Conflict Resolution and Systemic Change

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INTRODUCTION

Over the last 50 years, alternative dispute resolution has become a fixture of the conflict resolution landscape.\(^1\) As its label suggests, ADR is generally viewed as an alternative to adjudication, developed in response to litigation’s liabilities—its expense, delay, adversarialism, and limits as a tool for addressing complex problems. In contrast, ADR’s value rests in its capacity to produce prompt, fair and efficient resolutions that satisfy the disputants.\(^2\)

Both ADR proponents and critics alike presuppose that the benefits of ADR are achieved at inevitable costs. The assumption is that informal conflict resolution necessarily resolves disputes for the disputants and no one else.\(^3\) It does so by satisfying the interests of those involved in the immediate conflict, often under guarantees of confidentiality. As a result, it is argued, ADR does not and cannot generate values or solutions that can apply beyond the scope of the particular dispute.\(^4\) In this sense, it is assumed that informal conflict resolution is necessarily non-normative, and that it cannot yield more general public values or solutions to problems affecting more than the individual disputants.\(^5\)

The confidentiality of ADR gives rise to a second perceived cost—lack of accountability. Confidentiality insulates the particulars of the dispute resolution process and outcome from public scrutiny.\(^6\) If ADR cannot, consistent with the confidentiality requirement, include the opportunity for outside review, it is widely assumed that the process inevitably lacks any check on decision maker bias.\(^7\) Confidentiality is also seen to preclude holding ADR accountable in rela-
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tion to any standards other than the efficiency of the process and the satisfaction of the disputants. 8

These two assumptions about ADR—its inability to elaborate public values and its unaccountability—lie at the heart of the ADR critique. This critique typically contrasts the limitations of ADR with the countervailing virtues of adjudication as the paradigmatic form of norm elaboration and accountability.9 Adjudication elaborates public norms by developing binding precedents in a particular case, which will then apply in the future to comparable cases. Adjudication provides for accountability and minimization of bias because it is generally open to the public and subject to appellate review. ADR’s critics and supporters presume that adjudication’s method of elaborating public norms and providing accountability constitutes the preferred, if not the only way that these rule-of-law values can be achieved.10

This Article suggests that the prevailing view of public norm elaboration and accountability underlying the critique of ADR is too narrow and needs to be re-thought. This argument rests on a broader conception of the meaning of public norms, as well as the way in which public norms are elaborated. Public norms do not consist only of the precedents developed and applied by courts or other adjudicative bodies. They also emerge when relevant institutional actors develop shared values or remedies through an accountable process of principled and participatory decision making, and then adapt these values and remedies to a group that extends beyond the disputants. ADR can play a significant role in developing legitimate and effective solutions to common problems and, in the process, produce generalizable norms.

We argue that, contrary to conventional wisdom and practice, ADR’s capacity to generate accountable public norms stems from the linkage of individual and systemic conflict resolution.11 Conflict resolution systems often segregate individual casework from systemic interventions—those aimed at addressing policy issues, examining recurring problems, or redesigning organizational systems. We demonstrate the value of integrating (but not merging) systemic thinking into individual casework, and individual cases into the project of understanding and addressing systemic concerns. The linchpin is a methodology of inquiry and intervention for case work, which uses a form of root cause analysis to identify and, where possible, address underlying problems. We document this novel form of conflict resolution that begins by attending to individual cases, but proceeds through a critical methodology to produce systemic interventions advancing public values. We demonstrate that, under certain circumstances, informal conflict resolution can produce systemic changes that adjudication cannot achieve, and can

8. Kenneth Abraham, The Lawlessness of Arbitration, 9 CONN. INS. L.J. 355 (2002); JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 136 (1983); Luban, supra note . These are rule-of-law values that are widely embraced in the scholarly literature, as well as the legal and public discourse. Fiss, supra note ;

9. See Fiss, supra note , Luban, supra note .

10. But see Menkel-Meadow, supra note , at

thus solve public problems and generate public values. Indeed, we argue that, in some situations, effective individual conflict resolution depends upon its linkage to systemic problem solving.

The methodologies used to link individual and systemic conflict resolution also provide a kind of accountability presumed to be unavailable without appellate review. We question the conventional assumption that “detached neutrality” is the only or even the best way to achieve impartiality and reduce the expression of bias. We introduce the idea of “multi-partiality”—critically analyzing a conflict from multiple vantage points—as a way to check the inevitable biases in decision making that have to be continually surfaced and corrected. 12 Multi-partiality can be achieved through institutional design that builds in participatory accountability—ongoing examination and justification to participants and a community of practitioners. This reflective practice, if institutionalized, provides a check on conflict resolver’s bias, by requiring conflict resolvers to subject their analysis to the scrutiny of their peers and to explain and justify their choices as part of doing their work. It also provides a way to learn from and build on experience.

These ideas developed through a process of reflective inquiry very much like the conflict resolution processes we propose. Susan Sturm’s prior work documents examples of conflict resolution systems that use individual conflict resolution and problem solving to generate data about patterns in the nature of problems and complaints over time. These systems used this information to make systemic changes, and they developed new roles as intermediaries and cross-boundary problem solvers to help the company learn from and act on these patterns. 13 As a result of this work, Susan Sturm was invited to work with the Center for Cooperative Resolution/Office of the Ombudsman (“CCR”) at the National Institutes of Health (“NIH”) by Howard Gadlin, the Director and Ombudsman. 14 CCR is a comprehensive conflict resolution program located within NIH, an agency of the federal government within the Department of Health and Human Services. From its inception, the office has explored the degree to which it could address systemic issues, and still remain true to the ombuds responsibility to address discrete conflicts. CCR defined its work in a way that challenged the dichotomies framing the conflict resolution debate.

After determining that we shared a set of questions and conceptual frameworks, we decided to work together in an effort to deepen understanding of the relationship of conflict resolution to systemic change. Susan structured a process of participatory inquiry to examine this practice and articulate the working theories and strategies used to link individual conflict resolution and systemic problem solving. We began by collectively establishing a set of goals for our work, which included

14 As part of their monthly Journal Club meeting, at which the staff discusses articles relevant to their work, CCR read Susan’s article on Second Generation Employment Discrimination, which introduced the idea of conflict resolution as a means of systemic problem solving. Id. Howard then came to Susan’s class at Columbia Law School on the Theory and Practice of Workplace Equity, and there Howard faced a series of questions about the ways he was or was not addressing structural issues in his role. This prompted Howard to bring these questions back to the staff, and they invited Susan to work with them.
developing a vocabulary to analyze the relationship between individual and systemic problems, as well as deepening the understanding of how and under what circumstances conflict resolution could produce systemic change. We were interested in developing conceptual frameworks and strategies for moving from the individual to the systemic and back.

We then had a series of meetings during which Susan asked the ombuds to identify current issues or cases they saw as structural or systemic, and then to work through how they learned about those problems, what type of information informed their understanding of the problem over time, what led them to view those problems as structural or systemic, what they did to address those problems, and how they assessed their intervention. She also asked them to contrast those cases with those they identified as non-structural. We collaboratively developed a structural intervention log, which was used to varying degrees by the staff to track the cases that they identified as structural or systemic. Susan and her students also had a series of conversations with individual ombuds about their work. Over a period of about a year, we observed and debriefed 40 Thursday case review sessions. In addition, Susan participated in three CCR retreats, two of which also included Ken Kressel, a conflict resolution scholar who was doing reflective practice work with the Center.

This inquiry was framed in light of working theories about the relationship between individual and systemic problems, which were in turn continually revised in light of experience. We moved back and forth between the collective sense-making and observations of how people described their cases to each other and to the researchers. Through this intensive back-and-forth between intervention theories and practical consequences, our inquiry coalesced into a framework for using conflict resolution to fairly and effectively address individual problems, and simultaneously to develop knowledge about and occasions to intervene at a more systemic level.

This Article presents the fruits of that collaboration. It mines the lessons about how to aggregate knowledge from individual cases and prompt structural change, and considers the implications of this analysis for the design of informal conflict resolution systems as well as for adjudication. It provides a concrete setting to test the possibilities for intervention that advance public values and still preserve the capacity to afford individual justice. This inquiry also prompted new understandings of the meaning of impartiality, accountability, and public values.

15. Over the course of this project, Orna Rabinowich-Einy, Alexandra Marchosky, and Jennifer Kronick, students in Susan’s Workplace Equity Seminar, have performed important roles as co-researchers. They conducted interviews, attended group sessions and retreats, observed case reviews, and wrote up their observations.

16. Several constraints have operated during this research, many of which mirror some of the constraints under which the conflict resolution itself takes place. CCR operates under confidentiality requirements, which necessitate that the office preserve the confidentiality of the parties to particular conflicts. As a result, the research was limited to observations, interviews, and discussions that involved the CCR staff or that were not bound by confidentiality. Researchers were not able to survey or interview anyone outside CCR about their involvement in cases handled by the office. Records revealing the identity or progress of particular cases are not maintained by the office once a dispute is resolved. All of the research is based on meetings, observations interviews, and group work done with CCR. No information that would reveal the identity of particular disputants or NIH employees was disclosed and none could be used in reporting this research.
The Article proceeds in five parts. Section I first defines the meaning of individual and systemic conflict, and then documents and critiques the conventional practice of separating the two. Section II develops a matrix to map the dynamic relationship between individual and systemic analysis and intervention, and then applies that framework to particular examples. Drawing on case analyses, it illustrates the interdependence of individual and systemic work, the methodologies used to link them, and the resulting synergies.

In Section III, the article considers the implications of this framework for conflict resolution and theories of law. We extrapolate from CCR’s work to identify the elements of a conflict resolution program that can perform the role of integrating conflict resolution and systemic change. Through examples, we show that conflict resolution programs with these features may be found within the court system and administrative agencies, as well as in new institutions operating within organizations or service delivery systems. The methodology used by CCR can be employed in conflict resolution to link individual conflict resolution and systemic change. We also discuss potential role conflicts created by the linkage and how they can be minimized. Finally, in Section IV, we use the matrix analysis to generate new theoretical understandings about conflict resolution and its relationship to rule-of-law values. We suggest that the CCR case study does more than raise questions about the assumptions underlying the traditional debate about conflict resolution. It offers a reconceptualization, or at least an expanded understanding, of core rule-of-law values, such as impartiality, principled decision making, generalizability, and accountability. Contrary to the assumptions underlying the scholar and practitioner debate, non-adjudicative conflict resolution can, under certain circumstances and institutional arrangements, embody rule-of-law values and generate institutional practices advancing public values and addressing issues of common concern. We use this analysis to reconsider the relationship between adjudicative and non-adjudicative forms of conflict resolution.

I. THE CONVENTIONAL APPROACH: SEPARATING INDIVIDUAL AND SYSTEMIC CONFLICT RESOLUTION

Dispute resolution scholarship and practice frequently assign different approaches, and even different conflict resolution systems, to individual and systemic problems, This section first defines what we mean by individual as compared to systemic conflict resolution. It then documents the tendency to separate these two forms in conflict resolution practice and scholarship, and offers reasons to question the desirability this separation.

A. Defining Individual and Systemic Conflict

Much conflict resolution work originates as issues or problems between specific people. Often, parties will describe an issue as a dispute between individuals, and that designation determines the scope of the analysis and intervention for many forms of conflict resolution. However, many problems presented initially as personal or individual issues turn out to be rooted in policies, organizational practices, or systems affecting broader groups.

Of course, in some sense, every conflict or problem is systemic, depending upon how far back the process of defining a cause goes and on which systems are
treated as relevant for purposes of analysis and intervention. Every person operates in the context of a system – a psychodynamic system, a family system, a work group, etc. But we are using these terms to inform how problems are understood for purposes of intervening to address them at the appropriate level. This goal justifies a more targeted distinction between individual and systemic cases, one that limits the definition of systemic to problems that are amenable to analysis and intervention within the context of the organization or some other domain over which the organization has influence, where the source can be located, at least in part, in organizational rules, practices, decisions, or norms.

When considered in relation to the project of intervention, individual cases can be defined as conflicts between direct disputants involving personal issues that do not involve others or implicate public values. They are essentially self-contained problems particular to the parties in a conflict or dispute. People other than those directly involved do not affect and are not affected by the conflict and the result of a resolution pertains largely to the participants. Individual conflicts can be addressed on their own terms, without considering more general concerns or the implications of those cases for public values.

Individual disputes are contrasted with conflicts involving conditions, practices, or values that matter to people beyond those directly involved in a dispute. We call these kinds of conflicts “systemic.” By this, we mean those that cannot be fully understood or addressed within the parameters of the conflict among the primary parties. The underlying source is located outside the problem as it is presented by the parties. These are often recurring problems, because routines or practices create the conditions making the dysfunction more likely. Systemic problems often involve actors who are not involved in the immediate conflict as initially framed. The problems they reveal could be connected to a broader set of goals that affect how the problem can be addressed. They frequently involve issues or values of more general concern.17

Some scholars label systemic problems as “structural”, based on the observation that many conflicts are rooted in conditions sustained by institutional practices. However, we decided not to use this term because some problems of general concern may not be actually rooted in structure. We also decided not to use the label “public” to refer to disputes implicating problems and values of general concern. This term carries different meanings for different constituencies. Lawyers tend to equate “public” with government involvement, but conflicts may implicate more general values and conditions, without necessarily involving judicial or legislative requirements. Indeed, part of our project involves providing greater understanding of the relationship between informal conflict resolution and the generation of public norms.18

B. The Tendency to Separate Individual and Systemic Problems

Many conflict resolution systems determine the scope of their intervention based on the participants’ designation of a conflict or problem. They make a choice up front between addressing a problem as a discrete, individual dispute involving only the participants, or as a systemic issue. Analysis and intervention focuses on either the individual or the systemic level, rather than on the interaction between the two.

Mediation, which is the most common form of alternative dispute resolution, often exemplifies this tendency. Mediation programs are designed to provide a voluntary and participatory process for addressing disputes. They involve a third party who assists disputants in finding a solution of their own. Typically, mediation’s methodologies, roles and relationships are geared toward reaching successful outcomes in individual cases. The inquiry proceeds from disputants’ understanding of the problem and seeks a resolution based on the parties’ interests. Success is often evaluated in terms of prompt resolution, party satisfaction, improvement of the disputants’ relationship over time, and cost-effectiveness.

Each case is resolved on its own terms, detached from the organizational or systemic dynamics implicated by the individual case. The preference, in fact, is to use outside mediators who have no ongoing relationship with the organization or knowledge of the particular context and will thus provide a “neutral” perspective.

Many mediation programs are not designed to connect resolving individual cases with identifying and addressing systemic concerns or problems. Unless systemic issues are the subject of the dispute between the parties to a mediation, they remain off the table and are taken as constraints within which the mediation proceeds. The Equal Employment Opportunity Commission (“EEOC”), and ADR generally, address disputes on a case-by-case basis and “individualize complaints.” One study shows that 50% of companies avoid EEOC mediation because they believe it requires monetary compensation. EEOC mediation is not consistently successful, often creating increased tensions. For federal government agents involved in the disputes, “[s]ettling a dispute means the same thing as resolution of a conflict in the minds of the parties, representatives, and EEOC officials involved in the complaints…and they…believe that resolving individual cases

19. Lipsky, supra note.
20. Menkel-Meadow, supra note.
22. There are important differences and disagreements among mediators about mediations’ goals, the role of the mediator, and the criteria for success. Mediation could be “facilitative,” “evaluative,” or “transformative.” Deborah R. Hensler, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System 108 Penn St. L. Rev. 165 (2003) (summarizing differences in these mediation strategies). These strategies share a focus on individual dispute settlement.
24. See Lipsky, supra note, at 186.
26 Id. at 84.
adds up to solving systemic problems.” If systems analysis does occur, it focuses on the performance of the conflict resolution system itself—its efficiency, level of party satisfaction, and cost. This focus is not designed to equip conflict resolvers to analyze or use knowledge gained from engaging over time with recurring problems or institutional patterns. Mediations targeting collective problems or group interests often are defined as such from the outset of the process, and explicitly avoid addressing individual issues.

Ombuds offices are a form of dispute resolution with responsibility for both individual and systemic issues. They work “for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve.” Ombuds offices have become commonplace in universities, corporations, and federal, state and local government. Several ombudsmen organizations have emerged to provide information sharing and some measure of coordination among the various ombudsman offices.

