1998

Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations

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

RACE, GENDER, AND THE LAW IN THE TWENTY-FIRST CENTURY WORKPLACE: SOME PRELIMINARY OBSERVATIONS

Susan Sturm†

We are at an important juncture in the development of race and gender policy in this country. The prevailing regulatory framework erected in the 1960s and 1970s to address discrimination in the workplace faces fundamental challenges. At a time when the United States population is becoming increasingly diverse, traditional methods of considering race and gender as "plus factors" or "add-ons" are being challenged in courts,[1] legislatures,[2] and public referenda[3] with much greater frequency and success. The widely shared moral consensus about the need to redress racial and gender inequality has broken down.[4] Those who are committed

---

† Professor of Law, University of Pennsylvania. I deeply appreciate the insights and suggestions on an early draft of this article by Sarah Barringer Gordon, Lani Guinier, Peter Huang, Alvero Reyes, Ed Rubin, Chuck Sabel, Kim Lane Scheppele, Eric Tilles, Barbara Woodhouse, participants in the Ad Hoc Workshop and the Symposium on "Rethinking Law in the Twenty-First Century Workplace" at the University of Pennsylvania Law School, and the participants in the Public Governance seminar at Columbia Law School. I also would like to thank the Editorial Board of the *Journal* for their willingness to think creatively and to undertake a genuine interdisciplinary, theory/practice publication.

1. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that racial classifications imposed by a government actor must be analyzed under strict scrutiny); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that a law school may not use diversity as a basis for taking race into account in law school admissions), *cert. denied*, 518 U.S. 1033 (1996); Taxman v. Board of Educ., 91 F.3d 1547 (3d Cir. 1996) (en banc) (holding that diversity may not be used by a school district as a basis for adopting an affirmative action plan).

2. *See, e.g.*, Donna St. George, *For White Men, Anger Taking Political Shape*, PHILA. INQUIRER, Nov. 12, 1995, at A1 (describing efforts in the Illinois, Georgia, and Pennsylvania state legislatures to end race and gender protections).

3. *See, e.g.*, CAL. CONST. art. I, § 31 (barring "preferential treatment" based on race or gender).

4. *See* Tamar Lewin, *Public Schools Confronting Issue of Racial Preferences*, N.Y. TIMES, Nov. 29, 1998, at A1 (in public school districts, "an increasing number of parents—mostly white, are complaining about [affirmative action] policies they say are unfair to their children."). In the words of Constance Horner, a member of the U.S. Civil Rights Commission, "It's the end of an era. What tells us that this is the end of an era is that all branches of government—the courts, the Congress, the White House, even the state

to the civil rights vision of full participation in the arena of citizenship find themselves on the defensive. The traditional civil rights paradigm that has been in place for the past four decades no longer provides an adequate vision or strategy for effectively pursuing the goals of racial and gender equality and fairness in the workplace.[5]

This fundamental challenge to racial and gender policy coincides with a period of transition in many workplaces and occupations. Employment law has been developed largely to address a model of organization premised on hierarchical, vertically integrated, stable, and centralized bureaucracies.[6] This model has never fully reflected the dynamics of power and decision making—even in traditionally organized bureaucracies. Moreover, workplaces are in the midst of reorganizing production and employment relationships in ways that explicitly depart from the bureaucratic model of organizational governance. In these developing structures, power and decision making patterns do not conform to the traditional, top-down, hierarchical model pictured in much legal discourse about the workplace.[7] Organizational forms are emerging that eschew stability, permanence, and rule-driven decision making in an effort to respond to the demands for adaptability, flexibility, and technological innovation.[8] Flexible governance requires workers at all levels to participate more actively in decision making about work assignments, leadership, advancement, pay, and evaluation. Workers from different backgrounds and fields face the challenge of functioning effectively as teams.[9] The boundaries between organizations and their customers, clients,

---

legislatures—are actively engaged in the same process, and that's a rare event in American politics." St. George, *supra* note 2.

5. *See* LANI GUINIER, LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE 276-311 (1998).

6. *See* DAVID HARVEY, THE CONDITION OF POSTMODERNITY 125, 177-78 (1990); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

7. *See* HARVEY, *supra* note 6, at 147; David Krackhardt & Jeffrey Hanson, *Informal Networks: The Company Behind the Chart*, HARV. BUS. REV., July-Aug. 1993, at 104.

8. *See* PETER DRUCKER, THE NEW REALITIES 207-31 (1989) (discussing changes in work arrangements and management techniques necessitated by the growing importance of information); HARVEY, *supra* note 6, at 156-58; MICHAEL PIORE & CHARLES SABEL, THE SECOND INDUSTRIAL DIVIDE 282 (1984) ("[M]ass-production corporations are flattening their hierarchies and giving lower-level supervisors more authority, in order to speed adjustment to shifting markets and to lower the cost of producing small lots."); Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation*, 94 COLUM. L. REV. 753, 879-903 (1994); Dorf & Sabel, *supra* note 6; Paul Osterman, *Impact of IT on Jobs and Skills*, *in* THE CORPORATION OF THE 1990S, at 220, 220-43 (discussing effects of technological change on the nature of modern jobs and the structure of organizational governance).

9. *See* Robert B. McKersie & Richard E. Walton, *Organizational Change*, *in* THE CORPORATION OF THE 1990S 244, 249-50, 255-56 (Michael S. Morton ed., 1991) (discussing

and suppliers are blurring.[10] Institutions and individuals operate in environments that are increasingly mobile.[11] Many of the anchors against insecurity and arbitrariness in the workplace, such as seniority, promotion ladders, established job descriptions, and union representation, have lost their grip.[12]

During this same time, the dynamics and patterns of racial and gender exclusion or bias have also changed considerably. The classic forms of deliberate exclusion based on race and gender that were characteristic of the early stages of the civil rights regime certainly have not disappeared.[13] But patterns of exclusion, job segregation, and bias frequently emerge from more subtle, interactive, and structural dynamics that often are not visible within the individualistic, fault-driven categories embodied in current legal structures.[14] The dynamics of conflict among diverse groups play a significant role in shaping opportunity and exclusion, especially for nondominant groups such as women and people of color.[15] These

---

greater interdependence among workers necessitated by technological change).

10. *See* PETER CAPPELLI, CHANGE AT WORK (1997); Barenberg, *supra* note 8, at 883 (discussing the increasingly shifting boundaries within and among organizations); Peter Cappelli, *Rethinking Employment*, 33 BRIT. J. INDUS. REL. 565 (1995); Charles Sabel, *Moebius-Strip Organizations and Open Labor Markets: Some Consequences of the Reintegration of Conception and Execution in a Volatile Economy*, *in* SOCIAL THEORY FOR A CHANGING SOCIETY 23 (Pierre Bourdieu & James S. Coleman eds., 1991).

11. *See* ROSABETH MOSS KANTER, WORLD CLASS 156 (1995) (describing the uncertainty many workers experience concerning their jobs and the lack of protections against layoff or discharge).

12. *See* HARVEY, *supra* note 6, at 150. Even the definitions and demands of expertise are in flux. Learning problem solving, rather than mastering established bodies of knowledge, increasingly constitutes the central challenge of many fields. Many professions, including law, journalism, and law enforcement, are struggling to redefine their role and mission.

13. The Texaco and Mitsubishi settlements are two recent indications that explicit bias based on race and gender continues to account for the exclusion of women and people of color from the workplace. *See, e.g.*, *Judge OKs Texaco's Settlement of Bias Suit*, L.A. TIMES, Mar. 27, 1997, at D3 (federal judge approved Texaco's $176 million settlement of race discrimination suit); *Mitsubishi Settles Sex Discrimination Case for $34 Million*, LIABILITY WK., June 15, 1998, at 24; Steven M. H. Wallman, *Equality Is More Than "Ordinary Business"*, N.Y. TIMES, Mar. 30, 1997, § 3, at 13.

14. *See* Karen A. Jehn, *Managing Workteam Diversity, Conflict, and Productivity: A New Form of Organizing in the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 473 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1165 (1995); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Karen Proudford, *Notes on the Intra-Group Origins of Inter-Group Conflict in Organizations: Black-White Relations as an Exemplar*, 1 U. PA. J. LAB. & EMP. L. 615 (1998).

15. See Susan Jackson, *Team Composition in Organizations*, *in* GROUP PROCESS AND PRODUCTIVITY (S. Worchel et al. eds., 1992); David Thomas & Karen L. Proudford, *Making Sense of Race Relations in Organizations: Theories for Practice*, *in* ADDRESSING CULTURAL

dynamics cannot be understood solely through an individualistic framework of analysis. In addition, analysis based solely on motivation ignores the role of cognition in shaping and producing bias.[16] Recent research in social psychology and organizational behavior offers insights into the dynamics of racial and gender exclusion that cannot be processed within the existing legal categories of analysis.

In addition, opportunity for advancement increasingly depends on training, social networks, skills enhancement, and adaptability.[17] The capacity to develop social and knowledge-based capital on the job requires informal relationship building, making the patterns of interaction among workers at comparable levels of the organization critical to opportunities for advancement within the organization.[18] Subtle patterns of non-interaction or exclusion can deny access to these skills and relationships for members of particular groups. These patterns emerge from structural arrangements within the organization affecting who gets considered for advancement, how decisions are made, how conflict is addressed generally, and how problems or failures are processed by the organization. They often signal more general gaps in the capacity of the organization to structure productive, fair, and dynamic work relationships.[19]

These changes in the dynamics of discrimination and the structure of workplace governance have not been accompanied by comparable changes in the approach or content of legal regulation.[20] Legal doctrine reflects

---

ISSUES IN ORGANIZATIONS (Robert Carter ed., forthcoming 1999); Karen A. Jehn, et al., Opening Pandora's Box: A Field Study of Diversity, Conflict, and Performance in Workgroups (unpublished manuscript, on file with author).

16. *See* Krieger, *supra* note 14, at 1165.

17. *See* PETER DOEHRINGER ET AL., TURBULENCE IN THE AMERICAN WORKFORCE 4 (1992) (discussing the importance of on-the-job learning due to redeployment and layoffs); KANTER, *supra* note 11, at 154-57 (new workplace security comes from employability, which is a function of the chance to develop human capital); PIORE & SABEL, *supra* note 8, at 273 (discussing the importance of broadly developed skills for workers).

18. *See* Bonalyn Nelsen, *Should Social Skills Be in the Vocational Curriculum? Evidence from the Automotive Repair Field*, *in* NATIONAL RESEARCH COUNCIL, TRANSITIONS IN WORK AND LEARNING: IMPLICATIONS FOR ASSESSMENT 62, 63 (1997) ("Social capital consists of the skills and knowledge required to evaluate and respond to situational demands in social settings."); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1823 (1990) (The experiences of women in the workplace "and their exposure to opportunities seemed more crucial to the development of their vocational interests than advance planning, preparation, or reinforcement from a teacher, parent or counselor.").

19. *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1025-26 (1996) (exploring the role of race and gender patterns as signifiers of more general organizational dysfunction).

20. Other scholars have emphasized the structural nature of bias and the failure of existing legal doctrine to account for the dynamics of discrimination, bias, and segregation. *See, e.g.*, Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional*

many outmoded assumptions about both the dynamics of discrimination and the structure of decision making that were in place at the inception of the civil rights regime.[21] Individuals constitute the unit of analysis, to the exclusion of groups and structures that often play more central roles in causing individual exclusion based on race and gender.[22] Traditionally defined hierarchies between supervisors and subordinates shape analyses of legal responsibility. Fault-based discrimination reflecting intentional exclusion based on class membership dominates analyses of bias and exclusion.[23]

The gap between law and practice also exists at the level of how law is understood and practiced within the sites that are the focus of legal regulation.[24] Legal discourse about workplace discrimination tends to categorize regulatory options in terms of a series of dichotomies: formal/informal, public/private, rule/discretion, and external/internal. Legal doctrine, and lawyers' interpretation of that doctrine as advice to their clients, tends to focus on two types of discriminatory conduct: the rules and policies formulated at the top of organizations and the practices of individuals in relation to those rules.[25] Legal regulation is often framed as a choice between two approaches: 1) a system of universal rules defined externally by courts, legislatures, and administrative agencies, and imposed on organizations through formal process; or 2) a system of private or internal, informal processes that do not generate or inform norm development and that essentially obviate the need for further external regulation.[26] Group-level interactions are often either disaggregated into a series of individual actors or merged into analyses of organization-wide

---

Infliction of Emotional Distress, 41 STAN. L. REV. 1, 36-49 (1988); Tracy E. Higgins, *Limiting Respondeat Superior Liability: A Wolf in Sheep's Clothing?*, 23 FORDHAM URB. L.J. 1181 (1996); Hamilton Krieger, *supra* note 14; Schultz, *supra* note 18. However, their remedial solutions remain within the doctrinal framework they intend to critique, and thus fail to respond adequately to the critique of current regulatory approaches.

21. *See infra* Section III.

22. *See* Barbara J. Flagg, *"Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Krieger, *supra* note 14.

23. *Cf.* PHILIPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978); JOSEPH V. REES, REFORMING THE WORKPLACE: A STUDY OF SELF-REGULATION IN OCCUPATIONAL SAFETY (1988) (observing the same dynamic in the context of administrative regulation).

24. *See* Dorf & Sabel, *supra* note 6.

25. Articles and books written by lawyers to aid in advising clients about employment discrimination issues offer one source of information about how lawyers view discrimination law. Informal interviews with lawyers about their role in counseling clients offer another anecdotal source of information.

