

**Legal Endogeneity and the Limits of Equal Opportunity\***

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## Introduction

One of the most central questions in the sociology of law is the extent to which legal rights can produce social change. That question is rarely more salient than it is in the context of civil rights and, in particular, the right to equal opportunity, which is the central legacy of the Supreme Court's decision in *Brown v. Board of Education* in 1954. There is no question that fifty years after the *Brown* decision and forty years after the passage of the Civil Rights Act, American society has changed in many ways. The era of legal "Jim Crow" segregation is over and persons who are racial minorities enjoy the same *formal* legal rights as do white Americans. But while we no longer see racially segregated railroad cars and schools, legally sanctioned lynchings of black Americans, or the overt violence and hatred that characterized the civil rights battles in the South during the middle twentieth century, we still live in a society that is highly racially stratified.

Race still shapes the lives of children in very significant ways. More than seventy percent of black and Latino children in the U.S. attend schools that are majority nonwhite (Iceland et al. 2002; Massey and Denton 1993). Schools that serve primarily minorities remain far inferior to schools that serve predominantly whites as measured by physical facilities, teaching materials, technology, teacher quality, class size, and curricular programs (Card and Krueger 1998; Jencks and Phillips 1998; Ehrenberg et al. 2001). Violence and drugs are also far more prevalent at schools serving minorities (Waters 1999). Even at schools that are integrated, research suggests that depressed teacher expectations and tracking systems place minority students at a significant disadvantage above and beyond the effects of socio-economic class (Heubert and Hauser 1999; Lucas 1999). At the high school level, minority students are significantly less likely to have access to advanced placement courses (Werkema 2002).

Lower family income (Nettles et al. 1998) and the stigmatizing effects of being nonwhite in America (Van Ausdale and Feagin 2001) put minority children at a further disadvantage.

Workforce statistics are equally dismal. Based on data from the Current Population Survey, the median income for whites (ADD FIGURE) is considerably higher than the median income for blacks (ADD FIGURE) or Hispanics (ADD FIGURE). Minorities are far less likely than whites to hold management or professional positions but minorities are paid less well than whites even when they do hold those higher status positions. Minorities, moreover, are disproportionately likely to hold jobs where opportunities for advancement are limited.

The extant socio-legal literature points to a number of explanations for the enduring racial inequality in our society. One key factor is that legal rights must be mobilized in order to be effective, yet those who are victimized by discrimination may be least able or likely to mobilize the law. Victims of racial discrimination may be so accustomed to injustice and inequality that they tend not to see their conditions as legal injuries (Felstiner, Abel, and Sarat 1988; Bumiller 1987). Due to discriminatory treatment and negative experiences with police, moreover, racial minorities are disproportionately likely to distrust legal officials and the legal system and therefore may choose to endure legal injuries rather than to subject themselves to a process that appears biased or unjust (Bumiller 1988). Fear of repercussions and retaliation or the desire to avoid feelings of victimization may also act as obstacles to mobilization (Bumiller 1988).

Where the barriers to rights mobilization are overcome, litigation itself becomes a second major barrier to equal opportunity. The socio-legal literature establishes that litigants who use the legal system on a single or occasional basis face considerable disadvantages relative to repeat players in the litigation process (Galanter 1974). Victims of racial

discrimination are almost always individuals who are inexperienced one-shot players in the legal game and they are almost always making claims against organizations that encounter litigation on a repeated basis. As repeat-players, organizations face lower start-up costs and greater expertise, they can settle cases where they have weak claims and litigate those with strong claims, they can cases structure their transactions to improve their position in litigation, and they can lobby for more favorable rules or interpretations of rules (Galanter 1974, Albiston 1999). Organizations, moreover, generally have access to lawyers who enjoy considerable advantages over lawyers who typically represent employment discrimination victims. Corporate lawyers generally have attended elite law schools and enjoy higher prestige and incomes, lower caseloads, and greater familiarity with their clients. In contrast, lawyers who represent individuals tend to have attended local non-elite law schools and to have much higher and more varied caseloads (Heinz and Laumann 1977). Increasingly, moreover, organizations seek to handle a broader variety of legal issues through internal dispute resolution, thus maximizing their control over the outcomes (Edelman and Suchman 1999).

Perhaps most critically, and somewhat ironically given the progressive role of decisions such as *Brown v. Board of Education*, courts play a key role in muting the impact of civil rights. Rights are inherently subject to political manipulation (Tushnet 1984) and are especially so in the context of race. Given the social and political volubility of racial issues in America, courts are continually called upon to define and redefine their meaning, their boundaries, and their depth. While there is always considerable variation across jurisdictions and over time, courts have in general tended to define civil rights in ways that protect racial minorities from overt and malevolent forms of discrimination but not from institutionalized social practices that systematically if subtly place racial minorities at a disadvantage. For

example, courts favor constructions that require a malevolent perpetrator over those that would find substantive inequality itself legally problematic (Freeman 1990) and they fail to recognize subtle forms of discrimination that affect how employers evaluate merit and qualifications (Krieger 1990) or how widely accepted institutionalized practices incorporate and perpetuate racial inequality (Schultz 1990, Haney-Lopez 2003).

In this essay, I explore another phenomenon that limits the capacity of equal opportunity jurisprudence to effect social change, which I call “the endogeneity of law.” Prevailing theories treat law as *exogenous* to organizations – that is, as formed prior to and relatively autonomously from organizational actors, structures, and institutions. In contrast to this view, I propose that law is *endogenous* in that it tends to acquire meaning within the social fields that it seeks to regulate. I argue that law tends to incorporate and to legitimate practices that have become widely institutionalized in society.

