American University Washington College of Law
Digital Commons @ American University Washington College of Law

Working Papers | Works

2-8-2008

Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?

Susan D. Carle
American University Washington College of Law, scarle@wcl.american.edu

Follow this and additional works at: http://digitalcommons.wcl.american.edu/fac_works_papers

Part of the Organizations Commons

Recommended Citation
Carle, Susan D., Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change? (January 24, 2008). Available at SSRN: http://ssrn.com/abstract=1087119.

This Article is brought to you for free and open access by the Works at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Working Papers by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

PROGRESSIVE LAWYERING IN POLITICALLY DEPRESSING TIMES: CAN NEW MODELS FOR INSTITUTIONAL SELF-REFORM ACHIEVE MORE EFFECTIVE STRUCTURAL CHANGE?

SUSAN D. CARLE*

INTRODUCTION

Susan Sturm's important work[1] offers a ray of optimism in a contemporary political climate most people of progressive inclinations find somewhat depressing. Sturm examines new models for bringing about institutional reform without extensive management from legislatures or courts.[2] As Sturm recognizes, resort to litigation as a strategy for increasing gender parity in employment is not a promising option these days, for several sets of reasons. First, as Sturm has explained in an earlier pathbreaking article, judicial decrees are not well suited to addressing "second generation" problems of structural reform of institutions, such as eliminating manifestations of race and gender inequality that persist despite laws banning discrimination.[3] These complex, intractable problems require nuanced remedial strategies tailored to particular settings.[4] Courts lack this kind of remedial flexibility.[5] Nor are they well-equipped to monitor compliance with the complex, long-term remedies required to bring about deep and lasting structural change. The past half century of litigation over school desegregation and many other kinds of institutional reform have taught these lessons. Litigation-focused

---

* Professor of Law, American University Washington College of Law; Visiting Professor of Law, Harvard Law School, spring 2006. My thanks to Rachel Rebouche of the *Harvard Journal of Law & Gender* for inviting me to participate in this Workshop, to Robert Dinerstein, Lani Guinier, *Harvard Journal of Law & Gender* editor Mary Newman, and Susan Sturm for helpful feedback on earlier drafts of this paper, and to Robert Dinerstein and Richard Ugelow for sharing their knowledge of cases as civil rights litigators. I am also indebted to Vincent Chiao, Harvard Law School '08, and Ryan Hardy, Washington College of Law '08, for excellent research assistance.

[1] Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006).

[2] *See, e.g.*, *id.* at 261 (explaining that some lawyers for universities are exploring ways to increase diversity through improving their institutions' "governance capacity").

[3] Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462–63 (2001) (advocating a method of second generation reform that involves combining legal compliance with active efforts to prevent discrimination).

[4] *See generally id.*

[5] *Id.* at 461 ("The complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts . . . to articulate and enforce specific, across-the-board rules.").

Electronic copy available at: http://ssrn.com/abstract=1087119

approaches can help correct some egregious violations of law,[6] but few argue today that traditional, court-ordered "command and control" injunctions provide a promising avenue for future structural reform.[7]

A second set of reasons traditional litigation strategies offer scant hope for achieving greater gender parity in employment today has to do with the specific politics of current anti-discrimination law. Here Sturm describes many problems: what should constitute actionable discrimination is a highly contested question.[8] Anti-discrimination doctrine has unfortunately developed in increasingly restrictive directions.[9] Empirical evidence provides startling confirmation: it is much harder for plaintiffs to win Title VII cases than any other cause of action.[10] The popularity of reverse discrimination lawsuits also presents problems for those seeking to increase workplace diversity through traditional litigation avenues.[11]

Institutions' voluntary efforts to increase workforce diversity through affirmative action have likewise met with legal censure. Under the U.S. Supreme Court's constitutional standards, public institutions must usually

---

[6] For example, it was institutional reform litigation that dismantled de jure segregation of the nation's public schools, integrated police and fire departments in many major cities on both gender and race lines, and corrected some serious abuses of institutionalized persons. *See, e.g.*, Ruiz v. United States, 243 F.3d 941, 943–44 (5th Cir. 2001) (summarizing history of litigation enforcing constitutional rights of Texas prisoners); Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983) (ordering city to revise firefighter employment tests that had disparate impact on women applicants); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) (reviewing complex remedial orders requiring changes to eliminate race discrimination in city's police department); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) (finding violations of constitutional rights of patient confined in a state mental hospital).

[7] For a description of an emerging new model of successful litigation in this area, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1015, 1019, 1023, 1030 (2004), also criticizing "command and control" injunctions as a method for institutional reform and describing cases in which such methods did not work.

[8] *See* Sturm, *supra* note 1, at 259–61 (describing the current uncertainty in antidiscrimination law).

[9] *See id.* at 259–65 (describing these and other legal problems with traditional approaches).

[10] *See, e.g.*, Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 Emory L.J. 1887, 1943–44 (2004) (summarizing evidence showing that employment discrimination plaintiffs who allege claims other than sex harassment fare much worse than plaintiffs in other types of lawsuits); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical L. Stud. 429 (2004), *available at* http://lsr.nellco.org/cornell/lsrp/papers/1/ (presenting data showing plaintiffs' low chances of winning employment discrimination cases and appeals after success before trial courts); David B. Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. Davis L. Rev. 511, 535 (2003) (finding statistically significant difference in California jury verdicts in employment discrimination cases as compared to other kinds of cases).

[11] For example, Sturm discusses a lawsuit filed by white students against the National Science Foundation ("NSF") challenging its minority set-aside program for graduate fellowships. *See* Sturm, *supra* note 1, at 273–74 (discussing this case and the decisions NSF made in its aftermath).

Electronic copy available at: http://ssrn.com/abstract=1087119

present evidence of prior wrongdoing in order to justify the use of affirmative action.[12] Race-conscious measures are highly suspect—in the view of both a significant segment of the public and the Court.[13] The Court subjects gender classifications to an intermediate scrutiny standard,[14] but strong forms of affirmative action are clearly problematic in the gender context as well.[15]

Finally, there are the general problems of solving any dispute through litigation. Even at its best, litigation is expensive and time consuming. It is surely a much better use of limited resources on all sides to devote efforts to finding creative methods for moving forward, rather than to be involved in endless gamesmanship and finger-pointing focused on what has gone wrong in the past. And court-imposed, externally driven liability judgments tend not to generate the buy-in of those ordered to comply. Without the buy-in of those who must implement reforms, institutional culture is unlikely to change very much and little change of lasting significance is likely to be accomplished in the end.[16]

Sturm is interested in finding effective techniques for institutional change that do not rely on traditional legal mechanisms such as litigation or legislative fiat.[17] The alternative approach Sturm studies in *The Architecture of Inclusion* involves bringing affected interests together to find win-win solutions to problems of institutional reform.[18] Sturm by no means discounts the importance of law to such projects, however. To the contrary, in her groundbreaking earlier article,[19] Sturm examined how legal rules can encourage institutional responses that will prevent or minimize the need to resort to litigation.[20] Law, for example, can provide support for the achieve-

---

[12] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 332–35 (2003) (allowing the use of some forms of affirmative action in law school admissions processes in light of the state's compelling interest in creating a diverse leadership class in society); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 289 (1986) (O'Connor, J., concurring) (requiring at least some evidence of prior wrongdoing to support the use of affirmative action).

[13] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that all racial classifications are subject to strict scrutiny).

[14] *See* United States v. Virginia, 518 U.S. 515, 533 (1986) (applying intermediate scrutiny to a gender-based classification and invalidating the Virginia Military Institute's male-only admission policy).

[15] *See* Sturm, *supra* note 1, at 260 (noting that programs that limit participation to women are "legally vulnerable").

[16] *See* Susan Sturm, *Equality and the Forms of Justice*, 58 U. Miami L. Rev. 51, 81–82 (2003) (describing the need to "creat[e] occasions and incentives for non-legal actors to deliberate about norms in context, and to construct conditions of permeability between legal and non-legal actors so that formal law can legitimately and effectively take account of informal normative activity and vice versa").

[17] *See* Sturm, *supra* note 1, at 251 (noting her study of an innovative initiative that builds capacity for institutional change without relying "on the direct threat of judicial sanctions").

[18] *Id.* at 261 (discussing her interest in developing models that generate organizational governance capacity).

[19] Sturm, *supra* note 3, at 489.

[20] *Id.* For example, the Supreme Court's judicially crafted affirmative defense to vicarious employer liability for supervisor sexual harassment may motivate employers to

ment of consensus through voluntary negotiation because it presents a normative background. And, if necessary, law can stand as a threat: if reasonable agreement is not reached, affected parties may resort to litigation, with all its accompanying uncertainties and other drawbacks.

Sturm's central goal in the article that provides the centerpiece for this Workshop is to study how one such model for generating voluntary, self-designed processes to achieve institutional change has worked in practice.[21] She presents a case study of the National Science Foundation's ("NSF") ADVANCE initiative, "a foundation-wide effort to increase the participation and advancement of women in academic science and engineering careers."[22] Through NSF funding, ADVANCE supports the efforts of persons and groups located within academic institutions to study and correct problems of underrepresentation of women in the academic sciences. Sturm refers to these strategically located persons and groups as "organizational catalysts"[23] or "change agents."[24] They occupy "pivotal position[s]."[25] Their strategic locations allow them to engage in the difficult tasks of gathering information and motivating various constituencies to address "barriers to women's participation within their own domain."[26] This concept of internal change agents is key to Sturm's model, as I will examine at greater length in Part II.A below.