26. *See, e.g.*, Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993). *But see* NONET & SELZNICK, *supra* note 23; REES, *supra* note 23.

policies and practices. The process of intermediation between the legal norm and complex internal dynamics of organizational practice lies outside the domain of traditional legal doctrine or practice.[27]

The profound changes in the structure of governance and interaction within the workplace necessitate rethinking the regulatory structure through which issues of discrimination are addressed. This requires a move beyond the traditional civil rights paradigm, which focused on articulating formal rights enforced externally through after-the-fact, formal legal processes.[28] These forms of legal intervention responded to pervasive, deliberate exclusion and subjective bias practiced through informal, private, unstructured decision making. They coincided with developments in personnel practice that emphasized the importance of standardized, objective measures of merit, designed to eliminate bias, reduce discretion, and create mechanisms of accountability through articulation and enforcement of uniform processes and standards.[29] Much of the current, valid criticisms of alternative dispute resolution and negotiated rule making document the dangers of informal, unaccountable processes that tend to replicate existing power imbalances, using processes that appear fair and are more difficult to challenge.[30] At the same time, proponents of alternative dispute resolution and negotiated rule making challenge the adequacy of formal, adversarial process as a means of reshaping relationships, solving problems, and reallocating power.[31]

This article seeks to move beyond the debate between informal and formal legal regulation. Both approaches reflect essential but limited components of a legal regulatory regime. Neither approach adequately responds to the simultaneous challenges of changing organizational structure, racial and gender dynamics, and market-driven demands for flexibility and adaptiveness. The next step requires that we take account of

---

27. The formal/informal dichotomy also frames the analysis of scholars who have examined organizational responses to formal law. *See, e.g.*, Edelman et al., *supra* note 26.

28. *See* Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1402-09 (May 1990).

29. *See* James N. Baron et al., *War and Peace: The Evolution of Modern Personnel Administration in U.S. Industry*, 92 AM. J. SOC. 350, 359-77 (Sept. 1986).

30. *See* Richard Abel, *The Contradictions of Informal Justice*, *in* 1 THE POLITICS OF INFORMAL JUSTICE 267 (Richard Abel ed., 1982); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Edelman, *supra* note 28; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1990).

31. *See generally* Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Cary Menkel Meadow, *The Trouble with the Adversary System in a Post Modern Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

the critiques of formality *and* informality. This requires embracing the challenge of developing new forms of legal regulation that treat organizational decision makers and incentive structures explicitly as part of the legal regulatory regime. In this view, law consists of a set of practices, incentives, structures, and principles that emerge both outside of and in interaction with formal and instrumental law. This approach embraces the process of experimenting with organizational structure, processes of decision making about everyday work, and incentives as a part of an explicit system of legal regulation. Workplaces operate within this legal regime as functioning law-making bodies that operate in interaction with other legal regulatory systems, rather than merely as objects of external or private regulation. The challenge then becomes one of forging a dynamic relationship between law as a system of enforcing minimum standards of conduct through sanctions and law as a system for developing the capacity and incentives to make those norms meaningful in the organizational regimes that shape conduct on a day-to-day basis.

This article sketches out the major themes and directions suggested by the need to rethink approaches to regulation of discrimination in the workplace to respond to changes in organizational structure and demographics. It is a first step in a larger theoretical project, currently underway in collaboration with Chuck Sabel, of developing an approach to law in the new workplace that has the potential to respond to the dynamic, interactive, and unstable conditions in which employment practices increasingly occur. In this article, the potential themes are introduced and developed through examining three different organizational contexts, presented in Section II, in which employment decision making illustrates the racial, gender, and organizational dynamics that are emerging in the workplace. Section III draws on these examples to question the continuing validity of the assumptions about the structure of work and the dynamics of bias that underlie current legal approaches to discrimination. Section IV offers one example of an alternative regulatory process and structure addressing racial and gender bias in the workplace to suggest the contours of a more structural, dynamic, and integrated regulatory approach to the problem of discrimination.

I. THE DYNAMICS OF RACE, GENDER, AND LAW IN THE EMERGING WORKPLACE: SOME RECENT EXAMPLES

This Section describes three different sites that illustrate the dynamics of race and gender in the context of decentralized, group-based, interactive organizational decision making. It is intended to lay the foundation for the next Section, which uses these examples to question the continued validity of key assumptions about race, gender, and power reflected in prevailing

legal discourse. These scenarios are drawn from actual events but are not case studies. They are offered not as accurate depictions of a single workplace or conflict but rather as illustrations of patterns of interaction that recur in many workplaces, and yet fall through the cracks of existing regulatory approaches.[32] They offer concrete and specific illustrations of the ways race and gender bias play out in current workplace settings, and the inadequacy of either formal or informal legal responses to respond to and address those dynamics. This approach begins the work of articulating a new, experimental, and inductive methodology I seek to develop for the law.

A. *De-centering Power: Self-Directed Work Teams*

This example builds on a case reported in the *Wall Street Journal* about a suit recently filed against Johnson Wax Corporation by a group of African-American workers in the component manufacturing plant in Racine, Wisconsin.[33] These charges of discrimination followed the company's decision to adopt a self-governing team approach to its operation. This decision was reportedly made to improve productivity, make the workplace more interesting and rewarding for the workers, reduce management costs, and increase the capacity of the company to respond quickly and proactively to internal problems and external changes in technology and market conditions.

Under this new system of governance, self-directed work teams make decisions as a group concerning their daily work operations. These teams of front-line workers make decisions that would be made by a supervisor or foreman in a typical bureaucratic organization. The team might decide who will operate what machines, what breaks would be taken, what types

32. The first two examples draw primarily on events reported in the media, case files, and reported cases. The third example is based on work I have done consulting with various universities and companies.

33. *See* Timothy D. Schellhardt, *Race Bias Suit at S.C. Johnson Raises Some Worker-Team Issues*, WALL ST. J., Feb. 13, 1997, at B7. The company in question is one that is widely known for its family-friendly policies and its strong community relations and service. Johnson and Johnson has made it to the Top Ten List for Working Mothers in six of the past ten years, based in part on its "flexible schedules, elder care resource and referral and sick-child care at all four on-site centers." *Working Mother Magazine Announces the "100 Best Companies for Working Mothers,"* BUS. WIRE, Sept. 12, 1997. The company has also been the subject of periodic allegations of racial and gender discrimination. *See* Ellen Neuborne, *Temporary Workers Feeling Shortchanged*, USA TODAY, Apr. 11, 1997, at 1B ("A group of temporary workers for S.C. Johnson Wax in Racine, Wis., alleges that race and gender bias has kept them in lower-paid temp positions for years."); Schellhardt, *supra* (race discrimination law suit challenging racial impact of self-directed work teams); First Amended Complaint, Hardin v. S.C. Johnson & Son, Inc. (E.D. Wis. 1995) (No. 95-C-0944) (on file with author).

of maintenance would be performed, how quality would be checked, and other routine decisions. In addition, the team might interact with suppliers and customers. It also takes over many of the human resource functions, such as hiring and firing decisions, making performance appraisals, assigning work, and electing supervisors.[34] Finally, a certification board composed of employees determines issues of merit-pay increases based on increased proficiency at running production machinery.

Many at the company have described the shift to self-governing teams as remarkably successful. This form of worker self-governance has been identified as at the cutting edge of management practices. In one company, management reported that "the change has speeded up response time, simplified work for agents, and cut turnover to [eight] percent."[35] Some workers reported that "it's like having your own business. We kind of run the place now. It's fun—it's actually enjoyable to come to work."[36] Managers also report that "better decisions get made if in fact you can move those decisions closer to where the actual work is performed."[37] They pointed to dramatic savings in administrative costs and production expenses as a result of the new system.

However, the company also appears to have discovered that the move to team-based management necessarily surfaces tensions and inadequacies in the company's governance system.[38] The success of the team approach requires explicit attention to issues that managers, workers, and regulatory regimes alike frequently neglect or avoid. Group based decision making, while crucial to the fair and productive operation of any workplace, requires the capacity to engage in constructive conflict, to match incentive structures with goals and operating strategies, to create processes that permit the development of workable goals and standards, to experiment and learn from mistakes, and to build in mechanisms of accountability that keep this system dynamic in its capacity to monitor both process and results.[39]

Often groups assume responsibility for decision making about work and workers, with little or no attention to the structure, process, or skills

34. *See* John L. Cotton, *Does Employee Involvement Work? Yes, Sometimes: The Quality Function in Redesigned Organizations*, 12 J. NURSING CARE QUALITY 33 (Dec. 1997).

35. Erik Gunn, *Breaking the Mold: Johnson Wax Finds It Profitable to Allow Workers to Self Manage, Police Themselves*, MILWAUKEE J., Dec. 10, 1993, at 1D.

36. *Id.*

37. *Id.*

38. *See* Mary Ann Jannazo, *Firms Shoot for Success with Worker Team Plan*, CRAIN'S CLEV. BUS., Nov. 3, 1997, at 23 (quoting organizational consultant who identified a mismatch between the company goals and incentive structure, that surfaced after the move to team-based management).

39. Peter Huang, a colleague at the University of Pennsylvania, offered a view of conflict in Chinese culture as danger plus opportunity. This dual conception captures the potential relationship of conflict to creativity and innovation.

shaping that process of governance.[40] The composition of work groups often changes over time, further complicating the challenge of implementing fair and effective processes of interaction and decision making. Yet, the group's capacity to function effectively, fairly, and efficiently depends substantially on how it deals with conflict. Research on small group interaction highlights the capacity of groups to deal constructively with, and indeed to make productive use of, conflict as a key determinant of stability, productivity, and long-term commitment to work.[41]

The unavoidable and ubiquitous role of identifiable and shifting groups in governing workplaces poses particular challenges for addressing the dynamics of race and gender in the workplace context.[42] The team concept requires workers to be able to interact effectively as a group, to address conflict constructively, and to reach consensus about day-to-day issues. Informal power dynamics, including those around issues of race and gender, invariably arise in the day-to-day interactions of the team. These interactions do not take place in a vacuum. They are influenced by the relationships and perceptions around race and gender that existed prior to and in conjunction with the move to a team-based system of governance. Heterogeneous groups of workers assume new power to make decisions about crucial issues such as work assignments, pay, and promotion. These decisions reflect patterns of informal, cumulative interactions among groups of workers, and they frequently are embedded in the day-to-day interactions of the group.[43] Under these circumstances, social capital, which is the capacity to gain access to the informal knowledge and relationships necessary to succeed on the job, plays a significant role in determining a worker's status and advancement on the job.[44] Exclusion

40. *See* EDWARD E. LAWLER ET AL., EMPLOYEE INVOLVEMENT AND TOTAL QUALITY MANAGEMENT: PRACTICES AND RESULTS IN FORTUNE 1000 COMPANIES 16-17 (1992) (Most employees, in a three-year period, did not receive training in interpersonal skills or in the kinds of technical/analytical skills necessary for them to participate in problem solving groups and team-based decision making.).

41. *See* Jehn et al., *supra* note 15.

42. *See* Annelise Goldstein, *Who's on Top: Unchanging Demographic Patterns*, ORGANIZATIONS, Aug. 1995; Jehn, *supra* note 14; Thomas & Proudford, *supra* note 15. *See generally* DIVERSITY IN WORK TEAMS: RESEARCH PARADIGMS FOR A CHANGING WORKPLACE (Susan Jackson ed., 1996).

43. *See* Thomas & Proudford, *supra* note 15; Nancie C. Zane, The Discourses of Diversity: Examining the Links Between Diversity, Structure and Culture (1996) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with author).

44. One recent ethnography of auto repair shops vividly captures this dynamic. *See* Nelsen, *supra* note 18, at 71. Although many of these shops are formally structured as hierarchies, with one or two formal supervisors and managers overseeing the work of larger groups of technicians, those who were formal peers of new workers in fact determined the tenure and economic position of new technicians. Neophytes were unlikely to advance unless they developed the capacity to successfully negotiate the development of informal

and bias also can take different forms that are not as visible and that are more embedded in day-to-day patterns of interaction among the group.

At Johnson Wax, dissatisfaction with the dynamics and consequences of the team-based management has arisen at least among a group of black workers.[45] Four African-American workers sued Johnson Wax, claiming that the team-based system of decision making systematically disadvantages African-Americans in their opportunities for advancement, their pay, and their day-to-day working conditions. These workers claimed that they are systematically paid less than their white and male counterparts, that the decision making process produces biased results, and that the system of team decision making systematically disadvantages them in their opportunities to advance within the company. They did not claim that a particular individual targeted them for less favorable treatment because of their race. Instead, they claimed that the system of decision making, which relied on the collective judgments of predominantly white coworkers, reproduced biases that resulted in less favorable treatment of black employees.

One of the four plaintiffs, Louise Hardin, already had sued Johnson Wax in a related case involving allegations that she was subjected to racial and gender harassment by her former line chief.[46] Prior to the reorganization, line chiefs were hourly production workers ranking below the level of the supervisor, but they had responsibility for handing out time cards and distributing vacation and work assignments. After the reorganization, these lines of authority were eliminated, and Hardin and her former line chief were assigned to the same team. Not surprisingly, plaintiffs' counsel reported that the conflict between them escalated, culminating in the departure of Hardin and the expansion of the litigation to include a claim that the team system of governance systematically discriminates against black workers.

Resistance to the team system was also likely from line chiefs, most of whom were white males who had marginally greater power than the line workers under the old system.[47] These workers lost that authority under the

---

knowledge necessary to do the job effectively. This capacity in turn depended on their ability to learn about and adapt to the work culture and patterns of relationships that opened up access to the informal knowledge necessary to succeed on the job. Those who were unable to gain that knowledge and develop those relationships were unlikely to last on the job.

45. *See* Schellhardt, *supra* note 33, at 137. Recent press coverage indicates additional concerns about the implementation of the team-based management system, including the evaluation system. *See* Jannazo, *supra* note 38, at 23.

46. *See* First Amended Complaint, Hardin v. S.C. Johnson & Son, Inc. (E.D. Wis. 1995) (No. 95-C-0944) (on file with author).

47. Other research on organizational dynamics and change has identified middle managers as experiencing the greatest level of tension and differences of opinion, regarding

new system, in which they were expected to function as equal members of the team. Although some line chiefs retired from the company, others were absorbed into the teams. Thus, the Johnson Wax example involves a move from bureaucratic, hierarchical decision making to decentralized, group decision making. The success and fairness of teams' decisions then depends on the capacity of a racially diverse group of people who previously operated in more traditional hierarchical ways to interact productively and fairly.

