I'll See You at Work: Spatial Features and Discrimination

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We increasingly talk about HR practices and work cultures as mechanisms for discrimination in work with nary a thought given to one of the most obvious influences on our daily work lives: where we work. This Article seeks to change that. In it, I delineate spatial features as a condition of discrimination in workplaces and develop an understanding of what spatial features might matter and why. Drawing together some seemingly disparate lines of research and literature — from social psychology and sociology to geographies, spatial justice, and urban planning — I theorize three specific spatial feature categories: insularity, precarity, and permeability. Each of these categories is about place as it affects our interactions and our expectations around interactions in our work.

The Article also examines the law's current stance toward spatial features, segregation, and discrimination. It turns out that we are at an important crossroad: Where once spatial segregation was an obvious form of discrimination, today courts are backpedaling. Segregation is downplayed as evidence of discrimination, and spatial features are often either ignored entirely or siphoned off into individualized allegations, where they are treated as passing, innocuous moments of subjective experience rather than as organization-driven causal contributors to systemic discrimination. I urge us to put work "place" on our research and advocacy agendas and to consider spatial features and segregation as causal

mechanisms for discrimination in legal cases as well. I make several specific recommendations to this end.

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INTRODUCTION

Where we work matters. Whether we work in fluorescent or natural lighting can affect our productivity and also our overall mental and physical health, so much so that some European countries require that all offices have "visual connection to the outside."[1] The temperature of a meeting room can affect whether negotiators take a firm stand or are willing to agree to concession. Indeed, one study suggests that just holding a cup of warm coffee will make people more likely to connect with another person and agree to their demands.[2]

This fact — that where we work matters — should not come as a surprise. Most of us know intuitively (and through our own personal experiences) that physical spaces affect how we feel, learn, react, and interact. For generations, architects and urban planners have been designing spaces with this reality in mind. What's more, we know that the way space is planned affects us not just as individuals but also as members of larger communities. Our spaces help shape the conditions for our interactions, everything from how often we interact and for how long to whether we interact in a formal or casual way or even whether we like each other or will help each other in a difficult moment.

Organizing work spaces today is also big business: think of the move from closed offices to cubicles and then to more open-concept, "creative" spaces. Google's People Operations Department uses big data to decide what size and shape to make the lunch tables at their headquarters and what other spatial offerings, from on-site dinners and laundry services to bowling alleys, might lead to more (or more productive) work within their grounds.[3] Zappos uses a metric called

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[1] *Germany: New Employment Law Regulations in 2017*, KLIEMT BLOG (Mar. 3, 2017), https://www.printfriendly.com/p/g/aaCYJU [https://perma.cc/NT88-HLPV].

[2] THALMA LOBEL, SENSATION: THE NEW SCIENCE OF PHYSICAL INTELLIGENCE 16-19 (2014) (describing studies on temperature and trust).

[3] *See* Farhad Manjoo, *The Happiness Machine: How Google Became Such a Great Place to Work*, SLATE (Jan. 21, 2013, 5:41 AM), https://slate.com/technology/2013/01/google-people-operations-the-secrets-of-the-worlds-most-scientific-human-resources-department.html [https://perma.cc/VQ62-2SGE] (on people operations at Google); *see generally* STEVEN LEVY, IN THE PLEX: HOW GOOGLE THINKS, WORKS, AND SHAPES OUR LIVES 121-42 (2011) (describing emphasis on space and offerings in work at Google).

"collisionable hours" to assess the effectiveness of a space.[4] During the pandemic, some companies held business meetings over online gaming platforms to break the monotony of virtual meetings via Zoom or other meeting apps.[5] Indeed, we often overlook that spatial features of work can go beyond physical architecture to include off-site spaces as well as on-site offerings, scheduling, and work contracts. Even perceptions of whether space is a work space or a private space can be thought of as a spatial perception, and not just a cultural one.

What then of spatial features of workplaces and discrimination? We are at a moment when people are more willing than ever to think about structures and systems in our calls for justice for women and people of color. Spatial features should be a prominent lever in that project. First, there is research on how our surroundings can affect individuals' emotions and cognitive biases and ultimately their decisions and performance. For example, some research finds that having a racial minority member on a committee can reduce biases in the decisions of the other members of the committee.[6] Merely having the racially diverse committee has this effect regardless of what position the racial minority on the committee takes.[7] There is also research suggesting that the environment, such as the kinds of pictures that are hung on walls, can either prime or reduce stereotype threat in people of color and women, which can affect their performance on work-related tasks.[8]

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[4] Ben Waber, Jennifer Magnolfi & Greg Lindsay, *Workplaces that Move People*, HARV. BUS. REV. (Oct. 2014), https://hbr.org/2014/10/workspaces-that-move-people [https://perma.cc/9KSW-J8RV].

[5] *See* David Segal, *'Hey, You Free on Friday for a Meeting and a Bank Heist?'*, N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/31/business/video-game-meetings.html [https://perma.cc/2P5U-6MFG].

[6] *See, e.g.*, Brian S. Lowery, Curtis D. Hardin & Stacey Sinclair, *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCH. 842, 844-47 (2001) (detailing study suggesting the presence of a person of color in social groups could result in a reduction of automatic prejudice against members of the person's group).

[7] *Id.*

[8] *See* Valerie Purdie-Vaughns, Paul G. Davies, Claude M. Steele, Ruth Ditlmann & Jennifer Randal Crosby, *Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*, 94 J. PERSONALITY & SOC. PSYCH. 615, 626-27 (2008) (discussing the idea of "situational cues"). Some research suggests, for example, that exposure to counter typical exemplars can reduce biases in individuals. *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1105-09 (2006) (reviewing studies that tested the impact of priming participants with images of negative examples of either well-known Black or white figures before instructing them to begin a racial bias test). *See generally* CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT

Beyond physical environments that affect the emotions and cognitive biases of individuals in moments of performance or decision, spatial features can also set relational conditions for interactions over time. This is key for thinking about how spatial features can serve as condition for discrimination. Research tells us that much discrimination in workplaces (as in other spaces) is relational.[9] In other words, racial, gender, and other protected-category biases tend to play out in judgments, perceptions, and behaviors in interactions and evaluations over time rather than solely in static, one-time decisions. There are exceptions. Plenty of research, including the well-known study of call-back decisions involving race-typed names on resumés, shows that biases can operate in discrete moments that do not involve human interaction.[10] But most employment decisions, including promotion and pay decisions, build from many earlier judgments about a candidate's competencies or achievements as well as his or her failings, and those judgments (as well as opportunities provided and denied along the way) are usually based on interactions, not just an isolated data point frozen in time.[11]

If spatial features of workplaces affect the frequency, duration, and conditions of our interactions in work, as we know they do, we might expect then that those same features will also affect whether workplace interactions (or lack thereof) are likely to be bias producing or bias reducing and whether they are likely to result in discrimination in outcomes like pay and promotion over time. Another way to think about this is that spatial features of a workplace serve as a component of relational conditions, conditions under which biases can be produced or reduced, heightened or dampened in key moments and also more incrementally over time. Spatial features are the place-focused features that affect the frequency, duration, and conditions of interactions and also expectations for those interactions. They are interrelated with and

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US AND WHAT WE CAN DO (2010) (describing various studies on the effects of stereotype threat, including on individual performance).

[9] *See infra* Part I.B.

[10] *See generally* 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) (demonstrating that when researchers distributed identical resumés to employers, changing only the names of the applicants, resumés with white names received fifty percent more callbacks for interviews).

[11] For discussion of some of the research on discrimination as relational, as well as solutions aimed at the relational level, see generally Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435 (2008).

yet distinct from other components of relational conditions and discrimination that have tended to take center stage in employment discrimination scholarship and advocacy: work cultures and especially human resources (HR) processes for hiring, promotion, and pay.[12]

We have seen a resurgence in interest in place in thinking about racial injustice in the United States, from our stark racially segregated neighborhoods and schools to our architectures of transportation, parks, and geography and other policies, cultures, and practices of spatial exclusion.[13] Some legal scholars in the area of employment discrimination, moreover, have drawn on the metaphor of architecture in framing organizational responsibility for the overarching structures of their firms.[14] Yet, on the whole, scholars have not examined place in a sustained manner when it comes to discrimination in work.[15] We see the relevance of decision-making processes and increasingly of work cultures to discrimination — but we have missed almost entirely the importance of spatial features.[16]

In this Article, I seek to delineate spatial features as a condition of discrimination in workplaces and to develop an initial understanding of what spatial features might matter and why. In doing so, I draw together some seemingly disparate lines of research and literature to theorize

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[12] *See id.* at 1437-45 (describing current efforts aimed at the individual level, usually through formalization of HR practices); *see also* Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623 (2005) (identifying work culture as a source of discrimination). For more on the recent focus on HR decision-making practices, see *infra* Part II.B.

[13] *See generally* GEORGE LIPSITZ, HOW RACISM TAKES PLACE (2011) (emphasizing the role of place and perceptions of place in racism).

[14] *See* Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J. L. & GENDER 247, 249 (2006) ("This Article develops a framework and methodology for pursing inclusive institutions and for building the architecture to sustain the practice of inclusiveness."). In this Article, I use the term "organizational operations" to refer to the overarching bundle of organizational decisions. *See infra* Part II.B.

[15] *See* Steven P. Vallas, *Rediscovering the Color Line Within Organizations: The 'Knitting of Racial Groups' Revisited*, 30 WORK & OCCUPATIONS 379, 383-84 (2003) (noting an emphasis on aggregate data in sociology that "has been hampered by inability to detect the social mechanisms and normative constructs that unequally allocate job rewards"); *cf.* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003) (emphasizing the importance of relations at work, including in reducing biases and prejudice, without specific attention to place).

[16] Giving attention to spatial features also emerges from a behavioral-realist approach. *See generally* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006) (expressing the idea that law can operate at level of creating conditions for decisions and human behavior and including as one example settings for work); Kang & Banaji, *supra* note 8.

three specific spatial feature categories: insularity, precarity, and permeability. Each of these categories is about place as it affects our interactions and our expectations around interactions in our work. The first, insularity, has to do with the degree to which express directives by employers, physical features of workplaces, and work-related offerings physically segregate along racial or gender lines, thereby limiting or fostering the frequency and duration of day-to-day interactions as well as affecting the conditions for those interactions over time. The second, precarity, includes features such as contracts and scheduling and turnover that affect the frequency and duration of interactions as well as perceptions about the likelihood of future interactions. The third, permeability, has less to do with the physical map for interactions and more to do with perceptions, people's perceptions of whether the space in which they are working is a work or private life space.

I also examine the law's current stance toward spatial features, segregation, and discrimination. It turns out that we are at an important crossroad: Where once spatial segregation was an obvious form of discrimination, today courts are backpedaling. In a recent decision of the Seventh Circuit Court of Appeals, a three-judge panel unanimously held that an employer's transfer of a Black employee from one store to another to keep a store "predominately Hispanic" did not violate Title VII of the Civil Rights Act, our preeminent federal employment antidiscrimination statute.[17] A majority of the full Circuit denied rehearing of the case en banc.[18] This case represents a stark retreat from longstanding concern about employer efforts to segregate their workforces.[19] In other cases, spatial features of discrimination are ignored or implicitly or expressly condoned by courts applying Title VII law. Segregation is downplayed as evidence of discrimination, and spatial features are often siphoned off into individualized allegations of harassment, where they are treated as passing, innocuous moments of subjective experience rather than as organization-driven causal contributors to systemic discrimination.

This Article provides an opportunity to re-invest in theorizing acts of segregation as discrimination and also in segregation as one among several spatial features that create conditions for discrimination. More broadly, moreover, we can begin to see spatial features alongside decision-making processes and work cultures to better understand how

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[17] EEOC v. AutoZone, 860 F.3d 564, 568-70 (7th Cir. 2017).

[18] *See* EEOC v. AutoZone, 875 F.3d 860 (7th Cir. 2017) (en banc).

[19] *See, e.g.*, James v. Stockham Valves & Fittings Co., 559 F.2d 310, 333 (5th Cir. 1977) (explaining that segregation by itself, apart from any issue of economic harm, violates Title VII).

discrimination operates within organizations and the role that organizations play. I urge us to put work "place" on our research and advocacy agendas and to consider spatial features and segregation as causal mechanisms for discrimination in legal cases as well. I make several specific recommendations to this end, both for organizations seeking to improve their conditions for racial and gender justice and for Title VII law to hold organizations accountable. Acknowledging the role of spatial features in and sometimes as discrimination makes our task of reducing discrimination more complex, but data analytics like those being used at Google to decide the size of its tables, for example, can also be put to use to design spatial features that are likely to reduce or avoid discrimination.

By emphasizing spatial features as a component of relational conditions within work organizations, the Article builds on and brings together several lines of scholarship from diverse fields. The first is architectural theory, which has emerged in legal scholarship recently as a powerful tool in thinking about everything from regulating crime to integrating neighborhoods and schools.[20] This Article takes a broad understanding of architecture to include spatial features that are less physically grounded but nonetheless affect the frequency, conditions, and duration of interactions in place.[21] The second is relational theory, especially as applied to understanding discrimination. In their 2014 introduction to a special issue of the *American Behavioral Scientist*, sociologists Vincent Roscigno and George Wilson challenged social scientists to "move beyond analysis of individual attributes or aggregate disadvantages and think creatively . . . by more explicitly incorporating relational processes into theoretical conceptions and analyses."[22] Research along relational lines, as Roscigno and Wilson describe, highlights relational processes that "(a) alleviate, reinforce, and/or

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[20] *See infra* Part II.A.

[21] Closely related and equally instrumental to my thinking, including a broad understanding of architecture, is some of the scholarly work in the field of legal geography, which has been defined as "a stream of scholarship that makes the interconnections between law and spatiality, and especially their reciprocal construction, into core objects of inquiry." THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY 1 (Irus Braverman et al. eds., 2014). *See generally id.* at 2-12 (describing some of the works in this area).

[22] Vincent R. Roscigno & George Wilson, *The Relational Foundations of Inequality at Work I: Status, Interaction, and Culture*, 58 AM. BEHAV. SCIENTIST 219, 219-20 (2014). In their article in the same volume, sociologists Steven Vallas and Emily Cummins identify research that emphasizes relations and builds from three strands of sociological thinking: categorical, symbolic boundaries, and intersectionality. Steven Vallas & Emily Cummins, *Relational Models of Organizational Inequalities: Emerging Approaches and Conceptual Dilemmas*, 58 AM. BEHAV. SCIENTIST 228, 228 (2014).

exacerbate inequality within workplace organizations; (b) are not simply reducible to individual attributes or psychologies; and (c) are constitutive of, while also fundamentally shaped by, the structures and cultures that unfold them."[23]

Sociologist Victor Ray has also urged sociologists to include organizations in race theory. As he explains in his article, *Racialized Organizations*, "Race theory typically focuses on the state as primary loci of racial processes, downplaying the role of organizations in the production of racial ideologies and the social construction of race itself."[24] Yet "occupational segregation connects racialized schemas regarding competence to workplace hierarchies, time-management rules, and even informal rituals of interaction between racial groups."[25] This is as true for gender as it is for race. Organizational structures can be mistakenly construed as race or gender neutral when in fact they serve as important levers for sustained subordination and thereby equally as sites for progress.

The Article is organized in four parts. Part I introduces the idea of spatial features and discrimination with two brief vignettes and provides a review of some of the research on the importance of relations and relational conditions to antidiscrimination efforts. Part II explores the three spatial feature concepts — insularity, precarity, and permeability — and situates spatial features within current understanding of organizational mechanisms for discrimination and inequality in work. Part III then looks at Title VII cases involving spatial features and provides concrete recommendations for advocates and law, while building connections and drawing lessons across fields. Part IV considers expected concerns.

It may seem an odd time to be highlighting the importance of spatial features of workplaces in discrimination. With remote work widespread during the pandemic and possibly beyond, as well as the emergence of remote, often hub-like work spaces and the expanding gig economy, a hermetic, employer-controlled physical work space seems less likely than ever. For that very reason, however, it is especially important to

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[23] Roscigno & Wilson, *supra* note 22, at 220-21. In Part II below, I situate spatial features within this move, and I add to the call for more research on organizational mechanisms of discrimination and inequality at the relational level, particularly of spatial features.

[24] Victor Ray, *A Theory of Racialized Organizations*, 84 AM. SOC. REV. 26, 30 (2019); *see* Roscigno & Wilson, *supra* note 22, at 221; *see also* Vallas, *supra* note 15, at 384 (urging more ethnographic attention to microsocial patterns and "organizational processes that often reproduce racial and ethnic inequality at work").

[25] Ray, *supra* note 24, at 32.

think about spatial features now, as work is being moved increasingly away from a central physical location. The concepts of spatial features will be key as we think about workplaces in new, and virtual, ways. In particular, understanding that spatial features go beyond directives of segregation and brick-and-mortar, physical spaces will tap into new methods for assessing whether and how discrimination is occurring — and for devising solutions.

I.   INTRODUCING SPATIAL FEATURES: VIGNETTES & RESEARCH ON RELATIONS AND DISCRIMINATION

The project to delineate spatial features as a condition for relations and discrimination within organizations aligns with an emerging theoretical emphasis in law and the social sciences on geographies and spatial justice.[26] Spatial justice scholars maintain that there are three fundamental ontological qualities of human experience: the social/societal, temporal/historical, and spatial/geographical, noting that we tend to neglect theorizing of the third.[27] In short, we live and experience and develop as human beings in particular spaces (real and imagined)[28] and not just through social interaction and an understanding of history and our place in it.

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[26] Much of the scholarly work on spatial justice has been in geography departments. *See generally* Edward Soja, *Afterword*, 48 STAN. L. REV. 1421, 1422-23 (1996) (describing a spatial turn, "what might be called the spatialization of critical studies"). In law, property law has been central to spatial justice analysis. *See* Paul Babie, *The Spatial: A Forgotten Dimension of Property*, 50 SAN DIEGO L. REV. 323 (2013) (recognizing how property and space are central to people's lives). For an account of the geographies of law in terms of space, movement, and power more generally, see NICOLAS BLOMELY, LAW SPACE, AND THE GEOGRAPHIES OF POWER (1994). On the relationship between race, property, and space in constructing spatial injustice, see generally Bennett Capers, *Policing, Place, and Race*, 44 HARV. C.R.-C.L. L. REV. 43, 45 (2009) (describing the role of race in "space-making"). *See also* ALFRED L. BROPHY, ALBERTO LOPEZ & KALI MURRAY, INTEGRATING SPACES: PROPERTY LAW & RACE, at xvii-xix (2011); EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 1-20, 64-70 (2010); *infra* Part III.B (further discussing work as "place," including "colorlined" space).

