Lawyers and the Practice of Workplace Equity

Susan Sturm
*Columbia Law School, ssturm@law.columbia.edu*

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship

Part of the Legal Ethics and Professional Responsibility Commons, and the Legal Profession Commons

**Recommended Citation**

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1004

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.
INTRODUCTION

Lawyers involved in the pursuit of workplace equity are difficult to pigeon-hole. Of course, the practice of many employment lawyers conforms to conventional understandings of lawyers’ roles. These lawyers litigate cases on behalf of management or employees, advise clients about their legal rights and obligations, and define their mission as avoiding liability or winning battles in court. But innovators have crafted interesting and dynamic roles that transcend the traditional paradigm. These innovators connect law, as it is traditionally understood, to the resolution of the underlying problems that create and maintain workplace inequity. Civil rights lawyers working in both public and private settings are using their knowledge, credibility, relationships, and reputation to leverage change initiatives with
companies and communities. Proactive lawyers (some plaintiffs’, some management’s) are spearheading the redesign of employment systems in companies concerned about the adequacy and legal vulnerability of their workplace practices. Civil rights-oriented lawyers are serving stints in newly-designed positions within companies that have embarked on major change initiatives. Workplace advocacy organizations are experimenting with interesting combinations of law, policy, organization, community development, training, and institutional redesign. In the process, they are redefining the nature of their relationships with other professions and with the constituencies they represent.

In developing creative solutions for problems, and new institutions to implement them, these lawyers are extending a great tradition among American labor and employment lawyers. Louis Brandeis originated the concept of the “lawyer for the situation,” charged by management to develop solutions to labor problems. Brandeis developed such enduring American workplace institutions as arbitration boards, employee shared ownership, and even pay spreads over the year, as well as such ideas, too radical even for our own times, as elected employee committees to run personnel. Brandeis is a powerful example of the lawyer as problem-solver. His career raises questions of accountability and responsibility that continue to challenge his contemporary successors.

Throughout the twentieth century, the creation of enduring institutions has been part of the practice of labor and employment innovators. Employers’ lawyers helped create the earliest planned litigation committees in the open shop movement. Other employer lawyers worked to make grievance arbitration work. Lawyers who sought to protect employees through legislation helped create a community in support such reforms. The explosive union organization campaigns of the 1930s could not, at first, draw on a specialized labor bar. Instead, lawyers with backgrounds in constitutional and criminal

2. See Hair, supra note 1, at 11.
3. The next two paragraphs draw on conversations with Alan Hyde, reflecting the seminar he and James Pope teach on the history of American labor lawyering.
7. Julius Henry Cohen, They Built Better Than They Knew (1946).
law worked with unions to create new institutional forms: the industrial union, labor-community alliances around political and economic issues, and new government agencies.

The two greatest postwar institutional creations for workplace administration await comprehensive documentation. The first was the Great Compromise of the 1950s, by which management accepted unions, collective bargaining, pensions, health benefits, and grievance arbitration, while unions agreed to limit strikes and other workplace action and accede to managerial control. Often referred to as the Great Compromise, this understanding has not yet been traced to the microlevel, where individual managers, union officers, and their lawyers assessed what was possible. Similarly, we await biographies of the key shapers of the apparatus of workplace equal employment opportunity, such as early consent decrees combining goals and implementation committees. Today's employment lawyers have helped build community-based workplace projects and community campaigns for worker ownership and against plant closing.

The 1991 amendments to the Civil Rights Act of 1964 attracted to the practice of employment law a new generation of lawyers, who approach employment litigation like personal injury cases. However, alongside this trend, today's labor and employment lawyers continue to solve problems by participating in the creation of institutions that outlive any lawsuit. They continue to face problems of accountability—the relation between the lawyer's power and his or her constituency's, and

12. The future Supreme Court Justice, William J. Brennan, was a management lawyer in New Jersey in the 1940s and 1950s, and he played a crucial role in getting large employers to accept labor unions and grievance arbitration. His biographers to date, however, have done little with this story. Arthur J. Goldberg played a pivotal role in these events but failed in his efforts to broker a grand, Swedish-style labor-management pact. See generally David L. Stebenne, Arthur J. Goldberg: New Deal Liberal (1996).
the tension between advocacy and collaboration—that resemble those faced by Louis Brandeis.

These dynamic and transactional roles are not unique to innovators in the employment area. Transactional lawyers, family law practitioners, and creative in-house counsel have been referred to as problem-solvers, transaction cost engineers, and lawyers for the situation. Yet, the dominant conception of the lawyer fails to take account of these transactional, problem-solving dimensions of lawyers’ roles. Many of the traditional assumptions about law and lawyers do not fully explain these practices. These lawyer-innovators span organizational and disciplinary boundaries. Their practices are quite surprising when examined through the lens of traditional professional dichotomies, such as litigation/non-litigation, public/private, legal/managerial, and law/organizing.

In employment law and other civil rights areas, these practices have remained largely below the radar screen and outside of the dominant discourse about lawyers’ practice. As workplace equity problems become more complex, these more innovative and dynamic roles assume greater significance. Gender, race, and ethnic inequalities continue to exist, but their manifestation increasingly deviates from the classic paradigm of “first generation” problems. First generation bias involves deliberate exclusion or subordination directed at identifiable members of disfavored groups. It is relatively easy to define, and it violates widely shared norms of formal equality. Violations give rise to clear, rule-like remedies and sanctions imposed after the fact.

First generation forms of exclusion continue, but have been increasingly intertwined with, and in some contexts, supplanted by “second generation” forms of bias. Many forms of workplace inequality do not result from deliberate and overt subordination or exclusion. Structures of decision-making, patterns of interaction, and cultural norms often produce second generation inequalities that are not immediately discernable at the individual level. Unlike first generation bias, these problems cannot be traced to deliberate exclusions by identifiable bad actors. Biased treatment may result from cognitive or unconscious bias, from the dynamics of group interaction, from organizational norms, or from underinclusive labor markets, rather than

16. In a recent article, I developed the idea of second generation bias and an emerging “structural” approach that emphasizes dynamic interaction among multiple actors engaged in problem-solving. Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458, 524-25 (2001). This Article explores the role of lawyers within this emerging structural model. To understand the empirical and normative premises informing the analysis of lawyers’ roles, it is necessary to briefly elaborate upon some of the themes developed in the earlier article.
from deliberate exclusion. The overall racial or gender impact may be
discernible only if examined in context and in relation to broader
patterns of interaction and access. The organizational dimensions of this
bias are crucial determinants of its expression.

In short, second generation workplace inequity is, by its nature,
complex. It is often structurally embedded in the norms and cultural
practices of an institution. Racial, gender or ethnic exclusion may be
symptomatic of broader structural unfairness. Gender- or race-based
exclusion may overlap with, or be complicated by, patterns of bad
management, general worker abuse, or economic exploitation driven by
bottom-line concerns. Organizational practices that create gender bias
can also cause organizational dysfunction. Racial, gender, and ethnic
injustice may be best remedied by addressing these underlying
institutional arrangements. No single normative frame adequately
defines the goal of achieving full and meaningful participation in the
workplace by all. Issues of racial and gender bias are deeply connected
to other concerns such as health and safety, worker participation,
working conditions, and long term economic sustainability of a
community.

Second generation problems resist definition and resolution solely
by enforcing codes of conduct. Instead, remediation of workplace bias
and exclusion requires a process of problem-solving. This process
includes identifying the organizational (and potentially legal) dimensions
of a problem, gathering and analyzing relevant information, building
individual and institutional capacity to respond, and designing and
evaluating solutions that involve participants in the problematic patterns.
This approach looks to systems, structures, and problem-solving
processes within and across organizations for innovations that get to the
heart of biased workplace practices. It encourages organizations to
identify and innovate to correct these problems, and enable cross-
organizational learning to take place. The key is to create ongoing
processes where this cross-boundary problem-solving continues to
happen.

Innovative lawyers have responded intuitively and creatively to the
increasing complexity in workplace problems, the diffusion of the sites
in which legal norms are elaborated, and the obvious limitations of
traditional, legalistic responses. They are working without fully
developed theories of legitimacy and accountability to evaluate their
choices and strategies.17 Scholars have begun to document and analyze

17. See Judith Resnick et al., Individuals Within the Aggregate: Relationships,
forms of group-based advocacy and the failure of courts, ethical rules, and
commentators to address issues of financing, allocation of responsibility, and
similar developments in areas such as health care, community economic development, environmental regulation, and school reform. Much of this work proceeds in the tradition of pragmatism—bootstrapping theory from critical analysis of practice, revising practice in light of theory, and so on. This shift in practice is characterized by a problem-oriented approach involving critical evaluation, collaboration across professional boundaries, and innovation in institutional design.

This interest in problem-solving is not limited to the legal profession. Problem-oriented forms of practice characterize the work of innovative actors in fields as diverse as policing, organizational development, religious leadership, human resource practice, union accountability); William H. Simon, The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era, 48 U. MIAMI L. REV. 1099, 1101, 1111 (1994) (arguing that the scholarship on progressive lawyering does not adequately treat lawyering issues of collective practice and the role of lawyers’ judgments in promoting effective collective action).


23. MALCOLM K. SPARROW, IMPOSING DUTIES: GOVERNMENT’S CHANGING APPROACH TO COMPLIANCE (1994); Fung, supra note 21; Susan Sturm, Creative Tensions [or Creating Tensions?]: A Preliminary Account of Structural Change in the New Haven Police Department (Sept. 3, 2001) (unpublished manuscript, on file with author).


organizing, and management. We are witnessing and participating in the development of an emerging field of practice that spans professional boundaries. Law is not an autonomous discipline but is one of many public-oriented domains that is responding to shifts in the nature of social problems, the structure of organizations, and the architecture of public governance.

These developments pose important questions for scholars and practitioners interested in the law’s role in public problem-solving. What are the features of these dynamic forms of practice? How do they vary depending on the context and problem? What criteria should we use to evaluate their efficacy? What skills and analytical tools are needed to perform these roles effectively? How do these practices relate to the practice traditions and narratives that have come to define how we think about lawyers’ roles? What legitimates (and distinguishes) lawyers’ roles in these collaborative, problem-solving initiatives? How can lawyers and other social actors be held accountable for their work in these dynamic, experimental projects? More precisely, can we develop systems of accountability that preserve the dynamic, structural character that is so crucial to the emerging forms of legal practice?

These are crucial questions that cannot be answered adequately in the abstract or through across-the-board theory divorced from the range of contexts and problems in which lawyers participate. At least at this stage of knowledge, the method of constructing theories of practice should mirror the method of the problem-solving practice itself. Theory develops by, and is in turn revised through, critical engagement with the practices themselves.

This Article examines the role of law and lawyers involved in reducing bias in and expanding access to the workplace. It represents the next step in a much broader examination of role innovators, including lawyers, involved in workplace equity initiatives.


30. This project grows out of recent work developing what I call a structural approach to second generation employment discrimination. See generally Sturm, supra note 16.
proceeds by locating lawyers' roles in a broader set of developments concerning the nature of workplace bias, the structure of organizations, and the regulatory environment. The legal actors described in the opening paragraph share a structural approach to their role: an orientation constructed around lawyers' capacity to evaluate, collaborate, and innovate. They have moved away from the courtroom as the barometer of their social change activity, although they continue to turn to the courts to articulate social justice aspirations and create pressure for change. Their roles and strategies emerge from a self-conscious attention to the relationship between legal advocacy and the dynamic character of the problems they must tackle. They participate in forming and adapting the regulatory architecture to permit and encourage this form of problem-solving.

I develop the idea of structural lawyering by examining the practices of four legal actors that employ a structural approach to workplace advocacy. Examination of the practice of innovative lawyers is one important method of developing new conceptions and models for law, lawyers, and regulation. It also uncovers the dilemmas accompanying this problem-solving role, focusing particularly on the need to rethink approaches to lawyers' accountability. Before turning to this examination of lawyers' practices, however, it is important to understand what is prompting a structural reconceptualization of lawyers’ roles.

