Chapter 14

Remedying Organizational Discrimination

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Philip Selznick’s classic work, *Law Society, and Industrial Justice*, places organizations at the center of the study of law and legality. This emphasis on organizational activity as a crucial domain of lawmaking is one of Selznick’s enduring legacies. His work reverberates with the ongoing struggle to refashion our conceptions of law and legality to “embody ideals in institutions.” His methodology intertwines the descriptive and the normative, by treating present institutional innovation as an occasion to rethink our conceptions of successful and just institutional arrangements.

I share Selznick’s conviction that organizations are crucial sites of governance and lawmaking and that emergent practice provides a rich source for rethinking our theories of regulation. My work grapples with these ideas in relation to the particular problem of workplace discrimination. The employment discrimination laws articulate goals that link individual dignity and group empowerment, economic access and fair treatment, legal entitlements and political mobilization. These goals rest on the premise that the workplace is a site where vital economic interests and possibilities for self-development come together. Put otherwise, the employment discrimination laws strive for a regime that links

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these concerns so as to do justice to the role of the workplace as a site for the expression of democratic citizenship. 3

The legal categories that have developed in the wake of these aspirations, however, do not match the problems they purport to remedy. Scholars have documented the limitations of both formal and informal responses to discrimination. 4 The debate often proceeds as if our regulatory options were necessarily limited to choosing between two admittedly inadequate approaches: (1) alternative or internal dispute resolution (private, decentralized, and informal processes producing settlements that operate outside the public regulatory regime) or (2) adjudication (public, centralized, formal processes of judicial or administrative norm elaboration and enforcement). Moreover, the organizational domain often remains invisible in legal discourse. Even in the area of employment discrimination—a legal violation explicitly located in organizations—scholars and judges have tended to focus on legal theories, policies, and individual behavior and have neglected the organizational dimension that produces or counteracts persistent bias. Yet, organizational dynamics lie at the core of much current discriminatory practice. Discriminatory patterns cannot be named, understood, or remedied without an emphasis on this structural dimension.

Current workplace bias frequently involves patterns of interaction and decision making that, over time, exclude nondominant groups. 5 For example, a now common type of harassment claim targets interactions among coworkers who have the power to exclude or marginalize their coworkers, but who may lack the formal power to hire, discipline, or reassign. This form of harassment may consist of undermining women’s perceived competence 6 or sanctioning behavior that departs from stereotypes about gender or sexual orientation. 7 It is particu-

larly intractable because the participants in the conduct may perceive the same conduct quite differently. Moreover, behavior that appears gender neutral when considered in isolation may turn out to produce gender bias when connected to broader exclusionary patterns. The social impact of particular conduct may vary depending upon the context in which it occurs and the organizational culture shaping the perceptions of the various participants. At the margins, it can be difficult to draw lines between discriminatory harassment and lawful, albeit unprofessional or destructive behavior.

A similar dynamic frequently characterizes discrimination claims challenging subjective employment practices. 8 Exclusion increasingly results not from a deliberate effort formally to exclude, but rather as byproduct of ongoing interactions shaped by the structures for day-to-day decision making and workplace relationships. The glass ceiling remains a barrier for women and people of color largely because of patterns of interaction, informal norms, networking, training, mentoring, and evaluation, as well as the absence of systematic efforts to address bias produced by those patterns. 9

Thus, “second-generation” manifestations of workplace bias are structural, relational, and situational. The underlying problems are exacerbated in workplaces that have consciously adopted flexible, decentralized governance structures that require workers to participate more actively in decision making about work assignments, leadership, advancement, pay, and evaluation. 10 These emerging organizational forms eschew stability, permanence, and rule driven decision making. They do so in response to market and technological pressures for adaptability, flexibility, and technological innovation. 11 In these environ-

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8 Subjective employment practices” refer to discretionary decision-making practices that require the exercise of discretion and judgment. They include decisions about recruitment, work assignment, training, mentoring, and promotion, and may be subject to legal challenge as a system or practice if they have a discriminatory impact on a protected group and are not justified by business necessity.


ments, interactions that produce the occasions for exclusion are simultaneously both frequent and organizationally necessary.