Ombuds offices typically combine individual conflict resolution with some responsibility for identifying complaint patterns and trends and providing “upward feedback” to the organizational leadership about systemic problems. Although there are differences in type and philosophy, “all ombudsmen give voice to peo-

27 Id. at 85.
28 See Lipsky et al., supra note at 265-66. For example, Bingham and Pitts have conducted an ongoing longitudinal evaluation of United States Postal Service’s REDRESS program, the largest employment dispute resolution program. See Lisa B. Bingham and David W. Pitts, Highlights of Mediation at Work: Studies of the National REDRESS Evaluation Project, 18 Negot. J. 135 (2002). REDRESS provides facilitative mediation for equal opportunity disputes arising out of federal discrimination claims. REDRESS is a case-by-case model that focuses on the individual. Although Indiana University has been evaluating the program since inception, the researchers’ data-tracking focuses on individual concerns and perceptions, not necessarily systemic issues. Id. at 136.
29 Aimee Gourlay & Jenelle Soderquist, Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes, 21 Hamline J. Rev. 261 (arguing that current ADR approaches are ineffective, failing to address disputes early enough, understand how conflicts arise, and explore a change in methods to deal with conflict).
30 See Lawrence Susskind, Breaking the Impasse.
31 ABA Ombuds Standards, Preamble.
35 Gadlin identifies two types of ombudsmen: classical and organizational, with variations in each category. Classical ombudsmen emphasize “statutory independence from governmental control, the power to investigate complaints, and the authority to publish findings and recommendations.” Organ-
ple who might otherwise be disadvantaged in their dealings with the management and bureaucracy of the institution within which the ombudsman functions.\footnote{36} “Ombudsman Association surveys indicate that about a third of the working time of organizational ombudspeople is spent on systems change – that is working with line and staff managers to improve supervision, human services and conflict management system of the organization.”\footnote{37}

Ombuds offices struggle with the question of how to integrate systemic intervention into their regular practice. Many offices are set up to separate their individual and systemic work.\footnote{38} These offices do not address systemic issues or patterns as part of doing casework, which is the primary focus of their practice. Systems-level work consists primarily of periodic reports to the public or to upper management based on an analysis of patterns from the aggregate data.\footnote{39} Some offices emphasize the ombuds’s ability to serve as an early warning system—“to receive, perhaps analyze, then pass along information that will foster timely change in a company policy.”\footnote{40} This role is referred to as “upward feedback.” The ombuds functions as an information conduit to flag problems, but does not otherwise intervene at the systemic level or use systemic analysis to conduct individual casework. Participation in organizational change initiatives is often described as a process entirely separate from case work, often initiated by management in response to an identified problem or crisis.\footnote{41}

On the surface, Integrated Conflict Management Systems (“ICMS”) also looks like a program designed to connect individual and systemic problem solving. The core idea of ICMS is “to apply the techniques and sensibility of interest-based negotiation to the identification, prevention, management, and resolution of conflict within organizations.” ICMS employs a “coordinated set of easily accessible organizational mechanisms to identify conflict in its earliest stages, manage it carefully to prevent escalation, and to resolve it efficiently in order to maintain positive workplace relations.”\footnote{42}

Despite its emphasis on integration, the logic of ICMS in fact segregates the process of conflict resolution. The system provides comprehensive services, but by different offices that are largely separate in their operation. Individual conflicts could be resolved by a mediation office, an open door policy, a grievance proce-

\footnote{36} Howard Gadlin, The Ombudsman: What’s in a Name?, 16 Negot. J. 37, 38, 43 (2000).  
\footnote{38} Id.; ABA Standards, supra note .  
\footnote{39} Wagner, supra, note .  
\footnote{40} Meltzer  
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dure, or an ombudsman resolving individual conflicts. Systemic problems would be the responsibility of management. Crucially, all of these separate processes are then integrated into a unitary system overseen by management and committed to the goals of conflict prevention and improved productivity. ICMS are often management driven, and precipitated by concerns about litigation reduction. This top-down approach contrasts with the logic behind CCR’s approach, which explores the linkages between individual and systemic conflicts but maintains them as is explored in greater detail below.

Like informal conflict resolution, adjudication can occur in contexts with repeat players involved with recurring problems, particularly adjudication done by administrative agencies with responsibility for a particular activity or problem. Yet, administrative agencies also tend to separate their dispute resolution activities from their preventive and standard-setting work. They too proceed on the assumption that cases are either private or public, individual or systemic, conflict resolving or norm generating etc. Administrative case processing tends to be separated from problem identification and system reform. Federal agencies’ dispute resolution programs typically address disputes on an individual case-by-case basis. The Equal Employment Opportunity Commission, for example, segregates its case processing functions from its “technical assistance,” policy making, prevention and training functions. Internal Equal Employment Opportunity (“EEO”) offices that handle formal discrimination claims within bureaucracies are often set up much the same way: they process individual discrimination cases, but do not track patterns or revealing recurring patterns. Individual cases are analyzed only in terms of their impact and implications on the formal parties. Some administrative agencies have adopted an approach that resembles CCR’s in

43. See LIPSKY, supra note .


45. Aimee Gourlay & Jenelle Soderquist, Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes, 21 Hamline J. Rev. 261, 264 (finding that ADR is typically used in tandem with traditional legal remedies).


its effort to link individual case work and systemic redesign, particularly in the areas of education and child welfare.\textsuperscript{50}

Conflict resolution scholarship has, to some degree, reinforced this separation of individual and systemic intervention. The classic articles celebrating the judiciary’s special role in elaborating public norms draw a stark line between private dispute resolution and public law.\textsuperscript{51} Typologies of conflict resolution typically place individual and systemic processes on different ends of a progression or different levels of a dispute resolution pyramid. Some analyses presume that systemic issues should be reached only if individual dispute resolution fails.\textsuperscript{52} Others suggest that systemic problem solving will only work if individual conflict resolution takes a back seat.\textsuperscript{53}

Methodological research tends to address one form or the other. There has been relatively little work on the methodology of systemic conflict resolution, and even less on the relationship between individual and systemic interventions. The field lacks research on how a practice structured around resolving cases can effectively integrate individual conflict resolution and systemic change without compromising the integrity of either. Conflict resolution programs that try to connect these two levels often proceed intuitively, without adequate language or theories to guide their practice.

C. Rethinking the Conventional Wisdom

Our analysis suggests that the conventional separation of individual and systemic problems solving should be rethought. Well-structured linkage of individual conflict resolution and systemic change enhances the efficacy and legitimacy of both. Indeed, in important respects, individual conflict resolution and systemic change are interdependent. This section elaborates why linkage of individual and systemic conflict resolution is a good idea. In the next section, we illustrate these arguments with examples from CCR’s practice.

One compelling reason to link individual and systemic conflict resolution is increased efficacy. To begin with, the process of reframing through the identification of underlying, systemic causes, described in greater detail below, often de-personalizes a conflict and makes it possible to engage disputants in problem solving. Moreover, conflict resolvers and disputants do not know at the outset of a conflict whether an issue is rooted in systemic problems, and whether those problems are amenable to a systemic intervention. Many cases do not fall neatly into one or the other category. As Carrie Menkel Meadow commented after mediating a series of auto accident cases:

\begin{quote}
\textsuperscript{50} These programs are discussed in greater depth as part of the Section developing the features permitting legitimate and effective conflict resolution. See pp., infra.
\end{quote}

\begin{quote}
\textsuperscript{51} Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Fiss, supra note 8. For a criticism of Chayes’ analysis for ignoring “the systemic and self-consciously regulatory aspects” of individual dispute resolution, see Destabilization Rights: How Public Law Litigation Succeeds, 117 Harv. L. Rev., 1015, 1057 (2004)
\end{quote}

\begin{quote}
\textsuperscript{52} See, e.g., Mettler, supra note 8.
\end{quote}

\begin{quote}
\textsuperscript{53} See William H, Simon, Toyota Jurisprudence: Legal Theory and Rolling Rules Regimes, in Law and New Governance in the EU and the US 37 (Grainne de Burca & Joanne Scott eds. 2006); Lawrence Susskind and Jeffrey Cruikshank, Breaking the impasse.
\end{quote}
I am struck by the difficulty of characterizing disputes. On one hand, all of these cases were "simple" car accidents: factual disputes about small amounts of money, with issues ranging from full liability disputes to disagreements about the value of medical expenses and property damage. . . . On the other hand, however, any single one of these cases could also be taken as representative of any number of very important public or democratic issues. Insurance companies were clamping down on alleged widespread fraud by plaintiffs, their doctors, and their lawyers in overclaiming. Virtually all of these disputes involved the multicultural/racial issues that are sub rosa in increasingly diverse Los Angeles. Lawyers made arguments about how the racial composition of juries would affect the valuation of cases. And standards of human behavior and responsibility were constantly being negotiated in these sessions, both with reference to the law "on the books" and in reality. 54

Often, the capacity to understand and address cases effectively at the level of the individual requires a systemic understanding that developed from the opportunity to step back and address problems outside the context of a particular conflict. Many individual issues or problems cannot be remedied effectively without addressing their structural or systemic underpinnings. If individual problems are rooted in a system that remains unchanged, the problem is likely to resist remediation or to recur. In any case, searching for systemic problems enhances legitimacy when the search results in a determination that the system worked well, and that an individual intervention was appropriate.

Ongoing involvement with individual conflicts also enhances the capacity to address systemic issues, if the program is set up to link the two levels. Engagement with cases over time enables conflict intermediaries to identify, understand, and address systemic problems. Case work enables problems to emerge out of ongoing pattern analysis, so that unrecognized problems can eventually be detected. Many problems combine interpersonal aspects with structural aspects. Both must be addressed for change to occur. Similarly, ongoing casework may be necessary to create sufficient pressure or support for change, and to engage stakeholders whose participation in the problem solving process is required to develop workable and legitimate remedies. The legitimacy of structural change often hinges upon being able also to remedy unfairness at the level of the individual. Unresolved individual problems breed dissatisfaction with reform, and can foster resistance or backlash.

Thus, individual casework provides situated knowledge, legitimacy, and access to change needed to sustain systemic change. This analysis provides a counter-argument to proposals for separating systemic change and individual conflict resolution. In Toyota Jurisprudence, for example, Bill Simon advocates bracketing and muting individual concerns, and focusing "jurisprudence" solely on systemic problem solving. He expresses concern that attention to individual fairness concerns necessarily disrupts a collective problem solving process.

54 Menkel-Meadow, supra note , at n.24 (references omitted).
Simon draws on the example of Toyota’s problem solving system within its production process, in which every individual can pull an “andon cord,” which then stops production and forces everyone affected by or responsible for the breakdown to figure out how to prevent the problem from recurring. Simon advocates applying this metaphor to the context of public problem solving. But the article does not address how to transfer this methodology from a business to a public policy arena. Systems change requires that information about systemic problems come from stakeholders operating at points of breakdown, where changes in practice are most needed. Reliance on pre-constituted deliberative bodies or outside audits does not necessarily fulfill this function. These bodies tend to function outside the working unit; they do not necessarily involve those operating at crucial leverage points. They also do not necessarily provide a mechanism to pressure change. What’s more, people may not recognize that the problems they experience have deeper roots, or that they can be remedied. Many problems go undetected or remain unchanged, because there is no impetus to address them. Systems problems can be particularly challenging to address in the context of crises, when relationships are highly charged and more adversarial.

Conflict resolution can operate as this much-needed trigger for systemic analysis and change. Issues raised through conflict resolution offer a mechanism prompting analysis and intervention, particularly when the costs of raising questions are low. In many areas, the interactions around issues of individual fairness are the equivalent of the ‘andon cord’ on the Toyota shop floor. They are the trigger that brings recurring problems to the attention of the group. Conflicts are focused and discrete, and yet connected to systems and underlying causes. The linkage of individual and systemic problems allows breakdowns in practice to become part of the data contributing to the understanding of a systemic problem. They also allow a problem to be “chunked” – to be defined at the appropriate level of scope and depth so that it has the prospect of a successful intervention.

Conflict resolution practitioners have begun to recognize the importance of linking individual conflict resolutions with systemic change. However, they lack knowledge about how to connect these levels, both in their casework and in the design of the conflict resolution system. Questions persist about how this integration can be achieved without compromising basic principles such as confidentiality and commitment to participant agreement as the basis for intervention. We now turn to addressing these “how” questions, which are a crucial step toward

57. See, e.g., John S. Barkat, Blueprint for Success: How to Effectively Design an Organizational Ombuds Department, [need to request permission to cite], available at http://www.abanet.org/adminlaw/ombuds/blue-3-26-pm2.pdf (last visited February 24, 2007) (arguing that one of the three vital functions of an ombuds office is organizational critical self-analysis, using institutional knowledge gathered to improve organizational practices); Carrie Menkel-Meadow, The Lawyer’s Role(s) in Deliberative Democracy, 5 Nev. L. rev. 347 (2004); Mary P. Rowe, The Ombudsman’s Role in a Dispute Resolution System, 7 Negotiation J. 353, 360 (1991) (arguing that “ombuds practitioners can help to provide ‘motivation, resources, and skills’ for continuous problem solving in times of change, within a dispute resolution system.”)
conducting conflict resolution so that it can generate public norms and achieve accountability.

II. ANALYZING THE RELATIONSHIP BETWEEN INDIVIDUAL AND SYSTEMIC WORK

This section draws on CCR’s practice to develop a framework for understanding the dynamic relationship between individual and systemic work analysis and intervention. We begin by providing a description of the office and its practice. We then flesh out the meaning of systemic conflict by categorizing the kinds of systemic problems that arise, in general and in CCR’s work. Finally, we work through examples to illustrate the different ways in which individual and systemic work interrelate in practice.

A. An Overview of the Office of the Ombudsman/Center for Cooperative Resolution

CCR is a comprehensive conflict resolution program offering assistance to employees in addressing conflicts and concerns involving scientific and workplace issues at the National Institutes of Health (“NIH”). NIH is “the primary federal agency for conducting and supporting federal [biomedical] research.” Its mission is “to uncover new knowledge about the prevention, detection, diagnosis and treatment of disease and disability.”\textsuperscript{58} CCR was created in 1998, following a one year pilot program. Its mission is to provide “expert, neutral, confidential and independent assistance in preventing conflict, and resolving workplace disputes for NIH scientists and administrative employees.”\textsuperscript{59} It operates as the focal point of NIH’s conflict processing system, by providing:

(1) dispute resolution through neutral, confidential and informal processes, (2) conflict management and prevention through training and education, and (3) dispute systems design to create or improve mechanisms to effectively handle disputes.

The center addresses “every sort of issue that arises in the NIH environment: scientific disputes, employer-supervisor conflicts, racial and ethnic tensions and difficulties between peers.”\textsuperscript{60} The staff handles individual, interpersonal conflicts, multi-party, group, and organizational concerns. They perform these functions through an array of techniques, including coaching, facilitation, consultation,

\textsuperscript{58} FY Annual Performance Plan. It is comprised of 27 institutes and centers located on its Bethesda campus, plus relationships with universities, hospitals, research institutions, and pharmaceutical and biotechnology companies that conduct research directed and/or funded by NIH. About 10% of the NIH’s budget supports projects conducted by nearly 6,000 scientists in its own laboratories, most of which are on the NIH campus in Bethesda, Maryland. NIH has an annual budget of approximately $28 billion.

\textsuperscript{59} http://www4.od.nih.gov/ccr/overview.html.

shuttle diplomacy, peer panels, training, presentations and systems design. The office is specifically charged with responsibility for "receiving and inquiring into workplace disputes brought to the Ombudsman by any NIH staff member, initiating independent inquiries, identifying and analyzing systemic issues that foster workplace disputes, and making recommendations to the appropriate responsible agency official(s) for changes in policies and procedures."61 The ombudsmen also participate ex officio on key committees addressing issues relevant to their work, such as the Ethics Committee and various policy committees. They offer a range of services not limited to individual conflict resolution. CCR is primed to think more systematically about the relationship between individual and systemic issues and problems, and its role in mediating between the two levels.

Although CCR is located administratively in the office of the Director, it operates independently and is outside any of NIH’s constituent institutes or centers. The Director is not authorized to dictate the methods, content, or focus of CCR’s work. CCR is not accountable to or integrated with management systems. It is an independent office designed to help employees at all levels to address conflicts and concerns about their work.62

CCR is not the only conflict resolution program operating at NIH. There is an EEO office that processes discrimination complaints, a human resources grievance procedure, a program to help handle situations in which there might be a threat of violence, and an employee assistance program providing counseling and referrals for personal, family, or job-related problem that could interfere with job performance or conduct.63

A key feature of CCR is its deliberate design as an interdisciplinary collaboration.64 The office includes: (1) Howard Gadlin, the Ombudsman, a former tenured professor of experimental psychology professor and university ombudsman;65 (2) The Deputy Ombudsman, who has a masters degree in Public Administration and a certificate in organizational development,66 and (3) three associate ombudsman, including an associate ombudsman with a counseling and psychology background and a PhD in counseling psychology, another with a law degree and a PhD in English literature and poetry, and a junior ombudsman with experience in a biomedical research laboratory and a recent law degree. The office is also somewhat demographically diverse, by age, race, and gender.

The office has undertaken a self-conscious effort to reflect about the systemic dimensions of its work. This is in part built into its mission. Like many ombuds offices, CCR is charged with helping the agency address systemic issues that arise

62. In this important respect, the logic behind CCR differs from Integrated Conflict Management Systems, which are designed to manage conflict to minimize costs and maximize productivity. See pp. infra.
64. “Diversity of backgrounds was crucial to Howard in putting together the office. He wanted to put together an ensemble of different people who could still work together.” Interview, 2-28-02 at 4.
65. Gadlin served as ombudsman while he was on the faculty at University of Massachusetts, Amherst, and then worked as an ombudsman at UCLA before coming to NIH to create the Office of the Ombudsman.
66. Doris was hired because Howard was looking for someone who could do another of things, not only intervene but do training and program development. Campos-Infantino interview March 20, 2002
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in the context of their conflict resolution work. The office has undertaken to integrate systemic approaches into the fabric of its individual casework. This commitment came out of its ongoing reflective practice work. The entire staff meets every Thursday to reflect about ombuds’ interventions. Case review is an ongoing form of critical evaluation, in an atmosphere where acknowledging uncertainty about one’s actions is acceptable and identifying mistakes is seen as a step toward improving effectiveness. They also have a “staff huddle” every Monday morning to serve as a check-in, so everyone will have an idea of what work is being done in the office. They periodically write reports to the whole organization, which summarize their activities and focus attention on recurring problems and systemic issues. They have previously worked intensively with a researcher using a reflective practice methodology inspired by Donald Schon’s work to increase their understanding of conflict dynamics and effective interventions. This model “enables them to talk easily about mistakes and successes in a safe way.”

