

**Overlapping Fields and Constructed Legalities:
The Endogeneity of Law***

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Introduction

Institutional theory invokes the construct of organizational fields to explore the force of institutionalized logics, structures, models, and rituals within recognized areas of social life (DiMaggio and Powell 1983; Scott and Meyer 1983). Early accounts emphasized institutional isomorphism that resulted in a dominant logic within a field (Tolbert and Zucker 1983; Edelman 1990). More recently, scholars have emphasized that fields often include multiple, contradictory logics (Friedland and Alford 1991; Stryker 2000; Heimer 1999; Scott et al. 2000; Schneiberg 2002; Lounsbury, Ventresca, and Hirsch 2003; Schneiberg and Soule 2004) and that actors who transcend or span field boundaries play a role in bringing disparate field logics to bear in ways that promote institutional change (Leblebici et al. 1991; Clemens 1993, 1997; Campbell 1997; Heimer 1999; Edelman et al. 2001; Kleinman and Vallas 2001; Schneiberg 2002; Morrill, Powell, Schneiberg and Clemens, this volume).

This chapter elaborates ideas of overlapping fields and multiple logics in the context of the relationship between law and organizations. Institutional theory brought law and the state to the forefront of organizational analysis. In contrast to more rational and materialist perspectives on organizations, which emphasize organizations' capacity for resisting law or for capturing state administrative agencies, institutional theorists offer a more nuanced account in which the meaning of law and compliance evolves through processes of collective construction and institutionalization. As a central component of organizations' normative environments, and as an institutional force, law encourages organizational conformity more than resistance.

Institutional theorists have struggled, however, with the precise relation of law to organizations and with questions of institutional change. Extant analyses of law and organizations tell us too little about how organizations (and actors within organizations) make sense of law; how organizations translate law into internal policies and procedures;

whether and when organizational compliance is more symbolic than substantive; and whether and how organizations exert influence on legal institutions. A particularly vexing question in the institutional literature, given institutional theory's tendency to downplay the importance of strategic action, is how to make sense of organizations' efforts to avoid lawsuits and to reduce their exposure to legal liability.

I consider these questions by offering a theoretical framework that emphasizes the blurring of organizational and legal logics as a source of institutional change. My framework introduces the construct of a legal field and calls attention to the interplay of ideas at the intersection of organizational and legal fields. Just as organizational fields are understood as the environment within which organizations interact and in which conceptions of rational organizational actions and actors evolve, "legal fields" may be understood as the environment within which legal institutions and legal actors interact and in which conceptions of legality and compliance evolve. At the point of intersection between legal and organizational fields, differing logics of the two fields come into play and respond to one another; thus it is a critical locale for institutional change. In this arena, ideas about both legality and rationality are constructed, negotiated, tested, contested, and sometimes institutionalized.

In this essay, I discuss the differing logics of organizational and legal fields as well as the effects of those logics on the making and institutionalization of legal meaning. I then argue that as the logics of organizational and legal fields come together in the area in which the fields overlap, law becomes *managerialized* or infused with managerial interests, assumptions, and ideas. As conflicts arise within organizations and the law becomes mobilized, managerialized understandings of law can then reenter legal fields and affect the thinking of judges and the rulings of courts. In this way, managerialized law can be incorporated into and legitimated by judicial, and even legislative, constructions of law.

The result of the blurring of organizational and legal logics is that law should not be treated as an exogenous force on organizations. Rather, law should be considered at least in part *endogenous*, constructed in and through the organizational fields that it seeks to

regulate. Law, then, is not a set of fixed mandates but rather a continuously evolving institution that is shaped and given meaning through its interaction with organizations. The idea of endogenous law stands in stark contrast to most institutional (as well as rational) accounts of law and organizations, which presume that law stands above and outside of organizational fields and thus constitutes a force that is exogenous, authoritative, coercive, and unambiguous (e.g., DiMaggio and Powell 1983; Scott 1991; Brint and Karabel 1991; Fligstein 1990, 1991).¹

The endogenous view of law has its roots in works that combine early law & society insights with the “old institutionalism” in organizational analysis. Willard Hurst’s (1964) account of the legal history of the lumber industry in Wisconsin, for example, showed how the timber industry was able to take advantage of the government’s interest in economic development to achieve favorable legal policies and to alter conceptions of public good with respect to the use of property and state funds. And Philip Selznick’s work has always called attention to the interplay between public and private normative realms. In *TVA and the Grass Roots* (1949), Selznick showed how community interests infiltrated and co-opted the strategies and policies of a state agency. Also, in *Law, Society and Industrial Justice* (1969), Selznick argued that the everyday conflicts in organizational life both reflected legal change and were reflected in it. In this essay, I seek to integrate these early institutional accounts of law and organizations, which emphasized the agency of organizational actors and societal interests in shaping the law, with the new institutionalist accounts that emphasize organizational fields as homogenizing forces. I show how particular actors and interest groups help to mingle the logics of organizational and legal fields so that particular

