

HEINONLINE

Citation: 101 Colum. L. Rev. 458 2001

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Dec 7 17:09:28 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0010-1958](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0010-1958)

ARTICLE

SECOND GENERATION EMPLOYMENT DISCRIMINATION: A STRUCTURAL APPROACH

Susan Sturm*

The judiciary's traditional rule-based approach has been successful in reducing overt discrimination against women and people of color. It has been less effective in addressing more subtle and complex forms of workplace inequity. These second generation forms of bias result from patterns of interaction, informal norms, networking, mentoring, and evaluation. Drawing on the potential of recent Supreme Court decisions, Professor Sturm proposes a structural regulatory solution to this problem of second generation employment discrimination. Her approach links the efforts of courts, workplaces, employees, lawyers, and mediating organizations to construct a regime that encourages employers to engage in effective problem solving. This approach enables employers to combine legal compliance with proactive efforts to improve their firms. This Article details three case studies that reveal some of the building blocks of a successful structural approach.

| | |
|---|-----|
| INTRODUCTION | 459 |
| I. THE CHALLENGE OF REGULATING COMPLEX WORKPLACE RELATIONSHIPS | 465 |
| A. First Generation Discrimination | 465 |
| B. Second Generation Discrimination | 468 |
| C. The Limits of a Rule Enforcement Approach | 475 |
| II. A STRUCTURAL REGULATORY APPROACH TO SECOND GENERATION DISCRIMINATION | 479 |
| A. The Courts: General Norm Elaboration and Context- Based Problem Solving | 479 |
| 1. Hostile Environment Sexual Harassment | 480 |
| 2. Legal Regulation of Subjective Employment Practices | 484 |
| B. Shaping an Effective Internal Workplace Regime: Examples from the Field | 489 |

* I deeply appreciate the helpful comments and suggestions of many colleagues on earlier drafts of this article, including Henry Monaghan, Richard Briffault, Michael Dorf, Cindy Estlund, Barry Goldstein, Robert Holland, Deborah Kolb, Linda Krieger, Alan Lerner, Lance Liebman, John Manning, Martha Minow, Chuck Sabel, Vicki Schultz, Clyde Summers, Louise Trubek, Mark Tushnet, Lucy White, and participants in the Harvard Legal Theory Workshop, the Columbia Faculty Workshop, the University of Pennsylvania retreat, the Women and the Constitution Workshop, and the Law and Society panel on rethinking regulation. Excellent research assistance was provided by Kara Finck, Brandon Garrett, Andrea Kirschenbaum, Michael Kraver, Christopher Murray, Ramsey Nasser, Alvaro Reyes, and Tanja Santucci. I also want to acknowledge the extraordinary editorial assistance of Peggy Cross. Finally, I am grateful to those who agreed to be interviewed as part of the field research for this Article for their time, openness, and insight.

| | |
|---|-----|
| 1. Deloitte & Touche | 492 |
| 2. Intel Corporation | 499 |
| 3. Home Depot | 509 |
| 4. Common characteristics of effective workplace problem solving | 519 |
| C. Law's Role in Shaping Internal Problem Solving Processes | 520 |
| III. THE PIVOTAL ROLE OF INTERMEDIARIES IN A STRUCTURAL REGIME | 522 |
| A. Individual Change Agents: Redefining the Role of Problem Solver | 524 |
| B. Organizational Mediators of Change | 526 |
| C. Problem-Solving Lawyers | 527 |
| D. Employee Groups: Constituencies for Change | 530 |
| E. Insurance Companies and Brokers: Potential Gatekeepers of Legal Norms | 535 |
| IV. INCOMPLETE STRUCTURALISM: THE COUNTERTENDENCIES ... | 537 |
| A. The Judiciary: Reversion to Rules or Deference | 537 |
| B. Workplace Problem Solving: Limitations of Capacity, Incentives, and Accountability | 543 |
| C. Intermediaries: The Need for Transparency and Accountability | 546 |
| 1. Legal Actors | 546 |
| 2. Organizational Intermediaries | 547 |
| 3. Insurers | 549 |
| 4. Administrative Agencies | 550 |
| V. DYNAMIC REGULATION: STRENGTHENING THE INFRASTRUCTURE FOR EFFECTIVE WORKPLACE PROBLEM SOLVING | 553 |
| A. Strengthening the Judiciary's Structural Role | 556 |
| B. Developing the Role of Individual Change Agents ... | 564 |
| C. Building the Capacity of Mediating Institutions | 566 |
| CONCLUSION | 567 |

INTRODUCTION

The project of pursuing workplace equity has reached a new stage. Racial and gender inequality persists in many places of employment.¹ However, the explanations and solutions for these conditions have become more complex and elusive. Smoking guns—the sign on the door

1. See Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* 45–50 (1995); Federal Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital* 75 (1995). Texaco, Denny's, and Mitsubishi have become contemporary corporate symbols of the continuing problem of overt race and sex discrimination in the workplace. See Judge OKs Texaco's Settlement of Bias Suit, *L.A. Times*, Mar. 27, 1997, at D3; Mitsubishi Settles Sex Discrimination Case for \$34 Million, *Liability Wk.*, June 15, 1998, at 24.

that "Irish need not apply" or the rejection explained by the comment that "this is no job for a woman"—are largely things of the past.² Many employers now have formal policies prohibiting race and sex discrimination, and procedures to enforce those policies. Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality.³

Frequently, sexual harassment and discriminatory exclusion involve issues that depart from the "first generation" patterns of bias. Unequal treatment may result from cognitive or unconscious bias, rather than deliberate, intentional exclusion.⁴ "Second generation" claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate. Structures of decisionmaking, opportunity, and power fail to surface these patterns of exclusion, and themselves produce differential access and opportunity.⁵

Thus, second generation manifestations of workplace bias are structural, relational, and situational. The underlying problems are exacerbated in workplaces with flexible, decentralized governance structures that require workers to participate more actively in decisionmaking concerning work assignments, leadership, advancement, pay, and evalua-

2. This can be explained in part by changes in public attitudes toward the legitimacy of deliberate exclusion. See Ann C. McGinley, *!Viva La Evolucion!:* Recognizing Unconscious Motive in Title VII, 9 Cornell J.L. & Pub. Pol'y 415, 426 (2000) (summarizing social science research showing that mainstream whites view prejudicial attitudes and behavior as unacceptable, but continue to harbor unconscious racist attitudes and behave in racist fashion toward blacks). Also a factor is employers' reliance on defensive practices to minimize liability. See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 Fla. St. U. L. Rev. 959, 967-71 (1999) [hereinafter Bisom-Rapp, *Bulletproofing the Workplace*] (analyzing human resource publications advising employers to take defensive measures through documentation and careful file management to avoid liability).

3. This Article focuses on race and gender discrimination. However, much of the analysis could be applied to other forms of class-based bias, such as age, sexual orientation, religion, or disability discrimination.

4. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1186-88 (1995) [hereinafter Krieger, *The Content of Our Categories*]; Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in *Foundations of Employment Discrimination Law* 122, 124-25 (John Donahue III ed., 1997).

5. See Robin J. Ely & Debra E. Meyerson, *Theories of Gender in Organizations: A New Approach to Organizational Analysis and Change*, in *Research in Organizational Behavior* (B. Staw & R. Sutton eds., forthcoming 2001) (manuscript at 10, on file with the *Columbia Law Review*); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 Cal. L. Rev. 496, 496-501 (1996).

tion.⁶ In response to market and technological pressures for adaptability, flexibility, and technological innovation,⁷ these emerging organizational forms eschew stability, permanence, and rule-driven decisionmaking. In these environments, however, interactions that produce the occasions for exclusion are simultaneously frequent and organizationally necessary.

The complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts (or other external governmental institutions) to articulate and enforce specific, across-the-board rules. Any rule broad enough to cover the variety of contexts and conduct that might arise will inevitably be quite general and ambiguous, and it will produce considerable uncertainty about the boundaries of lawful conduct. Ambiguous rules will provide inadequate guidance to shape conduct, and will undermine efforts at anticipatory compliance. This uncertainty in turn tends to induce gestures of compliance with the legal norm, without necessarily inducing any change in the underlying behavior causing the problem.⁸ Employers' fear of sanctions if internal evaluation reveals previously unrecognized bias has the perverse effect of discouraging them from inquiring into or addressing second generation problems.⁹

Efforts to reduce the uncertainty of general and ambiguous legal norms by articulating more specific and detailed rules produce a different but equally problematic result. Specific commands will not neatly adapt to variable and fluid contexts. Inevitably, they will be underinclusive, overinclusive, or both. Moreover, the process of designing and implementing effective remedies for second generation bias is inseparably linked to that of defining the nature of the problem itself. Separating problem definition from its institutional context undermines the efficacy of the resulting legal norm as well as the remedy designed to achieve it.

Notwithstanding the limitations of solving problems involving complex relationships through specific commands, much of the current debate over sexual harassment and discrimination revolves around identifying the best theory of what constitutes discrimination.¹⁰ This court-

6. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, 297-99 (1998); Robert B. McKersie & Richard E. Walton, *Organizational Change, in The Corporation of the 1990s*, at 244, 249-50, 255-56 (Michael Scott Morton ed., 1991).

7. See Peter Cappelli et al., *Change at Work* 5-6 (1997); Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 Colum. L. Rev. 753, 883 (1994); Charles Sabel, *Moebius-Strip Organizations and Open Labor Markets: Some Consequences of the Reintegration of Conception and Execution in a Volatile Economy, in Social Theory for a Changing Society* 23, 28-29 (Pierre Bourdieu & James S. Coleman eds., 1991).

8. See Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 Am. J. Soc. 1531, 1538 (1992) [hereinafter Edelman, *Legal Ambiguity*].

9. For a fuller discussion of this dynamic, see *infra* text accompanying notes 55-58.

10. See, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 Cornell L. Rev. 1169, 1170 (1998) (discussing recent focus of scholars on the "how" of

centered regulatory focus is understandable, given the judiciary's historic preeminence in the articulation and enforcement of antidiscrimination norms. However, this focus now obscures a deeper innovation inchoate in the emerging regulatory approach to the problems of sexual harassment and the glass ceiling.

Over the last decade, an interesting and complex regulatory pattern has emerged. Multiple public, private, and nongovernmental actors are actively and interactively developing systems to address sexual harassment, glass ceiling, and other second generation problems. Each of these institutional actors has begun to approach these questions as posing essentially issues of problem solving. Each has, to varying degrees, linked its anti-bias efforts with the more general challenge of enhancing institutional capacity to manage complex workplace relationships. These multiple actors have, perhaps unwittingly, begun to carve out distinctive roles and relationships that form the outlines of a dynamic regulatory system for addressing second generation discrimination.

This Article offers a framework that makes visible these emerging and converging patterns of response to second generation discrimination. It explores the potential for a de-centered, holistic, and dynamic approach to these more structural forms of bias. This regulatory approach shifts the emphasis away from primary reliance on after-the-fact enforcement of centrally defined, specific commands. Instead, normative elaboration occurs through a fluid, interactive relationship between problem solving and problem definition within specific workplaces and in

sexual harassment); Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 *Harv. L. Rev.* 445, 450 (1997) [hereinafter Bernstein, *Treating Sexual Harassment*] (arguing that sexual harassment must be understood as a form of disrespect); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 *U. Pa. L. Rev.* 899, 900-02 (1993) (discussing applicability of theories of unconscious racism to employment discrimination); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *Yale L.J.* 1683, 1687, 1690-91 (1998) [hereinafter Schultz, *Reconceptualizing Sexual Harassment*] (analyzing sexual harassment as being "designed to maintain . . . highly rewarded lines of work as bastions of masculine competence and authority" by undermining women's perceived competence and maintaining women in positions of subordination). Scholars who have recognized the limitations of after-the-fact enforcement of judicially formulated rules have yet to offer a satisfactory alternative. One response proposes deregulation with a hope for market solutions. See Amy L. Wax, *Discrimination as Accident*, 74 *Ind. L.J.* 1129, 1130-34 (1999) (arguing against extending existing antidiscrimination regulation to cover unconscious disparate treatment in the workplace and for support of market solutions). Other scholars propose admittedly inadequate, limited judicial rules as a least-worst alternative while we await adequate knowledge about the problem to enable more sweeping doctrinal reform. See Krieger, *The Content of Our Categories*, *supra* note 4, at 1243-47 (concluding that cognitive bias cannot currently be addressed through law because of the difficulty of articulating a specific legal rule that could be implemented by courts). A third approach urges courts and commentators to adopt a sociological account of antidiscrimination jurisprudence, which specifies the purposes and assumptions that drive courts' treatment of race or gender. See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 *Cal. L. Rev.* 1, 17 (2000) (arguing that antidiscrimination law must be understood as a "social practice").

multiple other arenas, including but not limited to the judiciary. In this framework, compliance is achieved through, and evaluated in relation to, improving institutional capacity to identify, prevent, and redress exclusion, bias, and abuse. This approach expands the field of "regulatory" participants to include the long-neglected activities of legal actors within workplaces and significant nongovernmental organizations, such as professional associations, insurance companies, brokers, research consortia, and advocacy groups. These actors have already begun to play a significant role in pooling information, developing standards of effectiveness, and evaluating the adequacy of local problem-solving efforts.

The motif of this second generation regulatory approach is that of structuralism. By this, I mean an approach that encourages the development of institutions and processes to enact general norms in particular contexts. "Legality" emerges from an interactive process of information gathering, problem identification, remediation, and evaluation. Regulation fosters dynamic interactions that cut across established conceptual, professional, and organizational boundaries in reaction to observed problems. This approach encourages experimentation with respect to information gathering, organizational design, incentive structures, measures of effectiveness, and methods of institutionalizing accountability as part of an explicit system of legal regulation. Workplaces and nongovernmental institutions influencing workplace practice are treated within this regulatory regime as lawmaking bodies, rather than simply as objects of state or market regulation.

Courts, employers, and nongovernmental actors each play an important part in fostering this shift toward structuralism. Recent Supreme Court decisions can—I do not say must—be read to encourage workplace structures that provide for contextual norm elaboration and problem solving.¹¹ At least in some contexts, these cases have converged with a more structural and dynamically oriented approach to second generation bias within workplaces as well. Some employers have responded to patterns of bias, exclusion, turnover, and glass ceiling by redesigning their systems of decisionmaking, work assignment, and conflict resolution to simultaneously address concerns about equity and effectiveness.¹² Sexual

11. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding employers liable for hostile environment harassment unless employer has "exercised reasonable care" to avoid harassment and to eliminate it when it might occur, and evaluating employers' efforts by their effectiveness); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (same); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–23 (1993) (rejecting a mathematically precise test in favor of a general principle of a discriminatorily abusive work environment); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990–91 (1988) (approving disparate impact challenges to "an employer's undisciplined system of subjective decisionmaking [that] has precisely the same effects as a system pervaded by impermissible intentional discrimination").

12. See, e.g., David A. Thomas & John J. Gabarro, *Breaking Through: The Making of Minority Executives in Corporate America* 152–86 (1999) (analyzing approaches adopted by three companies that "had reemerged as dominant leaders in their markets while also

harassment and glass ceiling jurisprudence has encouraged and reinforced widespread organizational development of internal problem-solving and dispute resolution processes.¹³

This Article examines three companies that have constructed internal processes that pursue compliance with legal norms while improving the organization's capacity to address broader problems involving complex relationships. It also describes the set of intermediate actors, operating within and across the boundaries of the workplace, that have emerged as important players in the implementation of workplace inno-

integrating their management and executive ranks"); Lorian Roberson & Nancy C. Gutierrez, *Beyond Good Faith: Commitment to Recruiting Management Diversity at Pacific Bell*, in *Diversity in the Workplace: Human Resource Initiatives* 65, 70-85 (Susan E. Jackson ed., 1992) (describing sustained approach to diversifying the company through long-term developmental strategy and organizational redesign).

13. See Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 Am. J. Soc. 406, 407-08 (1999) [hereinafter Edelman et al., *Endogeneity*] (discussing the evolution of grievance procedures as a compliance mechanism for Title VII); Alison M. Konrad & Frank Linnehan, *Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?*, 38 Acad. J. Mgmt. J. 787, 788 (1995) (discussing a study of over one hundred organizations regarding the adoption of various human resource management strategies). Lawyers, psychologists, organizational consultants, and human resource specialists have developed articles, manuals, and training materials on sexual harassment prevention. A literature search generated well over 1000 articles addressing the issue of sexual harassment. See, e.g., John J. Copelan, Jr., *Revisiting Preventive Law as a Strategy for Local Governments After Faragher v. City of Boca Raton*, 28 Stetson L. Rev. 635, 635, 638-39 (1999) (urging local governments to adopt aggressive preventive law programs, and offering three examples of "successful" proactive programs); Robert K. Robinson et al., *U.S. Sexual Harassment Law: Implications for Small Businesses*, J. Small Bus. Mgmt., Apr. 1998, at 1, 3-6 (documenting particular challenges for small businesses in addressing sexual harassment and offering guidelines on effective approaches to prevention); Brian B. Stanko & Charles A. Werner, *Sexual Harassment: What is it? How to Prevent it*, The Nat'l Pub. Acct., June 1, 1995, at 14 (documenting problem of sexual harassment in accounting firms and urging firms "to design and establish a business atmosphere that is conducive to establishing proper professional relationships"); Charlene Marmer Solomon, *The Secret's Out: How to Handle the Truth of Workplace Romance*, 77 Workforce 42, 44-50, (July 1998) (describing challenges of regulating office relationships and offering an example of a company that avoids a rigid formulaic approach by establishing an implementation system that reflects its corporate culture and corporate principles and values that it has articulated). Industries from manufacturing to policing have shown considerable interest in issues of prevention. See, e.g., Jennifer Blalock, *Informal Harassment Policies Key to Prevention*, 77 Workforce S9 (Oct. 1998) (discussing different types of informal harassment policies and procedures); Deborah Duenes & Francine Hermelin, *Sexual Harassment Inc.*, 19 Working Woman 9 (1994) (arguing that prevention of sexual harassment has become big business); Sally E. Heckerroth & A. Michael Barker, *Police Department Efforts to Deter Sexual Harassment*, USA Today (Mag.), July 1997, at 64 (discussing importance of a "well-written sexual harassment policy"); Herff L. Moore & Don B. Bradley III, *Sexual Harassment in Manufacturing: Seven Strategies Successful Companies Use to Curb It*, 39 Indus. Mgmt. 14, 15-18 (1997) (discussing success that experts attribute to companies' firm commitment to "'zero tolerance' of sexual harassment" and the importance of training and modeling by upper management of "appropriate employee interaction practices").

vations to address bias. These nongovernmental actors are simultaneously influencing judicial definitions of effective workplace problem solving and translating legal norms into organizational systems and standards.¹⁴ Indeed, the long-term viability of a structural regulatory regime may depend on the effectiveness of intermediaries in translating and mediating between formal law and workplace practice.

This Article proceeds in five parts. Part I identifies the limits of a rule-enforcement approach to regulating the complex relationships underlying second generation discrimination. Part II documents the emerging structural approach to second generation bias in case law and workplace practice. It draws on three case studies to sketch out approaches to second generation bias that build in legitimacy and accountability, and it then describes law's role in encouraging the development of these internal problem-solving systems. Part III examines the crucial role played by intermediaries in brokering the relationship between judicial elaboration and workplace innovation. Part IV describes the countervailing tendencies in law and practice that undercut the structural move, and the need to develop a tiered and interactive "regulatory" framework that disrupts these tendencies and encourages effective problem solving. The final Part offers proposals to institutionalize the relationships within and across organizational boundaries and to provide the necessary accountability and pooling of contextually-based reflection. This final Part also considers potential objections to this overall regulatory approach, as well as its implications for the role of law and lawyers.

I. THE CHALLENGE OF REGULATING COMPLEX WORKPLACE RELATIONSHIPS

It is crucial to understand why the regulatory approach developed for first generation discrimination fails to remedy second generation problems.

A. *First Generation Discrimination*

The first generation employment discrimination cases mirror the social and political conditions that led to the adoption of the civil rights legislation.¹⁵ Workplace segregation was maintained through overt exclusion, segregation of job opportunity, and conscious stereotyping. Dominant individuals and groups deliberately excluded or subordinated

14. See Frank Dobbin et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 *Amer. J. Soc.* 396, 404 (1993) (describing the central role of personnel professionals in constructing internal labor markets as EEO compliance mechanisms); Edelman et al., *Endogeneity*, *supra* note 13, at 409, 412, 442 (describing role of professional networks in the diffusion of new forms of governance and responses to law, and the corresponding influence of these networks on courts' treatment of legality).

15. I am indebted to Barry Goldstein and Linda Krieger for pushing me to clarify the meaning of first generation bias and its continuity with second generation concerns.

women and people of color.¹⁶ Job requirements that highly correlated with gender or race, such as educational and training prerequisites¹⁷ and height and weight requirements,¹⁸ solidified these patterns of exclusion. Thus, the first generation cases focused largely on dealing with the consequences of a long-standing structure of job segregation. By the passage of Title VII, many companies had eliminated explicit policies of exclusion, but continued their exclusionary practices. These practices, although embedded in structures of exclusion, were often obvious and pervasive, and conformed to a well understood idea of discrimination. The patterns of exclusion were quite stark, and could be traced to actions by individuals or groups engaged in forms of deliberate exclusion.¹⁹ These more blatant practices obviated the need to uncover and analyze more subtle forms of bias that certainly operated even at the early stages of the civil rights laws and contributed to racial and gender marginalization.

The "wrong" of first generation discrimination revolved around deliberate exclusion or subordination based on race or gender. This form of unequal treatment violated clear and uncontroversial norms of fairness and formal equality. The premise of this antidiscrimination principle is that race or gender is, by definition, irrelevant to one's capacity to do a job, and that considering race or gender is, by nature, arbitrary, denigrating, and unfair.²⁰ Disparate impact cases of the first generation type also derived their moral bite and legitimacy from the prior era of deliberate exclusion, although they never fit neatly into the dominant antidis-

16. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) (describing complete exclusion of African Americans and Latinos from the position of line driver, and how this "inexorable zero" demonstrated a pattern and practice of racial discrimination).

17. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (finding that Duke Power Co.'s requirements of high school diplomas and satisfactory performance on aptitude tests operated to "'freeze' the status quo of prior discriminatory employment practices," in ways that were "directly traceable to race"); *United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 36*, 416 F.2d 123, 140 (8th Cir. 1969) (finding that the union excluded African Americans from membership, participation in apprenticeship training programs, and use of referral systems, and conducted its examinations in a discriminatory fashion).

18. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 328-31 (1977) (accepting lower court finding that height and weight requirements for correctional counselors disproportionately excluded women).

19. Even when formal policies of discrimination were abolished, intentional exclusion could be traced to stark inequalities in the treatment and criteria applied to dominant and nondominant groups. So, for example, in *Teamsters* the Court noted the District Court's finding that "[n]umerous qualified black and Spanish-surnamed American applicants who sought line driver jobs over the years either had their requests ignored, were given false or misleading information about requirements, opportunities, and applications procedures, or were not considered and hired on the same basis that whites were considered and hired." *Teamsters*, 431 U.S. at 338.

20. See Owen Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 237 (1971).

crimination paradigm.²¹ Discriminatory application procedures and tests were problematic because they perpetuated patterns of past deliberate, systemic exclusion or reflected ongoing, though unstated, intentional exclusion.²²

The remedies for first generation problems shared these characteristics of clarity, uniformity, and simplicity. The remedies frequently took the form of rules: stop taking race or gender into account in hiring or promotion decisions; provide back pay to those previously excluded based on their gender or race;²³ afford the same opportunities, standards, and processes for access, training, hiring, and promotion to all workers, regardless of race or gender;²⁴ communicate generally to the public and specifically to communities of color that the company does not discriminate; take steps to increase the interest of previously excluded groups in seeking employment; adopt goals to integrate previously segregated jobs; discontinue use of discriminatory tests.²⁵ These remedies prohibited unequal treatment, adopted outcome goals to desegregate workplaces,²⁶ increased the representation of women and people of color in the applicant pool, and eliminated tests or criteria that were demonstrably exclusionary and not job related.²⁷ They did not, however, examine

21. Disparate impact claims challenge facially neutral employment criteria that have exclusionary consequences. See, e.g., *Griggs*, 401 U.S. at 427–28 (holding that facially neutral employment criteria, such as high school graduation and proficiency tests, could be discriminatory if they excluded blacks disproportionately and without business necessity).

22. See *id.* at 239.

23. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418–24 (1975) (providing for back pay relief as both compensation and a deterrent to future discrimination).

24. See, e.g., *United States v. Local 36, Sheet Metal Workers Int'l Ass'n*, 416 F.2d 123, 140 (8th Cir. 1969) (holding that the union must modify its employment referral systems and its examination procedures, and undo the effects of its prior discriminatory organizational policies); *United States v. Local 638, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus.*, 337 F. Supp. 217, 220–21 (S.D.N.Y. 1972) (ordering the union to grant full journeyman status to previously excluded minority workers, to admit them to the union on same terms and conditions as whites, and to develop objective examinations for admission of workers, regardless of race or national origin).

25. See EEOC, *Uniform Guidelines on Employee Selection Procedures* (1978), 29 C.F.R. § 1607 (2000) (setting forth guidelines regarding validation or establishment of “job relatedness” for employment tests and other selection procedures).

26. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (upholding judicial imposition on Alabama state troopers of a one-black-for-one-white promotion requirement as an interim measure); *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (upholding judicial imposition on construction trade union of a nonwhite membership goal equal to the minority percentage in the labor pool as remedy for past discrimination); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (upholding affirmative action plan for union apprenticeship position that reserved for black employees 50% of the training positions until percentage of black skilled workers approximated percentage of blacks in local labor force).

27. See, e.g., *Albemarle*, 422 U.S. at 436 (1975) (invalidating general ability tests that were not shown to be job-related).

or directly encourage revision of the intra-organizational culture and decision processes that entrench bias, stereotyping, and unequal access.

B. *Second Generation Discrimination*

First generation discrimination has not disappeared, and indeed has played a significant role in recent litigation against companies such as Texaco and Mitsubishi²⁸ that did not develop strong, effective programs to address even overt forms of bias.²⁹ However, this type of discrimination often operates in tandem with or is supplanted by subtle, interactive, and structural bias. In fact, second generation bias often coexisted with first generation bias, even in the early stages of the civil rights era. But the presence of overt and familiar forms of exclusion obviated the need to explore more deeply, at least as a regulatory concern, the significance of subtle forms of bias. For this reason, first generation remedies tended not to focus on the organizational and cultural dimensions of bias that were operating along with more visible and blatant forms of exclusion. Thus, the term "second generation" most accurately refers to a subtle and complex form of bias and its appropriate regulatory response, rather than to a chronological development in the dynamics of bias.

Second generation claims frequently involve patterns of interaction among groups within the workplace that, over time, exclude nondominant groups.³⁰ This exclusion is difficult to trace directly to intentional, discrete actions of particular actors. For example, a now-common type of harassment claim targets interactions among co-workers who have the power to exclude or marginalize their colleagues, but who may lack the formal power to hire, discipline, or reassign. This form of harassment may consist of undermining women's perceived competence, freezing them out of crucial social interactions,³¹ or sanctioning behavior that de-

28. See *EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059 (C.D. Ill. 1998) (documenting allegations of pervasive and serious physical and sexual abuse, including women having their genitals and breasts grabbed and routinely being called bitches and whores); *The Top 25 Managers*, *Bus. Wk.*, Jan. 10, 2000, at 66 (describing how Texaco was shaken to its foundation by tape recording revealing that senior executives made disparaging racial remarks); see also Jeff Cole & Richard B. Schmidt, *Cochran Makes Race-Bias Case A Lot Noisier*, *Wall St. J.*, May 9, 2000 at B1 (describing allegations of hangmen's nooses, make-believe "ticket back to Africa," and circulation of Ku Klux Klan Literature at Lockheed Martin).

29. There may be more progress toward eliminating deliberate exclusion of women than of people of color, particularly African Americans. Derrick Bell's work certainly highlights the persistence of racism, and the difficulties associated with its elimination. See, e.g., Derrick A. Bell, Jr., *Racial Realism*, in *Critical Race Theory: The Key Writings That Formed the Movement* 302, 306 (Kimberlé Crenshaw et al. eds., 1995) ("[D]espite centuries of struggle, none of us—no matter our prestige or position—is more than a few steps away from a racially motivated exclusion, restriction, or affront.").

30. See Krieger, *The Content of Our Categories*, *supra* note 4, at 1186–88 (claiming that stereotypes, which are "central, and indeed essential to normal cognitive functioning," tend to "bias intergroup judgment and decisionmaking").

31. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 10, at 1687.

parts from stereotypes about gender or sexual orientation.³² It is particularly intractable, because the participants in the conduct may perceive the same conduct quite differently. Moreover, behavior that appears gender neutral, when considered in isolation, may actually produce gender bias when connected to broader exclusionary patterns. The social impact of particular conduct may vary depending upon the context in which it occurs and the organizational culture shaping the perceptions of the various participants. At the margins, it can be difficult to draw lines between discriminatory harassment and lawful, albeit unprofessional, destructive behavior.

A similar evolution has occurred in the nature of bias claims involved in subjective employment practices.³³ Exclusion increasingly results not from an intentional effort formally to exclude, but rather as a byproduct of ongoing interactions shaped by the structures of day-to-day decision-making and workplace relationships. The glass ceiling remains a barrier for women and people of color largely because of patterns of interaction, informal norms, networking, training, mentoring, and evaluation, as well as the absence of systematic efforts to address bias produced by these patterns.³⁴

Claims of hostile workplace environment, exclusionary subjective employment practices, and glass ceilings are, by their nature, complex. Their complexity lies in the multiple conceptions and causes of the harm, the interactive and contextual character of the injury, the blurriness of the boundaries between legitimate and wrongful conduct, and the structural and interactive requirements of an effective remedy. This complexity resists definition and resolution through across-the-board, relatively specific commands and an after-the-fact enforcement mechanism.

These features may be best illustrated through an example. Consider a large law firm in which complaints have surfaced about a series of issues involving gender.³⁵ Almost half of the firm's associates are women,

32. See Abrams, *supra* note 10, at 1209–12; Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. Pa. L. Rev. 1, 87–98 (1995); Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 Stan. L. Rev. 691, 693–94 (1997) [hereinafter Franke, *What's Wrong with Sexual Harassment?*].

33. "Subjective employment practices" refer to decisionmaking practices that require the exercise of discretion and judgment. They include decisions about recruitment, work assignment, training, mentoring, and promotion, and they may be subject to legal challenge as a system or practice if they have a discriminatory impact on a protected group and are not justified by business necessity. For a fuller discussion of the law addressing subjective employment practices, see *infra* Part II.A.2.

34. See Debra E. Meyerson & Joyce K. Fletcher, *A Modest Manifesto for Shattering the Glass Ceiling*, Harv. Bus. Rev., Jan.–Feb. 2000, at 127, 128–29.

35. This example draws from recent scholarship examining patterns of advancement in law firms and their impact on women and people of color. See Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 Am. U. L. Rev. 669, 670–78, 724–42 (1997) (reviewing results of author's study on impact of organizational factors on women and people of color in law firms); David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law*

but the representation of women drops off precipitously at the senior associate/junior partner level. The firm's senior management is almost entirely male. Several firm departments, such as tax and mergers and acquisitions, have particularly low numbers of women. Lawyers at this firm "work around the clock" and frequently collaborate on large and complex cases. For many lawyers, the law firm functions as both their professional and social community. Decisionmaking about personnel issues is largely subjective and discretionary, with little systemic assessment of its efficacy or fairness. Advancement depends upon informal decisions about assignment of cases, access to training, and exposure to significant clients. Mentoring of new lawyers, which is also crucial to professional success, blurs the line between personal and professional interaction.

A group of women have questioned recent decisions denying women promotion to partnership, the firm's general failure to retain and promote women despite comparable entry credentials, and a series of individual incidents that triggered complaints of sexual harassment and gender bias. In part because the firm aggressively recruits women at the entry level and fails to track patterns in work assignment and promotion, the firm's management has been largely unaware of any problem until these complaints arose. The complaints involved a range of issues: differences in patterns of work assignment and training opportunities among men and women; tolerance of a sexualized work environment by partners who are otherwise significant "rainmakers"; routine comments by male lawyers, particularly in the predominantly male departments, on the appearance, sexuality, and competence of women; harsh assessments of women's capacities and work styles based on gender stereotypes; avoidance of work-related contact with women by members of particular departments; and hyper-scrutiny of women's performance by some, and the invisibility of women's contributions to others. These complaints coincide with a concern about low morale and productivity among diverse work teams. Upon examination, the firm discovers dramatic differences in the retention and promotion rates of men and women in the firm.

The problems of bias described in this scenario result from ongoing patterns of interaction shaped by organizational culture.³⁶ These interac-

for "High-Level" Jobs, 33 Harv. C.R.-C.L. L. Rev. 57, 57-61 (1998) (asserting that discrimination is likely to be self perpetuating in jobs where performance is difficult to monitor); Cynthia Fuchs Epstein et al., Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession, 64 Fordham L. Rev. 291, 295-305 (1995) (reviewing results of report on organizational issues facing women in New York law firms); Wilkins & Gulati, *supra* note 5, at 496-501 (providing institutional analysis of dynamics of advancement that systematically (although unintentionally) disadvantage black associates); Catalyst, Women in Law: Making the Case 9 (2001) (Executive Summary) (documenting women's perception of exclusion from internal networks and lack of mentoring opportunities).

36. See Ely & Meyerson, *supra* note 5, at 4 (describing how informal practices promote gender disadvantage); Susan T. Fiske, Stereotyping, Prejudice, and Discrimination, in 2 *The Handbook of Social Psychology* 357, 357, 391-92 (Daniel T.

tions influence workplace conditions, access, and opportunities for advancement over time, and thus constitute the structure for inclusion or exclusion.³⁷ They cannot be traced solely to the sexism of a single "bad actor." Nor can they be addressed by disaggregating the problem into discrete legal claims.³⁸ The overall gender impact of this conduct may be discernible only if examined in context and in relation to broader patterns of conduct and access. The absence of systematic institutional reflection about these patterns and their impact on workplace conditions, access, and opportunity for advancement contributes to their cumulative effect.³⁹ The overall organizational culture affects the extent to which particular acts produce bias in a given workplace.⁴⁰ Comments or behavior occurring in conjunction with sex segregation and marginalization may be discriminatory, while the same statements may produce little gender exclusion in a more integrated context.⁴¹

Gilbert et al. eds., 4th ed. 1998) (reviewing social psychological studies on the operation and impact of stereotyping and prejudice); David Thomas & Karen Proudford, Making Sense of Race Relations in Organizations: Theories for Practice, in *Addressing Cultural Issues in Organizations* (Robert Carter ed., 1999) (discussing complexity of modern race relations in organizations); Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749, 1824-26 (1990) [hereinafter Schultz, Telling Stories] (asserting significance of structural features of organizations in influencing the aspirations and performance of women in the workplace); Wilkins & Gulati, *supra* note 5, at 499 (asserting that "institutional features of contemporary elite firms" disadvantage black lawyers); Karen A. Jehn et al., Opening Pandora's Box: A Field Study of Diversity, Conflict, and Performance in Workgroups 21-27 (unpublished manuscript, on file with the *Columbia Law Review*) (discussing influence of structural characteristics on the performance of diverse work groups' performance).

