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Equality and the Forms of Justice

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Justice and equality are simultaneously noble and messy aspirations for law. They inspire and demand collective striving toward principle, through the unflinching comparison of the "is" and the "ought."[1] Yet, law operates in the world of the practical, tethered to the realities of dispute processing and implementation. The work of many great legal scholars and activists occupies this unstable space between principle and practice. Owen Fiss is one such scholar, attempting to straddle the world of the here-and-now and the imagined and then deliberately constructed future, the contours of which have been established during the founding moments of our constitutional past.[2]

Fiss's work could be understood as an eloquent and indefatigable effort to preserve law's majesty and moral authority as it interacts with the complexity and messiness of flawed institutions. My first exposure to this valiant struggle occurred in his injunction classroom at a time when I was also working for a special master in a Rhode Island prison case.[3] I experienced the joy of engaging in serious debate about fundamental issues with such a formidable yet accessible intellect. Here was someone who had a nose for the big idea of the coming decade, just before the wave of its historical momentum was about to break, and who could frame the broad-brush outlines of that idea with eloquence and brilliance. Of equal importance, Fiss embraced social justice as an integral part of scholarly and lawyerly inquiry — something that I was searching for and found missing from many other law school projects.

I also remember the disjuncture between Professor Fiss's sweeping historic sense of the judge as oracle of justice and the actuality of the day-to-day frustrations emerging in the process of cramming a judicially formulated decree down the throats of marginally competent prison administration.[4] This juxtaposition — the romantic judiciary of Fiss's

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1. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 9-10 (1983) ("Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative. . .").

2. This article is part of a Symposium organized around Owen Fiss's scholarship.

3. I served as an assistant to the special master in *Palmigiano v. Garrahy*, 639 F. Supp. 244 (D.R.I. 1986).

4. For an analysis of the role of the special master in mediating the relationship between right and remedy, which is the product of trying to learn from that frustration, see Susan Sturm, Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062 (1979).

injunction classroom and the nitty-gritty messiness of the actual implementation process — produced an interesting whipsaw effect, which I find instructive to this day. I was inspired and attracted by Fiss's faith in the judiciary as the pedagogue and protector of constitutional norms. I shared his commitment to normativity as one of the law's crucial and defining qualities, as well as his diagnosis that prison bureaucracies lacked the internal capacity to institutionalize constitutional practices.[5] At the same time, I had to come to terms with the undeniable gap between his idealized version of abstract legal principles and judicial loftiness on the one hand, and the concrete norms and judicially decentered processes needed to effectively address the problems underlying the constitutional violations on the other. The remedial stage, to me, was the place where the rubber met the road, where workable norms could develop and revise participants' understandings of constitutional principles, and where legality as a practice would emerge. The question of *how* to develop and implement aspirations to justice seemed inextricably linked to the substantive aspirations themselves. It was not that the judiciary played no constructive role, but rather that the didactic and directive role at the core of Fiss's vision didn't adequately describe the judiciary at its most legitimate, normatively grounded and effective. The tension between symbol and reality seemed greatest when the court embraced the imperial role Fiss most valued.

Fiss's imperial judiciary, as well as its impact on the shape of constitutional principles, assumes its strongest form in his equality scholarship. He has devoted a substantial part of his academic career to the question of federal courts' role in pursuing equality for black Americans.[6] He does this in two veins of scholarship — one focuses on developing equality theory and its implications for doctrine, and the other on "the forms of justice" — the jurisprudential and remedial roles of the judge in the pursuit of these public norms.[7]

These two lines of scholarship are often treated as distinct and unrelated. Choices about judicial role often seem to be taken for granted in the discussions about legal doctrine of, and remedies for, inequality. Attention focuses immediately on the question of whether the dominant rules are the right rules. This assumed treatment of judicial role is not

5. *See* Susan Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993); Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990).

6. This commitment continues in his more recent work. *See* OWEN M. FISS, A WAY OUT (2003).

7. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978); Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

unique to Fiss's equality jurisprudence; it also runs through much public law scholarship and doctrine.[8]

Yet, judicial role and process shape the content of legal norms, the judicial strategies used to address complex problems, and the perceived legitimacy of these choices. Fiss's equality theory is profoundly influenced by his conception of the judiciary's role in elaborating and enforcing public norms. Judicial oversight of constitutional values comprises one leg of Fiss's theory of democratic legitimacy. The other is the elimination of slavery's legacy. Fiss is concerned with the problem of structural inequality, which requires probing institutional underpinnings that are not visible in the picture of racism symbolized by the fire hoses on the school children in Birmingham. His scholarship grapples with the problem of what he refers to as second order discrimination: problems that cannot easily be communicated in a visual image or morally simple account. As Fiss and many others after him have noted, inequality operates as "a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition."[9] The equality problem is thus complex and institutionally embedded in these conditions that produce continued subordination of blacks. Acts of de jure segregation have become intertwined with institutional and political structures that are themselves lawful: seniority systems, school assignment systems, hiring structures, systems of evaluation. Racially segregated patterns develop through interactions of formal and informal conduct.

For Fiss, the judiciary's role is to unilaterally elaborate equality norms addressing those conditions and then impose those "truths" on noncompliant bureaucrats. Law is about rule elaboration and enforcement with the judiciary bearing a special institutional responsibility for determining and implementing public rules. Many scholars — Fiss's critics and fellow-travelers alike — share this unitary view of court's inevitable role as norm elaborator and enforcer. A formalistic conception of the judiciary operates as an uninterrogated, baseline assumption even for scholars who employ an institutional and cultural analysis of the problems law and courts address.

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8. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). The insight about the impact of substance on procedure and vice versa has infused procedure scholarship. It has not yet penetrated much of the substantive, doctrinal scholarship. Even thoughtful scholarship challenging the assumed wisdom that rights and remedies are distinct takes for granted the judiciary's rule-enforcement approach. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

9. Fiss, *supra* note 7, at 18.

This didactic role places great pressure on the judiciary to adopt unitary equality norms that can be implemented, at least in theory, through top-down imposition. However, any theory of discrimination that is sufficiently clear to provide guidance, including Fiss's particular conception of anti-subordination theory, cannot deal adequately with the varied, complex, and shifting dynamics and normative meaning of group-based discrimination. These kinds of complex structural problems resist diagnosis and remediation through centralized, unilateral, logic-driven directive.[10] Thus, Fiss exposes an equality problem that will persist without public intervention, but employs a jurisprudential and doctrinal approach ill-suited to addressing that problem.

Fiss's claim that political and bureaucratic failures necessitate some role for the judiciary in elaborating and enforcing public norms has withstood the test of time.[11] The challenge is to link the question of the meaning of equality norms to the question of how courts participate in public norm elaboration under conditions of complexity and uncertainty. What are the repertoires legitimately available to courts for addressing complex discrimination consistent with the rule of law? How can and should courts construct the relationship between the articulation of rights and the enforcement of remedies? What is and should be the nature of courts' interaction with other normative actors? Generally stated, what are the implications of the sociological/institutional/contextual/ interdisciplinary analysis of legal problems for judicial participation in the reconstruction of institutional practices?

This commentary demonstrates the importance of making explicit and then critically assessing assumptions about judicial role that run through public law scholarship. It illustrates the impact of judicial role conceptions on equality doctrine by showing how Fiss's imperial judiciary influences his articulation of the anti-subordination principle, elaborated in his important article, *Groups and the Equal Protection Clause.*[12] It then sketches the outlines of an under-acknowledged but widely practiced and, in my view, legitimate judicial role: facilitating the elaboration and implementation of public law norms. This role, as an important concomitant of the court's more traditional rule elaboration and enforcement function, would enable the judiciary to participate in addressing complex patterns of interaction that produce group-based exclusion without compromising its legitimacy or overstepping its capacity. It would also highlight and create accountability for the many occasions

10. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 475-78 (2001).

11. *See* Charles F. Sabel & William H. Simon, *Destabiliation Rights: How Public Law Succeeds*, 117 HARV. L. REV. 1015 (2004).

12. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

beyond formal liability adjudication in which courts prompt elaboration of equality norms under conditions of uncertainty.