¹ DiMaggio and Powell (1983) suggest that law evokes “coercive isomorphism.” in other words, organizations become more alike because they are also subject to the coercive force of legal mandates. Scott (1991) suggests that law directly imposes certain structures on organizations when he argues that “Some sectors or fields contain environmental agents that are sufficiently powerful to impose structural forms on subordinate organizational units. Nation-states do this when mandating by law changes in existing organizational forms.” Brint and Karabel (1991: 345) argue, in discussing the origin of institutional interests, that “there are many instances when organizational interests are pre-given by legal decrees ... ” And Fligstein (1991) also adopts an exogenous view of law when he suggests that “the

constructions of law and forms of compliance come to be understood as rational, legal, and legitimate.

The remainder of this chapter is divided into three sections and a conclusion. In the next section, *Legal and Organizational Fields*, I argue that legal and organizational fields are organized around different logics, which exert divergent forces upon the construction and implementation of law. Then, in *Organizational Fields and the Managerialization of Law*, I show how ideas about rational responses to law evolve in organizational fields in ways that infuse managerial logic into legal ideals. In *Legal Fields and the Rationalization of Managerialized Law*, I suggest that the construction of law can come full circle, as courts incorporate managerialized understandings of rational modes of compliance, and ultimately, of the meaning of law. Finally, in the conclusion, I discuss the implications of overlapping organizational and legal fields for understandings of the relationship between law and organizations.

Throughout the chapter, I illustrate my argument by discussing the endogenous construction of the rationality of internal grievance procedures. Once available almost exclusively to unionized employees, employers now create internal grievance procedures – or formal written procedures that allow employees to challenge the actions of their superiors in the organization – because they see them as a rational response to civil rights law. Although internal grievance procedures are not legally required, they have become increasingly institutionalized over the past third of a century. A 1995 survey conducted by the General Accounting Office found that almost 90 percent of employers use at least one form of ADR to resolve employment discrimination complaints.² The increasing prevalence of internal grievance procedures is attributable in large part to the claims of management consultants

state can actually set the rules of the game for any given organizational field....It can, therefore, alter the environment more profoundly and systematically than other organizations."

² The survey involved a stratified random sample of 2000 businesses with 100 or more employees. Internal workplace dispute resolution involved some kind of fact-finding by a personnel professional or other management representative in 81% of the organizations, mediation by a management representative in 38% of the organizations, and mediation by a private mediator in 9% of the organizations (United States GAO 1995).

that these procedures would insulate organizations from legal liability. Such claims had little foundation when they were first being made (during the 1960s, 1970s, and 1980s), but courts have in recent years begun to affirm the legality of internal grievance procedures and in fact to defer to the logic of internal grievance procedures. The law, then, has to some extent incorporated and legitimated the logic of organizational fields.

Legal and Organizational Fields

The construct of “organizational field” is now well known in the organizational literature: it refers to the subset of the environment that is most closely relevant to a given organization, including suppliers, customers, and competitors as well as flows of influence, communication, and innovation (see Scott et al. this volume). Courts or regulatory agencies are often recognized as relevant, but peripheral, elements of organizational fields. Legal agencies and institutions are relevant elements of organizational fields in that they are viewed as sources of “coercive isomorphism;” that is, they promulgate rules to which organizations within the field must orient their behavior, through either compliance or circumvention (DiMaggio and Powell 1983). Legal institutions are peripheral to organizational fields, however, in the sense that organizations are thought to look first to the actors with which they interact most directly (professionals within and around the organization, similar organizations, and business partners).³

Although legal institutions may be peripheral to the fields that are organized around a given set of business organizations, they may also be understood as central to a separate, but overlapping, *legal field*. Legal fields are not unlike the fields of private goods- or service-producing organizations: they consist of flows of influence, communication, and innovation among the various organizations and professions that interact with legal institutions. Principal actors in legal fields are judges, lawyers, legislators, administrative agency

³ Of DiMaggio and Powell’s (1983) trilogy of isomorphic processes, the professions (a source of normative isomorphism) and similar organizations (a source of mimetic isomorphism) are generally treated as more relevant to the formation of organizational fields than are legal institutions.

personnel, court clerks, and inspectors. Just as legal actors and institutions are peripheral elements to organizational fields, organizations and organizational actors are peripheral elements in legal fields.