37. Partners make daily decisions about whom to invite to lunch, whom to include in meetings and consultations, whom to provide with training, and whom to mentor. These choices often proceed on taken-for-granted assumptions about who does good work, or on a preference for working with those with whom lawyers feel comfortable.

38. See Krieger, The Content of Our Categories, *supra* note 4, at 1184-85; Schultz, Reconceptualizing Sexual Harassment, *supra* note 10, at 1689-90.

39. See Ely & Meyerson, *supra* note 5, at 4 (attributing women's failure to advance to "organizations' failure to question—and change—prevailing notions about what constitutes the most appropriate and effective ways to define and accomplish work, recognize and reward competence, understand and interpret behavior"); Wilkins & Gulati, *supra* note 5, at 499-501, 564-84 (documenting cumulative impact of decisions about mentoring, case assignment, and advancement on blacks' lack of success in law firms, and firms' lack of awareness of this dynamic).

40. See Charles L. Hulin et al., Organizational Influences on Sexual Harassment, in *Sexual Harassment in the Workplace: Perspectives, Frontiers, and Response Strategies* 127, 131-34 (Margaret S. Stockdale ed., 1996).

41. Researchers have identified the importance of contextually-determined factors in developing effective institutional responses, such as the gender composition of the workgroup, the size of the workgroup, the perceptions of the consequences of complaining, the occupational status of the involved parties, the labor market conditions, the nontraditional character of the occupations for women or men, the organizational climate regarding sexuality, the degree of decentralization of decisionmaking within the organization, and the perceptions of past outcomes of sexual harassment complaints. See Deborah Erdos Knapp et al., Determinants of Target Responses to Sexual Harassment: A

In addition, participants in these interactions may experience the same conduct quite differently, depending on their position in relation to the conduct, their power, their gender, their mobility, their support networks, and the degree of their cross-gender interaction. Those involved in conduct producing bias may not perceive their behavior as problematic or discriminatory. Given the organizational tendency to avoid addressing conflict or problematic workplace interactions, many managers and workers simply have never been asked to account for any aspect of their workplace relationships until a discrimination complaint has actually arisen. Moreover, the nature of the organizational response to harassment or exclusion concerns often shapes the extent and seriousness of the injury itself. Sometimes, communication of the impact of the conduct changes perceptions in ways that reduce the likelihood of its recurrence. Creating regular occasions for reviewing the basis and impact of informal or discretionary employment decisions reduces the expression of bias. Conversely, failure to address harassment and other forms of bias intensifies the exclusionary impact of the primary conduct.⁴²

Under some circumstances, the boundaries between legitimate and illegitimate behavior will be quite difficult to draw. Informal workplace relationships that encourage creative exchange of ideas and mentoring relationships also increase the opportunity for power abuses and expressions of bias.⁴³ Gender-based abuses of power may overlap with, or be complicated by, patterns of bad management, general worker abuse, or other unprofessional conduct.⁴⁴ In close cases, the necessity to establish

Conceptual Framework, 22 Acad. Mgmt. Rev. 687, 712-15 (1997); Schultz, Telling Stories, *supra* note 36, at 1827-39.

42. One study assessing the impact of sexual harassment on employees found that the perception of organizational tolerance of harassment was a more significant determinant of variance in job withdrawal, psychological well-being, anxiety, and depression than the harassment itself. Hulin et al., *supra* note 40, at 145.

43. So, for example, in a recent interview with a professor in a university theater department, the interviewee discussed the challenges of implementing a sexual harassment policy in a department where sexual interaction might literally be written into the script, and where intense interpersonal connection may be needed to teach effectively. He emphasized the importance of talking through where the boundaries were clear, where they were ambiguous, and how to check along the way. Interview with Professor A, Professor and Chair of the Theater Department, University A, in Phila., Pa. (May 24, 2000) (transcript on file with the *Columbia Law Review*).

44. See Regina Austin, Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress, 41 Stan. L. Rev. 1, 21-25 (1988). A study of the implementation of the sexual harassment policy at the University of Pennsylvania revealed that the problem of sexual harassment in graduate education was connected to a series of broader issues involving "the reciprocal responsibilities and roles of graduate professors and their advisees/mentees/researchers." Report of the Working Group on Implementation of the Sexual Harassment Policy, Almanac Supplement, Nov. 15, 1994, S-1, S-14 (on file with the *Columbia Law Review*). These problems were linked to structural aspects of graduate education, such as "the dependence on one individual, the longevity of the relationship, [and] the close working relationship frequently involved." *Id.* Potential for abuse of power surfaced as sexual harassment, exploiting graduate student research,

the boundary lines between unprofessional and discriminatory conduct can deflect attention from the institutional dysfunction producing both types of problems. More general abuses of power or unfairness may accentuate the expression of gender bias or make its elimination more difficult. Harassment claims that expose these more general patterns of dysfunction may be difficult to address in the absence of effective systems of problem solving, information gathering, and communication up and down the organization.

Finally, the "wrong" of second generation discrimination cannot be reduced to a single, universal, or simple theory of discrimination. Second generation discrimination does not evoke the first generation's clear and vivid moral imagery—the exclusionary sign on the door or the fire hose directed at schoolchildren. Instead, the applicable normative theories are plural, subtle, and, not surprisingly, more complex. One such theory would apply to decisions or conditions that violate a norm of functional, as opposed to formal, equality of treatment. This theory defines discrimination to include differences in treatment based on group membership, whether consciously motivated or not, that produce unequal outcomes.⁴⁵ Second generation bias could also violate a norm of equal access, which defines discrimination to include employment decisions that are formally fair but functionally biased in favor of the dominant group by using criteria that advantage one group over another for arbitrary reasons, meaning reasons that do not advance the articulated goals of the employment de-

exacting personal favors, and failing to communicate about expectations in the working relationship. The inquiry concerning sexual harassment also uncovered the particular vulnerability of international students because of cultural and language barriers and "an undercurrent of hostility, intolerance, and neglect that sometimes marginalizes the concerns and experiences of international individuals." *Id.* Often, a high rate of discrimination claims signals a more general problem of abuse or poor management. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 1026 (1996).

45. See Lawrence, *supra* note 4, at 122–25; McGinley, *supra* note 2, at 421–25; Oppenheimer, *supra* note 10, at 900–02. This theory of discrimination focuses on fair opportunity, which requires that "equal consideration should be given to all qualified candidates so that candidates are chosen on the basis of their qualifications, where qualifications are set that are relevant to the legitimate social purposes of the position in question." Amy Gutmann, *Responding to Racial Injustice*, in *Color Conscious: The Political Morality of Race* 106, 126 (K. Anthony Appiah & Amy Gutmann eds., 1996). The methods of proof, if not the explicit reasoning, set out by the Supreme Court for both individual and systemic disparate treatment cases could, though need not, be read to extend to this type of disparate treatment. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2108–12 (2000) (holding that factfinder is permitted, although not required, to infer fact of discrimination from combination of *prima facie* case and proof that employer's articulated reason is pretextual); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (finding disparate treatment when "the employee's protected trait actually played a role in [the decisionmaking process] and had a determinative influence on the outcome"); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 357–58 (1977) (permitting disparate treatment to be established by unexplained disparities between composition of applicant pool and candidates selected). For a discussion of the conflicting interpretations of the scope of disparate treatment, see McGinley, *supra* note 2, at 446–65.

cision.⁴⁶ A third possibility is that these subtle, exclusionary practices violate an antisubordination principle, which itself is a plural normative category that could include stereotyping,⁴⁷ gender policing,⁴⁸ undermining women's competence,⁴⁹ or maintaining gender or racial hierarchy.

Depending on the context, one or a combination of these discrimination theories may be implicated. Indeed, aspects of second generation bias frequently blend with circumstances that themselves may not violate any current legal norm.⁵⁰ The normative significance of particular interactions often requires an inquiry into their power dynamics, gender or racial patterns, and longer-term impact. Thus, the problem-solving process inevitably shades into the project of elaborating the applicable norms. The definition of the right (or wrong) is integrally linked to the remediation of the underlying problem.⁵¹

46. In *Griggs*, the Supreme Court relies on the "fabled offer of milk to the stork and the fox" to illustrate, although not fully explicate, this theory of discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). "[T]he vessel in which the milk is proffered [must] be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* The Court's rationale for applying disparate impact theory to subjective employment practices, set forth in *Watson v. Fort Worth Bank & Trust*, also embraces this access theory of discrimination. 487 U.S. 977, 989-1000 (1988). See *infra* text accompanying notes 86-93; see also Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 980-91 (1993) (arguing that discrimination includes standards that arbitrarily privilege white workers); Joel Wm. Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 Tex. L. Rev. 41, 43-44 (1986) [hereinafter Friedman, *Redefining Equality*] (defining discrimination as conduct that deprives individuals or groups of meaningful access to employment opportunities through the use of standards, criteria, or structures that fail to minimize the expression of bias, or that arbitrarily advantage one group over the other); Susan Sturm, *Equality and Inequality*, forthcoming in the *International Encyclopedia of the Social Sciences* (on file with the *Columbia Law Review*).

47. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (recognizing role that stereotyping plays in placing women "in an intolerable and impermissible catch 22").

48. See Abrams, *supra* note 10, at 1197-98, 1207-08 (reviewing workplace treatment of women that compels them to conform to gender stereotypes); Franke, *What's Wrong With Sexual Harassment?*, *supra* note 32, at 693 (identifying reinforcing gender stereotypes as the fundamental evil of sexual harassment).

49. See Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 10, at 1691.

50. For example, the requirement of a lengthy work day, coupled with the absence of a work-family policy that provides flexibility for working parents, tends to stack the deck against women and may even be inefficient over the long term. However, it does not in and of itself give rise to a viable legal challenge.

51. This interrelationship between the construction of the remedy and the elaboration of the meaning of the right is not unique to this area. It is indeed a common feature of public law. Cf. Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 884-85 (1999) (discussing reciprocity of right-remedy causation); Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 Geo. L.J. 1355, 1361-64 (1991) [hereinafter Sturm, *Public Law Remedies*] (discussing importance of the public remedial formulation process in determining how to address violations of general constitutional standards). Levinson focuses primarily on the degree to which concerns about the capacity to implement remedies shape the definition of the right. He overlooks the insight, derived from pragmatism, that there is an even more basic and inseparable

C. The Limits of a Rule Enforcement Approach

For the reasons described above, second generation problems cannot be reduced to a fixed code of specific rules or commands that establishes clear boundaries governing conduct.⁵² Instead, their resolution requires a different process, namely problem solving. That process identifies the legal and organizational dimensions of the problem, encourages organizations to gather and share relevant information, builds individual and institutional capacity to respond, and helps design and evaluate solutions that involve employees who participate in the day-to-day patterns that produce bias and exclusion. An effective system of external accountability, including judicial involvement as a catalyst, would encourage organizations to identify and correct these problems without creating increased exposure to liability, and to learn from other organizations that have engaged in similar efforts.

A rule-enforcement approach to regulating second generation problems discourages this type of proactive problem solving. That approach treats regulation as punishing violations of predefined legal rules and compliance as the absence of identifiable conduct violating those rules. Rules developed externally and imposed unilaterally, whether by courts or other regulatory bodies, cannot adequately govern the range of circumstances implicated by the general principle of nondiscrimination, or account for how those circumstances will shape the law's meaning in context.⁵³ Any rule specific enough to guide behavior will inadequately account for the variability, change, and complexity characteristic of second generation problems. General rules, unless linked to local structures for their elaboration in context, provide inadequate direction to shape behavior. This is particularly true for more subtle and less familiar problems, such as second generation discrimination. Externally-imposed solutions also founder because they cannot be sufficiently sensitive to context or integrated into the day-to-day practice that shapes their imple-

means-ends relationship. Elaborating a general norm in context is crucial to formulating a remedial response, which in turn deepens and even alters the understanding of the aspirational norm.

52. Fredda Klein, a noted authority on sexual harassment, put it this way: "The idea isn't to get the right rigid or formulaic approach; the idea is to get the right principles in place." Solomon, *supra* note 13, at 45. Solomon embraces the strategy of "sensible employers" who treat sexual harassment as one of a broader set of issues about privacy, respect, and diversity, which are in turn connected to issues of productivity, information exchange, and creativity. *Id.* at 46.

53. For a more general articulation of this point, see Michael C. Dorf, Foreword: The Limits of Socratic Deliberation, 112 Harv. L. Rev. 4, 7-8 (1998) (discussing how Supreme Court's common law gradualism limits its ability to learn systematically from experience, and urging adoption of provisional adjudication to encourage decentralized experimentation); Sturm, Public Law Remedies, *supra* note 51, at 1427-28 (arguing for deliberative model of public remedial formulation to preserve judicial legitimacy and foster effective adaptation to particular settings).

mentation.⁵⁴ Yet, internally-generated solutions are often insufficiently attentive to their normative implications, or to the connection between those local practices and the general antidiscrimination norm.

In a rule-enforcement process, problems tend to be redefined as discrete legal violations with sanctions attached. Fear of liability for violation of ambiguous legal norms induces firms to adopt strategies that reduce the short-term risk of legal exposure rather than strategies that address the underlying problem. They accomplish this in significant part by discouraging the production of information that will reveal problems, except in the context of preparation for litigation. Under the current system, employers producing information that reveals problems or patterns of exclusion increase the likelihood that they will be sued. Thus, lawyers counsel clients not to collect data that could reveal racial or gender problems or to engage in self-evaluation, because that information could be used to establish a plaintiff's case.⁵⁵ Similarly, the rule-enforcement approach to compliance induces plaintiffs' lawyers and advocates to view information about institutional problems and failures as a potential basis for establishing liability. It thus encourages these important legal actors to overlook ways of using that information proactively to develop accountability systems and promote constructive structural change.

Fundamentally, the rule-enforcement model encourages lawyers to see issues as potential legal claims, rather than as problems in need of systemic resolution. This narrow focus on avoiding liability diverts attention from the structural dimensions underlying the legal violations, as well as the organizational patterns revealed through aggregating claims. It predisposes lawyers attempting to formulate employer sexual harassment policies to articulate a set of specific rules governing behavior that could conceivably be viewed as harassment and enforced after-the-fact.

54. They may also trigger resistance or backlash, which further undermines the law's transformative potential. See Sturm, *Public Law Remedies*, supra note 51, at 1427–28.

55. See Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 *Emp. Rts. & Emp. Pol'y J.* 1, 18–34 (1999) [hereinafter Bisom-Rapp, *Discerning Form from Substance*]. For example, when offered a computer program that would enable companies to track information about their human resource practices, company general counsel uniformly responded that this would be an extremely helpful tool, but no one would buy it. See Telephone Interview with AON Broker B, AON Risk Services, Inc., at 1 (Jan. 7, 2001) (transcript on file with the *Columbia Law Review*). Right now, companies rely on the burdensomeness defense to avoid gathering and disclosing information about company-wide practices as part of the discovery process. Once that information collection process is simplified, that defense will no longer work. Lawyers view increased information gathering and analysis as making plaintiffs' case for them. Barry Goldstein refers to this response as the “ostrich approach—don't collect any information because the information might help plaintiffs.” Memorandum from Barry Goldstein, Partner, Saperstein, Goldstein, Demchak, & Baller, to Susan Sturm 4 (Dec. 4, 2000) (on file with the *Columbia Law Review*). He views the approach as self-defeating, because it sometimes enables plaintiffs' lawyers to know more about the actual operation on the shop/store/plant floor than the “head-in-the-sand” employer. *Id.* at 5.

These legal actors would be extremely troubled by the generality and emphasis on contextualization embodied in current Supreme Court jurisprudence.⁵⁶ In the absence of such specificity from the Court, these legal actors have in many instances formulated internal workplace rules that purport to carve out a safe harbor against legal exposure for workplace conduct.⁵⁷ For example, lawyers may counsel employers to avoid sexual harassment problems by discouraging informal or social contact among men and women. Of course, this advice fails to achieve the sought-after status of a legal safe harbor, and it undercuts the capacity of preventive action to further the goals of equal employment opportunity. Advice of this character necessarily trivializes the problem of sexual harassment. It defines the scope of the problem underinclusively so that the general and fundamental problem of women's access and participation remains unaddressed. This approach also erects barriers to addressing claims directed at the employer's failure to promote women, since that issue would be no part of the narrowly defined sexual harassment inquiry. Similarly, the potential connections between patterns contributing to sexual harassment or glass ceiling claims and the company's turnover and productivity problems remain hidden.⁵⁸

Finally, a rule-enforcement approach encourages the impulse to establish and enforce specific legal boundaries. This, in turn, necessarily inflates the importance of the most controversial cases involving conduct close to the line between simple (if regrettable) unprofessional conduct and conduct that is actually unlawful. These close cases, accordingly, become the focus of organizational discussion of problems such as sexual

56. See, e.g., *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81-82 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships . . ."); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) ("Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."). These cases are discussed in greater depth in Part II, *infra*.

57. This legalistic response has been described in numerous interviews with lawyers, organizational consultants, insurance brokers, human resource professionals, and workers. It has also been noted in the trade literature. See, e.g., Jonathan A. Segal, *Kill All the Lawyers?*, *HRMagazine*, Feb. 1998, at 117, 117 [hereinafter Segal, *Kill All the Lawyers*] ("Management attorneys often make their clients so paranoid of potential legal claims that many executives make it their primary goal to avoid all legal risks, instead of balancing the costs and benefits of a course of action and making a reasoned, informed decision."); Jonathan A. Segal, *Sexual Harassment Prevention: Cement for the Glass Ceiling?*, *HRMagazine*, Nov. 1998, at 129, 129 [hereinafter Segal, *Sexual Harassment Prevention*] (presenting potential adverse effects of sexual harassment prevention programs).

58. Susan Bisom-Rapp documents a similar tendency of management lawyers in the context of performance appraisal and discipline. Lawyers have recommended techniques designed to create supportive documentation for employee dismissals, including sanitizing files to eliminate potentially misleading or harmful documents. This "preventive" advice focuses predominantly on producing a favorable record to discourage litigation or enable summary judgment, and neglects the use of this information to identify and correct patterns of biased decisionmaking. Bisom-Rapp, *Discerning Form from Substance*, *supra* note 55, at 18-34.

harassment. Cases of this character pose the greatest risk of polarization, delegitimation of the antidiscrimination norm, and perceived unfairness if addressed primarily as a question of whether the challenged behavior should be punished because it technically crossed the legal line. They may well involve conduct that perpetuates and reinforces gender bias, even if it is not sufficiently severe to warrant imposition of a legal sanction. Unless placed in a broader context, a legalistic response risks distorting not only employers but also public understanding of the impact and importance of sexual harassment.

Thus, second generation cases are resistant to solution through after-the-fact adjudicative sanctions for rule violations. Yet, these types of problems will persist if left solely to the discretion of employers to address in response to market incentives. Although there often is an overlap between concerns about efficiency and fairness, many firms have not developed the organizational systems that would enable them to identify these connections. Firms tend to undervalue the importance of human resource issues generally, and avoid addressing the messy problems of managing human relationships until those problems surface as crises.⁵⁹ Many firms use short-term measures of productivity, which frequently fail to make visible the longer term patterns of inefficiency that underlie second generation bias. Moreover, there may be situations in which the values of nondiscrimination and efficiency conflict, such as when firms perceive exclusion of particular groups to serve or reflect rational economic goals. In the absence of continued legal regulation, firms will lack adequate incentives to address bias in those situations.

Problems of gender-based exclusion and unfairness will persist without external legal regulation, but the first generation form of regulation is inadequate to address the complexities of second generation bias. The next Part outlines a regulatory approach that offers a "third way" of integrating problem solving and accountability.

59. John Wymer, a partner at King & Spaulding and mediation counsel for Home Depot in *Butler v. Home Depot*, explained:

Home Depot is very open to sharing this information [about human resource systems to increase accountability and access]. I am recommending Home Depot's system to companies as a prototype. You don't want to have to defend a class action for the next three years. I have yet to see it take. Most of the companies that want to talk to Home Depot are companies that have been sued, that are in the position Home Depot was in 5 years ago. I teach seminars on these issues. People diligently take notes. I have yet to have anyone say, I would like you to come in and design a system for [us] It is hard to get their attention. They are blowing and going. This sounds like an enormous diversion of assets and waste of time. I give a lot of speeches and seminars, and preach this gospel. Operations people look at you like you are crazy.

Telephone Interview with John Wymer, Mediation Counsel, Home Depot, at 4, 5 (June 8, 2000) (transcript on file with the *Columbia Law Review*).

II. A STRUCTURAL REGULATORY APPROACH TO SECOND GENERATION DISCRIMINATION

The architecture of a multi-sector regulatory system for addressing second generation workplace problems is emerging through the interplay among the judiciary, workplaces, and nongovernmental actors playing an intermediary role. In crucial areas of discrimination law, the Supreme Court has outlined a framework that is capable of providing for dynamic interactions between general legal norms and workplace-based institutional innovation that promotes effective problem solving. Responsive employers have instituted internal systems for preventing and remedying problems stemming from complex workplace relationships. These systems develop the information and capacity necessary to understand the nature of the problem, respond at the appropriate organizational level to remedy it, and learn from previous problem-solving efforts. These pathbreaking organizations demonstrate that internal dispute resolution and problem-solving systems can be robust, if they are designed to provide for accountability and effectiveness. They also provide a starting point for systematic reflection about the meaning of legitimacy and accountability in these internal workplace problem-solving regimes. This Part draws on these complementary developments to sketch out the contours of this emerging regulatory approach.

A. *The Courts: General Norm Elaboration and Context-Based Problem Solving*

Supreme Court decisions can be read to cast the judiciary in an important but de-centered role in addressing second generation bias. This role, if properly implemented, moves beyond the traditional choice between deregulation and rule-enforcement by adopting a structural approach that encourages effective problem-solving. Organizations, in turn, have developed processes to address sexual harassment and subjective employment practices in context, over time, and in relation to broader patterns of bias or dysfunction. This combination opens the door for elaborating general norms, building problem-solving capacity, and developing systems of accountability. It also diversifies the pool of actors responsible for applying the general legal prohibition against harassment or biased treatment to particular contexts. Although the elements of this structural approach have been set forth in recent cases, the Court has not yet fully articulated the conceptual framework that ties these elements together and explains their significance. Perhaps this lack of clarity has contributed to the uneven implementation of the Court's structural jurisprudence by the lower courts.⁶⁰ This Section develops this dynamic, yet incompletely specified, approach to workplace regulation in two doctrinal areas addressing second generation bias: sexual harassment and subjective employment practices.

60. The problem of inadequate implementation of this structural approach by lower courts is discussed in Part IV.A, *infra*.

1. *Hostile Environment Sexual Harassment*. — The Supreme Court's basis for treating sexual harassment as a form of sex discrimination begins with the general, ambiguous language of Title VII itself, which makes it: an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.⁶¹

The Court interpreted Congress's use of the phrase "terms and conditions or privilege of employment" to show an intent "to strike at the entire spectrum of disparate treatment of men and women in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment.⁶² The Court's discussion of why sexual harassment constitutes discrimination is strikingly open-ended. As Justice Ginsburg explained, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."⁶³ The violation is a discriminatorily abusive work environment, which exists if it "would reasonably be perceived, and is perceived, as hostile or abusive."⁶⁴

The Court thus defined hostile environment sexual harassment as a condition that cannot be reduced to precise, unambiguous rules. Its opinions explicitly rejected the goal of specifying rules as futile. "This is not, and by its nature cannot be, a mathematically precise test."⁶⁵ The Court also refused to adopt a particular theory of the link between sexual harassment and the statutory prohibition of sex discrimination. Implicitly, the Court delegated the task of explaining why sexual harassment is discriminatory to the situation-specific, problem-solving process. But general rules continued to play a crucial, boundary-defining role. For example, the Court concluded that the broad congressional prohibition against "discrimination because of sex" precluded a limiting interpretation that did not include same-sex harassment within the meaning of hostile environment discrimination.⁶⁶ Thus, the Court rejected the idea of dictating codes of conduct for employers, but it has continued to play the role of establishing floors below which their conduct may not fall.

The Supreme Court added two doctrinal features that invite contextualization as the method of elaborating clear but revisable norms to account for variability in local conditions. First, the Court specifically called for a contextual approach. In *Harris*, the Court said that "whether an

61. 42 U.S.C. § 2000e-2(a)(1) (1994); see *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); *Oncale*, 523 U.S. at 78; *Harris*, 510 U.S. at 21; *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986).

62. *Harris*, 510 U.S. at 21.

63. *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

64. *Id.* at 22 (quoting *Meritor Sav. Bank*, 477 U.S. at 67).

65. *Id.*

66. *Oncale*, 523 U.S. at 78–82.

environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."⁶⁷ The Court listed the types of factors that would influence such a determination.⁶⁸ But its list of factors was illustrative rather than comprehensive, and the Court made clear that "no single factor is required." In *Oncale*, the Court again emphasized specific context as the means of norm elaboration:

In same sex (as in all) harassment cases, th[e] inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.⁶⁹

Second, the Court adopted an approach to employer liability that, if properly implemented, clearly encourages the development of workplace processes that identify the meaning of and possible solutions to the problem of sexual harassment. Elaborated most recently in *Burlington Industries, Inc. v. Ellerth*⁷⁰ and *Faragher v. City of Boca Raton*,⁷¹ the Court held employers liable for hostile environment harassment involving supervisors unless the employer has "exercised reasonable care to avoid harassment and to eliminate it when it might occur."⁷² Of crucial importance here, the Court evaluated the adequacy of those steps by their effectiveness. These cases offer employers an affirmative defense to a hostile environment harassment claim if the employer has shown that it took reasonable steps to prevent harassment and to eliminate it when it does occur.⁷³

67. *Harris*, 510 U.S. at 23.

68. "These [factors] may include the frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*

69. *Oncale*, 523 U.S. at 81-82.

70. 524 U.S. 742 (1998).

71. 524 U.S. 775 (1998).

72. *Id.* at 805.

73. *Id.*; see also *Ellerth*, 524 U.S. at 765. The second prong of the employer liability defense focuses on the reasonableness of the *employee's* efforts to obtain redress. An employer may also avoid liability by demonstrating that the complaining employee had failed to act with reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided. This language, if properly interpreted, is entirely consistent with the flexible, contextual approach described above. It invites lower courts to take account of the circumstances and dynamics facing a victim of sexual harassment. However, as Linda Krieger, Shawna Parks, and Priya Sridharan have noted, many lower courts have interpreted *Faragher* to impose a strict reporting requirement, and have failed to consider the dynamics of sexual harassment in determining the reasonableness of employee's response to harassment, even when reasonable fear or egregious conditions explain the plaintiffs' delay. See Linda Krieger et al., *Employer Liability for Sexual Harassment: Normative, Descriptive, and Doctrinal Interactions* 7 (unpublished manuscript, presented at Law & Society Association Annual Meeting, Miami, 2000, on file with the *Columbia Law Review*) [hereinafter Krieger et al., *Employer Liability*]. This interpretation of the plaintiff's obligation to complain, if

This is not simply a good faith standard that substitutes formal process for meaningful results. Instead, it ties the adequacy of problem-solving processes to demonstrated elimination of the discriminatory condition. Such an approach blurs the line between internal and external legal regulation, and between formal and informal legal process. It offers incentives to create internal processes that can be shown to be legitimate and effective when assessed in relation to other workplaces and to the underlying principles reflected in the general sexual harassment norm articulated by the Supreme Court.⁷⁴

While technically specified as an affirmative defense, the Court's employer liability approach moves in the direction of linking problem definition and resolution. In effect, the Court's approach makes the creation of an administrative problem-solving process a part of an employer's legal obligation.⁷⁵ Thus, it is not only jurors and judges who will be struggling to define sexual harassment as part of a determination of liability for past conduct. As part of their responsibility for preventing and redressing workplace harassment, employers must determine the meaning and causes of harassment as it occurs on an ongoing and continuous basis. The Court's emphasis on effective problem solving encourages employers to define sexual harassment in terms of its impact and cause, rather than

validated by the Supreme Court, would fundamentally threaten the efficacy of the structural approach. See *infra* text accompanying notes 295-297.

74. The Supreme Court in *Ellerth* grounds its interpretation of employer liability in part on Title VII's goal of encouraging preventive action and conciliation:

Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context. . . . To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.

Ellerth, 524 U.S. at 764 (citations omitted); see also *Faragher*, 524 U.S. at 806 ("It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."). Training materials and articles written by practitioners in the wake of the Supreme Court's sexual harassment decisions emphasize the importance of proactive policies and procedures to address sexual harassment. See, e.g., Joann Keyton & Steven C. Rhodes, *Organizational Sexual Harassment: Translating Research into Application*, 27 J. Applied Comm. Res. 158, 161 (1999) ("The subsequent question becomes: How can this information be utilized by organizations in their policies, procedures, and training?"); Barry J. Baroni, *Unwelcome Advances: Sexual Harassment in the Workplace*, Training & Development, May 1, 1992, at 19 (noting that "education and training can be an effective prevention tool"); Rebecca A. Thacker, *Preventing Harassment in the Workplace*, Training & Development, Feb. 1992, at 51 ("Keep harassment incidents at bay by training employees in how to respond to them."); The Law Firm of Wolf, Block, Schorr, & Solis-Cohen, *Model Sexual Harassment Prevention Training Guide* (June 10, 1999).

75. Susan Sturm, *Race, Gender and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. Pa. J. Lab. & Emp. L. 639, 654-55 (1998) [hereinafter Sturm, *Race, Gender and the Law*].

to engage solely in after-the-fact legal line-drawing. Because their efforts will only be rewarded if they prevent or eliminate serious problems, employers must at least identify whether the challenged conduct presents a problem important enough to warrant change at an individual or organizational level.

The Court's approach also renders visible the connection between the adequacy of the organizational response and the determination that the underlying conduct was harassment. An effective complaint procedure encourages employees to report harassment before it becomes severe or pervasive, and it enables employers to stop the harassment before it reaches this level.⁷⁶ This, in turn, creates considerable incentives for employers to focus on the meaning and application of the antidiscrimination norm in relation to its own workplace culture and dynamics. It also encourages the integration of sexual harassment problem solving into the day-to-day processes of production and conflict resolution. Even more fundamentally, it encourages proactive steps to produce information and build capacity to problem solve by rewarding effective results with reduced liability.

If the Supreme Court's decisions are understood in this way, courts will continue to play an important but less didactic role in the elaboration and enforcement of sexual harassment norms. Courts will not attempt to specify and enforce detailed rules for the various permutations of sexual harassment. Nor does this approach devolve into a system of workplace self-regulation. Instead, the Court casts the judiciary in the role of catalyst and backstop. This textured approach both creates and continually reapplies incentives for employers to engage in situation-specific problem solving, providing for accountability by assessing effectiveness and by imposing liability should employers fail to identify and correct problems that are shown to be identifiable and correctable. The information generated by internal problem-solving efforts, in turn, improves the Court's own capacity to perform its role by providing both a more fully developed record and a set of criteria for evaluation that the employees themselves participate in formulating. Such an approach sets the stage for institutional self-reflection that can enable organizations to address new problems without predetermined rules or purely formalistic responses, and to learn from the problem-solving efforts of others.⁷⁷

A judicially enforced interactive approach to sexual harassment will provide a means of holding workplace processes accountable without sup-

76. See *Ellerth*, 524 U.S. at 764; *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 804 (5th Cir. 1999) (Weiner, J., concurring) ("[W]hen an employer satisfies the first element of the Supreme Court's affirmative defense, it will likely forestall its own vicarious liability for a supervisor's discriminatory conduct by nipping such behavior in the bud.").

77. Subsequent sections describe the countertendencies apparent in lower court decisions, the need for more explicit attention to the implementation of this role to counteract those tendencies, and an elaboration of how that role might take shape. See *infra* Parts IV and V.

planting the crucial role of these processes in defining and addressing the problem. Employers' internal processes of conflict resolution will not be self-regulated or insulated from external scrutiny. If employers are sued, a court will evaluate the effectiveness of their processes in preventing and eliminating the problematic condition. Over time, courts will have numerous opportunities to evaluate how these practices operate in different contexts, and to encourage the pooling of information about what works. Companies are encouraged to compare their practices with those of other companies that face similar challenges. A court will decide a problem is correctable if some other company has in fact corrected it, so companies will have incentives to learn about the problems other companies confront and the solutions they create. Courts' assessment of the adequacy of these processes will thus influence what employers view as important in their internal processes for preventing and redressing sexual harassment.

The Court's opinions, however, do not yet specify principles guiding the adequacy determination.⁷⁸ They are, indeed, susceptible to more wooden or formalistic interpretations of employer liability. Thus, *Burlington Mills* and *Faragher* are watershed opinions. Their future elaboration could provide a framework for either promoting or retarding dynamic problem-solving approaches necessary to address complex workplace relationships. In fact, lower courts and lawyers could undercut the promise of *Burlington Mills* and *Faragher* by rubber stamping ineffective internal processes or developing rules for internal dispute resolution processes that encourage employers simply to replicate an ineffectual rule-enforcement model within the workplace.⁷⁹ The future is thus an open one.

2. *Legal Regulation of Subjective Employment Practices.* — The Court has also provided for a problem-solving approach in its application of disparate impact to subjective employment practices, although this move has gone largely unheralded.⁸⁰ The structural approach here is built into the

78. *Ellerth* refers to the importance of "a stated policy suitable to the employment circumstances." 524 U.S. at 765. *Faragher* refers to regulations promulgated by the Equal Employment Opportunity Commission (EEOC) "advising employers to 'take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment.'" *Faragher*, 524 U.S. at 806 (quoting 29 C.F.R. § 1604.11(f) (1997)). The opinion refers approvingly, in its discussion of the plaintiff's duty to avoid or mitigate harm, to an employer who has "provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense." *Id.* *Meritor Savings Bank*, the first Supreme Court case establishing the principle of employer liability, questions the adequacy of a procedure that requires an employee to complain first to her supervisor. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72–73 (1986).

79. The risk that, in the absence of clarification by the Supreme Court, lower courts and lawyers will substitute formalistic compliance for effective remediation in interpreting employer liability is discussed in Part IV.A, *infra*.

80. Other areas reflecting a move toward structuralism include affirmative action, downsizing, and the reasonable accommodation approach to disabilities, pregnancy, and family leave. See Americans With Disabilities Act of 1990, 42 U.S.C. § 12101–12213 (1994);

definition of the legal harm, rather than introduced through the articulation of an independent employer liability defense, as in the sexual harassment area. When read this way, if a subjective decisionmaking process is shown to have an adverse impact, the business necessity of such a process is determined by evaluating the adequacy of an employer's efforts to minimize arbitrariness and bias. Discrimination is defined, then, as maintenance of an arbitrary and exclusionary system of decisionmaking that systematically disadvantages individuals based on their group status. Indeed, reading these cases through a structural lens provides a way out of the Hobson's choice between subjecting those practices to impossibly high job validation requirements or applying empty reasonableness standards.⁸¹

Employers engage in subjective decisionmaking whenever they make employment decisions that require the exercise of judgment and discretion. These practices could involve individuals, such as promotion and job assignment decisions resulting from interviews, references, and collective or individual assessments of the relative merits of candidates,⁸² or groups, such as decisions about defining the pool from which to select employees for a particular position.⁸³ For a variety of reasons, decisions requiring the exercise of individual or collective judgment that are highly unstructured tend to reflect, express, or produce biased outcomes.⁸⁴

Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* 80–94 (1990); Alfred W. Blumrosen et al., *Downsizing and Employee Rights*, 50 Rutgers L. Rev. 943 (1998); Paul Steven Miller, *Disability Civil Rights and A New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. Pa. J. Lab. & Emp. L. 511, 520 (1998); Sturm & Guinier, *supra* note 44, at 1011–31. For example, Blumrosen argues that the imposition of information disclosure requirements will compel employers to attend carefully to employee interests before and during the downsizing process, despite the virtual immunity that the waiver appears to provide. The principle that employees are entitled to advanced information about a major adverse personnel action may become the foundation of a new industrial relations era.