I. LAW'S FORM AND FUNCTION IN FISS'S EQUALITY THEORY

Groups and the Equal Protection Clause is perhaps the best known of Fiss's equality articles.[13] It attempts to articulate an overarching equality theory adequate to the task of remedying the historic and legally countenanced subordination of blacks. The article advances a critique of anti-discrimination theory for its failure to account for (and thus discipline) judicial outcomes, and for its limitations in addressing the material conditions contributing to racial inequality. It nonetheless accepts the need to reduce the ambiguity of the constitutional equality principle through judicial fiat (a move that this article will question) and offers an alternative mediating principle — the group-disadvantaging or anti-subordination principle — as one that "has as good, if not better, claim to represent the ideal of equality, one that takes a fuller account of social reality, and one that more clearly focuses the issues that must be decided in equal protection cases."[14]

Fiss's emphasis on groups in defining equality theory was path-breaking in 1975, and it endures as a milestone in the on-going effort to expand discrimination jurisprudence beyond formal equality. His ambition is bold — to retool equality theory so that it can address structural discrimination. Yet, Fiss's version of group-based equality is surprisingly limited and static as a mediating principle. It attempts to delimit dynamic social and political phenomena — group based inequality — by using decontextualized logical and historical methods. It anchors the meaning of all group-based inequality in the dynamics of black exclusion from political participation at a particular historical moment.[15] Fiss's version of group-based equality has the contradictory qualities of being both too radical in ambition to be seriously considered by the courts and too thin in content to have much purchase as a catalyst for normative discourse. Fiss is simultaneously romantic and timid in his articulation of equality jurisprudence.

What accounts for this contradictory character of Fiss's group disadvantaging principle? One cannot fully understand Fiss's equality scholarship without considering it in the context of his work on the role

13. Fiss's other major articles dealing with equality theory include *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971) [hereinafter *Fair Employment*], and *The Jurisprudence of Busing*, 39 LAW & CONTEMP. PROBS. 194 (1975).

14. Fiss, *supra* note 12, at 108.

15. For an analogous critique of scholars' over-reliance on the Carolene Products analysis of black exclusion as the fount of all equality theory, see Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

of the courts in expounding public law values. Fiss embraces a particular conception of the judiciary, which he articulates in his writing on the forms of justice: "The task of the judge is to give meaning to constitutional values, and he does that by working with constitutional text, history, and social ideals. He searches for what is true, right, or just."[16] In *Groups and the Equal Protection Clause*, Fiss exemplifies this judicial stance by his own analytical methodology. He uses reasoning, logic, and moral intuition to search for truth in the interpretation of equal protection doctrine.[17] He defines a particular problem to focus the constitutional inquiry, charges the judiciary with defining a single, unitary mediating principle to address that problem, and then constructs a hierarchical relationship between the judiciary and other public bodies to implement those principles. He overlooks the inconsistency between his goals and methods: this Socratic methodology cannot produce workable constitutional principles or relationships that can address the complex problems that drive Fiss's scholarly agenda.

Fiss begins with the character of the equal protection clause and the equality principle itself. The equal protection clause is an ideal, susceptible to a wide range of meanings. It is not dictated by either the text or the legislative history of the Clause. Yet, the anti-discrimination clause has reigned supreme as the dominant mediating principle. One of Fiss's principle goals — one that other contemporary scholars have since pursued[18] — is to dislodge the idea that the anti-discrimination principle flows inevitably from the equal protection clause. It is instead a "mediating" principle giving ambiguous constitutional principles a judicial gloss that is open to reevaluation. Fiss constructs a compelling critique of anti-discrimination jurisprudence to show that this particular conception of equality is neither inevitable nor defensible as an over-arching equality norm.

Fiss successfully demonstrates that the anti-discrimination principle embodies a limited conception of equality that is not compelled by the constitutional text. He then attributes the appeal of the clause to its supposed correspondence with rule of law values such as limited judicial discretion, formality, objectivity, universality, and individualism. Fiss argues that "the connection between those rule-of-law ideals and the

16. Fiss, *supra* note 7, at 9.

17. Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437 (1989).

18. *See, e.g.*, Robert Post, *Prejudicial Appearances: The Logic of American Anti-Discrimination Law*, 88 CAL. L. REV. 1 (2000); Reva Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000); David Strauss, *The Myth of Color Blindness*, 1986 SUP. CT. REV. 99 (1986).

anti-discrimination principle may be nothing more than an illusion."[19] The anti-discrimination doctrine does, after all, require judges to make complex and discretion-laden judgments. Notwithstanding its individualistic emphasis, anti-discrimination doctrine incorporates the concept of groups through the device of suspect classifications, but it does not justify that reliance on groups through the anti-discrimination principle. What's more, the anti-discrimination principle does not provide the normative or analytical tools to address several of the most pressing and difficult aspects of racial policy: preferential treatment, state inaction in the face of private racial subordination, and facially neutral criteria. The principle is both over- and under-inclusive. It does not provide a theoretical foundation for distinguishing between different kinds of race-based categories, or can only do so by departing from the anti-discrimination principle itself.[20]

Fiss goes further and questions the validity of these principles of mechanical jurisprudence. He shows that value choices are inevitable in deciding the relevant categories of comparison and standards of review.[21] He is even more explicit about the role of value choices in his public law scholarship, arguing not only that judges cannot be value-neutral in constitutional interpretation, but that their paramount function entails expounding constitutional values. Fiss embraces the overriding importance of racial equality, to the point of stomaching the adjustment of procedure "to meet felt necessities."[22] He characterizes the judge as an "oracle" whose job is not "to tell people . . . what they already believe,"[23] and as the "sovereign" who "sends out his officers throughout the realm to speak the law and to see that it is obeyed."[24] The central task of the judiciary is to give operative meaning to constitutional values by searching for "what is true, right or just."[25] At the remedial stage, Fiss casts the judge in the role of manager who, as part of the task of giving meaning to public values, undertakes the direct reconstruction of a bureaucracy: "In the course of the reconstructive process, the judge must ultimately penetrate the institutional façade, take the lid off the so-

19. Fiss, *supra* note 12, at 129.

20. To some extent, Fiss is stacking the deck against the anti-discrimination principle. The principle itself can accommodate some aspect of group analysis. Fiss's article on a theory of employment laws introduces the idea of functional equivalence as a way of conjoining individual and group based analysis. Fiss, *Fair Employment*, *supra* note 13.

21. Fiss, *supra* note 12. Martha Minow has eloquently expounded on the role of implicit assumptions and values in performing the comparison that is the hallmark of anti-discrimination analysis. *See* Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987).

22. Fiss, *supra* note 7.

23. Fiss, *supra* note 12, at 173.

24. Fiss, *supra* note 7, at 29.

25. *Id.* at 9.

called black box, in order to locate critical operatives within the institution to whom reconstructive directives must be issued."[26] But he holds tightly to the method of inquiry and relationship with the parties developed under the rubric of mechanical jurisprudence. His commitment to judge as Socratic oracle precludes his consideration of other approaches to judicial role that might be more responsive to concerns about judicial legitimacy and potentially more effective in elaborating equality norms.[27]

Having demonstrated the limitations of the anti-discrimination norm as a mediating principle, Fiss proceeds to advocate for an alternative. He advances the group-disadvantaging theory, not as a supplemental but as a substitute unitary and universal theory of equality. Law's capacity to address current forms of inequality depends upon the legitimation of the group-based equality analysis in constitutional and statutory jurisprudence. As Fiss and many others after him have noted, inequality operates as "a social condition that threatens important constitutional values and the organizational dynamic that creates and perpetuates that condition."[28] But Fiss's methodological approach and resulting doctrinal proposal do not match the dynamic and complex insight that drives his critique of the anti-discrimination principle. For him, as for many public law scholars, the judiciary's task entails finding and enforcing the right rule. Such a rule must be sufficiently clear, concise, and general to justify attaching coercive consequences to the rule's violation. Exemplifying the stance he urges for the judiciary, Fiss uses analogy, logic, and moral intuition to define the problem at the core of the constitutional principle, to formulate a single, unitary mediating principle to address that problem, and then to construct a hierarchical relationship between the judiciary and other public bodies to implement those specified rules. He proceeds using a methodology that is not grounded in the social circumstances he seeks to address. The resulting constitutional rule is difficult to defend using these same methods of textual and logical analysis, and provides little guidance in addressing new and unanticipated situations. It thus fails as both a constitutional method and a principle. Indeed, it suffers from many of the defects that Fiss so astutely levels at the anti-discrimination principle.

