

Washington Law Review

Volume 92 | Number 3

10-1-2017

Breaking Down Bias: Legal Mandates vs. Corporate Interests

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BREAKING DOWN BIAS: LEGAL MANDATES VS. CORPORATE INTERESTS

Jamillah Bowman Williams*

Abstract: Bias and discrimination continue to limit opportunities and outcomes for racial minorities in American institutions in the twenty-first century. The diversity rationale, touting the broad benefits of inclusion, has become widely accepted by corporate employers, courts, and universities. At the same time, many view a focus on antidiscrimination law and the threat of legal enforcement as outmoded and ineffective. Thus, many organizations talk less in terms of the mandates of laws such as the 1964 Civil Rights Act, or a “legal case,” and more in terms of a “business case” where benefits of inclusion seem to accrue to everyone. It is easy to explain the appeal of the business case for diversity: it merges the goals of racial inclusion with business profitability and corporate interests. Antidiscrimination law, by contrast, is viewed as top down and coercive. But there is one major problem: there is little-to-no evidence that the business case for diversity actually reduces bias and promotes racial inclusion.

In this Article, I present experimental research findings that for the first time test the relative efficacy of the business case rationale versus a legal case for equity and inclusion. I find that inclusion efforts grounded in antidiscrimination law, or the legal case, are the most likely to curb widely held biases and promote equitable behavior. These findings challenge emerging scholarship that suggests legal justifications for integration are no longer effective. Despite the appeal of the business case for diversity, emphasis on corporate interests actually generate negative beliefs about inclusion and more biased decision making. Civil rights law, with a deeper historical, political, and moral grounding, appears to exert a stronger normative influence. Based on these findings, this Article argues that antidiscrimination law is still needed, not only for its exogenous pressure on organizations to promote inclusion but also for its normative effect on individual values, beliefs about inequality, and behavior.

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INTRODUCTION

Despite the advances made since the civil rights era, racial and ethnic differences are still salient and politically divisive in the United States. Bias and discrimination continue to limit opportunities and outcomes for racial minorities in many arenas of life (e.g., employment, education, health care, lending, the justice system, and housing).¹ We continue to see

1. See PHILIP MOSS & CHRIS TILLY, *STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA* 245–48 (2001); UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson eds., 2003); Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007); John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 47–48 (2009) (collating studies finding that individuals exhibit implicit biases with respect to race, ethnicity, nationality, gender, and social status, and these implicit associations predict social and organizationally significant behaviors, including employment, medical, and voting decisions made by working adults); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCHOL. SCI. 617, 619–21 (2015) (finding that teachers felt significantly more troubled by a second infraction committed by a black student than a white student, thought the black student should be disciplined more severely after the second infraction, and were more likely to label the black student a troublemaker and to view the black student's misbehavior as indicative of a pattern); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 186–92, 200 (2008) (finding that despite progress since the early 1960s, discrimination continues to affect the allocation of contemporary opportunities and remains an important factor in shaping contemporary patterns of social and economic inequality); Stephen L. Ross & Margery Austin Turner, *Housing Discrimination in Metropolitan America: Explaining Changes Between 1989 and 2000*, 52 SOC. PROBLEMS 152 (2005).

racial incidents on college campuses that spark student unrest.² Violence and killings of unarmed black men, women, and children have become all-too-common as a result of racial profiling and untethered police biases.³ Employers deny job opportunities to qualified candidates because they have black skin or a “black sounding” name.⁴ The President of the

2. See generally *Campus Racial Incidents*, J. BLACKS HIGHER EDUC., <https://www.jbhe.com/incidents/> [<https://perma.cc/W2U7-FG44>] (providing running timeline of racial incidents involving U.S. colleges and universities); Brandon Griggs, *Do U.S. Colleges Have a Race Problem?*, CNN (Nov. 10, 2015, 8:38 PM), <http://www.cnn.com/2015/11/10/us/racism-college-campuses-protests-missouri/> [<https://perma.cc/R4X7-C75Y>] (reporting that racial incidents on college campuses are not a new trend and most go unreported, but that students now feel empowered to demand action, although proposed solutions are not necessarily sufficient); Symone Jackson, *5 Things Black Students Say Will End Racism on College Campuses*, FUSION (Apr. 25, 2016, 4:06 PM), <http://fusion.net/story/294744/end-racism-college/> [<http://perma.cc/P7TY-NJZN>] (detailing recommendations from black student organization leaders, including stricter antidiscrimination policies, more cross-cultural learning, fewer police and more student oversight, more black “safe spaces,” and divestment from the prison industrial complex); *USA Today College Staff*, *Racism on College Campuses: Students on Where We Are Now*, USA TODAY C. (Feb. 26, 2016, 10:30 AM), <http://college.usatoday.com/2016/02/26/racism-on-college-campuses-students-on-where-we-are-now/> [<https://perma.cc/GL6G-2WHN>] (describing protest efforts at fourteen U.S. colleges and universities and what is happening now on those campuses to promote diversity and equity); Alia Wong & Adrienne Green, *Campus Politics: A Cheat Sheet*, ATLANTIC (Apr. 4, 2016), <http://www.theatlantic.com/education/archive/2016/04/campus-protest-roundup/417570/> [<https://perma.cc/49FF-J4ZW>] (describing Princeton student activists’ failed efforts to remove Woodrow Wilson’s name from campus buildings due to his racist legacy, and providing a periodically updated timeline of high-profile campus protests).

3. See, e.g., R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1173–75, 1174 n.24 (2006) (noting that “African Americans are four times more likely than Whites to die during, or as a result of, an encounter with a law enforcement officer” and detailing studies finding that shooting behavior differed based on the race of the suspect, but this behavior was not explained by explicit racial prejudices and instead was reasonably attributable to stereotypic associations present in our society); Sandhya Somashekhar et al., *Black and Unarmed*, WASH. POST (Aug. 8, 2015), <http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/> [<https://perma.cc/G9JZ-HT4M>] (detailing numerous incidents of police killing unarmed black men and noting that black men are “seven times more likely than white men to die by police gunfire while unarmed”). See generally Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002); Kimberly Barsamian Kahn et al., *Protecting Whiteness: White Phenotypic Racial Stereotypicality Reduces Police Use of Force*, 7 SOC. PSYCHOL. & PERSONALITY SCI. 403 (2016).

4. See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004) (finding job applicants with white-sounding names were 50% more likely to receive callbacks for interviews than applicants with African-American-sounding names); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955–60 (2003) (finding that a criminal record presents a major barrier to employment and blacks are more strongly affected by the impact of a criminal record than their white counterparts); Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS (Apr. 4, 2014), http://www.nextions.com/wp-content/files_mf/14468226472014040114WritteninBlackandWhiteYPS.pdf [<https://perma.cc/TU2X-C83K>] (finding that confirmation bias unconsciously causes

United States campaigned on promises to build a wall around the U.S. border, to prioritize the mass deportation of Mexican immigrants, and to ban “certain types” of Muslims from “terror countries.”⁵

Some of these examples closely resemble traditional prejudice and racial animus, while others are subtle, unconscious, and institutionally based.⁶ Whatever the root cause of the bias, the consequences for racial minorities are real. The following questions remain: what are the best strategies to reduce bias and discriminatory outcomes? How do we change the behaviors of managers, police officers, politicians, doctors, and teachers?

In the 1960s, Congress passed monumental civil rights laws to address inclusion, but in decades since, focus has shifted away from the mandate of law and more toward voluntary efforts to realize diversity and its benefits. Now, organizational leaders increasingly rely on instrumental diversity rationales that focus on business and organizational success. For example:

supervising lawyers to more negatively evaluate legal writing by an African American lawyer than by a white lawyer).

5. See Jeremy Diamond, *Trump on Latest Iteration of Muslim Ban: ‘You Could Say It’s an Expansion,’* CNN (July 24, 2016, 11:45 AM), <http://www.cnn.com/2016/07/24/politics/donald-trump-muslim-ban-election-2016/> [<https://perma.cc/GY2Q-NYEC>]; Dolia Estevez, *Debunking Donald Trump’s Five Extreme Statements About Immigrants and Mexico*, FORBES (Sept. 3, 2015, 6:28 PM), <http://www.forbes.com/sites/doliaestevez/2015/09/03/debunking-donald-trumps-five-extreme-statements-about-immigrants-and-mexico/#1e8d32667076> [<https://perma.cc/H92X-C3GJ>]; Jenna Johnson, *Donald Trump Is Expanding His Muslim Ban, Not Rolling It Back*, WASH. POST (July 24, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/> [<https://perma.cc/8PLN-UCVE>]; Ashley Parker, *Mike Pence Hints at Trump’s Muslim Ban Extending to Other Religions*, N.Y. TIMES (Aug. 10, 2016), <http://www.nytimes.com/2016/08/11/us/politics/mike-pence-muslim-ban.html> [<https://perma.cc/2CEL-M9P9>]; Julia Preston et al., *What Would It Take for Donald Trump to Deport 11 Million and Build a Wall?*, N.Y. TIMES (May 19, 2016), <http://www.nytimes.com/2016/05/20/us/politics/donald-trump-immigration.html> [<https://perma.cc/U2XL-4687>]; Maxwell Tani, *We Pressed Donald Trump About the Practicality of His Plan to Deport 11 Million People*, BUS. INSIDER (Nov. 21, 2015, 10:11 AM), <http://www.businessinsider.com/donald-trump-deportation-plan-2015-11> [<https://perma.cc/M27H-V79A>]; Ali Vitali, *In His Words: Donald Trump on the Muslim Ban, Deportations*, NBC NEWS (June 27, 2016, 4:58 PM), <http://www.nbcnews.com/politics/2016-election/his-words-donald-trump-muslim-ban-deportations-n599901> [<https://perma.cc/H3QX-W8DL>].

6. See generally Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment History*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Krieger & Fiske, *supra* note 1; Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 281.

- University leaders suggest a need to include racial minorities on college campuses because it will lead to a more dynamic educational environment and better learning outcomes for all students.⁷
- Police forces must be diverse because it will lead to better community engagement and more productive policing outcomes.⁸
- Corporations must actively recruit racial minorities for leadership positions because it will create more innovative strategies and position companies for high profits in a global economy.⁹

7. See *Diversity at Stanford*, STAN. U., <http://admission.stanford.edu/student/diversity/> [<https://perma.cc/J68E-QWGN>] (advocating for diversity in “opinions, cultures, communities, perspectives and experiences, all of which challenge a student’s own beliefs, intellectual passions, opinions and understanding of the world,” and further “enables students to investigate and engage in current issues and deeper societal questions”); *Institutional Diversity, Equity & Affirmative Action*, GEO. U., http://ideaa.georgetown.edu/#_ga=1.122484363.1694979479.1416691239 [<https://perma.cc/N4JM-3RQR>] (quoting Georgetown Univ. President John J. DeGioia who advocates for “diversity, equity, and affirmative action, so that we can all be enriched by the experience of working and studying in an integrated environment”); Mark S. Schlissel, *President’s Letter*, U. MICH., <http://diversity.umich.edu/our-commitment/presidents-letter/> [<https://perma.cc/M9WD-54JZ>] (stating that the university “cannot be excellent without being diverse in the broadest sense of that word”).

8. See Yamiche Alcindor & Nick Penzenstadler, *Police Redouble Efforts to Recruit Diverse Officers*, USA TODAY (Jan. 21, 2015, 9:07 PM), <http://www.usatoday.com/story/news/2015/01/21/police-redoubling-efforts-to-recruit-diverse-officers/21574081/> [<https://perma.cc/KG2H-JNV4>] (noting that “a force that racially and ethnically reflects the population of the community can improve relations between police and residents, dispel mistrust and communicate more effectively”); Albert Antony Pearsall III & Kim Kohlhepp, *Strategies to Improve Recruitment*, 77 POLICE CHIEF (Apr. 2010), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2056&issue_id=42010 [<https://perma.cc/P49J-7QWW>] (stating that a “diverse and competent workforce is essential to the operation of a successful police agency”); Mary Ann Viverette, *President’s Message: Diversity on the Force*, 72 POLICE CHIEF (Dec. 2005), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=755&issue_id=122005 [<https://perma.cc/MC4Y-BT2V>] (stating that “[c]entral to maintaining [community] support is the recognition that law enforcement agencies must reflect the diversity of the communities they serve” and that “[f]ailure to recognize and adjust to community diversity can foster confusion and resentment among citizens and quickly lead to a breakdown in the critical bond of trust between a law enforcement agency and its community”).