Blumrosen, *supra*, at 953. These areas will not be discussed here. I mention them to underscore that the structural approach may very well reflect a broader trend.

81. See *infra* text accompanying notes 90–95.

82. See Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 955 (1982); Krieger, *The Content of Our Categories*, *supra* note 4, at 1227–31 (describing courts' treatment of subjective employment practices prior to and after *Watson*).

83. See, e.g., *Thomas v. Wash. County Sch. Bd.*, 915 F.2d 922 (4th Cir. 1990) (holding that nepotism in filling teaching positions had disparate impact on minorities); *Taylor v. USAir*, 56 FEP (BNA) 357, 365 (W.D. Pa. 1991) (holding that maintenance of an all-white nepotistic/word-of-mouth hiring channel had disparate impact on blacks). But see *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 305 (7th Cir. 1991) (holding that an employer's passive reliance on potential employees' hearing about vacancies did not constitute a "practice" subject to disparate impact analysis).

84. See *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) (noting "the tendency of unique employees (that is, single employees belonging to a protected class, such as a single female or a single minority in the pool of employees) to be evaluated more harshly in a subjective evaluation process"); Charny & Gulati, *supra* note 35, at 77–78; Ely

This bias has been linked to patterns of underrepresentation or exclusion of members of nondominant groups.⁸⁵

The Supreme Court has recognized this relationship between unstructured discretionary employment decisions and discrimination. In *Watson v. Fort Worth Bank & Trust*, the Court held that disparate impact analysis applies to subjective employment practices, including "an employer's undisciplined system of subjective decisionmaking."⁸⁶ This decision reflected a recognition that systemic factors, namely the structure (or lack thereof) of decisionmaking, caused exclusion, as well as the expression of bias by individuals or groups operating within those structures.

Watson's decision to apply disparate impact analysis to subjective employment practices was unanimous.⁸⁷ The appropriate standard for establishing business necessity, upon a showing that the subjective employment practices produced a disparate impact, was more controversial. The Court, like many commentators, treated the issue as a choice between requiring employers to validate its subjective employment practices using standard test validation methods or reducing employers' burden of demonstrating the necessity of using those practices. A plurality of the Court feared that, as a practical matter, subjective employment practices would be so difficult and expensive to validate if traditional disparate impact theory applied that employers would revert to quotas to avoid liability. Faced with that choice, a plurality of the Court instead articulated a less stringent standard of business justification to assess subjective employment practices with a disparate impact, and allocated the burden of persuasion for demonstrating business justification to the plaintiff.⁸⁸

The Court thus failed in *Watson* to carry through on the structuralist insight that prompted disparate impact's application to subjective employment practices in the first place. The conduct that was being challenged was not the individual expression of bias per se, or the exclusion-

& Meyerson, *supra* note 5, at 16-19; Krieger, *The Content of Our Categories*, *supra* note 4, at 1187-88.

85. See Wayne Cascio, *Applied Psychology in Personnel Management* 77 (3d ed. 1987); Susan T. Fiske & Shelley E. Taylor, *Social Cognition* 159-67 (1984) (detailing the cognitive basis of stereotyping, the "cognitive culprit[] in prejudice and discrimination," which can promote bigotry against outgroups); Krieger, *The Content of Our Categories*, *supra* note 4, at 1199-1211 (describing how informal practices promote gender disadvantage); Sturm, *Race, Gender and the Law*, *supra* note 75, at 668 (describing employment process in which "the absence of a systematic, racially diverse, and accountable method of decision making heightened the risk that bias would result"); see also sources cited *supra* note 35.

86. 487 U.S. 977, 990 (1988).

87. *Id.* at 981.

88. *Id.* at 997-99. This standard was subsequently embraced by the Court for all disparate impact cases in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Congress then legislatively altered the standard and allocation of burdens of proof for disparate impact claims in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A) (1994)).

ary impact of the particular qualification being sought through the subjective process. It was instead the failure of the employer's decision-making system to minimize the expression of bias. Given the structural nature of the problem, it made sense to define employers' business necessity defense as an inquiry about their system's adequacy. This possibility was not considered by the Court in *Watson*, or by many of the commentators addressing the issue of whether disparate impact analysis should be applied to subjective employment practices.⁸⁹

Some lower courts have framed their legal analysis of subjective employment practices to take account of the systemic and structural determinants of bias.⁹⁰ Their decisions, interpreting *Watson* in light of the Civil Rights Act of 1991,⁹¹ focus on the adequacy of employers' internal decisionmaking processes and systems as the basis for determining the business necessity of subjective employment practices with adverse impact.⁹²

89. See, e.g., Krieger, *The Content of Our Categories*, *supra* note 4, at 1230-37; George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297, 1338-44 (1987).

90. See *infra* text accompanying notes 91-95.

91. 42 U.S.C. § 2000e-2(k)(1)(A). The Civil Rights Act of 1991 expressly provided for disparate impact challenges under Title VII. In a disparate impact claim, a plaintiff is required to demonstrate "that [an employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). This is now the law governing the application of disparate impact analysis to subjective employment practices.

92. See, e.g., *Butler v. Home Depot, Inc.*, No. C-85-2182SI, 1997 U.S. Dist. LEXIS 16296, at *47 (N.D. Cal. Aug. 28, 1997) (finding that plaintiffs had sufficient evidence that defendant failed "to provide its store managers with meaningful criteria by which to guide hiring, assignment, promotion, and compensation decisions" to avoid summary judgment on claim of disparate impact on female employees); *Shores v. Publix Super Markets, Inc.*, No. 95-1162-CIV-T-25(E), 1996 WL 407850, at *5-6 (M.D. Fla. Mar. 12, 1996) (finding that a class of female employees qualified for the commonality requirement in class certification where store managers were given no written guidelines or training regarding decisionmaking process when assigning employees entry level jobs or deciding which employees will receive training); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 335 (N.D. Cal. 1992) (holding that Lucky's "amorphous and subjective" decisionmaking policies had a disparate impact on female employees); see also *Green v. USX Corp.*, 896 F.2d 801, 805 (3d Cir. 1990) (holding that "subjective interviews had a significantly disparate impact on blacks"); *Allen v. Seidman*, 881 F.2d 375, 381 (7th Cir. 1989) (holding that examination "devoid of objective standards, where . . . testers based an unknown part of the grade on the results of an unstructured personal interview" was responsible for low promotion rate of blacks even though "plaintiffs failed to pinpoint particular aspects of it that were unfavorable to blacks"). Courts have also approved a number of consent decrees that contain provisions premised on, or explicitly recognizing, the relationship between exclusionary outcomes and unstructured, unaccountable hiring, promotion, and job assignment processes. See, e.g., *Haynes v. Shoney's, Inc.*, No. 89-30093-RV, 1993 WL 19915, at *6-7 (N.D. Fla. Jan. 25, 1993); *Roberts v. Texaco Inc., Agreement in Principle to Settle*, at <http://www.courtstv.com/legaldocs/business/texaco/settlement.html> (last visited Nov. 11, 2000) (on file with the *Columbia Law Review*). Coca-Cola recently agreed to the largest settlement ever of a class action law suit challenging the company's promotion

If subjective employment practices produce a disparate impact on women or people of color, this disparity operates as a signal of the possibility that the system is contributing to the production or expression of bias.⁹³ The court then assesses the subjective decisionmaking process to determine whether it provided adequate steps to minimize or eliminate the expression of bias. The emphasis is on whether the degree of unaccountable or unstructured exercise of discretion is warranted. To make this determination, courts will look at the available alternatives. Are there systems of decisionmaking that will permit the exercise of discretion, but will institute standards and processes that minimize the expression of bias?

Thus, the statistical disparity between the composition of the pool of applicants and the composition of those selected does not in and of itself constitute a violation. It instead prompts an inquiry into the adequacy, fairness, and accountability of the decisionmaking processes that produced the initially suspect outcome. In *Butler v. Home Depot, Inc.*, the court based its finding of a potential violation in part on an expert's report that:

There are no written guidelines for making decisions about promotions to department supervisor positions, and the company does not provide training to Store Managers and Assistant Managers on how to select employees for promotions. While Standard Operating Procedures specify the process to be followed in making promotions into salaried assistant manager and store manager positions, they do not specify the criteria to be used in making promotion decisions. Promotion opportunities in existing stores are not posted, and there is no formal procedure for making vacancies known or requesting a promotion. In making decisions about promotion to department supervisor, there is no requirement that the person under consideration meet any minimum rating on recent performance evaluations, or that written performance reviews are consulted at all in making the decision. Nor is there any requirement to record the reasons why an employee is or is not selected for a promotion.⁹⁴

Other courts have found processes inadequate where employers had left decisions entirely to management's discretion, where selection committees had no representation of nondominant group members, and

practices. The settlement, which has not yet been approved by the court, includes a massive reorganization of the company's human resource practices. See Betsy McKay, *Coca-Cola Agrees to Settle Bias Suit for \$192.5 Million*, Wall St. J., Nov. 17, 2000, at A3 (describing how settlement provides for seven-member task force to oversee employment policies and practices, and calls for more effective oversight of managers' decisions on promotions, more mentoring programs, and regular diversity training for all employees).

93. In each of these cases, the court found either that the employment practice was distinct enough to establish causation or, in the words of the Civil Rights Act of 1991, that the practices were "not capable of separation for analysis," so that "the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i).

94. 1997 U.S. Dist. LEXIS 16296, at *33.

where employers lacked criteria or guidelines for hiring and promotion.⁹⁵

This legal approach does not establish a set of rules specifying how employers should set up their systems of decisionmaking. Instead, it establishes a requirement that an employer take steps to minimize the likelihood that its subjective decisionmaking processes will produce bias. The results of the process are not the only measure of success; they are a trigger that suggests the need for employers to engage in a process of self-evaluation to establish fair systems and mechanisms of accountability. Employers who engage in this process, with demonstrable results showing that they are effectively addressing the problem and will continue to do so, would at least in general be found to satisfy the business necessity requirement. These employers would, in theory, also be less likely to maintain subjective employment practices that produce pronounced discriminatory effects in the first place.

The Court's sexual harassment and subjective employment practices opinions thus point toward a structural judicial approach by (1) defining the underlying legal violation as a condition or problem that must be effectively addressed; (2) embracing contextualization as part of the process of determining the impact and legal significance of particular conduct; (3) encouraging institutional innovation within workplaces by prescribing an approach that enables employers to avoid liability by preventing or redressing harassment or bias problems; and (4) providing accountability by evaluating the effectiveness of internal processes in addressing conduct properly identified as problematic.

B. Shaping an Effective Internal Workplace Regime: Examples from the Field

The Supreme Court's structural approach encourages the development of a dynamic regulatory regime through ongoing interaction between general legal norms and workplace problem solving. The key to this regime's legitimacy is the adequacy of the workplace problem-solving processes it spawns. Do these workplace systems have the capacity to expose second generation problems? Do they produce information in a manner that institutionalizes analysis and resolution? Do they provide adequate incentives for appropriate actors to engage in the process of defining and addressing these problems? Do they generate solutions that address the structural problems underlying second generation bias? Do they evaluate the results of these processes in relation to their effective-

95. *Green*, 896 F.2d at 805 ("[T]he process by which [USX] divined who, among its applicants, were the best qualified was wholly subjective, consisting essentially of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant.") (quoting *Green v. U.S. Steel Corp.*, 570 F. Supp. 254, 269 (E.D. Pa. 1983)); *Stender*, 803 F. Supp. at 335 ("Lucky's policy of leaving initial placement, promotion and training decisions to the sole discretion of lower level supervisors whose conscious and unconscious prejudices are unchecked by objective and publicized decision making criteria, has had a disparate impact on female employees . . .").

ness in addressing problems of both productivity and inclusion? Do they build the capacity of workplace participants to prevent and address bias? And can legal actors within and outside the workplace differentiate between effective and ineffective problem-solving systems?

Recent scholarship has drawn attention to the risk that employers will adopt legalistic, sham, or symbolic internal processes that leave underlying patterns of bias unchanged.⁹⁶ This literature brings to the surface serious questions about the legitimacy, accountability, and effectiveness of workplace dispute resolution and problem-solving systems. What will prevent the adoption of sham or purely symbolic processes that leave the status quo intact? What keeps these processes from simply replicating the power dynamics that produced the complaints about harassment in the first place?⁹⁷ Will these processes become captive to managerial concerns that may be inconsistent with legal aspirations? Much of the scholarship on workplace dispute resolution has evaluated internal dispute resolution processes in the aggregate, without attempting to distinguish the impact of different types of internal processes.⁹⁸ Yet, internal dispute resolution processes vary widely in their features and effectiveness. In part because of the reluctance of many companies to open up their internal processes to scrutiny, most scholars have not analyzed particular dispute

96. See Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 *Berkeley J. Emp. & Lab. L.* (forthcoming 2001) [hereinafter Bisom-Rapp, *An Ounce of Prevention*]; Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 2, at 961–64; Edelman et al., *Endogeneity*, *supra* note 13, at 408–09; Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *Law & Soc'y Rev.* 497, 501 (1993) [hereinafter Edelman, *Internal Dispute Resolution*]; Edelman, *Legal Ambiguity*, *supra* note 8, at 1567–69; Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 *Am. J. Soc.* 1401, 1402–09, 1436 (1990) [hereinafter Edelman, *Legal Environments*].

97. Another way of posing the question is to ask how this more dynamic approach avoids the valid criticisms of alternative dispute resolution and negotiated rulemaking. Recent scholarship documents the dangers of informal, unaccountable processes that tend to replicate existing power imbalances despite using processes that appear fair, inclusive, and respectful. See Richard L. Abel, *The Contradictions of Informal Justice*, in 1 *The Politics of Informal Justice* 267, 295–310 (Richard L. Abel ed., 1982); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 *Duke L.J.* 1255, 1321–26 (1997); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *Wis. L. Rev.* 1359, 1391–1404; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *Yale L.J.* 1545, 1555–99 (1991).

98. Some of the research is based on a content analysis of academic and professional articles about internal dispute resolution processes. See, e.g., Bisom-Rapp, *An Ounce of Prevention*, *supra* note 96; Edelman, *Legal Environments*, *supra* note 96. Much is based on surveys of randomly sampled organizations and publicly available data on complaints and judicial decisions. See Frank Dobbin et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 *Am. J. Soc.* 396, 409–21 (1993); Krieger et al., *Employer Liability*, *supra* note 73, at 17.

resolution or problem-solving processes in depth to begin to differentiate between robust and sham processes.

But the practice that has emerged in forward-looking workplaces offers fertile ground for beginning to elaborate principles of effective, accountable, and legitimate workplace processes, along with the regulatory framework that would encourage their development. Indeed, the challenge of my project is to enable the courts, along with administrative agencies and nongovernmental organizations,⁹⁹ to encourage the evolution of accountable and legitimate internal problem-solving processes. Increasing evidence exists of employers who develop effective systems for identifying, addressing, and minimizing particular manifestations of workplace bias.¹⁰⁰

This section begins by describing the problem-solving and dispute resolution processes in three companies: Deloitte & Touche, Intel Corporation, and Home Depot.¹⁰¹ These examples of workplace processes were selected because they exhibit attributes of an ongoing, continually revised, and accountable problem-solving system. They are, however, not presented as fully realized models of ideal practice or as representative of the norm.¹⁰² Instead, each example depicts a range of problems faced in

99. See *infra* Part V.

100. It is difficult to gauge the extent of this more structural response. Part of the difficulty stems from the relative dearth of scholarly and professional attention focused on critically analyzing differences in organizational responses to harassment. Until quite recently, the focus of scholarly attention seems to have been on understanding the dynamics of sexual harassment, developing and testing causal theories, and documenting the extent of sexual harassment and its impact on individuals and organizations. Within the last few years, researchers have begun to turn their attention to evaluating the impact of organizational responses. See, e.g., James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 *Gender & Soc'y* 301, 314–17 (1998) (discussing results of study evaluating effects of occupational and workplace sex ratios and organizational policies and procedures on frequency and severity of sexual harassment); Karen E. Lindenberg & Laura A. Reese, *Sexual Harassment Policy: What Do Employees Want?*, 24 *Pol'y Stud. J.* 387, 391–97 (1996) (discussing findings of survey given to city and university employees on the efficacy of sexual harassment grievance procedures); Elissa L. Perry et al., *Individual Differences in the Effectiveness of Sexual Harassment Awareness Training*, 28 *J. Applied Soc. Psychol.* 698, 715–20 (1998) (discussing study evaluating effectiveness of sexual harassment training video).

101. These three examples draw on publicly available documents and selected interviews with employees, lawyers, insurance industry representatives, consultants, and human resource professionals. I have not conducted in-depth studies of these companies that closely assess the impact of these practices. In each case, however, the companies were able to provide some indicators of the relationship between the processes implemented and outcomes achieved.

102. Kenneth Winston eloquently synthesizes the role of ideal conceptions, drawing on the work of Philip Selznick, Martin Golding, and Lon Fuller in an unpublished draft entitled “Lessons from the Right of Silence,” which was presented at a conference on Law, Society, and Industrial Justice. Kenneth Winston, *Lessons from the Right of Silence* (Apr. 14, 2000) (unpublished manuscript, on file with the *Columbia Law Review*). Winston notes that a “model serves two functions: cognitive (distinguishing this institutional procedure

designing an internal problem-solving regime, and the particular design solutions that offer the possibility of accountability, legitimacy, and efficacy. The analysis extrapolates from these workplace examples to identify the characteristics that account for their apparent effectiveness. The goal is most decidedly not to develop a one-size-fits-all model or a predetermined set of criteria. Any effort to prescribe a universal model necessarily would fail to account for the complexity and diversity of organizational forms. It would also cut off the process of organizational development and experimentation that is so crucial to an effective regulatory system. Instead, this Part demonstrates that effective, legitimate, and accountable processes can emerge, and it develops contingent criteria that could assist in the evaluation of future processes.

1. *Deloitte & Touche*. — Deloitte & Touche, America's third largest accounting, tax, and management consulting firm, implemented a major Women's Initiative that dramatically increased women's advancement in the company and reduced the turnover rate of women in particular and employees in general.¹⁰³ The firm accomplished this by forming ongoing, participatory task forces with responsibility for determining the nature and cause of a gender gap in promotion and turnover, making recommendations to change the conditions underlying these patterns, developing systems to address those problems and to make future patterns transparent, and monitoring the results. The task force recommendations were implemented through ongoing data gathering and analysis, operational change through line management, and accountability in relation to benchmarks.

The Women's Initiative resulted not from the threat of litigation, but rather from the CEO's perception that a gender gap in the promotion and turnover rate signaled a problem with the firm's capacity to compete effectively for talent. In 1991, Mike Cook, Chairman and CEO of Deloitte & Touche, discovered that, although Deloitte had been hiring women at an aggressive rate—50% or more—for more than ten years,¹⁰⁴ the rate of

from others) and evaluative (judging whether the procedure as it operates in practice is successful).” *Id.* at 17. He elaborates that “the practical significance of any present institutional experience lies, in great part, in its relation to a present-but-absent future.” *Id.* at 20.

103. This case study draws heavily from an excellent, two-part case study prepared under the supervision of Professor Rosabeth Moss Kanter as part of the Harvard Business School case-study series. See Jane Roessner, *Deloitte & Touche (A): A Hole in the Pipeline*, N9-300-012 (September 28, 1999) [hereinafter *Deloitte & Touche (A)*]; Jane Roessner, *Deloitte & Touche (B): Changing the Workplace*, N9-300-013 (September 28, 1999) [hereinafter *Deloitte & Touche (B)*] (both on file with the *Columbia Law Review*). It is supplemented by media coverage of Deloitte & Touche's Women's Initiative.

104. In the mid-1970s, Deloitte & Touche “acknowledged the women's issue—basically, that it pretty much had no women. So it began hiring more women and dutifully placing them in the pipeline toward partnership, a journey that takes a decade or more. By the mid-80's, 50% of its new hires at the professional level were women.” Gillian Flynn, *Deloitte & Touche Changes Women's Minds*, *Personnel J.*, Apr. 1996, at 56, 56 [hereinafter *Flynn, Deloitte & Touche Changes*].

promotion hovered at around 10%. The data also revealed “a significant and growing gap in turnover” between the percentage of women and men.¹⁰⁵ This gender gap coincided with a series of changes that “made hiring and training professionals a strategic imperative.”¹⁰⁶

In response to this problem, Deloitte’s Board established the Task Force on Retention and Advancement of Women.¹⁰⁷ Cook charged the Task Force with the mission of explaining the high turnover rate for women, and figuring out how to reverse the trend.¹⁰⁸ He was careful to include a cross-section of the organization that was diverse based on age, sex, geography, department, and family status. The CEO chaired the Task Force and attended all of its meetings.¹⁰⁹

The Task Force began by analyzing the personnel records for the previous three years to identify overall patterns in hiring, promotion, and retention. This analysis revealed that, “although men and women left the firm in roughly equal numbers at the entry level, at higher and higher levels, women were leaving at an ever-increasing rate.”¹¹⁰ The Task Force then hired a nonprofit research organization, called Catalyst, to help the members to understand better the problem and how to respond.¹¹¹ Catalyst interviewed 40 high-potential women who had recently left the firm.¹¹² Most of these women, it turned out, were still in the workforce: “Only a handful were caring for their children full time (contrary to the original assumptions about the high turnover). . . .”¹¹³ The firm also interviewed 500 women throughout Deloitte, and it conducted small, all-men and all-women focus groups. “Women spoke of the frustrations in getting ahead, the discouragement of continually being passed over for high-profile assignments, and the disappointment at a lack of mentoring and networking opportunities. Both men and women expressed concerns about the work-life balance at the firm.”¹¹⁴ The interviews revealed

105. Deloitte & Touche (A), *supra* note 103, at 1; see also Flynn, Deloitte & Touche Changes, *supra* note 104, at 56, 60 (“It appeared that women were leaving the firm faster than men.”).

106. Deloitte & Touche (A), *supra* note 103, at 4. These changes included an expansion in the consulting component of the firm’s business, an increased competition for talent, a merger of Deloitte Haskins & Sells, and Touche Toss & Co., and a recession. *Id.*

107. *Id.* at 4.

108. *Id.*

109. *Id.*

110. *Id.* at 5.

111. *Id.* at 5. Catalyst’s involvement is one example of the increasingly important role of nongovernmental organizations as mediating organizations that build the capacity to implement effective problem-solving systems. This domain is discussed in greater depth in Part III, *infra*.

112. Deloitte & Touche (A), *supra* note 103, at 5.

113. Flynn, Deloitte & Touche Changes, *supra* note 104, at 60.

114. *Id.*

that many former and incumbent women viewed Deloitte as "a lousy place for a woman to work."¹¹⁵

The task force incorporated Catalyst's findings into its report, which identified three obstacles to the advancement and retention of women:

- (1) "A male-dominated culture, particularly in senior leadership and partner positions, which perpetuated stereotypes and assumptions about women"¹¹⁶;
- (2) "[B]uilt in systems for advancement—mentoring, coaching, counseling, networking—that worked for the men didn't work for the women"¹¹⁷;
- (3) "A company-wide need for a more balanced work-life approach."¹¹⁸

The Task Force presented these findings, along with preliminary recommendations for addressing the problems, to the Management Committee in January, 1993. Although initially skeptical, the Management Committee ultimately recognized that women at the firm faced subtle but powerful obstacles, which had to be addressed for both business and ethi-

115. Deloitte & Touche (A), *supra* note 103, at 5.

116. Flynn, Deloitte & Touche Changes, *supra* note 104, at 60. One task force member described the change in her views:

Before her experience of being on the Task Force, she said, she would have described the firm as . . . a classic meritocracy, run according to the simple rule, "If you do good work, you'll get rewarded." To the degree that there were issues around being female, it had more to do with clients than Deloitte.

Id. Her post-Task Force view of the world was essentially the same picture, but seen through a different lens:

The pervasive issue was people in leadership positions in our firm—then they were exclusively male—making assumptions about women, like "I wouldn't want to put her on that kind of client because it's a dirty manufacturing environment, and that's just not the right place for her" or "That client's in a real nasty part of town." Or making assumptions on behalf of the client, like "Well, the client's not really going to be comfortable with her." If you asked the people who were doing that if they were doing that, I think that they'd say no. It was very subliminal and unconscious, but it was happening a lot. So women were deciding not to stay with the firm, and then men were saying, "See I told you so."

Id.

117. Id. Flynn elaborated:

Because women were not being mentored, were not getting their fair share of the best assignments, were not being included in informal networks, and didn't have role models of successful women, they were coming to the same conclusion: 'I'm not going to get ahead here, so I might as well cut my losses now and move on.

Id.

118. Catalyst surprised some by ranking work/life balance third. Flynn explained: Although this was assumed to be the major reason women were leaving the firm, Catalyst ranked it as third in importance. For many women, however, it was the straw that broke the camel's back. . . . "It would be one thing to do this job if the environment were supportive and if I thought I could get ahead. But without those two, who needs it?"

Id.

cal reasons.¹¹⁹ The firm realized that since 50% of the best hires were women, its disproportionately low promotion and retention policies were diluting the quality of the partnership.¹²⁰ In April of 1993, the firm's CEO held a press conference to announce the Initiative for the Retention and Advancement of Women. He also announced the formation of an external advisory group, the "Council on the Advancement of Women," which would meet quarterly to monitor the firm's performance with respect to the Women's Initiative and to continue to push for change. The Council's members included highly visible business and public figures; Lynn Martin, the former Secretary of Labor and head of the Glass Ceiling Commission, was appointed chair.¹²¹ The firm also created an internal Task Force on the Retention and Advancement of Women, headed by a respected partner who served on the initial task force that studied the problem and developed recommendations. Deloitte created a full time position of chief of staff for national human resources (HR), which served as a liaison between the women's initiative and HR.¹²² The Task Force undertook the process of translating Catalyst's findings into an agenda for change.¹²³

Three basic principles guided the implementation process.¹²⁴ First, line management, rather than Human Resources, would drive the operational changes. Second, accountability and commitment had to be ex-

119. *Id.* at 7. The Harvard case study recounts the pivotal role of senior women partners in validating the task force's findings and overcoming the skepticism of many of the senior partners about the need for change. When one Management Committee member asked rhetorically, "What's the problem. I'm not really sure what you're trying to tell us," one Task Force member explained:

[O]ne of the top-ranked women in the firm [] looked him right in the eye and said, "What we are trying to tell you is, there are days when this is really a crappy place for a woman to work." . . . The moment seems to have become part of the firm's family history, recalled and recounted by partner after partner. "For all of us who had pride in the organization," Cook said, "to be told that by a partner we really respected, who had come up through the organization, was just a jolting moment. It had more impact than all the charts and numbers. . . . We had to confront the fact that we weren't what we thought we were, which was a gender-neutral, warm and fuzzy, met-our-mission-statement kind of an outfit."

Id.

120. *Id.*

121. Deloitte & Touche (B), *supra* note 103, at 1.

122. Flynn, Deloitte & Touche Changes, *supra* note 104, at 62.

123. *Id.* Flynn explained:

The Task Force framed its work according to the three areas Catalyst identified as crucial to retaining and advancing women at Deloitte: A male-dominated work environment, a perception of fewer opportunities for career advancement for women, and work/life balance. A workshop. . . focused on behavioral change. To address the report's second and third issues, the Task Force designed and implemented a series of operational changes.

Id.

124. *Id.* at 5.

pressed both internally and externally to assure follow-through.¹²⁵ Finally, an accountability structure was developed to make the Women's Initiative matter to each partner's success. Responsibility for implementing the changes was decentralized to each individual office.¹²⁶

[Each office was required to complete] an annual plan for the Women's Initiative, including its status in relation to a set of benchmarks such as number of women, gender gap, female promotions, female partner promotions, and flexible work arrangements. Offices were asked to complete a self-assessment of their achievements in the past year, and set goals for each benchmark for the coming year. In addition, each office described in detail the actions it planned to take to achieve each of its stated goals. Offices were compared to one another, as well as to their progress in relation to their own goals. . . . The results of the office plans were distributed firmwide.¹²⁷

One of the key issues addressed by the Task Force was the assignment process. "At Deloitte, the type of industry you were working for, the type of project you were on, and who was leading it were all critical factors in career advancement."¹²⁸ At this time, the assignment process was not clearly defined, and the assignment directors acted largely on their own. The Task Force audited the assignment process—how assignments were made, who was considered, what criteria were used, what results emerged, and whether gender bias existed. "The Task Force found that on the accounting side, women's assignments tended to be clustered in not-for-profit companies, health care, and retail. . . . Women were rarely assigned to such high-potential areas as mergers and acquisitions."¹²⁹

One of the changes instituted by the Task Force was to make the process and its results visible by instituting annual assignment reviews. These reviews required office managing partners to list the nature and quantity of the assignments, who got the best ones, and how that broke down by gender. Until then, many offices had no idea that disparities existed.

125. Lynn Martin has remarked on the distinctiveness and effectiveness of the firm's outsider strategy: "Often you find that whenever any firm [begins a cultural change], it wants to internalize it. . . . Because I'm outside the firm, employees can say things to me that they wouldn't necessary say to their bosses. Partners listen to me in a different way." Gillian Flynn, *Would You Invite the Creator of the Glass Ceiling Commission to Inspect Your Company?*, *Personnel J.*, Apr. 1996 at 58, 58 [hereinafter Flynn, *Glass Ceiling*].

126. The Task Force provided each office with options, but left it up to the individual office to develop its own plan. The company explained:

If we told them what to do, it wouldn't have happened. . . . It wouldn't have fit our culture—and we didn't know how Dallas was different from Denver was different from Des Moines. Instead we said, "Here is the goal. Here are a bunch of ways to get there. How you get there is up to you. Any help you want, we'll give you."

Deloitte & Touche (B), *supra* note 103, at 5.

127. *Id.*

128. *Id.* at 5–6.

129. *Id.* at 5.

The Task Force also adopted changes to make flexible work arrangements viable without threatening an individual's advancement. This was done by calibrating the timing of promotion decisions based on experience and performance, and following through in partnership decisions. Deloitte also instituted the "3-4-5" program for consultants, which reduced the amount of time that Deloitte consultants would be on the road.¹³⁰ The Task Force reviewed every policy to identify and minimize gender bias. The Initiative also introduced succession and formal career planning for women. The process encouraged the formation of women's management groups, "in which women would assemble to identify issues in their own offices, as well as to provide another opportunity for networking."¹³¹

Deloitte worked with a consulting firm to develop a two-day workshop, called "Men and Women as Colleagues," to raise awareness of gender dynamics in the firm. The workshop explored gender differences and assumptions, how those assumptions hurt women and the company as a whole—and what to do about them.¹³² The CEO attended the first workshop, committing two full days of his time. As further evidence of high-level commitment, the entire board of directors, the Management Committee, and managing partners also completed the workshop before anyone else was asked to participate. After that, the firm's entire professional staff completed the workshop in groups of twenty-four.¹³³

Deloitte & Touche installed a system of accountability, but only after the Initiative was well underway. "We believed that if we put in accountability too soon, we would get quotas."¹³⁴ The firm now compares offices to one another and to benchmarks the firm has established, and it provides reports to management that are used in evaluations and tied to compensation.

The Women's Initiative produced swift and observable results, both in women's participation and in the firm's overall retention rate. The combination of increased communication and programmatic change

130. The program changed the practice of deploying consultants nationally, five days a week. Instead, they "would be out of town three nights a week, working in the client's office four days a week, and in the home office on the fifth day." Deloitte & Touche (B), *supra* note 103, at 1.

131. *Id.* at 64.

132. According to Flynn:

one of the issues addressed was the diffusion of high profile assignments and why these assignments so often went to men. The assumption many men admitted to was that women would not want the traveling and extra work linked to this kind of trophy assignment. Obviously this type of generalization kept women from getting the skills they needed to advance within the organization.

Flynn, Deloitte & Touche Changes, *supra* note 104, at 62.

133. Deloitte & Touche (B), *supra* note 103, at 8 ("[A]ll of Deloitte's partners, directors, senior managers, and managers attended the workshops. . . . Although some attendees come away from the workshop feeling it was a waste of time, the Task Force achieved its goal of converting a core group—a critical mass of 25% to 30%.").

134. *Id.*

contributed to what many called a culture change. Flexible work has become acceptable at Deloitte for women and men. "By 1995, 23% of senior managers were women, the percentage of women admitted to partner rose from 8% in 1991 to 21%; the turnover rate for female senior managers dropped from 26% to 15%."¹³⁵ In 1993, the U.S. firm had 88 women partners; in 1999, the total was 246.¹³⁶ The turnover rate fell for both men and women between 1995 and 1998. Cook credits his firm's thirty percent growth rate in 1999, the best among the "Big Five," to lower turnover.¹³⁷ Deloitte's success has attracted attention and awards, and has itself become an effective recruitment tool.¹³⁸

The Deloitte & Touche story illustrates one method of building accountability and ongoing adaptation into an internal problem-solving system—a method that fit its project-oriented work ethic. The company institutionalized a change process by creating a combination of inside and outside deliberative groups comprised of diverse stakeholders and then investing those groups with the legitimacy, capacity, and resources to solve problems effectively.¹³⁹ The internal problem-solving group included key partners with local knowledge of the dynamics and culture of the firm and the skills needed to uncover root causes of the gender gap. The composition of the group itself linked the concerns of equity and effectiveness, by bringing together people concerned with women's participation and those concerned with more general personnel issues. This permitted the group to address both gender dynamics and broader concerns made visible by their particularly strong impact on women.¹⁴⁰ Its diversity and deliberative character enhanced the group's capacity to generate alternative solutions to problems, to make optimal choices, and to create a process of information sharing that transcends the normal boundaries.¹⁴¹ The composition of the group also evolved as the demands of the problem-solving process changed.

135. *Id.*

136. Deloitte & Touche CEO Explains Growth in Terms of Lower Turnover, *The CPA J.*, Mar. 2000, at 10.

137. *Id.*

138. Gillian Flynn, *Attracting the Right Employees: And Keeping Them*, *Personnel J.*, Dec. 1994, at 44 ("The external recognition in the marketplace is helping us retain people. It's helping us develop our own business. It's helping us tremendously in recruiting.").

139. *Cf.* Sturm, *Public Law Remedies*, *supra* note 51, at 1357–60 (describing an analogous process for the development of legitimate and effective structural remedies in public law litigation).