I. THE IMPETUS, OPPORTUNITY, AND ORIENTATION OF STRUCTURAL LAWYERING

What is it that prompts plaintiff and management lawyers alike to expand and redefine their roles? Lawyers' roles in pursuing workplace equity are developing in response to the nature of the problems they face, the regulatory framework establishing opportunities to address those problems, and the stakeholders and constituencies who support and resist efforts at change. The same conditions that prompt lawyers to redesign their roles also offer opportunities to construct new roles. This Section describes the environment that workplace equity lawyers inhabit. Understanding this environment is necessary to make visible the challenges, choices, and dilemmas that structural lawyers face.
A. The Definition of Workplace Equity as a Practice: Complexity and Interdependence

Law addresses a variety of problems and goals relating to the pursuit of workplace equity. Workplaces have become highly regulated sites, and lawyers are regular and significant participants in decisions and practices affecting workplace equity. Innovative lawyers have moved beyond traditional legal formulations of the problems they address, the goals they pursue, and the remedial strategies they employ. They are responding, in part, to the complexity of the problems they confront and the limitations of litigation as an exclusive tool.

The most easily understood forms of workplace bias consist of formal discrimination—deliberate exclusion or marginalization because of an employee's race, ethnicity, national origin, sex, age, religion, sexual orientation, or disability. These forms of exclusion provide the clearest target for traditional forms of legal advocacy: litigation aimed at establishing and enforcing rules prohibiting disparate treatment. However, these "first generation" forms of workplace inequity are frequently embedded in an institutional structure that preserves exclusion, even if it prohibits more deliberate discrimination. These underlying norms, arrangements, and processes may themselves be problematic for reasons unrelated to concerns about equity and fairness. As lawyers face the challenge of implementing remedial decrees designed to eliminate the effects of systems that have deliberately subordinated workers, they find themselves dealing with issues of organizational norms, culture, and structure.

31. A review of the casebooks addressing employment law reveals the range of statutory and doctrinal regimes affecting the employment relationship (discussing topics such as discrimination, labor participation, safety and health, wage and hours, privacy, and corporate governance as part of the curriculum). See, e.g., SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW (2000); MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW (1999).

32. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). "Disparate treatment"...is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Id.

Many forms of workplace inequality do not result from deliberate and overt exclusion. Structures of decision making, patterns of interaction, and cultural norms often produce "second generation" inequalities that are not immediately discernible at the level of the individual. For example, in one case, plaintiffs brought a class action lawsuit alleging that Home Depot's hiring and promotion system steered women to lower-paying, lower-status, dead-end jobs. In its decision certifying the class, the court validated the plaintiffs' theory attributing this pattern to a highly arbitrary, subjective decision-making process that encouraged personnel decisions based on stereotypes:

The subjective decision-making 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.

Scholars have also documented the systemic roots of current workplace inequity in different organizational contexts. David Wilkins and Mitu Gulati offer a trenchant analysis of law firm hiring and promotion practices that shows how the tournament system of promotion combines with informal work practices, cognitive biases that steer blacks away from interactions crucial to success, and an overabundance of talent in the pool from which partners are drawn, to systematically undermine advancement of black lawyers. Robert Nelson and William Bridges have shown how Sears's system of internal promotion, decentralized and unaccountable decision-making, and dysfunctional relationships between local and national management exacerbated gender stereotypes and produced inequality in wages and employment conditions for women.

These more complex and interactive roots of bias are often only visible if examined in context, over time, and in relation to broader

34. See Sturm, supra note 16, at 468-74.
36. Id. at *49-50 (quoting a sociologist's report submitted by plaintiffs).
patterns of conduct and access. They are often linked to problems that produce workplace inequity, but lie beyond the reach of formal legal prohibitions. For example, work and family issues figure prominently in the dynamics of gender participation in many workplaces. Exclusion results, in part, from stereotyping about women as workers based on their dual role as caregivers. But work/family questions connect with more general concerns about the values and incentive structures operating within firms, such as the question of the role of time in structuring and evaluating work. These organizational governance and cultural questions interact with, although they are not co-extensive with, gender bias concerns. Both must be addressed to achieve full and productive participation of women (and men, for that matter) in the workplace.

Second generation forms of bias do not fall neatly within predefined legal categories. Gender- or race-based exclusion may overlap with, or be complicated by, patterns of bad management, general worker abuse, or economic exploitation driven by bottom-line concerns. Moreover, formal legal categories do not correspond to the dimensions of the problems they target. Issues of racial and gender bias are deeply connected to other concerns such as health and safety, worker participation, working conditions, and the long-term economic sustainability of a community. This interconnectedness is illustrated by a recent dispute involving K-Mart in Greensboro, North Carolina. Low wages, poor working conditions, and abusive treatment prompted employees to unionize. Many of the workers affected were black, and there was a palpable racial and gender subtext to the abusive and unfair treatment of the workers. The labor and civil rights aspects of the


41. In addition to the traditional labor issue of wages, "workers complained that temperatures in this huge, unventilated warehouse often would soar above 100 degrees. Port-O-Johns were the only restroom facilities . . . . According to the Rev. Nelson Johnson, the level of injuries, back injuries in particular, was 'horrendous.'" HAIR, supra note 1, at 106.

42. Johnson, supra note 25, at 678-79.

Race and racism clearly played a role in the controversy. In a very real sense whites in the country, in the South, and in the Greensboro Kmart plant in particular, are victims of racism. In Greensboro, Kmart's only distribution center with a majority black work force, the company was
problem were closely intertwined. Neither issue fully explained the
dynamics contributing to workplace equity. The labor and civil rights
conflict surfaced broader considerations involving K-Mart's relationship
with the Greensboro community. The problem could not be neatly fit
into particular legal categories or adequately addressed by advocacy
groups focusing solely on one aspect.43

Interestingly, employment discrimination law and norms may play a
more limited role in addressing the problems of low-wage workers in
industries that do not have a well-developed internal labor market, even
though women and people of color are disproportionately represented in
those jobs. Many of these workers are part-time or contingent;
employers have routinely contested whether these workers are even
covered by state and federal discrimination law.44 Those that are
covered may be more reluctant to sue or unable to obtain legal
representation. Additionally, low-wage workers may be less focused on
race and gender inequality (even if it is pervasive and systematic) than
they are on other issues such as wage payment and workplace

paying an average of five dollars an hour below that of its other twelve
distribution centers—seemingly a racist policy.

Id.; Hair, supra note 1, at 106 ("Workers and managers were not allowed to use the
same bathrooms, managers insulted workers frequently and sexual harassment and racial
slurs were common and tolerated.").

43. Rev. Nelson Johnson eloquently summarized the importance of resisting a
narrow formulation of the problem as a race struggle for economic rights, and instead
raised an alternative framework of building sustainable communities. Johnson, supra
note 25, at 676-80.

The Pulpit Forum worked hard to make the point that this struggle is about
justice, it is about doing the right thing by our neighbors. We said that when
fellow members of our community allege that they are slapped around,
forced into hot places, patted on the behind, subjected to all kinds of
disrespectful actions, and paid an average of five dollars less an hour than
others doing the same work in other cities, then all of our instincts for justice
need to be activated, and we all need to get involved in resolving this
unacceptable situation.

Id. at 678.

44. See Gillian Lester, Careers and Contingency, 51 Stan. L. Rev. 73, 75
(1998) (noting that "many contingent workers fall outside the scope of mandated
employment benefits and protections . . . [and] may fail to meet the legal definition of a
covered "employee".).

45. See Jennifer Gordon, From the Glass Ceiling to the Dirt Floor: A Response
to Susan Sturm's Second Generation Employment Discrimination Article (n.d.)
(unpublished manuscript on file with author).

I have found low-wage workers to be far more worried about pay, safety,
and stability than they are about discrimination. Discrimination happens in
low-paying jobs, of course. That it is so rarely the primary issue low wage
workers choose to pursue is a sign of how pressing other needs are, how
hard legal support is to come by, and how discrimination can work in
complex ways that make both those rewarded and those excluded reluctant to
As Jennifer Gordon has argued, the dynamics that produce structural exclusion at the bottom of the economic ladder require their own deep, institutional analysis.\textsuperscript{46} An internal workplace problem solving system is unlikely to address the interests of those who have not even been recognized as stakeholders.\textsuperscript{47} Moreover, employers may lack adequate incentives to address the problems of low-wage workers. Effective problem solving may thus require creating or strengthening incentives and pressures to take seriously the problems of low-wage workers. The nature of the structural analysis and strategic response necessarily varies depending upon the dynamics and circumstances of the institutional domain.

This discussion highlights the complex nature of workplace equity.\textsuperscript{48} Its complexity lies in the multiple conceptions and causes of the harm, the interactive and contextual character of the injury, the blurriness of the boundary between legitimate and wrongful conduct, and the structural and interactive requirements of an effective remedy. This complexity resists definition and resolution solely through across-the-board, specific commands and after-the-fact enforcement. Efforts to address these problems primarily through precise legal rules and direct

:\textsuperscript{\ldots}

complain (think of the Latinos hired over African Americans, women hired over men, or undocumented Chinese immigrants hired over Chinese US Citizens because they are presumed to be more vulnerable and harder working and less "difficult"—and the subsequent social labeling of the jobs they do as "beneath" African Americans or men or citizens.

\textit{Id.} at 2.

Gordon argues that:
In the underground economy of immigrant workers, strict enforcement of legal rules about wages (and taxes, and so on) may be every bit as troublesome as a solution as it is among the corporate elite – and complex, grounded responses every bit as necessary for real improvement in working conditions. Strict rule enforcement in the underground economy risks obliterating that sector’s most valuable features: its openness, its low entry costs for workers as well as small business-people, and its role as a route to more stable jobs for workers whose immigration status might otherwise prevent access to them. Yet complete abdication of rule enforcement allows the race to the bottom to continue unabated, as we stand by and wonder just how little a human being will come to be paid for a day’s work in the richest country in the world. To resolve this dilemma, the structural model . . . transplanted to the non-discrimination issues presented by the underground economy, would prompt us to pay close attention to how this particular organism really works, to the perhaps unexpected directions in which workers might want to take it, and to the various actors and systems that would need to come together for it to change.

\textit{Id.} at 8.


\textsuperscript{48} Sturm, supra note 16, at 469.
judicial (or legalistic) management of institutional change tend to mis-
\[\text{define the problems. Fear of sanctions for rule violations also}\]
discourages the production of information necessary to diagnose and
develop effective remedial responses. Change strategies centered
around courts' elaborations of specific legal rules and after-the-fact
enforcement miss the crucial structural dimension of current workplace
inequity.

Instead, remediation of workplace bias and exclusion requires a
process of problem solving. That process identifies the structural
dimensions of a problem through an insistent inquiry of tracing back to
root causes. It requires participants to articulate norms in context as
part of the process of determining why particular circumstances pose a
problem requiring remediation. It encourages organizations to gather
and share information enabling that analysis to proceed. It emphasizes
developing individual and institutional capacity and incentive to respond
to problems thus revealed. It encourages the design, evaluation, and
comparison of solutions that involve affected stakeholders. This process
involves reconceptualizing problems in ways that expose underlying
causes and bring together unlikely partners and allies. It also entails
reframing the aspirations motivating change to reflect these interlocking
problems and constituencies. Formal legal standards and categories do
not define the aims, scope, and strategies of problem solving. Instead,
law is considered in the context of a broader analysis of causes,
institutional patterns, and roles.

The challenge for those concerned about problems of equity,
justice, and access thus becomes one of constructing a practice of
workplace equity. Workplace equity is itself a set of practices that must
continually be examined and reconstructed. It cannot be reduced to a
rule or to the elimination of particular, predetermined forms of abuse.
A focus on practices, only one of which is the elaboration of formal
legal rules, captures the idea that workplace equity is a condition, a
complex system, a set of relationships and structures that foster on-going
reflection about and responses to unfairness and exclusion. Effective
regulatory and advocacy responses must themselves reflect the dynamic
character of the problems they face.