Fiss identifies the status of blacks as the model group with which the equal protection clause is concerned.[29] He justifies this choice

26. Fiss, *supra* note 7, at 24.

27. This point is elaborated below.

28. Fiss, *supra* note 7, at 18.

29. "In attempting to formulate another theory of equal protection, I have viewed the Clause primarily, but not exclusively, as a protection for blacks." Fiss, *supra* note 12, at 147. It is important to note that Fiss intends his analysis to apply not only to constitutional interpretation but

through conventional doctrinal method — original intent, stare decisis, and judicial practice. He builds a theory of groups by extrapolating analytically from the historical situation of blacks, and then limiting his conception of group inequality to the analytical categories thus derived. He articulates, as natural and empirical truths, a set of unchanging features of groups — an entity that also meets the condition of interdependence. This discussion is completely abstract and almost axiomatic in its method. It is also divorced from historical and social context, except as examples to illustrate the features of these "natural classes." Thus, Fiss argues that blacks, as a group that has been "perpetually subordinated" and politically disempowered, are entitled to protection as a specially disadvantaged group.

Fiss analyzes black people's socioeconomic and political positions, but not as part of the process of identifying the nature of the equality problem or the particular equality values implicated by those conditions. Instead, "the socioeconomic position of the group supplies an additional reason for judicial activism and also determines the content of the intervention — improvement of the status of that group."[30] As an analysis of the particular circumstances of black Americans at a particular historical moment, Fiss's analysis is trenchant. But it fails as a universal theory adequate to differentiate among the equality claims of diverse groups. Fiss's criticism (in his attack on the antidiscrimination principle that lays the foundation for the group-disadvantaging alternative) of the use of suspect classes in standard equal protection analysis is equally applicable to his proposed substitute: "It anchors the category of suspect classification in historical fact, without room for the kind of generality expected of constitutional doctrines, a generality that might be sufficient to embrace new situations. . . ."[31]

Fiss grounds his embrace of the anti-subordination principle in Socratic reasoning,[32] without the usual supports of text and logic that typically buttress such arguments. In the process, Fiss naturalizes groups as fixed and predefined phenomena and the domain of formal

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also to the courts' elaborations of statutory principles of equality. He is attempting to articulate a unified theory and role. Contrary to Fiss's expectation, equal protection and Title VII jurisprudence have not developed in tandem. Disparate impact and affirmative action doctrine under Title VII has been more amenable to taking account of group status, although not based solely or even predominantly on the justifications Fiss offers. For this reason, I will focus on a general theory of equality and the court's role in elaborating that theory. This discussion is directed at the relationship between the conceptions of equality and judicial role. More careful attention should be paid to the question of whether the judiciary should play a different role in elaborating constitutional as opposed to statutory principles of equality.

30. *Id.* at 154.

31. *Id.* at 125.

32. *See* Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4 (1998).

political participation as the focal point of public exclusion. His emphasis on blacks' capacities to participate in the formal political process completely sidesteps the dynamics of racial subordination and exclusion in some of the institutions he cares most about, such as schools and workplaces. Blacks' lower status and limited access in these institutions frequently stems from cognitive bias, informal interaction, cultural norms, and institutional arbitrariness. Fiss' focus on shared identity and fate undervalues the relevance of informal and sometimes unintentional group interaction to the participation of group members as full citizens. Because it is grounded in abstract analysis detached from its empirical underpinnings, his group concept is impervious to the lessons of cognitive psychology, organizational theory, and even history outside of the particular history of black Americans.[33] Group status may matter if it affects members' capacity to participate equally in the conditions of citizenship. Group status may be relevant not only in the political domain (which is the form of group participation at the heart of Fiss's definition) but also as a factor shaping access to and participation in the day-to-day governance of institutions or as a cognitive category shaping how decision-makers treat members of different groups or as a unit of interaction. To be fair, Fiss's *Groups* article predates the recent explosion of legal scholarship taking account of the implications of sociological, psychological, and organizational research for equality jurisprudence.

According to most of its champions, a key virtue of the anti-subordination principle is its sensitivity to context, which also enables responsiveness to these emerging, interdisciplinary analyses. But for Fiss, the reach of the Socratic methodology justifying courts' special and didactic constitutional roles delimits the scope of the constitutional principle. His conception of judicial role, and his concern to preserve its legitimate exercise, ultimately cabins his conception of equality. His commitment to a top-down view of norm elaboration, with the judiciary at the top, prevents him from taking advantage of the potential suppleness of the anti-subordination principle. Fiss's top-down-ness ultimately infects his elaboration of the anti-subordination principle itself.

Fiss's version of the anti-subordination principle does not answer questions that are crucial to the principle's legitimacy and effectiveness

33. *See* David Charny & G. Mitu Gulati, *Efficiency Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, *in* FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 122 (John Donahue ed., 1997); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 30 (2000). *See also* Sturm, *supra* note 10.

as a guide for future cases. How do we know what subordination is? Why should we care about group status over other forms of equality? On what basis do judges make choices about the ends and means involved in improving the status of protected groups? Fiss acknowledges that the concept of the group is "problematic" and "messy" and that "the usual material of judicial decisions — legislative history and text — provides no guidance."[34] He asserts, however, that the text clothes the court with the authority to give specific meaning to the ideal of equity — to choose among the various subgoals contained within the ideal. He concedes that the group disadvantaging principle will strain the resources, imagination, and patience of the judiciary. But Fiss's commitment to the importance of the constitutional principle of equality combines with his faith in a form of substantive rationality that comes from judges' abilities to be "distanced and detached from immediate contestants and from the body politic, and yet fully attentive to grievances."[35]

This conception of judicial role also constructs a particular type of relationship between the judiciary and the other institutions and subsystems whose conduct is implicated by legal norms. According to this conception, judges dictate to other actors the details of legal norms as they apply to new circumstances. This is a purely hierarchical relationship, albeit within a circumscribed interaction defined essentially by footnote four of *Carolene Products*.[36] Judges unilaterally formulate rules, impose these rules as legal or remedial requirements, and enforce those rules when violated. Judges thus necessarily choose between ambiguous and under-inclusive formulations of legal norms. They do not define their role as actively encouraging other institutional actors to engage with the meaning of those standards in the contexts where the problems occur, at least as part of the process of judicial deliberation and norm elaboration.

Fiss's view of judicial role, method, and relationship places discrimination remedies involving institutional redesign in an uneasy relationship to the articulation of rights. These remedies cannot be logically deduced from an abstract, general legal norm. Without a legitimate process that relates the discriminatory condition to the appropriate remedial response, remedies bear only an instrumental relationship to rights. If judging is only about declaring and enforcing norms and remedies bear no relationship to the elaboration of those norms, then there is "no likely

34. Fiss, *supra* note 12, at 172.

35. Fiss, *supra* note 17, at 16.

36. United States v. Carolene Products, Co., 304 U.S. 144, 152 n.4 (1938). For a discussion of this point, see Ackerman, *supra* note 15, at 746.

connection between the core processes of adjudication, those that give the judge the special claim to competence, and the instrumental judgments necessarily entailed in fashioning the remedy."[37] Fiss's formalistic schema of legitimate judicial decision-making predisposes him to assume that right and remedy are distinct in both content and methodology, and that remedial formulation is derivative and secondary to elaborating entitlements.[38] He underappreciates the blurriness of the line between liability and remedial decision-making. Courts sometimes determine the meaning of general legal norms in areas of complexity by drawing on normative deliberations conducted by non-judicial actors with expertise, authority, and legitimacy in the relevant domain.[39] Public law norms also emerge from less general and binding occasions for norm elaboration in the context of conflict resolution, such as through patterns in consent decrees, contract enforcement, and customary practice. Legal norms can be seen as the sedimentation of non-binding normative evaluations that have sufficient resonance and reasoned support to justify their general application. The inquiry needed to make informed and contextually justified decisions about the causes and constitutional significance of problematic conditions is not so far from the more engaged, sociologically informed, and interactive problem-solving process that makes up the remedial stage.[40] Both require a recalibration of the courts' relationships to other deliberative actors as part of the process of judicial intervention, rather than as a basis for withdrawing from or taking over the process of problem solving.