140. See Sturm & Guinier, *supra* note 44, at 1025–26 (arguing for the importance of identifying patterns affecting nondominant groups both to assure that members of those groups can fully participate in the workplace and as a signal of broader patterns of institutional dysfunction or unfairness); Michael Walzer, *Multiculturalism and Individualism, Dissent*, Spring 1994, at 185, 191 (arguing for the importance of preserving both individual and group associations).

141. See Adam B. Butler & Lisa L. Sherer, *The Effects of Elicitation Aids, Knowledge, and Problem Content on Option Quantity and Quality*, 72 *Org. Behav. and Hum. Decision Processes* 184, 184 (1997) (showing that participants generated more possible solutions to

Significantly, the group involved outsiders with expertise and legitimacy, such as Catalyst and the Center for Gender in Organizations, which provided the information and processes needed to develop workable (and revisable) solutions. These outsiders were effective boundary negotiators who could place the firm's experience in a broader context and help to identify recurring patterns. The company's external advisory group, with its highly visible, credible, and public participants, provided a continual source of reflection, and protected the process from internal capture.

The process also created a constituency for change, both inside and outside the organization. Women developed an internal (and external) presence and a vehicle for expressing their concerns as a group.¹⁴² This enabled women who were reluctant to raise concerns individually to participate without creating an adversarial relationship with the firm or risking their personal position.¹⁴³ The problem-solving process created an immediate and direct focus for women's (and men's) concerns, which provided incentives for collective action. This in turn helped constitute this group as an internal source of accountability.

2. *Intel Corporation*.¹⁴⁴ — Intel Corporation's problem-solving system mirrors the company's engineering and data-driven orientation.¹⁴⁵ Intel has adopted a system that uses individual conflict resolution and problem solving to generate data about overall patterns in the nature of problems and complaints. It has established regular opportunities to evaluate the patterns revealed by the data, to make systemic changes, and to assess the

sexual harassment problems "when two conflicting objectives were presented at a time than when the same two objectives were presented simultaneously or not at all"); Dorf & Sabel, *supra* note 6, at 301-02 (describing benefits of problem-solving groups with diverse membership in the context of the new firm).

142. See Maureen Scully & Amy Segal, *Passion With An Umbrella: Grassroots Activists in the Workplace* 44 (2001) (unpublished manuscript on file with the *Columbia Law Review*).

143. *Id.* at 28-30 (documenting risks of individual activism around race or gender in the workplace).

144. To avoid any risk of revealing confidential information or compromising their role, the Intel interviewees requested that I not attribute their remarks by name, but instead to refer to their role. I have adhered to this request by assigning each Intel interviewee a position and letter identity (e.g., Senior Specialist A) and citing to this identity.

145. One of the senior specialists interviewed put it this way:

There is a sense of proactivity in your job. You just don't do your job. You look at it both from the inside and the outside. How can I improve this? What can I do with this information? How can I leverage my knowledge from doing these cases? That is how you are measured. Not just how you do your core job, but also what you do with that core job. This comes from INTEL's overall engineering philosophy. We build these chips. They are when we make them state of the art. If we keep making 486s or Pentium Is, we'd go out of business. We must keep moving. The culture is an engineering model which we try to apply to people."

Interview with Senior Specialist A, Intel Corp., in Santa Clara, Cal., at 1-2 (Apr. 13, 2000) (transcript on file with the *Columbia Law Review*).

system's fairness and efficacy. Finally, it has developed a new role for independent specialists within the company and encouraged them to develop the expertise, credibility, and relationships necessary to function effectively as intermediaries and cross-boundary problem solvers.

Intel Corporation is the world's largest producer of microprocessors.¹⁴⁶ Like many high-technology businesses, Intel's success depends on its capacity "to deliver newer and better products in rapidly rising volume to satisfy customer demand."¹⁴⁷ This means that much of the work is done in teams composed of individuals with diverse backgrounds and methodologies. The work depends on continual innovation and collaboration. Expectations run high, and performance is evaluated regularly and in relation to measurable criteria. The company's culture reflects the engineering philosophy of its founders.¹⁴⁸ The company extols the virtues of innovation and risk-taking to solve identified problems and deliver measurable results. This approach relies heavily on using data to identify problems and solutions.

Predictably, this environment of high energy, high stress, and high expectations produces conflict and friction.¹⁴⁹ It also generates the potential for subtle forms of bias and exclusion through the interactions of teams and the discretionary character of work assignment and performance evaluation. The work is highly collaborative and intense, making effective conflict resolution all the more significant. Intel has developed a culture in which conflict over ideas and strategies operates as an important element of strategic planning. Within this culture, destructive interpersonal relationships interfere with the capacity to learn from differences in perspective or approach, and thereby with productivity, as well as create potential legal liability. Intel's success depends in no small part on its capacity to address these twin risks of destructive conflict and biased or unfair decisionmaking. Its emphasis on data analysis systematically linked to problem solving is reflected in the system it has designed to meet this challenge.

146. Albert Yu, *Creating the Digital Future: The Secrets of Consistent Innovation* at Intel vii (1998).

147. *Id.* at 83.

148. Intel is quite explicit about the values that define its culture: "results orientation," "discipline," "risk-taking," "quality," "customer orientation," "great place to work." Intel's Homepage, at <http://www.intel.com/jobs/workplace/working.htm> (last visited Apr. 1, 2001). New employees learn of these values as part of their new employee orientation. The company's website and employee identification badges prominently feature them as well. *Id.*

149. A senior specialist described the culture as follows:

There is the expectation that there will be friction because the company is so fast moving. People have different ideas about how things will happen. The company expects people to disagree and commit, to engage in constructive confrontation. This idea is so important that it is written into the guidelines and is the subject of a half-day class that everyone over grade 12 must take part in as part of new employee orientation.

Interview with Senior Specialist A, Apr. 13, 2000, *supra* note 145, at 2.

Until 1995, complaints involving any aspect of employee treatment were handled by HR professionals who were integrated into each of the business groups in the field.¹⁵⁰ The HR Development Representatives (HRDR) worked closely with the managers of their business group on every issue from staffing to employment relations. Under that model, the HRDR fielded complaints about workplace issues, from the fairness of an evaluation or promotion decision to sexual harassment. On paper, this system satisfied the goal of encouraging employees to come forward with complaints by providing a forum outside the employee's normal chain of command.¹⁵¹ As part of a more general review of HR's adequacy, the lawyers charged with human resources responsibilities at Intel, called "HR Legal," conducted an evaluation of this dispute resolution system, which included an anonymous employee survey about its adequacy. This survey revealed that the complaint system went largely unused because it had little credibility with many employees. HR's highly visible involvement with managerial concerns created the perception among employees that HR staff were not impartial, and that their complaints would not be taken seriously.¹⁵² This perception discouraged the use of the complaint system.

In response, Intel redesigned the system for handling individual employee complaints, including claims involving sexual harassment and bias in performance evaluations and promotion decisions. This change was part of a broader strategic reorganization of HR, to change a pattern of intervening either too early to understand the significance of the problem or too late to avoid a crisis. The new system combined broad, undifferentiated problem solving for particular complaints, a triage process to refer nonroutine problems to specialists, and an extensive system of data gathering, analysis, and response.

150. See *id.* at 1; Telephone Interview with Senior Specialist C, Intel Corp., at 1 (June 23, 2000) (transcript on file with the *Columbia Law Review*); Telephone Interview with HR Legal Counsel A, Intel Corp., at 2-3 (Dec. 13, 1999) (transcript on file with the *Columbia Law Review*).

151. Indeed, the Equal Employment Opportunity Commission recently recommended the use of HR officials for this purpose. See EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, at <http://www.eeoc.gov/docs/harassment.html> (last visited Apr. 1, 2001) (on file with the *Columbia Law Review*).

152. See Interview with Senior Specialist A, Apr. 13, 2000, *supra* note 145, at 1 ("Employees had certain amount of skepticism for someone working so closely with their manager. 'I went to HRD, but they are always talking to my manager.' There is a built-in paranoia for workers when dealing with issues challenging manager action."). Another senior specialist explained:

They [employees] didn't understand it as a process by which serious complaints could be addressed. We looked at how people experienced open door. We talked to people who used open door and found a great deal of mistrust in the system. It had to do with who employees were going to have issues looked at by. There were concerns about confidentiality and objectivity. That confirmed for us that we were going in the right direction of independent third party role.

Interview with Senior Specialist C, *supra* note 150, at 1.

The first step in the new process involves a revised open door system, which established a telephone complaint process with a 1-800 number to address employee problems covering any employment issue, ranging from dissatisfaction with performance evaluations to sexual harassment.¹⁵³

[This is] Intel's way of encouraging employees not to sit on problems and to provide them with a variety of avenues for redress. People are encouraged to call the call-center for anything, from "I want a parking spot" to "I think my performance review was unfair" to "I am being harassed."¹⁵⁴

The call center is staffed by agents who are trained with scripts covering answers to routine questions about benefits or company policy. The system is widely utilized; open door staff field hundreds of thousands of calls. Information about the call is recorded in a computer database that categorizes information by caller, location, type of problem, etc.

Intel has designed the open door system both to provide an accessible and reliable response to routine problems and to function as a trip wire for problems requiring more expertise and investigation. Open door agents triage issues coming through the call center. They keep track of the types and loci of issues posed by the calls. Any issue requiring coaching, policy interpretation, or investigation is referred to a senior specialist. All complaints that potentially involve claims of discrimination are automatically referred to a senior specialist.

Senior specialists are the linchpin of Intel's system of conflict resolution and problem solving. They bear responsibility for investigating and attempting to resolve conflicts, and then using the information gleaned from that role to identify and address more systemic problems. Thus, they play a crucial role as problem solvers at both an individual and organizational level. Their stock-in-trade is information. At the level of individual complaint resolution, the senior specialist functions as "an independent, somewhat autonomous, upstream person" who investigates and attempts to resolve problems flagged by the open door system or brought directly to his or her attention.¹⁵⁵ Senior specialists have no independent authority to order particular changes in policy or practice. Instead, they have unlimited access to information necessary to evaluate the nature, strength, and cause of a particular complaint.¹⁵⁶ This information includes databases, confidential files, interviews, and subsequent analyses of this data. They then use this information to bring about a resolution that they believe is fair. They conduct an investigation aimed at understanding what happened, why it happened, why it poses a problem, and what can be done to address that problem. The senior specialists are general-

153. Intel, Open Door Guideline (Apr. 1996) (on file with the *Columbia Law Review*).

154. *Id.*

155. Interview with Senior Specialist A, Apr. 13, 2000, *supra* note 145, at 1.

156. "I am the sheriff. I can find out whatever I need to." *Id.* at 5. This statement includes access to personnel files, databases, personnel, and organizational policy.

ists in that they address different kinds of problems, but they have received specialized training in issues involving sexual harassment and bias. Once they have analyzed a problem, they then attempt to reach a resolution that both resolves the immediate conflict and addresses the underlying problem.¹⁵⁷

For each complaint, the senior specialists conduct an extensive initial interview that fleshes out the nature of the complaint, the context for the problem, and the possible sources of information bearing on the complaint. Senior specialists input relevant information from this initial interview into a secure database, including an initial investigation code that indicates the individual's description of the basis for the complaint (e.g., unfair performance review, sexual harassment, discriminatory job assignment, etc.), as well as factual information such as the name and position of the complaining individual, the names and positions of the individuals complained about, the specific business unit, the kind of complaint, and demographic information about the parties. The senior specialist then conducts an investigation that assesses the validity of the complaint and the underlying problems that triggered it. This is done by interviewing those with relevant information, analyzing patterns among similarly situated employees, and reviewing the specific complaint in the context of broader patterns revealed by analyzing the data generated from previous complaints. Thus, the senior specialist provides a process of accountability, after the fact, for decisions that an employee perceives as unfair.¹⁵⁸ But, importantly, that is not the end of the matter. Each individual claim handled by a senior specialist is also nested in a broader context of data generation and analysis.

The senior specialists track the characteristics and results of complaints filed through the open door system. This tracking enables the senior specialists to analyze information in order to uncover patterns involving particular individuals, types of complaints, specific business units, particular demographic categories (such as women or people of color),

157. Id. at 1. This senior specialist explained:

We have the authority to try to negotiate and influence an outcome that we think is unfair. We can recommend and then cajole folks into trying to do the right thing. Our fundamental charter is fairness. . . . Our influence comes from the credibility of the work and the system that from the top down everyone believes in.

Id.

158. See, e.g., Telephone Interview with Senior Specialist B, Intel Corp., at 2 (Apr. 21, 2000) (transcript on file with the *Columbia Law Review*).

I come to them with more information than they would have had when they made the initial decision. There is a review with someone who wasn't involved with the initial decision. This brings the results one level above the decisionmaker The opinions of the group are surveyed. They also raise things that would cause concern from a fairness perspective at Intel—time dedicated to training, putting someone in a management role without full preparation, or examples of favoritism.

Id.

rates of system utilization, complaint substantiation rates, and changes in managerial decisions or conduct as a result of the process. "[The company] is watching in real time [whether] there are problems."¹⁵⁹ A report is generated five or six times a year, which provides a set of indicators about the significance of individual conflicts.¹⁶⁰ The results are compared to previous reports, and divisions within the company are compared to each other. The indicator list has grown and evolved in response to the problems that have surfaced through the open doors. The senior specialists regularly meet to analyze the data and identify indicators of problems warranting further inquiry, such as overutilization or underutilization by a particular unit, spikes in types of cases brought or sustained, or a pattern of open doors involving a particular manager or unit.¹⁶¹ The senior specialists at all of the company's branches compare trends and practices across work units and divisions at weekly staff meetings and quarterly data reviews. If complaints reveal a pattern involving a particular business unit, the problem then is raised at the group or organizational level with that unit. If the data suggests more systemic issues, senior specialists then inform those who are in a position to make systemic changes and help develop an action plan. If the aggregate data show a pattern in the type, location, or number of complaints, then this triggers an in-depth inquiry into why that pattern has developed and how to address it.

The inquiry thus proceeds out from the nature of the problem as it is manifested within a particular setting.¹⁶² This is in contrast to framing the inquiry around whether particular conduct violates a specified legal rule. At the level of individual complaint, group process, or system design, the organization undertakes a problem-oriented inquiry similar to the "why" form of inquiry that characterizes the search for root causes as a predicate to problem solving.¹⁶³

The senior specialists' approach to complaints about performance appraisals illustrates this problem-solving orientation. Intel has at-

159. Interview with HR Legal Counsel A, *supra* note 150, at 2.

160. *Id.*

161. Interview with Senior Specialist A, Apr. 13, 2000, *supra* note 145, at 7. Senior Specialist A explained:

Within that framework, the company tracks how many cases are sustained, overruled or modified; who is utilizing the open doors in terms of business group; the rate of utilization as compared to other units within the company; the types of complaints; the identity of the managers complained about; and the changes from previous periods."

Id.

162. Malcolm K. Sparrow, *Imposing Duties: Government's Changing Approach to Compliance* xxv, 36 (1994) (describing similar shift away from incident-based work toward problem-oriented policing, which aggregates or clusters incidents for analysis and attention).

163. *Id.* See generally Dorf & Sabel, *supra* note 6, 299-300 (describing process of identifying source of disruption or defect by asking a series of insistent questions as a crucial component in process of continual improvement).

tempted to normalize challenges to managers' decisions, and to encourage employees to raise questions when they perceive a problem.¹⁶⁴ Thus, complaints by employees dissatisfied with their performance review are a staple of the senior specialists' work. The senior specialists address these problems at an individual level, and also track patterns in complaints and outcomes. If a disproportionate number of these complaints involve women, that trend would be apparent in the data reviewed and reported regularly to the CEO and the Vice President for Human Resources.

"Once we identify larger numbers, trends, then we go back to the individual case. [We t]alk about each individual case, whiteboard all this stuff, so we try to find trends. Is there a specific group, manager, organization where the stuff is coming from?"¹⁶⁵ Once the "why" question is answered, the inquiry turns to what should be done to address it.

The types of solutions generated by senior specialists indicate the flexibility of the system. If the problem is traced to a lack of criteria and structure for assigning cases, the specialists will work with human resources to design and implement such a system. One investigation of a harassment complaint involved a claim against a co-worker who regularly commented on women's appearances and made crude, sexual jokes.¹⁶⁶ This individual had a tendency to be glib and inappropriate with comments generally, and investigation revealed that this pattern had compromised his effectiveness on several teams in the past.¹⁶⁷ The investigation also revealed that the employee interacted with women in stereotypical, macho ways that undermined other women's working environment.¹⁶⁸ At the same time, the types of comments were not unequivocally hostile, and may have been on the line between inappropriate and discriminatory if the case were ever adjudicated. Sexual harassment problems involving the accused had never surfaced before, and he seemed genuinely surprised that his comments had a negative effect on his female co-workers.

The senior specialist identified the problem as an issue of sexual harassment, but did not make a finding that was based solely on the gender/harassment dimensions of the issue. He thus signaled an issue relating to discrimination, but based his actions on additional concerns relating to professionalism. Given the ambiguity of conduct and the lack of past history, he recommended that dismissal would not be appropriate. Instead, he suggested that the manager "write up" the individual, require training

164. Telephone Interview with Senior Specialist A, Intel Corp., at 2 (June 19, 2000) (transcript on file with the *Columbia Law Review*) ("Employees feel very comfortable challenging their performance review. You don't get dinged for doing it. You can say—I don't like that you gave me the lowest possible review. I deserve more than this. . . . We have taken disciplinary action against those who retaliate for using open door.").

165. *Id.* at 2.

166. See Interview with Senior Specialist A, Apr. 13, 2000, *supra* note 145, at 6.

167. *Id.* at 6.

168. *Id.* at 5.

on working with others and particularly with women, as well as sexual harassment training, and transfer him laterally to break up the interaction with the complaining party.¹⁶⁹ He also provided a written warning, established a clear set of expectations for this employee's future performance, and a visible record that would provide a baseline if the problem recurred in the future. He communicated the disciplinary action to the complaining party, with confidentiality restrictions.

The problem orientation of their investigation enables senior specialists to assess whether a particular employment issue is part of a broader pattern of bias or dysfunction.¹⁷⁰ Take an employee of Taiwanese ancestry who files an open door claiming that his manager favors mainland Chinese employees. The manager denies engaging in any form of favoritism or bias. The senior specialist then looks at the personnel statistics of this manager's group over a period of time, including ratings and rankings, promotions, and project assignments. He or she also interviews other employees in the work group. If the numbers and aggregate interviews reveal a pattern, this will trigger a recommendation for remediation. Steps would be taken to equalize access and promotion opportunities, and the manager would receive training to minimize the likelihood that the problem would recur.¹⁷¹

Essentially, the conflict resolution process operates as a trip wire, by dealing effectively with individual cases in context, making connections as problems are revealed, and evaluating the resolution of those problems in relation to the performance of other branches of the company. To give another example, during a particular reporting period, many of the Intel complaints involved dismissals or discharges of probationary employees. This prompted an investigation revealing problems in the treatment of employees during the probationary period. Changes were made, managers were trained, and from the next year on, the company dramatically reduced the number of terminations of probationary employees.¹⁷²

Also interesting is the impact that this system has had on the position and role of lawyers. Intel's legal department is located within the human resources function ("HR Legal") that addresses both the legal and organizational dimensions of employee complaints. Its labor and employment counsel report to the Vice President for Human Resources, rather than to Intel's General Counsel.¹⁷³ HR Legal's charge is general: to assure that employees are treated objectively and fairly. Lawyers who staff this department work extensively on system design, problem solving, and strategic advice. They work closely with the senior specialists, brainstorming with them about cases, translating legal standards into organizational

169. *Id.* at 6.

170. *See id.*

171. *Id.* at 3-5.

172. *See id.* at 7-8; Interview with Senior Specialist C, *supra* note 150, at 2-3.

173. Intel's current Vice President for Human Resources is a former litigator at Morrison and Foerster.

terms, and designing training modules and policy revisions in response to the problems identified through the open door process.¹⁷⁴ They actively embrace the role of problem solver and systems designer, in addition to their more traditional role in litigation. All HR Legal attorneys have projects, such as developing systemic approaches to long-term and short-term disability, family care, and probationary employees.¹⁷⁵ The lawyers work with the senior specialists to evaluate and continually redesign the system.¹⁷⁶

Lawyers are evaluated by their success in avoiding litigation, their promptness in processing open doors, and their effectiveness in enabling senior specialists and managers to resolve problems before they result in litigation.¹⁷⁷

Several features of Intel's system seem important to its effectiveness and legitimacy. First is the transparency of the problem-solving process, achieved through computerized data gathering, tracking of the data at regular intervals, and review of the data by actors with different roles and interests in the corporation. Intel informally shares information about its conflict resolution system with other companies, conducting what Intel's lawyers referred to as "informal benchmarking" both across branches of the company and with other companies in the industry.

Second is the practice of evaluating the open door program and the senior specialists in relation to the data and their responses to it. Measures of effectiveness emerge from and are revised as part of evaluating the data. These measures include: utilization in proportion to expected levels, given the size of each unit (overutilization or underutilization signals a potential problem and warrants further investigation), ratio of open doors to outside complaints (a larger number of internal complaints as compared to external charges indicates a successful process);

174. Interview with Senior Specialist A, April 13, 2000, *supra* note 145, at 9; Interview with HR Legal Counsel A, *supra* note 150, at 3; Telephone Interview with HR Legal Counsel B, Intel Corp., at 1-2 (July 28, 2000) (transcript on file with the *Columbia Law Review*).

175. Interview with HR Legal Counsel B, *supra* note 174, at 2-3. HR Legal Counsel B explained:

We are supposed to figure out how it is all working together and where the gaps and holes are, and what to do about it. We are going beyond what the law requires. Trying to get to the right result, which . . . is having people reassigned in a meaningful way in a job they are able to do. . . . Not everything can be resolved by passing judgment where more needs to be done.

Id.

176. The same HR legal counsel continued:

We are looking at systems where people within a workgroup are trained, and then people within the workgroup would function as internal mediators. This would be a supplement, rather than a substitute for an open door system. Part of this inquiry is benchmarking, by looking at other models at other companies, and seeing what works and how we could improve upon it.

Id. at 3.

177. See *id.* at 2; Interview with HR Legal Counsel A, *supra* note 150, at 5.

percentages of open doors that are substantiated (senior specialists fully or partially substantiate employee complaints and provide a remedy for employees in approximately 50% of the cases); and systems redesign prompted by analysis of open door data.¹⁷⁸ Intel also surveys every employee and manager involved in the open door process about its effectiveness and fairness, and it then aggregates and analyzes this data.¹⁷⁹ Senior specialists are themselves tracked in relation to their effectiveness and timeliness in dealing with cases and their effectiveness in implementing projects designed to respond to the trends and problems revealed by the data.¹⁸⁰

Finally, the senior specialists have developed a robust set of conventions, roles, standards of conduct, accountability systems, and patterns of interaction that equip them to operate as multidisciplinary problem solvers. In a sense, they have become a profession in the functional rather than the credentialized sense of the word. They have institutionalized a community of practice, meeting regularly and holding each other accountable to evolving standards of conduct. They have autonomy within the organization, and their independence is fiercely protected and central to their role. They do not report to line managers, whose decisions may be questioned in their investigations. They are rewarded for generating usable information and for developing programmatic responses to problems revealed by their investigation. They are problem- and project-oriented, and they are expected to combine individual case work with projects designed to respond to problems detected through data gathering. Over time, they have developed a practice ethic that emphasizes credibility, careful investigation and data gathering, pooling of information, problem solving, benchmarking, and developing pragmatic responses to the data. They function at the intersection of roles and disciplines within the organization, and enable communication across boundaries, informed by data revealing patterns that link seemingly unrelated problems or practices. The data they use to perform their function also serves to hold them accountable because the results of their work are visible to other senior specialists and to the managers who evaluate them.

After the adoption of the open door system, the number of employee complaints increased substantially, including complaints about sexual harassment and bias in performance evaluation and promotion. Employees' confidence in the process also increased, based on information from anonymous surveys. According to estimates, senior specialists

178. See Interview with Senior Specialist C, *supra* note 150, at 5.

179. See Interview with Senior Specialist A, Apr. 13, 2000, *supra* note 145, at 8–9.

180. Interview with Senior Specialist B, *supra* note 158, at 3. This senior specialist explained:

I am evaluated on thoroughness, on judgment, around recognizing legal risks, . . . problem solving, making recommendations that will work, confidentiality. We get feedback from the person raising the complaint, the reviewing manager, and the HR person for that business group.

Id.

fully or partially substantiated employee complaints and provided a remedy for employees in approximately fifty percent of the cases. When an investigation substantiated that a manager or supervisor engaged in sexual harassment, that individual was fired. If the company took disciplinary action against an employee for sexual harassment, the complaining party was notified. The senior specialists also followed up with complainants and respondents to assure that proposed remedies were actually implemented. Reports indicate that the number of complaints filed internally has increased, and that the number of EEOC complaints and lawsuits involving sexual harassment and discrimination has now become disproportionately low for a company of this size.

The apparent success of the open door system does not mean that Intel is necessarily an easy place in which to work. The company is widely acknowledged as imposing extremely high expectations and workloads; stress is part of the job.¹⁸¹ It is also important to note, as the senior specialists did, that the system has been implemented during a period of high growth, and it is difficult to know how the system would fare in a recession. In addition, Intel's dependence on individual complaints as the primary source of information about decisionmaking patterns may limit its capacity to respond proactively when individuals are unlikely to complain.¹⁸² These limitations are explored in the next Part. But the overall design of the Intel system offers one promising method of providing accountability and legitimacy in an internal, problem-solving regime.

3. *Home Depot*. — Home Depot is a home improvement company that pioneered the concept and, in many ways, the market for do-it-yourself home improvements.¹⁸³ It was founded as a close-knit, family-oriented company that emphasized loyalty and entrepreneurship. From the outset, Home Depot adopted a nonbureaucratic, decentralized management style. Add on top of that “the sense of camaraderie that gets shared when you start a new venture and are fighting for everything—vendor, financing, property. They were small people scrapping for their dream.”¹⁸⁴

181. It bears noting that age discrimination was not the focus of the inquiry, and some critics claim that age presents particular issues in the high tech field. Norm Alster, *Techies Complain of Age Biases*, *Upside*, Jan. 1999, at 66 (noting that Intel, along with Digital Equipment Corporation and many others, have litigated age discrimination cases for years, and describing a group that calls itself FACE Intel, which gathers information about claims of age discrimination at Intel). Intel has denied FACE Intel's claims of age discrimination, and the company attributes the low average age to its rapid expansion. *Id.* at 70–71.

182. Subtle problems, such as the glass ceiling and balancing between work and family, may not prompt sufficient self-initiated complaints to trigger further inquiry.

183. See Chris Roush, *Inside Home Depot* 1–2 (1999) (documenting the rise of Home Depot, its financial growth since its creation, and the novelty of its approach).

184. Telephone Interview with Faye Wilson, Senior Vice President, Value Initiatives, Home Depot, at 1 (July 5, 2000) (transcript on file with the *Columbia Law Review*).

The company embraced the concept of providing expert service and knowledge for purchasers of home improvement products. Its early approach to hiring reflected this mission:

Looking at the company itself, it grew from a male dominated, white male dominated business base of home repair and home building, founded around giving a level of service and knowledge to expand and in many ways create the do-it-yourself market. They were building a new concept in retailing and an industry. So they hired from the feeder industries that were natural. They were white male. They hired people with plumbing, electrical, and construction experience to build home improvement knowledge. My own theory is that this set the stage for this close-knit family to continue to grow and move up in that way. The company was not only non-bureaucratic, it was about loyalty. They were very dedicated. They brought friends with them when they opened a new store. That creates a certain way of doing things.¹⁸⁵

In 1998, Home Depot instituted a new system for hiring, promotion, and training that replaced this informal, ad hoc approach. In part, this new system was prompted by the company's rapid growth. "Home Depot was the prototype of a high growth entrepreneurial company where decisions were made quickly and informally, which is what you could do when you had twelve or twenty-five branches. These informal, nonbureaucratic methods did not serve them well as they became a mature company."¹⁸⁶ Concerned about turnover and quality,¹⁸⁷ experts within the company had begun to develop minimum job requirements,¹⁸⁸ tests that related to those requirements, and a computer-based job application process.

These internal efforts coincided with a class action lawsuit, brought in 1994 by a group of female employees and applicants in the Western Division, alleging gender discrimination in hiring, initial assignments, promotions, compensation, and training.¹⁸⁹ The plaintiffs claimed that

185. *Id.*

186. Interview with John Wymer, *supra* note 59, at 2.

187. Interview with Al Frost, Senior Human Resource Specialist, Director of Selection and Performance, Home Depot, in Atlanta, Ga., at 1 (July 28, 2000) (transcript on file with the *Columbia Law Review*) ("We had a high turnover rate. [People were] being sold on Home Depot and walking away with huge expectations. They would come and work on a cement floor. It hurts your back, requires multi-tasking . . . and stress tolerance. Let's give the applicants a realistic view of [the job.]").

188. The Director of Selection and Performance, who is trained in job analysis and performance evaluation, determined based on academic research that conscientiousness is highly correlated with job performance. He then went into the field and extensively analyzed the range of jobs to be filled, including by working them himself. He followed up by creating a performance evaluation, and then cross-validated it. "There is a definite business value to that." *Id.* at 2.

189. *Butler v. Home Depot*, No. C-95-2182 ST, 1997 U.S. Dist. LEXIS 16296 (N.D. Cal. 1997).

women were underhired for merchandising positions,¹⁹⁰ and overhired for operations positions, compared to men with similar prior experiences and job desires. Plaintiffs alleged similar disparities in Home Depot's promotion processes. They attributed these disparities to a highly arbitrary, subjective decisionmaking process, that operated in "a working environment that is heavily male-oriented" and encouraged personnel decisions based on stereotypes. The court noted in its decision certifying the class that:

The subjective decisionmaking throughout the Home Depot personnel system, applied in the context of a male-dominated corporate culture which encourages managers to ignore the objective qualifications and interests of women employees, leads to a pattern of segregation whereby women have limited opportunities to advance into the most rewarding positions in the company.¹⁹¹

In addition, the company's emphasis on prior work experience as the indicator of current product knowledge disadvantaged women who were less likely to have been employed as plumbers, electricians, or construction workers.

Barry Goldstein, a prominent plaintiff-side employment discrimination lawyer, was part of the team serving as class counsel.¹⁹² He connected Home Depot's gender problems to its rapid growth:

Home Depot had brilliant managers, but until [the] law suit they have never put the resources and time into personnel practices that they did to marketing practices, opening stores, figuring out how to make products accessible to people. There were people within Home Depot who knew they were falling short. People weren't willing to put the resources into personnel practices. . . . They didn't have any way to tap their pool of workers in a rigorous way.¹⁹³

The court certified a class of female applicants and employees. On the eve of trial, a court-ordered mediation process produced a global settlement, embodied in a consent decree. The mediation process involved plaintiffs's counsel, in-house counsel, senior HR officials, and experts in

190. Merchandising positions included sales associates, which were the stepping stone to higher positions in the company. Operations positions, such as cashiers, paid less and tended to lock employees in to lower, less lucrative positions. *Id.* at *31 n.16.

191. *Id.* at *49-50 (quoting from Bielby Report).

192. Goldstein was one of the lead counsel in the case, along with Lieff, Cabraser, Heimann, & Bernstein. Lieff, Cabraser had a long track record of success representing plaintiffs in securities, tobacco, and other complex litigation.

193. Telephone Interview with Barry Goldstein, Class Counsel in *Butler v. Home Depot*, Partner, Saperstein, Goldstein, Demchack, & Baller, at 4 (May 16, 2000) (transcript on file with the *Columbia Law Review*).

systems design.¹⁹⁴ The participants focused on developing a remedy that would combine “keep[ing] Home Depot on the road to success”¹⁹⁵ and mak[ing] sure that personnel decisions were not going to be the result of subjective decisions made by male managers that were infected by stereotyping. We would define it as a better system for making sure that every qualified and interested applicant and employee had a full and fair opportunity to compete.¹⁹⁶

According to Home Depot’s mediation counsel, the settlement became possible “[o]nce we realized that there were programs that we were working on that would blend nicely with what plaintiffs wanted us to do.”¹⁹⁷

The challenge was to develop a system that would work in a company that was dynamic, decentralized, and entrepreneurial. The solution was to achieve accountability through technology, information systems, and systematizing discretion, rather than through rules. The design and implementation of this innovative solution was possible in no small part because of a mutual recognition (by the company and plaintiffs’ counsel) that this system must be designed to link equity and effectiveness,¹⁹⁸ and a commitment at the top of the organization to its successful implementation.¹⁹⁹

The keystone of the new system is an automated hiring and promotion system, called JPP, for Job Preference Process.²⁰⁰ This is an in-store

194. Also, people outside were utilized as consultants, such as “statisticians, surveyors, and labor economists from Berkeley.” Interview with Faye Wilson, July 5, 2000, *supra* note 184, at 2. Al Frost described the settlement process as “group decision-making, brainstorming that [asked] what is the best way we can do this? Not just because of the consent decree, but going forward.” Interview with Al Frost, July 28, 2000, *supra* note 187, at 3.

195. Interview with Barry Goldstein, May 16, 2000, *supra* note 193, at 3.

196. Interview with John Wymer, *supra* note 59, at 1.

197. *Id.*; see also Telephone Interview with Faye Wilson, Senior Vice President, Value Initiatives, at 1 (July 28, 2000) (transcript on file with the *Columbia Law Review*). Wilson explained:

The new system had to fit in with other standard operating procedures so there were no conflicts. I added some field operations people as we came along, [and] someone from the legal department to broaden the committee. I told them they were no longer the consent decree task force. We are the Home Depot Hiring and Promotion task force. We are going to figure out the best way to have the best hiring and promotion process possible.

Id.

198. See Meyerson & Fletcher, *supra* note 34, at 131–33 (noting importance of linking equity and effectiveness, and providing other examples of successful initiatives that improved productivity and increased women’s participation).

199. Faye Wilson describes the importance of taking a stand and holding managers accountable. “Home Depot made this system of selection and promotion on par with drug testing—to make it part of the culture.” Managers had to sign an acknowledgment that they knew they would be held accountable. Interview with Faye Wilson, July 28, 2000, *supra* note 197, at 2.