Organizational and legal fields overlap substantially: virtually every aspect of organizational life takes place against a legal backdrop and a large proportion of legal transactions involve organizations. The legal life of organizations begins with the legal act of incorporation, which in essence “gives birth” to the organization, and may end with the legal acts of bankruptcy, merger, or dissolution. During their life spans, organizations raise capital under securities law, hire employees under labor and anti-discrimination laws, exchange goods and services under contract law, develop public identities under trademark laws, innovate under patent and copyright laws, and engage in production under environmental, health, and safety laws. Specific bodies of legal rules define, protect, and regulate many industries and most professions. Even the basic distinctions between organizations as “private,” “public,” and “nonprofit” are in large part legal constructs (Edelman and Suchman 1997).

Similarly, organizations are heavily intertwined in the life of law. Much law arises out of, or is changed because of, conflicts that stem from the actions and interests of corporations, nonprofits, social movement organizations, and other types of organizations. Law gains meaning through its interpretation by organizational actors and its implementation within organizations. Law is mobilized by and finds force in the actions of organizational actors, and its boundaries are shaped in part by organizations’ buffering and decoupling strategies. The wheels of justice usually start turning at the behest of organizational actors (Galanter 1974; Edelman and Suchman 1999).

What distinguishes organizational and legal fields may be found less in the elements that compose them than in the logics that drive them. Although logics within fields are themselves multiple, complicated, contested, and changing (Fligstein 1990, Voss 1996; Schneiberg 2002; Berk and Scheiberg 2004), a central logic within U.S. organizational fields

since the early 1900s has been efficiency and rationalization (Chandler 1962, 1977; Scott 2003). This logic has been a particularly salient factor in the rise of administrative hierarchies within corporations, municipal and civil service reform during the Progressive Era, and the governance of employees, where the twentieth century has seen the rise of models of management that emphasize formalization, rationalization, consistency (see e.g., Orloff and Skocpol 1984; Jacoby 1985, Baron et al. 1986; Knocke 199X, Halaby and Brown 199X, Selznick 1969). At least with respect to the governance of employees, then, the dominant logic of management in the latter half of the twentieth century foregrounds rationality and efficiency.

By contrast, the primary or core logic of legal fields highlights rules and rights. The logic of rules derives from the liberal legal jurisprudence that has characterized American law since the latter part of the 19th century. Liberal legal jurisprudence holds that law is developed and enacted through adherence to rational principles, producing a set of rulings that is impartial and just. It is impartial in that it is insulated from political, religious, or other substantive influence; it is just in that rules are equally applicable across all types of situations and to all citizens. Liberal legal ideology sees the legislative and executive branches as implementing the central precepts of justice articulated in a constitution, and the courts as passive institutions, that *apply* determinative rights and principles to particular fact situations but do not *make* law.⁴

⁴ It is difficult to identify the emergence of liberal legal ideology precisely, because it developed in fits and starts, but it is clear that American jurisprudence, from its origins in colonial law, moved progressively toward a liberal legal model. The increasingly important role of law schools, published legal literature, and the professionalization of legal practitioners were particularly important in the development of liberal legalism. Christopher Columbus Langdell, who became dean of the Harvard Law School in 1870, introduced and actively promoted the idea of law as a science. To achieve his goal of moving law into the professional realm, he raised law school admission and graduation requirements, and he introduced the case method of teaching law as a means of demonstrating the subtle rationality of law. He purged the law school curriculum of economics and politics, and largely ignored legislation, instead focusing on judges' law – but judges' law narrowed to extreme formalism and abstraction (Friedman 1973). Although not well-received at first, Langdell's practices eventually revolutionized law school teaching and led to the institutionalization of liberal legalism in law schools. The publication of case decisions at the state level was common by the mid-nineteenth century and the National Reporter System began in 1879, providing the volumes of records necessary for lawyers to develop the art of reasoning by analogy to precedent. Judges also adopted the practice of hiding their reasoning behind a

Although liberal legal ideology is the primary and legitimating logic of legal fields, it is important to note that it is more a legitimating ideal than it is a reality. Rights and legal principles are indeterminate, easily manipulated by those with greater clout and organization (Tushnet 1984; Kennedy 1980; Bumiller 1988; Freeman 1990; Schultz 1990). Rights are often ambiguous and tend to acquire meaning through the interaction of social actors and institutions. This is especially true where, as in the case of employment, rights-holders lack political clout, economic wealth, and social organization. People with power can take advantage of a stratified legal profession (Carlin 1966; Heinz and Laumann 1977; Wexler 1970), and can use legal tactics such as delay, procedural maneuvers, and institutional bias to their advantage (Galanter 1974; Albiston 1999, Edelman and Suchman 1999), they can influence the rulings of administrative agencies, which in turn influence the courts (Clune 1973), and they can prevent the voicing of legal claims in the first place (Felstiner, Abel and Sarat 1981; Bumiller 1987, 1988). Courts' adherence to precedent is tempered, then, by a society in which the rights of those without clout are often rendered symbolic (M. Edelman 1964).