[27] *See generally* EDWARD W. SOJA, SEEKING SPATIAL JUSTICE (2010) (focusing on geography and spatial consciousness to seek spatial justice).

[28] Soja argues for a third, locating it at least in part in the mutually formative nature of the social and the spatial. *See generally* EDWARD W. SOJA, THIRDSPACE: JOURNEYS TO LOS ANGELES AND OTHER REAL-AND-IMAGINED PLACES (1996) (exploring the idea of thirdspace).

Importantly, the spatial world influences the ordering of human relations and yet is also informed and shaped by those relations.[29] Highways and sidewalks, for example, both result from power and themselves exert social and political power by affecting relations. One of the early thinkers in this area, French sociologist Henri Lefebvre, insisted that space is not a "thing" but rather "a set of relations between things."[30] Yet, while space in this literature is understood as a relational process, it is also a structural force that generates inequalities and injustice.[31] Geographer Edward Soja explains:

> That our geographies and histories are socially produced and not simply given to us by god or nature leads to an awareness that the geographies in which we live can have both positive and negative effects. They can provide advantage and opportunity, stimulate, emancipate, entertain, enchant, enable. They can also constrain opportunity, oppress, imprison, subjugate, disempower, close off possibilities.[32]

In this Section, I provide two brief vignettes that emphasize organizational decisions about work space. In doing so, I aim to take theory into practice by providing an initial, concrete illustration of spatial features and their impact on relations.[33]

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[29] *See, e.g.*, THE EXPANDING SPACES OF LAW, *supra* note 21, at 1 (describing legal geography as "a stream of scholarship that makes the interconnections between law and spatiality, and especially their reciprocal construction, into core objects of inquiry").

[30] *See* HENRI LEFEBVRE, THE PRODUCTION OF SPACE 83 (Donald Nicholson-Smith trans., 1974).

[31] *See generally* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990) (urging movement away from fixation on distributive justice to focus more on the structural forces that generate inequalities and injustice).

[32] SOJA, *supra* note 27, at 104. Much of this work has focused on race; there is also fertile ground for exploring the role of space in creating and reproducing gendered relations. *See* DOREEN MASSEY, SPACE, PLACE AND GENDER 214-24 (1994) (critiquing spatial analysis scholars for being inattentive to sex). Richard Chused's work on the temperance movement and male and female spaces is helpful in this regard. *See generally* Richard H. Chused, *Courts and Temperance "Ladies,"* 21 YALE J.L. & FEMINISM 339 (2010) (exploring how women-led "temperance crusades" impacted women's role in judicial proceedings, political movements, and long-term social movements).

[33] By highlighting organizational decisions, I do not mean to suggest that individuals and groups do not "practice" space themselves, that they have nothing to do with the space. For another look at work space through the lens of spatial justice, see David Delaney, *At Work in the Nomosphere: The Spatiolegal Production of Emotions at Work*, *in* THE EXPANDING SPACES OF LAW, *supra* note 21, at 239.

A.   Introductory Vignettes

Vignette #1: Designing Work Space

Like many tech companies, Google has operated out of numerous spaces over the years, but the basic physical work space features have remained largely the same. "Make sure it looks like a dorm room," said incoming CEO Eric Schmidt when he arrived at the company in 2001.[34] Open working spaces, volleyball courts, ping pong tables, and physio (yoga) balls allow employees to let off steam and move around.[35] Well-provisioned conference rooms make connecting with people around the globe a breeze.[36] Google took over the former Silicon Graphics space in Mountain View, California, in 2003. With multiple buildings, the space was built to accommodate close to 2,000 employees, but Silicon Graphics had housed just 950 employees in the space, allowing employees to spread out. George Salah, who was Google's director of real estate and workplace services during the company's early years, had the opposite idea: he wanted density. "We want to pack those buildings [with people]," said Salah, "not just because it minimizes our footprint but because of the interactions you get, just accidental stuff you overhear."[37]

Google also provides services or offerings as a way of creating what it sees as the most productive work space. Its food offerings, for example, are notorious. Cofounder Sergey Brin once commanded the architects, "No one should be more than 200 feet away from food."[38] The reason for the food, according to Laszlo Bock, Senior VP of People Operations, is innovation: It's a spatial way of nudging people to interact and collaborate by creating a space (and reason) for employees to leave their desk and interact with other people whose desks are not near theirs.[39] The company also offers massages and gyms and organizes parties.[40] Several people have described the goal of the offerings in terms of creating a campus feel so that "[y]ou walk between buildings here and

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[34]   LEVY, *supra* note 3, at 129.

[35]   *Id.* at 126.

[36]   *Id.* at 136-37.

[37]   *Id.*

[38]   David Burkus, *The Real Reason Google Serves All That Free Food*, FORBES (July 2, 2015, 10:45 AM EDT), https://www.forbes.com/sites/davidburkus/2015/07/02/the-real-reason-google-serves-all-that-free-food/?sh=6ab2950d95f6   [https://perma.cc/Q2AH-XF77].

[39]   *See* LASZLO BOCK, WORK RULES!: INSIGHTS FROM INSIDE GOOGLE THAT WILL TRANSFORM HOW YOU LIVE AND LEAD (2015).

[40]   LEVY, *supra* note 3, at 134-35.

see people interacting like they would at a university."[41] In line with this view, Google also hosts lectures, shows, movies and has sponsored an author series featuring weekly book talks.[42]

There is also a data component to modern organizational attention to spatial features of workplaces and employee interaction. That Google calls its human resources department "people operations" is no accident.[43] Indeed, a related term, "people analytics," is used well beyond Google to refer to the use of data to inform a firm's human resources practices, including its design of spaces and offerings.[44] Hewlett Packard is a well-known user of people analytics, as is the consulting firm Deloitte. A recent Deloitte report estimated that seventy-one percent of companies considered people analytics a high priority.[45]

One type of people analytics data is that of employee movement and behavior. In 2015, the Japanese company Hitachi announced that it had developed a sensor that it claims quantifies the "happiness level" of a group from the patterns of a variety of physical movements.[46] More specifically, the sensor monitors not just paths of movement, but also whether the person wearing the badge is interacting with someone and for how long, and also the tone and pitch of the wearer's voice. Another badge, this one produced by the Boston-based company Humanyze, similarly gauges tone of voice and how frequently someone is

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[41] *Id.* at 135.

[42] *Id.* Not surprisingly, Google continues to think about ways of structuring workplaces for productivity in a post-pandemic world. *See* Daisuke Wakabayashi, *Google's Plan for the Future of Work: Privacy Robots and Balloon Walls*, N.Y. TIMES (Oct. 7, 2021), https://www.nytimes.com/2021/04/30/technology/google-back-to-office-workers.html [https://perma.cc/Z9MA-RUHJ].

[43] Adam Bryant, *Google's Quest to Build a Better Boss*, N.Y. TIMES (Mar. 12, 2011), https://www.nytimes.com/2011/03/13/business/13hire.html [https://perma.cc/VW69-N6AT].

[44] *See generally* BEN WABER, PEOPLE ANALYTICS: HOW SOCIAL SENSING TECHNOLOGY WILL TRANSFORM BUSINESS AND WHAT IT TELLS US ABOUT THE FUTURE OF WORK (2013) (describing the use of people analytics to understand how people work and collaborate). For legal scholarship considering issues around people analytics, see Matthew T. Bodie, Miriam A. Cherry, Marcia L. McCormick & Jintong Tang, *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. 961 (2017).

[45] *Rewriting the Rules for the Digital Age: 2017 Global Human Capital Trends Report*, DELOITTE 6 (2017), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/HumanCapital/hc-2017-global-human-capital-trends-gx.pdf [https://perma.cc/JL7Q-T7RU].

[46] *See* News Release, *Hitachi, Hitachi High-Technologies Has Developed a New Wearable Sensor that Measures "Organization Activation Level" Correlated with Collective Happiness* (Feb. 9, 2015), https://www.hitachi-hightech.com/global/about/news/2015/nr20150212.html [https://perma.cc/3K5E-5LXE].

contributing in meetings as well as body language and how often someone pushes back from their desk.[47] Visiting scientist at the MIT Media Lab and CEO of Humanyze Ben Waber describes the goal of the badge like this: "To be able to show you — here's what people who get promoted do . . . here's what the top performers do, here's what the happiest people do — and show that change over time and how your behavior is changing over time." [48] According to Waber, "If the company moves your desk or they changed how you get paid, what actual impact does that have?"[49] He claims his monitor can help with the answers.[50] A Deloitte team experimented with the Humanyze badge after switching from a traditional cubicle office to an open-concept space.[51] The badge showed that people in the new environment were less likely to get up and take breaks.[52] Bank of America also used the badges to track employees at a call center for three months.[53] Based on the data from the badges, Humanyze suggested that if employees took their breaks at the same time, productivity would increase. Bank of America made the schedule change and Humanyze reported that productivity increased by twenty percent (while stress levels reportedly dropped by nineteen percent).

Vignette # 2: Designing Where and When Work Takes Place

In the future, you're going to *love* going to the office. Everything you need to do your job effectively will present itself without effort. You won't have your own desk, because your employer will know you only use it for 63 percent of the day. But you won't mind sharing it, because said employer will make sure you have a private room with green leafy plants, soundproof walls, and warm light between 2 and 2:20 p.m. so you can call your daughter. At 3:30 p.m., when you need a conference room for the product managers' meeting, you won't even have to book

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[47] Tara Kimura, *How New Data-Collection Technology Might Change Office Culture*, CBS NEWS (Sept. 14, 2015), https://www.cbc.ca/news/science/how-new-data-collection-technology-might-change-office-culture-1.3196065 [https://perma.cc/77Z6-B2ZV].

[48] *See* Zach Dennis, *Office ID Badges Could Track Employee Behavior and Production*, PALM BEACH POST (Sept. 21, 2015, 5:55 PM), https://www.palmbeachpost.com/news/tech-science/office-badges-could-track-employee-behavior-and-production/pAe5VEXQ1BB1E3Tfw9dIZL/ [https://perma.cc/TDJ2-ZBJH] (quoting Waber).

[49] Kimura, *supra* note 47.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

> it. It'll just be there. And everyone attending remotely will already be invited.[54]

WeWork is an office space provider. Its vision depends on organizational "outsourcing" of physical spatial management, but it also calls to the neoliberal idea of an employer-employee relationship as one involving hands-off financial investors and entrepreneurial workers instead of longer-term commitment and employee dependence on employers. It is certainly possible to have a traditional employer-employee relationship in which work merely takes place at a WeWork site and during relatively set hours (the model is little more than a co-working site, after all), but the reality is that WeWork goes hand-in-hand with a particular employment relationship, one of short-term work contracts. Workers shift regularly from one employer to another (whether voluntarily or not), as well as between the WeWork work space and other sites.

Work and private life also become perceptually intertwined in the WeWork vision. As one reporter puts it, the company is selling a lifestyle "where work and play are virtually indistinguishable," a pitch not unlike that made by Google for its Googlers and echoed by the many start-up workers dotting places like Silicon Valley.[55] Workers are "freed" from a rigid 9-5, office-bound work schedule, while work becomes part of their 24-hour-a-day lives. In a recent study of workers doing software and digital media production work in San Francisco, including start-up work, one participant commented on the lack of distinction between work and private life. He said, "I don't need to

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[54] Jessi Hempel, *Why WeWork Thinks It's Worth $20 Billion*, WIRED (Sept. 6, 2017, 7:00 AM), https://www.wired.com/story/this-is-why-wework-thinks-its-worth-20-billion/ [https://perma.cc/J7CR-JCD6]. Despite its lofty vision and early success in obtaining private equity investment, WeWork has had its struggles, mostly centered around its co-founder. On some of its troubles, see Ian Bogost, *The Wildly Appealing, Totally Doomed Future of Work*, ATLANTIC (Sept. 26, 2019), https://www.theatlantic.com/technology/archive/2019/09/why-wework-was-destined-fail/598891/ [https://perma.cc/3S2R-6APL]. As a basis for thinking about what it means for workers to be interacting in non-traditional worksites, however, WeWork is still useful, especially given that forecasts continue to be for new office-home arrangements. *See* Dror Poleg, *The Future of Offices When Workers Have a Choice*, N.Y. TIMES (Jan. 4, 2021), https://www.nytimes.com/2021/01/04/upshot/work-office-from-home.html [https://perma.cc/D9LM-3F9K]; Patrick Sisson, *How Data Is Changing How Offices Are Run*, N.Y. TIMES, https://www.nytimes.com/2021/04/27/business/smart-offices-data-collection.html (Apr. 28, 2021) [https://perma.cc/9MMP-679V] (noting substantial investment in "proptech" startups like Cherre and HqO).

[55] Kate Aronoff, *Thank God It's Monday*, DISSENT (2017), https://www.dissentmagazine.org/article/wework-sharing-economy-labor-company-town [https://perma.cc/7DUM-Y2NH].

switch off, because the work that I'm doing is less work, . . . it's more a passion, so it kind of just merges into everything else."[56] During his time assigned to relaxation or hobbies, he would be "checking email, waiting for an investor to get back on a promising opportunity [. . .]. I mesh those two worlds together."[57]

From these brief vignettes, we can begin to see how organizational decisions might shape spatial features of workplaces that in turn affect worker interactions, whether physically in frequency and duration or perceptually in expectations of when, where, and how work takes place. These vignettes are admittedly narrow in the sense that they tend to capture knowledge- and service-based work rather than work in fields and factories. But even physical labor is being increasingly automated on-site and at the same time pushed out to a piece-work-like system.[58] Task Rabbit sewing and assembly projects, for example, are increasingly popular.

As I explore in Part II, attention to spatial features and scheduling and the intertwining of work and private life is not itself entirely new. At the time of the industrial revolution, for example, scholars asked questions about how mechanization would affect relationships inside and outside of work. And some commentators argue that the app-based labor market of today is not unlike the exploitive, industrial homework done mostly by women in the garment and textile industries in the early and mid-twentieth century.[59] We have yet to consider, however, how spatial

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[56] Daniel G. Cockayne, *Entrepreneurial Affect: Attachment to Work Practice in San Francisco's Digital Media Sector*, 34 ENV'T & PLAN. D: SOC'Y & SPACE 456, 462, 468 (2016) (arguing that "affect and desire function in digital media work to produce ambivalent passionate attachments to one's satisfaction in precarious form of work, allowing entrepreneurs' and engineers' work to increasingly encroach on other aspects of their lives"). According to Cockayne, "'satisfaction' erases the necessity for clear distinctions between 'work' and 'life,' as the former becomes the defining and central feature of the latter." *Id.* at 461.

[57] *Id.* at 462.

[58] More traditional factory and other physical work spaces can also have spatial features that condition relations. For early research suggesting as much, see Everett Cherrington Hughes, *The Knitting of Racial Groups in Industry*, 11 AM. SOC. REV. 512, 513-15 (1946) ("On the job itself, the patterns of relationship are subject in varying measure to the physical lay-out of the shop, the distribution of workers of different races among the various kinds of jobs, by the degree of dependence of one worker upon others for successful performance of his work, as well as by the social atmosphere created by management, supervision, the union and the workers themselves.").

[59] *See, e.g.*, Andrew Calabrese, *Home-Based Telework and the Politics of Private Woman and Public Man: A Critical Appraisal, in* WOMEN AND TECHNOLOGY. 161, 169 (Urs E. Gattiker ed., 1994) (explaining that women industrial homeworkers in the pre-New Deal era faced "long hours, poor working conditions, low pay, piece work, and having wages withheld without recourse").

features and particularly spatial features in workplaces today can affect relations and discrimination.

B. *Foundational Concepts & Research: The Importance of Relations in Discrimination at Work and Conditions for Those Relations*

The mechanisms of discrimination and persistent inequality in employment are broad and complex. Sociologists and social psychologists researching workplace inequality have studied structural causes, such as skewed labor markets and the group-based phenomenon of social closure,[60] and also individual mechanisms, such as attitudes and cognitive biases and stereotype threat as it influences individual performance on tasks.[61] Between these two ends lie relations. Relations as I use the term here are the social interactions between two individuals or small groups of people in discrete moments and over time. It is these relations that we should be most concerned about in thinking about spatial features and discrimination. In this Section, I identify conditions for relations and specifically spatial features as key in thinking about organizational efforts to reduce discrimination, and I draw out the premises of this claim.

1. Relational Conditions

Some degree of intergroup contact is inevitable in most modern workplaces today. Most workplaces are integrated in that people of different groups are employed together, and this means that crossing paths with others (whether virtually or in person) is a given.[62] The

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[60] On social closure, see generally Catherine Albiston & Tristin K. Green, *Social Closure Discrimination*, 39 BERKELEY J. EMP. & LAB. L. 1 (2018).

[61] On stereotype threat, see generally STEELE, *supra* note 8.

[62] Research suggests that racial and gender occupational segregation decreased substantially in the 1970s, mostly stalled in the 1980s, and has seen a resurgence since then. *See* KEVIN STAINBACK & DONALD TOMASKOVIC-DEVEY, DOCUMENTING DESEGREGATION: RACIAL AND GENDER SEGREGATION IN PRIVATE-SECTOR EMPLOYMENT SINCE THE CIVIL RIGHTS ACT, at xxxi-xxxiv (2012) (describing these periods). Similar trends are seen in establishment segregation, yet with marked increased racial segregation from the 1990s through 2014. *See generally* John-Paul Ferguson & Rembrand Koning, *Firm Turnover and the Return of Racial Establishment Segregation*, 83 AM. SOC. REV. 445 (2018) (examining more than forty years of longitudinal data to calculate between- and within-establishment trends in racial employment segregation over time). This recent research on establishment segregation suggests that while "[f]or white workers, exposure to non-white co-workers has steadily increased for 40 years . . . [d]uring the same period, exposure tended to fall for non-white workers—fitfully for blacks, more steadily for Hispanics, Asians, and others." *Id.* at 466. Integration (even if stratified) may also exist in places of work, but across entity boundaries, such as when

equality challenge in the modern workplace then is less one of whether members of different groups will interact, but how often, how long, and generally under what conditions. Work organizations influence relations by setting the conditions for interaction, what I call "relational conditions." This is not to say that organizations have full control, or that individuals, who have their own biases, histories, personalities, and mindsets, do not matter. It is to say, however, that organizations matter, that they make structural decisions that affect individuals' interactions at work and that organizations should therefore be acknowledged as playing an active role in employment discrimination — and in its reduction.

