public understands that many symbolic structures are ineffective at best.<sup>325</sup> Incentivizing use of such policies and programs through legal doctrine makes a mockery of EEO law.

Scholars have advocated employer strict liability for hostile environment harassment, both before and after the creation of the *Ellerth/Faragher* affirmative defense.<sup>326</sup> Keith Cunningham-Parmeter recently argued for closing the "harassment loophole" that provides a liability shield for firms adopting train-and-report systems of harassment prevention. He recommended holding employers strictly accountable whether the perpetrator is a supervisor or a coworker.<sup>327</sup>

I have taken a different tack. My focus has been on what should count as admissible evidence in EEO suits, recognizing the tremendous evidentiary

322. *Id.* at 197.

323. *Id.* at 198.

324. *Id.*

325. See, e.g., Bisom-Rapp, *Sexual Harassment Training Must Change*, *supra* note 232, at 73–74 (“[C]ountless articles in the popular press question harassment training efficacy, with the common refrain being that training does not work . . . . These changed and nuanced popular perspectives on harassment training may signify a tipping point.”); see also L.V. Anderson, *You Say You Want a Diverse Workforce: Badly Designed Policies Can Make the Problem Worse*, SLATE (Jan. 21, 2016), <https://slate.com/business/2016/01/corporate-diversity-policies-can-harm-the-people-theyre-intended-to-help.html> [<https://perma.cc/W5F2-WAW5>]; Justin Wm. Moyer, *Workplace Diversity Policies ‘Don’t Help’ – and Make White Men Feel Threatened*, WASH. POST (Jan. 5, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/01/05/workplace-diversity-policies-dont-help-women-minorities-and-make-white-men-feel-threatened/> [<https://perma.cc/5V7W-7J7L>]; Musa al-Gharbi, *Research Shows Diversity Training is Typically Ineffective*, REAL CLEAR SCI. (Dec. 5, 2020), [https://www.realclearscience.com/articles/2020/12/05/research\\_shows\\_diversity\\_training\\_is\\_typically\\_ineffective\\_652014.html](https://www.realclearscience.com/articles/2020/12/05/research_shows_diversity_training_is_typically_ineffective_652014.html) [<https://perma.cc/3TNJ-JUAS>].

326. See, e.g., Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 41 COLUM. HUM. RTS. L. REV. 41, 52 (1992); Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1343–44 (2014); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 789 (1999); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 735–36 (2000); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 107–18 (1995); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229 (1991).

327. See generally Cunningham-Parmeter, *supra* note 41, at 195–96.

advantage enjoyed by employers. For example, in 2001, and again in 2018, I argued that harassment and diversity training should not be competent evidence of employer due care or lack of bias in EEO suits for compensatory damages.<sup>328</sup> A process of speculative value should not be used to deny a plaintiff make-whole relief.<sup>329</sup> By contrast, I suggested courts carefully evaluate training efficacy when considering employer good faith claims related to the safe harbor from punitive damages.<sup>330</sup> At the time, I believed that such a searching review by courts was likely.

Similarly, in 1999, I analyzed the bulletproofing advice provided to employers to render firms' employment decisions immune from challenge. I recommended plaintiffs' attorneys be mindful of the panoply of litigation prevention techniques that potentially render documentary and testimonial evidence suspect.<sup>331</sup> By focusing on how firms create evidence to justify employment decision-making, I hoped that the plaintiffs' bar might fashion effective counternarratives for their clients.<sup>332</sup> In retrospect, this recommendation strikes me as timid since social science research has revealed that bureaucratic evaluation programs, often used to bulletproof firms' decisions, are vulnerable to bias.<sup>333</sup>

Decades of increasing judicial deference to symbolic structures,<sup>334</sup> judge's reluctance to second guess firms' decision-making,<sup>335</sup> and employer-friendly liability standards more generally, counsel against timidity in ending an era of cosmetic compliance. To that end, I agree with those commentators advocating employer strict liability for hostile environment harassment, whether that harassment is perpetrated by a supervisor or an employee.<sup>336</sup> This might be accomplished in part by legislatively overruling the *Ellerth/Faragher* affirmative defense for supervisor harassment. Liability standards for coworker harassment could also be set legislatively; in other

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328. See Bisom-Rapp, *An Ounce of Prevention*, *supra* note 36, at 44 (“Until we know much more about antidiscrimination 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.”); Bisom-Rapp, *Sexual Harassment Training Must Change*, *supra* note 202, at 68 (“[T]raining should not assist an employer in its efforts to establish an affirmative defense to vicarious liability for harassment.”).

