

CHAPTER 2

Law's Role in Addressing Complex Discrimination

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ABSTRACT

This essay demonstrates the importance of making explicit and critically assessing assumptions about judicial role that run through antidiscrimination scholarship. A formalistic conception of the judiciary operates as an uninterrogated baseline even for scholars who employ an institutional and cultural analysis of the problems law and courts address. The rule-enforcement conception of law and courts is, however, vastly over-simplified, as both a descriptive and normative matter. Its formalism clashes with the rich, interdisciplinary, and structural analyses that characterize scholars' critique of formal equality doctrine. This essay sketches the outlines of an under-acknowledged but widely practiced and legitimate judicial role: facilitating the elaboration and implementation of public law norms. Legal norms develop not only through liability determinations, but also through legally structured occasions for deliberating about the relationship between norms and practice. Within the context of judicial decision making, norm elaboration occurs in less formal settings that more directly facilitate data gathering and deliberations by relevant stakeholders and experts. These processes generate learning and outcomes that are more generally applicable, even if they have less formally binding effect than a formal adjudication. This analysis cast courts in a crucial but limited role in addressing problems that implicate public norms but are insufficiently understood or resistant to centralized rule enforcement. They emphasize law's role in structuring focal points of normative activity within and across institutions. This role, as an important concomitant of the court's more traditional rule elaboration and enforcement function, enables the judiciary to participate in addressing complex patterns of interaction that produce group-based exclusion without compromising its legitimacy or overstepping its capacity. It would also highlight and create accountability for the many occasions beyond formal liability adjudication in which courts prompt elaboration of equality norms under conditions of uncertainty.

INTRODUCTION

For years, scholars have challenged the dominant legal paradigm for addressing employment discrimination. They have criticized its formalistic, intent-based doctrinal framework as insufficiently descriptive of the dynamics that produce inequality;

insufficiently explanatory of what judges actually do; and insufficiently robust as a normative theory of equality. Viewed in the light of recent interdisciplinary scholarship, the formal equality account—its prime protagonists, its plot, its problematic, and its prognosis—is an easy target.

Recent interdisciplinary scholarship shows that workplace bias often operates as a set of social practices: a dynamic interaction among culture, cognition, and context (Charny and Gulati, 1998, p. 57; Krieger, 1995, p. 1761; Lawrence, 1997, p. 122; Post, 2000, pp. 1, 30; see also Sturm, 2001, p. 458). For example, Lawrence and Krieger have drawn on cognitive and Freudian psychology to debunk conscious intent as an adequate explanation of racial and gender influence on employment decision-making (Krieger, 1995, pp. 1161, 1217; Lawrence, 1997, p. 122). Schultz has criticized courts' failure to consider how organizational and cultural factors, often sustained by employers, shape employees' interest and success in non-traditional jobs (Schultz, 1998, p. 1683). Charny, Gulati, and Wilkins have shown that the dearth of black corporate lawyers results not primarily from overt racism or the lack of qualified candidates. Instead, the tournament system of advancement, cognitive bias, and group dynamics, in combination, cause much of the underparticipation by black lawyers in firms (Wilkins and Gulati, 1996, p. 496; Charny and Gulati, 1998, p. 57). Minow has exposed the implicit, baseline assumptions that normalize a world organized around the values and practices of dominant groups (Minow, 1987, p. 10. See also Yoshino, 2002, pp. 769, 781; Post, 2000, pp. 1, 30).

The inequality stories anchoring these rich accounts convey a flavor of complexity and, to varying degrees, uncertainty. They are descriptively and normatively far more complicated than the stock story of deliberate discrimination. The problematic activities they target are embedded in institutional structures, group interactions, and cultural stereotypes. Their exclusionary character is not intuitively obvious, and sometimes emerges only from analyzing problematic patterns and their potential causes in particular contexts. These dynamics trigger equality concerns, although the precise character of the harm and the contours of the particular norm can be hard to pin down.

What is law's role in addressing these complex problems? How do and should courts elaborate and enforce ambiguous norms? What legitimate repertoires are available to courts for addressing complex discrimination consistent with the rule of law? How do they construct the relationship between the articulation of rights and the enforcement of remedies? What is and should be the nature of judicial interaction with other normative actors? Generally stated, what are the implications of the sociological/institutional/contextual/interdisciplinary analysis of legal problems for judicial participation in the reconstruction of institutional practices?

The answers to these questions are often taken for granted in the discussions about legal doctrine and remedies for workplace discrimination. When grappling with law's response to complex and subtle discrimination, many employment scholars fall back on a surprisingly formalistic conception of law. Their punch line is often a new legal rule that better reflects current understandings of the problem. Some scholars propose

doctrinal standards that reflect more complex and dynamic accounts of workplace inequality (Schultz, 1998, p. 1683; Lawrence, 1997, p. 122; Oppenheimer, 1993, p. 899). Yet another approach offers a different cognitive or decisional framework to shape judges' reasoning process as courts address cases involving discrimination (Minow, 1987, pp. 88–89; Post, 2000). A final set of responses considers the implications of this complexity for courts' capacity to address the problem at all. These scholars advocate private or market solutions as better suited to this type of complex, interactive problem (Wax, 1999, p. 1129). Others more modestly counsel against judicial incorporation of cognitive bias insights until sufficient evidence develops to permit articulation of a clear and workable rule (Krieger, 1995).

These responses take for granted a formalistic conception of legal norm elaboration. This conception presumes that “law” emerges from formal adversary process producing post-liability judicial decisions that interpret loosely worded civil rights statutes. The function of legal rules is to dictate the boundaries between legal and illegal conduct. Courts affect informal workplace norms by the “shadow” their decisions (and the costs of generating them) cast over informal decision-making (Mnookin and Kornhauser, 1979, p. 950). Law and legal process operate as a decontextualized process detached from the dynamics by which norms develop and influence practice.

This formalistic judicial conception shapes and constrains scholars' substantive responses to complex discrimination. It influences the proposed content of legal norms, the judicial strategies chosen to address complex problems, and the perceived legitimacy of these choices. The rule-enforcement conception of law and courts is, however, vastly over-simplified, as both a descriptive and normative matter. It fails to incorporate law and society's well-developed insights about legal pluralism, rights consciousness, and legal mobilization (McCann, 1994, p. 6; Merry, 1990). Its legal formalism clashes with the rich, interdisciplinary, and structural analyses that characterize scholars' critique of formal equality doctrine. Indeed, public law scholars' blanket commitment to a rule-enforcement conception of law and law-making seems surprising when compared to the more dynamic and reflexive accounts in international law and human rights scholarship and in the commercial and business domain (Cain, 1994, p. 15; Sugarman, 1994, p. 115).

