Constructing the Practices of Accoutability and Professionalism: A Comment on In The Interests of Justice

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CONSTRUCTING THE PRACTICES OF ACCOUNTABILITY AND PROFESSIONALISM: A COMMENT ON *IN THE INTERESTS OF JUSTICE*

*Susan Sturm**

In the Interests of Justice: Reforming the Legal Profession lives up to its ambitious title. Deborah Rhode comprehensively surveys the structural problems confronting the legal profession, from its subscription to the "sporting theory of justice" to its preoccupation with profit. The book also lays bare the failure of legal education and the professional regulatory system to confront the roots of these structural problems.[1]

I must confess that reading the book felt like a whirlwind tour of the legal profession's inevitable problems. In part, this perception grew out of the sheer range of economic, institutional, and structural factors contributing to the problems surveyed and the reforms prescribed. The book also left me with some burning questions: What would trigger or support a sustained movement in the direction Rhode urges? What would align the capacities and incentives of the varying professional, regulatory, and non-governmental actors to mobilize change? Who are those actors? Where are the convergences of catalysts among them that might lead to unlikely alliances and creative problem solving? How might the range of governmental, nongovernmental, and professional regulatory organizations be linked to provide an architecture for tiered (and effective) regulation? How could such a system provide incentives and build capacity to engage in good practice, as well as provide effective sanctions to discourage serious abuse?[2]

What *In the Interests of Justice* did not set out to do was to provide a compelling theory of institutional and professional change. Indeed, Rhode's account can be seen as a devastating account of organizational and professional stasis, with the prevailing norms, incentives, information, and power operating to undermine or defuse

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reform efforts.[3] Particularly when I attempt to imagine the process of professional transformation at the global and comprehensive level, fundamental structural change toward Rhode's social justice vision seems almost utopian.

My response to the enormity of the problems Rhode canvassed was to imagine a more context-specific analysis and reform agenda. The prospect of achieving professional reform took on more realism when I shifted my gaze from the global level to that of particular domains with interrelated problems and actors.   Lawyers operate in institutional contexts and communities of practice: organizations, specialty areas, industries, professional roles. What if we took a problem oriented approach to these practice domains?

Such an approach means first identifying a constellation of problems that are sufficiently linked in function and practice so that they operate interdependently and can be usefully addressed together. It then entails what I call a "structural approach" to the problem of lawyers' roles. What is (and should be) lawyers' roles in addressing these types of problems? What are the problems with their current practices in that domain? Why are those roles problematic? What are the dynamics, operating both within the lawyers' work setting and within the surrounding regulatory and social context, that sustain this counterproductive conduct? Who are the constituencies affected by the problematic practices? How could these dysfunctional patterns be made visible to potential change agents with power and incentives to mobilize change? What are the occasions that enable the convergence and collaboration of these catalysts for change?

This problem-oriented approach both narrows (to particular practice domains, such as repeat players addressing problems of workplace equity, families, or criminal justice) and broadens (to other professional actors and constituencies who interact with lawyers within those practice domains) the scope of the inquiry. It redefines the accountability inquiry to include identifying the range of stakeholders affected by, interested in, or responsible for shaping lawyers' roles. This inquiry links professionalism and accountability issues to a broader analysis of the practice patterns and incentive structures shaping lawyers' conduct within these contexts. It proceeds from the convergence of conditions, incentives, and relationships that might enable structural change.   It also identifies strategic opportunities to leverage change, as well as characteristics of the actors who are in a position to take advantage of those strategic opportunities. It would connect the project of reforming the legal

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3. For an account of organizational stasis in a narrower institutional context, namely that of prison reform, see Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. Pa. L. Rev. 805 (1990).

profession with the project of enabling lawyers to adapt to changing conditions and changing regulatory environments.

This approach to reforming the legal profession operates at the intersection of converging problems, constituencies, and conversations. It focuses not only on correcting the worst abuses, but also on locating and building out from the spaces where creative, innovative practices are emerging. In fact, this approach would require systematic attention to the relationship between regulatory efforts aimed at sanctioning abuse and regulatory efforts aimed at encouraging innovation. Mediating actors—individuals and organizations in a position to translate across established boundaries—could play an important role as catalysts and capacity builders for such initiatives.