Fiss's anti-subordination principle thus fails to provide an equality standard or judicial method adequate to the task of constitutional elaboration that he quite properly lays at the judiciary's pedestal. This failure invites legitimacy challenges that buttress the rationalization for judicial disengagement with problems directly implicated by constitutional principles. I trace the problems with Fiss's approach to his preoccupation with articulating a unitary constitutional principle capable of addressing the status of a particular group's problems and his imperial conception of judicial role and responsibility in addressing those problems. Fiss's project is directed toward legitimating the federal judiciary's role in elevating the status of black Americans as an identifiable group. He is in search of an elegant limiting principle that "justifies the institutional allocations — our willingness to allow those "nine men" to substitute

37. Fiss, *supra* note 11, at 52.

38. *See* Sabel & Simon, *supra* note 11, at 1054; Levinson, *supra* note 8, at 119.

39. *See* Lauren Edelman et al, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 Am. J. Soci. 406 (1999); Sabel & Simon, *supra* note 11, at 1063-64; Robert Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003)

40. *See* Sabel & Simon, *supra* note 11, at 1054-55.

their judgment (about ends as well as means) for that of "the people."[41] This is a misdirected search. No single, over-arching theory of groups will respond to the complex and varied conditions that produce exclusion and subordination. Nor can a single mediating principle, unilaterally imposed by the judiciary, provide the situational specificity and guidance needed to answer hard questions and still respond to the diversity and fluidity of contexts to which the principle must apply. The learning done through engaging in the problem solving process is a crucial source of knowledge, legitimacy, and commitment needed both to formulate appropriate norms and to develop effective remedial responses. Casting the judiciary in the role of oracle or unilateral norm enforcer ultimately undercuts its legitimacy and effectiveness as a participant in defining equality norms.

II. WHY MOVE BEYOND LEGAL FORMALISM TO ADDRESS STRUCTURAL INEQUALITY

Treating rule elaboration and enforcement as the only legitimate mode of judicial interaction discounts much of courts' actual practice. It also discourages the development of theories and criteria to guide judicial intervention aimed at responding to complex conditions that threaten publicly articulated values. Recent interdisciplinary scholarship indicates that inequality results from social practices, and the dynamic interaction between culture, cognition, and context. It cannot be reduced to a single explanatory theory or rule violation.[42] Inequality can often only be discerned by examining patterns of interaction that produce problematic conditions or relationships. The normative significance of inequality is itself determined through the problem identification process, which may in turn reveal limitations of the norms themselves. The problem solving process is then necessary to determine the extent and scope of legal obligations that are triggered by acts that violate legal standards.[43]

Moreover, reflective, participatory deliberation is better suited than detached logical consideration for producing the situated knowledge needed to determine the normative significance of complex or novel problems, as well as how they can be remedied. It may be important to know how particular practices affect members of identified groups, how and why those patterns persist over time, what they mean for the status of group members, and whether alternatives exist that could minimize

41. Fiss, *supra* note 12, at 154.

42. *See* Charny & Gulati, *supra* note 33; Krieger, *supra* note 33; Lawrence, *supra* note 33; Post, *supra* note 33; Sturm, *supra* note 10.

43. *See* Levinson, *supra* note 8, at 876.

exclusion. Identification, definition, and remediation of group based inequality require a process of problem solving. That process identifies the structural dimensions of a problem by tracing back to root causes. Participants are then able to articulate norms in context as part of the process of determining why particular circumstances pose a problem requiring remediation. The problem solving process encourages organizations to gather and share information that enables that analysis to proceed. It emphasizes developing individual and institutional capacity and incentives to respond to problems thus revealed. It fosters the design, evaluation, and comparison of solutions that involve the stakeholders who participate in the day-to-day patterns that produce bias and exclusion. The problem solving process also entails reframing the aspirations motivating change. Legal rules that result from logical analysis do not elucidate the aims, scope and strategies of this essential problem solving.

Similarly, there is a more dynamic relationship between right and remedy than the formalistic paradigm acknowledges. There is a basic, inseparable, and iterative means-ends relationship that results from problem solving in context. For example, figuring out whether a particular employment system that disproportionately excludes blacks is discriminatory requires an inquiry that is also the first stage of remediation: What impact does a particular employment system have on people of color? Why does it have that effect? Does the system's design contribute to the expression of bias in individual decisions? Are there ways of making equally effective decisions that would minimize the expression of bias?[44] All of these questions help determine the normative significance of the condition and the formation of an effective remedy. Figuring out whether something is problematic enough to look further begins a remedial inquiry which helps pin down why something is a problem in the first place. Thus, elaborating a general norm in context is crucial to understanding the nature and significance of the problem. This understanding enables the formulation of a remedial response, which in turn deepens and even alters the understanding of the aspirational norm. This reciprocal relationship generates new understandings of both right and remedy.[45]

In fact, the willingness of the judiciary to address structural inequality most likely hinges on rethinking the nature of judicial involvement in these cases. Judges and litigants resist participation in rule-enforcement type judicial regulation of complex discrimination. Courts have been extremely reluctant to assume direct responsibility for con-

44. *See* Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 287 (2003).

45. *See* Sabel & Simon, *supra* note 11, at 1054.

structing managerial solutions for subtle bias, based on concerns about institutional competence, resource constraints, and uncertainty about the problem itself. Employees are reluctant to utilize formal processes to complain about practices when they are uncertain as to whether these practices connotate discrimination.[46] Employers resist identifying problems within their workplace where they believe that doing so would be to do plaintiffs' counsel's work for them.[47] In fact, the formalistic, adjudicatory, rule-enforcement paradigm does not fully describe how judges in fact fulfill their norm elaboration function. Thus, the prospect of continued judicial involvement in addressing complex discrimination necessitates surfacing these less formal judicial modes and expanding law beyond the model of judiciary as rule-enforcer.

III. LAW AS CATALYST OF NORMATIVE ELABORATION AND PROBLEM SOLVING

This section sketches out a conception of law and judicial role. It is inspired by Fiss's idea that the judiciary take on the normative function in pursuing equality. Yet it is grounded in a less formalistic and jurocentric approach to normative elaboration and remediation.

A. *Expanding the Form and Function of Equality Norms*

Recent scholarship and case law contains the seeds of a more reflexive and self-reflective approach to the process of developing mediating principles to actualize public law norms such as equality.[48] The focus is not on developing a unitary, trans-substantive equality theory. Instead the objective is to calibrate the scope and method of the mediating principle to the type of problem under consideration. The factors shaping the court's approach to equality norm elaboration would include: the simplicity and certainty of the legal norm in the abstract and in relation to the circumstances posed by the case, the complexity and novelty of the remediation process, the scope of participation needed to address the problems, and the capacity and willingness of responsible and affected actors to participate in and generate criteria for evaluating the adequacy of problem solving,.

This emergent facilitative and "destabilizing" role complements

46. *See* KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988).

47. *See* Sturm, *supra* note 10, at 476

48. *See* DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003); James S. Liebman & Charles Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 214 (2003); Sabel & Simon, *supra* note 11; Sturm, *supra* note 10.

rather than supplants the operation of legal rules backed by coercive sanctions in areas of normative simplicity. Some conduct violates well-established and easily enforced principles. At this point in our history, deliberate exclusion based on race, sex, religion, or age is a normatively easy case, as is quid pro quo sexual harassment.[49] Rules solidify and preserve well-established baseline norms and aspirations. They also legitimate normative discourse about the domains they regulate. Thus, rules enforced by sanctions would remain an important backstop and platform for normative elaboration in areas of equality jurisprudence where rules have legitimacy and efficacy. Rules dictating that defendants "stop doing that!" can effectively remedy deliberate discrimination. Moreover, the hammer of substantial compensatory damages and coercive sanctions may be necessary as a first step to "destabilize the status quo" and open up institutions to an effective problem solving approach.[50] This approach depends on the presence of some company insiders who assume responsibility for interpreting law to prompt internal norm elaboration and implementation. Coercion is sometimes needed to bring companies to the point where they take equity problems seriously, particularly in companies that have denied the existence of or resisted to addressing pervasive discrimination. Courts' facilitative role depends for its legitimacy and effectiveness on the continued operation of legal rules backed by coercive sanctions in areas of normative consensus and simplicity.

What about the role of equality norms in addressing more complicated, less well understood bias —problems that cannot be isolated to a particular act or actor, that involve dynamics of interaction and evaluation producing marginalization or exclusion, that are inextricably linked with activities that we actually value? The issue in these cases is still whether the conduct in question violates public norms and if so, what should be done to remedy those conditions.[51] Is there a way for courts to participate in the elaboration of norms for problems that resist resolution through rules? Can equality norms be dynamic, responsive, contextually contingent and still robust in that they that they influence private actors to engage in normatively desirable conduct?

