The Rights Revolution Revisited

INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE US

Edited by

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For Matthew

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The Civil Rights Template and the Americans with Disabilities Act: A Sociolegal Perspective on the Promise and Limits of Individual Rights

Thomas F. Burke and Jeb Barnes

The Civil Rights Act of 1964 (CRA) is in many ways a remarkable law, but the implications of one of its most powerful effects seems to us underappreciated: Like the modern civil rights movement, which became a model of other social movements (first on the left, then on the right, first in the United States, then in the rest of the world), the CRA created an influential template for public policy in the United States. The "civil rights template" addresses social injustices through lawsuits that punish discrete, culpable acts of discrimination, much as common law tort suits deter and punish irresponsible acts that cause injury. The civil rights template has become the basis for laws targeting discrimination on an array of grounds (race, gender, religion, disability, age, immigration status, sexual orientation, family makeup, language usage, physical appearance) in nearly every realm of social activity, from housing and health care to policing, shopping, schooling, and employment.

The civil rights template has had unusual political appeal – it is one of the rare policy mechanisms that retained some bipartisan support from the 1960s all the way to the 1990s – but its results in achieving social equality have been disappointingly mixed. For critics of the civil rights template, its shortcomings come as no surprise, reflecting a structural mismatch between remedy and problem. These critics argue that the civil rights template is a clumsy tool for reducing social inequalities because it is designed to punish individual acts of discrimination in a world in which organizational practices have far more weight than the discretionary actions of individuals. Moreover, this template seems best suited to addressing conscious, intentional acts, but psychological research demonstrates the powerful ways in which unconscious biases shape social life.[1]

[1] The law professor Charles Lawrence (1987) famously pointed to the problem of unconscious racism just as wave of psychological research on implicit bias was getting underway. For an overview on the literature on unconscious bias, see John T. Jost et al., "The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore," *Research in Organizational Behavior* 29

These concerns are powerfully reflected in what has been called the "structural turn" in civil rights scholarship, which has been spearheaded by leading law school professors, a group that would seemingly be most inclined to defend civil rights litigation. Their critique starts from the premise that the civil rights template is inadequate to the task of confronting "second generation discrimination": discrimination arising from organizational practices and unconscious biases.[2] Under this structural approach, these legal scholars have moved away from their traditional focus on case law and doctrine toward studying how organizations receive, interpret, and address the laws. From their perspective, civil rights law litigation is at most a catalyst, at worst a distraction, in the effort to reshape the behavior of organizations.

In this chapter, we consider the promises and limits of the civil rights template. We start from the premise that the fundamental contentions of the structural critique are inarguable: (1) organizational practices and routines are a far more powerful source of inequality than individual discriminatory acts, so that (2) lawsuits narrowly aimed at discrete acts of discrimination have limited ability to eradicate social inequalities. For us as sociolegal scholars, though, this is just the beginning of the matter. The big question left is the extent to which the civil rights template can be used as a political resource for institutional change. Under what conditions can individual lawsuits go beyond the particular facts of the case to reshape the practices of organizations?

There is a large literature in sociolegal studies that addresses this question. In this chapter we illustrate some of the themes of that literature with some data from our research on organizational responses to the accessibility provisions of the Americans with Disabilities Act (ADA),[3] a law explicitly fashioned on the CRA. The story that emerges from our research is one of contingency and complexity. In the cases we studied, litigation had significant effects on organizations, although the degree to which litigation helped to reshape organizational practices varied considerably. The

(2009): 39–69; David L. Faigman, Nilanjana Dasgupta, and Cecilia L. Ridgeway, "Matter of Fit: The Law of Discrimination and the Science of Implicit Bias," *Hastings Law Journal* 59 (2007): 1389–1434. The literature that criticizes the civil rights template is vast. Within the legal academy, see, e.g., two collections of essays in the Critical Race Theory tradition, Kimberlé Crenshaw, ed., *Critical Race Theory: The Key Writings that Formed the Movement* (New York: The New Press, 1996); Richard Delgado and Jean Stefancic, *Critical Race Theory: The Cutting Edge*, 2nd Edition (Philadelphia, PA: Temple University Press, 2013).

2 Susan Sturm, "Second Generation Employment Discrimination: A Structural Approach," *Columbia Law Review* 101(3) (2001): 458–568 (hereinafter "Second Generation Discrimination"); see also, Samuel R. Bagenstos, "The Structural Turn and the Limits of Antidiscrimination Law," *California Law Review* 94 (2006): 1–47. See generally Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (New Haven, CT: Yale University Press 2009).

3 Jeb Barnes and Thomas F. Burke, "The Diffusion of Rights: From Law on the Books to Organizational Rights Practices," *Law & Society Review* 40:3 (2006): 493–524; "Making Way: Legal Mobilization, Organizational Response and Wheelchair Access, " *Law & Society Review* 46 (2012): 167–198.

challenge remaining is to understand the causes of this variation, and, in the process, to identify the factors that facilitate effective "rights practices."[4] Meeting this challenge is critical because, given the unlikelihood of Congress passing major new civil rights legislation or of judges aggressively using existing structural remedies, especially in nongovernmental settings, the civil rights template, for all its inadequacies, is one of the main tools available to social activists.

THE POLITICAL LEGACY OF THE CRA: THE ENDURING BIPARTISAN APPEAL OF THE CIVIL RIGHTS TEMPLATE

Sociolegal scholars focus on the "radiating effects" of law, the ways in which formal rules affect behavior and processes even in the absence of a formal dispute.[5] One potential radiating effect of law, especially landmark legislation like the CRA, is that it can provide a template for addressing social problems.[6] Civil rights laws address the issue of inequality by identifying it as a matter of "discrimination." There are many ways of defining discrimination as a social problem. On one end of the spectrum, we can see discrimination as the result of deep-seated social, economic, and institutional forces that create systematic disadvantages for certain groups. Here, the challenge revolves around reforming basic institutions and social conditions by, for example, redistributing wealth and services to historically disadvantaged groups and requiring fundamental shifts in the ways in which institutions operate, for example in school admission policies, hiring practices, and contracting rules. From this vantage, intentional acts of discrimination are a (distressing) symptom of a much deeper disease; indeed, part of what makes inequality so insidious and resistant to change is its taken-for-granted, naturalized quality, so that discriminatory practices are seen as not even open to challenge.

On the other end of the spectrum, we can think of discrimination on a purely individual level. From this perspective, inequality arises from specific discretionary and conscious acts. The solution is to give those injured the right to challenge unjust practices and recover any losses caused by the discrimination. Individual bigotry is at the heart of the problem. Given this framing, once individual discriminatory attitudes are rooted out, the elimination of discriminatory practices should follow suit.

These views are not mutually exclusive, of course. For example, the 2014 media blitz over the racist comments of Los Angeles Clippers' owner Donald Sterling

4 Barnes and Burke, "The Diffusion of Rights," 494.

5 Marc Galanter, "The Radiating Effects of Courts," in Keith Boyum and Lynn Mather, eds., *Empirical Theories of Court* (New York: Longman Press, 1983).

6 For a critical view of how litigation and judicial decisions can frame public policy discourse, see Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves and Kills Politics* (New York: Cambridge University Press, 2009).

highlighted his prejudiced attitudes, but also the lack of nonwhite participation in the ownership of major sports franchises. Ferguson Police Officer Darren Wilson's shooting of Michael Brown first focused attention on whether Wilson was influenced by racism, but later expanded to raise questions about more general structural inequalities in the city.