The example of Johnson Wax is offered to illustrate the new kinds of challenges and circumstances shaping the dynamics of race and gender in workplaces that have decentralized and diffused power over employment and production decisions. As companies restructure their workplaces to respond to changes in technology and the market, they face different kinds of challenges regarding race and gender dynamics. The issues of conflict and dissatisfaction that may be most visible around claims of discrimination reveal more general concerns about effective, productive, and fair work groups. If racial and gender conflict does emerge, it can have a dramatic impact on the capacity of the group to perform, as well as on the capacity of women and people of color to participate fully and fairly in the workplace. Workers also find themselves in settings managed through discretionary decisions by shifting groups, which increasingly determine their status and access to opportunity. The Johnson Wax example thus poses the question, addressed in the next section, of the capacity of prevailing legal categories and processes to address these dynamics.

The Johnson Wax example also serves as a reminder of the pervasive role of law and lawyers in shaping responses to innovation in organizational structure. Unless the case settles, a court will pass judgment on whether the team system of governance discriminates based on race. Lawyers for both plaintiffs and the employer will be translating the prevailing legal doctrine to their clients, and thereby influencing how problems of racial dynamics are perceived and how they should be addressed. The question is: how do the existing categories of legal analysis and legal intervention analyze the problem, identify responsibility, and shape remedial responses? Do they offer an approach to these complex issues that can respond to emerging conditions, without either sidestepping key sources of bias or stymieing organizational innovation?

Before turning to these more fundamental issues, two other examples offer variations on these themes. The next example focuses more on the interpersonal dynamics and the structure of decision making used by a

---

issues of demographic difference, *see* Thomas & Proudford, *supra* note 15, at 31, and moves to decentralize and flatten hierarchies, *see* PIORE & SABEL, THE SECOND INDUSTRIAL DIVIDE (1984).

group to make hiring decisions.

B. *Employment Decision Making by Committee: A Case of University Hiring*

Universities, law firms, and accounting firms routinely employ group based decision making processes to make hiring and promotion decisions.[48] These organizations designate committees of faculty or partners who bear the responsibility of evaluating candidates for hiring or promotion and making recommendations to the full faculty or partnership. Although higher level administrative officials may review those decisions (such as the dean, provost, trustees of a law school, or management committee of a firm), the faculty or partnership committee plays the most critical role in determining both the process and the outcome of the decision. Groups have assumed considerable responsibility for employment decisions, even in more traditionally structured organizations.

The exercise of judgment lies at the core of these decision making processes. Individuals and groups must make judgments based on differing views of the criteria for successful performance and varying assessments of whether particular individuals meet those criteria. Those assessments are made in the context of well-established patterns of interaction among the decision makers and those affected by their decisions. These relationships in turn shape the assessments of those under consideration. Differing views of the racial and gender dynamics that underlie the assessment process frequently operate under the surface and hidden from view.

Employment decisions in these contexts thus offer an opportunity to examine a context in which groups play a central role in employment decision making and have done so long before the recent interest in decentralized, team-based decision making. In addition to this reliance on groups as primary decision makers, the university setting offers a prime example of internal dispute resolution processes and their relationship to the non-legal organizational processes for making decisions. *Lam v. University of Hawaii*,[49] a recent case challenging a law school's hiring process, involves a group decision making process which operated without clear guidelines, criteria, or mechanisms of accountability. The case provides a good example of the significance of the structure within which group decisions occur and the inability of current legal categories to take

48. *See, e.g.*, University of Pa. v. EEOC, 493 U.S. 182 (1992) (the use of committees for decision making in universities); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (accounting firms); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993) (law firms).

49. 40 F.3d 1551 (9th Cir. 1994).

account of that structural dimension of bias.[50] Maivan Clech Lam, a woman of Vietnamese descent, applied for the position of Director of Pacific Asian Legal Studies ("PALS") at the University of Hawaii's Richardson School of Law ("the Law School"). The Law School established an appointments committee consisting of three professors and two students to screen applicants and recommend finalists for review by the full faculty.[51] This first committee prepared a list of ten names, including Lam's. Five of the ten candidates were women, among whom were two of the three ethnic Asians recommended. Matsuda, who was a friend of Lam's, chose Lam as one of her top two candidates.

Matsuda then resigned from the committee, due to a previously scheduled semester's leave, and a new committee was constituted. The new chair of the committee, Professor A, had a previous "run-in" with Lam. Under his leadership, the committee discussed forwarding one name, that of a white male, rather than ten names, to the faculty. Professor A spoke extremely critically of Lam at a joint meeting of the appointments committee and the committee that oversaw the PALS program. As a result, two faculty members went to the dean to recommend the removal of Professor A as chair. The dean then announced, without explanation or any attempt at conflict resolution, that Professor A had resigned from the committee. The candidate list was narrowed to four, including Lam, whose applications were considered by the full faculty meeting. At that meeting, polarized positions about Lam were expressed by Professor A and Lam's supporters. The underlying polarization and discomfort was not addressed openly, and the faculty failed to reach a consensus about any particular candidate, although a white male candidate received the highest number of votes.

Lam filed an internal discrimination complaint about this process with the office of the University vice-president. Although the University rejected her administrative grievance, it issued a report detailing confidentiality breaches and procedural violations in the PALS search process. At a law school faculty meeting the following fall, two University Equal Employment Opportunity officers discussed selection procedures and recommended, among other things, the use of rating sheets and a clear definition of the program and the role of its director. At the dean's request, Professor Matsuda prepared a memo on search procedures for the law

50. *See Ezold*, 983 F.2d at 509. *Ezold*, a sex discrimination case challenging a law firm's decision denying a plaintiff's promotion to partnership, provides another illustration of the unrecognized importance of the process structuring group decision making. *See* Tracy A. Baron, Comment, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper Level Jobs*, 143 U. PA. L. REV. 267 (1994).

51. The initial committee consisted of Professor Mari Matsuda, who was the chair, Professors Eric Yamamoto and Randall Roth, and two students. *See Lam*, 40 F.3d at 1555.

school in which she proposed ranking desired candidates and encouraging minority applicants. The faculty reopened the search the following year, and Lam reapplied for the position. The new faculty appointments committee consisted of three white members of the faculty who did not support Lam in 1988, along with two students of Asian ancestry. The new committee proceeded with little guidance for the selection process. The chair, who had been on leave the previous fall, did not know about the previous extensive discussions and developments regarding selection procedures. None of the recommendations concerning the process of structuring a fair selection process was followed. Little, if any, attention was paid up front to the criteria or process of decision making. "Despite all of the past debate over the possibility of discrimination and the need for careful selection procedures, no mechanism was put into place to screen out potential bias or retaliatory sentiments resulting from the prior search."[52]

Lam did not appear on any of the committee members' lists. The final list consisted of persons of United States ancestry, both white and non-white, of whom three were women. The faculty met six candidates, three of whom had applied during the first search and were ranked lower than Lam. The faculty voted to offer the position to a white Harvard Law graduate who declined the offer. At this point, the faculty again canceled the search, without selecting a director. Lam then sued the University, claiming that both of the selection committees refused to hire her for the position of director based on her status as an Asian woman.

Lam is offered as an example of the centrality of subjective, group-based decision making to the hiring and promotion process already in place in many professional settings and the complexity of the interactions involving race and gender that emerge.[53] Questions about the process and structure of decision making by the committee, the composition of the decision making body, and the racial and gender dynamics that predated the hiring decision lurk just below the surface, but do not appear to have been explicitly addressed by either the participants or the court. Despite the court's acknowledgment of the arbitrariness of the decision making process, the court focused its legal analysis on whether there was evidence of intentional bias. This framework of analysis led to a finding of discrimination in the first committee decision and the absence of discrimination in the second committee decision.[54] This example also shows the development of internal mechanisms of dispute resolution to address discrimination claims, that operate internal to the University but

52. *Id.* at 1558.
53. *See also Ezold*, 983 F.2d at 510.
54. *See Lam*, 40 F.3d at 1558.

quite separate from the day-to-day interactions that produced the contested decision.

C. *Replicating the Formal/Informal Dichotomy Within the Workplace: The Example from Sexual and Racial Harassment Procedures at a University*

The third example involves a description of a university's internal dispute resolution regime established to address issues of sexual and racial harassment and its relationship to the external legal regime.[55] Many universities and other employers have created internal mechanisms to address sexual harassment in particular, often in response to the law of employer liability. In *Meritor Savings Bank v. Vinson*,[56] the Supreme Court held that an employer is not "automatically" liable for harassment by a supervisor or employee. More recently in *Burlington Industries Inc. v. Ellerth*[57] and *Faragher v. City of Boca Raton*,[58] the Court articulated a defense to hostile environment sexual harassment by non-managerial supervisors if the employer has shown that it "exercised reasonable care to avoid harassment and to eliminate it when it might occur, and that the complaining employee had failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise to prevent harm that could have been avoided."[59] Thus, at least for hostile environment harassment, if an employer has taken steps to prevent and redress harassment, that employer can avoid liability under certain circumstances. The law creates direct incentives, embodied in the liability standard, for employers to maintain an effective sexual harassment policy. These steps include setting up effective mechanisms for disseminating the policy against harassment, educating employees about sexual harassment and how to avoid it, creating a process that is accessible and effective to respond to concerns about sexual harassment, taking prompt steps to investigate complaints of sexual harassment, and taking steps to put a stop to and redress harassment that has been found to occur.[60]

At least in theory, current law makes the creation of an informal

---

55. This example is drawn from work I have done consulting with universities and other organizations concerning the implementation of their sexual harassment policies and procedures. It is a composite of several organizations, which are not identified here for reasons of confidentiality.

56. 477 U.S. 57 (1986).

57. No. 97-569, 1998 U.S. LEXIS 4217 (Apr. 21, 1998).

58. No. 97-282, 1998 U.S. LEXIS 4216 (June 26, 1998).

59. *Id.* at *10.

60. *See* Cross v. Alabama, 49 F.3d 1490 (11th Cir. 1995); Spicer v. Virginia, 44 F.3d 218 (4th Cir. 1995); Kauffman v. AlliedSignal, Inc., 970 F.2d 178 (6th Cir. 1992); Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991).

administrative process a part of the employer's legal obligation. The adequacy of those processes is essential to the determination of the employer's liability for sexual harassment that has occurred.[61] This approach to employer liability blurs formal and informal legal process. It makes the shadow of the law part of the liability claim. Employers' actions undertaken to prevent and redress harassment become an explicit focus of the determination of whether the employer will be held liable at all. If courts focus their determination on the adequacy of the employers' system for influencing day-to-day practice, this approach offers the possibility of self-consciously constructing law in relationship to culture and practice. The legal standard invites organizations to think about how rules and policies actually affect practice. Organizations that successfully embody the proscription of harassment in their systems of decision making and conflict resolution may avoid liability for individual violations of the rules. This approach creates incentives for employers and universities to experiment with ways of translating legal norms about sexual harassment into organizational patterns of liability prevention.[62]

The processes created by organizations to address sexual harassment (and thereby avoid liability) do not necessarily bridge the divide between legal norms and organizational practice. I had the opportunity to observe efforts to implement sexual harassment policies in the course of consulting with various universities and companies. This work offered an opportunity to describe in the aggregate the dynamics of internal legal regulation, albeit in a general and impressionistic manner. To preserve the confidentiality of individual institutions, what follows is a composite account of those experiences. This account is intended to suggest recurring patterns that should be subjected to more rigorous empirical inquiry, rather than as an accurate or complete description of particular institutional practices.

University X has a sexual harassment policy that basically tracks the legal standards articulated by the Supreme Court and reflected the regulations of the Equal Employment Opportunity Commission.[63] Notwithstanding the existence of a clearly stated policy prohibiting sexual and racial harassment, the staff charged with addressing issues of harassment report that conflicts and problems involving sexual and racial harassment surface periodically, and within certain subcommunities, recur

61. *See* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liabilility of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66 (1995).

62. *See, e.g.*, Jonathan A. Segal, *Diversify for Dollars*, HR MAG., Apr. 1997, at 113; Jonathan A. Segal, *Legal Trends: The Risky Business of Risk Aversion*, HR MAG., Feb. 1997, at 113.

63. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

regularly. Some of the problems concern classic forms of quid pro quo harassment of individual students or employees by powerful supervisors, particularly in fields dominated by men, such as engineering, mathematics, and medicine. Women of color and non-white, foreign-born women report particular patterns of systematic abuse and vulnerability in lab settings. Another recurring pattern emerges in the graduate student/faculty advisor relationship, where the lines of power are blurred, contact is regular, and the stakes are high. A third pattern involves peer harassment of non-majority students—students of color, gay, lesbian, and bisexual students, both in and out of the classroom setting. Finally, the staff charged with enforcing the sexual harassment policy describe a problem of the marginalization of faculty who take on an active role in addressing issues of harassment at the University.

The processes developed to address harassment complaints consist of two separate tracks: 1) informal counseling and private mediation, and 2) formal investigation and adversarial hearings. This two-track system reflects the typical two-sided approach to the legal process, which carves up regulation into a formal and an informal process for addressing harassment. The informal system consists of counseling and mediation by designated resource staff, most often the ombudsman. In essence, this process treats the problem as a conflict between two individuals, the complainant and the alleged harasser, and attempts to work out a solution acceptable to both sides. These resolutions are typically private and confidential. Indeed, disclosure of the negotiations is itself a breach of University rules. The institutional decisions, patterns, and culture within which the harassment takes place are not the focus of the informal resolution process. Those with responsibility and authority for shaping day-to-day conduct within the department or school are not necessarily the ones who are held accountable for or involved in addressing problems of harassment. Resolutions of conflicts typically focus on how to avoid contact between the parties in the future, and on whether the behavior was serious enough to warrant some sanction of the perpetrator and monetary compensation to the victim. This process enables the affected parties to avoid a public, adversarial hearing that frequently polarizes departments and causes considerable pain to both the victim and alleged perpetrator. In some cases, informal, private dispute resolution offers the only practical avenue for any form of problem solving.[64] However, alternative dispute resolution rarely generates information or addresses practices that extend beyond the participants in the immediate dispute, unless a particular

64. Many victims are unwilling to file formal complaints of harassment because of fear of stigma and retaliation. *See, e.g.*, Margaret S. Stockdale, *What We Know and What We Need to Learn About Sexual Harassment, in* SEXUAL HARASSMENT IN THE WORKPLACE 3, 17 (Margaret S. Stockdale ed., 1996).

administrator independently chooses to assume responsibility for follow up. It usually fails to produce any visible, public norms or programs directed at the broader problem of harassment.