As a descriptive matter, the judiciary's current dispute processing repertoire includes a much richer set of legal norm elaboration practices than the dominant narrative acknowledges. Within the context of judicial decision-making, norm elaboration occurs in less formal settings that more directly facilitate data gathering and deliberations by relevant stakeholders and experts. These processes generate learning and outcomes that are more generally applicable, even if they have less formally binding effect than a formal adjudication. They involve proceedings about class certification, discovery, and expert witnesses, as well as proceedings about settlement and remedy. Outside the formal law-making and enforcement process, actors participate in norm elaboration that directly contributes to the content of formal legal norms, and courts sometimes actively shape the contours of that informal norm elaboration process.

As a normative matter, the facilitative role that courts, sometimes apologetically, perform is in fact an important, legitimate, and under-theorized aspect of judicial participation in norm elaboration and implementation. It connects the use of coercive state power to provide significant, legally mandated occasions for those directly affected by or responsible for the conduct at issue to participate in evaluating the relationship between current and desired practice. This role encourages a collaborative, deliberative, and accountable problem-solving process that can be linked to collective learning and norm generation. It permits judicial involvement in addressing problems for which some state intervention is warranted to legitimate norms and prompt corrective action, even though coercion through rule enforcement may not be justified or workable. I take the less familiar position of advocating greater use of the nonformal or interactive—within courts and outside—to develop norms specifically to deal with a problem that otherwise resists redress: complex discrimination.

I am not suggesting that courts give up their formal rule elaboration role under the right circumstances. The hammer of rule enforcement is a necessary backdrop, both substantively and procedurally, for the judiciary's facilitative role. I instead suggest that scholars and judges explicitly tailor the relationship between dispute processing institutions and the development of substantive norms. The overarching insistence on judicial imposition of the "right" legal rule places considerable strain on both the law and the courts. As I have discussed elsewhere (Sturm, 2001, p. 458; Sturm, 2002) the complex problems revealed by institutional and behavioral analysis of discrimination resist resolution by either generally applicable rules or private, decentralized norms. Relying on purely private solutions suffers from the mirror image of these problems.

This seemingly intractable dilemma—legal intervention as both necessary and problematic—hinges on shared premises about law and judicial role. I want to step back from the substantive equality debate to examine these unarticulated yet foundational conceptions of the law and the judiciary. This analysis builds on the observation that a significant portion of legitimate "law-making" results from much more dynamic and judicially de-centered interactions than accounted for by the conventional narrative, both within the workplace context and between formal and informal legal actors (Suchman and Edelman, 1996, p. 903). Moreover, I argue that law's role should include creating occasions and incentives for non-state actors to deliberate about norms in context, and to construct conditions of permeability between legal and non-legal actors so that formal law can legitimately and effectively take account of informal normative activity and vice versa. This expansion in conceptions of law's role holds considerable promise in resolving the regulatory dilemma posed by complex discrimination.

This chapter begins by demonstrating the formalistic conception of judicial process and role that recurs in discrimination scholarship. It then briefly discusses the limitations of this conception of the judiciary, drawing on the interdisciplinary insights used by scholars to critique anti-discrimination doctrine. Finally, building on earlier work, it suggests a conception of the judiciary role that emphasizes creating spaces for normative engagement and acting as a catalyst for effective norm elaboration and remediation.

1. UNPACKING THE IMPLICIT ASSUMPTIONS ABOUT LAW AND LEGAL PROCESS

1.1. The Form and Function of Equality Norms

Scholars disagree about the judiciary's proper response to complex and structural discrimination. Their proposals run the gamut, from assuming direct managerial responsibility (Selmi, 2003) to reformulating legal rules (Oppenheimer, 1993, p. 899; Schultz, 1998, p. 1693) to refraining from ruling at all (Wax, 1999, p. 1129). Despite these profound differences, many intellectual adversaries become fellow travelers when it comes to their implicit view of a legal equality norm's form and function. They agree that legal equality norms are, or at least should be, rules that establish boundaries between lawful and unlawful conduct. These rules must be sufficiently clear, consistent, and general to justify attaching coercive consequences to the rule's violation.

An example demonstrates the rule-enforcement conception's centrality in equality scholarship. In her important article, *The Content of Our Categories*, Linda Krieger embraces a rule-enforcement/boundary-setting definition of legal equality norms. She expresses skepticism about proposals that would impose a duty upon employers to reduce "cognitively based judgment errors." Her reservations stem from the current lack of certainty or clarity about how to understand and remediate the problem. Krieger concludes that courts should not intervene until "we know enough about how to reduce cognition-based judgment errors to enable us to translate such a duty into workable legal rules. . . . If our goal is to reduce race, gender, and ethnicity-based categorical responses, the imposition of a duty of care without defining what specific actions an employer should undertake to fulfill that duty could prove counterproductive" (Krieger, 1995, pp. 1245, 1247. For other examples, see Schultz, 1998, p. 1683, Post, 2000, pp. 1, 17, 30).

Even scholars analyzing legal equality norms operating outside of courts and inside organizations employ a formalistic conception of legal norms. For example, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, explores the tension between legal and organizational norms and practices in complaint handlers' approaches to resolving discrimination complaints (Edelman, Erlanger, and Lande, 1993, p. 497). The authors conclude that law plays a very peripheral role in complaint handlers' orientation toward discrimination. The formalistic conception of law they apply in evaluating complaint handlers' approaches plays a critical role in reaching their conclusion. For them, "a major goal of legal forums is to define and announce the boundaries of compliance" (Edelman, Erlanger, and Lande, 1993, p. 511). They posit that "claims framed in terms of rights are often absolute" (Edelman, Erlanger, and Lande, 1993, p. 505). If law is ambiguous or procedurally oriented, it departs from the ideal of "law." Moreover, formal legal standards constitute key indicators of law's presence (Edelman, Erlanger, and Lande, 1993, p. 513). When complaint handlers construe anti-discrimination law as requiring fair, unbiased treatment, rather than

“adopting the calculus of the courts and EEO agencies,” the authors interpret their conduct to signal a shift from law to management (Edelman, Erlanger, and Lande, 1993, p. 513).

A legal norm thus operates under this view as a code of conduct that gives rise to clear obligations to address well-understood problems with clear normative implications. Legal pronouncements should settle disagreements or uncertainties about the nature and scope of problematic activity and its relationship to the generally articulated constitutional or statutory principles calling for judicial interpretation. Less formal and definitive norms, such as those produced through judicially accountable agreements or emerging from administrative- or expert-facilitated problem solving, do not count as legal norms. Nor do the processes requiring parties to generate information and engage in self-assessment about whether legal norms have been violated. Legal norms are the substantive product of post-adjudicatory deliberation by a court, adoption of enforceable regulations by an administrative agency, or statutory enactment by the legislature. Given the EEOC’s current inability to promulgate binding regulations and the legislature’s enactment of predominantly open-ended statutes, development of legal equality norms for many scholars thus depends on judicial elaboration.