This dynamic, structural character of the substantive goal of
workplace equity has important implications for legal advocacy and for
law generally. Lawyers' work in this area involves constructing

49. The important but limited role of litigation was recognized early on by equal
pay advocates.

50. See Trubek, Advocating for Healthcare, supra note 18; Liebman & Sabel,
supra note 21.
practices of workplace equity. Workplace advocates have to think institutionally and organizationally. They must have the capacity to gather information that identifies and explains problematic patterns, to prompt the development of systems to hold companies accountable for addressing these patterns, and to collaborate with internal and external stakeholders needed to sustain on-going change.

B. The Emergence of Multi-Sector, Dynamic Regulatory Relationships

Workplace equity lawyers have witnessed a shift in the regulatory landscape as well, away from exclusive reliance on the judiciary and toward normative elaboration through a fluid, interactive relationship between problem solving and problem definition within specific workplaces and in multiple other arenas, including, but not limited to, the judiciary. Within this emerging framework, the sites for developing and implementing legal norms have multiplied and diffused. Perhaps even more interestingly, these institutions have become intertwined in their approach to legal elaboration and implementation. In the process, new institutions and practices for the elaboration of law develop. These emerging forms blur the boundaries between external and internal regulators, legal and organizational norms, and practices pursuing equity and efficiency.

The diffusion of sites for the development and implementation of workplace norms is a crucial aspect of this development. The rights revolution of the 1960s and 1970s created the leverage and legitimacy for lawyers, activists, and public policy makers to play an on-going role in shaping workplace norms and practice. Recently, federal courts have been less hospitable to expanding their role as enforcers of

51. These roles for lawyers are neither unique nor new. Transactional business lawyers have routinely performed these functions for their corporate clients. See Maureen Cain, *The Symbol Traders*, in *Lawyers in a Post Modern World: Translation and Transgression* 15 (Maureen Cain & Christine B. Harrington eds., 1994). The authors argue that “creative institution building is not occasional work done for government but regular work done for capital; and . . . it has always been so . . . Lawyers invent relationships. This is their special skill, their indispensable contribution to capital.” Id. at 32-33; David Sugarman, *Blurred Boundaries: The Overlapping Worlds of Law, Business and Politics*, in *Lawyers in a Post Modern World*, supra, at 105, 113, 117 (documenting lawyers’ historical roles as creators of new structures within business organizations, entrepreneurs, and translators of economic power into institutional and cultural activity).


This reluctance, along with other factors, has encouraged workplace advocates to diversify their efforts beyond the judiciary. Courts, legislatures, and administrative agencies continue to regulate workplace practice. However, other domains actively participate in the formulation of norms, the resolution of disputes, and the construction of problem solving practices.

One such domain is the workplace itself. Legal actors operating within the workplace, such as in-house counsel, human resource administrators, and ombudsman, routinely translate legal norms into organizational decisions and practices. Companies have developed internal dispute resolution and problem solving systems. These developments have been prompted in part by decentralized, flexible governance structures that require workers to participate more actively in decision-making concerning work assignments, leadership, advancement, pay, and evaluation. Their proliferation may also have been encouraged by recent judicial approval of workplace dispute resolution and problem solving. The structure, implementation, and use of these internal dispute resolution and problem solving processes have themselves become a focus of law-making, advocacy, and conflict.

Employee organizations—employee caucus groups and

---

57. In a previous article, I argue that recent judicial decisions can be read to encourage institutional innovation within workplaces by prescribing an approach that enables employers to avoid liability by effectively preventing and redressing discriminatory conditions. See Sturm, supra note 16, at 479-89. Two areas where these developments have emerged are sexual harassment, e.g. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (establishing an affirmative defense to hostile environment harassment by supervisors if the employer shows that it has "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"), and subjective decision-making, e.g., Home Depot, 1997 U.S. Dist. LEXIS 16296, at *47; Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 335 (N.D. Cal. 1992) (focusing on the adequacy of employers' internal decision-making processes as the basis for determining the business necessity of subjective employment practices with adverse impact).
58. See Maureen Scully & Amy Segal, Passion With An Umbrella: Grassroots Activists in the Workplace, in RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS (forthcoming). For example, African-Americans at an electronics firm experienced exclusion and bias in assignments, compensation, and social networks that provide social capital. David A. Thomas & John J. Gabarro, Breaking Through: The Making of Minority Executives in Corporate America 177 (1999). A group of employees responded by meeting in groups to share collective insights into the corporation. They attempted to work with the company, but got little response. Id. at 177-78. Their meetings led them to file a suit claiming discrimination in assignments, promotion and
unions—have become actively involved in the construction and challenge
of systems for workplace decision-making and conflict resolution. Professional communities are actively experimenting with approaches
designed to bridge concerns of equity and organizational effectiveness. Industry-wide groups have also begun to participate in designing
workplace problem solving systems and in pooling information about
recurring problems and how to address them.

Thus, law develops through the interaction among these multiple
locations of legal elaboration and implementation. These interactions
across regulatory contexts mean that the work of legal actors takes place
in multiple arenas. It does not occur exclusively or even primarily
within formal judicial or administrative agency processes. This work is
also not the exclusive domain of lawyers. Human resource practitioners, workplace advocates, union representatives, managers,
and information technology specialists, among others, are deeply
interested and involved in the redesign of institutional practices to
promote effective, fair, and equitable governance. The diffusion of
sites for law-making thus requires that lawyers work in interdisciplinary

other employment practices. Id. at 178. The suit provoked a prompt and systematic
response from the company, including the development of a process of negotiation and
problem solving that led to many innovations designed to diminish biases in the system.

Id. The company instituted mechanisms that legitimated the participation of the group in
an on-going process. Id. at 178-79. Employee groups organized around diversity issues
and social identities have an obvious connection to the legal norms, and thus can serve
as a source of accountability to assure that companies act on information revealing
problems. Id. at 178-81; see also Valerie I. Sessa, Managing Diversity at the Xerox
Corporation: Balanced Workforce Goals and Caucus Groups, in DIVERSITY IN THE
WORKPLACE: HUMAN RESOURCE INITIATIVES 37, 43-44 (Susan E. Jackson ed., 1992)
(discussing 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).

59. See Scully & Segal, supra note 58 (describing the role of employee caucuses in
addressing workplace equity issues); Warren & Cohen, supra note 27, at 631-37
(describing union collaborations with community and civil rights groups to address
issues of racial and gender equity as part of a larger reform agenda).

60. See, e.g., EMPLOYMENT ISSUES COMM., WOMEN'S BAR ASS'N OF MASS.,
MORE THAN PART TIME: THE EFFECT OF REDUCED-HOURS ARRANGEMENTS ON THE
RETENTION, RECRUITMENT, AND SUCCESS OF WOMEN ATTORNEYS IN LAW FIRMS (2000),
http://womenlaw.stanford.edu/mass.rpt.html (last visited Mar. 31, 2002); JOAN
WILLIAMS & CYNTHIA THOMAS CALVERT, PROJECT FOR ATTORNEY RETENTION,
BALANCED HOURS: EFFECTIVE PART-TIME POLICIES FOR WASHINGTON LAW FIRMS (2d
ed. 2001).


62. For a rich account of pay equity reform that documents the dynamic
interaction among lawyers, union organizers, workers, women's rights groups,
professional associations, and regulatory agencies, see McCANN, supra note 53.
collaborations with multiple stakeholders to address problems that are not limited to the articulation of legal norms or the response to potential legal violations.

The involvement of diverse regulatory actors in workplace problem solving also opens up possibilities for new structural forms of regulatory oversight by courts and regulatory agencies. This approach casts courts in a crucial but limited role. Courts in a structural regime act as a catalyst and a floor. They encourage the formation of deliberative and participatory structures aimed at solving problems that threaten the legality (and efficacy) of institutions,63 and they sanction employers who refuse to correct problems that violate well-established minimum standards or that have been identified through the problem solving process.64

For example, courts that have adopted a structural approach to problems of workplace equity elaborate general principles of nondiscrimination and underscore their continued legitimacy and importance. They create focal points for non-legal actors to give those norms meaning in new contexts, to share the results of these context-specific elaborations, and to evaluate their efficacy.65 Courts also supply incentives for employers to implement effective internal problem solving mechanisms, to evaluate their effectiveness, and to learn from the efforts of others facing similar problems. Coercion is used to induce employers to develop effective and accountable internal problem solving systems to address and prevent structural bias, and to sanction conduct that violates widely accepted, clear standards. Ideally, judicial actors collaborate in deliberations about the criteria of effectiveness, without assuming direct responsibility for formulating a code of conduct. They do this by insisting that employers, with the help of inside and outside collaborators, develop and justify working criteria for evaluating the effectiveness of their internal problem solving mechanisms. Courts are then in a position to assess employers' justification for their effectiveness criteria and their compliance with those criteria. This enables courts to function as a catalyst, rather than as either a de facto

64. Id.; McCANN, supra note 53, at 48-91 (Chapter 3: Law as a Catalyst).
65. See Carol A. Heimer, Competing Institutions: Law, Medicine, and Family in Neonatal Intensive Care, 33 LAW & Soc'y REV. 17, 38 (1999) (elaborating upon 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 solved, and what solutions are viewed as feasible); McCANN, supra note 53, at 94 (suggesting that social transformations have created new opportunities for critical assessment of practices in relation to publicly defined goals).
employment director or a deferrer to employers' unaccountable choices.66

These new roles for public engagement are themselves often forged through the participation of affected participants in crafting ad hoc institutions that connect public and private actors in an on-going process of problem solving. They could emerge from the development of a consent decree,67 from a court's post-liability remedial decision-making process,68 from a process initiated by a regulatory agency,69 or from political or community mobilization.70 The EEOC, under the leadership of Eleanor Holmes Norton, used the agency's resources to gather data and study the problem of pay equity, to create public occasions to examine the causes of the problem and its potential remedies, and to initiate litigation to prompt states to assume responsibility for identifying and addressing the problem.71 Some district offices of the EEOC have begun experimenting with proactive, interactive, and deliberative forms of involvement. They have brought together employers, plaintiffs' counsel, and employee organizations to share and compare problem solving strategies.72

A set of intermediate actors, operating within and across the boundaries of workplaces, have emerged as important players in mediating the relationship between formal legal institutions and workplaces. These actors include: legal, organizational development, and human resource professionals and the networks within which they operate; coalitions of advocacy groups concerned about a shared

66. For a comparable analysis of judicial role in the context of prison reform, see Sturm, supra note 33.


69. Chuck Sabel and Michael Dorf have generally characterized this as a federal administrative role assisting state and local governments in benchmarking by "almost literally creating the infrastructure of decentralized learning." Dorf & Sabel, supra note 22, at 345.

70. See HAIR, supra note 1; cf. McCANN, supra note 53, at 208 (concluding that "proponents [of pay equity] have generally fared best where grassroots-intensive, participatory efforts have taken advantage of formal rights to flood the implementation process at all levels"); Liebman & Sabel, supra note 21, at 4-5.

71. McCANN, supra note 53, at 52.

72. See, e.g., PRIORITY CHARGE HANDLING TASK FORCE, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, LITIGATION TASK FORCE REPORT app. C (1998) ("Creative Strategies") (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), http://www.eeoc.gov/task/pch-lit.html (last visited Apr. 5, 2002).
problem; insurance companies; employee organizations; regional, industry or academically based research/policy/practice learning networks; and consortia organized around aspects of workplace equity. These intermediaries have, at least in some instances, begun to play an on-going role in (1) building the capacity and constituencies needed to operate effective systems within organizations, (2) pooling and critically assessing examples of change initiatives across organizations, (3) generating effectiveness norms, and (4) constructing communities of practice to sustain this on-going, reflexive inquiry.  