9. See, e.g., Boris Groysberg & Katherine Connolly, *Great Leaders Who Make the Mix Work*, HARV. BUS. REV. (Sept. 2013), <https://hbr.org/2013/09/great-leaders-who-make-the-mix-work> [<https://perma.cc/6R7P-9TYA>] (interviewing twenty-four CEOs from inclusive companies around the world, many of whom expressed that diversity is both a business and a moral imperative); Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2013), <https://hbr.org/2013/12/how-diversity-can-drive-innovation> [<https://perma.cc/DED2-LRVB>] (finding “compelling evidence that diversity unlocks innovation and drives market growth”); Glenn Llopis, *Diversity Management Is the Key to Market Growth: Make It Authentic*, FORBES (June 13, 2011, 7:41 AM), <http://www.forbes.com/sites/glennllopis/2011/06/13/diversity-management-is-the-key-to-growth-make-it-authentic/#407bc9326248> [<https://perma.cc/CQ6B-7CFB>] (speaking about

While these instrumental narratives seem compelling, are they truly persuasive and, more importantly, do they lead to pro-equity beliefs and behaviors? Or should we be emphasizing traditional legal requirements that are centered on principles of nondiscrimination?

This project explores how to break down racial bias, specifically in the employment discrimination context. Congress passed Title VII of the Civil Rights Act of 1964¹⁰ (Title VII) with the primary goal of integrating the workforce and eliminating arbitrary bias against minorities and other groups that had been historically excluded.¹¹ Shortly after the passage of Title VII, the legal environment for organizations shifted from strongly enforced civil rights and equal employment opportunity (EEO) laws to increased resistance and less stringent accountability. This change has been reflected in the greater difficulty of winning traditional discrimination cases and an increased number of reverse discrimination lawsuits.¹² Despite opposition to race-conscious policies, legal pressure and business competition have continued to result in organizational initiatives and values that call for diversity and inclusion of traditionally underrepresented groups.¹³

diversity management with diversity executives who note it is a “must-have” in today’s global marketplace); Glenn Llopis, *Is Diversity Good for Business?*, FORBES (Apr. 23, 2016, 7:33 AM), <http://www.forbes.com/sites/glennllopis/2016/04/23/is-diversity-good-for-business/#3eca095b12e8> [<https://perma.cc/RWY6-JNUH>] (arguing that companies should follow the path of a Deloitte Tax partner who is striving to advance “more diverse leaders into senior leadership roles,” as “embracing diversity of thought is the new currency for growth” and required if companies “are to compete in the 21st century?”); Ekaterina Walter, *Reaping the Benefits of Diversity for Modern Business Innovation*, FORBES (Jan. 14, 2014, 10:28 AM), <http://www.forbes.com/sites/ekaterinawalter/2014/01/14/reaping-the-benefits-of-diversity-for-modern-business-innovation/#55add296476> [<https://perma.cc/U34S-M9NC>] (interviewing Progressive Insurance’s Business Leader of Talent Management, “an avid advocate of diversity as a business imperative”).

10. 42 U.S.C. §§ 2000e–2000e-17 (2012).

11. *Johnson v. Transp. Agency*, 480 U.S. 616, 628 (1987) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)).

12. HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH xiii–34 (Laura Beth Nielsen & Robert L. Nelson eds., 2005) (finding that while there has been very significant growth in the number of complaints filed with the EEOC and in federal courts (nearly tripling from 8,000 in 1989 to almost 24,000 in 1998), the success rates for plaintiffs is low (estimated at less than 20% for federal cases with opinions) as courts have moved in the direction of requiring direct proof of discriminatory intent, making affirmative action in employment nearly impossible to practice, and making sexual harassment under Title VII easier to defend against for employers).

13. See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 133–60 (2009); SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* xxi (2007); Frank Dobbin & John R. Sutton, *The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions*, 104 AM. J. SOC. 441, 455–56 (1998); Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1589–90 (2001); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 320 (2005); Cedric Herring, *Does Diversity Pay?: Race,*

Formal diversity strategies often feature both inclusive narratives expressing the value of diversity and specific organizational policies and practices. These efforts may involve inclusive vision statements, diversity training, affinity groups, and recruitment strategies that emphasize the inclusion of racial minorities, women, and other underrepresented or disadvantaged groups. These combined efforts aim to increase the presence of underrepresented groups while also promoting an inclusive work environment where all organizational members can thrive.

Although companies regularly endorse the value of diversity and make large financial investments to further it, research has yet to clarify the impact of this movement within organizations.¹⁴ Eight-billion dollars is invested annually in diversity programs.¹⁵ Two critical questions remain: first, how do organizational diversity strategies focused on performance and profit shape beliefs about inclusion and behavior? Second, are these business rationales focused on organizational success more effective at eliminating bias and increasing inclusive behavior than legal rationales emphasizing antidiscrimination law? Overall, I find that the legal case is more effective than the business case. Furthering our understanding of *why* deepens our appreciation for the role of law and the potential drawbacks of instrumental diversity rationales.

Gender, and the Business Case for Diversity, 74 AM. SOC. REV. 208, 213 (2009) (indicating that businesses with diversity programs report higher productivity than competitors); Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 591–95 (2006) (providing three approaches to increasing managerial diversity often used by businesses); Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCHOL. INQUIRY 77, 77 (2010); Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1017 (2011); David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556 (2004).

14. See, e.g., CEDRIC HERRING & LOREN HENDERSON, *CRITICAL DIVERSITY: THE NEW CASE FOR INCLUSION AND EQUAL OPPORTUNITY* 50–52 (2013); Herring, *supra* note 13, at 220–21 (showing a positive relation between diversity and business functioning); Katherine W. Phillips, *The Effects of Categorically Based Expectations on Minority Influence: The Importance of Congruence*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 3, 3–4 (2003) (finding evidence that minority opinions attributed to outgroup members are, contrary to previous research, more influential than minority opinions attributed to ingroup members). For more on the movement, see for example, DOBBIN *supra* note 13, at 133–60.

15. Michele E. A. Jayne & Robert L. Dipboye, *Leveraging Diversity to Improve Business Performance: Research Findings and Recommendations for Organizations*, 43 HUM. RESOURCE MGMT. 409, 409 (2004) (citing Fay Hansen, *Diversity’s Business Case Doesn’t Add Up*, WORKFORCE 28, 30–31 (2003)); see also Kristen P. Jones et al., *Beyond the Business Case: An Ethical Perspective of Diversity Training*, 52 HUM. RESOURCE MGMT. 55, 55 (2013) (finding that 67% of all U.S. organizations and 74% of Fortune 500 companies utilize diversity training programs and on average, the costs of diversity training for a single large organization exceed one-million dollars per year).

This Article is organized into three main parts. Part I discusses the corporate shift away from antidiscrimination law as a strategy to reduce bias to the rationale that minorities and other underrepresented groups should be integrated in organizations because their presence increases organizational effectiveness and improves the bottom line. Part II presents evidence from two studies that empirically test the extent to which antidiscrimination law and organizational diversity strategies are effective at reducing bias. Part III concludes by discussing social psychological insights that help explain the findings and implications for the future of antidiscrimination law.

I. THE SHIFT FROM CIVIL RIGHTS LAW TO BENEFITS OF DIVERSITY

A. *Antidiscrimination Law—The Legal Case for Inclusion*

Until the 1960s, job segregation was commonplace, and many employers openly discriminated against racial minorities in hiring and promotions.¹⁶ In 1964, Title VII of the Civil Rights Act outlawed employment discrimination on the basis of race, color, religion, national origin, and gender with the objective of “break[ing] down old patterns of racial segregation and hierarchy.”¹⁷ Now most employers are required to adhere to federal, state, and local equal opportunity laws, and many invest additional resources to go beyond what is required by law.

The passage of the Civil Rights Act represented a major turning point in employment relations and in society, generally. In addition to Title VII, Executive Order 11246,¹⁸ issued on September 24, 1965, prohibits discrimination and further requires federal contractors to take affirmative steps to ensure equal opportunity and fair treatment to protected groups.¹⁹ Courts, the Equal Employment Opportunity Commission (EEOC), and Department of Labor auditors may also require consent decrees or other

16. 1-1 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 1.06 (2d ed. 2016); Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 5 (2005); Deborah L. Rhode, *Women and the Path to Leadership*, 2012 MICH. ST. L. REV. 1439, 1440–43 (2012).

17. *Johnson v. Transp. Agency*, 480 U.S. 616, 628 (1987) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)).

18. Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965), *reprinted as amended* in 42 U.S.C. § 2000e (2012), *amended by* Exec. Order No. 13,665, 79 Fed. Reg. 20749 (Apr. 8, 2014), Exec. Order No. 13, 672, 79 Fed. Reg. 42971 (July 23, 2014).

19. *Id.*

forms of injunctive relief that put in place specific efforts to remedy discriminatory patterns and promote equity.²⁰

These civil rights mandate opened organizational governance to public scrutiny and legitimated employees' demands for fair treatment. As a result, attorneys and consultants regularly advise employers on how to comply with these antidiscrimination laws and how to train employees on EEO policies, making a legal case for inclusion.²¹ When focusing on legal compliance, organizations pursue inclusion primarily to keep pace with these antidiscrimination requirements and to avoid costly litigation and negative publicity. These legal requirements also legitimize voluntary diversity efforts by establishing federal requirements and expectations, and creating monetary consequences for failing to implement fair policies and form inclusive cultures. Antidiscrimination law may also lessen bias through a normative component in which civil rights law conveys a shared consensus on which behaviors are right and which are wrong.²²

While some scholars focus on the potential failures of antidiscrimination law, others emphasize the continuing normative influence of law.²³ The classic ambition of legal regulation, which is to change behaviors, can be accomplished directly through fear of sanctions or desire for rewards, or indirectly, by changing attitudes about regulated

20. *Id.*

21. See Frank Dobbin & Alexandra Kaley, *The Origins and Effects of Corporate Diversity Programs*, in THE OXFORD HANDBOOK OF DIVERSITY AND WORK 253, 261–63 (Quinetta M. Roberson ed., 2013); Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715, 726–28 (2011); Edelman et al., *supra* note 13, at 1605–06 (finding that the most frequently cited reason in managerial literature in support of diversity is profit: 48% of the management publications support diversity for profit, while only 19% refer to law and 30% refer to fairness); Deborah L. Kidder et al., *Backlash Toward Diversity Initiatives: Examining the Impact of Diversity Program Justification, Personal and Group Outcomes*, 15 INT'L J. CONFLICT MGMT. 77, 80 (2004); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 520–22 (2001).

22. See Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241, 257 (Eyal Zamir & Doron Teichman eds., 2014); Catherine Albiston et al., *Law, Norms, and the Motherhood/Caretaker Penalty* 2, 12–13 (7th Ann. Conf. on Empirical Legal Stud. Paper, 2012), <http://ssrn.com/abstract=2109919> [<https://perma.cc/V3PG-9TXJ>].

23. See, e.g., Bilz & Nadler, *supra* note 22, at 241–43; Leonard Berkowitz & Nigel Walker, *Laws and Moral Judgments*, 30 SOCIOMETRY 410, 421–22 (1967) (finding that knowledge of a law has a small, but significant tendency to alter views of morality, though not nearly as much as knowledge of consensus of opinions of one's peers); Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497, 503–06 (1993) (explaining how morality, social norms, and stigmatization are affected by law); Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 480–82, 486–90; Albiston et al. *supra* note 22, at 13, 24–25.

behaviors.²⁴ Suchman outlines three leading perspectives on law and decision making:

- (1) “[I]nstrumental” or “rational choice” theories, which hold that decision makers act primarily on the basis of material self-interest;
- (2) “normative” or “moral” theories, which hold that decision makers act primarily on the basis of ingrained moral beliefs, even when doing so conflicts with self-interest; and
- (3) “cognitive” or “constitutive” theories, which hold that decision makers act primarily on the basis of taken-for-granted roles and scripts, without consciously exploring alternatives at all.²⁵

The normative perspective argues that antidiscrimination law is effective at reducing bias and inequality because law affects behavior not only through punitive sanctions but also by changing moral judgments.²⁶ For example, Albiston et al. acknowledge the criticism that antidiscrimination laws can fail to eliminate discrimination from the rational actor perspective due to weak enforcement, competing incentives, and second-generation discrimination, but they argue that law also communicates that discrimination is illegitimate and morally wrong.²⁷ In an experiment, they found that participants who were familiarized with the Family Medical Leave Act²⁸ were less biased against people who took family leave than participants who reviewed a voluntary organizational family leave policy.²⁹ Thus, “by expressing a collective moral judgment, these laws may both discourage discriminatory behavior *and* change the negative normative judgments that produce biased outcomes.”³⁰ They found that “unlike law’s coercive effects, law’s expressive effects do not require uniform and vigorous enforcement, only publicity and knowledge by the relevant actors.”³¹ If civil rights law can change behavior and normative judgments, then exposure to laws prohibiting discrimination in the workplace may lessen bias against racial minorities and improve their outcomes in employment and other contexts.

24. Bilz & Nadler, *supra* note 22, at 241.

25. Suchman, *supra* note 23, at 475–76.

26. Albiston et al., *supra* note 22, at 2.

27. *Id.*

28. 29 U.S.C. §§ 2601–2654 (2012).

29. Albiston et al., *supra* note 22, at 24–25.

30. *Id.* at 2.

31. *Id.* at 14.