Because of their complex and contextually linked character, second-generation problems cannot be reduced to a detailed code of specific rules establishing clear boundaries governing conduct. The process of assessing the normative significance of particular organizational conditions is, instead, deeply intertwined with determining the appropriate systemic response. Effective regulation under these conditions requires problem solving, a process that elaborates general legal norms through context-based inquiry, identifies the legal and organizational dimensions of the problem, encourages organizations to gather and share relevant information, builds individual and institutional capacity to respond, and helps design and evaluate solutions that involve the participants involved in the day-to-day patterns that produce bias and exclusion. A robust system of external accountability would encourage organizations to identify and correct these problems without creating increased exposure to liability, and to learn from other organizations that have engaged in similar efforts.

Over the last decade, a regulatory pattern has emerged that mirrors the more organizational dimensions of bias. Multiple public, private, and nongovernmental actors are actively and interactively developing systems to address sexual harassment and glass ceiling issues. In each of these domains, actors have begun to approach these questions as posing essentially issues of problem solving. They have, to varying degrees, linked their antibias efforts with the more general challenge of enhancing institutional capacity to manage complex workplace relationships. Their evolving roles and relationships form the outlines of a dynamic regulatory system for addressing second-generation discrimination.

The approach I propose treats the emerging practices in these multiple arenas as a springboard for moving beyond the familiar dichotomies of public/private, formal/informal, group/individual, regulation/deregulation that have defined and constrained conceptions of law and legality. It explores the potential for a decentered, holistic, and dynamic approach to these more structural forms of bias. This regulatory approach retains judicial involvement in articulating general legal norms, but shifts the emphasis away from specifying and enforcing detailed codes of conduct. Instead, normative elaboration occurs through a fluid, interactive relationship between problem solving within specific workplaces and in multiple other arenas. Compliance in this framework is achieved through and evaluated in relation to improving institutional capacity to identify, prevent, and redress exclusion, bias, and abuse. This approach expands the field of "regulatory" participants to include the activities of legal actors within workplaces and significant nongovernmental organizations, such as professional associations, insurance companies, brokers, research consortia, and advocacy groups. These

actors have already begun to play a significant role in pooling information, developing standards of effectiveness, and evaluating the adequacy of local problem-solving efforts.

The motif of this "second-generation" regulatory approach is its structuralism. By this, I mean an approach that encourages the development of institutions and processes to enact general norms in particular contexts. "Legality" emerges from an interactive process of information gathering, problem identification, remediation, and evaluation. Regulation fosters dynamic interactions across established conceptual, professional, and organizational boundaries in reaction to observed problems. This structural approach encourages experimentation with respect to information gathering, organizational design, incentive structures, measures of effectiveness, and methods of institutionalizing accountability as part of an explicit system of legal regulation. Workplaces and nongovernmental institutions influencing workplace practice are treated within this regulatory regime as law-making bodies, rather than simply as objects of state or market regulation.

Courts, employers, and nongovernmental actors each play an important part in fostering this shift toward structuralism. This essay outlines their roles and theorizes about their significance in reshaping our approach to regulation of workplace bias in particular and, more generally, to our conceptions of law and legality.

I. The Courts: General Norm Elaboration and Context-Based Problem Solving

Recent Supreme Court decisions can be read to encourage—if they do not require—workplace structures that provide for contextual norm elaboration and problem solving. The Supreme Court's sexual harassment opinions point in this direction by (1) embracing contextualization as part of the process of determining the impact and legal significance of particular conduct; (2) defining the underlying legal violation as a condition or problem that must be effectively addressed; (3) encouraging institutional innovation within workplaces by prescribing an employer liability approach that enables employers to avoid liability by effectively preventing or redressing harassment problems; and (4) providing accountability by evaluating the effectiveness of internal processes in addressing conduct properly identified as problematic.12

The Supreme Court has also provided for a problem-solving approach in its application of disparate impact to subjective employment practices, although

this move has gone largely unheralded. If a subjective decision-making process is shown to have an adverse impact, the business necessity of such a process is determined by evaluating the adequacy of employer’s efforts to minimize arbitrariness and bias. Discrimination is defined, then, as maintenance of an arbitrary and exclusionary system of decision making that systematically disadvantages individuals based on their group status.

