I. REIMAGINING WORK AND THE EROSION OF WORK STRUCTURES

In the wake of the Industrial Revolution the social arrangements through which people do productive work have changed. Sometimes changes in the technology or organization of work sufficiently alter work practices so that they themselves are revolutionary. Most recently, microelectronic technological innovations, the globalization of work, and the development of multinational capital markets have had revolutionary consequences by permitting capital to achieve and hence to pursue unlimited profits. In the last decades of the twentieth century, this pursuit has ushered in such startling changes in employment practices that reimagining work has become a minor industry. Social scientists and management scholars predict the externalization of work and the erosion of the employer-employee relationship, and with them the elimination of jobs as we know them. The celebrants of these changes envision workers with the same goal as their employers—attaining enormous wealth—and the same chance to realize their goal. They imagine workers in the new economy as free agents who voluntarily string together a series of contractual exchanges of work for compensation into a career. In the process, and through investment markets and e-commerce, workers will supposedly achieve economic security, independent of a particular employer.

Observers also emphasize debureaucratization and the disappearance of hierarchy in work organizations. The prototypical work organization in this

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fantasy resembles a Silicon Valley startup, with a flat organizational structure in which a relatively homogeneous group of workers perform similar jobs, work cooperatively as peers, and share the benefits of breakthroughs. In addition, social scientists predict that social capital, by which they mean social networks, will be the key for success in this brave new world of work. Thus, despite the valorization of rugged individualism in the new economy, success still comes to the well connected.

Regardless of how pervasive the phenomena are in these visions, their existence and glorification as the embodiment of a brave, new workplace have alarming implications for the creation of work without exclusionary barriers. Consider the elimination of hierarchy. Organizations can indeed become flatter by combining job categories or compressing job ladders, and some have done so. But flatter organizations also mean the compression or elimination of job ladders that have provided to white women and minority women and men a path from jobs as laborers, bank tellers, and reservation clerks to more rewarding positions. Although glass ceilings have prevented members of these groups from using job ladders to reach the top organizational strata, the elimination of those ladders will further lower the ceilings. The disappearance of formal hierarchical structures does not necessarily mean the disappearance of hierarchy. In some cases, hierarchy is outsourced when firms outsource low-prestige functions like security, cleaning, mailing, and human resources. This flattens hierarchies within establishments, by replacing them with cross-establishment hierarchy. Moreover, in flattened organizations hierarchy moves behind the scenes, thus increasing the importance of informal social networks for determining who gets what.

The erosion of workplace bureaucracies threatens the careers of the traditionally excluded. Bureaucracy within work organizations is expressed primarily in written rules that govern employers’ and employees’ rights and responsibilities regarding their employment relationship. These include the specification of necessary job qualifications, the definition of job families and job ladders, promotion and transfer policies, evaluation criteria and procedures, entitlement to benefits, cause for termination, and the like. It is through these formal policies and their accompanying structures that workers obtain due-process protections. As I argue below, formal rules check caprice and favoritism. Although people who belong to the group that makes the rules

4. Peripheral functions have been outsourced. Pfeffer & Baron, supra note 1, at 269; Sharon R. Cohany et al., Counting the Workers: Results of a First Survey, in CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION 41, 49, 58 (Kathleen Barker & Kathleen Christensen eds., 1998).

5. Outsourcing low-prestige functions like security, cleaning, mailing, and human resources helps to flatten hierarchies within organizations, although it does not reduce inequality in the workforce as a whole, it just concentrates nonstandard workers in different and less desirable work arrangements. See Pfeffer & Baron, supra note 1, at 269, 270, 274; Arne Kalleberg, Barbara Reskin & Ken Hudson, Bad Jobs in America, 65 AM. SOC. REV. 256, 264 (2000).
rarely need formal rules to advance in their careers, the traditionally excluded derive their rights and protections from organizational bureaucracies.\footnote{Externalization of work—-independent contracting, outsourcing, and the like—has narrowed the reach of bureaucratic work structures. Kalleberg et al., supra note 5, at 274.}

The replacement of the standard employer-employee relationship, the model organization of work in the last half of the 20th century, with more “flexible” arrangements also threatens to exacerbate race- and sex-based exclusion. The standard employment arrangement, which came into its own in the middle of the twentieth century, is characterized by the exchange of a worker’s labor for monetary compensation by an employer, with work performed on a fixed schedule, at the employer’s place of business, under the employer’s control, and with the mutual expectation of continued employment.\footnote{Kalleberg et al., supra note 5, at 257-58.} It is through this standard employment relationship that the government protects workers from dangerous working conditions, unfair treatment and discrimination, and the vicissitudes of unemployment. Through it the government provides family and medical leave and social security to some Americans. Thus, the standard employment relation can be seen as a work structure that provides certain protections to workers.