CCR employs a version of root cause analysis as its overarching methodology. In part, this involves a process of reframing. The initial stance at the beginning of a case is one of inquiry: a careful, back-and-forth process of identifying the source of the problem. Experience suggested that many problems operated on multiple levels; one of the strengths that Howard Gadlin brought to the office was the skill of reframing issues in new terms, and moving back and forth between the individual/personal, and the systemic/organizational. The ombuds officers have come to approach their cases through a process of discovery. They attempt to identify the issues that are at the center of a conflict. They do this by asking why a certain problem exists, and why that state of affairs in fact constitutes a problem. They then try to engage the appropriate actors in addressing the conflict or problem, either in the context of the particular dispute or at a more institutional level.

It might be helpful to describe the CCR case process in some detail. The starting point for most CCR interventions is a consultation initiated by an NIH employee or a group of employees. Most people come to the CCR office because they question the fairness of an impending or actual decision or action. Typically the ombudsman will review with the inquiring person the possible options for responding to the action as well as the possible consequences of pursuing those options. In some instances people do not want direct intervention from the ombudsman. They just seek some guidance on how to handle the situation in a less...
adversarial manner than they might use if left to their own devices. In other in-
stances they hope that the ombudsman will become directly involved.

In every situation the ombudsman’s first obligation is to understand the his-
tory and basic dynamics of the situation about which the person is consulting, the key issues for the person seeking the consultation and that person’s reasons and hopes for seeking help. The ombudsman must craft interventions that are consonant with the needs and interests of the consulting party. The ombudsman will explain the rationale for possible approaches to intervention but will not proceed without the person’s assent

If the person who first consulted the ombudsman gives permission then the ombudsman may also discuss the matter with the person whose action or decision has triggered the inquirer’s concerns. This is almost always the next step in situation where the person who made the initial contact asks for the ombudsman to facilitate a discussion with the other party or even to conduct an actual mediation. In those situations the ombudsman will first meet separately with the second party in an attempt to understand the situation from that person’s perspective and to explain the ombudsman’s obligations and commitment to fairness, impartiality and neutrality.

Over time the ombudsmen have learned that people often overestimate the significance of individual factors and underestimate the importance of systemic factors as contributors to their problems, conflicts and concerns. Consequently the sorts of questions the ombudsmen ask have evolved and now they always ask questions designed to elicit information about how the policies and practices as well as the informal norms and values of the work group within which the problems have arisen might be contributing to those very problems.

This attention to systemic factors puts the CCR ombuds in a different relation to disputants than mediators, the most common organizational conflict interven-
ers. While the ombuds share with mediators a commitment to helping the disputants pursue their interests, ombuds in organizations recognize that achieving those interests almost always requires changes in several areas: the working relation-
ship between the disputing parties, each party’s understanding of the situation, and some aspects of the policies or practices that guide everyday transactions within the organization or a sub-unit of the organization.

B. A Taxonomy of Systemic Problems

As we analyzed what we meant by systemic or structural issues, it became clear that each Ombudsman was using the term to mean different things, and that in fact a problem could be systemic in different ways. 72 We also found ourselves using the terms “systemic” and “structural” interchangeably, with subtle differences in emphasis. “Structural” was used to refer to patterns that were built into organizational routines, policies, or roles. “Systemic” was used more broadly to refer to any problem that was embedded in a set of ongoing relationships or inter-
actions. We sometimes use the terms interchangeably, but we generally have

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72. See JAMSHID GHARAJADEGHII, SYSTEMS THINKING: MANAGING CHAOS AND COMPLEXITY; Wendell Jones, About Complex Systems, Negotiation Journal; John Paul MacDuffie, The Road to “Root Cause”: Shop Floor Problem-Solving At Three Auto Assembly Plants, 43 MANAGEMENT SCI. 479 (1997).
opted for the language of “systemic” problems, to maintain the analytic tension
between problem identification and the level of intervention.

Before analyzing the relationship between individual conflict resolution and
systemic change, it will be helpful to survey the indicators suggesting to the prac-
titioner that a problem has a systemic source.

**Analysis of patterns: recurring problems, parties, and sites**

The most straightforward clue to the systemic nature of a problem is that it
recurs. Analysis of cases over time reveals patterns in the types of problems, the
parties, the dynamics producing the case, the unit, or the type of conflict. CCR
does this analysis somewhat systematically, by gathering data about the types of
problems and their location. They also identify patterns through their weekly
reflective practice work, discussing cases or problems that pose particular chal-
lenges to the ombuds or might be of particular interest to the office as a whole.
Examples of recurring problems that have been identified in this manner include:
recurring disputes about scientific collaboration, problems stemming from per-
sonal relationships among partners or spouses in labs, and problems stemming
from failure to provide feedback or supervision.

Some institutes or work units are the site of a disproportionate number of con-
flicts or problems. Occasionally the problems involve the same individuals or
managers within the site. Sometimes the problematic patterns are replicated
among different players within a work site. A site that has a high rate of conflict
that cannot be constructively addressed can trigger a question about the underly-
ing causes of these problems.

CCR works with a variety of offices within NIH, and also works with em-
ployees who interact with those same offices in the context of doing the work.
They are thus in a position to observe patterns in the way different offices define
and perform their role and patterns in the types of tensions and conflicts within
those offices and in their interactions with others. Sometimes, these can be traced
to the way a particular office is organized. Because CCR can observe similar
dynamics across different cases involving the same office, it can sometimes trace
the roots of organizational conflicts and dysfunctional relationships among offices
within NIH.

**Policy Problems, Ambiguities or Gaps**

A second type of structural issue involves gaps or problems with formal pol-
icy. Sometimes, problems come up because a rule or practice was developed
without anticipating a particular type of consequence or situation. Then, a dispute
might arise that falls in the gray area of the policy and thus prompts confusion or
arbitrariness. In many ways, these are the easiest kind of structural case to ad-
dress. Disputes or conflicts are traced to an ambiguity or gap in policy, which can
be cured both for the individual and the organization through policy change. Gaps
in policy may also produce recurring conflicts, such as around issues of family
leave, for example. These policy gaps may also signal disagreements about or-
ganizational priorities or the inability of lower status employees to mobilize suffi-
cient attention to the issues affecting them.
Problems or inequities recurring within identifiable groups

Issues involving race, gender, disability, age, and national origin also emerge as systemic issues. They recur, in part, because these groups experience a common set of dynamics and problems. For example, women scientists who are perceived as tokens within a predominantly male work group in disciplines that are also predominantly male face common experiences that are replicated across the agency. At times spousal relationships within labs surface as a source of recurring problems. In addition, there are large scale status differences within NIH that correlate with race. Labs are sometimes heavily identified with scientists from a particular country—the home country of the leader of the workgroup. This can create difficulties for lab workers from other nationalities or ethnic groups. Race and gender conflicts also recur because these are the categories of analysis that have legal protection and for which one can bring a complaint. To the extent that there is a mismatch between the way a problem is framed and how it is experienced, that mismatch is itself a systemic problem.

Other non-demographic groups can also be identified as experiencing systemic problems. Contract employees, part-time employees, and post-doctoral fellows are among those for whom recurring problems signal issues in the underlying relationships.

Problems in the management or organizational structures or practices

Some problems are rooted in the way the organization has structured the work itself. There may be a lack of accountability for those in a position of power. There may be a mismatch between organizational responsibilities (such as managing a work team) and professional incentives (such as pursuing funds and publishing articles). The work may operate to heighten tensions between workers of different status, without providing mechanisms for participation or for addressing the resulting problems. The work unit may systematically fail to promote information flow and collaboration, both of which are crucial to accomplishing the work.

Major organization-wide initiatives, crises, or disruptions

Major events or crises can create systemic issues or problems. As an agency of the federal government, NIH is subject to system-wide developments that can have major repercussions across the entire organization. One such development involves Executive Order A-76.\(^3\) This order implements the current policy of the Executive Branch to privatize where possible by requiring all government services, other than those designated as inherently governmental, to demonstrate that their team is the most efficient organization (MEO) team for each activity. A-76 essentially requires every branch of the agency not designated as inherently governmental to demonstrate that it is more efficient to provide the service through government actors rather than to contract out to the private sector. A-76 has re-

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required an extensive review process, accompanied by considerable uncertainty and risk for those employees potentially affected. This process has led to reorganizations, downsizing departments, and high levels of turnover. It has had major impact on the morale and staff composition of NIH, particular among the technical and service employees. As such, it has introduced system-wide issues, some of which lie beyond the control of NIH. In fact, any kind of high-level administrative change in leadership or general administration of the federal government produces yet more changes that ripple throughout the organization.

Problems rooted in the culture or organization of science

Some of the challenges or problems stem from the structure and culture of science, which is located in a broader institutional and professional environment, which in turn shapes relationships and conflicts among scientists. Some of the hierarchies that create conflicts and problems stem from relationships that are structured by the larger discipline or profession. The fact that science and technology is constantly changing, and that new scientists do a lot of the hands-on work in the lab, creates structural problems for veteran scientists, who are always at risk of being bypassed by new techniques, findings and discoveries. Collaborators have to contend with the fact that most people have been educated and continue to operate within a particular discipline, while contemporary biomedical research is increasingly inter-disciplinary. The financial and reputational reward structures for scientists may encourage behavior that is inconsistent with professional, ethical, or legal norms. There is also a clash between the organizational bureaucracy and the very processes of formulating and conducting scientific research. The bureaucracy is rule-bound, emphasizing standardization and routinization. This bureaucratic sensibility is very different than the scientific sensibility, which does not necessarily follow a chain of command, emphasizes creativity, resists being told how to do things and what to do, and features independent thinkers who are accustomed to a lot of control over their work and work conditions and who thus may without malice aforethought break the rules.

Our discussions also revealed a repertoire of responses to problems imposed by structural features of the bureaucracy; these responses include frustration and avoidance, acknowledgement, referral, reframing the understanding of the protagonists, reframing the contours of the problem solving process, creating occasions for addressing structural problems at different levels of the institution, facilitating interactions, training and capacity building, developing tools for internal and external use in ongoing problem solving, forming new partnerships or institutional relationships, facilitating institutional creation or redesign.

C. Developing A Conflict Resolution Matrix

CCR’s methodology places conflict resolution in the context of a problem-solving process. The term “conflict” suggests that the triggering or presenting issue is one of disagreement; problems constitute a broader category that include actions, conditions or decisions that are not spawned by disagreement but that lead to results that are viewed as unacceptable or wrong. Conflict resolution is thus a subset of the broader category of problem solving that comprises CCR’s work. For this reason, notwithstanding the articulation of its formal mission in terms of
conflict resolution, CCR is really constituted to address problems, some of which are presented as conflicts and some of which emerge from an analysis of organizational dysfunction or dissatisfaction and which are likely to produce conflict over time.

The conflict resolution/problem solving process can be understood to involve two distinct but deeply intertwined components: analysis and intervention. Analysis includes defining, framing and diagnosing the problem. Intervention includes generating solutions, selecting a course of action, and implementing those decisions. These components of the work do not necessarily operate in stages. In fact, both in any discrete case and over time, conflict resolution moves back and forth from diagnosis to intervention to re-analysis of the problem and redefinition of the possible interventions. Conflict resolution as it is practiced by CCR involves a dynamic relationship between inquiry and intervention.

As we examined the way systemic issues came up, we found it necessary to assess the individual or systemic character of the decision making for each component of the conflict resolution/problem solving process. The problem could be understood to be individual and the intervention performed could also be individual, the analysis could be individual and the intervention systemic, the analysis systemic and the intervention individual, and finally, both the analysis and the intervention could be systemic. We also saw that the understanding of a problem as individual or systemic changed over time. This realization moved us to place our analysis in the context of a two-by-two matrix, with the component of the conflict resolution process on one axis and the quality of the conflict as individual or systemic on the other:

<table>
<thead>
<tr>
<th></th>
<th>Individual</th>
<th>Systemic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Analysis</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intervention</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The matrix provides a framework for organizing the inquiry into the relationship between individual and systemic cases and problems. Analyzing a series of problems through the lens of this matrix exposes the types of problems that are more or less amenable to systemic intervention through conflict resolution. It also highlights the implications of using a systemic frame to analyze problems that are not amenable to systemic intervention.

This framework led us to analyze the interactions between the level of analysis and intervention, by determining what combination of analysis and intervention was operating at different points of the process:

74. See MacDuffie, supra note , at 481.
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Quadrant I
Individual Analysis/
Individual Intervention

Quadrant III
Systemic Analysis/
Individual Intervention

Quadrant II
Individual Analysis/
Systemic Intervention

Quadrant IV
Systemic Analysis/
Systemic Intervention

Such an analysis provides a way into the question of how cases move over time from one cell of the matrix to another. The matrix is not intended to suggest that cases can be compartmentalized as individual or systemic, but rather to understand how the work moves back and forth from one combination of analysis and intervention to another. This framework also focuses attention on the processes that build capacity to address problems at a systemic or structural level.

What follows is an application of this framework to particular problems that were handled by CCR. This analysis provides examples showing the linkage of individual and systemic work. We will use these examples in subsequent sections as a springboard for reconsidering prevailing assumptions about conflict resolution’s efficacy and legitimacy.75 For each quadrant of the matrix, we will begin with an individual case because that mirrors the typical manner in which issues come to the attention of the office. People who come to the office are looking for assistance in addressing a specific situation affecting their work. In each cell, we then illustrate how CCR moves from analyzing individual case dynamics to broader systemic analysis.

A. Individual Analysis, Individual Intervention

The Spurned Scientist. Consider the following example from a case review meeting: John, an established and well-known staff scientist with an international reputation came to CCR complaining that he was treated unfairly by a search committee. He had applied for a position as a scientist at another NIH institute and was not selected. He gave a seminar, and then was not asked to interview for the position. He claimed that the search process was not fair, and that the search committee was biased in favor of an internal candidate. He based his conclusion on the fact that he has a higher profile and more publications in the relevant field than the candidate selected for the position. Although he was not a native-born American and spoke with an accent, he did not suggest that national origin played a role in the decision making process.

With John’s permission and agreement from Tom, the ombudsman spoke with Tom, the individual to whom the search committee made its recommendation. Tom had met with John about why he was not selected, and had taken seriously John’s concern that the search process might not have been fair. Tom had

75. See Sections, infra.
undertaken an extensive investigation of the decision making process. He interviewed everyone on the search committee and the people who had been at the presentation. He determined that the decision not to interview was based on an assessment of the quality of the seminar and the candidate’s reference letters. The consensus of everyone interviewed, confirmed by a review of the presentation, was that John was not a creative scientist, and that creativity was a key criterion for the new position. This kind of creativity was not a significant component of John’s current position, but would be crucial for success in the new one. The scientist selected was known for his creativity, even though he did not have quite the number of publications in the field. Tom also learned that John got along with his lab chief, and was secure in his current position. Based on this review, Tom concluded that the process was thorough, fair, and justified. He communicated this to John.

The ombudsman assigned to the case reviewed the record and spoke with John and Tom, as well as other decision makers involved with the case. The ombudsman agreed with Tom’s general assessment of the selection process and also noted that the criteria used to reach the decision were well-specified and fairly applied. The problem was traced not to issues with the adequacy of the process (which was well-executed) or with bias having to do with national origin (which was never mentioned by the complainant and did not correspond to any pattern of decision making within the office). Nor did the inquiry reveal any issues with the quality of feedback or supervision within John’s work-group. He had received considerable mentoring, coaching, guidance, feedback and support. The ongoing conflict was traced to John’s personal characteristics that made it difficult for him to accept the decision. He assumed that because he was a well-known and established scientist, he was the best qualified for the job. He was having a hard time coming to grips with his own qualifications. He was considering a more formal complaint, which he could assert both by raising the issue with the top level administrators at NIH and by filing an EEO complaint. In the early stages of the process, the ombuds officer tried coaching, to communicate to John that there might be unrecognized aspects of his style and actions that were working against him. John was not able or willing to engage in self-reflection as part of this process, and the ombudsman’s goal became to direct John toward a formal process that could produce a fair and definitive resolution of his challenge to the search process.

This case illustrates the first cell of the matrix: an individual diagnosis, prompting an individual intervention. Although the type of decision at issue is a recurring one, inquiry revealed no apparent problems with the process used to reach the decision or the criteria that were applied. Nor was John’s lack of success in this process indicative of more general patterns of non-performance or non-supervision. Resolving this problem would take place through activities directed at resolving the individual conflict whether by informal coaching by CCR or formal decision by the EEO or the upper level administrators. Although case review raised questions about the appropriate role and responsibility of CCR in working with people who lacked the capacity to reflect about their own behavior, it did not produce any systemic insights or interventions.
B. Individual Conflict, Systemic Intervention

The troubled employee. Consider a second type of problem that came up numerous times during case review: employees with serious psychological or health issues that give rise to performance or disciplinary issues. An employee came to CCR to challenge a letter of reprimand issued because of bizarre and disturbing behavior attributed to him at the worksite, of a kind that strongly suggested psychological issues.76 The employee wanted the letter of reprimand removed from his file. There was no dispute that the behavior was serious and offensive enough to warrant disciplinary action, but the employee initially denied taking the action.

At the time the employee was receiving counseling from the Employee Assistance Program (“EAP”). Interactions with the employee, along with discussions with his co-workers and supervisors, indicated that the employee had serious psychological issues that were creating disruptions within his work group, but that he was otherwise competent at his job. At first glance, these problems look like quintessential individual conflicts, or at least situations involving systems that are beyond the scope of organizational intervention. CCR’s work showed, however, that for some cases, systemic interventions could be developed to improve the organization’s capacity to address individual cases.

The work began with an inquiry to verify that the process used to determine the employee’s involvement was thorough and fair, and that the problems most likely stemmed from the employee’s psychological issues. This discussion raised issues about how the organization handled problems of this character. It revealed an ongoing relationship with the EAP counselor, to whom the ombudsman regularly refers cases involving very pathological employees who are willing to seek counseling. Experience shows that this particular counselor is extremely effective in providing counseling services in such cases. The ombuds also discussed how best to utilize the different counselors within the NIH system. This process enabled the ombuds to figure out a way to connect the letter of reprimand to a process for getting the employee psychological help in managing his behavior in the workplace, without breaching confidentiality. The client agreed that it made sense for the ombudsman to follow up with the EAP counselor, with whom the office regularly worked.

