
A PROPOSAL FOR LAW SCHOOLS TO COMBAT STRUCTURAL DISCRIMINATION AT LAW FIRMS THROUGH MANAGEMENT-BASED REGULATION

Although women and minorities are no longer excluded from most jobs by law or overt discrimination, significant barriers continue to preclude full workplace equality for these groups. The legal profession in particular lacks gender and racial parity as women and minorities remain dramatically underrepresented in senior positions¹ and, as importantly, may be getting less out of their jobs than their white, male counterparts.² Despite these significant disparities, there is no consensus on how to progress toward full workplace equality³ or on what such equality would look like.⁴ Recently, a growing number of employment law scholars have suggested that persistent inequality may result from “structural” forces in workplaces that impose real but un-

¹ See AM. BAR ASS'N, COMM'N ON WOMEN IN THE PROFESSION, CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY 5 (2006) [hereinafter AM. BAR ASS'N, CHARTING OUR PROGRESS], available at <http://www.abanet.org/women/ChartingOurProgress.pdf> (noting that in 2003, women represented only 16.3% of partners at major law firms, 15.0% of general counsels of Fortune 500 companies, 16.2% of federal district court judges, and 25.1% of tenured law faculty); ELIZABETH CHAMBLISS, AM. BAR ASS'N, EXECUTIVE SUMMARY, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 3 (2005), available at http://www.abanet.org/abastore/products/books/abstracts/4520014_2005%20execsumm.pdf (noting that as of August 2004, members of racial or ethnic minority groups nationally made up about 4.0% of law firm partners and that “[s]ince 1999, national minority representation among partners has increased only 0.7 percent”).

² See AM. BAR ASS'N, CHARTING OUR PROGRESS, *supra* note 1, at 5 (reporting that in 2003, women lawyers received an average of only 76% of the compensation of male lawyers); AM. BAR ASS'N, COMM'N ON WOMEN IN THE PROFESSION, EXECUTIVE SUMMARY, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 10 (2006), available at <http://www.abanet.org/women/VisibleInvisibility-ExecSummary.pdf> (cataloguing a variety of ways in which the experiences of women of color at law firms differ from those of white men, including that women of color are significantly more likely than white men to experience harassment, be denied promotion or other opportunities, miss out on desirable assignments, and receive unfair performance evaluations).

³ Compare Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. GENDER RACE & JUST. 411, 422–27 (2002) (advocating internal changes to the workplace, such as proportional pay and advancement for part-time work, as the best way to improve women's status at work), with Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 981–86 (2006) (discussing the possibility that workplaces that promote positive depictions of minorities and that are diverse may decrease implicit bias and therefore lessen workplace discrimination), and Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 289, 306–10 (2002) (suggesting that factors outside the workplace, such as a longer school day and better education for women, are the keys to achieving workplace equality for women).

⁴ See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 34 (2006) (arguing that “there is no generally accepted understanding . . . of what forms of subtle discrimination are wrongful”).

seen barriers on achievement by women and minorities.⁵ These scholars argue that traditional antidiscrimination law is focused on overt, animus-based discrimination, and is therefore insufficient to address more subtle and generally unintentional structural sources of ongoing inequality.⁶

A new regulatory tool, sometimes called management-based regulation, might better address the complex problem of structural discrimination. A management-based system mandates that regulated firms engage in an internal review process to locate possible sources of a social problem and then engage in planning, usually in cooperation with experts, to create a strategy for eliminating these firm-specific sources.⁷ This Note argues that, by requiring broad participation from the private sector while also providing supervision and expert assistance from a regulator, management-based regulation has the potential to contribute to a solution to structural discrimination, particularly in the legal profession.

In light of this potential, this Note applies the lessons of management-based regulatory successes to design a management-based system that will combat structural employment discrimination in law firms. Part I puts the discussion in context by examining management-based regulation in more detail and arguing that management-based regulation may hold promise particularly for combating structural discrimination in law firms. Part II suggests specific design elements for a proposed system, based on specific needs in the legal industry. Part III argues that law schools, rather than activists or government actors, are the best choice to implement such a management-based regime and might do so by conditioning on-campus interviewing privileges on law firm participation. Part IV addresses potential criticisms of this approach, and Part V concludes that a management-based system that marshals the power of law schools to combat structural discrimination

⁵ In an influential article, Professor Susan Sturm groups these structural forces under the term “second generation discrimination,” which she defines to include any workplace practices “that, over time, exclude nondominant groups.” Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001). She notes that “second generation manifestations of workplace bias are . . . relational[] and situational” and may stem from “[c]ognitive bias, structures of decisionmaking, and patterns of interaction.” *Id.*

⁶ See, e.g., *id.* at 460–61; see also Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 375–76 (2007) (discussing generally “the law’s failure” to address the sources and effects of contemporary “racial disparities”); Jolls & Sunstein, *supra* note 3, at 978 n.45 (cataloguing literature that “critiq[ues] existing antidiscrimination law . . . for its general failure to address the problem of implicit bias”).

⁷ See, e.g., Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC’Y REV. 691 (2003) (defining management-based regulation and analyzing its use in food safety, industrial safety, and pollution prevention); Johnson, *supra* note 6 (analyzing successes under a federal law that mandates internal review and planning in state juvenile justice agencies).

at law firms could enable substantial progress and improve upon structural approaches previously suggested in the employment discrimination literature.

I. THE CASE FOR MANAGEMENT-BASED REGULATION OF STRUCTURAL DISCRIMINATION AT LAW FIRMS

This Part explores management-based regulation in more detail and explains how such a regulatory approach to structural discrimination builds on, and improves upon, prior suggestions for solving the problem of structural discrimination. It then details why management-based regulation may be a particularly appropriate choice for combating the unique and persistent problem of structural discrimination in law firms.