329. Bisom-Rapp, *An Ounce of Prevention*, *supra* note 36, at 44–45; Bisom-Rapp, *Sexual Harassment Training Must Change*, *supra* note 202, at 68.

330. Bisom-Rapp, *An Ounce of Prevention*, *supra* note 36, at 44–47; Bisom-Rapp, *Sexual Harassment Training Must Change*, *supra* note 202, at 68.

331. Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 39, at 1040 (“Plaintiffs’ attorneys should approach client representation with a sound appreciation of how employers produce neutral documentary and testimonial evidence . . . I suggest they be mindful of the panoply of litigation prevention techniques described herein.”).

332. *Id.* at 1041 (“These defensive strategies may in some cases prove useful fodder for fashioning a plaintiff’s counternarrative.”).

333. See *supra* Part II.C.1.

334. See *supra* Part I.B.

335. See *supra* Part I.B.2.

336. See *supra* notes 326–327 and accompanying text.

words, one might, by amending the EEO statutes, abolish the requirement that plaintiffs prove the employer knew or should have known about the harassment and failed to stop it. I also believe Tristin Green is correct in arguing that strict vicarious liability is warranted in cases of individual discrimination. Given the role of organizational culture in providing fertile soil for discrimination, it makes no sense for organizations' complaint and response systems to protect firms from liability.<sup>337</sup> Moving to a system of strict liability will provide better incentives for employers to consider the effects of their EEO policies and programs rather than allow them to hide behind such policies.

One should also consider what counts as competent evidence in EEO suits. I reiterate my earlier points that diversity and harassment training should be irrelevant to employer liability for compensatory damages in EEO cases.<sup>338</sup> I would add to that list EEO grievance procedures since they do not promote diversity and inclusion.<sup>339</sup> Additionally, considering all we know about most bias eradication training, I now believe *Kolstad's* good faith safe harbor from punitive damages must be abolished.<sup>340</sup> That might be accomplished by legislatively overruling *Kolstad's* safe harbor. Legislative action can define a symbolic structure as incompetent evidence or irrelevant to a claim. For example, in California, legislation mandates that employers with five or more employees provide biennial supervisory and non-supervisory employee harassment training.<sup>341</sup> Yet the state legislature made clear that compliance with the training mandate will not insulate an employer from harassment liability.<sup>342</sup> Certainly this approach—prohibiting employers from proffering evidence of a symbolic structure to avoid liability in an EEO suit—would be possible on the federal level.

Taking these steps would increase the incentive for employers to take an evidence-based approach to EEO compliance. Employers could no longer count on the benefits of cosmetic efforts. These changes, however, would not be sufficient. For example, in California, there is no *Ellerth/Faragher*

337. GREEN, DISCRIMINATION LAUNDERING, *supra* note 39, at 151.

338. See Bisom-Rapp, *An Ounce of Prevention*, *supra* note 36, at 44; Bisom-Rapp, *Sexual Harassment Training Must Change*, *supra* note 202, at 68.

339. See *supra* Part II.C.1.

340. Joseph Seiner would likely disagree with this proposal. He endorsed the *Kolstad* safe harbor and noted that to satisfy the good faith requirement, employers must show they have an antidiscrimination policy, which is maintained and enforced. A firm should also train its employees on preventing discrimination. Finally, responding to employee complaints through an established procedure is required to establish good faith. Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473, 511–12 (2012). As demonstrated above, these symbolic structures—an antidiscrimination policy, EEO training, and grievance procedures—are not substantively effective in eradicating bias so I do not believe they should shield an employer from liability.

341. See CAL. GOV'T CODE § 12950.1.

342. See CAL. GOV'T CODE § 12950.1(c) (“[A]n employer’s compliance with this section [mandating harassment training] does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.”).

defense for hostile environment harassment.<sup>343</sup> Employers are held strictly liable.<sup>344</sup> No one would claim, however, that strict liability has eliminated harassment in the state<sup>345</sup> or caused a change in employers compliance strategies.<sup>346</sup> To change employers' approach to compliance, and encourage them to work with researchers and regulators, the next Section examines the concept of a research safe harbor, which would promote employer experimentation and evidence-based compliance with EEO law.