Regulatory patterns have thus emerged that locate formal law within a broader institutional context, de-center the role of courts in addressing complex social problems, and forge on-going, dynamic relationships between government, workplaces, and mediating organizations and actors. These fluid, hybrid, problem-oriented arrangements create occasions for developing creative, systemic responses to the problems of workplace inequity. They also demand a capacity to innovate as a feature of effective advocacy. This requires a shift in the orientation of legal actors to the law and to their role as lawyers, a shift that emerges out of reflective, critical inquiry about the problems lawyers seek to address.

C. The Importance of Unlikely Allies and Converging Catalysts

Lawyers are not the only actors involved in this problem-oriented, decentralized process. Other professionals, activists, policy makers, and organizational actors have experienced a similar move in the direction of problem solving. The role of law and lawyers in addressing workplace equity emerges out of an interactive dynamic among diverse professional, political, and organizational actors. Effective lawyering requires operating at the intersection of multiple disciplines and institutional boundaries.

Shifts in organizational governance patterns contribute to the increase in interdisciplinary collaboration. Many organizations have flattened their administrative structures and increased their need for flexibility and adaptiveness. This has prompted greater emphasis on

73. Sturm, supra note 16, at 530-35.
74. I am grateful to Peggy Finster for labeling this dynamic as the "convergence of catalysts."
problem solving and collaboration as a general form of internal workplace decision-making. Top-down strategies of legal implementation do not reach these more decentralized and dynamic interactions. Thus, lawyers seeking to regulate or change behavior must find ways to integrate legal norms into day-to-day routines. This functional integration requires working actively with those responsible for day-to-day decisions, in both elaborating and implementing norms.

The process of defining and implementing legal norms under conditions of complexity also requires collaboration across disciplinary and organizational boundaries. Identifying the causes and conditions of structural exclusion requires taking account of organizational dynamics, human resource practice, cognitive psychology, and labor economics. No one of these frameworks is adequate in and of itself to understand the problem or to mobilize the changes needed to solve it. These problems call for capacity to marshal multiple forms of analysis and problem solving.

Cross-cutting alliances are also needed to mobilize the resources, incentives, information, and capacity to design and implement change. As we have seen, workplace equity problems are complex and intertwined with other legal, organizational, and economic problems. Change often requires creating the conditions that enable those with differing positions, interests, and expertise to meet in areas of overlapping concern. In the Home Depot case, for example, the convergence of creative lawyers and respected progressive insiders enabled an innovative, interdisciplinary collaboration that bridged organizational equity (full and fair participation by women) and organizational effectiveness (reducing turnover, expanding the pool of qualified applicants, and matching employees' skills with appropriate jobs.)

Civil rights and labor activism in Greensboro also demonstrates the importance of reframing problem solving to promote sustained collaboration among groups that have traditionally pursued separate or even competing agendas. The K-Mart dispute prompted a strategy of placing traditional labor issues in a broader context of community development. UNITE won certification by a 2-1 margin but couldn’t wield enough power to make any meaningful changes in contractual

76. See Sabel, supra note 75, at 28.
77. Sturm, supra note 16, at 531 & n. 270.
78. See McCANN, supra note 53, at 92-137 (analyzing the range of political, institutional, and economic factors and actors that converged to make legal mobilization around pay equity possible and effective).
79. See HAIR, supra note 1, at 114-16; Hensler, supra note 40, at 687, Johnson, supra note 25, at 676.
terms or enforcement. The Pulpit Forum, an organization of African-American religious leaders, joined the struggle. Together, UNITE and the Pulpit Forum redefined the dispute from either a labor/management or civil rights conflict, to a structural problem of building sustainable communities. This transformed the struggle into a comprehensive, community-wide initiative to keep K-Mart in Greensboro but create greater accountability for its reciprocal relationship to the community. This new framework opened up opportunities for building alliances, mobilizing change, strengthening and redefining the boundaries of organizing efforts, and working with the business community to address underlying issues of community economic development.

Courts have also looked to other disciplines and institutional arenas to share responsibility for defining and redressing complex legal problems. For example, courts have relied on organizational consultants and human resource professionals to help determine the impact of unstructured decision-making on advancement by women and people of color. As organizations and other professions develop the capacity to problem-solve and evaluate their efforts, courts face fewer obstacles to playing a catalyst role in public problem solving. Courts' willingness to encourage effective problem-solving at the level of the workplace also calls upon lawyers to mediate between judicial, managerial, and professional domains. Lawyers are important, although they are by no means the exclusive intermediaries for operating across disciplinary and institutional boundaries. Along with other intermediaries, they play the role of mediating between principle and practice, judiciary and organization, symbols and realities, and normative aspirations and organizational practices.

II. FOUR VERSIONS OF STRUCTURAL LAWYERING FOR WORKPLACE EQUITY

This Section presents four illustrations of lawyers who have defined their roles to respond creatively and proactively to their complex and dynamic environments. Their structural lawyering roles emanate from their response to the complexity of workplace problems, the diversification of sites for legal mobilization, and the significance of converging catalysts in connecting law to effective problem solving. These examples provide a basis for identifying commonalities in the orientation, roles, and dilemmas of legal actors addressing workplace
Workplace Equity

These four legal actors share is a stance, an orientation to their lawyering role. This stance is: (1) problem-oriented in defining workplace equity (both normatively and strategically) as an on-going institutional dynamic, (2) innovative in developing relationships, spaces or structures for on-going problem solving, and (3) collaborative across professional, disciplinary, and institutional boundaries.

The lawyers featured below are also noteworthy for their differences. They include private practitioners, in-house lawyers, and public interest lawyers, representing management as well as employees. They operate in different industries and sectors of the economy. Their tools and functions also vary in their emphases, from litigating to organizing. One legal organization (National Employment Law Project) represents marginalized groups who sit at or outside the boundaries of formal legal protection, such as contingent or undocumented immigrant workers. Its structural approach to problems of workplace inequity differs significantly from that of lawyers working on behalf of groups with substantial bargaining power and formal legal protections.

Despite these differences, lawyers’ roles across the spectrum have converged in interesting ways. The continuities in their roles suggest ways in which traditional dichotomies describing lawyers’ roles—between employee and management, organizational insider and outsider, public interest and private gain, equity and efficiency—break down when lawyers adopt a problem-oriented approach to second generation problems. Finally, the dynamic and fluid relationship of these problem-solving roles pose significant challenges to lawyers’ accountability and legitimacy as professionals.

A. Barry Goldstein: Using Class Actions to Leverage Systemic Organizational Change

Barry Goldstein is of counsel to a private firm that brings class actions in discrimination and other workplace related cases. He started out as a lawyer with the NAACP Legal Defense Fund and went into private practice, in part because he saw the opportunity for greater

84. At a recent retreat of the Center for Gender in Organizations ("CGO"), Joyce Fletcher introduced the term “stance” as a way of characterizing the distinctive character of change agents who adopt what CGO refers to as “fourth frame” approach to gender equity. This notion of “stance” conveys the importance of the conceptual and methodological orientation of these lawyers to their work.

85. See supra Part I.A.
flexibility in addressing employment discrimination problems, not to mention the opportunity to combine doing good with doing well.  He joined Saperstein, Goldstein, Demchak & Baller—one of nation's most visible and successful firms handling plaintiffs' discrimination cases.

Goldstein consciously focused on group-based discrimination, initially using the class action device as his primary tool. His firm brought some of the nation's most visible employment discrimination class actions. In many ways, Goldstein's practice looks quite traditional, even first generational. He has relied heavily on litigation as the spur and entrée to institutional change. His track record emerges from years of traditional, hard-fought litigation. Pattern and practice cases have been around since the early days of Title VII. Goldstein is certainly not unique in his use of the class action to produce significant decrees.

The important question, however, is not whether Goldstein uses litigation, but rather how he uses his role in litigation to spur institutional change. Goldstein's role in the Home Depot case and in subsequent workplace initiatives suggests that he is using his litigation track record and knowledge to play a significant structural role. This structural orientation shows up in pivotal aspects of Goldstein's practice, including case selection, remedial formulation, and client relationships. It is perhaps most striking in the novel relationships he has begun to develop with companies interested in changing their internal employment practices, as well as with smaller employee advocacy organizations involved in workplace equity initiatives.

Goldstein employs a problem-oriented approach to case investigation and selection. Rather than adopting a reactive or scattershot approach, he tackles fields of industrial practice, such as food services, restaurants, banks, and the insurance industry. Over time, his firm developed into a repeat player with tremendous research capacity and a track record that enabled it to aggregate information

86. Telephone Interview with Barry Goldstein, Partner, Saperstein, Goldstein, Demchak, & Baller, May 27, 2000 (transcript on file with author).
89. Telephone Interview with Barry Goldstein, supra note 86.
about particular employers, industries, and types of problems. In addition to knowledge from experience in prior cases, the firm has developed a substantial capacity to identify employment patterns within a sector of the economy and to generate hypotheses about why people of color and women fare worse in that sector. It has also developed a network of experts, enabling development of interdisciplinary teams for both problem identification and remedial formulation. This approach has enabled the firm to get to know patterns in particular industries, and to use this knowledge and its position as a repeat player to bootstrap changes from one company to another.

Goldstein's clients consist primarily of employees who seek a remedy for unfair and biased workplace practices. When these employees have developed the organizational capacity to participate effectively, Goldstein has facilitated their involvement in the problem identification and remedial process. For example, representatives of a strong organization of African-American employees participated in the negotiation of a remedy in a glass ceiling case against Southern California Edison. This group of black engineers and managers, who mobilized initially as a group without success, became reenergized as part of the process of retaining Goldstein and pursuing a class action claim against the company for promotion discrimination. The negotiation of the settlement was particularly challenging because effective intervention required a plan for a dynamic economic situation in which the utility industry was moving from a regulated to a deregulated industry. Two of the plaintiffs, who were members of the employees' association, were part of the entire mediation process. Their knowledge of the problems "on the ground" provided crucial insight about the dynamics causing black engineers and managers to experience exclusion. They were also able to show how those problems related to the more general challenges facing employees in a volatile market. These employee representatives participated in developing the negotiation strategy, made the problems facing African-American engineers visible and concrete to the company, provided crucial information about the day-to-day interactions causing exclusion, participated in brainstorming about solutions, and communicated with the class about the progress of the negotiations and the settlement ultimately reached. Their involvement also energized the organization

90. Rice, No. 94-6353-JMI (Jrx).
91. Telephone Interview with Barry Goldstein, Partner, Saperstein, Goldstein, Demchack, & Bailer (May 16, 2000) (transcript on file with author).
92. Id.
93. Id.
94. Id.
by creating concrete occasions for collective action, concrete problems to address, and regular opportunities to evaluate their progress.  

Goldstein's role in the Home Depot case illustrates how a consent decree process can be part of constructing the architecture for accountable, legitimate, and effective problem solving.  

Old boy networks and stereotypes drove employment decision-making. Goldstein brought a class action claiming that managers were steering women to dead end jobs. The informal and arbitrary hiring practices that disadvantaged women also undercut the company's capacity to hire and retain employees: "These informal, nonbureaucratic methods did not serve them well as they became a mature company."

The class action settled on the eve of trial. As part of the settlement process, Goldstein, along with his co-counsel, participated in the development of a remedial structure that by all accounts has been extremely effective in increasing women's participation and improving productivity. This remedial structure established practices that would generate information needed to address the problem on an ongoing basis, involve people with expertise and responsibility for implementing the system, and set up internal and external accountability mechanisms. The deliberative process for remedial formulation included operations people and experts in system design, as well as plaintiffs' counsel, in-house counsel, and senior human resources professionals. This group itself adopted a problem approach to designing the remedy, locating the problem in the failure of a system that was ad hoc, unaccountable, and ineffectual. This system perpetuated bias and contributed to problems of turnover, poor morale, and inadequate development of an applicant pool.