Scholars have suggested that a solution to the problem of structural discrimination will require participation from the private sector. For example, Professor Susan Sturm proposes a reform under which companies and private consultants would work together to pool information and identify the best practices for decreasing structural discrimination in the workplace; they would then share these practices with courts, allowing judges to scrutinize employer practices more carefully.⁸ Other scholars have similarly suggested relying on private parties to provide expert assistance to courts in combating structural sources of discrimination.⁹ However, Professor Samuel Bagenstos strongly criticizes proposals like Professor Sturm's for their reliance on courts and unsupervised private actors, arguing that it is "doubtful that courts have the capacity or inclination to police the structures employers adopt to promote workplace equality"¹⁰ and that empirical research shows that outside experts, such as consultants and human resources professionals, cannot be relied upon to provide useful information to courts.¹¹

At the same time that employment scholars have been proposing ways to involve the private sector in combating workplace discrimination, another group of legal scholars has identified a new form of social regulation that, among other things, seeks to include input from private parties in regulatory regimes while limiting reliance

⁸ Sturm, *supra* note 5, at 556–64. Under her proposed system, the information that firms and experts provided to judges would create the necessary baseline to guide discrimination lawsuits to "sanction those employers who have not undertaken the process of internal problem solving, and whose capacity to address problems of harassment or discrimination remains ineffectual." *Id.* at 560.

⁹ See, e.g., Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659, 720–22 (2003).

¹⁰ Bagenstos, *supra* note 4, at 20.

¹¹ *Id.* at 27–30.

on courts and unchecked private parties. This approach, variously termed “management-based regulation,”¹² “democratic experimentalism,”¹³ or a “rolling-rule regime,”¹⁴ may help address some of the concerns raised above. These cooperative models are motivated by a recognition that a regulated firm may have easier access to better information than a regulator does about how it can contribute to the achievement of social goals. They are, therefore, characterized by a partnership between the regulator and the regulated under which the regulator sets social goals and grants power to the regulated to design plans for achieving them.¹⁵ Such regulatory systems (hereinafter referred to as “management-based”) typically include mechanisms through which firms submit their plans to regulators, giving regulators access to information discovered during internal planning processes; this information, in turn, aids regulators in evaluating these plans, promulgating best practices, and identifying underperforming firms.¹⁶ Through review and approval of firm plans, regulators can check the power of private firms and ensure that they undertake planning efforts seriously.

Management-based regulatory regimes have been successfully implemented in various contexts, including pollution prevention¹⁷ and

¹² See, e.g., Coglianese & Lazer, *supra* note 7.

¹³ See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); see generally Bagenstos, *supra* note 4, at 19 n.93 (cataloguing democratic experimentalist scholarship); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 189 n.23 (2003) (same).

¹⁴ See Charles Sabel, Archon Fung & Bradley Karkkainen, *Beyond Backyard Environmentalism*, BOSTON REV., Oct.–Nov. 1999, at 4, 4 (describing a new regulatory architecture characterized by “a combination of local experimentation and centralized pooling of experience”). Rolling-rule regimes are specifically characterized by regulators’ use of information received from regulated firms “to periodically reformulate minimum performance standards, desirable targets, and paths for moving from the former to the latter.” *Id.*; see also Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1069 (2004) (characterizing as “rolling-rule” a system in which provisional rules “incorporate a process of reassessment and revision with continuing stakeholder participation”). This continual revision of standards is not necessarily a part of management-based regulation, which requires only a managed process of internal review and planning.

¹⁵ See Coglianese & Lazer, *supra* note 7, at 694 (“Under management-based regulatory strategies, firms are expected to produce plans that comply with general criteria designed to promote the targeted social goal.”); Liebman & Sabel, *supra* note 13, at 184 (describing “the core architectural principle” of the system in the context of school governance as “the grant by higher-level authorities — federal government, states, and school districts — to lower level ones of autonomy to pursue the broad goal of improving education”).

¹⁶ See Liebman & Sabel, *supra* note 13, at 184 (“In return, the local entities — schools, districts, and states — provide the higher ones with detailed information about their goals, how they intend to pursue them, and how their performance measures against their expectations.”).

¹⁷ See Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 354–56 (2001) (praising a Massachusetts state law that forces firms using toxic chemicals to engage in an internal planning

food and industrial safety.¹⁸ Each of these regulatory programs asks regulated parties to engage in an internal review process to identify hazards at their firms, and then to propose plans for the elimination of these hazards. In the food safety context, for example, firms are asked to evaluate their food production process, identify points in the process that may present a risk of contamination, and provide regulators with their individualized plan for lessening or eliminating these risks.¹⁹ Regulators, in this case federal food safety and agriculture agencies, serve as independent monitors of firm plans and implementation, ensuring that private efforts are oriented toward public goals.²⁰

Recent scholarship has even identified a successful federal program that uses a management-based approach to identify and address structural discrimination. In a recent article, Professor Olatunde Johnson analyzes the inspiring successes of a federal law²¹ aimed at decreasing the disproportionate detention of juveniles who are minorities.²² Under this law, states must examine “all decision points in the juvenile justice continuum,” identify points in the process that may contribute to the disproportionate detention of minorities, and submit yearly reports to regulators detailing plans for dealing with any problems discovered at these decision points.²³ Taken together, these successful applications of management-based regulation reveal many lessons for designing a cooperative regulatory regime in which supervised participation by private firms can help achieve social goals.

Management-based regulation and the structural proposals of employment scholars both aim to advance social goals by involving private firms in the regulatory process as providers of information and expertise. Despite this commonality, no scholar has yet applied the lessons of management-based regulation directly to structural employment discrimination. Professor Sturm, for example, advocates “a dynamic regulatory system” to encourage “an interactive process of information gathering, problem identification, remediation, and evalua-

process and to work with regulators to reduce their use of toxics); *see also* Sabel, Fung & Karkainen, *supra* note 14, at 5 (same).

¹⁸ *See* Coglianese & Lazer, *supra* note 7, at 696–99 (pointing to the federal Hazards Analysis and Critical Control Points (HACCP) program, a widely used approach to regulating food safety that mandates internal firm planning and risk evaluation, and to the “process safety management” (PSM) program established by the Occupational Safety and Health Administration (OSHA) for regulating the handling of hazardous chemicals as successful implementations of management-based regulation).

¹⁹ *Id.* at 697–98.

²⁰ *See id.*

²¹ 42 U.S.C. § 5633 (Supp. III 2003), *amended by* Pub. L. No. 109-162, tit. III, § 305, 119 Stat. 2960, 3016 (2006).

²² Johnson, *supra* note 6, at 407–09.