### B. Regulatory Encouragement and a Research Safe Harbor

Myth-busting is essential to bring an era of cosmetic EEO compliance to a close. Social scientists and the public understand that many common symbolic structures—stand-alone harassment and diversity training, and EEO grievance procedures, in particular—do not work.<sup>347</sup> Social scientists also cast doubt on the use of other common so-called bias elimination tools, including performance reviews and employment tests.<sup>348</sup> We are starting to understand the kinds of DEI and harassment prevention efforts that foster healthy workplaces and apparently lead to greater inclusion of minority men, women of color, and White women in the managerial ranks.<sup>349</sup> Apart from changing liability and evidentiary standards, how do we encourage corporate leaders to change direction?

A recent meta-analysis of studies on countering misinformation offers lessons that may assist. Debunking messages are more effective when corrective information is provided.<sup>350</sup> Changing minds requires coupling

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343. See Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 129 (2018) (noting that California's Fair Employment and Housing Act ("FEHA") does not allow for an *Ellerth/Faragher* affirmative defense).

344. *Id.* (noting that under California law, employers are held strictly liable for supervisor hostile environment harassment).

345. *Id.* at 132 ("Even with the expansive protections of [California's] FEHA, sexual harassment persists, and employees are still afraid to express their opposition to sexual harassment.").

346. As noted above, harassment training is mandatory in California. See CAL. GOV'T CODE § 12950.1. Employers with five or more employees must provide two hours of sexual harassment training to supervisors and one hour to nonsupervisory employees every two years. The training must include prevention of abusive conduct, and information about gender identity, gender expression, and sexual orientation. *Id.* The California legislature directed the Department of Fair Employment and Housing (DFEH) to make available free training modules to the public. The training module for nonsupervisory employees was posted in May 2020. See Dan Eaton, *State Posts Free Sexual Harassment Training for Non-supervisors*, SAN DIEGO UNION-TRIBUNE (Jun. 8, 2020), <https://www.sandiegouniontribune.com/business/story/2020-06-08/state-posts-free-sexual-harassment-prevention-training-for-non-supervisors> [<https://perma.cc/EQW5-2HCN>]. I served as a *pro bono* consultant to the DFEH in the preparation of the training. DFEH worked hard to avoid "forbidden behavior" framing. Indeed, as one commentator noted: "Addressing effective bystander intervention, the training encourages viewers to be the ally they'd like to have in the workplace." *Id.*

347. See Part II.

348. See *supra* Part II.C.1.

349. See Part II.C.

350. See Man-pui Sally Chan, Christopher R. Jones, Kathleen Hall, Jamieson, and Dolores Albarracín, *Debunking: A Meta-Analysis of the Psychological Efficacy of Messages Countering*



disconfirming data with information “enabl[ing] recipients to update the mental model justifying the misinformation.”<sup>351</sup> Myth-busting efforts by the EEOC and other EEO regulators must be aimed at corporate crusaders and innovators —people like those who helped bring about a revolution in personnel and human resources policy in the 1950s and 1960s.<sup>352</sup> Not satisfied with cosmetic DEI efforts, these are the leaders interested in substantive change. Corporate decision-makers must understand why common DEI and harassment prevention mechanisms fail, why other structures work, and how change might be implemented and tracked in their organizations. Of course, not every human resources professional is a corporate crusader and innovator. Certainly, some such professionals are content with the status quo. Yet for strategic reasons, I believe that Dobbin and Kalev are correct to focus on those who earnestly desire change. If we are to bring the end to an era of cosmetic compliance, we must identify and focus on these potential change agents.

Regulators should encourage evidence-based EEO compliance. The EEOC’s education and outreach efforts could be instrumental to that effort.<sup>353</sup> Additionally, the EEOC should promote further research into DEI and harassment prevention program efficacy. To that end, convening another special task force with a focus on evidence-based DEI and harassment prevention would be useful. Relatedly, the Office of Federal Contract Compliance Programs (OFCCP), which is responsible for oversight of federal contractors’ affirmative action and DEI efforts, should recommend an evidence-based approach through its compliance assistance program.<sup>354</sup> Evidence-based EEO compliance should be embraced by the U.S. Department of Labor more generally.

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*Misinformation*, 28 PSYCH. SCI. 1531, 1543 (2017) (“[T]he debunking effect was weaker when the debunking message simply labeled misinformation as incorrect rather than when it introduced corrective information.”).

351. *Id.* (“[D]ebunking is more successful when it provides information that enables recipients to update the mental model justifying the misinformation.”).

352. *See supra* Part I.A.

