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 70s 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 (Adarand Constructors v. Pena, 1995; Board of Education of the Township of Piscataway v. Taxman, 1996; Hopwood v. Texas, 1996) and legislatures (St. George, 1995) with much greater frequency and success. The widely shared moral consensus around the need to redress racial and gender inequality has broken down. Those who are committed to the civil rights vision of full participation in the arenas 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.

This fundamental challenge to racial and gender policy coincides with a period of transition in many workplaces and occupations. Much employment law has been developed to address a model of organization premised on hierarchical, vertically-integrated, stable, and centralized bureaucracies (Dorf & Sabel, 1998). Many workplaces are in the midst of reorganizing production and employment relationships in ways that depart from this 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 (Krackhardt & Hanson, 1993). To respond to the demands for adaptability, flexibility, and technological innovation, organizational forms are emerging that eschew stability, permanence, and rule-driven decision making (Barenberg, 1994; Dorf & Sabel, 1998; Drucker, 1989; McKersie & Walton, 1991; Piore & Sabel, 1984).

This system of governance requires workers at all levels of the organization 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. The boundaries between organizations and their customers, clients, and suppliers are blurring (Barenberg, 1994; Capelli, 1995; Sabel, 1991). Institutions and individuals operate in environments that are increasingly mobile (Kanter, 1995). 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.

During this same time, the dynamics and patterns of racial and gender exclusion or bias have also changed considerably. To be sure, the classic forms of deliberate exclusion based on race and gender that were characteristic of the early stages of the civil rights regime have not disappeared. 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 (Jehn, in press; Krieger, 1995; Lawrence, 1987; Proudford, in press; Steele, 1997). 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 (Jackson, 1991; Jehn, Northcraft, & Neale, 1998; Thomas & Proudford, in press). These 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 (Krieger, 1995). 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, channels of opportunity for advancement increasingly depend on training, social networks, skills enhancement, and adaptability (Doeringer, 1991; Kanter, 1995; Piore & Sabel, 1984). The capacity to develop social and knowledge-based capital on the job depends on informal relationship building, making the patterns of interaction among workers at comparable levels of the organization critical to opportunities for advancement within the organization (Nelson, 1997; Schultz, 1990). 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 (Sturm & Guinier, 1996).

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 (Austin, 1998; Higgins, 1996; Krieger, 1995; Schultz, 1990). Legal doctrine continues to reflect many of the 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. 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 (Flagg, 1993; Krieger, 1995). 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 (Rees, 1988).

Many workplaces are in the midst of reorganizing production and employment relationships in ways that depart from this 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 (Krackhardt & Hanson, 1993). To respond to the demands for adaptability, flexibility, and technological innovation, organizational forms are emerging that eschew stability, permanence, and rule-driven decision making (Barensberg, 1994; Dorf & Sabel, 1998; Drucker, 1989; McKersie & Walton, 1991; Osterman, 1991; Piore & Sabel, 1984).

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. 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 (Dorf & Sabel, 1998). Legal discourse about workplace discrimination tends to categorize regulatory options in terms of a series of dichotomies: formal/informal, public/private, rule/discretion, internal/external. Legal doctrine—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. Legal regulation is often framed as a choice between two approaches: 1) as a system of universal rules defined externally by courts and legislatures and imposed on organizations through adversary process, or 2) a system of private, or internal, informal processes that do not generate or inform norm development and essentially obviate the need for further external regulation (Edelman, Elsinger, & Lande, 1993). Group-level interactions are often either disaggregated into a series of individual actions or merged into analyses of organization-wide policies and practices. The process of intermediation between the legal norm and the complex internal dynamics of organizational practice is not normally the subject of legal doctrine or practice (Edelman et al., 1993).