200. Consent Decree at 32, *Butler v. Home Depot, Inc.*, No. C-95-2182 ST, 1997 U.S. Dist. LEXIS 16296 (N.D. Cal. 1997) [hereinafter *Consent Decree*].

computer or telephone system that enables employees²⁰¹ and applicants to indicate their job preferences and qualifications, and thus automatically become part of the pool for any position that meets those preferences and qualifications. The JPP is intended:

(i) to improve the information available to Home Depot's management in making promotion and employee development and training decisions; (ii) to provide a systematic Division-wide method, consistent with equal employment opportunity, for Home Depot Associates to make informed and documented decisions about their career preferences; (iii) to provide a systematic framework within which Home Depot will incorporate such Associate preferences into its retail store promotion and Associate development and training decisions; and (iv) to establish a meaningful basis for setting Benchmarks . . . designed to afford guidance as to whether Home Depot is making selection decisions in such a way as to afford equal employment opportunity.²⁰²

Home Depot installed a computer and phone kiosk in every store. This kiosk eliminated the steering role of managers in defining the applicant pool. Employees now regularly register their job preferences through an interactive process that asks them to describe their qualifications and past experience, respond to a battery of questions that establishes minimum qualifications for the job, and indicate which jobs they would be interested in within the next six months. This information is then processed via computer. A new applicant or employee who registers for a position and meets the minimum qualifications will automatically be in the pool of applicants for any such opening for a six-month period.²⁰³

Every manager throughout the Division then receives a print-out for every person in the pool of applicants qualified for and interested in an open position. Home Depot has developed minimum job qualifications for every position.²⁰⁴ The consent decree does not specify how managers are to process these candidates. Home Depot instituted a policy of "n plus 2," which requires that a manager interview at least three candidates

201. Home Depot refers to employees as "associates."

202. Consent Decree, *supra* note 200, at 33, 39.

203. This information may be updated regularly. *Id.* at 33-36.

204. The Consent Decree requires Home Depot to determine the adverse impact of minimum qualifications, and provide evidence that the minimum qualification is consistent with business necessity. See *id.* at 37-39. Home Depot had been working on validated tests for a variety of positions prior to the Consent Decree's adoption. Home Depot scrutinized all of these tests to make sure that there was no adverse effect to any group. See Interview with Faye Wilson, July 5, 2000, *supra* note 184, at 2; Interview with Al Frost, July 28, 2000, *supra* note 187, at 2 ("The test was in development for two years before the law suit was an issue."). The Consent Decree provides that "[t]he information that has been provided to Class Counsel about the Sales Associate test indicates that the test does not have an adverse impact on women, is valid, and was developed consistent with professional standards." Consent Decree, *supra* note 200, at 39.

for every position.²⁰⁵ This policy is designed to get away from the idea that managers know in advance who will get the job, and to expand opportunities for qualified "newcomers" to advance.²⁰⁶ The company also developed a set of structured interview questions for the interview process.²⁰⁷

This process virtually eliminates the possibility for managers to steer applicants to particular roles based on stereotypes,²⁰⁸ expands the pool of applicants for every position, and opens up avenues for advancement that applicants themselves may not otherwise have considered. For example:

Claudia Corral had worked off and on for ten years with her uncle, fixing leaky roofs and renovating outdated kitchens. Yet when she sat down at the job kiosk in a suburban Atlanta Home Depot, she applied for a cashier's position. "I thought that's where women went," shrugs Corral. The computerized application prompted her to state what jobs she wanted in the future. She answered, "Sales associate." Given her experience and her aspirations, the computer bumped her up to the higher job level, and she was hired as a sales associate in building materials.²⁰⁹

The JPP also brokers and tracks information at both the individual and the system level. A system of exception reporting was instituted as a "trip wire" to indicate if, for example, a manager didn't interview three candidates, or if someone has been interviewed over and over and never offered a job. The company then built in system-prompts that lead to developmental plans for managers to share with unsuccessful applicants. The screen will tell the manager: These are the people not getting the job. The system then provides a developmental plan to guide the manager in counseling unsuccessful applicants. The system uses the same techniques to give unsuccessful applicants prompts about what to do to qualify in the future.²¹⁰

205. Interview with Faye Wilson, July 5, 2000, *supra* note 184, at 2.

206. Faye Wilson described the consequences of the "n plus 2" system:

There were things we added on in the thought of fairness . . . "n plus 2"—managers had to interview three people for any job opening, and we added structured interview questions, so everyone had the same shot. They frequently didn't choose the person they thought they were going to give the job to because they found someone better.

Id.

207. *Id.*

208. "The application process shall involve minimal interaction with Home Depot managers or Associates, thus promoting an applicant's informed yet nonsuggestive consideration of various job positions." Consent Decree, *supra* note 200, at 35. "If someone tries to go outside the system, that invalidates the action. We know anyone who tries to go around the system. We hold people accountable." Interview with Al Frost, July 28, 2000, *supra* note 187, at 4.

209. Cora Daniels, *To Hire a Lumber Expert, Click Here*, *Fortune*, Apr. 3, 2000, at 267, 268.

210. See Interview with Faye Wilson, July 28, 2000, *supra* note 197, at 3; Interview with Faye Wilson, July 5, 2000, *supra* note 184, at 3.

Home Depot's new personnel system also expands access to information and training needed to advance within the company. Home Depot publishes a Jobs Brochure containing summary job descriptions for all positions in the store and outlining potential job paths. It also makes available an informational CD Rom describing the Sales Associate position that includes footage of women working as Sales Associates.²¹¹ Home Depot developed an extensive product knowledge training program to "enhance the Associate's general knowledge, assist them in obtaining relevant experience, assist them in determining a career path and help prepare them for new positions."²¹² Cashiers are required to take Home Depot's Product Knowledge Basics course, which "is designed to give cashiers a basic knowledge about Home Depot products and may help cashiers develop an initial interest in a specific sales department or departments."²¹³ Associates may then sign up for self-study courses in particular product areas. Home Depot tracks the Product Knowledge Training each Associate receives, and uses that information in developing the pool of candidates for open positions.

Home Depot tracks the information generated through the JPP system, and uses this information as a diagnostic tool. The system tracks the demographics of each step of the process: training, expressing job preferences, determining minimum qualifications, declining an interview, receiving and offering a position, accepting or declining an offer, and advancing to a new position.²¹⁴ Wilson explained:

We have distribution of reports which show results and exceptions. Those are down to the store level and individual position. Those are sent to President of the Division, the regional vice president. Meetings are held to review the reports. They hold meetings with district managers, looking at the performance of each of the stores. There has to be a response and a plan.²¹⁵

This information is used both to increase the effectiveness of the personnel system in matching applicants to positions and to identify trends or patterns of underutilization that warrant further inquiry. For example, if a particular individual who is interested in a position does not get interviews, or is repeatedly turned down after being interviewed, that fact would surface in the regular reporting of the data. This information would then trigger an investigation of why the problem is occurring, and a corresponding intervention to correct the problem.²¹⁶

211. Consent Decree, *supra* note 200, at 36.

212. *Id.* at 31.

213. *Id.* at 32.

214. Performance ratings, evaluation, counseling, and discharge documents are currently retained, and are in the process of being computerized. See *id.* at 45; Interview with Al Frost, July 28, 2000, *supra* note 187, at 4-5.

215. Interview with Faye Wilson, July 5, 2000, *supra* note 184, at 2.

216. If the problem rests with the employees' qualifications, experience, or interviewing skills, the inquiry will lead to a developmental plan for that employee. If the problem is traced to a particular manager's hiring patterns, the intervention would focus

The aggregate demographic data serves a similar diagnostic function for locating and correcting problems concerning the inclusion of women, people of color, and older workers. Home Depot has established Benchmarks for each position. The Benchmarks "are not quotas; they are Benchmarks designed to afford guidance as to whether Home Depot is making selection decisions in such a way as to afford equal employment opportunity."²¹⁷ Failure to achieve a Benchmark triggers further inquiry and a "constructive dialogue" aimed at understanding whether a problem exists and if so, how to correct it.²¹⁸

Give people the opportunity and a tool and allow them to select the best person and you do get diversity. That works better than targets. If you give people numbers, they can meet them, but it may not change a lot. With Benchmarks, you trust the system to help you do the right thing. What you have to do is follow the process. If you follow the process that will lead you to do the right thing.²¹⁹

As long as a manager can show that the decision was made on qualifications, and that Home Depot used its best efforts to meet the Benchmarks, failure to achieve a Benchmark is not a violation of the decree. Thus, Home Depot's use of Benchmarks closely resembles the structural approach adopted by the district court in *Butler v. Home Depot*: Disparities function as signals of potential bias that trigger further investigation, rather than as sufficient evidence in and of themselves that bias has occurred.²²⁰

This raises an important question: What are the means for holding the system and its agents accountable? Home Depot achieves meaningful accountability through technological design, management systems, and information transparency. Managers cannot enter a new employee into the payroll system or change a current employee's payroll status without inputting a JPP system number. Managers who have attempted to circumvent the system have been fired.²²¹ Training in the use of the JPP includes a blunt message telling managers that use of the JPP was equivalent to Home Depot's drug test—the company's only absolute rule: Do this or you are fired.²²²

Computerization of the personnel process integrates data analysis with the personnel process. By instituting this data analysis and reporting system, this information and the processes it tracks in real time become

on developing the manager's personnel skills. See Interview with John Wymer, *supra* note 59, at 2–3; Interview with Faye Wilson, July 28, 2000, *supra* note 197, at 1.

217. Consent Decree, *supra* note 200, at 39.

218. Interview with John Wymer, *supra* note 59, at 3.

219. Interview with Faye Wilson, July 5, 2000, *supra* note 184, at 3.

220. See *supra* text accompanying notes 97–98.

221. See Daniels, *supra* note 209, at 268 ("This new way of doing things is nonnegotiable. Five managers have been dismissed for not using the system, says a Home Depot lawyer.").

222. See Interview with Faye Wilson, July 5, 2000, *supra* note 184, at 2.

transparent to a diverse group of actors who are responsible for producing a fair and efficient personnel system. These results are also used as part of the yearly evaluation of managers. Home Depot, both through the consent decree and on its own initiative, has placed responsibility for using this information squarely on those with operational responsibility within the company, who then report to the Human Resources Committee of the Board of Directors.

The current system also involves individuals who are not part of the day-to-day personnel process in holding the system accountable in relation to its goals. At least for the duration of the decree, the company reports regularly to Class Counsel, who has unlimited access to the data described above. The company has also developed an internal cadre whose role includes providing accountability for the personnel process and for implementing the Consent Decree. In addition to a compliance monitor, Home Depot recently created a position called the Senior Vice President, Value Initiatives, and appointed a highly respected member of the Board of the Directors, Faye Wilson, who had previously helped the company put together the financing plan for its first 100 stores and then became Home Depot's "banker."²²³ She was appointed in part because she combines an insider/outsider perspective. She has had a long history with the company, and knew the culture and its problems. At the same time, as a member of the Board of Directors, she was not a careerist within Home Depot, had considerable independence, and "wouldn't be subject to pressures of a political nature."²²⁴ Her role is not limited to or defined in terms of compliance with the consent decree:

There were a lot of things they wanted to do. The company was growing, it was more complex, was more difficult to see every location, train every manager . . . They needed to find a way to institutionalize the values of the company, maintaining parts of culture that made them successful, throwing away the parts that no longer fit and knowing the difference. There was also this consent decree. They still wanted to understand it and build it into the company.²²⁵

Accountability also depends on developing measurable but flexible standards of effectiveness for the process and its outcomes. In addition to the Benchmarks established in the Consent Decree, Home Depot has developed several other indicators of the effectiveness of their new person-

223. Faye Wilson explained:

I have had a longer history with the company as an outsider than an insider. I started in '81 when I was asked to come in and guide in putting together a financing plan for the first hundred stores. I became the banker. Then I worked in Europe for five years. When I returned, I was asked to go on the board in early 1992. I stayed on the board until two years ago. I am still on the board. I was asked if I would come inside.

Id. at 1.

224. Id.

225. Id.

nel system. These indicators refer both to the impact on women's participation in the company and on the company's ability to attract and retain high-quality employees. According to these measures, Home Depot's system has been strikingly successful in both increasing women's participation at all levels of the company and retaining high quality personnel.

Since the JPP was introduced, the number of female managers and the number of minority managers has increased by thirty percent and twenty-eight percent respectively.²²⁶ More women are expressing interest in merchandising positions, receiving serious consideration, and being hired or promoted into those positions. The process has also tangibly improved the effectiveness of Home Depot's personnel process: "I can tell you how many people apply at what time of day. We can target high and low need areas. In the tightest labor market in twenty years, we've doubled the number of applicants."²²⁷

Rather than feeling displaced by the system, managers seem happy to get help with the bread-and-butter task of filling jobs with the right people. For one thing, they no longer have to waste time interviewing people who clearly aren't up to par. The computer takes care of that. . . . Managers say that has meant better candidates, which in turn has helped reduce turnover, one of the biggest problems in retail, by 11%.²²⁸

"One of the enormous benefits: If you put the right person in the right job, you get better quality and better customer service. This reduces turnover."²²⁹ Managers report that the "n plus 2" requirement and the structured interview have increased the effectiveness of the interview and induced managers to base decisions on more substantive grounds.²³⁰

These changes have been reported to be functionally integrated into Home Depot's day-to-day operations. Faye Wilson required personnel to stop referring to the internal committee that implemented these changes as the consent decree task force: "We are the Home Depot Hiring and Promotion task force."²³¹ Perhaps the best indicator of the success of the system in institutionalizing these changes is the degree to which the company has generalized these changes beyond the jurisdiction of the Con-

226. See Daniels, *supra* note 209, at 267.

227. Interview with Al Frost, July 28, 2000, *supra* note 187, at 2.

228. Daniels, *supra* note 209, at 268.

229. Interview with John Wymer, *supra* note 59, at 1; see also Interview with Al Frost, Senior Human Resources Specialist and Director of Selection and Performance, Home Depot, in Atlanta, Georgia, at 2 (July 2, 2000) (transcript on file with the *Columbia Law Review*).

230. Interview with Faye Wilson, July 5, 2000, *supra* note 184, at 2. Wilson explained the managerial reaction to the "n-plus-2" system:

One of the things that happened to managers is that they found that people who were interviewed were doing the talking and they were finding out something out about the people they were interviewing. Once they used it and saw good benefits, if we tried to take it away they would object."

Id.

231. Interview with Faye Wilson, July 28, 2000, *supra* note 197, at 1.

sent Decree. Although the Consent Decree only covers the Western Division, Home Depot has instituted the JPP system company-wide.²³² Other than the requirement of reporting to plaintiffs' counsel and the accompanying risk of contempt, the systems of information gathering, reporting, and accountability are basically the same for all divisions, whether or not they are covered by the decree.²³³ The rates of participation by women have risen and the employee turnover rates have dropped all across the company, not just in the divisions covered by the Consent Decree. Moreover, the decree has enhanced the participation rates of people of color, whose participation is now tracked by the company,²³⁴ even though they are not covered by the terms of the Consent Decree.²³⁵ And, the company has begun to track information from its Open Door Dispute Resolution system, and to use this information as a problem-solving tool.²³⁶

4. *Common characteristics of effective workplace problem solving.* — The three employers described here have self-consciously designed or revised their systems of conflict resolution and problem solving to address their particular culture, power dynamics, and patterns of daily interaction. These companies were quite different in their cultures and missions, and their approaches to problem solving and conflict resolution reflect those differences. The circumstances prompting them to develop a system that addresses second generation problems also vary. Notwithstanding these differences, the companies share several characteristics that seem important to the effectiveness of their internal problem-solving regimes. They are: (1) *problem oriented*—each company developed a customized system to address problems holistically and in relation to its particular culture;²³⁷ (2) *functionally integrated*—the systems linked processes for addressing interrelated domains, such as principle (e.g., bias, access, fairness) and productivity (e.g., recruitment, turnover), individual employment decisions and systemic patterns, and day-to-day operations and problem-solving procedures; (3) *data driven*—decisionmaking generates and is informed by ongoing analysis of information that reveals patterns of dysfunction

232. I have not assessed whether these processes have altered practice at the local level, particularly in areas not covered by the consent decree. See *infra* text accompanying notes 322–323.

233. Interview with Faye Wilson, July 28, 2000, *supra* note 197, at 1.

234. *Id.*

235. Since the JPP was introduced, the number of minority managers has increased by 28%. See Daniels, *supra* note 209, at 267.

236. Interview with Faye Wilson, July 5, 2000, *supra* note 184, at 4. Wilson explained: We now can track a manager and type of complaints. How many anonymous calls you get out of a store or district tells you something about the quality or openness. I might decide to go and walk the store or ask someone else to do that. Now we are using this information more to problem solve and for training.

Id.

237. Cf. Sparrow, *supra* note 162, at 108 (“The new arrangements must support the complex processes of problem identification or risk analysis. That requires the facility to cluster and analyze incidents in a wide variety of dimensions: The various dimensions in which ‘problems’ or ‘risks’ can be defined.”).

(and success); and (4) *accountable*—each system generates process and outcome measures of effectiveness, and builds in systems of accountability for those responsible for its effective implementation.

These systems of problem solving, designed to identify and remedy patterns of dysfunction over time, served to elaborate norms as well. They provided the participants over time with the detailed knowledge needed to understand and articulate the normative significance of these patterns. Home Depot learned about a particular form of bias, reflected in the pattern of failing to match women with positions leading to advancement, and it then adopted a norm of equal consideration and access. Deloitte & Touche determined that, in the context of its workplace, job assignments and networks of opportunity were skewed to disfavor women, and adopted a norm of fair and equal access to jobs. Intel determined that interactions with women in stereotypical and macho ways may constitute gender discrimination, but it linked this legally relevant analysis with the more general norm of professionalism and respectful treatment. In this way, the remediation process generated an understanding of the relevance of the norms in context, which then helped redirect the process of remediation.

The provisions for accountability in each of these systems are of particular importance. It was not sufficient, although it was certainly necessary, to develop information systems that identified the problem. Some form of pressure had to be built into the system to assure that, once identified, problems were in fact addressed. This means connecting solution of the identified problem to improving performance generally, and then rewarding that improvement. This could occur through review by representative employee and outsider committees, as in Deloitte & Touche; through new, high level positions committed to acting on the patterns revealed by the data and reporting to plaintiffs' counsel, as in Home Depot; or through professional accountability and administrative oversight, as in Intel. Indeed, it appears that the success of these initiatives stems in part from the fit between the organizational culture and the system of accountability. But whatever form, accountability is key to the long term viability of these problem-solving systems.

C. Law's Role in Shaping Internal Problem-Solving Processes

What role did law play in the design and implementation of these internal problem-solving and dispute resolution processes? Law shaped rather than fully determined each employer's approach to employment decisionmaking. The legal regime regularized reflection about day-to-day conduct in relation to general legal standards. It dictated some of the goals of the new systems, and offered incentives influencing the means employed; but it neither completely defined the goals nor fully specified the necessary means. Liability avoidance certainly provided crucial incentives to change, but economic and ethical motivations figured prominently as well. To be sure, law helped justify the implementation of initia-

tives lacking short-term economic pay-off, and it legitimated the pursuit of ethical values of fairness and respectful treatment in the workplace; but law never provided the sole justification or constrained experimentation with the means of achieving legality. Related problems that did not themselves constitute legal violations could be addressed through the systems developed in part to reduce legal exposure. This is in contrast to the tendency of a rule-enforcement system to create separate, formalistic procedures that discourage problem solving or integration with underlying systemic concerns.

Lawyers were important but not dominant actors in developing and operating these internal problem-solving processes. They worked closely with those with direct responsibility for developing and implementing these systems. They communicated the legal risks of action and inaction and counseled companies about how to manage information to minimize these risks.²³⁸ They translated legal norms into organizational culture, and vice versa. They helped to develop interdisciplinary groups of insiders and outsiders with the capacity to develop, implement, and monitor problem-solving processes. In some cases, they used litigation to induce organizational actors to address claims of exclusion and bias and to create interdisciplinary problem-solving mechanisms. But they did not design or operate the systems that were developed to respond to the problems signaled by potential liability.

Finally, legal incentives were only part of the mix of factors influencing the development of these systems. Those responsible for developing and implementing these internal systems were well aware of the company's legal exposure. This knowledge cut in seemingly contradictory directions. These actors knew that, under recent case law, employers with effective internal systems would avoid or minimize liability. This case law buttressed their resolve to develop effective internal systems. At the same time, they were reminded continually by their in-house counsel of the risks of producing information about problems relating to race, gender, age, disability, or any group with potential legal claims. Again, this influenced what information they gathered, how they communicated this information, and what documents they retained. But it did not fully determine the type of information gathered and how that information was used to change internal practices.

Thus, law interacted with internal change initiatives in both complementary and contradictory ways. It served as a catalyst, and provided legitimacy, clout, and regular consideration for human resource concerns that are typically neglected or undervalued. At the same time, however, "legal" sometimes came to symbolize the risk involved in taking proactive steps to address problems with legal implications. Law helped make the

238. This role in counseling companies to avoid legal risk sometimes collided with the company's ethical and business interest in addressing racial and gender issues. This tendency is discussed further in Part IV.B, *infra*.

vocabulary of norms a part of the day-to-day language of the workplace, and to inject normative considerations into decisions about how to structure the day-to-day operations of the business. But it also threatened to relegate these same concerns to the category of liability avoidance and thus marginalize both their ethical and economic dimensions. Law encouraged the development of internal systems of accountability, even as it sometimes stifled creativity and risk-taking out of concern that revealing problems or mistakes would fuel legal "punishment." In each of the three examples described above, individual and organizational intermediaries played a crucial role in mediating this tension between the coercive and aspirational character of law. That role is explored more fully in the next Part.

III. THE PIVOTAL ROLE OF INTERMEDIARIES IN A STRUCTURAL REGIME

The structural approach to second generation problems calls for a dynamic and reciprocal relationship between judicially elaborated general legal norms and workplace-generated problem-solving approaches, which in turn elaborate and transform the understanding of the general norm. This interactive dynamic is important because of the limitations of both judicially managed *and* completely decentralized regimes. If the courts assume direct responsibility for elaborating specific standards for effective problem solving, they risk reproducing the limitations of a rule-enforcement dynamic. The systems described in the previous section work because they are tailored to their context, and functionally integrated into the incentive structure and culture of the organization. These same systems might fail miserably if introduced in a different organizational or cultural context.²³⁹ Efforts to define comprehensive and adequately directive standards that still account for differences in context face insurmountable obstacles.²⁴⁰ Judicially defined codes for effective process are likely to mimic adversarial processes that fail to respond to the complexities of second generation employment discrimination. Or, they will embrace minimal standards that do not provide any meaningful accountability.²⁴¹ Judicially developed and imposed systems frequently trigger strong resentment and resistance, and they invite strategic behavior aimed at minimizing the impact of the law.²⁴² This tendency discour-

239. For example, many companies have grievance systems and open door policies that produce little if any meaningful impact on workplace conditions. See Anne Donnellon & Deborah M. Kolb, *Constructive for Whom? The Fate of Diversity Disputes in Organizations*, 50 J. Soc. Issues 139, 139-40 (1994).

240. They are the procedural analogue to the equally problematic project of specifying substantive rules to address the complex problem of second generation employment discrimination. See *supra* Part I.C.

241. A later section, discussing the incompleteness of the structural move, discusses this risk in greater detail. See *infra* Part IV.A.

242. Cf. Sturm, *Public Law Remedies*, *supra* note 51, at 1412-13, 1419-20 (arguing that unilateral imposition of a remedy, whether by a judge or expert panel, generates resistance and precludes meaningful participation by responsible stakeholders).

ages employers from analyzing their practices to identify and correct problems. In any case, courts are often reluctant to dictate unilaterally how employers should manage their employees.

But if the regulatory project remains entirely local and context-specific, the structural move risks abdicating accountability to public norms. Many employers lacking the capacity or incentive to develop effective systems would face little pressure or support to change. Internal processes that emerge from gross inequalities or power imbalances would lack an external reference point to bring those problems to light. A decentralized approach to defining effective problem-solving systems would also provide no way of learning from the successes and failures of other companies or elaborating the meaning of the nondiscrimination principle in light of changing circumstances, except at the most local level. The complete privatization of responsibility for problem-solving processes would thus undermine the law's normative impact.

This dilemma seems intractable if framed as a choice between employers on the one hand and government on the other. How can there be external accountability without externally imposed rules? How can the law shape internal problem-solving processes without taking over the process of defining their features? How can standards of effectiveness be developed that are flexible enough to account for variability and still comparable across different locations?

These tensions seem unresolvable in part because commentators frequently depict the relationship between courts and employers as dyadic: courts act on (or refuse to act on) employers, and employers comply with (or resist) judicially imposed norms. This analytic framework vastly oversimplifies the regulatory dynamic. Importantly, it ignores the crucial role of nongovernmental organizations and professional networks in mediating the relationship between legal institutions and workplaces. A set of intermediate actors, operating within and across the boundaries of workplaces, have emerged as important players in the implementation of workplace innovations to address bias.²⁴³ At least some of these intermediaries have begun to play an ongoing role of: (1) building the capacity and constituencies needed to operate effective, accountable systems within organizations; (2) pooling and critically assessing examples across institutions; (3) generating effectiveness norms; and (4) constructing communities of practice to sustain this ongoing, reflexive inquiry. These nongovernmental actors are shaping courts' approach to defining effective workplace problem solving, and translating legal norms into organizational systems and standards. Indeed, the long term viability of a structural regulatory regime may depend on the effectiveness of intermediaries in translating and mediating between formal law and workplace practice.

243. See Edelman et al., *Endogeneity*, *supra* note 13, at 412.

The three case studies illustrate the importance of intermediaries in bridging conventional dichotomies such as public/private, legal/nonlegal, general/contextual, coercive/cooperative. These intermediaries are individuals and organizations who do not directly act for the state, but who have the authority to articulate and vindicate legal norms without directly deploying coercive state power. Their participation sets up regular occasions for evaluating and revising day-to-day practices.²⁴⁴ They are also connected to a broader community of practice that provides some form of accountability for the actions of the intermediary. This affiliation with a broader network enables these intermediaries to pool information within and across contexts; to identify problems without directly triggering punitive legal action; and to navigate the challenges of sharing information about best practices without revealing trade secrets to business competitors or breaching confidentiality in individual cases. This section describes the individual and organizational actors that mediate the relationship between formal law and the workplace.

A. Individual Change Agents: Redefining the Role of Problem Solver

One category of intermediaries consists of individuals with some form of professional knowledge and an affiliation with a larger community of practice, who function as interdisciplinary, intergroup problem solvers. This group includes the human resource professionals, lawyers, industrial psychologists, and organizational consultants who have redefined their roles to translate legal norms into organizational terms, and who then convey to formal legal bodies the organizational practices that effectuate and elaborate legal principles. Many of these individual actors are repeat players, either within one organization or across a variety of contexts. They straddle an insider/outside role. Their effectiveness as intermediaries lies not with their professional expertise per se, but rather with the pattern of relationships and experiences their professional or organizational position enables them to aggregate.

Some of these intermediaries are housed within the workplace setting. Intel's senior specialists are an example.²⁴⁵ They come to the job with some relevant, though nonspecific expertise, such as human resource management, legal investigation, or organizational development. They operate within the organizational setting, but outside regular lines of authority. They have developed systems of information gathering and accountability both for the problems they address and for their own conduct. They compare practices across divisions, to identify potential problem areas and best practices from which other divisions could learn.

244. See Carol A. Heimer, *Competing Institutions: Law, Medicine, and Family in Neonatal Intensive Care*, 33 *Law & Soc'y Rev.* 17, 34 (1999) (elaborating law's role in determining when organizational actors have to take account of information, what information they have to take account of, how problems are defined, and what solutions are viewed as feasible).

245. See *supra* Part II.B.2.

They also compare their own practices to those of other companies, and revise their systems in light of what they learn.²⁴⁶ Their capacity and interest in external benchmarking flows from their active participation in multiple networks within and outside the company. Many of them are members of a professional community that regularly holds conferences and sponsors informal networks for information sharing.²⁴⁷ They are also part of industry-based networks and organizations, with whom they regularly communicate about common problems and strategies for addressing them. When the professional incentives to share information exist, these pre-existing networks enable internally-based problem solvers to share information, compare strategies, and use this knowledge to advance the development of testable and revisable standards.²⁴⁸ However, individual change agents may lack the orientation and incentives necessary to perform a mediating role. The countertendencies, and the risks associated with them, are discussed in the next Part.

246. For example, Intel is exploring a mediation process as a supplement to the Open Door system. Interest in mediation resulted from a combination of internal reflection about the need for such an informal process in specific situations that are not amenable to resolution through an open door, and external investigation, which revealed other companies that had successfully implemented a mediation system. Interview with Senior Specialist A, Apr. 13, 2000, *supra* note 145, at 9; Interview with HR Legal Counsel B, *supra* note 174, at 2-3.

247. These professional associations include the Association for the Advancement of Affirmative Action (AAAA) and the Society for Human Resource Management (SHRM). Diversity consultants have recently formed a professional association to pool information and develop effectiveness criteria. Neil Gunningham and Joseph Rees discuss the role of mediating institutions such as industry and professional associations in providing common meaning systems at the industry level, and in bridging gap between the organizational and societal levels. They explore the role of intermediate institutions and government agencies in developing an industry's capacity for self-regulation. See Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 *Law & Pol'y* 363, 370-76 (1997). They quite aptly note that:

[T]here is no clear dichotomy between self-regulation on the one hand and government regulation on the other. Rather, there is a continuum, with pure forms of self-regulation and government regulation at opposite ends. However, those pure forms are rarely found in the real world, in which distinctions between self-regulation and government are incremental rather than dichotomous. . . .

Id. at 366. They suggest that we "rethink the state's regulatory role and ask how it can facilitate and support the development of stronger and more effective systems of industry self-regulation." *Id.* at 389.

248. Home Depot offers another example of this form of informal information sharing. Faye Wilson, the Senior Vice President for Values Initiatives, has agreed to share information with companies in the food services sector about the job preference process implemented at Home Depot. These are companies that have comparable employment patterns, but are not direct competitors of Home Depot. Interview with Faye Wilson, July 28, 2000, *supra* note 197, at 4. "Home Depot is very open to sharing this information. I am recommending Home Depot's system to companies as a prototype." Interview with John Wymer, *supra* note 59, at 5.

B. *Organizational Mediators of Change*

The Deloitte & Touche example illustrates the potential for outside consulting organizations to perform a mediating role.²⁴⁹ As part of its Women's Initiative, Deloitte & Touche retained the services of several nonprofit action research organizations to help figure out why women were leaving the firm and what to do about it.²⁵⁰ One such organization was Catalyst, a nonprofit research organization that advises corporations on how to move women ahead.²⁵¹ It conducts internal assessments of employment practices, and it helps companies devise long term, structural approaches that address glass ceiling issues.²⁵² Its staff includes an interdisciplinary group of researchers with different kinds of expertise, who work as a problem-solving team. In addition to its corporate services, Catalyst conducts aggregate research on problems and best practices, and it shares this information both with its corporate membership and in published reports.²⁵³ Catalyst also sponsors conferences and distributes awards for exemplary initiatives.

Deloitte & Touche also worked with the Center for Gender in Organizations (CGO) a nonprofit, academically-based center that is working at the intersection of scholarship and practice to advance "learning and understanding of the connection between gender, in all its complexities, and organizational effectiveness."²⁵⁴ CGO combines consulting for organizations with research and network development. It helps organizations to analyze gender issues in the workplace and their connection to strategic objectives and organizational performance. CGO then works to help the organization make changes in systems, work practices, and norms to enhance both gender equity and organizational effectiveness.²⁵⁵ CGO has explicitly undertaken to bring scholars and practitioners together, both in the workplace and in other settings, to make innovative research and practice visible, and to develop theory and practice.

249. See Donnellon & Kolb, *supra* note 239, at 150.

250. Deloitte & Touche (A), *supra* note 103, at 4.

251. For an overview of Catalyst's mission, role, services, and staff, see Catalyst Homepage, at <http://www.catalystwomen.org> (last visited Apr. 1, 2001).

252. Catalyst's website explains:

Catalyst Advisory Services works with corporations and professional firms to identify issues and develop action strategies related to the recruitment, retention, and advancement of women. Our consulting engagements range from a comprehensive change initiative to a single-issue focus, such as mentoring, succession planning, flexibility or women's workplace networks. Frequently Catalyst works directly with the CEO or executive committee.

Id. at <http://www.catalystwomen.org/about/advisory.html>.

253. "Since 1990 we have benchmarked, quantified, and shared the results of our research through the release of our annual Catalyst Census and 22 other publications." *Id.* at <http://www.catalystwomen.org/research.html>.

254. Center for Gender in Organizations Homepage, at <http://www.simmons.edu/gsm/cgo> (last visited Apr. 1, 2001).

255. *Id.*

These two organizations are examples of regional, industry-based, and national research/policy/practice consortia that have emerged in the area of workplace practice, inclusion, and organizational change.²⁵⁶ Indeed, CGO is poised to play a significant role as a mediating organization that helps develop communities of practice for effective problem solving, within and across organizational boundaries. That role includes bringing together groups with overlapping interests relating to justice and productivity; building internal and external constituencies for change; developing a rolling "inventory of stories"; structuring occasions to critically evaluate these examples so that learning can occur within and across contexts; pooling information; developing and revising standards; and improving the accountability both of companies and of the intermediaries themselves.²⁵⁷

C. Problem-Solving Lawyers

Creative lawyers on both sides of the employment discrimination divide also play an important role as catalysts, poolers of information, and sources of accountability. The roles of plaintiffs' counsel and in-house counsel have intersected and blurred in interesting ways, particularly in the process of developing effective remedies.²⁵⁸ Again, the case studies

256. Other initiatives like this have sprung up around the country. One recent and ongoing project involves a major collaboration between academic researchers and business executives. A group of business leaders developed The BOLD Initiative, Inc., a nonprofit organization of business leaders "committed to developing and implementing a comprehensive approach to help corporate America diversify its leadership to gain competitive advantage in the global economy. One of its objectives is sponsoring breakthrough research on the effects of diversity on organizational performance." The BOLD Initiative, *The Effects of Workplace Diversity on Corporate Performance* (Research Proposal Submitted to The Alfred P. Sloan Foundation, October 1998) (on file with the *Columbia Law Review*). Under its auspices:

a group of academic researchers (The Diversity Research Network) and human resources executives from leading US companies (The National Human Resources/Operations Advisory Council) have been reviewing the evidence on the effects of diversity on performance and discussing strategies for advancing our understanding of this important social and economic issue.

Id. This Initiative has resulted in a major collaborative research project between academics and businesses. Thomas Kochan, a professor at MIT's Sloan School of Management, is the Project Director and Coordinator of the Diversity Research Network. Karen Jehn, a professor at the Wharton School of Business at the University of Pennsylvania, is the Project's Research Director. Id.

257. See E-mail from Deborah Kolb, Co-Director, Center for Gender in Organizations, to Paul Brest (August 29, 2000) (copy on file with the *Columbia Law Review*).

258. Deval Patrick has performed the role of change agent from the inside, first at Texaco, and now at Coca Cola. Patrick served as the assistant attorney general in charge of the Justice Department's civil rights division. While in private practice, he was chair of a task force set up to oversee Texaco's human resources policies and progress after the company settled its race discrimination class action. He then served as general counsel to Texaco, where he spearheaded efforts to improve diversity. He was hired in January by Coca Cola as general counsel, following Coke's settlement of its race discrimination class action. See Coke Names Patrick, Civil Rights Lawyer, As General Counsel, Wall St. J., Jan.

illustrate this development. In-house counsel at Intel and Home Depot report to a vice president responsible for human resources, rather than to the General Counsel. They sit at the table during process of system analysis and redesign. A substantial portion of their role involves translating the problems identified through the problem-solving process into ongoing training, system redesign, and policy revision. Their knowledge and power to mobilize law make them legitimate and influential participants in shaping but not dictating practice, unless a crisis erupts.