353. U.S. EQUAL EMP’T. OPPORTUNITY COMM’N, FISCAL YEAR 2022 CONGRESSIONAL BUDGET JUSTIFICATION PART VII (May 28, 2021), [https://www.eeoc.gov/fiscal-year-2022-congressional-budget-justification#\\_Toc71812511](https://www.eeoc.gov/fiscal-year-2022-congressional-budget-justification#_Toc71812511) [<https://perma.cc/BTU4-3FSK>] (detailing no-fee based and fee-based EEOC outreach efforts).

354. For an overview of the OFCCP, *see generally* Jane Farrell, *The Promise of Executive Order 11246: “Equality as a Fact and Equality as a Result,”* 13 DEPAUL J. FOR SOC. JUST. 1, 3–10 (2020) (discussing the OFCCP’s “legal authority, mandates, and enforcement procedures”). The OFCCP’s enforcement procedures include: (1) providing compliance assistance to employers, (2) conducting compliance evaluation and investigating complaints, (3) obtaining conciliation agreements, (4) reviewing employer compliance reports, and (5) recommending enforcement actions. *OFCCP’s Enforcement Procedures*, U.S. OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, <https://www.dol.gov/agencies/ofccp/about> [<https://perma.cc/FF2X-TBZE>] (last visited March 1, 2022).

### 1. *A Supervised Research Safe Harbor for Employers*

One hurdle to surmount is the concerns of in-house counsel and others in management who assume an evidence-based DEI approach will expose potential violations that otherwise would remain hidden.<sup>355</sup> Why invest in a new EEO compliance strategy that could perversely lead to increased sanctions or disastrous public relations? Solving this compliance dilemma requires a different approach to compliance: a system that protects those employers willing to experiment with the assistance of researchers and regulators.

A few scholars have proposed methods that would allow or require employers to assess their EEO, harassment prevention, and diversity efforts without fear of creating adverse evidence. Pam Jenoff has suggested use of the self-critical analysis privilege. Companies asserting the privilege could assess their diversity initiatives and then shield the results from discovery.<sup>356</sup> While noting that most courts reject the privilege in the employment context,<sup>357</sup> Jenoff argued that its acceptance would further the Supreme Court's policy of discrimination prevention. The cases she cited for support are *Ellerth*, *Faragher*, and *Kolstad*.<sup>358</sup> Because this proposal is based on three cases that exemplify legal endogeneity and judicial deference, I fear it would reinforce cosmetic compliance. The privilege would shield evidence not only of successful programming but also traditional, ineffective programming.<sup>359</sup> A self-critical research privilege risks exacerbating the evidentiary imbalance, which already plagues employment discrimination plaintiffs.

A different proposal is proffered by Gregory Mitchell and Brandon Garrett. Examining several corporate compliance issues, including those involving EEO, they suggested that firms be required to validate their compliance programs and report on those efforts to the federal government.<sup>360</sup> Firms under the Securities and Exchange Commission's oversight would be the first to be subject to the mandate.<sup>361</sup> The government would not set standards for the type of programming companies adopt, but firms would need to reveal the validation methodology employed, and provide detail on the data forming the basis of the report.<sup>362</sup> Information reported would remain

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355. Garrett & Mitchell, *Testing Compliance*, *supra* note 245, at 72.

356. Pam Jenoff, *The Case for Candor: Application of the Self-Critical Analysis Privilege to Corporate Diversity Initiatives*, 76 BROOK. L. REV. 569 (2011).

357. *Id.* at 585–86.

358. *Id.* at 595–99.

359. Garrett & Mitchell, *Testing Compliance*, *supra* note 245, at 75 (noting that the proposal's opponents fear the privilege will lead companies "to conceal otherwise discoverable information about an ineffective compliance program and shoddy efforts to investigate and prevent wrongdoing.").

360. *Id.* at 77.

361. *Id.* at 78.

362. *Id.*

confidential. Unlike EEO-1 forms,<sup>363</sup> the government could not use the compliance validation reports for its enforcement activities.<sup>364</sup> No other party possessing the information could use the reports in litigation either.<sup>365</sup>

A validation mandate with a litigation safe harbor is an interesting idea, but the proposal appears agnostic about whether the validation is done in-house, by employing a consultant, or by working with university researchers. No government enforcement action could be undertaken pursuant to the report, weakening employers' incentives for system improvement. Moreover, since the most common symbolic structures do not work, why reward employers who continue to use them and shield their assessments from the public? Dobbin and Kalev found programming promoting social accountability conducive to diversity gains in the managerial ranks.<sup>366</sup> Without public disclosure in some form and with no chance for an enforcement action, the social accountability associated with the validation mandate would be greatly diminished.<sup>367</sup>