This inquiry led to a CCR discussion of the parallels between this case and cases involving violence at work, and particularly, the importance of a recovery period for employees in the affected work unit after such incidents. The ombuds shared and compared experiences involving several different cases and indicated the importance of addressing this issue more systemically. Two staff members suggested studies of reactions to violence at work, to be discussed at their journal club meeting. Another ombuds officer was asked to gather resources and information about the protocol for managing the aftermath. They then discussed how they would look at the problem from their different disciplinary backgrounds (legal, organizational, psychological) and how that inquiry could help them in designing more effective organizational responses. They decided to invite the EAP counselors, including one who did her PhD dissertation about the aftermath of

76. The details of the incident have been withheld to preserve confidentiality.
traumatic events, to a discussion comparing this case with two other cases involving recovery in the workplace after trauma or extreme psychological problems.

Five months later, at case review, there was additional follow up. One ombuds described an ongoing project with the same EAP counselor to develop role plays for how to help people who don’t want to or can’t help themselves. The group decided to bring in a psychiatrist who could work with several situations with a psychiatric element, and then figure out how to translate this into organizational interventions better able to handle cases such as these. They discussed the difficulties of integrating this work into the handling of a specific ongoing case, because of the compelling nature of the immediate issues and the personalities involved. They were searching for and identifying systemic ways to equip groups to deal with people with mental problems.

These discussions also prompted questioning of prevailing norms at NIH. Sometimes, co-workers or supervisors want to discipline, transfer, or fire employees because they do not conform to perceived civility norms. The office raised the question of how and the extent to which a bureaucracy could tolerate eccentric behavior, and whether there was a double standard for the range of acceptability depending on one’s status in the organization. The analysis also revealed the cultural roots of certain norms, such as whether one is loud or quiet in one’s interactions at work, and when possible, created contexts where work groups would actively negotiate about the prevailing norm.

These issues have been raised, not only with participants in particular disputes but also with those such as Human Resources, who are in a position to set relevant policy.

Cases like the one above exemplify individual conflicts that involve recurring problems that may be rooted in psychological or family systems located outside work, but that present common or recurring challenges to the organization. The systemic intervention consists of developing or building the organization’s capacity to work with and accommodate problems that affect each employee individually and are not necessarily caused by dysfunctional organizational systems, but that are not uncommon among a large group of workers. These systemic interventions can produce new norms and processes for responding to problems existing independent of the workplace that affect employees’ ability to perform and that could be ameliorated through developing greater organizational capacity to handle conflict constructively, to structure work effectively, and to provide support both to the individual and to his or her co-workers.

Also, once these individual issues are placed in a systemic frame, they can reveal and make accessible recurring problems that affect many employees. For example, carpal tunnel cases often reveal potential problems with how work is being performed or how offices are set up. Although the problems are experienced most intensively by those with carpal tunnel, they can compromise the health and productivity of a larger group of employees. The solution to the individual problem may either require or prompt more general redesign of office equipment or allocation of work responsibilities, which will both address the individual problem and potentially generate changes in the more general office practices.

77. Case Review 1 [August 5, 2004].
78. Case Review, 2 and 3 [10/23/03, 1/15/04].
Sometimes dysfunctions in the organization that affect everyone are only raised by people with heightened sensitivity to unfair or arbitrary treatment. Particularly when that treatment involves offices operating within separate units of the organization, with little cross-institutional interaction at a policy level, these problems can be difficult to identify and address. For example, CCR has had cases that raised problems about the relationship between the NIH police and the professional staff.

If those systemic issues are ones that cannot be addressed, either in the context of the particular dispute or at their root, then the problem gets resolved at the individual level, either by equipping the “difficult” individuals with the tools to cope with an organizational problem or by removing the difficult individual, if that person’s behavior violates important work norms and the person’s behavior resists change. Prompted by recurring cases of this sort, CCR is now working with managers to identify triggers that bring out this behavior, and steps that could be taken to reduce paranoia or other expressions of mental illness, for example. One of the ombuds is putting together a list of nearby psychiatrists with particular specialties. They have facilitated discussions about how to improve the process of referral to outside counseling, the relationship between psychological evaluation connected to disciplinary proceedings and psychological referrals for therapeutic purposes, as well as how best to structure the ongoing relationship with the EAP counselor, within the constraints of confidentiality and roles.

An organizational response emerged from the ombuds’ exposure, through case analysis, of the communication and coordination gap among the various offices that might be involved in addressing the behavior of violent or unstable employees. CCR urged the formation of an informal group of people, involving representatives from the full range of offices that might have some role to play. The group formed and began to meet on a regular basis, with the idea of doing follow up on particular instances and thinking through together what would be an effective coordinated response. This process led to two systemic changes: one, a clearly formulated and widely distributed policy about violence, and second, the establishment of an office called CIVIL. This office became the central contact point for people who had any concern about violence or potential for violence in the workplace. It now has the responsibility and the expertise to convene the appropriate actors to discuss the situation and develop an intervention plan. Managers and employees alike can appear before this group asking for guidance and assistance. By comparison to the chaos that existed before hand, this program is quite an improvement.

C. Structural problem, individual intervention

The under-appreciated minority employee – The employee, a minority male working in a technical position reported that he was being treated unfairly. Although he had always received a satisfactory job rating he was not getting promotions at the same rate as comparable employees, he rarely was praised for his performance. Also, he had been denied the chance to receive tuition reimbursement for work-related course he was taking on his own time while working toward a

79. 9/9/04 at 2.
college degree. He came to CCR when he was written up after an incident in which he had lost his temper during an interaction with another employee who had (properly) asked for his help on a technical matter which was a part of his job responsibility. Although he believed that race was the major explanation of his past unfair treatment he did not want to pursue an EEO complaint on the disciplinary action because he did not believe that his race was a factor in his current supervisor’s disciplinary action. The manager who had written him up was a relatively new supervisor for that work unit and the employee believed they had a good working relationship which might be damaged if he filed a formal complaint. Ironically, the write-up for the incident was one of the very few times he had ever received direct feedback. In this case the employee believed that his new supervisor was one of the few people who might understand why he felt that his previous supervisors had been unfair to him because of race and he asked CCR to facilitate a discussion with this supervisor, the very person who had written him up for the incident. Although he wanted to discuss the disciplinary action it was more important to him to raise with his supervisor the history of past injustices.

This case illustrates the third quadrant of the matrix, which involves problems that have been identified as systemic but which are nonetheless addressed through an intervention focused on the individual issues or parties to the presenting conflict. These are situations in which CCR determines that the problem, although systemic in character, could not currently be addressed at its root cause. This occurs where CCR has unsuccessfully attempted a systemic intervention as well as situations where the person whose complaint brought the problem to CCR’s attention was unwilling to have the specific details of their case used as a link into raising the systemic issues.

There are multiple and inter-related systemic issues illustrated by this case. Many of the cases handled by CCR can be traced back to an organizational culture in which issues, tensions, conflicts, and performance problems are over-looked until they blow up into crises. One important contributor to this structural problem derives from managers and supervisors who fail to provide ongoing feedback and criticism to employees about their work. The performance evaluation system in place at that time discouraged managers from providing ongoing and critical feedback of those whose work needs improvement, because it was a pass-fail system that elicited little serious feedback or supervision. At first, CCR believed that it was the pass-fail system itself that was responsible for these difficulties. Without formal opportunities for managers to provide critical feedback to employees, CCR found that employees interpreted such feedback in personal terms on those occasions when it was offered. In case analysis, CCR noticed a parallel phenomenon: many managers who were reluctant to provide ongoing critical feedback, because they prefer to avoid conflict, or because they do not invest adequate time in evaluating work, or because they are worried that critical performance evaluations will prompt grievances. As a result, correctable problems persist and, when the problems reach a more serious level, employees experience the feedback as arbitrary and unfair. However, as NIH is moving to a four point

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evaluation system there are early signs that the pass-fail system was merely an indicator, but not a root cause of the culture of managerial avoidance.

Racial dynamics interact in significant ways with this more general failure to provide ongoing feedback; often managerial avoidance is most extreme when managers and employees have different racial or ethnic identities. CCR saw some examples of managers who were particularly reluctant to give critical feedback to staff of color. In some instances, this was because managers seemed uncomfortable communicating problems, and did not have enough of a close working relationship to overcome that discomfort. Adding to their discomfort was the fear that if they did give critical feedback it might be taken as racist. On the other pole of this dynamic are employees who are not receiving the sort of critical guidance they need to be able to improve their performance. In addition to not having the same opportunity to address shortcomings as do their colleagues, these employees often feel undervalued leading to demoralization and withdrawal which in turn makes the process of constructive criticism even less likely. Then, when they do not get promotions, or when performance problems accumulate to become serious issues, they are ill equipped to understand the criticisms.

The existing conflict resolution systems complicate the effort to address racial dynamics as a systemic problem. Overshadowing all employee-manager issues in the federal workplace is the EEO system. The federal government’s EEO process, intended as a means of addressing discrimination in the workplace, has generated distrust and criticism from employees and managers alike. Because employees perceive the EEO process as the only way to get management’s attention, they may file discrimination claims to address problems that they may not see as primarily about discrimination. Neither agencies nor managers want to be known as having large numbers of EEO complaints. Many managers will acknowledge that they avoid confronting workplace problems because they do not want to endure the various stresses and accusations that are associated with the EEO complaint process. The discrimination frame also affects whether racial dynamics that are operating in a particular dispute will be identified and addressed. When problems do get framed in terms of race, the issue becomes whether someone is a racist, and thus blameworthy. The anti-discrimination framework leads participants to ask the question, was race the determinative cause of this decision? If the answer is no, then race drops out of the analysis, even if racial dynamics are an important, but not determinative element of the problem. The dynamics of cognitive bias and cultural exclusion may not be visible at the level of the individual case, and many people do not understand race in these terms. They thus lack the frameworks and language to deal with race as part of the larger issue.

83 Id.
85 For a description of a similar dynamic in other federal agencies, see Meltzer, supra note .
86 See ADR brief, supra note .
These micro-dynamics are reinforced by larger cultural and organizational patterns.\textsuperscript{88} Black and Latino employees make up a small proportion of the scientists and scientific management, that is, the high status employees, and a much larger proportion of the technicians and service employees, who are the lower status employees.\textsuperscript{89} This structural power difference produces racially-inflected tensions and dissatisfaction that would not meet the criteria to be labeled discrimination within EEO definitions of the term.\textsuperscript{90} CCR has identified the need for ongoing interaction and problem solving outside the context of discrimination claims and with substantial support from high levels within the organization. Ironically, while NIH has many programs to recruit, retain and promote minority scientists, they are of limited success because they do not effectively address the structural barriers to diversifying the pool.\textsuperscript{91}

CCR reported to the organization about these dynamics, as part of its annual report in 2000. The organization has also proposed several initiatives to create a context in which NIH can address the management issues at a more systemic level, and to undertake a process of institutional engagement with issues of race. Some of these efforts have been undertaken as part of resolving a particular case. Some have been undertaken by CCR in its reporting or facilitating roles. However, many of the problems stemming from the culture of management and race within the organization have proven difficult to address at a systemic level. The same dynamics that produce the problem seem to short-circuit efforts to reconfigure roles and systems so that the integrated problem solving needed to address this issue can occur. Discrete systems that operate now separately would have to be able to operate interdependently. Workplace management would have to be seen and understood as an integral part of doing good science, and race and gender would have to be connected to the core work of the organization.\textsuperscript{92}

Analysis of the casework and the systems intervention work shows that many of these systemic interventions have not been sustainable, or have not generated an adequate level of organizational engagement. Conflicts stemming from these deeply embedded organizational patterns are more likely to be resolved at the individual level. Sometimes having the structural analysis is helpful in enabling individuals to de-personalize their problems and to find ways to work around the dynamics of management and race in their own context. Sometimes, identifying the structural problems only deepens the sense of frustration at the inability to respond. The case of the under-appreciated minority employee illustrates this point. His personal work history may or may not be an example racial discrimination but his awareness of the broader institutional problems around race served to reinforce his own conviction that he too was being treated unfairly on the basis of race. At the same time although he was certainly concerned about the systemic issues his immediate interest was to address and improve his particular situation

\textsuperscript{88} See Kenneth Avruch, Integrating Ideas of Culture, Ethnicity and Multiculturalism into Conflict Resolution and ADR Practice (unpublished manuscript on file with authors).
\textsuperscript{90} 2000 Annual Report, supra.
\textsuperscript{92} Id.
and it was that situation on which the ombudsman had to focus while working with that employee. Many cases arise where the problem presents as a question about the fairness of a particular decision, or a conflict between two employees, but the discussion traces back to underlying problems of inadequate accountability built into the structure of management responsibility. For example, one case involved an employee, Taylor, who was complaining about a decision to deny her leave.\(^93\) Taylor had followed the informal practice for requesting leave, although she had not actually submitted a formal request. In the past, the informal practice was sufficient. This time, the leave was denied. The initial trigger for the problem was a conflict with another employee’s leave request, and Taylor’s perception that this employee was favored because of a personal relationship with Lee, the manager. The reason the prior relationship dictated the outcome was because Lee was operating with unfettered discretion in the office and was not supervised or held accountable for any of her decisions. She regularly abused that authority. The reason she could function without any accountability was because her supervising scientist was focused on doing research, which was the aspect of the work for which scientists were valued, and did not want to spend significant amounts of time on administration. The issue had not come to anyone’s attention because the employees were afraid to complain to Lee’s director because that director delegated everything to the manager, and so the issue would simply find its way back to Lee. Employees were concerned that Lee would retaliate against anyone who raised issues about the manager’s performance. This problem can be particularly difficult to prevent when race and gender differences are involved in the interaction.\(^94\)

CCR traced these management problems to several deeply embedded organizational practices, for example, the system for evaluating employees, the fear of grievances that discourage managers from giving on-going feedback, the lack of effective systems for addressing conflict within the work-group, and the silo structure for managing science. In the context of particular workgroups, CCR has been able to reframe individual conflicts to make visible the underlying problems with the structure of leadership. For example, through group facilitation, CCR has been able to change the frame for understanding a case from a problem with a particular worker to a problem with the communication and feedback provided by the leadership of the group, and inadequate mechanisms for raising issues within the work group. When this reframing occurs, it has prompted the development of communication norms and processes for raising issues and taking stock within the work group. But this work typically occurs within the confines of a particular lab or branch or program and does not necessarily generalize across the organization. This is not automatically a bad thing because the solutions generated often need to be specific to a particular micro-culture within the larger organization.

However, when the management issues cannot be addressed within the context of the work group, structural interventions have not taken root. Efforts to intervene at an organizational level to address the issues of management culture have proven more challenging. CCR has brought these dynamics to the attention of the organization, and has attempted several major initiatives to enable the or-

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93. The names are fictitious to preserve confidentiality.
94. Case Review 1 [4-1-04]
ganization to address the problem at the level of organizational design. Interven-
tions to improve the fairness and efficacy of management within particular units
have sometimes worked, including efforts to create governance systems to con-
struct learning relationships at the outset of new collaborations or programs. CCR
has reported that the efforts to deal with these problems at the overall organiza-
tional level have yet to materialize.

But the capacity to address structural problems at a structural level is itself
dynamic and changing. In effect, CCR did a root cause analysis of why their ef-
forts to engage management in addressing management culture failed. They also
looked at other arenas where serious problems occurred and became an occasion
to improve practice. They determined that, although there was resistance to ad-
dressing the cultural or managerial dynamics head on, CCR could enlist organiza-
tional leaders in a process of self-reflection about their failures. This process
might then lead the actors themselves to identify the roots of the recurring prob-
lems, and enlist them in making more structural changes. So, Howard Gadlin
recently proposed to the Executive Officers, the highest level of non-scientific
managers, that they participate regularly in a version of Morbidity and Mortality
Rounds used in hospitals to address iatrogenic failures.95 This intervention moves
beyond employee- or manager-initiated conflict as the trigger for root cause
analysis. Nothing compelled the executive officers to respond favorably to this
proposal. But more than half of the executive officers showed up at the first M &
M that CCR did. CCR is now going to do M & M sessions on a regular basis.
The office will be taking difficult cases, where the outcome of a managerial action
was different than intended, and walking the executive officers through a root
cause analysis. Instead of having that analysis done within CCR, it will be done
with groups of organizational actors, with the facilitation of CCR.

The move to the systemic level seems to generate the most engaged organiza-
tional response when it is driven by the demands of science, particularly in the
context of scientific collaboration at different levels of activity that demand recon-
figuration of relationships to do successful scientific work. This is the domain in
which CCR has been most successful in reaching systemic problems through sys-
temic intervention.

A potential gap between the level of analysis and intervention is most evident
in Quadrant III of the matrix, in which problems are diagnosed as systemic but
addressed only at the individual level.96 The possibility of a gap between analysis
and intervention, though inelegant and destabilizing, is important. It reduces the
risks and costs associated with asking the systems question. Participants in the
conflict can raise systemic issues without committing themselves to undertaking
them before they have fully assessed the costs, risks and potential for success.
The gap between analysis and intervention also marks a problem as systemic, and
thus changes the way that problem will be perceived when it recurs. Quadrant III
is where you see the consequences of systemic problems. They are not just ab-
stractions, but insistent problems affecting the quality of work and the quality of
life within the organization. The process of developing a systemic diagnosis de-
velops knowledge about the problem. It also gradually builds understanding of

95. See Gawande, supra note . See also Laura M. Lee, Root Cause Analysis (on file with author).
96. See Section , supra.
the need for change among different stakeholders within the organization. As the Quadrant III example of CCR’s root cause analysis of management culture illustrates, the capacity and openness for systems change can develop over time.