Sturm highlights the many potential advantages of this model. First, when an institution is willing to take part in self-generated solutions to structural problems, resources that might otherwise have been spent in litigation battles, such as in bickering over discovery requests, can be spent on more productive and cooperative tasks, such as gathering and analyzing useful information.[27] Second, in these conditions, there can be less defensiveness among participants. The institution working on self-reform can provide organizational catalysts with information that may help identify the sources of structural problems and possible solutions to them, trusting that such openness will not be used in ways the institution would perceive to be damaging, such as blaming, public exposure, or other forms of institutional embarrassment.[28] Third, the model generates the buy-in of those participating.[29] Par-

---

establish adequate sexual harassment policies so that victims of sexual harassment do not have to resort to lawsuits for redress of sexual harassment complaints. *Id.*; *see also* Sabel & Simon, *supra* note 7, at 1070–72 (noting that the specter of potential coercion through law offers important motivation to the parties to find solutions through alternative voluntary means).

[21] Sturm, *supra* note 1, at 251 (noting that she chose her case study as a "springboard" for examining a "new paradigm").

[22] *Id.* at 252.

[23] *Id.* at 250.

[24] *Id.* at 249.

[25] *Id.* at 258.

[26] *Id.*

[27] *Id.* at 251 (describing the way in which institutional intermediaries are able to build knowledge by sharing information).

[28] *See id.* (noting greater openness under Sturm's proposed paradigm); *see also* Sturm, *supra* note 3, at 475 (noting that an institutional change process works best if it

ticipants gain an interest in the success of the plans they generate. Self-instituted plans thus offer the hope of much greater and more enthusiastic compliance than do litigation-generated orders imposed from outside.[30]

The voluntary compliance paradigm Sturm describes, which relies on the good faith and cooperative efforts of participants, is emblematic, in my view, of an important zeitgeist shift in the way political activists think about achieving institutional change. It impresses me as startlingly different from the way a prior generation of activists believed they should go about institutional reform.[31] These activists, sometimes influenced by Saul Alinsky's confrontational model for political change,[32] thought organizational change agents should play the roles of gadflies, provocateurs, or angry oppositionists.[33] This older way of thinking about reform advocacy had everything to do with confronting power, shaking things up, demanding recognition, and forcing concessions. Protest was angry, righteous, defiant, and supposedly empowering to those who engaged in it.[34]

Today, in contrast, even activists who self-identify as operating in the community organizing tradition talk about need for "negotiated relationships," "power-sharing," and "new experimentalist approaches to public problem-solving."[35] From many positions on the political spectrum, reformers voice enthusiasm about collaboration models.[36] Indeed, there seems to be virtually no oppositional politics in American legal academia anymore, at least as far as I am aware.[37] To many, even to the formerly confrontational

---

"encourages organizations to identify and correct . . . problems without creating increased exposure to liability").

[29] *See* Sturm, *supra* note 3, at 475 (noting benefits of involving "employees who participate in the day-to-day patterns that produce bias and exclusion").

[30] *See id.* (criticizing rule enforcement approaches, in which rules are "developed externally and imposed unilaterally," and calling instead for "a different process, namely problem solving").

[31] *See* SUSAN D. CARLE, LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE 224, 230–37 (2005) (summarizing and providing leading example of earlier oppositionalist lawyering for social change literature).

[32] *See* SAUL ALINSKY, RULES FOR RADICALS (1971).

[33] *See, e,g.*, Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 42 STAN. L. REV. 581 (1990), *reprinted in* CARLE, LAWYERS' ETHICS, *supra* note 31, at 230, 235–36 (arguing that lawyers should seek to "disrupt" the state's attempt to depoliticize legal cases, to "politicize" local courtrooms, and generally to shake up the status quo through creative, oppositionalist tactics).

[34] *See id.*

[35] Julissa Reynoso, *The Impact of Identity Politics and Public Sector Reform on Organizing and the Practice of Democracy*, 37 COLUM. HUM. RTS. L. REV. 149, 164–66 (2005) (describing new forms of collaborative governance between community organizations and government).

[36] *See, e.g.*, DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003) (left-wing theorists' collection of activists' essays describing a diverse variety of local collaborative governance projects).

[37] In contrast, some legal academics in the 1980s were deeply engaged in thinking about oppositional strategies in academia. *See, e.g.*, Duncan Kennedy, Notes of an Oppo-

old guard, this seems a great relief—a new era of constructive engagement, mutual problem solving, and searching for win-win solutions is upon us.

As a matter of intellectual history, this trend presents a fascinating development. There are probably many reasons accounting for it. One surely must be the influence of post-modernism on American thought.[38] Post-modernism tells us that there is no righteous place to operate outside the power structure.[39] There is no way to confront power, as Alinsky wanted to do, because we are all already always complicit in it, sold out in a thousand ways we do not even recognize. Even the work of radicals such as Derrick Bell argues that all efforts at change simply serve the interests of the ruling class.[40] Radical ideas and movements are immediately co-opted and made to do the business of the dominant ideology.[41] Incremental change merely vents the pressure cooker, serving the interests of those in power by releasing some of the energy underlying the grievances of the oppressed.[42]

This pessimistic view of the prospects for meaningful political change through political activism sheds much doubt on the value of oppositional attempts at institutional reform. If campaigns for winnable victories, which Alinsky advocated as first steps in building movements for more fundamental structural reform,[43] simply serve to further entrench existing power relations, then there seems little reason to engage in such efforts. Many of today's reformers have abandoned grand hopes for fundamental change as the long-term goal of their work. Instead, they have moved toward a model for social change that looks for micro-locations of possibility for minor interruptions or interventions.[44] These may shake established structures loose a bit, but really cannot be expected to achieve much more than that.

---

sitionist in Academic Politics (Dec. 1980) (unpublished manuscript, on file with author) (outlining some tenets for engaging in oppositional politics in academia).

[38] On the influence of post-modernism and post-structuralism on American legal thought, see Susan D. Carle, *Theorizing Agency*, 55 Am. U. L. Rev. 307, 326–40 (2005).

[39] *See id.* at 329–30.

[40] *See, e.g.*, Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980) (presenting thesis that social change occurs only when it serves the interests of those with the most political and social power); David Wilkins, *Class, Not Race in Legal Ethics: Or Why Hierarchy Makes Strange Bedfellows*, 20 Law & Hist. Rev. 147 (2002) (suggesting that white lawyers involved in the early NAACP were motivated by a desire to perpetuate their long-term class interests).

[41] *See* Bell, *supra* note 40, at 532 (noting that civil rights lawyers' "antidefiance strategy" used to prevent the evasion of *Brown* ended up becoming one "aimed at creating a discrimination-free environment," which was ineffective and often "educationally destructive").

[42] *See id.*

[43] *See* Alinsky, *supra* note 32, at 106, 119 (explaining that community organizers should be "built on issues that are specific, immediate, and realizable").

[44] *See, e.g.*, Judith P. Butler, Gender Trouble: Feminism and the Subversion of Identity 147 (1990) (arguing that progressive politics should take place through micro-interventions at the local level). *But see* Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 Law & Soc'y Rev. 697, 719–28 (1992) (criticizing the focus of postmodernist activism on local disruptions that fail to produce sustained, large-scale political change).

Against the backdrop of this zeitgeist, Sturm's work appears particularly refreshing. Sturm believes in the ability of organizational catalysts to make meaningful structural change. She believes that empirical study can produce answers about which methods work to achieve this goal. She comes to the project with her eyes wide open; she is far from naive, but she is not jaded either. Sturm is committed to a methodology that values self-reflection and critique, interdisciplinary collaboration, empirical testing and evaluation, and the creation of structures and processes that remain fluid and do not succumb to rigidity, bureaucratization, or the stifling effects of political conformism.

In short, Sturm's work does much to reinvigorate contemporary legal thought about how to remedy deep and intractable structural problems within institutions in general, and continuing problems of race and sex inequities in particular. But I will argue in this Essay that the model Sturm examines has some drawbacks—as, of course, all paradigms do. The central problem on which I will focus concerns the vagueness of the model with respect to the participation of traditional outsiders who are the supposed beneficiaries of institutional change processes that take place through the efforts of actors operating within institutions.

This vagueness leads to a host of unanswered questions: The central goal of Sturm's project is to make institutions more "open,"[45] but who decides to whom they should be opened, what kind of openness is appropriate, and how to balance openness with other institutional values? How much change is enough? Is greater justice really achieved merely because of changes in the gender of the faces that represent educational institutions, when deeper problems involving these institutions' roles in perpetuating privilege based on economic, race, gender, and other status hierarchies are left unaddressed? Who challenges the unexamined "insider" assumptions of internal change agents? Without the check of scrutiny from the outside, how do institutions test the legitimacy of their self-designed plans? All of these present substantial challenges to the model Sturm examines, and I address some of these challenges here.