This type of equality norm presupposes the judiciary’s capacity to define and redress the problem through centralized articulation of an appropriate legal rule. Complex, poorly understood or normatively uncertain problems strain judicial capacity to craft and justify robust legal rules. These attributes underlie the queasiness apparent in many scholars’ efforts to craft rule-based solutions for complex discrimination. The worry is that courts will get it wrong or, in getting it right, compromise their legitimacy as principled elaborators of public norms.

1.2. The Role of the Judiciary

The picture of a court that emerges from the anti-discrimination literature is that of a unilateral norm elaborator and enforcer. The judicial task is to figure out what abstract legal norms mean in particular contexts, and then to determine what to order others to do to comply with those more fully elaborated norms (and compensate those injured by noncompliance). The judge’s defining role is to produce certain and specific outcomes that will differentiate lawful from unlawful conduct and dictate effective remedies for the latter. Through adjudication, judicial participation in law-making achieves legitimacy: it is public, norm- or precedent-generating, and accountable. Settlement necessarily removes a dispute from the realm of public law and potential norm generation. Underlying much scholarship is the assumption that, when courts deviate from formal adjudication of liability (which they do frequently), they no longer engage in norm elaboration and they depart from their core competency (Molot, 2003).

Judicial decisions resulting from formal adversary process are the hallmark of legitimate and effective judicial action. They receive inputs (evidence and arguments) and produce outputs (legal rules, judgments, and sanctions for noncompliance).

Paradigmatic judicial involvement takes place in the courtroom through receiving evidence and argument, and in chambers through detached deliberation and unilateral judgment. The judicial role in discovery and pre-trial motion practice is to narrow and properly frame the issues requiring judicial decision through adjudication and to eliminate issues for which adversary process is unnecessary or inappropriate. Remedial determinations are subsidiary to and in service of the core function of liability determination. Experts and affected stakeholders do not participate in elaborating norms; their role is to supply facts, interpretations, and legal arguments, which are then processed by the judicial decision-maker. Interactions outside of those stylized spaces and forms lack the imprimatur of the adversary process, and thus adjudication's presumption of accountability, transparency, and legitimacy.

Owen Fiss has perhaps the most romantic articulation of this directorial conception of judicial role. The central task of the judiciary is to give operative meaning to constitutional values by searching for "what is true, right or just" (Fiss, 1979, pp. 1, 9). Although Fiss' faith in judicial truth-telling makes him somewhat of an outlier, his basic conception of the judge as unilateral decision-maker is more widely shared. Often, this conception operates implicitly, cropping up in the section of the article that proposes doctrinal reform. This scholarship does not necessarily focus on the court's role in addressing discrimination. Its emphasis, instead, is on demonstrating (quite effectively, I might add) that prevailing doctrinal categories distort or misdirect judges' analyses of employers' decision-making processes (Krieger, 1995; Schultz, 1998, p. 1683; Oppenheimer, 1993, p. 899) or that unstated norms and empirical assumptions dictate judicial outcomes in discrimination cases (Minow, 1987, pp. 88–89; Post, 2000, pp. 1, 17, 30). Relying on insights drawn from psychology, organizational theory, sociology, and critical theory, these scholars show how prevailing doctrinal fails to account for the role of cognitive bias, dominant value structures, and the practices of racial and gender conventions. When it comes to proposing remedies for these empirical and conceptual blind spots, all eyes turn to the judge, or more precisely, to the judge's capacity to craft new rules or frameworks that are adequately sensitive to the complexities of race, gender, and other "practices" of difference. Does the court have the right operative framework for understanding and explaining the social practices of gender and race? (Post, 2000, pp. 1, 17, 30; Schultz, 1998, p. 1683). Do "we know enough about how to reduce cognition-based judgment errors to enable us to translate such a duty into workable legal rules"? (Krieger, 1995, p. 1245).

These questions lead one to ask how courts elaborate specific standards, particularly when they are interpreting ambiguous legal texts. Again, Fiss is perhaps the most didactic in his discussion of method. Particularly in cases involving injunctive relief, judges use intuition, logic, and analogy to apply general law to specific facts and then to issue pronouncements. "The text clothes the court with the authority to give specific meaning to the ideal of equity—to choose among the various subgoals contained within the ideal" (Fiss, 1979b, p. 173). What is needed is just the right rule. If judges get good enough information through the adjudicative process, processed through the right cognitive frame, they can provide just that.

Other scholars have taken a less sanguine view of purely intuitive, logical, and textual methods for developing and applying discrimination doctrine. They challenge the capacity of judges to stand outside the practices they must assess, showing instead that “anti-discrimination law always begins and ends in history, which means that it must participate in the very practices that it seeks to alter and to regulate” (Post, 2000, p. 17). They strive to expand judges’ capacities to identify their own preconceptions and stereotypes, and to learn from experts presenting current empirical understandings of discrimination and from those with unfamiliar and suppressed perspectives. Acknowledging that judges, as humans, cannot self-identify the range of perspectives that they are failing to see or the preconceptions that are influencing their decision-making, these scholars gesture toward expanding participation by experts (Krieger, 2003, p. 7) amici, and parties in the adjudicative process (Minow, 1987, p. 88–89).

Yet, these scholars seem to accept the hegemony of a rule elaboration and enforcement regime, with judges developing norms exclusively by imposing a decision, after full consideration of competing perspectives and data. According to this conception, judges dictate the details of legal norms as they apply to new circumstances. For norm elaboration to occur, they assume that the judiciary must choose among competing views about how to give concrete meaning to ambiguous standards, rather than facilitate a participatory process of public, accountable, informed, and principled norm elaboration.¹ Even in cases involving other public bodies involved in some norm-generating role, such as administrative agencies, the focus is primarily on evaluating whether the agency got it right, or at least whether they acted within their authority in interpreting and enforcing the applicable norm. Once a court rules on the applicability of legal norms in a particular case, extended interaction (either with the court or within the relevant institution) questioning the meaning and implementation of the legal norm suggests failure—failure to articulate a precise enough rule, failure to embody the ideal of dispassionate adjudication, or failure to achieve compliance with the applicable rule.