The Court’s approach, if implemented by the lower courts, moves toward linking problem definition and resolution. In effect, it makes the creation of an effective decision-making and problem-solving process part of the employer’s legal obligation. Thus, it is not only jurors and judges who will be struggling after the fact to define discrimination. As part of their responsibility for preventing and redressing discrimination, employers must determine its meaning and causes on an ongoing and continuous basis. The Court’s emphasis on effective problem solving encourages employers to define bias in terms of its impact and cause, rather than to engage solely in a process of after-the-fact legal line-drawing. Because their efforts will only be rewarded if they prevent or eliminate serious problems, employers must at least identify whether the challenged conduct presents a problem important enough to warrant change at an individual or organizational level.

The Court’s approach makes visible the connection between the adequacy of the organizational response and the determination that the underlying conduct was discriminatory. For example, an effective complaint procedure “encourages employees to report harassment before it becomes severe or pervasive, and enables employers to stop the harassment before it reaches this level.” This in turn creates considerable incentives for employers to focus on the meaning and application of the anti-harassment norm in relation to its own workplace culture and dynamics. It also encourages the integration of sexual harassment problem solving into the day-to-day processes of production and conflict resolution. Even more fundamentally, it encourages proactive steps to produce information and build capacity to problem solve by rewarding effective results with reduced liability.

In a similar vein, some lower courts have interpreted the Supreme Court’s standard of liability for subjective employment practices to focus on the adequacy of employers’ internal decision-making processes for job assignment, training, and promotion. If subjective employment practices produce a disparate impact on women or people of color, this disparity is a signal of the possibility that the system is contributing to the production or expression of bias. The court then assesses the subjective decision-making process to determine whether the employer took adequate steps to minimize or eliminate the expression of bias in those decision-making processes. The emphasis is on whether the degree of unaccountable or unstructured exercise of discretion is warranted. To make this determination, courts will look at the available alternatives. Are there systems of decision making that will permit the exercise of discretion, but will institute standards and processes that minimize the expression of bias? Thus, the signal of a potential problem is the statistical disparity between the composition of the pool of applicants and the composition of those selected. This disparity prompts an inquiry into the adequacy, fairness, and accountability of the decision-making processes that produced the initially suspect outcome.

If the Supreme Court’s decisions are understood in this way, courts will continue to play an important but less didactic role in the elaboration and enforcement of antidiscrimination norms. The Court casts the judiciary in the role of catalyst and backstop. This approach creates and continually renews incentives for employers to engage in situation-specific problem solving, providing for accountability by assessing effectiveness and by imposing liability should employers fail to identify and correct problems that are shown to be identifiable and correctable. The information generated by internal problem-solving efforts improves the court’s own capacity to perform its role. Such an approach sets the stage for institutional self-reflection that can enable organizations to address new problems without predetermined rules or purely formalistic responses, and to learn from the problem-solving efforts of others.

A judicially enforced interactive approach to workplace bias will provide a means of holding workplace processes accountable without supplanting the crucial role of these processes in defining and addressing the problem. Employers’ internal processes of conflict resolution are not self-regulated. If employers are sued, a court will evaluate the effectiveness of their processes in preventing and eliminating the problematic condition. Over time, courts will have numerous opportunities to evaluate how these practices operate in different contexts, and to encourage the pooling of information about what works. Indeed, assessment

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14Ellerth, at 2270. See Indest v. Freeman Decorating, Inc., 168 F.3d 795, 803 (5th Cir. 1999) (“when an employer satisfies the first element of the Supreme Court’s affirmative defense, it will likely forestall its own vicarious liability for a supervisor’s discriminatory conduct by nipping such behavior in the bud.”) (Wiener, J., concurring in Indest, 164 F.3d 258 (5th Cir. 1999)).
16In each of these cases, the court found either that the employment practice was distinct enough to establish causation or that the practices were “not capable of separation for analysis,” so that “the decision-making process may be analyzed as one employment practice.” 42 U.S.C. §703(k)(1)(B).
of the adequacy of these processes thus will influence what employers view as important in their internal processes for preventing and redressing sexual harassment and biased decision making.