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 (Edelman, 1990). 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 articulating and enforcing uniform processes and standards (Baron, Dobbin, Jennings, & Devereaux, 1986). Many of the current, valid criticisms of alternative dispute resolution articulate the dangers of informal, unaccountable processes that tend to replicate existing power imbalances, using processes that appear fair and are more difficult to challenge (Abel, 1982; Delgado & Dunn, 1985; Edelman, 1990).

This essay seeks to move beyond the debate between informal and formal legal regulation. Both approaches reflect essential components of a legal regulatory regime. However, neither approach adequately responds to the simultaneous challenges of changing organizational structure, racial and gender dynamics, and economic demands. The next step requires that we take account of the critiques of formality and informality. This means 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 as objects of external or private regulation.
The Dynamics of Race, Gender, and Law in the Emerging Workplace: Some Recent Examples

This section describes three different sites which 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 emerging workplaces and yet fall through the cracks of existing regulatory approaches. 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 address these dynamics. In part, these examples provide a window into how I am trying to rethink issues of race, gender, and workplace practice at a point when the underlying theoretical framework has not been fully articulated. This approach hopefully establishes the experimental and inductive methodology I seek to develop for the law.

Decentering Power: Self-Directed Work Teams

This example builds on a case recently reported in the Wall Street Journal about a suit recently filed against Johnson Wax Corporation by a group African American workers in the component manufacturing plant in Racine, WI (Neuborne, 1997; Schelhardt, 1997; Working Mother, 1997). 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.

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 site, management reported, “The change has sped up response time, simplified work for agents, and cut turnover to 8 percent” (Gunn, 1993). Some workers reported, “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.” Managers also report, “Better decisions get made if in fact you can move those decisions closer to where the actual work is performed.” Managers reported 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 (Cotton, 1997). 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. Often groups assume responsibility for decision making about work and workers, with little or no attention to the structure, process, or skills shaping that process of governance (Lawler, Mohrman, & Ledford, 1992). 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 groups’ capacity to deal constructively with and, indeed, to make productive use of conflict as a key determinant of stability, productivity, and long-term commitment to the work (Jehn, in press).

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 (Jehn, in press; Goldstein, 1995; Thomas & Proudfoot, in press). 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 operated prior to and in conjunction with the move to the team-based system of governance. Heterogeneous groups of workers assume 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 frequently are embedded in the day-to-day interactions of the group (Thomas & Proudfoot, in press; Zane, 1996). Under these circumstances, social capital—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 (Nelsen, 1997). Exclusion 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 (see Schelhardt, 1997; Neuborne, 1997), the most visible dissatisfaction with the dynamics and consequences of the team-based management system arose from Black workers. 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 company's method of team-based decision making produces biased results, and that the system systematically disadvantages them in their opportunities to advance within the company.

The Johnson Wax example involves a move from bureaucratic, hierarchical decision making to decentralized, group decision making. The success of the teams and the fairness of the decisions generated by teams then depends on the capacity to interact productively and fairly among a racially diverse group of people who previously operated in more traditional hierarchical ways.

The Johnson Wax case illustrates 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 employers restructure their workplaces to respond to changes in technology and the market, they face different kinds of challenges around race and gender dynamics. The issues of conflict and dissatisfaction that may be most visible around claims of discrimination connect to more general concerns about effective, productive, and fair work groups. If racial and gender conflict does emerge, it can undercut 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 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. 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?

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 (Ezold v. Wolf, Block, Schorr & Solis Cohen, 1993; Price Waterhouse v. Hopkins, 1989; University of Pennsylvania v. EEOC, 1992). 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, or 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.

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 differing 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 also operate in ways that often proceed under the surface and are 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 (1994), a recent case challenging a law school's hiring process, offers a peek into the dynamics of academic decision making and how these processes fare under legal scrutiny. Lam is 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 around race and gender that emerge (see Ezold et al., 1993). Lam filed suit after she was denied a position as the director of Pacific Legal Studies Program. The law school faculty made this decision through a committee that acted without guidelines, criteria, or any methods of accountability. When the composition of the committee changed, the committee's approach and outcomes shifted as well. Despite serious concern about the potential for discrimination and the need for careful selection procedures, "no mechanism was put into place to screen out potential bias or retaliatory sentiments" (Lam, 1994). Nonetheless, the court ruled for the university. 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. The case also shows the development of internal mechanisms of dispute resolution to address discrimination claims, which operate internal to the University but quite separate from the day-to-day interactions that produce the contested decision.