²³ *Id.*

tion,”²⁴ but in the end would rely on courts and unregulated private entities to force such a process. Further, she admits that “most scholars have not analyzed particular . . . problem-solving processes in depth to begin to differentiate between robust and sham processes”²⁵ and that “the challenge remains to institutionalize a governance system” that would foster successful “problem-solving” approaches across the board.²⁶

Applying the lessons from successful management-based regulatory efforts to employment discrimination policy bridges the gap between these two strands of scholarship. The planning mandate of the management-based regime proposed below is designed to encourage wider adoption of problem-solving mechanisms that Professor Sturm recommended. Moreover, following examples of successful management-based systems, the proposed system relies on an expert regulator to oversee and approve firm planning processes, thereby providing some check on the possible cooptation of the planning process by private interests and removing this responsibility from the courts. Management-based regulation may therefore be an appropriate regulatory tool for combating structural discrimination in workplaces generally. However, analysis of such a broad application is beyond the scope of this Note, the remainder of which will mount a more limited proposal for the potential application of management-based regulation to combat structural discrimination at law firms.

A management-based approach to structural discrimination may be particularly necessary and appropriate in the law firm context. Law firms present an especially intractable problem of structural discrimination. Despite nearly twenty years of reports and research on the barriers to full equality in the legal profession,²⁷ law firms have made only incremental progress in solving this problem²⁸ and still lag significantly behind other industries in creating equality and opportunity for women and minorities.²⁹ Common institutional features of law firms

²⁴ Sturm, *supra* note 5, at 462–63.

²⁵ *Id.* at 490–91.

²⁶ *Id.* at 555.

²⁷ See, e.g., DEBORAH L. RHODE, AM. BAR ASS’N, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 13 (2001), available at <http://womenlaw.stanford.edu/aba.unfinished.agenda.pdf> (noting little progress since the first report of the ABA Commission on Women in the Profession in 1988).

²⁸ See AM. BAR ASS’N, *supra* note 2, at 7 (noting that law firm “progress on diversity generally has been slow”).

²⁹ See CHAMBLISS, *supra* note 1, at 1 (noting that as of 2004, minority representation in the legal profession stands at about half the level of representation in other professions, such as accounting, medicine, and university teaching); N.Y. CITY BAR, COMM. ON WOMEN IN THE PROFESSION, BEST PRACTICES FOR THE HIRING, TRAINING, RETENTION, AND ADVANCEMENT OF WOMEN ATTORNEYS 2 (2006), available at <http://www.nycbar.org/pdf/report/BestPractices4WomenAttorneys.pdf> (noting that “the legal profession fare[s] especially poorly

— such as high partner-to-associate ratios, disunified training opportunities, and subjective promotion standards — may especially facilitate structural discrimination.³⁰ Poor management unique to the legal profession³¹ may further impede progress by decreasing the chance that firms will study this problem or have the management capacity to solve it. Some argue that recent high profits in the legal industry have made it easy for law firms to ignore the high costs that structural discrimination imposes through low employee morale and attrition.³² The problem of structural discrimination in law firms, therefore, mimics, but may be worse than, the problem of structural discrimination in workplaces more generally.

The essential elements of management-based regulation will likely be particularly helpful in combating the special problem of structural discrimination in law firms. By forcing internal review and planning, a management-based system overcomes the failure of profits alone to motivate law firms to address structural discrimination. By requiring submission of information on firms' review and planning processes, a management-based system allows the regulator to develop knowledge about successful methods that firms uncover to investigate and solve their structural problems. The regulator may thus be able to add more empirical data about firm experiences to the research conducted by bar associations.³³ Finally, a management-based system that facilitates expert assistance from regulators can help even the most poorly managed firm address problems of structural discrimination. For all these reasons, a management-based approach to combating structural discrimination at law firms makes sense both as an example of how management-based approaches might address this problem in general and,

when compared to other fields, such as the accounting industry, in ensuring that the hiring, training, retention, and advancement of women are monitored consistently and effectively").

³⁰ See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CAL. L. REV. 493, 499–500, 564–83 (1996).

³¹ See ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 775 (4th ed. 2002) (noting that “despite their size and profitability, law firms remain notoriously poorly managed”).

³² See Seth Stern, *Traffic on the Off-Ramp*, HARV. L. BULL., Fall 2006, at 28, 30 (interviewing industry experts).

³³ Bar associations have provided a variety of helpful suggestions about how law firms might change institutional practices to improve the experiences of female and minority attorneys. See, e.g., N.Y. CITY BAR, *supra* note 29; WOMEN'S BAR ASS'N OF D.C., CREATING PATHWAYS TO SUCCESS: ADVANCING AND RETAINING WOMEN IN TODAY'S LAW FIRMS (2006), available at <http://www.wbadc.org/associations/1556/files/Creating%20Pathways%20Report%20PDF.pdf>. However, much of this research is based on reviews of existing literature or attorney focus groups. See N.Y. CITY BAR, *supra* note 29, at 6–7; WOMEN'S BAR ASS'N OF D.C., *supra*, at 1. A management-based system in which many law firms submitted reports to regulators on their practices and proposed solutions could enable more comprehensive research based on the full range of firm experiences.

independently, as an appropriate method to address the unique problems confronting law firms.

II. ELEMENTS OF A MANAGEMENT-BASED APPROACH TO STRUCTURAL DISCRIMINATION IN LAW FIRMS

The literature on management-based regulation reveals several key decisions that regulators face in designing a successful management-based regime.³⁴ This Part explains each of these design questions and indicates the appropriate response for the proposed management-based regime for law firms.

A. *The Basic Requirement of Planning*

The first, and arguably most important, element of a management-based regulatory scheme is a requirement that participating firms engage in self-evaluation and planning.³⁵ The planning requirement differentiates management-based regulation from other regulatory systems and increases efficiency and innovation by revealing information from within firms and putting increased decisionmaking responsibility in the hands of regulated parties.³⁶ Successful management-based regimes generally mandate firm engagement in internal planning processes to, first, identify risks and hazards and, second, identify or develop mechanisms to minimize such risks.

To mandate these processes, most management-based regimes identify a general social problem and then require that participating firms review their own processes in order to find risks of this problem and methods to eliminate them. The federal, management-based food safety program, for example, “first requires firms to identify potential hazards associated with all stages of food processing and to assess the risks of these hazards occurring” and then requires firms to “identify the best methods” for minimizing each identified risk.³⁷

A management-based regime that is designed to combat structural workplace discrimination should include this essential aspect of management-based regulation. A regime should request that participating firms survey their internal processes to “identify potential hazards” and “assess the risk” that such processes may be contributing to structural discrimination. The program should go on to require that firms “iden-

³⁴ See Coglianesse & Lazer, *supra* note 7, at 706–19 (describing these design choices).