The evolution of the role of plaintiffs' counsel who function as repeat players in structural reform regimes is particularly striking. The involvement of plaintiffs' counsel in the negotiation of the Home Depot Consent Decree illustrates this development. The firm that represented plaintiffs in the West Coast litigation—Saperstein, Goldstein, Demchak, & Baller—is one of the nation's most successful firms handling plaintiffs' discrimination cases. Co-lead counsel in the case, Barry Goldstein, spent years at the NAACP Legal Defense and Educational Fund litigating employment discrimination cases before he joined the firm.²⁵⁹ The firm in general, and Goldstein in particular, brought several of the largest and most visible employment discrimination class actions prior to the Home Depot case.²⁶⁰ This track record equipped Goldstein and the firm to play a significant structural role.

Goldstein employs a problem-oriented approach to case investigation and selection.²⁶¹ The firm has developed substantial capacity to identify employment patterns within a sector of the economy, and to generate hypotheses about why women or people of color fare less well in that sector. It has also developed a network of experts in various fields and disciplines, enabling the lawyers to facilitate interdisciplinary teams for both problem identification and remedial development. They conduct a substantial investigation to develop and test their causal hypotheses prior to determining whether to pursue litigation or settlement. This approach has enabled them to get to know patterns in particular industries, and to use their knowledge and position as repeat players to translate and apply changes from one company to another.

25, 2001, at B2; see also Jonathan A. Segal, *Evaluating the Evaluators*, HRMagazine, October 1995 (advising corporate HR departments to avoid employment discrimination lawsuits by developing a fair, consistent and accurate evaluation system for employee performance).

259. Lieff, Cabraser, Heimann, & Bernstein, a plaintiffs' class action firm, also served as counsel in Home Depot.

260. See, e.g., *Kraszewski v. State Farm Insurance*, 38 FEP Cases 197 (N.D. Cal. 1985); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992); *Haynes v. Shoney's, Inc.*, 1993 U.S. Dist. LEXIS 749 (N.D. Fla. 1993); *Rice v. Southern California Edison*, 94-6353-JMI (JRx); *Shores v. Publix Stores*, 69 Empl. Prac. Dec. (CCH) ¶44, 477 (M.D. Fla. 1996). Interview with Barry Goldstein, May 16, 2000, *supra* note 193, at 1-2.

261. The firm only handles class action cases and the individual cases they subsume. *Id.* at 5.

In the Home Depot case, participants on all sides of the litigation describe Goldstein's role as crucial to the development of a flexible, accountable remedy that by all accounts has been extremely effective in increasing women's participation and improving productivity. Once settlement negotiations began in earnest, Goldstein participated in setting up a process that would generate the information needed to address the problem and involve the people with the expertise and responsibility within the organization for implementing the newly devised system.²⁶² He had tremendous credibility as a result of his track record, his knowledge derived from years of experience addressing companies' human resource practices, and his appreciation of the importance of designing a system that would be consistent with Home Depot's culture, mission, and economic goals.²⁶³ He sat at the table with the actual operations people, the psychologists who were developing the employment tests, and the systems engineers who were designing the computer system. His role was not to design the system himself, or to hire an expert who would manage its implementation. Instead, his role was to help structure a process for developing a system that would work, that would be sufficiently transparent so that the information would provide a continual check on the process, and that would institutionalize regular occasions for evaluating the system's effectiveness. Built into the consent decree process was the assignment of responsibility for internal compliance monitoring to high-level company officials, backed up by regular compliance reports to plaintiffs.

Goldstein's firm has recently taken this problem-solving approach to a new level by serving as a conduit of information about innovative employment practices for companies seeking to increase productivity and avoid liability. Even more striking is an arrangement that explicitly blurs the roles and relationships of the law firm to companies. Companies have retained the Saperstein, Goldstein firm to help them comply with employment discrimination laws and simultaneously to improve their hiring and selection practices. Sometimes this arrangement is made as part of an out-of-court settlement of potential class action litigation. The law firm essentially audits the settling company's practices and provides advice and recommendations to develop the company's capacity to comply with the agreement. Both the firm and the original plaintiffs waive conflict of interest claims. The agreement builds in provisions for information sharing, active monitoring, and advising over an extended period.²⁶⁴

262. "We started with the plaintiffs' proposed model, and pointed out the things that wouldn't work at Home Depot. They were heavily involved at the beginning . . . but Home Depot has taken the initiative in tweaking it." Interview with John Wymer, *supra* note 59, at 3.

263. *Id.* at I, 5; Interview with Al Frost, July 28, 2000, *supra* note 187, at 3.

264. "Sometimes companies will figure out we are investigating and they give us a call . . . and ask to try to resolve before [we] file a complaint." Interview with Barry Goldstein, May 16, 2000, *supra* note 193, at 5. The company opens up its files, and Goldstein agrees to hold off on suit pending an investigation and settlement negotiation.

This novel (and somewhat unorthodox) arrangement vividly illustrates the convergence for lawyers of entrepreneurialism and justice-seeking. Management lawyers prod and enable their clients to adopt more functional and fair human resource systems.²⁶⁵ Employee advocates work with corporations and insurance companies to develop effective structures for minimizing bias within organizations. Problem-solving lawyers on both sides can play an important role as catalysts and resources for effective problem solving.

D. Employee Groups: Constituencies for Change

Employee groups operating both within and across workplace boundaries provide another important source of accountability, information sharing, and pressure to adopt equitable employment practices. This role has not been widely embraced by many traditional unions, many of which themselves have had a history of excluding women, immigrants, and people of color.²⁶⁶ However, new forms of worker organization, both union and nonunion, have emerged as potential catalysts for

The settlement discussions resemble the collaborative, problem-solving approach used in the Home Depot case, bringing together ideas from prior experience and the firm's particular culture and practices. In some cases, an agreement results that redesigns the company's hiring and promotion practices to meet the twin goals of improving the hiring and promotion process and enhancing equal employment opportunity. This agreement sets up a system for gathering information, internally evaluating the fairness of the process, and holding managers accountable for complying with these processes. *Id.* at 6-7. As part of the agreement, the company retains Saperstein, Goldstein as counsel "to advise the Company regarding compliance with this Agreement and to participate in the confidential fact finding and resolution process . . . with the goal of ensuring [the company] that it has in fact complied the this Agreement." The Law Firm of Saperstein, Goldstein, Demchack, & Baller, Settlement Agreement and Release 4-5 (on file with the *Columbia Law Review*). The retainer provides that, if in the firm's view the company fails to follow the settlement agreement, the firm can take the company to arbitration. Generally, the agreements designate an arbitrator who is familiar with EEO law and the type of structural issues that are the focus of the agreement. If the plaintiff prevails in the arbitration but the company fails to comply with the arbitral order, the law firm may seek judicial enforcement. *Id.* at 21-22.

265. Interview with John Wymer, *supra* note 59, at 3-4; Interview with Jonathan Segal, Partner, Wolf, Block, Schorr, & Solis-Cohen, in Phila., Pa., at 2 (July 27, 1999) (transcript on file with the *Columbia Law Review*).

266. See Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 Mich. L. Rev. 1155, 1169 (1991) (documenting that women's interests have been largely ignored by the labor movement, and that women are not adequately represented in the labor movement's power centers or agenda); Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. Pub. Int. L. J. 245, 267 (1995) (describing tensions between labor unions and civil rights groups over affirmative action programs); Dorian T. Warren & Cathy J. Cohen, *Organizing at the Intersection of Labor and Civil Rights: A Case Study of New Haven*, 2 U. Pa. J. Lab. & Emp. L. 629, 632-33 (2000) (describing the problems posed by "the traditional model of union organization which focused primarily on the concerns of white men"); Rochelle Sharp, *Divided Ranks: Women at Mitsubishi Say Union Fell Short on Sexual Harassment*, Wall St. J., July 10, 1996, at A1 (reporting disillusionment with the United Auto Workers for ignoring sexual harassment claims).

improving access, knowledge, opportunity, and decisionmaking within workplaces.²⁶⁷

Employee identity caucuses (women's, Black, Asian, gay and lesbian) have formed in many organizations.²⁶⁸ These groups function as identity-based networks within particular companies, professions, or industries. These groups have focused their activities primarily on facilitating career development, connecting members with role models and resources, training, sharing information, and providing mutual support.²⁶⁹ However, some have gone beyond this individualized function to spur companies to correct systemic problems with their hiring, training, mentoring, job assignment, and promotion processes.²⁷⁰ By bringing together employees with common experiences, these groups facilitate the identification of exclusionary patterns. They also enable employees to interact with their employer as a group, which both elevates the urgency of responding and

267. See, e.g., Penda D. Hair, *Prayer and Protest: Bringing a Community Vision of Justice to a Labor Dispute*, 657 U. Pa. J. Lab. Emp. L. 657, 660 (2000) (describing an initiative in Greensboro, North Carolina, in which "a group of pastors and workers have begun to transform a traditional labor/management dispute into a community-wide exploration of the responsibilities of individual and corporate citizens."); Warren & Cohen, *supra* note 266, at 629 (describing emergence of "a new type of union activism"; one which puts the community, and not the workplace, at the center of the struggle).

268. See, e.g., Donnellon & Kolb, *supra* note 239, at 151 (providing two examples of minority coalitions formed in order to stimulate change in their workplaces); Raymond A. Friedman, *Defining the Scope and Logic of Minority and Female Network Groups: Can Separation Enhance Integration?*, in 14 Res. in Personnel and Hum. Res. Mgmt. 307, 307 (Gerald R. Ferris ed., 1996) [hereinafter Friedman, *Defining the Scope*] (highlighting "the importance of employee network groups as a means for enhancing female and minority success in organizations"); Ray Friedman, *Network Groups: An Emerging Form of Employee Representation*, in *Indust. Rel. Res. Ass'n Series: Proc. Forty-Eighth Ann. Meeting* 241, 241 (Paula B. Voos ed., 1996) [hereinafter Friedman, *Network Groups*] ("A new institutional mechanism is emerging for handling employee relations: employee network groups for minority and female employees."); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 Chi.-Kent L. Rev. 149 (1993) (predicting that "the voluntary, informal caucus of employees . . . ha[s] the potential to become . . . the dominant institution of employee voice in the United States"); Valerie I. Sessa, *Managing Diversity at the Xerox Corporation: Balanced Workforce Goals and Caucus Groups*, in *Diversity in the Workplace*, *supra* note 12, at 37, 47-50 (describing the caucus groups formed by women and minority employees at Xerox corporation).

269. Alan Hyde, *Employee Identity Caucus Groups in Silicon Valley: Can They Transcend the Boundaries of the Firm?*, 13 Lab. L.J. 491 (1997), available at <http://andromeda.rutgers.edu/~hyde/caucus1.html>; Friedman, *Network Groups*, *supra* note 268, at 244-45.

270. Scully & Segal, *supra* note 142, at 18 ("Employee activism became both a spur and a reaction to top management pronouncements and actions about diversity."). One activist quoted in Scully and Segal's study vividly attested to the importance of top management collaboration in pursuing a change initiative: "It can't all be sort of top-down or HR-down. And for those initiatives to succeed you both need leadership from people who have some passion and understanding of the issues, and they exist. And they need protection, they need like what I call an umbrella. They need space, the time to do it." *Id.* at 19.

diffuses the target of any retaliation.²⁷¹ Commentators have noted the potential of employee network groups as sources of information about and accountability for firms: "[Employee] ratings of firm equal employment efforts may turn out to be more important [in Silicon Valley] than legal protection of equal employment opportunity, which assumes stable labor markets and job descriptions and does not fit well with high velocity labor markets."²⁷²

Employee groups organized around diversity issues and social identities have a vested interest in the relevant legal norms, and thus they can hold companies accountable for acting on information that reveals problems. At the same time, the concrete issues generated by an ongoing problem-solving process help to sustain the activism crucial to the survival of these groups.²⁷³ Employee organizations that participate in problem solving also transcend the frequent dependence upon crises as the sole (and often ephemeral) motivator for collective activity.

Some employee groups have become active in workplace problem solving as a response to perceived patterns of exclusion or underrepresentation.²⁷⁴ For example, Barry Goldstein described his work with

271. See *id.* at 25.

272. Hyde, *supra* note 268, at 497.

273. See Scully & Segal, *supra* note 142, at 25 (describing importance of "[o]ppportunistic moments for enacting passion").

274. See *id.* at 18 ("The grassroots efforts we identified were generally fueled by a belief that top management had not sufficiently or adequately addressed issues regarding diversity."). David Thomas and John Gabarro describe one such company in a recent book. David A. Thomas & John J. Gabarro, *Breaking Through* 37, 39-40, 177-81 (1999). Gant Electronics is a company that produces electronic and electro-mechanical products and systems that had reorganized in the 1980s "into a number of highly focused product divisions responsible for the design, marketing and product planning, manufacturing, and finance of specific product families." *Id.* at 40. Gant recruited a substantial number of people of color in the 1960s and early 1970s. Once in the organization, many of these newcomers experienced inequity in assignments, compensation, and promotion, as well as exclusion from the informal social networks. "[The] young African Americans [responded by meeting] in groups for informal sessions to share their collective experiences and insights into the corporation" and to coach one another. *Id.* at 177-78. This experience led a group of black sales representatives to file suit claiming discrimination in assignments, compensation, and promotion. "The purpose of the suit was to get the attention of Gant's senior executives rather than to embarrass the company." *Id.* at 178. The suit triggered a prompt and systemic response from the company, and the suit was subsequently dropped.

Over the course of the next several years, a partnership developed between the leaders of the self-help movement and Gant's corporate executives and top managers. As partners, they jointly developed a process of negotiation and problem solving that led to many innovations designed to diminish biases in the system that unfairly advantaged or disadvantaged employees based on race. . . .

Without officially recognizing or financing the self-help groups, Gant's senior executives instituted mechanisms to legitimize the participation of their leaders in developing ways to improve the company and its practices. Principal among these was the creation of advisory councils that called for employee participation. These councils provided an avenue for the leaders of self-help

an organization of African American employees in a glass ceiling case against Southern California Edison. The settlement negotiations were particularly challenging because the case involved a utility industry in the midst of a move from regulation to deregulation. Two of the plaintiffs, who were members of the employees' association and themselves engineers, were part of the entire mediation process. They were instrumental in crafting a remedy that could adapt to the dynamic economic situation and yet assure meaningful relief. As representatives of the employee organization, they provided crucial information in developing the remedy, made the problems visible and concrete to the company, and communicated with the class about the progress of the negotiations and the settlement ultimately reached.²⁷⁵

Some companies have encouraged formation of employee identity groups, and they have included them as key participants in developing and monitoring innovations designed to address bias. For example, at Deloitte & Touche, networks of female managers have developed both within the company and among professional women within the local business community. These groups help identify issues of shared concern, evaluate the effectiveness of internal initiatives, and design effective strategies for new types of problems. Management's adoption of problem-solving processes to address diversity and inclusion itself encouraged the formation of these groups, which then provide an important source of accountability for those same processes as long as the groups maintain financial and substantive independence.²⁷⁶

Unions have in some settings provided the institutional framework to enable workers (and management) to tackle problems involving complex workplace relationships.²⁷⁷ The Harvard Union of Clerical and Techni-

groups to bring their views and recommendations to bear on organizational decisions that affected their constituents.

....

Gordon Kingsley [the executive vice president who later became CEO] was fond of saying that the relationship with the self-help groups and their role in the advisory councils was the precursor to the broader programs of employee involvement that helped to turn the company around in the 1980s. Kingsley believed that many of the issues raised affected all employees, although with disproportionate consequences for minorities. Using this feedback, management was able to participate in improving the system for everyone.

Id. at 178–181.

275. Interview with Barry Goldstein, May 16, 2000, *supra* note 193, at 2; see also Sessa, *supra* note 268, at 43–44 (explaining how black caucus groups formed, exerted pressure on local and national management concerning their lack of full participation in the company, brought suit when their concerns were not met, worked out a process for addressing their concerns without going to court, and developed a social support system for African Americans within the company).

276. See Scully & Segal, *supra* note 142, at 23–24 (describing the dynamic relationship between grass roots organizations and top management initiatives).

277. See, e.g., Charles C. Hockscher, *The New Unionism: Employee Involvement in the Changing Corporation* 177 (1996) (arguing for an “associational unionism”: a kind of unionism that replaces organizational uniformity with coordinated diversity,” and noting

cal Workers played such a role by agreeing to take up issues related to work organization and policy in local bipartite bodies called joint councils.²⁷⁸ The joint councils emphasized decentralized decisionmaking and problem solving at the local level.²⁷⁹ The union provided training, work groups, and problem-solving teams to enable workers to "articulate their perspective collectively, to share it with others, and to make their experience visible."²⁸⁰ The union, through the joint councils, offered "a place for reflecting on and renegotiating the workplace experience and relationships."²⁸¹ This enabled workers to address concrete issues of fairness, participation, respect, and power in the workplace, and to support the capacity of workers to function effectively in those participatory processes.²⁸²

Finally, workplace, women's rights, civil rights, and advocacy groups have begun to play a role in building the capacity of employees to hold their employers accountable and to participate in shaping their workplace cultures and practices. In varying degrees, organizations such as 9to5, the National Employment Law Project, the Workplace Project, and national civil rights groups have used their legitimacy, resources, and track record to document patterns of exclusion, create networks among local groups interested in pooling information and strategies, and build the capacity of employee groups to push for and participate in effective, structural change.²⁸³ These organizations approach litigation as a part of their work, but not the central or defining strategy. They use patterns revealed through study to create incentives for companies to change, and to enhance workers' social capital by expanding the opportunities for col-

the pressures pushing unions to experiment with more associational structures); Doug Gamble & Nina Gregg, *Rethinking the Twenty-first Century Workplace: Unions and Workplace Democracy*, 1 U. Pa. J. Lab. & Emp. L. 429, 449-50 (1998) (describing a shift in unions' focus toward their role in the control and nature of workplaces and corporations).

278. Susan C. Eaton, "The Customer is Always Interesting": Unionized Harvard Clericals Renegotiate Work Relationships, in *Working in the Service Society* 303-04 (Cameron Lynne Macdonald & Carmen Sirianni eds., 1996).

279. *Id.* at 302.

280. *Id.* at 305.

281. *Id.* at 310.

282. *Id.* at 304.

283. See Jennifer Gordon, "We Make the Road By Walking": Immigrant Workers, the Workplace Project, and the Struggle for Social Change, 30 Harv. C.R.-C.L. L. Rev. 407 (1995) (describing the Workplace Project's approach to worker mobilization through a combination of service delivery, education, and organizing); Jennifer Bott, *Home Depot Faces Race Discrimination Suit*, Knight-Ridder Trib. Bus. News, Jan. 20, 2000, available at 2000 WL 10325047 (describing requests by group of 20 investors, organized by the Interfaith Center on Corporate Responsibility, for information about the hardware store chain's minority hiring); Jesse Jackson, *Mitsubishi Motors Unit Reach Accord to End National Boycott*, Wall St. J., Jan. 15, 1996, at B6 (describing opening of office to rank U.S. companies on their commitment to racial and sexual equality); National Employment Law Project Homepage, at <http://www.nelp.org> (last visited Apr. 1, 2001) (describing NELP's projects and strategies); 9to5 Homepage, at <http://www.9to5.org> (last visited Apr. 1, 2001) (describing organization's training, networking, and advocacy projects).

lective engagement and increasing their knowledge about problems and their potential resolution.

E. Insurance Companies and Brokers: Potential Gatekeepers of Legal Norms

The insurance industry is an increasingly important player in the workplace equity arena. Until recently, firms could not purchase insurance for sexual harassment and discrimination claims. By 1998, seventy insurance companies offered sexual harassment insurance to their clients, and the number of companies that have purchased this kind of insurance has increased sharply in the last five years.²⁸⁴ Concern has been expressed about the impact of insurance on discrimination law's effectiveness,²⁸⁵ but insurance companies could turn out to be a significant player in the move to encourage structural workplace responses.²⁸⁶ Insurers have begun to require employers to adopt a proactive approach to sexual harassment and discrimination as a prerequisite for obtaining and maintaining a liability policy.²⁸⁷ In the wake of decisions requiring them

284. Amy Joyce, *More Firms Are Buying Sexual Harassment Insurance Policies*, L.A. Times, May 26, 1998, at D3. According to one estimate, between 1994 and 1998 the percentage of companies with some form of discrimination insurance increased from 5% to over 20%. *Id.*; see also Jeffrey P. Klenk, *Emerging Coverage Issues in Employment Practices Liability Insurance: The Industry Perspective on Recent Developments*, 21 W. New Eng. L. Rev. 323, 323 (1999) ("Employment Practices Liability Insurance . . . has become the hottest selling, most talked about insurance product today.").

285. Ellen Bravo, co-director of 9to5, National Association of Working Women, puts it this way: "The best insurance against sexual harassment claims is proactive leadership by management in preventing sexual harassment. Or stopping it quickly, should it occur. . . . It is really disheartening to people who experience sexual harassment, knowing that their company's remedies are focusing on insurance." Joyce, *supra* note 284, at D3.

286. For discussions of the role of insurance companies in encouraging loss prevention in other contexts, see generally Carol Heimer, *Reactive Risk and Rational Action* 1-23 (1985) (investigating how insurance companies use contract provisions to manage their exposure to moral hazard, which is closely tied, conceptually, to their efforts to prevent loss); George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 Conn. Ins. L.J. 305, 326-27 (1997) (describing loss prevention roles of legal malpractice insurers, which range from general educational services to more individually tailored consulting services, such as firm audits). I am indebted to Thomas Baker, the Director of the Insurance Law Center at the University of Connecticut School of Law, for useful discussion and sources on the role of insurance companies in encouraging loss prevention.

287. See Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. Miami L. Rev. 1, 78 n.272 ("The availability and cost of EPLI policies for law firms is directly linked to proactive practices adopted by firms."). As Mootz notes, courts and regulators have taken account of potential oversight benefits of insurance coverage. See *id.* at 5 n.7. This discussion has occurred as a result of the determination to reverse the longstanding prohibition on insurance coverage of discrimination. See, e.g., *American Mgmt. Ass'n v. Atlantic Mut. Ins. Co.*, 641 N.Y.S.2d 802, 808 (Sup. Ct. 1996) ("By bringing to employers' attention practices that can potentially result in unlawful discrimination, insurers' loss prevention programs and underwriting standards should discourage such practices. Any employer who does not diligently attempt to modify employment procedures accordingly may well be denied insurance coverage.") (quoting New York State Department of Insurance Circular Letter No. 6, May 31, 1994), *aff'd* 651 N.Y.S. 2d 301

to pay for injuries arising from sexual harassment, "insurance companies are likely to start requiring clients to have the kind of anti-harassment policies and remedies that were outlined . . . by the United States Supreme Court."²⁸⁸ "[T]he underwriting process is likely to include an evaluation of a firm's existing employment practices," including a review by an outside lawyer or consultant of the adequacy of current conditions and decisionmaking processes.²⁸⁹ Once a policy is in place, most underwriters offer and encourage the use of loss control services.²⁹⁰

Insurance brokers also act as gatekeepers for clients seeking employment practices liability ("EPL") insurance by advising clients about the kinds of changes needed to get coverage or to reduce their premium.²⁹¹ Although the insurance companies' risk management approach might well be reactive and narrow,²⁹² this is not necessarily the case. Risk management could also routinize the opportunity to engage companies in self evaluation about the adequacy of their employment systems and the correction of the shortcomings that are identified.

In addition, insurance companies have expanded the services they offer in order to compete with consulting firms that provide advice to companies on how to lower their risk of liability. They now offer free or reduced-fee consulting services to interested account holders. These services include employment practices audits, assistance in designing effective human resource systems, and review of policies and manuals for compliance and effectiveness in risk reduction. Insurance companies have

(App. Div. 1996); *Dixon Distrib. Co. v. Hanover Ins. Co.*, 612 N.E.2d 846, 857 (Ill. App. Ct. 1993) ("Having a third party, with an economic interest to protect, oversee the actions of the employer could be very beneficial to the employee and society."), *aff'd* 641 N.E. 2d 395 (Ill. 1994).

288. Leslie Eaton, *State Insurers May Demand Stricter Harassment Policies*, N.Y. Times, July 4, 1998, at B6.

289. Dave Pelland, *Exploring Employment Practices and Policies*, 45 Risk Mgmt. 6, 6 (1998); see also Dave Pelland, *Facing a Rising Exposure*, 44 Risk Mgmt. 10, 10 (1997) ("Middle market companies, which typically don't have the ability to retain a full-time human resources or legal staff, can turn to their insurance broker or carrier for employment practices guidance.").

290. For example, Chubb Executive Risk has a program called Check Mate, which provides the client company with a toll-free hotline for dealing with sexual harassment issues. Other services offered may include: 1) a discounted risk-management audit to evaluate policies and procedures, 2) a desk manual with information on sexual harassment, 3) model sexual harassment policies, and 4) newsletters. Most insurers offer similar services and are also affiliated with law firms. Small companies without human resources departments or staff regularly utilize these resources. See Telephone Interview with AON Broker A, Director of Resources, AON Risk Services, Inc., at 3 (Dec. 21, 1999) (transcript on file with the *Columbia Law Review*).

291. Interview with AON Broker B, *supra* note 55, at 2 ("If a client comes to us saying they want EPL coverage, the broker will tell them what kind of changes they need to make to get coverage. These changes then get put in place ahead of time."). This role for brokers was confirmed in telephone interviews with insurance industry representatives who declined to be quoted directly.

292. See *infra* text accompanying notes 335-337.

developed relationships with plaintiffs' counsel and technology experts, in addition to more traditional human resource consultants, in order to expand the menu of services that they offer to companies seeking to reduce their premiums and lower their litigation risk.²⁹³

Thus, a spectrum of mediating actors and organizations have fostered the development of hybrid forms of relationships between public and private norms, legal and informal incentives, and contextual and general learning.

IV. INCOMPLETE STRUCTURALISM: THE COUNTERTENDENCIES

This Article has identified components of an emerging structural approach to workplace regulation and the features of legal doctrine and practice that would enable this approach to remain open, accountable, and tethered to the law's normative aspirations. Unsurprisingly, however, countertendencies that undercut the development and viability of a structural approach now exist in each of the relevant domains. The current regulatory environment provides conflicting incentives for organizations to respond structurally, unless they are already predisposed and equipped to do so. The crucial elements of information pooling, comparability, and accountability are often missing, unless they are forged in an ad-hoc manner in specific settings. Without a more mature infrastructure to support the development of a structural response to the Court's general articulation of norms, participants in the internal lawmaking regime have often reverted to more static approaches that focus upon formal compliance and avoidance of liability. Many workplaces, lawyers, and lower courts appear still stuck in the command-compliance approach that was described in the Introduction. This Part summarizes the countertendencies that threaten the emergence and widespread implementation of a structural regime.

A. *The Judiciary: Reversion to Rules and Deference*

Some lower courts have undercut the promise of *Watson*, *Burlington Mills*, and *Farragher* by reverting to patterns reminiscent of the rule-enforcement mode of judicial regulation. One form that this reversion takes is deference. Some courts have deferred to an employer's procedures, regardless of their actual effectiveness in eliminating identified problems of harassment or discrimination.²⁹⁴ Deference may stem from a judicial reluctance to impose a specific code that dictates the features of

293. See Michel G. Williams, New Policies Target Sex Harassment Claims, *Baltimore Bus. J.*, Oct. 16, 1998, at 31 (describing insurance companies' relationship with firms). This trend has been confirmed in informal conversations with insurance industry representatives who declined to be quoted directly.

294. The Supreme Court's plurality opinion in *Watson v. Fort Worth Bank & Trust* could be read as inviting deference by substituting "reasonableness" for "business necessity" as the standard of review. 487 U.S. 977, 997-98 (1988). However, the 1991 Civil Rights Act clearly adopted business necessity as the standard of review for all disparate

an internal process to employers. But uncritical acceptance of internal dispute resolution processes legitimates purely formalistic solutions, and it will often leave underlying patterns and conditions unchanged.

In the context of sexual harassment, judicial deference has taken the form of allowing an employer to assert the existence of a formal anti-harassment policy or grievance mechanism as an affirmative defense to proven instances of sexual harassment, without examining the accessibility or effectiveness of the policy or mechanism.²⁹⁵ For example, in one recent case the court refused to inquire into the adequacy of the employer's grievance system and granted summary judgment to the employer despite compelling evidence that the employer did not remedy the harassment and that the plaintiff did not use the internal grievance system out of fear of reprisal.²⁹⁶ Particularly troubling are lower court decisions that convert the second prong of the employer liability requirement, which *Farragher* expresses as a general standard of unreasonable failure by plaintiffs to complain, into an inflexible and misguided rule requiring all plaintiffs to promptly complain using the employers' formal complaint procedures. Linda Krieger's work is a sobering reminder that this judicial approach threatens to foreclose law's meaningful role if it is not reversed by the Supreme Court.²⁹⁷

In the context of disparate impact challenges to subjective employment practices, some courts have deferred to highly arbitrary, unstructured, and exclusionary employee selection practices, based upon the reasonableness of using interviews to select employees.²⁹⁸ This deference appears to stem from the erroneous perception that the courts' only alternatives to deference are to impose upon employers quotas or impossibly high thresholds of construct validation.²⁹⁹ This interpretation invites employers to develop purely formal processes that have little genuine impact on workplace practice. It undercuts the employers' incentive to develop effective internal problem-solving practices, and it thwarts the role of the law in shaping environments to pursue normative aspirations.

A judicial response of imposing a set of rules dictating the features of effective problem-solving systems would be problematic in the opposite

impact challenges. For a more complete discussion of this issue, see *supra* text accompanying notes 80–95.

295. See generally Krieger et al., *Employer Liability*, *supra* note 73, at 6.

296. *Johnson v. Brown*, No. 94 C 6530, 1998 U.S. Dist. LEXIS 12689, at 12–13 (N.D. Ill. Aug. 6, 1998), *rev'd Johnson v. West*, 218 F. 3d 725 (7th Cir. 2000).

297. See Krieger et al., *Employer Liability*, *supra* note 73, at 6 (documenting that this approach ignores well-established social science principles and produces bad public policy).

298. See *Watson*, 487 U.S. at 985–91, 999–1000. *Watson*, the case in which the Supreme Court extended disparate impact theory to subjective employment practices, invited deference to employers' subjective processes to avoid imposing validation requirements that employers could not meet. *Id.*

299. See *supra* text accompanying notes 87–88.

direction, however. These rules tend to enact a formalistic, "due process" interpretation of employer liability, with a focus on investigating after-the-fact and punishing wrongdoers.³⁰⁰ This Article has shown the limitations of individualistic processes that are defined by legal claims and resolved through after-the-fact enforcement in addressing second generation bias.³⁰¹ This approach sharply undercuts the dynamic, problem-solving potential of the Supreme Court's structural approach. It does not encourage employers to design systems that will bring problems to the surface, to develop and continually reassess measures of effectiveness, to reflect on patterns that cut across individual cases, or to undertake more structural approaches that connect gender or racial concerns to patterns of day-to-day conflict resolution. It risks superimposing universal solutions over an area where culture and context are key to effective problem solving and normative elaboration.

Some scholars have criticized the Supreme Court's jurisprudence for its failure to articulate more specific rules to govern sexual harassment. This criticism rests on the premise that law best proceeds through universal, specific rules, and that generally articulated, contextually developed norms breed unbridled discretion and arbitrariness. This criticism, moreover, rests upon a belief that a sufficiently robust, comprehensive, and adequately explanatory theory of sexual harassment currently exists.³⁰² That underlying belief, however, has an insufficient empirical basis. While recent work has elaborated sophisticated and differing theories of harassment, each of these theories captures an important but necessarily partial account of the normative and empirical underpinnings of the wrong of harassment and its possible remedies.³⁰³ Some critics, however,

300. See, e.g., *Coates v. Sundor Brands Inc.*, 160 F.3d 688 (11th Cir. 1998) (basing its finding on adequacy of employer's procedures on the formal published policy, without inquiry into its real-world effectiveness); *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379, 1382-86 (S.D. Ga. 1998) (upholding employer liability defense based on formality that plaintiff signed company's sexual harassment policy, despite demonstrated fear of retaliation and lack of actual access to the complaint process); *Duran v. Flagstar Corp.*, 17 F. Supp. 2d 1195, 1202-03 (D. Colo. 1998) (granting summary judgment in favor of employer because plaintiff failed to file complaint pursuant to employer's sexual harassment policies and procedures).

301. See *supra* Part I.

302. See Bernstein, *Treating Sexual Harassment*, *supra* note 10, at 451 (promoting the respectful person standard because it is "intelligible, easy to execute, and not especially vulnerable to abuse or confusion").

303. See, e.g., *id.* at 446-55, 524-27 (showing inadequacy of the reasonableness standard in hostile work environment harassment, and proposing a new "respectful person" standard); Franke, *What's Wrong With Sexual Harassment?*, *supra* note 32, at 693-96, 771-72 (showing how accepted paradigms linking sexual harassment to sexual discrimination are inadequate, and proposing that sexual harassment is a sexually discriminatory wrong because of gender stereotypes it reflects and perpetuates); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 10, at 1686-92 (showing inadequacy of the sexual desire-dominance paradigm as an explanation for hostile work environment harassment, and offering a "competence-centered" account, which attributes such harassment to the desire to preserve favored lines of work as masculine).

have urged the doctrinal incorporation of the theory of harassment that covers the form of exclusion or bias that they view as most fundamental or inadequately expressed by existing norms.³⁰⁴ This approach, which has seen some success in the lower courts, cements into law the necessary limitations of any unitary theory of harassment—an approach that cannot account for the full range of circumstances, unless that theory is stated so generally as to be useless as a means of understanding, shaping, or distinguishing between different kinds of behavior.³⁰⁵

The compliance approach to norm generation also competes with a structural approach in the area of exclusionary subjective employment decisionmaking. The public record suggests that many corporations and regulators continue to rely almost exclusively upon outcome measures of success determined by proportions of participation by targeted groups. These measures offer clear goals and measures of success, and they serve as important indicators of a pattern of exclusion, underrepresentation, or destructive conflict that needs to be investigated further.³⁰⁶ They are easy to measure and monitor, and they have been shown to increase the participation of women and people of color in firms that actively negotiate with the Office of Federal Compliance Contracts Programs (OFCCP), the EEOC, or private plaintiffs.³⁰⁷ For those employers predisposed to treat numerical goals as indicators of systemic dysfunction, outcome measures have prompted a process of internal self-reflection that has produced greater organizational capacity both to address issues of inclusion and to create accountable and effective processes of decisionmaking and conflict resolution more generally.³⁰⁸

304. See Bernstein, *Treating Sexual Harassment*, *supra* note 10, at 450 (arguing that the “respectful person” standard “would rightly supplant references to reason and reasonableness” because “respect is integral to the understanding and remedying of sexual harassment, whereas reason is not”); Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 10, at 1769–74 (asserting that the “competence-centered” account of harassment “would return Title VII to its original and primary focus on dismantling job segregation by sex”).

305. Kathryn Abrams has also pointed out the risks of simply replacing one unitary theory of sexual harassment with another. See Abrams, *supra* note 10, at 1172. She does, however, embrace a “contingent, multifaceted account based on a theory of women’s subordination.” *Id.* at 1204–05. Abrams takes issue with the theory of harassment as a form of disrespect, largely because it opts for a universalistic account that fails to “focus on the particularized, sex based dynamics of the workplace.” *Id.* at 1172.