In sum, trends that have been attributed to the new economy involve the erosion of employment structures—practices and policies that govern the allocation of employment and job rewards. Seniority-based promotion systems, academic tenure, and professional partnership all exemplify work structures that can protect the marginalized—or at least those members of marginalized groups who obtain jobs under their protection.\footnote{Just as tenure-track jobs are increasingly outside the reach of some academics who must settle for contingent work that provides no job security, low pay, and few if any benefits, law firm associates increasingly find themselves as permanent employees rather than equity partners. Elizabeth H. Gorman, Up-Or-Out Contracts in Law Firms: Promotion or Dismissal in the Context of Knowledge-Intensive Services (1997) (unpublished manuscript, on file with author).} Thus, employment structures are critical for ensuring equal access for marginalized groups.\footnote{It is no coincidence that these protective structures are at risk when people of color and white women can finally draw on their protections. To paraphrase Carter and Carter, once women and minorities got a ticket to ride, the gravy train stopped running. Michael J. Carter & Susan Boslego Carter, Women’s Recent Progress in the Professions or, Women Get A Ticket to Ride After The Gravy Train Has Left The Station, 7 FEMINIST STUD. 477, 500-01 (1981).}

II. WHY WORK STRUCTURES ARE CRITICAL FOR MARGINALIZED GROUPS

Work structures are essential for protecting members of marginalized groups for several reasons. In the first place, work structures make visible and public the “rules” (e.g., job posting, job descriptions) one needs to survive and succeed at work. Their visibility also signals an employer’s public values with respect to uniform treatment, fairness, and the like. For example, the existence
of job ladders signals to workers that their employer rewards satisfactory performance with a promotion, while the absence of promotion structures makes workers pessimistic about their promotion chances. By the same token, structures make inequities visible, because they permit workers to compare the outcomes of similarly-qualified members of different groups. Structures often link performance, performance evaluation, and rewards: what are normally perquisites for insiders become entitlements for those—and only for those—who meet performance standards. For example, job ladders signal who is potentially eligible to move up. Third, structures limit discretionary behavior by gatekeepers. For example, blind auditions markedly increased women’s participation in major symphony orchestras. The use of a physical structure—a screen—during auditions increased women’s share of new hires in symphony orchestras by 30 percent between 1970 and 1996! Fourth, structures can trump custom—a major force for business as usual. In recognition of this, the Equal Employment Opportunity Commission literally restructured segregated eating facilities and restrooms in formerly segregated southern plant in the Civil Rights era to preclude de facto segregation from replacing that mandated by company policy. Finally, structures can provide mechanisms to challenge illegitimate treatment, such as appeals processes.

Structures are essential for controlling discrimination. They are particularly important because—as I argue in the next section—many of the actions that give rise to the exclusion of men and women of color and white women are not intentional; they stem from automatic, unconscious cognitive processes. This means that the good intentions of workplace decisionmakers are not sufficient to prevent the discriminatory results of cognitive biases. The only real safeguards are structural.

III. NONCONSCIOUS ORIGINS OF DISCRIMINATION

Despite the existence of regulations designed to check discrimination and the establishment of public agencies charged with administering those regulations, social scientists continue to document pervasive employment discrimination based on gender and race. To the credit of employers, workers, and regulatory agencies, men and women of color and white women have made headway in their access to and rewards for employment since major federal anti-discrimination regulations were enacted in the 1960s. Nonetheless, recent

10. Sex differences in the importance of being promoted stem from women’s lower likelihood of holding jobs that have promotion structures. Naomi R. Cassirer & Barbara Reskin, High Hopes: Organizational Position, Employment Experiences, and Women’s and Men’s Promotion Aspirations, 27 WORK & OCCUPATIONS 438, 458 (2000).
strong evidence documents the persistence of race and sex discrimination which excludes people from some jobs and restricts them to occupational ghettos, reduces their on-the-job autonomy and authority, and lowers their pay. In more than 2,000 audits, employers discriminated against minorities between one-fourth and one-fifth of the time, favoring whites in invitations to interview, job offers, compensation, job assignments, and information about unadvertised opportunities. Applicants with white-sounding names who replied to classified ads were half as likely as those with black-sounding names to get call-backs from employers. Additional evidence of on-going discrimination comes from an innovative study that uses 1997 EEO-1 data to assess firms’ underemployment of women or blacks compared to others in the same industry and location that employ workers in the same occupations. Consistent with the above evidence of sustained race and sex discrimination are employers’ admission of their aversion to employing people of color.