I proceed as follows: In Part I, I describe ADVANCE and situate it in the context of the limits imposed by current political conditions. In Part II, I examine Sturm and other Workshop[46] participants' findings related to the key role organizational catalysts play in this model as actors who work from strategic locations within institutions to bring about change through flexible and dynamic internal processes. I then focus in particular on Sturm's discussion of lawyers' potential in such organizational catalyst roles. In Part III, I expand my focus to consider the budding literature that promotes alternative

---

[45] *See, e.g.*, Sturm, *supra* note 1, at 302 n.243 (noting NSF's central mission of making scientific institutions open and inclusive).

[46] Harvard Journal of Law & Gender *Architecture of Inclusion* Faculty Response Workshop (Oct. 20, 2006).

paradigms for lawyers' involvement in such new institutional change processes more generally. Drawing on an extensive legal ethics literature, I query the proper limits to the de-linking of lawyers' work from the representation of the self-articulated interests of actual clients or client groups. Finally, in Part IV, I argue that models for generating structural change through the work of institutional insiders can suffer from a lack of critical reflective analysis about the underlying values and assumptions that are driving change efforts. I tie this discussion to a brief exegesis of Jürgen Habermas's discourse ethics, which argues that all affected interests must participate in deliberative processes if they are to produce legitimate results.

I. Advance in Political Context

As Sturm explains, ADVANCE's legislative authorization derives from a 1980 federal statute, the Science and Engineering Opportunities Act,[47] in which Congress declared it to be in the national interest to insure "the full development and use of the scientific talent and technical skills of men and women, equally, of all ethnic, racial, and economic backgrounds."[48]

Through ADVANCE, NSF offers substantial grants to academic institutions in science and engineering that submit "innovative and comprehensive proposals 'to catalyze change that will transform academic environments in ways that enhance the participation and advancement of women in science.'"[49] NSF also "coordinates and stimulates knowledge sharing about institutional transformation among ADVANCE grantees and their peer institutions," and requires a continual process of self-assessment and further innovation among grantees as a condition for obtaining renewed funding.[50]

To gain a more detailed picture of NSF ADVANCE, I visited NSF's very helpful website. The website's internal search engine yielded 104 grants under the general ADVANCE classification, for about $85 million in total.[51] The majority of this money, about $64 million, went to "institutional transformation" awards.[52] The size of these grants ranged considerably, from ten thousand to almost four million dollars. A total of thirty-three institutions received these awards. The list of such institutions includes some of the nation's top private universities, such as Brown ($660,000), Case Western Reserve ($2.8 million), Columbia ($3.27 million), Cornell ($660,000 million), Duke ($200,000) and Rice ($640,000); publicly funded institutions included ones in Arizona ($650,000), California ($3.5 million), Kansas ($2.8 million); Michigan ($3.9 million), New Mexico ($3.7 million), Washington

[47] 42 U.S.C.A. § 1885(a) (2002).
[48] *Id.*
[49] Sturm, *supra* note 1, at 252 (quoting NSF program solicitation literature).
[50] *Id.*
[51] *See* NSF.gov, NSF Award Search, http://www.nsf.gov/awardsearch/ (type in search term "ADVANCE") (last visited March 22, 2007).
[52] *Id.*

($3.8 million), Wisconsin ($3.8 million), and Virginia ($2.9 million). Cross-checking the list of all 104 institutions receiving ADVANCE awards against an on-line listing of historically black colleges and universities[53] produced only two matches: The University of Maryland Eastern Shore, which received an ADVANCE Institutional Transformation grant of $150,000, and the University of Texas at El Paso, which received the same kind of grant for $2.7 million.[54] Other institutions on the list of those receiving ADVANCE Institutional Transformation awards surely can also be classified as financially disadvantaged schools, such as the University of Puerto Rico, which received an Institutional Transformation grant of $3.1 million. Overall, however, the list of institutions receiving ADVANCE funds does not appear, on its face at least, to be specially targeted toward traditionally underfunded or historically disadvantaged institutions, and in her case study Sturm does not describe this as one of NSF's ADVANCE priorities.

As Sturm's article richly depicts, ADVANCE's program design gives primary responsibility for designing and implementing change to the target institutions receiving funding. These institutions must report to NSF about how they spend the funding they receive, but apparently do not have to meet any specified benchmarks or goals in order to continue to receive funding for their grant periods.[55] In designing ADVANCE to preserve great discretion and flexibility on the part of the institutions being targeted for government intervention, ADVANCE follows an important, well-recognized trend of our times.[56] This trend involves the move away from use of mechanisms located in the public sphere for rule development, assessment, and judgment on matters of compliance, and toward private and quasi-private processes to carry out these important functions, which have traditionally been the responsibility of public government agencies. In the case of ADVANCE, for example, the process of determining what changes should be made to bring targeted institutions in line with public values favoring an end to gender discrimination is left to the targeted institutions themselves.[57] Although political conservatives have long argued for increased reliance on the private sphere to carry out such governance functions, the increasing popularity of new governance models among moderates and political progressives cannot

---

[53] *See* Education On-Line's Listing of Historically Black Colleges and Universities, http://www.edonline.com/cq/hbcu (last visited Mar. 22, 2007).

[54] NSF.gov, *supra* note 51.

[55] That is, at least, my best understanding of how the program works, though it may be that additional information will show more accountability than I currently understand there to be.

[56] *See generally* MARTHA MINOW, PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002). A search on Google Scholar for articles updated in the last year with the term "privatization" in their title returns 384,000 hits. *See* http://www.google.com/search (last visited May 31, 2007).

[57] To be sure, some of the universities receiving ADVANCE funding are publicly funded, but in context this is simply a coincidence. In employment matters these universities are basically acting in the same capacity as their privately funded counterparts.

be argued to stem from any long political tradition. Other explanations must account for this development.

One explanation for the current popularity, even among non-conservatives, of governance models that privatize regulatory functions traditionally located within public agencies surely has to do with the current state of national politics. Although the Democratic sweep of mid-term congressional elections in November 2006 suggests future hope for the Democrats in regaining political control at the national level, the last quarter century has largely represented a period of failure for centrist and moderate Democrats in the national political arena. People of this political orientation, who went to law school hoping to have rewarding careers advancing reform agendas through national politics, have been disappointed. There has been only one Democratic administration, serving two terms, since Jimmy Carter left office in 1980, and that administration was so plagued with scandal and ineffectualness that little was accomplished about which Democrats today can be proud. Before that we had George H.W. Bush, and afterwards George W. Bush, a terrible war, assaults on civil liberties, escalating levels of cynicism about acting on principle in either business or government, multiple mega-corporate wrongdoings such as Enron and Worldcom, and political scandals with connections at the highest points of government. It does not seem as if much progressive policy development will be happening at the level of national government any time soon, even if the Democrats do win the White House in 2008.

Given the current climate, what are lawyers who want a role in influencing public policy to do? If little appears likely to happen through public governmental mechanisms, it makes excellent sense to move one's efforts into the sphere of civil society, especially into the elite arenas from which these lawyer/policymakers emerged in the first place. A social class of politically interested, moderate Democrats still controls many universities, law firms, and other important institutions of civil society. This landscape might motivate members of the social class I describe to take a step I observed in a prior historical research project: they might seek ways to affect policy through the exercise of power outside the realm of public governmental processes.[58] If the courts and legislatures are not going to act according to the moderately progressive political values many members of this social class share, then it makes sense for them to use their private power to circumvent legislatures and courts and accomplish things in other ways.

I studied the operation of this phenomenon in a case study of the very early years of the NAACP, between 1910 and 1920.[59] Then, formal legal ethics laws prohibited many of the creative test case litigation techniques the organization favored. But this minor obstacle of inconvenient law did not

---

[58] *See* Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97 (2002).

[59] *Id.*

deter its national legal committee.[60] That committee, then composed predominantly of white corporate lawyers, simply created its own private interpretation of those laws, which articulated a distinction between public and private interest litigation.[61] This was a distinction the U.S. Supreme Court would not endorse for another fifty years,[62] but it served the NAACP well in early work out of its national headquarters in New York City. In later years, the national organization was strong enough to withstand legal assaults brought on the basis of the legal ethics principles its first national legal committee had earlier ignored.[63]

There is thus ample historical precedent for social change strategies in which actors avoid public governance structures and instead rely on the exertion of social and political power through the institutions of civil society. As is true for all strategies for bringing about social reform, however, there are benefits and drawbacks to relying on such approaches to achieving change. On the one hand, methods for achieving social reform that bypass courts and legislatures can permit the accomplishment of important objectives when avenues for reform through public political processes are blocked. On the other hand, these methods can involve political and social elites' exercise of power largely without public scrutiny, check, or protection. Indeed, I sometimes wonder if a significant part of the enthusiasm about alternative governance techniques among moderate progressives today is related to the opportunity these methods offer to take progressive reform work off the public radar screen in today's rather bleak political landscape.[64]

But enthusiasm about the potential opportunities for progressive policy development that quasi-private governance methods offer in conservative times should not dampen concern about these methods' potential drawbacks—which are, as always, closely related to their advantages. I often wonder whether these new processes will in the end turn out to disappoint. Will the current highly enthusiastic literature sometimes referred to under the label of "new governance"[65] or "democratic experimentalism"[66] end up

---

[60] *Id.*

[61] *Id.* at 138–44.

[62] *See* NAACP v. Button, 371 U.S. 415 (1963) (exempting non-profit civil rights organizations such as the NAACP from legal ethics proscriptions against soliciting clients and fomenting litigation).

[63] *See generally* Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 W. POL. Q. 371, 374 (1959).