B. The Rise of Diversity as a Rationale for Inclusion

Due to ambiguities in Title VII and weak federal enforcement, little changed in the years immediately following its passage.³² In response to the lack of progress, Congress enacted the Equal Employment Opportunity Act of 1972.³³ This expanded the specificity and scope of EEO laws and gave the EEOC litigation enforcement authority over federal antidiscrimination laws. These heightened legal standards led to the growth of affirmative action as organizations hired EEO and management specialists to develop policies and programs to shield them from litigation.³⁴ As a result of this legislation and the responding management efforts, the 1970s saw a significant increase in the numbers of women and racial minorities in the workplace.

In the 1980s, this trend ceased as President Ronald Reagan curtailed the enforcement power of the EEOC by cutting staffing and funding at the agency.³⁵ Over the years, this conservative administration made its opposition to affirmative action clear and appointed federal judges opposed to government regulation, in general, and to affirmative action, in particular. This political shift resulted in rising numbers of reverse discrimination cases and less stringent accountability in traditional discrimination cases.³⁶

In response to this emerging opposition, employers began to reframe the purposes and goals of affirmative action rather than deinstitutionalize existing practices.³⁷ This led to the rise of the diversity-management movement, which hit its stride in the early 1990s. When addressing integration and inclusion, managerial rhetoric shifted from a focus on compliance with federal mandates to a business strategy aimed at increasing organizational effectiveness. At this time, many affirmative action and EEO specialists became “diversity managers.”

In this broader social-political context, opposition to legally mandated affirmative action was juxtaposed with an emerging diversity movement

32. DOBBIN, *supra* note 13, at 75; Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1536–41 (1992); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST 960, 963–64 (1998).

33. Pub. L. No. 92-261, 86 Stat. 103 (1972).

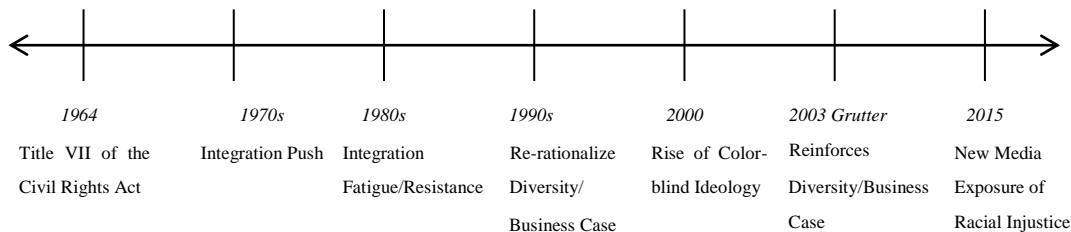
34. See DOBBIN, *supra* note 13, at 83–88; Edelman, *supra* note 32, at 1531; Kelly & Dobbin, *supra* note 32, at 960, 964–66.

35. Kelly & Dobbin, *supra* note 32, at 966–67.

36. See *id.* at 968 (indicating the Reagan administration had some success in assisting challengers of affirmative action plans by filing supporting amicus briefs).

37. See *id.* at 969; Edelman, *supra* note 32, at 1568.

with multiple stakeholders.³⁸ Legal compliance and the moral underpinnings of civil rights law were downplayed and organizations began rationalizing integration efforts by emphasizing business-related benefits of racial inclusion, such as “efficiency,” “productivity,” “innovation,” “client service,” “competitive advantage,” and “increased profits.”³⁹ Shortly after, the public discourse in the United States shifted toward a “color-blind” or “postrace” ideology, in which race-neutral processes and goals were increasingly endorsed.⁴⁰



38. See PATRICIA GURIN ET AL., DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN 4–5 (2004); HERRING & HENDERSON, *supra* note 14, at 51–52; THE AFFIRMATIVE ACTION DEBATE 73–75 (George E. Curry ed., 1996); Jack Greenberg, *Diversity, the Universe, and the World Outside*, 103 COLUM. L. REV. 1610, 1611–12 (2003); Kalev et al., *supra* note 13, at 591–95; Wilkins, *supra* note 13, at 1554–55.

39. See Brooke & Tyler, *supra* note 21, at 716; Edelman, *supra* note 32, at 1548 (focusing on efficiency and high productivity contributes to acceptance of EEO/AA (affirmative action) structures); Edelman et al., *supra* note 13, at 1618; Kelly & Dobbin, *supra* note 32, at 972–73; Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 373 (2008); Wilkins, *supra* note 13, at 1553.

40. See Eduardo Bonilla-Silva et al., “It Wasn’t Me!”: *How Will Race and Racism Work in 21st Century America*, in POLITICAL SOCIOLOGY FOR THE 21ST CENTURY 111, 113 (Betty A. Dobratz et al. eds., 2003); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 2–4 (4th ed. 2014); MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 2 (2003); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 162–64 (1994); Roland G. Fryer, Jr. et al., *An Economic Analysis of Color-Blind Affirmative Action*, 24 J.L. ECON. & ORG. 319, 320–21 (2008). See generally Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (providing a history of the shift to a “color-blind” ideology); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77 (2000); Jeffrey J. Wallace, *Ideology vs. Reality: The Myth of Equal Opportunity in a Color Blind Society*, 36 AKRON L. REV. 693 (2003); J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213 (1980); Destiny Peery, Comment, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J. L. & SOC. POL’Y 473 (2011) (arguing for race-conscious, not race-neutral laws).

Diversity efforts may take on a range of different forms in organizations, but most combine a value of inclusion with access and equity concerns that seek to lessen inequality.⁴¹ Unlike traditional affirmative action programs, these inclusive diversity strategies often emphasize valuing a wide range of social differences, including groups not protected by federal law. For example, in addition to the legally protected categories of race, gender, age, and religion, these efforts may also incorporate broader notions of diversity, such as geography, experiences, and intellectual perspectives.⁴²

The following examples help clarify how organizations across industries communicate the value of diversity. First, in its published marketing materials, The Coca-Cola Company expresses that embracing diversity is critical for multinational corporations to achieve success in a global market.⁴³ The online “Diversity as Business” narrative reads: “As a global business, our ability to understand, embrace, and operate in a multicultural world—both in the marketplace and in the workplace—is critical to our long-term sustainability.”⁴⁴ Panasonic is another corporation that strongly asserts the value of diversity. Its colorful printed recruitment advertisement depicts diverse employees from a range of backgrounds and reads, “[u]nique and diverse perspectives drive innovation and business success.”⁴⁵

Apple advocates diversity in its organization as well as in those with which it conducts business. Its online marketing material declares,

41. See, e.g., HERRING & HENDERSON, *supra* note 14, at 82–87; EDWARD E. HUBBARD, IMPLEMENTING DIVERSITY MEASUREMENT AND MANAGEMENT 10–12 (2004) (providing case studies of diversity initiatives and programs); Dobbin & Sutton, *supra* note 13, at 464–66; Herring, *supra* note 13, at 220 (concluding that businesses have positive outcomes when combining diversity with concerns about parity).

42. Gratz v. Bollinger, 539 U.S. 244, 273–75 (2003) (finding admissions policy that did not fully consider the “differing backgrounds, experiences, and characteristics of students,” but instead automatically awarded points to racial minorities violated the Equal Protection Clause); Daan van Knippenberg & Michaëla C. Schippers, *Work Group Diversity*, 58 ANN. REV. PSYCHOL. 515, 519–21 (2007) (discussing the various typologies of diversity proposed by researchers); Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. PUB. INT. 31, 33 (2005) (defining diversity “as variation based on any attribute people use to tell themselves that another person is different”).

43. *Global Diversity Mission*, COCA-COLA JOURNEY (2017) <http://www.coca-colacompany.com/our-company/diversity/global-diversity-mission> [https://perma.cc/9DCT-UGAR]; see also COCA-COLA CO., AS INCLUSIVE AS OUR BRANDS: 2010 U.S. DIVERSITY STEWARDSHIP REPORT 6 (2010), http://coke-journey.s3.amazonaws.com/11/f9/7d132d8d43c9a41aaed8216e563/2010_US_Diversity_Stewardship_Report.pdf [https://perma.cc/872C-7TET].

44. See, e.g., *Global Diversity Mission*, *supra* note 43.

45. *Making a Difference in the Community*, AFR. AM. TODAY, Feb. 1, 2012, at 16.

“[i]nclusion inspires innovation. . . . At Apple, we rely on our employees’ diverse backgrounds and perspectives to spark innovation.”⁴⁶ CEO Tim Cook states that Apple’s commitment to diversity is “unwavering.”⁴⁷ Another technology giant, Microsoft, also embraces the value of diversity. The company notes that “maximizing the contribution of every individual allows us to infuse diverse thought as a natural part of the way we innovate” and proclaims that “Diversity + Inclusion = Success.”⁴⁸ Similarly, Google CEO Sundar Pichai acknowledges the positive impact of diversity by asserting, “[a] diverse mix of voices leads to better discussions, decisions, and outcomes for everyone.”⁴⁹

Even DLA Piper, a large private law firm in an industry that is among the least integrated, states that “Diversity Works” and that its attorneys are not all “using the same spice.”⁵⁰ The firm’s published marketing materials read, “[w]e count on our people to contribute unique ideas, drawn from a diversity of backgrounds. . . . It brings greater perspective to our clients.”⁵¹ Carlos Rodriguez-Vidal, the chair of the American Bar Association (ABA) Center for Racial and Ethnic Diversity proclaims, “[t]he American Bar Association must stand for the elimination of bias and the enhancement of diversity if it is to remain relevant in the public discourse of ideas relating to the law, the legal profession, and the justice system.”⁵²

While these organizations all imply the value of racial and ethnic diversity through colorful and demographically diverse imagery in their marketing and recruiting materials, it is important to note that most state these values in race-neutral terms. This inclusion strategy is very different from traditional affirmative action and legal requirements that specifically address the need to include women, minorities, and other protected groups.

Another example of the shift to the business case for diversity as a strategic rationale for inclusion is the overwhelming support of Fortune

46. INCLUSION & DIVERSITY, APPLE INC., <http://www.apple.com/diversity/> [<https://perma.cc/NC79-RHYD>].

47. *Id.*

48. *Global Diversity and Inclusion*, MICROSOFT, <https://www.microsoft.com/en-us/diversity/> [<https://perma.cc/N8AE-KJ8S>].

49. *Diversity*, GOOGLE, <https://www.google.com/diversity/> [<https://perma.cc/K5MQ-PFWT>].

50. To view the ad, see Mark Copyranter, *Law Firm’s Diversity Ad Recipe Calls for Lots of Whitey Spice*, COPYRANTER (July 16, 2008, 9:00 AM), <http://copyranter.blogspot.com/2008/07/law-firms-diversity-ad-recipe-calls-for.html> [<https://perma.cc/4KMK-3RTT>].

51. *Id.*

52. Carlos A. Rodriguez-Vidal, *Chair’s Message*, A.B.A. OFF. DIVERSITY & INCLUSION, <http://www.americanbar.org/groups/diversity.html> [<https://perma.cc/E33E-59RU>].

500 companies in the reverse discrimination lawsuits *Grutter v. Bollinger*⁵³ and *Gratz v. Bollinger*.⁵⁴ These historic Supreme Court cases debated the value of including racial minorities on college campuses and whether there was a compelling case to use race-conscious policies in college admissions. The amicus briefs submitted by numerous multinational corporations argued that diversity in higher education is a compelling interest because it is necessary to develop the type of diverse leaders required for businesses to remain competitive in the twenty-first century.⁵⁵ In each of these briefs, the companies proffered arguments about the central importance of diversity and inclusion to business success and to remaining competitive in a global economy.⁵⁶

For example, in its brief, General Motors announced that “abundant evidence suggests that heterogeneous work teams create better and more innovative products and ideas than homogeneous teams.”⁵⁷ The *Bollinger* defense built its legal strategy around the business case and other research on the benefits of diversity, which played a critical role in ultimately persuading the Court. In the majority opinion, Justice Sandra Day O’Connor states that the benefits of diversity for “major American businesses” are “not theoretical but real.”⁵⁸

C. *Why the Business Case Eclipsed the Legal Case*

To increase buy-in to inclusion efforts, a growing number of business leaders and scholars emphasize profit by making a business case rather than a legal or moral case for diversity because of its broader appeal.⁵⁹

53. 539 U.S. 306 (2003).

54. 539 U.S. 244 (2003).

55. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 3–10, *Grutter*, 539 U.S. 306 (No. 02-241), *Gratz*, 539 U.S. 244 (No. 02-516); Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 5–26, *Grutter*, 539 U.S. 306 (No. 02-241), *Gratz*, 539 U.S. 244 (No. 02-516).

56. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *supra* note 55, at 3–10; Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, *supra* note 55, at 5–26.

57. Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, *supra* note 55, at 24.

58. *Grutter*, 539 U.S. at 330.