³⁵ See *id.* at 694.

³⁶ See *id.* at 695–96.

³⁷ *Id.* at 697. Similarly, in the industrial safety context, OSHA’s PSM program requires firms to “assess risks for chemical accidents” and “develop procedures designed to reduce those risks.” *Id.* at 698.

tify the best methods” for minimizing such risks and develop plans for implementing these methods.

One might argue that lessons from the food safety regime are inapplicable in the employment discrimination context because it is far more difficult in a review of internal processes to identify sources of *discrimination* than it is to identify sources of a less complex problem like food contamination. However, Professor Johnson’s case study of the “disproportionate minority contact standard” (DMC), a federal, management-based system for decreasing minority detention,³⁸ demonstrates that an internal review process can uncover and address previously unknown sources of structural discrimination. The DMC program requires states to “assess the cause of disproportionate minority confinement, by, at a minimum, identifying and explaining differences at various points in the juvenile justice system (such as arrest, diversion, adjudication, and court disposition). States in which racial and ethnic disparities in confinement are a problem must develop an intervention plan.”³⁹ The DMC program is therefore designed to force states to “analyze how racial disparities arise and develop solutions stemming from those analyses.”⁴⁰

Professor Johnson cites several examples of government agencies that responded to the DMC by using an internal review and planning process to successfully identify and address unique sources of structural racial discrimination in their juvenile justice systems. One county’s review process “considered how criteria in [the county’s detention] screening instruments such as ‘good family structure’ might lead to disparities in minority communities with higher rates of single-parent families. The county now asks ‘whether there is an adult willing to be responsible for assuring the youth’s appearance in court.’”⁴¹ Internal review in another county led to changes in the training and intake procedures in its probation department.⁴² The internal review and planning processes central to management-based regimes can similarly uncover and spark creative responses to unique and previously ignored sources of structural discrimination.

Evidence suggests that internal review and planning programs at workplaces can similarly uncover previously unknown sources of achievement disparities and dissatisfaction among women and minor-

³⁸ Johnson, *supra* note 6.

³⁹ *Id.* at 409 (footnote omitted).

⁴⁰ *Id.* at 411.

⁴¹ *Id.* at 412 (quoting ELEANOR HINTON HYOTT ET AL., REDUCING RACIAL DISPARITIES IN JUVENILE DETENTION 57 (2001)).

⁴² See *id.* at 413 n.173.

ity employees.⁴³ Absent a coherent system to encourage such review and planning on a larger scale, however, these processes have been undertaken only occasionally in the legal profession, at those firms that have volunteered to engage in them.

An ideal management-based system to address workplace discrimination in law firms should require participating firms to engage in a process of internal review and planning that, along the lines of the DMC, asks firms to identify and investigate the possible sources of structural discrimination and develop a plan for eliminating them.

*B. Monitoring Planning Only vs.
Plan Implementation and Compliance*

A second design choice to be made about a potential management-based regime is whether it will monitor only planning or also the implementation of plans.⁴⁴ To be successful, any management-based system should at least request that firms submit the results of their internal reviews and planning efforts for certification by a regulator. Submission and approval of plans lessens the chance of sham efforts. Even early in the life of a management-based system, when a regulator may not yet have sufficient information to evaluate plans fully, “it may be possible to establish criteria for planning and general parameters for effective management” to ensure that firms are taking the planning mandate seriously.⁴⁵ All of the management-based systems examined in this Note contain some mechanism for this basic regulatory oversight and approval of firm plans, but they vary in the extent to which the implementation of plans is also required or monitored by the regulatory regime.

Some management-based regimes impose regulatory oversight over both planning efforts and compliance. For example, the “process safety management” (PSM) program established by the Occupational Safety and Health Administration (OSHA) provides for both regulatory review and approval of plans as well as for monitoring by agency regulators to ensure firm compliance.⁴⁶ Similarly, a management-based system implemented by universities in response to the student anti-sweatshop movement requires firms not only to assess their proc-

⁴³ For example, internal review and planning at accounting firm Deloitte & Touche identified failures in mentoring and work assignment as leading to unequal work achievement and experiences for female workers. See Sturm, *supra* note 5, at 492–99.

⁴⁴ See Coglianese & Lazer, *supra* note 7, at 694 (noting that under management-based regulatory schemes “plans sometimes are made subject to approval or ratification by . . . regulators, but . . . need not be,” and that firms are sometimes required to document subsequent compliance with plans, but sometimes are not).

⁴⁵ *Id.* at 706.

⁴⁶ *Id.* at 698–99.

esses in compliance with one of several available plans to improve labor conditions, but also to implement those systems.⁴⁷

Compliance oversight is not always needed, however. For example, the management-based system implemented under the Massachusetts Toxics Use Reduction Act⁴⁸ (TURA) does not monitor firms' compliance with plans, or even require their implementation.⁴⁹ Despite this lack of regulatory oversight, many TURA participants voluntarily implement some aspects of the plans they develop under the program,⁵⁰ and there is evidence that this has led to a reduction of toxic emissions in Massachusetts.⁵¹ A planning-only mandate should be sufficient when it is expected that firms will realize during the planning process that voluntary implementation of their plans will provide them with net benefits.⁵² TURA's designers may have believed that once firms reviewed their use of toxics and gained knowledge through the planning process of methods to reduce such use, they would likely see that using fewer toxics would benefit them in addition to benefiting society.

Two factors indicate that a planning-only mandate is likely the best approach for a management-based system designed to combat structural discrimination in law firms. First, it is likely that, paralleling the TURA example, law firms that engage in an internal review and planning process around structural discrimination will realize that net benefits will accrue to them from actually implementing their plans. Structural discrimination and its resulting disparities are imposing significant costs on law firms, even if firms have not yet effectively measured these costs.⁵³ A management-based system that mandates internal review would force law firms to measure and take note of these costs, motivating them to implement remedial plans voluntarily.⁵⁴ Re-

⁴⁷ See KIMBERLY ANN ELLIOTT & RICHARD FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 65-67 (2003). Monitoring of firm compliance is primarily accomplished by independent auditors hired by participating firms, with the regulatory bodies monitoring this internal monitoring. *Id.*

⁴⁸ MASS. GEN. LAWS ch. 21I (2004 & Supp. 2006).