Nonetheless, liberal legal logic is important as a legitimating ideal. Because legal institutions lose legitimacy when they appear to deviate from their rationalized roles, courts must be formally attentive to rights. The language of rights empowers those who lack clout but enjoy formal rights (Williams 1987; Minow 1987) and has deep appeal for most of the

cloak of legal formalism, listing strings of precedent rather than creative social reasoning. And the birth of university law reviews, beginning with the *Harvard Law Review* in 1887, further developed the “science” of law and its aura of autonomy from society (see Friedman 1973 for a rich history of American law). The writings of 20th-century legal philosophers such as Hart, Fuller, Dworkin, and Rawls helped to solidify and institutionalize notions of liberal legalism in American scholarship, as did the (translated) writings in sociology of Max Weber. Weber adopted the liberal legal paradigm in his portrayal of rational-legal authority, the type of legal authority that he associated with modern capitalism. Rational-legal authority is justified by reason rather than tradition or charismatic decree, and it is carried out by a specialized staff who, by virtue of their official roles, can be presumed to be impartial actors fulfilling formal roles (see Meyer and Jepperson, this volume). Law, in this vision, is presumed to have an autonomous internal logic, and it is presumed to apply universally to all citizens and across all situations. Thus Weber associated law’s formal rationality with the predictability necessary for capitalist development.

public to which judges, juries, and attorneys have to be somewhat responsive. In the language of institutional theory, liberal legal ideology consists of a set of unwritten, taken-for-granted rules that give considerable force to arguments that are framed in terms of those rules.

In recent years, a secondary (and to some extent, competing) logic has also become prominent in legal fields. Although liberal legalism remains dominant, various forms of “alternative dispute resolution” (ADR) are becoming increasingly prominent parts of the legal landscape and have had an impact on formal legal ideology (see Morrill, this volume).

The ADR movement, which began in earnest in the 1970s, developed largely as a critique of the formalism of the courts and of the liberal legal model more generally. Grounded in an ideology of community rather than liberal legal rights, ADR seeks to move away from the formal constraints of procedural rules and precedent and toward a model that empowers the parties to create their own solutions to problems (Fisher and Ury 1981; Menkel-Meadow 1984; Moore 1986; Westin and Feliu 1988; Bush and Folger 1994; Bush 1989; Rosenberg 1991). The ADR movement seeks not simply to resolve disputes but rather to use the process of conflict resolution to identify and cure underlying psycho-social pathologies, to empower individuals to recognize and assert their needs while taking into account the needs of the other, and—most generally—to build community.⁵ Because ADR stresses party participation in the dispute resolution process and sees courts as less capable of finding “correct” solutions than the parties themselves, formal legal rules and rights are

⁵ There are many forms of alternative dispute resolution. Some, like arbitration, retain the general form of court adjudication but relax the rules of evidence and *stare decisis*, allowing the decision-maker far greater latitude in fashioning remedies. Arbitration decisions exhibit deference to organizational practices in that arbitrators base their decisions largely on industry norms and practices rather than on statutory mandates. Other forms of ADR, such as mediation, are far less formal and do away with third party decision-making entirely. Mediation uses a facilitator who, at least in theory, makes no decisions and simply assists the parties in reaching an agreement based on their own interests and needs.