If the "conflict" cannot be resolved informally, or if the allegations are sufficiently serious to expose the University to liability if no disciplinary action is taken, the dispute proceeds to a formal process. A disciplinary process commences, focused on whether the subject of the complaint has engaged in sexual harassment, and if so, what the appropriate sanction should be. The issue in these proceedings focuses on the degree of blameworthiness of the individual wrongdoer. The complainant is not a party to the proceedings. The "case" is investigated and "tried" before a faculty committee. Again, the focus of the inquiry is not on the patterns that contribute to the harassment or strategies for changing those patterns. The "dispute" typically emerges as a "he said/she said" conflict between two individuals. The power dynamics, general incentive structure, and patterns of conflict within the organization remain uninterrogated, unless other allegations of harassment against the accused individual exist. The adequacy of the institutional response frequently focuses on the thoroughness of the investigation, the fairness of the hearings, the adequacy of the sanctions imposed, and the degree to which the sexual harassment policy was disseminated. To the extent the University's handling of the complaint becomes an issue, the inquiry focuses on whether the University's procedures were accessible, whether the investigation was thorough, and whether sanctions imposed for findings of harassment were sufficiently tough. If the University fails to fire or otherwise seriously discipline the alleged perpetrator, the complainant then files a lawsuit. The perception among many in the community, including the staff charged with handling sexual harassment, is that the higher the status of the alleged perpetrator, the less likely the individual is to be sanctioned. Many of those who sue the University leave either before or shortly after they sue. Ranks close around those who remain. The underlying patterns of relationship and incentive structures that contribute to abuses of power and to marginalization of women and people of color remain unchanged.

The dynamics of sexual and racial harassment at University X also illustrate the centrality of conflict and power dynamics to the way race and gender conflict is addressed. Although sexual and racial harassment appears as a conflict about the exclusion or marginalization of women and people of color, a deeper analysis reveals this conflict as part of a broader pattern of institutional dysfunction over relational conflict and power. The University's incentive structure did not generally emphasize relationships, the appropriate exercise of power in those relationships, and the capacity to address conflicts in relationships fairly and constructively. Value within the University setting derived almost entirely from measurable productivity

of scholarship which would enhance the status of the University as compared with its peer institutions. Relationships, both in and out of the classroom, were of secondary importance in the reward structure, the status hierarchy, and the decisions that shaped status, power, and compensation within the institution.[65] Abuses of power generally between superiors and subordinates were not seriously questioned unless they were extreme and were not considered to be relevant to the "public" domain of decisions. Sexual and racial harassment was treated as a marginal form of a marginal concern about fair and respectful relationships. It was further marginalized as an issue because those who were most concerned about the problem were women, people of color, administrative staff—members of groups that are less powerful and more marginal in contexts where harassment is most likely to occur.

The staff of the resource offices charged with the institutional responsibility for attempting to resolve harassment complaints frequently learn over time the patterns of harassment: which departments have recurring problems, which individuals trigger repeated complaints, which administrators downplay the significance of complaints or problems around harassment, and which students or student groups tend to experience ongoing harassment or marginalization. But staff members do not share this information, except in informal and often confidential settings, and rarely act on these patterns except as part of a formal complaint against a particular individual. The resource officers tend to be women, often women of color, with little status or credibility among the faculty and senior administrators. They may have the knowledge and expertise needed to understand the dynamics and construct institutionally grounded responses, but they frequently lack the access and opportunity to explore systemic approaches to the problem of harassment. In contrast, those with the power to address harassment as part of the overall incentive structure and culture of the organization lack the information, expertise, and incentive to do so. They often do not know of the subtle but pervasive patterns of group inclusion and exclusion that can underlie harassment complaints. Administrative authority for addressing sexual harassment rotates regularly, and department chairs and administrators often do not know that they bear legal responsibility for taking effective action to address harassment and that their action (or inaction) legally binds the university around issues of harassment.

65. Teaching, mentoring, and community building reportedly played a secondary role in tenure and promotion decisions. Abusive treatment of students, staff, and junior faculty also went unsanctioned, unless the behavior resulted in a complaint of sufficient magnitude to expose the University to legal liability. Professors who brought in substantial grant income or produced large quantities of scholarship were perceived by the advocacy community as relatively immune from responsibility for abusive, harassive behavior.

The advocacy groups interested in such issues also function in a vacuum. They interact primarily with women and people of color who seek help in dealing with their experiences of harassment and in attempting to educate and organize the community to take action. They have access to patterns of experience and strong incentives to reshape those patterns but lack the opportunity to harness this knowledge to day-to-day practices within the university. In part because they are deeply skeptical about the willingness of high level administrators to take meaningful action in the face of harassment, advocacy groups frequently assume an adversarial posture that attempts to place blame and responsibility on particular individuals and to encourage complainants to sue the university individually. These suits, even when successful, tend to become focused on how serious the conduct of the offender was, and whether the university took adequate action in response. They have not focused attention and energy on the underlying patterns or on the consequences to the broader community's relationships or productivity of those patterns. Advocacy groups are perceived by those in power as "political," adversarial, and focused on finding discrimination wherever they look. Advocates are frequently marginalized at or excluded from pivotal decisions about policy and organizational structure. They react to crises, mobilize for brief periods, and then fade back into the margins of the institution.

These three examples bring to the surface the kinds of interactions within organizations that frequently remain hidden in legal discourse and yet are so central to the way race, gender, and the law actually operate in many workplaces. They are intended to illustrate more general patterns that accompany shifting systems of workplace governance. They reflect the interactive group dynamics of power, race, and gender. These examples highlight the structural, embedded character of decisions involving race and gender, and the importance of these dynamics to the capacity of organizations to function fairly and effectively. The next section builds on these examples to identify emerging themes and their implications for the adequacy of the current system for regulating discrimination.

II. RETHINKING ASSUMPTIONS UNDERLYING LEGAL APPROACHES TO RACE, GENDER, AND ORGANIZATIONS

A. The Locus of Power over Workplace Status

In the three examples described above, power over day-to-day decisions about workplace status has been exercised in ways that depart from the traditional bureaucratic model. Decision making was pushed

downward in the organization, and power was spread among shifting groups of employees, often without a formal supervisory or managerial role. Employees who look identical on the organizational chart make pivotal decisions about each other. The line between supervisors and employees blurs considerably. The people who make decisions for the organization, who exercise the organization's legally relevant authority, are more decentralized and dispersed. That power is also constantly shifting. Workers rotate roles and responsibilities. Formal positions do not define actual authority to influence the status and future of other workers on the team.

This move toward more interactive, nonhierarchical approaches to day-to-day governance within organizations challenges basic assumptions embodied in current legal doctrine about how organizations operate. Just this past term, the Supreme Court reiterated the premise that underlies its approach to employer liability in sexual and racial harassment cases:

> As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of [direct economic injury]. A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct . . . . But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.[66]

The Supreme Court's assumption about how power is typically deployed in organizations reflects the bureaucratic paradigm of management that has dominated legal discourse. Current analysis of employer liability for conduct of its agents focuses on the distinction between managers, supervisors, and coworkers, and assumes that the power to make decisions affecting employment status correlates with the level of formal power in the organization.[67] This assumption is strongly reflected in

66. Burlington Indus., Inc. v. Ellerth, No. 97-569, 1998 U.S. LEXIS 4217, at *36-37 (Apr. 21, 1998).

67. This assumption is shared by many courts and commentators alike. *See* Guess v. Bethlehem Steel Corp., 913 F.2d 463 (7th Cir. 1990); Garcia v. ANR Freight Sys., 942 F. Supp. 351 (N.D. Ohio 1996); Christine Merriman & Cora G. Yang, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 93 (1984-85); Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeling the Standard of Employer Liability*, 71 U. DET. MERCY L. REV. 817 (1994); Philip D. Brandt et al., Note, *Employment Discrimination*, 64 GEO. WASH. L. REV. 1148, 1168 (1996).

the law on employer liability in the context of sexual and racial harassment.[68] It is certainly not a new insight to suggest that this top-down, black box treatment of organizations is flawed. Even within organizations that are structured along traditional hierarchical lines, researchers have questioned the validity of the assumption that formal power to determine economic and social position equates with power as it is actually expressed and practiced at the level of the shop floor.[69] Certainly, organizations such as universities have used "decentralized" decision making about promotion and tenure long before the recent trend.[70]

But recent developments in organizational practice that actively embrace decentralized decision making widen the gap between standard legal analysis and organizational practice. Contrary to the assumptions of prevailing case law (and the approach of many lawyers interpreting that case law to their clients), traditional, bureaucratic structures may not accurately depict the structure of governance in a growing proportion of the economy.[71] Although studies attempting to assess the prevalence of these

68. Sexual harassment by high level managers in a position to bind an organization triggers vicarious liability. Supervisors who make decisions resulting in "tangible harm" provoke liability, which employers may avoid by successfully interposing an affirmative defense that they acted reasonably in addressing the problem. *See Burlington*, 1998 U.S. LEXIS 4217; *see also* Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995) (holding employer not liable for hostile work environment created by supervisor when employee could not reasonably believe that the supervisor had explicit or implicit authority to harass her and that the employer had an effective anti-harassment policy). Employers are only liable for coworker harassment if they have constructive knowledge of the wrongful behavior and fail to act. *See* Perry v. Ethan Allen, Inc., 115 F.3d 143, 153-54 (2d Cir. 1997) (holding when harassment is committed by an employee's coworkers, the employer is liable if the employee shows the employer failed to provide a reasonable avenue for complaint or knew of the harassment but did nothing about it).

69. *See* NONET & SELZNICK, *supra* note 23; REES, *supra* note 23, at 24-25; Austin, *supra* note 20; Dorf & Sabel, supra note 6.

70. *See* Lam v. University of Haw., 40 F.3d 1551, 1560 (9th Cir. 1994) ("The principal defendant in this case is the University, which has delegated to the faculty near-total control over hiring. The faculty, first in committee, then as a whole, reviews applications, chooses the final candidates, and votes on whether to extend any candidate an offer of employment.").

71. For examples from the case law of other workplaces that have decentralized authority for employment decision making, see *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1174-75 (2d Cir. 1996) (plaintiff was part of a team assembled to prepare a competitive bid for the sports-insurance account of the World University Games); *Smith v. The Berry Co.*, No. CIV.A.96-1899, 1997 WL 358123 (E.D. La. June 24, 1997) (case arose out of the company's adoption of a new employment plan which changed the task structure and method of compensation to reward team rather than individual performance); *Hearn v. General Elec.*, 927 F. Supp. 1486, 1489 (M.D. Ala. 1996) (new plant manager reorganized "plant's administrative structure, changing it from a traditional 'supervisory' one, in which forepersons and other administrators supervised by giving orders, into a 'team' structure, in which employees would confront issues and resolve problems more through interaction and cooperation among themselves"); *Rivera v. Prudential Ins. Co.*, No. 95-CV-0829, 95-CV-

types of structural reorganizations are inconclusive, there are indications that organizations in both the public and private sector are experimenting with systems of governance in ways that depart dramatically from the bureaucratic, hierarchical paradigm depicted in the case law.[72] Johnson Wax's experimental approach to workplace governance is not unique. Developments in technology and market demand have placed pressure on companies to find ways to increase adaptability and to connect decision making authority with information about production, markets, workers—in short, with information that exists at the level of production or service delivery.[73] This pressure encourages employers to decentralize decision making authority.[74] Many companies have experimented with some forms of decentralized decision making, although most have not moved entirely to self-governing teams.[75]

The Supreme Court's description of power in *Burlington Industries*[76] does not provide an adequate framework for addressing the emergence of the team-based structures of the type employed at Johnson Wax. In situations where power does not correspond to formal status, the distinction between managers, supervisors, and coworkers is arbitrary, at least with respect to their capacity to impose tangible adverse consequences on other employees. For example, if a full professor engages in harassment of an untenured professor, is that supervisory harassment? That professor will ultimately function as a direct decision maker concerning the untenured faculty member's continued employment. Yet, there is no formal supervisory relationship between the full professor and the untenured professor. By analyzing the dynamics of power in relationship to traditional categories of bureaucratic position that do not reflect patterns of organizational governance in many workplaces, the current doctrinal framework offers no coherent, principled framework for assessing the way power is exercised in the workplace and the employer's appropriate responsibility for how that power is exercised. Perhaps the Court would treat workplaces like Johnson Wax as falling within the exception to the

---

0830, 1996 WL 637555, at *1 (N.D.N.Y. Oct. 21, 1996) (plaintiff was assigned to a team of customer service representatives (CSR) that was led by an another more experienced CSR who was designated the team leader).

72. *See* LAWLER ET AL., *supra* note 40, at 2 (results of survey showed significant adoption rates for employee involvement; although many key practices had only recently been adopted, many organizations practiced employee involvement in only part of the organization, and in many cases organizations adopted limited changes); MALCOLM K. SPARROW, IMPOSING DUTIES: GOVERNMENT'S CHANGING APPROACH TO COMPLIANCE (1994); Dorf & Sabel, *supra* note 6.

73. *See* HARVEY, *supra* note 6, at 147.

74. *See* PIORE & SABEL, *supra* note 8, at 35-36; Barenberg, *supra* note 8, at 890-93.