59. TAYLOR COX JR., *CREATING THE MULTICULTURAL ORGANIZATION: A STRATEGY FOR CAPTURING THE POWER OF DIVERSITY* 53–55 (2001); *DIVERSITY IN THE WORKPLACE: HUMAN RESOURCES INITIATIVES* 13, 233–34 (Susan E. Jackson et al. eds., 1992); HERRING & HENDERSON, *supra* note 14 at 47; R. ROOSEVELT THOMAS, JR., *BUILDING ON THE PROMISE OF DIVERSITY: HOW WE CAN MOVE TO THE NEXT LEVEL IN OUR WORKPLACES, OUR COMMUNITIES, AND OUR SOCIETY* 122–25 (2006); Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229, 265 (2001); Herring,

The reasoning is that individuals may be more likely to internalize a value of inclusion with this explicit link between demographic diversity and organizational performance. They explain that “the emphasis on profit in the diversity rhetoric, then, appears to be a means of rationalizing the need for management techniques that incorporate workforce diversity.”⁶⁰ In addition to business leaders, lawyers, judges, and legal scholars have also relied more and more on a business case for diversity when discussing integration and inclusion.⁶¹

supra note 13, at 208; Kelly & Dobbin, *supra* note 32, at 972–73; Wilkins, *supra* note 13, at 1556.

60. Edelman et al., *supra* note 13, at 1619.

61. See, e.g., Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed Reg. 33,016, 33,018 (June 10, 2015) (stating that commenters on this policy statement “were generally supportive of including standards to assess an organization’s commitment, with several referencing the importance of diversity and inclusion in their own organizations. Some commenters noted that an organization’s commitment to diversity and inclusion can provide a competitive advantage”); Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 1 (2009) (providing “data showing that highly diverse law firms generate greater revenue per lawyer and turn higher profits per partner, even after controlling for location, firm size, and hours worked”); ROBERT BARTOLOTTA ET AL., EMPLOYER ENGAGEMENT STRATEGY: WORKFORCE INCLUSION 3, 3 (2014), <http://www.dol.gov/odep/pdf/20140604BusinessCaseEngagementWhitePaper.pdf> [<https://perma.cc/J3QX-M7KL>] (“The purpose of this white paper is to describe the evolution of ideas that occurred during the execution of the ODEP *Business Case for Hiring People with Disabilities* research. Originally designed to update previous ODEP business cases by providing quantitative data supporting the value added by hiring people with disabilities, this focus was ultimately shifted in light of the limited research data available to support a quantitative argument.”); FED. GLASS CEILING COMM’N, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL 5 (1995) (“It is not only a matter of fair play, but an economic imperative that the glass ceiling be shattered. It matters to the bottom line for businesses and to the future economic stability of America’s families.”); INST. FOR INCLUSION IN THE LEGAL PROFESSION, THE BUSINESS CASE FOR DIVERSITY: REALITY OR WISHFUL THINKING 6 (2011) (stating that the report “helps answer two basic questions: Is the oft-discussed business case for diversity truly creating a more diverse and inclusive legal profession? If not, how can the business case be more effective?”); Kathleen Nalty & Andrea Juarez, *Diversity Really Does Matter*, NALP BULL., Sept. 2012, at 12 (“[I]ndividuals and organizations cannot be as smart or competitive in the 21st century without deliberately incorporating diverse perspectives in their thought processes and decisions. . . . [The] intersection between inclusiveness and intelligence (The Next IQ) transforms the ‘why’ discussion from ‘diversity is important because the client says so’ (the traditional business case) to ‘diversity and the different perspectives it brings makes me a smarter, more effective lawyer (or organization) for my clients.’”); *Making a Business Case*, ABILITIES FOR BUS., <http://www.abilitiesforbusiness.com/return-on-investment-roi/> [<https://perma.cc/G7HQ-GSK8>] (“Businesses that employ people with disabilities turn social issues into business opportunities. These opportunities translate into lower costs, higher revenues and increased profits.”); Press Release, U.S. Equal Emp’t Opportunity Comm’n, EEOC Issues New Guidance on Work/Family Balance and Promotes Employer Best Practices, (May 23, 2007), <https://www.eeoc.gov/eeoc/newsroom/release/5-23-07.cfm> [<https://perma.cc/2TFE-ZDDG>] (discussing a public meeting the EEOC held “focusing on employer best practices to achieve work/family balance” and explaining that the “research director of Catalyst, Inc., spoke of the unique challenges faced by women of color in achieving a work/family balance” and “highlighted her organization’s research, workforce statistics, and literature in making the ‘business case’ for work/life

Thus, a business case for diversity may be perceived as more legitimate than antidiscrimination law because it offers a connection between increased diversity and inclusion and positive performance outcomes. It may also be favored because it frames the efforts as *proactive*—to reap financial rewards—rather than *reactive*—to stop discrimination and avoid punishment. Other arguments for a business case include reducing resistance and implementing new governance perspectives.

Many scholars and organizational leaders fear that emphasizing antidiscrimination law may lead to resistance and backlash, which may ultimately undermine the broader goals of inclusion.⁶² Some studies have supported the idea that diversity efforts may be especially likely to result in resistance if they are perceived to have an externally driven legal rationale that does not reflect any internally motivated organizational value.⁶³ This rational choice logic rests on the assumption that majority group members may not be convinced that discrimination still exists, so they may disregard laws that insinuate it does. Top-down external demands focused on legal compliance do not make the claim that

programs focusing on women of color”).

62. Linda Hamilton Krieger, *Sociolegal Backlash*, in *BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS* 340, 353, 357–62 (Linda Hamilton Krieger ed., 2003); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1902 (2009) (“[W]hile clear, firm, and enforceable legal standards are necessary in order to define basic limits on discriminatory behavior, when these standards come to feel unfair or overly controlling, they evoke guilt, resentment, and resistance—all reactions that actually increase stereotyping.”); Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July/Aug. 2016, at 54. (“By headlining the legal case for diversity and trotting out stories of huge settlements, they issue an implied threat: ‘Discriminate and the company will pay the price.’ We understand the temptation . . . but threats, or “negative incentives,” don’t win converts.”); Kalev et al., *supra* note 13, at 595; Kidder et al., *supra* note 21, at 78; Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 477 (2000) (positing the Americans with Disabilities Act suffers from a backlash); Justine Eatenson Tinkler et al., *Can Legal Interventions Change Beliefs? The Effect of Exposure to Sexual Harassment Policy on Men’s Gender Beliefs*, 70 SOC. PSYCHOL. Q. 480, 481, 491 (2007) (concluding that legally-driven sexual harassment policies may have the unintended effect of activating unequal gender beliefs).

63. Kalev et al., *supra* note 13, at 602–06 (demonstrating that employer efforts to promote diversity by establishing organizational responsibility for it leads to the broadest increases in managerial diversity); Kidder et al., *supra* note 21, at 91 (finding that whites more favorably supported a diversity initiative when the organization justified it using a competitive advantage versus reactive, affirmative action rationale); see also Jena McGregor, *To Improve Diversity, Don’t Make People Go to Diversity Training. Really.*, WASH. POST (July 1, 2016), <https://www.washingtonpost.com/news/on-leadership/wp/2016/07/01/to-improve-diversity-dont-make-people-go-to-diversity-training-really-2/> [https://perma.cc/N7ME-89Z2] (discussing an interview with Alexandra Kalev on the negative effects of diversity training and stating “Kalev said their research has shown that training programs that focus on multiculturalism and the business case for diversity—rather than the legalistic reasons behind why it’s being offered—have a less negative impact”).

inclusion will benefit high-status actors (e.g., white males), their group, or their organization in some way.⁶⁴ If these individuals do not internalize the value of diversity, they may informally resist such efforts and continue to exclude and marginalize members of low-status groups.

For example, when discussing antidiscrimination law, a professional consultant noted:

While the doors of opportunity were opened to many who were previously excluded, new hurdles were created by the unnatural focus on special target groups in organizations, the perception by white managers that standards were being lowered to accommodate minorities and women, and the perception that EEO and [affirmative action] programs were artificial methods forced upon organizations and their managers to pay for the historical sins of U.S. society.⁶⁵

Hence, diversity and inclusion for legal compliance may trigger stereotypes that suggest minorities and women are less competent, not essential for business performance, and recruited for reasons other than their qualifications and expected contributions. Survey and laboratory studies also provide evidence suggesting that antidiscrimination training can facilitate resistance.⁶⁶ For example, Tinkler et al. found that male undergraduate students who read a sexual harassment policy displayed more implicit gender beliefs advantaging men (relative to women) in status and competence compared with those who received no policy information.⁶⁷

Thus, legal compliance and moral rationales regarding what is “fair” or “just” may convince women and minorities that diversity is important, but when it comes to white males, the business case may be perceived as more legitimate because it is internally driven and relates to the bottom line, which will eventually affect their personal outcomes. If this is the case, strategically framing inclusion with reference to organizational effectiveness and profit may lead to more equitable behavior among all groups, particularly white males, who less clearly benefit by such efforts.

64. Ellen Foster Curtis & Janice L. Dreachslin, *Diversity Management Interventions and Organizational Performance: A Synthesis of Current Literature*, 7 HUMAN RESOURCE DEVELOPMENT REVIEW 107, 131 (2008) (concluding that more empirical support is needed indicating that diversity is good for business); Edelman et al., *supra* note 13, at 1628.

65. Cresencio Torres & Mary Bruxelles, *Capitalizing on Global Diversity*, HR MAG., Dec. 1992, at 30, 31.

66. Kalev et al., *supra* note 13, at 595; Tinkler et al., *supra* note 62, at 481, 482, 491.

67. Tinkler et al., *supra* note 62, at 491.

A number of scholars also argue that top-down legal regulation is no longer effective at combating the forms of discrimination most common in the twenty-first century.⁶⁸ This is because antidiscrimination law formulated in the 1960s and 1970s responds to first-generation forms of discrimination, such as explicit acts of exclusion and racial animus by an identifiable bad actor. In reality, employers are aware that these forms of discrimination are now rare and therefore disregard the law as obsolete.⁶⁹ Contemporary workplace discrimination is also very difficult to prove through litigation without employer admissions or other smoking gun evidence that is difficult to obtain. This may cause inclusion efforts framed in terms of antidiscrimination law to lack force and legitimacy, resulting in dismissal of goals rather than internalization.

New governance scholars advise that inclusion efforts should move away from antidiscrimination law that is court-centered, top-down, and rights-based and instead argue that institutions such as workplaces and universities should serve as the primary promoters of inclusion.⁷⁰ Under this approach, voluntary institutional participation plays a central role in identifying problems and generating privatized, market-based solutions.⁷¹ The argument is that internal strategies such as the business case that are voluntary, flexible, and designed by organizational leaders are more likely to be effective at reducing bias than hard legal mandates.⁷²

Sturm notes, “[w]orkplace equality is achieved by connecting inclusiveness to core institutional values and practices.”⁷³ Based on this perspective, an internal business case for diversity endorsed by organizational leaders and focused on organizational goals and values, may be the most effective rationale for overcoming bias and inequality. Likewise, legal rationales for inclusion that emphasize the benefit of compliance and avoiding punishment may be less effective. Thus, a new governance perspective suggests that the business case would be more

68. Guy-Uriel E. Charles, *Toward a New Civil Rights Framework*, 30 HARV. J.L. & GENDER 353 (2007) (“Law is significantly less effective when put to more offensive use—that is, as a sword of racial equality—as opposed to defensive use—that is, as a shield to defend racial equality measures.”); Sturm, *supra* note 21, at 461.

69. Susan Sturm, *Rethinking Race, Gender, and the Law in the Twenty-First Century Workplace*, 12 PERFORMANCE IMPROVEMENT Q. 20, 37 (1999).

70. See Estlund, *supra* note 13, at 367–68; Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 249 (2006); Sturm, *supra* note 21, at 462–63; Sturm, *supra* note 69, at 22.

71. See Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 331–37 (2009) (describing the principles of New Governance); Sturm, *supra* note 21, at 479, 491.

72. See, e.g., Sturm, *supra* note 21, at 489–91.

73. Sturm, *supra* note 70 at 249.

likely to lead to inclusive group processes and the internalization of pro-equality values than top-down legal strategies.

While the business case strategy may be intended to underscore the legitimacy of inclusion efforts and limit resistance efforts by finding common ground (everyone likes success and profits), its actual effect on behavior and intergroup relations has not been studied empirically. The business case for diversity may persuade the United States Supreme Court justices and top U.S. business leaders, but the question remains whether this rationale is persuasive to the remainder of the U.S. workforce. When it comes to this broader audience, majority group members may not be convinced that diversity and inclusion will benefit them, their group, or their organization.

II. EXPLORING THE EFFECTIVENESS OF INCLUSION STRATEGIES: WHAT WORKS?

This Article presents two studies that examine two primary questions. First, I conducted a laboratory experiment to investigate whether instrumental diversity narratives focused on benefits or the *business case* decrease bias and increase inclusion of racial minorities as intended. Generally, results revealed that white participants exposed to the business case for diversity treated their minority teammates more harshly than white participants who were not exposed to such diversity messages.

I then followed the first study with a survey-based experiment to investigate whether a traditional *legal case* for inclusion, emphasizing civil rights law, may be more effective than the popular business case examined in the first study. Findings from this study revealed that a legal case for inclusion evokes a more positive response than a business case for diversity or no rationale at all.