Discrimination persists, I contend, because our remedies for it are inadequate. And they are inadequate because the paradigmatic conception of discrimination ignores one of its fundamental causes. Based on my work as an expert witness in discrimination cases, I came to doubt the adequacy of the conventional view of discrimination as conscious hostile acts motivated by antipathy. I soon learned that others who had worked as experts or attorneys have drawn the same conclusion I reached: normal, nonconscious, automatic cognitive processes of which we are unaware and which we do not consciously intend routinely gives rise to discrimination in employment. Thus, after reviewing evidence that much employment discrimination originates in automatic cognitive processes, I concluded that we must expand the...
paradigmatic understanding of discrimination in order to effectively control it. Ironically, the interventions that can control discrimination originating in nonconscious cognitive processes are particularly threatened by the restructuring of work.

I focus here on two key cognitive processes that—unless checked—can give rise to discrimination: ingroup favoritism and stereotyping. These unconscious, automatic processes lead to “micro” acts of discrimination such as social exclusion, the denial of opportunities to acquire skills, unnoticed contributions, and unwarranted reprimands. Victims may not identify these acts as discriminatory and the data available to social scientists do not capture them as well as they capture discrimination in consequential employment “events”—the denial of employment or a promotion, a segregated job assignment, or an unwarranted termination—which tend to be the focus of most scientific assessments of the extent of discrimination and of federal anti-discrimination regulations.

IV. CATEGORIZATION, INGROUP FAVORITISM, AND STEREOTYPING

Both ingroup favoritism and stereotyping stem from an apparently natural and generally adaptive cognitive process: the categorization of “cognitive objects” (i.e., people, things).  


20. However, when the ingroup is small, members show ingroup homogeneity (“all of them are alike”), and to exaggerate differences between in- and outgroups on dimensions that favor our own group and minimize those that do not.  


A. Ingroup favoritism

The distinction we make between others like and unlike ourselves is automatic and largely outside our awareness or control; it involves fundamental processes such as what we store and recall about others. For instance, even when the same information is provided about members of ingroups and outgroups, subjects do not retain the same information about them.
outgroup membership defines the pool of those to whom people are attracted, with whom they seek equal treatment, and who serve as their reference group. We evaluate ingroup members more positively than outgroup members, trust them more, have more positive feelings for them, and are inclined to cooperate with them rather than competing. For example, we readily assess nonsense words paired with "us" and "we" more favorably than those paired with "them" and "they."

In addition, what we expect of others depends on whether they are outgroup and ingroup members: we anticipate positive behaviors by ingroup members and negative behaviors by outgroup members. Observers assess others' performance and account for their successes and failures. Descriptive stereotypes affect observers' expectations and hence the explanations they construct. When the actions of others conform to our expectations, we tend to attribute their behavior to stable, internal propensities (e.g., ability), while we attribute actions that are inconsistent with our stereotype-based expectations to situational (i.e., external) or transient factors (e.g., task difficulty, luck, or effort). In this way, stereotype-based expectations give rise to biased attributions. For example, given the stereotype that men are good at customarily male tasks, competent performance by men doesn't require an explanation; men's failures do, however, and observers tend to attribute these unexpected outcomes to situational factors such as bad luck or lack of effort, none of which predict future failure. In contrast, women are stereotypically not expected to do well at customarily male endeavors, so explaining their failure is easy: They lack the requisite ability (an internal trait) and hence are likely to fail in the future. In contrast, their successes are unexpected, so they must have resulted from situational factors that do not predict future success. Moreover, in the attributions we make to account for others' behavior, we tend to attribute expected behavior to internal dispositions and unexpected behavior to external situations. Thus, we would attribute failure by an ingroup member and success by an outgroup member—both unexpected outcomes—to the situation, but credit success by an ingroup member and failure by an outgroup member—both expected outcomes—to their own dispositions. These propensities preserve our impressions of ingroup members as superior to outgroup members.

24. Brewer & Brown, supra note 18, at 559.
The consequences of ingroup favoritism resemble what we would expect from differential treatment based on outgroup antagonism. The differences are that the former is less subject to personal control than the latter, and that vastly more people are affected by the former than the latter. While a minority of Americans harbor sufficiently strong antipathy toward an outgroup to purposively avoid them at work, ingroup preference appears to be an almost universal phenomenon. As a result, ingroup preference is an important source of discrimination in the workplace. Brewer and her colleagues claimed that much of what social scientists and legal scholars construe (and what workers experience) as discrimination against outgroups originates not in animus toward an outgroup but in preference for others like ourselves. Rather than being targets of animosity to ingroup members, outgroup members are invisible to the ingroup.