⁴⁹ Coglianese & Lazer, *supra* note 7, at 700.

⁵⁰ *Id.* at 709.

⁵¹ See Sabel, Fung & Karkkainen, *supra* note 14, at 6 (reporting significant reductions in the production-adjusted use of toxic chemicals and generation of toxic byproducts in Massachusetts after adoption of TURA).

⁵² Coglianese & Lazer, *supra* note 7, at 709 (noting that "if the regulator is successful in pushing the firm to study the problem, the firm will then 'self-regulate' because its interests coincide sufficiently with those of the public," and that in such cases a planning-only mandate is sufficient).

⁵³ See Stern, *supra* note 32, at 30.

⁵⁴ See Coglianese & Lazer, *supra* note 7, at 703 (explaining that even when firms are not sufficiently motivated independently to research risks and best practices, "[t]he type of analysis that is required under a management-based regulatory approach may overcome this limitation by forcing firms to confront and assess risks that they might otherwise find insufficiently beneficial to study,"

latedly, many law firms seem interested in solving the problem of structural discrimination⁵⁵ and may just be stalling because they do not have a “hook” to spark action⁵⁶ or cannot decide on the proper first steps to take. A management-based system that forces firms to take the first steps in this process, and provides them with expert assistance and suggestions on how to do so (as discussed in the following section), may be all that is needed to push firms to finish the job.

C. Expert Assistance

Because both the review and planning processes may be difficult, most management-based regimes include a mechanism to assist firms in identifying sources of risk and designing remedial plans. Under the DMC, for example, the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) provides technical assistance to states that includes “cataloging innovative state efforts to address the problem” and “publishing assessments on model programs.”⁵⁷ An important design decision to be made in any management-based regime, therefore, is how and to what extent the regime will provide such assistance to firms.⁵⁸

One method of providing expert assistance is to include specific suggestions for risk evaluation in the planning mandate itself. The federal food safety program specifies that firms must engage in risk analysis through a “critical control point” (CCP) process developed by regulators that requires firms to identify and attend to each step of their production process in which food spoilage is likely to occur.⁵⁹ By requiring firms to use a particular risk evaluation methodology, this program provides guidance while maintaining the flexibility and firm-specific analysis that are the essential benefits of management-based regulation.⁶⁰

This approach to expert assistance could be applied in a management-based system to address structural workplace discrimination in

and that once confronted with such risks, firms may discover that implementing plans in fact provides net gains).

⁵⁵ See, e.g., Stern, *supra* note 32, at 31 (quoting Harvard Law School Dean Elena Kagan as saying, “many employers desperately want to solve [the problems facing women in the legal profession] and are looking for any help that anyone can offer”).

⁵⁶ See Johnson, *supra* note 6, at 415 (describing how management-based regulation can inspire action that regulated entities are already interested in undertaking).

⁵⁷ *Id.* at 409.

⁵⁸ Cf. Coglianese & Lazer, *supra* note 7, at 712–13 (suggesting that an important design element of management-based regimes is “how prescriptive government should be in directing firms’ management practices”).

⁵⁹ *Id.* at 697.

⁶⁰ Although HACCP requires that firms identify CCPs and use the CCP process to evaluate risks, it gives firms “substantial latitude” to choose CCPs and control mechanisms to suit their particular production processes and control preferences. *Id.* at 698.

law firms. A potential regime could mandate something like the CCP process and require firms to pay special attention to specific aspects of internal processes (such as assignment systems, informal networking opportunities, work schedules, and child care opportunities) that have been identified in past studies as likely to lead to structural discrimination in law firms.

However, concerns specific to structural discrimination and the legal profession suggest that many firms may be unable to assess risks and best practices adequately even if provided with some general guidance from regulators. Information on possible sources and suggested remedies for structural discrimination in law firms has been publicly available for some time, and while many firms have made some efforts to enact recommendations for improving the experiences of female and minority attorneys, most have likely not engaged in in-depth internal review or planning processes. Additionally, poor management and the lack of dedicated human resources departments in most law firms means that merely informing firms of recommended processes and remedies may not be sufficient to ensure that firms enact them effectively. Thus, to implement a successful management-based regime, law firms will need a higher level of expert assistance.

Existing management-based regimes reveal two ways to incorporate higher-level, firm-specific expert assistance: such assistance can be provided by a centralized institution run by the regulator that works directly with firms, or it can be “outsourced” such that participating firms obtain consulting services from external providers. Under a centralized approach, an expert institution run by or affiliated with the regulator receives and reviews firm plans, compiles information and insights from the collective planning process, and then delivers expert assistance, primarily by sharing this information with participants, as OJJDP has done under the DMC.⁶¹ This approach allows the management-based system to create expertise within the regulating body, which is then shared with participating firms. An outsourced approach, by contrast, asks firms to engage outside experts for assistance in complying with a planning mandate. For example, the management-based system imposed by universities to improve labor conditions in foreign factories allowed participating firms to outsource the task of evaluating factories and creating plans for improvement to international labor NGOs, such as the Fair Labor Association or the Workers’ Rights Consortium.⁶²

A combination of these two approaches might best meet the needs of law firms in combating structural discrimination. A centralized in-

⁶¹ See Johnson, *supra* note 6, at 408–09.

⁶² See ELLIOTT & FREEMAN, *supra* note 47, at 49–72.

stitution could aid in the ongoing process of identifying and researching sources of and remedies for structural discrimination. On the other hand, outside experts might be better suited to provide the firm-specific advice that has proved helpful in past efforts to reduce structural discrimination.⁶³ An outsourced approach could also promote a competitive market for such expertise.⁶⁴ To permit the information gathering of a centralized institution and the firm-specific assistance and competition of an outsourcing system, a dual system could rely on a central institution to review and approve submitted plans but permit firms to engage any expert for assistance in creating such plans. In addition, through the plan submission and approval process detailed above, a dual system would enable a centralized expert institution to exercise necessary oversight over plans developed by outside consultants, thus mitigating fears that outsourced assistance would be coopted by private interests.