A reflexive and structural conception of law's form and function, building on such conceptions developed in international human rights

49. "We assume[d], and with adequate reason, that if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

50. Liebman & Sabel, *supra* note 48.

51. For example, problems that cannot be isolated to a particular act or actor, that involve dynamics of interaction and evaluation producing marginalization or exclusion, that are inextricably linked with activities that we actually value.

and corporate governance domains, offers a way forward.[52] In areas of normative and remedial uncertainty and complexity, the function of judicially articulated legal norms is not to establish precise definitions boundaries of acceptable conduct which, if violated, warrant sanction. Instead, the judicial function is to prompt — and create occasions for — normatively motivated inquiry and remediation by non-legal actors in response to signals of problematic conditions or practices. This legal equality norm is one of inquiry, analysis, reflection and remediation. Law imposes an obligation to inquire upon a showing of an unexplained pattern of bias. Thus, the legal consequence of exposing a discrimination problem through this normative inquiry is not the imposition of a sanction; it is instead the imposition of a legally enforceable obligation to correct the problem. This attenuation (but not elimination) of coercion relieves the pressure for a clear, before-the-fact rule (which is needed to justify sanctions for failure to comply) and still maintains incentives and opportunities to elaborate robust norms in context.[53]

Law's involvement sustains the normative dimension as a relevant and legitimate part of the problem solving process. It creates occasions and incentives for parties to convene, thereby solving collective action problems. It introduces "rule of law" values (such as participation, transparency, and reasoned decision making) to deliberations by non-judicial actors. Courts and other public institutions also provide the architecture to compare and build on the outcomes of this contextual problem solving. Over time, this process promotes the development new legal norms when clear, recurring patterns and normative consensus emerge.

There is a procedural dimension to this substantive responsibility to inquire about identified and unexplained problems. What if we think about the exercise of judicial power to prompt inquiry as on a continuum? Each phase of the conflict resolution process offers an occasion for bringing together affected and potentially responsible stakeholders to deliberate, albeit with different levels of legal obligation to take action on what is learned from that inquiry.

What makes a condition or practice sufficiently "problematic" to trigger an obligation to deliberate its normative significance and perhaps take the steps necessary to remedy it? More specifically, how would a plaintiff make prima facie showing that a condition or practice suffi-

52. Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUROPEAN L. J. 1 (2002).

53. *Cf.* Silbey & Sarat, *supra* note 17 (discussing how informal conflict resolution doesn't require violation of law to trigger action and does not stigmatize participants, intervention can be earlier, unconstrained by jurisdictional boundaries. Coercion replaced by persuasion threat, manipulation, but power and authority exercised nonetheless.).

ciently implicates constitutional or liability concerns? Congress has articulated general, ambiguous equality norms. These norms potentially comprise a variety of equality theories, such as anti-subordination, equal access, or equal treatment. Individuals or groups affected by these conditions would offer evidence permitting the conclusion that a condition or pattern of exclusion, unequal treatment, or subordination exists. This could be done through statistical evidence, through benchmarking the conditions in a particular firm against other comparable organizations with more inclusive practices, or through methodologically accountable expert testimony.

A signal of problematic conditions or conduct is an identifiable set of circumstances that give reason for concern about compliance with equality norms. Courts and administrative agencies can and have already begun to identify indicators of potentially discriminatory conditions or practices. Enduring and unexplained patterns of lower promotion rates by members of particular groups are one such signal. Unequal participation by the targeted group in informal networks or access to mentors and training are another. Conduct or comments of a sexual or gendered nature that are susceptible to multiple interpretations are a third. These practices may not alone signify gender or racial bias. But in some contexts and circumstances they do, particularly in the absence of investigation and institutional response. When the problem is complex and contextually contingent, the court lacks an adequate basis for imposing a unitary, overarching mediating principle. It is in a position, however, to trigger attention to a potential problem, to encourage stakeholders to assess its meaning and cause, and to stimulate problem solving that considers the normative significance of this potentially problematic activity.

One interesting aspect of these signals is that they demonstrate the link between "right" and "remedy" in defining the normative significance of complex bias. An un-interrogated pattern of exclusion or subtle harassment often looms larger and may produce greater inequality than the same conduct that prompts analysis and change. The institution's failure to respond contributes to, and indeed, can become a crucial element of the discrimination experience. This is in part because of the incremental, cumulative, and systemic causes of much complex discrimination.[54] In these areas, inequality can result from the combination of micro-level interactions and inadequate structural responses that interrupt these cumulative patterns. Conversely, prompt inquiry into and

54. *See, e.g.*, Jonathan Cole, A Theory of Limited Differences: Explaining the Productivity Puzzle in Science, *in* WOMEN IN THE SCIENTIFIC COMMUNITY (Harriet Zuckerman et al. eds., 1991).

remediation of problematic conditions or practices can affect whether that pattern ultimately produces and is experienced as producing, discrimination. Thus, the capacity to identify and respond to problems is integrally related to the normative significance of the underlying conditions. Process becomes part of the substantive meaning of equality. Elaborating of a general norm in context is crucial to formulating a remedial response, which in turn deepens and even alters the understanding of the aspirational norm. This dynamic relationship between problem identification and remediation provides further support for expanding beyond rules where complex discrimination is present.

This is a reflexive and pragmatic, rather than a formal approach to elaborating mediating constitutional principles. This approach encourages continually translating meaning back and forth across practice domains. It focuses not exclusively or primarily on the doctrinal formulation or direct reference to law, but rather on the underlying meaning and remedial response. Applied to the anti-subordination principle, this approach means resisting a one-size-fits-all mediating principle. Instead, it prompts a problem-oriented institutional analysis. This method can answer the kinds of questions left untouched by Fiss's formalistic approach. Why is this group excluded? Does group status factor into access and participation? If so, how and why? What information is needed to adequately understand what is accounting for under-participation by black employees? How can that information be developed and analyzed, and by whom? Who needs to be involved in the process of evaluating and developing responses to any patterns thus revealed?

B. *The Role of the Judiciary*

How does the judiciary participate in this norm elaboration and capacity building process? More precisely, is there a role that is consistent with judicial practices, competencies, self-conceptions, and institutional relationships? If courts are not acting as unilateral interpreter and enforcer of legal rules, what are they doing? Are there ways, in addition to formal adjudication, for courts to participate in public norm elaboration? How can they engage in a less directorial relationship with non-legal actors in the norm generation process and still act like judges?

It is possible to craft a workable judicial role. But it requires expanding our analytical lens beyond liability decisions. It also entails generating judicial legitimacy theories that are grounded in a critical examination of actual judicial practices that intervene in and influence workplace norms. This inquiry moves beyond formalistic notions of law and judicial role just as a more nuanced understanding of discrimination

resulted from a pragmatist and institutional methodology. The full range of norm-generating activity in which the courts and legal actors participate must be included, as well as the array of actual and potential channels for making that normative activity transparent, public, and precedential.

This pragmatist analysis also takes seriously the impact of courts' concurrent and, for many judges, core function as adjudicators on their non-adjudicatory activities, and how that identity constrains judicial role development. In this sense, this approach differs from the position articulated by Malcolm Feeley and Ed Rubin that judges are just like other public actors in their role as implementers of public policy.[55] Feeley and Rubin advocate that we "assign the judge the same range of tasks that are assigned to other administrators."[56] They pay little attention to the "how" question — how judges participate in public problem solving. Their analysis of judicial legitimacy and efficacy lumps together distinct forms of judicial problem solving activity, from director to broker to catalyst.[57] Their blanket acceptance glosses over valid concerns about certain types of judicial intervention. The legitimacy (and, in my view, long term efficacy) of a judge who assumes direct responsibility for institutional redesign differs markedly from that of a judge who uses the tools and processes of the judiciary to prompt responsible actors to engage in effective problem solving. Judges' willingness to participate in problem solving under conditions of complexity turns on the availability of a role that is consistent with their tools, practices, and relationships.