The small and large advantages that people receive from ingroup members contribute importantly to their success. Of course, if membership in influential ingroups were independent of sex and race, then ingroup favoritism—while unfair—would not contribute to sex- and race-based inequality. But in an already sex- and race-stratified society, white European-ancestry men dominate posts as decisionmakers or informal gatekeepers who control opportunities that can enhance careers, and hence are best able to favor members of their ingroups. The substantial underrepresentation of women of all races and men of color in predominantly white, predominantly male posts in the top echelons in the corporate world, in law firms, in the academe, and in the skilled trades is consistent with the operation of high levels of ingroup favoritism in which white men benefit from being helped or selected because of their race and sex—in DiTomaso’s language, from “affirmative inclusion.”

My experience as an expert witness has illustrated the importance of ingroup favoritism for creating outgroup disadvantage. Search committees and managers may not consciously reject women or people of color because of their sex or race; none comes to mind during brainstorming sessions to develop a pool of candidates. Being the wrong sex or race excludes women and minorities by rendering their accomplishments invisible and distorting others’ perceptions and evaluations of them, including their expectations of and explanations for women’s and minorities’ successes and failures.

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28. As Alejandro Portes put it, “your community is my exclusion.” Comment during a discussion of papers at the University of Pennsylvania Conference on Economic Sociology (March 4, 2000).

29. See, e.g., Brewer & Brown, supra note 18, at 566.


31. Id. at 1.
B. Sex and race stereotyping

The other important way that categorization gives rise to potentially discriminatory cognitive distortions and biases is sex and race stereotyping. We can think of stereotypes as habits of thought (as habits, they are overlearned and automatic) or as implicit theories that link group membership to personal attributes. Although we are aware of some of our stereotypes (I know, for example, that I consciously stereotype students with green hair, nose rings, and large tattoos as nonstudious and hence must struggle not to treat them differently), it is unconscious stereotypes that I emphasize here. When we encounter a person, the traits that are stereotypically associated with her/his group membership automatically come to mind—including stereotypes that we consciously reject as unfounded. The automatic nature of stereotyping helps to maintain stereotypes, despite evidence that they are inaccurate. In fact, we automatically pursue, prefer, and remember acts that support our stereotypes (including remembering “events” that did not occur), and we ignore, discount, and forget acts that challenge them. We process information that conforms to their stereotypes more quickly than inconsistent information, and we are more likely to stereotype when we are under time pressure, partly because stereotyping conserves mental resources.

Unconscious stereotyping can lead to discrimination because it affects our impressions and judgments of others. For example, people can more quickly pair positive words with “white” than “black,” even when the stimulus term “black” is presented subliminally. When we do not have complete information about others that we need for making decisions, we automatically draw on stereotypes to fill in the blanks. Importantly, these invisible assumptions can be the basis for our actions. For example, employers lacking objective information about the career commitment of a young woman are likely to assume that she is less committed than a man with similar credentials. Indeed, according to Browne and Kennelly, Atlanta employers admitted that they were reluctant to employ African American women because they assumed that they were single mothers. Brooklyn employers assumed that African American women who lived nearby would attract their boyfriends and children.

34. Fiske, supra note 21, at 367.
35. Id. at 366.
to the workplace.\textsuperscript{38} And law firms that list stereotypically male attributes (e.g., assertiveness) among the criteria for choosing associates hired disproportionately more males, while firms that listed stereotypically female traits (e.g., interpersonal skills) hired disproportionately more females.\textsuperscript{39}

Considerable research has established that anything that highlights group membership primes stereotypes, thereby increasing the likelihood that they will be invoked.\textsuperscript{40} For example, Devine showed that subjects who were subliminally exposed to words stereotypically linked to African Americans but which were unrelated to hostility (e.g., jazz) were more likely to interpret ambiguous behavior by blacks as hostile than were those whose stereotypes about African Americans were not primed before they were presented with the ambiguous behavior.\textsuperscript{41} Thus, an idle remark about skirt lengths or pro-basketball can activate sex or race stereotypes, and activated stereotypes can distort decisionmakers' assessments.

Importantly, diversity training—which has displaced affirmative action in American corporations—is likely to prime stereotypes and hence make treatment based on sex or race more likely.\textsuperscript{42} “Celebrating our differences” at work activates stereotypes associated with the groups to which we belong.\textsuperscript{43} According to laboratory experiments, people can temporarily suppress stereotyping when they are instructed to do so, but suppression is followed by a \textit{rebound} in which people display more stereotyping than members of a control group that was not instructed not to stereotype.\textsuperscript{44} Research also demonstrates that we stereotype more when we are under time pressures or are engaged in complex tasks that tax our cognitive resources.\textsuperscript{45}

In sum, stereotyping and ingroup favoritism act automatically at the preconscious level in ways that disadvantage women and people of color. They endure because they are cognitively efficient. By freeing us to concentrate our attentions on the stimuli that are consequential for outcomes that matter to us, they permit us to process complex stimuli automatically. Given their efficiency for individuals—and their presumed advantage for dominant groups—they are difficult to eradicate. Given their automaticity and their nature, they distort and