[64] *See* Sturm, *supra* note 1, at 259–61 (acknowledging that one consideration in the design of ADVANCE was the avoidance of conservative challenges).

[65] *See* Joel Handler, Orly Lobel, Elizabeth Mertz, Edward Rubin & William Simon, *Roundtable on New Legal Realism, Microanalysis of Institutions, and The New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, 492 (2005) [hereinafter *Roundtable*] (comments of Orly Lobel) (arguing that conventional liberalism's rights-based proceduralism has proved "lacking and limiting").

[66] *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). Democratic experimentalism begins with the observation that conventional proceduralist and rights-based ways of trying to solve complex legal and social problems have in some respects proven woefully ineffec-

having the same dated quality of over-ebullient enthusiasm that the 1970s literature about the potential for public impact reform litigation has when read today?[67] I sometimes fear that too much is being promised by these new techniques, at too vague and general a level, and with too little attention to the weakness inherent in these, as in all, reform strategies. Indeed, Sturm herself shares such concerns.[68] While I am all in favor of many of the progressive political goals new governance advocates endorse, I find myself drawn to voicing some tentative notes of caution. In so doing, I in no way intend to criticize Sturm, either for her powerful theoretical work on new ways to conceive of the role of law in generating positive social change—which has led me to major personal intellectual epiphanies—nor for her fascinating documentation of initiatives that seek to operationalize these new insights. Instead, my intent is to serve in the role of friendly critic, also committed to the objective of advancing the anti-discrimination, fairness, and justice values I believe we both share.

II. Organizational Catalysts: Insider Access and Outsider Perspectives

Sturm's study, and the Workshop addressing it, produced important insights concerning improved methods of bringing about institutional change. The Workshop highlighted many important themes in this respect. The one on which I want to focus, because of its relevance to themes I will explore below, concerns the concept of organizational catalysts.

A. *Who Are Organizational Catalysts Generally and What Do They Do?*

The characteristic features of successful organizational catalysts emerged clearly from Sturm's study and various presentations at the Workshop. Sturm's case study documents the way organizational catalysts work within the context of ADVANCE. They are "individuals with social capital and legitimacy within particular practice domains who operate at the conver-

---

tive, and seeks to resolve some such problems by bringing together "various actors, at the ground level, who create and enforce norms." *Roundtable*, *supra* note 65, at 481. Sturm is not wholly in accord with the positions of leading scholars working in this genre, and declines the democratic experimentalist label. Susan Sturm, Remarks at Harvard Journal of Law & Gender *Architecture of Inclusion* Faculty Response Workshop (Oct. 20, 2006) [hereinafter Sturm Remarks].

[67] *See*, *e.g.*, Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 2 (1979) (presenting, in the most confident terms, the many reasons mandating public, judicially supervised litigation of issues involved in "structural reform" of society and its institutions); *see also* Sturm, *Forms of Justice*, *supra* note 16, at 51 (expressing her great admiration, yet ambivalence, about Fiss's "sweeping historic sense of the judge as oracle of justice" in contrast to her experience as the assistant to a special master in "the actuality of the day-to-day frustrations emerging in the process of cramming a judicially formulated decree down the throats" of the relevant institutional managers).

[68] Sturm Remarks, *supra* note 66.

gence of different domains and levels of activity."[69] They "leverage knowledge, ongoing strategic relationships, and accountability across systems," and "bridge structural holes."[70] In its design ADVANCE seeks to rely on and support the people in these important roles as change agents.[71]

Debra Meyerson's broader study[72] further enriches Sturm's observations. Meyerson's study involved extensive interviews of more than 200 such persons, located in several diverse business organizations, and included supplemental data gathered from scores of additional interviewees, working in a variety of institutional settings, who self-identified as institutional change agents. Meyerson discovered that individuals make change in their workplaces in a wide variety of ways, with varying degrees of commitment and impact. Some "pave alternative roads just by quietly speaking up for their personal truths or by refusing to silence aspects of themselves that make them different from the majority."[73] Others act more deliberately to organize large-scale collective actions.[74] All bring about change through committed and sustained work within the organizations with which they are affiliated.[75]

Frank Dobbin's broad-scale empirical study of private sector employers provides still more important information.[76] Dobbin's work shows, at highly reliable levels of statistical significance, that in private industry the most effective methods for increasing workforce diversity come from the actions of persons located *within* institutions.[77] These persons are affirmative action officers, or, even better, diversity task forces—very much like the action committees Sturm writes about in the context of ADVANCE.[78] Such task forces or committees are effective because their members have been assigned responsibility and are held accountable for making progress on diversity goals.[79] These individuals and groups analyze data, write and monitor action plans, do follow up, revise and improve strategies in light of their experiences and analyses, and account for themselves and their work.[80]

---

[69] Sturm, *supra* note 1, at 324.

[70] *Id.* at 287 & n.191.

[71] *Id.* at 325 ("Public intervention strategies could strengthen this role's use by building the development of organizational catalysts into regulatory design.").

[72] DEBRA E. MEYERSON, TEMPERED RADICALS: HOW EVERYDAY LEADERS INSPIRE CHANGE AT WORK XV (2001) (describing study's methodology).

[73] *Id.* at 5.

[74] *Id.*

[75] *See* Debra Meyerson & Megan Tompkins, *Tempered Radicals as Institutional Change Agents: The Case of Advancing Gender Equity at the University of Michigan,* 30 HARV. J.L. & GENDER 303 (2007).

[76] *See* Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279 (2007).

[77] *Id.* at 291–93.

[78] *See* Sturm, *supra* note 1, at 283–84 (describing composition of the committee that the president of the University of Michigan formed to address gender issues in the sciences and engineering at that university).

[79] Dobbin & Kalev, *supra* note 76, at 283–84.

[80] *Id.*

They make change happen because they have enduring commitments to their institutions and are being held accountable within them for the goals they have been assigned.

The Workshop presentations and accompanying discussion also made clear that such effective organizational catalysts cannot be peripheral players within their institutions. They must have the social and intellectual capital to "mobilize learning and change."[81] One telling discussion at the Workshop concerned the frustration of persons who hold positions devoted to diversity but end up being frozen out of access to the institutional power they need to be effective organizational catalysts. As Sturm succinctly noted, an important conclusion arising from empirical studies such as those of Meyerson and Dobbin is that change processes and associated structures or positions must remain vibrant and flexible. Those involved as organizational catalysts must have multiple avenues of access to power centers and must utilize multiple strategies to motivate change. The procedures employed cannot become bureaucratized or rigid, or they risk losing their capacity for effectiveness.[82]

Equally significantly, Dobbin's study concludes that institutional *outsiders*, such as professional diversity consultants, are not effective organizational catalysts.[83] Sturm's and Meyerson's work explain why: outside diversity consultants lack the status of trusted and long-term insiders required in order for organizational catalysts to play effective roles.[84] In this and in other respects, Dobbin's large-scale study of private industry provides empirical verification for Sturm's and Meyerson's hypotheses: effective change requires committed and well-positioned organizational catalysts who can work from *within* institutions.[85]

Meyerson's and Sturm's work add another important caveat to the insight that effective organizational catalysts are insiders with access to centers of power within their institutions. That caveat is that organizational catalysts cannot be too completely identified with the institution's status quo. If they are, they serve as little more than institutional hacks, who lack the vision or interest to bring about institutional reform. Thus, effective organizational catalysts must have a hybrid status, as both insiders and outsiders. Lani Guinier's Workshop comments crystallized this point. Speaking from long experience with creative institutional change experiments, Guinier highlighted the need for organizational catalysts to retain some elements of outsider status. They must, to borrow Guinier's terminology, bring outsider "communities of accountability" to their work.[86]

---

[81] Sturm, *supra* note 1, at 289 (citing example of prominent male mathematician Mel Hochster's speech about the need to fight against overwhelming gender bias in math and science).

[82] Sturm Remarks, *supra* note 66.

[83] *See* Dobbin & Kalev, *supra* note 76, at 294–95.

[84] Sturm Remarks, *supra* note 66.

[85] *See* Dobbin & Kalev, *supra* note 76, at 291–93.

[86] Lani Guinier, Remarks at Harvard Journal of Law & Gender *Architecture of Inclusion* Faculty Response Workshop (Oct. 20, 2006).

I find this insight from the Workshop particularly significant, because it raises important unanswered questions about new governance models more generally. How is it that outsider perspectives are incorporated in reform processes that depend largely on the participation of institutional insiders? Why should organizational catalysts care about outsider perspectives in the first place, and, if they do or should do so, who should embody these perspectives and how should they be presented in the process? In an institutional reform process that has as its very goal the bringing of former outsiders into institutions—in the case of ADVANCE, for example, bringing into academic sciences persons previously excluded from high status professorial positions—who speaks for those absent from the table? Should it be those few who have managed to make it there? In the case ADVANCE, for example, should the relatively few women who have "made it" within existing institutional configurations speak for those who have not? Will their experiences be comparable to those who are not yet present? Or might there be something significantly different about the experiences of pioneers, as shown by their very ability to find places in inhospitable institutions when others cannot? And how should insiders choose which groups of absent outsiders should be their focus or priority? New collaborative governance paradigms have tended to be vague on this set of questions. ADVANCE serves as a case in point.