The Court's opinions, however, do not yet specify principles guiding the adequacy determination. Thus, cases such as Burlington Mills and Faragher are in fact watershed opinions. Their future elaboration could provide a framework for either promoting or retarding dynamic problem-solving approaches necessary to address complex workplace relationships. In fact, lower courts and lawyers could undercut the promise of this structural approach by substituting a good faith process inquiry for the Court's current insistence on an effectiveness assessment. The future is thus an open one.

II. Shaping an Effective Internal Workplace Regime: Examples from the Field

At least in some contexts, the Supreme Court's recent cases have converged with a more structural and dynamic approach to bias within workplaces as well. Sexual harassment and glass ceiling jurisprudence have encouraged and reinforced widespread organizational development of internal problem-solving and dispute resolution processes. Grievance mechanisms and other internal dispute resolution mechanisms are by no means unique to sexual harassment issues; they have been adopted in a wide range of employment areas. Recent scholarship, however, argues that grievance processes adopted to minimize liability for violations of ambiguous legal standards tend more toward symbolic gestures designed to reduce legal exposure but not producing any meaningful change.

There are counter examples in which organizations have constructed internal processes that pursue compliance with legal norms while simultaneously


improving the organization's capacity to address broader problems involving complex relationships. These examples of workplace processes exhibit attributes of an ongoing, continually revised, and accountable problem-solving system. They are presented not as fully realized models of ideal practice or as representative of the norm. Instead, each example depicts a range of problems faced in designing an internal problem-solving regime, and the particular design solutions that offer the possibility of accountability, legitimacy, and efficacy. The goal is decided not to develop a model or predetermined set of criteria. Any effort to prescribe a universal model necessarily would fail to account for the complexity and diversity of organizational forms. It would also cut off the process of organizational development and experimentation that is so crucial to an effective regulatory system. Instead, the aim is to establish that effective, legitimate, and accountable processes can emerge, and to develop contingent criteria that could assist in the evaluation of future processes.

For instance, Deloitte and Touche, America's third-largest accounting, tax, and management-consulting firm, implemented a major Women's Initiative, which dramatically increased women's advancement in the company and reduced the turnover rate of women in particular and employees in general. The firm accomplished this by forming ongoing, participatory task forces and giving them the responsibility to determine the nature and cause of the problem, make recommendations about how to address them, develop systems to address those problems, and then to monitor the results. The task force recommendations were implemented through ongoing data gathering and analysis, operational change through management and accountability in relation to benchmarks. This approach offers a structured set of opportunities for collective action by women's groups oriented around addressing problems of immediate and direct concern. The Women's Initiative produced swift and observable results, both in women's participation and in the firm's overall retention rate. The combination of increased communication and programmatic change contributed to what many called a culture change. Flexible work has become acceptable at Deloitte, for women and men.

Home Depot faced the problem of how to minimize the expression of bias in a highly discretionary process of hiring and promotion in a company that was dynamic, decentralized, and entrepreneurial. The solution, embodied in a Consent Decree, was to achieve accountability through technology, information sys-

19 Kenneth Winston eloquently synthesizes the role of ideal conceptions, drawing on the work of Philip Selznick, Martin Golding, and Lon Fuller in an unpublished draft entitled "Lessons from the Right of Silence," which was presented at a conference on Law, Society, and Industrial Justice. Winston notes that a "model serves two functions: cognitive (distinguishing this institutional procedure from others) and evaluative (judging whether the procedure as it operates in practice is successful)." He elaborates that "the practical significance of any present institutional experience lies, in great part, in its relation to a present-but-absent future."
tems, and systematizing discretion, rather than through rules. The keystone of the new system is an automated hiring and promotion system, called the Job Preference Program. This process virtually eliminates the possibility for managers to steer applicants to particular roles based on stereotypes, expands the pool of applicants for every position, and opens up avenues for advancement that applicants themselves may not have considered.

As a result, the rates of participation by women have risen, and the employee turnover rates have dropped across the company, not just in the divisions covered by the Consent Decree. People of color are participating at higher rates, even though they are not covered by the terms of the Consent Decree. And, the company has begun to track and use information from its Open Door Dispute Resolution system as a problem-solving tool.