The consent decree process created a hybrid institution for redesigning institutional practice. That institution was located within the company but self-consciously employed external accountability using

95. Id.  
96. I describe the Home Depot case more fully in Sturm, supra note 16, at 509-519.  
97. Telephone Interview with Faye Wilson, Senior Vice President, Value Initiatives, Home Depot (July 5, 2000) (transcript on file with author).  
99. Telephone Interview with John Wymer, Mediation Counsel, Home Depot (June 8, 2000) (transcript on file with author).  
100. Sturm, supra note 16, at 512.  
101. Id.  
102. Id. at 511-12.  
103. Id. at 512.
Workplace Equity

technology, information transparency, and regular occasions to review progress with plaintiffs' counsel. This remedy included computerizing the initial phases of hiring and promotion, using computer kiosks to eliminate the possibility of managerial bias, generating a database for decision-making, and creating systems that managers were required to follow. Goldstein's role was not to design the system by himself, to hire an expert to manage the implementation process, or to create a new, judicially managed administrative body to design and oversee compliance. Instead, his role was to help structure a process for developing a system that would work, that would be sufficiently transparent to provide a continual check on the process, and that would institutionalize, as part of the ordinary course of business, regular occasions to evaluate the system's effectiveness in relation to appropriate diagnostic standards. This approach distinguishes Goldstein's role in the Home Depot consent decree process from the more conventional approach to class action litigation, which focuses on liability at the expense of remedy, underplays the organizational and systemic underpinnings of discrimination, and tends to cast the court in the role of formulating remedial rules, which are then enforced, if at all, through coercive sanctions.

The consent decree process also led to the identification and mobilization of effective internal change agents within Home Depot. Crucial collaborations formed among Goldstein and progressive insiders with clout, expertise, and vision. Faye Wilson, a senior leader who had been on Home Depot's Board of Directors, assumed broad responsibility for linking the consent decree to broader efforts to achieve cultural change within the organization. Al Frost, an industrial psychologist who had begun to redesign Home Depot's hiring system, was able to undertake a system-wide redesign of the hiring and promotion process company-wide. These internal change agents gained authority and resources through their compliance role and connected the consent decree with a much broader agenda of organizational effectiveness.

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. The firm has undertaken investigations of companies that reveal patterns of exclusion. Companies then retain the

104. Id.; Interview with Barry Goldstein, supra note 91.
105. Interview with Barry Goldstein, supra note 86.
107. Interview with Barry Goldstein, supra note 91.
Saperstein, Goldstein firm to help them comply with employment discrimination laws and simultaneously to improve their hiring and promotion practices. Sometimes this arrangement is made as part of an out-of-court settlement of potential class action, with the law firm hired to help in development, implementation, and monitoring of system change to eliminate bias. The firm actively draws on the knowledge, relationships, and experience gained in addressing these problems with other companies. Goldstein also brings together new clients with participants in previous successful efforts to remedy bias, such as Home Depot.

Goldstein's innovative stance toward his role shows the promise of experimentation with lawyers' roles to address the complexity and variability of workplace inequity. Along with this blurring of role boundaries comes the challenge of designing forms of accountability that can keep pace with innovation without constraining its creativity. What norms and institutions exist to tether structural lawyers to the interests of the communities they represent, and to prevent cooptation and abuses of power? It is noteworthy that Goldstein has formed long-term relationships predominantly with other lawyers: plaintiffs' counsel, who retain him as a consultant to their litigation/remedial design work; defense counsel; experts in addressing employment discrimination; and companies that have embarked on (or are about to embark on) a change initiative. In Home Depot, it does not appear that the workers themselves actively participated in the shaping of the remedy or in holding their employer accountable for its implementation, except through their lawyer's involvement. Unlike the engineers and managers at Southern California Edison, the employees who made up the Home Depot class did not belong to a pre-existing employee organization with structures and representatives poised to form a reciprocal relationship with their counsel. Technological design, information transparency, and management commitment provided for the remedy's accountability, rather than active employee monitoring. The creation of workplace systems to address problems does promote conditions for mobilization. It creates structures and intermediate institutions through which workers can pursue equity, advance interests, and possibly mobilize.

108. Id.
109. Ann Southworth has documented more generally that lawyers representing groups that are themselves organized find it easier to structure participatory mechanisms of accountability than those who represent groups that exist only as a collective client for purposes of class action litigation. Ann Southworth, Collective Representation for the Disadvantaged: Variations in Problems of Accountability, 67 FORDHAM L. REV. 2449, 2454 (1999).
But the ongoing relationship with management, particularly in situations where employees remain largely absent from direct involvement, poses an issue of accountability over the long-term. If companies are paying for the firm’s activities, how will the firm maintain independence and remain accountable to the interests of employees in achieving structural change? Size, changing personnel, and competing incentives inevitably constrain the effectiveness of an information transparency and dispute resolution system. What happens when the consent decree expires? What happens now that Faye Wilson has left Home Depot and new leadership has assumed the helm? What if new problems emerge that are not picked up by the current information-gathering system and that conflict with the company’s conception of its interests? What if the interests of the employees diverge or conflict? What incentives and processes prompt Goldstein and others at his firm to identify and address these conflicts?

The long-term relationships also pose risks to Goldstein’s independence and accountability. Without client, professional, or judicial intervention providing accountability for its decisions and outcomes, the firm risks skewing its judgments toward management’s interests. As the law firm collaborates closely with a company, it could become overly invested in the success of the enterprise. How does the firm evaluate its own role in these complex and novel experiments? What is the metric for evaluating the law firm’s performance? If companies evaluate Goldstein’s performance using a metric of productivity, what prompts the firm to consider potentially conflicting equity concerns?

One source of accountability comes from the firm’s historical and professional community. Goldstein, like most of the lawyers at Saperstein, Goldstein, spent the first stage of his career as a public interest lawyer. He developed strong relationships with the public interest community, relationships that remain important to this day. This identification and regular interaction with the public interest professional community continues to influence his conception of his role. Goldstein’s professional standing also equips him with the social capital that is so crucial to effective problem solving across traditional boundaries. Saperstein, Goldstein has developed a national reputation for tough, principled plaintiffs’ advocacy. Its identity and marketability are bound up with this role. This reputation is also an important factor in the firm’s capacity to negotiate its unconventional monitoring agreements. However, this reputational accountability operates in a

diffuse and indirect way. It may not provide the timely and sufficiently
detailed information needed for the firm to differentiate between
cooperation and cooptation until long after decisions have been made
and consequences have filtered out to the broader professional
community. Reputation may also play a weaker role for less visible
lawyers with fewer long-standing relationships to the advocacy
community.

The structure of the firm's contractual and financial relationships
offers another potential source of accountability. Saperstein, Goldstein
has taken some steps to align its financial interests and its monitoring
responsibilities. This is accomplished through the fee structure
negotiated at the outset of the relationship. However, this arrangement
only addresses the financial incentives to maintain a monitoring role. It
does not provide substantive accountability for how that role is
performed. The settlement agreements that structure the firm's
relationships with clients and companies also build in opportunities for
employees to "voice" their concerns to counsel either directly or
through filing complaints that will be mediated, arbitrated, or litigated.
Or, they may "exit" the group representational relationship through
mechanisms such as individual dispute resolution, judicial challenges, or
retention of new counsel to pursue claims.¹¹¹

Lawyers at Saperstein, Goldstein actively participate in a larger
workplace practitioner community as members of a variety of
professional associations that may well provide another layer of
professional accountability. For example, Goldstein has played a
leadership role in the Labor and Employment Section of the American
Bar Association. This section meets regularly, sponsors regular
educational, professional development, and training programs,
establishes discussion groups, and creates liaisons with government,
non-profit, and private stakeholders in equal employment
opportunity.¹¹² It provides regular opportunities for information sharing and
networking. The Labor and Employment Section has yet to assume a
more proactive role in promoting criteria and practices of professional
accountability.¹¹³

¹¹¹. See John C. Coffee, Jr., Class Action Accountability: Reconciling Exit,
(analyzing "exit," "voice," and "loyalty" as alternative mechanisms for holding lawyers
accountable to the classes they represent); Samuel Issacharoff, Governance and
¹¹². See EQUAL EMPLOYMENT OPPORTUNITY COMM., AM. BAR ASS'N, THE
EQUAL EMPLOYMENT OPPORTUNITY COMMITTEE (n.d.).
¹¹³. Bill Simon describes promising initiatives undertaken by other voluntary bar
associations to enhance the accountability and professional responsibility of particular
domains of practice. For example, "[t]he American Academy of Matrimonial Lawyers
Yet another source of accountability could come from the firm's efforts to structure information transparency and reflective practice into its regular interactions. Take the lawyers that work together over a long period of time on a variety of cases involving structural change. Some of them work at Saperstein, Goldstein; others work in firms that collaborate regularly with the firm. These lawyers could themselves more explicitly constitute a community of practice, which would regularly reflect on their strategies, outcomes, and relationships with clients and companies. The firm could use the data-gathering strategies developed to monitor other firms to provide accountability (and ongoing learning) for its own practices. Goldstein already participates in informal reflection with scholars about his role through his willingness to expose his practice to scrutiny.

The firm could also use the data developed in its litigation to assess its own effectiveness and legitimacy. We have already seen how, as part of its remedial role in structural interventions, the law firm helps design systems that produce information about companies' performance in addressing bias. If this information were available to groups with the incentive and capacity to raise questions, it would provide a way of holding the firm accountable in relation to performance measures. However, settlement agreements that are conducted under conditions of confidentiality eliminate this form of accountability. Under these agreements, information produced through the redesign of employment systems cannot be shared. Goldstein's monitoring activities, financed by the companies whose practices are under scrutiny, will be serving multiple interests that could conflict, at least in the short run. Of course, dramatic failures could be exposed through a new round of litigation brought by different lawyers.

There are some creative, institutional design approaches to accountability that have yet to be explored.114 A later Section of this Article offers a framework for developing structural accountability for structural lawyering.

**B. James Ferguson: Blurring the Role of Organizational Lawyer and Community Stakeholder**

James Ferguson is a founding member of Ferguson, Stein, Wallace, Adkins, Greshan & Sumpter, the first racially integrated firm in North

---

114. See discussion infra Part III.D.
The firm was among the original interracial law firms established by a Ford Foundation program aimed at building the capacity to pursue racial justice work on a local and regional basis. It is one of a number of black or interracial law firms that use the strategy of leveraging the firm's political and social capital to address systematic subordination of the black community. Charles Hamilton Houston developed this paradigm of linking the economic and political interests to the black community's interest in building and expanding its civil rights. He advocated the use of "symbolic power in the form of social capital (gained by a pooling of community resources)," to address structural conditions of inequality.

The Ferguson example does more than provide an additional illustration of insider/outsider lawyers who effectively leverage social capital to advance the interests of a subordinated community. He combines this boundary-spanning position with a problem-oriented approach to second generation problems. It is this combination of power and perspective that makes him noteworthy as a role innovator.

Ferguson is African-American and deeply rooted in the community. He is extremely active in the social, political, and legal organizations of North Carolina, and he is acknowledged as a state civil rights leader. His knowledge of problems affecting the black community developed through his multiple roles. He is a prominent discrimination/criminal/medical malpractice lawyer. He serves on a variety of boards and local commissions that have involved him with business and community leaders. He is also active as a citizen in local and national advocacy and community organizations dedicated to the pursuit of racial justice.

Ferguson's involvement with issues of workplace equity has developed over time and in relation to a wide range of issues, problems, and roles. He started out with the NAACP Legal Defense and Educational Fund (LDF) as an intern. "The contacts that we developed from way back with LDF, doing school desegregation, employment

115. See HAIR, supra note 1, at 114.
117. Id. at 159.
118. For example, Ferguson jointly led a fifty member Community Building Task Force, assembled in response to "a call from local business and political leaders for the community to address simmering racial problems and growing ethnic diversity." Carolyn Barta, With Tensions Growing, Charlotte Took Action; City's Approach Could Be Model, Experts Say, DALLAS MORNING NEWS, Feb. 16, 1998, at 16A, 1998 WL 2512776. Ferguson agreed to co-chair the second phase of the project with the President of First Union National Bank. Id.
discrimination, public accommodations, and other civil rights cases gave us an opportunity to interact with those communities and to build those relationships that have been so important over the years.119 From the outset, he defined the problems not in relation to winning a particular case, but as a project of "bringing justice to a marginalized community. I didn't see it as a one-shot deal but rather as a continuation of a struggle to empower the black community."120 Even his fee-generating cases, which are primarily in the areas of medical malpractice and catastrophic injury, advance this mission of his work:

In all the work we do, we find ourselves representing people who otherwise might not get the representation they deserve. We find ourselves representing the underdogs, people who would not have a voice if we didn't give them a voice, most likely to be ripped off by the system. If I stay with the medical malpractice work, it is not unusual for black people to get substandard medical care and not be able to get redress, unless there is someone willing to go the extra mile. . . . We are representing the same interests, although with cases that we wouldn't term civil rights per se.121

Through his own experience and his role in representing African-Americans in a wide range of civil rights cases, Ferguson has developed a nuanced understanding of the patterns producing exclusion and bias, and how they lie at the intersection of economic, labor, class, and racial dynamics.122 He has developed on-going relationships with community organizations and social institutions that inform his more traditional lawyer-client relationships.