Yet in the political debates over the passage of the CRA, individual remedies often took center stage. The emphasis on individual remedies in Congress did not arise out of some deep philosophical study of the best possible model or understanding of the problem. In introducing an early, more sweeping draft of the CRA, Senator Hubert Humphrey defended its broad scope by observing that "willful discrimination is often commingled with the many impersonal institutional processes, which nonetheless determine the availability of jobs for non-white workers."[7] The CRA that was eventually enacted was considerably narrower than the draft Humphrey presented, in ways that reflected both the legacy of existing civil rights laws and the realities of civil rights politics. Civil rights advocates began with the example of Reconstruction-era civil rights laws, in which individuals were empowered to sue in federal court for acts of discrimination. In an era in which courts and litigation were primary mechanisms of national-level governance this was unremarkable. The Republicans who crafted the first civil rights laws, in the 1860s and 1870s, saw them as addressing deprivations of constitutional and common law liberties such as the right to contract, and so created rights to sue modeled after common law litigation. Aside from the military, the federal courts were just about the only tool available to intervene in the affairs of Southern states, and so the progress, and eventual collapse, of Reconstruction was tied closely to the actions of federal courts in civil rights litigation.[8]

[7] William E. Forbath, "Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements," *University of Pennsylvania Journal of Labor and Employment Law*, 2 (2000): 713, cited in Bagenstos, "The Structural Turn," 1.

[8] The Freedmen's Bureau, an agency created within the military after the Civil War, theoretically could have handled the job of implementing civil rights policies, but it was overwhelmed, lacking the necessary legal expertise and resources, and its constitutional status was a matter of great controversy. Laura Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015), 101–103. Eric Foner notes that for a short time the Freedmen's Bureau operated its own court system in order to address some of the grievances of the freed slaves. He observes, however, that "Congress placed great reliance on an activist federal judiciary for civil rights enforcement – a mechanism that appeared preferable to maintaining indefinitely a standing army in the South, or establishing a permanent national bureaucracy empowered to oversee Reconstruction." Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988), 238. See also Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction* (New York: Cambridge University Press, 2011); Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: University of Chicago Press, 2009); and generally Stephen Skowronek, *Building A New American State: The Expansion of National Administrative Capacities: 1877–1920* (New York: Cambridge University Press, 1982).

The role of the federal government expanded tremendously in the twentieth century, and the modern civil rights movement theoretically could have taken advantage of this by creating a more agency-based and structural approach to racial inequality. But civil rights advocates in the 1960s faced a classic problem of "pivotal politics": they knew that the Southern Dixiecrats would filibuster any bill and that a significant number of conservative Republicans would have to supply the critical votes to overcome it.[9] As Sean Farhang explains, the negotiation between civil rights advocates and these Republicans was not about basic civil rights but how these rights would be enforced.[10] Before the CRA passed in 1964, anti-discrimination laws at the state level were enforced with a bureaucratic regime in which state agencies were given investigatory powers coupled with the right to issue cease-and-desist orders and this was the model of enforcement in early versions of the CRA.[11] This bureaucratic/state-centered model was wholly unacceptable to small government Republicans, who saw this as a recipe for over-zealous Democratic appointees to harass businesses.

Civil rights advocates traded away traditional cease-and-desist enforcement powers to get votes needed among Northeastern and Midwestern small government conservatives. The stripping of these enforcement powers is well-documented. Farhang stresses what civil rights advocates received in return: a system that would be enforced through private litigation with fee-shifting statutes, so that winning plaintiffs would get their fees paid for. The privatizing of enforcement was acceptable to small government conservatives who thought business would fare better in expensive court cases than in front of a civil rights agency populated with over-zealous Democratic appointees, and that the brunt of cases focusing on acts of intentional discrimination would fall on the South. For liberals, fee-shifting was critical because they were deeply skeptical about litigation as a means to enforce civil rights given the costs of bringing such suits, the dearth of civil rights lawyers (especially in the South), and the intimidation of plaintiffs.[12]

Advocates wasted no time in using some of the same elements of the template in the 1965 Voting Rights Act and the Fair Housing Act of 1968. And, despite gathering political headwinds in the 1970s, as the GOP turned to the right and efforts to curtail litigation and "judicial activism" became a significant rallying cry

[9] For more on pivotal politics, see Keith Kreihbel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998).

[10] Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton, NJ: Princeton University Press, 2010).

[11] Ibid., 98.

[12] Ibid. 106–114 (describing the political trade-offs of enacting the private enforcement regime underlying the CRA).

for conservatives, the civil rights template remained durable. From the 1970s to the 1990s, the template was extended to address a wide array of issues, including education for children with disabilities, the problems of senior citizens and older Americans, and eventually, discrimination based on sexual orientation. While some civil rights laws, starting with Title VI of the CRA, gave agencies the power to withdraw federal funding as an enforcement mechanism, by far the predominant tool was private litigation.[13]

In 1990, the ADA was added to the long list of laws created out of the civil rights template. The ADA was the product of a coalition between seemingly unlikely allies: disability activists and conservative Republicans. Nurtured during Reagan administration and enacted during the first Bush administration with broad bipartisan support, the ADA was trumpeted as a way to open the doors of society to people with disabilities by providing new remedies that would, eventually, reduce the size of government by getting people out of disability programs.[14] Federal agencies were given the power to enforce the law not directly but through litigation, and individuals were given the right to sue. Thus just as with the CRA, a litigation-based reform was sold as a way to resolve social problems without the heavy hand of centralized, command-and-control federal bureaucracies. The left–right coalition agreement on private enforcement may be one reason that, as Sean Farhang shows, rights-based enforcement regimes are more likely to be created during periods of divided government.[15]

From the perspective of progressives, then, the civil rights template rests on an interesting political two-step. Civil rights laws in their various guises are intended to advance a progressive goal of a more-inclusive and equal society, yet the civil rights template approaches the problem of inequality from a limited and arguably conservative frame, by placing individual misdeeds, and individual initiative, at the center of social change. Whatever one thinks about this compromise, it was a broadly appealing strategy that attempted to address pervasive social problems without creating the divisions that arise when trying to establish new programs (and the taxes needed to pay for them).[16]

[13] R. Shep Melnick, *The Civil Rights State* (unpublished manuscript).

[14] Thomas F. Burke, *Lawyers, Lawsuits and Legal Rights: The Battle over Litigation in American Society* (Berkeley, CA: University of California Press, 2002).

[15] *The Litigation State*, 77–78; see also Thomas F. Burke, *Lawyers, Lawsuits and Legal Rights*, 2002; Jeb Barnes, "Bankrupt Bargain? Bankruptcy Reform and the Politics of Adversarial Legalism," *Journal of Law & Politics* 13:4 (1997): 893–935.

[16] For more on the differences between the politics of litigation-based policies versus administrative federal programs, see Jeb Barnes and Thomas F. Burke, *How Policy Shapes Politics: Rights, Courts, Litigation, and the Struggle over Injury Compensation* (New York: Oxford University Press, 2015).