306. See Sturm & Guinier, *supra* note 44, at 998–99 (discussing short-term results of numerical hiring goals, as well as limitations of numerical goals in achieving long term racial and gender justice).

307. See Jonathan S. Leonard, *What Promises are Worth: The Impact of Affirmative Action Goals*, 20 J. Hum. Res. 1, 18 (1985) (arguing that affirmative action goals set by OFCCP, while costly, do have measurable and significant effects). Other studies suggest that the aggregate impact of affirmative action goals has been to increase participation of people of color in firms most likely to hire them, rather than necessarily to address the conditions and practices that lead to exclusion, denial of access, or biased consideration.

308. See, e.g., Barbara A. Walker & William C. Hanson, *Valuing Differences at Digital Equipment Corporation in Diversity in the Workplace*, *supra* note 12, at 119, 123

Numerical measures alone, however, do not provide an adequate framework for addressing second generation bias and exclusion. It bears noting that today, such measures may also be declared illegal.³⁰⁹ The normative theory underlying their adoption has often remained unarticulated both by employers and by the public agencies validating their use, as does the method for achieving the stated goal.³¹⁰ The nature of the problem, the need, and the normative justification for adopting affirmative action has often been developed after-the-fact, by lawyers, as a post-hoc justification to avoid liability.³¹¹ But the absence of a clearly articulated normative justification not only invites challenges to the legitimacy of the effort itself, it also fails to deal with the meaning and normative significance of current racial and gender patterns. Indeed, many employers apparently view discrimination law as an obstacle to their efforts to deal effectively with issues of diversity as they relate to concerns about productivity.³¹² Outcome-based measures thus can stunt the refinement,

(describing role of organizational consultants in encouraging the firm to address issues of race and gender as an issue of both productivity and fairness); Clayton P. Alderfer, *Changing Race Relations Embedded in Organizations: Report on a Long Term project with the XYZ Corporation*, in *Diversity in the Workplace*, supra note 12, at 138, 138. The Home Depot case study also illustrates this dynamic. See supra text accompanying notes 214–220; see also Ely & Meyerson, supra note 5, at 10; Roberson & Gutierrez, supra note 12, at 65.

309. See, e.g., *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1567 (3d Cir. 1996) (en banc) (invalidating layoff made pursuant to an affirmative action plan adopted to further diversity in the workforce), cert. dismissed, 522 U.S. 1010 (1997).

310. The general justification for relying on statistical disparities was offered by the Supreme Court in *Int'l Bhd. of Teamsters v. United States*:

Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

431 U.S. 324, 339 n.20 (1977). This generalization, however, fails to account for or explain the patterns of exclusion or bias in many workplaces, or to justify the adoption of affirmative action plans in those contexts. See, e.g., *id.* at 337–43 & n.20. In part, the absence of expressed justification for the numerical goals used by the OFCCP is a product of how they came to be used. John Skrentny documents the agency's adoption of numerical goals as a response to the administrative imperative of finding efficient and rational ways to achieve results. He also documents the political volatility of the reliance on numerical goals as an additional explanation for the lack of extensive public discussion of their use. John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* 141–44 (1996). For a slightly different account of the adoption of numerical goals, see Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy 1960–1972*, at 282–90 (1990) (describing introduction of numerical goals as an evidentiary requirement introduced to pin down stalwart segregationists who had been fraudulently claiming compliance without actually effecting change).

311. For a vivid example of this dynamic, see *Taxman*, 91 F.3d at 1563.

312. Human resource managers and company executives interviewed in connection with this project repeatedly characterized their experience with many lawyers as an obstacle to productive and progressive problem solving. These lawyers focused only on

rearticulation, and reformation of the normative meaning of racial and gender participation and exclusion.

In addition, compliance determinations focused on outcome measures do not reveal information about, or build organizational capacity to address, the underlying problems that account for patterns of underutilization. Although useful as signals of dysfunctional patterns, outcome measures reflecting the demographic composition of the pool and the workforce do not yield information about why systems are failing or how to learn from that failure. Firms that lack internal capacity or incentives to treat numerical goals as a catalyst for internal experimentation may ignore the outcome-based standards based on a rational assessment of the unlikelihood that violations will be enforced. Or, they may hire strictly by the numbers, without creating the internal infrastructure to support and maintain a diverse and integrated workforce or to enable productive conflict resolution in diverse work groups. Finally, outcome-based measures fail to capture the complexity and variability of the circumstances and underlying dynamics involved in addressing bias, exclusion, diversity, and conflict. Their unitary and result-oriented focus discourages the development of the range of performance measures needed to generate standards and processes of accountability and organizational learning.³¹³

Thus, the Supreme Court's emergent structural approach has not been fully understood or embraced by either the lower courts or academic commentators. The features of accountability, reflection, and effectiveness that link process to outcomes have sometimes dropped out of judicial analysis. The tendency to treat judicial involvement as a choice between deference and direction lurks on the judicial horizon and threatens the viability of the structural solution to second generation bias.

what the company could not do, on how to characterize as lawful whatever the company was going to do anyway, or on steering clear of any topics that could trigger a question about liability. Telephone Interview with Virginia Vanderslice, Consultant, Praxis, at 1 (July 13, 1999) (transcript on file with the *Columbia Law Review*). Lawyers willing to engage with the challenges facing the company, and to help the company figure out how to shape their practices to conform with legal norms and productivity concerns were described as a welcome development, and one that was on the rise. See, e.g., Telephone Interview with Karen Jehn, Professor, Wharton School of Business, at 1 (June 5, 1999) (transcript on file with the *Columbia Law Review*); Telephone Interview with Professor A, Director of Sexual Harassment Committee at University B, Theatre Department at 1, (July 11, 2000) (transcript on file with the *Columbia Law Review*). Of course, the lawyers' involvement at Intel, Home Depot, and DeLoitte & Touche did not elicit this response, and it was described quite differently by stakeholders within their organizations.

313. Cf. Charles F. Sabel, *A Measure of Federalism: Assessing Manufacturing Technology Centers*, 25 Res. Pol'y 281, 283-84, 287 (1996) (discussing need to develop different performance measures to take account of different circumstances).

B. *Workplace Problem Solving: Limitations of Capacity, Incentives, and Accountability*

The structural approach has, at this point, been unevenly implemented at the level of the workplace as well. Employers vary widely in their capacity and motivation to address issues of sexual harassment, inclusion, and conflict generally. In many workplaces, employers and workers have yet to make the connection between the capacity to address the various forms of racial and gender conflict effectively and the capacity to respond to the inevitable challenges of functionally diverse work groups in the new economy. Many companies are unwilling to incur the short-term costs of developing effective human resource practices and addressing cultural conflict. If they do not regularly evaluate long-term productivity or nonquantified measures of success, companies tend to neglect areas that do not produce a short-term, visible impact on the bottom line.³¹⁴ Moreover, smaller companies often lack the resources to invest adequately in improving their human resource practices. They are less likely to have separate human resource departments or individuals with applicable expertise on staff.³¹⁵ They may also lack the technical capacity to develop solutions like those adopted by Home Depot and Intel.

Many of the internal dispute resolution mechanisms developed by employers under the current liability regime are focused exclusively on resolving individual disputes simply as a way of avoiding costly litigation.³¹⁶ These mechanisms may consist of boilerplate from the most recent decisions of the court or the reproduction of EEOC guidelines. Quite plainly, these processes embody the limitations of the command-compliance approach to regulation that are discussed in the first section of this Article.³¹⁷ Processes designed with litigation avoidance as the sole objective all too frequently fail to account for the de facto power differentials and dynamics that discourage employees' use of internal dispute resolution mechanisms and undermine effective organizational re-

314. See Interview with Al Frost, July 28, 2000, *supra* note 187, at 4. Mr. Frost states: They don't see the value without the law suit. I'm selling this, presenting it to a high level person within the company. He says to me, the whole thing you are talking about will cost money. What will I get out of it? You will get better performers. How do I know that? OK, what will they get on their performance reviews? Higher ratings. I don't want it because I will have to pay them more. [There is this] short term outlook. Don't give me any expense today. Most companies are that way. They don't want to spend money on things like this.

Id.

315. See Susan E. Jackson, Preview of the Road to be Traveled, in *Diversity in the Workplace*, *supra* note 12, at 3, 3-4 (documenting that many small businesses lack a human resource office, and that time and financial constraints prevent these firms from implementing policies or education and training programs).

316. See, e.g., John T. Dunlop & Arnold M. Zack, *Mediation and Arbitration of Employment Disputes* 73-91 (1997) (describing employer-designed arbitration plans, which are intended to minimize the costs of litigation by arbitrating all employment-related disputes); Bisom-Rapp, *Discerning Form from Substance*, *supra* note 55, at 3.

317. See *supra* Part I.C.

sponses.³¹⁸ Some commentators have observed that internal grievance mechanisms developed to avoid perceptions of noncompliance with ambiguous legal norms may function only symbolically rather than as effective processes for addressing problems and implementing legal norms.³¹⁹ Internal dispute resolution processes may remain unconnected to the processes of decisionmaking and conflict resolution that shape day-to-day interaction, and have little, if any, normative or structural impact.³²⁰

Without some external benchmark, the success of any particular internal system depends upon the power dynamics and incentive structures of a particular employer. The complaint handlers may lack status, credibility, or independence, and this may undermine their power to provide more than symbolic relief from problems.³²¹ Moreover, an effective system of problem identification and information pooling does not itself mobilize change. Some form of sustained commitment and follow-through remains necessary. Even in companies that have demonstrated top level commitment, such as Home Depot and Intel, implementation may sometimes be incomplete. For example, even with its exemplary overall system, Home Depot was sued by the Michigan Department of Civil Rights and private plaintiffs in 1998 for race discrimination in one of its Michigan stores.³²² The allegations claimed that the local management of the stores was circumventing the hiring, promotion, and accountability system set up by the central administration.³²³ Size, changing personnel, and competing incentives inevitably constrain the effectiveness of any information and dispute resolution system. Without some form of accountability, even serious errors and failures to remedy problems revealed by the data will inevitably fall through the cracks. Litigation, along with the accountability provided by employee participation in monitoring company responses to identified problems remains essential to focus attention on identified problems when internal systems fail to correct them.

318. Krieger et al., *Employer Liability*, *supra* note 73, at 14–30 (discussing the limitations of procedures designed to discourage litigation).

319. See Edelman, *Legal Ambiguity*, *supra* note 8, at 1538.

320. See Donnellon & Kolb, *supra* note 239, at 143–44.

321. See Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 2, at 972–73; Edelman et al., *Internal Dispute Resolution*, *supra* note 96, at 501.

322. John Caulfield, *Home Depot Faces Bias Charge, Suit*, 26 Nat'l Home Center News, February 7, 2000, at 1, 1 (describing discrimination claims filed by 12 current and former black employees, as well as by the Michigan Department of Civil Rights). Home Depot responded to these allegations by asserting that they focus on "the actions of a few management-level employees" rather than "chain wide company policy," and reiterated that its goal is "to ensure fair and equal access for all." Caulfield, *supra*, at 1; Home Depot Seeking to Avoid Racial Bias Investigation, 26 Nat'l Home Center News, March 20, 2000, at 3, 3.

323. The complaint focuses on the actions of a store manager, the store's human resource manager, and the district manager, "whom plaintiffs allege set up a 'good old boy' system that hired and promoted white friends over blacks." Caulfield, *supra* note 322, at 2.

Moreover, internal dispute resolution processes may be highly individualized and private. Many companies and government agencies do not analyze complaint patterns to reveal and correct systemic problems. The processes and their outcomes often remain confidential, and thus they provide no opportunity for more general organizational learning or norm generation.³²⁴ Confidentiality is often a crucial component of an effective internal system of problem solving, particularly for claims of sexual harassment.³²⁵ In addition to concerns about liability avoidance, there is a legitimate desire to protect individuals, including complainants, from unnecessary disclosure of personal information. Some of the systems improvements and human resource information also give firms a competitive edge, and they may thus be unwilling to share that information with their direct competitors.³²⁶

Yet, without some mechanism for aggregating data and generating internal norms, a highly privatized internal system may obscure rather than reveal patterns rendering visible second generation bias. Power imbalances stemming from differences in status or access to information may simply reemerge in the dynamics of informal processes. Moving to entirely confidential, individualized dispute resolution frustrates the development of shared understandings of public norms and knowledge of effective remedial responses. It also fails to provide a basis for sharing information across settings. Under the current legal regime, innovations in governance or conflict resolution need never be provided to other similarly situated workplaces or even revealed publicly, except as a defense to a claim of discrimination. However effective the response of a particular workplace to the challenges of addressing a problem such as harassment, the innovation will not contribute either to the development of knowledge about how to address conflict fairly and effectively within organizations, or to normative development through contextualized problem solving. Both of these processes are essential to the development of a regulatory regime that can simultaneously take account of particular contexts, generate background norms, and build institutional capacity for problem solving. Finally, fear of liability continues to discourage many employers from gathering the information they would need to identify and address problems relating to second generation bias.

There is a large middle group of employers that is neither in the forefront, developing innovative ways to link inclusion and productivity, nor in the backwaters, actively excluding members of nondominant groups. The crucial regulatory question is how to encourage this middle group to learn from and improve upon the efforts of the top group. As

324. See Donnellon & Kolb, *supra* note 239, at 143.

325. See EEOC, *Enforcement Guidance*, *supra* note 151.

326. See Telephone Interview with Barry Goldstein, Class Counsel in *Butler v. Home Depot*, Partner, Saperstein, Goldstein, Demchak, & Baller, at 1 (May 27, 2000) (transcript on file with the *Columbia Law Review*) (describing Home Depot's willingness to share information with noncompetitors, but not with those who directly compete for business).

of now, fear of litigation, and of liability if problems are uncovered, discourages companies from engaging in this kind of innovation and problem solving.

C. Intermediaries: The Need for Transparency and Accountability

Intermediaries play a pivotal role in the emerging structural regime as cross-boundary problem solvers who mediate the relationship between legal norms and organizational demands. Yet, this potential is only partially realized in each of the relevant domains.

1. *Legal Actors.* — At the level of the individual professional, many legal actors continue to operate within a rule-enforcement framework. Quite unsurprisingly, this disposes in-house lawyers to discourage the production and retention of information that could be used in litigation. Lawyers representing employers can undercut the dynamic potential of the judiciary's structural framework by interposing rules that create a "safety zone" as a strategy of litigation avoidance.³²⁷ Lawyers are often viewed by managers and human resources personnel as obstacles to effective problem solving, prompting those with responsibility for addressing problems of diversity and inclusion within corporations to avoid contact with lawyers unless they are about to be sued.

Plaintiffs' advocates have yet to realize their potential as internal change agents. The remedial approach adopted by plaintiffs' counsel in the Home Depot case remains the exception rather than the rule. Legal advocacy on behalf of workers tends to be litigation-centered, individualistic, compensatory, and focused on after-the-fact enforcement of rule violations. Problems discovered in employers' practices present opportunities to prevail in litigation, recover damages and fees, and focus public attention on the problem. Advocacy by plaintiffs' employment discrimination lawyers typically emphasizes prevailing on liability and recovering compensation (and attorneys' fees), with institutional and structural change often a byproduct rather than a focus of the work. In part, this pattern is a function of the fee structure for the plaintiffs' bar, which generally limits recovery to legal services connected to litigation, encour-

327. In the words of one expert:

"If you deal with office romance in isolation from sexual harassment and other diversity/respect/privacy issues, you're going to cause confusion, and maybe outright contradiction. . . ." The problem is "more rules, more rules, more rules, instead of backing up and asking, 'What are our values, our principles, our approach?'"

Solomon, *supra* note 13, at 45–46 (quoting Freada Klein); see also Segal, *Sexual Harassment Prevention*, *supra* note 57, at 129; cf. Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 *Law & Soc'y Rev.* 47, 77 (1992) (documenting similar tendency to construct legalistic responses in the context of wrongful discharge).

ages competition among class counsel,³²⁸ and poses barriers to group litigation.³²⁹ In addition, the current regulatory structure provides limited opportunities for holding employers accountable without a finding of liability.

2. *Organizational Intermediaries.* — As matters now stand, the intermediate players, such as employee organizations, insurance companies, consultants, researchers, and professional associations, do not have sufficient incentives or support to provide adequate information pooling, comparability, and accountability. The internal and private orientation of many efforts to address issues of harassment, diversity, and discrimination hampers the impact of workplace innovations on the development of methods and criteria of accountability and success. Currently, researchers and regulators face considerable obstacles to obtaining information about the dynamics of inclusion and exclusion within organizations, due to fear that information documenting problems would encourage litigation and be used to establish liability.³³⁰ Research on the relationship between constructive conflict and diversity is exploding, but it is both quite diverse methodologically and uneven in its quality and methodological sophistication. The field has begun to identify ways of evaluating the success of

328. See R. Robin McDonald, *Rival Lawyers Clash Over Coke Pact*, Nat'l L.J., Dec. 25, 2000, at B4 (explaining that if settlement is approved, one law firm stands to recover \$20.6 million and another will recover nothing even if prevails in separate litigation).

329. See, e.g., 42 U.S.C. § 1988(b) (Supp. IV 1999); *Spencer v. General Electric Co.*, 894 F.2d 651, 661–64 (4th Cir. 1990) (holding that plaintiff was not entitled to recovery of post-offer fees under Rule 68 because voluntary implementation of sexual harassment policy, even if prompted by litigation, was relief but not a judgment, and thus could not be considered in determining the extent of plaintiffs' recovery after trial).

330. Companies are unwilling to generate or share information that could be used to establish a legal violation in subsequent litigation. For instance, lawyers have discouraged employers from studying how their sexual harassment systems were functioning out of concern that this information would be used in future sexual harassment cases. Researchers and consultants report difficulty obtaining access to corporations to study racial or gender dynamics because of fear of subsequent litigation. Interview with Karen Jehn, *supra* note 312, at 1; Interview with Virginia Vanderslice, *supra* note 312, at 1. The EEOC reported in its recent publication on Best Practices of Private Sector Employers that "a number of employers expressed reservations about divulging information to the EEOC because of a concern that such information might come into play in some subsequent EEOC enforcement action against them." *Id.* at 24. Employers have attempted to avoid this problem by asserting a self-critical analysis privilege against disclosure, with mixed success. See, e.g., *Troupin v. Metro. Life Ins. Co.*, 169 F.R.D. 546, 547 (S.D.N.Y. 1996); *Flynn v. Goldman, Sachs & Co.*, No. 91 Civ. 0035, 1993 WL 362380, at *1 (S.D.N.Y. Sept. 16, 1993); *Hardy v. New York News*, 114 F.R.D. 633, 635–36 (S.D.N.Y. 1987) (allowing discovery of documents related to an affirmative action plan even though incidentally useful for preparation for litigation). In each of these cases, the company charged either an internal manager or a consultant to identify and eliminate barriers to equal employment for women and people of color. These documents were then sought by plaintiffs in litigation. In two out of the three cases, the court required the employer to disclose the documents. See *Troupin*, 169 F.R.D. at 550 (denying use of self-critical analysis privilege to employer); *Hardy*, 114 F.R.D. at 643 (same); *Flynn*, 1993 WL 362380, at *3 (permitting employer to privilege the requested documents).

particular interventions directed at minimizing bias and enabling meaningful participation among diverse groups.

Currently the communities of practice that provide for information pooling and systematic reflection are underdeveloped. Many human resource practitioners operating on the front line of organizations lack the skills and resources necessary to function effectively as problem solvers.³³¹ Many workplace consultants have been educated in the compliance approach to regulation. Their work tends to revert to the patterns of after-the-fact compliance and private dispute resolution that simply maintain the status of organizational governance. Diversity consultants also lack external accountability standards, and recent studies raise serious concerns about the qualifications of some of the consultants as well as the quality of the training and system design they provide.³³² Those lawyers and consultants who are engaging in more proactive and structural work lack either the incentives or the opportunities to evaluate their own efforts. Much of their work is developed for particular clients, and the results of their work must be maintained confidentially. They lack market incentives to invest in critically assessing their methods or to share their knowledge with potential competitors.

In many workplaces, employee groups concerned about workplace equity simply do not exist, or have not developed the capacity to participate effectively.³³³ Many employee identity caucuses focus on the individ-

331. Insurance brokers regularly observe this problem. One interviewee explained: The level of professionalism at the front line is very low. Those are the ones who are going to get you hung. Guys in the field office are crucial. We have to get the information down into the organization. That's where things are falling down . . . the overworked, underpaid nature of human resource groups. They are dedicated professionals. Ask them to do anything proactively—they roll their eyes and say 'no way'. If an insurance product asks them to do more than they are currently doing, they won't buy the product.

Interview with AON Broker B, *supra* note 55, at 4.

332. See Gruber, *supra* note 100, at 316 (indicating that informational methods proved less effective than proactive methods in lowering incidents of harassment); Hellen Hemphill & Ray Haines, *Discrimination, Harassment, and the Failure of Diversity Training: What To Do Now* 5 (1997) (arguing that diversity training has failed because of its exclusive focus on understanding and appreciating differences rather than teaching skills to help employees relate more effectively with each other given their differences, and advocating an approach that improves the capacity of individuals and workgroups to deal constructively with their bosses, their peers, their team members, their customers, and others different from themselves).

333. See Roy B. Helfgott, *The Effectiveness of Diversity Networks in Providing for Collective Voice for Employees* (Sept. 1997) (unpublished manuscript), quoted in Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, U. Ill. L. Rev. 583, 615 n.207 (1999) (reporting that diversity networks in three companies did not engage in joint problem solving with management, had almost no role in solving members' specific workplace problems, were not viewed by management as speaking for their members, and had little impact on company policy); Scully & Segal, *supra* note 142, at 24 (describing the difficulties of sustaining effective grassroots activism over time). But see Friedman, *Defining the Scope*, *supra* note 268, at 307–08 (finding that some networks were effective in many of these same areas); Friedman, *Network Groups*, *supra* note 268, at 244–47

ual professional advancement of their members, to the exclusion of more systemic concerns. If broader participation is a response to a crisis, it can be difficult to sustain. Unions have only begun to address these concerns as a central part of their mission.³³⁴

3. *Insurers.* — Unless encouraged to do so by authoritative public actors, the insurance industry also faces serious obstacles to moving beyond a narrow, reactive definition of risk management in their interactions with employers about equity concerns. Preliminary reports suggest that insurance company audits of human resource practices tend to be narrow in scope, and they encourage the development of formal processes that are perceived to minimize the risk of liability.³³⁵ The efficiency and productivity benefits of a structural approach are, however, less relevant to insurers. Their economic interest is served by maintaining sufficient fear of liability to induce companies to purchase insurance, and yet minimize the likelihood of a pay-out. Given the market incentives driving the insurance industry's participation, insurers at present are not likely to take the lead in shaping structural responses if the legal system does not clearly signal the importance of such responses in minimizing legal exposure. As competition for employer practices liability insurance increases, firms are less likely to impose disclosure and auditing requirements if doing so will drive business to their competitors. Moreover, preliminary evidence suggests that some firms are resistant to the involvement of insurance companies in assessing the adequacy of their internal processes, particularly in areas as central to governance as human resource policy and practice.³³⁶ If an insurance audit reveals a problem that remains uncorrected, and firms are subsequently sued, they face the risk that the company will refuse coverage for problems that were identified and could have been corrected.³³⁷ This potential role conflict discourages companies from utilizing the consulting services that insurers offer in the human resource area. Insurance companies have begun to respond to this concern by separating and clearly demarcating their con-

(arguing that network groups provide support to their members and can influence company policy).

334. See *supra* text accompanying notes 266–267.

335. Interview with AON Broker A, *supra* note 290, at 3–4; Interview with AON Broker B, *supra* note 55, at 1–2. This tendency was confirmed in informal interviews with insurance employees and lawyers who declined to be quoted directly. The role of employee practices liability insurance in shaping human resource decisions has yet to be examined in any depth. Further research is a crucial predicate for effective policymaking in this area.

336. As one broker put it:

Most of the stuff that insurers are offering have not been utilized. Three to five percent are using complaint lines and audits. Fear that results will not be privileged is preventing people from using them. There is not enough confidence that audits or proactive examinations will remain confidential and that this information is papering the plaintiffs' case.

Interview with AON Broker B, *supra* note 55, at 5.

337. See *id.*

sulting/auditing from their underwriting functions. But this potential conflict creates an additional impediment to insurance companies' role as effective agents of structural change.

4. *Administrative Agencies.* — In other regulatory contexts, scholars have proposed that administrative agencies develop the architecture for gathering and analyzing information across local contexts, benchmarking, developing and continually revising standards, capacity building, and monitoring.³³⁸ Administrative agencies would thus provide courts more detailed and structural information upon which to base assessments of employers' problem-solving processes and outcomes. However, in the context of workplace discrimination, administrative agencies currently face serious challenges as central players in providing the infrastructure for information sharing and benchmarking.

The Equal Employment Opportunity Commission is the administrative agency with general responsibility for enforcing the employment discrimination laws. As a result of earlier political compromise, the agency lacks independent power to sanction violations of the employment discrimination laws or to promulgate regulations under Title VII. It pursues its enforcement role primarily by: (1) issuing guidelines; (2) investigating, conciliating, and mediating individual cases; and (3) litigating to address particularly egregious violations or establish new legal principles. The agency has been repeatedly and consistently criticized as a toothless tiger.

In theory, the agency's lack of formal enforcement and rulemaking power creates an opening for moving to a more structural and facilitative role. The agency is not hamstrung by the Administrative Procedure Act's formalities, and it cannot fall back upon traditional enforcement powers that it does not have. The agency has taken tentative steps toward providing greater assistance to employers seeking help in complying with the employment discrimination laws.³³⁹ Information gathering is already

338. See, e.g., Dorf & Sabel, *supra* note 6, at 345; Bradley C. Karkkainen et al., *After Backyard Environmentalism: Toward a Performance-Based Regime of Environmental Regulation*, 44 *Am. Behav. Scientist* 690–709 (2000).

339. "[W]ithin current resource limitations, the National Enforcement Plan encourages that public education, outreach and technical assistance be conducted at both the national and local level to support and enhance the enforcement activities directed by the NEP." U.S. Equal Employment Opportunity Commission National Enforcement Plan, at <http://www.eeoc.gov/nep.html> (last visited Apr. 1, 2001). The EEOC provides training and technical assistance to employers, employees, and groups. The purpose of the program is "to inform the public (including individuals with rights protected under the Act) and covered entities about their rights and duties; and to provide information about cost-effective methods and procedures to achieve compliance." U.S. Commission on Civil Rights, *Helping Employers Comply with the ADA* 223 (1998). The EEOC also puts together manuals and guidelines, and offers workshops designed to inform employers and employees about their rights and duties. For example, the agency, along with four other implementing agencies, undertook to create a clearinghouse function "to benefit from the experiences of covered entities and individuals with disabilities in complying with the ADA." *Id.* This function is performed by separate personnel within the agency, and, until

part of the EEOC's repertoire; employers must submit EEO-1 reports concerning their hiring and promotion patterns.³⁴⁰

However, the history, culture, and politics surrounding the agency strongly militate in the other direction:

When you begin to think expansively about what the agency can become, you are immediately constrained by what Congress and stakeholders expect of us, regardless of how we want to reinvent ourselves. Congress has expectations of what we should do. When Congress thinks of what our agency is, it sees us as an agency which is there to manage employment discrimination disputes. That's why so much of the focus and discussion is over the backlog or inventory. To the extent that Congress defines our mission as managing charges that are filed with us, that becomes the measure by which we are judged.³⁴¹

The agency does not analyze the data it already collects from employers, except for internal operational purposes such as staffing levels. It continues to struggle primarily with how to function most effectively as an enforcement agency.³⁴² The EEOC tends to treat its involvement with companies that have identified problems primarily as a sanction for failure or noncompliance. If a company is found to be doing well, the agency then reduces the company's obligation to gather or report information. Information revealing patterns of noncompliance leads to increased monitoring and then to litigation. The process of linking monitoring to self improvement seems to come together only at the remedial stage of

recently, does not appear to have been integrated or coordinated with the dispute processing or enforcement activities of the agency.

340. Telephone Interview by Christopher Murray with Edward McCaffrey, Program Analyst, Philadelphia District Office of the EEOC, at 4 (Oct. 17, 1999) (transcript on file with the *Columbia Law Review*). Private employers with 100 or more employees must file an EEO-1 report. These reports are computerized and the data is accessible to EEOC staff. But there is no regular practice of reviewing the information received through the EEO-1 reports. *Id.* at 5.

341. Interview with Paul Steven Miller, Commissioner of the Equal Employment Opportunity Commission, Washington, D.C., at 1 (June 1, 2000). Commissioner Miller spoke in his capacity as an EEOC Commissioner, but was not expressing the institutional position of the agency as a whole.

342. Commissioner Miller asked:

What is the defining issue for the agency? To rearticulate its relevancy in the cause of civil rights enforcement, given the creation of a plaintiffs' employment bar and private law suits [since the 1991 Act which created a plaintiffs' bar because of damages and jury trial]. Now people have the ability to come to the EEOC, get their ticket punched, and file their own lawsuit.

Id. Miller emphasized that:

the EEOC's prime mission, and what the agency has evolved into, is as a regulatory agency, rather than a technical assistance agency. That is its core identity. It is difficult in a time of tight resources to add on another prime mission, certainly without discussing this with stakeholders and Congress. We don't want to create a vacuum on the regulatory enforcement side. The technical assistance is part of the regulatory insistence.

Id.

litigation. For companies that have not been found liable, the ideal relationship with the agency naturally seems to be one of avoidance. The agency does not link its activities directed toward building employers' capacity to maintain equitable workplaces with its monitoring and enforcement activities. This further limits the agency's capacity to pool local information.

Information pooling about race and gender patterns can be especially daunting for administrative agencies, particularly the in-depth, context-specific type of information about decisionmaking patterns and system redesign. In the first place, courts have shown some reluctance to permit agencies to require disclosure of this type of information in the absence of illegality.³⁴³ Companies often resist producing information about race or gender patterns in the first place. Moreover, they are legitimately concerned about sharing information with competitors about their successful human resource innovations. Because some of the problems addressed through internal problem solving require confidentiality with respect to the specifics of a claim, some form of protection from disclosure is needed for the internal problem-solving system to function. Yet, long-term effectiveness and legitimacy require some way of aggregating and sharing information so that these systems can improve and be held accountable. This apparent contradiction has been effectively solved by creative uses of mediating actors who can broker access to information and pool data without revealing confidential or private information.³⁴⁴ The solutions are likely to vary depending on the nature of the problem and the industry. Centralized information pooling does not easily lend itself to these types of nuanced and contextually sensitive solutions, although it produces useful data about overall demographic patterns. Moreover, the geographic boundaries that currently define the jurisdiction of local district offices poorly correspond to the communities of practice that may most fruitfully share information and compare results.

Some district offices that are operating below the national radar screen have apparently begun to experiment with more proactive, interactive, and deliberative forms of involvement.³⁴⁵ Thus, at least at the lo-

343. *Id.*; see also *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 24 (D.C. Cir. 2001) (overturning the FCC's reporting requirements because they are not narrowly tailored to the goal of nondiscrimination).

344. See Interview with Barry Goldstein, May 16, 2000, *supra* note 193, at 1; Interview with Faye Wilson, July 5, 2000, *supra* note 184, at 4 (describing how Home Depot shared information about its problem-solving processes without revealing trade secrets to industry competitors); Interview with John Wymer, *supra* note 59, at 5 (same).

345. See, e.g., Priority Charge Handling Task Force, Equal Employment Opportunity Comm'n, *Litigation Task Force Report*, app.C, *Creative Strategies* (1998) [hereinafter *EEOC, Litigation Task Force Report*] (describing efforts of local and regional offices to create stakeholder networks, such as advisory groups, quarterly stakeholder meetings, stakeholder task forces of advocacy groups, community organizations, employers, and racial and ethnic group media).

cal or regional level, there does appear to be room for administrative agencies to play a role in bringing stakeholders together to address problems and in building technical capacity among companies that lack internal resources to do so. There are also indications that the EEOC and the OFCCP have recently experimented with more structural approaches to regulation.³⁴⁶ These agencies have undertaken to identify and disseminate model employer practices, and have increased outreach, education, and assistance to federal contractors and other companies on equal pay, glass ceiling, and other issues.³⁴⁷ If these activities continue in earnest, they could help in developing the capacities of firms to develop effective problem-solving systems. However, the agencies' emphasis on traditional forms of enforcement fundamentally tends to shape their relationship with firms. This relationship would have to undergo a structural realignment for the agencies to occupy a central role in the development of a structural regime.

V. DYNAMIC REGULATION: STRENGTHENING THE INFRASTRUCTURE FOR EFFECTIVE WORKPLACE PROBLEM SOLVING

I have documented an important but incomplete move toward a judicially decentered, holistic, and dynamic regime for addressing second generation bias. At its best, this regime encourages and rewards effective, context-specific problem solving and dispute resolution within workplaces, informed by analysis of more general patterns and examples of effective processes. Incomplete implementation, however, threatens both to dilute the law's normative impact and to interfere with employers' economically motivated initiatives to address second generation bias. We thus face a watershed moment in the regulation of workplace practices.

One response would be to resist the judicial move toward a structural approach and instead to strengthen the judiciary's role in developing and

346. See, e.g., Katia Hetter, *A White Man's World: Diversity in Management*, *Newsday*, Apr. 16, 2000, at A6 (documenting recent efforts of OFCCP to look at patterns and practices, and to use its auditing power to induce companies to change their hiring and promotion practices).

347. See Office of Federal Contract Compliance Programs, Dep't of Labor, *Affirmative Action Fact Sheet* (Dec. 13, 1999) at <http://www.dol.gov/dol/esa/public/regs/compliance/ofccp/aa.htm>. The OFCCP also plays a significant role in monitoring and enforcing compliance with the Executive Order 11246 imposing affirmative action requirements on government contractors. See *id.* (describing the mission and operation of the OFCCP). It does require government contractors, as a condition of having a federal contract, to engage in a self-analysis for the purpose of discovering any barriers to equal employment opportunity. However, this information is only disclosed to the agency if the OFCCP conducts a compliance review. Firms tend to treat the reporting as a legalistic requirement to be discharged with the goal of avoiding more in-depth agency scrutiny. *Id.*; Hetter, *supra* note 346, at A6 (noting criticism that many companies "do the bare minimum to comply with OFCCP directives while changing little in their hiring practices"). Since 1965, only 11 companies have been barred from bidding for federal contracts as a sanction for noncompliance.

enforcing rules directed at second generation bias. For example, some critics of internal dispute resolution and the lower courts' decisions interpreting *Farragher* and *Ellerth* oppose the entire employer liability approach and urge advocates to resist the move toward internal dispute resolution and problem solving.³⁴⁸ In light of the mixed results on both the judicial and workplace front, this skepticism about the potential of internal dispute resolution to provide effective remedies for sexual harassment is understandable. However, overall resistance to the structural move, in my view, is both futile and ill advised.

First, internal dispute resolution and problem solving has already taken hold in both the judiciary and the workplace. At this point, there is no going back. The Supreme Court has extended the reasoning of *Ellerth* and *Farragher* in the punitive damages context.³⁴⁹ There is no indication of a retreat from the Court's commitment to employer liability. Similarly, many employers have embraced internal dispute resolution with a vengeance. Industries and professional associations have sprung up around this growing interest, and they are likely to fuel further expansion of internal dispute resolution and internal problem solving. Critics concerned about the effectiveness of internal problem-solving processes cannot stem the tide. They are more likely to be able to influence the quality and accountability of those internal processes.