Finally, Richard Thompson Ford, in a study focusing on Silicon Valley, proposed a safe harbor pilot program providing an EEO litigation shield to any employer making verifiable diversity improvements.<sup>368</sup> Ford would provide no limitations on how diversity is pursued; in terms of programs and policies, "anything goes."<sup>369</sup> Employers who meet agreed-upon targets<sup>370</sup> would be able to make individual hiring, promotion, and retention decisions however they like without fear of litigation.<sup>371</sup> However, Ford also built sticks into this proposal: companies that do not reach "agreed-upon targets face heavy fines and public shaming."<sup>372</sup> My concern about Ford's proposal, which was pitched as a thought experiment, is its superficial approach to diversity. All that would matter to regulators administering the pilot is the employer's bottom line. As such, Ford risks, and acknowledged risking,

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363. *EEO-1 Data Collection*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/eo-1-data-collection> [<https://perma.cc/JPV3-7NQ7>] (last visited Feb. 17, 2022).

364. Garrett & Mitchell, *Testing Compliance*, *supra* note 245, at 77–78.

365. *Id.*

366. *See supra* Part II.C.1.

367. As Linda Krieger noted, the watched variable improves. Linda Hamilton Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, in *SEX DISCRIMINATION IN THE WORKPLACE* 297, 321 (Fay J. Crosby, Margaret S. Stockdale & S. Ann Ropp eds., 2007). She advocated mandated, extensive data collection related to gender, jobs, and pay. Reporting under her proposal would be not only to regulatory agencies but also to the public. *Id.* at 312–13.

368. Richard Thompson Ford, *Civil Rights 2.0: Encouraging Innovation to Tackle Silicon Valley's Diversity Deficit*, 11 *STAN. J. C.R. & C.L.* 155, 177 (2015).

369. *Id.* at 178.

370. Ford did not specify how or with whom the diversity targets would be set. I assume he envisioned regulators and employers discussing and arriving at achievable targets.

371. Ford, *supra* note 368, at 177–78.

372. *Id.* at 178.

trampling upon existing legal rights and potentially violating Supreme Court caselaw.<sup>373</sup>

There are two notable facts about all three proposals. First, all of the proposals allow employers to choose and examine any policies and programs they believe will advance EEO. This is an error considering what we know about the myths surrounding symbolic structures. When the aim is to advance DEI and harassment prevention, why perpetuate those myths and use of the structures? Second, under none of the proposals is the quality of the assessment or validation process ensured—in other words, there is no effort to confirm that the assessment process is conducted objectively. This too is problematic. Protection from suit or an enforcement action, or the shielding of evidence from discovery, is a valuable inducement that should not be offered by the government without ensuring the quality of the efficacy studies.

To foster research into the most promising efforts, I recommend creating a supervised research safe harbor program for innovative, DEI-committed employers willing to partner with professional researchers and regulators. What follows are my initial thoughts about such a program. Eligibility would turn on two factors: (1) participating employers would agree that the assessment would be conducted by professional researchers,<sup>374</sup> and (2) the focus of the assessments would be on EEO programming that promotes managerial engagement and accountability. Symbolic structures aimed at preventing bias, such as standalone, forbidden behavior harassment and diversity training, or conventional EEO grievance procedures, would not be eligible for examination. These structures would not be eligible because social scientists have found that they are ineffective at eliminating discrimination.

With these prerequisites satisfied, the government would receive but would not use the research results against any employer taking part in the program. To remain in the safe harbor program, employers would need to demonstrate good faith efforts to respond to the assessments and improve their harassment prevention and DEI programming over time. The EEOC might publish findings as best practices and feature the results at conferences or other educational events. Mechanisms for reporting to the public on the safe harbor program's outcomes would maintain the confidentiality of the employer participants. Employers could waive confidentiality if they wished to publicize positive results.

There are several ways in which a safe harbor might be created. One possible method would be for the EEOC to create a safe harbor rule as a

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373. *Id.*

374. Without specifying qualifying credentials, I assume the researchers will typically be associated with a university or other institution of higher education. Since, as noted below, the research will be funded through grants, the grant-making entity, whether governmental or philanthropic, would no doubt evaluate the researchers' credentials when evaluating study proposals.

regulation after notice and comment.<sup>375</sup> Samuel Estreicher has proposed this method for creating temporally limited safe harbor rules to address employers' aversion to hiring older workers, people with obvious disabilities, and those with serious criminal convictions.<sup>376</sup> Although the issue has not been litigated, the EEOC's ability to create a research safe harbor through regulation is likely limited. Any safe harbor created would probably only affect the EEOC's use of employers' research reports in its own prosecutorial capacity.<sup>377</sup> Moreover, employee advocates would look askance at any effort to shield employers from the reach of EEO law simply because those employers worked with university-based researchers to examine their DEI and harassment prevention policies.<sup>378</sup>