STRETCHING THE CIVIL RIGHTS TEMPLATE

The limits of an individualized approach to race discrimination soon became apparent in the years following the enactment of the CRA, and litigation quickly evolved in ways that attempted to grapple with the institutional roots of racial inequality. In the landmark case *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), the Supreme Court endorsed the Equal Employment Opportunity Commission's contention that the CRA had outlawed business practices that had a "disparate impact" whether or not the plaintiffs could show that these practices were consciously adopted in order to discriminate against minorities. Disparate impact litigation then moved the CRA from individual attention to institutional practice, though organizations could defend themselves if they showed that their practices were a "business necessity." Disparate impact litigation proved particularly controversial – the Supreme Court all but eliminated it with its decision in *Wards Cove v. Atonio*, 491 U.S. 164 (1989). After some political wrangling, Congress ostensibly restored disparate impact analysis with the 1991 Civil Rights Act, though disparate impact cases appear to constitute a tiny percentage of all civil rights claims.[17] The Supreme Court's 2009 decision in *Ricci v. DeStefano*, 557 U.S. 557, has raised the possibility that the Court will one day declare that the race consciousness inherent in disparate impact analysis violates the Constitution's Equal Protection Clause.[18]

Another way in which civil rights litigation attempts to overcome the limits of the civil rights template is through class actions. Class actions do not merely aggregate individual claims; they must also show how the individual claims are linked, and that usually requires some argument about structural forms of discrimination, organizational policies that have an effect across individuals. In recent years, however, the Supreme Court has been tough on class action lawsuits across several fields, including civil rights, and Congress has acted to discourage them. In *Wal-Mart v. Dukes*, the Court reversed a trial court that had certified a class action on behalf of Wal-Mart's more than 1.5 million female employees claiming sex discrimination.[19] The Court took issue with several structural aspects of the lawsuit, including the use of statistical evidence to demonstrate organizational disparate treatment, and the claim that organizational policies, principally the use of local discretion in awarding pay and promotions, could be forms of disparate treatment illegal under the

[17] A study that sampled employment discrimination lawsuits filed in federal court between 1988 to 2003 found that only 4% made a disparate impact claim, though the study also found that they fared roughly as well as lawsuits with disparate treatment claims. See Laura Beth Nielsen, Robert Nelson, and Ryon Lancaster, "Individual Justice or Collective Legal Mobilization? Employment Discrimination in the Post-Civil Rights United States," *Journal of Empirical Legal Studies*, 7 (2010): 192.

[18] Richard A. Primus, "The Future of Disparate Impact," *Michigan Law Review* 108 (2010): 1341–1387.

[19] 131 S.Ct. 2541 (2011).

CRA. *Wal-Mart* was a restatement of the basic elements of the civil rights template: Plaintiffs, the Court concluded, had to show that they suffered because of individual discriminatory decisions; a structural claim based on broader patterns to link the fates of a vast class of employees went beyond the bounds of the CRA. *Wal-Mart* certainly did not end the use of class actions in civil rights litigation, but it introduced a series of barriers that will be hard to overcome.[20] Given that multiple plaintiffs are far more likely to be successful than lone individuals in civil rights litigation, this may represent a major shift.[21]

Perhaps the main way courts overcame the limits of the civil rights template is through its injunctive powers.[22] In tort or contract lawsuits, the model for the civil rights template, money is the way in which victims are made whole. But for much civil rights litigation, for example the school desegregation rulings following *Brown*, money damages were beside the point: the plaintiffs wanted fundamental changes in the ways in which schools operate. In school desegregation and other lawsuits against public entities, such as prisons and mental health institutions, judges were challenged to force recalcitrant officials change the way they operated, and this sometimes led the judges to directly administer, or appoint administrators, to make the required changes.[23] These structural remedies clearly differed from the civil rights template, but the place of such remedies in civil rights lawsuits against nongovernmental institutions was more tenuous. Judges were understandably reluctant to take charge of private entities through direct administration in the ways they had done for governmental entities such as prisons and schools. So, while the landscape of civil rights remedies has included a mix of approaches, including structural ones, the civil rights template remains central to the struggle for social equality through the courts, especially the fight against discrimination in private settings.

THE "STRUCTURAL TURN" IN CIVIL RIGHTS SCHOLARSHIP

Susan Sturm, a law professor specializing in civil rights, has written extensively about the ways in which judges directly administered governmental entities, and perhaps that made her more acutely aware of the limited effects of money

[20] Catherine Fisk and Ermin Chemerinsky, "The Failing Faith in Class Actions: *Wal-Mart v. Dukes* and *AT&T Mobility v. Conception*," *Duke Journal of Constitutional Law & Policy* 7 (2011): 73–97.

[21] Nielsen, Nelson, and Lancaster, "Individual Justice or Collective Legal Mobilization?," 194.

[22] See generally Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (New Haven, CT: Yale University Press, 2003); Charles Sabel and William Simon, "Destabilization Rights: How Public Law Succeeds," *Harvard Law Review* 117:4 (2004): 1015–1101.

[23] On the prison reform cases, see generally Malcolm Feeley and Edward Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998); see also Jack Bass, *Taming the Storm: The Life and Times of Judge Frank M. Johnson* (New York: Doubleday, 1993).

damages in cases with private defendants. In an influential 2001 article, "Second Generation Employment Discrimination: A Structural Approach," she argues that judges must find more artful ways to go beyond the limits of the template in cases involving private defendants. Sturm distinguishes between "first generation" discrimination, explicitly racist or sexist acts, and "second generation" discrimination, based on unconscious biases and practices that were not chosen to disadvantage minorities. Women, for example, may be disadvantaged by being excluded from informal social interactions, or because they do not receive mentoring within an organization, and because promotion decisions turn on subjective and discretionary judgments. These kinds of problems do not line up very neatly with the hard and fast rules of the civil rights template, because discrimination results from the accumulation of effects from subtle processes and small, seemingly minor acts as opposed to dramatic, overt acts of discrimination. Rather than rule enforcement, rectifying second-generation discrimination, Sturm argues, "requires a different process, namely problem-solving."[24] A rule-based approach, Sturm argues, is likely to be insensitive to the particular context of an organization, and is likely to make the organization defensive in ways that are counterproductive. To resolve tricky issues regarding sexual harassment, for example, the organization may create rules discouraging informal contact among employees, an approach that Sturm argues trivializes the fundamental issue of equal employment opportunity.[25]

In principle, Sturm could have entirely detached her argument for fundamental organizational change from civil rights law. But she argues that courts need to be a catalyst; organizations otherwise will resist the difficult task of reforming their practices to reduce inequalities. So Sturm argues for a new kind of civil rights law, in which courts serve as a stimulus for organizational change and a sensitive critic of the reforms that organizations make. She points to Supreme Court rulings on employer liability in sexual harassment cases, in which the Court has urged lower courts to engage in "careful consideration of the social context in which particular behavior occurs" and to review the processes by which employers have used to discourage harassment.[26] It counts in the employer's favor, if, for example, it has developed a process by which employees can bring complaints of sexual harassment and their claims are reviewed in a fair way. Similarly, Sturm cites disparate impact discrimination cases in which courts had engaged in a contextual review of employer practices, the beginnings of what she hopes will be a problem-solving approach to civil rights cases.

[24] Sturm, "Second Generation Discrimination," 475.

[25] Ibid., 477.

[26] Ibid., 483, quoting *Oncale v. Sundowner*, 523 U.S. 75 (1998).

The hallmarks of an effective structural reform, Sturm argues, is that it is designed specifically for the needs of the organization, that it links individual decision-making in a larger structure, that it is data driven, and that it has measures of effectiveness and accountability for meeting those measures.[27] Sturm looks to various intermediaries – lawyers, consultants, human resource professionals, and even insurers – to combine their professional expertise with their knowledge of individual organizations to help design such reforms. The role of the judiciary in confronting second-generation discrimination should be to review organizational structures critically and holistically, developing a kind of "'common law' of effectiveness that can be both situation-specific and comparable across context."[28] This framework, of requiring organizations to be problem-solving and inequality mitigating, would be communicated beyond individual lawsuits, becoming a general norm for organizational behavior.

Sturm acknowledges some of the challenges involved in her approach. Judges, she admits, would struggle to evaluate local conditions, and would be tempted to make "wooden" rules for organizational response, simple templates that ignored particular contexts. But Sam Bagenstos, a sympathetic critic of the structural turn, argues that its problems lay much deeper.[29] The surface issue is that judges are not management experts and will understandably recoil from performing a task that involves sets of knowledge, of local context and of good management techniques, that they lack. Relying on intermediaries who have this knowledge, such as human relations personnel, simply delegates the problem – and as Bagenstos notes, sociolegal scholars who study how such personnel work are deeply critical of the organizational reforms they produce.[30] After all, these intermediaries can use their expertise to minimize the impact of the law instead of championing significant reforms.