Replicating the Formal/Informal Dichotomy within the Workplace: The Example from Sexual and Racial Harassment Procedures at a University

Many universities and other employers have created internal mechanisms to address sexual harassment in particular, often in response to case law on employer liability. First, in Meritor Savings Bank v. Vinson (1986), 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 (1998) and Faragher v. City of Boca Raton (1998), 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" (Faragher v. City of Boca Raton, 1998). Thus, at least for hostile environment harassment, if an employer has taken steps to prevent and redress harassment, that employer can, under certain circumstances, avoid liability. Law creates direct incentives, embodied in 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 (Cross v. State of Alabama, 1995; Ellison v. Brady, 1991; Kauffman v. Allied Signal, 1992; Spicer v. Virginia, 1995).

In theory, at least, this holding makes the creation of an informal administrative process a part of employer’s legal obligation. The adequacy of those processes becomes part of the issue of whether the employer is liable for sexual harassment that has occurred (Oppenheimer, 1995). This approach to employer liability blurs formal and informal legal process. It makes the shadow of the law part of the liability claim. It offers the possibility of self-consciously constructing law as culture and informal process, as an co-equal component of the legal system as it addresses sexual harassment. This approach might also create incentives for employers and universities to experiment with ways to translate legal norms about sexual harassment into organizational patterns as part of liability prevention (Segal, 1997a; Segal, 1997b).

The process developed to address complaints typically consists of two tracks: 1) informal counseling and private mediation, and 2) formal investigation and hearings. The informal system consists of counseling and mediation by human resource staff. This process treats the problem as a private conflict between two individuals. The institutional decision, patterns, and culture within which the harassment takes place are not the focus of informal resolution process. Resolutions typically focus on how to avoid contact between the parties in the future and whether behavior was serious enough to warrant some sanction of the perpetrator.

If “conflict” cannot be resolved informally, or if allegations are sufficiently serious to expose the University to liability if no disciplinary action is taken, the dispute proceeds to 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 wrong-doer. The plaintiff is not a party to the proceedings. The “case” is investigated and “tried” before a faculty committee.

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 law suit. The perception is that the higher the status of the alleged perpetrator in the university community, 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 marginalization of women and people of color remain unchanged.

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. Sexual and racial harassment was constructed as 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 the contexts where harassment is most likely to occur. Those with the knowledge and expertise to construct institutionally-grounded responses lacked the access and opportunity to act proactively. 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 take these steps.

Rethinking Assumptions
Underlying Legal
Approaches to Race, Gender, and Organizations

The Locus of Power Over Workplace Status

In the three examples above, the power over day-to-day decisions about workplace status has been exercised in ways that depart from the traditional bureaucratic model. Deci-
sion 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, non-hierarchical 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, may cause [direct economic] injury. A co-worker (absent some elaborate scheme) cannot dock another's pay, or force one co-worker to 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 (Burlington Industries, Inc. v. Ellerth, 1998).

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 co-workers and assumes that the power to make decisions affecting employment status correlates with the level of formal power in the organization (FitzRandolph, 1996; Merriman & Yang, 1984/85; Turner, 1994). This assumption is vividly reflected in the law on employer liability in the context of sexual harassment and racial discrimination (see Burlington Industries, Inc. v. Ellerth, 1998; Gary v. Long, 1995; Perry v. Ethan Allen, Inc., 1997). 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 (Austin, 1988; Rees, 1988; Sabel & Dorf, 1998). Similarly, organizations such as universities have used "decentralized" decision making about promotion and tenure long before the recent trend.

