CONFLICT RESOLUTION AND SYSTEMIC CHANGE

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ABSTRACT

Over the last thirty years, alternative dispute resolution has become a fixture of the conflict resolution landscape. Its ascendency has provoked a scholarly and public policy debate structured around the presumed tension between rule of law values and informal dispute resolution, between public principle and private remediation. This article documents an unexplored form of conflict resolution that begins by attending to individual cases, but proceeds through a critical methodology to produce systemic interventions advancing public values. In so doing, this informal process realizes rule of law principles. This approach invites rethinking the field of conflict resolution.

Our analysis shows that, contrary to the assumptions underlying the scholarly and practitioner debate, individual conflict resolution can produce systemic change and, in the process, generate institutional practices advancing public values and addressing issues of common concern. We document a conflict resolution process that both resolves individual, private disputes and generates systemic solutions and public norms. The key is to link, without merging, individual conflict resolution and systemic intervention. These linkages are structural (through the position of an institutional intermediary within a norm community), substantive (by defining norms that invite accountable deliberation about their meaning in different contexts), and methodological (through critical reframing, root cause inquiry and pattern analysis). Linking individual and systemic conflict resolution, when structured to assure accountability and independence, enhances the capacity to produce successful individual outcomes and systemic improvements. We identify the process features that produce this linkage, and consider the implications of this analysis for the design of informal conflict resolution systems as well as for adjudication. Through examples, we show that conflict resolution programs with these features have developed within the court system and administrative agencies, as well as in new institutions operating within organizations or service delivery systems. Finally, this approach prompts a reconceptualization, or at least an expanded understanding, of core rule-of-law values, such as impartiality, principled decision making, generalizability, and accountability. This analysis offers a way to broaden and deepen the discussion of law’s relationship to the promotion of public values.
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INTRODUCTION

Over the last thirty years, alternative dispute resolution has grown into a fixture of the conflict resolution landscape. Its ascendancy has provoked a scholarly and public policy debate. Up until now, this debate has been structured around the presumed tension between rule of law values and informal dispute resolution. It is framed as a choice between public principle and private remediation. In this article, we document an unexplored form of conflict resolution that begins by attending to individual cases, but proceeds through a critical methodology to produce systemic interventions advancing public values. In so doing, this informal process realizes rule of law principles. This approach, not contemplated by existing frameworks, invites rethinking the field of conflict resolution.

It is important to begin by understanding the terms of the debate. Critics challenge informal conflict resolution as being inherently private (and thus unable to generate or advance public knowledge or values), individualistic (and thus unable to address systemic or structural problems), non-normative (and thus focused on maintaining peace and restoring order), unaccountable (and thus at risk of biased decision making, power abuses and arbitrariness), and managerial (and thus ultimately undemocratic and preserving of bureaucratic authority). They worry that the use of mediation and negotiation to generate consensual solutions to public conflicts compromises public values. The critique resonates with the underlying view that alternative dispute resolution isn’t law-like enough to generate legitimate, transparent, and accountable public norms.
ADR proponents respond by arguing that the world is more complex than the critics acknowledge, and that ADR serves many important public values that formal adjudication cannot.\(^8\) ADR proponents criticize adjudication as inhumane, wasteful, inefficient, and unfair.\(^9\) They accuse ADR critics of “litigation romanticism”, which encourages over-estimations of litigation’s efficacy and fairness.\(^10\) They extol the values served by ADR, which include party participation (thus increasing the perceived legitimacy and fairness of the processes),\(^11\) privacy (thus encouraging information-sharing and allowing problems involving sensitive issues to be addressed), efficiency (by reducing the costs associated with conflict resolution) and efficacy (by crafting solutions reflecting parties’ interests and needs).\(^12\) According to this view, ADR’s capacity to solve parties’ problems justifies any departure from rule-of-law values.\(^13\)

Both sides tend to frame the conflict resolution debate as a choice between alternative values and systems.\(^14\) Conflict resolution is either informal or formal, problem-solving or norm-generating, private or public, individual or systemic, consensual or principled, transparent or confidential.\(^15\) The design of conflict resolution systems reflects these assumed oppositions. Individual and systemic processes are often segregated, with formal and informal systems designed according to different logics. Formal systems are designed to meet rule-of-law requirements through adversary process.\(^16\) Often, conflict resolution conducted outside the court system is designed to mimic aspects of adjudication, as a way to maximize their legitimacy. Rule-of-law values are equated with formal due process and thus treated as irrelevant, indeed antithetical, to consensual conflict

\(^8\) Carrie Menkel-Meadow, Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases) 83 GEO. L.J. 2663 (1995).
\(^12\) Menkel-Meadow, supra.
\(^13\) See Silbey and Sarat, supra note , at 440-45 (synthesizing arguments and constituencies promoting ADR). The debate even surfaces in the language used to frame the new category. Alternative dispute resolution has been criticized as too narrow, because the word “dispute” marginalizes interventions based on conflicts or problems that have not been framed as disputes or claims. Proponents of non-adversary conflict resolution also reject the “alternative” label because it treats adjudication as the baseline, rather than thinking about conflict resolution as an integrated or comprehensive system. For purposes of this article, we use the term “informal conflict resolution”.
\(^14\) Indeed, the terminology defines informal conflict resolution as an alternative to litigation.
\(^15\) Other scholars have noted this tendency. See, e.g., Menkel-Meadow, supra, note (Whose Dispute); Luban, supra note .
\(^16\) For a recent discussion of the relationship between due process jurisprudence and rule of law values, see Nan D. Hunter, Managed Process, Due Care: Structures of Accountability in Health Care, 6 YALE J. HEALTH POL’Y L & ETHICS 93 (2006).
resolution. For this reason, ADR critics have been particularly wary of conflict resolution systems operating within organizations, expressing concerns about their impartiality and their capacity to pursue values other than managerial efficiency or litigation avoidance. Informal processes, operating both within the court system and elsewhere, are designed to maximize other values, such as party satisfaction and efficiency. Systemic concerns are often sacrificed or hived off from individual conflict resolution.

This article undertakes to reframe the conflict resolution debate. The current framework discourages the much-needed search for ways to realize the values animating both sides. It locks in overly narrow assumptions about the relationship between conflict resolution and rule-of-law principles. It lumps together all informal conflict resolution, and fails to provide the analytic categories needed to evaluate the legitimacy and adequacy of different forms. Conflict resolution does not fit neatly into the conventional dichotomies that have governed the debate. Our analysis shows that non-adjudicative conflict resolution can transcend these dichotomies; it can both resolve individual, private disputes and generate systemic solutions and public norms. This is achieved by explicitly and carefully linking (but not merging) individual and systemic conflict resolution. These linkages are structural (through the position of an institutional intermediary within a norm community), substantive (by defining norms that invite accountable deliberation about their meaning in different contexts), and methodological (through critical reframing, root cause inquiry and pattern analysis). They enhance the legitimacy and efficacy of individual casework and systemic intervention. They enable non-adjudicative conflict resolution to advance rule-of-law values of public norm elaboration, principled decision making, impartiality, and accountability. They also breathe new meaning into these values. Applying these rule-of-law values within informal conflict resolution provides a basis for evaluating the applicability of informal norms to formal adjudication. Conceived in this manner, conflict resolution then fulfills what we argue is a crucial function of law, namely to develop the capacity to address issues of public concern through institutional design.

Our approach for developing our “jurisprudence” of conflict resolution is drawn from reflective practice research, which mirrors the forms of inquiry and accountability that are emerging in conflict resolution practice. This work is based on a conflict resolution practice that is actively striving to connect individual conflict resolution to systemic change, and in a manner that is legitimate and accountable. We occupy different positions in relation to this study. Susan Sturm was invited into the Center for Cooperative Resolution/Office

18 See supra note .
20 The Vanishing Trial.
of the Ombudsman ("CCR") at the National Institutes of Health ("NIH") by Howard Gadlin, the Director and Ombudsman. CCR is a comprehensive conflict resolution program located within NIH, an agency of the federal government within the Department of Health and Human Services. From its inception, the office has explored the degree to which it could address systemic issues, and still remain true to the ombudsman's responsibility to address discrete conflicts. CCR defined its work in a way that challenged the dichotomies framing the conflict resolution debate. Working with CCR afforded the opportunity to study a group of practitioners who were attempting to use conflict resolution to fairly and effectively address individuals' needs and relationships, while simultaneously developing knowledge about and occasions to intervene at a more systemic level. CCR’s work involved various ways of advancing public values—including creating opportunities to make explicit, question, and articulate shared norms; developing second order norms or processes to address recurring problems; creating protocols that help scientists create fair and workable governance structures for their collaborations; and using training, facilitation, and retreats to incorporate these norms and processes into daily practice.

After determining that we shared a set of questions and conceptual frameworks, we decided to work together in an effort to deepen understanding of the relationship of conflict resolution to systemic change. Our goals were to help develop a vocabulary and methodology for identifying and addressing systemic issues and their relationship to conflict resolution, and to determine how to maintain the tension between the case level and the systemic level. CCR was looking for frameworks to integrate and reconcile the different levels of its practice. We were interested in developing strategies for moving from the individual to the systemic and back.

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

The Article proceeds in five parts. Section I sets the stage for our approach to thinking about these issues with an overview of CCR and its place within the field. It also offers a conceptual framework and a language for interrogating the relationship between individual and systemic work, and describes the research methodology for this study. Section II develops a matrix to

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21 As part of their monthly Journal Club meeting, at which the staff discusses articles relevant to their work, CCR read Susan’s article on Second Generation Employment Discrimination, which introduced the idea of conflict resolution as a means of systemic problem solving. Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 Colum. L. Rev. 458 (2001). Howard then came to Susan’s class at Columbia Law School on the Theory and Practice of Workplace Equity, and there Howard faced a series of questions about the ways he was or was not addressing structural issues in his role. This prompted Howard to bring these questions back to the staff, and they invited Susan to work with them.
map the dynamic relationship between individual and systemic analysis and intervention, and then applies that framework to particular examples. Drawing on case analyses, it illustrates the interdependence of individual and systemic work, the methodologies used to link them, and the resulting synergies.

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

I. SETTING THE STAGE FOR EXPLORING CONFLICT RESOLUTION AND SYSTEMIC CHANGE

This section provides an orientation to CCR’s work, its place in the larger conflict resolution arena, and the methodology we have used to investigate, analyze, and write about its work.

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

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

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

The center addresses “every sort of issue that arises in the NIH environment: scientific disputes, employer-supervisor conflicts, racial and ethnic tensions and difficulties between peers.” The staff handles individual, interpersonal conflicts, multi-party, group, and organizational concerns. They perform these functions through an array of techniques, including coaching, facilitation, consultation, shuttle diplomacy, peer panels, training, presentations and systems design. The office is specifically charged with responsibility for “receiving and inquiring into workplace disputes brought to the Ombudsman by any NIH staff member, initiating independent inquiries, identifying and analyzing systemic issues that foster workplace disputes, and making recommendations to the appropriate responsible agency official(s) for changes in policies and procedures.” The ombudsmen also participate *ex officio* on key committees addressing issues relevant to their work, such as the Ethics Committee and various policy committees. They offer a range of services not limited to individual conflict resolution. CCR is primed to think more systematically about the relationship between individual and systemic issues and problems, and its role in mediating between the two levels.

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

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


26 In this important respect, the logic behind CCR differs from Integrated Conflict Management Systems, which are designed to manage conflict to minimize costs and maximize productivity. See pp. , infra.
CCR is not the only conflict resolution program operating at NIH. There is an EEO office that processes discrimination complaints, a human resources grievance procedure, a program to help handle situations in which there might be a threat of violence, and an employee assistance program providing counseling and referrals for personal, family, or job-related problem that could interfere with job performance or conduct.27

A key feature of CCR is its deliberate design as an interdisciplinary collaboration.28 The office includes: (1) Howard Gadlin, the Ombudsman, a former tenured professor of experimental psychology professor and university ombudsman;29 (2) The Deputy Ombudsman, who has a masters degree in Public Administration and a certificate in organizational development,30 and (3) three associate ombudsman, including an associate ombudsman with a counseling and psychology background and a PhD in counseling psychology, another with a law degree and a PhD in English literature and poetry, and a junior ombudsman with experience in a biomedical research laboratory and a recent law degree. The office is also somewhat demographically diverse, by age, race, and gender.