Existing resources in the legal profession indicate that such a dual system might be easy to implement. Harvard Law School has recently founded a Center on Lawyers and the Professional Services Industry, a research institution that aims to “study and provide guidance on the serious challenges facing the [legal] profession today.”⁶⁵ This new institution, in keeping with its stated goal of “closing the gap between the academy and practice,”⁶⁶ could easily fill the role of a centralized reviewer of firm plans. This center could also provide expert assistance in plan development, but law firms could utilize a number of other consulting services to aid with planning requirements. For example, Catalyst, a nonprofit organization dedicated to the expansion of opportunities for women in the workplace,⁶⁷ has engaged in extensive study of the legal profession,⁶⁸ often provides strategic consulting,⁶⁹ and would likely be available to assist law firms with planning obligations.

Management-based systems in other industries have also relied on consulting services provided by existing experts within an industry.

⁶³ For example, when engaging in a voluntary internal effort to reduce gender disparities, Deloitte & Touche relied on an outside expert, Catalyst, to review firm-specific processes and complaints and provide individualized consultation on the causes of gender imbalances in upper levels of the firm. See Sturm, *supra* note 5, 493–94.

⁶⁴ See ELLIOTT & FREEMAN, *supra* note 47, at 63–64 (describing benefits that accrued from the competitive market for the creation and monitoring of labor standards).

⁶⁵ Elaine McArdle, *Bridge-Building for the Future*, HARV. L. BULL., Fall 2006, at 12, 14.

⁶⁶ *Id.* at 20.

⁶⁷ See Catalyst, About Catalyst: Mission and History, <http://www.catalyst.org/about/mission.shtml> (last visited May 11, 2007).

⁶⁸ See, e.g., CATALYST, WOMEN IN LAW: MAKING THE CASE (2001), available at <http://www.catalystwomen.org/files/full/Women%20in%20Law%20-%20Making%20the%20Case.pdf> (studying the career paths of women in the legal profession and the obstacles they face).

⁶⁹ See, e.g., *supra* note 63.

Under an Environmental Protection Agency program similar to OSHA's PSM system, regulators entrusted "loss prevention engineers" within the toxics industry to assist firms on compliance with management-based planning requirements.⁷⁰ Legal malpractice insurers, given their existing relationships with a variety of firms and their expert knowledge of internal processes, could provide similar consulting assistance.⁷¹

D. Summary of Plan Design

This review of existing management-based regimes permits several conclusions about the ideal structure of a management-based system to combat structural discrimination in law firms. An ideal system should require participating firms to engage in internal review to identify the risks of structural discrimination; mandate submission and approval of a plan detailing such risks and outlining proposed methodologies for eliminating them; and, finally, implement a dual system to permit expert assistance by both a centralized regulator and external consultants. As the following section will discuss, this ideal management-based system could be adopted by a variety of potential regulators. No matter how or by whom such a system is adopted, the above analysis should prove helpful to the designers of such a system.

III. IMPLEMENTATION

Various players, public and private, could implement the management-based system outlined above. This Part will assess whether public or private actors, and which actors within the private sphere, are best positioned to implement a management-based system to address structural discrimination in law firms.

A. Public or Private Regulation?

Local, state, or even federal authorities could use the design recommendations explored above to enact a management-based system. However, the lack of local, state, or federal interest in regulating structural discrimination to date, and the somewhat novel nature of management-based regulation, suggests that adoption and implementation of such a system by a private entity may be more feasible. Even if the

⁷⁰ Coglianese & Lazer, *supra* note 7, at 609.

⁷¹ Insurance brokers are increasingly offering consulting services to account holders. See Sturm, *supra* note 5, at 536. The motivation for insurers to offer these services is theoretically to help account holders avoid subsequent legal liability. Although this motivation could be somewhat diminished in the management-based regulation context (for example, because penalties for violating management-based regimes might not be high enough to draw the attention of insurers), insurers might still be motivated to provide these services to attract clients.

government were to address the problem of structural discrimination generally, it would be unlikely to intervene in the particular context of law firms because the legal profession is seen as primarily self-regulating⁷² and therefore is not often the specific target of government oversight.

The experiences of student activists in pressuring American universities to adopt and implement a management-based system to fight sweatshop conditions abroad provides an instructive example of conditions under which the implementation of a management-based regime by private entities might be best. In the late 1990s, legal and political action to improve conditions in international factories was hindered by the fact that activists were primarily located within the United States and Europe and by the lack of international treaties or agreements that could provide legal traction to challenge labor conditions in foreign countries.⁷³ In the absence of such legal hooks, activists realized that a better option was to “pressure multinational corporations to raise labor standards in overseas operations.”⁷⁴ Although these activists could have focused on lobbying their own governments to take action to improve labor conditions abroad, forcing action by private universities arguably led to quicker results and, by providing evidence that labor conditions could be improved, assisted in later efforts to lobby for government action.⁷⁵

Those interested in fighting structural discrimination in the U.S. labor market currently face a similar lack of legal and governmental hooks.⁷⁶ These activists could focus on lobbying local, state, or federal governments to attend to this issue and pass relevant legislation. However, as in the sweatshop example, progress may come more rapidly if these activists marshal private institutions to work for them, rather than focus exclusively on government lobbying. Success from private efforts could then support and inform concurrent or future efforts to lobby for government intervention on the issue.

B. Which Private Parties Should Regulate, and How?

As discussed above, a management-based system run by private, rather than government, entities may be the best choice to combat structural discrimination in law firms. But what private actor can

⁷² See MODEL RULES OF PROF'L CONDUCT, pmbi., paras. 10–12 (2006).

⁷³ See ELLIOTT & FREEMAN, *supra* note 47, at 55 (noting that “American and European activists cannot use courts or voting to pressure developing-country governments to improve conditions where the activists have no legal presence”).

⁷⁴ *Id.*

⁷⁵ See *id.* at 131 (arguing that the private labor standards campaign in the United States “[i]nduced the United States to put labor standards into bilateral trade agreements” and “[h]elped galvanize political and financial support to strengthen the [International Labor Organization]”).

⁷⁶ See *supra* note 6 and accompanying text.

best induce compliance with a management-based system without the legal sanctions available to the government? Three possible candidates emerge: the law firms themselves, private activists, and law schools. As detailed below, law schools are the private entities that are best suited to impose management-based regulation on law firms because they can leverage their gatekeeping power to force firm compliance and thereby avoid the potential disadvantages of self-regulation or regulation by activists directly.