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. Although studies attempting to assess the frequency of these types of reorganizations in structure are inconclusive, there are indications that organizations in both the public and private sector are experimenting with their systems of governance in ways that depart dramatically from the bureaucratic, hierarchical paradigm depicted in the case law (Lawler et al., 1992; Sabel & Dorf, 1998; Sparrow, 1994). Developments in technology and market demand have placed pressure on companies to find ways to increase adaptability and to connect decision-making with information about production, markets, workers—in short, information that exists at the level of production or service delivery. This pressure encourages employers to decentralize decision making authority (Barenberg, 1994; Sabel, 1991). Many companies have experimented with some forms of decentralized decision making, although most have not moved entirely to self-governing teams (Lawler et al., 1997).

The Supreme Court's description of power in the Burlington Industries (1998) case does not provide an adequate framework for addressing the emergence of team-based structures. In situations where power does not correspond to formal status, the distinction between managers, supervisors, and co-workers 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. The court does not offer any guidance as to how "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, risk 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
treat as irrelevant the intermediate level of worker interaction, which is often central either to encouraging or minimizing the expression of bias. Lawyers then design employment systems that focus exclusively either on 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.

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

The examples described in the previous section involve 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 (Barenberg, 1994). 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 (Jehn, in press; Kanter, 1993; Reed v. A.W. Lawrence, 1996; Rivera v. Prudential Insurance, 1996).

At the same time, this group 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 (Thomas & Proudford, in press). These individuals may have a profound impact on the functioning and outcome of group interactions. 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 (Cascio, 1987; Fiske & Neuberg, 1988; Fiske & Taylor, 1991; Stender v. Lucky Stores, 1992). The developing literature on benchmarking provides a distinct yet complementary 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 dynamic 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 (Sabel, 1995; Sparrow, 1994).

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 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 either on a search for individual "bad actors" or on policies instituted at the top of the organization that produce discriminatory results (Perry v. Ethan Allen, 1997). Individuals typically constitute the basic unit of analysis for purposes of determining wrongful conduct.

If an individual discriminator is identified, under existing doctrine the next step 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 (Krieger, 1995; Price Waterhouse v. Hopkins, 1989). 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. Neither of these questions focuses attention on the level at which decisions actually take place. The intermediate level of the group falls between the cracks of the individual "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 patterns of a group.

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 (Civil Rights Act, 1991)? 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. 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 (Watson v. Fort Worth Bank & Trust, 1988; West Virginia University v. Deckerm, 1994).

The other avenue for challenging a subjective selection process is a pattern and practice claim (Jauregui v. City of Glendale, 1988; Stender v. Lucky Stores, 1992). 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 underrepresentation (Teamsters v. United States, 1977). The focus of the inquiry in these cases is on pervasive and conscious discrimination practiced at every level of the organization. Again, this inquiry overlooks the process of constructing and reinforcing bias at the level of ordinary team interactions and decision making.

This theory focuses attention on the pervasiveness of conscious, intentional bias.

The court's analysis of the selection processes used in Lam (1997) exemplifies the pattern of focusing either on individual bias or on 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 [Equal Employment Opportunity Commission] 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 recommendations and proceeded again in an entirely ad hoc manner and that 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 and found no discrimination based on its conclusion that there was no evidence either of 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.

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 ignore the incentive structure and group dynamics that often perpetuate the pattern of conduct (Carey, 1992; Lindemann & Kadue, 1992; Tamminen, 1994; Wagner, 1992). The structural dimension is frequently overlooked even in the context of sexual harassment, where courts have created incentives to develop effective internal mechanisms for addressing sexual harassment.

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

Assessments of performance, which determine opportunities for more challenging work and opportunities for advancement, are 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 (Nelson, 1997). 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 pattern of conduct that produces decisions about who advances in the organization.