Although these systems vary considerably in their design and implementation, they share several features: They have: (1) adopted a process of data-gathering and analysis to identify the patterns of decision making that risk producing bias, (2) instituted effective problem-solving strategies at both the individual and systemic level, and functionally integrated those processes with day-to-day operations; (3) generated process and outcome measures of effectiveness, and (4) built in systems to hold these processes accountable. These examples offer a starting point for identifying how internal workplace processes can meet concerns about accountability, legitimacy, and effectiveness.

What role did law play in the design and implementation of these internal problem-solving and dispute-resolution processes? To varying degrees, law shaped but did not dictate the features and operation of these internal systems. Law is one of several motivating factors leading organizations to undertake change. Legal norms, such as the prohibition of sexual harassment and discriminatory selection practices, intersected with but did not define the goals of these systems. The law provided legitimacy and priority to companies’ efforts to pursue values of fairness and respectful treatment. It also helped carve out space for initiatives without short-term economic pay-off, but with long-term potential to improve productivity. But legality did not substitute for these values or establish the parameters of the problem-solving system. Nor was it a necessary motivator in organizations, such as Deloitte & Touche, that had identified compelling economic bases for addressing second-generation type problems.

Lawyers were important but not dominant actors in developing and operating these internal problem-solving processes. They worked closely with those with direct responsibility for developing and implementing these systems. They communicated the legal risks of action and inaction, and counseled companies about how to manage information to minimize these risks. They translated legal norms into organizational culture, and vice versa. They helped to develop interdisciplinary groups of insiders and outsiders with the capacity to develop, implement, and monitor problem-solving processes. In some cases, they used litigation to force organizational actors to respond to claims of exclusion and bias. But they did not define or operate the systems developed to respond to the problems signaled by potential liability.

Finally, legal incentives were only part of the mix of factors influencing the development of these systems. Those responsible for developing and implementing these internal systems were well aware of the company’s legal exposure. This knowledge cut in seemingly contradictory directions. These actors knew that, under recent case law, employers with effective internal systems would avoid or minimize liability. This case law buttressed their resolve to develop effective internal systems. At the same time, they were reminded continually by their in-house counsel of the risks of producing information about problems relating to race, gender, age, disability, or any group with potential legal claims. Again, this influenced what information they gathered, how they communicated this information, and what documents they retained. But it did not fully determine the type of information gathered and how that information was used to change internal practices.

Thus, law functioned in these settings in both contradictory and complementary ways. It served as a catalyst, and provided legitimacy and clout for human resource initiatives that are typically neglected or undervalued. At the same time, “legal” came to symbolize the risk involved in taking proactive steps to address problems with legal implications. Law helped make the vocabulary of norms a part of day-to-day language of the workplace, and to inject normative considerations into decisions about how to structure day-to-day operations of the business. It also threatened to relegate these same concerns to the category of liability avoidance, and thus marginalize both their ethical and economic dimensions. Law encouraged the development of internal systems of accountability, even as it sometimes stifled creativity and risk taking out of concern that revealing problems or mistakes would fuel legal “punishment.” In each of the examples described above, individual and organizational intermediaries played a crucial role in mediating this tension between the coercive and aspirational character of law. That role is explored more fully in the next section.

III. The Pivotal Role of Intermediaries in a Structural Regime

The structural approach to second-generation type problems calls for a dynamic and reciprocal relationship between general legal norms elaborated by the judiciary and problem-solving approaches to these norms developed within the workplace setting. This interactive dynamic is important because of the limitations of both judicially managed and completely decentralized regimes. If the courts assume direct responsibility for elaborating specific standards for effective problem solving, they risk reproducing the limitations of a rule-enforcement dynamic. The systems described in the previous section work because they are tailored to their context, and functionally integrated into the incentive structure.
and culture of the organization. These same systems might fail miserably if introduced in a different organizational or cultural context.20 Efforts to define comprehensive and adequately directive standards and still account for differences in context face insurmountable obstacles. Courts are reluctant to dictate how employers should manage their employees. Judicially defined codes for effective process are likely to mimic adversarial processes that fail to respond to the complexities of second-generation employment discrimination. Or, they will embrace minimal standards that do not provide any meaningful accountability. Judicially developed and imposed systems frequently trigger strong resentment and resistance, which invites strategic behavior aimed at minimizing the impact of the law. This tendency discourages employers from analyzing their practices to identify problems.