A. *Testing the Effect of an Inclusive Diversity Strategy*

The first study was designed to provide new insights into the effects of inclusive diversity strategies on outcomes such as group decision-making processes, beliefs about diversity, and racial attitudes.⁷⁴ Sixty-three white undergraduate participants were recruited from the Center for Social Research at Stanford University on the basis of interest in a study on organizational decision making. Fifty-seven percent of the participants were female, and they ranged from eighteen to twenty-three years of age.

74. For full methods and results, see Jamillah Williams, Status Processes and Organizational Inequality: Do Diversity Strategies Hurt or Help Racial-Ethnic Inclusion? (June 2016) (unpublished manuscript) (on file with author).

Participants were randomly assigned to one of three conditions: an “Inclusive Diversity” condition or one of two control conditions, a “Traditional” condition or a “Neutral” control condition. The diversity strategy was manipulated with a video shown to participants at the beginning of the study. In each condition, using an interactive computer system, participants joined a team with two teammates.⁷⁵ Participants were told that the team would be working together to resolve a number of management scenarios. One teammate was white, and one was African American.

In the Inclusive Diversity condition, participants watched a video presentation similar to a training film that might be produced by a large research institute or consulting organization. The footage included professional graphics of racially diverse students and professionals. During one segment of the video, the narrator briefly described the history of research studies indicating that one result of the research was that, in the current global marketplace, organizations benefit from diversity. More specifically, on a range of decision-making tasks, diverse work groups were found to be most effective, leading to greater success in the workplace and educational settings. This script is consistent with the business case for diversity.

In the Traditional control condition, the video viewed by participants was similar to that for the Inclusive Diversity condition, but without diversity narrative or imagery. The images included a more traditional and mainstream workforce with mostly older, white male executives, a few white females, and one racial minority in every few scenes. The narrator discussed a history of studies related to teams and performance in organizations, but with no mention of diversity.

In the Neutral control condition, the video narrative was identical to that of the Traditional control condition, but the video displayed different imagery. The video showed neutral corporate logos and imagery, such as

75. The teammates were fictitious and pre-programmed in the computer program. Participants were led to believe that the teammates were real participants also present at the study location. When deciding to use deception in experiential settings, the potential costs and benefits must be carefully weighed. If deception were not used in this study, it is possible that participants may have provided the socially acceptable answers, to avoid appearing discriminatory, or may not have taken the task seriously, thus not revealing their true preferences. Both of these options would have suppressed the study's ability to provide insight on the effects of inclusive diversity strategies. The author believes that the costs of a relatively brief (the deception and reasoning behind it was fully explained to the participants at the end of the study, meaning the deception lasted less than an hour in most cases) and mild (the deception was not distressing to participants or violative of their privacy) use of deception was outweighed by the benefits of more accurate study results. See Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1311 n.6 (2007) (explaining a similar decision to use deception in an experimental setting).

office boardrooms and organizational charts. No people were present in the videos, so no cues about race or gender composition or other values regarding diversity were provided. This condition was designed to capture baseline outcomes in a neutral environment.

After viewing one of the three videos, the white participants were informed that they had been randomly selected as group leader for the first task. The group task involved answering twenty multiple choice questions regarding how to resolve a management problem.⁷⁶ For each question, leaders first selected their own response to the question. They then were given the opportunity to review their teammates' responses. After reviewing their teammates' responses, the participant was responsible for selecting the final answer for the group.

After answering the final question, the participant was asked to evaluate each group member's performance on the task. A report then informed the participant that he/she answered fewer questions correctly than the other two teammates and that the group performed below the average of most teams. The participant was then given the choice of appointing one of his/her teammates as group leader for the next task or retaining his/her position as leader.⁷⁷ The final segment asked participants to answer eight questions for a separate study. This final survey measured contemporary racial attitudes.

The measures used in this study go beyond self-reported attitudes to tap the subtle behaviors that are more consistent with the forms of discrimination most common in the twenty-first century.⁷⁸ The primary dependent variables in this analysis are (1) leadership/distribution of rewards, (2) evaluation of minority teammate, (3) beliefs about diversity, and (4) contemporary racial attitudes.

This study allowed me to test two competing predictions. First, based on the prevalence of diversity efforts and their intended effects, participants in the Inclusive Diversity condition may exhibit more positive

76. All multiple-choice questions were selected from civil service exams. See Jeffrey W. Lucas, *Status Processes and the Institutionalization of Women as Leaders*, 68 AM. SOC. REV. 464, 472 (2003) (describing an experimental setting that used questions adopted from civil service exams). Questions were extremely ambiguous and difficult with no clear correct response. Participants selected their individual responses, then after a brief delay, they were able to view the responses of their teammates by clicking on their names and pictures.

77. There actually was no second group task.

78. See Sturm, *supra* note 21, at 468–74 (discussing second generation discrimination). Implicit measures of bias do not rely on a respondent's willingness or ability to report their opinions or openly discriminate against minorities. For example, it has been found that people who report feeling "exactly the same" about whites and African Americans still demonstrate preferences for whites. See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1475 (1998).

behavior toward the minority teammate than participants in the control conditions. Alternatively, participants could exhibit resistance, resulting in more negative treatment of the minority group member in the Inclusive Diversity condition compared with the Traditional and Neutral control conditions.

Following the decision-making task, the participant could either appoint a teammate as leader or maintain his or her position as leader. The participant was instructed that the entire team would be rewarded for high group performance and the leader would receive a bonus reward. White participants in the Inclusive Diversity condition were less likely to select the minority teammate as group leader than participants in the Traditional and Neutral conditions.⁷⁹ Only 36% of participants in the Inclusive Diversity condition selected the African American teammate as leader, while 67% of participants in the Traditional condition and 50% of participants in the Neutral condition selected the African American teammate as leader.⁸⁰

The participant's evaluation of competence was measured by asking what percentage of questions they estimated each teammate answered correctly, from 0% to 100%. The white participants in the Inclusive Diversity condition evaluated their minority teammates more negatively than participants in the Traditional and Neutral conditions did. Participants in the Inclusive Diversity condition estimated that the minority members answered 49% of the questions correctly, while participants in the Traditional and Neutral conditions estimated that they answered 53% and 54% percent correctly, respectively.⁸¹ Another measure asked participants how confident they were serving as group leader, from 0% confident to 100% confident. On average, white participants in the Inclusive Diversity condition, who viewed the video with diversity imagery and narrative, also reported *lower confidence* in themselves as group leader (44.68% confident) than participants in the Traditional condition (52.9% confident).⁸² This suggests that diversity messages emphasizing the performance benefits of inclusion may cause whites to experience some form of threat to their self-concept.⁸³

79. The responses were coded into a dichotomous variable, 1 = Minority selected as group leader and 0 = Minority not selected as group leader.

80. Diversity vs. Traditional ($p < .05$) and Diversity vs. Neutral ($p < .10$).

81. Diversity vs. Traditional (n.s.) and Diversity vs. Neutral ($p < .10$).

82. Diversity vs. Traditional ($p < .05$).

83. See Tessa L. Dover et al., *Members of High-Status Groups Are Threatened by Pro-Diversity Organizational Messages*, 62 J. EXPERIMENTAL SOC. PSYCHOL. 58, 66 (2016) ("Our findings suggest that in organizational contexts, members of high-status groups, such as whites and men, are threatened

Ironically, white participants' beliefs about the performance value of diversity were also more negative in the Inclusive Diversity condition. Participants were more likely to agree with the statement "[r]acially diverse teams perform better than racially homogeneous teams" in both the Traditional condition (2.95) and the Neutral condition (3.00) than those in the Inclusive Diversity condition (2.31).⁸⁴ Only participants in the Inclusive Diversity condition were directly exposed to research findings demonstrating that diversity is a valuable asset, yet they were *less likely* to agree that diversity is beneficial to team performance. This suggests that participants rejected these common notions concerning the benefits of diversity.

Eight questions from the Symbolic Racism 2000 Scale were used to measure contemporary racial attitudes.⁸⁵ The Symbolic Racism 2000 Scale measures whether whites privately yet explicitly agree with sentiments such as "[t]oo much is done for racial minorities" and "[d]iscrimination is no longer a problem." Although greater behavioral bias was exhibited in the Inclusive Diversity condition, explicit racial attitudes measured by the Symbolic Racism 2000 Scale did not vary across conditions.⁸⁶ This finding supports the social psychological theory that intergroup attitudes are now more liberal, with explicit racism less frequently observed. Further, resistance to inclusive strategies may operate through subtle and possibly unconscious processes that are not ascribed only to overt racists.

These results challenge the proposition that an inclusive strategy focused on the instrumental benefits of diversity will reduce inequality. Instead, these findings support a resistance hypothesis. Not only did the participants not agree with the ideas conveyed by the diversity messages, they seem to actively resist them by evaluating the minority teammates more negatively and by being less inclined to select them as group leader. Note that the higher likelihood of selecting the minority members as team leader in the Traditional condition corresponds with the participants' higher self-confidence in that condition. This suggests that whites may be more likely to make decisions inclusive of minorities when they have high

by messages that promote diversity and appreciation for all.").

84. This variable was measured on a five-point Likert scale, from "Strongly Disagree" to "Strongly Agree" and average responses were compared across conditions using a t-test. Diversity vs. Traditional ($p < .01$) and Diversity vs. Neutral ($p < .01$).

85. For more on the Symbolic Racism 2000 Scale, see P.J. Henry & David O. Sears, *The Symbolic Racism 2000 Scale*, 23 POL. PSYCHOL. 253 (2002).

86. Symbolic Racism 2000 Scores, Diversity condition (22.05), Traditional condition (21.24), Neutral condition (21.80); Diversity vs. Traditional (n.s.) and Diversity vs. Neutral (n.s.).

evaluations of themselves and do not feel personally threatened by the minority candidates and the objectives of the business case.

Evaluation and distribution of rewards are behaviors that will continue to reinforce inequality in the workplace, universities, and other organizations if minorities are systematically disadvantaged. Here, race was not relevant to the group task; in fact, there was evidence that the minority group member was a high performer (higher than the participant, in fact), yet the white participants treated them *more negatively* after being exposed to instrumental diversity values. This raises a serious question about corporate diversity-training programs in which managers describe the performance benefits of diversity to persuade employees to hold pro-equality attitudes and engage in inclusive behavior. This strategy may backfire.

B. Testing Persuasiveness: Legal Versus Business Case Rationales

Although diversity and inclusion efforts have become commonplace, the justifications or rationales for such efforts vary widely.⁸⁷ The major rationale for diversity focuses on meeting internal business goals, such as profit, performance, and serving client needs, which is the business case examined in the first study.⁸⁸ Despite the general trends toward emphasizing a business case, formal inclusion efforts continue to be introduced and institutionalized for various reasons and strategically “framed” according to other rationales for why integration is an important goal, such as *legal compliance* and *morality*.⁸⁹

This second study builds on findings from the first study by investigating whether different justifications or rationales for inclusion lead to different outcomes.⁹⁰ In the previous study, the business case narrative paired with imagery of diverse teams had a counterproductive effect, leading to more biased behavior toward minorities. The following study explores whether a legal case for inclusion may be more effective at reducing bias and discriminatory behaviors.

87. See Herring, *supra* note 13, at 209–10; Nalty & Juarez, *supra* note 61, at 12–13; Sheryl L. Axelrod, *Disregard Diversity at Your Peril: Diversity as a Financial Competitive Advantage*, DIVERSITY & THE BAR, May–June 2013, at 42, 44; BARTOLOTTA ET AL., *supra* note 61.

88. Brooke & Tyler, *supra* note 21, 726–28; Edelman et al., *supra* note 13, at 1605–06 (finding that the most frequently cited reason in managerial literature in support of diversity is profit: 48% of the management publications support diversity for *profit*, while only 19% refer to *law* and 30% refer to *fairness*); Kelly & Dobbin, *supra* note 32, at 975; Levit, *supra* note 39, at 373; Wilkins, *supra* note 13, at 1556–58.

89. See Edelman et al., *supra* note 13, at 1605–06; Wilkins, *supra* note 13, at 1556–58.

90. For full methods and results, see Williams, *supra* note 74.

I designed the second experiment using Qualtrics online survey software.⁹¹ The subject pool was recruited through the Institute for Research in the Social Sciences at Stanford University. The sample included 166 Stanford graduates and parents of Stanford students who volunteered to participate in a research-experience program. Respondents ranged from twenty-two to ninety-four years of age, with an average age of fifty-two. The sample was 80% white and 20% minority. Respondents resided in thirty-three states and had a wide range of employment experiences. Eighty-two percent had managerial experience.

The sample was randomly divided into three subgroups, each viewing a different video: “Business Case,” “Legal Compliance,” or “No Rationale” control condition. Each video discussed diversity and inclusion, but the narrator expressed a different rationale for inclusion in each condition. The imagery in all three videos illustrated diverse individuals in a range of group settings and was identical across conditions.