But the deepest issue is that there is no agreed-upon standard for what counts as a good outcome. By what criteria can anyone assess whether an organization is performing in a nondiscriminatory manner? Numbers and percentages can easily be stigmatized as quotas. Moreover they too need to be contextualized in light of characteristics of the relevant workforces and labor pools, and choosing the baseline for such comparisons can be tricky and contestable. (Indeed if there was agreement on such numbers and percentages, there would be no need for a structural turn – judges could simply evaluate the numbers, not the operations of the organization.) The "structural turn" is a turn away not just from a focus on first-generation discrimination, but from hard and

[27] Sturm, "Second Generation Discrimination," 519–520.

[28] Ibid., 559.

[29] Bagenstos, "The Structural Turn," 20–40 (reviewing the issues of judicial competence and inclination to engage in structural reform, the problematic role of intermediaries in implementing such reform and the absence of clear normative benchmarks for assessing these reforms).

[30] Ibid., 28–30.

fast rules, toward a kind of institutional engineering. As Bagenstos argues, however, it left some deep puzzles about how to evaluate the work of the engineers.[31]

THE SOCIOLEGAL MODEL

Sturm's approach drew on what has become a very large and diverse literature on law and social change, a literature that had explored in some depth how organizations structure themselves in response to legal mandates. Scholars of regulation have explored how different enforcement practices affect organizational responses to law and how attitudes toward the law within organizations may affect their behaviors.[32] Sociologists and law and society scholars working under the banner of "neo-institutionalism" have focused on the indeterminacy of formal rules and explore how organizations internalize legal requirements and translate them into standard operating procedures, which are then legitimated and diffused.[33] Sturm's discussion

[31] Ibid., 37–40.

[32] See generally Jennifer Howard-Grenville, Jennifer Nash, and Cary Coglianese. "Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions," *Law & Policy* 30 (2008): 73–107; Peter J. May, "Compliance Motivations: Affirmative and Negative Bases," *Law & Society Review* 38 (2004): 41–78 and "Compliance Motivations: Perspectives of Farmers, Homebuilders and, and Marine Facilities," *Law and Policy* 27 (2005): 317–347; Neil Gunningham, Robert A. Kagan, and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (Palo Alto, CA: Stanford University Press, 2003); Peter J. May and Robert S. Wood, "At the Regulatory Frontlines: Inspectors' Enforcement Styles and Regulatory Compliance," *Journal of Public Administration Research & Theory* 13 (2003): 117–139; Robert A. Kagan, *Adversarial Legalism: The American Way of Law*. Cambridge, MA: Harvard University Press, 2001); Cary Coglianese, "Social Movements and Society: The Institutionalization of the Environmental Movement," *University of Pennsylvania Law Review* 150 (2001): 85–118; Peter J. May and Soeren Winter, "Regulatory Enforcement and Compliance: Examining Danish Agro-Environmental Policy," *Journal of Policy Analysis and Management* 18 (1999): 625–651; John Braithwaite and Ian Ayres, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992); Albert, Reiss, Jr., "Selecting Strategies of Social Control Over Organizational Life," in Keith Hawkins & John M. Thomas, eds., *Enforcing Regulation* (Boston, MA: Kluwer-Nijhoff Publishing, 1984); Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia, PA: Temple University Press, 1982); William K. Muir, *Law and Attitude Change* (Chicago, IL: University of Chicago Press, 1973).

[33] See generally Frank Dobbin, *Inventing Equal Opportunity* (Princeton, NJ: Princeton University Press, 2009); Frank Dobbin and Frank R. Sutton, "The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions," *American Journal of Sociology* 104 (1998): 441–476; Lauren Edelman, "Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace," *The American Journal of Sociology* 95 (1990): 1401–1440 and "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law," *Journal of American Sociology* 97 (1992): 1531–1576; Lauren Edelman and Mark C. Suchman, "The Legal Environments of Organizations," *Annual Review of Sociology* 23 (1997): 479–515; Lauren Edelman, Steve Abraham, and Howard Erlanger "Professional Construction of the Law: The Inflated Threat of Wrongful Discharge," *Law & Society Review* 26 (1992): 47–83; Lauren Edelman, Christopher Uggen, and Howard S. Erlanger, "The Endogeneity of Legal Regulation: Grievance Procedures

of the role of intermediaries in designing workplace procedures drew on a long-standing research tradition. As Bagenstos notes though, researchers in this tradition were much less sanguine than Sturm about the outcomes.[34]

In order to better evaluate the argument for a structural turn, it is useful to review some of the main concepts in this broad literature on law and social change. We draw together some of its central insights to create a framework that provides a relatively simple roadmap for tracing how formal rights are translated into organizational practices and policy outcomes. What we call the "sociolegal model" starts with the standard observation in sociolegal scholarship, at odds with common wisdom, that most people who feel they have been injured by someone else's illegal actions often do nothing, "lumping it." This is particularly true for people who feel that they have been discriminated against and especially the case for those suffering from second-generation discrimination, who may not even be aware of the subtle discriminatory practices and unconscious biases they face.[35] Mostly then law is not invoked, and this lack of invocation typically leaves it to the organization to define for itself how a law should affect its operations. Moreover, even on the unusual occasion when law is mobilized, the resolution of an individual lawsuit does not usually give the organization a fully formed set of routines for how it should be responding to the law beyond the particular case, despite Sturm's advocacy.

So to understand how a law based on the civil rights template affects the behavior of organizations we have to go inside the organization. We must examine how officers within the organization translate formal and often ambiguous rules into concrete practices, often in the absence of a lawsuit or even the advice of lawyers. The sociolegal framework is premised on the claim, drawn from neo-institutionalism, that to survive organizations must find ways to respond to threatening aspects of their environment. The threat can be economic (a new competitor, or a new technology),

as Rational Myth," *American Journal of Sociology* 105 (1999): 406–454; Charles R. Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago, IL: University of Chicago Press, 2009); Jon B. Gould, *Speak No Evil: The Triumph of Hate Speech Regulation* (Chicago, IL: University of Chicago Press, 2005); Valerie Jenness and Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement* (New York: Russell Sage, 2001); Catherine Albiston, "Bargaining in the Shadow Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights," *Law & Society Review* 39 (2005): 11–50 and *Institutional Inequality and the Mobilization of the Family and Medical Leave Act: Rights on Leave* (New York: Cambridge University Press, 2010). See also Paul J. DiMaggio and Walter W. Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields," *American Sociological Review* 48 (1983): 147–160.

[34] Bagenstos, "The Structural Turn," 30–31.

[35] Richard E. Miller and Austin Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," *Law and Society Review* 15 (1980): 525–566; Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore, MD: Johns Hopkins University Press, 1992).

social (a new social movement that threatens their practices), or legal (a new regulation or type of lawsuit).[36] All things being equal, organizations try to respond to such threats in ways that insulate their core processes, the services or products they create, from being affected by the threat. For legal threats that often means creating an office or officer charged with responding to the law, and then having that office or officer develop routines or policies that in some way address the demands of the law. For example, to respond to the threat of sexual harassment lawsuits, someone within the organization can be designated to hear allegations of harassment. That person can in turn create a formal procedure for hearing complaints, as well as rules and even training for employees of the organization aimed at avoiding the complaints in the first place.

The problem, as anyone who has slept through such a training session can attest, is that formal rules, procedures, and trainings can be mere window dressing, symbolic routines that appear to be implementing important social goals, but that have no real effect on how the organization operates. Everyone in the organization can attend sensitivity training but still have unconscious biases and engage in discriminatory practices. Neo-institutionalism, which studies the diffusion of organizational responses to legal mandates, has struggled to answer the extent to which these organizational responses are merely symbolic, or translate into real social change.