\textsuperscript{38} Kasinitz & Rosenberg, \textit{supra} note 16, at 190.
\textsuperscript{40} Madeleine E. Heilman, \textit{Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know}, 10 J. SOC. ISSUES 3 (1995); Fiske, \textit{supra} note 21, at 366.
\textsuperscript{43} The mention of affirmative action may have this effect. See Madeleine E. Heilman, \textit{Affirmative Action: Some Unintended Consequences for Working Women}, 16 RES. IN ORGANIZATIONAL BEHAV. 125, 142-54 (1994).
\textsuperscript{44} Bodenhausen et al., \textit{supra} note 33, at 326.
\textsuperscript{45} Fiske, \textit{supra} note 21, at 366.
hence bias our impressions and evaluations of others. Thus, their likely effect is sex and race discrimination. Fortunately, these discriminatory effects can be minimized, however, through employment structures, the topic to which I now turn.

V. EMPLOYMENT STRUCTURES THAT MINIMIZE THE DISCRIMINATORY EFFECTS OF NONCONSCIOUS COGNITIVE PROCESSES

Work organizations cannot eradicate people’s automatic propensity to categorize others into ingroups and outgroups. And organizations’ attempts to eliminate stereotyping can backfire. However, employers can prevent these cognitive processes from biasing employment decisions and hence causing discrimination against people of color and white women. They can do this—and some do—by formalizing personnel practices and holding decisionmakers accountable for any discriminatory effects. In other words, employment practices can curtail, permit, or exacerbate the effects of normal intrapsychic processes. Thus, while work structures can forestall the discriminatory consequences of cognitive processes—and even of some intentional discrimination—they can also invite employment discrimination. Consider word-of-mouth recruiting). Because informal networks are often based on sex, race, ethnicity, and other personal characteristics, organizations’ use of workers’ personal social networks to identify candidates for jobs, promotions, membership on a task force, and the like almost always excludes for outsiders. One consequence is seen in the effect of using informal networks to recruit managers. Across a national sample of work organizations, the greater employers’ reliance on informal networks to recruit managers, the lower women’s share of managerial jobs. In short, the presence or absence and the form of work structures strongly influence the levels of employment discrimination in a workplace. Organizational sociologists have identified organizational characteristics and employment practices that affect levels of sex- and race-based ascription or discrimination. Social cognition research also points to employment practices that can minimize or exacerbate the biasing effects of social cognition processes. In this section, I draw on these literatures

46. Brewer & Brown, supra note 18, at 566.
47. Fiske, supra note 21, at 375.
49. Barbara F. Reskin & Debra B. McBrier, Why Not Ascription? Organizations' Employment of Male and Female Managers, 65 AM. SOC. REV. 210, 220-22 (2000). The survey did not ask employers about the race of their managers, so we could not investigate whether the same effect holds for race, but from a theoretical standpoint one would expect that it does.
to identify organizational structures and practices that mediate the biasing effects of nonconscious cognitive processes.

A. Demographic composition of the work setting

The heterogeneity of the work group influences both the basis on which we categorize coworkers into in- and outgroups and our likelihood of stereotyping. The more heterogeneous the work group, the lower the extent of unconscious stereotyping because in heterogeneous settings we are more likely to have individuating information about fellow workers. In work groups that are genuinely diverse, sex and race are less likely to be the basis for ingroup and outgroup status, and sex- and race-based status groups are less likely to dominate decisionmaking groups. Thus, the more heterogeneous a work unit's sex, race, and ethnic composition, the less likely it is that ingroup preference, outgroup derogation, stereotyping, and attribution error will introduce race and sex bias into personnel decisions.

Employers may be able to reduce the use of sex or race as the bases of categorization by making work groups more heterogeneous. Moreover, they can reinforce the effect of workforce heterogeneity and heighten workers' identification with work-related groups by encouraging and rewarding cooperation, and through task interdependence, job rotation, and collective activities. Integrating workgroups by sex and race reduces the salience of category distinctions and encourages the individuation of people of another sex or race.\(^5\) Competition between groups, on the other hand, exacerbates stereotyping by heightening the importance of group membership and because competition encourages people to use cognitive resources to obtain accurate information about other members of their own team, while discouraging the individuation of competitors.

B. Categorization and ingroup favoritism

Organizations can reduce the discriminatory consequences of ingroup favoritism by categorizing employees on the basis of characteristics that are independent of their sex and race. Employers can exploit people's ready attachment to artificially created ingroups, even those based on seemingly irrelevant criteria, and hence their subjectivity to recategorization, by supplanting ascriptively defined categories and recategorizing workers in terms of functional categories that are relevant at the place of work. Such functional categories include projects, teams, divisions, branches, or even the organization itself (where the outgroup is its competitors).