I have always felt that these community efforts were part of the civil rights movement that I devoted my life to working with. I never saw myself as being apart from the movement. Even if it wasn't part of the community I was living in, it was

119. Telephone Interview with James Ferguson II, Founding Member, Ferguson, Stein, Wallas & Adkins (Feb. 5, 2002) (transcript on file with author).
120. Id.
121. Id.
Ferguson uses his fluency in multiple domains and his professional legitimacy to build the social and economic capital of the black community:124

People are somewhat comfortable with people whom they know. We don’t have to go through getting to know each other all over again, whether it is dealing with the establishment or leaders in the community. No one questions my motives. When you have been around as long as I have, if you have ulterior motives, it would have come to light. You are not always starting from zero. You are starting from some relationship having been built up.125

Ferguson played a part in the Greensboro struggle I described earlier. He had been involved in Greensboro “as far back as I can remember, with specific involvement when the Klan marches took place.”126 He knew Reverend Nelson Johnson first as an organizer and then as a pastor who was one of the most respected members of the community.127 He did work with both the unions and the civil rights community. When the Greensboro K-Mart initiative started, Nelson Johnson called Ferguson to seek his advice and assistance: “It was just a continuation of what we had been doing the past twenty to twenty-five years of working together.”128

Ferguson’s relationships, depth of experience, and multiple roles enabled him to develop an analysis of the dispute that transcended particular legal categories or definitions. He, along with the labor and civil rights activists with whom he collaborated, did not view litigation as the primary strategy for directly pursuing the goal of sustainable communities.129 He stated that:

123. Interview with James Ferguson II, supra note 119.
124. This important role of private practitioners with strong ties to the African-American community has been noted by other scholars. See, e.g., Porter, supra note 116, at 151; Louise G. Trubek, Embedded Practices: Lawyers, Clients, and Social Change, 31 Harv. C.R.-C.L. L. Rev. 415 (1996).
125. Interview with James Ferguson II, supra note 119.
126. Id.
127. Id.
128. Id.
129. Id.

One of the things I have learned is that the quickest way to kill a vehicle for change is to file a lawsuit. They take so long. Often the lawsuit results
The typical response to claims of harassment and discrimination would be to sue. Initially, we thought about bringing this as a discrimination case. When we were doing the analysis of the case and talking about what the organizers of that movement were trying to accomplish, it became clear early on that this didn’t need to be a traditional civil rights case.130

At the same time, his skills and position as a lawyer deeply involved in the community proved crucial to the success of the initiative. Ferguson participated as a citizen and member of the community in organizational activity, brainstorming, problem analysis, and remedial design. This involvement gave him the information, access, and legitimacy to use his particular skills as a lawyer to advance the overall effort. He had good working relationships with local business leaders whose cooperation was necessary to pressure K-Mart to come to the table and to develop a long-term economic development plan that would keep K-Mart in Greensboro. At the same time, his deep connection to the African-American community afforded him legitimacy in playing that role and enabled him to bring the concerns of that community to his discussions.

Ferguson also used his litigation skills to prevent the law from operating as an obstacle to effective organization and, indeed, to transform these occasions into opportunities to reframe problems and form new alliances. Particularly in the context of organizing, law is often used to suppress effective organization. Ferguson played an important role in forestalling the suppressive impact of law on the organizing effort. For example, K-Mart sued African-American pastors and workers, as well as the union, saying they had irreparably damaged K-Mart’s business.131 Ferguson represented the workers in the hearing.132 With the collaboration of civil rights and labor activists, he used the hearing as a stage for demonstrating that the strategy of driving a wedge between civil rights and labor backfired.133 Preparation for the hearing went beyond avoiding liability. It was linked to the larger goal of developing long-term working relationships between the civil rights

---

130. Id.
131. HARR, supra note 1, at 114.
132. Id.
133. Id.

from the specific focus on the lawsuit. Here, the specific focus was on organizing the workplace and educating the community. We approached it differently from the beginning.
community and the union and building the capacity of that alliance to identify underlying problems so that long-term solutions could be developed. The courtroom performance also conveyed a different public image of the problem and provided an occasion for reframing the public’s perception of and discourse about the K-Mart dispute and its relationship to broader community concerns.

This possibility grew out of Ferguson’s on-going involvement in the community and more structural definition of his role. He is embedded in a community, and he develops his analysis of problems through continued participation in that community as an activist, a lawyer, a citizen. The groups with which he works did not develop solely, or even primarily, through his initiation. On the contrary, “Greensboro, North Carolina, is home to a deeply rooted civil rights movement and years of union organizing at major local manufacturers.” 134 Strong leadership comes from members of the Pulpit Forum, an organization of black Greensboro ministers founded in the 1960s that has allied with local labor leaders in building sustainable communities. 135 Ferguson developed his strategy through extensive consultation with this alliance. The community capitalized on Ferguson’s national reputation as a civil rights leader to enhance the strategic importance of his involvement:

This was a community. The community was who they said they were. The people who were affected by what was going on and wanted to bring about change . . . . This is the way my firm has done it; for the most part, we would not be the ones to initiate the action. We would be going in to assist groups that had already identified the issues to be addressed. Groups that had defined themselves as the persons aggrieved or as acting in the interests of the community. That may be because of our longstanding relationships with communities. There was a relationship of trust. We see ourselves as being the lawyers for the community. 136

Thus, Ferguson’s affiliation with local and national civil rights communities has enhanced his social capital, as well as his deep knowledge of the social and political context of the struggle at hand. 137 He has developed a blend of roles that leverage his capacity to use more

134. Id. at 106.
136. Interview with James Ferguson II, supra note 119.
137. “I am on the board of the ACLU, the Drug Policy Foundation. I don’t do that as an adjunct to the work. The work has brought us in contact with different groups. We work with these groups to make changes in the community.” Id.
formal legal intervention. He uses his professional and social capital of status, access, and knowledge to advance the interests of the community. His conceives law as a site for renegotiating power, vision, and relationships.

Again, there are questions of legitimacy and accountability. On what basis does Ferguson decide how to leverage his considerable social and economic capital in service of his community? To whom is he answerable for the decisions he makes? How does he create regular opportunities for his constituents to participate in shaping his agenda and giving feedback about his choices? How does he deal with the inevitable disagreements and conflicts within the African-American community about strategy and vision? Responses to these questions require more direct and systemic inquiry than I have conducted at this point. On the surface, it appears that, at least informally, Ferguson’s location and on-going connection to community organizations committed to democratic participation provide a direction for structural accountability and legitimacy. He is accountable not to an abstraction of community, but rather to a constituency with leaders who are themselves accountable to their own community organizations. Some of the positions Ferguson occupies—for example, as a board member of non-profit organizations—create regular occasions for evaluation of the goals and strategies of various participants in social action initiatives. However, this on-going involvement may also compromise a lawyer’s impartiality and create irreconcilable conflicts of interest. An important focus of future inquiry is whether and how accountability can be achieved through (1) deep connection and commitment to democratically defined communities, and (2) deliberately constructed professional networks.

C. Intel’s In-House Lawyers: Benchmarkers and Problem-Solvers

In-house counsel at Intel illustrate the potential for internal legal actors to function as problem-solvers and internal change agents. Lawyers at Intel do not define their role solely in relation to particular cases. Intel’s legal department is located within the human resource
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 (who is herself a lawyer) rather than to Intel’s general counsel. The lawyers’ 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.

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 the right result which . . . is having people assigned 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.140

Lawyers in HR Legal work closely with senior specialists who occupy a specially created role to solve individual complaints through problem-solving, track information about those disputes, assess patterns revealed by data from these individual disputes, and redesign systems to address these problems.141 “[The company] is watching in real time [whether] there are problems . . . . We look at the best performers and see what they are doing right, and what issues are being raised.”142 The lawyers’ roles are not just to litigate. They brainstorm about how to address problems raised by particular complaints, translate legal standards into organizational terms, and design training modules and policy revisions in response to the problems identified through Intel’s dispute resolution process.

We examine the results of our data carefully, we categorize them, track them, track them by site, track them by issue, by result. We slice and dice that information in whatever [way]
we can. We use that information to try to improve our process. There may be a bump up in one particular kind of complaint. One year we realized that a disproportionate number of complaints had to do with dismissals or discharges of probationary employees. We rolled out a management program on how to manage employees during the probationary period. From the next year, we dramatically reduced terminations of probationary employees.\textsuperscript{143}

These lawyers actively embrace the role of problem-solver and systems design, in addition to their more traditional litigation role. All HR Legal attorneys have projects, such as developing systemic approaches to long-term and short-term disability, family care, and probationary employees. The lawyers work with the senior specialists to evaluate and continually redesign the system. One such initiative developed in response to the difficulties of dealing with conflicts between two employees who have to work together and do not want to file formal complaints.

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.\textsuperscript{144}

Intel lawyers are evaluated by their success in avoiding litigation, their promptness in processing open-door complaints, and their effectiveness in enabling senior specialists and managers to resolve problems before they result in litigation. The company’s ongoing data gathering, tracking, and reflection enables this kind of accountability to take place.

We generate a report for the CEO and senior VP for HR which is a set of indicators. We look at the types of conflicts. What do they look like? How does it compare to last year? We look at branches all over the place, since we are an international company. We have meetings about 5-6 times a year and review the open door data, together.\textsuperscript{145}

\textsuperscript{143} \textit{Id.}  
\textsuperscript{144} Interview with HR Legal Counsel B, \textit{supra} note 140.  
\textsuperscript{145} Interview with HR Legal Counsel A, \textit{supra} note 142.
Intel's lawyers thus have some accountability through the transparency of the problem-solving process and the informal development of a "community of practice" among the lawyers and senior specialists.\textsuperscript{146} The Intel example illustrates how changes in information technology enhance the feasibility, speed, and efficiency of data collection, distribution, and comparison. These technological developments open up interesting opportunities to use data collection to improve both decision-making and accountability. They also signal the need for lawyers to adapt their role to take account of information technology's impact on organizational governance.

The potentially transformative role of in-house lawyers seems to have been recognized by former civil rights lawyers as well. For example, Deval Patrick has played 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 monitor compliance with a consent decree settling a class action race discrimination case against Texaco. 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.

The issues of accountability for progressive insiders are also significant. On one hand, the same kind of data-gathering, tracking, and benchmarking used by the internal problem-solvers could be, and in Intel's case, has been applied to hold the internal problem-solvers accountable. The senior specialists and lawyers at Intel have developed a robust set of conventions, roles, standards of conduct, accountability systems, and patterns of interaction. 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. The data they use to perform their function also hold them accountable because the results of their work are visible to other lawyers, senior specialists, and the managers who evaluate them.

However, employees do not directly participate in the process of evaluating the adequacy of the problem-solving process. Their interests are funneled through an individual complaint process and surveys conducted by the company. Particularly in tight economic times, what assures that the concerns of employees will continue to play a role in defining problems, priorities, and strategic responses? Given the

\textsuperscript{146} See Sturm, \textit{supra} note 16, at 507-09.
problem-solvers' and in-house counsels' ultimate accountability to management, how can these actors be held accountable when the incentive structure of the company discourages effective problem-solving?