It is important to stress that while the social legal model recognizes the possibility of symbolic compliance, it emphasizes contingency in organizational responses to legal mandates. Some might resist the laws, but others might embrace it as "true believers."[37] To get some purchase on the internal organizational factors that might explain this variation, we have developed measures for three aspects of organizational response to law that relate to the development of meaningful rights practices.[38] *Commitment* is the degree to which organizational personnel, who are primarily responsible for interpreting and implementing the relevant law, embrace its underlying social goals. The person designated as the sexual harassment officer within an organization may be skeptical or even opposed to sexual harassment laws; on the other hand, such an officer may be a strong feminist who feels that existing laws do not go far enough in rectifying gender inequalities, and that the organization's response to such laws should be stronger. *Professionalization* is the degree to which the organization has written procedures and policies related to the law, creates a formal office with responsibility for implementing the organization's response to law, and interacts with outside groups and experts to learn about the law and best

[36] Gunningham, Thornton, and Kagan, *Shades of Green*, 35–38 (describing what they call the economic, regulatory and social "licenses to operate" of organizations).

[37] Ibid., 101–102, 116–122.

[38] Barnes and Burke, "Making Way," 172–176.

practices. Neo-institutionalist studies often measure the diffusion of professionalized responses to law, but scholars in this tradition recognize that even highly professionalized responses to law can be "decoupled" from the key decision-making processes; the human resources (HR) office that hears sexual harassment complaints and conducts trainings has little respect within the organization and so its procedures and policies do not penetrate the organization's routines.[39] *Routinization*, the third aspect of organizational response, is the degree to which its consideration of the law's underlying goals and purposes permeate the daily practice of the organization, so that planning and management incorporates consideration of those goals.

If civil rights lawsuits, or the threat of such lawsuits, cannot create some degree of commitment, professionalization or routinization in organizations, then it is hard to imagine how laws based on the civil rights template could be effective. Conversely, as described later, when the mobilization of civil rights law stimulates all three, the effects can be powerful.

DISABILITY ACCESS LAW AND THE POLICY LEGACY OF THE CIVIL RIGHTS TEMPLATE

To illustrate the sociolegal model in action, we will use some examples from our research on disability access law. Disability access laws require organizations to make their facilities accessible to people with disabilities, and treat the failure to do so as a matter of discrimination. On its face, access rules seem more "structural" than, say, an individual employment discrimination claim. For one thing they involve physical structures and program provisions, matters that inherently affect more than one person, rather than contentions about why an individual was fired or not hired. The structures are in public places and programs so that whatever is decided is likely to have an impact on the organization that goes beyond the particular. Yet disability access laws still bear the imprint of the civil rights template. The main mechanisms by which they are enforced are, first, complaints to a government agency and, second, civil rights lawsuits. This parallels the enforcement structure of Title VII of the CRA, which requires people who believe they have been discriminated against to first bring a complaint to the Equal Employment Opportunity Commission, and then, if not satisfied by the result, to bring a lawsuit. A lawsuit must demonstrate that the plaintiff suffered from the lack of accessibility that is claimed. Such lawsuits can be brought by public interest groups or by the government, but as in employment

[39] Eva Boxenbaum and Stefan Jonsson, "Isomorphism, Diffusion and Decoupling," in Royston Greenwood et al., eds., *Sage Handbook of Organizational Institutionalism* (Los Angeles, CA: Sage 2008), 78–98; Neil Gunningham and Robert Sinclair, "Organizational Trust and the Limits of Management," *Law & Society Review* 43 (2009): 865–897.

litigation, most claims are brought by individuals. The remedy under the ADA, the most prominent of the access laws, is simply an order to the defendant to change that aspect of the facility or program and pay the claimant's attorney's fees, though under some state laws additional penalties can be assessed.

When a new building is built, or when significant renovation on an older building is performed, accessibility laws can be enforced through the permitting process, and franchise agreements can serve as a means to promote some types of rights practices,[40] but enforcement of access laws is significantly driven by individual complaint and lawsuits. There are good reasons to believe this is a rickety process, prone to under-enforcement simply because there are not strong incentives for individuals to bring access complaints. This feature of most access law, the requirement that individuals mobilize and bring complaints in order to change organizations, is a central aspect of the civil rights template.

We were drawn to studying access law because it had some features that seem particularly interesting for scholars of law and social change. First it is remarkably ambitious. The access provisions of the ADA cover just about every public program, service, or facility, from auditoriums and bakeries to pharmacies and zoos. Title II of the ADA covers access to governmental programs, requiring states and localities to make their programs and services equally available to disabled and non-disabled. Title III regulates accessibility in places of public accommodation operated by non-governmental entities. These titles generally require "readily achievable" removals of physical barriers and "reasonable modifications" to programs and services that would otherwise screen out people with disabilities. In addition, both titles create accessibility guidelines for the construction or remodeling of facilities, which co-exist with state laws.

For organizations, interpreting these requirements is a significant task. Both federal titles and corresponding state laws have an array of defenses and exceptions that potentially limit the reach of these requirements, but defenses and exceptions tend to be open-ended and ambiguous, subject to interpretation. So, for example, Title III provides that program directors do not have to make "reasonable modifications" to their policies, practices, or procedures if that would "fundamentally alter the nature" of the good or services they provide (42 U.S.C. sec. 12182 (b)(2)(A)(iii)). This makes the disability mandate in these laws particularly open to interpretation and dispute. The laws, though, clearly require organizations to reconsider a diverse set of practices. While some of those are marginal to the organization's core functions, such as adding a ramp or handrails to a path, others are fundamental. A store may have to transform the layout of its merchandise; a program may have to change its eligibility requirements.

[40] Barnes and Burke, "The Diffusion of Rights," 509.

Yet there is an even more ambitious goal of disability access laws. From the perspective of the social movement that advocated access laws, the disability rights movement, access law is a tool not simply for reconfiguring programs and facilities but for changing consciousness. The disability rights movement is premised on the "social model" of disability, in which disability is literally created by social attitudes and arrangements. From the perspective of the social model, the arrangements of society – a bathroom too narrow for a wheelchair, a subway without an elevator, an elevator without Braille buttons – can be considered a form of discrimination because of the failure to take into account the full range of human diversity. This view, that disability is created by social arrangements rather than an individual's impairment, and that organizations have a moral responsibility to make their programs and facilities accessible to all, requires a radical gestalt switch from the conventional understanding of disability. Buildings like the Supreme Court, with its entrance of inaccessible marble steps, would be seen in the same light as "colored only" water fountain. Of course, it is likely that few, if any, members of Congress who voted for the ADA subscribed to this vision; the predominant view seems to have been that the ADA was simply a good thing to do for people with disabilities, particularly if it led some of them to employment.[41] From the perspective of many in the disability rights movement, however, a shift in consciousness is the ultimate goal of disability rights laws. Thus it is particularly important with access law to measure both consciousness and concrete outcomes, changes both in discourse and in practice, in understanding organizational response to access law.