Several recent articles illustrate this structural approach to both understanding and reforming the legal profession within particular practice domains. *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis,*[4] by David B. Wilkins and G. Mitu Gulati, effectively challenges conventional understandings of the racial dynamics in corporate firms. It first shows the inadequacy of prevailing accounts of underparticipation of African Americans which cite racism in decision making or lower qualifications of blacks in the pool. It situates the question of racial participation and advancement in a broader institutional analysis of hiring and promotion. The article then offers a trenchant analysis of law firm hiring and promotion practices that shows how the tournament system of promotion combines with informal work practices, cognitive biases that steer blacks away from interactions crucial to success, and an overabundance of talent in the pool from which partners are drawn, to systematically undermine advancement of African Americans in law firms. This analysis reveals the futility of reform efforts that do not connect racial and gender equity to basic governance issues within large firms. It also demonstrates the connection between racial exclusion and more general patterns of dysfunction in firms' hiring, training, and promotion practices. Reading the article with an eye toward change, one can identify potential leverage points at which the incentives of multiple constituencies line up. These areas of convergence offer promising locations for mobilizing change.[5]

The Overproduction of Death,[6] by James S. Liebman, offers another example of a structural approach that locates lawyers' problematic conduct within a deep and careful institutional and political analysis. Liebman exposes lawyers' roles in a systemic dynamic that predictably produces errors in the allocation of the death penalty. He examines

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4. 84 Cal. L. Rev. 496 (1996).
5. *See id.*
6. 100 Colum. L. Rev. 2030 (2000).

the incentives for police, prosecutors, and judges to generate as many death penalty verdicts as they can, as well as the strategic choices and resource constraints that lead anti-death penalty lawyers to unwittingly collude in the overproduction of death. He demonstrates that many current reform proposals will fail because they do not take this systemic and structural dynamic into account. His proposed solutions aim to interrupt the institutional and political dynamic that induces lawyers to abdicate their professional responsibilities. They focus on reshaping the incentives that inform lawyers' conduct and on expanding the occasions for transparent and accountable decisionmaking so that a new dynamic can develop.[7]

Deborah Rhode's work on class actions provides a third example of the type of institutional analysis that paves the way for strategic and effective professional reform.[8] This article examines the overlapping and conflicting interests of class members in institutional reform litigation. It then maps how current judicial standards, economic arrangements, and alignments of interest discourage lawyers from identifying and responding to these complex and contradictory interests. Her reform proposals strive to reshape incentives and opportunities for transparency so that participation and accountability can be achieved without sacrificing the benefits of the class action mechanism.[9]

These scholarly projects put forward normative goals for professionalism that are sufficiently concrete to guide reform initiatives. They also provide a theory of institutional dysfunction and change, informed by a thick description of the institutional dynamics and the leverage points for shifting those dynamics. Another promising line of scholarship investigates earlier professional reform initiatives that successfully transformed domains of practice to illuminate the strategies and circumstances that disrupted the powerful dynamics preserving the status quo. For example, current day reformers can learn from the strategies and circumstances that produced clinical education and legal services.[10] These are large scale reform efforts that, although certainly flawed, are widely regarded as transforming the legal profession for the better.

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7. *See id.*

8. Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183 (1982).

9. *See id.*

10. Gary Bellow described "an ad hoc group of lawyers working at a variety of federal agencies that orchestrated a set of conferences, speeches, alliances, meetings, and intra-agency agreements that led to the establishment of the federal legal services program under the Office of Economic Opportunity." Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 Harv. C.R.-C.L. L. Rev. 297, 298 (1996) (citing Earl Johnson Jr., Justice and Reform: The Formative Years of the American Legal Services Program (1978)).

It is also worthwhile to consider innovation on a smaller scale, particularly as a way to locate the energy for mobilizing professional reform. For example, what led to the adoption of experimental sections at Harvard Law School and Georgetown Law Center that take a problem oriented approach, and link theory and practice even in the first year curriculum? How have these innovations fared? If they have succeeded, what sustained them? If they foundered, what happened? My experience suggests that successful change often emerges from mobilization by faculty, students, administrators, and practitioners who have intersecting interests and critiques. It often succeeds when the research and teaching interests of faculty overlap with curricular innovation. Bringing these diverse perspectives together often produces unexpected innovation in the form and content of pedagogy. This comes in part from identifying the germs of innovation at the individual level, revealing patterns in innovative practice across group fields, pooling ideas and resources to build the capacity to sustain these efforts, and then developing the organizational infrastructure to enable them to succeed and others to join. The effort to respond produces a set of shared interests, programmatic initiatives, and quite possibly, institutional transformation.