I have identified three related judicial practices that operate in this intersection of efficacy and legitimacy:

1. Structuring occasions for collective norm development and problem solving in the penumbra of formal judicial process;
2. Increasing non-legal actors' capacity to conduct conflict resolution and problem solving that generates and institutionalizes efficient, fair, and workable norms; and
3. Developing the capacity of mediating actors, such as experts and administrative agencies, to connect the domains of law and norms.

Legal norms thus develop not only through liability determinations, but also through legally structured occasions for deliberating about the

55. Malcolm Feeley & Edward Rubin, Responsive Law and the Judicial Process: Implications for the Judicial Function, *in* LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK 249, 262 (Robert Kagan et al. eds., 2002).

56. *Id.*

57. For an earlier treatment judicial approaches' differential effectiveness and legitimacy, see Susan Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991).

relationship between norms and practice. These practices cast courts in a crucial but limited role in addressing problems that implicate public norms but are insufficiently understood and/or resistant to centralized rule enforcement. They emphasize law's role in structuring focal points of intra- and inter-institutional normative activity.[58] Each of these roles could be (and will be) the subject of its own article. I undertake here to give only enough concrete meaning to these roles to allow a discussion about their viability and desirability for addressing complex discrimination.[59]

1. NORM GENERATION IN THE PENUMBRA OF FORMAL ADJUDICATION

Discussions of the judicial role in elaborating equality norms typically involve liability determinations: Have courts rendered a published opinion determining whether liability does or could flow from the application of legal norm to a particular set of facts?[60] This focus on liability determinations as the vehicle for normative elaboration is understandable. These determinations produce a public normative outcome in the form of a published opinion, which is widely available and serves as a guide or binding precedent for future decisions. The published opinions are the result of a formal process designed to enable participation and principled decision-making. This process also incorporates caution, certainty, and predictability that justify the state's imposition of coercive authority.

Liability determinations are not, however, the most frequent or necessarily the preferred occasions for judicial participation in norm elaboration in the area of complex discrimination. Courts participate in deliberations about the meaning and scope of norms as a necessary part of reaching other decisions less directly tied to coercive imposition of rules or liability. They do this by assessing the potential viability of discrimination theories in pre-liability (and sometimes post-liability) decisions and by structuring occasions for party deliberation about the normative implications of complex discrimination and strategies for their remediation as part of moving a case forward. In both roles, courts participate in and foster normative development in a more open-ended and exploratory posture. Judicial involvement can also influence the way non-legal actors negotiate and deliberate by focusing on the methods of inquiry and governance structures that produce informal norms

58. *Cf.* David Charny, *Illusions of a Spontaneous Order, "Norms" in Contractual Relationships*, 144 U. PA. L. REV. 1841 (1996).

59. In the interest of providing an overview of this functionalist judicial role, I necessarily gloss over many issues, which will have to await more careful consideration in subsequent work.

60. *See* Catherine Albison, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 4 (1999).

and agreements, and by weighing more heavily those outcomes that result from principled, accountable, and participatory practices. Courts could encourage and facilitate the sharing of the results of less formal norm elaboration by discouraging confidential settlements, publishing opinions concerning informal agreements implicating public norms, and maintaining a publicly accessible data base containing court-approved settlements. These steps would and increase the legitimacy and accountability of informal norm elaboration.

It is important to emphasize that this does not necessarily mean requiring informal processes that mirror the features of formal adjudication, but rather encouraging a more principled and context-specific approach to due process. As Kenneth Winston has argued, "the form [due process] should take depends crucially on the setting in which it finds its application. Specific norms or rules should depend on the purpose of the enterprise and even its stage of development"[61] Insisting on an adversarial process as the only measure of fair and effective process would defeat the deeper values motivating due process, such as participation, information generation, and effective problem solving, by importing the previously discussed limitations of a rule enforcement approach into the informal arena. Courts should instead encourage parties to develop (and the court would then assess the adequacy of) functional criteria of adequate process in light of the purposes and attributes of the particular project. Processes or outcomes could be precedential (in the sense of providing a normative or remedial solution that others can learn from) even if they are not formally binding. Full and fair participation could be achieved through creative institutional design and governance, even without representation by counsel. Decisions could be public and norm generating, even if Westlaw and Lexis do not publish them. Courts could develop standards for evaluating informal agreements and expert opinions and reward those that that give general legal norms concrete meaning in the particular context, articulate criteria by which their agreements can be evaluated, and generate the information needed to evaluate resulting normative assessments and agreements.

The judicial process builds in a variety of decision points that invite less binding norm elaboration. Norm elaboration occurs as part of a decision about whether to keep the judicial machinery open as a public forum for engaging a particular type of problem.[62] One could look at

61. Kenneth Winston, *Lessons from the Right of Silence*, *in* LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK 389, 391-92 (Robert Kagan et al. eds., 2002) ("[T]he form [due process] should take depends crucially on the setting in which it finds its application. Specific norms or rules should depend on the purpose of the enterprise and even its stage of development.").

62. One could look at decisions denying summary judgment in the same light.

decisions denying summary judgment in the same light.[63] The decision at stake may also involve the question of who can legitimately participate in the problem solving process. It sometimes entails assessments of the type and quality of information needed to participate in the problem solving process or to justify reaching a particular outcome. These types of questions cast the court in a role beyond the determination of whether to impose liability for violation of a rule. Courts either consciously or unwittingly craft process frameworks that potentially shape the capacity and incentives of non-legal actors to engage in effective problem solving and accountable norm elaboration. These non-binding occasions for normative elaboration have the potential to be public, norm generating, accountable, and precedential (if these terms are given principled rather than formalistic meaning). If, for example, consent decrees are published and used as benchmarks of new normative understandings and remedial responses, they can have general and precedential value even if they are not binding.[64] Web publication and professional practice networks make possible the dissemination of informal normative activity.[65]

A few examples might help clarify the meaning of norm elaboration in the penumbra of judicial rule-enforcement. Class certification decisions require courts to assess plaintiffs' theory of discrimination in deciding that there are questions of law and fact common to the class, that the representative claims are typical, and that remediation would warrant an injunction affecting the class as a whole.[66] Class certification decisions frequently discuss in some detail the types of problems asserted as discriminatory by plaintiffs and whether they are sufficiently systemic to warrant class treatment.[67] This is not a determination of the likelihood of success at trial, but rather one of whether the case is in a posture to warrant group-based resolution.[68] Class certification also can create a framework for assessing whether participants engage in legitimate and effective information gathering, problem solving, and norm generation once a class is certified. They function as a focal point for defining the contours of a conflict, identifying the participants (including employees, key company officials, and outside experts) who should be involved, developing the data needed to understand if and why systemic

63. *See* Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869 (1999).

64. *See* Mark Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55 (1988).

65. Accountability measures would have to be built in to this expanded publication process.

66. FED. R. CIV. P. 23.

67. *See, e.g.*, Latino Officers Ass'n N.Y. v. City of New York, 209 F.R.D. 79 (S.D.N.Y. 2002); Webb v. Merck & Co., 206 F.R.D. 399 (E.D. Pa. 2002); Beck v. Boeing Co., 203 F.R.D. 459 (W.D. Wash. 2001); Butler v. Home Depot, 1996 U.S. Dist. LEXIS 3370 (N.D. Cal. 1996).

68. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251 (2002).

problems persist, and creating ground rules for effective and accountable participation.[69] Class certification is thus an occasion to establish a governance structure that can produce fair, effective, and principled norm generation.[70] They are particularly important because most cases settle following class certification.

Similarly, the decision to approve a class action settlement, if taken seriously by the court, involves an assessment of the adequacy of the process that produces the settlement as well as the reasonableness of the settlement itself. Judicial opinions evaluating the adequacy of settlements also address the plaintiffs' theories of discrimination and remediation as part of the process of determining whether the proposed settlement is reasonable. Although this inquiry is too often a judicial rubber stamp, it does offer an occasion for the court to review the adequacy of the governance process and the resulting agreement. Courts could develop criteria for evaluating settlements that would take seriously the norm elaboration function of consent decrees, even if the terms of the agreement do not constitute precedent in the formal sense of the word. They could pay attention to the process by which decrees are formulated, the adequacy of participation, and the sufficiency of the information generated through the problem solving process.[71] This type of process review might remedy the legitimacy deficit courts face in monitoring and enforcing consent decrees by offering a process-based justification for backing a private agreement with state enforcement resources and authority. The prospect of a genuine process evaluation could induce parties to develop meaningful ways of including affected stakeholders, to develop a workable problem solving process as part of the negotiations, and to elaborate the equality theory underlying the settlement, whether it would in fact present a viable claim at trial.[72] They may also spell out the parties' remediation theories and strategies.