D. Structural problem, Structural intervention

The failed collaboration. Early in the history of CCR two scientists asked for help in resolving a dispute over the order of authorship for a paper they were about to publish. Each believed that he deserved to be the first author, typically the position that gives one the most recognition. In the course of working with the scientists the ombudsman was struck by the absence of any personal animosity between the two scientists. In addition, when inquiring about the origins of the dispute, the ombudsman learned that when they began their collaboration the scientists had not spoken directly about their mutual expectations. Sharing an interest in the research topic, recognizing the complementarity of their respective areas of expertise and abilities in different techniques, they had simply assumed all would work out. They had not discussed the question of authorship or been specific about how they would handle many of the regular transactions that are part of research collaboration or any major areas of decision making that they might confront. Building on the strong personal and scientific bond between the two, the ombudsman was able to help them resolve the matter by helping them identify some independent criteria by which the authorship matter could be fairly resolved. However, speaking with other scientists CCR became aware that it was fairly common for scientists to begin collaborations without making explicit their expectations of one another and without developing a process for resolving any differences should they arise. Often these collaborations involved individuals with unequal status and power. The case of the failed collaboration alerted CCR to the potential value of attending to systemic issues embedded in the culture of science.

The final cell involves systemic or structural problems addressed by structural solutions. These are problems that come to be understood as systemic, and for which interventions that match the level of analysis take place. The area of scientific collaboration offers an example of a problem that, over time, has come to be understood as systemic, and for which CCR has developed interventions that permit systemic intervention that actively engage with the systemic dimensions of the problem.

Collaboration lies at the center of much scientific work. Collaborations involve both peers and scientists at different stages of their careers. A host of issues can erupt in the course of these collaborations, including issues of authorship, ownership of data, and the scope and direction of the research. These issues can be particularly fraught when they arise in the context of a mentoring relationship between a post doc and a staff scientist. The issue of relationships between post docs and mentors is a recurring one. It comes up over and over again, in individual cases. Gender, racial, ethnic, and cultural differences can further complicate the problems that almost inevitably will arise in the course of the relationship.

Over time, CCR has learned the ways in which these issues are built into the structure of the relationship, and also lie at the center of core scientific goals.

97. See generally Kathy Baron, At the Helm: A Laboratory Navigator, (2002).
Collaboration among scientists with different levels of experience and expertise lies at the heart of NIH’s mission. It also carries with it built-in tensions, issues, and possibilities for abuse of power. “There is a fundamental imbalance in the relationships between post-docs and lab-chiefs. We can do things to mitigate that, but we can never change the basic situation.”

The challenge is to figure out how does one work with this power differential for which there is no cure. Gender, race and national origin can intersect with these issues about mentoring. The dynamics that produce conflicts and unfair outcomes also affect the capacities and trust of the parties in negotiating resolutions to those conflicts. So, working out the specific problems depends in part on addressing the conditions that produce that conflict—creating an atmosphere of trust, building the capacity of the less powerful actor to negotiate effectively, articulating principles for the relationship that everyone agrees to, and providing some form of accountability for the way the relationship proceeds. Issues that have come up in this relationship include deciding upon the direction of the research, how to use the data, who owns the data, authorship issues, sharing of biological materials, and whether post docs can take data or research with them when they leave to go elsewhere. Complicating this issue is the fact that the post doc is dependent upon the mentor for professional development and future positions.

So, for example, some cases involve postdoctoral fellows recruited to work in labs on collaborative projects, who are given inadequate support and feedback, and because they don’t “rise to the challenge” come to be viewed as a “warm body” who can perform routine work but will never advance. The resulting conflicts are often interpreted as about personality issues. Some cases have raised issues of favored fellows in the lab, sometimes because the post docs come from the same country or region as the PI, and speak the same language or dialect. Sometimes the relationship is complicated by gender dynamics as well, particularly when women are not well-integrated into the social relationships of the lab. Issues also come up in other cases about authorship. There are disagreements about whether the post-doc should be included as an author, and if so, whether they should be first, second or third author. Fellows often interpret this decision as a power play by the Principal Investigator. Gender and sometimes national origin can also come into play in shaping how managers interpret the cause of the problems.

Over time, CCR has intervened in hundreds of cases involving conflicts about scientific collaboration. They have developed a sophisticated understanding of the evolution and structure of these conflicts. They also have developed strategies for enabling participants in the collaboration to identify their underlying goals and develop a structure and set of principles to guide their work going forward. They essentially help scientists develop a “constitution” to guide their activities. Mostly this constitution involved a set of processes or questions that the parties would have to work through as part of constituting their relationship. But they also developed over time an understanding of some of the shared norms governing

99. Id.
collaborations among different types of scientists that could help parties in figuring out fair arrangements for matters such as sharing data and determining authorship.

CCR figured out that many disputes could be avoided and collaborations made more productive and fair from the outset if the participants actively addressed the structure of their relationship. By developing a protocol, a set of questions to help collaborators establish a framework for their working relationship, they were able also to structure a set of processes and principles by which to address unanticipated conflicts or problems that arise over the course of the relationship.

Initially, CCR used this structure in working with people who were already in conflict. They then developed a tool that could be used prospectively, and made that template available on the NIH website. They wrote articles and gave talks about the use of collaboration agreements. Scientists and institute directors learned of these presentations, both through their effectiveness in redirecting dysfunctional collaborations, and as a way to set up fair and effective working relationships from the outset. They invited the ombuds to develop materials for general use and for training purposes, and to participate in the orientation and training of new post docs and mentors. They were then invited to facilitate retreats for those workgroups who were interested in using the collaboration agreement as a framework for their working relationships. The ombuds used these occasions, as well as the principles and processes developed through their conflict resolution work, to facilitate the development of a set of norms and processes governing collaboration within particular workgroups. As collaboration has become more and more central to the NIH’s sense of the future of science, the work generated through the collaboration agreements has expanded in its scope and impact. Most recently, CCR worked with a group of scientists who were designing a new program and building conceptualized around principles of collaboration and employing the principles of the collaboration agreements as a framework for developing a governance structure for this institute.

These collaboration agreements help scientists formulate a set of norms around practice, as well as institutionalize processes that structure communication and interaction to prevent or address future problems. Through the device of collaboration agreements, utilized at different levels of organizational practice, CCR is engaged in making explicit a set of implicit or underspecified norms and in articulating a set of norms where none have existed. Many of these norms have been understood and expressed idiosyncratically, for example, the basis of trust in a scientific relationship. When scientists enter into a collaboration, they take certain things for granted, although these understandings often remain implicit and there is little beyond professional socialization to hold people accountable. Scientists are trying to negotiate the complexities both of the scientific work and the working relationship: data will be fully shared and exchanged, communication will be balanced, decisions are supposed to be made mutually and based on the power of argument rather than the power of position, credit is supposed to be allocated fairly. These understandings are filtered through scientific discourse as well

102. See Gadlin and Jessar, supra note .
as through the power dynamics in the collaborative relationship. Scientists typically are not thinking about the relational dimensions of their collaboration. They are thinking primarily about the science and the need to publish, enhance reputations, and advance knowledge. They must depend upon each other for their individual areas of expertise. What constitutes fairness in the collaboration isn’t necessarily going to map up in a linear way to predefined rules. They want public understandings and practices to be pertinent to preventing extreme situations of abuse, and they want the norms to be able to attach in a meaningful way to the day-to-day dilemmas that people face in the collaboration.

When the sharing or exchange of biological materials is involved, scientists are required by law to enter into a formal agreement about the exchange of biological samples, but this agreement does not address the full range of potential problems that often arise in the interaction among people with different perspectives and power. By institutionalizing the practice of using collaboration agreements, CCR is exemplifying law as a set of practices and institutional arrangements. It is enabling the creation of a normative framework and relationships of accountability for preventing and addressing wrongs that may not necessarily violate pre-specified rules or that can only be understood as problems in context. Public values, such as addressing power imbalances, minimizing the expression of bias, and fairly allocating credit, are enacted within the context of the collaborative relationship, with accountability provided through the norms generated by analyzing many other such relationships and through the involvement of third parties who can engage in identifying the source of problems that emerge in the context of practice.

An example will further illustrate the dynamic relationship between the individual case and structural change. This example began with a case in which CCR was not intending to make a systemic intervention, even though the ombuds were aware of the need for one. They thought they needed to address the issues between the direct parties to the conflict before they could reach the systemic questions clearly implicated. The case involved two scientists, one of whom was a lab chief to the other. Both are independent investigators with their own budget; the lab chief function is more administrative and pro forma than it is substantive. These two scientists were doing work in the same laboratory, though not in the same physical lab space. A variety of tensions developed between them. The junior person suspected that the senior person was working against his interests. The more senior person suspected that the more junior person was not willing to accept his role as lab chief and that the junior scientist didn’t like him. The distrust increased with every passing week, with each decision that had to be reviewed. There were allegations that the junior scientist was keeping secrets about a scientific project from his colleagues. This did not necessarily violate any ethics or disciplinary rule, but it did violate shared implicit norms within the lab. The issue of sharing information about research is an ongoing issue in every laboratory in which people are colleagues in the work, but competitors in obtaining grants and advancing reputations. A lot of attention was paid to whether the secrecy war-

ranted bringing ethical or misconduct charges, and a determination was ultimately made not to bring such charges.

The two scientists turned to CCR for help because the junior person was thinking about leaving, which would mean the end of the lab. The higher-ups did not want the lab to break up, because it had a distinctive and valued configuration of expertise. The higher-ups instructed the parties: to try to find a way to resolve their antagonism, which was affecting others in the lab. The scientists were also from different nationalities and, though these issues weren’t at the center of conflict, they were affecting their capacity to communicate with each other. CCR had also talked with them about organizational issues affecting the whole program. Though the lab chief did not actually hire the junior scientist, the junior scientist was placed in the lab chief’s lab. The junior scientist’s loyalties were thus to the person who hired him and, when unhappy, he would turn to the person who hired him, while the lab chief turned to a different superior for support or influence.

The two scientists were under pressure from above to resolve their conflict. CCR began to work with them, and had a series of discussions with them both separately and jointly. The goal was to forge an agreement that would explicitly lay out the terms of the relationship between the two scientists: what issues the lab chief could legitimately raise, how to schedule meetings between them, how requests for resources would be handled, how they would cope with possible competition in their research or for outside funding, how they would address conflicts, etc. It was clear to CCR that each particular issue was also symbolic of the superordinate issues of power and autonomy.

This conflict produced a long and difficult negotiation. With each iteration of a possible agreement, CCR was finding the need to be more and more explicit and clear. The need for that kind of clarity made CCR doubt whether the parties will be able to uphold any agreement, no matter what the terms. The need for great detail pointed to an underlying distrust and dislike that was so profound that either party could find a violation of agreement based on a technical detail.

Although these negotiations were confidential, everyone in the program knew about the tension and conflict. Through the initiative of the junior person, these issues were raised as part of the planning of a retreat for their program. CCR had talked with the parties about whether it would be useful if the program itself had specific guidelines about the role of a lab chief, as well as the role of a tenure track scientist working under that chief. While there are general guidelines about the roles of lab chief and Principal Investigator on the NIH website, they are at a level of generality that does not help in preventing or addressing possible disputes. This policy issue, however, was set aside, and attention was instead focused on working out the particulars of a collaboration agreement between the lab chief and the scientist.

At the retreat, the two scientists brought up the general issue of the role of the lab chief. The entire lab group wound up clarifying for the whole program almost all the issues that were posed in individual form for the two scientists. They also identified a set of additional issues or problems for which additional clarification was necessary. They agreed to have follow-up meetings to generate lab-wide solutions. The junior scientist compiled and circulated notes for the meeting. The group tweaked the language, and produced a document reflecting their collective agreement and understanding among the group about how they will do business in the future. The two scientists who were parties to the original dispute then ar-
ranged a meeting with CCR to discuss these developments. Once these general agreements and processes were in place, they both felt they no longer needed a personal agreement addressed specifically to them. They felt their issues were more appropriately addressed through the structure that they had helped put in place for the whole lab. CCR observed that there was a level of relaxation and ease in their conversation that they had not witnessed before. The protagonists’ body language and tone of voice were different; they were speaking to each other rather than to the ombuds. They acknowledge that they still have a ways to go before they trust each other, but felt that they had a fair and effective way to address their issues going forward.

CCR predicts that this intervention will have an impact on the whole program. It may spread through the culture as a model—not because it was adopted as a rule, but because it acknowledges the need for coworkers to be explicit, to have common norms to govern their interactions.

The kinds of norm elaboration we have described within NIH also occurs across organizational boundaries, because the ombuds are part of larger professional groups that regularly share knowledge about their work. So, for example, Howard Gadlin is actively involved in shaping the practice of ombuds offices within the federal government and nationally. This framework for collaboration has been extended to other organizational environments.104

III. THEORIZING THE FEATURES ENABLING INDIVIDUAL CONFLICT RESOLUTION AND SYSTEMIC CHANGE

The matrix elaborated in the previous section maps the dynamic relationship between individual and systemic conflict resolution. The examples we document do not fit neatly into the conventional dichotomies that have governed the analysis of conflict resolution. The interventions described both resolve individual, private disputes and generate systemic solutions and public norms. The choice is not either/or, once-and-for-all, but when, under what circumstances, and how best to mediate the relationship between individual and systemic conflict resolution. Linking individual and systemic conflict resolution, when structured to assure accountability and independence, enhances the capacity to produce successful individual outcomes and systemic improvements. Conflict resolution in these examples is thus simultaneously informal and formal, problem-solving and norm generating, private and public, individual and systemic, collaborative and principled, accountable and confidential, consensual/interest-oriented vs. coercive/principled.

The practical and theoretical significance of this example depends upon its generalizability. We mean here generalizability in two senses. First, can the case study be more broadly applied to other settings? Its success cannot depend on upon the particular configuration of features present in this case study (i.e., a public agency devoted to science with an interdisciplinary office of highly respected

104. For example, CCR’s “collaborative agreement” approach has been adopted by the University of Minnesota. See http://www1.umn.edu/ohr/chairing/practices/student/dispute.html.
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conflict resolvers). Second, does the matrix analysis have broader theoretical implications for how conflict resolution advances rule-of-law values?

This section addresses these dimensions of generalizability. First, we extrapolate from CCR’s work to identify the elements of a conflict resolution process that integrates conflict resolution and systemic change. These features are not unique to CCR or present in all (or even most) ombuds offices. Our analysis identifies those elements, and explains their role in enabling a conflict resolution process to connect individual dispute resolution to the advancement of public values. It also shows that conflict resolution processes with these features are located across the spectrum of conflict resolution, in judicial settings, administrative agencies, and some privately managed, publicly charged conflict management systems. These elements also provide a framework for critically evaluating the capacity of a conflict resolution program to link individual conflict resolution to systemic questions.

We then use the matrix analysis to generate new theoretical understandings about conflict resolution and its relationship to rule-of-law values. We suggest that the CCR case study does more than raise questions about the assumptions underlying the traditional debate about conflict resolution. It offers a reconceptualization, or at least an expanded understanding, of core rule-of-law values, such as impartiality, principled decision making, generalizability, and accountability. Contrary to the assumptions underlying the scholarly and practitioner debate, we show that non-adjudicative conflict resolution can, under certain circumstances and institutional arrangements, embody rule-of-law values and generate institutional practices advancing public values and addressing issues of common concern. We use this analysis to reconsider the relationship between adjudicative and non-adjudicative forms of conflict resolution.

A Boundary-Spanning Institutional Intermediary

One of the qualities enabling a conflict resolution body to link individual and systemic work is its position as an institutional intermediary located at the intersection of multiple, inter-related systems. CCR occupies such a position; it is an embedded but independent office nested within one or more communities of practice.105 Institutional intermediaries address problems arising within defined systems that involve repeat players whose conduct affects those within the system, even if they do not regularly and directly interact. Their boundary-spanning position affords access and knowledge concerning the range of problems that arise

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105. Communities of practice are groups of people who “are active participants in the practices of a social community,” interact with each other on a regular basis, and construct their activities and identities in relation to that community. ETIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY 4 (1998). They could include a unit of an organization, a work group, or a professional association. These social groupings could also be considered norm communities—groups of people who cooperate and compete, and in the process generate and enforce norms. See Robert Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U. PENN. L. REV. 1643, 1645 (defining a community as “a social network whose members develop relationships with each other through repeated interactions.”); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORHOODS SETTLE DISPUTES (1991). For a discussion of the role of institutional intermediaries outside conflict resolution, see Sturm, supra (Architecture of Inclusion.)
within that overall system. Because they operate within defined practice domains, over time they confront problems that recur within that domain. Institutional intermediaries also interact with and have an opportunity to observe repeat players over time. They operate at the intersection of multiple governance systems, seeing the relationships among those systems. By working with these “communities of practice,” they are in a position to generate norms, processes, and remedies that have impact beyond a particular case.106 They also cultivate communities of practice as learning systems.107

Crucially, institutional intermediaries are both embedded and independent. They are located outside the normal chain-of-command, and they work with actors in many different parts of the system. Institutional intermediaries do not have particular governance or organizational duties that tie them to particular routines or lines of authority. They operate independent of outside supervision over how they define and address problems. CCR exemplifies this characteristic. The office is set up to foster trust in its independence, impartiality and integrity by different organizational participants. When he was brought in to create the program, Howard Gadlin was given full authority to establish an ombuds office according to the vision and practice that would be successful. The office’s independence has been part of the social pact with the organization, and is built into the cultural understandings and routines of the organization from CCR’s inception. No one is permitted to dictate what CCR works on, who they speak to, how they do their work, or what they recommend. This insider/outsider status is one important factor positioning the office to connect conflict resolution to structural intervention over time.