75. *See* LAWLER ET AL., *supra* note 40.

76. No. 97-569, 1998 U.S. LEXIS 4217 (Apr. 21, 1998).

usual allocation of power characterized in *Burlington Industries*, as an aberration (or "elaborate scheme"). However, the Court does not offer any guidance as to how those "exceptional" cases fit into the conceptual structure that applies to these cases.

Legal analysis that focuses on questions of formal status or position may bear no relation to the actual process of decision making or the capacity or predisposition to abuse power in ways that implicate discrimination. By failing to explicitly engage with intermediate structures of governance within organizations, legal actors risk misdefining the problem, and in so doing, misdirecting efforts to avoid liability or comply with the legal norm. The project of developing an effective regulatory regime requires the capacity to ask the right questions that focus attention on the level at which power is exercised and the incentive structures that shape current behavior. The current categories of analysis ignore or discount the intermediate level of worker interaction, that is often central to either encouraging or minimizing the expression of bias. Lawyers design employment systems that focus exclusively on either formal policy or identifying and disciplining individuals who are visibly engaging in discrimination. The underlying patterns that encourage the expression of bias, produce exclusionary dynamics, and undermine productivity remain untouched.

B. The Neglect of Intermediate Level, Group Decision Making Processes in Law and Theories of Regulation

Each of the examples described in the previous Section involves a complex and intertwined relationship between individual and group action. Teams, committees, panels, and other groups frequently determine both the day-to-day experience and the outcome of pivotal decisions in the workplace.[77] Groups play a key role in decision making, determining access to training, job assignments, salary, vacations, and advancement within the organization. These decisions are the culmination of interactions and decisions that may be difficult to isolate or trace to a particular event or individual. The capacity of any individual to influence the outcome of the decision is a function of the structure of decision making within the group as well as the informal relationships and power within the group formally charged with decision making responsibility. Within the group as a whole, informal subgroups develop that structure interactions and power in ways that can profoundly affect the relationships and status of women, people of color, and other non-dominant subgroups.[78] At the same time, this group

77. *See* Barenberg, *supra* note 8, at 891.

78. *See* Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1176 (2d Cir. 1996) (female

dynamic has been mapped onto a set of more traditionally defined hierarchical relationships between individuals. Particular individuals may continue to have enhanced power as a residue of the old system or as a result of formal status differences.[79] These individuals may have a profound impact on the functioning and outcome of group interactions.[80] They may also act in ways that focus attention on individual acts of racial or gender bias.

Individual decision makers exercise judgment within a particular organizational and social context. Research by organizational and social psychologists shows that the process used to make group decisions dramatically affects the reliability, fairness, and validity of the evaluation process. Collective decision making can be structured to minimize bias and enhance reliability. Participants in group decision making can develop skills that equip them to recognize bias, address conflict constructively, and reduce the influence of stereotypes on the outcome.[81] The developing literature on benchmarking provides a distinct yet complementary

---

member of team marginalized within group, excluded from collaboration, and subjected to offensive remarks; after complaining, she was fired because "she wasn't being a team player"); Rivera v. Prudential Ins. Co., No. 95-CV-0829, 95-CV-0830, 1996 WL 637555, at *3-4 (N.D.N.Y. Oct. 21, 1996) (plaintiff who complained about harassing behavior by assistant team leader subjected to "silent treatment" by coworkers, which created extremely high levels of stress and ultimately led to the termination of their employment). *See generally* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 47-48 (1977); Jehn, *supra* note 14 (according to social identity theory, group members establish a positive social identity and confirm affiliation by showing favoritism for members of their own social category—in effect via discrimination and self-segregation that disrupts group interaction).

79. *See* Thomas & Proudford, *supra* note 15.

80. This power may be expressed or made visible through statements or conduct that reflects racial or gender bias. For example, in the Johnson Wax example, the plaintiff filed a sexual/racial harassment claim alleging that her quasi-supervisor repeatedly harassed her and made offensive comments that created a hostile work environment. The plaintiff alleged that this individual called African-American women workers "black bitches" and singled out black women for disparaging and hostile treatment. *See* Interview with Willie Nunnery, Counsel for Plaintiff. The workplace was subsequently reorganized into self-directed teams, with the plaintiff and her former quasi-supervisor assigned to the same work group. In *Lam v. University of Hawaii*, the chair of the appointments committee, Professor A, wielded considerable power as a result of his position as chair and as a tenured member of the faculty. At the same time, his influence was mediated through the entire committee. *See Lam*, 40 F.3d at 1556-60.

81. *See* Stender v. Lucky Stores, Inc., 803 F. Supp. 259 (N.D. Cal. 1992); WAYNE F. CASCIO, APPLIED PSYCHOLOGY IN PERSONNEL MANAGEMENT 77 (3d ed. 1987); SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 139-81 (1984); Susan T. Fiske & Shelley E. Neuberg, *A Continuum of Impression Formation from Category Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, *in* 23 ADVANCES IN EXPERIMENTAL INTERPRETATION (M. Zanna ed., 1988). EEOC Guidelines incorporate some of this research in the requirements for criterion validation studies. *See* 29 C.F.R. § 1607.5(B) (1998).

systematic approach to structure discretion in ways that link productivity, fairness, and minimization of bias by group decision makers. This structural approach employs systems of decision making that aggregate and reflect on similar, related, or clustered incidents or problems in relation to articulated criteria and goals. This iterative process enables groups and organizations to accurately label problems and dysfunctions in organizational decision making and to search for appropriate solutions and systems of accountability.[82]

Decisions made through highly unstructured processes on an ad hoc basis, without specified criteria, articulated reasons, deliberation, and accountability of decision makers, are considerably more likely to reflect the motivational and cognitive biases held by individual decision makers.[83] Teams or groups that lack the capacity to express and resolve conflict frequently play out the underlying causes of that conflict in their employment decisions, such as hiring, promotion, and job assignment.[84] Unarticulated racial and gender dynamics can have a profound impact on conflict and decision making of groups. Although the exercise of discretion is both unavoidable and in many instances desirable, organizations can and do shape the processes by which discretion is exercised. The important question is not *whether* groups use discretion in making employment decisions but rather *how* groups exercise discretion. The criteria, processes, and mechanisms of accountability used by the group fundamentally determine the legitimacy, fairness, and outcomes of discretionary decision making processes.

These insights about the structures for exercising discretion, which are familiar concepts in the industrial psychology and group process literature, fall through the cracks of much legal analysis. The inquiry prompted by the current legal regime fails to take account of this intermediate and crucial level of organizational decision making. Standard legal analysis typically focuses on either a search for individual bad actors or on policies instituted at the top of the organization that produce discriminatory results.[85] Individuals typically constitute the basic unit of analysis for

82. *See* SPARROW, *supra* note 72, at 45 (describing a similar process used in problem oriented public service management); Charles F. Sabel, *Bootstrapping Reform: Rebuilding Firms, the Welfare State, and Unions*, 23 POL. & SOC. 5, 36 (1995) ("[T]he parties proceed, as in disciplined discussion, by agreeing on what they understand, defining what they would like to know beyond that, and deciding how to explore the knowable and the doable jointly, with reference to precise but corrigible interim goals. Continuous discussion of efforts to reach those targets then becomes simultaneously the means of revising the goals and monitoring the partners' performances and capacities; because learning and monitoring are inextricably connected in this relation, I refer to it as learning by monitoring.").

83. *See* Krieger, *supra* note 14, at 1199-1211.

84. *See* Jehn, *supra* note 14; Thomas & Proudford, *supra* note 15.

85. *See* Perry v. Ethan Allen, Inc., 115 F.3d 143 (2d Cir. 1997) (focusing on sexual

purposes of determining wrongful conduct. The first step is to determine if there is a individual whose statements or conduct shows that race or gender bias motivates their actions.[86] A court analyzing the Johnson Wax allegations would ask, were there statements by individuals who played a role in the decision making process that demonstrate discriminatory bias against the plaintiff? Did they motivate his behavior with respect to her? Was he in a position to shape the day-to-day conditions of her work? Similarly, the court in *Lam v. University of Hawaii* inquired as to whether Professor A or other participants in the decision making process spoke or acted in a way that indicated that their selection decision was motivated by gender or ethnicity. These statements were not analyzed in relation to the structure or process of decision making that shaped the impact of the individual on the group or the capacity of the group to deal with bias when it arose.

Once an individual discriminator is identified, the next step under existing doctrine would be to attempt to determine the relationship of the individual acts of bias to the overall decision making process. This often takes the form of attempting to disaggregate the decision making team into a series of individual actors and then determine how much influence the individual bad actor had on the outcome of the decision.[87] If the plaintiff did not fare well under the team-based system, did the sexist/racist individual play a significant role in producing the decisions that kept her from advancing, from getting raises, from getting good work assignments? Were comparable white male employees treated differently?

This analysis proceeds from the assumption that employment decisions necessarily result from the exercise of discretion and that this individual exercise of discretion is not itself discriminatory. Unless that discretion is demonstrably motivated by bias or the decision making process is so arbitrary that it cannot be explained except as bias, then the law has no further role in monitoring or regulating the exercise of discretion as it affects bias. The group level of practice is almost invisible, in both factual and legal analysis. When groups are addressed, courts treat them as aggregations of individuals, rather than dynamic entities that emerge from structural decisions and patterns. This approach does not focus attention on the level at which decisions actually take place. The intermediate level of the group falls between the cracks of the individual

---

harassment policy articulated at the top of the organization and procedures in place for responding to individual violations of that policy).

86. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984). In situations where no explicit employment action is taken, the question is whether the racial or gender based harassment is sufficiently severe or abusive to change the conditions of the workplace.

87. *See Price Waterhouse*, 490 U.S. at 228; Krieger, *supra* note 14.

bad actor and the organization as a whole. The emphasis on individuals to the exclusion of groups as decision makers focuses attention on the most extreme form of conduct that bubbles to the surface, but which frequently reflects and emerges out of group patterns.

If no particular bad actor can be identified, then the focus of legal analysis shifts to the company's overall policy or practice that causes a discriminatory outcome. This inquiry may proceed within the framework of disparate impact analysis. Did the organization as an entity use a selection practice or criteria, such as an interview or a team based decision making process, that had a disproportionate impact and could not be justified by business necessity?[88] If the interview or decision making process produced a discriminatory outcome, courts typically ask the question whether the exercise of discretion was appropriate under the circumstances. Did the job at issue require a skill that could not be assessed objectively? If so, was an interview an appropriate way to evaluate the candidate's ability? Then courts frequently conclude that the process satisfies business necessity and is thus not discriminatory.[89] There is little if any attention paid to the process of decision making, the systems of accountability, the articulation of criteria, or the steps taken to minimize the expression of individual bias in the decision making process.[90]

The other avenue for challenging a subjective selection process is a pattern and practice claim.[91] This claim relies heavily on statistical data and requires a showing that the employer engaged in a pattern and practice of discrimination, supported by a statistical pattern of racial or gender under-representation.[92] The focus of the inquiry in these cases is on

88. *See* Civil Rights Act of 1991, 2 U.S.C. § 703(k)(1) (1991).

89. Courts have rejected the requirement of test validation for interviews largely because of the difficulty of validating these types of selection criteria. Interviews and other selection processes assessing general abilities and traits, such as intelligence or leadership, can only be validated using construct validation. As the Supreme Court recognized in *Watson*, this form of validation is both prohibitively expensive and almost always unsuccessful. As a result, the Court articulated an extremely weak test of business necessity to govern disparate impact cases involving subjective employment practices. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

90. *See id.* at 977; West Virginia Univ. v. Deckerm, 447 S.E.2d 259 (W. Va. 1994).

91. *See, e.g.*, Jauregui v. City of Glendale, 852 F.2d 1128 (9th Cir. 1988); Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992).

92. The underlying legal theory for pattern in practice cases was first expressed in a footnote in *Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977):

> Statistics showing racial or ethnic imbalance are probative . . . only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a workforce and that of the general population thus may be

pervasive and conscious discrimination practiced at every level of the organization. Was the process so arbitrary and laden with bias that it can only be explained as a pretext for the exercise of bias? Again, this inquiry overlooks the process of constructing and reinforcing bias at the level of ordinary team interactions and decision making. Instead, pattern and practice analysis focuses attention on the pervasiveness of conscious, intentional bias.

The court's analysis of the selection processes used in *Lam* exemplifies the pattern of focusing either on individual bias or top-down policy, to the exclusion of the structural level. The University's first search for the position of director of the Pacific Asian Legal Studies program proceeded without any clear guidelines or structure. The court found that this first stage of the selection process was discriminatory. It expressly recognized the arbitrary nature of the first committee's decision making, and described in some detail the recommendations made by EEOC representatives to establish a more fair, less biased system of decision making. The court also acknowledged that the second committee charged with overseeing the selection process completely ignored the EEOC recommendations and proceeded again in an entirely ad hoc manner. The absence of a systematic, racially diverse, and accountable method of decision making heightened the risk that bias would result. Yet, the court in no way linked its analysis of discrimination in the second process to the inadequate structure of the process. It found no discrimination based on its conclusion that there was no evidence of either individual bias or decisions by high level administrators that expressed bias. Its description of the inadequacies of the decision making process played no role in its determination of the dynamics of discrimination.[93]

The doctrinal neglect of the structural, group level as a focus of inquiry also shapes how lawyers interpret and translate legal norms for their organizational clients. If practice guides and personal experience are indicative, lawyers tend to focus on developing formal procedures to punish wrongdoers and clear rules to establish policy and to ignore the incentive structure and group dynamics that often perpetuate the pattern of conduct.[94] The structural dimension is frequently overlooked even in the context of sexual harassment, in which courts have created incentives to

---

> significant even though . . . Title VII imposes no requirement that a workforce mirror the general population.

93. *See* Lam v. University of Haw., 40 F.3d 1551, 1551 (1994).