This combination of the abstract and the concrete makes access law a particularly useful example for probing the sociolegal model. We want to understand both how people within an organization think about some legal mandate but also what they actually do about it. The measurement of outcomes has always been a troublesome issue in neo-institutionalist and regulatory literatures, in part because the outcomes of the laws it studies are often opaque to outsiders. A study of the effects of the Civil Rights Act of 1964 on employment, for example, is complicated by the fact that the researcher cannot directly observe the hiring process, but also because what counts as successful implementation is often unclear and a matter of dispute. The outcomes in access law, though, are objectively measurable and easily observed. The access provisions we study only apply in areas open to the public, so we were able to independently inspect an organization's facilities to see if their self-reported attitudes and practices produce outcomes that advance the goals of access law. Because accessibility is such complex area of regulation, involving everything from Braille

[41] Thomas F. Burke, "On the Rights Track: The Americans with Disabilities Act," in Pietro Nivola, ed., *Comparative Disadvantages? Social Regulation and the Global Economy* (Washington, D.C.: The Brookings Institution, 1997), 242–318.

signage to the height of toilets, we limited ourselves to the features most relevant to wheelchair users, a group that numbers at least 1.7 million according to one estimate.[42] Using government documents and focus groups with wheelchair users, we created an "index of accessibility," which we used to score facilities on a zero to 100 range, with zero being a completely inaccessible facility and 100 a facility in which wheelchair users would have the same level of access as walkers.[43]

We examined facilities operated by three different types of organizations – universities, cities and restaurants – in two highly affluent communities in a state with an unusual number of access lawsuits. We chose a range of private and public organizations because we thought varying organizational type might help us to gain some insight into the differences and commonalities stemming from the different environments and tasks associated with the organizations. The two cities were chosen because they were in regions with a relatively high level of access litigation, which made it easy to compare organizations that had been sued with those that had not. Most states seems to have little access litigation, but because of a state law that made accessibility litigation more rewarding than under the ADA, in this particular state and in these particular communities it was easy to find organizations that had been sued.[44]

SIX ORGANIZATIONAL RESPONSES TO THE ADA'S CIVIL RIGHTS TEMPLATE

The wide variety of responses to disability access law we found, described in this section, illustrates both the promise and limits of the civil rights template – and provides some clues about the contexts in which the use of the template is likely to be most effective in reducing social inequalities.

The Ostriches

In the words of a leading compliance consultant, when it comes to access, some organizations are "ostriches" – they have a fuzzy idea that the law requires them to accommodate people with disabilities, but they do nothing about it and keep their

[42] Stephen H. Kaye, Taewoon Kang, and Mitchell P. Laplante, "Wheelchair Use in the United States," *Disability Statistics Abstract #23* (San Francisco, CA: University of California Disability Statistics Center, 2002) available at: http://dsc.ucsf.edu/ publication.php?pub_id=1.

[43] Details about how we developed our index and tested its reliability can be found at Barnes and Burke, "Making Way," 192–194.

[44] Given the amount of litigation in the state we studied, it is possible that *all* the organizations in our sample perceived a legal threat, regardless of whether they faced a formal claim or not. However, when we asked about this, the key personnel in the organizations that had not faced a formal claim did not state they felt an imminent threat of litigation and could not name other cases.

heads in the sand. We examined five family-owned independent restaurants that met this description. The managers of the independent restaurants, typically the owners, evinced little knowledge of access law. They reported no designated staff to deal with access issues, no training about these issues, and no formal procedures. They would do their best to help individual customers with disabilities, but they had only the barest sense of access law, so they had no idea about how far their obligations extended. They were poorly networked in the community, so they had little chance to learn about the law from other lawyers, other businesses, or community organizations. Largely because of their ignorance of the law and isolation, these organizations scored low across-the-board in terms of commitment, professionalization and routinization. Unsurprisingly, the outcomes were poor; in some cases people in wheelchairs would be unable to access their facilities, while in others they would struggle and be unable to use the bathroom. On our index of wheelchair accessibility these facilities averaged a 38. After interviewing the managers of these organizations, we gave them a short brochure on access law and a pamphlet on how they could get tax credits to compensate for the costs of making their facilities more accessible.

The Recalcitrant Compliers

A chain of restaurants that operated within the same communities, which we will call "Johnny's," provides an interesting contrast to the independent restaurants. Like many chain restaurants in the state, Johnny's had been sued under state and federal access law. According to management, the suit was brought in bad faith; they considered it a strike suit aimed at wringing fees from the business under the applicable state law's fee shifting provisions. The managers expressed little commitment to the law; indeed, they were somewhat hostile to it.

Unwilling to face a protracted and expensive legal battle, Johnny's agreed to settle the suit, in part because it was in the process of updating its facilities anyway. Under the resulting settlement, Johnny's spent hundreds of thousands of dollars in upgrading its existing facilities to make them more accessible. Beyond this, Johnny's changed its design template for future sites. Thus accessibility guidelines were literally written into Johnny's standard plans for prospective restaurants during a time when it was expanding its operations. Thus in one important respect Johnny's operations had been transformed by its encounter with litigation. In all other ways, Johnny's response was limited and grudgingly adopted.

Johnny's response to the law was not professionalized. It did not create a staff to deal with new disability issues on an ongoing basis or develop procedures or a written policy to address the issue. Instead, organizational leaders worked with their lawyers

to comply with the minimum terms of the settlement. This meant that aside from its templates for new facilities, Johnny's response was not routinized. No understanding, much less concern, for accessibility issues filtered down through the organization's employees. This had significant consequences. For example, as part of the settlement, the company had installed an intercom system at one of its older locations that was particularly inaccessible. At the time of the inspection, the intercom had fallen into disrepair. Coincidentally, a company employee responsible for checking the area's facilities visited the site during our inspection. Although he had an extensive checklist of safety items to inspect, he had no items related to access on his checklist and did not bother to press the button on the intercom to see if it worked.

Johnny's key personnel were not committed to the law's social goals and were hostile to the lawyers who had brought the access suit and whom they described as shakedown artists. (One of the lawyers was later declared a vexatious litigant by a federal judge.) Accordingly, they sought to meet the minimum requirements of the settlement as they understood it. Yet even so, concerns about access had clearly permeated Johnny's planning processes. In the shadow of litigation, management scanned the horizon for win-win strategies, particularly ways in which it could align the goals of improving access with its ongoing redesign of its facilities. Thus, although Johnny's response lacked commitment and professionalization, it had one important element of routinization: it had routinized facility planning by incorporating access features into its design template. The result was decent access by our measures, well above that of the independent restaurants, a score of about 60. A wheelchair user could navigate all the facilities we inspected, though not on an equal basis with walkers; the new facilities still had some issues and there were still some major obstacles at older facilities, which some wheelchair users would need assistance to overcome.

The Symbolic Responders

At first glance Sunny Valley University was a success story, especially in light of some of the type of changes some structuralists champion. It had a disability office, and, in the two years prior to our inspections, it had hired a full-time disability specialist. This official had an extensive background in disability issues and embraced the social model of disability; she framed inaccessibility as a civil rights issue. She was a member of a professional networks dedicated to access issues, including a regional group that met in person each month. From the vantage of some structuralists accounts, this is a crucial step in addressing discrimination, as this official can raise issues within the organization, challenge assumptions and existing practices, and help search for win-win organizational solutions.

But the disability official was marginalized within her organization. She was not involved in day-to-day decisions about the design of new buildings, nor was she given a budget specifically for access improvements. She had no regular input into the facilities planning process. Thus, while Sunny Valley University's response was professionalized, with a plethora of official policies and offices, and its key manager was committed, there was no routinization. Sunny Valley University represented a classic example of what neo-institutionalists call a decoupled response, in which the organization creates the symbols of response to law, including an office, but disconnects the office from its core operations.

The results for anyone who would have tried to get around the campus on a wheelchair were significant. Several older buildings were completely inaccessible, and there were difficult obstacles throughout the campus. We were surprised to see new buildings that clearly did not comply with state codes for access. The access score for Sunny Valley University was a paltry 38, no better than that for the ostriches, the independent restaurants.

The "Beyond Compliance" Responders

The contrast with Shady Grove University was striking. It scored the highest on our measure of access, a 76. In response to a high-profile student protest and a federal agency complaint, it had created a specialized office dedicated to disability issues. This office was well funded, with dedicated staff, routinely touring the campus with students with disabilities and taking the initiative to address problems, even if it meant closing popular but inaccessible facilities and programs, such as a mobile dental clinic for students and staff. Unlike Johnny's key personnel, who viewed disability lawyers and lawsuits with suspicion, the Shady Grove University staff saw litigation as a potential lever for change within the organization and had even cooperated with a lawsuit against the university. These professionals, some of whom had disabilities, fully embraced the social change goals of the law, explaining that they wanted everyone on campus to see barriers to access in the same light as "colored" drinking fountains in the segregated South. In sum, this was a highly committed, professionalized office.