Legal endogeneity is made possible in the civil rights realm because law regulating organizations tends to be broad and ambiguous. Legal ambiguity leaves organizations substantial latitude to construct the meaning of compliance (Edelman 1992). Understandings of “compliance” with law, and ultimately of the meaning of law itself may be crystallized by the courts but those understandings derive in large part from institutionalized organizational patterns, structures, practices, rituals, and culture. By understanding law as endogenous, it becomes possible to understand how and why laws regulating organizations often take unanticipated forms, and why judicial interpretations of those laws often fail to remedy inequality in the workplace. A theory of endogenous law provides a framework for understanding how and why equal opportunity jurisprudence has had limited impact, and how the courts legitimate and institutionalize forms of compliance that undermine the very legal

rights they apparently enforce. Endogeneity theory is not, however, simply an explanation for the claims made by critical legal scholars regarding the incapacity of law to reform social institutions. Endogeneity theory also explains how law may produce significant social change in subtle, indirect, and unexpected ways by altering conceptions of what constitutes good management, organization I examine the endogeneity of law primarily in the context of work and employment. Although the *Brown* decision itself concerns education, the legacy of *Brown* may be found in virtually every social institution, including employment, housing, education, health, transportation, and even marriage. Although I posit that law can become endogenous (to varying degrees) in each of these social arenas, employment may provide the clearest example because of the power of corporate America to influence lawmakers and regulators. Law regulating employment tends to be particularly broad and ambiguous, providing perhaps the greatest opportunity for meaning to be generated within employing organizations. Further, work is arguably the institution most directly responsible for inequality in society. Occupation affects not only economic wealth but also social status. Prestige, at least in American society, is closely linked to one's occupation and the location of work. Finally, work is the social institution most directly linked to education and is therefore a particularly interesting context in which to examine the commitment to equal opportunity articulated in the *Brown* decision.

### **Legal Endogeneity Theory**

The idea of legal endogeneity draws both on neo-institutional organization theory, which emphasizes the cultural environments of organizations, and socio-legal scholarship, which emphasizes the cultural life of law. Neo-institutional organizational theory developed in the late 1970s. Whereas earlier organizational studies, following the writings of Max Weber

(1947), generally emphasized the rational, purposive, and strategic nature of bureaucracy,<sup>1</sup> neo-institutional accounts highlight the role of taken-for-granted cultural rules, models, and myths in structuring organizations.

Seminal neo-institutional works by Meyer and Rowan (1977), DiMaggio and Powell (1983), and Meyer and Scott (1983) suggest that organizations exist within “*organizational fields*,” which are defined as “organizations that, in the aggregate, constitute a recognized area of institutional life: key suppliers, resource and product consumers, regulatory agencies, and other organizations that produce similar services or products” (DiMaggio and Powell 1983:148). Organizations within those fields tend to incorporate institutionalized models not only because of rational analysis of their costs and benefits but also because certain actions, forms, or rituals come to be understood as proper and natural.

Because it emphasizes the cultural aspects of organizational life, neo-institutional theory provides a frame for theorizing the intersection of law and organizations. However, there is a curious paradox in the predominant conceptualization of law in neo-institutional theory. While neo-institutional theory understands *organizations* as complex institutions that, in addition to their formal structures and roles, are constituted by their cultural environments and social contexts, its conceptualization of *law* is far less institutional. Law is generally understood as a set of formal rules that are fairly stable and coercive; there is little attention to the cultural life of law or the way in which law is shaped through and by social actors, norms, rituals, and meaning-making (Suchman & Edelman, 1996). Further, neo-institutional organization theory (like most organization theory) theorizes law as a top-down phenomenon:

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<sup>1</sup> Some of the classic works in this vein are Blau & Scott 1962; Stigler 1971; Pfeffer & Salancik 1978; Thompson 1967; see Scott 2003 for a thorough review of the “rational perspective.”

law causes or sets the stage for organizational change but it is not itself the product of organizational life (e.g., Meyer and Rowan 1977; DiMaggio and Powell 1983; Fligstein 1990).

In stark contrast to the simplistic, exogenous, and coercive vision of law that one finds in organization theory, the law and society tradition holds that law itself is a culturally and structurally embedded social institution. Although early law and society scholarship rarely considered the interplay of law and organizations (Selznick 1969 and Macaulay 1963 are notable exceptions), the law and society perspective was a natural fit with the more cultural conception of organizations developed in neo-institutional organization theory. Neo-institutional work on law and organizations combines organizational scholars' insights on the institutional nature of organizations with socio-legal scholars' insights on the institutional nature of law (Edelman 1990, 1992; Suchman and Edelman 1996; Edelman and Suchman 1997).

Building on DiMaggio and Powell's construct of organizational fields, I have argued in earlier work that organizations are highly responsive to their "legal environments" or the law-related aspects of organizational fields (Edelman 1990, 1992). Legal environments include formal law and its associated sanctions; informal practices and norms regarding the use, non-use, and circumvention of law; ideas about the meaning of law and compliance with law, and the broad set of principles, ideas, rituals, and norms that may evolve out of law (Edelman 1990, 1992; Edelman and Suchman 1997; Cahill 2001).