The office has undertaken a self-conscious effort to reflect about the systemic dimensions of its work. This is in part built into its mission. Like many ombuds offices, CCR is charged with helping the agency address systemic issues that arise in the context of their conflict resolution work.31 The office has undertaken to integrate systemic approaches into the fabric of its individual casework. This commitment came out of its ongoing reflective practice work. The entire staff meets every Thursday to reflect about ombuds’ interventions. Case review is an ongoing form of critical evaluation, in an atmosphere where acknowledging uncertainty about one’s actions is acceptable and identifying mistakes is seen as a step toward improving effectiveness.32 They also have a “staff huddle” every Monday morning to serve as a check-in, so everyone will have an idea of what work is being done in the office. They periodically write reports to the whole organization, which summarize their activities and focus attention on recurring problems and systemic issues. They have previously worked intensively with a researcher using a reflective practice methodology inspired by Donald Schon’s work to increase their understanding of conflict

28 “Diversity of backgrounds was crucial to Howard in putting together the office. He wanted to put together an ensemble of different people who could still work together.” Interview, 2-28-02 at 4.
29 Gadlin served as ombudsman while he was on the faculty at University of Massachusetts, Amhurst, and then worked as an ombudsman at UCLA before coming to NIH to create the Office of the Ombudsman.
30 Doris was hired because Howard was looking for someone who could do another of things, not only intervene but do training and program development. Campos-Infantino interview March 20, 2002.
32 The process of critically evaluating cases that pose problems was inspired by the model of Morbidity and Mortality rounds in medicine, Interview, 2-28-02 at 4. See Atul Gawande, When Doctors Make Mistakes, The New Yorker, Feb. 1, 1999.
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dynamics and effective interventions.\textsuperscript{33} This model “enables them to talk easily about mistakes and successes in a safe way.”\textsuperscript{34} CCR employs a version of root cause analysis as its overarching methodology. In part, this involves a process of reframing. The initial stance at the beginning of a case is one of inquiry: a careful, back-and-forth process of identifying the source of the problem. Experience suggested that many problems operated on multiple levels; one of the strengths that Howard Gadlin brought to the office was the skill of reframing issues in new terms, and moving back and forth between the individual/personal, and the systemic/organizational.\textsuperscript{35} The ombuds officers have come to approach their cases through a process of discovery. They attempt to identify the issues that are at the center of a conflict. They do this by asking why a certain problem exists, and why that state of affairs in fact constitutes a problem. They then try to engage the appropriate actors in addressing the conflict or problem, either in the context of the particular dispute or at a more institutional level. CCR is thus an independent, interdisciplinary ombuds office that combines case work and systemic intervention.

B. The Conflict Resolution Landscape

It may be helpful to place CCR in the broader landscape of conflict resolution approaches. CCR is constituted as an ombuds office, with the essential characteristics of that role: independence, impartiality in conducting inquiries and investigations, and confidentiality.\textsuperscript{36} Ombuds offices have become common place in universities, corporations, and federal, state and local government.\textsuperscript{37} “All ombudsmen give voice to people who might otherwise be disadvantaged in their dealings with the management and bureaucracy of the institution within which the ombudsman functions.”\textsuperscript{38} Ombuds offices typically combine individual conflict resolution with some responsibility for identifying complaint patterns and trends and providing “upward feedback” to the organizational leadership about systemic problems. The offices vary widely, however, in their structure and methodology, including in how they combine their individual and systemic work.\textsuperscript{39} Many ombuds offices are set up to focus their interventions on resolving individual

\textsuperscript{34} Id. at 2.
\textsuperscript{35} 2-6-02. at 5-6.
\textsuperscript{36} American Bar Association Standards for the Establishment and Operation of Ombuds Offices, Preamble (hereinafter “ABA Standards”).
\textsuperscript{38} Howard Gadlin, The Many, Different, and Complex Roles Played by Ombudsmen in Dispute Resolution, 16 NEGOTIATION J. 37-48 (2000)
\textsuperscript{39} Id.; ABA Standards, \textit{supra} note .
cases. They report to management about systemic problems, based on an analysis of patterns from their casework. Many ombuds offices segregate their individual and systemic work, and do not become involved in systemic work beyond providing that upward feedback. In contrast, CCR’s methodology uses root cause analysis, critical reframing and a systemic lens in all of its work.

CCR’s work also connects in important respects to mediation. Mediation is both a methodology and a system. As a methodology, it involves a third party who assists disputants in finding a solution of their own. CCR uses mediation as one method for resolving conflicts, particularly in situations where a case is not amenable to systemic intervention. Mediation is also a system or program: it provides disputants with a mediator who will attempt to help them resolve their dispute. Mediation systems are the most common form of alternative dispute resolution. Mediation programs are designed to provide a voluntary and participatory process for addressing disputes. Typically, their methodologies, roles and relationships are geared toward reaching successful outcomes in particular cases. Success is often evaluated in terms of prompt resolution, party satisfaction, improvement of the disputants’ relationship over time, and cost-effectiveness. Each case is resolved on its own terms, detached from the organizational or systemic dynamics implicated by the individual case. The preference, in fact, is to use outside mediators who have no ongoing relationship with the organization or knowledge of the particular context and will thus provide a “neutral” perspective. These conflict resolution systems are not explicitly designed to connect resolving individual cases with identifying and addressing systemic concerns or problems. Unless systemic issues are the subject of the dispute between the parties to a mediation, they remain off the table and are taken as constraints within which the mediation proceeds.

On the surface, CCR integration of individual and systemic conflict resolution sounds similar to another relatively new approach to workplace conflict, called Integrated Conflict Management Systems (“ICMS”). The core idea of ICMS is “to apply the techniques and sensibility of interest-based negotiation to the identification, prevention, management, and resolution of conflict within organizations.” ICMS employs a “coordinated set of easily accessible organizational mechanisms to identify conflict in its earliest stages,
manage it carefully to prevent escalation, and to resolve it efficiently in order to maintain positive workplace relations. 47

Several crucial differences exist in ICMS’ logic and structure as compared to programs like CCR. ICMS are often management driven, and precipitated by concerns about litigation reduction. 48 The logic of ICMS is both more segregated and more integrated in its connection of individual problems and systemic issues. The system provides comprehensive services, but by different offices that are largely segregated in their function. Individual conflicts could be resolved by a mediation office, an open door policy, a grievance procedure, or an ombudsman resolving individual conflicts. Systemic problems would be the responsibility of management. Crucially, all of these separate processes are then integrated into a unitary system overseen by management and committed to the goals of conflict prevention and improved productivity. This is contrasted with the logic behind CCR’s approach, which is explored in greater detail below.

Like informal conflict resolution, adjudication can occur in contexts with repeat players involved with recurring problems, particularly adjudication done by administrative agencies with responsibility for a particular activity or problem. Yet, administrative agencies also tend to separate their adjudicative activities from their preventive and standard-setting work. They too proceed on the assumption that cases are either private or public, individual or systemic, conflict resolving or norm generating etc. Administrative case processing tends to be separated from problem identification and system reform. 49 The Equal Employment Opportunity Commission, for example, segregates its case processing functions from its “technical assistance,” policy making, prevention and training functions. Internal EEO offices that handle formal discrimination claims within bureaucracies are often set up much the same way: they process individual discrimination cases, but do not track patterns or revealing recurring patterns. Individual cases are analyzed only in terms of their impact and implications on the formal parties. Some administrative agencies have adopted an approach that resembles CCR’s in its effort to link individual case work and systemic redesign, particularly in the areas of education and child welfare. 50

Finally, CCR bears some resemblance to new institutional intermediaries that have emerged outside the organizational setting to address problems affecting particular communities or subject areas, both in domestic and in international settings. For example, conflict resolution programs have been developed to address conflicts with insurance companies in managed care systems. 51 In the international arena, Joanne Scott has described a collaborative process within the World Trade Organization for addressing conflicts and developing standards for

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48 See LIPSKY, supra note.
50 These programs are discussed in greater depth as part of the Section developing the features permitting legitimate and effective conflict resolution. See pp., infra.
51 See Hunter, supra note.
food safety among member organizations. That process bears much resemblance to the logic and methodology used by CCR. The features of this approach linking individual problems and systemic change will be developed more fully below.

C. Our Research Methodology

We began by collectively establishing a set of goals for our work, which included developing a vocabulary to analyze the relationship between discrete and systemic problems, as well as deepening the understanding of how and under what circumstances conflict resolution could produce systemic change. We then had a series of meetings during which Susan asked the ombuds to identify current issues or cases they saw as structural, and then to work through how they learned about those problems, what type of information informed their understanding of the problem over time, what led them to view those problems as structural or systemic, what they did to address those problems, and how they assessed their intervention. She also asked them to contrast those cases with those they identified as non-structural. Over time, we collaboratively developed a structural intervention log, which was used to varying degrees by the staff to track the cases that they identified as structural or systemic. Susan and her students also interviewed the ombuds individually about their work. Over a period of about a year, we observed and recorded 40 Thursday case review sessions. We also participated in three retreats, two of which also included Ken Kressel, a conflict resolution scholar who was doing reflective practice work with the Center.

Our approach enabled us to combine traditional interview investigation with reflective analysis to develop a conceptual framework to understand and evaluate systemic work. We moved back and forth between the collective sense-making and observations of how people actually described their cases to each other and to an interviewer. Over time, the nature of the reflection and the language began to coalesce into working frameworks for analyzing their problem identification, analysis, and intervention activities.

Several constraints have operated during this research, many of which mirror some of the constraints under which the conflict resolution itself takes place. CCR operates under confidentiality requirements, which necessitate that the office preserve the confidentiality of the parties to particular conflicts. As a result, the research was limited to observations, interviews, and discussions that involved the CCR staff or that were not bound by confidentiality. Researchers were not able to survey or interview anyone outside CCR about their involvement in cases handled by the office. Records revealing the identity or progress of particular cases are not maintained by the office once a dispute is resolved. All of the research is based on meetings, observations interviews, and group work done

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52 See Joanne Scott, The SPS Committee (unpublished manuscript on file with authors).
53 Over the course of this project, Orna Rabinowich-Einy, Alexandra Marchosky, and Jennifer Kronick, students in Susan’s Workplace Equity Seminar, have performed important roles as co-researchers. They conducted interviews, attended group sessions and retreats, observed case reviews, and wrote up their observations.
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with CCR. No information that would reveal the identity of particular disputants or NIH employees was disclosed and none could be used in reporting this research.

D. Working Definitions

The first step in the process of understanding the relationship between individual and systemic change is to define our terms. What do we mean when we refer to cases or problems as individual as compared to systemic or structural? The definitional question turned out to be more complicated than we had anticipated. These categories assume that it is possible to differentiate between an individual and systemic understanding and intervention. It was not enough to rely on the parties’ designation of their claim in individual or structural terms (which is the typical way of differentiating between individual and group or structural conflicts). We had to be able to define our terms in relation to the goals of the inquiry, which was about understanding the relationship between discrete and systemic conflict resolution and problem solving.

Of course, in some sense, every conflict or problem is systemic, depending upon how far back the process of defining a cause goes and on which systems are treated as relevant for purposes of analysis and intervention. Every person operates in the context of a system – a psychodynamic system, a family system, a work group, etc.

Our terms became more robust when we considered them in relation to the context and purposes driving their use. The goal was to develop the capacity to intervene at a systemic level, to enable organizational learning through conflict analysis, and to see whether systemic analysis would help in more effectively intervening in discrete cases. This goal justified a more targeted distinction between individual and systemic cases, one that limits the definition of systemic to problems that are amenable to analysis and intervention within the context of the organization or some other domain over which the organization has influence, where the source can be located, at least in part, in organizational rules, practices, decisions, or norms.

When considered in relation to the project of intervention, individual cases can be defined as those that are essentially self-contained; that is, that involve problems particular to the parties in a conflict or dispute. People other than those directly involved do not affect and are not affected by the conflict, and the result of a resolution would pertain largely to the participants. Inquiry does not reveal the operation of problematic practices, processes, norms or policies that predispose or stimulate the problem’s occurrence.