2. Social Science on Interactions and Discrimination

My goal in this Article is not to take on or resolve the complexities of all discrimination, or even to take a position on precisely where specific organizations should come down on the continuum of each of the categories of spatial features that I identify. Nonetheless, my argument that spatial features matter for discrimination rests on two interrelated empirical premises: (1) that spatial features of work will affect the frequency, duration, and conditions of interactions, including expectations for those interactions; and (2) that it is better to have more sustained, status-equal intergroup interactions and relations over time than fewer, or none at all.

The former of these premises is founded in architectural theory and geography studies, in addition to research across fields, including sociology and social psychology, and plain common sense.[63] It is difficult to connect with someone who resides on the other side of a tall wall or, in the work setting, who works in a different building. Some of the research supporting this premise appears in the vignettes above, and I will draw out additional research throughout the Article.

The latter of these premises is founded in social science research showing that racial and gender integration in work — and especially positive social relations — is key in reducing discrimination. A brief review of some of this research is warranted here as groundwork. Some

a predominantly female or racial minority cleaning or cooking crew works within a larger work campus community.

[63] *See* Mario L. Small & Laura Adler, *The Role of Space in the Formation of Social Ties*, 45 ANN. REV. SOC. 111, 112, 125-26 (2019) (noting that some existing research is conflicting and that gaps exist, including on the potential moderating effect of homophily, but "[t]he general literature on how space shapes social relationships is long-standing, including work in network analysis, geography, organizational science, neighborhood research, architecture and design, and urban planning").

of this research emphasizes benefits that might not typically be described as relational, benefits, for example, in reduced stereotyping and prejudice in men and whites or reduced perceived bias on the part of women and people of color.[64] But stereotyping and perceptions of bias are themselves relational in the sense that stereotyping and perceptions of bias are both affected by and affect behaviors in interactions. For example, sociologists Cecilia Ridgeway and Lynn Smith-Lovin explain in their work that when men and women interact, "status and power differences create very real interaction effects."[65] Specifically, "Beliefs about gender difference[s] combine with structurally unequal relationships to perpetuate status beliefs, leading men and women to recreate the gender system in everyday interaction."[66]

Researchers have been studying the influence of intergroup contact on prejudice for well over seventy years now. In 1954, Gordon Allport formalized the contact hypothesis in his book, *The Nature of Prejudice*.[67] There, he emphasized that integrated relations could lead to reduced prejudice in whites, provided that those relations occur under favorable circumstances:

> Prejudice (unless deeply rooted in the character structure of the individual) may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom or local atmosphere), and provided it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.[68]

This and other early work in the field of social psychology tended to focus primarily on whites' prejudices and on changes in whites' attitudes as a result of intergroup contact rather than on the experiences of interactions and relations for both participants.[69] More recently, however, social psychologists have turned to studying interactions and

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[64] *See infra* notes 69–70.

[65] Cecilia L. Ridgeway & Lynn Smith-Lovin, *The Gender System and Interaction*, 25 ANN. REV. SOC. 191, 191 (1999).

[66] *Id.*

[67] GORDON W. ALLPORT, THE NATURE OF PREJUDICE 281 (1954).

[68] *Id.*

[69] For a meta-analysis of research studying changed attitudes toward out-groups, see generally Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY. & SOC. PSYCH. 751 (2006).

relations over time of both (or multiple) parties to interaction.[70] Conditions for those interactions have also become a prominent area of research in the field.[71]

This research suggests that interracial interactions are most likely to be positive when interactions are sustained (continue to occur over time).[72] One study found that individuals engaging in interracial interaction that involved discussing intimate aspects of their lives and cooperating on activities over a three-day period resulted in closer feelings to their out-group partner at the end of the third day compared with the first and also less stress over time in the interaction, as assessed by self-report and physiological (i.e., levels of cortisol) measures.[73] Moreover, the study suggests that feelings of closeness to an interracial partner can influence the quantity and also the quality of individuals' interracial interactions beyond that partner.[74] Another study suggests that negative emotions that participants often experience in interracial interactions tend to decrease across multiple interactions.[75]

Sometimes segregation involves status or job isolation but not necessarily physical separation. In these cases, interaction is more likely

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[70] *See* J. Nicole Shelton & Jennifer A. Richeson, *Interacting Across Racial Lines, in* 2 APA HANDBOOK OF PERSONALITY AND SOC. PSYCH. 395 (M. Mikulincer, P.R. Shaver, J. F. Dovidio & J. A. Simpson eds., 2015). This research suggests that interracial interactions are interdependent in the sense that categorization affects perceptions (what you think of your relational partner and the situation) as well as metaperceptions (what you think your partner thinks of you and the situation) that, in turn, affect emotions and behaviors, such as whether to engage or avoid the current and future interactions. *Id.*

[71] *See id.* (describing research focused on intergroup interactions and on ways to change categorizing processes, expectations, coping strategies, and self-motivations in interactions). For a meta-analysis taking an intersectional, relational, and contextual approach to intergroup contact, see Negin R. Toosi, Laura G. Babbitt, Nalini Ambady & Samuel R. Sommers, *Dyadic Interracial Interactions: A Meta-Analysis*, 138 PSYCH. BULL. 1 (2012). For a recent article in the workplace context that suggests the importance of conditions for interactions and not just of interaction itself, see Tracy L. Dumas, Katherine W. Phillips & Nancy P. Rothbard, *Getting Closer at the Company Party: Integration Experiences, Racial Dissimilarity, and Workplace Relationships*, 24 ORG. SCI. 1377 (2013).

[72] *See* ALLPORT, *supra* note 67, at 261-81; Pettigrew & Tropp, *supra* note 69, at 751. For a recent study suggesting that white individuals who work with Black co-workers manifest less racial bias, see Sean Darling-Hammond, Randy T. Lee, Rodolfo Mendoza-Denton, *Interracial Contact at Work: Does Workplace Diversity Reduce Bias?* 12 (U.C. Berkeley Goldman Sch. Pub. Pol'y 2020), https://ssrn.com/abstract=3379069 [https://perma.cc/Y3EU-35EC].

[73] Elizabeth Page-Gould, Rodolfo Mendoza-Denton & Linda R. Tropp*, With a Little Help from My Cross-Group Friend: Reducing Anxiety in Intergroup Contexts Through Cross-Group Friendship*, 95 J. PERSONALITY & SOC. PSYCH. 1080, 1089 (2008).

[74] *Id.*

[75] *See* Toosi et al., *supra* note 71.

to occur, but a wealth of research suggests that interactions will be affected by status hierarchies and stereotypes that both perpetuate and are exacerbated by the visual of segregation. For example, in her famous book, *Men and Women of the Corporation*, Rosabeth Moss Kanter argued that demographics themselves — women predominately in secretarial positions with men in positions of power — can contribute to relations in various ways.[76] She maintained that the secretarial support jobs in the firms that she studied, where women make up the majority of the jobs, were dead-end jobs not only because they were attached to a short and unattractive promotion ladder, but also because of the nature of the relations between the secretaries and their bosses, relations in which stereotyping was prevalent.[77] More recent research buttresses Kanter's point, suggesting that skewed demographics can result in biased interactions and also in disadvantage from relational isolation, or lack of ties to the people in powerful positions and networks.[78] Further research shows that segregation can lead to devaluation of jobs that are deemed over time "female" or "minority" and can serve to activate gender and racial stereotypes and biases in interactions.[79]

Indeed, at the more macro level, over the past several decades, sociologists have turned increasingly to the role of relations in inequality, developing models that are more relationally founded than in the past and that specifically focus on relations within organizations. Charles Tilly's book, *Durable Inequality*, published in 1998, served as a foundational work in this vein, even as relational theory had already begun its rise.[80] Tilly focused on the role of social relationships in inequality and emphasized how categorical distinctions — such as race and sex — become interactional bases for inequality as they are wedded to organizational divisions of labor.[81] Some of the research in this area

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[76] ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 77-87 (1977).

[77] *See id.*

[78] *See generally* Vallas, *supra* note 15, at 385 (discussing effects of spatial segregation).

[79] *See* Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 322 (2000); Ridgeway et al., *supra* note 65 (describing and developing expectation states theory, which holds that men and women recreate the gender system when they interact in a context of structural inequality).

[80] *See* CHARLES TILLY, DURABLE INEQUALITY (1998).

[81] *See id.*; DONALD TOMASKOVIC-DEVEY & DUSTIN AVENT-HOLTE, RELATIONAL INEQUALITIES: AN ORGANIZATIONAL APPROACH 15-16 (2019); *see also* Roscigno & Wilson, *supra* note 22. From the perspective of this work in sociology, this article might be understood to take a relatively micro view on relations within organizations by emphasizing intergroup relations and relational conditions over broader market and cross-organization mechanisms for inequality. *Id.* Seeing spatial features within

suggests that organizing work so that there is more collaborative interaction between workers of different levels can lead to better career outcomes for women and minorities.[82] In a quantitative, nationwide study of private firms, for example, sociologist Alexandra Kalev found that women and minorities were more likely to be promoted into the managerial ranks in firms that adopted cross-boundary work teams — work teams that bring together workers from different jobs on a regular basis to share information and participate in decision-making — than in firms that did not adopt those types of teams.[83] Training programs that involved job rotation also led to greater success than programs that focused on in-job training.[84]

The research on intergroup interaction and relations is vast and growing. Every day, we are learning more about influences on intergroup interaction, from the role of categorization, diversity ideologies, prejudice concerns, mindsets, stress and coping mechanisms, and more. At the same time, we are learning about the role of architecture and space in relations, both inside and outside of work organizations. From whether neighbors have front porches[85] and where front doors are placed[86] to the siting and lighting of laundry rooms and mail areas, architecture and planning researchers are thinking about how our relations are structured and affected by the spaces in which we live and interact.[87] I will draw on more of this research as I explore the categories of spatial features below.

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antidiscrimination theory may in this way spur broader research and theoretical advancements.

[82] *See* Green & Kalev, *supra* note 11, at 1450-53 (describing some of this research).

[83] Alexandra Kalev, *Cracking the Glass Cages? Restructuring and Ascriptive Inequality at Work*, 114 AM. J. SOC. 1591, 1602 (2009).

[84] *See id.*; *see also* Zoë B. Cullen & Ricardo Perez-Truglia, *The Old Boys' Club: Schmoozing and the Gender Gap* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26530, 2021) (finding male-to-male advantage with physical proximity).

[85] The front porch concept may also help multiethnic communities break racial tensions as people begin to see each other as neighbors. *See* Barbara B. Brown, John R. Burton & Anne L. Sweaney, *Neighbors, Households, and Front Porches: New Urbanist Community Tool or Mere Nostalgia?*, 30 ENV'T & BEHAV. 579 (1998).

[86] *See* Robert K. Merton, *The Social Psychology of Housing*, *in* CURRENT TRENDS IN SOC. PSYCH. 163, 207-08 (Wayne Dennis et al. eds., 1948); *see also* Theodore Caplow & Robert Forman, *Neighborhood Interaction in a Homogeneous Community*, 15 AM. SOC. REV. 357 (1950) (presenting a separate study of housing finding that residents whose front doors looked out onto common sidewalks were likely to know each other, even compared to neighbors that were closer but did not look onto common sidewalks).

[87] *See generally* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1064-65 (2002) (discussing architectural solutions to crime).

My overall position when it comes to relational conditions and work is this: A workplace with good relational conditions has structures and cultures that provide frequent opportunities for positive intergroup contact, especially in the form of peer-like collaborative intergroup interactions; one with poor relational conditions has structures and cultures that provide few such opportunities and/or wherein status and power differentials are salient in intergroup interactions and workers from different groups have little opportunity for positive relations. Spatial features are one structural component of these conditions, a component that involves organizational decisions and design.

II.   BUILDING BLOCKS: SPATIAL FEATURES OF WORKPLACES AND DISCRIMINATION

In this Part, I elaborate on three categories of spatial features:

- insularity, a spatial concept of or relating to islands, having to do with the degree to which physical features or offerings segregate along racial or gender lines;

- precarity, a spatial concept of being precarious, poorly rooted or prone to topple, having to do with features such as contracts, scheduling, and turnover that affect the frequency and duration of interactions as well as perceptions about future interactions; and

- permeability, a spatial concept of borders and the ease with which they can be passed through or discerned, having to do with the degree to which the workplace is perceived as separate from private space.

I also situate spatial features together with some of the other organizational mechanisms of discrimination that are more widely acknowledged — decision-making systems and work cultures — under an overarching umbrella concept, what I call organizational "operations."

A.   Categories of Spatial Features

1.   Insularity

Insularity: a spatial concept of or relating to islands and separateness.

Insularity refers to the degree to which express directives, physical features, and offerings in a workplace segregate along racial or gender lines. A workplace high in insularity will be segregated, with work spaces tightly contained and very little interaction across groups. A workplace low in insularity, in contrast, will be highly integrated, with physical features and offerings that make interaction across groups likely. I identify here two broad categories of features that sit within this concept of insularity: (1) directives of segregation; and (2) architecture, including work offerings, such as cafeterias, water and coffee stations, even gyms and bathrooms, as well as virtual architecture in meeting apps or other remote-work tools.

a. *Directives of Segregation*

We might like to think that race- and sex-explicit directives of spatial segregation are long behind us. Yet there is reason to believe that employers continue to openly hire people by race and sex into certain types of work or for work in certain spaces. In his book, *After Civil Rights*, sociologist John Skrentny gathers resources documenting this reality in the market today.[88] Skrentny shows that employers, especially in areas of low-wage work, continue to openly target members of racial and ethnic groups and also men or women for certain types of work.[89] The image of the Latino worker as hard working and compliant (non-complaining) and Black workers as lazy and demanding dominates, from poultry and meatpacking to construction and landscaping.[90] Additional ethnographic work reveals directives in scheduling, such as relegating Black workers to the least desirable late-night shifts in the

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[88] JOHN D. SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE 3-18 (2014).

[89] *Id.*

[90] *See* Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1166 (2008). On racial and gender stratification within Silicon Valley, see Karen J. Hossfeld, *Their Logic Against Them: Contradictions in Sex, Race, and Class in Silicon Valley*, *in* TECHNICOLOR: RACE, TECHNOLOGY, AND EVERYDAY LIFE 34, 39-40 (Alondra Nelson & Thuy Linh N. Tu eds., 2001). For an example of an employer's use of race and immigration to divide workers in one meatpacking enterprise, see Charlie LeDuff, *At a Slaughterhouse, Some Things Never Die; Who Kills, Who Cuts, Who Bosses Can Depend on Race*, N.Y. TIMES (June 16, 2000), https://www.nytimes.com/2000/06/16/us/slaughterhouse-some-things-never-die-who-kills-who-cuts-who-bosses-can-depend.html [https://perma.cc/ZS5X-MLKT].

fast food industry.[91] In Silicon Valley, low-end technology jobs are often filled by Southeast Asians.[92]

b. *Architecture & Offerings*

The built architecture of work spaces can affect interactions and relations in a multitude of ways. Architectural theory dates back centuries, when cities were being planned and housing and work structured for efficiency, community, and cleanliness and safety, as well as aesthetic beauty.[93] Obviously, buildings and walls define spaces for interaction. We know that if engineers are housed in one building and administrative workers are housed in another building, members of the two groups will be unlikely to see each other, much less bump into each other or interact. This example involves physical segregation and job segregation. Architectural theory goes much further, however, to include the ways that buildings, streets, pathways, as well as gardens and other outdoor spaces get us together and encourage (or discourage) us to interact, build relationships, and look out for each other.[94]

Recently, there has been renewed interest in the legal literature around the idea of architecture as regulation. In his well-known essay from 1998, Lawrence Lessig asserted that human behavior may be regulated or constrained, in part, by "architecture" (in addition to laws, social norms, and markets).[95] Lessig pointed to Jeremy Bentham, Irving Goffman, and Michel Foucault as some of the earlier theorists of this idea.[96] Jane Jacobs with her book, *The Death and Life of Great American Cities*, similarly explores architecture as a social constraint and facilitator.[97]

Drawing on the work of Jane Jacobs and others, legal scholar Neal Kumar Katyal in *Architecture as Crime Control* details some of the ways that architecture can reduce crime.[98] Katyal identifies four core architectural principles for reducing crime: increasing an area's natural

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[91] Carol B. Stack, *Beyond What are Given as Givens: Ethnography and Critical Policy Studies*, 25 ETHOS 191, 202 (1997).

[92] SKRENTNY, *supra* note 88.

[93] These principles date back at least to Vitruvius and his multi-volume book, *De Architectura*, written circa 27 B.C. VITRUVIUS POLLIO & HERBERT LANGFORD WARREN, VITRUVIUS: THE TEN BOOKS ON ARCHITECTURE (Morris Hickey Morgan trans., 1960).

[94] *See generally* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961) (emphasizing architecture's influence on relations).

[95] Lawrence Lessig, *The New Chicago School*, 27 J. LEG. STUD. 661, 662-63 (1998).

[96] *Id.* at 665-66.

[97] *See* JACOBS, *supra* note 94.

[98] Katyal, *supra* note 87.

surveillance (its visibility and susceptibility to monitoring by private citizens); introducing territoriality (by demarcating private and semiprivate spaces), reducing social isolation and building community (by building spaces for unplanned social interaction), and protecting potential targets (through closed streets or metal doors).[99] Katyal argues that law should harness architecture through these principles to the end goal of reduced crime.[100] Sarah Schindler more recently has also drawn on architectural research and theory to expose the ways that communities engage in exclusion through architecture, including use of physical barriers, public transit siting, highways and roads, and parking permits.[101]

Similar ideas can and do apply to the workplace. There is a robust literature on office design, and from this and architectural theory more broadly, we can imagine architectural designs involving pathways, lighting, and spaces for community that evoke feelings of ownership and pride on work campuses much as those or similar design features operate to reduce crime in the neighborhoods and residential buildings that Katyal describes.[102] For example, a recent study on office arrangements suggests that open space arrangements like those popular in some workplaces today tend to curb rather than foster face-to-face interactions and collaboration.[103] Researchers used tracking devices like those described in Part I to study people's interactions in their work spaces. Although the company being studied removed partitions with the goal of increasing time spent in face-to-face interactions, the study revealed that the change in fact resulted in less time spent face-to-face and more time spent interacting over digital media.[104] As the researchers state, "Even though everyone on the floor could see everyone else all of

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[99] *See id.* at 1048-49.