B. Lawyers As Organizational Catalysts in Sturm's Study

Many of the themes I have just raised can be illustrated by focusing on the role Sturm identifies for lawyers as agents of institutional change in the context of ADVANCE. Sturm describes lawyers as playing important roles in this regard in her case study,[87] but I found myself left with many unanswered questions about how lawyers should perform such roles.

Sturm discusses in general terms the way in which lawyers can serve as institutional catalysts, change agents, and creative problem solvers.[88] As a legal ethicist, I found this discussion particularly exciting. Sturm's argument is that lawyers should shed their traditional roles as "gatekeepers of legality" and instead serve as "proactive problem solvers who help constitute systems that advance equity within legal boundaries."[89] Sturm compares the roles lawyers played in her case study to the can-do attitude and creative problem-solving functions really good transactional lawyers play. These lawyers adopt a "thinking outside the box" approach. They do not adopt the

---

[87] *See, e.g.*, Sturm, *supra* note 1, at 302 (describing lawyers as "proactive problem solvers who help constitute systems that advance equity within legal boundaries"); *id.* at 311 (describing lawyers' role in NSF in creating ADVANCE); *id.* at 333 (envisioning "lawyers working within organizations to use a capacity-building orientation simultaneously to advance core institutional values and to achieve compliance with the law").

[88] *See id.* at 301, 311, 333.

[89] *Id.* at 302.

crabbed, risk-averse perspective of traditional, litigation-focused lawyers, and are careful not to be unduly cautious in their legal counseling.[90] They do not, for example, insist on the safest alternative, such as more race blindness after *Gratz*.[91]

Instead, the lawyers Sturm studied help design programs with integrity.[92] They "invent relationships."[93] We do not get a great deal of detail about these lawyers; they appear to work in the legal counsel's office for the NSF and at the various universities that have taken part in the ADVANCE initiative. We do see one wonderful example of such creative lawyering in Sturm's article. When the NSF general counsel faces objections about a requirement that women be represented on search committees, he figures out an ingenious solution: the NSF will require that *both* men and women be members of search committees. That, he figures, "will cover most of the human species."[94] This truly is lawyering with humor and creativity.

Sturm proposes that the kinds of lawyering she witnessed in studying ADVANCE "suggest new possibilities, strategies, and locations for lawyers involved in pursuing workplace equity."[95] I wanted to understand far more about where those locations will be. She suggests that "gender and racial justice advocates could play a crucial role in developing the capacity of institutional citizens to participate effectively in these institutional transformation projects."[96] Some forward-looking university general counsel, she reports, "have begun to meet with advocacy organizations to brainstorm about effective strategies for moving forward."[97] But would not—or should not—those interested in pursuing gender and racial justice look to the interests or perspectives of some embodied manifestation of "clients"? At least this is the objection tradition-bound legal ethicists might make. Future work examining the intersection of new institutional change paradigms and lawyering theory must explore these issues concerning "interest representation," as I will discuss further below.

A central issue I wish to flag concerns the absence of outside checks on the processes used to generate institutional change under the ADVANCE model. To be sure, the lawyers serving as institutional counsel Sturm describes in her study do have clients to which they are accountable, namely, the institutions for which they work. And those clients have representatives

---

[90] *Id.* at 311–12.

[91] Gratz v. Bollinger, 539 U.S. 244 (2003) (invalidating race-conscious admission procedures used in University of Michigan undergraduate admissions). *But see* Grutter v. Bollinger, 539 U.S. 306 (2003) (allowing use of more carefully designed race-conscious procedures in the same institution's law school admissions).

[92] Sturm, *supra* note 1, at 311.

[93] *Id.* at 311 n.283 (quoting Maureen Cain, *The Symbol Traders*, *in* LAWYERS IN A POST MODERN WORLD: TRANSLATION AND TRANSGRESSION 15, 32–33 (Maureen Cain & Christine B. Harrington eds., 1994)).

[94] *Id.* at 312.

[95] *Id.* at 331.

[96] *Id.*

[97] *Id.* at 333.

capable of articulating interests and perspectives on behalf of these institutions. Moreover, the NSF is a federal government agency, and it administers ADVANCE pursuant to a legislative mandate, embodied in the Science and Engineering Opportunities Act.[98] But these relationships of accountability appear to provide only very broad parameters to those involved in institutional reform efforts. The NSF's authorizing legislation, for example, provides only very broad direction to the NSF and its counsel, leaving them and the universities receiving ADVANCE grants to choose program designs and priorities. There is, of course, nothing untoward or unusual about that as a matter of administrative law. One may still be led to question, however, the processes through which the NSF has made choices to focus on only some of the equity goals listed in the authorizing legislation. How will the NSF and the institutions receiving ADVANCE funding continue to make and assess these choices among priorities as they proceed?

Sturm acknowledges that there are bound to be plenty of snags and disagreements as ADVANCE goes forward.[99] Nothing in that inevitable fact inherently detracts from the project's merits. Processes will be required to deal with these problems, however, and one wonders how this will occur. For example, some women scientists do not see the obstacles to their success in terms of gender discrimination, a perspective Sturm attributes to "post-feminist consciousness."[100] How is this perspective, whatever its proper label, to be taken into account? In the spirit of candid assessment, Sturm mentions that the most significant downside of ADVANCE has been that increased attention to gender issues has heightened "women's sense of being under scrutiny" and has led to "varying degrees of backlash and resistance."[101] Do the programs' successes outweigh these negative side effects? Who decides this?

As one might expect given the commitment to non-bureaucratic processes she describes, Sturm can foresee future problems based on the high rates of turnover in the ranks of the university leaders who have championed ADVANCE.[102] Who, Sturm asks, will take responsibility for maintaining progress on gender representativeness after the five-year term for ADVANCE funding ends?[103] This problem, of course, is inherent in the very choice to use informal processes in order to avoid bureaucratization. How will it be addressed without setting up structures that embody institutional history and thus resemble bureaucracies?

All of these and other problems will continue to surface as the project moves forward, and will demand that more work be done to figure out both

---

[98] 42 U.S.C.A. § 1885(a) (2002).

[99] Sturm, *supra* note 1, at 263, 286–87 (indicating initial resistance to filing suits along with subsequent backlash to the program's implementation).

[100] *Id.* at 263 n.61.

[101] *Id.* at 287.

[102] *See id.* at 319 (expressing this concern).

[103] *Id.*

how to factor various competing interests and perspectives into the balance, and how lawyers involved in the project should incorporate these interests and perspectives into their work. In the next Part, I turn to these issues as related to rethinking lawyers' roles in the context of new collaborative governance paradigms more generally.

III. The Problem of Unattached Lawyers

The theoretical work of connecting new voluntaristic paradigms for institutional reform with lawyering theory has barely begun. Sturm's article does not take on this task as one of its central goals, but her work illuminates interesting issues along these lines nonetheless.

As discussed above, Sturm suggests that lawyers may play significant and creative roles in representing institutions undergoing change. Sturm's case study thus helpfully points toward many interesting questions about how lawyers may play such roles, especially vis-à-vis the many competing interests and perspectives at stake in the process. On these questions, a growing literature related to the collaborative governance movement is beginning to propose some interesting lines of analysis. That literature draws from a smorgasbord of ideas, including classical pragmatism,[104] postmodernism,[105] and the alternative dispute resolution movement, along with its related literature emphasizing alternative visions of lawyering roles as creative problem solvers and neutral mediators.[106] This lawyering literature frequently invokes the Brandeisian "lawyer for the situation" vision of lawyers.[107] On that vision, lawyers should adopt a more independent, justice-seeking stance vis-à-vis their clients' interests, rather than following the traditional model which emphasizes lawyers' client-centered, zealous advocacy role.[108]

---

[104] *See, e.g.*, Dorf & Sabel, *supra* note 66, at 268 (noting that democratic experimentalism relies "on ideas associated with early-twentieth-century American pragmatism"); *id.* at 284–86 (exploring in further detail the links between the ideas of Dewey and classical pragmatism and contemporary democratic experimentalist movement); *Roundtable*, *supra* note 65, at 501 (comments of William Simon) (discussing new governance regimes as adopting in part "a pragmatist or 'Dewey' perspective, based on experimentation in context").

[105] These new movements' borrowing from postmodernism is reflected in the emphasis on local, contingent sites of political action and on the deconstruction of the public/private distinction. *See, e.g.*, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 Minn. L. Rev. 342, 381–85 (2004) (discussing these tenets of the new governance movement).

[106] *See, e.g.*, Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 Nev. L.J. 347, 349–50 (2004–2005) (discussing visions of the lawyer's role as neutral problem solver in the context of democratic experimentalist models).

[107] For an excellent summary of this literature, see Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 Yale L.J. 1445, 1472–77 (1996).

[108] *See, e.g.*, Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,* 85 Yale L.J. 1060 (1976) (presenting a classical statement of the traditional zealous advocacy representation model).