94. *See, e.g.*, ELLEN J. WAGNER, SEXUAL HARASSMENT IN THE WORKPLACE: HOW TO PREVENT, INVESTIGATE, AND RESOLVE PROBLEMS IN YOUR ORGANIZATION (1992); Jana Howard Carey & E. Anne Hamel, *Sexual Harassment in the Workplace*, 426 P.L.I. Litig. 7 (1992); Julie M. Tamminen, *Sexual Harassment in the Workplace: Managing Corporate Policy*, DISP. RESOL. J., Jan. 1995, at 85, 85 (1994).

develop effective internal mechanisms for addressing sexual harassment.[95]

C. *Patterns of Advancement and Exclusion: Blurring the Boundaries Between Working Conditions and Employment Opportunities*

In organizational structures like Johnson Wax, people do not get ahead by applying for promotional opportunities that are defined in advance and posted for competitive bidding. Indeed, it is often difficult to know in advance whether a particular opportunity or assignment constitutes a step toward promotion. Discrete decisions about advancement blur into decisions about day-to-day roles and responsibilities that are made by the group. Assessments of performance, which determine opportunities for more challenging work and advancement, are more likely to be embedded in day-to-day interactions and decisions. Opportunities to get ahead are a function of building skills and relationships among diverse groups of people, both within the work group and in other parts of the organization and its environment. In the context of this dynamic and shifting set of power relationships and opportunities, it is difficult to isolate a single decision as *the* defining act of promotion or exclusion. Similarly, acts that alone do not define a worker's status or opportunity are inextricably linked to a broader pattern of conduct that produces decisions about who advances in the organization.

These embedded patterns of relationships interact in significant ways with race, gender, and other salient categories of difference. Nontraditional workers often remain outside these crucial networks of interaction and advancement, not necessarily due to intentional motivation. Social science research consistently documents the common desire to work with people who are familiar and similar.[96] Recent work in cognitive psychology also shows that evaluations of members of identifiable and salient groups often reflect judgments made based on pre-existing frames of reference about members of those groups.[97] Research on small groups shows that the unacknowledged conflict within diverse groups frequently reinforces these selective patterns of interaction to produce informal patterns of exclusion from critical aspects of occupational development. The consequences of these more subtle patterns of interaction can be just as stark in terms of the denial of access to opportunity based on race or gender. But the causes and potential solutions for these patterns of exclusion can only be understood as part of a broader analysis of the role of social capital in creating access and opportunity.

95. *See supra* notes 51-57 and accompanying text.
96. *See* Jehn, *supra* note 14; Schultz, *supra* note 18.
97. *See* Krieger, *supra* note 14.

In contrast to this embedded and interactive approach to employment decision making, case law rests on the assumption that identifiable and discrete moments of decision produce outcomes that determine economic and organizational status. Several important doctrinal areas exemplify this assumption. The courts' approach to mixed motive and direct evidence discrimination focuses on determining the connection between statements showing discriminatory motivation and the moment of decision.[98] Similarly, the distinction between quid pro quo and hostile environment discrimination, recently elaborated on by the Supreme Court, rests on the possibility of distinguishing between decisions that have an adverse impact on the employee and other decisions that only affect the conditions under which an employee works.[99] This approach assumes the existence of formal progressions, job descriptions, seniority systems, or some other hierarchical and formal structure for decision making about pay, job assignment, and promotion. This approach also assumes that decisions that have an adverse impact on an employee's status can be separated from decisions only affecting the conditions under which work is performed. In the emerging workplace, that distinction is harder and harder to draw.

D. Law's Assumptions About and Impact on Workplace Conflict Involving Race and Gender

In each of the examples described above, organizations were structured in ways that required diverse individuals to interact regularly and reach decisions about issues that matter to each of the participants. Under these circumstances, conflict is inevitable. Even among homogeneous groups, conflict will arise. When groups of people with different skills, mindsets, backgrounds and interests interact, disagreements about tasks, values, and personal relationships are a fact of organizational life.[100] One of the goals of moving decision making responsibility to team-based, functionally integrated groups rests on an acknowledgment of the value of information-based conflict as a means of generating organizational and group learning. This learning occurs as a consequence of articulating different strategies for solving problems, making errors, generating conflict among differing perspectives, and evaluating results in relation to

98. *See id.* Krieger critiques the case law for failing to take into account the nature of cognitive processes in structuring memory, interpretation, judgment, and decision making. I am offering an additional critique based on changes in patterns of opportunity in the workplace.

99. *See* Faragher v. Boca Raton, No. 97-282, 1998 U.S. LEXIS 4216, at *53-61 (1998).

100. *See* DIVERSITY IN WORK TEAMS, *supra* note 42; Jehn, *supra* note 14; Thomas & Proudford, *supra* note 15.

articulated goals.[101] Tasks that require developing new ideas or making decisions under conditions of uncertainty or complexity will likely produce conflict. Inevitable differences within work groups stemming from diverse backgrounds, values, and experiences contribute to the multiplicity of responses to uncertainty.[102] Research also clearly establishes that relational conflict (based on personal likes and dislikes) is inevitable, linked to racial and gender difference, and destructive to the capacity of groups to function effectively and fairly. As the work of Karen Jehn demonstrates, functional groups have several key capacities relating to conflict: (1) the capacity to address conflict openly, (2) the capacity to translate relational conflict into issues of experience, knowledge, and perspective, and (3) the capacity to use conflict to redefine problems and develop creative, inclusive responses to those problems that respond to identifiable concerns underlying the conflict.[103] Thus, conflict is a normal, inevitable, and potentially constructive aspect of work, especially in decentralized, team-based governance structures.

Racial and gender conflict in work groups and organizations like those described in Section II develop in interaction with more general patterns and processes for addressing group conflict and power differentials. The capacity of multi-racial teams[104] to treat non-majority group members as full-fledged participants in the group depends in large part on the general capacities of the work group to address conflict, to learn from each other, and to address the interests and concerns of each member of the group. At the same time, racial and gender dynamics affect the group's capacity generally to handle conflict constructively, to adapt to internal and external demands on the group, and to generate usable information about how to address recurring problems.

Current legal approaches to racial and gender dynamics in the workplace tend to embody an entirely different set of assumptions about conflict. These assumptions shape processes of decision making in organizations in ways that can prevent groups from developing the capacity to address conflict constructively, particularly if that conflict involves racial or gender difference. Legal regulation of employment discrimination focuses on conflict as personal (and thus legally irrelevant) unless it directly involves an employment decision, and workplace conflict as irrelevant unless it reflects racial or gender bias.[105] Personal conflict is

101. *See* Dorf & Sabel, *supra* note 6; Sabel, *supra* note 82, at 36.

102. *See* Jehn, *supra* note 14.

103. *See id.*

104. See, for example, those established by Johnson Wax to govern workplace decision making.

105. This point, which emerged in conversations with Charles Sabel, will be developed further in a forthcoming article we are writing together on rethinking discrimination

addressed, if at all, through private efforts at dispute resolution aimed at eliminating the conflict and restoring order, if not harmony. Workplace conflict is addressed through a formal adversarial process that attempts to determine whether race or gender played a role in decision making, in which case the accused is at fault and subject to sanctions. These tracks for addressing conflict construct racial and gender conflict as either irrelevant or aberrational. The law appears to assume that, absent racist or sexist motivation, race and gender identity does not enter into workplace decision making, and if it does, the goal is to suppress or remove any focus on race, gender, or other categories of difference. Indeed, the current emphasis on color-blindness as the norm suggests that explicit acknowledgment of race and gender dynamics may be interpreted as bias.

Internal dispute resolution processes designed to address claims of sexual and racial harassment also reflect this false dichotomy between personal disputes and violations of workplace norms. Informal systems of mediation that many institutions have created target the *private* interactions of two individuals. A neutral third party attempts to resolve the personal disagreement or conflict between the complainant and the accused. The formal disciplinary system focuses on adjudicating rule violations. Third parties to the conflict necessarily oversee this process. The managers and work group members who govern and operate within the workplace system that constructs the general pattern of conflict and power remain outside of and often irrelevant to either the informal or formal conflict resolution process. Not surprisingly, the patterns that produce sexual and racial harassment and exclusion in workgroups and teams frequently remain unchanged, even when conflicts are effectively resolved at the formal or informal level.

E. Reprise: The Dynamics of Racial and Gender Bias in the Emerging Workplace

Legal regulation within the prevailing paradigm treats racial and gender discrimination as an issue of individual fault, reflected in conscious or unconscious, racial—or gender—based motivation. Race and gender function within this framework as fixed, static categories of victims based on membership in a set, unchanging group defined by physical characteristics such as skin color. Bias emerges from individual decisions that deliberately or unconsciously take race or gender into account in ways that adversely affect a member of a particular social group. Race and gender analysis is important to protect the interests of the disfavored group. In this sense, it is a special interest inquiry: the issues of race and gender

---

regulation.

are important only to those who care about the status and access of those within the disfavored group.[106]

However, this way of defining the problem of racial and gender bias and exclusion fails to capture the dynamics of the emerging workplace or to reflect the results of recent psychological and organizational research. Bias is produced not only as a result of motivation but also as a product of racial or gender schemata,[107] multi-racial group interactions, and patterns of conflict resolution or avoidance. The salience of race or gender depends on the particular composition of a workplace and the projects or problems facing that workplace. Bias or exclusion often results from interactive patterns of non-inclusion in the networks and informal learning opportunities of a workplace, as much as from exclusion motivated by bias. Racial and gender bias is often reflective of and affected by deeper patterns of institutional dysfunction around power, conflict, and decision making. Under these circumstances, organizations cannot change racial bias without taking account of the structure that produces that bias. At the same time, organizations often cannot see deeper patterns of dysfunction that affect broader interests without examining the impact of these patterns on visible, marginalized groups.[108] Effective responses to these deeper forms of dysfunction and exclusion prompt systemic change that can benefit the whole organization. Thus, race and gender concerns offer a much needed catalyst for the continual organizational reflection that the new forms of organizational governance require.

F. The Inadequacy of Formal Rules and After-the-Fact Enforcement to Address Racial and Gender Bias in the Emerging Workplace

As organizations move in the direction of decentralized, team-based systems of production and governance, crucial aspects of their decision making become less amenable to effective regulation via enforcement of formal, universal legal rules dealing with discrimination. Rules proscribing intentional discrimination will not reach much of the behavior that produces identity-based exclusion. Workplaces are increasingly reorganizing to enable the exercise of judgment and discretion at lower levels of formal power.[109] This discretion is crucial to the capacity to adapt

106. *See* Sturm & Guinier, *supra* note 19.

107. "Schemata" are frames of reference for organizing our interpretations, attention, memory, and emotions. There is now considerable empirical evidence that cross-racial interactions are shaped by racial schemata—well developed frames of reference or theories for organizing information about race. *See generally* Krieger, *supra* note 14.

108. *See* Sturm & Guinier, *supra* note 19.

109. *See* SPARROW, *supra* note 72, at 72-80; Dorf & Sabel, *supra* note 6; *see also supra* notes 9 & 10.

in the new working environment. The exercise of discretion is unlikely to be prohibited by the courts and will be strongly resisted by managers. At the same time, it is in the exercise of individual and group-based discretionary decision making that racial and gender bias frequently operates. A rule-driven approach by definition either eliminates discretion or bypasses the sites where discretion operates. An effective system of discrimination regulation would thus both permit and discipline the exercise of discretion to make it accountable, fair, and unbiased (as well as productive of information that can be used to inform subsequent decisions). This cannot be accomplished solely through a system focused on determining, after-the-fact, that individual decision makers and organizational policies have complied with pre-established, universal rules.

The nature of discrimination itself makes a rule-oriented approach to discrimination inadequate. The examples provided above, informed by the analysis of the interactive, structural character of bias, demonstrate that although there are general themes and patterns that help in understanding and defining racial and gender dynamics, the particular meaning of racial and gender interactions can only be understood in context.[110] This insight helps understand and accept the courts' inability to develop a universal, specific rule governing sexual harassment. Instead, the courts have articulated a series of factors that are to be taken into account in a particular context to determine whether behavior constitutes a hostile working environment.[111] Although courts can and have identified factors such as the seriousness of the conduct, the extent of contact, and the nature of the power relationship in which the harassment arises, the interaction of those factors in a particular context determines whether the conduct constitutes a hostile environment in the case under consideration.[112] Similarly, the particular expression of racial and gender diversity must be understood in context to enable effective work teams to operate and to promote constructive conflict that produces organizational learning. For example, if the women in a particular work group that was previously all-male deal with issues of conflict and collaboration differently than the previous norm, that difference will likely generate disagreements that could either fragment the work group or expand the group's repertoire of strategies. The significance of the difference that correlates with gender or race will vary with the configuration of the group and the nature of the task at hand and thus must be addressed contextually.

Lawyers' traditional response to the absence of clear rules frequently misses the discretionary group level of action that is so crucial in the

110. *See* Sturm & Guinier, *supra* note 19.

111. *See* Faragher v. Boca Raton, No. 97-282, 1998 U.S. LEXIS 4216, at *53-61 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993).

112. *See Harris*, 510 U.S. at 21-23.

emerging workplace. One response is to define a safe zone of conduct that could not be found under any circumstances to violate the legal norm and to articulate a rule steering behavior toward that safety zone. For example, lawyers may counsel organizations to avoid sexual harassment problems by discouraging any informal or social contact among men and women, particularly if they are in unequal positions of power in the organization. This approach risks perpetuating the dynamics of exclusion by isolating women from the informal networks through which social capital and access to advancement develop. It may thus fail to avoid liability and will most likely hamper the capacity of teams to address conflict constructively and to work together effectively. Similarly, lawyers may counsel clients not to share decision making responsibilities with work teams to avoid problems with subjective decision making. At least in organizations committed to this approach to production for economic reasons, this advice tends to marginalize lawyers, to encourage clients to avoid their participation unless and until a crisis arises, and to deal with any claims of racial or gender bias on a purely individual level.