This formalistic conception of law may explain why some discrimination scholars question the legitimacy and desirability of more interactive, consent-based resolutions of conflicts involving public norms. Scholars like Fiss are “against settlement” because they assume that resolution by agreement necessarily detracts from the judiciary’s core function of articulating public values (Fiss, 1984, p. 1073). Conflict resolution that takes place outside of formal adjudication is “bargaining in the shadow of the

¹ For example, Linda Krieger’s remedy for the current gap between Title VII doctrine and current psychological theory is to have legal actors “accurately and completely specify the various ways in which race can adversely skew an employment decision maker’s perception and judgment of a particular applicant or employee and adversely affect his or her employment opportunities.” (Krieger, 2003). The adversarial, jurocentric method for revising legal norms remains uninterrogated, but the substance of current doctrine is “naturalized” to reflect developments in empirical social science. Krieger acknowledges the promise of soft law such as jury instructions and advocate argumentation, but seems to value these legal forms as avenues leading to a fully elaborated, judicially imposed specification of desired norms, behaviors, levers, and doctrinal models, rather than as appropriate sites for ongoing and contingent norm elaboration.

law,”—at best a distant and non-binding approximation of public values and more likely a product of personal preferences discounted by bargaining power. Settlement and internal dispute resolution (IDR) are taken necessarily to mean the inevitable privatization and managerialization of law, thereby undermining its normative force (Edelman, Uggen, and Erlanger, 1999, pp. 406, 442).

This view of judicial role, method, and relationship places employment discrimination remedies involving institutional redesign in an uneasy relationship to the articulation of rights. Remedies for complex discrimination often involve redesigning systems, transforming institutional culture, and realigning incentives—practices that connect to but extend beyond the conduct constituting the legal violation. The liability norm does not provide criteria for choosing among those values unrelated to the legal violation itself, although it does shape the definition of the problem to be remedied. For example, a legal violation may consist of maintaining an arbitrary selection system that fosters decision-making biased against women. A non-arbitrary system could take a variety of forms, depending on considerations unrelated to bias minimization (such as efficiency and consistency with organizational culture). Why should judges make these decisions, if judicial legitimacy depends upon adversary process designed to interpret constitutional or statutory principles, and these principles do not govern remedial decision-making? The judiciary as rule-elaborator and enforcer thus faces a legitimacy deficit when it unilaterally imposes remedial choices (Fiss, 1984, p. 1073).

Remedial solutions developed by intermediaries, such as monitors, masters, and experts employed by the judiciary to shore up their remedial design capacity, are similarly suspect. Intermediaries who facilitate the participatory formulation of remedies by affected parties do not invite the same legitimacy problems, but their role tends to be viewed as expedient rather than principled, designed to settle particular disputes and not to generate public norms.

1.3. The Relationship between Legal and Workplace Norms

How does (and should) law interact with organizational and cultural norms to reshape the conditions and practices constituting complex discrimination? This law–norm interaction is quite important to the identification and remediation of complex discrimination. The question, for example, of whether reasonable people would experience conduct as hostile and abusive involves an inquiry into the relevant expectations, power relationships, and gender patterns (*Harris v. Forklift Systems, Inc.*, 1993). Professional norms about effective management and grievance processing may affect judicial allocation of legal responsibility for detecting and responding to exclusionary practices (*Faragher v. City of Boca Rotan*, 1998; Edelman, Uggen, and Erlanger, 1999). Effective remedial decision-making also depends on successfully negotiating the relationship between law and norms. Complex bias reflects and is sustained by organizational norms, incentives, and practices. Changing exclusionary practices requires addressing the interaction of identities such as gender and race with power,

merit, and status within particular normative communities (Minow, 1987, pp. 88–89; Post, 2000, p. 17; Sturm, 2001, p. 478).

Scholars (and courts) have long recognized law's influence, as well as its dependence upon cultural and social norms (See Engel and Munger, 1996; Yngvesson, 1988; McCann 1994). Indeed, employment discrimination law's paramount aim has often been described as fostering informal norms of equal participation in the workplace, and its primary obstacle as the resistance of informal normative systems to formal legal intervention. But formal conceptions of law permeate public law scholars' analysis of *how* law influences informal norms: the stock story emphasizes the output of formal legal process determined by judges. Law influences norms, if at all, by judicial calibration of the rules and the remedial consequences of their violation. Law is produced in the courthouse and the legislature by formal state actors with official power to generate and enforce law. Non-judicial actors operate in the world of cultural and social norms, and as consumers, manipulators, or resisters of these legal products. The impact of the processes producing legal outcomes, and of the interactions of formal legal actors with stakeholders outside the domains producing formal legal outputs, does not figure into the law–norm relationship.

In the “law and norms” literature, for example, the law–norm relationship has often been posed as a choice: are the courts (through the imposition of legal rules) better at formulating the appropriate across-the-board norm, or are private actors operating through market interactions, custom and practice more able to develop workable norms? (Rock and Wachter, 1996, p. 1913). Will coercive enforcement disrupt prevailing norms and incentives of non-legal actors or simply underscore their legitimacy? (Bernstein, 1996, 1769; Charny, 1996, pp. 1841, 1852). Depending upon the answer to these questions, many scholars recommend a legal outcome: the law should incorporate, supplant, or defer to informal norms. Thus, the question of whether courts should intervene to address complex discrimination would be cast in terms of whether courts have the capacity to figure out what informal norms or processes are and should be. If so, the courts will tailor a legal rule based on that correct understanding. If not, they will stay out.

The concept of “bargaining in the shadow of the law,” coined by Robert Mnookin and Louis Kornhauser in a much-cited article (Mnookin and Kornhauser, 1979, p. 950) acknowledges that law and norms interact, but this analysis focuses on law's formalistic aspects. Law casts a shadow on negotiations and decisions that take place outside of formal legal process. Legal rules establish the range within which informal settlements operate, and can even influence the terms governing informal agreements by legitimating particular principles dictating how the case would come out in court. Non-legal actors take law into account as the outer boundary of their private conflict resolution. If law does migrate into the language of organizational culture, some commentators treat this translation process as necessarily denoting privatization and managerialization (not internalization or elaboration) (Edelman, Uggen, and Erlanger, 1999, pp. 406, 442). Nor does the “shadow of the law” metaphor take account of any impact that non-legal norms have on the development of the legal principles.