[100] *See id.*

[101] *See* Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L. J. 1934, 1953-73 (2015).

[102] *See* NICOLA GILLEN, FUTURE OFFICE: NEXT-GENERATION WORKPLACE DESIGN (2019). Recent research also suggests influences of dorm configuration on students. *See* Jeremy Bauer-Wolf, *How Dorm Rooms Can Affect Grades*, INSIDE HIGHER ED (June 21, 2019), https://www.insidehighered.com/news/2019/06/21/study-shows-how-different-types-college-dormitories-can-affect-grades [https://perma.cc/K3WY-79YJ].

[103] Ethan S. Bernstein & Stephan Turban, *The Impact of "Open" Workspace on Human Collaboration*, 373 PHIL. TRANSACTIONS B 1 (2018); *see also* Ethan S. Bernstein & Ben Waber, *The Truth About Open Offices: These Are the Reasons Why They Don't Produce the Desired Interactions*, 97 HARV. BUS. REV. 83, 84 (2019).

[104] *See* Bernstein & Turban, *supra* note 103.

the time (and perhaps because they could), virtual interaction replaced [face-to-face] interaction in the new boundaryless workplace."[105]

Research in this same vein suggests that physical proximity matters in predicting interaction.[106] In general, the farther apart people are positioned as they work, the less they collaborate. According to the results of one study conducted at the headquarters of a large consumer product company, "[P]eople on the same team were six times as likely to interact if they were on the same floor, and people on different teams were nine times as likely to interact if they were on the same floor."[107] Moreover, another study by the same researchers suggests that remote work drives down interaction considerably. The researchers found that remote workers communicated nearly eighty percent less about their assignments than co-located team members did.[108]

Adjusting physical workplace configuration can also shift relational expectations, sometimes in surprising ways. One company studied by organizational behaviorist Leroy Gonsalves decided for economic reasons (to save money on rent) to adopt a campus-like workplace configuration where workers did not have assigned space but instead could show up and work in a variety of spaces, from quiet areas to small meeting spaces to larger conference rooms, throughout the day.[109] The company had a flexible work policy for several years, but few employees took advantage of it. After the workplace configuration change, however, they expressed much less reservation in using the flexible work policy. By mixing up who they saw when throughout the day, they were less worried about being judged if they did not stick to a 9-5-at-the-desk schedule.

What on-site offerings employers provide, and when, can also affect interactions.[110] One study suggested that shifting from small coffee

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[105] *Id.* at 3.

[106] *See* Small & Adler, *supra* note 63, at 114-15 (identifying three forms of physical spatial contexts that can affect social tie formation: "spatial propinquity, or the degree of physical proximity between actors; spatial composition, or the presence of fixed places, such as parks, restaurants, or lobbies, that make interaction possible or likely; and spatial configuration, or the segmentation of space into subunits with physical boundaries and pathways between them").

[107] Bernstein & Waber, *supra* note 103.

[108] *Id.*

[109] Leroy Gonsalves, *From Face Time to Flex Time: The Role of Physical Space in Worker Temporal Flexibility*, 65 ADMIN. SCI. Q. 1058, 1070 (2020).

[110] *See generally* Georg Simmel, *The Sociology of Space, in* SIMMEL ON CULTURE: SELECTED WRITINGS 137, 138 (David Patrick Frisby & Michael Featherstone eds., 1997) (emphasizing the role of space for social interaction and the importance of certain locations for social orientation and activity).

stations that served just six people to fewer, larger coffee stations that served 120, plus a larger cafeteria, resulted in a twenty percent increase in sales by increasing interactions between co-workers on different teams.[111] This point was also raised in the report conducted by Eric Holder for the board of Uber after Susan Fowler went public with her complaints about sexual harassment and sex-based discrimination within the firm.[112] The report recommended, among other things, that Uber move the time of the catered, on-site dinner to a time when more employees could take advantage of it and also so that it would signal an earlier end to the work day.[113]

Architecture can also be digital, as Katyal illustrates in a later article, *Digital Architecture as Crime Control*.[114] In the antidiscrimination realm, we might think about the ways that organizationally structured methods of communication, such as email, on-campus chat apps, and meeting apps like Zoom, might affect interactions and enhance or minimize stereotyping and biases as they affect behaviors and relations in discrete moments and over time. On some work campuses today, employees interact throughout the day on an internal chat app more than they do in person. These apps may affect duration and frequency and expectations for future interactions, and they also set conditions for relations. They can alter the formality of the interaction, for example, and also constrain how emotion is conveyed.[115]

Relatedly, there are architectural features — physical or virtual — that can set conditions for interaction without altering the frequency or duration of interaction. Several years ago, the United States Equal Employment Opportunity Commission ("EEOC") brought several high-profile cases in the agriculture industry involving harassment of

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[111] Waber et al., *supra* note 4.

[112] *See* Miguel Helft, *Here's the Full 13-Page 'Holder Report' Aimed at Resetting Uber's Management and Culture*, FORBES (June 13, 2017, 1:48 PM EDT), https://www.forbes.com/sites/miguelhelft/2017/06/13/heres-the-full-13-page-holder-report-aimed-at-resetting-ubers-management-and-culture/?sh=23aec2802c00 [https://perma.cc/EES4-SB89] (includes the full 13-page report).

[113] *Id.* at 12 ("Uber should consider moving the catered dinner it offers to a time when this benefit can be utilized by a broader group of employees, including employees who have spouses or families waiting for them at home, and that signals an earlier end to the work day.").

[114] Neal Kumar Katyal, *Digital Architecture as Crime Control*, 112 YALE L.J. 2261, 2262 (2003).

[115] For example, the structures (and features) of physical and virtual spaces might facilitate or disrupt the backstage for whites. *See infra* notes 147–152 and accompanying text.

women workers in the fields.[116] The cases and solutions in the settlement decrees emphasized the lack of processes for complaint and retaliation. It would have been helpful had they also considered spatial features. Women were often isolated in the fields, where lighting was poor. Providing better lighting and reorganizing schedules to reduce isolation may go a long way to reducing sexual assault of these women by altering the conditions for interaction between the women and their male supervisors. In other contexts, spatial features that set conditions for interactions might include pictures on walls, statues, or other art, even possibly temperature or other choices that affect the senses, such as smell, sound, or touch.[117]

2. Precarity

Precarity: a spatial concept of being precarious, poorly rooted or prone to topple.

Precarity, and in particular the concept of labor precarity, has risen in prominence in legal and labor scholarship over the past several decades. Precarity is usually defined in this literature as a condition of uncertainty in the labor relationship for workers, premised on changes in the labor market that have driven employers to reduce their commitment to workers.[118] Researchers document a global shift toward contingent, insecure work where risk is placed on individual workers. As sociologist Arne Kalleberg explains, "Even good jobs that pay well and provide opportunities for control and intrinsic rewards have become more insecure and stressful."[119] Extant research and theorizing

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[116] *See* Press Release, EEOC, *California Farm to Pay $300,000 To Settle EEOC Sexual Harassment & Retaliation Lawsuit* (July 25, 2018), https://www.eeoc.gov/newsroom/california-farm-pay-300000-settle-eeoc-sexual-harassment-retaliation-lawsuit [https://perma.cc/WD6M-UC95]. *See generally* TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 149-50 (2017) (discussing the cases and their scope).

[117] On pictures and other counter-stereotypic exemplars, see Kang & Banaji, *supra* note 8. *See also* Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotypes*, 40 J. EXPERIMENTAL SOC. PSYCH. 642, 644-45 (2004).

[118] *See* Arne L. Kalleberg & Steven Vallas, *Probing Precarious Work: Theory, Research, and Politics*, *in* 31 RESEARCH IN THE SOCIOLOGY OF WORK 4 (Arne Kalleberg & Steven Vallas eds., 2018) (on theoretical foundations of and research on precarious work); ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S–2000S, at 2 (2010) (examining changes in job quality in the United States since the mid-1970s).

[119] KALLEBERG, *supra* note 118, at 82-104 (describing shift to more precarious work). Some scholars argue that the rise in precarious work is tied to a rise in positive

around precarity has emphasized the effects of precarity in the labor market on economic status and well-being, family, gender roles, and other aspects of life.[120] Much of this research has focused on how labor precarity affects individuals and their relations and emotions outside of work.[121]

We might turn a similar lens on relationships inside of work.[122] In this way, precarity can be understood as a spatial feature of a specific workplace. Each employer makes decisions about how it will structure relations with its employees and by doing so also makes decisions about how it hopes those employees will view the firm and those working alongside them. Examples of organizational features that might affect levels of precarity include contracts (e.g., short-term contracts and independent contractors), scheduling (e.g., varying schedules), and policies or systems and work cultures that affect turnover (e.g., firings and other departures).[123] These decisions, in turn, can affect both the physical frequency and duration of interactions and also workers' perceptions of those interactions. We might expect, for example, high perceptions of precarity in a workplace like WeWork, where independent contractors work for different employers and circulate through the WeWork space on an ad hoc, variable basis. As autonomy advances, collectivity — connectiveness to others and willingness to form relational ties — may diminish. The same may be true for remote workers where home becomes more prominent and work ties less so.

psychology, in addition to neoliberalism generally. *See* Edgar Cabanas & Eva Illouz, *The Making of a "Happy Worker," in* BEYOND THE CUBICLE: JOB INSECURITY, INTIMACY, AND THE FLEXIBLE SELF 25-49 (Allison J. Pugh ed., 2017).

[120] *See* KALLEBERG, *supra* note 118, at 89 ("Labor economists have tended to focus on job stability and instability, utilizing indicators such as job displacements and involuntary job loss, unemployment, and employer job tenure. Sociologists and psychologists have focused more on subjective measures, such as workers' perceptions of their job security and fear of job loss.").

[121] *See generally* Cabanas & Illouz, *supra* note 119 (noting that precarity "explores the hidden ramifications of job insecurity, from strained interpersonal relationships to crises of identity and self-worth").

[122] In the late 1990s, Bourdieu theorized that labor market uncertainty and resulting precarity diminishes the possibility that individuals will engage in collective action. Precarity is seen by Bourdieu and others in this way as an instrument of governing, of disempowering workers through disruption of relations and undermining of common interest and solidarity. *See* PIERRE BOURDIEU, ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET 82 (Richard Nice trans., 1998); *see also* Judith Butler, *Foreword, in* STATE OF INSECURITY: GOVERNMENT OF THE PRECARIOUS, at vii (Isabell Lorey ed., Aileen Derieg trans., 2015).

[123] Note that the precarity here need not be in the employment relationship itself, which distinguishes precarity as a relational condition in work as I theorize it here, from the narrower use of precarity in the labor literature.

Work scheduling is also increasingly variable in ways that are less employee-controlled and that could affect interactions and expectations around those interactions. In many areas of the service sector, for example, employers have turned to variable, "just-in-time" scheduling. Under this system, workers are given very little notice of their schedule for the week or even the day; they are often called in during unscheduled times to meet peaks in customer demand, and sent home during times when customer demand is low.[124] Employers also sometimes use software that triggers a send-home and a call-in for another when a worker is about to hit 40 hours for the week, so as to avoid paying overtime.[125]

Strict performance and behavior rules tied with at-will employment that result together in frequent firings; unsafe conditions that lead to frequent absences; and work cultures that drive people to quit would also lead to greater precarity in relational conditions, lowering experiences and expectations of long-term relationships. Charlotte Alexander's work on the poultry industry provides a good example of how precarity in work might affect relations and expectations of relations. She describes an industry with extremely high turnover, estimated at between forty and one hundred percent annually. "At the high end," she explains, "this means that a single plant will have to replace its entire chicken catching and disassembly workforce of between 400 and 2,000 workers every year."[126] She provides this account by a poultry worker at Tyson Foods:

> Tyson always gets rid of workers who protest or who speak up for others. When [the speed of the disassembly line] jumped from thirty-two chickens a minute to forty-two, a lot of people protested. The company came right out and asked who the leaders were. And then they fired them. They told us, "If you don't like it, there's the door. There's another eight hundred applicants waiting to take your job."[127]

Similar precarious dynamics are in play for many immigrant workers. Most courts have held that undocumented immigrants are covered by

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[124] *See* Naomi Gerstel & Dan Clawson, *Control Over Time: Employers, Workers, and Families Shaping Work Schedules*, 44 ANN. REV. SOC. 77, 82 (2018).

[125] *See* Charlotte S. Alexander & Elizabeth Tippett, *The Hacking of Employment Law*, 82 MO. L. REV. 973, 975 (2017).

[126] Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 362 (2012).

[127] *Id.* at 365 (quoting HUMAN RIGHTS WATCH, BLOOD SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS 44, 80 (2004)).

Title VII.[128] And, yet, research suggests that precarity in the work relationship of these workers — the risk of being fired if they complain — undermines enforcement of nondiscrimination rights.[129] Moreover, the extreme precarity in the work relationship for many immigrant workers, whether undocumented or documented, is likely to affect their interactions and relations within the workplace as well. The numbers of H-2 visa workers, for example, workers who are permitted by law to enter the United States for seasonal work tied to a single employer, are increasing in the United States.[130] These workers will stay in the United States only for the duration of their work, usually one season. Relations while they are here will necessarily be tenuous and fleeting.

Scholars have emphasized parallels between this type of guest worker work and the task work that is increasingly obtained in a gig economy, including crowdsourcing.[131] Task work in the gig economy is framed as self-propelled, independent work, though it is driven by apps that create in-time requests for work from consumers, whether for rides, grocery delivery, or home cleaning. Crowdsourcing takes that arrangement one step further. In crowdsourcing, computers automate and break down tasks, and then any human-based work is outsourced to them on an individualized basis. "If the digital era broke schedules down into part-time or project-based shifts, crowdwork breaks those schedules down even further . . . from 'project' based work . . . occurring over a duration of weeks, months, or years, into 'task' based work . . . occurring in just hours, minutes, or seconds."[132]

High precarity might be problematic for bias and discrimination because individuals may have less motivation to overcome their biases and may be more likely to engage in social closure and other tools of subordination. If I don't expect to interact with someone regularly, then

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[128] *See, e.g.,* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064-65 (9th Cir. 2004) (protecting workers filing Title VII claims from discovery regarding their immigration status).

[129] *See id.* at 1064-66 (describing the harm of disclosure of immigration status for people complaining of national origin discrimination); *see also* Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 966-72 (2006) (describing conditions that make it difficult for undocumented workers to complain).

[130] *See generally* Kati L. Griffith & Shannon M. Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims*, 39 COMP. LAB. L. & POL'Y J. 111, 125-26 (2017) (describing H-2 visa requirements).

[131] Leticia M. Saucedo, *The Parallel Worlds of Guest Work and Gig Work*, 63 ST. LOUIS U. L.J. 119 (2018).

[132] Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 600 (2016).

I may be less likely to choose engagement over antagonism or avoidance.[133] High precarity might also affect worker ability to recognize discrimination when it is occurring as well as willingness to call it out when it is recognized. For example, in the judicial clerkship context, where recently graduated law students rotate through a judge's chambers for a year or two, clerks are unlikely to signal the alarm about harassment or discrimination because the clerk knows that their time is short and they will soon be moving on.[134]

Very low precarity, however, in some cases might also be problematic. Very low precarity — through low or no job turnover, for example — can contribute to insularity and facilitate strong in-group cultures and behaviors that can exclude those perceived as interlopers.[135] My point is not that low or high precarity must always be bad or good, but that precarity is a spatial feature of all workplaces, a spatial feature that is determined in large part by organizational decisions and design, and one that should be considered when assessing possible organizational mechanisms of discrimination and inequality within an employer's workplace.

3. Permeability

<u>Permeability</u>: a spatial concept of borders that can be easily passed through or not easily discerned.

Permeability is a spatial feature that involves the degree to which the workplace is organized and perceived by workers as comingled with or separate from private space. In the "dorm"-like environment popular at Google and other tech companies today, with ping pong tables and beer on tap, for example, we might expect high permeability, where workers perceive their work and private lives to be highly intertwined. Similarly, as work moves into the home through Zoom and other virtual meeting apps, we might also expect increased permeability. Work and private become merged in new ways.

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[133] *See* Tristin K. Green, *Racial Emotion in the Workplace,* 86 S. CAL. L. REV. 959, 975-81 (2013) (describing research on coping strategies for discomfort in interracial interactions).

[134] *See generally* Zachary Johnson, Note, *#CourtsToo: Constitutional Judicial Accountability in the #MeToo Era*, 46 J. LEGIS. 346 (2019) (describing hearings articulating concerns about harassment in the judiciary).

[135] *See* Albiston & Green, *supra* note 60.

In June 2020, the radio show On Point aired a segment reporting on work meetings taking place in video games.[136] Nate Crowley, Reviews Editor at Rock, Paper, Shotgun, an independent site that reports on the video game industry, explained that his work team met in the video game Red Dead Redemption 2. The game is a cowboy game (according to Crowley, it's gender neutral — at least in that "anyone can be a cowboy").[137] They "sat around the fire like cowboys" — . . . "talking about commerce as the wolves howl in the distance."[138] He describes the game as a "relaxing" environment to talk things through.[139] A team at another company took a similar approach, meeting on the video game Minecraft.[140] One interesting observation was the idea that meeting up in a video game is more like meeting up with friends than with colleagues. They put it this way: "The most obvious difference from a video conference meeting is the relationship with our colleagues. When we meet up with others in video games, they're usually our friends. So, when we are immersed in this parallel world, our professional relationships are transformed into something more like friendship."[141]

Working in virtual worlds is not entirely new. In the 2000s, a company called Second Life was featured in the media and garnered considerable corporate interest. [142] Second Life provided a 3D world where people could create their own avatar, interact with others, and even buy goods, such as furniture or clothes for an avatar.[143] In 2008,

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[136] Tim Skoog, *Radio Diary: Work Meetings, Meet Video Games*, WBUR (June 15, 2020), https://www.wbur.org/onpoint/2020/06/15/radio-diary-zoom-to-video-game-servers [https://perma.cc/UM9H-3MXF]; *see also* Geoffrey James, *Use Video Games to Spice Up Your Online Meetings and Build Teamwork: Why Settle for Zoom When You Can Interact in Your Own Virtual World?*, INC. (June 11, 2020), https://www.inc.com/geoffrey-james/use-video-games-to-spice-up-your-online-meetings-build-teamwork.html [https://perma.cc/Y8U6-XNCV].