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These embedded patterns of relationship interact in significant ways with race, gender, and other salient categories of difference. Non-traditional 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 (Jehn, in press; Fiske & Neuberg, 1988; Kanter, 1993; Schultz, 1990). 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 (Krieger, 1995). Research on small groups shows that the unacknowledged conflict within diverse groups frequently reinforces these patterns of inclusion and exclusion that can reinforce 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.

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 (Krieger, 1995). Similarly, the distinction between quid pro quo and hostile-environment discrimination, recently elaborated by the Supreme Court, rests on the possibility of distinguishing between decisions that have an adverse impact on the employee and other decisions that affect only the conditions under which an employee works (Faragher v. City of Boca Raton, 1998). 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 affecting only the conditions under which work is performed. In the emerging workplace, that distinction is harder and harder to draw.

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

In the examples described above, organizations are 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, mind-sets, backgrounds, and interests interact, disagreements about tasks, values, and personal relationships are a fact of organizational life (Jehn, in press; Thomas & Proudford, in press). 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 articulated goals (Sabel, 1991). 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 Jehn (in press) demonstrates, functional groups have the capacity: 1) to address conflict openly; 2) to translate relational conflict into issues of experience, knowledge, and perspective; and 3) to use that conflict to redefine problems and develop creative, inclusive responses to those problems that respond to identifiable concerns underlying the conflict. 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 develop in interaction with more general patterns and processes for addressing group conflict and power differentials. The capacity of multi-racial teams—such as those established by Johnson Wax to govern workplace decision making—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 generally affect the group's capacity 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, which in turn 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. Personal conflict is to be 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 are private intersections 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 either to the informal or formal conflict resolution process. Not surprisingly, then, the patterns that produce sexual and racial harassment and exclusion in work groups and teams frequently remain unchanged, even when conflicts are effectively resolved at the formal or informal level.

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.

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: 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 fixed, unchanging group defined by physical characteristics such as skin color. Bias emerges from individual decisions that deliberately or unconsciously take race into account in ways that adversely affect a member of a particular racial, gender 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 are important only to those who care about the status and access of those within the disfavored group (Sturm & Guinier, 1996).

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, 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 (see Sturm & Guinier, 1996).

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 prescribing 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 (Sabel, 1991; Sparrow, 1994). This discretion is crucial to the capacity to adapt 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 of after-the-fact compliance 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 (Sturm & Guinier, 1996). This insight helps understand and accept the court's 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 (Faragher v. City of Boca Raton, 1996).
Raton, 1998). Moreover, 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.

Lawyers’ traditional response to the absence of clear rules frequently misses the discretionary, group level of action that is so crucial in the 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 of resolving individual conflict and sanctioning individuals who have engaged in demonstrably biased decision-making. But it does not get at the underlying source of the problem and fails to encourage or enable organizations to operate proactively around these issues.

This analysis suggests significant limitations of 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 non-legal 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.

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 approach to intervention frequently embodied in the case law and applied by lawyers simply replicates individual, after-the-fact, fault-based approaches within the organization. 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 "boiler plate" 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. This process of self-assessment, if linked to overall issues of decision making, also has the capacity to generate information about 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.

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 quite 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 next 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 how well the organization had implemented its sexual harassment policy. The chair undertook the role of creating a working space that could support the development of regulatory capacity and accountability both around sexual harassment in particular and around power relationships within the University community more generally.
Instead of defining the issue of sexual harassment around particular cases or incidents, the committee adopted a project orientation that focused on defining the underlying problem and constructing networks that would build on existing capacity within the organization to address the problem at the group level. Many of those who participated were initially quite skeptical about the process and distrustful of the desire to produce any results. The typical approach to addressing complaints in the past had been to create a committee that would study the problem. 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. This kindled the hope that the committee could become a sustained intermediate space for policy making, information sharing, and problem solving 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. 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 the 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 power to act. Institutionalizing this policy process would provide a mechanism for continually generating information and translating that input 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 when 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 other groups within the university community could be explored. This permitted the identification of both 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 ways of addressing crises. It 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 to solve this problem, the group linked the legal problem of sexual harassment with the normative problem of managing unequal and amorphous relationships.