As Edelman, Uggen, and Erlanger have shown, the causal arrows can go in both directions: the results of the norm generation process in each domain influence the substantive calculus in the other (Edelman, Uggen, and Erlanger, 1999, p. 406). Edelman and co-authors point out the “endogeneity” of legal norms: courts sometimes incorporate the norms of regulated groups into the judicial formulation of the legal rules. This work also documents the important role of norm intermediaries—lawyers, human resource professionals, organizational consultants—in transporting norms between legal and organizational domains (Edelman, Uggen, and Erlanger, 1999, p. 406). Their account, however, emphasizes law’s formal dimensions—adversary process and the legal rules it produces. Intermediation of formal law takes place outside legal process, in informal, professional or managerial networks. In this narrative, courts act as passive consumers of normative outputs produced by non-legal actors outside of the legal domain. The judiciary does not actively shape how local or professional norms take account of existing legal norms, or the circumstances under these informal norms will influence public and enforceable legal norms.

2. THE VALUE OF BRIDGING LAW AND NORMS

It is striking to contrast scholars’ static paradigm of judicial role with their dynamic analysis of discrimination that drives the critique of the dominant doctrinal paradigm. Formalism is problematic as a method of norm elaboration for complex discrimination. General rules do not really tell you much about how structural bias operates in particular settings, or why challenged decisions or processes are exclusionary. Detailed prescriptions are problematic because, as detached, centralized adjudicators, the judiciary lacks the deep knowledge of local circumstance or the occasions for ongoing adaptation to context needed to solve local problems. Judicial mastery of a particular workplace dynamic does not get around the dilemma of generalizability; moreover, it will likely trigger concerns about judicial legitimacy and competence, not to mention questions about judicial resources.

Yet, complete privatization abandons the law’s role in generating public norms. It would also relegate the intended beneficiaries of employment discrimination laws to the informal norms, power dynamics, and problem solving capacities of their particular workplace. For this reason, many scholars worry about the trend to encourage informal resolution of employment discrimination disputes (Silbey and Sarat, 1989; Delgado et al. 1985; Grillo, 1991). Insistence on rule elaboration and enforcement as the preferred mode of judicial interaction thus disables courts in responding to conditions that implicate publicly articulated values.

Identification, definition, and remediation of group-based inequality require a process of problem solving. Situated knowledge generated through reflective interaction may be more productive than detached logical consideration in identifying the normative significance of challenged practices, what sustains them, and how they can be changed. It may be important to know how particular practices affect members

of identified groups, how and why those patterns persist over time, what they mean for the status of group members, and whether alternatives exist that could minimize exclusion. That process identifies the structural dimensions of a problem through an insistent inquiry of tracing back to root causes. It enables participants to articulate norms in context as part of the process of determining why particular circumstances pose a problem requiring remediation. It encourages organizations to gather and share information enabling that analysis to proceed. It emphasizes developing individual and institutional capacity and incentives to respond to problems thus revealed. It fosters the design, evaluation, and comparison of solutions that involve the stakeholders who participate in the day-to-day patterns that produce bias and exclusion. It also entails reframing the aspirations motivating change to reflect these interlocking problems and constituencies. Legal rules resulting from logical analysis do not elucidate the aims, scope, and strategies of this essential problem solving.

As a practical matter, judges and litigants resist participation in rule-enforcement type judicial regulation of complex discrimination. Courts have been extremely reluctant to assume direct responsibility for constructing managerial solutions for subtle bias, based on concerns about institutional competence, resource constraints, and uncertainty about the problem itself. Employees are reluctant to utilize formal process to complain about practices that they are not sure count as discrimination. Employers resist identifying problems within their workplace if they perceive that doing so will essentially do plaintiffs' counsel's work for them. In fact, the formalistic, adjudicatory, rule-enforcement paradigm does not fully describe how judges in fact fulfill their norm elaboration function. The prospect of continued judicial involvement in addressing complex discrimination thus necessitates surfacing these less formal judicial modes and expanding law beyond the model of judiciary as a rule-enforcer.

3. LAW AS CATALYST OF NORMATIVE ELABORATION AND PROBLEM SOLVING

3.1. Expanding the Form and Function of Equality Norms

Rules enforced by sanctions remain as an important backstop and platform for normative elaboration in the area of equality jurisprudence. Some conduct violates clear and well-understood principles. At this point in our history, deliberate exclusion based on race, sex, religion or age is a normatively easy case, as is quid pro quo sexual harassment. (*Burlington Industries, Inc. v. Ellerth, Inc.*, 1998). Rules solidify and preserve well-established baseline norms and aspirations. They also legitimate normative discourse about the domains they regulate. Rules dictating that defendants "stop doing that!" can effectively remedy deliberate discrimination. Compensation to those harmed by intentional discrimination seems directly connected to the wrongful conduct and important to law's purpose and legitimacy. Moreover, the hammer of substantial compensatory damages and coercive sanctions may be necessary as a first step toward an

effective problem solving approach. This approach depends on the presence of some company insiders who assume responsibility for interpreting law to prompt internal norm elaboration and implementation. Coercion is sometimes needed to bring companies to the point where they take equity problems seriously, particularly in companies that have denied the existence of or resisted to addressing pervasive discrimination. Courts' facilitative role depends for its legitimacy and effectiveness on the continued operation of legal rules backed by coercive sanctions in areas of normative consensus and simplicity.

What about the role of equality norms in addressing more complicated, less well-understood bias—problems that cannot be isolated to a particular act or actor, that involve dynamics of interaction and evaluation producing marginalization or exclusion, or that are inextricably linked with activities that we actually value? Is there any way for courts to participate in norm elaboration for problems that resist resolution through rules? Can equality norms be dynamic, responsive, and contextually contingent and still robust, in the sense of influencing private actors to engage in normatively desirable conduct?

A facilitative, reflexive, and structural conception of law's form and function (building on such conceptions developed in international human rights and corporate governance domains) offers a way forward (Scott and Trubek, 2002). In areas of normative and remedial uncertainty and complexity, the function of judicially articulated legal norms is not to establish definitive boundaries of acceptable conduct which, if violated, warrant sanction. It is instead to prompt—and create occasions for—normatively motivated inquiry and remediation by non-legal actors in response to signals of problematic conditions or practices. This legal equality norm is one of inquiry, analysis, reflection, and remediation. Law imposes an obligation to inquire upon a showing of an unexplained pattern of bias. The legal consequence of exposing a discrimination problem through this normative inquiry is not the imposition of a sanction; it is instead the imposition of a legally enforceable obligation to correct the problem. This attenuation (but not elimination) of coercion relieves the pressure for a clear, before-the-fact rule (which is needed to justify sanctions for failure to comply) and still maintains incentives and opportunities to elaborate robust norms in context.²

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

² In a similar vein, Silbey and Sarat show that because informal conflict resolution does not require violation of the law to trigger action and does not stigmatize participants, intervention can be earlier and unconstrained by jurisdictional boundaries (Silbey and Sarat, 1989).