Because civil rights law tends to be highly ambiguous, organizations turn to their legal environments for ideas about what it means to be in compliance with the law. Legal environments become the arena within which organizations collectively construct the meaning of compliance. Through organizational mimicry and the normative claims of professionals

within organizations, certain forms of compliance become institutionalized, that is, they attain a mythical and taken-for-granted form of rationality and spread quickly among organizational populations (Edelman 1992). The institutionalization of forms of compliance appears to be relatively independent of legal ideals, enabling organizations to comply with law symbolically but without much substantive change (Edelman & Petterson 1999).

This essay extends extant theory on organizational response to law by proposing a theory of law as *endogenous* – that is, as *generated within the social realm that it seeks to regulate*. As organizations become respond to legal ideals by themselves becoming legalized, they shape social understandings of law and of the meaning of compliance. Courts, as actors within the same broad social environments – or organizational fields – as organizations, tend to incorporate ideas about law that have arisen and become institutionalized within these fields. Thus, as employment law becomes progressively institutionalized in organizational fields, it is simultaneously transformed by the very organizational institutions that it is designed to control. As organizations become increasingly legalized, the law becomes managerialized.

### **The Endogeneity of Law**

The central actors in the legalization of organizations and the managerialization of law are *compliance professionals* – that is, professionals both within and outside of organizations whose work involves managing the law for organizations. Compliance professionals within organizations include human resource professionals who handle legal requirements or design organizational policy in light of law; in-house counsel who handle compliance or legal issues either as a major or minor component of their work; compliance specialists such as affirmative action or safety officers; and general administrators whose roles include the administration of

legal requirements. Compliance professionals outside of organizations include lawyers who advise organizations on legal issues or handle legal problems, and various management consultants who provide similar sorts of advice. Attorneys who represent either organizations or parties who have complaints against organizations also act as compliance professionals. In some cases, external compliance professionals work closely with organizations, as in the case of lawyers on retainer or regular management consultants; in other cases, compliance professionals have more fleeting interactions with organizations, as in the case of consultants who provide one-shot advice or who maintain web sites that offer advice.

Compliance professionals act as social filters through whom legal ideas must pass on their way to organizations and through whom organizational constructions of law must pass on their way back to the legal realm. In the process of advising clients, making policy, resolving problems, or seeking change, these compliance professionals thus have multiple opportunities to shape both organizations and law.

Figure 1 shows the circular path along which law travels through social space, creating (simultaneously) a legalization of organizations and a managerialization of law. For the purposes of this analysis, the circle begins with the broad and ambiguous civil rights legislation that regulates organizations (Edelman 1992). This analysis focuses on the process by which enacted legislation is constructed through the actions of organizations, compliance professionals, and courts; nonetheless, it is important to recognize that ambiguity of employment regulation is itself the product of organizational lobbying and the social construction of (previous) law.

This essay identifies six stages that contribute to the construction of statutory law: (1) the construction the legal environment; (2) the construction and diffusion of compliance

structures; (3) the construction of law within organizations; (4) the formation of legal consciousness; (5) the construction of legal disputes; and (6) judicial deference to organizational institutions. These stages, which are illustrated by the circle in Figure 1, give rise to several macro-level transformations in law. As the meaning of law evolves, there is an increasing legalization of organizations (as legal ideas become institutionalized within organizational fields) but also an increasing managerialization of law (as managerial ideologies and traditional managerial prerogatives influence understandings of ambiguous legal rules). As organizational life gives rise to legal disputes and the mobilization of law, moreover, there is an increasing legitimation of managerialized understandings of law. In the remainder of this section, I discuss each of the stages of legal evolution.

### ***(1) The Construction of the Legal Environment***

Laws become relevant parts of organizational fields only when they are made known to organizational actors. Actors within organizations generally learn about the law not by reading statutes or cases or administrative regulations but rather through the compliance professionals in and around their organizations. Myriad professional journals, websites, workshops, and consultants provide filtered accounts of what the law is and how it is relevant to organizations. Informed by these sources, compliance professionals communicate to organizational administrators what laws are relevant, how they are relevant, and how much threat they pose.

Of course, different compliance professions are likely to present somewhat different visions of the legal environment, reflecting the logics of the fields within which they work. Persons within a given profession often have similar forms of education (and sometimes social background) and tend to be connected through professional networks; they interact at conferences, write for and read their professional journals, participate in on-line forums and

workshops, and exchange views at work or in the context of professional transactions. Thus, certain ideas about law tend to become institutionalized within particular professions.

There is in fact a complex relation – to some extent a hierarchy – among the professions, which promotes a systematic transformation of legal information as it enters organizational fields. Lawyers often stand at the apex of this hierarchy by providing initial admonitions about changes in law or new threats posed by patterns of litigation. These lawyers write for web sites and professional journals; they lead workshops for other lawyers and for managers; they serve as consultants to more general lawyers and, especially, to in-house counsel for organizations. Slightly lower in the hierarchy are management consultants, who often work in tandem with lawyers and also help to diffuse “knowledge” about the threat of law and about what constitutes compliance.

When lawyers and management consultants present the legal environment to the business world, they also help to construct for the business world the extent to which law threatens traditional managerial prerogatives, the meaning of law for organizational policy, the likelihood of lawsuits and liability, and what actions or structures constitute reasonable means of compliance. Lawyers and management consultants often emphasize or even exaggerate the threatening aspects of legal environments, both because they see their role as “bulletproofing the workplace” (Bisom-Rapp 1999) and because, by emphasizing the threat and offering a solution to that threat, they stand to gain a larger market for their services and to gain power and stature within organizational fields (Edelman, Abraham, and Erlanger 1992).