Systemic or structural problems are those that cannot be fully understood or addressed within the parameters of the conflict among the primary parties. The underlying source is located outside the problem as it is presented by the parties. These are often recurring problems, both because routines or practices create the conditions making the dysfunction more likely. This structural or systemic root of the problem could be because the problem is latent or not visible or understandable to those directly involved and thus has not been addressed. The
presenting problem could be shaped by broader dynamics or cultures with strong influence on the behavior or frameworks of those involved in the conflict. Structural problems often involve actors who are not involved in the immediate conflict as initially framed. The problem they reveal could be connected to a broader set of organizational goals that affect how the problem can be addressed. This could be because the barriers to addressing the problem are embedded in routines or structures that are beyond the power of the parties to influence in the course of their regular work, because of recurring problems built into the structure of the working relationship, because of organizational patterns or routines that are dysfunctional, because of built-in power imbalances between people in different positions, or because of dynamics of race and gender that are structured by larger cultural and social systems as well as by the way race and gender have been framed by formal legal processes and rules.54

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

Before analyzing whether and how problems could be addressed, it will be helpful to survey the indicators suggesting to the practitioner that a problem has a systemic source.

Analysis of patterns: recurring problems, parties, and sites

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

Some institutes or work units are the site of a disproportionate number of conflicts or problems. Occasionally the problems involve the same individuals or

managers within the site. Sometimes the problematic patterns are replicated among different players within a work site. A site that has a high rate of conflict that cannot be constructively addressed can trigger a question about the underlying causes of these problems.

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

**Policy Problems, Ambiguities or Gaps**

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

**Problems or inequities recurring within identifiable groups**

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

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

**Problems in the management or organizational structures or practices**

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

**Major organization-wide initiatives, crises, or disruptions**

As an agency of the federal government, NIH is subject to system-wide developments that can have major repercussions across the entire organization. One such development involves Executive Order A-76.\footnote{\url{http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf}; \url{http://a-76.nih.gov/}} This order implements the current policy of the Executive Branch to privatize where possible by requiring all government services, other than those designated as inherently governmental, to demonstrate that their team is the most efficient organization (MEO) team for each activity. A-76 essentially requires every branch of the agency not designated as inherently governmental to demonstrate that it is more efficient to provide the service through government actors rather than to contract out to the private sector. A-76 has required an extensive review process, accompanied by considerable uncertainty and risk for those employees potentially affected. This process has led to reorganizations, downsizing departments, and high levels of turnover. It has had major impact on the morale and staff composition of NIH, particular among the technical and service employees. As such, it has introduced system-wide issues, some of which lie beyond the control of NIH. In fact, any kind of high-level administrative change in leadership or general administration of the federal government produces yet more changes that ripple throughout the organization.

**Problems rooted in the culture or organization of science**

Some of the challenges or problems stem from the structure and culture of science, which is located in a broader institutional and professional environment, which in turn shapes relationships and conflicts among scientists. Some of the hierarchies that create conflicts and problems stem from relationships that are structured by the larger discipline or profession. The fact that science and technology is constantly changing, and that new scientists do a lot of the hands-on work in the lab, creates structural problems for veteran scientists, who are always at risk of being bypassed by new techniques, findings and discoveries. Collaborators have to contend with the fact that most people have been educated and continue to operate within a particular discipline, while contemporary
CONFLICT RESOLUTION AND SYSTEMIC CHANGE

biomedical research is increasingly inter-disciplinary. The financial and reputational reward structures for scientists may encourage behavior that is inconsistent with professional, ethical, or legal norms. There is also a clash between the organizational bureaucracy and the very processes of formulating and conducting scientific research. The bureaucracy is rule-bound, emphasizing standardization and routinization. This bureaucratic sensibility is very different than the scientific sensibility, which does not necessarily follow a chain of command, emphasizes creativity, resists being told how to do things and what to do, and features independent thinkers who are accustomed to a lot of control over their work and work conditions and who thus may without malice aforethought break the rules.

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

II. ANALYZING THE RELATIONSHIP BETWEEN INDIVIDUAL AND SYSTEMIC WORK

Having defined what we mean by individual and systemic, we then turn to the task of analyzing whether particular conflicts or problems are one or the other. It quickly became clear, however, that cases did not fall neatly into one or the other category. As we examined the way systemic issues came up, we found it necessary to disaggregate the inquiry, to assess the individual or systemic character of the decision making for each component of the conflict resolution/problem solving process. Conflict resolution as it is practiced by CCR involves a dynamic relationship between inquiry and intervention. Through its reflective work, CCR determined that its methodology consists of a root cause analysis, which places conflict resolution in the context of a problem-solving process. The term “conflict” suggests that the triggering or presenting issue is one of disagreement; problems constitute a broader category that include actions, conditions or decisions that are not spawned by disagreement but that lead to results that are viewed as unacceptable or wrong. Conflict resolution is thus a subset of the broader category of problem solving that comprises CCR’s work. For this reason, notwithstanding the articulation of its formal mission in terms of conflict resolution, CCR is really constituted to address problems, some of which are presented as conflicts and some of which emerge from an analysis of organizational dysfunction or dissatisfaction and which are likely to produce conflict over time.

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

We determined that the individual/systemic question had to be asked for each component of the problem-solving process. The problem could be understood to be individual and the intervention performed could also be individual, the analysis could be individual and the intervention systemic, the analysis systemic and the intervention individual, and finally, both the analysis and the intervention could be systemic. We also saw that the understanding of a problem as individual or systemic changed over time. This realization moved us to place our analysis in the context of a two-by-two matrix, with the component of the conflict resolution process on one axis and the quality of the conflict as individual or systemic on the other:

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

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

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

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

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

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56 See MacDuffie, _supra_ note , at 481.
What follows is an application of this framework to particular problems that were handled by CCR. This analysis provides examples showing the linkage of individual and systemic work. We will use these examples in subsequent sections as a springboard for reconsidering prevailing assumptions about conflict resolution’s efficacy and legitimacy.57

A. Individual Analysis, Individual Intervention

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

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

The ombudsman assigned to the case reviewed the record and spoke with John and Tom, as well as other decision makers involved with the case. The ombudsman agreed with Tom’s general assessment of the selection process and also noted that the criteria used to reach the decision were well-specified and fairly applied. The problem was traced not to issues with the adequacy of the process (which was well-executed) or with bias having to do with national origin (which was never mentioned by the complainant and did not correspond to any pattern of decision making within the office). Nor did the inquiry reveal any issues with the quality of feedback or supervision within John’s work-group. He

57 See Sections , infra.
had received considerable mentoring, coaching, guidance, feedback and support. The ongoing conflict was traced to John’s personal characteristics that made it difficult for him to accept the decision. He assumed that because he was a well-known and established scientist, he was the best qualified for the job. He was having a hard time coming to grips with his own qualifications. He was considering a more formal complaint, which he could assert both by raising the issue with the top level administrators at NIH and by filing an EEO complaint. In the early stages of the process, the ombuds officer tried coaching, to communicate to John that there might be unrecognized aspects of his style and actions that were working against him. John was not able or willing to engage in self-reflection as part of this process, and the ombudsman’s goal became to direct John toward a formal process that could produce a fair and definitive resolution of his challenge to the search process.

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

B. Individual Conflict, Systemic Intervention

Consider a second type of problem that came up numerous times during case review: employees with serious psychological or health issues that give rise to performance or disciplinary issues. At first glance, these problems look like quintessential individual conflicts, or at least situations involving systems that are beyond the scope of organizational intervention. CCR’s work showed, however, that for some cases, systemic interventions could be developed to improve the organization’s capacity to address individual cases.

One example arose early in our work together. An employee came to CCR to challenge a letter of reprimand issued because of bizarre and disturbing behavior attributed to him at the worksite, of a kind that strongly suggested psychological issues.58 The employee wanted the letter of reprimand removed from his file. There was no dispute that the behavior was serious and offensive enough to warrant disciplinary action, but the employee initially denied taking the action. At the time the employee was receiving counseling from the Employee Assistance Program (“EAP”). Interactions with the employee, along with discussions with his co-workers and supervisors, indicated that the employee had serious psychological issues that were creating disruptions within his work group, but that he was otherwise competent at his job. Our work in CCR began with an

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

This inquiry led to a CCR discussion of the parallels between this case and cases involving violence at work, and particularly, the importance of a recovery period for employees in the affected work unit after such incidents. The ombuds shared and compared experiences involving several different cases and indicated the importance of addressing this issue more systemically. Two staff members suggested studies of reactions to violence at work, to be discussed at their journal club meeting.59 Another ombuds officer was asked to gather resources and information about the protocol for managing the aftermath. They then discussed how they would look at the problem from their different disciplinary backgrounds (legal, organizational, psychological) and how that inquiry could help them in designing more effective organizational responses. They decided to invite the EAP counselors, including one who did her PhD dissertation about the aftermath of traumatic events, to a discussion comparing this case with two other cases involving recovery in the workplace after trauma or extreme psychological problems.

Five months later, at case review, there was additional follow up. One ombuds described an ongoing project with the same EAP counselor to develop role plays for how to help people who don’t want to or can’t help themselves. The group decided to bring in a psychiatrist who could work with several situations with a psychiatric element, and then figure out how to translate this into organizational interventions better able to handle cases such as these.60 They discussed the difficulties of integrating this work into the handling of a specific ongoing case, because of the compelling nature of the immediate issues and the personalities involved. They were searching for and identifying systemic ways to equip groups to deal with people with mental problems.

These discussions also prompted questioning of prevailing norms at NIH. Sometimes, co-workers or supervisors want to discipline, transfer, or fire employees because they do not conform to perceived civility norms. The office raised the question of how and the extent to which a bureaucracy could tolerate eccentric behavior, and whether there was a double standard for the range of

59 Cite studies.
60 Case Review 1 [August 5, 2004].
acceptability depending on one’s status in the organization. The analysis also revealed the cultural roots of certain norms, such as whether one is loud or quiet in one’s interactions at work, and when possible, created contexts where work groups would actively negotiate about the prevailing norm. These issues have been raised, not only with participants in particular disputes but also with those such as Human Resources, who are in a position to set relevant policy.

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

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

Sometimes dysfunctions in the organization that concern low level inconvenience or annoyances that affect everyone are only raised by people with heightened sensitivity to unfair or arbitrary treatment. Particularly when that treatment involves offices operating within separate units of the organization, with little cross-institutional interaction at a policy level, these problems can be difficult to identify and address. For example, CCR has had cases that raised problems about the relationship between the NIH police and the professional staff. If those systemic issues are ones that cannot be addressed, either in the context of the particular dispute or at their root, then the problem gets resolved at the individual level, either by equipping the “difficult” individuals with the tools to cope with an organizational problem or by removing the difficult individual, if that person’s behavior violates important work norms and the person’s behavior resists change. Prompted by recurring cases of this sort, CCR is now working with managers to identify triggers that bring out this behavior, and steps that could be taken to reduce paranoia or other expressions of mental illness, for

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61 Case Review, 2 and 3 [10/23/03, 1/15/04].
62 9/9/04 at 2.
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example. One of the ombuds is putting together a list of nearby psychiatrists with particular specialties. They have facilitated discussions about how to improve the process of referral to outside counseling, the relationship between psychological evaluation connected to disciplinary proceedings and psychological referrals for therapeutic purposes, as well as how best to structure the ongoing relationship with the EAP counselor, within the constraints of confidentiality and roles.

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

C. Structural problem, individual intervention

The third cell of the matrix involves problems that have been identified as systemic but which are nonetheless addressed through an intervention focused on the individual issues or parties to the presenting conflict. These are situations in which CCR determines that the problem, although systemic in character, could not currently be addressed at its root cause. This cell also includes situations where CCR has unsuccessfully attempted a systemic intervention.

CCR has identified some inadequacies in management practices, conflict resolution, and employee supervision as reflecting systemic problems that resist efforts to address their institutional underpinnings. Many of the cases handled by CCR can be traced back to a management style whereby issues, tensions, conflicts, and performance problems are side-stepped until they blow up into crises. One important aspect of this structural problem concerns management and supervision. One class of problems involves a failure to provide ongoing feedback and criticism to employees about their work. The current system discourages managers from providing ongoing and critical feedback of those whose work needs improvement, because the system essentially operates as a pass-fail system requiring little serious feedback or supervision. At first, CCR believed that it was the pass-fail system itself that was responsible for these difficulties. Without formal opportunities for managers to provide critical feedback to employees, CCR found that employees interpreted such feedback in

personal terms on those occasions when it was offered. In case analysis, CCR noticed a parallel phenomenon: many managers who were reluctant to provide ongoing critical feedback, because they prefer to avoid conflict, or because they do not invest adequate time in evaluating work, or because they are worried that critical performance evaluations will prompt grievances. As a result, correctable problems persist and, when the problems reach a more serious level, employees experience the feedback as arbitrary and unfair. However, as NIH is moving to a four point evaluation system there are early signs that the pass-fail system was merely an indicator, but not a root cause of the culture of managerial avoidance.