But if the regulatory project remains entirely local and context specific, the structural move risks sacrificing accountability in relation to public norms. Many employers lacking the capacity or incentive to develop effective systems would face little pressure or support to change. Internal processes that emerged from gross inequalities or power imbalances would lack an external reference point that would bring those problems to light. A decentralized approach to defining effective problem-solving systems would provide no way of learning from the successes and failures of other companies or elaborating the meaning of the nondiscrimination principle in light of changing circumstances, except at the most local level. The complete privatization of responsibility for problem-solving processes would undermine the law’s normative impact.

This dilemma seems intractable if framed as a choice between employers on one hand and government on the other. How can there be external accountability without externally imposed rules? How can the law shape internal problem-solving processes without taking over the process of defining their features? How can standards of effectiveness be developed that are flexible enough to account for variability and still comparable across different locations?

These tensions seem irresolvable in part because commentators frequently depict the relationship between courts and employers as dyadic: courts act on (or refuse to act on) employers, and employers comply with (or resist) judicially imposed norms. This analytic framework vastly oversimplifies the regulatory dynamic. It ignores the crucial role of nongovernmental organizations and professional networks in mediating the relationship between legal institutions and workplaces. A set of intermediate actors, operating within and across the boundaries of workplaces, have emerged as important players in the implementa-
tion of workplace innovations to address bias.21 These nongovernmental organizations are shaping courts’ approach to defining effective workplace problem solving and translating legal norms into organizational systems and standards. At least some of these intermediaries have begun to play an ongoing role of: (1) building the capacity and constituencies to operate effective, accountable systems within organizations, (2) pooling and critically assessing examples across institutions, (3) generating norms of effectiveness, and (4) constructing communities of practice to sustain this ongoing, reflexive inquiry. Indeed, the long-term viability of a structural regulatory regime may depend on the effectiveness of intermediaries in translating and mediating between formal law and workplace practice.

Legal actors play an important role in encouraging or thwarting this dynamic and proactive organizational response. In organizations that have constructed robust internal processes, creative lawyers and human resource professionals facilitate a process of institutional design and conflict resolution. Plaintiffs’ employment discrimination lawyers have begun to play a more structural role as well. Trailblazers within the plaintiffs’ bar have developed the capacity to analyze the dynamics of bias and remediation in particular sectors of the economy and to play a crucial information pooling and system design role for employees and employers. Lawyers’ knowledge and symbolic connection to the applicable legal standard position them to play an important integrative role by operating in the intersection of concerns about legal compliance and organizational effectiveness. These institutional innovations are prompted by the perception their adoption will reduce legal exposure22 and by the discovery that processes that effectively address these legally related problems also help solve more general problems of workplace interaction. This development is particularly noticeable in workplaces that have moved to more flexible, participatory, and decentralized systems of production.

Nongovernmental organizations are increasingly concerned with the outcomes of these procedural innovations. Insurance coverage for employment-related liability is growing exponentially, and along with it actions by insurers and brokers to monitor, evaluate, and improve problem-solving processes within the workplace. Employee organizations and worker advocates have also begun to focus attention on these processes and to play a role in their design and accountability. Research consortia and professional associations have formed to pool information about these types of practices and to develop measures of effectiveness. Advocacy organizations participate in the design of these organizational

20For example, many companies have grievance systems and open door policies that produce little if any meaningful impact on workplace conditions. See Edelman, supra note; Anne Donnelon and Deborah M. Kolb, “Constructive for Whom? The Fate of Diversity Disputes in Organizations,” Journal of Social Issues, vol. 50 (1994): 139.


22Edelman et al., supra note 15, at 409, 410 (describing the “prevalent belief” that organizations can avoid significant legal costs by creating grievance procedures, and the corresponding increase in organizations’ adoption of internal grievance procedures).
processes and in evaluating their effectiveness. These nongovernmental organizations have begun to play a significant, although as yet incomplete intermediary role in providing external accountability, measures of effective problem solving, opportunities for pooling information from local workplaces, and identification of emerging norms and best practices.