From its initial exposure in organizational fields, the law becomes what its interpreters make it. Stories about large jury verdicts in favor of employees are told and retold, often without authority to back up the claims. In a study of organizational response to wrongful

termination lawsuits based on breach of implied contract, for example, Edelman, Abraham, and Erlanger (1992) found that exaggerated accounts of huge jury verdicts in favor of employees were repeatedly cited in personnel journals. Although wrongful termination is a common law doctrine that varied considerably by state, the management literature described cases almost exclusively from those states where courts were most sympathetic to employees. Even there, exaggerations were rampant. Articles in management journals repeatedly cited the “half million” figure as a typical jury verdict, saying nothing about state variation and providing no authority to support this figure. Yet in a systematic survey of outcomes in implied contract wrongful discharge cases, Edelman et al. (1992) found that even in the two states most sympathetic to the implied contract action, the figures were far lower. In California, the median jury verdict in implied contract wrongful termination cases was \$93,750 and a mean was \$188,278; in Michigan the median was \$100,000 and the mean \$168,072.

Characterizations of the threat of wrongful discharge, moreover, varied both with the profession of the author and with the intended audience of the journal. Journal articles written by managers were significantly more likely to exaggerate the threat of wrongful discharge than were those written by lawyers, and journals aimed at managers were more likely to exaggerate the threat than journals aimed more at management academics. Although limited to the wrongful termination context, these findings suggest that characterizations of legal threats may become more extreme as they move out of legal fields and into organizational fields.

## ***(2) The Construction and Diffusion of Symbolic Forms of Compliance***

Armed with a vision of law and legal threats provided by compliance professionals, actors within organizations seek rational solutions to those threats. But how to comply with law is often not obvious. Antidiscrimination law tends to be broad, ambiguous, and

procedurally oriented. Statutory proscriptions against employment decisions “based on” race or sex give employers very little guidance about what they may or should do. In a national survey of employers’ responses to civil rights law from 1964-1989, Edelman (1992) shows that certain forms of compliance diffuse quickly throughout organizational fields. She argues that civil rights law interacts with public support for civil rights to produce a normative environment in which fair treatment of employees becomes increasingly valued and racial or gender disparities may be challenged as violations of that value. As this value becomes increasingly accepted – or institutionalized – organizations are more likely to incorporate structures that visibly demonstrate attention to that value. In some cases, especially early on, organizations strategically design structures that symbolize attention to legal values in order to gain legitimacy; in other cases, especially later in the institutionalization process, organizations may adopt these structures because they come to be seen as natural and proper and are even equated with “compliance.”

Given the murkiness of both “the law” and “compliance,” organizations turn to the organizational fields around them for models of how to comply. Especially in the mid-1960s, when there were few models for how to comply with civil rights law, public governance served as a ready source of legitimized models for private governance, and therefore as a source of solutions to laws that challenge organizational governance. In response to the ambiguous civil rights mandates of the 1960s and 1970s, employers created rules and policies that look like statutes, offices that look like administrative agencies, compliance officers who look like administrative officers or even police, and grievance procedures that look like courts (Edelman 1992; Edelman et al. 1999). These anti-discrimination rules, civil rights offices, grievance procedures and other legal structures served as visible symbols of attention to law.

The forms of compliance adopted by these trend-setting organizations in turn served as ready models of legitimate compliance for other organizations. Networks of compliance professionals helped to diffuse these forms of compliance. As certain forms of compliance became increasingly prevalent, the rationality of those solutions became “mythical” or taken-for-granted and organizations adopted those structures at increasing rates (Edelman 1990, 1992, Sutton et al. 1994). Edelman (1992) shows, for example, that the creation rates of discrimination grievance procedures were slow for the first few years following the enactment of the 1964 Civil Rights Act, but then increased dramatically during the mid-1970s as the form became institutionalized. Similar patterns hold for EEO offices and rules (Edelman and Petterson 1999) and for at-will clauses in employment contracts (Sutton et al. 1994). These diffusion patterns reflect a rationalization and institutionalization of symbolic structures. Over time, these structures came to be seen as evidence of compliance, even though nothing in the statutory language mandated that organizations create them.

### ***(3) The Managerialization of Law***

Once in place, compliance structures tend to serve as vehicles for the making of legal meaning, often evolving independently of the intentions of organizational strategists. As compliance professionals confront the everyday problems of organizational life (such as hiring, job assignment, employee discipline, dispute handling; and federal, state, and local reporting requirements), they construct the meaning of law *within* organizations.<sup>2</sup>

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<sup>2</sup> In some organizations, those who construct the meaning of law within organizations are the same people who construct the legal environment generally. In many other organizations, the environment is constructed by legal and management consultants outside the formal organizational structure, while the day-to-day construction of law is in the hands of the compliance professionals who are employees (predominantly human resource managers, other administrators, and in-house counsel). In some cases, the construction of the legal environment occurs simultaneously with the construction of law within organizations. More frequently, however, organizations respond to law initially by elaborating their formal structures to create symbols of compliance, leaving the details of legal meaning to be worked out in the day-to-day context of organizational life.

As compliance professionals go about making sense of the law in the context of their daily activities, they do so not as autonomous individuals but rather as inhabitants of organizational fields. In most cases, managers and even lawyers in the arena of human relations learn about the law not through an independent reading and analysis of statutes and cases but rather through common networks, through professional journals and workshops, and through business schools. Because compliance professionals inhabit common organizational fields, the institutionalized ideas of those fields influence how they interpret legal requirements, process legal paperwork, and attempt to resolve law-related problems.