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

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

terms. They thus lack the frameworks and language to deal with race as part of the larger issue.

These micro-dynamics are reinforced by larger cultural and organizational patterns. Black and Latino employees make up a small proportion of the scientists and scientific management, that is, the high status employees, and a much larger proportion of the technicians and service employees, who are the lower status employees. This structural power difference produces racially-inflected tensions and dissatisfaction that would not meet the criteria to be labeled discrimination within EEO definitions of the term. CCR has identified the need for ongoing interaction and problem solving outside the context of discrimination claims and with substantial support from high levels within the organization. Ironically, while NIH has many programs to recruit, retain and promote minority scientists, they are of limited success because they do not effectively address the structural barriers to diversifying the pool.

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

Analysis of the casework and the systems intervention work shows that many of these systemic interventions have not been sustainable, or have not generated an adequate level of organizational engagement. Conflicts stemming from these deeply embedded organizational patterns are more likely to be resolved at the individual level. Sometimes having the structural analysis is helpful in enabling individuals to de-personalize their problems and to find ways to work around the dynamics of management and race in their own context. Sometimes, identifying the structural problems only deepens the sense of frustration at the inability to respond.

Many cases arise where the problem presents as a question about the fairness of a particular decision, or a conflict between two employees, but the

67 See Sturm, supra.
discussion traces back to underlying problems of inadequate accountability built into the structure of management responsibility. For example, one case involved an employee, Taylor, who was complaining about a decision to deny her leave. Taylor had followed the informal practice for requesting leave, although she had not actually submitted a formal request. In the past, the informal practice was sufficient. This time, the leave was denied. The initial trigger for the problem was a conflict with another employee’s leave request, and Taylor’s perception that this employee was favored because of a personal relationship with Lee, the manager. The reason the prior relationship dictated the outcome was because Lee was operating with unfettered discretion in the office and was not supervised or held accountable for any of her decisions. She regularly abused that authority. The reason she could function without any accountability was because her supervising scientist was focused on doing research, which was the aspect of the work for which scientists were valued, and did not want to spend significant amounts of time on administration. The issue had not come to anyone’s attention because the employees were afraid to complain to Lee’s director because that director delegated everything to the manager, and so the issue would simply find its way back to Lee. Employees were concerned that Lee would retaliate against anyone who raised issues about the manager’s performance. This problem can be particularly difficult to prevent when race and gender differences are involved in the interaction.

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

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

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68 The names are fictitious to preserve confidentiality.
69 Case Review 1 [4-1-04]
Interventions to improve the fairness and efficacy of management within particular units have sometimes worked, including efforts to create governance systems to construct learning relationships at the outset of new collaborations or programs. CCR has reported that the efforts to deal with these problems at the overall organizational level have yet to materialize.

But the capacity to address structural problems at a structural level is itself dynamic and changing. In effect, CCR did a root cause analysis of why their efforts to engage management in addressing management culture failed. They also looked at other arenas where serious problems occurred and became an occasion to improve practice. They determined that, although there was resistance to addressing the cultural or managerial dynamics head on, CCR could enlist organizational leaders in a process of self-reflection about their failures. This process might then lead the actors themselves to identify the roots of the recurring problems, and enlist them in making more structural changes. So, Howard Gadlin recently proposed to the Executive Officers, the highest level of non-scientific managers, that they participate regularly in a version of Morbidity and Mortality Rounds used in hospitals to address iatrogenic failures.\textsuperscript{70} This intervention moves beyond employee- or manager-initiated conflict as the trigger for root cause analysis. Nothing compelled the executive officers to respond favorably to this proposal. But more than half of the executive officers showed up at the first M & M that CCR did. CCR is now going to do M & M sessions on a regular basis. The office will be taking difficult cases, where the outcome of a managerial action was different than intended, and walking the executive officers through a root cause analysis. Instead of having that analysis done within CCR, it will be done with groups of organizational actors, with the facilitation of CCR.

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

D. Structural problem, Structural intervention

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

Collaboration lies at the center of much scientific work. Collaborations involve both peers and scientists at different stages of their careers. A host of issues can erupt in the course of these collaborations, including issues of authorship, ownership of data, and the scope and direction of the research. These

\textsuperscript{70} See Gawande, \textit{supra} note. See also Laura M. Lee, Root Cause Analysis.
issues can be particularly fraught when they arise in the context of a mentoring relationship between a post doc and a staff scientist. The issue of relationships between post docs and mentors is a recurring one. It comes up over and over again, in individual cases. Gender, racial, ethnic, and cultural differences can further complicate the problems that almost inevitably will arise in the course of the relationship.\textsuperscript{71}

Over time, CCR has learned the ways in which these issues are built into the structure of the relationship, and also lie at the center of core scientific goals. Collaboration among scientists with different levels of experience and expertise lies at the heart of NIH’s mission. It also carries with it built-in tensions, issues, and possibilities for abuse of power. “There is a fundamental imbalance in the relationships between post-docs and lab-chiefs. We can do things to mitigate that, but we can never change the basic situation.”\textsuperscript{72} The challenge is to figure out how does one work with this power differential for which there is no cure. Gender, race and national origin can intersect with these issues about mentoring. The dynamics that produce conflicts and unfair outcomes also affect the capacities and trust of the parties in negotiating resolutions to those conflicts. So, working out the specific problems depends in part on addressing the conditions that produce that conflict—creating an atmosphere of trust, building the capacity of the less powerful actor to negotiate effectively, articulating principles for the relationship that everyone agrees to, and providing some form of accountability for the way the relationship proceeds. Issues that have come up in this relationship include deciding upon the direction of the research, how to use the data, who owns the data, authorship issues, sharing of biological materials, and whether post docs can take data or research with them when they leave to go elsewhere, and what happens when the post doc leaves NIH. Complicating this issue is the fact that the post doc is dependent upon the mentor for professional development and future positions. And then there is an issue about whether post docs can take data or research with them if they leave to go elsewhere.

So, for example, some cases involve postdoctoral fellows recruited to work in labs on collaborative projects, who are given inadequate support and feedback, and because they don’t “rise to the challenge” come to be viewed as a “warm body” who can perform routine work but will never advance. The resulting conflicts are often interpreted as about personality issues. Some cases have raised issues of favored fellows in the lab, sometimes because the post docs come from the same country or region as the PI, and speak the same language or dialect. Sometimes the relationship is complicated by gender dynamics as well, particularly when women are not well-integrated into the social relationships of the lab.\textsuperscript{73} Issues also come up in other cases about authorship. There are disagreements about whether the post-doc should be included as an author, and if so, whether they should be first, second or third author. Fellows often interpret this decision as a power play by the Principal Investigator. Gender and

\textsuperscript{71} See generally KATHY BARON, AT THE HELM: A LABORATORY NAVIGATOR, (2002).
\textsuperscript{72} Case Review 3 [1-8-04] at 2.
\textsuperscript{73} Id.
sometimes national origin can also come into play in shaping how managers interpret the cause of the problems.

Over time, CCR has intervened in hundreds of cases involving conflicts about scientific collaboration. They have developed a sophisticated understanding of the evolution and structure of these conflicts. They also have developed strategies for enabling participants in the collaboration to identify their underlying goals and develop a structure and set of principles to guide their work going forward. They essentially help scientists develop a “constitution” to guide their activities.74 Mostly this constitution involved a set of processes or questions that the parties would have to work through as part of constituting their relationship. But they also developed over time an understanding of some of the shared norms governing collaborations among different types of scientists that could help parties in figuring out fair arrangements for matters such as sharing data and determining authorship.

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

Initially, CCR used this structure in working with people who were already in conflict. They then developed a tool that could be used prospectively, and made that template available on the NIH website.75 They wrote articles and gave talks about the use of collaboration agreements.76 Scientists and institute directors learned of these presentations, both through their effectiveness in redirecting dysfunctional collaborations, and as a way to set up fair and effective working relationships from the outset. They invited the ombuds to develop materials for general use and for training purposes, and to participate in the orientation and training of new post docs and mentors. They were then invited to facilitate retreats for those workgroups who were interested in using the collaboration agreement as a framework for their working relationships. The ombuds used this structure, as well as the principles and processes developed through their conflict resolution work, to facilitate the development of a set of norms and processes governing collaboration within particular workgroups. As collaboration has become more and more central to the NIH’s sense of the future of science, the work generated through the collaboration agreements has expanded in its scope and impact. Most recently, CCR worked with a group of scientists who were designing a new program and building conceptualized around principles of collaboration and employing the principles of the collaboration

76 See Gadlin and Jessar, supra note.
agreements as a framework for developing a governance structure for this institute.

These collaboration agreements are creating a set of norms around practice, as well as institutionalizing processes that structure practice to prevent or address future problems. Through the device of collaboration agreements, utilized at different levels of organizational practice, CCR is engaged in making explicit a set of implicit or underspecified norms and in articulating a set of norms where none have existed. Many of these norms have been understood and expressed idiosyncratically, for example, the basis of trust in a scientific relationship. When scientists enter into a collaboration, they take certain things for granted, although these understandings often remain implicit and there is little beyond professional socialization to hold people accountable. Scientists are trying to negotiate the complexities both of the scientific work and the working relationship: data will be fully shared and exchanged, communication will be balanced, decisions are supposed to be made mutually and based on the power of argument rather than the power of position, credit is supposed to be allocated fairly. These understandings are filtered through scientific discourse as well as through the power dynamics in the collaborative relationship. Scientists typically are not thinking about the relational dimensions of their collaboration. They are thinking primarily about the science and the need to publish, enhance reputations, and advance knowledge. They must depend upon each other for their individual areas of expertise. What constitutes fairness in the collaboration in the collaboration isn’t necessarily going to map up in a linear way to predefined rules. They want public understandings and practices to be pertinent to preventing extreme situations of abuse, and they want the norms to be able to attach in a meaningful way to the day-to-day dilemmas that people face in the collaboration.

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

An example will further illustrate the dynamic relationship between the individual case and structural change. This example began with a case in which CCR was not intending to make a systemic intervention, even though the ombuds were aware of the need for one. They thought they needed to address the issues

77 See CRADA, Cooperative Research and Development Agreement.
between the direct parties to the conflict before they could reach the systemic questions clearly implicated. The case involves two scientists, one of whom is a lab chief to the other. Both are independent investigators with their own budget; the lab chief function is more administrative and pro forma than it is substantive. These two scientists are doing work in the same laboratory, though not in the same physical lab space. A variety of tensions developed between them, so that the junior person suspected that the senior person was working against his interests. The more senior person suspected that the more junior person was not willing to accept his role as lab chief and that the junior scientist didn’t like him. The distrust increased with every passing week, with each decision that had to be reviewed. There were allegations that the junior scientist was keeping secrets about a scientific project from his colleagues. This did not necessarily violate any ethics or disciplinary rule, but it did violate shared implicit norms within the lab. The issue of sharing information about research is an ongoing issue in every laboratory in which people are colleagues in the work, but competitors in obtaining grants and advancing reputations. A lot of attention was paid to whether the secrecy warranted bringing ethical or misconduct charges, and a determination was ultimately made not to bring such charges.

The two scientists turned to CCR for help because the junior person was thinking about leaving the lab. For the senior person that departure would be devastating because it would mean the end of the lab. The higher-ups did not want the lab to break up, because it had a distinctive and valued configuration of expertise. The higher-ups instructed the parties: to try to find a way to resolve their antagonism, which was affecting others in the lab. The scientists were also from different nationalities and, though these issues weren’t at the center of conflict, they were affecting their capacity to communicate with each other. CCR had also talked with them about organizational issues affecting the whole program. Though the lab chief did not actually hire the junior scientist, the junior scientist was placed in the lab chief’s lab. The junior scientist’s loyalties were thus to the person who hired him and, when unhappy, he would turn to the person who hired him, while the lab chief turned to a different superior for support or influence. The two scientists were under pressure from above to resolve their conflict. CCR began to work with them, and had a series of discussions with them both separately and jointly. The goal was to forge an agreement that would explicitly lay out the terms of the relationship between the two scientists: what issues the lab chief could legitimately raise, how to schedule meetings between them, how requests for resources would be handled, how they would cope with possible competition in their research or for outside funding, how they would address conflicts, etc. For example, one issue involved what the lab chief should do if, toward the end of the budget year, he realized that the junior scientist was at risk of going over budget. He proposed that he would communicate that risk to the junior scientist. The junior scientist found that objectionable and unnecessary. It was clear to CCR that each particular issue was also symbolic of the superordinate issues of power and autonomy. CCR investigated and learned that it was the norm for lab chiefs to play this role as a matter of routine, and that this
oversight worked to head off problems. In other labs, the issue was not automatically fraught with meaning about the power dynamic.