Decisions about the admissibility and weight of expert testimony also require courts to assess the adequacy and viability of plaintiffs' discrimination theories.[73] A relevancy determination necessarily involves

69. *See generally* Sturm, *supra* note 57.

70. *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337 (1999); Alexandra LaHay, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65 (2003) (proposing process requirements that would enable courts to play this role in small claims class actions).

71. *See* Elizabeth J. Cabraser, *Enforcing the Social Compact Through Representative Litigation*, 33 CONN. L. REV. 1239 (2001); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1663-68 (1997).

72. Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003).

73. *See, e.g.*, Butler v. Home Depot, 984 F. Supp. 1257 (N.D. Cal. 1997); Collier v. Bradley Univ., 113 F. Supp. 2d 1235 (C.D. Ill. 2000).

consideration of the relationship between the expert evidence and an underlying theory of discrimination.[74] For example, as part of its consideration of the admissibility of expert testimony, the court in *Butler v. Home Depot* articulated several possible discrimination theories that would support the relevance of expert testimony "as to the causes, manifestations, and consequences of gender stereotyping as well as the organizational circumstances which allow such stereotypes to flourish."[75] These included the failure of Home Depot to take steps to correct stereotyped decision-making, notwithstanding its awareness that the problem existed and that current practices were inadequate to remedy the resulting gender bias.

Broadening conceptions of the judicial role to include prompting and keeping open normative deliberation could provide a workable framework for courts' pre- and post-liability involvement with complex discrimination. Decisions about discovery, party and expert participation, settlement, and out of court problem-solving would be seen as occasions to: (1) bring together those with responsibility for, knowledge of, concern about, and expertise in the potentially problematic conditions; (2) establish the heightened authority and validity of non-adjudicatory deliberations that functionally satisfy core legitimacy and accountability concerns; (3) create incentives for non-judicial actors to develop and demonstrate the capacity to solve problems and to identify the norms and criteria by which those problem solving practices should be evaluated; and (4) share and evaluate the results of this problem solving and conflict resolution. Courts would focus less on getting it right all by themselves and more on determining whether there is sufficient reason to be concerned about complex discrimination to warrant sustained and publicly accountable problem solving by non-legal actors.

Moreover, there are some potential advantages to norm elaboration in the penumbra of judicial power that critics have not taken into account. Courts are more likely to remain involved in addressing complex discrimination if they are not imposing a general rule or assuming direct responsibility for institutional problem solving. They are also constructing an interactive relationship with those responsible for addressing complex discrimination, without actually administering private institutions. This view of the judicial role enables courts to avoid the dilemmas facing courts operating solely within the rule enforcement

74. *See* Tracey Meares & Bernard Harcourt, *Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988).

75. *Butler*, 984 F. Supp. at 1264.

conception.[76]

2. SHAPING NON-LEGAL ACTORS' PARTICIPATION IN EFFECTIVE NORMATIVE ELABORATION AND REMEDIATION

Courts also shape norms for addressing complex discrimination by creating the architecture to prompt effective problem solving and conflict resolution by non-legal actors, and then developing points of permeability between legal and non-legal arenas so that public norms can emerge out of that local norm generation process.[77] The judiciary becomes involved in addressing complex discrimination when there is a strong indication that particular systems and practices are failing in ways that fall within the purview of generally articulated equality principles. In contexts that resist resolution by a clearly defined rule, judicial intervention supplies incentives for employers to implement effective internal problem-solving and conflict resolution 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 mechanisms addressing and preventing structural bias, and to sanction employers' failures to take steps needed to address identified problems.[78] 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 informal mechanisms. Courts are then in a position to assess employers' justifications for and compliance with their effectiveness criteria. This enables courts to function as a catalyst, rather than as a de facto employment director or a deferrer to employers' unaccountable choices.

This structural role has assumed heightened significance because of the explosion of interest in alternative dispute resolution as a way of resolving employment discrimination disputes. Judicial doctrine has encouraged employers to develop internal dispute resolution and problem solving mechanisms.[79] The Equal Employment Opportunity Commission has embraced mediation as a method resolving discrimination charges.[80] Employers have instituted a wide range of dispute resolution

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76. *Cf.* Sabel & Simon, *supra* note 11, at 1019-20 (making a similar argument in the context of public institutions).

77. For an extended discussion of this structural approach, see generally Sturm, *supra* note 10.

78. Judges also use coercion to sanction, compensate, and provide remedies for violations of clearly defined rules prohibiting discrimination.

79. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 764 (1998); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27-28 (1991).

80. *See* Patrick McDermott et al., *An Evaluation of the Equal Opportunity Commission Mediation Program*, (Sept. 20, 2002), *available at* http://www.eeoc.gov/mediate/report/

processes, including ombuds officers, mediation, peer review, open door policies, and arbitration.[81]

The move to alternative dispute resolution ("ADR") has raised concern among scholars and practitioners who value the judiciary's role in elaborating and holding employers accountable for compliance with public norms. The worry is that ADR (or internal dispute resolution ("IDR"), when it takes place inside an organization) is necessarily private, non-norm-generating, and unaccountable.[82] "IDR can be unconcerned with elaborating the definition of discrimination or equal employment opportunity or articulating a standard that others can appeal to."[83] As David Charny put it, reliance on informal systems is problematic "because one loses the 'public goods' associated with more formal litigation: development of a set of precedents; public revelation of information about such important policy matters as accident rates; and . . . the use of judicial decision to propagate and reinforce social norms."[84] Scholars have also expressed concern that the processes used to produce settlements may be unfair, particularly for addressing zero-sum problems involving disputants with unequal power.[85]

This critique assumes that the move to IDR necessarily displaces judicial involvement in norm generation processes and outcomes. It also assumes that IDR is by definition individualistic (not systemic) in its orientation, private (not transparent) in its operation, instrumental (not normative) in its analysis, ad hoc (not precedent-setting) in its results, and unaccountable in its process and implementation.[86] To the extent that informal processes currently fit this description, these concerns are well-founded.[87] Indeed, research shows that these processes are not all that employers claim, and are sometimes used to "bullet-proof" a com-

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index.html; *see also* EEOC, *Equal Employment Opportunity Commission's Alternative Dispute Resolution Policy Statement*, (July 17, 1995), *available at* http://www.eeoc.gov/docs/adrstatement.html.

81. Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO ST. J. ON DISP. RESOL. 467, 480 (2001). For examples, see Sturm, *supra* note 10.

82. "To be against settlement is only to suggest that when parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties may settle while leaving justice undone." Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

83. Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 524 (1993).

84. Kenneth S. Abraham, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355 (2003); Charny, *supra* note 58, at 1852.

85. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Fiss, *supra* note 84; Stone, *supra* note 83, at 480.

86. Edelman et al., *supra* note 85; Grillo, *supra* note 87.

87. *See, e.g.*, Abraham, *supra* note 86; Joanna Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

pany rather than remedy problems.[88] However, it is important to separate critiques of current practice from normative theories about the appropriate relationship between courts and informal conflict resolution. The judiciary can and sometimes does play a role in shaping the terms under which informal systems operate to address discrimination.[89] Courts do have the opportunity to assess the adequacy of the processes and to consider the normative outcome of the results. When executed in keeping with this role, judicial introduces a level of accountability and genuine participation that is absent from ADR involving purely contractual norms. Judges can evaluate whether a system is sufficiently robust, accountable, and norm generating to justify private involvement in publicly relevant norm elaboration.

In recent work, I have identified the features of this jurisprudential approach in judicial doctrine involving sexual harassment and subjective employment practices.[90] This work focuses on the approach to complex and structural forms in equality in Title VII jurisprudence. The Supreme Court's sexual harassment and subjective employment practices jurisprudence points toward a structural judicial approach by (1) defining the underlying legal violation (inequality or discrimination) as a condition or problem that must be effectively addressed; (2) embracing contextualization (and comparing across context) as part of the process of determining the impact and legal significance of particular conduct; (3) encouraging institutional innovation within workplaces by prescribing an approach that enables employers to avoid liability by preventing or redressing problems of bias or exclusion; and (4) providing accountability and norm elaboration by evaluating the adequacy of the problem solving process in relation to the general equality norm and the effectiveness of institutional processes in eliminating the problematic conditions.[91]

So, for example, some courts have focused on the adequacy of employers' internal decision-making processes and systems as the basis for determining whether systems that disproportionately exclude members of particular groups are engaged in discrimination.[92] If subjective employment practices produce a disparate impact on women or people

88. Susan Bisom-Rapp, *Bulletproofing the Workplace: Sylmbol and Substance in Employment Discrimination Law and Practice*, 26 FLA. ST. U. L. REV. 959 (1999); Edelman et al., *supra* note 85.