The Shady Grove University disability offices, moreover, were influential within the organization. The disability office was represented at meetings over proposals to build new facilities, in deliberations over the rehabilitation of older buildings, and even the acquisition of temporary space. Moreover, when conflicts emerged on access issues, the disability office was able to appeal to the highest levels of university administration and reported success in doing so. Thus, Shady Grove University's response featured all three positive attributes: its key personnel were committed; the organization had professionalized; and concerns

about access had become routinized in the planning activities on campus. The results were the best access by far in our sample, including accommodations that clearly went "beyond compliance" with what the law required. At Shady Grove University, wheelchair users would not enjoy complete equality with those on foot, and there were some nooks and crannies of the campus that they would struggle to access, but for the most part the users would be able to get around without much difficulty.

The Ad Hoc Service Providers

Cities are specifically required to designate an official responsible for access issues. Cities are not, however, required to promulgate official access policies, or to train their employees in access issues, and neither of the two cities in our sample did these things, thus earning a medium score for professionalization. The City of Shady Grove designated a longtime building and facilities officer to be its disability coordinator. This official, in line with his background, took a pragmatic, service-oriented approach to their disability duties. Unlike the access officials at the universities, he was not steeped in the philosophy that animates access law, disability rights; he did not talk as if accessibility was a matter of social justice, a moral obligation that his city owed to people with disabilities. That said, when problems came to his attention, mainly through complaints, he responded with sympathy and professionalism toward people with disabilities and often went beyond what he considered the minimum requirements of the law. Thus we scored him medium on commitment.

The ADA also requires cities to create a review of their facilities, setting the stage for a proactive plan for improving accessibility. At Shady Grove this plan seemed long forgotten; we found it collecting dust on a bookshelf. Yet there was no evidence that the official designated as an access officer was, like the completely decoupled disability office at Sunny Valley University, completely isolated within his organization. In Shady Grove, city officials who managed facilities such as libraries and community centers understood that access issues were important in a general way and if they had questions, they should ask the designated compliance officer, whom they knew by name. There were also some informal mechanisms to reach out to the public and obtain feedback on access issues, suggesting some routinization went beyond the mere designation of staff and desire to incorporate the consideration of access issues as part of their daily operations. Shady Grove exemplified a middling response, and so it was not surprising to us that its facilities proved middling on our access scale, a 52 for its buildings and a 44 when we included parks, which pose particularly difficult access issues.

The Seekers

When we interviewed the designated disability coordinator at the city of Sunny Valley, the city was in the midst of implementing a settlement agreement that resolved an access lawsuit brought by the Justice Department. The coordinator was perhaps understandably reluctant to reveal many details about the organization's historical response to access law. The settlement agreement, however, clearly represented a break with business as usual in the city. It mandated improvements in more than a dozen city facilities and set aside money specifically for those improvements. Perhaps more importantly, the settlement had stimulated the city to hire an outside consultant to help them assess issues; any time a significant issue arose, it was now sent to the consultant for review. The access lawsuit had changed the city's approach to access issues, making the city more proactive in spotting problems. As the disability coordinated noted, "Now [the consideration of disability issues is] part of our process, and that's a good thing." The city had, in fact, set aside a budget to make the mandated improvements, though at the time of our inspections not all of the improvements had been made.

It was not clear to us how committed, professionalized, and routinized Sunny Valley would be in the long run, but on accessibility it was already well ahead of the comparison city, Shady Grove, scoring a 67 on the access index for its buildings and a 54 when we included parks. It appeared that, stimulated by the lawsuit, Sunny Valley was changing the way it approached access issues, though its efforts still fell well short of the most energetic response in our sample, Shady Grove University.

Tables 7.1 to 7.3 summarize the widely varying patterns of response to access law across our six organizations. Some of the patterns are surprising. Sunny Valley University had a highly committed, professionalized disability office, but its facilities were less accessible than Johnny's, whose managers were hostile to access law. Johnny's access score, in fact, beat all the organizations in the sample that had not faced legal mobilization. Other patterns are not surprising, particularly the inability of law to reach the independent restaurants, with their lower level of organizational resources and relative isolation from the kinds of business and professional networks that might provide information about the law. Overall the story shows both what makes the civil rights template so attractive and yet so disappointing. More than two decades after the enactment of the ADA, and even in highly affluent communities in a state with significant disability activism and favorable state law, the civil rights template has generated a very uneven organizational response. Wheelchair users at Sunny Valley University are nearly at parity with walkers, but in the other organizations we studied they simply cannot count on having facilities that are fully accessible to them.

TABLE 7.1 *Summary of Organizations*

Name	Sector	Face Legal Mobilization?
Independent restaurants (5)	Private	No
Johnny's	Private	Yes
City of Shady Grove	Public	No
City of Sunny Valley	Public	Yes
Sunny Valley University	Non-profit private	No
Shady Grove University	Non-profit private	Yes

TABLE 7.2 *Comparison of Organizational Responses: Relative Levels of Commitment, Professionalization, and Routinization*

Organization	Commitment	Professionalization	Routinization (0–8)
The Independents	Low	Low	Low
Johnny's+	Low	Low	Medium
Shady Grove	Medium	Medium	Low
Sunny Valley+	Medium	Medium	Medium
Sunny Valley University	High	High	Low
Shady Grove University+	High	High	High

+ Faced significant legal mobilization.
For a more extensive discussion of this coding, see Barnes and Burke (2012).

WHAT OUR STORIES SAY ABOUT THE CIVIL RIGHTS TEMPLATE

Our conclusions are necessarily tentative, as our cases were not chosen in such a way as to provide a representative sample of organizations. Still we think they illustrate some aspects of the policy legacy of the civil rights template that complicate and challenge the structuralist critique.

Formal Rights Versus Organizational Translations

The structural analysis of the limits of the civil rights template tends to focus on the nature of formal rules as a limitation to organizational change. For law and society scholars, though, this focus misses that ways in which rules are socially constructed within organizations, making "law on the books" quite different from "law on the streets." The officials we interviewed who were charged with implementing access

TABLE 7.3 *Summary of Access Scores*

Organization (# of Facilities)	Mean Access Score (St. Dev.)
Independent restaurants (5)	37.66 (7.99)
Johnny's+ (19)	59.75*** (16.22)
Shady Grove (all facilities) (51)	44.37 (23.95)
Sunny Valley (all facilities)+ (35)	53.48**(1) (25.65)
Shady Grove buildings only (14)	51.72 (13.93)
Sunny Valley buildings only+ (17)	66.92**(1) (22.82)
Sunny Valley University (15)	38.26 (23.18)
Shady Grove University+ (36)	76.11**** (16.33)

* $p < .10$ ** $p < .05$ *** $p < .01$ **** $p < .0005$.
+ Faced significant legal mobilization.
P values are for differences within sector and, in the case of the cities, across facility type, using ANOVA and excluding facilities where accommodation is not readily achievable.

rules within their organizations had a broad and general sense of their legal responsibilities, and did not identify particular defenses and qualifications their organizations might have deployed to limit their organization's challenges. These officials' understanding of the law did not seem self-serving or defensive of past acts or practices. To the contrary, some organizations seemed to construe the requirements under the ADA in ways that went beyond the letter of the law and necessitated broad shifts in the operation of their organizations.