[137] Skoog, *supra* note 136.

[138] *Id.*

[139] *Id.*

[140] Gabrielle Predko, *Fortnite, Minecraft, Second Life: Will Meetings All Be in Video Games Soon?*, WELCOME TO THE JUNGLE (July 16, 2020), https://www.welcometothejungle.com/en/articles/video-games-work-conferences [https://perma.cc/99SB-33VM].

[141] *Id.*; *see also* James, *supra* note 136 (quoting a Reddit thread commenter: "Discussions are more lively, the atmosphere less serious, more whimsical, and therefore more creative").

[142] *See* Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 963-66 (2011).

[143] *See id.*

IBM created its own virtual space there.[144] At the time, 6,000 IBM employees had their own avatars on Second Life, so IBM thought it would be a good place for promoting productivity, fostering meet-ups and holding trainings and international events at low cost.[145]

Although meeting in virtual worlds at this point is not commonplace, the idea is helpful for thinking about whether a work space is perceived as work or private — or something in between. Google wanted to arrange its workplace as a college campus, including with a dorm room feel, for a reason. Golf outings, weekday lunches at strip clubs, evenings at bars, even drug-infused sex parties in Silicon Valley raise similar, longstanding questions about work and private space.[146] Apart from the sex-based exclusion and subordination that some of these venues and activities can involve (including fostering invites only to men or sex-determined behavioral expectations), the permeability of the space can result in biased and negative intergroup interactions.

In short, permeability affects relational conditions for discrimination by shifting perceptions. The greater sense of being in private space — the feeling of "meeting up with friends," whether in a video game or a dorm-like office space — can ease relations in ways that foster productivity and creativity.[147] But sensing space as "private" can also affect biases and especially willingness to exclude and efforts to enhance feelings of in-group belonging by telling racial jokes or otherwise acting in ways that subordinate or stereotype.[148] In her work on "racetalk," sociologist Kristen Myers documents talk about race that people use when they perceive themselves to be in "private" spaces.[149] The problem is not just that racetalk is demeaning of others; it is that "[r]acetalk

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[144] *See* Scott Morrison, *A Second Chance for Second Life*, WALL ST. J. (Aug. 19, 2009, 11:59 PM ET), https://www.wsj.com/articles/SB125064110693841789 [https://perma.cc/36U3-XA8Z].

[145] *See id.*

[146] *See* EMILY CHANG, BROTOPIA: BREAKING UP THE BOYS' CLUB OF SILICON VALLEY (2018).

[147] *See* LEVY, *supra* note 3.

[148] *See* CHANG, *supra* note 146, at 57-58 (reporting on conversation with Rubenstein in which he says that beer availability (and drinking) create an "ambient sexism" and "culture of immature individuals" — "there are all sorts of comments like 'Gee, that's gay,' or 'Gee, do you have a vagina?'"); *see generally* Maria Krysan, *Privacy and the Expression of White Racial Attitudes: A Comparison Across Three Contexts*, 62 PUB. OP. Q. 506 (1998) (exploring privacy in expression of attitudes and views on policies). Of course, there can be overlap between spatial features and work cultures. Beer fridges as a spatial feature, for example, easily overlap with beer drinking as part of a work culture. *See* Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 645-46 (2005) (describing a work culture involving heavy drinking).

[149] KRISTEN A. MYERS, RACETALK: RACISM HIDING IN PLAIN SIGHT 2-3 (2005).

helps to normalize . . . racist attitudes and practices."[150] Nolan Cabrera's work in his book, *White Guys on Campus*, finds similar tendencies. Cabrera interviewed white, male college students who reported that racially insensitive jokes were the most common form of discrimination that they could think of and also that those jokes took place in white spaces that were considered "private" and thereby safe from reprobation for bad behavior.[151] Heightened levels of racetalk and other expressions of biases and stereotypes can be a way of attaining emotional solidarity with the in-group, and it is harmful both within those "private" spaces and beyond.[152]

Some research also suggests that private spaces — perceived as more central to person and socially significant — will be "guarded more carefully than peripheral space that is less important to the individual or the group."[153] This research is consistent with that of social psychologists who study the role of motivations on biases. We need to be motivated to reduce our biases.[154] Just as motivation to control one's own bias may be reduced in situations where interactions are perceived to be fleeting and unlikely to reoccur, so too might motivation be limited when in spaces perceived to be "private," as if biases and expression of biases within those spaces is less regulated by social norms against bias and discrimination.

There is reason to believe that sexual harassment is also more likely to occur in spaces perceived as informal and less constrained by formal rules of behavior.[155] In 2017, women complained of groping, lewd

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[150] *Id.* at 27.

[151] NOLAN L. CABRERA, WHITE GUYS ON CAMPUS: RACISM, WHITE IMMUNITY, AND THE MYTH OF "POST-RACIAL" HIGHER EDUCATION (THE AMERICAN CAMPUS) (2018); *see also* LESLIE HOUTS PICCA & JOE R. FEAGIN, TWO-FACED RACISM: WHITES IN THE BACKSTAGE AND FRONTSTAGE (2007).

[152] *See, e.g.*, Lu-in Wang & Zachary W. Brewster, *Dignity Transacted: Emotional Labor and the Racialized Workplace*, 53 U. MICH. J.L. REFORM 531 (2020) (discussing the way that backstage racetalk translates to stereotyping in the front stage and negative interactions between wait staff and clients).

[153] Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 444 (2010).

[154] *See* E. Ashby Plant, Patricia G. Devine, David M. Amodio, Eddie Jones-Harmon & Stephanie L. Vance, *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 J. PERSONALITY & SOC. PSYCH. 835 (2002).

[155] Unregulated (or lowly regulated) online sites are also often rampant with sexism and racism. *See* Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 238-45 (2011) (describing stories of women's experiences in cyberspace). For more on the issues of sexual harassment in cyberspace, see Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 101, 128 (2009) (discussing a popular reputation defense service in light of "the poisonous climate in sectors of the Internet");

comments, and suggestions of trading sexual favors for legislation while doing business in Sacramento.[156] A *New York Times* article noticed that "many state Capitols are famous for being old boys' clubs," and it went on to note that "[m]any, including the one in Sacramento, are in relatively isolated parts of the state, away from family, friends and onlookers, in a culture marked by late-night dinners and drinking."[157]

This is not to say that fostering personal connections through work should not be done. In fact, some research suggests that reciprocal personal sharing can enhance closeness in interracial interactions.[158] Much like with precarity, however, it is to say that when designing spaces for informal gathering, organizations should consider the implications of those spaces for intergroup interactions and long-term relations and equality.

Together, these categories of spatial features — insularity, precarity, and permeability — can open thinking about ways that organizational decisions affect success outcomes for individuals and groups in work. On the front end, acknowledging spatial features as relational conditions for discrimination can guide organizations in their decision-making. Discrimination need not be the only goal when designing workplaces, but it should be a major consideration. Moreover, on the back end, when an organization sees skewed success outcomes, such as stark disparities in promotions or pay, it should consider spatial features in identifying possible causes and solutions. As I have said before, it may not be possible to draw bright lines for each of the categories. For the category of insularity, we can safely say that low insularity will usually be better than high insularity. Workplaces with low insularity will have designed architecture and offerings to foster integration for purposes of equality and not just productivity and creativity. For precarity, too, we would expect high precarity to be problematic for interactions, but it is possible that high precarity could be balanced with other features and cultures that make status-equal interactions more likely. Permeability similarly may require balancing of concerns, but the more permeable the line between work and life, the more concerned we

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Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 Mich. L. Rev. 373, 375 (2009) (explaining that harassment impedes women's participation in online activities).

[156] Adam Nagourney & Jennifer Medina, *Women Denounce Harassment in California's Capitol*, N.Y. Times (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/us/california-women-sexual-harassment-sacramento.html [https://perma.cc/V9KR-LHSJ].

[157] *Id.*

[158] Page-Gould et al., *supra* note 73.

should be about biases and stereotyping creeping in to affect intergroup interactions.

B.   *Spatial Features as a Component of Organizational Operations*

Once we begin to see spatial features and how they can influence relations and discrimination at work, it can be tempting to think that they cover the field — what isn't a spatial feature? So far, I have focused on spatial features as a condition of discrimination in workplaces, with an emphasis on relational conditions. There are, of course, other organizational decisions that can result in discrimination or, alternatively, foster equality and nondiscrimination at work. As I will discuss in more depth in the next Part, HR decision-making processes are one category of organizational decisions that can facilitate or inhibit discrimination, a category that has taken center stage over the past several decades. Research suggests that highly subjective decision-making practices, especially in organizations where members of one group dominate in positions of power and where stereotyping is prevalent, can result in biased decisions and skewed outcomes.[159] Other HR decision-making systems might include job descriptions, recruitment techniques, and interview practices.

Work culture is another category of conditions for discrimination. Work culture has been over-shadowed by HR decision-making systems, but it is often part of the story of systemic discrimination. Work culture "defines the social, behavioral expectations of interaction that manifest in everything from informal interactional style and appearance signals to specific displays of competence."[160] Allegations of a "boys' club" atmosphere highlight work culture, as do allegations of widespread harassment. Sometimes discriminatory work cultures can support an independent legal claim, provided that the culture rises to the level of severe or pervasive and qualifies as a hostile environment,[161] but even without rising to this level, they can contribute to discrimination and

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[159] *See* William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120 (2000) (theorizing that formalization can reduce discrimination by reducing the influence of bias on decisions). This research does not suggest, however, that bureaucratic control is always the answer. *See, e.g.*, Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589 (2006) (suggesting that formalization in decision-making processes is not as important as the absence or presence of bureaucratic accountability).
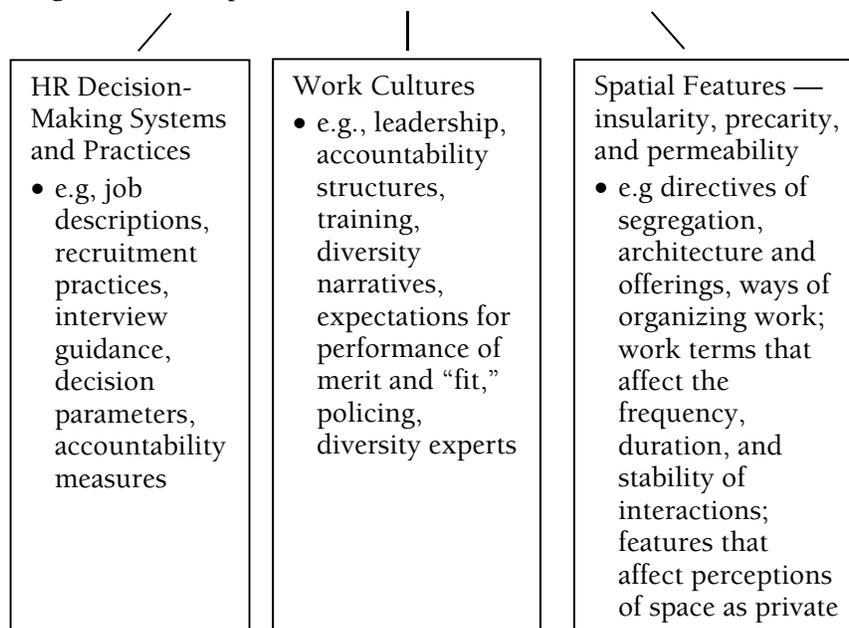
[160] Green, *supra* note 12, at 627.

[161] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (requiring harassment be severe or pervasive to amount to a violation of Title VII).

inequality in success outcomes by entrenching narratives of merit that rest on stereotypes and in-group favoritism.[162] Moreover, discriminatory work cultures are not merely social problems transferred to the employment context. Rather, work cultures, like spatial features, are created and altered through organizational decisions.[163]

These categories are interrelated and intersecting. Organizational decisions as a whole affect bias, discrimination, and success outcomes, and keeping in mind how decisions work together is key for devising an effective strategy for reform. I call the overarching umbrella concept "organizational operations." Visually, we might represent the three categories across organizational operations like this:

Organizational Operations that Create Conditions for Discrimination

HR Decision-Making Systems and Practices	Work Cultures	Spatial Features — insularity, precarity, and permeability
• e.g, job descriptions, recruitment practices, interview guidance, decision parameters, accountability measures	• e.g., leadership, accountability structures, training, diversity narratives, expectations for performance of merit and "fit," policing, diversity experts	• e.g directives of segregation, architecture and offerings, ways of organizing work; work terms that affect the frequency, duration, and stability of interactions; features that affect perceptions of space as private

Some scholars have used the word "architecture" as a metaphor to capture the full set of organizational decisions and structures that can result in discrimination. In her influential article, *The Architecture of Inclusion*, Susan Sturm uses the term in this way.[164] However, I use

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[162] *See* Green, *supra* note 12.

[163] *Id.*

[164] Sturm, *supra* note 14. Elizabeth Emens identifies architecture as a subset of structural constraints in her work on intimacy. *See* Elizabeth F. Emens, *Intimate*

"operations" for two reasons. First, I seek to expose architecture more literally as a feature of the workplace, and for this reason using "architecture" metaphorically to describe the overarching concept may be unduly confusing. Second, "operations" may more easily denote the active nature of organizational decisions and their ability to change. Even architecture is rarely set in stone, and there are admittedly costs to changes in many organizational practices, but operations are matters that organizations make decisions about every day. Organizational operations are open to regular assessment and capable of being altered in light of emerging data.

III.   SHIFTING PERSPECTIVE

With the goal of bringing spatial features into conversation about when and why discrimination takes place within organizations, I consider in this Part the extent to which courts currently acknowledge spatial features as relational condition, what I call the "prevailing perspective" on spatial features. I then make three principal recommendations for shifting this perspective: that advocates and courts (1) consider directives of segregation as discrimination; (2) consider the full range of spatial features — insularity, precarity, and permeability — in framing and understanding Title VII litigation and in devising solutions; (3) hold onto place in work by being aware of ways that perceptions of "private" space can affect biases and behavior and by resisting tight boundary drawing around work space.

A.   *The Prevailing Perspective*

Title VII of the Civil Rights Act prohibits discrimination based on race, color, sex, religion, and national origin.[165] For some time now, courts — and, accordingly, litigants — have emphasized individuals and key employment decisions such as pay or promotion decisions when conceptualizing discrimination. This is not especially surprising when it comes to individual claims of discrimination; allegations that a manager, for example, passed a worker over for a promotion because of their race often focus on the reasons for the promotion decision. But Title VII also allows plaintiffs to sue collectively and to establish systemic discrimination, either by proving that discrimination is the regular rather than unusual practice within an institution (systemic

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Discrimination: The State's Role in the Accidents of Sex and Love, 122 HARV. L. REV. 1307, 1393-96 (2009).

[165] 42 U.S.C. § 2000e-2 (2018).

disparate treatment theory) or that a practice that the employer uses has a disparate impact on a protected group and cannot be justified by business necessity (disparate impact theory).[166]

Since the 1970s, the law, as decided by the Supreme Court, has permitted plaintiffs to use statistics to prove systemic discrimination, including systemic disparate treatment.[167] Specifically, the Court held that statistical analyses can support an inference that bias operating within an organization is more likely the explanation for an observed outcome than outside factors or chance.[168] What's interesting when thinking about the courts' perspective on spatial features is that in the early years, courts tended not to focus closely on the precise organizational mechanisms for discrimination at all. Rather, they focused on the statistical analyses, together with any other evidence, such as anecdotal testimony, that suggested that discrimination within the organization caused the observed disparity.[169] I say this is interesting because one might imagine that as we have learned more about how discrimination operates over the past fifty plus years, courts would open the lens even further to acknowledge that various and multiple organizational practices may be working together to result in biased decisions and disparate outcomes. Rather than opening the lens, however, courts have been pushing it ever more tightly closed. Indeed, the trend in the employment discrimination area has been in quite the opposite direction of relations and relational conditions, much less spatial features.

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[166] *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-40 (1977) (accepting use of statistics to prove systemic disparate treatment); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (establishing what is now known as disparate impact theory); *see also* 42 U.S.C. § 2000e-2(k) (codifying disparate impact theory). For argument that commentators tend to mistakenly frame the concepts of disparate treatment and disparate impact as wholly distinct, thereby unduly narrowing systemic disparate treatment theory, see Tristin K. Green, *The Juxtaposition Turn:* Watson v. Fort Worth Bank & Trust, 50 Seton Hall L. Rev. 1445 (2020).

[167] Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 306-08 (1977); *Teamsters*, 431 U.S. at 339-40. Although varying in sophistication and focus, the statistical analyses in early cases typically compared the actual makeup of an employer's job category with what one would expect the makeup of that job category to look like, assuming nondiscrimination, given a relevant labor pool.

[168] *See Hazelwood*, 433 U.S. at 307-08 (stating that statistical analysis alone can be sufficient).

[169] *See id.* (relaying anecdotal and other evidence to support an inference of discrimination within the school district in hiring of teachers); *see also Teamsters*, 431 U.S. at 337-38 (pointing to statistics and anecdotal evidence to buttress an inference of discrimination within the company rather than some other cause).

Beginning in the mid-1990s, plaintiffs in private class actions, as well as government plaintiffs, pointed increasingly to decentralized, highly subjective decision-making processes at the pay and promotion level as the alleged organizational mechanism for systemic discrimination.[170] Identifying subjectivity in decision-making as a mechanism for discrimination was not new — some of the most well-known systemic discrimination cases, including the seminal *Hazelwood* case, alleged that bias was being exercised through subjectivity in decisions.[171] But the extent of the emphasis on a specific organizational decision-making process as causal explanation for observed disparities was new. Case after case brought since the late 1990s has focused on organizations' processes for pay and promotion decisions and especially on the subjective components of those processes.[172]

There are various reasons why plaintiffs may have turned to focus closely on decision-making processes, particularly in systemic claims. The rise in attention to cognitive bias may have played a role, as may have a shift toward individualized accounts of discrimination in the media, accounts that tend to emphasize decisions in identifiable moments and decisions in isolation rather than over time or in context.[173] Another possible cause is the conservative resistance to the use of statistics in systemic cases. As mentioned, the Supreme Court held early on that statistics could be used to establish a pattern or practice of discrimination, and that law has not been overturned.[174] But there has been a chipping away at the edges of that law through heightened expectations that plaintiffs will identify a precise organizational policy or uniform practice that drives any observed disparities.