Safe harbors can also be created legislatively.<sup>379</sup> Congress might create a research safe harbor for the EEOC to administer. Given my proposal's novelty and uncertain effects, however, were Congress to act, I recommend the safe harbor include a sunset provision with targets to meet before legislators could reauthorize the evidentiary shield. In order to avoid the use of a safe harbor as a cover for flagrant or systemic discrimination, I urge caution in creating a safe harbor through legislation. Congress might grant protection that is too broad in its sweep and too difficult to eliminate if it results in adverse effects.

A more promising route might be to focus on the OFCCP and its compliance review process. As noted above, the OFCCP oversees the affirmative action and DEI efforts of federal contractors.<sup>380</sup> To encourage employers to empirically assess their EEO compliance programming, the OFCCP would receive copies of research study reports, but shelter those reports from use in its compliance reviews. This would provide breathing

375. As Melissa Hart explained, the EEOC enforces Title VII, the ADEA, and Title I of the ADA. "Each of these statutes contains slightly different language about the agency's authority to fill in gaps left by Congress . . . [Under] Title VII, . . . the Commission [may issue] 'suitable procedural regulations' . . . . By contrast, the ADEA . . . broadly authorizes the EEOC to 'issue . . . regulations as it may consider necessary and appropriate . . . [Regarding the ADA], the EEOC [is] 'required . . . to issue regulations to carry out [the ADA's employment provisions].'" Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1941 (2006). Note that under Title VII, the EEOC is not required to use notice and comment procedures. *Id.* at n.22.

376. Samuel Estreicher, *Achieving Antidiscrimination Objectives Through "Safe Harbor" Rules for Cases of Chronic Hiring Aversion*, 2 *U. PA. J.L. & PUB. AFF.* 1, 8 (2017) [hereinafter Estreicher, *Achieving Antidiscrimination Objectives*].

377. One would expect any effort by the EEOC to create a safe harbor through the regulatory process to be challenged in court.

378. Thanks to Chai Feldblum for making this point.

379. Estreicher cites to the Texas administrative code as an example of a state creating a safe harbor for whistleblowing nurses. Estreicher *Achieving Antidiscrimination Objectives*, *supra* note 376, at 9 n.23 (citing *Tex. Admin. Code* § 217.20 (15)). Interestingly, Estreicher notes that a judicially created safe harbor preventing liability for supervisor hostile environment harassment was created by the Supreme Court via the *Ellerth/Faragher* affirmative defense. *Id.* at 9. The supervised research safe harbor I propose would not be created judicially. Nor, as clear from this Article, do I believe the *Ellerth/Faragher* affirmative defense should continue to exist as precedent.

380. See *supra* note 354 and accompanying text.

room for those employers serious about DEI and harassment prevention to experiment with and improve their efforts. Such a non-enforcement policy would differ from the Voluntary Enterprise-wide Review Program, which the OFCCP announced during the Trump administration.<sup>381</sup> That program seeks to “exempt from compliance evaluations ‘high performing’ federal contractors who meet certain criteria.”<sup>382</sup> My suggestion would shelter the study results without entirely exempting the employers from compliance review. Additionally, the OFCCP would still investigate discrimination complaints, engage in conciliation, and, where appropriate, recommend enforcement actions against any participant in the safe harbor program.

OFCCP might also create a mechanism for federal contractors to share research results in an anonymous fashion. To the extent that groups of employers in similar industries are studied, data might be aggregated, and studies could be published without revealing the identity of any employer. Publishing the results so that the public remains informed would advance social accountability and myth-busting. Managers working with researchers would benefit from the engagement and problem-solving aspects of the studies. Further elaboration of this proposal awaits future development. Funding the research, however, will be briefly addressed below.

## 2. *Funding the Safe Harbor Research*

Quality research requires funding. To ensure their objectivity, the researchers working within the safe harbor program could not accept remuneration or anything of value from the employers being studied. Rather, the research would be funded by government or philanthropic sources.