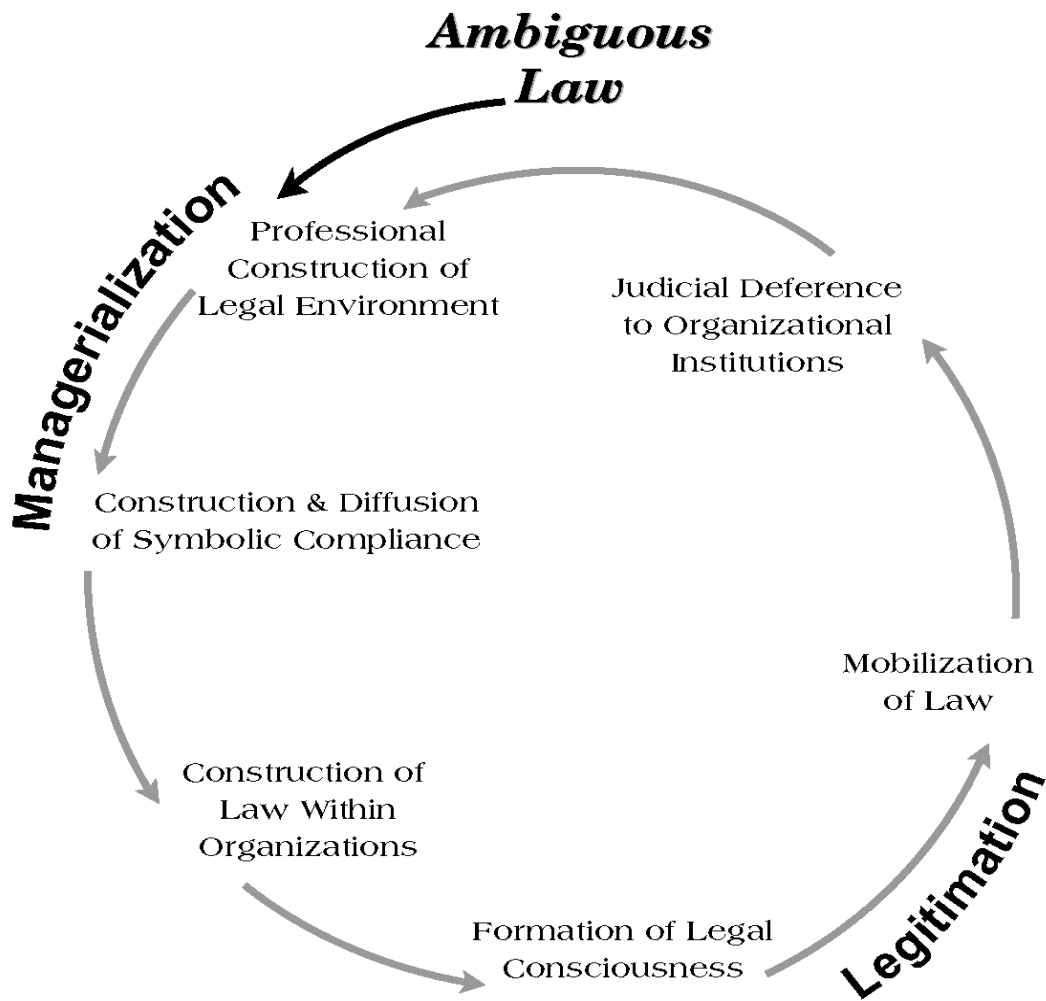
often given relatively less weight and the stated interests or wishes of the parties relatively more (Edelman, Erlanger and Lande 1993).⁶

The differing core logics of organizational and legal fields – the emphasis on rationality and efficiency in organizational fields and on rights and justice (and to some extent community) in legal fields – drive institutional change in law. Tensions between the logics of organizational and legal fields come into play every time organizational and legal actors and institutions interact. Organizational actors bring managerial logic to bear as they construct the meaning of legal rules and ideals (Edelman, Fuller, and Mara-Drita 2001). The two logics tend to blur as business actors try to make sense of law and as legal actors consider the problems that arise out of organizational contexts. For example, organizational lobbying to restrict regulations that govern health and safety, working conditions, governance, and civil rights uses the logic of efficiency to challenge the logic of rights, whereas regulation of organizational actions and interactions uses the logic of rights to tame the logic of efficiency. Individual employee claims articulate rights to challenge practices that are accepted as rational and efficient, and employers cite efficiency and rationality as defenses to alleged rights violations. Further, managerialized understandings of law and rights frame understandings of injustice, thus shaping the nature and types of conflict that flow back into legal fields in the form of formal complaints and litigation.

As the logics come together, legal ideals tend to shape strategic action in business and managerial ideals tend to shape the thinking of lawyers and judges. In this way, law both constrains and enables the strategic actions of organizational actors, and conversely, ideas about rationality and efficiency seep into notions of justice. In the next two sections, I discuss the process through which legal logic enters into and transforms organizational fields

⁶ Mediation, in particular, stresses disputant participation, party-devised solutions, and the building of community over adherence to externally-specified rules or formal legal principles. In theory these solutions are based on enriched understandings of the others' position as well as of their own needs, often producing "win-win" situations. But many critics point out that, in practice, the removal of formal sanctions leaves parties with less economic or social clout at a considerable disadvantage and effectively undermines their legal rights (Fiss 1984; Delgado et al. 1985; Silbey and Sarat 1989; Edelman, Erlanger and Lande 1993; Bryan 1992, 1994; Fineman 1988; Edelman and Cahill 1998).