The most recent push came in the Supreme Court's 2011 class certification decision, *Wal-Mart v. Dukes*.[175] In that case, the plaintiffs, seeking class certification under Rule 23 of the Federal Rules of Civil Procedure, alleged that Wal-Mart's practice of having its managers make

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[170] *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 682-89 (2003) (describing the rise of these cases).

[171] *Hazelwood*, 433 U.S. at 302 (noting subjectivity in system of hiring by principals: "The only general guidance given to principals was to hire the 'most competent' person available, and such intangibles as 'personality, disposition, appearance, poise, voice, articulation, and ability to deal with people' counted heavily.").

[172] *See* Green, *supra* note 170.

[173] *See generally* GREEN, *supra* note 116, at 20-42 (detailing possible causal threads for increased attention to individuals and organizational innocence).

[174] *See supra* notes 167–169 and accompanying text.

[175] 564 U.S. 338 (2011).

pay and promotion decisions in their subjective discretion and without adequate oversight had led to disparities in pay and promotions between men and women and that Wal-Mart had accordingly engaged in a pattern or practice of discrimination in violation of Title VII.[176] The Supreme Court held that the plaintiffs had not presented sufficient ("significant") evidence that Wal-Mart had engaged in a "general policy of discrimination" to meet the commonality requirement for class certification.[177] Among other things, the Court stated that what plaintiffs needed to do was point to a "uniform employment practice" that would tie all of the plaintiffs' claims together.[178] According to the Court:

> The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.[179]

Not surprisingly, plaintiffs seeking class certification after *Wal-Mart* have narrowed their focus even further than before, seeking to identify a uniform practice or policy. In the recent lawsuits against Uber and Microsoft, for example, plaintiffs pointed to the employers' use of a "stack ranking" process in which managers are required to rank their employees along a numerical ladder, even if two employees' performances are otherwise equivalent.[180] This ranking process, plaintiffs argued, serves as a mechanism for discrimination against women and racial minority employees in pay and promotion decisions because it triggers gendered and racial biases in the managers doing the rankings.[181] In another recent case, *Chen Oster v. Goldman Sachs*, plaintiffs similarly drill down to specific decision-making practices, this time a 360-degree evaluation system and a process of "quartiling"

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[176]   *Id.* at 345-48.

[177]   *Id.* at 353-55.

[178]   *See id.* at 355.

[179]   *Id.*

[180]   *See* Nicholas Iovino, *Uber Settles Race & Gender Bias Suit for $10 Million*, COURTHOUSE NEWS SERV. (Mar. 27, 2018) https://www.courthousenews.com/uber-settles-race-gender-bias-suit-for-10-million/ [https://perma.cc/LKL5-ZGCQ] (describing plaintiffs' claims involving stack ranking). *But see* Moussouris v. Microsoft Corp., 799 Fed. Appx. 459 (9th Cir. 2019) (affirming district court denial of class certification).

[181]   *See* Iovino, *supra* note 180.

candidates for promotions into categories similar to the stack ranking identified at Uber and Microsoft.[182]

There are numerous problems with this focus on individual decisions in precise moments of time and specific organizational processes for decision-making as the core, if not the exclusive scope of employment discrimination law. One is that it squeezes the lens so tightly that neither relations nor organizational decisions other than those of HR process can come into view. I will come back to this point below. I start this Part from another angle to take a closer look at what courts are doing specifically with spatial features in employment discrimination cases. The reality is that spatial features rarely come up in employment discrimination cases. Examining the few cases where spatial features, including segregation, are expressly raised, however, allows us to see some of the ways in which courts downplay spatial features and positions us to consider ways in which we might begin to introduce spatial features into conversations about causes and solutions.

1. Sidelining Segregation

Segregation has played a unique role in the history of our country. Despite express governmental and private reliance on directed segregation as a tool for white supremacy — and, much later, judicial repudiation of segregation, naming it as a form of unconstitutional discrimination[183] — we see courts sidelining segregation from inquiry in Title VII cases across the years.

One way courts have sidelined segregation is through myopic attention to a narrow question: whether and when data showing stratification in jobs within a workplace might be used to prove systemic

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[182] Chen-Oster v. Goldman, Sachs & Co., 325 F.R.D. 55 (S.D. N.Y. 2018) (certifying class). As noted above, there has been some recognition by litigants, courts, and even work organizations that work cultures can play a role in discrimination. Consideration of work cultures often takes the form of evidence of a "boys club" or other culture that facilitates bias against women. For argument that there has been a rise in attention to organizational culture by organizations, in part due to shareholder derivative actions and insurance pressures, see generally Amelia Miazad, *Sex, Power, & Corporate Governance*, 54 UC DAVIS L. REV. 1913 (2021).

[183] *See* Brown v. Bd. of Educ. I, 347 U.S. 483, 490 (1954). Subsequently, in *Brown v. Bd. of Education II*, 349 U.S. 294 (1955), the Supreme Court used the term "discrimination" rather than "segregation," which some see as a signal of a turning point away from commitment to antisubordination in constitutional equal protection law. *See* Reginald Oh, *Discrimination and Distrust: A Critical Linguistic Analysis of the Discrimination Concept*, 7 U. PA. J. CONST. L. 837, 857 (2005); *see also* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472 (2004).

discrimination. The Supreme Court's 1989 decision in *Wards Cove v. Atonio* serves as an example of this sidelining.[184] The case involved staffing at several large Atlantic-salmon canning companies.[185] The canneries were located on the coast of Alaska, and much of the canning work took place at those canneries in the summer months of the salmon runs.[186] Lower paying cannery jobs were filled mostly by nonwhites, while the higher paying, non-cannery jobs were filled mostly by whites.[187]

A group of cannery workers sued, alleging discrimination on the basis of race in filling the non-cannery jobs and stating class systemic disparate treatment and disparate impact claims as well as individual claims of discrimination under Title VII.[188] The plaintiffs presented statistics showing that the workforce at each of the defendant companies was substantially Filipino and Alaskan native (approximately forty-three percent) and showing that those workers were employed almost entirely in the lower paying cannery jobs, with the higher paying non-cannery jobs filled by whites.[189] They presented evidence that the jobs were labelled according to race, with people referring to the cannery workers as the "Native crew" and the "Filipino Cannery Workers" and laundry and mail marked for the "Oriental bunkhouse."[190] And they submitted evidence of physical segregation: that predominantly white non-cannery workers and predominantly nonwhite cannery employees "live in separate dormitories and eat in separate mess halls."[191] They also provided anecdotal testimony from individual cannery workers who sought non-cannery positions.[192] They argued that defendants' practices of a rehire preference, separate hiring channels, refusal to promote from within, nepotism, a language requirement, and highly subjective decision-making (with hiring managers instructed to choose the "best applicant for the job") together resulted in a segregated workforce and denial of jobs in violation of Title VII.[193]

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[184] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[185] *See id.* at 646.

[186] *Id.*

[187] *Id.* at 647.

[188] *See id.* at 648.

[189] *See id.* at 647.

[190] Atonio v. Wards Cove Packing Co., 1983 WL 651, at *16 (W.D. Wash. Dec. 6, 1983).

[191] *Wards Cove*, 490 U.S. at 647.

[192] *Atonio*, 1983 WL 651, at *18-20 (describing the alleged individual instances).

[193] *See Wards Cove*, 490 U.S. at 647-48.

The district court judge in the case, sitting as fact finder, found for the defendants on all of the plaintiffs' claims.[194] The judge found that the plaintiffs did not prove their systemic disparate treatment case because they had not accounted for the low percentage of nonwhite workers in the areas surrounding the Oregon and Washington offices,[195] and because the individual accounts used to support the systemic claim involved oral inquiries about positions rather than formal applications.[196] The judge also found that, in his words, "defendants' evidence established that regardless of the manner in which a prospective employee came to the attention of hiring personnel, the person was evaluated according to job related criteria."[197] The judge did not expand on what that evidence entailed, other than stating, "The testimony showed that numerous white persons who 'knew' someone were not hired [into a non-cannery job] due to inexperience, and whites hired were paid no more than nonwhites [in those jobs]."[198] Finally, the judge found that none of the twenty-three plaintiffs alleging individual claims had proven discrimination.[199]

At the time, a question was percolating among the lower courts about whether subjective decision-making practices could be challenged using disparate impact theory. The district court judge in the *Wards Cove* case refused to consider the plaintiffs' claims under disparate impact theory,[200] and the appellate court panel affirmed.[201] Sitting en banc, the appellate court reversed, holding that subjective decision-making practices could be challenged using disparate impact theory.[202]

Prior to the Supreme Court's decision in *Wards Cove*, the Court had decided in another case, *Watson v. Fort Worth Bank & Trust,* that

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[194] *See id.* at 648.

[195] *Atonio*, 1983 WL 651, at *25.

[196] *Id.* The judge also found that the individuals who inquired lacked the necessary skills for some of the non-cannery jobs, although some of the jobs were amenable to learning on the job. *Id.*

[197] *Id.* at *28.

[198] *Id.*

[199] *Id.* at *18-21.

[200] *Id.* at *22-23. The court did consider the language requirement and nepotism practice using disparate impact theory, rejecting the claims. *Id.* at *29.

[201] Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1133 (9th Cir. 1985).

[202] Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1482 (9th Cir. 1987) (en banc). On remand, the Ninth Circuit panel held that the district court had erred in portions of its disparate impact analysis, including its failure to credit the comparative statistics presented by plaintiffs when the job qualifications of the skilled positions were being challenged. *See* Atonio v. Wards Cove Packing Co., 827 F.2d 439, 44-45 (9th Cir. 1987).

subjective practices could be challenged using disparate impact theory,[203] thereby setting *Wards Cove* up for questions about how plaintiffs can prove disparate impact, including the question of whether stark segregation data and other evidence of segregation like that presented by the plaintiffs in the case could be sufficient.[204] In its *Wards Cove* decision, the Supreme Court focused almost exclusively on the plaintiffs' evidence of the stark state of segregation in jobs.[205] In addition to a substantial portion of the opinion dedicated to reformulating disparate impact theory (some of which Congress later overturned in the 1991 Civil Rights Act), the Court held that statistical evidence of job stratification itself is not sufficient to establish a disparate impact.[206]

The Supreme Court's decision in *Wards Cove* sidelined segregation by isolating evidence of stratification from broader context, denoting it as a neutral component of a workplace rather than something to be suspected. Prior to *Wards Cove*, stratification evidence raised red flags, even if it may not have singlehandedly established a Title VII violation.[207] The majority opinion in *Wards Cove*, in contrast, made clear that courts need carry no suspicions about evidence of stratification, nor need they consider it together with other segregation evidence.[208] In doing so, the Court sidelined segregation to an easily isolated, neutral data inquiry rather than considering it within a broader contextual reality with a deplorable, deeply troubling history. The

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[203] Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 993 (1988).

[204] The Supreme Court construed that panel's decision as "rely[ing] solely on respondents' statistics showing a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in the noncannery positions" for establishing a prima facie case of disparate impact. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650 (1989).

[205] The Supreme Court opinion followed substantially the brief amicus curiae submitted by the United States in the case, written by Charles Fried, William Bradford Reynolds, and Roger Clegg, among others. *See generally* Brief for the United States as Amicus Curaie Supporting Petitioners, *Wards Cove*, 490 U.S. 650, (No. 87-1387).

[206] *Wards Cove*, 490 U.S. at 674.

[207] *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 337-38 (1977) (referring to segregation evidence as part of the DOJ's statistical evidence that established a prima facie case of systemic disparate treatment); *see also id.* at 365 (noting that a segregated workforce can send a signal that one need not apply); Griggs v. Duke Power Co., 401 U.S. 424, 427 & n.2 (1971) (noting a history of segregation at Duke Power and failure to hire a Black man into a historically white job category until six months after a charge had been filed with the EEOC).

[208] Indeed, the Ninth Circuit had not taken the statistical evidence in isolation but rather in conjunction with the evidence of segregation to find causation. According to the panel, "The segregated housing aggravated the isolation of the non-white workers from the 'web of information' spread by word-of-mouth among white people about the better paying jobs." Atonio v. Wards Cove Co., 827 F.2d 439, 448 (9th Cir. 1987).

NAACP brief to the Court in *Wards Cove* made this point, as did Justice Blackmun in his dissenting opinion, where he noted:

> The harshness of these results is well demonstrated by the facts of this case. The salmon industry as described by this record takes us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which, as Justice Stevens points out, resembles a plantation economy.[209]

The majority decision in *Wards Cove* exposes the Supreme Court's discomfort with segregation within workplaces as a basis for Title VII violation. Other cases exhibit similar willingness to push segregation aside in antidiscrimination inquiries. In the *Watson* case mentioned above, for example, the plaintiff, a Black woman, had applied several times for a teller position at the bank before she was hired in 1973 as a proof operator, not a teller.[210] She and the other four Black employees of the bank at the time worked in the back room and had no contact with the public. Of the other four Black employees, two printed checks in the basement, one was a kitchen attendant, and the last was a porter. Despite an appellate court dissenting opinion pointing this out,[211] the Supreme Court made no mention of this reality.

Lower courts have expressed similar reluctance in various ways, including in the sex-based discrimination context. In the well-known *EEOC v. Sears, Roebuck* case, for example, the appellate court accepted Sears's argument that women simply lacked interest in higher-paying commission jobs. The EEOC had alleged that women were hired into non-commission jobs, which were usually in-store jobs, while men were hired for the higher-paying commission jobs, which frequently involved outside-of-store house visits.[212]

Although these cases exhibit a reluctance to consider segregation, the Court has never expressly denied that a directed act of segregation is discrimination under Title VII. A recent case out of the Seventh Circuit, *EEOC v. AutoZone*, does just that.[213]

Kevin Stuckey, a Black man whose complaint to the EEOC resulted in the EEOC lawsuit against AutoZone, started working for the auto-parts retailer as a salesperson in 2008 and worked his way up to sales

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[209] Wards Cove Packing Co. v. Atonio, 490 U.S. at 662 (Blackmun, J., dissenting).

[210] Watson v. Fort Worth Bank & Tr., 798 F.2d 791, 793 (5th Cir. 1986).

[211] *Id.* at 800 (Goldberg, J., dissenting).

[212] EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 307 (7th Cir. 1988).

[213] EEOC v. AutoZone, Inc., 860 F.3d 564 (7th Cir. 2017).

manager.[214] During his four years at the company, he was transferred to several different stores, each time without change in pay, benefits, or job responsibilities.[215] In 2012, Stuckey was transferred out of a store on Kedzie Avenue in Chicago, which was located in "an area largely populated by Hispanics."[216] The facts in the case were disputed, but Stuckey testified that when the district manager responsible for the transfer called him to let him know, Stuckey asked the reason for the transfer.[217] The manager responded that he was trying to "keep [the Kedzie store] predominantly Hispanic" and that "sales [were] down" and "he was basically trying to get the sales back up to where they're supposed to be at."[218]

Stuckey initiated a complaint with the EEOC, which filed suit on his behalf. In addition to dignitary harm to Stuckey, the EEOC argued that AutoZone's practice of designating the Kedzie store as the "Hispanic" store and another store as the "African-American" store deprived people who did not belong to the designated group of employment opportunities at their preferred geographic location.[219]

After discovery, AutoZone moved for summary judgment, which the district court granted. On appeal, the Seventh Circuit affirmed. The court began by "assum[ing] for the sake of argument" that the there was a material factual dispute about whether AutoZone intentionally segregated Stuckey because of his race, thereby saving the EEOC from summary judgment on that ground.[220] Nonetheless, the court went on to grant summary judgment on the ground that the EEOC had presented no evidence that "the lateral transfer deprived or tended to deprive [Stuckey] of any employment opportunity or otherwise adversely affected his employment status."[221] According to this court, the directive of segregation itself is a not a violation of Title VII.

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[214] *Id.* at 566.

[215] *Id.*

[216] The court noted that that "the clientele at the store reflects the surrounding neighborhood." *Id.*

[217] *Id.* at 566-67.

[218] *Id.*

[219] EEOC v. AutoZone, 875 F.3d 860, 861-62 (7th Cir. 2017) (dissenting from denial of rehearing en banc).

[220] *AutoZone, Inc.*, 860 F.3d at 568.

[221] *Id.* at 570 (removed emphasis in original on "tended").

2.   Marginalizing Glimmers of Spatial Features & Siphoning into Harassment

Other spatial features that tend to surface in discrimination cases today are décor or surroundings related, features that might skew conditions for relations, when they occur, toward stereotyping and biases. Pornography is one example. While pornography lining the walls of a workplace may seem an obvious form of discrimination, courts have struggled with the question of whether untargeted behavior can serve as a basis for a Title VII lawsuit. Indeed, because these cases are generally brought as harassment cases, the inquiry tends to be individualized, focusing on specific individuals' harassing behavior and on how the plaintiff experienced the specific behavior (and how a reasonable person would have experienced the behavior).

In one recent case, *Reeves v. CH Robinson Worldwide, Inc.*, the plaintiff, Ingrid Reeves, worked in an open-concept space with a number of other department employees.[222] She was the only woman in the department, and she objected to the sexually explicit and derogatory language used by some of the men, including use of "fucking whore" and talking about their sexual exploits with women.[223] Her coworker also insisted on playing a crass radio show that aired "sexually offensive language, jokes, comments, advertisements, and songs."[224] The district court judge granted summary judgment for the employer on the ground that "Reeves's male coworkers did not subject her to foul language or the radio broadcast in an attempt to embarrass Reeves or to get a reaction from Reeves."[225] According to the court, the language and playing of the radio show were not "motivated by Reeves's sex" because the language was spoken in front of both men and women and because the radio show played in the common area.[226]

Spatial features are almost never raised as a principal component of systemic cases. Sometimes plaintiffs have mentioned spatial features involving office placement or seating assignment, but these allegations tend to be individualized and are often framed or understood as peripheral to the case. In her lawsuit against the venture capital firm Kleiner Perkins, for example, Ellen Pao claimed that she was provided

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[222] Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 803 (11th Cir. 2010) (en banc).

[223] *Id.* at 804.

[224] For more detail of the language and talk show, see Reeves v. CH Robinson Worldwide, Inc. (No. 2:06-CV-358-IPJ), 2006 WL 6903105, at *1-6 (N.D. Ala. Dec. 11, 2006).

[225] *Id.* at *10.