In the Business Case video, the narrator indicated that inclusion is important in organizations because corporations benefit from a diverse workforce.⁹² The script was consistent with the emerging theme that diversity is a profitable resource for organizations and therefore necessary in a competitive market. It asserted that diversity along the lines of race, gender, national origin, and age, among other factors, increases innovation and productivity. The video also stated that people from these different groups bring different perspectives valuable in decision making and problem solving, resulting in a wider range of strategies to attack problems and address diverse customer needs. This rationale was not presented as a mandate. It is internally driven, desired by organizations, and enhances the success of the group and organization.

In the Legal Compliance video, the narrator suggested that inclusion is important in organizations because of legal requirements, such as antidiscrimination law. The video indicated that inclusion should be a priority, to comply with the law and avoid litigation, and mentioned Title VII of the 1964 Civil Rights Act. An act which prohibits employers from discriminating on the basis of race, color, sex, national origin, and religion. The video stated that the law has certain requirements and, in order to maintain compliance, companies must seek to employ people from these different protected groups.

91. Qualtrics is a leading survey tool commonly used for social science research. *See* QUALTRICS, <https://www.qualtrics.com/> [<https://perma.cc/S4BX-DPDY>].

92. The Business Case Rationale video was very similar to the Inclusive Diversity condition used in the first study.

Last, in the No Rationale control condition, the video stated the importance of inclusion but did not express support for any specific rationale, including the Business Case or Legal Compliance rationale. This condition serves as a neutral control to compare with the other two conditions.

After viewing the video, participants completed a survey that asked them to (1) review an employee promotion scenario that subtly raises issues of race and social inequality, (2) answer questions regarding their reactions and a suggested decision regarding the promotion, and (3) respond to survey items regarding the perceived legitimacy of diversity values and intergroup attitudes.

The promotion decision involved a scenario where a white candidate was promoted over a minority candidate.⁹³ Race was primed using a stereotypically African American name, “Darnell,” and a stereotypically white name, “John.”⁹⁴ The scenario described a complex employment context where bias and subtle structural barriers could disadvantage members of low-status groups. The participant was asked which candidate he or she would recommend for promotion.

The primary dependent variables in this analysis are (1) promotion decision, (2) diversity beliefs, and (3) racial attitudes. Based on previous research, which offers competing predictions about the effect of law, I evaluate whether legal framing by referencing civil rights law has positive or negative effects on inclusion outcomes compared with a business case for diversity.

93. See Green, *supra* note 6, at 108–09 (describing an example of how bias can affect the allocation of opportunities in high-end jobs at traditionally organized institutions).

94. The full memo to participant read:

Dear Member of Max Corp. Committee,

Please carefully review the case and be prepared to share your recommendations with the committee.

Darnell is a fourth year associate at Max Corp. When John, a new associate with previous experience was hired, a senior partner asked Darnell to “show him the ropes” at Max Corp. Darnell, John, and the senior partner would all be working together in the same division. Darnell agreed and felt that this would be a good opportunity to demonstrate his leadership at the company. After a few months, Darnell noticed that John and the partner were getting along very well. The partner praised John’s performance, they frequently went out to lunch, and they were always chatting amongst themselves in the partner’s office. Darnell also noticed that John was receiving more of the assignments with the most prestigious clients.

A year later, John was recommended for promotion, mainly as a result of his performance on a case with a very prestigious client and a fine recommendation from the partner. Although both employees did promising work and had similar evaluations on record, Darnell was not recommended for promotion. Darnell became concerned due to the fact that, of 39 associates who were promoted this year at Max Corp, only three were members of a racial minority group.

Darnell has requested that his situation be reviewed.

Outcomes on behavioral measures are critical to understanding how exposure to antidiscrimination law and the business case may influence actual decision making in organizations. After reviewing the workplace scenario, the participants were asked to recommend one of the candidates for promotion: Darnell or John.⁹⁵ Participants in the Legal Compliance condition were more likely to recommend the minority candidate for promotion after reviewing the workplace scenario. Thirty-six percent of participants in the Legal Compliance condition thought that Darnell should be promoted, compared with 24% in the Business Case condition and 28% in the No Rationale condition.⁹⁶

Several questions measured the extent to which participants perceived inclusion to be an important goal in organizations. Participants in the Legal Compliance condition were more likely to express that diversity was an important goal than participants in the Business Case condition. Seventy-five percent of participants in the Legal Compliance condition felt that it was important to strive for diversity, whereas only 68% of participants in the Business Case condition and 71% in the No Rationale condition held this belief.⁹⁷

Another question specifically measured perceptions regarding different rationales for diversity. The question listed a number of specific rationales, each falling within the broader categories of business case, legal case, and moral case. Participants in the Legal Compliance condition were even more likely to support “business” rationales for inclusion that relate to the bottom line, such as “[i]t leads to success in the global market,” than participants in the Business Case condition.⁹⁸ Participants in the Legal Compliance condition were also more likely to agree that striving for diversity is “the right thing to do morally” and “provides a fair chance to the underrepresented” than participants in the Business Case condition and the No Rationale condition.⁹⁹

95. This item read: “[o]nly one person in this division can be promoted. At this point, based on your expertise and opinion, what preliminary recommendation do you wish to submit to the committee?” The response options were: “Definitely Promote John”; “Definitely Promote Darnell”; “Probably Promote John”; or “Probably Promote Darnell.” This item was coded into a dichotomous variable with 1 = Promote Darnell (Minority Candidate) and 0 = Promote John (White Candidate).

96. Legal vs. Business ($p < .05$) and Legal vs. No Rationale ($p < .05$).

97. Legal vs. Business ($p < .05$) and Legal vs. No Rationale (n.s.).

98. Diversity leads to success in the global market: Legal vs. Business ($p < .05$) and Legal vs. No Rationale (n.s.). Exposure to a legal rationale was just as likely to generate agreement that inclusion is a valuable *competitive* asset as exposure to business rationales. For example, participants in the Legal condition were just as likely or *more* likely to endorse the idea that inclusion helps organizations better serve clients, recruit top talent, and succeed in a global market compared to those in the Business Case condition.

99. Striving for diversity is the right thing to do morally: Legal vs. Business ($p < .05$) and Legal vs.

I used an adaptation of the Color-Blind Racial Attitudes Scale to measure racial attitudes.¹⁰⁰ In general, a high score on this multifactor scale indicates that the respondent denies the existence of racism and believes that race does not and should not matter.¹⁰¹ Participants in the Legal Compliance condition were more likely to acknowledge the existence of institutional discrimination than participants in the Business Case condition or the No Rationale condition. Across the different survey items, participants exhibited more positive racial attitudes after being exposed to antidiscrimination law.¹⁰²

These findings, particularly the promotion decision, do not support the common expectation that the business case for diversity grounded in performance benefits is generally perceived as most legitimate and results in the most inclusive behavior. Nor does it support the growing perception that legal rationales for diversity will generate the most resistance, given that antidiscrimination law is external, top-down, and increasingly considered passé. Instead, results support the perspective that the law can still have positive effects through normative influence.

No Rationale (n.s.); Striving for diversity provides a fair chance to the underrepresented: Legal vs. Business (p<.05) and Legal vs. No Rationale (p<.05).

100. See generally Helen A. Neville, *Construction and Initial Validation of the Color-Blind Racial Attitudes Scale (CoBRAS)*, 47 J. COUNSELING PSYCHOL. 59 (2000). It has been argued that even symbolic racism measures are no longer sensitive to current expressions of racial attitudes. Therefore, the Color Blind Racial Attitudes Scale (CoBRAS) is a measure often used to tap into contemporary forms of racial attitude expression. Participants were asked to report whether they agreed or disagreed with a number of statements. For example, “Racial problems in the U.S. are rare, isolated situations.” *Id.* at 62. Items were measured on a five point Likert scale from “Strongly Disagree” to “Strongly Agree.” *Id.* at 66. Some items were reverse coded as appropriate. Scores on the CoBRAS scale were compared across conditions using t-test analyses. *Id.* at 62–65.

101. See generally BONILLA-SILVA, *supra* note 40 (discussing color-blind racism).

102. Participants in the Legal condition were less likely to believe “[r]acial problems are rare and isolated”: Legal vs. Business (p<.05) and Legal vs. No Rationale (p<.05); Participants in the Legal condition were less likely to believe that “[r]acial minorities have advantages based on skin”: Legal vs. Business (p<.05) and Legal vs. No Rationale (p<.05); Participants in the Legal condition were more likely to acknowledge that “[w]hite people have certain advantages” (reverse coded): Legal vs. Business (p<.05) and Legal vs. No Rationale (p<.05); Participants in the Legal condition were less likely to believe it is “[i]mportant to think of ourselves as American, not African American, Mexican American, etc.”: Legal vs. Business (p<.05) and Legal vs. No Rationale (p<.05); Participants in the Legal condition were less likely to believe “[e]veryone who works hard can become rich”: Legal vs. Business (p<.05) and Legal vs. No Rationale (n.s.); Participants in the Legal condition were less likely to believe that “[a]ffirmative action discriminates against whites”: Legal vs. Business (p<.05) and Legal vs. No Rationale (n.s).

III. DISCUSSION: THE FUTURE OF ANTIDISCRIMINATION LAW

Findings from these empirical studies have implications for a growing debate about the relevance and future of antidiscrimination law. Some legal scholars argue that antidiscrimination law is ineffective because current legal categories and evidentiary standards requiring intent are insufficient to address the forms of bias most common in twenty-first century organizations.¹⁰³ This is consistent with research indicating that judicial enforcement of antidiscrimination law is weak and may not adequately provide redress for discrimination.¹⁰⁴ These scholars note the limited effectiveness of antidiscrimination law when penalties are rare, which leaves little incentive to comply with legal rules. New governance scholars advise that internal institutional problem solving may be a more promising method of reducing bias than legal rules.¹⁰⁵

However, the empirical findings reviewed in Part II demonstrate that a strategic reminder of Title VII of the Civil Rights Act may, in fact, encourage acknowledgment of racial inequality and promote more inclusive behavior. Thus, while it may generally be effective for institutions to take initiative and primary responsibility for inclusion efforts rather than rely exclusively on the courts, results indicate that civil rights law continues to play an important role in remedying inequality and should not be abandoned.

While internal organizational efforts may mean well, findings also suggest that some common strategies may be misguided and not empirically backed. For example, results show that the popular business case for diversity may sometimes be the biggest spoiler of inclusion efforts. Across a range of measures, exposure to the business case led to more negative beliefs about inclusion and more biased behavior than a legal rationale.

Drawing from a range of theories, social scientists have provided a useful framework to better understand why instrumental diversity rationales, such as the business case, may negatively influence beliefs and behavior.

103. See, e.g., Sturm, *supra* note 69, at 22 (explaining that legal regulation focuses on intentional exclusion); Sturm, *supra* note 21, at 468–69 (explaining that exclusion in the workplace is hard to trace to intentional actions).

104. See Susan Sturm, *Overview: Socio-Legal Approaches to Anti-Discrimination Law*, in *HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH*, *supra* note 12, at 35, 40–43.

105. See, e.g., Sturm, *supra* note 21.

A. *Why Instrumental Diversity Strategies May Fail: Social Psychological Insights*

Diversity strategies are implemented to achieve positive results; however, in real organizational contexts, blatant and direct backlash is often observed in response to seemingly benign efforts (i.e., threats of reverse discrimination litigation and overt opposition to inclusion practices).¹⁰⁶ Moreover, employees may exhibit less obvious forms of informal resistance and unconscious bias in response to such efforts.¹⁰⁷ Thus, while instrumental diversity efforts are designed to embrace difference and emphasize the great benefits of inclusion, they also challenge deeply ingrained stereotypes and hierarchies, which may also result in negative outcomes that stifle meaningful progress.¹⁰⁸ Four social

106. *E.g.*, *Fisher v. Univ. of Tex. at Austin*, ___ U.S. ___, 136 S. Ct. 2198 (2016) (appellant alleged reverse discrimination based on University's consideration of race as a part of its holistic review process for admissions); *Ricci v. DeStefano*, 557 U.S. 557 (2009) (white and Hispanic firefighters brought Title VII action against city that failed to certify tests used for promotion that, if used, would have had a disparate impact on minority firefighters); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Gutter v. Bollinger*, 539 U.S. 306 (2003); J. EDWARD KELLOUGH, UNDERSTANDING AFFIRMATIVE ACTION: POLITICS, DISCRIMINATION, AND THE SEARCH FOR JUSTICE 88–89 (2006) (explaining the argument that affirmative action harms white men); THE AFFIRMATIVE ACTION DEBATE, *supra* note 38, at 44–45 (providing evidence that despite fervent arguments that white men are discriminated against due to affirmative action, only 1.7% of discrimination charges filed between 1987 and 1994 were by white men); Kalev, *supra* note 13, at 595 (stating that research suggests some diversity programs have a negative effect on management diversity); Opinion, *The Harm of Diversity*, STAN. DAILY, Feb. 27, 2008, at 4 (claiming that being held accountable for not having a diverse staff is unfair when the applicant pool is not diverse).