1. *Self-Regulation by Law Firms.* — One solution might be to rely on law firms to implement a management-based system. The Massachusetts TURA program, though government-run, effects a system of self-regulation by relying on the potential cost savings that may accrue to firms that participate in a management-based system to induce firms actually to implement the plans that the law requires.⁷⁷ Some firms' voluntary adoption of plans to address structural discrimination implies that analogous potential cost savings may exist in the legal industry. If enough firms were interested in participating in such a program, they might identify an independent private institution willing to review and approve firm plans and to provide expert assistance and then voluntarily undertake a management-based system in cooperation with that institution. The failure of most law firms to undertake such efforts, however, indicates that economic incentives may not be sufficient to induce widespread participation in a voluntary effort.

2. *Regulation by Private Activists.* — Activist groups or private citizens, such as employees, clients, and bar associations, might be able to impose a management-based system on law firms by manipulating market forces to induce law firm participation. There is evidence that both law firm clients and potential and current employees are concerned about structural discrimination.⁷⁸ Activists could marshal market forces and induce firms to join a management-based system by monitoring the willingness of firms to do so and communicating this to clients and potential employees. To accomplish this objective, a private entity implementing a management-based regime could create a mark to approve firms that successfully participated in a management-based process and convince law firm employees and potential clients to make decisions about working with firms based on

⁷⁷ See Sabel, Fung & Karkkainen, *supra* note 14, at 6 (noting that TURA's planning requirements have allowed participating firms "to discover significant net benefits of pollution prevention" such that 86% of firms would continue to plan absent any legal requirement to do so).

⁷⁸ See, e.g., AM. BAR ASS'N, CHARTING OUR PROGRESS, *supra* note 1, at 9 ("Many large corporations link the hiring of outside counsel with a requirement for diversity in the law firm teams that service them.").

the presence or absence of this mark.⁷⁹ Professors Ian Ayres and Jennifer Gerarda Brown recently used this method to initiate a non-management-based system when they registered a private mark that signified compliance with a proposed regulatory scheme to combat discrimination against gays and lesbians.⁸⁰

The experience of student activists seeking to improve foreign labor conditions, however, suggests some limitations of this approach. Because profit motives encouraged manufacturing firms to rely on cheap sweatshop labor, activists sought to change these firms' economic interests by urging domestic consumers to boycott products manufactured in factories with poor conditions. Despite consumer interest in this campaign, however, activists found it difficult to coordinate sufficient consumer action across a large marketplace in which multiple factors were likely to influence consumer purchasing decisions.⁸¹ Although some campaigns and marks succeeded in drawing enough consumer and public attention to affect firm behavior,⁸² the complexity of information about firm practices and the variety of issues influencing consumer decisions hindered efforts to create an effective large-scale campaign.

The problems encountered by labor activists may similarly preclude effective regulation by private activists in the law firm context. A variety of services currently rank firms along various metrics, including female and minority representation and quality of life.⁸³ Many of these services also provide information about the number of part-time partners and associates and other data that could help potential employees and clients make decisions about firms based on markers of structural discrimination. Despite the prevalence of this information, however, there is no evidence that it has influenced enough private decisions to provide sufficient incentives for firms to improve their records in these areas. A unified mark distinguishing firms that actually

⁷⁹ Such a mark would be similar to the marks created by private regulatory firms to indicate to consumers that a product has conformed to its private performance standards. See ROSS CHEIT, *SETTING SAFETY STANDARDS* 89 (1990).

⁸⁰ Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639, 1641-42 (2006).

⁸¹ See ELLIOTT & FREEMAN, *supra* note 47, at 58 (noting that labor activists had to "appeal to consumers in the broader marketplace, where it is harder to identify particular concerns and to focus on particular products").

⁸² See, e.g., *id.* at 57 (describing influential exposés that informed consumers about child labor at Wal-Mart suppliers and describing a successful firm-specific campaign that sought to influence practices at Gap, Inc.).

⁸³ See, e.g., Minority Law Journal, *Diversity Scorecard*, <http://www.law.com/jsp/mlj/PubArticleMLJ.jsp?id=1146560724517&hubtype=Scorecard> (last visited May 11, 2007) (ranking firms based on percentage of minority partners); Vault, *Corporate Diversity Program Snapshots*, http://www.vault.com/companies/diversity_companies.jsp?ch_id=242 (last visited May 11, 2007) (providing reports on diversity initiatives and attorney demographics at many large law firms).

participated in a management-based program might convey more meaningfully a firm's commitment to combating structural discrimination, and thus be more effective in galvanizing employee and client support for such commitment. This approach has some promise if activists are able to run a management-based system independently or find an existing private entity, such as a bar association, to do so.

However, employee and client decisions to work with firms are likely influenced by multiple factors. Further, it is not clear that firms aggregate or assess the reasons for employee or client departure or student interview decisions. Both of these uncertainties lessen the potential impact of any market-based approach, even one that seeks to manipulate market forces based on participation in a management-based system.

3. *Regulation by Law Schools.* — Given the problems that arise in attempting to use market forces to support a management-based system directly, another approach seems desirable. To overcome the challenges of aggregating consumer decisions in the labor standards context, student groups used the power of universities and the closed market for insignia clothing to exert pressure on manufacturers. Within five years of the first action on a university campus, over 150 universities had “voted to require all licensees to uniformly disclose plant locations,”⁸⁴ a step that allowed monitoring organizations to investigate labor conditions more easily. Eventually, nearly 170 universities joined one of two independent organizations that oversaw management-based regimes for improving labor standards abroad.⁸⁵ These affiliations pressured thousands of manufacturers to submit to management-based regimes supervised by these organizations in order to receive licenses from universities to produce insignia clothing and other merchandise.⁸⁶ Universities were thus able to use their unique position as gatekeepers of insignia licenses to force “voluntary” participation in a management-based regulatory scheme.

In the legal profession, law schools occupy a similar gatekeeping position with regard to access to students for on-campus interviewing. At most top-tier law schools the school's administration makes decisions about which firms may come on campus to recruit students. In the same way that universities required labor-standards monitoring as a condition of access to insignia licenses, law schools might impose conditions on access to the privilege of on-campus interviewing. Indeed, many top law schools currently require participating firms to

⁸⁴ ELLIOTT & FREEMAN, *supra* note 47, at 58.