If examined in detail, the case studies illustrate the importance of intermediaries in bridging conventional dichotomies such as public/private, legal/nonlegal, general/contextual, coercive/cooperative. These intermediaries are individuals and organizations who do not directly act for the state, but who have the authority to articulate and represent legal norms without coercive state power. Their participation sets up regular occasions for evaluating and revising day-to-day practices. They are connected to a broader community of practice that provides some form of accountability for the actions of the intermediary. This affiliation with a broader network enables these intermediaries to pool information within and across contexts, to identify problems without directly triggering punitive legal action, and to navigate the challenges of sharing information about best practices without revealing trade secrets to business competitors or breaching confidentiality in individual cases.

IV. Dynamic Regulation: Strengthening the Infrastructure for Effective Workplace Problem Solving

I have documented an important but incomplete move toward a decentered, holistic, and dynamic regime for addressing second-generation bias. At its best, this regime encourages and rewards effective, context-specific problem solving and dispute resolution within workplaces, informed by information about more general patterns and examples of effective processes. Incomplete implementation, however, threatens both to dilute law’s normative impact and to interfere with employers’ economically motivated initiatives to address second-generation bias. We thus face a watershed moment in the regulation of workplace practices.

One response would be to resist the judicial move toward a structural approach and instead to strengthen the judiciary’s role in developing and enforcing rules directed at second-generation bias. For example, some critics of internal dispute resolution and the lower courts decisions interpreting Farragher and Ellerth oppose the entire employer liability approach and urge advocates to resist the move toward internal dispute resolution and problem solving. This skepticism about the potential of internal dispute resolution to provide effective remedies for sexual harassment is understandable in light of the mixed picture it presents on both the judicial and workplace front. However, overall resistance to the structural move, in my view, is both futile and ill-advised.

First, internal dispute resolution and problem solving has already taken hold in both the judiciary and the workplace. It seems that there is no going back. The Supreme Court has extended the reasoning of Ellerth and Farragher in the punitive damages context. There is no indication of a retreat from the Court’s commitment to employer liability. Similarly, employers have embraced internal dispute resolution with a vengeance. Industries and professional associations have sprung up around this growing interest and are likely to fuel further expansion of internal dispute resolution and problem solving. Finally, there are indications that employees have signed on to these processes as well. Critics concerned about the effectiveness of internal problem-solving processes cannot stem the tide. They are more likely to be able to influence the quality and accountability of those internal processes.

Second, as I have already shown, the rule-enforcement approach is itself ineffective in addressing second-generation bias. In addition to the inherent limitations of a rule-enforcement approach for addressing complex problems, judicial intervention has itself produced mixed results. Moreover, most plaintiffs do not sue. Those that do face poor odds, particularly in second-generation type cases that lack clear evidence of intentional bias or egregious harassment.

Finally, the potential for more complete implementation of the structural approach still exists, in my view. The basic features, described in this article, are already in place. The challenge remains to institutionalize a hybrid regulatory system that fosters dynamic interaction among workplaces, nongovernmental organizations, courts, and administrative agencies. This interactive, layered system would provide the infrastructure for identifying patterns within and across particular workplace contexts, cormarking effective problem-solving and dispute-resolution processes as benchmarks, and elaborating norms that emerge over time through this cumulative process. It would change the perverse incentives around producing information revealing problems involving second-

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23See Section II, supra.

24See, e.g., Susan Bisom-Rapp, "An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention..."
generation bias to foster (a) production of information about individual and systemic problems, (b) pooling of information within and across workplaces, and (c) emphasis on problem solving rather than liability avoidance by legal actors. A more fully developed structural approach would explicitly encourage employers and mediating actors to develop criteria and measures that differentiate between effective problem solving and ineffective, sham, or formalistic problem-solving/dispute-resolution processes, and revise those criteria in light of subsequent experience. It would also provide systems of accountability that (a) provide for regular assessment of the adequacy of processes and outcomes, (b) redefine compliance to reward effective problem solving, and (c) sanction stasis in the face of identified and uncorrected problems or extreme, first-generation violations.

V. Conclusion

This project is part of a growing body of scholarship that deepens the inquiry pursued by Philip Selznick: how do we construct responsive law and legal practice in a world of complexity and change? That the quest continues is a testament to the importance of Selznick’s questions. It may also illustrate the elusiveness of a grand solution, and the promise of institutionalizing the struggle toward legality.