Figure 1
The Endogeneity of Law



and the process through which managerialized forms of law then re-enter legal fields.

Collectively, I refer to this process as “the endogeneity of law” because, in contrast to the usual notion of law as a coercive force, the flow of logics between fields renders law in part endogenous to organizational fields. There are six stages to the endogeneity of law, as shown in Figure 1: (1) the professional construction of the legal environment; (2) the construction and diffusion of symbolic forms of compliance; (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. The first three stages involve the

managerialization of law in organizational fields; the last three stages involve the flow of organizational logic into legal fields, rendering law endogenous.

The Managerialization of Law in Organizational Fields

Rules that regulate organizations tend to be broad and ambiguous. Rather than narrowly prescribing organizational behavior, laws tend to articulate broad principles or ideals. Organizations, as well as administrative agencies and courts, are left to discern the meaning of these principles and the manner in which they will be realized in organizational life (Edelman 1992). Title VII of the 1964 Civil Rights Act, for example, makes it an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin” or “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (42 U.S.C. 2000).

Nowhere does the law specify the meaning of “to discriminate” or what it would mean to take action “because of” an individual’s race, color, religion, sex, or national origin. Although it is fairly clear from the legal language that employers may not hang out a sign specifying that “no blacks or Hispanics will be hired,” the law does not say what actions employers should or may take to be in compliance with the law. Debates over this ambiguity have generated thirty years of employer experimentation, political contest, and litigation.

Other civil rights laws are equally opaque. The Americans with Disabilities Act of 1990, for example, specifies that

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

As with the 1964 Civil Rights Act, the meaning of critical terms such as “qualified individual,” and “disability” are left open to interpretation.

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 the everyday lives of organizations as they struggle to give meaning to rights articulated by law and to construct the meaning of compliance. Organizational actors approach the matters of legal interpretation and construction of compliance not as persons trained in law but rather as actors squarely situated in organizational fields. Law, then, tends to become managerialized in organizational fields, that is, it tends to become infused with the logic of efficiency and rationality.

Professional 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, web sites, 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.

Management consultants and lawyers play a central role in interpreting the legal environment for employers. Both tend to have organizational interests in mind as they make sense of the law. Although lawyers might seem to be somewhat removed from

organizational fields, they often work very closely with organizations, either as in-house counsel or through retainer arrangements. Both management consultants and lawyers tend to filter the law through a set of organizational priorities and managerial interests in a way that privileges efficiency and rationality over rights. Further, the visions of law that these professions bring to organizational fields tend to be fairly similar because the practitioners are 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 during professional transactions.

As 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 emphasize and often 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 them, 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, then, 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, providing no authority to support this figure. Yet in a systematic survey of outcomes in implied contract wrongful discharge cases, Edelman, Abraham, and Erlanger (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 the 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. The study exemplifies, moreover, the process by which professionals help to construct the legal environment and the threat that it poses to organizations.

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. Because of legal ambiguity, however, it is rarely obvious how to comply with law. 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.

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 were visible symbols of attention to law.

The forms of compliance adopted by these trend-setting organizations in turn became ready models of legitimate compliance for other organizations. Networks of compliance professionals helped to diffuse these forms. 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.

The construction of law, then, occurs as civil rights law interacts with public legal consciousness 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 it. 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.”

The Construction of Law Within Organizations

Once in place, compliance structures tend to serve as vehicles for the making of legal meaning within organizations, 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.

As compliance professionals go about making sense of the law in 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 them 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, then, occurs as law is subtly framed by managerial logic. Law is framed by managerial logic through two processes: *the internalization of law*, in which organizations internalize elements of legislation, adjudication, and advocacy that are otherwise handled outside the boundaries of organizations; and the *rhetorical reconstruction of legal ideals*, which occurs as managerial rhetoric reframes the goals of law in ways that conform to managerial objectives.

The internalization of law occurs as organizations create internal rules that mimic formal legislation, create internal dispute processing mechanisms that act as a substitute for formal litigation, and create in-house counsel who take over functions formerly handled by lawyers outside of organizations. Each of these types of internalization gives organizations greater control over the law and greater opportunities to influence the form and content of law (Edelman & Suchman 1999).

Internal legislation involves compliance through the internalization of legal rules. Internal rules that mimic formal legal rules have clear symbolic value. 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 to decouple the rules from organizational practice so that they act merely as window dressing. Edelman and Petterson (1999) found, for example, that affirmative action plans (a form of internalized legislation) had no effect on the workforce representation of minorities and is actually associated with lower workforce representation of women.