The meaning of law is filtered through the lens of managerial norms and tempered by managerial concerns. This filtering process has a dual nature: on one hand, it eases the way for legal ideals to enter organizational terrain by rendering those ideals more consistent with the logic of organizational fields, thus producing a *legalization of organizations*. On the other hand, it means that legal ideals tend to become infused with traditional managerial ways of thinking, thus producing a *managerialization of law* (Edelman, Fuller, and Mara-Drita 2001). As law becomes managerialized, the logic of efficiency and rationality will often trump the logic of rights and justice.

The managerialization of law takes a variety of forms, which vary from overt efforts to circumvent the law to more subtle processes by which law is subtly framed by managerial logic. The more overtly evasive forms are generally: *internal legislation*, in which legal ideals are re-written in the context of managerial goals and *structural decoupling*, which preserves the symbolic value of compliance structures but renders them substantively ineffective. The more subtle forms are generally: *internal adjudication*, in which disputes are resolved in ways

that recast law-related problems in traditional managerial terms; and the *rhetorical reconstruction of legal ideals*, which occurs as managerial rhetoric reframes the goals of law in ways that conform to managerial objectives.

*Internal Legislation:* One form of symbolic compliance often implemented in the first stage of compliance is rules designed to look like legislation, such as anti-discrimination or anti-harassment or safety policies. The symbolic value of these policies lies merely in their existence. But internal legislation does not ensure replication of public law or recognition of legal ideals. Rather, organizations have significant latitude in *how* they actualize the law in internal policies. In an effort to combine legal and managerial goals, managers are likely to build discretion into rules, to replace legal standards (such as disparate treatment) with managerial standards (such as consistency), or even to circumvent legal standards. In some cases, moreover, internal legislation may even “legislate” away some or all of the thrust of legal ideals (Edelman and Suchman 1999). For example, when courts began to articulate a theory under which terminated employees could sue employers for violation of an “implied contract,” employers quickly began to revise their personnel policies and employment contracts to avoid legal risk by explicitly specifying that their employees worked “at will” and thus could be fired without reason (Edelman et al. 1992; Sutton et al. 1994).

*Structural decoupling:* The rapid diffusion of symbolic forms of compliance among organizational populations does not necessarily mean that these forms result in substantive change. Because it is generally the form rather than the substance of compliance that attains an institutionalized status, there is variation in how enthusiastically management, as well as the personnel who staff compliance structures, embrace legal ideals. In some cases, structures have both symbolic and substantive significance – their form signals attention to legal ideals

and they operate to enhance the workplace status and conditions of legally protected employees. In other cases, however, the structures fit the law in form but lack substantive effect. Organizations may strategically seek to create compliance structures merely as symbolic gestures by “decoupling” those structures from core organizational activities (Edelman 1992). Organizations may, for example, create affirmative action officer positions but give the officer little or no autonomy or authority (Chambliss 1996) or create grievance procedures that are hard to access and known to provide little relief.

In an empirical study of the impact of four types of compliance structures from 1984 to 1989 in a national sample of organizations, Edelman and Petterson (1999) found that neither formal EEO offices nor affirmative action plans significantly improved the workforce representation of women or minorities. Affirmative action plans in fact had a statistically significant negative impact on the representation of women, a result consistent with Baron, Mittman, and Newman’s (1991) finding that affirmative action plans had a negative impact on gender equity among California public employers. Edelman and Petterson did find, however, that organizations with EEO offices were significantly more likely to create affirmative action recruitment and training programs, and recruitment programs were in fact associated with an increase in minority representation. The late 1980s were, of course, not a time of active enthusiasm for civil rights; a similar study conducted during an earlier time period might have produced different results. Nonetheless, these results suggest that more basic compliance structures are more likely to be merely symbolic than more specific recruitment and training programs.

Both internal legislation and structural decoupling are generally overt strategic responses to law by organizational actors. Further, both strategies tend to be associated with

the growing numbers and roles of in-house counsel in firms (Rosen 1989; Galanter & Rogers 1991; Nelson & Nielsen 2000; Nelson 1994). In recent years, organizations have built increasingly large and sophisticated internal legal staffs. In large firms, these lawyers not only handle complaints and litigation but also screen corporate documents for possible exposure to liability and manage the distribution of work to outside counsel. Internal legal staffs are both more likely and more able than outside lawyers to interpret and implement the law in ways that subordinate legal values to managerial values like profitability, efficiency, and hierarchical authority (Edelman & Suchman 1999). In contrast to internal legislation and structural decoupling, the following two forms of managerialization are more subtle and may evolve out of active efforts to comply with legal ideals.

*Internal adjudication:* Various forms of internal adjudication are becoming increasingly common in organizations (Edelman et al. 1999). Internal adjudication facilitates the managerialization of law as internal complaint handlers make sense of the law on a case-by-case basis. While internal dispute resolution is far less formal than court adjudication and does not involve written decisions, it nevertheless helps to shape how legal rules are understood and experienced within organizations. As managers resolve disputes, they also shape understandings about what constitutes a problem, whether the problem is legal in nature, whether the problem can or should be resolved, whether and how legal standards might affect the resolution of the problem, and how the problem ought to be resolved.