Tying the safe harbor to research grants would enable university-based researchers to undertake high caliber field studies. The National Science Foundation (NSF), a public grant issuing agency with a long-standing interest in DEI studies, is a promising source of funds.<sup>383</sup> For example, NSF’s ADVANCE program, which began considering grant applications in 2001,<sup>384</sup> issues grants to universities endeavoring to diversify their science and engineering faculties.<sup>385</sup> NSF has significant involvement with the ADVANCE grantees, which in turn has enabled the agency to influence and spread positive diversity outcomes in higher education.<sup>386</sup> Another possibility

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381. See Farrell, *supra* note 354, at 21.

382. *Id.*

383. See, e.g., Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006) (exploring the impact of the NSF’s ADVANCE program at the University of Michigan).

384. See Dobbin & Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279, 279 (2007) (“In 2001, ADVANCE . . . considered the first round of applications for grants for institutional change.”).

385. See Susan Bisom-Rapp, *What We Learn in Troubled Times: Deregulation and Safe Work in the New Economy*, 55 WAYNE L. REV. 1197, 1231–1234 (2009) (describing NSF’s ADVANCE program).

386. See Sturm, *supra* note 20, at 314–21.

would be funding issued through the National Institute of Occupational Safety and Health (NIOSH), which is keenly interested in the effects of harassment and discrimination on occupational safety and health.<sup>387</sup> Among philanthropic organizations, the Ford Foundation, which funds research aimed at ending inequality and has a Future of Work(ers) program, might be a fertile source for grants.<sup>388</sup>

In subsequent work, I hope to flesh out the details of my proposal. We must engage the employers most likely to make the shift to evidence-based EEO compliance and conquer the myths that disable our EEO laws. A supervised employer research safe harbor, which protects the study results of grant-funded researchers, would be one tool for accomplishing these conjoined goals.

### C. *Employing the Brandeis Brief*

The two solutions set forth above—one advocating doctrinal change through legislative action and the other proposing a supervised research safe harbor—represent the means for nudging courts and employers towards an evidence-based approach to EEO compliance. Critics might deem the former wishful thinking given Congress’s present composition. A supervised research safe harbor, if implemented, might only be sought by and available to a small number of employers; moreover, conducting research is time-consuming so results might take years to reach the public. In the meanwhile, I recommend an additional method for myth-busting: the use of Brandeis briefs in EEO litigation.

As many lawyers know, the Brandeis brief is associated with Louis Brandeis’s submission in *Muller v. Oregon*,<sup>389</sup> a case where Oregon’s daily maximum hours law for women laundry workers was successfully defended from challenge.<sup>390</sup> Brandeis’s Supreme Court brief relied on “over ninety reports . . . to the effect that long hours of labor were dangerous for women.”<sup>391</sup> A similar strategy was employed decades later in another landmark Supreme Court case, *Brown v. Board of Education*.<sup>392</sup> That suit

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387. See Susan Bisom-Rapp, *Learning from Troubled Times: Pursuing Equality Outside an Anti-discrimination Law Frame by Rethinking the Promotion of Safe Work During the Bush Administration*, 45 U.S. F. L. REV. 603, 618–19 (2011) (describing NIOSH funded research).

388. See *Future of Work(ers)*, FORD FOUNDATION, <https://www.fordfoundation.org/work/challenging-inequality/future-of-work-ers/> [https://perma.cc/56SD-U4EY] (last visited Feb. 18, 2022).

389. *Miller v. Oregon*, 208 U.S. 412 (1908).

390. *Id.* at 423.

391. Danya C. Wright, *The Logic and Experience of Law: Lawrence v. Texas and the Politics of Privacy*, 15 U. FLA. J.L. & PUB. POL’Y 403, 412 (2004). Research for the original Brandeis brief was conducted by Brandeis’s sister-in-law, Josephine Goldmark. See William D. Blake, “Don’t Confuse Me with the Facts”: *The Use and Misuse of Social Science on the United States Supreme Court*, 79 MD. L. REV. 216, 221–22 (2019).

392. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

successfully challenged as unconstitutional racial segregation in public education.<sup>393</sup> *Brown*'s much discussed Footnote eleven cited several psychology studies examining the racial harms perpetuated by separate but equal systems,<sup>394</sup> evidencing the impact of the strategy on the Court.<sup>395</sup>

While the scientific research employed in both cases has been challenged as substandard,<sup>396</sup> social science can nonetheless beneficially impact both law and public opinion. Michael Heise argued, for example, that although *Brown* ultimately failed to integrate the nation's public schools, the case had an unanticipated benefit because it "transform[ed] . . . [legal] doctrine by casting it empirically."<sup>397</sup> He credited *Brown* with advancing "law's increasingly multidisciplinary character."<sup>398</sup> The more the social science on EEO symbolic structures is cited by lawyers, the more judges will confront the disjunction between legal doctrine and reality.