Another response is for law to encourage the construction of elaborate due process regimes that respond to individual claims of discrimination after the fact. This type of legal intervention serves important purposes such as resolving individual conflicts and sanctioning individuals who have engaged in demonstrably biased decision making. But it does not get at the underlying source of the problem, and it fails to encourage or enable organizations to operate proactively in an attempt to avoid these issues.

This analysis suggests that significant limitations exist in the current structure of legal intervention. As organizations become more fluid and power is exercised through group interaction and decision making, it becomes necessary to experiment with structural approaches to legal intervention that focus on systems of decision making and explicitly employ organizational incentives and nonlegal actors in the project of creating lawful, inclusionary practices within institutions. The challenge becomes one of forging a dynamic relationship between the role of law in enforcing minimum standards of conduct through sanctions, and the role of law in creating incentives for organizations to develop internal regulatory regimes that enable organizational actors to structure fair, accountable, and effective systems for exercising discretion. These incentives could consist of regulatory support in the form of resources, information, and networking among organizations facing similar challenges. They could also emerge out of regulatory approaches that tie the level of scrutiny of the outcomes of discretionary decisions to the organization's demonstrated capacity to engage in fair and accountable decision making.

Recent developments in case law, particularly in the area of sexual harassment, explicitly invite this kind of experimentalism—both in the

relationship between formal law and organizational law—and in creating incentives for organizations to develop more structural, proactive approaches to discrimination. However, the dominant approach to intervention frequently embodied in the case law and applied by lawyers encourages organizations to create internal processes that simply replicate the individual, after-the-fact, fault-based approaches that misdefine the problem and the necessary response. Courts have articulated standards for employer liability that focus on the adequacy of after-the-fact responses to individual complaints of harassment. These decisions, which end up as boilerplate in many sexual harassment policies, do not create legal incentives for organizations to engage in a process of self-assessment that would produce genuine accountability and organizational self-monitoring. If such a process of genuine self-assessment were linked to overall issues of decision making, it has the capacity to generate information regarding system failures that could improve the level of fairness and productivity more generally. Indeed, the search for methods of producing fair processes of decision making around issues of racial and gender difference can provide an ongoing catalyst for organizational learning that otherwise would not exist.

This deliberative, structural approach is not new, at least to some. Economic and technical demands have already induced some organizations to move in this direction. Innovative managers, activists, and unions have begun experimenting with these approaches to conflict resolution. The next section speculates about how to develop a legal regulatory regime that encourages organizations to develop this capacity and to pool their local knowledge as a way of refining the general principles that guide local practice. It offers one concrete example of an innovative approach to race, gender, and law in the workplace that could be linked to and encouraged by a more reflexive and dynamic form of legal regulation.

III. BRIDGING THE GAP: STRUCTURAL APPROACHES TO RACE, GENDER, AND THE LAW

What might a more structural, dynamic approach to discrimination regulation look like? At this stage, the response to this question is somewhat abstract and tentative, and is offered in the spirit of experimentation. I begin with an example involving the development of a system for addressing sexual harassment at a university to provide a concrete illustration of some of the principles of this structural approach to law and lawyering. I will then extrapolate from this story to some of the general themes that might comprise a more structural approach to workplace regulation.

This example comes out of my experience as a consultant for

universities concerning their processes for addressing sexual harassment. At University X, the administration appointed a committee to respond to concerns about the inadequacy of the existing processes for addressing harassment. A lawyer was designated as the chair of a committee charged with the responsibility of assessing the organization's implementation of its sexual harassment policy. The committee's composition, self-defined mission, and method reflected an emphasis on structural regulation that is unusual for compliance reviews managed by legal actors. Typically, such an inquiry might focus on assessing the adequacy of the University's written policies and procedures in relation to established legal requirements, and on proposing changes in the language of the formal policies and procedures to respond to concerns about clarity, validity, and comprehensiveness. Alternatively, it might focus on the adequacy of the University's response to a particular incident. Instead, this committee undertook to examine the extent to which the systems in place for addressing problems of harassment had the capacity to affect the actual decisions and practices within various sub-communities within the University. The composition of the committee reflected the emphasis on addressing the levels of activity that would be necessary to deal with harassment problems as they occurred. The committee consisted of stakeholders representing the various groups interested in, responsible for, or affected by the problems of sexual harassment: faculty members, undergraduate and graduate students, central administration, advocacy organizations on campus representing the interests of women and people of color, the general counsel's office, the non-faculty employees, and the resource officers charged with the responsibility of dealing with harassment complaints.

Sexual harassment law played an important role in framing the work of the committee, but it did not narrowly determine the committee's focus or method of defining and addressing the problem. The fact that sexual harassment problems exposed the University to legal liability gave the work of the committee legitimacy and urgency as well as a general normative direction. The legal prohibition of harassment legitimated the work of the committee and tied the work of the committee to a norm that could not be ignored. It did not, however, adequately define the meaning of harassment in practice at the University or the ways in which the University could reflect that meaning in its day-to-day practice. The committee undertook to identify how sexual harassment emerged in the University setting, and how its own system of evaluating, rewarding, and disciplining workplace behavior either discouraged or permitted such conduct.

The committee first identified problem areas that reflected breakdowns in the system of implementation, such as exploitive graduate

student/faculty advisor relationships, inadequate responses to abuses by high status individuals, the failure to pool and act on information suggesting patterns of abuse, and inadequate knowledge among administrators, faculty, and students about the avenues for seeking an effective and constructive resolution. The committee identified among its own members overlapping areas of interest, activity, and information, and the ways in which committee members might integrate their day-to-day activities. Committee members surfaced and worked through long-standing misperceptions and feelings of distrust among those charged with responsibility for addressing harassment, and identified the administrative mechanisms that perpetuated those fractured relationships. Individuals with information and experience involving the University's handling of sexual harassment met with the committee to provide information and answer questions. Individual names and cases were not mentioned, but patterns within particular departments or among a certain type of relationship were discussed. In this way, no information of a confidential nature was revealed, but areas of common concern could be identified and discussed. This inquiry revealed that the internal processes for addressing harassment, such as informal mediation or formal hearing, did not connect with or directly influence the avenues actually available within particular communities for addressing harassment. In addition, concerns over turf and accountability acted to discourage proactive efforts to address harassment before it escalated into a crisis. Multiple entry points into the dispute resolution process simply diffused responses, instead of expanding opportunities for redress or addressing the problems at its source, as originally intended. Committee members also used the inquiry into the enforcement of sexual harassment policy as a way of identifying more fundamental problems in the system of communication, decision making, and dispute resolution.

After identifying the nature of the problems and the breakdown of existing approaches, the committee undertook the task of identifying how this inadequate system exacerbated the underlying problem of harassment, and the need to address harassment at the level of interaction among faculty, students, and administrators. The committee developed a plan for information sharing at the aggregate level, and for periodic informal exchanges of information about complaints and concerns. It proposed the development of some mechanism of accountability for the overall process of evaluation to assure that it takes into account concerns about abuses of role. In-house counsel, advocacy groups, and organizations representing the interests of various stakeholders were proposed as effective players in assuring the accountability and legitimacy of the evaluation process. The committee also proposed a role for in-house counsel and the affirmative action office of assuring that issues of harassment are built into the yearly

training and education of new chairs, administrators, and supervisors, as well as students. It suggested building into the system of evaluation for purposes of salary and tenure concerns about the professional exercise of power over subordinates, including sexual harassment. It linked concerns about abuses of power through sexual relationships to the more general issue of professionalism. It also proposed that individuals and groups within each school or department with the power and interest to address issues of harassment be identified, that the power and responsibility to develop effective responses be placed with these individuals, and that support in the way of resources and training be provided by the University.

Many of those who participated were initially quite skeptical about the process and the desire to produce any results. The typical approach to addressing complaints in the past had been to create a committee to study the problem that defused organized dissatisfaction. But participants representing very different constituencies within the University—faculty, staff, graduate students, resource offices—also expressed a thirst for a space where they could brainstorm together, pool information, and develop the capacity to address underlying patterns of dysfunction that produced many of the complaints. The challenge was to create and sustain a process that could translate this shared interest into an ongoing and dynamic space for policy making, information sharing, and problem solving among diverse constituencies within the community.

The problem orientation to the process permitted the committee to translate and contextualize the meaning of harassment, to identify the factors that contributed to the problem, to embed the analysis in the incentive structure and dynamics of the organization as a whole, and to develop responses that would address both the legal norm and the underlying concerns of the various stakeholders. The process served to support the legitimacy of separate communities of interest around issues of harassment, as it also linked these communities in a common project. This process helped translate the problem of harassment into terms that were important to stakeholders who previously thought of the issue as irrelevant. It also identified areas of overlapping concern among disconnected stakeholders who previously lacked the opportunity of conceptual framework permitting collaboration. In this sense, the process created the possibility of redefining boundaries and relationships in ways that more accurately reflected the complexity of concerns at the table.

The committee used its process to bring together representatives of various constituencies within the organization and to build on informal networks of information and accountability. It brought together people who knew about the problems, the crises waiting to happen, and the relationship of sexual harassment to broader issues of organizational practice. The process generated information about how existing systems

were failing. It also enabled the transfer of information across boundaries, to people with the power to act. Institutionalizing this policy process would provide a mechanism for continually generating information and translating that information into the norm generating process.

This process also brought together people who knew about and were a part of the existing networks of problem solving and dispute resolution, which were not limited to the formal "legal" process set up to handle sexual harassment complaints. It included the people who would have to implement the policy on the ground and respond to problems as they arose. Thus, the stakeholders who participated in the process of "law" development had diverse but overlapping concerns. Patterns of exclusion or harassment that affected not only women and people of color, but also other groups within the University community, could be explored. This permitted the identification of the particularities of sexual harassment and its signifying character of broader problems or concerns.

This group focused its energy on generating creative and proactive solutions, as well as on discovering ways of addressing crises. It also identified flash points for conflict and likely areas of abuse. It identified existing groups that could provide safe spaces for taking proactive steps. It offered suggestions about how to build concerns about sexual harassment into the process of structuring relationships between graduate students and their faculty advisors. It explored ways of integrating training into the process of learning how to manage better and smarter. Instead of looking exclusively to legal rules and legalistic processes, the group linked the legal problem of sexual harassment with the organizational problem of managing unequal and amorphous relationships.

This process was a participatory endeavor that developed out of involvement by representative groups with meaningful roles and investment in the long-term implementation of the norms at issue. It focused on the dynamics and power relationships within the workplace, not simply on formal legal norms or potential bad actors. The process moved away from an exclusively individualistic model of problem definition and response and was potentially prospective and remedial in orientation. It employed genuine pluralism and shared power as a mechanism of accountability. It was not one-shot, but rather was built into the day-to-day functioning of the organization.

The approach to lawyering reflected in this story also departs from the individualistic and combative model. Law played a crucial role of continuing to ground the aspirations of the committee in the practical demands of complying with legal requirements. The lawyers also continually linked every-day practice with embedded values of fairness, accountability, and participation. The problem-oriented approach made law important but not adequate or defining of the particular outcomes

implementing the legal aspiration. It broke down the dichotomy between formal law and informal practice, and between public interest and private representation. It required the lawyer who oversaw the process to act as a facilitator of preventive and informal legal culture, using formal legal norms and adversary process as the impetus and boundary setter. It expanded the concept of law and lawyering to include professional norms and administrative practice.

This committee did not substitute for the existing informal or formal dispute resolution processes in operation. The committee's legitimacy and power rested in no small part on the continuing specter of external legal intervention to enforce the norm of harassment free workplaces and classrooms. Committee members also stressed the importance of maintaining effective channels for informally resolving claims where alleged targets of harassment desired prompt and confidential redress. The committee's approach integrated the formal and informal levels of regulation. It also added a structural dimension that took account of the dynamic nature of harassment and the importance of addressing patterns established at the group and intermediate level of the relevant communities of interaction. What it does not do is link that internal, local knowledge to the more general process of norm development. Many of the innovative, structural interventions in the area of sexual harassment regulation continue to be ad hoc, local, and private in the sense that they do not inform the development of more general practice and knowledge.

The intervention described here was not directly prompted, supported, or held accountable by the regulatory regime of judicial or administrative enforcement. The completely internal character of this structural approach to law leaves its success or failure entirely to the internal dynamics of power and change within the organization. The absence of any external involvement also limits the learning that other organizations experience as a result of whatever success University X achieved in building an internal legal regime that translates legal norms into organizational practices. Indeed, under the current system, the process of internal self evaluation would most likely be used against the University as evidence of the inadequacy of the current sexual harassment policy.

It is quite possible to conceive of a regulatory regime that would encourage University X to take seriously and follow through on efforts to develop an accountable, fair, and functional approach to decision making that embodies the values of nondiscrimination and inclusion. This might take the form of an administrative agency that provides technical assistance, resources, and information to universities and other employers attempting to construct effective internal governance systems. It might also bring employers engaged in similar efforts together to learn from each other and to engage over time in redesigning their systems. Finally,

effective and accountable internal regimes could be a basis for reducing the level of scrutiny of individual decisions by a university, at least in instances involving subjective, group-based processes of decision making. This regulatory regime would not substitute for judicial oversight in cases of harassment where employers chose not to develop effective internal governance regimes that had meaningful potential for accountability and institutional transformation. Its success would also depend on being able to develop ways of evaluating the adequacy of employers' and universities' internal governance systems. But even with these limitations, such a regulatory regime could create the space and support for organizations to begin to experiment and collaborate in developing governance structures that link legal norms with the instrumental and organizational concerns.

From this illustration of an ad hoc effort to develop an internal "legal" process that would engage the problem of harassment at the organizational level, I extrapolate several more general elements of a structural approach to discrimination regulation. First, within this regulatory regime, the organization would be viewed as a site for explicit law making and implementation. Law would explicitly strive to encourage organizational actors to examine the structures, incentives, and norms of the organizational context, and to develop internal structures and processes that connect organizational practice to the articulation and implementation of legal norms. This requires examining the deeper meaning of legal norms in relation to the organizational culture at issue, and serving as an intermediary between externally-defined legal principles and their internal organizational translation. It also entails examining the pivotal decision points that structure values and priorities, and connecting important legal values to those "informal regulatory regimes."