In an empirical study of how managers within organizations handle discrimination complaints, for example, Edelman et al. (1993) find that complaint handlers tend to recast complaints of discrimination as typical managerial problems, such as poor management or interpersonal difficulties, and to resolve them in those terms. Poor management may be

remedied by training or through pragmatic solutions such as transferring the employee; interpersonal difficulties are handled with therapeutic solutions, such as counseling, employee assistance programs, or mediation-like exchanges. While these remedies serve the organization's purpose in ensuring smooth employment relations and often resolve the employees' complaints, they tend to discourage attention to legal rights. In so doing, these remedies depoliticize and delegalize issues, potentially affecting not only the particular dispute but also both employee and employer reactions to future disputes (Edelman et al. 1993; Edelman and Cahill 1998; Edelman and Suchman 1999). Internal dispute resolution gives rise, then, to a "common law of the organization" that merges legal and managerial logics.

*The Rhetorical Reconstruction of Legal Ideals:* Models of management – such as "t-groups," "quality circles," "corporate culture," "total quality management," and "business process reengineering" come and go like fashions, yet can have lasting effects on organizational structure and culture (Abrahamson 1996). Generally designed as ways to enhance productivity by "manufacturing consent" (Burawoy 1979), these managerial philosophies can subtly yet powerfully infuse legal constructs with managerial ideas (Edelman, Fuller, and Mara-Drita 2001).

Edelman et al. (2001) study the managerialization of the construct of "diversity" during the 1980s and 1990s. Managerial rhetoric about diversity appears to stem from *Workforce 2000* (Johnston and Packer 1987), a 1987 study by a private consulting firm that warned that by the year 2005, the workforce would become predominantly non-white and would require dramatically different management skills. Although the prediction was based on a faulty assumption (Friedman and DiTomaso 1996), it became the rallying call for a new model of management centered on "valuing diversity," i.e., recognizing the varying backgrounds and

viewpoints of a diverse workforce could be harnessed for productive purposes. The authors show that by the early 1990s, articles on “diversity” had largely replaced articles on “civil rights” or “affirmative action” in the management literature. But while managerial rhetoric on diversity appears to buttress EEO law and to draw on the same moral ideal, the shift from equal opportunity to diversity language is much more than a change in packaging. Through a content analysis of the professional management literature, the authors show that whereas accounts of diversity initially emphasized legally protected categories such as race, sex, and national origin, the focus gradually expanded to include a wide variety of extra-legal dimensions of diversity including cultural differences, geographical differences, lifestyle differences, and even differences in communication style, dress style, and taste in food. Further, managerial rhetoric about diversity tends to portray antidiscrimination law in a negative light, asserting that while law imposes inefficient rules on organizations, diversity management promotes creativity, harmony, and profit. Managerial rhetoric about diversity has produced a dramatic shift in how diversity is understood in management, largely disassociating the construct from its legal context and linking it instead to traditional managerial values and goals.

These examples illustrate but do not exhaust the ways in which law is managerialized once it enters organizational fields. The managerialization of law may hasten the legalization of organizations in that legal values recast in managerial terms may be more easily assimilated into organizational governance. However, the managerialization of law may also weaken, deemphasize, and depoliticize legal ideals by subsuming them within managerial goals.

#### ***(4) Employees’ Legal Consciousness and the Mobilization of Law***

The stages discussed so far – the professional construction of the legal environment, the creation and diffusion of symbolic forms of compliance, and the managerialization of law – all

help to shape employees' *legal consciousness*, which may be understood as the cultural schemas that employees use to make sense of the law and of its relevance to their everyday lives (cf. Ewick and Silbey 1998; Nielsen 2000; Kostiner forthcoming). Employees' legal consciousness comprises how individuals within and around organizations view the ideals of law, the reach of law, the threat of law, and the fairness and legality of employers' law-related actions and structures (Fuller, Edelman, and Matusik 2000; cf. Bumiller 1987, 1988; Felstiner, Abel, and Sarat 1980; Ewick and Silbey 1998).

Many factors help to shape employees' legal consciousness. At the individual level, legal consciousness is likely to vary with individual social characteristics such as age, gender, race, education and individual experiences such as perceived rights violations and responses to those violations (Fuller et al. 2000). At the organizational level, legal consciousness is likely to be shaped by the compliance structures that employers create, by employers' actions, and by ideas about law that become institutionalized within an organization and throughout organizational fields. In particular, employees are likely to compare the perceived consistency or inconsistency between the symbols employers foster through compliance structures and employers' actions. Inconsistencies are likely to produce skepticism of employers and of legal rights (Fuller et al. 2000).

To the extent that symbolic forms of compliance and managerialized conceptions of law become institutionalized, employees' legal consciousness is likely to incorporate those institutionalized conceptions. While variation along individual characteristics may produce some differences in the schema that individuals use to understand the law, collective experiences and social networks among employees are likely to produce a core of

institutionalized schema that are widely shared among employees (Quinn 2000; Marshall forthcoming).

Employees' legal consciousness, then, is in part the product of managerialized conceptions of law that become institutionalized in organizational fields, but it is also in part the producer of problems that travel back into legal fields. To the extent that the employees' legal consciousness reflects managerialized conceptions of law, events that might otherwise seem problematic may be viewed as normal, proper, and fair.

##### *(5) The Framing of Legal Issues*

Research in the sociology of law suggests that the vast majority of individuals who believe that their rights have been violated take no formal action to redress those violations, especially when those violations occur in the employment context (Felstiner, Abel, and Sarat 1981; Miller and Sarat 1981; Bumiller 1987, 1988; Quinn 2000; Hoffmann 2001; Marshall forthcoming). Employees' legal consciousness can have a significant impact on what behaviors employees believe are problematic, the likelihood that employees will see those behaviors as constituting legal violations, and the likelihood that employees will mobilize their rights (Fuller et al. 2000; Hoffmann 2001; Cahill 2001).