Bill Simon, one of the leading thinkers in this new genre as well as a legal ethics expert, has engaged in much work focused on revisioning lawyers' roles along these lines.[109] As he has pointed out, new models for problem solving call for new thinking about the roles and ethics orientations of lawyers as problem solvers and client representatives. Simon characterizes the lawyering stance suggested by what he calls "legal pragmatism," in contrast to "legal liberalism," as involving, *inter alia*: an emphasis on problem solving rather than adjudicating claims of rights; forward looking rather than backward looking perspectives; and a focus on mainstream citizens with an ability to participate actively and exert agency freely, as opposed to marginalized persons who may be too damaged to engage in active involvement in the political process.[110]

Note that there are two aspects to Simon's and others' revisioning of lawyers' role in new governance processes. One involves freeing lawyers from their traditional, cautious, litigation-wary stance so that they can become more creative problem solvers. The second involves freeing lawyers from the traditional dictates of client-centeredness, in other words, uncoupling lawyers' work from the interests or perspectives of particular clients. These two points often seem to go together in new governance theorists' thinking. Bill Simon's work, for example, displays simultaneous enthusiasm for democratic experimentalism and a distaste for client-centeredness.[111] Another example is the extensive literature lauding Louis Brandeis's model of lawyering as serving as the "lawyer for the situation."[112] But the two ideas—creative problem solving, on the one hand, and detachment from clients, on the other—do not necessarily have to go together.[113]

Increasing lawyer creativity and problem solving for clients, along the lines of what good transactional lawyers already do, undoubtedly seems like a good idea. I have more ambivalence—though not outright hostility—toward the call for decoupling lawyers' work from the perspectives of clients. Recent scholarship has convinced me of the need for rethinking the traditional coupling of the lawyer's role with the narrowly defined interests of a

---

[109] William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 Wm. & Mary L. Rev. 127, 127 (2004) (comparing new conceptions of public interest lawyering that "seek[ ] to institutionalize the Pragmatist vision of democratic governance as learning and experimentation" with traditional "Legal Liberalism").

[110] *Id.* at 175–77.

[111] *See, e.g.*, William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. Miami L. Rev. 1099, 1103–14 (1994) (criticizing clinical and poverty law scholars for client-centered lawyering theory).

[112] *See* Spillenger, *supra* note 107, at 1472–77 (summarizing this literature).

[113] The literature on so-called rebellious lawyering, for example, simultaneously promotes creative, out of the box thinking *and* attachment to a strongly client-centered lawyering orientation. *See, e.g.*, Susan Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35 Hofstra L. Rev. 117, 131–32 (2007) (classifying rebellious lawyering as a client-centered approach).

particular client or client group.[114] As Susan Bennett's recent article discussing new models for lawyering in the context of community development persuades, clients are surely entitled to hire lawyers charged with the task of searching for areas of common benefit among them.[115] Lawyers need not restrict themselves to advancing the interests of their particular client, narrowly defined, if that is not what their client wants them to do. The underlying model here is again that of the lawyer for the transaction, which sophisticated business clients already use and appreciate. There is no reason why organizations serving poor clients should not be entitled to the benefits of that model as well.

In short, I am in part convinced by the scholarly effort to rethink lawyers' roles in the new zeitgeist of a collaborative governance society. But it seems to me that lawyers must at least remain committed to the general values and interests of their client *class*, i.e., the group of clients they generally represent, lest they simply end up substituting their own attitudes for those of the clients they are supposed to be representing. Moreover, it seems to me, the lawyer should consult with someone from the class whose interests are affected by the lawyer's work in order to obtain an accurate understanding of what these interests and perspectives are. Lawyers may not simply impute interests to client classes without such consultative outreach, lest we return to the old "lawyer knows best" models that legal ethicists have toiled so hard to displace.[116]

It thus seems to me that the literature on lawyering that is developing as part of new governance scholarship should take heed of the lessons learned from the many decades of literature that followed Derrick Bell's important article, *Serving Two Masters*.[117] The conclusion this literature reached is that, in the public interest law context at least, attention to a client's perspective serves an important disciplinary function, especially for lawyers engaged in broad-scale institutional reform.[118] Without such an attachment to the self-articulated perspective of a client class, lawyers can simply become free-agent, public interest reform entrepreneurs, working to implement values that have not been sufficiently scrutinized from multiple perspectives.

Applied to the context of ADVANCE, the problem I see is this: somewhere in the process, someone or some group must ask the question of what

---

[114] *See, e.g.*, Susan D. Bennett, *Creating a Client Consortium: Building Social Capital, Bridging Structural Holes*, 13 CLINICAL L. REV. 67 (2006).

[115] *Id.*

[116] *See, e.g.*, Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 562 (1990) (arguing against this lawyering model).

[117] Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (arguing that public interest lawyers for the NAACP sometimes pursued their commitment to the abstract goal of school integration at the expense of the self-articulated desires of the particular client groups they represented).

[118] For a list of further texts on public interest lawyering, see CARLE, LAWYERS' ETHICS, *supra* note 31, at 391–92.

underlying objectives the program is trying to achieve and why it is committed to those goals. It is not enough to say we want more "equality"[119] or "fairness,"[120] because these are enormously complex and contested concepts. The process of change requires interrogation of these concepts, and the more different perspectives and critical attention they receive the better. And that, as we learned at the Workshop, needs to come not only from a process within the institution, but from those accountable to outsider communities as well. This kind of critical scrutiny identifies and tests unexamined value assumptions that may or may not have legitimacy. I address this set of issues in Part IV below.

IV. The Problem of Unexamined Values

As Sturm explains, ADVANCE's general goals are to: increase "workplace equality,"[121] "integrate workplaces,"[122] "mainstream[ ] diversity as a value,"[123] and "create . . . conditions for full institutional citizenship."[124] Sturm does not provide further operational definitions for these terms. Many of us have a good general sense of what she is talking about, however, because we endorse similar values. Indeed, many members of the centrist liberal elite, especially in universities, regard the promotion of more women in high prestige jobs as a highly important social policy goal. But this value is not, needless to say, shared by all. One group unlikely to share Sturm's enthusiasm about ADVANCE is conservatives. But others, including those on the left rather than the right, might similarly find the implicit value assumptions that drive the NSF's diversity initiatives problematic.[125]

A. *Critiques Based On the Problem of Perpetuating Insider Values*

The ADVANCE model can be subject to several critiques on grounds that it fails to go far enough in uncovering the structural causes of institutional unfairness. One such critique, drawn in general terms from certain multi-culturalism critiques, questions whether changing the gender composition of science faculties amounts to much more than putting an even less penetrable veneer of equality on the face of a system that retains fundamen-

---

[119] *See, e.g.*, Sturm, *supra* note 1, at 324, 331, 334 (invoking this term).

[120] *See id.* at 302, 308, 311 (invoking concepts of fair and unfair processes and structures).

[121] *Id.* at 249.

[122] *Id.* at 248.

[123] *Id.* at 252.

[124] *Id.* at 261.

[125] Here I am not arguing that ADVANCE projects operate without substantive meanings being generated around all of these terms. Such shared meanings will of course develop within institutions as organizational players work on ADVANCE-funded initiatives. What I am questioning is how the insider assumptions embedded in those self-generated meanings will be exposed to outside scrutiny and critique.

tal structural unfairness. Walter Benn Michaels and others have made a variety of arguments along these lines.[126] Is the current preoccupation with "diversity" among academic institutions mere window dressing that has pernicious effects in masking far deeper problems of structural inequalities in society? Is a focus on the social identities of faces that occupy privileged positions in academia primarily a question of aesthetics? We want to see female as well as male faces represented among the ranks of academic scientists. But is this because we like academic institutions to project a certain look, involving the pleasing symbolic representation of a multicultural world?[127] And is that preoccupation disguising deeper structural problems, such as lack of job mobility for women in academic settings overall; or the way race and sex combine to create structural barriers for black women in the sciences, as Evelynn Hammonds discussed;[128] or the fact that the questions being asked and the populations being studied in science are still focused on males, as Londa Schiebinger suggested?[129] And, least explored of all, does a focus on gender diversity mask growing inequalities and roadblocks to the penetration of elite hierarchies based on powerful but often unmentioned factors such as social and economic class?[130] In raising these

---

[126] *See, e.g.*, WALTER BENN MICHAELS, THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY (2006) (arguing that American institutions' overwhelming concern about increasing cultural diversity has served to mask increasing problems of class and wealth disparity, especially as perpetuated through access to elite institutions of higher education); *see also* RICHARD T. FORD, RACIAL CULTURE: A CRITIQUE ch. 3–4 (2005) (presenting a critique of multiculturalism and arguing that the sole concern of antidiscrimination law should be caste discrimination); JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION (2002) (arguing that current race-conscious paradigms have moved national policy too far away from the fundamental concern of protecting victims of ongoing discrimination rooted in the legacy of American slavery).

[127] Research presented at the Harvard Journal of Law & Gender Architecture of Inclusion Faculty Response Workshop provides further indirect empirical support for this theory. *See* Richard R.W. Brooks & Valerie Purdie-Vaughns, *The Supermodular Architecture of Inclusion*, 30 Harv. J.L. & Gender 379 (2007). Brooks and Purdie-Vaughns found that experimental subjects asked to make decisions on job candidates as part of the process of selecting a *group* of new hires included more minority candidates than they did when they were asked to make hiring decisions on a person-by-person basis. *Id* at 384. Moreover, very specific kinds of candidates symbolically represented diversity in the group. Thus, African-American candidates benefited when group hiring decisions were made, but concerns about representing diversity in group hires did not extend to the benefit of Latinos. *Id.* at 386.

[128] Evelynn Hammonds, Senior Vice Provost for Faculty Development and Diversity at Harvard University, Remarks at Harvard Journal of Law & Gender *Architecture of Inclusion* Faculty Response Workshop (Oct. 20, 2006).