For example, in the Johnson Wax example described in Section I, the regulatory project would focus on the company's efforts at the level of the shop floor to create work teams that have the capacity to employ fair, effective, and accountable decision making processes. Members of the work group, supervisors who evaluate the efforts of the group, and officials who shape and act on the decisions of the group would be viewed as legal actors for purposes of establishing and implementing the internal regulatory regime. These actors would then be equipped with the tools to examine the processes used to reach decisions about work and workers, who has the capacity to influence those decisions, the standards that actually influence decision making, and how the group takes account of difference and conflict, both in relation to the production goals of the work group and in relation to the norms of fairness, inclusion, and nondiscrimination. Lawyers or human resource officials working with lawyers would help both identify the relevant internal "legal" stakeholders, the applicable legal norms, and the skills and processes necessary to link day-to-day practice

with those legal norms. This could include introducing the idea of ongoing training and self-assessment as part of the regular practice of team-based decision making.

Second, this project entails reconceptualizing the meaning and the framework used for taking race/gender into account. Instead of treating racial and gender issues solely as special interest concerns of significance to group members who are victimized by discriminatory practices, patterns of racial and gender exclusion should also serve as signifiers that flag areas of concern not only for the groups visibly affected, but also for a broader group of individuals or concerns that otherwise remain invisible. The experience of women and people of color frequently signifies patterns of organizational dysfunction or unfairness that affect a much broader group. They also offer a source of organizational reflection and evaluation that can disrupt patterns of inertia. The proposed system of regulation would permit and encourage an ongoing dynamic between patterns particular to treatment of women and people of color and more general patterns of exercising power. Redefining racial and gender bias in this way also encourages a problem, rather than a case, orientation to racial and gender conflict.[113] What is the pattern of noncompliance or bias that underlies a complaint? How does it relate to the capacity of the organization to function fairly and effectively?

In the context of the Johnson Wax example, the experience of African-Americans who challenged the fairness of the team-based decision making process could be viewed as a signal of more systemic problems with the system of decision making. Perhaps their experience suggests that the teams are not adequately equipped to take into account and learn from diverse members of the team, and that they cannot adequately address conflict and difference in ways that keep group members engaged in the overall effort. Many of the steps that might be taken to reduce racial or gender bias might in fact improve the productivity and fairness of the overall process, such as articulating clear standards and criteria, requiring that decisions be shared and explained, comparing and attempting to reconcile differences in assessment, assuring that decisions are based on experience and knowledge rather than preconception, and providing skills enabling conflict about relationships to be translated into conflict over differences in approach to the work that can be connected to functional difference.

Third, treatment of race and gender bias as a signifier has implications for those who participate in the process of articulating and enforcing internal regulatory norms. Participation and accountability by both internal and external stakeholders of the organization play a crucial role in

113. *See* SPARROW, *supra* note 72, at 108.

legitimating this organizational regime. People with incentives to promote the success of the organization *and* to hold the organization accountable to underlying legal norms would participate in decision making. Groups organized to protect values reflected in legal standards would play a significant role in designing solutions to problems of exclusion and unfairness, and in holding organizations accountable for their adherence to the system of decision making that is developed. For example, in the Johnson Wax example, advocacy groups for women and people of color could participate in the process of designing systems to minimize bias and would address problems when they arise. At the same time, others affected by the underlying problem signified by the racial or gender dispute would also participate in the process. This group could include workers from different disciplines who face communication problems as a result, representatives from other parts of the production process with concerns that are not adequately reflected in the day-to-day decisions of the team, or others with interests or information that should influence the team's decision making process.

Fourth, the external legal community—courts, administrative agencies, legislatures, and local government entities—would create incentives for the organization to construct systems of self-conscious experimentation that link concerns about race and gender fairness to overall decision making processes. The legal community would then share this information publicly to help develop legal norms. These incentives could take the form of resources (technical or monetary) which could be used by the organization to develop effective systems. Incentives could also be created through standards of review. The more participatory, accountable, responsive, and effective the organization's internal regulatory regime, the less stringent the external review.[114] Organizations that develop the capacity to make accountable, lawful, nonexclusionary decisions would be rewarded through reduced regulatory oversight and resource support. This approach would require organizational actors to develop ways of evaluating the success of their system in terms that could be monitored and communicated both within the organization and to external legal agencies.[115] Ideally, the internal system of benchmarking would produce a record of systematic, structural decision making that could be used to show regulators that the process is working. In addition, public agencies could provide resources and expertise, and pool information from various

114. One form of incentive is reflected in recent work such as Ian Ayres and John Braithwaite's theory in *Responsive Regulation.* The authors believe in creating a pyramid of regulation that reduces government oversight if organizations demonstrate that they have undertaken responsibility for self governance. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

115. *See* Dorf & Sabel, *supra* note 6.

workplaces to assist organizations in the development of effective systems for decision making that reduce bias and enable conflict around issues of difference to be addressed openly and constructively.[116] This role could either be assumed by existing regulatory agencies, such as the EEOC, or undertaken by new agencies.

Fifth, this regulatory approach does not aim to articulate a universal blueprint or model to be imposed from the top down across all organizations and contexts. This approach is only possible in particular institutional contexts which exhibit the capacity and incentive to engage in a collaborative regulatory regime. As Charles Sabel has noted in other regulatory contexts, the general principle that cuts across all workplaces is that the problems of how to address issues of race, gender, age, etc. are complexly local.[117] Every organization will face such problems as how to address multiracial group dynamics, relational conflict, racial and gender stereotyping, and bias as a feature of discretionary decision making. The pattern and dynamic of those problems will be a function of the particular environment, and the appropriate response cannot be determined as a universal rule applicable to all contexts. Instead, it must emerge out of the dynamics, incentive structures, and mechanisms of accountability particular to each workplace. The process of learning about and setting up structures to respond to these issues in a particular site will then generate knowledge of what works and what does not work. This knowledge can be shared with other workplaces and can be fed back to the general effort to identify patterns and overarching general principles to help guide the local search for problem definition and solution.

This project seeks to encourage a series of structured, ongoing, participatory, and locally grounded experiments, and to create a structure that encourages interaction between general legal norms and particular systems for translating those norms into organizational practice.[118] Law emerges as a web of interconnected norms, incentives, rules, and practices that take shape in interaction between local experiments and renegotiation of underlying, widely shared norms.[119] The feedback between the organizational experiments and the generalized norm is a crucial defining element of the law. The project of structuring organizational practice and decision making is a critical element of law making as well. Therefore, formal, externally-enforced legal regulation would continue to exist as the

116. This regulatory role resembles the approach of manufacturing technology centers, which is described by Charles Sabel in A MEASURE OF FEDERALISM: ASSESSING MANUFACTURING CENTERS 9 (Feb. 22, 1995) (unpublished manuscript on file with author).

117. *See* Sabel, *supra* note 82, at 23.

118. This work builds on the preliminary analysis set out by Susan Sturm and Lani Guinier. *See* Sturm & Guinier, *supra* note 19.

119. *See* Sabel, *supra* note 82.

backdrop for this structural regulatory regime.

Finally, this project of reconceiving law in organizational terms also suggests the need to develop a more democratic and inclusive vision of law and lawyering.[120] Lucie White has articulated a vision of lawyers as "architects of social and civic space."[121] The project of rethinking lawyers' roles in context is an important step in a much larger project of reconceiving the role of the law—a central task for critical theorists and progressives. As a way of entering this conversation about reconceiving lawyers' roles, I have employed the label "problem-solver" as the placeholder for the role of the lawyer in the organizational context.[122] Law and legal roles emerge out of the demands and possibilities of the setting and problem at hand. Instead of reasoning back from the formal legal process and rule to determine the limitations on the scope of permissible action, the lawyer as problem-solver begins with the context, problem, and organizational setting. The problem-solver defines law and legal process more broadly, dynamically, and proactively. The law functions as both an aspiration and a constraint. The challenge is to build compliance with legal norms into the incentive structure and framework of operation, and in the process, to use the law and legal process to enhance the fairness and productivity of the organization.

This approach to lawyering moves beyond a formalistic approach to law in the organizational context. Law becomes more than a set of externally-imposed rules to be followed or evaded. It also consists of a set of practices and principles that emerge both outside of, and in interaction with, formal and instrumental law.[123] The lawyer as a problem-solver links these organizational norms and practices with the external norms that formal law seeks to impose. She can introduce certain basic principles of legitimacy that underlie the aspiration of American legal norms to the decision making processes within the organization. These include fairness,

120. This section builds on an earlier article. *See* Susan P. Sturm, *From Gladiators to Problem Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119 (1997).

121. In email correspondence with the author, White argues that lawyers are well-trained and positioned to help community groups create the social and public spaces that they need to nurture their own individual and collective citizenship. Whether you call these sites homeplaces, free spaces, spaces of resistance, or intermediate institutions of civil society, they are local spaces within which citizens can come together to act together as citizens.

122. This word does not fully capture the nature of the role I put forth. It fails to capture the ideas of integrating and translating different disciplines, making law real on the ground, linking the aspirational and the practical, and bringing to the table a sense of the relationship of legal requirements to organizational practices and goals. I continue to search for a more appropriate label as part of the project of developing this conception of law and lawyering.

123. *See* Austin Sarat & Thomas Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, *in* LAW IN EVERYDAY LIFE (1993); Edelman, *supra* note 28; Susan S. Silbey, *Ideals and Practices in the Study of Law*, 9 LEGAL STUD. F. 7, 20 (1985).

participation, and reasoned and principled conduct. Each of these concepts can be translated into organizational terms.

For example, in the Johnson Wax scenario, the lawyers as problem-solvers might participate in a team of actors with different forms of expertise, faced with the challenge of redesigning the way teams function. The lawyer would be situated to help the group link the issue of racial and gender bias to the broader question of how teams decide on work assignments, resolve conflict, and evaluate performance. He or she could help assemble the actors with the necessary expertise and power to equip teams to act fairly and effectively, and work with others to design a system that builds in continual self-monitoring to the production process. The lawyer could also pose questions that conceptually link basic legal principles of fairness and legitimacy with the requirements of day-to-day employment decision making. Such questions include whether there are stated criteria that govern the assessments of decision makers and team members, whether such criteria adequately reflect the goals and range of options available, whether the decision making process require the actors to articulate the basis for their decisions, whether the risks of bias in the decision making process been identified and minimized, whether the decision making group reflects or takes account of diverse approaches, backgrounds, and experiences, and whether there is a way of signaling relational conflict, particularly as it implicates demographic differences such as race and gender and translating that conflict into disagreements that either benefit the work of the group or do not significantly impact work related decisions connected to the work of the group or minimized in its impact on work related decisions.

Lawyers as problem-solvers face the challenge of reconciling norms of autonomy and integrity with the demands of operating as counselors, collaborators, facilitators of decision making processes, and participants in managerial decision making. Crisis management skills continue to be part of the repertoire of legal roles. Organizations' willingness to involve lawyers in shaping day-to-day practice rests at least in part on lawyers' expertise in the formal, adversarial world. Yet lawyers' effectiveness depends on their capacity to reconcile the "gladiator" role with the informal, integrative, dynamic role of lawyer as problem-solver.[124]

IV. CONCLUSION

This article has proceeded from the premise that internal systems of

124. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754 (1984); Stephen Nathanson, *The Role of Problem Solving in Legal Education*, 39 J. LEGAL EDUC. 167 (1989); Sturm, *supra* note 120.

regulation are themselves an important part of the legal landscape, and that they should be analyzed explicitly as such. It begins to explore the relationship between systems of workplace decision making and legal analysis of those systems and to question the continued validity of some of the assumptions about organizational structure and bias reflected in legal doctrine. The dominant approach to regulation of discrimination in the workplace fails to mediate between the formal and informal, the organizational and the legal, the individual and the group, the instrumental and the prescriptive, and the external and the internal. This article argues that changes in the structure of workplace governance and in the dynamics of racial and gender bias make the failure to take account of organizations' day-to-day internal regulatory regime as "law" particularly problematic. Solutions to problems of discrimination in the workplace and current legal diagnosis of these problems frequently focus on the wrong level of activity within the organization and misdefine the nature of the problematic conduct.[125] Legal intervention often fails to alter the dynamics that cause exclusion and can have perverse or counter-productive effects on racial and gender dynamics in particular and organizational governance in general. As a result, the categories that frame legal regulation are inadequate, both descriptively and normatively.

At the organizational level, a more structural and embedded approach to legal norms already surfaced in some workplaces. Creative lawyers, managers, worker organizations, and human resource professionals have begun to experiment with problem solving and accountability systems that pay attention to the processes of group interaction and to the task of mediating between organizational practice and legal norms. Particularly in the area of sexual harassment, some organizations have developed multi-tiered approaches to preventing and redressing sexual harassment through reshaping patterns of decision making within organizations.[126] These systems explicitly focus on establishing diverse, accountable decision making structures for groups, involving groups in the process of problem definition and resolution around issues of race and gender, equipping managers and workers to translate legal norms into organizational practice, and holding group decision makers accountable for the results of those processes. However, these innovations in practice often operate outside or even at odds with the approaches developed by lawyers to address

125. For a structural analysis of the organizational and cultural dynamics that underlie sex segregation in the workplace, see Vicki Schultz, *supra* note 18, at 1815-39.

126. *See, e.g.*, Mary P. Rowe, *The Upward Feedback, Mediation Process at Massachusetts Institute of Technology, in* RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION 190 (Alan F. Westin & Alred G. Feliu eds., 1988). For a description of one effort to develop a more structural, dynamic approach to discrimination, see Section IV of this article.

discrimination. They have not yet influenced the approach to legal regulation of discrimination more generally.

This article will hopefully encourage others to experiment with creative forms of legal regulation in workplace settings. The expansion of the concept of legal regulation of discrimination is a central challenge for those concerned about race, gender, and the law in the twenty-first century workplace.