As questions of interpretation arise in organizations, compliance professionals – both managers and lawyers – play an important role in framing the legal issues that travel back into the legal realm. Complaint handlers and other managers within organizations serve as gatekeepers who seek to resolve complaints internally to insulate organizations from exposure to legal liability (Edelman et al. 1993, 1999; Chambliss 1996). Beyond the boundaries of organizations, officials in state and federal fair employment agencies and employee's (generally plaintiffs) lawyers play an important role in shaping which complaints become

formal legal complaints and how those complaints are framed. Employers' (generally defendants) lawyers further shape the form of complaints both through their settlement behavior and through their responses (in particular, through the affirmative defenses that they offer) (Albiston 1999).

Both employees' and employers' lawyers, in different ways, help to reinforce and legitimate managerialized models of compliance. Employees' lawyers are less likely to pursue actions where employers meet the institutionalized ideals of compliance. Even where employees have good reason to avoid an internal grievance procedure, for example, plaintiffs' lawyers are less likely to pursue a case where employees failed to use those procedures. Employers' lawyers act as conduits of managerialized logic to the court by framing their law-related procedures and policies *as compliance* and by defending their actions in terms of legitimized rationales such as market rates and business necessity. To the extent that managerialized conceptions of law seep into the emergence and framing of disputes by employers, employees, and lawyers, those conceptions also shape both the logic and the lexicon of disputing in the legal realm.

#### ***(6) Judicial Deference to Organizational Constructions of Law***

Whereas traditional top-down perspectives on law suggest that courts ought to serve as a corrective to organizational constructions of compliance that deviate from legal purposes, the idea of legal endogeneity suggests instead that courts tend to be influenced by compliance practices that become institutionalized in organizational fields.

Just as employers tend to take their cues from norms and practices in their legal environments, judges tend to take their cues from norms and practices that become institutionalized in organizations. Because organizational and legal fields overlap,

institutionalized ideas about law and compliance flow unobtrusively into the judicial realm. Thus courts often accept employers' symbolic indicia of compliance without recognizing the extent to which employers' legal structures fail to protect legal rights, and in some cases even thwart those rights. In this way, institutionalized – and managerialized – organizational practices tend to be (re)incorporated into judicial standards for EEO compliance. When courts incorporate ideas from the organizational realm into new case decisions, law becomes endogenous (Edelman et al. 1999).

The endogeneity of law is perhaps clearest with respect to employers' internal grievance procedures. The personnel profession promoted the legal value of grievance procedures during the 1970s and early 1980s even though there were no statutes mandating grievance procedures, and even though – at the time – courts tended to reject the idea that such procedures could constitute evidence of EEO compliance. Most EEO cases at that time were decided using a vicarious liability standard under which employers are held responsible for the wrongful acts of their employees regardless of whether they knew about the wrongdoing. Under that standard, neither a policy against discrimination nor a grievance procedure would help an employer escape liability. Personnel professionals claimed, nonetheless, that grievance procedures would be viewed by judges as evidence of fair treatment, and that employers therefore would be well-served by creating them (Edelman, Uggem, and Erlanger 1999).

In the mid-1980s, courts began to do precisely what the personnel professionals had been suggesting. In 1986, the Supreme Court in *Meritor Savings Bank v. Vinson* (106 S. Ct. 2399) suggested that an effective grievance procedure might protect an employer from liability

for sexual harassment.<sup>3</sup> Shortly thereafter, a federal circuit court of appeals adopted a similar standard in race harassment cases (*Hunter v. Allis-Chalmers*, 797 F.2d 1417 (1986)). And in 1998, the Supreme Court declared that an employee's failure to use an employer's internal grievance procedure might protect an employer from liability for harassment by its supervisory employees (*Faragher v. City of Boca Raton* 118 S.Ct. 1115; *Burlington Industries v. Ellerth* 524 U.S. 742). When courts proclaimed that internal grievance procedures could help employers avoid liability, they reinforced the legitimacy and rationality of grievance procedures as a form of compliance with law (even though those grievance procedures may in fact do little to ensure equal employment opportunity).

A similar process can be seen in the evolution of judicial standards in wage discrimination cases. In wage discrimination cases, employers often offer a "market defense" for wage inequality, arguing that they cannot be held responsible for paying women less than men because such pay disparities represent market rates. Nelson and Bridges (1999) show that, over time, courts have accepted and legitimized employers' reasoning. Rather than looking into the many ways in which employers create and exacerbate pay inequities in their own markets, courts have accepted – and thereby legitimized – employers' market defense. In so doing, Nelson and Bridges (1999) argue that courts have "legaliz[ed] gender inequality."

Law regulating organizations is endogenous, then, because its meaning is formed in part through the actions of organizations and the models of organizational action that become institutionalized in organizational fields. Legal ambiguity encourages organizations to create

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<sup>3 3</sup> The Supreme Court in *Meritor Savings Bank v. Vinson* (106 S. Ct. 2399) adopted a direct liability theory in sexual harassment cases involving hostile environments. Though the Court held that the grievance procedure in question was inadequate to insulate the employer from liability (because it required the victim to complain directly to her alleged harasser), it noted that in a future case, a better grievance procedure might provide such insulation.

internal legal structures designed to symbolize attention to law. Once in place, those structures engender struggles over the meaning of law as professionals and other officials seek to implement law within organizations. Because of their training, experience, and professional purview, organizational actors tend to construct law in ways that are consistent with traditional managerial prerogatives and goals. Over time, as these constructions of law become institutionalized, they subtly and gradually affect how other social actors – including judges – understand the meaning of law, and of rational compliance with law.