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

What makes a condition or practice sufficiently “problematic” to trigger an obligation to correct? More specifically, how would a plaintiff make *prima facie* showing that a condition or practice sufficiently implicates constitutional or liability concerns? Congress has articulated general, ambiguous equality norms that potentially comprise a variety of equality theories, or mediating principles, such as anti-subordination, equal access, or equal treatment. Individuals or groups affected by these conditions would offer evidence permitting the conclusion that a condition or pattern of exclusion, unequal treatment, or subordination exists. This could be done through statistical evidence, through benchmarking the conditions in a particular firm against other comparable organizations with more inclusive practices, or through methodologically accountable expert testimony.

A signal of problematic conditions or conduct is an identifiable set of circumstances that give reason for concern about compliance with equality norms. Courts and administrative agencies can and indeed have begun to identify indicators of potentially discriminatory conditions or practices. Enduring and unexplained patterns of lower promotion rates by members of particular groups, accompanied by arbitrary and highly decentralized decision-making practices, are one such signal. Unequal participation by the targeted group in informal networks or unequal access to mentors and training is another. Conduct or comments of a sexual or gendered nature, but that are susceptible of multiple interpretations, are the third. These practices may not alone signify gender or racial bias. But in some contexts and circumstances, they do, particularly in the absence of investigation and institutional response (*Dukes v. Wal-mart Stores, Inc.*, 2004). When the problem is complex and contextually contingent, the court lacks an adequate basis for imposing a unitary, overarching mediating principle. It is in a position, however, to trigger attention to a potential problem, and to stimulate problem solving that engages with the normative significance of this potentially problematic activity.

One interesting aspect of these signals is that they demonstrate the role of remedy in defining the normative significance of complex bias. An uninterrogated pattern of exclusion or subtle harassment often looms larger and may produce greater inequality than that same conduct when followed by prompt investigation, analysis, and change. The institution’s failure to respond contributes to and indeed, can become a crucial element of the discrimination experience. This is in part because of the incremental, cumulative, and systemic causes of much complex discrimination (Cole, 1991). In these areas, inequality can result from the interaction of micro-level interactions and inadequate structural responses that interrupt these cumulative patterns. Conversely, prompt inquiry into and remediation of problematic conditions or practices can affect

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

3.2. The Role of the Judiciary

Is there a role for the judiciary in this norm elaboration and capacity building process? More precisely, is there a role that is consistent with the judiciary's practices, competencies, self-conceptions, and institutional role? Are there ways, in addition to formal adjudication, for courts to participate in public, accountable norm elaboration? Can they engage in a less directorial relationship to non-legal actors in the norm generation process and still act like judges?

Crafting a workable judicial role is doable. But it requires expanding our analytical lens beyond liability decisions. It also entails generating judicial legitimacy theories that are grounded in a critical examination of actual judicial practices that intervene in and influence workplace norms. This inquiry moves beyond formalistic notions of law and judicial role, just as more nuanced understanding of discrimination resulted from a functional and institutional methodology. The full range of norm-generating activity in which the courts and legal actors participate must be included, as well as the array of actual and potential channels for making that normative activity transparent, public, and precedential.

This pragmatist analysis also takes seriously the impact of courts' concurrent and, for many judges, core function as adjudicators on their non-adjudicatory activities, and how that identity constrains judicial role development. In this sense, this approach differs from the position articulated by Feeley and Rubin that judges are just like other public actors in their role as implementers of public policy. Feeley and Rubin advocate that we "assign the judge the same range of tasks that are assigned to other administrators" (Feeley and Rubin, 2002, pp. 249, 262). Their analysis of judicial legitimacy and efficacy lumps together distinct forms of judicial problem solving activity, from director to broker to catalyst (Sturm, 1990, p. 305). This blanket acceptance of judicial managerialism glosses over valid concerns about certain types of judicial intervention. The legitimacy (and, in my view, long term efficacy) of a judge who assumes direct responsibility for institutional redesign differs markedly from that of a judge who uses the tools and processes of the judiciary to prompt responsible actors to engage in effective problem solving. Judges' willingness to participate in problem solving under conditions of complexity turns on the availability of a role that is consistent with their tools, practices, and relationships.

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

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

Legal norms thus develop not only through liability determinations, but also through legally structured occasions for deliberating about the relationship between norms and practice. These practices cast courts in a crucial but limited role in addressing problems that implicate public norms but are insufficiently understood and/or resistant to centralized rule enforcement. They emphasize law's role in structuring focal points of intra- and inter-institutional normative activity (Charny, 1996, p. 1841). Each of these roles could be (and will be) the subject of its own article. I undertake here only to give enough concrete meaning to these roles to allow a discussion about their viability and desirability as role conception for addressing complex discrimination.

3.2.1. Norm Generation in the Penumbra of Formal Adjudication

Discussions of courts' role in elaborating equality norms typically involve liability determinations (or, in the critiques of alternative dispute resolution, the absence thereof): Have courts rendered a published opinion determining whether liability does or could flow from the application of legal norm to a particular set of facts? (Albiston, 1999, p. 869). This focus on liability determinations and rule-making as the location of normative elaboration is understandable. These determinations produce a public norm in the form of a published opinion, which is widely available and serves as a guide or binding precedent for future decisions. Published opinions are the result of a formal process designed to enable participation and principled decision-making. This process also incorporates caution, certainty, and predictability that justify the state's imposition of coercive authority.

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

can also influence the way non-legal actors negotiate and deliberate, by focusing on the methods of inquiry and governance structures that produce informal norms and agreements, and by weighting more heavily those outcomes that result from principled, accountable, and participatory practices. Courts could also encourage and facilitate sharing the results of less formal norm elaboration in its penumbra to encourage public norm development, by discouraging confidential settlements, publishing opinions concerning informal agreements implicating public norms, and maintaining a publicly accessible database containing court-approved settlements. These steps would and increase the legitimacy and accountability of informal norm elaboration.

It is important to emphasize that this does not mean necessarily requiring processes that mirror the features of formal adjudication. As Winston has argued, “the form due process should take depends crucially on the setting in which it finds its application. Specific norms or rules should depend on the purpose of the enterprise and even its stage of development” (Winston, 2002, pp. 389, 392). Indeed, under some circumstances, insisting on adversary process as the measure of fair and effective process would defeat the deeper values motivating due process, such as participation, information generation, and effective problem solving, by importing the previously discussed limitations of a rule-enforcement approach into the informal arena. Courts would instead encourage parties to develop (and the court would then assess the adequacy of) functional criteria of adequate process in light of the purposes and attributes of the particular project. Processes or outcomes could be precedential (in the sense of providing a normative or remedial solution that others can learn from) even if they are not formally binding. Parties’ full and fair participation could be achieved through creative institutional design and governance, even if they are not represented by counsel. Decisions could be public and norm generating, even if they are not published by Westlaw and Lexis. Courts could develop standards for evaluating informal agreements and expert opinions, and validate those that give general legal norms concrete meaning in the particular context, articulate criteria by which their agreements can be evaluated, and generate the information needed to evaluate resulting normative assessments and agreements.