107. *E.g.*, BONILLA-SILVA, *supra* note 40, at 303 (giving examples of rationale used against affirmative action); David O. Sears & P.J. Henry, *Over Thirty Years Later: A Contemporary Look at Symbolic Racism*, in 37 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 95, 116 (Mark P. Zanna ed., 2005) (showing that the effects of symbolic racism influence whites' thoughts about racial policies); Dover, *supra* note 83, at 66 (study concluding that high-status groups are threatened by messages that promote diversity); Madeline E. Heilman & Brian Welle, *Disadvantaged by Diversity? The Effects of Diversity Goals on Competence Perceptions*, 36 J. APPLIED SOC. PSYCHOL. 1291, 1315 (2006) (minority group members are viewed more unfavorably when there is a perceived absence of merit criteria during the decision-making process to create the group); Cheryl R. Kaiser et al., *Presumed Fair: Ironic Effects of Organizational Diversity Structures*, 104 J. PERSONALITY & SOC. PSYCHOL. 504, 516 (2012) (“[F]or high-status groups, the mere presence of diversity structures has the ironic consequence of reducing perceptions of discrimination and undermining support for those who claim to be its victims.”) (emphasis in original); Cecilia L. Ridgeway, *Why Status Matters for Inequality*, 79 AM. SOC. REV. 1, 7 (2014) (indicating that status bias and associational biases occur unconsciously).

108. See DIVERSITY RESISTANCE IN ORGANIZATIONS 6 (Kecia M. Thomas ed., 2008) (providing a taxonomy of diversity resistance); Dover, *supra* note 83, at 58 (finding that members of high status groups were threatened by pro-diversity organizational messages, including expressing concerns about being the target of discrimination, exhibiting cardiovascular threat, and making a poorer impression during a job interview); Kaiser et al., *supra* note 107, at 504 (finding that the presence of organizational diversity structures caused high status group members to become less sensitive to

psychological mechanisms drawn from intergroup relations theory may facilitate this resistance, including negative stereotypes, threat to group position, social identity threat, and color-blind ideology.

First, by making people think about race, diversity efforts may activate negative stereotypes, leading to negative treatment of minority group members based on such stereotypes.¹⁰⁹ A negative stereotype is a culturally based, but often unfounded, generalization or belief about a group or group members.¹¹⁰ Negative stereotypes are often inaccurate and, when applied erroneously, have the potential to greatly limit opportunities available to target groups. An inclusive diversity strategy may prime these negative racial sentiments by putting racial differences at the forefront, leading to negative treatment of minority group members.¹¹¹

Second, another social psychological concern is that members of the dominant group will view groups that are being emphasized by instrumental diversity narratives as direct competitors for economic and social resources.¹¹² Blumer's group-position model suggests that feelings of competition and hostility emerge from historically developed judgments about positions in the social order that high- and low-status groups should rightfully occupy.¹¹³ Such perceptions may influence the potential for cooperation among groups and possibly increase the likelihood of open antagonism and conflict. Based on this theory, diversity

discrimination targeted at underrepresented groups and to react more harshly toward those members claiming discrimination); Lisa Legault, *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (but Also Increase) Prejudice*, 22 *PSYCHOL. SCI.* 1472, 1473 (2011) (finding that motivating individuals to reduce prejudice by emphasizing the societal requirement to control it produced more explicit and implicit prejudice than not intervening); E. Ashby Plant & Patricia G. Devine, *Responses to Other-Imposed Pro-Black Pressure: Acceptance or Backlash?*, 37 *J. EXPERIMENTAL SOC. PSYCHOL.* 486, 486 (2001) (finding that individuals who were primarily externally motivated to respond without prejudice felt constrained and bothered by politically correct pressure and responded with angry affect when pressured to comply with other-imposed pro-black pressure).

109. See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 196–97 (1954) (listing various negative stereotypes concerning blacks); Heilman & Welle, *supra* note 107, at 1302, 1308.

110. ALLPORT, *supra* note 109, at 191–204.

111. See Heilman & Welle, *supra* note 107, at 1313.

112. Herbert Blumer, *Race Prejudice as a Sense of Group Position*, 1 *PAC. SOC. REV.* 3, 5 (1958) (prejudice derived from group position and perceived economic competition); Lawrence Bobo & Vincent L. Hutchings, *Perceptions of Racial Group Competition: Extending Blumer's Theory of Group Position to a Multiracial Social Context*, 61 *AM. SOC. REV.* 951, 953–57 (1996) (defining four models that explain interracial hostility).

113. Bobo & Hutchings, *supra* note 112, at 955; see also Felix Danbold & Yuen J. Huo, *No Longer "All-American"? Whites' Defensive Reactions to Their Numerical Decline*, 6 *SOC. PSYCHOL. & PERSONALITY SCI.* 210, 210 (2015) (finding that whites resist diversity if their status as the prototypical ethnic group is threatened).

frameworks that place a high value on racial minorities may cause resistance because they threaten the historical status hierarchy.

Instrumental diversity efforts may also cause resistance because they pose a threat to scarce resources and privileges that members of the dominant group have traditionally enjoyed.¹¹⁴ If only a limited number of prestigious jobs and promotions exist, members of high-status groups may feel that these privileges are being taken by the racially diverse and low-status candidates emphasized by diversity narratives. If a threat is perceived, discrimination may be used as a preservation tactic that allows high-status group members to continue being the most valued and collecting prized rewards.¹¹⁵ Thus, any potential loss of these privileges may threaten high status actors and lead to discriminatory behavior aimed at restoring the status quo.

Third, social identity threat is a related social psychological construct that may help explain negative reactions to diversity narratives and values. Under this theory, instrumental diversity messages may threaten the identity of members of the dominant group by endorsing the valuable nature of underrepresented groups and their contribution in organizations.¹¹⁶ Exposure to inclusive diversity messages can cause members of high-status groups to worry about their status, influence, and continuing dominance in the hierarchy.

In an experiment, Dover et al. put white participants through a hiring simulation where they reviewed a firm's recruitment materials and interviewed for a job.¹¹⁷ Half of participants viewed recruitment materials expressing pro-diversity values, and the other half reviewed materials that did not mention diversity. The results show that white males exposed to pro-diversity messages performed more poorly in a subsequent interview, and they experienced heightened cardiovascular reactivity, which is evidence of threat.¹¹⁸ This research also revealed that the diversity messages in recruitment materials made the white participants believe

114. See Bobo & Hutchings, *supra* note 112, at 958–59.

115. See RICHARD BRISLIN, UNDERSTANDING CULTURE'S INFLUENCE ON BEHAVIOR 305 (1993).

116. Dover, *supra* note 83, at 65.

117. *Id.* at 59.

118. *Id.* at 65. Cardiovascular reactivity (CVR) measures gauge the automatic activation of distinct physiological systems and assess individuals' motivational and psychological states, in addition to revealing "whether pro-diversity messages 'get under the skin' to elicit maladaptive cardiovascular profiles." *Id.* at 59. The biopsychosocial model of challenge and threat indicates that "distinct CVR profiles characterize the motivational states of threat vs. challenge," with a threat response causing "either a slight increase or no increase in [cardiac output] from baseline, and an increase in [total peripheral resistance] from baseline (i.e., increased vasoconstriction)." *Id.* at 63.

they would be treated unfairly.¹¹⁹ These findings suggest that many whites view bias as a zero-sum game, where less bias against minorities means more bias against whites.¹²⁰ These effects were experienced independently of political ideology and attitudes toward minority groups. Based on this research, groups that typically occupy positions of power may feel vulnerable and experience identity threats when their organization claims to value diversity. When people feel threatened, they may ultimately resist efforts to make the workplace more inclusive.¹²¹

Last, these diversity values may generate resistance because they are inconsistent with an emerging color-blind ideology. The color-blind ideology assumes that different groups are given equal opportunities to excel and that employment decisions therefore should be based on “merit” without taking into account factors, such as race and gender.¹²² If it is believed that race does not and should not matter, inclusive diversity strategies threaten this ideal by placing emphasis on race. Inclusive strategies not only direct attention to race but also often suggest that organizations should take advantage of these differences to reach optimal levels of success. If individuals “don’t see race,” then this goal is unnecessary and possibly even offensive.

Social psychological research has also used procedural justice theory to demonstrate how some diversity structures can create an illusion of fairness, resulting in negative implications for members of underrepresented groups.¹²³ Under this theory, diversity structures signal to high-status group members that members of underrepresented groups are respected and valued in the organization.¹²⁴ Thus, high-status group members’ perceive a fair and procedurally just workplace based on the presence and not the efficacy of diversity structures.¹²⁵ This perceived

119. *Id.* at 62.

120. Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They Are Now Losing*, 6 *PERSP. PSYCHOL. SCI.* 215, 216–17 (2011) (demonstrating that whites associate decreases in perceived bias against blacks with increases in perceived bias against whites); Clara L. Wilkins & Cheryl R. Kaiser, *Racial Progress as Threat to the Status Hierarchy: Implications for Perceptions of Anti-White Bias*, 25 *PSYCHOL. SCI.* 439, 444 (2014) (finding that whites who believed in the legitimacy of the U.S. status hierarchy viewed racial progress as threatening and perceived more anti-white bias).

121. Blumer, *supra* note 112, at 5; Bobo & Hutchings, *supra* note 112, at 953–57; Danbold & Huo, *supra* note 113, at 210; Dover, *supra* note 83, at 65.

122. BONILLA-SILVA, *supra* note 40, at 302–03; *THE CHANGING TERRAIN OF RACE AND ETHNICITY* 45–46 (Maria Krysan & Amanda E. Lewis eds., 2004); Bonilla-Silva et al., *supra* note 40, at 120.

123. Kaiser et al., *supra* note 107, at 508.

124. *Id.* at 506.

125. *Id.* at 516.

procedural justice can *legitimize* existing social arrangements and hierarchies, even when they may be shaped by bias and discrimination.¹²⁶

For example, in a series of experiments, Kaiser et al. found that the presence of a diversity structure sends a *signal* that the organization is committed to fairness, which clouds the judgement of high-status actors and inhibits their ability to detect discrimination.¹²⁷ This perception of procedural fairness also causes the high-status actors to act more harshly against members of underrepresented groups that claim discrimination.¹²⁸ These racial minorities and women are challenging the justice of a “fair” system, which is seen as unwarranted. On the contrary, those exposed to civil rights law are reminded of racial inequality, which seems to have the opposite effect of the diversity structures.

This is problematic given that organizations that represent themselves as committed to diversity may convince others that they are fair and free of discrimination when, in fact, these are false representations that amount to mere rhetoric and symbolic window dressing.¹²⁹ Even employers with good intentions may implement diversity strategies without any empirical evidence that the strategies are effective. For example, judges commonly defer to these diversity structures in the course of Title VII litigation and assume the employer is procedurally fair and in compliance with civil rights law, without thoroughly evaluating whether the diversity structure is indeed effective.¹³⁰

126. *Id.* at 506.

127. *Id.* at 514–15.

128. *Id.* at 504.

129. See Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 894 (2011); Edelman et al., *supra* note 13, at 1597, 1600; Edelman, *supra* note 32, at 1542, 1568.

130. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, *supra* note 129, at 894, 905–06 (empirical studies demonstrate that the extent to which organizations formally endorse diversity values often drives the outcome in discrimination cases and federal audits. Judges and investigators commonly reward organizations by deferring to formal diversity narratives and recognizing them as “good faith efforts,” and thus a valid defense to discrimination charges without examining the extent to which the efforts are effective at reducing bias and systems of inequality. This becomes particularly problematic when there is no true “buy-in” to the value of inclusiveness or when resistance to such policies operates within the organization. In these cases, there are formal efforts on paper that signal compliance, yet informal bias still limits opportunities and outcomes. Ultimately, these ineffective strategies increasingly shield employers from accountability under antidiscrimination law, even in cases where the practices may do nothing or even exacerbate inequality as illustrated in Experiments 1 and 2. Even worse than well-intentioned but misguided implementation, some employers may introduce inclusion policies and practices without a genuine goal of fostering meaningful progress. Instead, these signs of compliance merely serve as symbolic gestures to avoid legal liability and appease subordinate group members while allowing status hierarchies and disparities to remain intact); Edelman, *supra* note 32, at 1539, 1542, 1568 (organizations may adopt formal diversity narratives to shield them from liability and scrutiny

The construct of legitimacy can help explain why law is effective as an inclusion strategy, while instrumental efforts may fail.¹³¹ If the organizational strategy is not perceived as *legitimate*, the diversity effort may reinforce inequality.¹³² Legitimacy is the belief that “authorities, institutions, and social arrangements are appropriate, proper, and just. . . . [W]hen it exists in the thinking of people within groups, organizations, or societies, it leads them to feel personally obligated to defer to those authorities, institutions, and social arrangements.”¹³³ Legitimation describes the process through which something is placed within a framework where it is viewed as right and proper.¹³⁴ Many programs and policies, including diversity programs, are “legitimated” through the educational system, social prestige, and law.¹³⁵

Legitimacy is important to the success of institutional strategies such as inclusion efforts, because it is not something that can be controlled by force. It is difficult to control behavior, reduce bias, and promote inclusion solely through the use of power, so inclusion messages and strategies must gain legitimacy through the eyes of many stakeholders.¹³⁶ Findings in Part II indicate that this can be facilitated by providing reminders of legal requirements or perhaps even strengthening legal protections. When a system is viewed as legitimate, organizational actors are likely to voluntarily comply with the rules and goals, even when they do not face penalties. If a system is not perceived as legitimate, people will protect their sense of self and engage in system-based attributions, such as discrimination.¹³⁷

from enforcement agencies such as the EEOC and the Office of Federal Contract Compliance Programs (OFCCP). Less invested leaders may implement these symbolic inclusion practices as “window dressing” with little concern about what practices are most appropriate for their specific context or the potential informal consequences that may result).

131. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 376–79 (2006).

132. *Id.* at 386–87.

133. *Id.* at 376.

134. Tyler, *supra* note 131, at 376; Morris Zelditch, *Processes of Legitimation: Recent Developments and New Directions*, 64 SOC. PSYCHOL. Q. 4, 7 (2001).

135. John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 343 (1977).

136. Tyler, *supra* note 131, at 375.

137. Brenda Major & Toni Schmader, *Legitimacy and the Construal of Social Disadvantage*, in THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 176, 201 (John T. Jost & Brenda Major eds., 2001) (“When distributions (at the system, group, or individual level) are appraised as legitimate, we suggest that members of socially devalued groups tend to attribute their lesser outcomes to qualities of themselves or their group and value (rather than devalue) domains in which their group is at a relative disadvantage. When distributions are appraised as illegitimate, however, we propose that members of disadvantaged

Thus, consistent with social psychological research, the business case may provide an illusion that inequality has shifted so that women and minorities are actually in higher demand, which may increase the perceived threat to scarce resources.¹³⁸ Even those who are not threatened by the heightened role of women and minorities in organizations may not monitor their own biases because of the perception that institutional efforts have this covered and therefore that they are personally “off the hook,” with no need to counter biased tendencies. On the other hand, the historical meaning of civil rights law seems to evoke beliefs about equality and fairness in the Legal Compliance condition.

B. *Why Law Matters: Continuing Normative Influence*

The findings in Part II are consistent with a well-established body of research on the normative influence of law.¹³⁹ Results of two experimental studies suggest that anti-discrimination law has the capacity to promote positive *beliefs* about inclusion and curb discriminatory *behaviors*, which can help lessen systemic bias within organizations. These experimental findings support normative perspectives on actors’ beliefs regarding illegal conduct, rather than rational actor or cognitive approaches.¹⁴⁰

For example, knowledge about antidiscrimination law made participants more likely to internalize the value of inclusion and reject racism.¹⁴¹ Participants in the Legal Compliance condition were more likely to believe that inclusion is an important goal and that it is valuable for a range of reasons (e.g., it leads to business success, provides a fair chance for all, and creates a more desirable environment). Based on these findings, antidiscrimination law not only mandates compliance but also influences beliefs that inclusion is important and valuable. Findings also show that exposure to antidiscrimination law makes individuals more

groups tend to attribute their outcomes to factors for which they are not responsible and to devalue domains in which they are disadvantaged.”); Tyler, *supra* note 131, at 386–87.

138. See Kaiser et al., *supra* note 107, at 504 (“[D]iversity structures have the potential to create an *illusion of fairness*, whereby high-status group members’ perceptions of how fairly members of underrepresented groups are treated may be influenced by the presence, not the efficacy, of a diversity structure. This illusion, in turn, impairs high-status group members’ ability to detect discrimination against members of underrepresented groups and causes them to react more harshly toward members of underrepresented groups who claim to experience discrimination.” (emphasis in original)).

139. See, e.g., Berkowitz & Walker, *supra* note 23, at 421 (finding that the knowledge of a law’s existence influences moral judgements of behavior regulated by the law); Suchman, *supra* note 23, at 489 (explaining that a normative decision-making model suggests that laws “shap[e] the public’s moral beliefs and . . . generate law-abiding behavior”).

140. See Suchman, *supra* note 23, at 485–92.

141. See *supra* notes 96 and 102.

likely to acknowledge institutional bias.¹⁴² Participants in the Legal Compliance condition were more aware of racial privilege and institutional discrimination, based on responses to the Color-Blind Racial Attitudes Scale. This suggests that legal requirements also have the potential to promote consciousness of systemic barriers and limit color-blind denial.

One of the most interesting findings is that exposure to antidiscrimination law promoted the belief among experimental subjects that being inclusive is “the right thing to do morally.”¹⁴³ This supports the normative perspective that law can reinforce moral judgments by symbolically conveying that certain actions are improper or wrong.¹⁴⁴ These findings also support the theory that law affects behavior, not only through threats of punitive sanctions, but also through its symbolic or expressive effect on normative judgments.¹⁴⁵ According to normative theory, the law establishes that some lines of action are embraced as “good,” “proper,” and “morally right,” while others, such as discrimination on the basis of race, are rejected as “improper” and “morally wrong.”¹⁴⁶ Thus, civil rights law may represent collective morality or at least bring individuals in touch with their core moral values regarding discrimination and exclusion.

For example, in the second study, participants who believed striving for inclusion is morally “the right thing to do” tended to acknowledge bias and select the minority candidate for promotion. This is consistent with the normative decision-making model that holds that people rarely act in ways they believe are morally wrong.¹⁴⁷ In the case of inclusion, civil rights law may remind individuals of their core moral beliefs regarding equity and fairness that are inconsistent with racial hierarchies and inequality. These primed moral beliefs then prompt individuals to act

142. *See supra* note 102.

143. Compared to a business case for diversity.

144. *See, e.g.*, Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 957 (1995) (explaining that “[g]overnments trade on standing social meanings to advance state ends”); MacCoun, *supra* note 23, at 503–04 (discussing the effect of the perceived morality of the law); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2029–33 (1996) (discussing the statements made by law as a way of correcting social norms); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 910 (1996) (describing law’s expressive function as “the function of law in expressing social values with the particular goal of shifting social norms”).

145. *See, e.g.*, Berkowitz & Walker, *supra* note 23, at 412 (“Laws may often be taken as implying a social consensus, and this implied consensus could influence attitudes toward the behavior that is the subject of the laws.”).

146. *Id.*; Suchman, *supra* note 23, at 480.

147. *Id.*

accordingly by controlling their biases and engaging in more equitable behavior.

C. *Policy Implications*

Thus, while some scholars suggest that antidiscrimination law is outmoded and ineffective, these findings indicate that antidiscrimination law continues to have a place in reducing bias because the normative weight of the law may influence decision making, even in the absence of strong judicial enforcement. These findings also have policy implications that differ from research asserting that merely mentioning the law has damaging effects on inclusion efforts.¹⁴⁸ To the contrary, policies that promote education about antidiscrimination law may increase positive attitudes about inclusion and facilitate more equitable behavior, because of the law's moral grounding dating back to earlier civil rights eras.

Based on these studies, antidiscrimination law is still needed, not only for its exogenous pressure on organizations to promote inclusion but also for its normative effect on individual values and beliefs about inequality within the organization. This is relevant for practitioners because employers sometimes feel conflicted about providing training and setting goals related to antidiscrimination law. Many have questioned whether efforts to promote inclusion would be more effective if they were completely separated from antidiscrimination law.¹⁴⁹ The results from this research suggest that this concern may be unfounded. Law can be effective when framed and discussed strategically with ties to history, morality, and civil rights. In these cases, law has the capacity to change both moral judgments and behavior; thus, legal prohibitions against discrimination continue to play a role in improving workplace outcomes for members of protected groups.

While private self-regulation, voluntary policies, and internal dispute resolution seem promising, these new governance strategies may have drawbacks.¹⁵⁰ These proposals take a rational actor view of compliance,

148. See, e.g., Kidder, *supra* note 21, at 91 (“Backlash in the form of less favorable attitudes toward the diversity program were stronger for an affirmative action justification than a diversity management justification.”); Sturm, *supra* note 21, at 521 (“[L]egal’ sometimes came to symbolize the risk involved in taking proactive steps to address problems with legal implications.”).

149. See Myrtle P. Bell & David A. Kravitz, *From the Guest Co-Editors: What Do We Know and Need to Learn About Diversity Education and Training?*, 7 ACAD. MGMT. LEARNING & EDUC. 301, 303 (2008).

150. For more on these new governance strategies, see generally Estlund, *supra* note 13 (discussing self-regulation); Sturm, *supra* note 70 (discussing the role of organizational catalysts); Sturm, *supra* note 21 (discussing internal problem solving).

noting the limited effectiveness of top-down coercive regulations when penalties are rare. While I agree that institutions such as workplaces and universities should take greater responsibility in promoting inclusion,¹⁵¹ they must be induced to care about such equality. In reality, competing priorities often leave inclusion in the shadow in the absence of reminders of legal obligations.

The results presented in Part II demonstrate that even when organizations prioritize inclusion goals in internal initiatives, they may not realize these objectives owing to the use of ineffective strategies, such as misguided diversity training and overreliance on the business case for diversity. It may seem more intuitive to base inclusion goals primarily on productivity and performance, to make the goals more unified and “rational” and show the benefits to individual actors, teams, and the organization. However, study findings show that this strategy can backfire and lead to unanticipated and counterproductive outcomes, such as increased resistance and discrimination.

Given that many organizations are using diversity strategies that are untested or ineffective with respect to fostering inclusion, it is also problematic that judges defer to these diversity structures.¹⁵² There is strong evidence that judges assume that employer diversity structures can or will reduce discrimination and effectively address their civil rights complaints.¹⁵³ Based on the social psychological literature discussed and findings from the two empirical studies, judges should not defer to diversity structures so easily. In many cases there is no evidence available that these structures actually could make any difference, and in some cases, they may lead to counterproductive outcomes that undermine the goals of anti-discrimination law.

It is important to note that this research *does not* conclude that there are no benefits of diversity in organizations; there is a substantial body of research that suggests such benefits exist.¹⁵⁴ Instead, findings from this

151. See Sturm, *supra* note 70 (providing a method for inclusiveness in higher education); Sturm, *supra* note 21 (proposing an approach for employers to the problem of employment discrimination).

152. See generally Edelman et al., *supra* note 129 (discussing judicial deference to organizational structures). For a related argument about the pitfalls of untested assumptions underlying interventions to change social behavior, see TIMOTHY D. WILSON, REDIRECT: THE SURPRISING NEW SCIENCE OF PSYCHOLOGICAL CHANGE 23–38 (2011) (discussing how interventions should be tested using scientific techniques).

153. See, e.g., Edelman et al., *supra* note 129, at 907–09 (discussing encouragement by courts for organizations to develop antiharassment policies and grievance procedures in two sexual harassment cases, Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998)).

154. For more on the benefits of diversity in organizations, see generally HERRING & HENDERSON, *supra* note 14; Patricia Gurin, *The Educational Value of Diversity*, in GURIN ET AL., *supra* note 38, at

study propose that touting the business benefits of diversity, such as innovation, team decision making, client service, and profit, may not be a persuasive rationale when attempting to engender broad support for inclusion and encourage equitable behavior among decision makers in organizations.

Given the law's significant normative authority, its legitimating effects, and its instrumental sanctions, these prohibitions against discrimination may nevertheless inspire compliance, even if enforcement is lax. While anti-discrimination law continues to play a role in limiting discrimination, lawmakers must still be accountable for strengthening the impact of antidiscrimination law by bringing it into sync with twenty-first century social trends and challenges. For example, the law must evolve to address both first- and second-generation forms of discrimination, including inequitable structural norms, unconscious bias, and other subtle barriers to inclusion within organizations. Finally, anti-discrimination law would be most effective if it required employers to take systematic steps to counter bias and discriminatory outcomes by requiring data-oriented monitoring of employment efforts and outcomes in addition to more abstract narratives regarding the value of diversity.

97–188; PAGE, *supra* note 13; Katherine W. Phillips et al., *The Value of Diversity in Organizations: A Social Psychological Perspective*, in SOCIAL PSYCHOLOGY AND ORGANIZATIONS 253 (David De Cremer et al. eds., 2011); Charles A. O'Reilly, III et al., *Group Demography and Innovation: Does Diversity Help?*, in COMPOSITION 183 (Deborah H. Gruenfeld ed., 1998); Herring, *supra* note 13; Felice J. Levine & Angelo N. Ancheta, *The AERA et al. Amicus Brief in Fisher v. University of Texas at Austin: Scientific Organizations Serving Society*, 42 EDUC. RESEARCHER 166, 167–69 (2013); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377 (2014); Flannery G. Stevens et al., *Unlocking the Benefits of Diversity: All-Inclusive Multiculturalism and Positive Organizational Change*, 44 J. APPLIED BEHAV. SCI. 116 (2008); Katherine W. Phillips, *How Diversity Works*, SCI. AM., Oct. 2014, at 42.