⁸⁵ *Id.*

⁸⁶ *See id.* at 60.

sign and adhere to a nondiscrimination policy.⁸⁷ Law schools simply could extend this mandate to require firms wishing to interview on campus to submit to a management-based system designed to combat structural discrimination.

The success of the anti-sweatshop movement in using the power of universities to improve labor conditions abroad provides ample evidence that an effort by law schools to improve workplace conditions in the legal profession should be well within reach. Further, the recent case of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*⁸⁸ demonstrates the lengths to which law schools will go to defend their ability to advance nondiscrimination goals through on-campus recruiting policies. Finally, there appears to be significant commitment within law schools to addressing structural discrimination in law firms, propelled by the view that “[t]his is an area in which law schools and practitioners must make common cause.”⁸⁹ All of these factors imply that law school implementation of a management-based system to combat structural discrimination is a feasible option.

IV. POTENTIAL CRITICISMS

One potential criticism of a management-based approach is that even if law schools implement it, they would not actually sanction noncompliant law firms.⁹⁰ However, there is evidence that, even without significant sanctioning, a management-based system enforced by law schools could still have a substantial positive effect. First, law schools unwilling to sanction noncompliant firms might still be willing to provide some incentives to complying or exceptionally performing firms. Schools might allow these firms on-campus interviewing advantages or make them more visible to students by instituting a ranking or publicity system. Additionally, the most important achievement of a law school system might not require any actual sanctioning by the law schools. Reflecting on the DMC program, Professor Johnson notes that, even absent much sanctioning by the federal government, “[s]ome

⁸⁷ See, e.g., Harvard Law Sch. Office of Career Servs., Recruiting Policies & Guidelines, http://www.law.harvard.edu/ocs/employers/Fall_OCI/Recruiting_Policies_and_Guidelines.htm (outlining Harvard Law School’s nondiscrimination policy and stating that firms must comply with it in order to participate in on-campus interviewing). Harvard Law School’s nondiscrimination policy for recruiting is more stringent than many state and federal laws, in that it prohibits discrimination on the basis of sexual orientation. See *id.*

⁸⁸ 126 S. Ct. 1297 (2006).

⁸⁹ Stern, *supra* note 32, at 30 (quoting Harvard Law School Dean Elena Kagan).

⁹⁰ Noncompliant firms might be defined to include firms that did not participate, that submitted “sham” plans, or that did not implement their plans or implemented them ineffectively. The *FAIR* case, which arose when law schools barred military recruiters because the military did not comply with the schools’ nondiscrimination policies, demonstrate that law schools might, in fact, be willing to sanction firms along at least one dimension — nonparticipation.

states have gone far in excess of what is required under the statute.”⁹¹ When the program succeeds, she notes, “it is unlikely to be the result of *coercion* by the federal government, but by its potential to *empower* internal and external advocates [already] concerned about the problem of racial disparity in the juvenile justice system.”⁹² There are likely interested advocates both within and outside of law firms who are committed to pushing law firms to improve workplace procedures to combat discrimination. Professor Johnson’s example demonstrates that a management-based system may provide these advocates with the necessary trigger, technical guidance, and framework to spark action, even when it is unlikely that firms would undertake such action absent an overarching, management-based system.

Another potential criticism is that the management-based approach will have only limited impact on a large-scale problem. If it were implemented through law schools’ on-campus recruiting policies, for example, such a program would impact only those firms that want to recruit on participating campuses; but the problem of structural discrimination impacts all law firms and firms in other industries. There are several reasons, however, why an effort that targets only some firms may nonetheless impact both firms that do not interview at participating schools and firms in other industries. Within the legal industry, firms that do not interview on campus at a participating school could still hear of and adopt practices that the management-based program identifies to combat structural discrimination. The law school program might support these efforts by actively working to export learning by, for example, publicizing lessons learned. Workers in other industries who learn of a management-based system for the legal industry may demand similar programs in their own fields.⁹³ After learning from a law school program, other professional schools could implement analogous programs for industries that recruit on their campuses.

Finally, the impact of a management-based system designed to address structural discrimination might be greater than critics might expect if the system facilitates eventual government action on this issue. The management-based system in the anti-sweatshop context had this effect: increased visibility resulting from the system arguably led Congress to push for the inclusion of labor standards in international trade

⁹¹ Johnson, *supra* note 6, at 415.

⁹² *Id.* (emphases added).

⁹³ This effect parallels the “demonstration effects” observed in consumer behavior when one consumer’s consumption decisions are influenced by the benefits a high-quality product is observed to provide to another consumer. See JAMES S. DUESENBERY, *INCOME, SAVING, AND THE THEORY OF CONSUMER BEHAVIOR* 25–26 (1949).

agreements.⁹⁴ As discussed above, it is possible that part of the reason the U.S. government has heretofore failed to intervene to combat structural discrimination in the workplace is that such discrimination, and the processes that may be necessary to eliminate it, are not yet fully understood. The processes and standards developed through a private, management-based system could provide new data and awareness to prompt a reexamination of the feasibility of legislative or other governmental action in this area.⁹⁵

V. CONCLUSION

Although employment law scholars have long called for a “problem-solving” approach to structural discrimination, refining this analysis to call for a management-based approach allows the application of insights based on past successes in that field. This Note argues that a management-based system may be particularly appropriate to combat the pervasive problem of structural discrimination in law firms. An ideal management-based system for fighting structural discrimination at law firms would mandate internal review, planning, and submission of plans for approval by a centralized expert institution. Additionally, the system would facilitate high levels of firm-specific and centralized expert assistance to support firms and provide some check to the work of outside consultants. Existing structures in the legal industry support adoption of such a system, especially one implemented privately by law schools through conditions on on-campus interviewing privileges.

⁹⁴ See ELLIOTT & FREEMAN, *supra* note 47, at 131.

⁹⁵ *Cf.* Ayres & Brown, *supra* note 80 (arguing that adoption of a private system to combat discrimination against gays and lesbians could lead Congress to adopt such a system as law by demonstrating that prohibition of such discrimination is feasible); Sturm, *supra* note 5, at 562–63 (describing how court review of employer processes under her proposed system for combating structural sources of discrimination would facilitate the discovery of best practices and norms that could then be articulated in legal rules).