Beverly Moran noted that "social science often contributes to how we comprehend society"<sup>399</sup> and impacts public opinion years ahead of any particular litigation.<sup>400</sup> She explained that shifting peoples' beliefs is a long-term project and suggests work must be done not only in the courtroom but "in the court of public opinion."<sup>401</sup> My suggestion that lawyers more frequently submit Brandeis briefs challenging the myths about symbolic EEO structures is designed for those dual purposes. The more attorneys that become familiar with the neo-institutionalist research, the more at least certain judges and members of the public will be receptive to it.<sup>402</sup> As argued above, conditions are ripe for a favorable shift away from cosmetic EEO compliance in doctrinal law and organizational practice.<sup>403</sup> Plaintiffs' attorneys can help hurry along that shift, which is necessary if we are to restore the potential of EEO law to change society for the better.

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393. *Id.* at 495.

394. Wright, *supra* note 391, at 416.

395. See Beverly I. Moran, *Constructing Reality: Social Science and Race Cases*, 25 N. ILL. U. L. REV. 243, 249 (2005) (calling *Brown* "one of the great decisions in terms of its use of social science").

396. See, e.g., Blake, *supra* note 391, at 222 ("[T]he scientific information included in the *Muller* brief would not be considered reliable by modern standards."); Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1, 20–21 (2002) (describing criticism of the social science cited in *Brown*).

397. Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 280 (2005).

398. *Id.*

399. Moran, *supra* note 395, at 244.

400. *Id.*

401. *Id.* at 252.

402. I do not deny there are troubling trends in the way our highest Court has responded to scientific evidence. In his study of how the Supreme Court uses social science, William D. Blake found "Liberal Justices are more likely to cite science than conservative Justices." Blake, *supra* note 391, at 252. He also determined that Justices on the left and the right "resort to scientific arguments to bolster their underlying worldviews." *Id.* Unfortunately, social science does not produce a moderating effect on the Justices. Rather, it leads to ideological polarization. *Id.*

403. See *supra* Part II.



## CONCLUSION

EEO law and many organizations' EEO practices are increasingly recognized as ineffectual or even harmful by social scientists,<sup>404</sup> those who have served on the EEOC,<sup>405</sup> legal scholars,<sup>406</sup> managers,<sup>407</sup> and the public.<sup>408</sup> Given the original promise of antidiscrimination law, it is heartbreaking to read top scholars in the field who have opined that “[b]usiness executives know that purely symbolic diversity structures will serve as well as effective structures in avoiding liability . . . . Judges, for their parts, operate largely in a check-the-box fashion . . . .”<sup>409</sup> Other pathbreaking researchers have noted that “[c]ompanies have . . . found that they can stay out of legal trouble by adopting cosmetic fixes, which is much easier than solving the problem of harassment at its roots.”<sup>410</sup> Many of us in the academic world have been making similar arguments for decades.<sup>411</sup> The research is clear. Law and employment practices are not working. In the wake of a pandemic-related civil rights crisis and a period of intense political attack on EEO, we must change course.

This Article has argued that conditions are favorable for beginning a shift from cosmetic to evidence-based compliance. In the wake of a COVID-19 civil rights crisis, we should not waste this opportunity. If we do not take steps to bring law and practice in line with empirical reality, we will never, despite President Biden’s laudable efforts to assemble a diverse cabinet, achieve workplaces that look like America. I am hopeful that we will choose not to continue making the mistakes that have bedeviled us.<sup>412</sup>

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404. See *supra* Part II.C.

405. See *supra* Part II.A.

406. See *supra* Parts I.B & III.A.

407. See note 224 and accompanying text (quoting EEOC Commissioner Victoria Lipnic).

408. See note 325 and accompanying text.

409. Nakamura & Edelman, *supra* note 4, at 2679.

410. Dobbin & Kalev, *Training Programs and Reporting Systems Won't End Sexual Harassment. Promoting More Women Will*, *supra* note 298, at \*2.

411. See, e.g., Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 39; Bisom-Rapp, *An Ounce of Prevention*, *supra* note 36; THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW (2005); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003); Krieger, *Normative, Descriptive, and Doctrinal Interactions*, *supra* note 319; Grossman, *The Culture of Compliance*, *supra* note 77.

412. Krieger, *Message in a Bottle*, *supra* note 179, at 57. Krieger believes that she will not see justice in her lifetime. *Id.* I am hopeful for a slightly shorter timeframe.