[129] Londa Schiebinger, *Getting More Women into Science: Knowledge Issues*, 30 HARV. J.L. & GENDER 365 (2007).

[130] Critiques that prioritize socioeconomic class as the key variable in perpetuating inequality and structural unfairness in American society clearly go too far, in my opinion, if they deny the continuing existence of subordination on the axes of race and gender in American society. In other words, to the extent that they argue for the abolition of attention to race and gender in seeking to remedy what Sturm refers to as structural inequality, they appear to me unhelpful and off the mark. But they do offer a helpful intervention to the extent that they urge mindfulness to the extremely salient, but seemingly collectively

questions, I by no means intend to suggest that ADVANCE should be condemned on any of these grounds. I mean them simply as questions, which ADVANCE, like any social change initiative, should and undoubtedly will address.

A second potential critique derives from critiques of "governance feminism."[131] Janet Halley and others have questioned the way in which the feminist rise to power and influence in quasi-government settings has led feminists to engage in their own kind of interest group politics, with sometimes insufficient reflection about the uses and consequences of their power.[132] Halley et al.'s recent article in this Journal focuses primarily on the role of governance feminism in international law, but some similar questions could be raised in analyzing ADVANCE through the lens of the governance feminism critique. ADVANCE could be argued to stand as an example of governance feminism in the domestic context. Although governance feminism operates somewhat differently here than in the overseas contexts Halley et al. examine, in which they criticize its preference for top-down, state-centered approaches,[133] the general critique might still be applicable insofar as it calls on feminists to reflect on the ways in which they employ the political power they possess. Such a critique might call for deeper scrutiny of ADVANCE's objectives, consideration of the limits of its legitimacy, and concern for balancing the interests of those disadvantaged in the process. Again one wonders, in a process driven by insiders, how will these crucial aspects of reflective analysis come about?

There are a number of features of the design of ADVANCE that catch the eye from this analytic angle. One is the way that the NSF has chosen to prioritize among the multiple areas of concern about problems of underrepresentation in the sciences that are listed in the Science and Engineering Equal Opportunities Act.[134] That legislation contained a many-fold mandate,

---

repressed, variable of economic inequality in producing deeply problematic structural forces in our society. And, as my own work urges, such mindfulness should extend to an examination of the pernicious effects of rigid status hierarchies that presuppose and rank people's worth on dimensions such as professional and academic status. *See, e.g.*, Susan D. Carle, *Re-valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719 (2001) (analyzing the relationships between and pernicious effects of academic and professional hierarchies that devalue legal work performed for modest income, individual clients).

[131] *See* Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006).

[132] *Id.* at 335–36.

[133] *Id.* at 385 (noting international governance feminism's preference for state-focused, top-down, prohibitory methods of regulation of sex crimes—ADVANCE does not share this characteristic, being instead focused on consensus-based, quasi-private negotiated solutions, as discussed *supra* in Part I).

[134] 42 U.S.C.A. § 1885(a) (2002); *see also id.* at (b), stating:

> The Congress declares it is the policy of the United States to encourage men and women, equally, of all ethnic, racial, and economic backgrounds to acquire skills

declaring it in the national interest to "insure the full development and use of the scientific and engineering talents of *men and women, equally, of all ethnic, racial and economic backgrounds, including persons with disabilities*."[135] One thus might see in it a mandate for analyzing how socioeconomic background, among other factors, affects access to top jobs in the sciences and engineering. Had the NSF interpreted its diversity mandate that way, it might have developed quite different goals and methods for achieving them.

This is not to argue that the NSF's choice to focus on gender was illegitimate. It is to point out that choices about program priorities reveal important, sometimes unexamined, value assumptions. One such value assumption involves decisions about what kinds of structural unfairness are most important to remedy and what kinds can have less priority. Those choices may or may not produce more overall "fairness" or more utilization of talent or merit, as called for by the legislation that authorized NSF to implement ADVANCE. In part, assessing those questions depends on how one defines fairness or efficient utilization of the nation's science talent. In all events, these are value-laden choices, which lie in the hands of those granted the power to make those decisions.

Moreover, the assessment of the fairness or structural dysfunction of academic institutions, in the sciences or elsewhere, may be strongly affected by the location within the prestige hierarchy of those doing the assessing. To take but one example of this phenomenon, members of elite institutions assume that their rankings are reflections of merit, but sometimes those affiliated with less elite institutions—"outsiders" on this score—are highly aware of the often arbitrary selection mechanisms and/or life decision issues that divide the elite from the non-elite. Perhaps a program that sought to dismantle the differential career opportunity ladder that separates scientists who begin careers at elite versus non-elite institutions would have interestingly different effects. Sturm reports that an important impetus related to ADVANCE involved the president of MIT convening a meeting of representatives from "eight major research universities" to discuss women in academic science and engineering.[136] But this targeting of elite institutions to analyze the problem may shape the analysis from the outset because of the complex ways in which status hierarchies and gender, race, and other variables intersect. For example, one might wonder: Are more women located in professorial positions in less elite schools in the sciences, as is true in law schools? Within elite institutions, are more women concentrated in less elite positions, as is also true in legal education? And, if so, might not an impor-

---

in science and mathematics, to have equal opportunity in education, training, and employment in scientific and technical fields, and thereby to promote scientific literacy and the full use of the human resources of the Nation.

[135] *Id.* (emphasis added).

[136] Sturm, *supra* note 1, at 283.

tant means of moving forward on gender parity in the academic sciences involve a more fundamental critique of the underlying hierarchies constructed among and within institutions along these axes of professional prestige?

Similarly, what would a program that included attention to socioeconomic background look like? There is a great deal of literature documenting the unsurprising correlation between the socioeconomic class of a student's parents and the likelihood that she will attend a more elite institution of higher education.[137] An initiative that cared about diminishing the effects of socioeconomic class on the production of top academic scientists might seek to dismantle the gigantic divide between the economic and career opportunities offered to those who start their educational and/or professional careers at non-elite academic institutions. Such an alternative design might do better at addressing the differential opportunities created by socioeconomic background in the academic sciences. It might even produce better scientists in the end, consistent with the enabling legislation's goal of achieving "the full use of the human resources of the Nation."[138] Finally, it might also lead to or require change in institutional culture in ways that would have positive externalities in other respects, including in the successful absorption of outsiders generally.

But it is not *necessarily* the case that enhancing diversity with respect to one aspect of social identity will lead to an institution becoming more inclusive overall. Sturm argues that ADVANCE's focus on gender disparities will help highlight and ameliorate other forms of "unfairness or institutional dysfunction."[139] But while highlighting gender disparities *might* illuminate other forms of institutional unfairness, this is not necessarily or obviously so. Indeed, it can plausibly be argued, as do the critics of multiculturalism already discussed, that change toward more diversity, without more, simply helps to insulate institutions from more fundamental challenges to the way they perpetuate privilege and produce illegitimate hierarchies through unexamined features of their organizational structures.[140]

Indeed, this is a point that pioneering activists focused on making institutions more inclusive on race and gender lines have long made.[141] Increasing diversity in only superficial respects does not inherently produce deeper

---

[137] For example, Walter Michaels reports that 75% of Harvard undergraduate students come from families with incomes over $100,000 per year, while only 20% of American families overall have incomes that high. MICHAELS, *supra* note 126, at 86. Of the 146 colleges ranked as "selective," only 3% of students come from the lowest socioeconomic quarter of American families, while 74% come from the highest. *Id.* at 95.

[138] 42 U.S.C.A. § 1885(b) (2002).

[139] Sturm, *supra* note 1, at 302.

[140] MICHAELS, *supra* note 126, at 7 (arguing that Americans' preoccupation with diversity masks an unwillingness to address fundamental problems of inequality based on socioeconomic class).

[141] *See, e.g.*, LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 125 (2002) (noting that granting a few members of traditionally excluded groups "insider access" may function simply to

changes at a structural level. Diversity is an important indicator of institutional fairness, but it is by no means the whole game.[142]

NSF's own experience with ADVANCE illustrates the lesson that attention to one aspect of diversity does not necessarily lead to more inclusive institutions overall. As we learned at the Workshop, NSF's initial program design choice to focus on gender, and to leave race for other programs, reflected value and policy choices with significant repercussions. Evelynn Hammonds gave an excellent, empirically based example in her Workshop presentation.[143] Hammonds hypothesized that NSF's initial foregrounding of gender at the expense of race was having the effect of "disappearing" black women from academic sciences.[144] NSF at first turned down requests that it disaggregate the data it was keeping on gender to show race as well, because the data for women of color could not be analyzed to produce statistically significant results. One might think that the dearth of sufficient women of color in these data cells *was* the telling point, but at the time NSF apparently thought differently. Hammonds, therefore, laboriously hand-collected this data by conducting her own independent survey of participating institutions. Her labor showed that black women were in fact "disappearing;" in other words, ADVANCE's assistance to women in obtaining placements in the academic sciences and engineering was not redounding to the benefit of persons who were *both* female and black.[145] Thus Hammonds, demonstrating another example consistent with Sturm and Meyerson's theory of institutional change, served as an institutional change agent. Both an insider and an outsider, accountable to and based in multiple communities as a scientist and a woman of color, Hammonds brought to light the kind of data important in understanding and improving on the change process.