Second, as I have already shown, the rule-enforcement approach is itself ineffectual in addressing second generation bias. In addition to the inherent limitations of a rule-enforcement approach for addressing complex problems,³⁵⁰ judicial intervention has itself produced mixed results. Moreover, most plaintiffs do not sue.³⁵¹ Those that do face poor odds, particularly in second generation cases that lack clear evidence of intentional bias or egregious harassment.

Third, there is a tendency to equate the second generation approach with deregulation or privatization. This is a misreading of the proposal, a misreading that may stem from the tenacity of conventional ways of thinking about regulation as a choice between market and legal solutions.

348. See, e.g., Bisom-Rapp, *Bulletproofing the Workplace*, *supra* note 2, at 1037; Edelman, *Legal Ambiguity*, *supra* note 8, at 1568; Krieger, *The Content of Our Categories*, *supra* note 4, at 1242; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 10, at 1886-88.

349. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999) (limiting employer's punitive damages liability for discriminatory managerial agents when such decisions are contrary to employer's good faith efforts to detect and prevent discrimination); Richard R. Meneghello, *Kolstad*, *One Year Later—What Constitutes "Good Faith Efforts"?*, at <http://www.lawmemo.com/emp/articles/kolstad.htm> (last visited Apr. 1, 2001).

350. See *supra* Part I.

351. Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 *Signs: J. of Women in Culture and Soc'y* (1987); Patricia A. Gwartney-Gibbs & Denise H. Lach, *Workplace Dispute Resolution and Gender Inequality*, 7 *Negotiation J.* 187, 198 (1991).

Under the approach I propose for second generation bias, courts and the law continue to play a crucial role. But that role differs from the conception of law as fixed, universal, and dictated from above. Courts, under this approach, are engaged in rearticulating the legitimacy and significance of the general norm, and engaging the relevant actors in a dialogue to give that norm meaning in context.³⁵² This is neither delegating the problem to private actors nor assuming central responsibility for dictating how to address it.

Finally, the potential for more complete implementation of the structural approach still exists. The basic features described in this Article are already in place. The challenge remains to institutionalize a governance system that fosters dynamic interaction among workplaces, non-governmental organizations, courts, and administrative agencies. This interactive, tiered system provides the infrastructure for identifying patterns within and across particular workplace contexts, earmarking effective problem solving and dispute resolution processes as benchmarks, and elaborating norms that emerge over time through this cumulative process. It would change the perverse incentives around producing information that reveals problems involving second generation bias to foster (a) production of information about individual and systemic problems, (b) pooling of information within and across workplaces, and (c) emphasis on problem solving rather than liability avoidance by legal actors. A more fully developed structural approach would explicitly encourage employers and mediating actors to develop criteria and measures that differentiate between effective problem solving and ineffective, sham, or formalistic problem-solving/dispute resolution processes, and revise those criteria in light of subsequent experience. It would also provide systems of accountability that (a) provide for regular assessment of the adequacy of processes and outcomes, (b) redefine compliance to reward effective problem solving, and (c) sanction stasis in the face of identified and uncorrected problems or extreme, first generation violations.

It bears noting that my approach is one of grounded theory: It derives overall regulatory approaches by grappling in depth with the dynamics, obstacles, and possibilities of particular regulatory contexts.³⁵³ The possible sources of accountability and effectiveness, which are crucial components of a robust regulatory solution, vary across regulatory domains. These differences are sometimes as important as the similarities, both in constructing workable frameworks and in formulating overarch-

352. Cf. James S. Liebman & Charles F. Sabel, *The Emerging Model of Public School Governance and Legal Reform: Beyond Redistribution and Privatization*, at <http://www.law.columbia.edu/sabel/papers/schoolreform.PDF> (last visited Apr. 1, 2001) (on file with the *Columbia Law Review*).

353. This is in contrast, for example, to the approach of staking out the general contours of an overarching experimentalist approach to governance, and then documenting its emergence in a variety of domains. See Dorf & Sabel, *supra* note 6, *passim*.

ing theories of regulation. For example, deep understanding of the theories and dynamics of race, gender, and power within organizations is crucial to developing a regulatory approach for those problems. A general regulatory theory does not necessarily foreclose this inquiry, but it may gloss over its significance or fail to take adequate account of developments that challenge its assumptions.

I also draw attention to figuring out how to reshape the roles of institutions and actors who are key players in either fostering or impeding the move to a structural approach. In my view, one cannot separate normative theory from its implementation, and that includes the implementation of a new theory of regulation. This means that an important part of the theoretical and practical project includes figuring out how to communicate with (and to learn from) actors deeply committed to the rule-enforcement model of regulation, including lawyers. It also means taking seriously the limitations of new regulatory approaches in dealing with certain kinds of problems (such as deliberate racial exclusion or *quid pro quo* harassment), and thus grappling with the difficult question of whether and how rule-enforcement approaches can continue to operate without undermining the viability of more structural regulatory models. I view this as an as-yet-unanswered question, and one that should also be resolved in context rather than on the basis of our current, limited understanding.

I have identified three focal areas to realize more fully the regulatory shift to a structural approach: (1) the judiciary—by shoring up the judicial commitment and elaboration of the structural approach, (2) individual change agents—by developing their role as problem solvers, and (3) nongovernmental organizations—by building their capacity to play an effective mediating role. This section sketches out the contours of these proposals.

A. Strengthening the Judiciary's Structural Role

First generation discrimination continues in some settings, notwithstanding the clear legal (and moral) prohibition to the contrary. For this reason, it is crucial to maintain the availability of a rule-enforcement approach to invalidate and provide strong remedies for first generation bias. Courts should continue to rearticulate and enforce specific and clear rules in situations where they fit the conduct, such as the rule prohibiting deliberate exclusion or marginalization of women or people of color. Also, for systemically supported deliberate bias, structural approaches to remedy may be crucial to their effective elimination as well.

The court's role in addressing second generation bias continues to be crucial, but it differs from and is more limited than its role when discrimination is blatant and violative of clear commands. In elaborating the general nondiscrimination principles enacted in Title VII, courts continue to fulfill law's expressive function by articulating general norms and

underscoring their continued importance.³⁵⁴ In addition, they create focal points for nonlegal actors to give these general norms meaning in new contexts, and to share the results of these context-specific elaborations.³⁵⁵ Unlike courts in the rule-enforcement regime, courts following the structural approach act as a catalyst, encouraging or even providing the structure for deliberations aimed at solving problems that threaten the legality (and efficacy) of institutions.³⁵⁶ Courts also supply incentives for employers to implement effective internal problem-solving mechanisms and to evaluate their effectiveness. These incentives come in part from the courts' formal power to confer the benefit of avoiding liability if effective processes are implemented, and in enabling employers to minimize litigation costs by providing for earlier resolution of cases where effective systems are shown to be in place. This legal inducement may be necessary in some cases to encourage employers to undertake internal problem solving. Courts may also provide a structure for producing agreements through a deliberative process that results in a consent decree like the one reached in Home Depot. This process itself can produce direct and indirect incentives for companies to address issues of equity.³⁵⁷ These

354. See generally Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 Colum. L. Rev. 1253, 1269 (1999) (arguing that "[a]doption of a legal rule that is based on a social norm sends a message that the community regards the norm as especially important"); Cass Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2031 (1996) (arguing that law's expressive function can reconstruct or solidify social norms "through a legal expression or statement about appropriate behavior").

355. Cf. Carol A. Heimer, *supra* note 286, at 36 (arguing that "an institutional sphere" such as the legal system "has to be able to propose solutions and get them considered if it is to influence organizational decisionmaking"); Liebman & Sabel, *supra* note 352, at 86 (describing an analogous role for courts in the context of educational reform: "to participate in a process of building a constitutional order, rather than imposing one or abandoning its obligation to do so").

356. See generally Sturm, *Public Law Remedies*, *supra* note 51, at 1412-27 (documenting legitimacy and efficacy problems that arise when courts adopt the role of deferrer (leaving remedial formulation to the defendants), director (imposing specific remedial solutions), broker (encouraging a split-the-difference deal), or expert remedial formulator (forming an outside body to develop and impose a remedy), and arguing for the efficacy and legitimacy of the court as catalyst (creating the site for public deliberations that build capacity to solve problems)); see also Liebman & Sabel, *supra* note 352, at 85 (making similar argument for the deliberative role of courts, and the greater capacity of courts to play this deliberative role when other branches of government have adopted an experimentalist approach).

357. The courts' capacity to play this role depends in no small part on the continued availability of class actions in employment discrimination cases. Several recent cases pose a threat to that continued viability. See, e.g., *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1231 (11th Cir. 2000) (denying class certification to Jewish plaintiffs alleging a corporate policy of discriminating against Jewish customers); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 425 (5th Cir. 1998) holding that "nonequitable monetary relief may be obtained in a class action certified under Rule 23(b)(2) only if the predominant relief sought is injunctive or declaratory"). But see *Rutstein*, 211 F.3d at 1240 ("Counsel for the plaintiffs and amici predict that a denial of class certification in this case will mean the end of all disparate treatment class actions in the Eleventh Circuit. . . . [W]e find it appropriate to note. . . what this case is *not* about. This is not a case alleging employment

law-related incentives interact with nonlegal inducements, such as productivity effects beyond concern for liability avoidance, that may become visible in interaction with legal norms. Finally, courts provide enforcement at the boundaries, by sanctioning and awarding monetary relief for violations of first generation conduct or failure to correct identified second generation problems.

At the same time, the judicial role is necessarily limited by the complexity of second generation problems and the importance of building workplace capacity for context-based problem solving. Judicial action interacts with, shapes, and supplements nonjudicial bases for generating norms and changing behavior. The challenge is to construct a judicial role that encourages effective, context-based problem solving without either prescribing a particular form of internal process or deferring to local contexts regardless of the adequacy of the process or outcome.

The Supreme Court has already laid the foundations of this role, by defining the norm as a problematic condition and encouraging employers to remedy that condition through institutional innovation. What is missing is (1) clear judicial expression of the commitment to effectiveness in remedying violations; (2) a method for generating and revising standards for evaluating the effectiveness of a particular problem-solving process, without reverting to command-specific rules; and (3) sufficient experience of the benefits of effective problem solving to overcome the prevailing culture of equating problem identification with liability.

The first gap is the easiest step, at least conceptually, to remedy through doctrinal clarification. This would require underscoring the importance of effectiveness as a criteria for evaluating the adequacy of employers' internal processes. This means making explicit and essential the courts' role in assessing the adequacy of employers' processes for preventing and redressing sexual harassment or subjective bias, as presently articulated by some lower courts, and rejecting the more formalistic approach of simply deferring to a policy or internal process regardless of its effectiveness. Courts would also make explicit the connection between organizational response to sexual harassment, currently embodied in the employer liability defense, and the experience of the conduct as hostile or abusive, currently embodied in the elements of liability.

The second missing piece squarely poses the issue of whether courts can provide accountability without reinstituting a code of conduct that would revert to the rule-enforcement model. Courts lack the expertise and legitimacy to develop and unilaterally impose specific criteria for evaluating effective problem-solving processes. Even if judges were willing to engage in this role—and many are not—centralized articulation of criteria of success would exhibit the rigidities and inattentiveness to con-

discrimination.”). The structural analysis provided in this Article may help demonstrate the importance of organizational remedies, and to differentiate between cases that are primarily about employees' compensation and those for which institutional design is a central focus.

text of the rule-enforcement model. Yet, if left solely to the discretion of employers, the regulatory process will simply reinforce existing levels of commitment to meaningful compliance and effective process. Is there a judicial role in assessing and rewarding effectiveness that respects the limits of judicial capacity, the importance of preserving employer discretion, and constraints imposed by the costs of process?

The Intel and Home Depot examples suggest a direction for resolving this apparent dilemma. Intel measured and compared indicators such as the relative utilization rates of the internal dispute resolution process, the relationship between internal and external complaints, the demographic patterns of complaints and resolutions, and employee and manager assessments of the effectiveness of the system.³⁵⁸ Home Depot developed and built into the hiring and promotion system ways of assessing the effectiveness of their process in addressing issues of bias. For example, the system tracked deviations from the process of open consideration, managers' patterns in considering employees for hire or promotion, failure rates of men and women seeking training and advancement, and hiring and promotion decisions and their explanations.³⁵⁹ Both companies then gathered data that enabled them to assess the effectiveness of their internal systems in relation to those criteria. These companies, with the assistance of mediating actors inside and outside the organization, developed their own norms governing the effectiveness criteria.

This activity in the workplace realm provides a source of a "common law" of effectiveness that can be both situation specific and comparable across contexts. Courts would look to employers to develop and justify criteria of effectiveness in problem solving for their own internal systems. Specification of robust criteria and measures of effectiveness in relation to the problems of bias would itself be an indication of an effective internal process. Employers' processes would be evaluated in relation to those criteria of effectiveness.

Courts would thus encourage employers to develop the capacity to evaluate their own systems, rewarding employers who do so. This process resembles other legal arenas in which courts look to "best practices" in the field to inform legal norms in particular cases³⁶⁰ and to continue fostering the development of a "common law" of workplace practice. It would encourage employers to utilize mediating actors with the capacity to pool information about effective practices and to produce internal systems that meet articulated and measurable criteria of effectiveness. It might also encourage greater transparency on the part of mediating actors as a way of attracting clients and legitimating their roles. This would, in turn, have a reciprocal impact on the courts' willingness and capacity

358. See *supra* Part II.B.2.

359. See *supra* Part II.B.3.

360. See, e.g., Liebman & Sabel, *supra* note 352, at 86 (noting that a court "can use . . . information on comparable schools . . . in order to determine if a particular school is breaking the law").

to play a catalyst role. As the depth and capacity of a field to help differentiate effective from ineffective systems increases, the easier and more likely judicial intervention will become.

Courts thus play an important role. They continue to apply coercion, but they separate coercion from an inflexible application of a fixed rule structure. They evaluate the adequacy of particular employers' internal efforts based on the information supplied by the litigants about the adequacy of the system established to address problems. This evaluation is based on both the process and the outcome of that process of conflict resolution. Courts also sanction the violations of norms that have been shown to be detectable and correctable and which were not detected or corrected by a particular employer.³⁶¹

Compliance is assessed based on the ability to respond to a problem of harassment or biased decision making, not just on the basis of the outcome of a particular conflict. Courts would continue to establish a floor of acceptable conduct. The floor would, however, rise as the capacity to address problems increases. The goal and standard would be to improve each time a conflict arises. The approach to compliance could also reward employers who develop effective, accountable, and inclusive decisionmaking processes by protecting them from liability for problems exposed and remedied by those processes. Employers engaged in an ongoing process of self-assessment and self-correction that can be evaluated by a standard of effectiveness, both in general and in relation to particular disputes or conflicts, would be subject to less stringent scrutiny for particular claims of discrimination. Employers who are continually improving are in compliance. This lowers the risk of pro forma compliance and gaming. It emphasizes improvement of the process and conditions, with individual disputes assessed in relation to the organization's effectiveness in addressing problems rather than as a basis in themselves for determining failure or noncompliance.

Courts would thus not unilaterally construct or articulate standards for effective internal conflict resolution mechanisms to be adopted or followed by employers as a basis for avoiding liability. Instead, they would participate in creating a structure for employers, with the assistance of mediating actors, to develop and evaluate the effectiveness of the employers' internal systems. Coercion would be used not to enforce predefined compliance standards, but rather to induce employers to participate in the development of effective internal systems that give meaning to the general sexual harassment norm in context. Judicial coercion would sanction those employers who have not undertaken the process of internal problem solving, and whose capacity to address problems of harassment or discrimination remains ineffectual.

Some commentators and courts have experimented with the idea of a self-evaluative privilege that would protect employers from disclosure of

361. Dorf & Sabel, *supra* note 6, at 400-02.

information gathered as a result of internal audits conducted proactively to identify and address bias.³⁶² This approach, however, is ill advised. It poses a serious risk of perpetuating the perverse incentives it is intended to eliminate. Employers who have no interest in correcting problems could use the privilege to insulate information about wrongdoing from public scrutiny. Employers could not retain the privilege unless they restricted disclosure of the report to top management. This restriction would limit the report's utility in fostering effective change. Moreover, an across-the-board secrecy solution would discourage employers from exchanging information with other companies facing similar problems. A structural solution would have the advantage of continuing to encourage the sharing of information about norms and problem-solving strategies, but detach the existence of information revealing problems from the necessary imposition of liability. Liability would only attach if employers did not respond to patterns of bias or exclusion that were revealed by self-study. Only if problems are detectable and correctable, and yet remain unchanged, would employers face liability as a result of engaging in internal problem solving.

There may also be value in exploring procedural innovations that would enable employers who have instituted effective internal procedures to avoid a full trial on the merits of the underlying claim. This would further reward employers who developed effective internal processes by reducing their litigation costs and uncertainty. Bifurcating trials on the affirmative defense and business necessity might accomplish this goal without undercutting the court's role in encouraging employers to take the effectiveness requirement seriously. However, summary judgment does not offer a viable procedural solution in many cases because of the

362. Ordinarily, privilege attaches only to documents collected in preparation for litigation under the attorney-client privilege. Studies of discrimination problems that are unrelated to litigation and geared at ending firm discrimination before a suit begins rarely are privileged. See *Hardy v. New York News*, 114 F.R.D. 633 (S.D.N.Y. 1987). The self evaluative privilege, where recognized, applies to 1) self-critical documents; 2) involving areas where the public has a strong interest in the free flow of information; 3) information gathering which would be discouraged if discovery were allowed; and 4) information which was treated by the parties as highly confidential. Courts require that only top corporate officials be able to see the information in order for the privilege to hold. See, e.g., *Troupin v. Metropolitan Life Insurance Company*, 169 F.R.D. 546, 548 (S.D.N.Y. 1996), (court allowed the privilege for documents recounting interviews with employees about what they saw as barriers to the advancement of women in the company because the reports were kept "strictly confidential" and availability was restricted "to senior officials on a need to know basis"); *Flynn v. Goldman, Sachs & Co.*, 1993 WL 362380, at 2 (S.D.N.Y. 1993) (court concluded that a report by a diversity consulting company met the confidentiality requirement because their report had "not been circulated beyond senior management. . . and thus ha[d] been treated as confidential"). If the court allows the privilege, facts are still discoverable, but analysis of those facts are not. See *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 219 (D. Mass. 1980) (the court considered the following to be factual items not covered by the privilege: the company's policy statement, dissemination of policy, identification of affirmative action program responsibilities, workforce analysis statistics, and statistics on hiring and promotion).

fact-intensive nature of the effectiveness determination.³⁶³ Aggressive use of summary judgment also might encourage courts to revert to a rule-enforcement approach to discrimination. Summary judgment in hostile environment cases currently encourages courts to impose over- or under-inclusive rules in close cases that would effectively undercut the emphasis on context-based decisionmaking.³⁶⁴

In many respects, the role I advocate is simply an extension of my earlier work articulating a normative theory for the role of courts in public remedial decisionmaking.³⁶⁵ However, in the structural workplace regime, the court's role is not limited to shaping this process upon a finding of a violation. The potential of the court's norm-generating regime lies in its creation of a framework for encouraging employers to develop these problem-solving processes on a more permanent basis. The court does not convene and directly oversee the problem-solving process. Instead, it establishes the general norm, and it then creates the incentives for employers to create processes that comply with the norm and help solve more general problems connected to fair and efficient decisionmaking under conditions of complexity and diversity. In addition, the results of these particular efforts to implement the general norm in specific contexts will then redefine the court's articulation of the general norm.³⁶⁶ The court will have information about patterns, problems, and practices

363. See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 *Wake Forest L. Rev.* 71, 95–96 (1999) (noting that harassment cases do not lend themselves to summary judgment because they require a highly fact-specific inquiry to assess pervasiveness of harassment, severity of harassment, and credibility of conflicting accounts of alleged incidents).

364. See, e.g., *Jones v. Clinton*, 520 U.S. 681, 684 (1997) (granting summary judgment on the ground that one incident is insufficient as a matter of law to constitute hostile environment harassment); *EEOC v. Barton Protective Serv.*, 47 F. Supp. 2d 57, 61 (D.D.C. 1999) (finding plaintiff's delay of eleven months before filing internal complaint unreasonable as a matter of law). Krieger, Parks, and Sridharan demonstrate that this legal standard fails to take account of the contextual factors and the social science literature on responses of women to harassment. See Krieger et al., *Employer Liability*, *supra* note 73, at 43–44.

365. In the context of overseeing the formulation and implementation of public law remedies, I proposed a deliberative model in which courts: (1) articulate the normative parameters of the remedial enterprise, which are shaped by the general liability norm; (2) establish a deliberative model of decisionmaking and induce the parties to establish the principles governing participation in that process; (3) engage a third party to assist the participants in structuring and engaging in the decisionmaking process; (4) outline the characteristics of a legitimate process of remedial decisionmaking, which include direct involvement by stakeholders, consideration of remedial alternatives, measurement in terms of effectiveness, and creation of a record permitting the process and its results to be visible and evaluated; and (5) offer incentives to participate in the remedial process, share information, and produce an effective remedy. See Sturm, *Public Law Remedies*, *supra* note 51, at 1427–44.

366. *Id.* at 1435–36 (arguing that “over time, courts’ decisions assessing the adequacy of particular remedial efforts may reveal patterns of effective remedial processes and outcomes in particular institutional contexts” and that “[t]hese decisions have the potential to contribute to the normative development of remedial process” and also

that could enrich the understanding of the normative issues, and enable the articulation of rolling standards when there is enough information to justify the interim conclusion that such a standard is warranted.

Courts already perform some version of this role at the remedial stage of sexual harassment and promotion cases. Courts have overseen the formulation, approval, and implementation of consent decrees, some of which contain many of the characteristics of effective problem solving that were described in the earlier section of this Article.³⁶⁷ In other instances, the court has entered an order following an adjudication of liability, which induces the employer to create a process of problem solving and dispute resolution along the same lines.³⁶⁸ A court that acts self-consciously to construct a framework for accountable deliberative decisionmaking as part of the remedial stage would provide not only a visible opportunity to witness a problem-solving process, but also to share the results of that process through a reported decision. The court's role would be both to identify unlawful behavior and help inform the process of finding workable solutions in cases in which there is no question that a norm is being violated.

Thus, in this structural regulatory regime, courts create a framework that will generate the information, incentives, and opportunity to elaborate the meaning of a general norm in context and the development of contingent solutions in cases that do not lie on the normative boundary. This process would then generate information that would deepen our

"produce greater clarity concerning the substantive norms informing the remedial decisionmaking in particular contexts").

367. In *Haynes v. Shoney's, Inc.*, the court approved a consent decree for a class of over 200,000 employees of Shoney's restaurants in twenty-three states, in a lawsuit alleging sexual harassment and racial discrimination. No. 89-30093-RV, 1993 WL 19915, (N.D. Fla. Jan. 25, 1993). The order included new recruitment and equal opportunity officers, new grievance procedures, disciplinary procedures, training and education, adopting and implementing job qualification and performance standards. *Id.* at *8. See also, *Bockman v. Lucky Stores*, No. CIV S 83-039 RAR, 1986 U.S. Dist. LEXIS 17405, at *6-*8 (E.D. Cal. Nov. 20, 1986) (establishing information gathering system, documenting of complaints, development of policies, hiring a recruitment consultant and personnel recruiter, network with other organizations); Joint Motion for Entry of Consent Decree, *EEOC v. Mitsubishi Motor Manufacturing of America*, No. 96-1192 (C.D. Ill. June 10, 1998), <http://www.ljx.com/practice/laboremployment/mitsubishi.html> (on file with the *Columbia Law Review*); *Roberts v. Texaco Inc., Agreement In Principle To Settle*, at <http://staging.courtstv.com/legaldocs/business/texaco/settlement.html> (last visited Oct. 7, 1999) (on file with the *Columbia Law Review*) (proposing consent decree that provides sexual harassment policy, complaint procedures, supervisor accountability policies, sexual harassment training, and sensitivity policies). These cases adopt different approaches to remedial formulation and implementation. For example, Texaco's panel approach employs expert remedial formulation, while the Home Depot approach employs a deliberative model. The relative efficacy of these different strategies is the subject of future research.

368. See, e.g., *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992); *EEOC v. Astra USA, Inc.*, No. CIV. A. 98-40014, 1998 WL 80324, at *1-*3 (D. Mass. Feb. 5, 1998) (requiring, in sexual harassment decree, employer to pay damages and develop a policy prohibiting sexual harassment, training programs, and a monitoring system).

understanding of the general norm, and perhaps better enable us to construct wise solutions in the cases closer to the normative line.

B. Developing the Role of Individual Change Agents

The story of effective workplace problem solving for second generation bias prominently features the role of internal change agents, such as lawyers, human resource professionals, and consultants. While these actors differ in their professional roles and formal positions, they share the common role of cross-boundary problem solver and mediator of legal norms. Yet, prevailing conceptions of professionalism, particularly for lawyers, frequently cut against this role. Legal education overemphasizes the litigation domain, and thereby fails to provide adequate training or legitimization of lawyers' roles as problem solvers. Much of the academic discussion about law in the workplace overlooks the role that lawyers play outside the litigation arena. Moreover, the current financial incentives for lawyers, particularly in the plaintiffs' bar, predispose lawyers to view problems predominantly through the lens of litigation. Other individual change agents, such as consultants and human resource professionals, also conceive of their roles narrowly and lack the incentives to pool their learning and develop ways of holding each other accountable.

On my account, individual change agents are critical to the internal problem-solving process and the external aggregation of information and experiences because they are best positioned to spread learnings into communities of practice. If correct, that fact requires revising the roles of human resource specialists, employee advocates, organizational development specialists, ombudsmen, corporate counsel, and general line managers. In order to see themselves as change agents, they need to expand their focus from individual cases and complaints to a systemic viewpoint. They should define their roles to include the gathering of data across cases, looking for patterns, and making changes based on them. What is critical here is how these change agents address the patterns they identify.³⁶⁹

It is crucial to devote energy, thought, and resources to the project of building the capacity and accountability of individual change agents to function as problem solvers. One important component of this shift is to focus academic attention on documenting and analyzing the emerging practice, assembling an inventory of stories or case studies involving effective change agents. This inventory would illustrate the importance of expanding the conception of advocacy beyond that of judicial and administrative proceedings, and broadening the conception of the professional role to include a focus on building institutional capacity to problem solve.

369. Cf. Lester M. Salamon, *The New Governance and Tools of Public Action: An Introduction* (forthcoming in *The New Governance and the Tools of Public Action: A Handbook*) (manuscript at 27-31, on file with the *Columbia Law Review*) (describing the shift in necessary skills for public governance to "enablement skills" that include activation skills, orchestration skills, and modulation skills).

It would provide a basis for broadening the field of action to include internal workplace decisionmaking, insurance companies, nongovernmental research groups, and other nongovernmental sites. Case studies would provide concrete contexts to spur experimentation and begin to identify patterns of practice. This would help identify and foster the conditions that enable a variety of organizational professionals and managers to become reflective practitioners and innovators in dealing with deeply embedded gendered norms and work practices.

Another aspect of role revision entails fostering communities of practice that themselves can create regular opportunities to share best practices and to develop ways to evaluate and continually improve practice. No easy shortcut exists to the work of building these professional networks. Efforts to professionalize through an accreditation process or the imposition of a unitary code of professional conduct are quite likely to short-circuit the experiences and information sharing that are so crucial to building capacity in a complex field. They also ignore the lessons about the inadequacy of unitary, centralized codes of process as an approach to complex workplace relationships. Further work is needed on how to foster communities of practice without importing the perils of professionalism.

Finally, it is important to examine and suggest ways of altering the incentive structures that lock in the cultural norms of a rule-enforcement approach. One place to start is with professional education and training. Law schools face the challenge of incorporating a problem-solving approach into the substance and culture of their standard curriculum. The means of financing the work of problem-solving practitioners, including the issue of attorneys' fees, also needs to be addressed. For example, courts could structure attorney's fee payments for monitoring compliance to encourage plaintiffs counsel to devote attention to the remedial stage.³⁷⁰ Work is also needed on the location, accountability, and role of inside counsel.

This emphasis on legal actors as problem solvers prompts the question: Why law and lawyers? Is this law or management? Isn't this proposal asking lawyers to act in ways that they are neither trained nor predisposed to operate? One important response is to challenge as overly narrow this view of how lawyers do and should operate. In both public and private law settings, lawyers perform a more transactional, problem-oriented role than this criticism acknowledges.³⁷¹ Lawyers already play an extremely influential role in shaping workplace decisionmaking. This

370. If monitoring payments are paid on a lump sum at the outset, plaintiff's lawyers lack adequate incentives to focus on implementation.

371. See David Sugarman, *Blurred Boundaries: The Overlapping Worlds of Law, Business and Politics*, in *Lawyers in a Postmodern World* 105, 105-07 (Maureen Cain & Christine B. Harrington eds., 1994); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *Yale L.J.* 239, 243-44 (1984) (arguing that a business lawyer is a transaction-cost engineer); William P. Quigley, *Reflections of Community*

Article has documented how lawyers can be irrelevant or even detrimental to normative and productivity concerns within the workplace. Law and lawyers will be involved one way or another. Given this reality, it becomes important to focus on creating a regulatory framework that at least discourages lawyers from preventing thoughtful innovation and, more optimistically, enables lawyers to act as translators and enablers of normative behavior within the workplace.

C. Building the Capacity of Mediating Institutions

Mediating institutions figure prominently in the case studies illustrating the potential for effective workplace problem solving. They have tremendous influence, both on the workplace site and in judicial decisions. Yet, they have been largely overlooked or treated skeptically by commentators and practitioners. The case histories presented here support far greater emphasis on mediating institutions in research, advocacy, and public policy initiatives. I leave for another article the project of analyzing more fully the incentive structures and cultures of various intermediate organizations, and the entry points for enhancing their legitimacy and accountability as mediating institutions. A first step would be to develop an inventory of practices by various nongovernmental organizations, including insurance agencies, employee caucuses, unions, and consulting organizations. It is also worth considering how stakeholders affected by their actions, including both companies and employee advocates, could intervene to improve the capacity and accountability of nongovernmental organizations. Governmental agencies could play a role in encouraging these intermediary organizations to share their knowledge, to assess their own effectiveness, to enable others to evaluate their work, and to develop networks within the communities they serve.³⁷² In fact, some of the more creative local offices of the EEOC have begun to experiment with initiatives that move in this direction.³⁷³ Finally, the organizations themselves have begun to think systematically about how they can build hybrid institutions and networks that embrace this mediating role.³⁷⁴

Organizers: Lawyering for Empowerment of Community Organizations, 21 Ohio N.U. L. Rev. 455, 455-56 (1995).

372. Cf. Dorf & Sabel, *supra* note 6, at 345-46 (arguing that government agencies, by creating an "infrastructure of decentralized learning" that allows communities across the country to compare the success of their programs with those of other communities, can play an important role in helping local governments develop efficient policies); Liebman & Sabel, *supra* note 352, at 87 (describing system in which the federal government gathers, pools, and shares information regarding state initiatives, thereby allowing both federal and state governments to refine their own programs in light of this comparative information).

373. See EEOC, Litigation Task Force Report, *supra* note 345, at 22, 39.

374. In fact, as a result of the research for this Article, I have begun to work with the Center for Gender in Organizations on just this issue—namely, their role as a mediating organization in pooling knowledge and in building communities of practice.

CONCLUSION

This Article demonstrates the continuing need to remedy second generation employment discrimination and the limits of a rule-enforcement regulatory approach to this complex problem. It documents the emergence of a structural, judicially de-centered regulatory approach that encourages effective problem solving within the workplace. The Article develops the promise of this approach as a "third way" that avoids the traps of privatization and judicial management.

In many ways, this Article strives to operate across, and even to redefine, conventional categories and boundaries. At the same time, it builds on existing practices as the springboard for this reconceptualization. Within this effort to reconceptualize lies the project's promise and its potential limitation. Familiar ways of thinking shape, and threaten to recast into traditional categories, the interpretation of new formulations. And the breadth of the project is both crucial as a first step and self-limiting. The Article maps out patterns of practice that cut across regulatory domains, identity categories, professions, and industries. The common thread is the reorientation of the workplace equality project toward redressing problems rooted in complex organizational dynamics. This preliminary mapping of the terrain necessarily glosses over differences in the implementation of a structural approach, depending on the specific problem or context.

For example, the dynamics of racial and gender bias and remediation differ in important respects that cannot be adequately explored here. My impression from preliminary research is that companies have made more progress in developing structural approaches to promoting gender equity. This may be because of greater degree of contact between men and women. It may be because of the persistence of deeply embedded racial patterns that are hard to disentrench, at the same time that racial and ethnic categories have become increasingly blurred and problematic. There is also a spiraling effect to success: As more women gain power in the workplace, they build the constituency, capacity, and incentive to address issues at the intersection of gender equity and effectiveness. Courts' willingness to intervene may be greater when they can easily locate the capacity and constituencies for change within the organizational or nongovernmental arena. It is important in future work to identify both the parallels and distinctions in addressing different forms of bias, and to extend the analysis begun here to other areas, including age, disability, and sexual orientation.

The emphasis on bootstrapping theory and practice brings its own challenges. The approach relies upon particular case studies to illustrate the potential of problem solving, and in the process to tease out contingent criteria of effectiveness that can then be revised in light of different stories. Necessarily, therefore, this is a preliminary and somewhat tentative endeavor. One cannot simply extrapolate from this somewhat limited set of case studies to a general theory of regulation. Instead, theory

building cannot proceed without deepening and extending these case studies to learn about the features that provide for, or detract from, their effectiveness, legitimacy, and accountability in different contexts. For this reason, this Article represents a first step in a long term research agenda that will develop a more extensive repertoire of narratives, and examine the role of problem-solving actors and institutions within those settings.³⁷⁵

This Article is part of a growing body of work exploring more generally the question of how to regulate dynamically in a world of complexity and change. Other scholars have documented analogous developments in a variety of regulatory contexts in which more tiered, interactive, and complex relationships between government agencies, courts, nongovernmental actors, and corporations have emerged.³⁷⁶ These areas include school reform, environmental regulation, labor reform, occupational health and safety, drug courts, health care, and international labor standards.

Hopefully, the workplace example will inform the work of both those concerned specifically with increasing workplace equality and those interested in the more general regulatory questions. It certainly invites further inquiry into the role of intermediary institutions and actors as enablers of complex regulatory regimes adequate to the challenge of complex problems. Perhaps it will encourage at least some companies to shift their focus toward learning from the Intels and Home Depots, instead of thinking simply about how to avoid becoming the next Texaco.

375. For example, this inquiry will be the centerpiece of a year-long, interdisciplinary, theory/practice seminar at Columbia Law School, which will include a substantial fieldwork component.

376. These scholars include Mark Barenberg, Michael Dorf, Jody Freeman, Archon Fung, Brad Karkinaan, Jim Liebman, Debra Livingston, Frank Michelman, Martha Minow, Chuck Sabel, Bill Simon, Gunther Teubner, Louise Trubek, and Lucy White. This is but a partial list.