[226] *Id.* The appellate court reversed en banc. *See Reeves*, 594 F.3d 798.

a seat on the outside of the meeting table rather than at the table as evidence that sex-based bias influenced the firm's decision not to promote her to partner.[227] At trial, however, the jury focused almost exclusively on Pao's evaluations as compared to her male colleagues, giving little weight to other evidence of bias.[228] Chen Oster, one of the named plaintiffs in the recent class action lawsuit against Goldman Sachs, noted that her desk was placed for a time near the administrative assistants, who were primarily women.[229] The plaintiffs in the *Chen Oster* case did include spatial features more broadly in their factual allegations under a heading "professional support"; they alleged that women were seated on the periphery of the trading floor while junior men were seated in the center of the floor, giving them more access to senior managers who sit in the center of the floor. [230] Despite including these factual allegations, nothing more was made in the complaint, including in the alleged claims of discrimination, about spatial features of the workplace.

3. Ignoring Precarity

Precarity also occasionally surfaces in employment discrimination scholarship. There is a rich scholarship, for example, on ways that precarity, particularly for low-wage working immigrants and undocumented workers, can serve as disincentive for claims-making under Title VII and other nondiscrimination and worker safety statutes.[231] Recent work also emphasizes precarity in job status as a structural risk factor for sexual harassment in some industries.[232]

There has been less attention, however, to the broader ways that precarity in the work relationship can affect relations at work, including among employees across the wage spectrum. Recent litigation around

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[227] *See generally* GREEN, *supra* note 116, at 103-05 (discussing the *Pao* case).

[228] *See id.* at 17.

[229] Complaint at 11, Chen-Oster v. Goldman, Sachs & Co. (No. 10-CV-06950-LBS-JCF), 2010 WL 3595826 (2d Cir., Sept. 15, 2010).

[230] *Id.* at 8.

[231] *See, e.g.*, Gordon & Lenhardt, *supra* note 90 (critiquing "existing theories of the link between work and citizenship for failing to attend to the realities of immigration, job differentiation within the universe of low-wage work, and the extent to which a group's race, formal citizenship status, and history affect its relationship to work"); Alexander, *supra* note 126 (explaining that a large percentage of poultry workers are immigrants and that they "are rarely union members and have few avenues for raising complaints and making claims").

[232] *Chart of Risk Factors for Harassment & Responsive Strategies*, EEOC, https://www.eeoc.gov/chart-risk-factors-harassment-and-responsive-strategies (last visited Jul. 16, 2021) [https://perma.cc/Q9JH-LY48].

shift scheduling and gig economy workers, for example, largely ducks the role that precarious work relationships can play in relations and discrimination. Instead, precarity aspects of employment are often considered exclusively as employment and labor law deficiencies related to employee contracts, visa concerns, or immigration abuses rather than in the context of a broader understanding of discrimination.[233]

4. Drawing Tight Boundaries Around Work Space

Courts do seem to acknowledge that work relationships can extend beyond the physical work site, especially when it comes to retaliation and harassment. The Supreme Court has held that retaliatory action against an employee for opposing a practice that Title VII forbids or participating in a Title VII investigation need not be employment related.[234] Moreover, it held that the action need not occur in the workplace, stating, "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace."[235] And in *Blakey v. Continental Airlines*, a Title VII case decided by the New Jersey Supreme Court, the court held that harassment on a virtual, employer-supported online bulletin board site was sufficiently similar to harassment in an on-site break room to amount to harassment at work.[236]

Beyond this surface-level understanding that a workplace can stretch beyond physical site borders, however, courts seem to miss the importance of permeability to discrimination. Indeed, rather than acknowledging the ways that space perceived as private can foster stereotyping and discrimination, courts tend to protect those spaces that they see as uniquely "male" or as tied to outside-of-work interests. In fact, the Supreme Court has noted that the standard for harassment should be different in an all-male locker room than in a mixed-sex, on-site meeting room.[237] Moreover, some judges have argued that all-male worksites should be protected from sex-based discrimination claims

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[233] For scholarship seeking to bring employment discrimination into the scholarship on immigration abuses, see generally Angela D. Morrison, *Why Protect Unauthorized Workers? Imperfect Proxies, Unaccountable Employers, and Antidiscrimination Law's Failures*, 72 BAYLOR L. REV. 117 (2020); Maria L. Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 39 BERKELEY J. EMP. & LAB. L. 117 (2018).

[234] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

[235] *Id.* at 63.

[236] Blakey v. Continental Airlines, 751 A.2d 538, 543 (N.J. 2000).

[237] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81-82 (1998).

brought by men on those sites, at least if the allegation involves a sexualized work environment.[238]

B.   *The Shifted Perspective*

A shifted perspective will bring spatial features into the conversation about organizational decisions and discrimination, especially systemic discrimination, in the employment context. Organizational leaders seeking to reduce discrimination and improve success outcomes for women and people of color as well as legal advocates, judges, and agencies should consider how spatial features — insularity, precarity, and permeability — might contribute to observed disparities. In this Section, I explore some of the ways that spatial features can be incorporated into our thinking about discrimination under Title VII of the Civil Rights Act. It is worth noting here that although the categories of spatial features help us see and understand spatial features as mechanisms for discrimination, they do not tell us anything specific about what the law should do. Indeed, we would be missing a complex reality to oversimplify prescriptions by mapping them onto the categories. For this reason, I seek to designate entry points for incorporating the three spatial features categories into our thinking about discrimination (and its solutions) rather than to map narrow doctrinal recommendations onto the three categories separately. In doing so, I also emphasize how seeing spatial features as a condition for discrimination can draw from and strengthen intersections across fields.

1.   Directed Segregation as Discrimination & Theorizing Work as "Place"

Physical separation of people has long been a tool of subordination and a foundation for sustained inequality in the United States. Segregation — the act of segregating people on the basis of race especially, regardless of the reason for doing so — is itself problematic, and so is often the space that is created from segregation. We should be ready to reestablish commitment to integration and to examining the spaces in which we interact.

a.   *Revisiting* Auto Zone: *Directed Segregation as Discrimination*

Understanding the relevance of spatial features as a condition of discrimination means that directives of segregation should constitute

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[238] *See* EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 470-76 (5th Cir. 2013) (Jolly, J., dissenting).

discrimination in violation of Title VII. *AutoZone* involved an individual claim of discrimination, but directives of segregation are at bottom declarations that employees should be separated based on a protected group status. Such a declaration by its nature thereby deprives individuals of opportunities and constitutes discrimination in violation of subsection (a)(2) of the Title VII nondiscrimination provision, section 703. This section states that it is an unlawful employment practice for an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin."[239]

The Seventh Circuit Court of Appeals in *AutoZone* held otherwise on the ground that the EEOC had provided no evidence that Stuckey's lateral transfer deprived him or tended to deprive him of employment opportunities.[240] According to the court, while the EEOC was not required to present evidence that Stuckey suffered an "adverse employment action" as it would have been required to do if it were seeking relief under (a)(1) of the Act, it was nonetheless required to present evidence that the lateral transfer "tended" to deprive Stuckey of employment opportunities.[241] The court rested its decision on the view that a lateral transfer "involving no reduction in pay and no more than a minor change in working conditions" was insufficient.[242] In a dissenting opinion from the denial of rehearing en banc, judges Wood, Rovner, and Hamilton rightly pointed out that this position of "separate-but-equal" is "contrary to the position that the Supreme Court has taken in analogous equal protection cases as far back as *Brown v. Board of Education*."[243] Indeed, the act of segregating employees on the basis of race into different work spaces separates individuals of different races in ways that will affect interactions and biases — and is a territorial separation that comes with its own visual and particular and troubling history.[244]

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[239] 42 U.S.C. § 2000e-a(2).

[240] EEOC v. AutoZone, Inc., 860 F.3d 564, 569-70 (7th Cir. 2017).

[241] *Id.* at 569.

[242] *Id.* (quoting Herrnreiter v. Chicago Hous. Auth., 315 F.3d 742, 744 (7th Cir. 2002)).

[243] EEOC v. AutoZone, Inc., 875 F.3d 860, 861 (7th Cir. 2017) (denial of petition for rehearing en banc).

[244] *See* Boddie, *supra* note 153, at 424 (noting that by focusing only on individuals and comparative evidence, asking the question, *would a non-Black person be treated differently?*, "overlooks the dignity harms that result . . . from the exclusion from territorialized white space"). *AutoZone* was a case less of exclusion and more of racial profiling (assuming Hispanics would be better sales employees in a Hispanic

Several recent cases (and ones long past) have also alleged channeling, which could be understood as a form of segregation. For example, the Department of Labor case against Oracle alleged that women and Black hires were channeled into lower paying positions.[245] Ethnographic research has also reported young, Black fast-food workers disproportionately being given the night shift.[246]These employer actions might be considered directives of segregation, much like *AutoZone*.[247]

b.   Work as "Place": Theorizing, Imagination, and Context in Segregation and Discrimination

Seeing spatial features as a condition for discrimination — and thereby re-enforcing the idea of work as "place" — dovetails with the rich scholarship on "colorlined" and male-defined spaces and draws history and context more expressly into our inquiries. Legal scholars have been hard at work on this project in the areas of policing, housing, and education.[248] For example, in her book, *Hate Thy Neighbor: Move-in Violence and the Persistence of Racial Segregation in Housing*, Jeannine Bell describes the phenomenon of "move-in violence" by whites when Blacks arrive into what are perceived as white residential spaces.[249] Bell and others are exploring how racial violence, including by citizen policing, can be tied to a "last stand" by whites to preserve their neighborhoods' whiteness and prevent white flight.[250] And Shaun Ossei-

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neighborhood), but the racialized space that is created is nonetheless troubling in its visual of space and competencies.

[245] *See* OFCCP v. Oracle Am., Inc., 2017-OFC-00006, ALJ's Recommended Decision (Dep't of Labor Sept. 22, 2020) (finding no discrimination).

[246] Stack, *supra* note 91, at 202. On racial and gender stratification within Silicon Valley, see Hossfeld, *supra* note 90, at 39-40.

[247] The law could also consider the state of segregation in extreme cases — such as when all workers in a job category are from a protected group (the "inexorable 100%") — to warrant an inference of discrimination, requiring the employer to "explain the dynamics underlying the segregated workplace." Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447, 503-04 (2008).

[248] *See generally* Capers, *supra* note 26, at 45 (describing the role of race in space-making).

[249] JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING (2013).

[250] *Id.* at 54; Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "Out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1171-72 (2017) (describing the neighborhood where George Zimmerman killed Trayvon Martin as having "just entered the beginning of its 'last stand' in preserving its whiteness"). *See generally* Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020) (advancing policing for integration).

Owusu in recent work interrogates the history and current use of dress codes and gender-based pricing to reveal ways in which these policies facilitate creation of racialized leisure space.[251]

Employment in the United States has its own history of exclusion and segregation along both race and sex lines. Not only were jobs segregated during Jim Crow, but so were physical spaces within workplaces. Blacks were forced to use separate entrances and exits, and partitions were used to demarcate white and Black space within buildings.[252] In her scholarship in the constitutional law arena, Elise Boddie reminds us that space has social meaning and can be "'decoded' to reveal 'spatial practices.'"[253] Moreover, she points out, "[i]t is important to recognize that racialized spaces represent more than a physical set of boundaries or associations: They correlate with and reinforce cultural norms about spatial belonging and power."[254] While Boddie focuses on government decisions and equal protection law — seeking to use the state of racialized space as evidence of the "intent" required in that context[255] — a similar idea could be applied in the realm of private employment. The argument would be that in some cases racialized space itself might establish employer intent to exclude or segregate on the basis of a protected characteristic.[256] This kind of re-working of the narrative of

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[251] Shaun Ossei-Owusu, *Velvet Rope Discrimination*, 107 VA. L. REV. 683 (2021). *See generally* Nina Held, *"They Look at You Like an Insect that Wants to Be Squashed": An Ethnographic Account of the Racialized Sexual Spaces of Manchester's Gay Village*, 20 SEXUALITIES 535 (2017) (identifying strategies of racialization in space).

[252] *See generally* Boddie, *supra* note 153, at 425-33 (describing these and other segregation mandates through architecture and otherwise). Segregation of the sexes has its own troubling history. *See generally* Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78 (2019) (recounting the first history of sex in public accommodations).

[253] Boddie, *supra* note 153, at 436 (quoting HENRI LEFEBVRE, THE PRODUCTION OF SPACE (Donald Nicholson-Smith trans., 1991)). *See generally* EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989) (discussing efforts to bring space more firmly into critical social theory).

[254] Boddie, *supra* note 153, at 438.

[255] Likely for this reason, Boddie tends to focus more on the acts of individuals staking ground, though she does mention individuals within context/institutions. *See id.* at 451-52.

[256] Imagination of "place" can also be introduced into theorizing of segregation as discrimination. Specifically, we might consider organizational presentations of "place" in thinking about ways that organizations create discrimination-producing conditions. Some industries and jobs may be imagined and presented as white or male space even as they are in fact integrated, and this imagination may fuel stereotyping and bias in interactions and in employee interest. In her book, *Little White Houses*, Dianne Harris describes the imagination of racialized space in housing in the post-war era. DIANNE HARRIS, LITTLE WHITE HOUSES: HOW THE POSTWAR HOME CONSTRUCTED RACE IN AMERICA

segregation to include contextual cues beyond evidence of stratification alone would also help to re-imagine inquiries into discrimination in cases like *Wards Cove*.

2. Spatial Features as a Mechanism of Discrimination — Legal Theories and Agency Inquiries

Another key way to begin incorporating an understanding of spatial features broadly as a mechanism of discrimination under Title VII is through the pattern or practice of systemic disparate treatment theory.[257] Just as work culture has begun to emerge more regularly in thinking about discrimination, spatial features should be on the radar for litigants, courts, and organizations as organizational decisions that can facilitate biases and fuel disparate outcomes. And they should be equally on the radar for devising solutions: Solutions may include re-orienting physical spaces, and also things as simple as scheduling, timing and siting of food and other offerings, and structuring cross-job trainings and projects.

In doing so, we can also pull spatial features out of the current siphon toward individualized harassment. Spatial features can be a form of hostile work environment in some cases, but in many cases they will contribute to biased decisions and interactions and ultimately disparate outcomes without rising themselves to the level of severe or pervasively hostile environment. Indeed, one of the advantages of understanding spatial features as condition for discrimination more broadly is that spatial features may be easily seen as features structured by organizations rather than as personal behavior that fall outside of antidiscrimination concern.

Disability discrimination under the Americans with Disability Act ("ADA") already does some of the conceptual work of reframing

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2-26 (2012) (describing the project); *see* Jodi Rios, *Racial States of Municipal Governance: Policing Bodies and Space for Revenue in North St. Louis County, MO*, 37 LAW & INEQ. 235, 261 (2019) ("[T]he suburbs were imagined, represented, and ultimately defined as White space in opposition to dark urban space, despite the fact that U.S. suburbs have always maintained surprising diversity."). Relatedly, in the sex context, this may be a good time to revisit the history of telecommuting. *See* Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 MAINE L. REV. 261, 273 (2003) (noting that telecommuting was framed as a boon for women workers, as a new "choice" and citing research suggesting that employers shifted clerical and other low-end jobs filled by women to telecommuting, contingent work).

[257] *See supra* note 167 and accompanying text (describing systemic disparate treatment theory). For fuller treatment, see GREEN, *supra* note 116, at 68-72, 152-60; Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395 (2011).

architecture and space from neutral, fixed status to something that organizations make decisions about over time.[258] Of course, some architectural features are difficult or costly to change, but many are not. Scholarship and advocacy in the disability context have been making this point for years: disability is located not solely in the individual but in the individual's relation to the environment, and changing the environment is one key way of expanding inclusion.[259] Moreover, decisions within the employment context involving disability are often assumed to be employer decisions, thereby avoiding the increasingly dominant narrative of organizational innocence, discrimination as a problem solely of individuals. When a manager refuses to provide an accommodation, for example, rarely do we see argument that the manager's action was somehow separate from the employer's in such a way to protect the employer from liability.[260]

By hitching spatial features onto the concept of operational decisions as potentially problematic and moveable, rather than fixed and neutral, advocates might shift judicial perceptions of discrimination.[261] Plaintiffs might also gain more traction for class actions by pointing to the spatial features that provide a "uniform employment practice" to satisfy commonality.[262] While subjective decision-making practices and work cultures struggle against a conceptual tide that wants to pull them to the level of individual bias, spatial features may more easily resist that pull.

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[258] A social model of disability situates disability at least in part as a consequence of environment, in contrast to a medical model, which historically has situated disability within individuals. *See* MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH 11 (1990).

[259] *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY CIVIL RIGHTS MOVEMENT 18-20 (2009) (describing the shift in the disability rights movement from a medical to a social model of disability). For an argument that we can build on the social model of disability to better understand causation and formulate solutions for gender inequalities, see Michelle A, Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, 91 DENV. U. L. REV. 893 (2014).

[260] *See* Tristin K. Green, *On Macaws and Employer Liability: A Response to Professor Zatz*, 109 COLUM. L. REV. SIDEBAR 107, 110 (2009) (explaining this assumption in considering disability accommodation requests, an assumption that tends not to be carried over to non-disability cases).

[261] *See* Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1401-02 (2012) ("[T]he social model [of disability] denaturalizes the current environment. Common features of our homes and offices begin to look less like essential components and more like accommodations to the majority: chairs are provided for people who walk (rather than travel on their own in chairs), and lights are required only by people who see (but not by those who do not).").

[262] *See supra* notes 175–182 and accompanying text (discussing the Supreme Court's narrow frame and increasing emphasis by litigants on HR practices).