We think this partially reflects the inherent complexity and ambiguity of rights. When confronted with a law like the ADA, organizations must try to make sense of a tangle of rules, which are often open-ended, and various judicial interpretations of the rules, which can be confusing and shifting. These confusing legal signals sometimes produce legal understandings that fail to track the underlying nuances of the black letter law. Access law is probably more complex than other laws fashioned out of the civil rights template and perhaps less "lawyered," but as much sociolegal

research demonstrates,[45] the process by which organizations translate formal rules into organizational practices is likely to be much more messy than rule-bounded, as in some forms of the structural critique. In our cases, the partial understanding of key personnel that the ADA required them to take reasonable steps to improve access could be seen as broadly consistent with a mandate for a general problem-solving approach consistent with the approach favored by Sturm, even if this mandate was not always acted upon.

Litigation Makes a Difference, But Its Impact Varies

In our cases each of the organizations that faced legal mobilization had significantly higher levels of access than their counterparts in the same sector. For example Johnny's, the restaurant that had been sued, was more accessible than the independent restaurants, which had never encountered a legal complaint. This suggests, contrary to strong versions of the structural critique, that civil rights litigation, at least in the case of accessibility law, can have some effect on organizational practices that goes beyond the matters named in the lawsuit. Moreover, this effect can be generated even by lawyers and litigants stigmatized as greedy and self-serving, as in the case of Johnny's, rather than the prototypical noble public interest group. Whatever the source, in our cases a legal complaint seemed to be a way of getting the attention of the organization, a "focusing event" that can for a moment makes members of the organization aware not just of the particular matter but of the broader issue of disability access.[46] What happens next, though, is highly contingent on how that focusing event is interpreted, and, we suspect, who does the interpreting within the organization. When, as with Sunny Valley University, there is a professionalized and committed disability office around to do the interpreting, a legal complaint may make the office more powerful within the organization, giving it the opportunity to routinize what we have called "rights practices,"[47] everyday regimes such as inspections, trainings, record-keeping, and planning that can promote the objectives of civil rights laws.[48] At Johnny's, by contrast, the interpreters were skeptical of access law and contemptuous of those who had sued them. Johnny's response was much more circumscribed, designed merely to fend off the threat of further lawsuits rather than to transform the everyday practices of the organization. So litigation can be

[45] E.g., Edelman, "Legal Ambiguity and Symbolic Structures," 1531–76.
[46] See generally John W. Kingdon, *Agendas, Alternatives and Public Policies, Second Edition* (New York: Longman, 2003), 94–100.
[47] Barnes and Burke, "The Diffusion of Rights," 494.
[48] Epp's concept of "legalized accountability" in *Making Rights Real* (2009) is similar except that he is writing about sets of practices endorsed by professions that are spread across organizations.

a powerful tool for organizational reform, but its effects appear to depend on how committed and professionalized the organization is before the lawsuit arrives.

The Gap between Organizational Responses and Outcomes

Our study dramatically illustrates a perennial neo-institutionalist concern that apparently important organizational responses – policies, offices, procedures – can turn out to be window dressing, symbolic responses that do not result in concrete outcomes. Having an office devoted to disability issues and staffed by disability rights advocates would seem to put an organization well ahead of others who lacked these structures, yet in our sample these factors by themselves were no guarantee of accessibility. The failure to link commitment and professionalization to routinization in Sunny Valley University resulted in symbolic compliance: ostensibly vigorous organizational responses to the law that failed to deliver even moderate accessibility. That is not to say that commitment is irrelevant; commitment combined with professionalization and routinization produced the best access by far in our sample. But it does suggest that commitment alone is not sufficient, even when it is institutionalized through the creation of highly professionalized offices. Moreover, what we have termed routinization, practices seemingly more closely related to the outcomes, in our cases inspections, separate access budgets, and planning, are also no sure sign about the quality of organizational response. Routinization too can be hollow and decay over time in organizations that lack commitment; we suspect this is what will happen at Johnny's. So at least in our sample, there is no simple way to be sure that an organization's response to law will be effective rather than simply symbolic. This is the problem that haunts many sociolegal studies of organizations; they struggle with whether the adoption of policies and procedures are merely symbolic or effective (and whether these responses will be stable over time). It is also a problem, as Bagenstos argued, with Sturm's recommendation that courts assess organizational response to law. Our study involves outcomes that are relatively concrete and measurable, but for many civil rights laws it is not so easy to assess whether the organization has done enough, say to hire racial minorities.[49] Trying to measure this by assessing the quality of an organization's policies and procedures seems to us a quite difficult enterprise.

Variation Not Averages

Our study reinforces one of Sturm's main claims, that in assessing the effects of civil rights laws on organizations, the particular context of each organization is crucial.

[49] Bagenstos, "The Structural Turn," 37–39.

Attempts to assess the effects of a law understandably start with aggregates: Have women's wages increased relative to men's? What has happened to the employment gap between racial groups? The disabled and non-disabled? Perhaps because of this, there is a tendency to slip into a conception of law as a uniform force, a wind that blows with equal pressure on all organizations, and a conception of evaluation that equates the absence of significant overall improvements at the community level with policy failure.

Once we examine the complex and contingent processes by which organizations receive and react to law, however, these notions are immediately displaced. Even if law was equally enforced against all organizations, we can see that for all kinds of reasons the response to law will be varied. Equally important, we would expect that progress will be uneven and partial, occurring at the level of individual organizations as opposed to the community level. From the perspective of activists, the adoption of some effective rights practices by at least a few organizations is a critical first step, even if it is unlikely to change the average response to a law at the community level.

The emergence of varied responses obviously raises the questions of how and why did some organizations translate the law into practices that significantly improved access and how might the most effective practices be diffused throughout the community? For some social scientists, this requires a shift in thinking, moving from an analysis of the average marginal effects of the law at the community level to studies of the sources of variation, the mechanisms at the organizational level through which law is translated into effective rights practices, the ways in which these practices are shared.[50] Understanding these processes and mechanisms – which are at the heart of understanding the radiating effects of the civil rights template – will require a textured approach to understanding the effect of rights, but it seems to us more consistent with the logic of the civil rights template and its individualistic, ad hoc model of implementation.

AN ORGANIZATIONAL TURN?

The legacy of the CRA is complex because its influence is so sweeping. As a political matter, it created a template for addressing pervasive social inequalities that has proved replicable, popular, and for decades, even bipartisan, which is no mean feat. But as a public policy, the problems it addresses have proven far more intractable than many advocates had hoped. These mixed policy results have understandably led some to question whether the civil rights template, with its emphasis on

[50] For a similar point in the context of the pay equity movement, see Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, IL: University of Chicago Press, 1994), 9.

individual remedies, is the appropriate mechanism for addressing the pervasive effects of discrimination.

Christopher Stone, in a book about the troubled attempts to use law to steer the behavior of corporations, makes a claim that goes well beyond the realm of civil rights: "The law," he writes, "never really sat down to consider the problems and possibilities of how best to deal with institutions."[51] Like a hammer used to sew a shirt, law from this perspective simply cannot do what it is being asked to accomplish, change the way organizations operate. There is much to this view, and we are very much in sympathy with those who are disappointed by the failures of the civil rights template in mitigating social inequalities where they are in large part produced, within the everyday operations of organizations. Yet under the right conditions we do think the hammer of individual civil rights litigation can have effects that go beyond the individual litigant.

According to the structuralist turn in civil rights scholarship, the crux of the problem is one of a mismatch between the legal remedy and underlying social problem: individual lawsuits are simply the wrong tool for fighting second generation discrimination. Ideally, Congress would provide a new set of tools or judges would use the existing structural remedies more aggressively, to root out the insidious effects of discrimination. Yet the prospect for the creation of new civil right remedies seems remote. The good news is that there are ways in which the civil rights template can be used to foster significant organizational change on a case-by-case basis. This suggests a different turn in civil rights scholarship, one that moves away from seeking to find significant aggregate change in social conditions and focuses on more fine-grained study at the level of specific organizations, an effort to explain how the contingent and complex effects of individual remedies engender more enduring and comprehensive organizational change.

[51] Christopher D. Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper & Row 1975).