Institutional intermediaries’ boundary-spanning location and role equips them to connect information, people, and problems.108 This position at the nodal point of multiple systems provides a vantage point for observing patterns and bringing that knowledge to bear on particular problems. The capacity to understand and identify systemic problems develops over time from individual case work. Conversely, the capacity to understand and address individual conflicts requires a systemic understanding that comes from the opportunity to step back and address problems outside the context of a particular conflict. An intermediary’s effective involvement in one context often produces occasions to address similar problems that arise at another time or location. This work produces cultural and institutional knowledge that intermediaries can draw on over time in spotting patterns, analyzing dynamics, and enlisting participation of relevant actors. This permits different forms of aggregation, which can be tailored to the nature of the problem as well as the pragmatic opportunities for intervention.

Institutional intermediaries are in a position to work at the level of the organization and with the parties that fit the contours of the conflict or problem. They can bring people to the table who do not ordinarily work together and do not otherwise have easy access to each other. A case may be resolved in the short run at the level of the individual, with no immediate consideration of its systemic implications. But, institutional intermediaries can use information obtained in the con-

107. See id.
text of an individual case to understand and design solutions for systemic problems when the opportunity to do so arises. It is also important that they utilize a range of intervention strategies, which give them considerable flexibility and scope. So, for example, CCR’s response to “the failed collaboration” included individual case intervention, development of a template for collaboration agreements, training, and facilitation of group problem solving, organizational analysis and system redesign. The multiple roles performed by CCR afford the opportunity to connect problems learned through individual case work to systemic change. Its mandate and range of intervention strategies gave the access and the tools to calibrate its intervention to the appropriate level.

The impact of institutional intermediaries is multiplied when they are located within different communities of practice. For example, CCR is nested within the decentralized institutes operating within NIH. It is in a position to interact with groups of people who occupy the same professional position, such as scientists, institute directors, and nurses. It is also part of the network of federal, university, and national ombuds offices, and thus in a position to diffuse its practices to those communities.109 CCR staff regularly speak at conferences and workshops about their approach linking individual and systemic change.110 The scientists with whom CCR works are accountable to broader professional communities, as well as a university network that is either directly or indirectly accountable to NIH as a grantee. As such, CCR’s role as a conflict resolution intermediary can have a cascading effect on an interrelated set of norm communities, even though its formal mandate is limited to addressing conflicts that arise among in-house NIH employees.

CCR exemplifies an institutional intermediary located within a formal organization, as well as within several professional norm communities. However, this institutional intermediary role is not limited to internal conflict resolvers. Any conflict resolution office that operates within an ongoing normative system, at the nodal points of interlocking systems, could potentially operate as an institutional intermediary able to integrate individual and systemic change. Some courts that focus on specialized areas of practice within defined geographic communities can play this role. For example, criminal courts can be in a position to identify systemic problems emerging across a variety of cases, to step out of the conflict resolution mode, and to develop systemic solutions to address those problems. Brandon Garrett has described this form of systemic intervention in the criminal justice system.111 Garrett observes that courts are repeat players regarding the criminal justice system, and that they “supervise the intersection of each of the other institutional actors in their courtrooms.”112 He documents recent innovations in which courts have aggregated information and prompted systemic reform, either them-

112. Id. at 9.
selves or through the involvement of third parties such as innocence commissions and expert panels.

Conflict resolution mechanisms developed to address problems within particular service delivery systems offer another example of an institutional intermediary. A recent article by Nan Hunter describes the development of external review systems set up to resolve disputes between patients and managed care organizations.\textsuperscript{113} These processes have produced an intermediary body that has the (as yet unrealized) potential to integrate fair treatment of individual cases with system-wide concerns such as quality of care and fair allocation of health care resources. Administrative agencies, such as child welfare agencies, have created third party intermediaries who then use case analysis to reveal information about systemic breakdowns and to intervene at both the case and the systemic level as part of and independent of the process of individual conflict resolution.\textsuperscript{114} These conflict resolution systems share the features of an institutional intermediary poised to integrate individual conflict resolution and systemic improvement. Interestingly, these examples illustrate the interrelationship and blurriness of the boundary between formal and informal approaches. Even courts—the epitome of formal process—are using the information gleaned through that adjudicative role to generate the possibilities of systems change.

Conversely, many alternative dispute resolution and mediation offices are not set up to function as institutional intermediaries. Internal conflict resolution offices may be located within a particular sector or office, such as human resources, and they may be directly accountable to management.\textsuperscript{115} They may have a more limited mandate and range of operation. Many offices are set up only to do mediation, and they do not interact with anyone in the agency outside the context of a particular individual conflict.\textsuperscript{116} Many conflict resolution systems are not designed to enable the development of ongoing interactions among repeat players. Mediation programs for workplace disputes often provide case-by-case intervention. More than half the time, outside mediators, selected from an external panel, are brought in.\textsuperscript{117} By definition, these mediators lack institutional knowledge and nothing in their mandate or functioning equips them to obtain that knowledge through their casework or to provide feedback to the organization. Mediation performed in this way is non-norm-generating and non-systemic.

\textbf{B. Root Cause Methodology: Enlisting Participants in Interrogating Underlying Causes and their Possible Solutions}

The methodology of analysis and intervention is a second crucial element enabling the connection of individual cases to underlying structures and systems.

\begin{footnotes}
\item[114.] \url{http://www.dhs.state.ia.us/cppc/service_reviews/qsr_overview.html}.
\item[115.] See Gadlin, supra note (discussing the problems associated with merging conflict resolution systems with managerial imperatives); DAVID B. LIPSY, RONALD L. SEEBER, RICAIHRD D. FINCHER, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT (2003).
\item[116.] See id; Meltzer supra note.
\item[117.] Id. at 186.
\end{footnotes}
What is key is that the inquiry proceeds through identification of reasons supported by available data, and that this process produces understanding of the relationship between the individual and the systemic in a way that enlists the affected parties in developing and acting on that knowledge. Until they began reflecting about their systemic work, CCR did not have a name for their methodology. They came to see this work as a form of root cause analysis. Root cause analysis explores why a problem arose and persists, by asking insistent questions that trace the problem to its source. Most conflicts are indicators of underlying, partially hidden problems within the organization or setting within which they occur. The initial framing of the problem tends to emphasize the most emotionally charged aspects of a dispute, and is often insufficient to accurately diagnose the problem and to figure out how to address it. Critical reframing deepens the questions asked of a particular participant and, when obvious explanations and remedies are insufficient, expands the participants who engage in understanding and addressing the problem.

This methodology structures inquiry about the nature of a problem and its relationship to intervention strategies by continually prompting a series of questions about the appropriate scope and goal of an intervention: What kind of problem is this? Why is it considered a problem and by whom? How does it relate to other problems you have seen? What is causing this problem? What would it take to remedy it here and for others, and what can you do about it, now and in the future? The conflict resolver continually questions whether the questions as posed locate the problem at the level at which it can be meaningfully addressed. Question making itself becomes an intervention; it is a process of making sense of a particular conflict and its potential for remediation.

This inquiry is a form of hypothesis generation and testing through the effort to develop workable solutions, and then stepping back to evaluate whether that approach works. It operates like a mini laboratory. The process entails successive approximations of analysis, which are then tested and validated by experience. You do something, based on predictions derived from current understanding. You may bring two people together or reframe a statement. You may do what you are doing with an intention: I think this will change the alliances within this unit. Then you pay attention to the consequences of your intervention. You may have some aspect of your hypothesis confirmed, but it might be disconfirmed. From there you have to rethink your hypothesis about what the problem is. For example, you might initially define a conflict in terms of power struggles between senior and junior people. So you run a certain kind of meeting, and it turns out that it is really between the men and the women. It was really more about gender, but that issue couldn’t be spoken. Then you have to adjust your understanding and your intervention to include a broader group, which then generates the next iteration.

The matrix analyses illustrate this methodology of hypothesis generation and questioning the questions. The spurned scientist, for example, initially described the negative employment decision as the result of a biased or arbitrary process.

119. For an insightful discussion of root cause analysis as a form of problem solving in manufacturing plants, see MacDuffie, supra.
The conflict resolver posed a series of questions aimed at validating whether bias or unfairness was in fact operating, and continually peeled back the inquiry to see whether an undetected problem lay at the root of the negative employment decision.  

Similarly, in the case involving the denial of vacation leave, the conflict resolver continually reframed the questions to get at the institutionally rooted source of managerial arbitrariness. This kind of hypothesis testing draws on institutional, cultural, and professional knowledge about the dynamics of relationships, organizations and systems. So, the analysis of the failed collaboration, over time, identified predictable flashpoints in a research relationship stemming from the structure of the relationship. The intervention of the collaboration agreement grew out of CCR’s hypotheses about the dynamics of research collaborations, which is continually revised in light what they learn from new cases.

This methodology builds systemic inquiry into the fabric of doing individual case work. CCR ombuds described a frame shift that has occurred in their practice as they have incorporated a systemic lens into their root cause inquiry, and this frame shift is noticeable in case reviews over time. The process of listening for systemic underpinnings begins when they first meet with someone. It affects the kinds of things they listen for and the kinds of questions they ask. They now routinely ask more historical questions designed to trace back the problem to its source, to situate it in a broader context, to identify others who are affected by the problem, and to consider the interrelationship of that problem with other aspects of the organization. When did the problem first arise? Was there a time when it was different? Did anything change in the person or organization? What else was going on? What else is happening? Was anyone else affected by the problem or did anyone else experience the same thing? They ask more systems kinds of questions: who benefits most by the conflict, who is hurt most by the conflict, and what is its effect on other people. They analyze whether a conflict serves some unacknowledged organizational purpose, separate from whatever personal needs it expresses, and why that purpose has been pursued in a problematic manner. They help relevant stakeholders assess whether that purpose is legitimate, and if so, whether it can be achieved through more productive means. They ask questions about the steps the person might take to change the dynamic, the steps others would have to take, who else would have to be involved, and the obstacles to change.

The intermediary gathers and validates information, both about the particular conflict and its larger context. Importantly, it does this both independently, drawing on its knowledge base, and through interaction with those directly involved in the conflict as well as those with knowledge about or a stake in the underlying issues revealed by that conflict. Often, this involves integrating interdisciplinary understandings of the problem, as well as information about the problem’s impact on people in different positions. Similarly, the process of developing solutions emerges through interaction with relevant stakeholders, who must be directly engaged in that process. It does not require that the participants themselves are self-reflective, although the process benefits tremendously when they are. Indeed,

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121 See p. , supra
122 The office has explored the complementarity between root cause analysis and systems approaches to family therapy, and their methodology has been influenced by both.
many conflicts explode because the protagonists are not. CCR’s experiences shows that participation in critical inquiry often prompts reframing, even when the participants would not reach those insights on their own. Sometimes, participation in the process develops participants’ capacity to use root cause analysis in their routine work. Indeed, some interventions are explicitly designed to help groups achieve that ability.

As the examples discussed above illustrate, the effort to trace a problem to its source will often lead beyond the confines of a particular dispute. We saw how many of their cases involved patterns, recurring issues, and problems that cannot be addressed at the level of the individual case. This inquiry leads the participants to reframe their understanding of what is causing the problem, and why the problem is one that warrants attention. As a result, this methodology necessarily, although not always explicitly, combines normative and instrumental inquiry. Root cause analysis and critical reframing enable conflict intermediaries to figure out, as part of the process of problem solving, whether to treat a problem as discrete and limited to its participants or as part of a broader pattern warranting more structural intervention. By moving to a more systemic level, the process necessarily identifies that something is wrong that warrants a more generalized intervention. This “something” could be a wrong because it violates shared understandings; it could be a wrong because the processes or routines in place violate those shared understandings; it could be a wrong because the shared understandings have never been made explicit, and when they are they cannot withstand scrutiny.

Interdisciplinarity enables conflict intermediaries to conduct root cause and systemic analysis. People from different disciplines are predisposed to ask different kinds of questions, reflecting different explanatory theories and intervention strategies. These differences in perspective can be achieved through the internal composition of an office or by involving those with relevant knowledge in the critical reframing process. For example, CCR was deliberately structured to draw on multiple disciplines, both in its analysis of problems and in its intervention strategies. It combines scientific, organizational development, legal, and psychological frames of inquiry. The operation of these multiple perspectives has a destabilizing impact on the inquiry. It fuels the hypothesis generating and questioning process.

Root cause analysis encourages the parties to resolve their conflicts by getting to their source, not just by finding a way to split the difference. It provides a check against the tendency of conflict resolution to focus on the presenting issues, the urgent emotional needs, the quick fix that will lower the temperature and return to normal. This framework creates a pragmatic tension between analysis and intervention. One always asks the systemic question, but one does not necessarily act at the systemic level. Part of the process entails assessing the possibilities, risks, and costs of a systemic approach as part of a particular case or intervention. Sometimes, it turns out there is no systemic problem, or at least not one that

123. Howard brings a sensitivity to the scientific mission and a commitment to critical reframing. Kathleen offers a counseling framework, emphasizing the power of relational systems in shaping interaction. Doris comes to problems with a background in organizational systems and processes. Kevin brings advanced degrees in law and literature, thus combining literary, legal and policy orientations to the work.
124. See pp. infra.
the organization and the larger society views as a problem.125 Sometimes proceeding at the systemic level would compromise the capacity to address an individual case. Sometimes the protagonists do not want to address the underlying questions. Sometimes, the stakeholders needed to make systemic changes cannot be brought to the table. Sometimes, the issue is not well enough understood by the stakeholders as a systemic issue to mobilize their commitment to addressing the problem. Sometimes, the issue is not (yet) enough of a priority for the organization to take on the resource and time commitment necessary for systemic change, at least at the moment. Root cause analysis structures inquiry about particular cases to enable reflective practice, which in turn equips conflict resolvers to craft interventions to match the demands and possibilities of the situations they face.

This methodology of root cause analysis forces a principled inquiry, both in the nature of the problem – why is it a problem, what is the justification, the reason, for treating it as a problem – and in the level and scope of the solution. It also requires justification in terms of reasons supported by research. It calls upon the intermediaries to justify their recommendations to those they are seeking to persuade. In an individual intervention, this will involve those who are the direct protagonists. In a more systemic intervention, it will involve all of those whose cooperation is needed to make the systemic intervention work, and to be perceived as legitimate. This is crucial because the office’s efficacy turns entirely on the persuasiveness of their analysis. (The example of the case in the individual analysis/individual intervention illustrates the point.)

In the CCR example, root cause analysis is incorporated into the practice of conflict resolution. In a smaller office, this critical analysis could be constructed by involving outside researchers in reflective practice inquiry or forming collaborative relationships with conflict resolvers in other offices. Some institutional intermediaries in other settings have followed a similar course. For example, in the social welfare context, innovative systems have created third party intermediaries who use root cause analysis and reflective practice to engage caseworkers, administrators, and families in generating solutions to systems failure manifested at the level of individual cases.126 Other intermediaries have used methodologies for analyzing the patterns emerging from their individual conflict resolution work, and designing interventions to address systemic problems identified through this analysis. In the criminal justice context, aggregative approaches employed by innovative criminal courts rely on pattern identification, investigation of systemic causes, and involvement of responsible institutional actors in the development of remedies.127 Systemic interventions driven by data and reflection about individual cases can be found in the descriptions of the methodology used by other institutional intermediaries in entirely different settings. In all these contexts, the mode of inquiry connects conflict resolution to learning, learning to reframing, and reframing to generating solutions that address underlying problems.

125. For example, the relevant communities did not view the underlying cause identified in John’s case – uncreative scientists don’t necessarily advance – as a problem requiring any change.
126. See, e.g., Quality Service Review Overview: Improving Results for Children and Families, http://www.dhs.state.ia.us/cppc/service_reviews/qsr_overview.html.
127. See Garrett, supra note .
C. Institutional Legitimacy Within the Relevant Communities of Practice

The capacity to connect conflict resolution to systemic change depends on the professional and organizational stature of the institutional intermediary. Participants in the conflict resolution process must be willing to work with the intermediary, which in turn requires that they have confidence in his or her integrity, knowledge, and judgment. They must believe that the intermediary has sufficient influence to bring to the table the various actors whose participation is necessary to address the problems. This institutional legitimacy affords access to the institutional knowledge (such as about managerial dysfunctions or collaboration problems) and opportunities to use that knowledge to prompt institutional redesign (such as the use of collaboration agreements as the basis for creating a new institute). The office must, then, have considerable stature and legitimacy across a wide range of organizational constituencies, operating at very different levels. A person of sufficient knowledge, expertise, skill, and gravitas within the relevant community must occupy the role. The formal attributes of the position – title, level, salary, role etc. – also play a role in defining its stature and influence. The stature and level also plays a signaling function; it communicates a view of the office’s significance to the community within which it operates.

So, for example, CCR’s access and influence depends upon the leadership’s expertise and stature. Howard Gadlin is himself a trained scientist, with a track record as a faculty member and scientific researcher. He gave up a tenured faculty position as an experimental psychologist to take on the role of ombudsman. His scientific background enables him to communicate in the language of science, with those at different levels of the organization. He negotiated a position that places him at a very senior level within NIH, and also to operate as an independent expert, where the office has a high level of visibility in which both upper and lower level people would see his office as a resource for them. He also plays a leadership role within the national conflict resolution arena. This intervention range, which is crucial to its capacity to its systemic understanding, depends upon the office’s legitimacy at each of these levels.