The judicial process builds in a variety of decision points that invite less binding norm elaboration. Norm elaboration occurs as part of a decision about whether to keep the judicial machinery open as a public forum for engaging with a particular type of problem. One could look at decisions denying summary judgment in the same light (Albiston, 1999, p. 869). The decision at stake may also involve the question of who can legitimately participate in the problem-solving process. It sometimes entails assessments of the type and quality of information needed to participate in the problem solving process or to justify reaching a particular outcome. These types of questions cast the court in a role beyond determining whether to impose liability for violation of a rule. Courts either consciously or unwittingly craft process frameworks that potentially shape the capacity and incentives of non-legal actors to engage in effective problem solving and accountable norm elaboration. These non-binding occasions for normative elaboration have the potential to be public, norm generating, accountable,

and precedential, if these terms are given principled rather than formalistic meaning. If, for example, consent decrees are published and used as benchmarks of new normative understandings and remedial responses, they can have general and precedential value even if they are not binding (Galanter, 1988, p. 55). Web publication and developing professional practice networks make possible the dissemination of informal normative activity.

A few examples might help clarify the meaning of norm elaboration in the penumbra of judicial rule enforcement. Class certification decisions require courts to assess plaintiffs' theory of discrimination in deciding whether there are questions of law and fact common to the class, that the representative claims are typical, and that remediation would warrant an injunction affecting the class as a whole (Rule 23, F.R.C.P.). Class certification decisions frequently discuss in some detail the types of problems asserted as discriminatory by plaintiffs and whether they are sufficient systemic to warrant class treatment (*Dukes v. Wal-mart Stores, Inc.*, 2004; *Latino Officers Association City of New York v. City of New York*, 2002; *Webb v. Merck & Co.*, 2002; *Beck v. Boeing*, 2001; *Butler v. Home Depot, Inc.*, 1996). This is not a determination of the likelihood of success at trial (Bone and Evans, 2002, p. 1251), but rather one of whether the case is in a posture to warrant group-based resolution. Class certification also can create a framework for assessing whether participants engage in legitimate and effective information gathering, problem solving, and norm generation once a class is certified. It functions as a focal point for defining the contours of a conflict, identifying the participants (including employees, key company officials, and outside experts) who should be involved, developing the data needed to understand if and why systemic problems persist, and creating ground rules for effective and accountable participation. Class certification is thus an occasion to establish a governance structure that can produce fair, effective, and principled norm generation (Issachoroff, 1999, pp. 337, 367). It is particularly important because most cases settle following class certification.

Similarly, the decision to approve a class action settlement, if taken seriously by the court, involves an assessment of the adequacy of the process that produces the settlement as well as the reasonableness of the settlement itself. Judicial opinions evaluating the adequacy of settlements also address the plaintiffs' theories of discrimination and remediation as part of the process of determining whether the proposed settlement is reasonable. Although this inquiry is too often a judicial rubber stamp, it need not be. It does offer an occasion for the court, which some courts have taken seriously, to review the adequacy of the governance process and the resulting agreement. Courts could develop criteria for evaluating settlements that would take seriously the norm elaboration function of consent decrees, even if the terms of the agreement do not constitute precedent in the formal sense of the word. They could pay attention to the process by which decrees are formulated, the adequacy of participation, and the sufficiency of the information generated through the problem solving process. This type of process review might remedy the legitimacy deficit courts face in monitoring and enforcing consent decrees by offering a process-based justification for backing a

private agreement with state enforcement resources and authority. The prospect of a robust process evaluation could induce parties to develop meaningful ways of including affected stakeholders, to develop a workable problem solving process as part of the negotiations, and to elaborate the equality theory underlying the settlement, whether it would in fact present a viable claim at trial (*Molski v. Gleich*, 2000). They may also spell out the parties' remediation theories and strategies.

Decisions about the admissibility and weight of expert testimony also require courts to assess the adequacy and viability of plaintiffs' discrimination theories (*Butler v. Home Depot, Inc.*, 1997; *Collier v. Bradley University*, 2000). A relevancy determination necessarily involves consideration of the relationship between the expert evidence and an underlying theory of discrimination (Walker and Monahan, 1988, p. 877; Meares and Harcourt, 2000, p. 733). For example, as part of its consideration of the admissibility of expert testimony, the court in *Butler v. Home Depot* articulated several possible discrimination theories that would support the relevance of expert testimony "as to the causes, manifestations, and consequences of gender stereotyping as well as the organizational circumstances which allow such stereotypes to flourish" (Meares and Harcourt, 2000, p. 1264). These included the failure of Home Depot to take steps to correct stereotyped decision-making, notwithstanding its awareness that the problem existed and that current practices were inadequate to remedy the resulting gender bias.

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

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

3.2.2. Shaping Non-Legal Actors' Participation in Effective Normative Elaboration and Remediation

Courts also shape norms for addressing complex discrimination by creating the architecture to prompt effective problem solving and conflict resolution by non-legal actors, and then developing points of permeability between legal and non-legal arenas so that public norms can emerge out of that local norm generation process. (See Sturm, 1990, p. 305). The judiciary becomes involved in addressing complex discrimination when there is a strong indication that particular systems and practices are failing in ways that fall within the purview of generally articulated equality aspirations. In contexts that resist resolution by a clearly defined rule, judicial intervention supply incentives for employers to implement effective internal problem solving and conflict resolution mechanisms, to evaluate their effectiveness, and to learn from the efforts of others facing similar problems. Coercion is used to induce employers to develop robust internal problem solving mechanisms to address and prevent structural bias, and to sanction failure to take steps needed to address identified. They do this by insisting that employers, with the help of inside and outside collaborators, develop and justify working criteria for evaluating the effectiveness of informal mechanisms. Courts are then in a position to assess employers' justification for and compliance with their effectiveness criteria. This enables courts to function as a catalyst, rather than as a de facto employment director or a deferrer to employers' unaccountable choices.