### **Legal Endogeneity and the Legacy of *Brown***

The idea of legal endogeneity helps to explain why and how courts unwittingly perpetuate institutions that discriminate. To the extent that practices are widely accepted in everyday life, individuals are less likely to challenge those practices, lawyers are less likely to see those practices as challengeable, and courts are less likely to see those practices as rights violations. The *Brown* decision was especially momentous because it challenged an institutionalized practice of segregated facilities and accepted legal understandings of equal opportunity. Unfortunately courts are not normally so bold. The past half century has seen myriad decisions in which courts fail to challenge, and in fact condone, institutionalized ideas about merit and about diversity that adversely affect minority students.

Consider, for example, the decision by the 11<sup>th</sup> Circuit court of appeals in *Johnson v. Board of Regents of University of Georgia*, 2001 WL 967756 C.A.11 (Ga.). The Georgia admissions process that this court disallowed included race as *one* factor in a complicated rating scheme designed to ensure a “diverse” student body. In rejecting the point value assigned to race (but leaving in place point values given to other factors, such as leadership), the court suggests that it is time for society to adopt a vision of diversity that moves “beyond

race” to “the broad mix of cultures, experiences, and ideas to be found in society.” Among other things, the court advocates recognizing as diverse “individuals who have lived or traveled widely abroad; ... individuals who speak foreign languages; [and] individuals with unique communications skills.”

Not only because of their economic disadvantages, but also because of the vestiges of discrimination, blacks are far less likely than whites to have traveled widely or to have unique communication skills. These factors may help to predict an applicant’s success, and may enhance the experience of other students or workers’ productivity. But the court’s elevation of these factors over race deflects attention from the discriminatory processes that disenfranchised minorities historically and that continue to place them at a disadvantage. More importantly, if the white applicant who has traveled widely abroad is more valuable to diversity than is the black applicant who has endured racial profiling, then diversity can easily be used to justify a student body or a workforce that is predominantly white. The new vision of diversity is unconcerned with this result, as is evident in the court’s statement that “If the goal in creating a diverse student body is to develop a university community where students are exposed to persons of different cultures, outlooks, and experiences, a white applicant in some circumstances may make a greater contribution than a non-white applicant.”

The court’s decision in *Johnson* is an example of endogenous law in that it incorporates ideas of value and merit that have become widely institutionalized in management, education, and society generally (Edelman, Fuller, and Mara-Drita 2001). The institutionalized vision of diversity suggests that difference along any social attribute is of value; in this vision, racial diversity is of no greater importance than geographic, cultural, or even taste diversity. To the

extent that law incorporates this notion of diversity, it embraces a form of equal opportunity that is not so equal in that it fails to compensate for past social disenfranchisement.

The Supreme Court recently adopted similar logic to the 11<sup>th</sup> Circuit in the *Gratz v. Bollinger*, which concerned the University of Michigan's use of a point system that assigned 20 points for being a member of an underrepresented racial minority. The *Gratz* case found that such a point system was unconstitutional because those points were unavailable to white students. The *Gratz* court failed to grasp, however, that many other points in the University of Michigan's system reward the experiences and qualifications of white students while failing to recognize the different experiences and qualifications of minority students.

Of the 150 total points available in the University of Michigan's undergraduate admissions system (prior to the lawsuit), 110 were awarded on the basis of academic performance – primarily grades and standardized tests. Yet research shows that standardized tests tend to measure developed skills more than innate ability (Jencks 1998). Psychologists have shown, moreover, that negatively stereotyped groups perform less well on standardized tests irrespective of their ability (Steele 1997; Spencer et al. 1999). When testing disadvantages are combined with the diminished opportunity for minority students to earn higher grade point averages through advanced placement courses, minorities are at a serious disadvantage in college admissions. Further, standard admissions procedures generally fail to capture other dimensions on which minorities may outperform whites. For example, because minority students often live in two worlds – a predominantly minority home situation and an outside world that is mostly white – and because minority students are more likely to encounter racism and other disadvantages, they may develop greater intellectual sophistication in

comprehending alternative explanatory frameworks as well as greater perseverance and coping skills (Fisher et al. 1996).

The court's reasoning in *Gratz* reflects institutionalized thinking about what constitutes merit. Standardized tests such as the SAT have gained widespread acceptance as objective measures of merit and as rational means of guiding access to higher education. Yet by rejecting the use of race either as a compensatory factor for biases in standardized tests or as a proxy for other life skills and knowledge while failing to acknowledge the racial bias inherent in standardized testing, the court both legitimated and perpetuated institutionalized beliefs about merit.

Today, the contours of the racial battleground have shifted from overt to covert barriers to racial minorities. Minority students no longer face fire hoses or lines of angry parents. But they face more insidious obstacles to equality in the form of social understandings of merit and diversity that differentially benefit the “majority” student – that is, the student who is white and middle or upper class. The new forms of discrimination are, unfortunately, more difficult for courts to detect than were the earlier, more manifest, forms. Judges are unlikely to realize that their understandings of merit and of diversity are shaped by the same social forces that shape the practices of universities and of corporations.

Institutionalization is a powerful social force that makes prevalent social practices seem normal, rational, and proper. Law becomes endogenous where social practices become institutionalized, immune from public challenge, and in the majority of cases, immune from legal challenge as well.

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