D. National Employment Law Project: Advocacy Organizations as Mediating Institutions

The National Employment Law Project (NELP) is a national and local organization that advocates on behalf of low-wage workers—the poor, the unemployed, and other groups that face significant barriers to employment. It started as a legal services back-up center for labor and employment issues. NELP embraces a structural approach to problems of low-wage and immigrant workers. It defines its role in relation to problems, projects, and constituencies, rather than in relation to cases, dockets, or lawyers' fields of expertise or practice. The organization has forged long-term partnerships with grass-roots organizations and labor unions. Its mission is to build the capacity of those organizations to address workplace problems. It devotes considerable resources and attention to developing networks of groups representing low income workers, women's organizations, labor unions, and other key constituencies. These groups help identify pressing problems, and enlist NELP's support in understanding their causes and developing advocacy strategies to address them. NELP has an active

148. Id. at 158.
149. NELP has forged important partnerships with farmworker-advocacy groups such as the Farmworker Justice Fund, Inc., Texas Rural Legal Services, Florida Rural Legal Services, and Evergreen Legal Services in Washington State. NELP, Immigrant Worker Project, http://www.nelp.org/iwp/ (last visited Apr. 14, 2002). Farmworking, like the garment industry and other industries that rely on subcontracting, relies on a largely immigrant work force. Working with the farmworker advocacy community and others, NELP is addressing the effects on immigrants and other low-wage workers of changes in immigration and welfare laws. Id. Work in this area includes providing technical legal support to immigrant-worker organizing and advocacy efforts and cross-border organizing initiatives, and facilitating communication between diverse groups within industries as well as between immigrant worker groups, in order to share expertise and identify specific joint projects. Id.
150. See Williams, supra note 147, at 158-59.
151. According to NELP's website:
NELP has built a diverse network of groups representing low-income workers, women's organizations, labor unions and other key constituencies that advocate for low-wage working families. In addition to providing in-depth technical assistance in support of state campaigns, NELP supports this network with electronic and print updates on [Unemployment Insurance]
and comprehensive web site, which posts information to a broad constituency.\textsuperscript{152} NELP also conducts in-depth analyses of particular problems as a first step in developing an advocacy strategy. It then uses its resources, legitimacy, and enduring presence in the field to pool information from diverse practitioners and advocacy groups, to assemble narratives about problems and promising initiatives, and to build relationships among groups.

For example, NELP, in partnership with the Farmworker Justice Fund (FJF), started the Subcontracted Worker Initiative to address the common, detrimental impact of subcontracting on wages and conditions of employment.\textsuperscript{153} This Initiative brought together organizers and legal advocates to share analyses and organizing strategies across industries. NELP and FJF convened activists and lawyers working at both the national and local level, prepared papers by and for the participants, and followed up the conferences with in-depth research and report writing. The participants examined “a broad range of strategies and tactics, including worker organizing, public education, media campaigns, coalition building, lobbying, and enforcement of labor laws through government action and private litigation.”\textsuperscript{154} The Initiative produced a comprehensive report presenting its analysis of the problem and promising approaches to mobilizing an effective response. The report, which is available on-line, provides a focal point for “expand[ing] collaboration among the various subcontracted worker groups” and developing effective strategies “for organizing and empowering contingent workers.”\textsuperscript{155}

Unlike many national organizations, NELP has developed an interactive, tiered, and dynamic relationship between local and national groups. NELP does not unilaterally formulate national strategy for implementation at the local level. Instead, the organization structures

\begin{itemize}
\item NELP also works in partnership with the Institute for Women’s Policy Research (IWPR) to provide empirical research in support of state campaigns. NELP convenes national gatherings of UI advocates, sponsors an e-mail discussion group providing a forum for over 200 UI advocates to regularly exchange information and strategies, and links support for state campaigns with policy advocacy at the federal level to promote UI reforms. NELP has an active and comprehensive website, which pools and disseminates information to a broad constituency.
\end{itemize}


152. See http://www.nelp.org (last visited Apr. 23, 2002).


154. Id.

155. Id.
interactions between local, regional, and national groups around particular problem areas. These interactions encourage the sharing of information, the connection of local initiatives, and the crafting of joint strategies and goals.\textsuperscript{156} Litigation paves the way for other strategies, but it is not the central or defining focus. The organization's priorities are defined through analysis of problems with the active participation of community groups.\textsuperscript{157} NELP's long-term relationships with these groups help build a form of accountability. NELP thus performs the role of a mediating institution that provides the connective tissue among local groups facing similar problems, and among distinct interests that share common concerns. This function enables patterns to be identified, relationships to be formed, resources to be provided, and capacity to be built.

Even in its traditional litigation, NELP's problem-orientation and commitment to capacity-building shape its strategy and approach. The lawyers bring cases that will contribute to a larger effort. It links the stages of the litigation process to the client group's long-term goals and to an analysis of the underlying problems that must be addressed through strategies that complement the litigation.

III. STRUCTURAL LAWYERING, LEGITIMACY, AND ACCOUNTABILITY

Each of the legal actors described above illustrates important aspects of a structural approach to law and lawyering. Law does not function solely as a set of rules developed by external legal actors and imposed on everyone else. Legal norms create spaces for engagement about current practice in relation to aspirations that have been identified to be of public significance. Law institutionalizes occasions for analysis, reflection, relationship building, boundary renegotiations, and institution building. It provides a normative and institutional framework for shaping who participates in public problem-solving, establishing institutional priorities, constructing sites for reflection about normative significance of organizational activity, and creating opportunities for mobilization.

The role of the lawyer in these four accounts is about enabling the construction of the practice of workplace equity. Although their

\textsuperscript{156} For a description of a workplace advocacy organization that developed a similar focus on alliances with other groups at the state level, see Judy Scales-Trent, \textit{Equal Rights Advocates: Addressing the Legal Issues of Women of Color}, 13 \textit{Berkeley Women's L.J.} 34, 78 (1998), which concludes that broad-based coalitions were crucial to effective protection of the interests of women of color.

\textsuperscript{157} NELP, \textit{About NELP}, http://www.nelp.org/about.htm (last visited Apr. 14, 2002).
analyses, strategies, and locus of problem-solving vary, their stance toward the role of legal actors converges around a structural approach. Their practice provides a common text for elaborating the meaning of this structural approach.

A. Assuming the Stance of a Problem-Solver

The practices described above reflect the lawyers’ problem-solving orientation—in their conceptual framework, their method of inquiry, and their relationships.158 The lawyers develop their approach by situating particular claims or conflicts within a structural, institutional, political, and cultural analysis. The legal claim is only a part of this analysis and does not provide the overarching framework for understanding the problem. The lawyers are reflective and critical in their practice; their work begins with, and continually relates back to, an analysis of why problems persist, what has worked for others to remedy those patterns, how those responses could be applied and improved upon in each new setting, and who should participate in the problem-solving process.159 This means that information-gathering plays a broader role than simply determining whether a legal violation has occurred. Data collection and analysis reveal problems that remain invisible at the level of individual practice. Their critical reflection includes surfacing the implicit norms that provide the benchmarks for determining whether problems exist in the first place.

These lawyers also develop long-term connections that enhance their capacity to understand and address problems. Each of the lawyers, in different ways, is embedded in an ongoing relationship to a problem, an organization facing a problem, a group of organizations dealing with the problem, or a community affected by the problem. Barry Goldstein develops strategies after careful analysis of patterns facing a particular industry. James Ferguson forges his role in conjunction with communities of color, of which he is a part. Intel’s lawyers translate cases into problems through aggregating data and observing patterns,

159. See Lucie E. White, Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice, 1 CLINICAL L. REV. 157, 170 (1994). Practitioners in racial-justice innovation “begin[] with the premise that societal structures . . . are the primary cause of racial exclusion,” and employ “far-reaching strategies that build alliances, that encourage participation by all relevant parties, and that strengthen democratic involvement in making changes that address the fundamental causes of racism.” HAIR, supra note 1, at 3. Hairs report called the approach a “comprehensive problem-solving” effort that springs from “local lawyers rooted in communities . . . [who] have long-term relationships with the constituencies they represent.” Id. at 5.
and they then develop systemic responses along with the operational personnel responsible for implementing them. NELP identifies problems and their causes, in large part through careful research and close collaboration with organizations affected by them. These lawyers do not define their function solely in relation to a particular legal skill or function. Nor do they limit their focus to formal lawmaking and dispute resolution. Instead, the problem is defined as a condition or set of practices that is institutionally embedded in non-legal concerns and dynamics.

These lawyers also function as mediators and translators between the aspirations reflected in legal norms and the exigencies of day-to-day practice. They legitimize the use of normative language and the articulation of a vision. They also collaborate in the translation of abstract visions underlying general legal norms into more concrete, organizationally situated terms. They have expanded the sites for the performance of their role to include the multiple arenas in which power is negotiated, norms are articulated, resources are allocated, and institutions are designed. Goldstein’s role in forging the consent decree was to broker this relationship between the aspirations of the non-discrimination norm and the demands of Home Depot’s culture and mission. NELP helps its organizational partners identify legal aspirations that will lend legitimacy and moral force to the claims of injustice and provides concrete forums for demonstrating the gaps between legal aspiration and practice.

B. The Stance of the Institutional Innovator

Structural lawyers develop new occasions for deliberation about existing practices in relation to a vision or norm. These lawyers go beyond one-shot interventions to participate in or, if necessary, help create the institutional architecture for ongoing problem-solving. As repeat players, they have developed the capacity to pool experiences of innovation and knowledge and to build the social capital of their organizational and community partners. They are involved in creating sites—third spaces that forge new configurations of relationships among public and private actors and among diverse stakeholders. Through


161. See id. at 305 (“Lawyers continually nurture reputation, relationships, and insider knowledge.”); Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC’Y REV. 95 (1974) (showing how these resources, available only to repeat players in legal processes, become key to coming out ahead in future conflicts).
these sites, structural lawyers can learn from past experience and revise their strategies and norms to take account of their learning. They create relationships, processes, or institutions that regularize occasions for evaluating the "is" in relation to the "ought," and for responding proactively to the gap revealed by this analysis.¹⁶²

These lawyers are also situated to pool and assess knowledge about problems and examples of successful innovations and to generate situated norms of effectiveness for those initiatives. Their ongoing relationships with others involved in similar work, and their role in linking these efforts, help to construct communities of practice to sustain this ongoing, reflexive inquiry. Barry Goldstein's firm develops deep knowledge of practices within a particular industry. This enables the firm to share and develop that knowledge with new firms or advocacy organizations within the same industry. NELP's involvement supporting the work of multiple jurisdictions dealing locally with comparable problems puts them in a position to compare these strategies, to link stakeholders in different jurisdictions so that they can learn from each other, and to generate contingent norms and strategies that communicate best practices to a diverse group who can then question and challenge the adequacy of those practices to address their own context.

C. The Stance of Collaboration and Alliance Building

The lawyers described above actively develop ongoing relationships with those stakeholders whose participation is necessary to address workplace conditions. These collaborative relationships operate outside of traditional professional hierarchies. The structural lawyer does not operate as a lone ranger who single-handedly saves the day but rather as a participant in a diverse problem-solving initiative in which law plays a significant but limited role. This involves creating intermediate spaces for critical reflection, evaluation, and problem-solving. These spaces bring responsible and affected stakeholders together to problem solve in new ways. The consent decree process in the Home Depot case produced a regular practice of problem-solving that brought together insiders and outsiders in a shared project of improving the company's capacity to hire and promote fairly and effectively. James Ferguson helped bridge the civil rights and labor divide, ultimately resulting in the

¹⁶². Robert Cover has described this process as lawyers' participation in the act of creating a narrative, which involves "the imposition of a normative force upon a state of affairs . . . . [A]ccount[s] of states of affairs [are] affected by a normative force field . . . . [A narrative thus integrates] the 'is', the 'ought', and the 'what might be.'" Robert M. Cover, Nomos and Narrative, 97 Harv. L. Rev. 4, 45 (1983).
creation of a new organization focused on building sustainable communities.