Two examples from my own experience come to mind to illustrate this problem-oriented, institutional approach. Both involve my own efforts at the level of the classroom to reform the curriculum in law schools. The first took place at University of Pennsylvania Law School, where I co-taught a seminar with Lani Guinier called "Critical Perspectives on the Law: Race and Gender." For seven years when we were on the faculty at the University of Pennsylvania Law School, Lani and I participated in a collaborative project of building a multi-racial learning community in a law school classroom.[11] The structure, format, and methods of the seminar enabled an extraordinarily open, engaged, and exciting dynamic to develop within a law school environment that typically is surprisingly resistant to and silencing of open discussion of race and gender. Over time, we witnessed and actively attempted to foster the development of a site for experimentation, learning, and problem solving around issues of social justice and social change.

We were inspired by the students' excitement, creativity, and experimentalism to think critically about the seminar experience. We undertook to identify what encouraged this unusual creativity and connection among the participants, what worked and what didn't, and how our experience might be useful to others interested in pursuing

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11. Lani Guinier has continued teaching the seminar at Harvard Law School. I have taught variations of the seminar at Columbia, and have used and witnessed many of the seminar techniques in a project with the New Haven Police Training Academy.

multi-racial collaboration in classrooms, communities, and workplaces. In 1996 we made a videotape called *Racetalk: Collaboration Through Conversation*,[12] which documents the ways in which the seminar built trust, engaged with difficult but important issues, enabled constructive conflict, and transformed both individuals and the group to enable effective problem solving. We are in the process of writing a handbook which updates our experience since we left Penn and provides more specific information for those seeking to experiment within their own formats with building multi-racial learning communities.

The second example builds on the lessons learned from co-teaching with Lani and applies those lessons to the area of workplace equity. I wanted to take the format of critical perspectives and harness it to a series of problems that were driving my intellectual project. This interest intersected with the work of a group of academics at Columbia Law School, who have begun experimenting with new forms of teaching that are problem-oriented, interdisciplinary, collaborative, and grounded in inquiry about practice. This move to problem solving emerged from different but interrelated critiques of current practice and legal education.[13]

I am currently the beneficiary of a form of this institutional innovation and support. I am teaching a year-long, theory/practice research seminar called "The Theory and Practice of Workplace Equity," in collaboration with the Center for Gender in Organizations. This year-long, theory/practice research seminar examines cutting edge developments in the regulation of workplace discrimination. This field is currently in a state of flux, posing new challenges that affect our understanding of the law's role in addressing discrimination. These challenges include more complex and interactive forms of workplace bias, more subtle and complex legal theories of employment discrimination, and new ways of addressing problems of bias within the workplace setting. These changes have also shifted the center of gravity for elaborating legal norms to include non-judicial actors, such as in-house counsel, employee advocacy groups, mediators, human resource professionals, and insurers. These developments have prompted changes in the role of lawyers and legal organizations representing both management and employee interests.

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12. Videotape of Race Talk: Collaboration Through Conversation, Seminar on Critical Perspectives on the Law: Issues of Race and Gender, held at the University of Pennsylvania (Nov. 29, 1995) (on file with author).

13. *See* Susan Sturm, *From Gladiators to Problem Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 Duke J. Gender L. & Pol'y. 119 (1997). One set of concerns focuses on women and people of color. Another focuses on the inadequacy of the prevailing model of legal professionalism. A third questions the values and goals of the legal educational mission. All three are part of Deborah Rhode's critique.

This seminar involves students in identifying and evaluating these emerging patterns. During the first semester, students investigate these issues by reading case law, secondary materials, and case studies, as well as by hearing from practitioners and policymakers who address these developments as part of their daily work. Innovative practitioners, including plaintiffs' counsel, in-house lawyers, employee advocates, human resource professionals, and managers participate in selected sessions. Their participation serves several purposes. It enables students to ground their inquiry in the concerns facing innovative practitioners and generates ideas for field research. The seminar also provides the occasion to develop a network of reflective practitioners interested in linking their efforts to the development of theory, and in turn, using academic inquiry to develop new frameworks for their own practice. These sessions offer the opportunity to experiment with creative approaches to pedagogy that introduce modes of inquiry that students will use in the field research, such as interviewing and focus group research. These methods are also a way of developing the analytical framework and skills that will be needed to function as a problem solver in practice.