Stature also affects the efficacy of institutional intermediaries operating in other domains. Judges who are repeat players in the criminal justice system bring a high level of stature and credibility to their role as systems change agent, when they are operating within the scope of perceived authority and competence. Similarly, panels of independent physicians and community advocates operating as third party intermediaries carry substantial weight and bring legitimacy to the process of conflict resolution and systems intervention. In contrast, sometimes an ombuds or mediator lacks sufficient credibility within the community they

128. The ABA standards for ombudsman also emphasize the importance of stature: “An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity.” American Bar Association Standards for the Establishment and Operation of Ombuds Offices, Section B.
129. For example, he has edited volumes of the Negotiation Journal, participated in drafting ABA resolutions on ombudsman. He is regularly invited to speak at national conferences.
130. See, e.g., Garrett, supra note .
must influence, either because they do not come to the position with the attributes that command respect or because position has been marginalized within the community. 132 Under those circumstances, the office lacks the social and intellectual capital often necessary to play an effective intermediary role.

D. Participatory Accountability

Finally, the capacity to sustain this linkage of conflict resolution and systemic change over time requires mechanisms for providing participatory accountability. By accountability, we mean having regular occasions for explaining, raising questions about practice and outcomes, and for evaluating, justifying and revising one’s practices and decisions in relation to the goals and principles behind the enterprise. 133 The intermediaries must regularly engage in questioning by and accounting to others whose judgments have to be taken into account in the doing of the work. Accountability is important both to check against abuses and bias, both in individual intermediaries and in the overall process. It also plays a crucial role in motivating the dynamic interaction between individual and systemic issues. CCR demonstrates how participatory accountability can be institutionalized by engaging peers in ongoing assessment and revision of their practice. This process provides for accountability in the traditional sense: assuring impartiality and preventing abuse of office, corruption, pursuing private ends.

Institutional intermediaries have considerable interaction over time with repeat players, and thus risk developing both positive and negative biases. Bias could operate to distort how intermediaries interpret information or which interests they emphasize. It could also create an imbalance in the quality of their interactions with people in different institutional positions. For example, there may be greater opportunity for repeat interaction with senior leadership of the organization than with lower level employees, which would likely skew the types of problems presented and the interests at stake. The opportunities for self-deception in professional practice are so great, particularly where you are providing services to people in vulnerable positions with limited choices and urgent needs. The possibility for confusing intentions and impact in this work are also enormous. Intermediaries need some kind of process to point out when bias may be operating, and to provide checks minimizing its influence on the process. Accountability is needed to operate as a check – against personal biased prejudgments or single-minded cognitive frameworks that exclude important perspectives or aspects of a problem. It assures that intervenors cannot hide decisions that violate practice norms, so that they can learn from – and take steps to rectify -- their mistakes. Accountability is also important as a basis for learning – both about problems that can be remedied, patterns that can help surface causes, and potential for gen-


eralizing to other contexts. By asking questions about choices and consequences of the work, it provides a basis for considering the work in relation to process and outcome goals, which are themselves open to revision. Tracking outcomes both provides the basis for assessing whether the goals of the office are being met, as well as crucial systemic information about recurring problems or patterns. It provides the internal tension needed to resist the tendencies to focus on the most emotional urgent, obvious or superficial issue, leaving underlying causes unchanged. Root cause analysis regularly involves conflict resolvers in a process making explicit and asking questions about the types of questions they are asking and not asking. This form of accountability is built into the process of doing the work, both to assure that criteria for evaluation assess what is actually valued, and to link feedback to ongoing (and unpredictable) practice. It is also important that conflict intermediaries are accountable to the range of stakeholders who use the process, not just to the management or mediated through a single stake holder.

Accountability is particularly necessary and tricky for a conflict resolution practice bound by confidentiality requirements. But the experience with CCR shows the possibility of incorporating internal and external accountability into the doing of the work. It is important that conflict intermediaries have to provide reasons for their analysis and understanding of a situation, and to reflect upon the adequacy of their investigation, analysis, and follow through. The office has to give compelling reasons to enlist participation and generate effective solutions; its work thus provides a kind of built-in accountability. In this regard, the ombudsman’s lack of formal power – he has no decision making authority and cannot command anyone to do anything – enhances the ombudsman’s accountability; he must elicit cooperation with his efforts.

An important source of this deliberative accountability comes from reflective practice work—regular deliberative sessions done as part of strategizing and critiquing the ongoing work of the office. CCR’s weekly case reviews and staff huddles exemplify this practice. Those sessions routinely include presentation of a case, choice points, strategies, and particularly, difficulties posed by the case. “When we were developing the case review method, we worked hard to develop an atmosphere when people will surface mistakes. It is very common for people to say, I am having a hard time with this, I really messed this up.” These sessions often generate suggestions of a strategy or criticism of how something was handled, picking up on what might be perceived as a deviation of impartiality. The stance is one encouraging the ability to work with disparate ideas simultaneously and integrate them as a way of critically evaluating the adequacy of one’s own position. This methodology generates a high tolerance for difference and for simultaneously accommodating different ways of understanding a problem.

CCR also uses reflective practice and critical reframing to learn about and revise their practice:

136. See pp., supra.; Interview, 2-28-02 at 4.
As we are going through cases, we are trying to draw systemic lessons. The reflective practice, merged with sensibility about systemic cases, enables us to think about these cases. We make connections across cases in case reviews regularly, we refer to commonalities and differences within particular kinds of cases. It is more common than not, when someone is presenting a case, to have someone make a connection with a case that they presented or are working on. It happens all the time.\footnote{137}

Some form of external accountability is still important as a check against bias, group-think, and corruption. External accountability can be integrated into this process by bringing in outsiders to do reflective practice work with the organization, to provide them with regular feedback and frameworks for evaluation. In many respects, research operates as a part of the reflective practice work of the office, providing a form of external accountability by working over an extended time with a researcher who mirrors the kind of embedded independence and insider/outsider dynamic that CCR strives for in its practice. They have also worked intensively with a researcher using a reflective practice methodology inspired by Donald Schon’s work to increase their understanding of conflict dynamics and effective interventions.\footnote{138} This model “enables them to talk easily about mistakes and successes in a safe way.”\footnote{139}

Intermediaries’ interactions with the overall constituency and the public create a weak source of external accountability. The responsibility to report and make recommendations on systemic issues and on the general patterns revealed by the cases, provides a baseline against which to assess progress. The use of the office depends entirely on public perceptions of the office’s efficacy and legitimacy. Tracking usage rates over time shows how different constituencies are voting with their feet, and thus provides an indirect form of accountability. Also, it is possible for the office to track outcomes on systemic cases without violating confidentiality, thus providing a source external accountability.

Accountability could also be provided by tracking information about individual cases over time.\footnote{140} CCR, like most conflict resolution offices, does not (and is not permitted to) maintain systematic data about individual cases, even for purely internal purposes of self-evaluation and pattern identification. Concerns about the possibility of forced disclosure through subpoena prevent this information from being maintained. In fact, CCR destroys all notes on cases, retaining only demographic information reflecting general attributes of the conflict’s participants and type of problem. Confidentiality around data retention and tracking is in fact a constraint on accountability. It prevents the office from performing a systematic analysis of data, and thus from the opportunity of looking at things with categories

\begin{footnotes}
\footnote{137. Interview, 7-19-06.}
\footnote{138. DONALD A. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983).}
\footnote{139. Id. at 2.}
\footnote{140 See, e.g., Orna Rabinovich-Einy, Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation, 11 HARV. NEGOTIATION L. REV. 253 (2006).}
\end{footnotes}
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not thought of at the time the data was gathered. “We lose a lot of fine detail.”\textsuperscript{141} If conflict intermediaries had legal protections so that records could be kept without being subpoenaed, then confidentiality in the functional sense could be preserved, and still allow the office to learn from its cases and self-monitor.

There are additional ways of institutionalizing accountability without abandoning independence. A periodic independent evaluation, based on criteria developed out of the doing of the work, would be helpful, as long as it is not directly tied to issues of funding or renewal. This review could be performed by peers -- researchers and practitioners with expertise in both the subject matter being addressed and in the area of conflict resolution. It would be worth exploring the role of relationships and methodologies that produce accountability by institutionalizing a process of inquiry about those practices.

IV. RE-EXAMINING THE RELATIONSHIP BETWEEN CONFLICT RESOLUTION AND RULE OF LAW VALUES

We began this Article with an apparent dilemma. Informal conflict resolution is increasingly prevalent, and all indications are that there is no turning back.\textsuperscript{142} Yet, these processes have prompted considerable criticism based on their purported compromise of widely accepted rule-of-law principles.\textsuperscript{143} There is a fairly broad consensus about what those principles are. They include participation of affected parties, elaboration of public values through principled decision making, decision making by impartial decision makers, and accountability for the process and outcomes.\textsuperscript{144} Much of the criticism of non-adjudicative conflict resolution decry the failure of these processes to advance the elaboration of general public norms through principled decision making. Critics also express concern about the departure from principles of impartiality and about the absence of accountability for both the decisions and outcomes of these informal processes. The gap between theories of legitimacy and practices of conflict resolution makes these new processes both unstable and more difficult to hold accountable.

Our matrix analysis, which shows how individual conflict resolution can be integrated with systemic change, invites a reconsideration of the assumptions underlying this debate. This section demonstrates that rule-of-law principles can be realized using non-adjudicative processes that integrate individual and systemic issues, at least under certain conditions.\textsuperscript{145} We also suggest that informal conflict resolution processes can internalize those values without imitating adjudication, and that doing so will enhance the legitimacy and efficacy of those processes. We use the CCR case study as a springboard for developing a more dynamic understanding of these rule-of-law values, one that accounts for how they actually oper-

\begin{thebibliography}{99}
\bibitem{141} Interview with ombuds.
\bibitem{142} LIPSKY, supra note .
\bibitem{145} For an argument calling for such a jurisprudence of informal conflict resolution, see Luban, supra; Daniels and Sabin, supra.
\end{thebibliography}
ate in different settings. This approach provides a framework for assessing both informal and formal conflict resolution in relation to their realization of rule-of-law values. It also challenges the idea that the methods used in adjudication are the only, and even the best way to realize those values across-the-board. Finally, we show the importance of explicitly constructing the relationship between formal and informal systems of conflict resolution as a way of enhancing the legitimacy and efficacy of each.

A. Elaborating Public Values

One of the core assumptions underlying the critique of ADR is its inability to advance public values through principled decision making. This conclusion derives in part from a particular idea of public—the formal declaration of general rules by courts or legislature—and a particular conception how public values emerge from conflict resolution—through Socratic reasoning from binding precedent. These are important forms of public norm elaboration, but they are not the only principled way that public values can be articulated and generalized, particularly in contexts where the coercive power of the state is not directly implicated. The adjudicatory conception too narrowly defines the meaning and role of public values, and the methods by which those values can be generated. As many theorists have shown, generalized norms are also developed outside the formal organs of the state. These informal norms are still public in the sense that they apply beyond the scope of an immediate conflict, serve broad social purposes, meet shared expectations of legitimacy, and solve collective problems. Informal norms take on legitimacy when they are developed through participatory processes and justified in relation to articulated principles. Over time, these informal norms often inform formal policy and law, particularly as informal norms gain currency through their reiteration, coordination and revalidation. The processes of conflict resolution described above institutionalize a mechanism for this kind of normative development. We argue that linkage of individual conflict resolution and systemic change creates the capacity for informal conflict resolution to generate public values through principled decision making. It can produce active engagement in public norm elaboration and transformation in non-adjudicative settings.

This conception of public norms builds on a rich foundation of scholarship challenging the adequacy of formalistic conceptions of law and articulating more constitutive, nuanced and descriptively accurate depictions of public normative elaboration. The conflict resolution and deliberative democracy literature has begun to explore conflict resolution which is intentionally designed to generate and generalize norms through conflict resolution processes. Recently,

147. See notes 165-168, infra.
148 Reva Segal eloquently analyzes a similar process of constitutional meaning-making in the context of the ERA. Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA; 94 Calif. L. Rev. 132, (2006)
Reva Segal’s important article on constitutional culture provides a language for understanding the dynamic relationship among, conflict, citizen engagement and norm elaboration:

Collective deliberation helps establish what things mean and why they matter. Collective deliberation is thus useful, not only as a procedure for deciding how to act, but also as a practice for articulating who we are. Collective deliberation forges the meanings through which individuals and communities can express identity, and infuses practical questions with symbolic significance so that they provide occasions for individuals and communities to vindicate values through which they define themselves. (references omitted).

Socio-legal scholars have also documented law’s constitutive character, depicting law as a “reciprocal process in which actions and interpretations given by individuals to their world—and law and legal institutions as part of the lived world—become repeated, patterned, stabilized and these stabilized patterns become part of the meaning system deployed by as well as constraining the individual.”150 Recently, economic literature has used norms to explain a breadth of positive and normative issues, including the informal resolution of property disputes among rancher neighbors in Shasta County; the preference of the diamond industry for non-legal means of contract enforcement; and the stability of racial discrimination in competitive markets.151

The combination of root cause analysis and multi-level remediation, illustrated in the CCR example, provides an example of deliberately designed processes of public norm elaboration outside of adjudication. This methodology pushes stakeholders to make implicit norms explicit, and then involves them in an inquiry by which those norms were justified or rejected. This norm elaboration happens as part of determining an issue is problematic, and if so, why it is and what can be done to change it. The process of finding causes and assessing impacts also poses the question of how others were potentially affected by a problem, and whether the opportunity to craft a more general solution exists and should be pursued. Problems revealed through conflict resolution sometimes give rise to changes in policy, which apply to everyone similarly situated within the relevant domain. We also saw examples of the advancement of public norms through addressing the institutional dysfunctions that prevent their realization. The case involving the lab chief identified systemic problems in sharing information, power and resources, which interfered with the quality of collaboration and produced unfairness. The process produced a general framework to guide the labs’ interactions and reduce arbitrariness and misunderstanding.

Public norms develop by using public reports, deliberation, training, and group facilitation to figure how to incorporate desired values into practice. This line of inquiry leads to second order norms which set up processes and principles by which new problems would be addressed. Collaboration agreements, used to construct fair and workable interactions and to create a framework for addressing disagreements, are perhaps the most vivid illustration of a “constitutional” form of public norm elaboration. These collaboration agreements are creating a set of norms around practice, as well as institutionalizing processes that structure practice to prevent or address future problems. Through the device of collaboration agreements, utilized at different levels of organizational practice, CCR is engaged in making explicit a set of implicit or underspecified norms and in articulating a set of norms where none have existed. Its methodology enables the development of public understandings and remedies that attach in a meaningful way to the day-to-day dilemmas that people face in the collaboration. In the absence of a structure or a process there is nothing to articulate those understandings or to hold people accountable for acting on them other than professional socialization. By institutionalizing the practice of using collaboration agreements, CCR is enabling the development of principled norms and accountability for addressing wrongs that may not necessarily violate pre-specified rules or that can only be understood as problems in context. Here, law is a set of practices. Collaboration agreements create occasions for elaborating values, identifying problems in advance, developing shared solutions, and holding people accountable.

As the problems became better understood as recurring, significant, and preventable through institutional design, some interventions generate deliberations that produce an overarching governance structure built around principles, values, and lessons gleaned from conflict resolution experience with recurring problems. Sometimes they produced “constitutional moments” for the organization, when the collective participated in rethinking framing principles and structures governing their work. In this manner, public values emerged from a non-adjudicative process.

The articulation of these public values draws on varied sources. Formal law plays a role, in several respects. It establishes the boundaries of acceptable decision making and practice. Relationships may not violate, for example, the rule about sharing biomedical research. Employers must reasonably accommodate employees’ disabilities. Legal principles also establish the legitimacy of an abstract value, which has to be translated into practice for it to make sense. Under some circumstances, formal law also influences how people interpreted the meaning of particular values. This is particularly apparent in the area of race discrimination; participants’ ideas of race were heavily influenced by legal ideas of intentional discrimination. In many conflicts, formal legal principles do not adequately diagnose or guide the process of determining whether an issue posed a problem warranting more general attention. Choices and meaning emerge from the active deliberation of participants in the problem solving process, who must explain their perspective so that it can be understood by and persuasive to others. In doing so, these participants draw upon professional norms, community norms, and widely

152. See H.L.A. HART, THE CONCEPT OF LAW
shared ethical norms such as fairness. The conflict intermediaries draw on analysis of past practice, tested by what works, in developing their understanding of a related issue and in reframing participants’ understandings of particular conflicts. Analysis of patterns revealing dysfunctions also triggers inquiry about why a pattern posed a problem, whether the problem warrants more general attention, and how to address it.

Thus, when linked to systemic change, non-adjudicative conflict resolution fostered articulation of implicit norms, “reasoned elaboration and visible expression of public values,” public solutions to common problems, implementation of public norms, and engagement with the relationship between norms and remedies. Law thus operates as a catalyst by facilitating the elaboration and implementation of public values, and the productive engagement of normative inquiry among relevant institutional actors. Rule-of-law values impose an obligation to articulate the basis for determining that a condition is sufficiently problematic to warrant public attentiveness, and to justify the adequacy and appropriateness of public actions. Conflict resolution thus institutionalizes principled decision making that can be generalized within the community of practice in which it operates.