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).

Internal dispute resolution is perhaps the most powerful means by which organizations internalize and transform the law. Organizations increasingly create internal forums in an effort to discourage employees from filing formal complaints with external fair employment agencies, which may evolve into lawsuits. Organizations also seek to improve employee morale and harmonious employment relations through the use of internal dispute resolution (Edelman, Erlanger & Lande 1993). Relative to formal litigation, however, internal dispute resolution tends to depoliticize and de-legalize discrimination complaints. In an empirical study of how managers within organizations handle discrimination complaints, for example, Edelman et al. (1993) found 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. These remedies serve the organization’s purpose in ensuring smooth employment relations and often resolve the employees’ complaints, but 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 third important form of legal internalization is the ascendance of the in-house counsel's office. Rather than keeping law firms on retainer, large bureaucratic organizations have been creating increasingly sophisticated internal legal staffs (Chayes & Chayes 1985; Rosen 1989; Galanter & Rogers 1991:22-25; Nelson 1994; Nelson & Nielsen 2000). Although many firms still use outside lawyers, they tend to rely on in-house counsel to manage the outside law firms, deciding which issues will be handled in-house and which contracted out. In interactions with outside attorneys, in-house counsel draw strength not only from their co-equal claims to legal expertise, but also from their extensive discretion over the selection of outside law firms for future business (Chayes & Chayes 1985:292; Nelson 1994:355). The power to control out-bidding to private attorneys and to handle legal issues internally substantially expands the role and influence of staff attorneys.

As in-house counsel play a greater role in organizations' legal business, they may not make organizations more compliant, but rather more skillfully evasive. Relative to private counsel, in-house counsel tend to identify more with the interests of the organizations they serve, to see law more as barrier than as norm, and to seek loopholes through those barriers. In-house counsel know more about the constraints of law, but also about know more about which constraints are somewhat flexible. They can act more as strategic advisors to organizations than as cautionary enforcers (Rosen 1989). The more deeply lawyers are embedded in the organization, the more likely they become to use their expertise to serve, rather than to question, prevailing managerial objectives.

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) studied 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 cry for a new model of management centered on “valuing diversity,” that is., recognizing that the varying backgrounds and viewpoints of a diverse workforce could be harnessed for productive purposes.

By the early 1990s, articles on “diversity” had largely replaced articles on “civil rights” or “affirmative action” in the management literature. But even though 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 study shows 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 whereas 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 (Edelman et al. 2001).

Through the internalization of law and the rhetorical reconstruction of legal ideals, law tends to become managerialized, or infused with managerial values. Managerialization

is a double-edged sword. On one hand, 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. On the other hand, the managerialization of law may also weaken, deemphasize, and depoliticize legal ideals by subsuming them within managerial goals.

Legal Fields and the Rationalization of Managerialized Law

The managerialization of law affects not only the form and content of law in organizational fields but also the construction of law in *legal* fields. The overlap in both actors and institutions between organizational and legal fields provides an arena in which the ideas that become institutionalized in organizational fields later seep into legal fields. In the remainder of this chapter, I explain how managerialized constructions of law enter into legal fields and why judges may unwittingly defer to these constructions of law even when they undermine legal values. The implications of my argument are that law should be understood not as a coercive force that is imposed upon organizations from above, but rather as a set of understandings that evolve, at least in part, out of the logic and institutionalized models of organizational fields.

Employees' Legal Consciousness and the Mobilization of Law

The stages discussed so far – the professional construction of the legal environment, the construction 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 (Ewick and Silbey 1998; Nielsen 2000; Kostiner 2003). 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 1981; Ewick and Silbey 1998).

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

Research in the sociology of law suggests that the vast majority of people who believe that their rights have been violated take no formal action to redress those violations, especially when violations occur in the employment context. Employees' legal consciousness can significantly affect 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 by filing formal complaints either within or outside of work organizations (Fuller et al. 2000; Cahill 2001; Felstiner, Abel, and Sarat 1981; Miller and Sarat 1981; Bumiller 1987, 1988; Hoffmann 2001; Marshall forthcoming).

Professional Framing of Rights Violations

As questions of interpretation arise in organizations, compliance professionals – both managers and lawyers – are central to 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 employees' (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 act as gatekeepers to the legal system, determining the scope and form of issues that enter the legal realm in the form of lawsuits. As lawyers counsel clients as to whether to file lawsuits, when they agree (or do not agree) to take cases, and when they frame employees' grievances as legal causes of actions, they consider not only the formal rules on the books but also the current legal climate – that is, understandings about what kinds of claims will pass muster with judges and juries. Lawyers base their decisions largely on what they perceive to be the feasibility of making a successful claim, and thus they are less likely to pursue actions where employers' actions appear to meet the institutionalized ideals of compliance.