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

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

At the retreat, the two scientists brought up the general issue of the role of the lab chief. The entire lab group wound up clarifying for the whole program almost all the issues that were posed in individual form for the two scientists. They also identified a set of additional issues or problems for which additional clarification was necessary. They agreed to have follow-up meetings to generate lab-wide solutions.

The junior scientist compiled notes for the meeting, circulated them to everyone else, and put them in a form that everyone agreed to. The group tweaked the language, and produced a document reflecting their collective agreement and understanding among the group about how they will do business in the future. The two scientists who were parties to the original dispute then arranged a meeting with CCR to discuss these developments. Now that these general agreements and processes are in place, they both feel they no longer need a personal agreement addressed specifically to them. They felt their issues were more appropriately addressed through the structure that they had helped put in place for the whole lab. CCR observed that there was a level of relaxation and ease in their conversation that they had not witnessed before. The protagonists’ body language and tone of voice were different; they were speaking to each other rather than to the ombuds. They acknowledge that they still have a ways to go before they trust each other, but felt that they had a fair and effective way to address their issues going forward.

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

This norm dissemination is not confined to NIH. Howard Gadlin is actively involved in shaping the practice of ombuds offices within the federal
government and nationally. This framework for collaboration has been extended to other organizational environments.78

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

The matrix elaborated in the previous section maps the dynamic relationship between individual and systemic conflict resolution. The examples we document do not fit neatly into the conventional dichotomies that have governed the analysis of conflict resolution. They both resolve individual, private disputes and generate systemic solutions and public norms. The choice is not either/or, once-and-for-all, but when, under what circumstances, and how best to mediate the relationship between individual and systemic conflict resolution. Linking individual and systemic conflict resolution, when structured to assure accountability and independence, enhances the capacity to produce successful individual outcomes and systemic improvements. Conflict resolution in these examples is thus simultaneously informal and formal, problem-solving and norm generating, private and public, individual and systemic, collaborative and principled, accountable and confidential, consensual/interest-oriented vs. coercive/principled. This case study thus shows that some of the prevailing assumptions about non-adjudicative conflict resolution are neither universally true nor endemic to non-adjudication.

The practical and theoretical significance of this example depends upon its generalizability. We mean here generalizability in three senses. First, can this role be generalized to other contexts and settings. Is the CCR example more broadly applicable, or does its success depend upon the unique configuration of features present in this particular case study (i.e., a public agency devoted to science with an interdisciplinary office of highly respected conflict resolvers)? Second, should individual and systemic conflict resolution be linked? Finally, there is the question of the example’s theoretical implications. Does the matrix analysis provide any broader insight into how conflict resolution advances rule-of-law values?

This section addresses each of these questions. First, we extrapolate from CCR’s work to identify the elements of a conflict resolution body that can perform the role of integrating conflict resolution and systemic change. Through examples, we show that conflict resolution bodies with these features may be found within the court system and administrative agencies, as well as in new institutions operating within organizations or service delivery systems. The methodology used by CCR can be employed to link individual conflict resolution and systemic change in these settings. Second, we analyze how linking individual and systemic work improves the efficacy of each. We also discuss potential role conflicts created by the linkage and how they can be minimized. Finally, we use the matrix analysis to generate new theoretical understandings about conflict resolution and its relationship to rule-of-law values. We suggest that the CCR

78 For example, CCR’s “collaborative agreement” approach has been adopted by the University of Minnesota. See website.
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case study does more than raise questions about the assumptions underlying the traditional debate about conflict resolution. It offers a reconceptualization, or at least an expanded understanding, of core rule-of-law values, such as impartiality, principled decision making, generalizability, and accountability. Contrary to the assumptions underlying the scholarly and practitioner debate, we have learned that non-adjudicative conflict resolution can, under certain circumstances and institutional arrangements, embody rule-of-law values and generate institutional practices advancing public values and addressing issues of common concern. We use this analysis to reconsider the relationship between adjudicative and non-adjudicative forms of conflict resolution.

A. Integrating Individual and Systemic Change: The Elements of Efficacy and Legitimacy

It is important to understand the characteristics enabling a conflict resolution office to combine individual conflict resolution and systemic change, and to do so in a way that adheres to principles of legitimacy. Our analysis identifies core features enabling CCR to combine these two roles, features which are not unique to that setting or present in all (or even most) ombuds offices. This section will specify those attributes, and explain their role in enabling a conflict resolution process to connect individual dispute resolution to the advancement of public values. It also shows that conflict resolution processes with these features are located across the spectrum of conflict resolution, in judicial settings, administrative agencies, and some privately managed, publicly charged conflict management systems. These elements also provide a framework for critically evaluating the capacity of a conflict resolution program to link individual conflict resolution to systemic questions.

1. Institutional Position: An Intermediary Institution Nested in a Community of Practice

CCR is an example of an institutional intermediary; it occupies a location as an embedded but independent office operating within one or more communities of practice.79 Institutional intermediaries address problems arising within defined systems that involve repeat players whose conduct affects those within the

79 Communities of practice are groups of people who “are active participants in the practices of a social community,” interact with each other on a regular basis, and construct their activities and identities in relation to that community. ETIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY 4 (1998). They could include a unit of an organization, a work group, or a professional association. These social groupings could also be considered norm communities — groups of people who cooperate and compete, and in the process generate and enforce norms. See Robert Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U. PENN. L. REV. 1643, 1645 (defining a community as “a social network whose members develop relationships with each other through repeated interactions.”); ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORHOODS SETTLE DISPUTES (1991). For a discussion of the role of institutional intermediaries outside conflict resolution, see Sturm, supra (Architecture of Inclusion.)
system, even if they do not regularly and directly interact. Institutional intermediaries may in fact be nested in multiple communities of practice. Their work cuts across different regulatory orders and bureaucratic units, so that they have access and knowledge concerning the range of problems that arise within that overall system. Because they operate within defined practice domains, over time they confront problems that recur within that domain. Institutional intermediaries also interact with and have an opportunity to observe repeat players over time. They operate at the intersection of multiple governance systems, seeing the relationships among those systems. By working with these “communities of practice,” they are in a position to generate norms, processes, and remedies that have impact beyond a particular case. They also cultivate communities of practice as learning systems.

Crucially, institutional intermediaries are both embedded and independent. Their caseload, strategies, activities are not dictated or controlled by anyone who may participate in an intervention. They are located outside the normal chain-of-command, and they work with actors in many different parts of the system. For example, CCR’s continued legitimacy depends upon the office’s independence from those with whom it regularly interacts. Different organizational participants must trust the impartiality and integrity of the office. The office is set up to foster that independence and impartiality. When he was brought in to create the program, Howard Gadlin was given full authority to establish an ombuds office according to the vision and practice that would be successful. The office’s independence has been part of the social pact with the organization, and is built into the cultural understandings and routines of the organization from CCR’s inception. No one is permitted to dictate what CCR works on, who they speak to, how they do their work, or what they recommend. At the same time, institutional intermediaries do not have particular governance or organizational duties that tie them to particular routines or lines of authority. Again, CCR operates outside bureaucratic lines of authority. This insider/outsider status is one important factor positioning the office to connect conflict resolution to structural intervention over time.

Institutional intermediaries’ boundary-spanning location and role equips them to connect information, people, and problems. This position at the nodal point of multiple systems provides a vantage point for observing patterns and bringing that knowledge to bear on particular problems. The capacity to understand and identify systemic problems developed over time from individual case work. Conversely, the capacity to understand and address individual conflicts requires a systemic understanding that comes from the opportunity to step back and address problems outside the context of a particular conflict. An intermediary’s effective involvement in one context often produces occasions to address similar problems that arise at another time or location. This work produces cultural and institutional knowledge that intermediaries can draw on

81 See id.
over time in spotting patterns, analyzing dynamics, and enlisting participation of relevant actors. This permits different forms of aggregation, which can be tailored to the nature of the problem as well as the pragmatic opportunities for intervention.

Institutional intermediaries are in a position to work at the level of the organization and with the parties that fit the contours of the conflict or problem. This flexibility is a by-product of their location within a practice community, their independence and their indirect relationship to power. They are exposed to information about how the same problem is addressed in different settings within the particular practice domain. They also can bring people to the table who do not ordinarily work together and do not otherwise have easy access to each other. A case may be resolved in the short run at the level of the individual, with no immediate consideration of its systemic implications. But, institutional intermediaries can use information obtained in the context of an individual case to understand and design solutions for systemic problems when the opportunity to do so arises. They utilize a range of intervention strategies which give the office considerable flexibility and scope. We saw how the multiple roles performed by CCR afford the opportunity to connect problems learned through individual case work to systemic change. Its mandate and range of intervention strategies gave the office the vantage point needed to identify systemic or structural problems, as well as the access and the tools to intervene at that level.

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

CCR exemplifies an institutional intermediary located within a formal organization, as well as within several professional norm communities. However, this institutional intermediary role is not limited to internal conflict resolvers. Any conflict resolution office that operates within an ongoing normative system, at the nodal points of interlocking systems, could potentially operate as an institutional intermediary able to integrate individual and systemic change. Some courts that focus on specialized areas of practice within defined geographic communities can play this role. For example, criminal courts can be in a position to identify systemic problems emerging across a variety of cases, to step out of the conflict resolution mode, and to develop systemic solutions to address those

83 There is, for example, the federal ombudsman association, the University and College Ombudsman Association, and The Ombudsman Association, which brings together organizational ombudsman.
problems. Brandon Garrett has described this form of systemic intervention in the
criminal justice system. Garrett observes that courts are repeat players
regarding the criminal justice system, and that they “supervise the intersection of
each of the other institutional actors in their courtrooms.” He documents recent
innovations in which courts have aggregated information and prompted systemic
reform, either themselves or through the involvement of third parties such as
innocence commissions and expert panels.

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

Conversely, many alternative dispute resolution and mediation offices are
not set up to function as institutional intermediaries. Internal conflict resolution
offices may be located within a particular sector or office, such as human
resources, and they may be directly accountable to management. They may
have a more limited mandate and range of operation. Many offices are set up
only to do mediation, and they do not interact with anyone in the agency outside
the context of a particular individual conflict. Many conflict resolution systems
are not located within a community of practice. Or, they may be located entirely
outside any particular system. Mediation programs for workplace disputes often
provide case-by-case intervention. More than half the time, outside mediators,
selected from an external panel, are brought in. By definition, these mediators

85 Id. at 9.
86 Nan D. Hunter, Managed Process, Due Care: Structures of Accountability in Health Care, 6
Yale J. Health Pol’y L. & Ethics 93 (2006); Norman Daniels and James Sabin, Limits to Health
Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers, 26
87 http://www.dhs.state.ia.us/cppc/service_reviews/qsr_overview.html.
88 Add cites.
89 See David B. Lipsy, Ronald L. Seeber, Richard D. Fincher, Emerging Systems for
90 Id. at 186. This is a function of the assumption that impartiality is best achieved through
detachment. In Section , infra, we address this assumption and show that impartiality can be
lack institutional knowledge and nothing in their mandate or functioning equips them to obtain that knowledge through their casework or to provide feedback to the organization. Mediation performed in this way is non-norm-generating and non-systemic.

2. Critical Reframing Methodology: Enlisting Participants in Interrogating Underlying Causes and their Possible Solutions

The methodology of analysis and intervention is a second crucial element accounting for the connection of individual cases to underlying structures and systems. What is key is that the inquiry proceeds through identification of reasons supported by available data, and that this process produces understanding of the relationship between the individual and the systemic in a way that enlists the affected parties in developing and acting on that knowledge. Root cause analysis, which is the methodology that runs through CCR’s practice, provides an example of this critical reframing methodology. Root cause analysis, performed through a systemic lens, explores why a problem arose and persists, by asking insistent questions that trace the problem to its source. The initial framing is often insufficient to accurately diagnose the problem and to build an adequate basis upon which to address it. Critical reframing deepens the questions asked of a particular participant and, when obvious explanations and remedies are insufficient, expands the participants who engage in understanding and addressing the problem. This methodology structures inquiry about the nature of a problem and its relationship to intervention strategies by continually prompting a series of questions about the appropriate scope and goal of an intervention: What kind of problem is this? Why is it considered a problem and by whom? How does it relate to other problems you have seen? What is causing this problem? What would it take to remedy it here and for others, and what can you do about it, now and in the future?