This process was a participatory endeavor that developed out of involvement by representatives 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 just on the formal legal norms or the potential “bad actors.” It moved away from an exclusively individualistic model of problem definition and response. It is potentially prospective and remedial in orientation. It employs genuine pluralism and shared power as a mechanism of accountability. It is not “one-shot” but rather is 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. It broke down the dichotomy between formal law and informal practice, 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 adversarial 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. Its 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. In many ways, it reflects the potential for the development of structural regulatory approaches within organizations. 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 this area continue to be ad hoc, local, and private in the sense that they do not inform the development of more general practice and knowledge.

From this example 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."

Second, this project entails reconceptualizing the meaning and the framework 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 also serve as signifiers that flag areas of concern not only for the groups visibly affected but for a broader group of individuals or concerns that otherwise remain invisible. The experience of women and people of color frequently signify 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. This system of regulation would permit and encourage an ongoing dynamic between patterns particular to treatment of women and people of color and patterns reflecting more general patterns for exercising power. Redefining racial and gender bias in this way also encourages a problem rather than a case orientation to racial and gender conflict (Sparrow, 1994). 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?

Third, this treatment of race and gender bias as a signifier has implications for who participates 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 legitimating this organizational regime. Those who have incentives to promote the success of the organization and to hold the organization accountable to underlying legal norms would each 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. So, for example, advocacy groups for women and people of color would participate in the process of designing systems to minimize bias and addressing 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.

Fourth, the external legal community—courts, administrative agencies, legislatures, 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 and then to share this information publicly to help develop legal norms. These incentives could take the form of resources (technical or monetary) that could be used by the organization to develop effective systems. Incentives could also be created through standards of review. The more participatory, accountable, responsible, and effective the organization's internal regulatory regime, the less stringent the external review (Ayres & Braithwaite, 1992). 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 (Dorf & Sabel, 1998). In addition, public agencies could provide resources and expertise and pool information from various 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 (Sabel, 1991).

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 (1995) 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. 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 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 that can be shared between workplaces and that can feed 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 instead 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 (see Sturm & Guinier, 1996). 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 (Sabel, 1995). 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. Formal, externally enforced legal regulation would continue to exist as the 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 (Sturm, 1997). This approach reflects a vision of lawyers as "architects of social and civic space." The project of restructuring 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 place-holder for the role of lawyer in organizational context. 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 limits 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 organizational context. Law is 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 (Edelman, 1990; Sarat & Kearns, 1993; Silbey, 1985). The lawyer as problem-solver brings together these organizational norms and practices and the external norms that formal law seeks to impose. She can introduce to the decision making processes within organizations certain basic principles of legitimacy that underlie the aspiration of American legal norms. These include fairness, participation, and reasoned and principled conduct. Each of these concepts can be translated into organizational terms.

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, yet they must be reconciled with the informal, integrative, dynamic role of lawyer as problem-solver (Menkel-Meadow, 1984; Nathanson, 1989).

Conclusion

This essay has proceeded from the premise that internal systems of regulation are themselves an important part of the legal landscape and that they should be analyzed explic- itly 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. It suggests that 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, the external and the internal. It 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. Current legal diagnosis of and solutions to problems of discrimination in the workplace frequently focus on the wrong level of activity within the organization and misdefine the nature of the problematic conduct (Schultz, 1990). Legal intervention frequently fails to alter the dynamics that cause exclusion and often have perverse or counterproductive 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 has begun to surface 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 (Rowe, 1988). These systems focus explicitly 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 at the level of practice often operate outside or even at odds with the approaches developed by lawyers to address discrimination. They have not yet influenced the approach to legal regulation of discrimination more generally.

This essay hopefully will 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 21st century workplace.

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