At the same time, ADA law might benefit from a shift toward thinking about spatial features as conditions for relations under Title VII. The ADA has struggled to break free of individualized focus on the plaintiff side. This is in part because the ADA requires attention to the individual in considering what accommodation would be reasonable.[263] As a number of scholars have pointed out, however, to focus too closely on the individual in all cases can be debilitating for broader change.[264] Disability accommodations under the ADA are generally understood to benefit the individual with a disability who requests an accommodation, and thereby to impose costs on the employer charged with providing the accommodation. While courts are often quick to see third-party costs, they rarely recognize that accommodations might provide benefits to third parties as well.[265] In this way, then, ADA law can benefit from a shift toward thinking about spatial features as conditions for relations under Title VII. A goal of improving relational conditions (as a way of reducing discrimination) does not emphasize one group over another or individuals over the group — the goal, after all, is improved intergroup interactions and relations. These improved relations are likely to improve success outcomes for women and racial minorities — this is the discrimination piece, after all — but we can easily see that broader benefits in the form of improved relations and the associated benefits that flow from those relations[266] are inuring to members of all groups.[267]

In some cases, use of disparate impact theory may also make sense as a way of highlighting spatial features as mechanisms of discrimination. As I have argued elsewhere, however, disparate impact theory should be reserved for those cases in which a specific organizational structure can be easily identified and isolated as a causal mechanism of observed

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[263] 42 U.S.C. § 12112(b)(5)(A) (making it an unlawful employment practice to "not mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability"). The EEOC has also interpreted the ADA to require an individualized "interactive process." *See* 29 C.F.R. § 1630.2(o)(3) (2019); 29 C.F.R. app. § 1630.9.

[264] *See generally* Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006) (arguing in favor of disability discrimination as a group-based phenomenon).

[265] Emens, *supra* note 261, at 1403-04.

[266] Such as reduced anxiety in intergroup interaction, reduced biases and prejudice, stronger human connections, etc.

[267] Indeed, while harm for legal claims may be identified in observed outcomes, improved relational conditions help promote equal identity. *See* Osamudia James, *Valuing Identity*, 102 MINN. L. REV. 127, 128-29 (2017) (arguing that current narratives often present Black identity as impoverished).

disparities.[268] If systemic disparate treatment theory is robustly understood to permit inference of entity intent from statistics and other evidence of difference in treatment, as it should be, then systemic disparate treatment theory should be sufficient for most cases. Indeed, the advantage of systemic disparate treatment theory is that it allows for more complex and nuanced solutions.[269] In many cases, spatial features will be operating not in isolation but together with other organizational decisions to increase biases or otherwise inhibit intergroup relations. Solutions should therefore consider spatial features in conjunction with decision-making systems and organizational influences on work culture.

Apart from litigation, the EEOC and other administrative oversight bodies might require employers to consider spatial features as part of company-wide self-assessment.[270] Under a 2018 Department of Labor directive, the Office of Federal Contract Compliance Programs ("OFCCP") is now authorized, if a desk audit identifies discrimination at one establishment, to enter into an agreement with multi-establishment companies wherein the company agrees to investigate and resolve similar violations at other establishments in exchange for a five-year period free of compliance evaluations.[271] Several major companies have entered into these agreements, including Microsoft, Bank of America, and Time Warner.[272] As part of this process, the

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[268] *See* GREEN, *supra* note 116, at 95-97 (describing the theory switch to disparate impact); 153-55 (explaining why it is key to resist the theory switch).

[269] *See id.; see also* Tristin K. Green, *"It's Not You, It's Me": Assessing an Emerging Relationship Between Law and Social Science*, 46 CONN. L. REV. 287, 294-97 (2013) (describing how disparate impact theory embeds social science within the law).

[270] U.S. DEP'T OF LAB., OFF. OF FED. CONT. COMPLIANCE PROGRAMS, DIRECTIVE No. 2019-02 (2018), https://www.dol.gov/agencies/ofccp/directives/2019-02 [https://perma.cc/BW4V-NMGM].

[271] OFCCP would monitor the implementation of the ERCA through semi-annual progress reports for five years but schedule no additional compliance evaluations during that time. *Id.* A 2019 directive would also allow designation of certain federal contractors as "top performing contractors with corporate-wide model diversity and inclusion programs" and provide a five-year exemption from scheduled reviews for those contractors. *See* U.S. DEP'T OF LAB., OFF. OF FED. CONT. COMPLIANCE PROGRAMS, DIRECTIVE No. 2019-04 (2019), https://www.dol.gov/agencies/ofccp/directives/2019-04 [https://perma.cc/X2DN-GQXN]. These directives may be problematic. *See generally* Jane Farrell, *The Promise of Executive Order 11246: "Equality as a Fact and Equality as a Result,"* 13 DEPAUL J. FOR SOC. JUST. 1 (2020) (reviewing the Obama and Trump administrations' enforcement of Executive Order 11246). My aim here is not to endorse the directives but to illustrate that there are existing ways that consideration of spatial features might be incorporated through agency oversight.

[272] Paige Smith, *Bank of America to Pay $4.2 Million to Settle Hiring Bias Claims*, BLOOMBERG L. (Sept. 30, 2019, 7:50 AM), https://news.bloomberglaw.com/class-

OFCCP might request assessment of possible spatial features solutions for observed disparities or discrimination. Similarly, EEOC guidance and settlement decrees might also emphasize spatial features as relevant to discrimination.

3.   Holding on to Work Space

Tight boundary drawing around work space — and variations in standards across work spaces — should be resisted. Judges should not ease the standard of hostile work environment based on whether the space is perceived as private, such as in a locker room or an all-male work site. Moreover, the workplace should be understood as any place where work gets done, including the social work, whether in bars, on golf courses, or in online chat feeds.

Here, it will be important to be aware, too, of the battle that is waging over the boundaries of public and private space in the area of civil rights. While the line between public and private holds particular legal significance in constitutional law doctrine,[273] the tactics that are being used to expand private space in constitutional law are also relevant to the line between work and private space in statutory employment discrimination law. In particular, an emerging rhetoric rooted in free expression and liberty — and infused with ideologies of home and family — threatens to encroach on employment nondiscrimination efforts.

Religious liberty and free expression claims that seek accommodation from antidiscrimination mandates are, bit by bit, reshaping public space into private space. In her aptly named essay, *The Geography of Bigotry*, Melissa Murray traces the shift in rhetoric in opposition to Proposition 8, a ballot initiative in California through which — by a slim margin — voters amended the California Constitution to prohibit legal

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action/bank-of-america-to-pay-4-2-million-to-settle-hiring-bias-claims?context=article-related [https://perma.cc/5AJH-RA4P]; Paige Smith, *Microsoft Hiring Bias Settlement Sidesteps DOL Pay Claims*, BLOOMBERG L. (Sept. 17, 2020), https://news.bloomberglaw.com/daily-labor-report/microsoft-reaches-3-million-hiring-bias-settlement-with-dol [https://perma.cc/M93P-TWSC]; Paige Smith, *Time Warner Bias Settlement Pauses DOL Audits for 5 Years*, BLOOMBERG L. (Feb. 21, 2020, 10:05 AM), https://news.bloomberglaw.com/business-and-practice/time-warner-bias-settlement-pauses-contractor-audits-for-5-years?context=article-related [https://perma.cc/FWX7-DTAV].

[273] *See generally* Richard S. Kay, *The State Action Doctrine, the Public/Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 334 (1993) (noting the reliance on public-private in constitutional law and also that "[t]he overwhelming weight of published academic opinion has rejected the premise that legal doctrine can rest on a supposed distinction between public and private actions").

recognition of same-sex marriages.[274] In this and earlier work, Murray shows that the "Yes on 8" campaign sought to vindicate rights of parents and persons of faith rather than expressing public distaste for gays and lesbians, as earlier campaigns had done.[275] "Proponents of Proposition 8 'circled the wagons and attempted to shore up protections for the family and the home — *private* spaces where dissenting views may be freely espoused.'"[276]

Even as the frame used by advocates invokes the home as its defensible space, the idea is one of pushing the boundary of private space. Justice Samuel Alito in his *Obergefell* dissent warns that dissenters from the new "orthodoxy" of respect for same-sex marriage will "be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[277] The Arizona Supreme Court took up this view in *Brush & Nib Studio*, where it granted an exception for nondiscrimination under a Phoenix statute to the owners of a stationery store on the ground that to require the store owners to serve a same-sex couple would violate their rights to free speech and free exercise of religion.[278] The court stated in its opinion: "The rights of free speech and free exercise, so precious to this nation, are not limited to soft murmurings behind the doors of a person's home or church, to private conversations with like-minded friends and family."[279] To Alito and the Arizona Supreme Court, views opposing same-sex marriage, especially but not exclusively when founded in religion, should be tolerated even when they result in discriminatory action because to do otherwise would cabin expression of those beliefs to the home.

In June 2020, the United States Supreme Court brought similar reasoning into the statutory framework of Title VII. The Court held in *Bostock v. Clayton County* that to discriminate against gay and transgender employees because they are gay or transgender is to

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[274] Melissa Murray, *The Geography of Bigotry*, 99 B.U. L. REV. 2611 (2019); *see* Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 Nw. L. REV. 825, 878 (2019) ("The grant of an accommodation is essentially the recharacterization of public space, where the state and its laws hold sway, into private space, where private actors may regulate their own vision of appropriate sex and sexuality.").

[275] *See* Murray, *supra* note 274, at 2614.

[276] *Id.* (quoting Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 407-08 (2009)).

[277] Obergefell v. Hodges, 576 U.S. 644, 741 (2015) (Alito, J., dissenting).

[278] Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019).

[279] *Id.* at 895.

discriminate on the basis of sex in violation of Title VII.[280] In its opinion doing so, however, the Court invited objections by employers who might claim an accommodation from the nondiscrimination obligation based on religious beliefs. "We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution," said the Court, noting that objections brought by religious and conservative dissenters might "supersede" antidiscrimination mandates "in appropriate cases."[281]

This battle is not limited to the sex-based discrimination arena. With religion loosely defined and intertwined with free expression, similar arguments might be made about statues of confederate "heroes" or confederate flags flying in workplace lobbies. The question of whether an employer should be permitted to fly the confederate flag on work premises as an accommodation may not seem like a determination of whether the space is work or private, but the rationale for allowing an accommodation is not unlike that identified by Murray. Courts have yet to allow free speech to trump Title VII when hostile work environments are involved, but the gravitational pull of the First Amendment may result in calls for free speech protections in the workplace grounded on the workplace — or portions of it — as a space where even extreme and harmful personal expressions should be allowed, much like many such expressions are allowed in our own private homes.[282] The risk of expansion of free speech into the workplace in this way is all the greater given traction in the realm of the internet, where private companies have been frequently called upon to provide free speech rights without any constitutional basis for so requiring.[283]

Seeing broadly the "place" of work as relevant to the antidiscrimination project is crucial for efforts to combat discrimination

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[280] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[281] *Id.* at 1754.

[282] On gravitational pull, see generally Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765 (2004) ("Because the First Amendment's cultural magnetism attracts a wide variety of claims, nonlegal factors, far more than legal ones, determine which opportunistic claims to First Amendment attention will succeed and which will not."); Mary Anne Franks, *The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Aug. 21, 2019), https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment [https://perma.cc/AH2W-JUXZ] (exploring the "gravitational pull" of the First Amendment).

[283] *See* Franks, *supra* note 282; *see also* MARY ANN FRANKS, THE CULT OF THE CONSTITUTION (2019).

and to push back on narratives that seek to increasingly protect work organizations from responsibility. Together, insularity, precarity, and permeability as spatial features open avenues for research, generate thinking about areas in need of organizational attention, and support theory and advocacy around the place of work in people's lives. Bringing spatial features more concretely into the law and legal arguments is one piece of this work.

IV. CONSIDERING CONCERNS

I anticipate several concerns about my effort to delineate spatial features as a condition of discrimination in workplaces. The first is about the capacity of law. Discrimination today is rarely a simple story of bad actors at the top — CEOs who order their managers to refuse to employ Blacks, for example.[284] Instead, we are coming to realize that the causes of discrimination are complex and that solutions will differ depending upon the specific organization at issue and its features, and this realization sparks concern that our law is not up to the task we lay out for it. This is a concern that has been percolating for years now in employment discrimination law circles, and it is the one that the Supreme Court capitalized on in its *Wal-Mart* opinion, insisting that plaintiffs have "significant proof of a "general policy of discrimination" in order to obtain class treatment.[285] Even Justice Ruth Bader Ginsburg seemed to stumble in her concurrence.[286] She described the evidence aptly: stark disparities in rates of promotion and pay, Wal-Mart's use of highly subjective decision-making practices that leave mostly male managers to exercise decisions without oversight, including a "'tap-on-the-shoulder' process, in which managers have discretion about whose shoulders to tap," and a "carefully constructed . . . corporate culture," one rife with gender stereotypes.[287] Ginsburg's description contemplates organizational decisions that can lead to discriminatory interactions, judgments, decisions, and ultimately to skewed bottom lines. But instead of showing how together this evidence could prove a

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[284] *See generally* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM & THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (3d ed. 2010) (discussing some of the research on the shift in expression of bias by whites).

[285] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353 (2011).

[286] *Id.* at 371 (Ginsburg, J., concurring in part and dissenting in part). For an understanding of the plaintiffs' case using systemic disparate treatment theory, see Tristin Green, Wal-Mart v. Dukes *Rewritten*, *in* FEMINIST JUDGMENTS: EMPLOYMENT DISCRIMINATION OPINIONS REWRITTEN 441 (Ann C. McGinley & Nicole B. Porter eds., 2019).

[287] *See Wal-Mart Stores, Inc.,* 564 U.S. at 371.

pattern or practice of discrimination on the part of *Wal-Mart*, Ginsburg relied on disparate impact cases, emphasizing the process of discretionary decision-making as if it were the sole practice being challenged.[288]

The problem here, it turns out, is not with the capacity of our employment discrimination law, but with our willingness to hold organizations accountable for their actions and, correspondingly, our willingness to require that organizations put nondiscrimination firmly on the table in decisions about structures, cultures, and systems for workplaces. One popular narrative is that discrimination is increasingly a problem of implicit biases rather than conscious ones, which leads courts and commentators to pull back on their willingness to hold organizations responsible.[289] This is also the narrative that leads to diversity training as the most popular solution adopted by firms. But this narrative is wrong. Employment discrimination continues to be as much about the organizations and the decisions leaders make about organizational structures, systems, and cultures than it is about the individuals who are making lower-level decisions or interacting on a day-to-day basis within those organizations. Of course, individuals and relations play a role — that is one point that I make in urging a focus on relational conditions — but organizations play a significant role as well. Individuals and groups do not judge, decide, or interact in a vacuum; they do so within a particular space that has been shaped (in part) by the organizations for whom they work.

This concern about the complexity of discrimination and the law's capacity to address it is likely to carry over to thinking about organizational capacity as well. In other words, as I urge us to consider spatial features in addition to the usual HR decision-making practices and work cultures — the full panoply of organizational operations — some readers may find themselves wanting to throw up their hands: "Are you saying that you can't tell us precisely what organizations should do?" Although we can likely devise a list of structures or practices that are problematic,[290] what some might call "risk factors," we are unlikely to be able to identify a list of structures or practices that, applied across all organizations, will always do the trick. And yet we do

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[288] *See id.* at 373.

[289] *See generally* GREEN, *supra* note 116, at 25-29 (discussing the rise in attention to cognitive or implicit bias and the narrative of organizational innocence).

[290] In the harassment area, for example, there has been movement to identify structural "risk factors" for sexual harassment, such as physical isolation, precariousness of position, and occupational segregation. *See Chart of Risk Factors for Harassment & Responsive Strategies*, *supra* note 232.

have a helpful indicator of whether something is going wrong within an organization: We can see outcomes on the back end. And systemic disparate treatment theory acknowledges this with its willingness to rely on statistical analyses and other evidence suggesting that stark outcomes are due to internal causation over external causation or chance.[291] Moreover, we have research and experts to help discern the various mechanisms that may be causing those outcomes — and to devise solutions. Organizations, with their access to data and attention to productivity, creativity, and "collisionable hours," are a lot more capable than they may want to let on.

We are increasingly living in a data-driven world, and the workplace is no exception. We know more than ever about how discrimination operates, and we should use what we know and the data that we can amass to further antidiscrimination principles, not to hide from them. Complexity is nothing new. Organizations can and should have multiple goals, and antidiscrimination should be one of them. As Neal Katyal put it in thinking about architecture as crime control, "A one-size-fits-all approach is destined to fail. Effective prevention of crime through architecture involves working through tradeoffs among operability, aesthetics, crime prevention, and other goals. Therefore, design principles for architecture and crime control cannot be divorced from the context in which they are applied and must be malleable enough to adapt to a variety of circumstances."[292] We have known this for generations when it comes to architecture and many other social problems with structural components. We should not balk now that we know more about organizational operations and discrimination.

Finally, a concern more specific to the precise endeavor of delineating spatial features may be that I have focused too closely on relations, undertaking a project of improving relations, rather than on structural forces for white and male supremacy.[293] Related to this is the critique that I have remained too narrowly in my prescriptions within existing law and not pushed enough toward bolder options. My response to both of these concerns is rooted in the realities of struggles within employment discrimination law and, perhaps most importantly, in my hopefulness that we can see the capaciousness of existing law at the same time that we push beyond its current reach. Human relations remain key to substantial progress in the anti-subordination project.

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[291] *See supra* notes 167–169 and accompanying text.

[292] Katyal, *supra* note 87, at 1049.

[293] *See generally* GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS, at xxii (3d ed. 2018) (describing whiteness as structural advantage beyond individuals and "race relations").

Emphasizing structural constraints and influences on conditions for those relations holds great promise because it maps on well to organizational responsibility under Title VII. Employment discrimination scholars today, in my view, tend to underestimate the potential of our existing systemic theories of discrimination, especially pattern or practice of systemic disparate treatment theory. That said, there is certainly more work to do both in understanding contextual influences on relations and also in thinking about the nature of space and its mutually constitutive relationship with social actors.[294]

Conclusion

My principal goal in this Article has been relatively modest: to identify spatial features as a condition of discrimination in work and to consider what spatial features might matter and why. In short, we need to add spatial features to HR practices and work cultures as key organizational mechanisms for discrimination in work. Spatial features are, in short, part of the organizational operations that set conditions for relations at work. I also provide some recommendations for how judges, advocates, and workers within organizations, including leaders, can better acknowledge the role of spatial features in discrimination — and thereby consider spatial features in devising strategies for change. There is, however, much work yet to be done. Future work will include research focused specifically on questions of spatial features, social ties, and nondiscrimination. We will want to forge new cross-disciplinary connections, develop new research agendas, and together send out a broad call for racial and gender justice reform that includes where we work.

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[294] This work includes pushing across perceived "employer" boundaries, such as in workplaces where high- and low-wage workers are separated by entity boundaries or constructions of labor supply, but not necessarily by spatial boundaries. For more on these boundaries, see Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace*, 12 Lewis & Clark L. Rev. 671 (2008); Jennifer Gordon, *Regulating the Human Supply Chain*, 102 Iowa L. Rev. 445 (2017).