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50. Brewer & Brown, supra note 18, at 580.
In addition, cross-cutting assignments should help erode categories and hence discourage workers and their supervisors from viewing themselves and others in terms of ascriptively-defined ingroups and outgroups.\textsuperscript{51}

\section*{C. Information and stereotyping}

Whether stereotyping leads to unequal treatment depends in part on what information is available to decisionmakers. As noted, when we lack individuating information about people, our stereotypes automatically come into play. Thus, employers can check the discriminatory effects of unconscious cognitive processes by implementing personnel structures which ensure that decisionmakers have relevant information for all candidates in all personnel decisions (both decisions involving major events like job assignment or promotion as well as routine events such as performance evaluation, committee appointments, or task assignments); that the available information is complete, objective, concrete, and timely; and that decisionmakers use only information that is relevant. The formalization of employment practices often involves explicitly specifying what information is relevant and ensuring that such information is available. This no doubt helps to account for the positive effect of formalized personnel practices on women’s share of managerial jobs.\textsuperscript{52}

One way that irrelevant “information” enters into personnel decisions is through the activation of stereotypes. This suggests that the personnel decision process should be separated from informal conversations, and it cautions against reminding decisionmakers about diversity immediately before they make personnel decisions. In contrast, priming egalitarian values appears to reduce the bias, so cautions about the importance of equal employment opportunity may be helpful.

Affirmative inclusion is tantamount to outgroup discrimination, and its effect is discriminatory whenever employment practices give decisionmakers discretion in selecting occupants for positions or promotions or other career-enhancing opportunities.

\section*{D. Accountability and evaluation bias}

Accountability can minimize the biasing effects of in-group favoritism and stereotyping. Informing evaluators that they will be held accountable for making objective, unbiased decisions before they are exposed to the information on which they will base their judgments reduces both the expression of bias and bias in nonconscious cognitive processes such as the

\textsuperscript{51} Id. at 583.

\textsuperscript{52} Reskin & McBrier, supra note 49, at 220-22.
encoding of information.\(^5\) For accountability to make a difference, however, it must be real, not nominal; in other words, it must be located in an organizational unit and must include consequences for departing from prescribed methods. Importantly, time pressure appears to destroy the benefits of accountability.\(^5\) Thus, employers can reduce the biasing effects of unconscious cognitive processes by allotting adequate time for personnel decisions.

**E. Race- and gender-conscious personnel practices**

A few organizations forestall the discriminatory consequences of their employees' cognitive processes by implementing affirmative action efforts that treat the race and sex of underrepresented workers' as plus factors when choosing among qualified candidates for a position. Race- and gender-conscious practices include identifying minorities or women who are potential candidates for management, recruiting at traditionally minority or female colleges, and evaluating line managers partly on the basis of their achievement of EEO goals.\(^5\) The explicit pursuit of members of groups excluded by past personnel practices does not try to minimize the effects of cognitive biases; it circumvents them. When implemented, such personnel practices increase the representation of members of excluded groups.\(^5\)

**VI. EXTERNAL PRESSURES ON ORGANIZATIONS TO CONTROL THE EFFECTS OF COGNITIVE BIASES**

Through their personnel practices organizations are able to limit the discriminatory effects of their members' automatic cognitive biases.\(^5\) Many, if not most, organizations fail to prevent the discriminatory consequences of these biases, however. The reason for this is simple: They don't have to.\(^5\)

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\(^{57}\) Bielby, *supra* note 17, at 124-27.

\(^{58}\) In addition, it seems safe to argue that most organizations are unaware of the discriminatory effects of such biases.
Whether employers implement safeguards to prevent employees’ nonconscious cognitive processes from giving rise to discrimination depends on the external coercive pressures to do so.\(^\text{59}\) When organizations are subject to genuine pressure from regulatory agencies to comply with anti-discrimination laws and executive orders, many comply.\(^\text{60}\) The consequences of the EEOC’s varying levels of enforcement of Title VII over the past four decades illustrate this point. Within the powers provided to the EEOC and the limits of its resources, the agency began an effective attack on race discrimination by the late 1960s and had chalked up several impressive victories by the early 1970s. Employers learned during the late 1960s and early 1970s that overt and pervasive racial discrimination was costly. While job segregation by race persisted, blacks posted unprecedented gains at work. The EEOC’s enforcement of Title VII helped to narrow the wage gap between blacks and whites and reduce job segregation based on race.\(^\text{61}\) In contrast, the Commission dragged its feet for years with respect to sex discrimination, with the predictable result that the law had little effect on women’s access to jobs until the mid-1970s.\(^\text{62}\) The changing enforcement climate after Reagan’s ascendancy to the White House provides further evidence that employers respond to the presence of serious regulatory pressure and backslide when it is absent.\(^\text{63}\) These comparisons reinforce the importance of organizational inertia: employers rarely change their personnel practices unless they believe that doing so will be profitable.