CCR ombuds described a frame shift that has occurred in their practice as they have incorporated a systemic lens into their root cause inquiry, and this frame shift is noticeable in case reviews over time. The process of listening for systemic underpinnings begins when they meet with someone. It affects the kinds of things they listen for and the kinds of questions they ask. They now routinely ask more historical questions designed to trace back the problem to its source, to situate it in a broader context, to identify others who are affected by the problem, and to consider the interrelationship of that problem with other aspects of the organization. When did the problem first arise? Was there a time when it was different? Did anything change in the person or organization? What else was going on? What else is happening? Was anyone else affected by the problem or

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92 For an insightful discussion of root cause analysis as a form of problem solving in manufacturing plants, see MacDuffie, supra.
did anyone else experience the same thing? They ask more systems kinds of questions: who benefits most by the conflict, who is hurt most by the conflict, and what is its effect on other people. They analyze whether a conflict serves some unacknowledged organizational purpose, separate from whatever personal needs it expresses, and why that purpose has been pursued in a problematic manner. They help relevant stakeholders assess whether that purpose is legitimate, and if so, whether it can be achieved through more productive means. They ask questions about the steps the person might take to change the dynamic, the steps others would have to take, who else would have to be involved, and the obstacles to change.

The intermediary gathers and validates information, both about the particular conflict and its larger context. Importantly, it does this both independently, drawing on its knowledge base, and through interaction with those directly involved in the conflict as well as those with knowledge about or a stake in the underlying issues revealed by that conflict. Often, this involves integrating interdisciplinary understandings of the problem, as well as information about the problem’s impact on people in different positions. Similarly, the process of developing solutions emerges through interaction with relevant stakeholders, who must be directly engaged in that process. It does not require that the participants themselves are self-reflective, although the process benefits tremendously when they are. Indeed, many conflicts explode because the protagonists are not. CCR’s experiences shows that participation in critical inquiry often prompts reframing, even when the participants would not reach those insights on their own. Sometimes, participation in the process develops participants’ capacity to use root cause analysis in their routine work. Indeed, some interventions are explicitly designed to help groups achieve that ability.

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

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93 The office has explored the complementarity between root cause analysis and systems approaches to family therapy, and their methodology has been influenced by both.
Interdisciplinarity both predisposes and enables conflict intermediaries to conduct root cause and systemic analysis. This can be achieved through the internal composition of an office or by involving those with relevant knowledge in the critical reframing process. For example, CCR was deliberately structured to draw on multiple disciplines, both in its analysis of problems and in its intervention strategies. It combines scientific, organizational development, legal, and psychological frames of inquiry. Each member of the office brings a perspective to the process that shapes how they initially understand a problem.\textsuperscript{94} The operation of these multiple perspectives has a destabilizing impact on the inquiry. It makes it more likely that different dimensions of a problem will be raised.

Root cause analysis encourages the parties to resolve their conflicts by getting to their source, not just by finding a way to split the difference. It provides a check against the tendency of conflict resolution to focus on the presenting issues, the urgent emotional needs, the quick fix that will lower the temperature and return to normal.\textsuperscript{95} This framework creates a pragmatic tension between analysis and intervention. One always asks the systemic question, but one does not necessarily act at the systemic level. Part of the process entails assessing the possibilities, risks, and costs of a systemic approach as part of a particular case or intervention. Sometimes, it turns out there is no systemic problem, or at least not one that the organization and the larger society views as a problem.\textsuperscript{96} Sometimes proceeding at the systemic level would compromise the capacity to address an individual case. Sometimes the protagonists do not want to address the underlying questions. Sometimes, the stakeholders needed to make systemic changes cannot be brought to the table. Sometimes, the issue is not well enough understood by the stakeholders as a systemic issue to mobilize their commitment to addressing the problem. Sometimes, the issue is not (yet) enough of a priority for the organization to take on the resource and time commitment necessary for systemic change, at least at the moment. Root cause analysis structures inquiry about particular cases to enable reflective practice, which in turn equips conflict resolvers to craft interventions to match the demands and possibilities of the situations they face.

This methodology of critical reframing and root cause analysis forces a principled inquiry, both in the nature of the problem – why is it a problem, what is the justification, the reason, for treating it as a problem – and in the level and scope of the solution. It also requires justification in terms of reasons supported by research. It calls upon the intermediaries to justify their recommendations to those they are seeking to persuade. In an individual intervention, this will involve those who are the direct protagonists. In a more systemic intervention, it will

\textsuperscript{94} Howard brings a sensitivity to the scientific mission and a commitment to critical reframing. Kathleen offers a counseling framework, emphasizing the power of relational systems in shaping interaction. Doris comes to problems with a background in organizational systems and processes. Kevin brings a legal and policy orientation to the work, often identifying the roots of problems in policies and analogies between seemingly different practices.
\textsuperscript{95} See pp. infra.
\textsuperscript{96} For example, the relevant communities did not view the underlying cause identified in John’s case – uncreative scientists don’t necessarily advance – as a problem requiring any change.
involve all of those whose cooperation is needed to make the systemic intervention work, and to be perceived as legitimate. This is crucial because the office’s efficacy turns entirely on the persuasiveness of their analysis. (The example of the case in the individual analysis/individual intervention illustrates the point.)

In the CCR example, root cause analysis is incorporated into the practice of conflict resolution. Some institutional intermediaries in other settings have followed a similar course. For example, in the social welfare context, innovative systems have created third party intermediaries who use root cause analysis and reflective practice to engage caseworkers, administrators, and families in generating solutions to systems failure manifested at the level of individual cases.97 Other intermediaries have used methodologies for analyzing the patterns emerging from their individual conflict resolution work, and designing interventions to address systemic problems identified through this analysis. In the criminal justice context, aggregative approaches employed by innovative criminal courts rely on pattern identification, investigation of systemic causes, and involvement of responsible institutional actors in the development of remedies.98 Systemic interventions driven by data and reflection about individual cases can be found in the descriptions of the methodology used by other institutional intermediaries in entirely different settings. In all these contexts, the mode of inquiry connects conflict resolution to learning, learning to reframing, and reframing to generating solutions that address underlying problems.

3. Institutional Legitimacy Within the Relevant Communities of Practice

The capacity to connect conflict resolution to systemic change depends on the professional and organizational stature of the institutional intermediary. Participants in the conflict resolution process have to be willing to work with the intermediary, which in turn requires that they have confidence in his or her integrity, knowledge, and judgment. They must believe that the intermediary has sufficient influence to bring to the table the various actors whose participation is necessary to address the problems. This institutional legitimacy affords access to the institutional knowledge (such as about managerial dysfunctions or collaboration problems) and opportunities to use that knowledge to prompt institutional redesign (such as the use of collaboration agreements as the basis for creating a new institute). The office must, then, have considerable stature and legitimacy across a wide range of organizational constituencies, operating at very different levels.99 A person of sufficient knowledge, expertise, skill, and gravitas within the relevant community must occupy the role. The formal attributes of the position – title, level, salary, role etc. – also play a role in defining its stature and

97 See, e.g., Quality Service Review Overview: Improving Results for Children and Families, http://www.dhs.state.ia.us/cppc/service_reviews/qsr_overview.html. (add Casey).
98 See Garrett, supra note .
99 The ABA standards for ombudsman also emphasize the importance of stature: “An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity.” American Bar Association Standards for the Establishment and Operation of Ombuds Offices, Section B.
influence. The stature and level also plays a signaling function; it communicates a view of the office’s significance to the community within which it operates.

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

Stature also affects the efficacy of institutional intermediaries operating in other domains. Judges who are repeat players in the criminal justice system bring a high level of stature and credibility to their role as systems change agent, when they are operating within the scope of perceived authority and competence. Similarly, panels of independent physicians and community advocates operating as third party intermediaries carry substantial weight and bring legitimacy to the process of conflict resolution and systems intervention.101 In contrast, sometimes an ombuds or mediator lacks sufficient credibility within the community they must influence, either because they do not come to the position with the attributes that command respect or because position has been marginalized within the community.102 Under those circumstances, the office lacks the social and intellectual capital often necessary to play an effective intermediary role.

4. Dynamic Accountability

Finally, the capacity to sustain this linkage of conflict resolution and systemic change over time requires mechanisms for providing dynamic accountability. By accountability, we mean having regular occasions for explaining, raising questions about practice and outcomes, and for evaluating, justifying and revising one’s practices and decisions in relation to the goals and principles behind the enterprise.103 The intermediaries must regularly engage in questioning by and accounting to others whose judgments have to be taken into account in the doing of the work. Accountability is important both to check against abuses and bias, both in individual intermediaries and in the overall

100 Garrett, Drug Courts.
101 Hunter, Trubek
102 Add cites.
process. It also plays a crucial role in motivating the dynamic interaction between individual and systemic issues.

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

Accountability is also important as a basis for learning – both about problems that can be remedied, patterns that can help surface causes, and potential for generalizing to other contexts. By asking questions about choices and consequences of the work, it provides a basis for considering the work in relation to process and outcome goals, which are themselves open to revision. Tracking outcomes both provides the basis for assessing whether the goals of the office are being met, as well as crucial systemic information about recurring problems or patterns. It provides the internal tension needed to resist the tendencies to focus on the most emotional urgent, obvious or superficial issue, leaving underlying causes unchanged. We use the term “dynamic” to signify that the form of accountability must match the goals and processes of the office. In fact, it has to be built into the process of doing the work, both to assure that criteria for evaluation assess what is actually valued, and to link feedback to ongoing (and unpredictable) practice. It is also important that conflict intermediaries are accountable to the range of stakeholders who use the process, not just to the management or mediated through a single stake holder.

Accountability is particularly necessary and tricky for a conflict resolution practice bound by confidentiality requirements. But the experience with CCR shows the possibility of incorporating internal and external accountability into the doing of the work. The office’s insistence on evidence-based practice, reason giving, and deliberation builds a form of accountability into the doing of the work. It is important that conflict intermediaries have to provide reasons for their

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analysis and understanding of a situation, and to reflect upon the adequacy of their investigation, analysis, and follow through. The office has to give compelling reasons to enlist participation and generate effective solutions; its work thus provides a kind of built-in accountability. In this regard, the ombudsman’s lack of formal power – he has no decision making authority and cannot command anyone to do anything – enhances the ombudsman’s accountability; he must elicit cooperation with his efforts.

An important source of this deliberative accountability comes from reflective practice work—regular deliberative sessions done as part of strategizing and critiquing the ongoing work of the office. CCR’s weekly case reviews and staff huddles exemplify this practice. Those sessions routinely include presentation of a case, choice points, strategies, and particularly, difficulties posed by the case. “When we were developing the case review method, we worked hard to develop an atmosphere when people will surface mistakes. It is very common for people to say, I am having a hard time with this, I really messed this up.” These sessions often generate suggestions of a strategy or criticism of how something was handled, picking up on what might be perceived as a deviation of impartiality. The office has, in effect, institutionalized a form of participatory accountability, by engaging peers in ongoing assessment and revision of their practice. Accountability in the traditional sense – impartiality, abuse of office, corruption, pursuing private ends – those are things that get picked up within this system.

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

As we are going through cases, we are trying to draw systemic lessons. The reflective practice, merged with sensibility about systemic cases, enables us to think about these cases. We make connections across cases in case reviews regularly, we refer to commonalities and differences within particular kinds of cases. It is more common than not, when someone is presenting a case, to have someone make a connection with a case that they presented or are working on. It happens all the time.