The objection might be posed, what is the legitimate basis for generalizing a norm developed through individual conflict resolution? Generalization has been thought to require the formal protections of adjudication. This position assumes that norms can only be generalized by imposing them on others, either through another case or through a general rule. We have seen, however, that generalization can take place through “substantive process” rather than through rules. For example, generalization could be achieved through reframing problems and thus expanding the scope and level of participation, convening a process to consider the implications of norms on larger systems, and participatory systems redesign. Different kinds of processes are needed to justify this form of generalization than for norms generalized through rules. More generally, the justification for generalizing a norm depends upon the legitimacy of the process used to develop that norm, as well as the scope and consequences of its application. Norm elaboration falls on a continuum of generality: from unarticulated to articulated to justified (or rejected) to shared with others to institutionalized within a particular setting to adopted in multiple settings, to embodied in a rule or practice to spread to other institutions within the community of practice to adopted across domains to embodied in published, enacted law. The question of when it is legitimate to

153. An illustration of the role of norms can be found in the description of the process used in the intervention involving the decision not to select John for a new position. See pp. , supra. There, the questions driving the inquiry were informed by from legal norms (was the process biased), community norms (were scientific standards of merit justified), ethical norms (was the process fair), and organizational norms (was the process reflective of deeper organizational dysfunction or collective dissatisfaction).
154. Abraham, supra note , at 2626, citing Fiss.
156. Susan Sturm, Equality and the Forms of Justice
157. See, e.g., Fuller; Fiss.
158 See Joanne Scott and Susan Sturm, Courts as Catalysts: Rethinking the Judicial Role in New Governance, forthcoming Columbia Journal of International Law 2007 (discussing this idea of law in the context of adjudication).
apply a norm articulated in a particular conflict to other contexts and stakeholders depends upon where the process falls on this continuum.

Here again, rule of law values can be built into the process used to decide when and to whom norms may be generalized. If people are similarly situated with respect to a particular problem, fairness permits, indeed, often requires more general application. Root cause analysis builds in the requirement that generalization be justified, based on the identification of commonalities in experience, cause, and solution. It also incorporates the participation of those affected by, responsible for, and knowledgeable about the problems at issue. Remedies cannot be imposed through this process; they must emerge from this collective deliberation, propelled by the search for causes and solutions.\textsuperscript{159}

Of course, sometimes norms and remedies cannot be developed through this collaborative process. We saw examples of this in the matrix discussion. For example, John did not accept the fairness and legitimacy of the decision not to award him the position he felt he deserved. Sometimes crucial stakeholders are unable or unwilling to participate, or the conditions for crucial organizational redesign may not yet exist. Sometimes participants want to solve the immediate problem and move on. Quadrant III of the matrix demonstrates that some conflicts are not amenable to reframing as systemic issues. Some issues might involve serious wrong-doing warranting the use of coercion. Coercion may be necessary to provide an end point to an ongoing conflict, to induce unwilling actors to take responsibility for addressing serious problems, to provide retrospective remedies for harms caused, or to take adverse action against an individual. In these situations, advancement of public values cannot legitimately be achieved through institutional intermediation.\textsuperscript{160}

These limits focus attention on the interdependence of informal and formal conflict resolution systems. Some problems are simple and recurring; experience with deliberative processes over time may show that a rule would in fact address the problem. The processes used to impose rules could then be invoked. Rules could emerge internally, through policy formulation, or externally, through state intervention. Institutional intermediation operates in tandem with other forms of conflict resolution.

Our analysis suggests that formal and informal systems are mutually constitutive, with capacities to generate public values for conflicts of different types.\textsuperscript{161} They can generate norms with different types of legitimacy. Norms generated in one domain affect those developed in the other. They can compete with each other, co-exist, or enhance each others’ efficacy and legitimacy.\textsuperscript{162} The type of relationship among these systems can, and we argue should, be deliberately and


\textsuperscript{160} So, for example, in CCR’s work, disputant preferences determine how a given matter is handled. At any point a dissatisfied person can pursue any of the formal grievance and complaint processes available within the organization. And every visitor to the office is always informed about the full range of formal and informal processes available for that person’s particular issue.

\textsuperscript{161} Cf. David Trubek and Louise Trubek, 

\textsuperscript{162} See JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM 164-79 (2002); Luban, supra Trubek and Trubek, supra.
self-consciously constructed. We have shown that collaborative critical inquiry can generate public values through internal processes of participation and accountability. Norms developed through processes attentive to rule-of-law values may carry greater weight in other conflict resolution arenas. These processes cannot, however, generate norms binding beyond the scope of that community, at least without further process. Yet, the system’s legitimacy is undermined if there is no effective backstop to address problems that cannot be resolved cooperatively, when those problems violate established norms and have consequences that fall heavily on particular individuals.\footnote{163}

At the same time, the co-existence of these conflict resolution systems poses potential threats to the efficacy of each. Sometimes the capacity to cut deals in private, without regard to fairness or public consequences, undermines formal law’s capacity to advance rule-of-law values.\footnote{164} Conversely, formal legal rules and sanctions can undercut the capacity of intermediation to involve necessary participants, generate much-needed data, or produce genuine deliberations.\footnote{165} They can also unduly narrow the normative framework within which root cause analysis must proceed. The contrast between anti-discrimination and disability norms illustrates this point.\footnote{166} One of the examples provided for Quadrant III illustrate how antidiscrimination law and process can distort the frame for analyzing cases in which race may play a role. The law imposes a fixed and unitary meaning of race discrimination; at the individual level it is defined by deliberate unequal treatment based on race. This legal framework dictates how race is understood; it discourages participants from addressing the racial dynamics producing exclusion, even when those legal standards do not apply. Contrast this rigid rule-based approach with the law’s approach to disability.\footnote{167} There, the legal standard of reasonable accommodation invites, indeed, requires the participants to deliberate about the meaning of disability in context and to try to address the consequences in the design of the workplace, at least with respect to that individual.\footnote{168} This kind of legal standard combines the imperative of formal law with the dynamism of collaborative problem solving.

The discrimination/disability example illustrates a more general point. Conflict resolution norms and processes can be designed to take account of their impact on the capacity to advance public values in other conflict processing sys-

\footnote{163. For example, research shows that proactive efforts to create effective systems for preventing sexual harassment are unlikely to work if clear violators of sexual harassment norms do not receive discipline. Add Cites. CCR has an abiding interest in the NIH providing strong and effective grievance and complaint mechanisms.}

\footnote{164. See Abraham, supra Luban, supra.}

\footnote{165. See Simon, supra note; Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458 (2001); Trubek}

\footnote{166. We are grateful to Liz Emens for inspiring this comparison of disability and anti-discrimination norms.}


\footnote{168. See Elizabeth Emens, Integrating Accommodations, forthcoming (on file with author).}
We see the potential and desirability of actively negotiating the relationship among these informal and formal normative systems. Legal norms could be articulated so that they foster conflict resolution designed to advance public values in other domains. Informal conflict resolution could be designed to enhance their capacity to advance public values, by building in the features linking individual conflict resolution with systemic issues.  

### B. Rethinking Impartiality

Impartiality is another important rule-of-law value that has figured prominently in the conflict resolution debate. The value of impartiality operates as a means of assuring unbiased and principled decision making. It is intended to provide process integrity, which requires that the process is not stacked in favor (or against) any participant. This means that the third party is equally open to the concerns and arguments of all sides, and will not conduct the process from a predetermined point of view because of a bias or an outside relationship.

The conventional view achieves impartiality through detached neutrality. This means that ideally, the third party should have no direct knowledge of the conflict or prior relationship with the participants. This conception of impartiality underlies a strand of criticism directed particularly at embedded conflict resolution. The assumption is that impartiality can best be achieved by removing the conflict from the context within which it occurs, and limiting the potential for outside relationships or knowledge to taint the process. This view would preclude embedded institutional intermediaries, and thus challenges the legitimacy of a crucial feature enabling conflict resolution to generate public values. Detached neutrality would practically disable conflict resolvers from using systemic knowledge in their individual case work or from playing the multiple roles that enable systemic responses to problems surfaced by individual cases. It would preclude the conditions necessary for the linkage of individual and systemic intervention.

An unbiased conflict resolver is a value crucial to process integrity. However, detached neutrality is not the only, or even necessarily the best means of achieving that end. Even in adjudication, bias cannot be eliminated without taking account of its more structural forms. It is now well understood that “the have come out ahead” in the litigation process, and that every decision maker approaches a problem from a perspective that builds in unstated assumptions and

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170. See Section , supra.


172. See, e.g., Edelman, supra note ,

173. See pp. , supra.

baselines often favoring more powerful group members. Detached neutrality does not provide a way of detecting or protecting against these forms of bias.

Detached neutrality has even less salience in non-adjudicative conflict resolution. There, the third party does not impose outcomes, but instead frames the way the conflict will be addressed, including who is at the table and how they participate. “Impartiality” requires that third parties do not privilege any party or point of view in that process. They must assure that the process is fair and open, and that every relevant stakeholder to participate meaningfully and fully. Unbiased process requires that every participant has the capacity to influence how issues are framed and solutions developed. To achieve this goal, a third party requires sufficient knowledge and access to identify relevant people who have been excluded or undervalued in the framing of the issues, and to provide a means for their effective participation. This demands ongoing interaction and knowledge of the context in which the conflict is occurring. These interactions introduce relationships that could bias third parties in the performance of their role. Thus, the engagement required to reduce structural bias in the process produces risks of interpersonal bias in the third party.

The CCR example shows the promise of a structural solution to this apparent dilemma. Bias is reduced through institutional design: first, by assuring the independence of the decision maker from the control of any particular interest; second, by creating ongoing critical inquiry from the perspective of multiple participants and points of view; and third, by building in forms of accountability to those multiple participants, rather than to any one position. Bias is checked by institutionalizing “multi-partiality.” Bias is acknowledged as inevitable, and as something that has to be surfaced and corrected. Reflective practice from an interdisciplinary perspective provides one such check. This process builds in destabilization of a fixed or predetermined point of view. This is done by the involvement in the process of people from multiple perspectives. The third party has to explain their understanding and strategy for each case, and will be questioned about their role. The concern for bias is an explicit part of this inquiry. This approach resembles the debiasing idea, developed by Jolls and Sunstein as an intervention for companies. Root cause analysis provides another method for assuring full and meaningful participation in the conflict resolution process. This method interrogates problems by involving those directly involved in identifying the points of breakdown and possible remediation. Its logic requires substantive participation in analysis and intervention by those with knowledge of the problem. As the third party, this methodology induces you to pay careful attention to the way you frame your in-

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tention, and to question assumptions in relation to the views of others and the consequences of acting on them.

Finally, the role may be defined to build in accountability to multiple constituencies. Voluntary participation performs this function. The third party’s legitimacy and efficacy depends upon the willingness of all affected parties to participate in this root cause inquiry, which in turn provides a strong incentive to adopt a stance of independence and to institutionalize a practice of legitimacy.

By institutionalizing multi-partiality, this approach enables the interaction crucial to linking individual and systemic interventions, while protecting against the expression of bias. This concept has applicability in both the judicial and non-judicial arena. It could help design ways to hold judges accountable for their non-adjudicative roles within litigation, such as overseeing discovery, promoting settlement and designing remedies. It also provides a framework for evaluating the legitimacy of embedded conflict resolution systems. This analysis is another example of how the meaning of rule-of-law values can best be constructed in particular contexts. It also shows that understandings developed within informal conflict resolution can be instructive for the design of formal process.

V. ADDRESSING THE TENSIONS BETWEEN INDIVIDUAL AND SYSTEMIC WORK

It is important to acknowledge and address the constraints and tensions that accompany the linkage of individual and systemic work. On the surface, confidentiality seems like an enormous limitation on the doing of systemic work. Many conflict resolution professionals make an ethical commitment to maintain the confidentiality of the contact, which means that the case cannot be discussed in the ways that would reveal the identity of the clients without their permission. The intermediary may only use information if not identifiable to individual, unless the parties agree. The intermediary could not initiate a systemic intervention if doing that would run the risk of revealing who had brought up the issue. Autonomy constraints also limit when intermediaries can proceed with systemic issues. A lot of people want to handle things on their own. They just want a little coaching. They want to talk with an independent person, someone who might challenge them but is a neutral. The check against disclosure is that intermediaries have to get the permission of the person who comes with the issue to involve any additional parties in addressing the conflict.

However, confidentiality is not as big a constraint as people might think. First, there are ways to maintain confidentiality and still proceed with systemic work. Part of the intervention can include taking steps to minimize the risk of adverse action stemming from raising the issue. Many of the people who come to the office come because they are offered confidentiality. People are concerned about the consequences of disclosure--that someone they are accountable to or affected by will know that they have raised an issue, and that raising the issue would trigger negative responses. Managing the consequences of disclosure changes the calculus of confidentiality. For example, there was an issue brought

178. See ABA Standards, supra note .
to the office by someone who was the only one in the lab who was likely to raise the issue. Together with the concerned individual, CCR devised a way of raising the issue that would not lead to her identification. At the point at which they see the possibility of constructive intervention, most individuals are comfortable having the issue raised with at least some people.

Second, confidentiality brings with it some advantages for connecting individual and systemic work. The promise of confidentiality reduces the risks associated with surfacing a problem within the workplace. It also provides a space for brainstorming and taking risks, at a point when it is easy to backtrack, revise, correct misunderstandings. It enables people to take responsibility for acting. It allows all of the parties to speak more fully and honestly about a situation than they might in a formal proceeding, where there could be unanticipated consequences of acknowledging mistakes, errors or vulnerabilities. People often resist admitting errors when they could be exposed publicly before they can take remedial steps. They may wind up defending a whole system they want to change to keep from revealing those mistakes. Also, some kinds of information needed to bring about change will only be revealed if there is some control over who will have access to that information. This includes information about the dynamics that are sustaining a systemically problematic situation, which are often partly interpersonal or political. To address problems, it is sometimes important to understand the history and politics explaining why a structure is in place, for example, to serve personal ends. Confidentiality also enables systemic work to take place within subunits of an organization, which may be unwilling to tackle problems if doing so invites scrutiny or criticism from those above them. Cumulative change at the sub-unit level may produce fertile ground for system-wide change.

Third, data can be aggregated and shared without revealing the identity of individuals. There are general points that can be drawn from the particulars, without referencing those particulars. The intermediary can compose a hypothetical case that is a composite of cases, which captures the essential pieces and dynamic of the conflict. Information drawing on the lessons of the confidential cases can be presented without breaching confidentiality. Also, reflective practice--ongoing discussion among a group of people bound by the confidentiality norm--serves as a way to pool information without disclosing that information publicly. Confidentiality around data retention and tracking is, however, a constraint. It currently prevents the office from performing a systematic analysis of data, and from detecting problems that fall outside predetermined or entrenched analytical categories.

It is important to acknowledge conflict resolutions’ limitations as a trigger for systemic change. As a conflict resolver, there is an obligation to address problems’ individual dimensions. The parties’ control over the scope and focus of the intervention remains paramount. In the short run, this means that the individual dimensions must take priority and may trump the decision to address longer term, systemic issues. In addition, there is a tendency to conceptualize cases at the individual level. The emotional valence of a case is gripping and insistent and it makes it difficult to avoid concentrating on the compelling character of the human drama in a particular instance.

179. See infra.
Also, the type of information obtained through conflict resolution is skewed. Conflict resolvers only see the problems that people are unable to resolve without outside intervention and that they are willing to raise. Problems that people do not see, or that are not raised, will not emerge through conflict resolution. Nor does individual conflict resolution prompt the gathering of systematic information across settings, unless the problem and the intervention have been reframed at a systemic level. Systemic interventions, such as the task force or deliberative body gathering and evaluating data about particular aspects of practice, could, however, emerge from or proceed in conjunction with conflict resolution.

The flip side to the repeat player phenomenon also raises potential problems. When one establishes a good working relationship with repeat players, it becomes more complicated when there is a complaint about one of them. There are, however, ways of minimizing this problem. For example, CCR has strict limitations about personal interactions with people in the organization. They do not socialize. A group practice provides another way out of individual conflict situations. There are instances in which a particular ombuds will ask someone else to take the case. Reflective practice also provides a check on the expression of bias over time.

CONCLUSION

This Article has shown that the prevailing assumptions that frame the ADR debate are neither universally true nor endemic to informal conflict resolution. Contrary to the assumptions underlying the scholarly and practitioner debate, individual conflict resolution can produce systemic change, and in the process, generate institutional practices advancing public values and addressing issues of common concern. We have documented an internal conflict resolution process that both resolves individual, private disputes and generates systemic solutions and public norms. It can do this in a manner that is principled, generalizable and accountable. Building these values into informal conflict resolution also improves those process’ efficacy and legitimacy. Embedded conflict resolution, when structured to produce critical inquiry, accountability and independence, enhances the capacity to produce effective individual outcomes as part of a long term process of generating systemic improvements and norms.

The process of writing this article together has transformed the way each of us think about conflict resolution and its relationship to law. It has provided Howard practice with critical frameworks enabling his office to evaluate and improve their practice. It has infused Susan’s theoretical stance with methods and examples that both validate and destabilize that framework. We hope that the resulting analysis provides useful tools to those engaged in conflict resolution, either as third parties or as participants. We also have tried to move the conflict resolution debate beyond the stalemate between advocates and critics of ADR. The choice is not either/or, once-and-for-all, but when, under what circumstances, and how best to mediate the relationship between individual and systemic conflict resolution. This approach provides conceptual frameworks for evaluating the legitimacy of informal processes, and for designing accountability mechanisms that can work within the relevant context.

This analysis offers a way to broaden and deepen the discussion of law’s relationship to the promotion of public values. Law is not limited to formal norm
elaborating, in the sense of articulating general rules enforceable by state coercion. It is also about creating systems that foster the capacity of actors in different settings to identify, generate, and revise norms, and to structure systems that are more likely to produce desired conditions and practices. It involves engaging with the processes and practices that encourage or prevent practices that advance values we care about. Public values are thus embedded in an institutional understanding and analysis. Only through realizing norms in institutional practice can we give concrete meaning to Robert Cover’s profound articulation of law’s role:

To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be."  \(^{180}\)

\(^{180}\) Cover, supra note.