In the second semester, students conduct field research in sites that have attempted (or are currently involved in efforts) to address issues of workplace bias, and on the role of various legal actors in facilitating (or impeding) these initiatives. The seminar prepares students to conduct, and then to critically assess field research on workplace equity, and to consider the implications of their findings for the future of employment discrimination regulation.

This problem oriented approach could be applied more generally to the project of thinking about the question of lawyer's roles in the context of workplace equity. Professional reform in this approach would proceed by beginning with a structural analysis that locates lawyers' roles in a broader set of developments concerning the nature of workplace bias, the structure of organizations, and the regulatory environment. These developments pose important challenges for scholars and practitioners interested in the law's role in public problem solving. What are the features and practices that characterize these emerging forms of practice? How do they vary depending on the context and problem? What criteria should we use to evaluate their efficacy? What skills and analytical tools are needed to perform these roles effectively? How do these practices relate to the practice traditions and narratives that have come to define how we think about lawyers' roles? What legitimates (and distinguishes) lawyers' roles in these collaborative, problem solving initiatives? How can lawyers and other social actors be held accountable for their work in these dynamic, experimental projects? More precisely, can we develop systems of accountability that preserve the dynamic, structural character so crucial to these emerging forms of legal practice? What

are the pitfalls and problems with the current organization of the provision of legal services? How do those problems contribute to the possibility of both serious professional misconduct and professional dysfunction that impedes effective problem solving?

These are crucial questions that cannot be answered adequately in the abstract or through across-the-board theory divorced from the range of contexts and problems in which lawyers participate.[14] They both connect to and go beyond the question of lawyer abuses. At least at this stage of knowledge, it seems crucial that the method of constructing theories of practice and accountability mirror the method of problem solving practice itself. Theory develops and is in turn revised through critical engagement with the practices themselves.

I have not yet undertaken this kind of systemic, structural analysis of the legal, organizational, and political actors involved in shaping lawyers' roles, incentives, and practices within the context of workplace equity. The inchoate idea is that there are professional associations, configurations of actors (some of them adversaries), mediating organizations, governmental agencies, advocacy organizations, and research groups, among others, that interact regularly with lawyers involved in workplace equity issues. Conducting a stakeholder and problem analysis within a context of sustained relationships and interaction would be a crucial first step in understanding the possibilities that exist within this configuration of relationships for developing systems of accountability, shifting incentives, and reforming the professional culture.

Occasions for critical reflection could, for example, be built into the structure and process of the lawyer's involvement. They could routinely gather information about their role, their effectiveness, client satisfaction, etc. at regular intervals. They could create their own intermediary institutions to share examples, pool information, and create a community of practice among practitioners facing similar challenges. They could track patterns in their own cases and initiatives, and build in a regular process of revising their practices in light of problems revealed. They could create regular opportunities for other stakeholders and similarly situated lawyers to assess and question their decisions and strategies in the context of a class of cases that seem related in important ways. The knowledge and capacity generated by these forms of accountability may be linked to clear benefits to the quality (and marketability) of lawyers' work.

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14. *See* Gary L. Blasi, *What's a Theory For? Notes on Reconstructing Poverty Law Scholarship*, 48 U. Miami L. Rev. 1063 (1994); John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 Fordham L. Rev. 1927 (1999); William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 Cornell L. Rev. 1447 (1992) (discussing how lawyers' power varies with the context of law, the kind of client, and the relationships developed).

These thoughts are extremely preliminary. They are intended to carry through the insight of the emerging forms of problem-solving practice; through critical reflection and reframing of problems and potential allies, informed by data about practices evaluated in relation to continually redefined norms, new forms of accountability and efficacy can emerge. If these reflective practices provide for meaningful participation by affected parties and principled elaboration of decisions made, they can also legitimate the inevitable exercise of power by lawyers and others who participate in conflict resolution, problem solving, and institutional innovation.

Notes & Observations