In the contemporary regulatory environment, organizations receive mixed signals regarding the kind of discrimination that Title VII addresses. The long hiatus in effective enforcement during the Reagan years contributed to organizations replacing EEO and affirmative action programs with an emphasis on managing diversity.\(^\text{64}\) In the 1990s, however, the OFCCP encouraged compliance with anti-discrimination regulations by doing “glass ceiling” audits of federal contractors. Routine reviews of Texaco, Xerox, CoreStates Financial, and US Airways by the OFCCP led to pay raises for female employees. Enforcement activities directed at one’s own company or at others in one’s industry are powerful motivators for corporate heads to improve

\(^{59}\) Konrad & Linnehan \textit{supra} note 55, at 807.
\(^{60}\) Reskin, \textit{supra} note 56, at 66-69.
\(^{63}\) See James N. Baron, Brian S. Mittman & Andrew E. Newman, \textit{Targets of Opportunity: Organizational and Environmental Determinants of Gender Integration Within the California Civil Service, 1979-1985}, 96 AM. J. SOC. 1362 (1991) (comparing progress in job integration in California state agencies that were and were not targeted by the State Personnel Board).
\(^{64}\) Kelly & Dobbin, \textit{supra} note 42, at 961-62.
conditions for women. Proving discrimination in court is another matter, however, given the conservative judiciary that is Reagan’s legacy.

But, as Edelman observed, the way a social problem is conceived limits the range of policy responses. Anti-discrimination policies in the U.S. fall short of the need because they are based on a limited conception of discrimination that was grounded in the academic and popular understanding of discrimination in the 1960s—that discrimination was intentional hostile treatment of individuals based on group membership. Even the expanded definition of discrimination that includes disparate impact discrimination does not address the nonintentional discrimination stemming from the automatic cognitive processes I have discussed.

What do we do when legal remedies that are based on incomplete understanding of a social problem cannot address that problem? First, of course, scholars must assemble persuasive evidence that the available remedies do not address the problem because the problem was not adequately conceived. Social scientists and legal scholars have begun to use social cognition research to make this case.

Krieger has proposed two ways for the law to address discrimination resulting from cognitive distortions. The first is for courts to abandon the attempt to determine whether an employer’s stated reason for some outcome is genuine or a “pretext”. Given the cognitive processes in which people normally engage, she argued, even reasons that seem to employers to be genuine may have been influenced by workers’ sex or race, thus causally linking these attributes to the outcome in question.

Krieger further argued for ceasing to equate intention with causality. She argued that this approach would not require amending Title VII (as amended in 1991), because, according to the statute “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion,

65. RUTH GILBERT SHAEFFER & EDITH F. LYNTON, CORPORATE EXPERIENCES IN IMPROVING WOMEN’S JOB OPPORTUNITIES (1979).
68. In fact, the conservative judiciary appointed during Reagan’s and Bush’s presidencies have viewed with skepticism disparate-treatment cases in which evidence showed clear race and gender animosity. For example, although a plaintiff who charged that her employer refused to train or promote her because of her sex showed that her supervisor had said, “Fucking women; I hate having fucking women in the office,” the trial and appellate judges treated this as not “direct evidence” of discrimination, and the plaintiff lost. Heim v. State of Utah, 8 F.3d 1541, 1546-47 (10th Cir. 1993). For a comprehensive discussion of the inability of discrimination law to reach discrimination resulting from automatic cognitive processes, see Krieger, supra note 17.
sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice” [emphasis added]. The problem is persuading a conservative federal judiciary that the biases inherent in cognitive processes illegitimately link workers’ sex or race with their employment outcomes. The question, according to Krieger, should not be whether the employer intended that a person’s ascribed status affected an employment outcome, but only whether it did so. Whenever gatekeepers’ cognitive errors link people’s ascriptive characteristics with employment outcomes, employers would be guilty of unintentional discrimination. Krieger also favored a two-tier standard for discrimination, modeled after the Americans Disability in Employment Act, that distinguishes “willful” discrimination from intentional discrimination, and reserves more serious penalties for intentional discrimination.

Another model of intervention borrows the idea of “negligence” as a less serious violation of the law. As Rhode pointed out, a negligence standard would require decisionmakers to take reasonable steps to minimize biases in their employment decisions. Distinguishing nonintentional from intentional discrimination has several advantages. First and foremost, charging one’s employer with or being found guilty of nonintentional discrimination need not lead to an adversarial procedure in which the employer is implicitly vilified as a biased person. A no-fault conception of discrimination would free more victims to approach their employer informally, and to take formal action, things that few employees do. Because such charges are less adversarial, they may be more amenable to an administrative remedy in which both sides win through a collective attempt to improve an unsatisfactory situation.