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

105 Hunter, supra, at 148.
106 See pp., supra.; Interview, 2-28-02 at 4.
107 Interview, 7-19-06.
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dynamics and effective interventions.\textsuperscript{108} This model “enables them to talk easily about mistakes and successes in a safe way.”\textsuperscript{109}

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

Accountability could also be provided by tracking information about individual cases over time. CCR, like most conflict resolution offices, does not (and is not permitted to) maintain systematic data about individual cases, even for purely internal purposes of self-evaluation and pattern identification. Concerns about the possibility of forced disclosure through subpoena prevent this information from being maintained. In fact, CCR destroys all notes on cases, retaining only demographic information reflecting general attributes of the conflict’s participants and type of problem. Confidentiality around data retention and tracking is in fact a constraint. It prevents the office from performing a systematic analysis of data, and thus from the opportunity of looking at things with categories not thought of at the time the data was gathered. “We lose a lot of fine detail.”\textsuperscript{110} If conflict intermediaries had legal protections so that records could be kept without being subpoenaed, then confidentiality in the functional sense could be preserved, and still allow the office to learn from its cases and self-monitor.

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

B. Justifying the Linkage of Individual Conflict Resolution and Systemic Change

Much of this article explores how individual conflict resolution can also generate systemic change without compromising its role in individual conflicts. This analysis proceeds on the premise that integration of individual and systemic

\textsuperscript{109} Id. at 2.
\textsuperscript{110} Interview with ombuds.
intervention is a good thing. But the desirability of this integration cannot simply be assumed, particularly because there are costs and risks associated with this individual/systemic linkage. Systemic work entails resources commitments. It expands the size and scope of a conflict resolution program and the amount of time devoted to a particular case.\textsuperscript{111} It requires a reorientation of the framework structuring conflict resolution, to provide the infrastructure and conceptual frameworks needed to facilitate more integrated consideration of individual and systemic issues.\textsuperscript{112} The individual/systemic linkage also introduces the possibility of role conflicts that could affect the legitimacy and efficacy of individual conflict resolution. Aspects of individual conflict resolution work, such as confidentiality and the absence of coercive authority, may limit the capacity to expand the remediation process beyond those directly involved in the conflict. Involvement in non-case-related activities could pose some threat to the credibility and legitimacy of the office in individual cases.

Why introduce these costs and risks? Why not maintain a separation between individual and systemic conflict resolution? Indeed, a common instinct of scholars and systems designers is to allocate responsibility for individual and systemic change to different conflict resolution processes,\textsuperscript{113} or to opt for systems change in lieu of individual conflict resolution (or vice versa).\textsuperscript{114} Our analysis suggests that this would be a mistake. Well-structured linkage of individual conflict resolution and systemic change enhances the efficacy and legitimacy of both. Indeed, in important respects, individual conflict resolution and systemic change are interdependent. This section elaborates why integration of individual and systemic conflict resolution is a good idea, and how the risks introduced by their linkage can be minimized.

1. Synergies through Linkage of Individual and Systemic Work

The interaction between the individual and systemic dimensions, both in a particular case and over time, enables more effective intervention at both levels. First, we analyze how systemic work enhances the efficacy of individual conflict resolution. The process of reframing through the identification of underlying, systemic causes often de-personalizes a conflict and makes it possible to engage disputants in problem solving. For example, participants in what looked initially like a bitter personality conflict with racial and religious overtones discovered that their conflict could be traced to the organization’s failure to provide an overall framework for critical analysis and productive interaction. One group member was paying the price for serving as the critical voice for the entire unit. This realization led them, for the first time, to develop a workable framework for their

\textsuperscript{111} Support with facts showing greater time commitments etc. involved in systemic as compared to individual cases.
\textsuperscript{112} See Section , infra.
\textsuperscript{113} See, e.g., Integrated Conflict Management Systems approach, which allocates responsibility for addressing systemic issues to one office and for conflict management to another.
\textsuperscript{114} See, e.g., Simon, Toyota Jurisprudence.
interactions going forward and produced improvements in the fairness and productivity of the overall work environment.

In fact, many individual issues or problems cannot be remedied effectively without addressing their structural or systemic underpinnings. If individual problems are rooted in a system that remains unchanged, the problem is likely to resist remediation or to recur. Often, the capacity to understand and address cases effectively at the level of the conflict required a systemic understanding that developed from the opportunity to step back and address problems outside the context of a particular conflict. As we saw in the example of the scientist who unsuccessfully applied for a research position, the process of searching for systemic problems also enhances legitimacy when the search results in a determination that the system worked well, and that an individual intervention was appropriate. For these kinds of issues, the process’ efficacy depends upon the capacity for systemic analysis and intervention.

Ongoing involvement with individual conflicts also enhances the capacity to address systemic issues. The examples elaborated in the matrix section show how engagement with cases over time enables conflict intermediaries to identify, understand, and address systemic problems required. For example, CCR developed its understanding of collaboration among scientists through working over time with many different research teams and detecting recurring patterns. The idea of the collaboration agreement, which became a systems intervention, grew out of the case work and was inspired by the work of the Army Corps of Engineers in developing partnering agreements for large scale construction projects. The case work enables problems to emerge out of ongoing pattern analysis, so that unrecognized problems can eventually be identified. The structural intervention analysis becomes a tool of interrogation that can reveal systemic problems. Similarly, ongoing casework may be necessary to create sufficient pressure or support for change, and to engage stakeholders whose participation in the problem solving process is required to develop workable and legitimate remedies.

This individual/systemic linkage creates a pragmatic tension between analysis and intervention. One always asks the systemic question, but one does not necessarily act at the systemic level. This potential gap is most evident in Quadrant III of the matrix, in which problems are diagnosed as systemic but addressed only at the individual level. The possibility of a gap between analysis and intervention, though inelegant and destabilizing, is important. It reduces the risks and costs associated with asking the systems question. Participants in the conflict can raise systemic issues without committing themselves to undertaking them before they have fully assessed the costs, risks and potential for success. The gap between analysis and intervention also marks a problem as systemic, and thus changes the way that problem will be perceived when it recurs. Quadrant III is where you see the consequences of systemic problems. They are not just abstractions, but insistent problems affecting the

115 Note that it was the ombudsman’s “membership” in a community of practitioners that led to his acquaintance with the use of partnering agreements in construction industry.

116 See Section , supra.
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quality of work and the quality of life within the organization. The process of developing a systemic diagnosis develops knowledge about the problem. It also gradually builds understanding of the need for change among different stakeholders within the organization. As the Quadrant III example of CCR’s root cause analysis of management culture illustrates, the capacity and openness for systems change can develop over time.

Even in a situation where the systemic issues cannot be addressed in the context of a particular case, it does not mean that the issue cannot be handled systemically. If the intermediary has addressed a discrete problem within a particular context, that contact increases the likelihood that the office will work with the same unit in the future. An analysis of CCR’s cases shows that the systems interventions have emerged out of repeat interactions developed through individual case work. Indeed, one informal measure of success for CCR in terms of treating people fairly is if CCR has handled a case initiated by an employee about problems involving a managerial person, and subsequently the managerial person contacts the office for help with another case, particularly one involving a systemic issue. The office has the opportunity to use the knowledge and relationships developed in individual cases to structure systemic responses at a later time and in another context. The knowledge, trust and legitimacy built through the process of doing case work plays a significant role in enabling the office to work at the systemic level.

Combining individual and systemic conflict resolution also enhances efficacy because many problems combine interpersonal aspects with structural aspects. Both must be addressed for change to occur. This is particularly true when the problems involve people in positions of power within the organization. The legitimacy of structural change often hinges upon being able also to remedy unfairness at the level of the individual. Unresolved individual problems breed dissatisfaction with reform, and can foster resistance or backlash. Of course, problems that are purely about redress for past harms can interfere with systemic change, by focusing on retrospective behavior and fault. Those types of cases can and should be addressed by a separate process. But many cases are addressed at the individual level through prospective problem solving, which also unearths the systemic dimensions of the individual problem.

The knowledge, legitimacy, and access coming from individual case work provides a counter-argument to the proposal to separate systemic change from individual conflict resolution. In Toyota Jurisprudence, Bill Simon advocates bracketing and muting individual concerns, and focusing “jurisprudence” solely on systemic problem solving. He draws on the example of a system of problem solving within the production process, in which every individual can pull an ‘andon cord,” which then stops production and forces everyone affected by or responsible for the breakdown to figure out how to prevent the problem from recurring. Simon advocates applying this metaphor to the context of public problem solving. But the article does not address how to transfer this methodology from a business to a public policy arena. It is crucial to map out

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how a dynamic, deliberative process will be triggered in a context without the organizational equivalent of an andon cord. Systems change also requires that information about systemic problems is linked to stakeholders operating at points of breakdown, where changes in practice are most needed. Reliance on pre-constituted deliberative bodies or outside audits does not necessarily fulfill this function. These bodies tend to function outside the working unit; they do not necessarily involve those operating at crucial leverage points. They also do not necessarily provide a mechanism to pressure change. What’s more, people may not recognize that the problems they experience have deeper roots, or that they can be remedied. Many problems go undetected or remain unchanged, because there is no impetus to address them. Systems problems can be particularly challenging to address in the context of crises, when relationships are highly charged and more adversarial.

Conflict resolution can operate as this much-needed trigger for systemic analysis and change. Issues raised through conflict resolution offer a mechanism prompting analysis and intervention, particularly when the costs of raising questions are low. In many areas, the interactions around issues of individual fairness are the equivalent of the ‘andon cord’ on the Toyota shop floor. They are the trigger that brings recurring problems to the attention of the group. Conflicts are focused and discrete, and yet connected to systems and underlying causes. The linkage of individual and systemic problems allows breakdowns in practice to become part of the data contributing to the understanding of a systemic problem. They also allow a problem to be “chunked” — to be defined at the appropriate level of scope and depth so that it has the prospect of a successful intervention.118

Linking individual conflict resolutions with systemic change is also justified as a way of enabling conflict resolution to advance public values that the norm community or the polity has decided are important. These values could be particular to the norm community, such as the advancement of science or the delivery of quality health care. Or, they could be more general norms, such as equality or worker safety.119

Fairness is another justification for linking individual conflict resolution and systemic intervention. Many conflicts or problems raised by particular individual affect others who are similarly situated. In addition, solutions that are developed to address individual concerns may benefit other people if those solutions can be applied to others facing the same kind of problem.

Finally, systemic treatment of issues raised in conflict resolution can be justified in terms of efficiency. If the same problem affects a large number of people who will also complain, it makes sense to be able to aggregate their claims to minimize the cost of addressing the problem.

2. Addressing the Tensions Between Individual and Systemic Work


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

However, confidentiality isn’t as big a constraint as people might think. First, there are ways to maintain confidentiality and still proceed with systemic work. Part of the intervention can include taking steps to minimize the risk of adverse action stemming from raising the issue. Many of the people who come to the office come because they are offered confidentiality. People are concerned about the consequences of disclosure--that someone they are accountable to or affected by will know that they have raised an issue, and that raising the issue would trigger negative responses or that people who don’t currently know about the problem will learn about it. Managing consequences changes the calculus of confidentiality. For example, there was an issue brought to the office by someone who was the only one in the lab who was likely to raise the issue. Together with the concerned individual, CCR devised a way of raising the issue that would not lead to her being identified. At the point at which they have the possibility of intervention, most people are comfortable having the issue raised with at least some people.

Second, confidentiality brings with it some advantages for connecting individual and systemic work. The promise of confidentiality reduces the risks associated with surfacing a problem within the workplace. It also provides a space for brainstorming and taking risks, at a point when it is easy to backtrack, revise, correct misunderstandings. It enables people to take responsibility for acting. It allows all of the parties to speak fully and honestly about a situation than they might in a formal proceeding, where they could be unanticipated consequences of acknowledging mistakes, errors or vulnerabilities. People often resist admitting errors when they could be exposed publicly before they can take remedial steps. Sometimes, if they can’t acknowledge mistakes they have made, they may wind up defending a whole system to keep from revealing the mistake that they made. Also, there are situations where information will only be disclosed if there is some control over who will have access to that information. So confidentiality is not only a constraint. You can learn things about the dynamics that are sustaining a systemically problematic situation which are partly interpersonal or about politics.

120 See ABA Standards, supra note.
You can learn the history and politics explaining why a structure is in place, for example, to serve personal ends. Confidentiality also enables systemic work to take place within subunits of an organization, which may be unwilling to tackle problems if doing so invites scrutiny or criticism from those above them. Cumulative change at the sub-unit level may produce fertile ground for system-wide change.