This structural role has assumed heightened significance because of the explosion of interest in ADR as a way of resolving employment discrimination disputes. Judicial doctrine has encouraged employers to develop IDR and problem solving mechanisms (*Faragher v. City of Boca Rotan*, 1998; *Burlington Industries v. Ellerth*, 1998; *Gilmer v. Interstate/Johnson Lane Corporation*, 1991). The Equal Employment Opportunity Commission has embraced mediation as a method resolving discrimination charges (McDermott, O'Barr, Jose, and Bowers, 2000; EEOC's ADR Policy Statement, 1995). Employers have instituted a wide range of dispute resolution processes, including ombuds officers, mediation, peer review, open door policies, and arbitration (Van Wezel Stone, 2001, pp. 467, 480; Sturm, 2001).

The move to ADR has raised concern among scholars and practitioners who value the judiciary's role in elaborating and holding employers accountable for compliance with public norms. The worry is that ADR (or IDR when it takes place inside an organization) is necessarily private, non-norm generating, and unaccountable. (Abraham, 2003; Edwards, 1986; Fiss, 1984, p. 1073). As David Charny put it, reliance on informal systems is problematic "because one loses the 'public goods' associated with more formal litigation: development of a set of precedents, public revelation about information about important policy matters . . . and the use of judicial decision to propagate and reinforce social norms" (Charny, 1996, p. 1852). Scholars have also expressed concern that the processes used to produce settlements may be unfair, particularly for addressing zero-sum problems involving disputants with unequal power (Abraham, 2003; Grillo, 1991; Van Wezel Stone, 2001, pp. 467, 480; Fiss, 1984, p. 1073).

This critique assumes that the move to IDR necessarily displaces judicial involvement in norm generation processes and outcomes. It also assumes that IDR is by definition individualistic (not systemic) in its orientation, private (not transparent) in its operation, instrumental (not normative) in its analysis, ad hoc (not precedent-setting) in its results, and unaccountable in its process and implementation (Edelman, Erlanger, and Lande, 1993; Grillo, 1991). To the extent that informal processes currently fit this description, these concerns are well-founded. Indeed, research shows that these processes are sometimes used to “bullet-proof” a company rather than remedy problems (Bisom-Rapp, 1999, pp. 959, 967–971; Edelman, Erlanger, and Lande, 1993). However, it is important to separate critiques of current practice from normative theories about the appropriate relationship between courts and informal conflict resolution. The judiciary can and sometimes does play a role in shaping the terms under which informal systems operate to address discrimination. Courts do have the opportunity to assess the adequacy of the processes and to consider the normative outcome of the results. When executed in keeping with this role, judicial introduces a level of accountability and genuine participation that is absent from ADR involving purely contractual norms. Judges can evaluate whether a system is sufficiently robust, accountable, and norm generating to justify private involvement in publicly relevant norm elaboration.

With judicial involvement in assessing and publicizing adequacy criteria, IDR has the potential to be norm generating, transparent, and accountable, at least at the systemic level. These systems build in a process of gathering data about recurring patterns that trigger concern about systemic problems; provide a regular mechanism for reflecting about those patterns, use employee and expert participation in designing and monitoring the system to assure its fairness and legitimacy, and institutionalize opportunities to develop and revise institutional norms and practices that respond to the problems identified through data analysis. Intel’s conflict resolution system, described in *Second Generation Employment Discrimination: A Structural Approach*, has built in many of these features (Sturm, 2001, p. 489). So has the National Institute of Health in designing its Center for Cooperative Resolution, which is the subject of a current study (Center for Cooperative Resolution, 2001, Annual Report).

Courts could, and in some instances, have evaluated IDR systems with criteria that relate to the legitimacy and efficacy of the conflict resolution or problem solving process. Sexual harassment and judicial evaluation of subjective employment systems are two areas where courts have made gestures in this direction. Thus far, the criteria have been unevenly developed, without an explicit emphasis on building the capacity and incentives of non-legal actors to engage in norm elaboration and problem solving. Broadening the court’s conception of its role to include this crucial function could shore up the lower courts’ spotty performance to date in enforcing the Supreme Court’s embrace of a structural role that measures decision-making processes in relation to their effectiveness in preventing and addressing problems. This role is also sensitive to judicial competency concerns. Courts are not themselves developing the criteria

and architecture for these processes, but rather they are insisting that those who use these processes develop and justify effectiveness criteria.

3.2.3. Promoting Mediating Actors' Capacity to Bridge Legal and Non-Legal Normative Practice

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

Courts review the activities and outcomes of these mediating actors who participate in normative elaboration and capacity building. This review affords the opportunity to prompt the development of standards and processes of accountability governing the role of these norm intermediaries. An example will help illustrate the idea. I have already discussed evaluations of expert testimony as a site for norm elaboration outside the context of rule enforcement. There is also a structural reason to pay attention to the role of experts as participants in norm elaboration. Experts play a crucial intermediary role in the formation and translation of norms. Many of the experts who appear in employment discrimination litigation also conduct research and consult with organizations about the adequacy of their workplace practices (www.bendickegan.com). They play a key role in translating legal principles into organizational norms and vice versa (Edelman, Uggen, and Erlanger, 1999). They are repeat players who work across the boundaries of legal regulation and workplace practice. It is crucial, and not always the case, that these professional intermediaries articulate and satisfy criteria of methodological and process accountability.

Courts can structure processes for the admissibility and evaluation of expert testimony that foster transparency and professional accountability for these norm intermediaries. Courts evaluating expert evidence must assess its persuasiveness, methodological validity, and generalizability (Walker and Monahan, 1988, p. 877; Meares and Harcourt, 2000, pp. 733, 1264). They also consider the degree to which expert evaluation develops replicable methodologies that receive review and validation within the relevant professional community. This review could be conducted with more explicit attention to the crucial intermediary role being played by experts. Ideally, courts could also review administrative agency decision-making with this concern about effective norm intermediation and capacity building as a guiding principle (Dorf and Sabel, 1998, pp. 267, 348).

4. CONCLUSION

This chapter emphasizes the importance of extending the interdisciplinary and constructivist understandings of discrimination to the formulation of the judiciary's role in addressing inequality. It questions the adequacy of rule enforcement as a unitary theory of law's role in addressing complex discrimination. It also critiques the "shadow of the law" image as an adequate guide for shaping the relationship between law and norms. The catalyst judicial role developed here requires a new metaphor that captures the dynamic and interactive relationship between informal norms and formal law. Courts can and should actively participate in structuring the relationship between law and norms, between non-legal and legal actors. Courts are not the only or necessarily the primary site for generating effective problem solving approaches to complex discrimination. But they continue to play a crucial legitimating and boundary-setting function, along the facilitative role that this essay has elaborated. This facilitative role conception opens up new possibilities for legitimate and effective judicial participation in normative elaboration that can respond to complex and subtle forms of discrimination.

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