89. *See* Edelman et al., *supra* note 85; Sturm, *supra* note 10.

90. *See* Sturm, *supra* note 10.

91. *Id.* at 489.

92. *See, e.g.*, Stender v. Lucky Stores, 803 F. Supp. 259, 335 (N.D. Cal. 1992). Interestingly, much of the legal development in this area has proceeded in the context of class certification and settlement approvals.

of color, this disparity operates as a signal of the possibility that the system is contributing the production or expression of bias. The emphasis is on whether the unaccountable or unstructured exercise of discretion can be justified, in relation to norms of equal participation and available alternative systems of decision-making. Are there systems that will permit the exercise of discretion to pursue employers' goals, but will institute standards and processes that minimize the expression of bias? Thus, adverse impact on a group does not in and of itself constitute a violation. It instead prompts an inquiry into the adequacy, fairness, and accountability of the decision-making processes that produced the initially suspect outcome.

With judicial involvement in assessing and publicizing adequacy criteria, IDR has the potential to be norm generating, transparent, and accountable, at least at the systemic level. These systems build in a process of gathering data about recurring patterns that trigger concern about systemic problems, provide a regular mechanism for reflecting about those patterns, use employee and expert participation in designing and monitoring the system to assure its fairness and legitimacy, and institutionalize opportunities to develop and revise institutional norms and practices that respond to the problems identified through data analysis. Intel's conflict resolution system, described in *Second Generation Employment Discrimination: A Structural Approach*,[93] has built in many of these features.[94] The National Institute of Health in designing its Center for Cooperative Resolution, which is the subject of a current study, also incorporates these features[95]

Courts could, and in some instances have, evaluated internal dispute resolution systems with criteria that relate to the legitimacy and efficacy of the conflict resolution or problem solving process. Sexual harassment and judicial evaluation of subjective employment systems are two areas where courts have made gestures in this direction. Thus far, the criteria have been unevenly developed, without an explicit emphasis on building the capacity and incentives of non-legal actors to engage in norm elaboration and problem solving. Broadening the court's conception of its role to include this crucial function could shore up the lower courts' spotty performance to date in enforcing the Supreme Court's embrace of a structural role that measures decision making processes in relation to their effectiveness in preventing and addressing problems. This role is also sensitive to judicial competency

93. Sturm, *supra* note 10.

94. *Id.*

95. *See* OFFICE OF THE OMBUDSMAN, THE CENTER FOR COOPERATIVE RESOLUTION, ANNUAL REPORT (2001).

concerns. Courts are not themselves developing the criteria and architecture for these processes, but rather they are insisting that those who use these processes develop and justify effectiveness criteria.

3. PROMOTING MEDIATING ACTORS' CAPACITY TO BRIDGE LEGAL AND NON-LEGAL NORMATIVE PRACTICE

Finally, courts play an important role in influencing how governmental actors (such as the Equal Employment Opportunity Commission) and nongovernmental actors (such as experts and lawyers) mediate the relationship between formal law and informal norms and practices. These mediating actors play a normative role within both the judicial and workplace domains. They translate legal norms to non-legal actors, and they educate courts about non-legal normative activity. These mediating actors can play an ongoing role of: (1) building the capacity and constituencies needed to operate effective, accountable systems within organizations; (2) pooling and critically assessing examples across institutions; (3) generating and revising norms that emerge from that reflective practice; and (4) constructing communities of practice to sustain this ongoing reflective inquiry.

Courts review the activities and outcomes of these mediating actors who participate in normative elaboration and capacity building. This review process affords the opportunity to prompt the development of standards and processes of accountability governing the role of these norm intermediaries. An example will help illustrate the idea. I have already discussed evaluations of expert testimony as a site for norm elaboration outside the context of rule enforcement.[96] There is also a structural reason to pay attention to the role of experts as participants in norm elaboration. Experts play a crucial intermediary role in the formation and translation of norms. Many of the experts who appear in employment discrimination litigation also conduct research and consult with organizations about the adequacy of their workplace practices.[97] They play a key role in translating legal principles into organizational norms and vice versa.[98] They are repeat players who work across the boundaries of legal regulation and workplace practice. It is crucial, but not always the case, that these professional intermediaries articulate and satisfy criteria of methodological and process accountability.

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96. *See supra* text accompanying notes 75-77.

97. *See, e.g.*, Mark Bendickegan, *Cases and Projects in Litigation Support* (Jan. 2004), *available at* http://www.bendickegan.com/MBLegal2004.pdf (describing Mark Bendick's extensive work as both an expert witness in employment discrimination cases and as an organizational consultant to plaintiffs, government agencies, and companies seeking assistance in evaluating and redesigning human resource systems).

98. *See* Edelman, *supra* note 67.

Courts can structure processes for the admissibility and evaluation of expert testimony that foster transparency and professional accountability for these norm intermediaries. Courts evaluating expert evidence must assess its persuasiveness, methodological validity, and generalizability.[99] They also consider the degree to which expert evaluation develops replicable methodologies that receive review and validation within the relevant professional community. This review could be conducted with more explicit attention to the crucial intermediary role being played by experts. Ideally, courts could also review administrative agency decision making with this concern about effective norm intermediation and capacity building as a guiding principle.[100]

IV. CONCLUSION

Owen Fiss's work has forged new ground in many different fields. Its boldness and public mindedness inspires scholars to take risks, to think big, and to engage with the unanswered questions surfaced in the wake of the forward momentum. His insistence on justice, both in his classroom and his scholarship, provokes his students and readers to reach for our better selves. His example inspires me and others like me, who are more pragmatic and grounded in their approach, to question whether we can infuse our work with the level of passion, commitment, and aspiration engendered by Owen's grand strokes. This is a tall order for ongoing, collaborative, multi-institutional change. Can the law be normative and aspirational when it is engaged in reflective practice and on-the-ground problem solving? Legal interventions that have bridged principle and practice have just that quality.

Owen Fiss's work has motivated scholars of all stripes to rethink, both because of the breadth of his vision and the difficulties with its implementation. In response to the limitations of Fiss's path-breaking equality jurisprudence, this essay urges connecting the content of equality norms with the process by which they are elaborated. This move entails expanding the courts' role beyond unilaterally imposing a mediating equality theory to creating occasions and incentives for non-legal actors to deliberate about norms in context, and to construct conditions of permeability between legal and non-legal actors so that formal law

99. See Walker & Monahan, *supra* note 76; Meares & Harcourt, *supra* note 76.

100. *Cf.* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 345 (1998); Sabel & Simon, *supra* note 11. The EEOC, which has no independent enforcement authority and is not bound by the Administrative Procedure Act, could conceivably enhance its legitimacy and efficacy by moving in this direction. There are, however, serious questions about the EEOC's current capacity and willingness to become a central player in providing the infrastructure for information sharing and norm intermediation. *See* Sturm, *supra* note 10, at 550-53.

can legitimately and effectively take account of informal normative activity and vice versa. This expansion in conceptions of law's role holds considerable promise in resolving the regulatory dilemma posed by complex discrimination.

This structural role must be distinguished from delegation of public law making to private actors. Nor is it opting for dispute settlement at the expense of public law values.[101] The catalyst approach reaches toward a third conception of judicial involvement that attempts to move beyond the familiar dichotomies between private settlement and public norm articulation. It directly engages other actors in the project of elaborating the meaning of equality, and creates occasions for the judiciary to evaluate those deliberations in relation to broad equality principles and their elaboration in other contexts.

101. In other work, Fiss has lumped together all forms of settlement and treated them as private peace-making. *See* Fiss, *supra* note 84. He also treats all forms of participation by stakeholders in public conflicts as cooptation. *See* Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 968 (1993). This response ignores a third form of judicial interaction, which links public deliberation to the process of defining public values.