Third, there are ways of aggregating data without revealing the identity of individuals. There are general points that can be drawn from the particulars, without referencing the particulars. The intermediary can compose a hypothetical case that is a composite of cases, which captures the essential pieces and dynamic of the conflict. There are ways presenting information that draw on the lessons of the confidential cases without breaching confidentiality. This is a workable system to protect confidentiality and still allow data about types of problems to be aggregated and shared. Also, reflective practice--ongoing discussion among a group of people bound by the confidentiality norm--serves as a way to pool information without disclosing that information publicly. Confidentiality around data retention and tracking is, however, a constraint. It now prevents the office from having a systematic analysis of data, looking at things with categories not thought of at the time.

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

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

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

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

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

Our matrix analysis, which shows how individual conflict resolution can be integrated with systemic change, invites a reconsideration of the assumptions underlying this debate. This section demonstrates that rule-of-law principles can be realized using non-adjudicative processes that integrate individual and systemic issues, at least under certain conditions. We also suggest that informal conflict resolution processes can internalize those values without imitating adjudication, and that doing so will enhance the legitimacy and efficacy of those processes. We use the CCR case study as a springboard for developing a more dynamic understanding of these rule-of-law values, one that accounts for how they actually operate in different settings. This approach provides a framework for assessing both informal and formal conflict resolution in relation to their realization of rule-of-law values. It also challenges the idea that the methods used in adjudication are the only, and even the best way to realize those values across-the-board. Finally, we show the importance of explicitly constructing the relationship between formal and informal systems of conflict resolution as a way of enhancing the legitimacy and efficacy of each.

A. Elaborating Public Values

122 Lipsky, supra note .
124 See Abraham, supra; Daniels and Sabin, supra; Melvin Aron Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 HARV. L. REV. 410 (1978); Luban, supra; Susan Sturm, A Normative Theory of Public Law Remedies, 79 GEO. L. J. 1357, 1410-11 (1991);
125 For an argument calling for such a jurisprudence of informal conflict resolution, see Luban, supra; Daniels and Sabin, supra.
One of the core assumptions underlying the critique of ADR is its inability to advance public values through principled decision making. This conclusion derives in part from a particular idea of public value—the declaration of general rules backed by sanctions—and a particular conception how public values emerge from conflict resolution—through Socratic reasoning from binding precedent. These are important forms of public norm elaboration, but they are not the only principled way that public values can be articulated and generalized, particularly in contexts where the coercive power of the state is not directly implicated. The adjudicatory conception too narrowly defines the meaning and role of public values, and the methods by which those values can be generated. As many theorists have shown, law’s role in advancing public values goes beyond articulating rules that will create order and predictability (although these are in fact important values). We argue that linkage of individual conflict resolution and systemic change creates the capacity for informal conflict resolution to generate public values through principled decision making. It can produce active engagement in public norm elaboration and transformation in non-adjudicative settings.

The combination of root cause analysis and multi-level remediation, illustrated in the CCR example, provides an example of public norm elaboration outside of adjudication. This methodology pushes stakeholders to make implicit norms explicit, and then involves them in an inquiry by which those norms were justified or rejected. This norm elaboration happens as part of determining whether an issue is problematic, and if so, why it is and what can be done to change it. The process of finding causes and assessing impacts also poses the question of how others were potentially affected by a problem, and whether the opportunity to craft a more general solution exists and should be pursued. Problems revealed through conflict resolution sometimes give rise to changes in policy, which apply to everyone similarly situated within the relevant domain. We also saw examples of the advancement of public norms through addressing the institutional barriers to their realization. This is done, for example, by using public reports, deliberation, training, and group facilitation to figure how to incorporate desired values into practice. This line of inquiry leads to second order norms, which set up processes and principles by which new problems would be addressed. Collaboration agreements, used to construct fair and workable interactions and to create a framework for addressing disagreements, could be understood in this way. Taken to the next level of generality, we also observe a more constitutional dimension to the advancement of public law values. As the problems became better understood as recurring, significant, and preventable through institutional design, some interventions generate deliberations that produce an overarching governance structure built around principles, values, and

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127 See H.L.A. Hart, The Concept of Law
lessons gleaned from conflict resolution experience with recurring problems. Sometimes they produced “constitutional moments” for the organization, when the collective participated in rethinking framing principles and structures governing their work. In this manner, public values emerged from a non-adjudicative process.

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

Thus, when linked to systemic change, non-adjudicative conflict resolution fostered articulation of implicit norms, “reasoned elaboration and visible expression of public values,” public solutions to common problems, implementation of public norms, and engagement with the relationship between norms and remedies. This process corresponds to Robert Cover’s description of a core function of law: integrating the "is," the "ought," and the "what might be." Law thus operates as a catalyst by facilitating the elaboration and implementation of public values, and the productive engagement of normative inquiry among relevant institutional actors. Rule-of-law values impose an obligation to articulate the basis for determining that a condition is sufficiently problematic to warrant public attentiveness, and to justify the adequacy and appropriateness of public

128 An illustration of the role of norms can be found in the description of the process used in the intervention involving the decision not to select John for a new position. See pp., supra. There, the questions driving the inquiry were informed by from legal norms (was the process biased), community norms (were scientific standards of merit justified), ethical norms (was the process fair), and organizational norms (was the process reflective of deeper organizational dysfunction or collective dissatisfaction).

129 Abraham, supra note, at 2626, citing Fiss.

Conflict resolution thus institutionalizes principled decision making that can be generalized within the community of practice in which it operates.

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

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

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

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131 Susan Sturm, Equality and the Forms of Justice
132 See, e.g., Fuller, Fiss.
individual. In these situations, advancement of public values cannot legitimately be achieved through institutional intermediation.133

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

Our analysis suggests that these are mutually constitutive systems, with capacities to generate public values for conflicts of different types. They can generate norms with different types of legitimacy. Norms generated in one domain affect those developed in the other. They can compete with each other, co-exist, or enhance each others’ efficacy and legitimacy.134 The type of relationship among these systems can, and we argue should, be deliberately and self-consciously constructed. We have shown that collaborative critical inquiry, can generate public values through internal processes of participation and accountability. Norms developed through processes attentive to rule-of-law values may carry greater weight in other conflict resolution arenas. These processes cannot, however, generate norms binding beyond the scope of that community, at least without further process. Yet, the system’s legitimacy is undermined if there is no effective backstop to address problems that cannot be resolved cooperatively, when those problems violate established norms and have consequences that fall heavily on particular individuals.135

At the same time, the co-existence of these conflict resolution systems poses potential threats to the efficacy of each. Sometimes the capacity to cut deals in private, without regard to fairness or public consequences, undermines formal law’s capacity to advance rule-of-law values.136 Conversely, formal legal rules and sanctions can undercut the capacity of intermediation to involve necessary participants, generate much-needed data, or produce genuine deliberations.137 They can also unduly narrow the normative framework within which root cause analysis must proceed. The contrast between anti-discrimination and disability norms illustrates this point.138 One of the examples

133 So, for example, in CCR’s work, disputant preferences determine how a given matter is handled. At any point a dissatisfied person can pursue any of the formal grievance and complaint processes available within the organization. And every visitor to the office is always informed about the full range of formal and informal processes available for that person’s particular issue.
134 See JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM 164-79 (2002); Luban, supra Trubek and Trubek, supra.
135 For example, research shows that proactive efforts to create effective systems for preventing sexual harassment are unlikely to work if clear violators of sexual harassment norms do not receive discipline. Add Cites. CCR has an abiding interest in the NIH providing strong and effective grievance and complaint mechanisms.
136 See Abraham, supra Luban, supra.
137 See Simon, supra note ; Susan Sturm, Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458 (2001); Trubek
138 We are grateful to Liz Emens for inspiring this comparison of disability and anti-discrimination norms.
provided for Quadrant III illustrate how antidiscrimination law and process can distort the frame for analyzing cases in which race may play a role. The law imposes a fixed and unitary meaning of race discrimination; at the individual level it is defined by deliberate unequal treatment based on race. This legal framework dictates how race is understood; it discourages participants from addressing the racial dynamics producing exclusion, even when those legal standards do not apply. Contrast this rigid rule-based approach with the law’s approach to disability.\footnote{139} There, the legal standard of reasonable accommodation invites, indeed, requires the participants to deliberate about the meaning of disability in context and to try to address the consequences in the design of the workplace, at least with respect to that individual.\footnote{140} This kind of legal standard combines the imperative of formal law with the dynamism of collaborative problem solving.

The discrimination/disability example illustrates a more general point. Conflict resolution norms and processes can be designed to take account of their impact on the capacity to advance public values in other conflict processing systems.\footnote{141} We see the potential and desirability of actively negotiating the relationship among these informal and formal normative systems. Legal norms could be articulated so that they foster conflict resolution designed to advance public values in other domains. Informal conflict resolution could be designed to enhance their capacity to advance public values, by building in the features linking individual conflict resolution with systemic issues.\footnote{142}

B. Rethinking Impartiality

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


\footnote{142} See Section , supra.
The conventional view achieves impartiality through detached neutrality. This means that ideally, the third party should have no direct knowledge of the conflict or prior relationship with the participants. This conception of impartiality underlies a strand of criticism directed particularly at embedded conflict resolution. The assumption is that impartiality can best be achieved by removing the conflict from the context within which it occurs, and limiting the potential for outside relationships or knowledge to taint the process. This view would preclude embedded institutional intermediaries, and thus challenges the legitimacy of a crucial feature enabling conflict resolution to generate public values. Detached neutrality would practically disable conflict resolvers from using systemic knowledge in their individual case work or from playing the multiple roles that enable systemic responses to problems surfaced by individual cases. It would preclude the conditions necessary for the linkage of individual and systemic intervention.

An unbiased conflict resolver is a value crucial to process integrity. However, detached neutrality is not the only, or even necessarily the best means of achieving that end. Even in adjudication, bias cannot be eliminated without taking account of its more structural forms. It is now well understood that “the haves come out ahead” in the litigation process, and that every decision maker approaches a problem from a perspective that builds in unstated assumptions and baselines often favoring more powerful group members. Detached neutrality does not provide a way of detecting or protecting against these forms of bias.

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

144 See, e.g., Edelman, supra note .
145 See pp. supra.
The CCR example shows the promise of a structural solution to this apparent dilemma. Bias is reduced through institutional design: first, by assuring the independence of the decision maker from the control of any particular interest; second, by creating ongoing critical inquiry from the perspective of multiple participants and points of view; and third, by building in forms of accountability to those multiple participants, rather than to any one position. Bias is checked by institutionalizing “multi-partiality.” Bias is acknowledged as inevitable, and as something that has to be surfaced and corrected. Reflective practice from an interdisciplinary perspective provides one such check. This process builds in destabilization of a fixed or predetermined point of view. This is done by the involvement in the process of people from multiple perspectives. The third party has to explain their understanding and strategy for each case, and will be questioned about their role. The concern for bias is an explicit part of this inquiry. This approach resembles the debiasing idea, developed by Jolls and Sunstein as an intervention for companies. It acknowledges that conflict resolvers are affected by the process they facilitate, and thus it is important to build checks against the expression of bias into that process.

Root cause analysis provides another method for assuring full and meaningful participation in the conflict resolution process. This method interrogates problems by involving those directly involved in identifying the points of breakdown and possible remediation. Its logic requires substantive participation in analysis and intervention by those with knowledge of the problem. The process entails successive approximations of analysis, which are then tested and validated by experience. As the third party, this methodology induces you to pay careful attention to the way you frame your intervention. You do something, based on approximations derived from current understanding. You may bring two people together or reframe a statement. You may do what you are doing with an intention: I think this will change the alliances within this unit. Then you pay attention to the consequences of your intervention. You may have some aspect of your hypothesis confirmed, but it might be disconfirmed. From there you have to rethink your hypothesis about what the problem is. You might initially define a conflict in terms of power struggles between senior and junior people. So you run a certain kind of meeting, and it turns out that it is really between the men and the women, but that hadn’t been apparent. It was really more about gender, but that issue couldn’t be spoken. Then you have to adjust your understanding and your intervention to include a broader group, which then generates the next iteration. Finally, the role may be defined to build in accountability to multiple constituencies. Voluntary participation performs this function. The third party’s legitimacy and efficacy depends upon the willingness of all affected parties to participate in this root cause inquiry, which in turn provides a strong incentive to adopt a stance of independence and to institutionalize a practice of legitimacy.

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

CONCLUSION

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

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

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

To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be."\textsuperscript{151}

\textsuperscript{151} Cover, supra note.