In sum, the fact that NSF initially chose to concentrate exclusively on gender in ADVANCE, leaving race to other programs, may be an example of the tendency of quasi-private negotiated solutions to concentrate on institutional changes that will benefit those already at the table. ADVANCE challenges the gender mix among the faces represented in high prestige jobs in the academic sciences, but may not address the underlying hierarchies that create such vast divides in career opportunities, which may be the result of structural burdens on any number of dimensions, including not only gender, but also race, socioeconomic privilege, disability, and the growing phenomenon of hyper-elitism. These burdens present additional factors warranting simultaneous analysis in seeking to understand the enormously complex issues raised when considering how to achieve more "fairness" in the ways

---

suggest that "existing forms of hierarchy are acceptable and merely need to be inclusive of a more diverse group of participants").

[142] *Id.* at 11–12 (noting that racial justice is important and signals a need for more systematic critique of social institutions).

[143] Hammonds Remarks, *supra* note 128.

[144] *Id.*

[145] *Id.*

that institutions operate. The problem is to determine how to go about such evaluative processes, and here I believe we must return to the underlying problem of representative participation.

B. The Need for Participation Reinforcement

As I have attempted to examine from various angles in this Essay, a key point requiring emphasis in assessing whether models for institutional reform such as ADVANCE will work involves the question of participatory inclusiveness. The importance of this question is likewise clear in the literature that has emerged from the new collaborative governance movement: there is a need for meaningful participation by all affected interests in such governance processes if they are to produce results that can be claimed to be "legitimate."[146] Addressing questions of how to provide for such considerations—of how to avoid processes becoming a mere sham in which all affected interests are ostensibly taken into account, but the insiders and their already vested interests in the end win out once again—will involve a difficult and long-term scholarly endeavor that will take much collective thought. That project may be aided theoretically by the work of a contemporary theo-

---

[146] *See, e.g.*, Lobel, *supra* note 105, at 458–65 (emphasizing the importance of accounting for power as a "central normative challenge" within the new governance movement); *see also Roundtable*, *supra* note 65, at 500–03 (comments of William Simon) (noting the importance in thinking about new governance techniques of fusing pragmatic—Deweyian—and power-regarding—Foucauldian—perspectives, "because it is an aspiration of most of these systems to incorporate a self-critical assessment of the kind that would take account of the power disparities, the alienation, the unrecognized subordination that is emphasized in the Foucauldian approach"); *see also id.* at 509 (comments of Orly Lobel) (describing an aspect of the new governance movement as an attempt to think more formally about the relationship between public and private and the inseparability of these two realms, and to "think about how power operates in all of these different dimensions" and then ask "what do we have to do to encourage participation by all parties" affected by lawmaking on particular issues). Simon and Sabel have also explored from a democratic experimentalism perspective the reasons why negotiated remedies between the parties in institutional impact litigation work. They observe that such litigation has a positive destabilizing effect on public institutions that have ceased to meet their public obligations, which can serve to shift "the balance of power between plaintiff and defendant," give plaintiffs power they previously lacked to force change and attention from defendant institutions, and create pressure for defendants to deal with the previously unheard interests of plaintiff classes. *See* Sabel & Simon, *supra* note 7, at 1077; *see also id.* at 1100–01 ("In stigmatizing the status quo, the court's intervention opens the defendant institution up to participation of previously marginalized stakeholders").

Critics of the new governance and experimentalism movements, and its ancestor or cousin, the alternative dispute resolution movement, likewise have raised the problem of large power imbalances as an important challenge to the expectations as to what can be accomplished through consensus based-methods for resolving legal disputes and/or developing new regulatory regimes. For classic statements of this critique, see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1548 (1991); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359, 1360–61.

rist of discourse ethics, Jürgen Habermas, whose central concerns seem very much in keeping with collaborate governance models.[147]

Consistent with much contemporary social theory, Habermas understands normative claims to always be embedded in a social world.[148] Habermas's theory of universalization posits that enduring acceptance of a norm depends on whether, in a given context or tradition, reasons for obedience to the norm can be mobilized that suffice to make its claim to validity seem justified in the eyes of those affected.[149] Drawing in part on Kant, Habermas asserts that norms are valid to the extent that they can meet with the qualified assent of all who are or might be affected by them.[150] But unlike Kant or Rawls, both of whom argue that moral principles meeting this condition can be found through rational analysis alone, Habermas asserts that the validation of norms as meeting this condition can only occur through the actual active participation of those affected in a process of achieving consensus. Actual participation in consensus-building processes "prevents others from perspectivally distorting one's own interests," subjects "the descriptive terms in which each individual perceives his interests" to "criticism by others," ensures that "needs and wants are interpreted in light of cultural values," and gives "participants the knowledge that they have collectively become convinced of something."[151]

Habermas's theory of discourse ethics has interesting notes of resonance with the consensual decision-making processes the collaborative governance theorists envision as the ideal for new dispute resolution and norm-building processes. But Habermas's theory raises the question of how all affected interests—including those of outsiders—will be represented in models that depend on internal institutional mechanisms for change. In this respect Habermas's principles for argumentative speech may offer a useful guide.

Habermas writes that for argumentative speech to be valid, it must approximate "the structures of a speech situation immune to repression and inequality."[152] Habermas proceeds to endorse certain rules of discourse for such situations, including, *inter alia*, that "all external or internal coercion other than the force of the better argument" be ruled out, that everyone be allowed "to express attitudes, desires and needs," and that no speaker be

---

[147] Special thanks to Vincent Chiao (Philosophy Ph.D., Northwestern Univ., 2006; J.D. Harvard Law School, 2008), for help on this portion of this Essay.

[148] *See* Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification, in* MORAL DISCOURSE AND PRACTICE: SOME PHILOSOPHICAL APPROACHES 287 (Steven Darwall, Allan Gibbard & Peter Railton eds., 1997). My discussion here draws primarily from this essay, but also from JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., Beacon Books 1987) (1981).

[149] *Id.*

[150] Habermas, *Discourse Ethics*, *supra* note 148, at 289.

[151] *Id.* at 292.

[152] *Id.* at 295.

"prevented by internal or external coercion from exercising his rights."[153] It is, indeed, Habermas argues, a contradiction in terms to claim that a norm is valid "to the extent persons are excluded from the discussion by silencing them or foisting our interpretation on them."[154] Finally, Habermas suggests, "institutional measures are needed to sufficiently neutralize empirical limitations and avoidable internal and external interference so that . . . idealized conditions . . . presupposed by participants . . . can . . . be adequately approximated."[155]

Habermas's claims also raise interesting questions about how to envision the role of lawyers in fora designed to achieve consensual agreement on law-type norms or resolution of disputes. Such fora should seek to approximate ideal conditions for argumentative speech in Habermasian terms. One of those conditions requires ameliorating power imbalances that render parties unable to participate fully or to express themselves adequately, and it follows that institutions should be developed to address such problems. Might new models for legal representation be among these? Might lawyers play special roles in applying the dialogic methods of probing for clients' perspectives and interests that client-centered clinical legal scholars have developed?[156] Might lawyers adopt ethical norms that help promote such a representation-enforcing role that serves to ameliorate power imbalance problems and ensure more meaningful participation by those without other outside sources of power?[157]

Most interesting of all, how will new governance initiatives ensure participation in institutional change processes of the people affected—be they individuals, groups or organizations reflecting the interests of those not represented within institutions pursuing self reform? If the validity of new governance processes depends on soliciting the voices and perspectives of all, might then lawyers' roles in such processes include bringing to the table and helping to articulate the perspectives of interested persons? And, if so, might there need to be lawyers who directly represent groups or interests other than the NSF and/or the universities, qua institutions? Again, we are back at the question of how to construct broadly participatory processes for internally generated institutional reform initiatives, and what lawyers' roles, both in constructing and in carrying out such processes, might or should be.

Conclusion

Sturm argues that further strides toward making institutions more inclusive depend on the self-reflective analysis and commitment to change of

---

[153] *Id.* at 295–96.
[154] *Id.* at 296.
[155] *Id.* at 297.
[156] *See, e.g.*, Dinerstein, *supra* note 116.
[157] *See* Carle, *supra* note 113 (testing such a proposal).

institutional insiders located in key positions from which they can serve as organizational catalysts.[158] This is an enormously interesting proposition, because at this historical juncture, judicial orders and legislative fiat do not appear to provide promising mechanisms for the eradication of persisting forms of institutional "unfairness."[159] Nor will outside expertise accomplish this goal. Instead, people have to want to change the organizations of which they are a part. Processes need to be developed that will generate such buy-in and allow institutional insiders to design effective solutions tailored to particular circumstances. But attempts to make organizations more inclusive through internally generated processes run into the problem that the people already at the table do not represent those who have been excluded. Outside communities of accountability thus must also figure into the change process. The case study Sturm presents appears to have gone part but not all of the way in resolving this difficulty. Further efforts in this direction will require evaluating how to set up mechanisms for the representation of affected interests and perspectives, along with further theorizing about how lawyers' roles can be adapted to fulfill these ends. Sturm's work offers an exciting and rich start in grappling with some of these issues, and we can only welcome more of it, which undoubtedly will continue to push forward into this important unplowed territory.

---

[158] Sturm, *supra* note 1, at 324.
[159] *Id.* at 302.