Amending existing laws is an exceedingly slow and, in today’s political climate, highly uncertain process. But—at least within nonhostile presidential administrations—enforcement agencies have considerable autonomy to redefine discrimination to encompass the results of normal cognitive processes and to push for compliance through proactive regulation, including random audits of employers. Thus, an immediate point of leverage is the administration of existing anti-discrimination laws and regulations. Importantly, these regulatory agencies not only operationalize laws and regulations, they are also the instruments of contact, persuasion, and external pressure on employers to implement practices that control nonconscious biases.

70. Krieger, supra note 17, at 1243.
71. Id. at 1242.
VII. CONCLUSIONS

Although federal and state regulations restrict employers’ right to discriminate on the basis of workers’ sex, race, national origin, and age, substantial sex and race discrimination nonetheless persists. An important reason for this persistence is that anti-discrimination interventions assume an overly narrow conception of discrimination: that it is an intentional (and hence conscious) act of differential treatment, motivated by the decisionmaker’s antipathy toward a group. In fact, discrimination often constrains workers’ employment opportunities and rewards because basic human cognitive processes that we neither intend nor of which we are aware link our perceptions, evaluations, attributions, and recollections of others to their sex and race.

In addition, concrete discriminatory outcomes often stem from “countless small acts by a changing cast of characters . . . that incrementally and consistently limit the employment prospects of one group of workers compared with those of another.” When nonconscious cognitions lead decisionmakers to prefer white men for challenging assignments and work-related social functions, and when they fail to notice the successes of women and men of color and white women, the victims may not bother with or even notice instances of ingroup favoritism. Only a termination or, much less often, the denial of a promotion precipitates legal action, but by then the outgroup member’s accumulated disadvantages make him objectively less qualified. The experience of African American attorney Larry Mungin, chronicled in The Good Black, illustrates these phenomena. Even if Mungin’s employers harbored no conscious negative feelings toward him based on his race, this did not alter the fact that partners who lacked objective information about Mungin were almost certainly swayed by their racial stereotypes. An absence of openly expressed racial antipathy is relevant only in reducing Mungin’s ability to prevail in a discrimination lawsuit. Ultimately it does not matter whether employment outcomes result from a single malicious act by a biased individual or from automatic unintended distortions that an employer has left unchecked and uncorrected. Either situation causally links race or sex to workers’ career opportunities, and this causal link constitutes discrimination.

Although the automatic cognitive processes discussed here almost always distort our assessments of people on the basis of their sex, race, ethnicity, and

75. For other explanations of the persistence of discrimination, see generally Reskin, supra note 66.
77. Krieger, supra note 17, at 1326.
78. A small minority of litigants sue their current employers. Donohue & Siegelman, supra note 73, at 104.
whether they belong to our ingroup, they need not lead to discrimination. That automatic cognitive distortions sometimes do not give rise to discrimination reflects the ability of organizational structures to check discrimination. Work structures and personnel practices can mitigate discriminatory effects by ensuring that decisions are made on the basis of relevant information and that decisionmakers do not take into account irrelevant information.

Many employers do not implement effective structures, however, and they will not do so without external pressure. Enforcement mechanisms under existing anti-discrimination law may provide an avenue for regulatory agencies to prompt employers to implement safeguards against the discriminatory results of nonconscious processes. The argument that regulatory agencies should coerce employers to check the consequences of intrapsychic processes is likely to be controversial. However, precedents exist for mandating interventions to prevent what is otherwise a likely risk to society. For example, laws against statutory rape, laws specifying an age of consent, and legal decisions on sexual harassment all try to protect the vulnerable from assumed psychic states in members of more powerful groups. In other domains we also use structural remedies to prevent unintended consequences of cognitive processes: The use of double-blind experiments in scientific research recognizes that we cannot trust ourselves to remain unbiased. The challenge, as in earlier struggles to create remedies for discrimination, lies in making the case that discrimination exists and identifying points for intervention. This essay is a step toward these ends.

The emergence of a new economy that includes transient and indirect employment relations, global and hence anonymous employers, deference to profits, and disregard for workers' rights has exacerbated the erosion of employment structures that can protect workers from nonconscious as well as intentional discrimination. These transformations of employment relations and work structures will almost certainly render workers more vulnerable to race and sex discrimination. Workers' increasing vulnerability makes correctly conceptualizing discrimination our first challenge. The second challenge is to create policy mechanisms that will preserve and expand employment structures that reduce discriminatory outcomes.