Each of these legal actors uses his or her role to build capacity of various actors to achieve the practice of workplace equity and to identify and collaborate with constituencies for that goal both within and outside particular organizations. James Ferguson deploys his contacts, knowledge, and relationships to develop the economic and social conditions of the African-American community. Barry Goldstein uses his knowledge, expertise, and track record to develop companies' capacities to make fair, unbiased, and effective employment decisions. Collaboration with problem-solvers in other roles, disciplines, and professions characterizes their work. It also means creating the language and frameworks that permit unlikely alliances to form at the intersection of interests.

For structural lawyers, then, law provides a source of legitimacy, knowledge, and analysis, but it does not fully define their roles. It is important to expand upon and rethink the concept of law to include this practice of institutional invention—linking law to practice. These functions should not be understood as political or add-on or stepping out of role. They are deeply connected to law as a practice; it is a practice that develops through experimentation and dynamic relationships among sites of elaboration of legal norms. This conception of law is consistent with a body of literature that contests the traditional, or "professional" notion of lawyering as mediating determinate client interests and stable legal norms and argues instead for the constitutive importance of developing a theoretical basis for law as practice.

D. Law and Accountability

Structural lawyering, like the problems it addresses, is complex. It often involves representing groups rather than individuals. It requires collaboration with clients, adversaries, and other stakeholders. Its goals concern long-term problems rather than discrete cases. These qualities complicate the already difficult task of holding lawyers accountable for

163. See Bellow, supra note 160, at 305.
165. Simon, supra note 139, at 469. Robert Cover, who was my teacher and mentor, also developed the idea of law as interpretive practice, as a system of relationships and understandings that give a legal pronouncement authoritative meaning. See Cover, supra note 162, at 45; Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601 (1986).
their conduct. How will potential conflicts within represented groups be exposed and addressed? Who will discipline lawyers to gather information needed to evaluate their own effectiveness? What will limit lawyers' power to place their own interests and concerns over those of the group they represent?

I want to suggest that structural lawyering could benefit from the same methodology it has used in addressing workplace equity problems. Codes of conduct and disciplinary proceedings will only set minimum standards and sanction serious abuse. Accountability within these complex relationships requires its own process of identifying goals and criteria of effectiveness and creating regular opportunities for evaluation. If conflicts or challenges arise, those would be occasions for critical reflection about their role, lawyers' effectiveness, and their exercise of power. More importantly, those occasions for critical reflection could be built into the structure of lawyers' involvement. They would then routinely gather information about their role, their effectiveness, and client satisfaction at regular intervals. They could create their own intermediary institutions, consisting of those they work with, represent, and resemble in practice. They could track patterns in their own cases and initiatives and build in a regular process of revising their practices in light of problems revealed. They could create regular opportunities for other stakeholders and similarly situated lawyers to assess and question their decisions and strategies in the context of a class of cases that seem related in important ways.


Stimulated by surprise, [professional practitioners] turn thought back on action and on the knowing which is implicit in action. They may ask themselves, for example, "What features do I notice when I recognize this thing? What are the criteria by which I make this judgment? What procedures am I enacting when I perform this skill? How am I framing the problem that I am trying to solve?" Using reflection on knowing-in-action goes together with reflection on the stuff at hand. There is some puzzling, or troubling, or interesting phenomenon with which the individual is trying to deal. As he tries to make sense of it, he also reflects on the understandings which have been implicit in his action, understandings which
This form of reflective practice, particularly if informed by data revealing patterns of conduct, would require practitioners to evaluate their practice in relation to articulated goals and criteria, and to revise their strategies in light of what they learn. This process induces self-consciousness and systematic inquiry, which in turn promotes responsible decision-making that can be (and has been) justified in relation to specified goals. This process also discourages, or at least makes visible, abuses of power.

A useful way to frame the challenge of regulating the practice of structural lawyering might be that of constructing the architecture to encourage and regularize "reflective conversation with the situation." At the level of the individual practitioner, realization of such a goal would require building the practice of reflection into the repertoire of daily experience. This process could begin in law school, by introducing future lawyers to the concept of reflective practice and creating learning opportunities that engage professionals who are themselves willing to reflect with academics and students about their practice. I am experimenting with this method of critical reflection in my own teaching and research. For example, I am teaching a year-long, theory/practice research seminar called "The Theory and Practice of Workplace Equity." This seminar examines cutting edge developments in the regulation of workplace bias from a variety of disciplinary and professional perspectives. During the first semester, students read case law, case studies documenting change initiatives, and secondary literature introducing them to an interdisciplinary understanding of the problems and possible remedial responses. They also have the opportunity to interact in the classroom setting with role innovators who developed creative responses to these complex problems. In the second semester, students conduct field research in workplaces that have attempted to address issues of workplace inequality. They have the opportunity to observe, interview, and critically reflect with practitioners who are themselves in the process of redefining their roles.

Legal organizations could themselves institute this form of reflection-in-action by building regular occasions for critical evaluation of their work into the fabric of their organizations. The lawyers and Senior Specialists at Intel accomplished this by tracking and analyzing their cases and their own decision-making patterns, meeting on a weekly basis and reflecting on their work in light of data revealing patterns of conduct. This process induces self-consciousness and systematic inquiry, which in turn promotes responsible decision-making that can be (and has been) justified in relation to specified goals.

basis to critique and brainstorm about each other's work, and reporting regularly to each other about their learnings from this reflection.\textsuperscript{167}

Clients play an important role in making this reflective practice possible. The reflective practitioner's relationship with his or her client "takes the form of a literally reflective conversation."\textsuperscript{168} The professional's claim to authority "is substantially based on his ability to manifest his special knowledge in his interactions with his clients."\textsuperscript{169} The lawyer does not "ask the client to have blind faith in a 'black box,' but to remain open to the evidence of the practitioner's competence as it emerges."\textsuperscript{170} One way to encourage this form of reflection and accountability would be to build it into the terms of the contractual relationship.\textsuperscript{171} In-house counsel, organizational clients, and other repeat players are particularly well suited to introduce these kinds of structural interactions with counsel over time.\textsuperscript{172} Of course, these institutional actors themselves have incentives that could discourage their own accountability to the larger organizations they purportedly represent.\textsuperscript{173} Lawyers' accountability (and effectiveness) depends in part on the self-governance capacity of the groups they represent. It is worth considering public interventions directed toward building this capacity, as well as the capacity to evaluate lawyers' work. The retainer negotiation is one leverage point, if viewed as establishing not only payment terms but also processes of lawyer-client interaction, evaluation, and accountability. The agreement could provide essentially a governance framework for the relationship between lawyer and client. This might include building in regular occasions for client input and reciprocal evaluation. The agreement could deal explicitly with the form of organizational or group participation, and, where applicable, representation. The issue of compensation is also an important

\textsuperscript{167} See Sturm, supra, note 16, at 499-09 (discussing the problem-solving methods of Intel Corporation).

\textsuperscript{168} SCHÖN, supra note 166, at 295.

\textsuperscript{169} Id. at 296.

\textsuperscript{170} Id.

\textsuperscript{171} See Coffee, supra note 111, at 410-11 (discussing the possibility and limitations of contractual arrangements as a mechanism for assuring loyalty of lawyers to the class).

\textsuperscript{172} Id. at 412; Southworth, supra note 109.

consideration in determining when lawyers' work is evaluated and how lawyers' priorities are established.\(^{174}\)

Professional associations, particularly those that specialize in a particular practice domain, could develop the capacity and incentives of their participants to engage in reflection about practice, and the accompanying generation of rolling standards of conduct that could emerge from such reflection. These professional associations could be legal (such as the ABA Section of Labor and Employment Law) or non-legal (such as associations of other professional stakeholders, ombudsman, diversity professionals, human resource professionals, or community organizers).

The judiciary is another potential source of accountability. The idea is for courts to articulate substantive and procedural standards that encourage lawyers to reflect both about their relationship to the substantive goals of the case and to the group's relationship to those goals. For example, employers are responsible for developing effective systems for minimizing the expression of bias in decision-making and for preventing and remedying sexual harassment.\(^{175}\) Lawyers play an important role in developing these internal systems. Judicial decisions could encourage employers to develop metrics for evaluating lawyers' success in implementing effective problem-solving systems.

Class certification and settlement approval provides another occasion for elaborating upon general norms of lawyer accountability in particular contexts.\(^{176}\) At least in theory, the courts' role in certifying classes and approving settlements provides an occasion to evaluate the adequacy of representation, and in so doing, to encourage processes and structures permitting meaningful participation and accountability for class members. This would also encourage lawyers to tailor their substantive ambitions to the client group's capacity to participate in the remedy formulation process.\(^{177}\)

\(^{174}\) See Issacharoff, supra note 111, at 369-70.


\(^{177}\) Cf. William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1097-98 ("[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substance justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she need assume for substantive justice."); Southworth, supra note 109, at 2469.

[L]awyers' ethics should consider the reliability of the procedures by which decisions will be made for the group, or in the case of formal organizations, for the natural persons who are the group's beneficiaries. The more reliable
This move would require a shift in the federal judiciary's orientation toward group representation. Much has been written about the limited role that class certification and settlement approval currently play in shaping the structure of class representation. The judiciary frequently acts more like an on/off switch for class representation. If serious conflicts arise, the court will determine whether to deny or decertify a class or refuse to approve a settlement because of conflicts of interest within the class. The judiciary's post-settlement role in the Home Depot case illustrates the limited oversight currently afforded by courts. Once the court approved the settlement, it has had virtually no involvement in implementing it, and the court inquired only into the competency and experience of counsel (which was beyond question) and the existence of conflicts of interest among the class. Efforts taken to maximize the effectiveness of the group as a client were beyond the court's ken. If courts did begin to inquire about those systems, counsel would have incentives from the outset to pay attention to the structures of participation. If no such mechanisms for participation or representation existed, then courts might ratchet up their scrutiny of class settlements.

Finally, it is important to think about money as a crucial factor shaping lawyers' incentives and accountability. Competition for work among lawyers on both sides will affect who ultimately represents group clients and whether and how information and “best practices” are shared. Fee structures and indemnification systems, particularly billing practices, insurance, and attorneys' fees, dramatically influence lawyers' priorities, incentives, and capacity to engage in problem-solving practice. For example, plaintiffs' lawyers currently can only recover attorneys' fees under the Civil Rights Act for work that produces a favorable judgment. Thus, the attorneys' fee provisions currently discourage lawyers from developing joint solutions to problems if those

the decision-making structures and opportunities for exit by individual members, the less direct responsibility the lawyer should bear for discerning the interests and preferences of the group's members and responding to evidence of dissent within the group.

Id. (footnotes omitted).


179. See Rhode, supra note 110; Simon, supra note 139; Southworth, supra note 109.

180. Issacharoff, supra note 111, at 369-70


solutions are not connected to a consent decree or other judicial remedy. Lawyers paid on an hourly basis for representing management have different financial incentives to prevent problems than those who are paid on a project basis or who are on retainer. Any systemic effort to institutionalize accountability must tackle these questions of compensation.

IV. CONCLUSION

These reflections are intended to carry through the insight of the emerging structural approach to workplace bias: through critical reflection, informed by data about practices evaluated in relation to continually redefined norms, new forms of accountability and efficacy can emerge. If these reflective practices provide for meaningful participation by affected parties and principled elaboration of norms, they can also legitimate the inevitable exercise of power by lawyers and others who participate in constructing these practices of workplace equity.

One final thought: The work of redefining lawyers' roles must grapple with the persistent question: Why law? Why should lawyers define their role to include structural change? Perhaps law's defining role is its insistence on normativity and its methodology inviting critical analysis of the meaning of norms in practice. Less understood, but equally important, is law's role in structuring relationships and systems to maintain accountability. The vision of practice that emerges from the four lawyers studied here has important implications for legal education, for conceptualization of law, and for constructing a practice of workplace equity.