In the current legal climate, for example, lawyers representing employees know that it is difficult to prevail in a case where an employer had a grievance procedure in place and the employee chose not to use it. Because of institutionalized ideas about compliance, a plaintiff-side employment lawyer is less likely to pursue a sexual harassment case if the employee chose not to use an internal procedure, even if the employee had a good very reason not to use that internal procedure (for example, it might be widely known that the procedure is a sham or that the decision maker is a close friend of the harasser). In choosing not to pursue such a case, the employee's lawyer helps to reinforce the notion that cases against employers who meet the institutionalized conceptions of compliance are not winnable. Similarly, 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 their lawyers, conceptions of compliance that become institutionalized in organizational fields have a dramatic effect on both the logic and the lexicon of disputing in legal fields.

Judicial Deference to Organizational Constructions of Law and Compliance

Because organizational and legal fields overlap, institutionalized ideas about law and compliance flow unobtrusively into the judicial realm. Judges are generally interpreting ambiguous legal language. While liberal legal theory would have judges resolve disputes over legal meaning by looking to legal precedent, judges can only make sense of that precedent by looking to organizational customs and practices. To the extent that certain models of compliance or ideas of efficiency have become widely accepted, or institutionalized, within organizational fields, judges are likely to incorporate organizational logic into their logic, and their rulings, about what organizational practices are fair, rational, and *legal*. As judges tend to take their cues from norms and practices that become institutionalized in organizations, the logic of organizational fields influences the logic of legal fields. 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, Uggen, and Erlanger 1999).

Judicial decision making, then, becomes a central vehicle for the transportation of ideas from organizational fields into legal fields. The logics of organizational and legal fields merge as judicial decisions incorporate organizational logic. Because institutionalized ideas seem rational, however, 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. Thus, the managerialization of law may in some cases undermine the logic of rules and rights.

Edelman, Uggen, and Erlanger (1999) show how grievance procedures have been reincorporated into legal conceptions of what constitutes justice in organizations, an illustration of the endogeneity of law. Despite the fact that organizations were creating grievance procedures at increasing rates beginning in the early 1970s (Edelman 1990), and the legal and personnel professions were making broad claims about the legal value of grievance procedures in the 1970s and early 1980s, there was actually little judicial attention to grievance procedures at that time.⁷

Where the use of grievance procedures as a defense did arise, primarily in sexual harassment cases denying employer liability for the acts of an agent (usually a supervisory employee), courts were not terribly sympathetic – emphasizing that employers are responsible for the actions regardless of what the employer knew or should have known about the employee’s actions (e.g. *Anderson v. Methodist Evangelical Hospital, Inc.* (1972); *Miller v. Bank of America* (1979); *Munford v. Barnes & Co.* (1977)). There is some evidence, moreover, that courts during the 1970s were somewhat suspicious of symbolic indices of compliance such as grievance procedures. For example, in a 1979 9th Circuit case, *Abramson v. University of Hawaii*, the court held: “[A]ppellant’s claims should be determined by reference to how the University in fact makes tenure decisions, not by reference to how their guidelines say they should.” The widespread notion among employers that grievance procedures would insulate them from liability under civil rights law, then, appeared to be largely mythical through the early 1980s.

In the mid-1980s, however, changes in judicial doctrine began to reflect the idea that grievance procedures could provide a measure of legal insulation to employers. 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

⁷ Edelman, Uggen and Erlanger (1999) conducted an extensive LEXIS search for all cases that mentioned the term “grievance procedure” and the root term “discriminat.”

harassment.⁸ 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)).

Significantly, the court in *Meritor* recognized that grievance procedures may be ineffective and should not always insulate the employer. In that case, in fact, the court found that the grievance procedure involved was not sufficient to allow the employer to escape liability because the employee would have had to file a complaint with the person who harassed her. And in quite a few subsequent cases, courts similarly found for plaintiffs because the grievance procedures were so inherently flawed that they could not be viewed as providing due process (e.g., *Yates v. Avco Corp* (1987); *Delgado v. Lehman* (1987); *Waltman v. International Paper Co.* (1989).⁹

Notwithstanding the caution that courts displayed in considering the relevance of grievance procedures, the *Meritor* decision gave rise to a new defense in sexual and racial harassment cases (and to a lesser extent, in a broad range of other civil rights cases). Following the *Meritor* decision, the use of a “grievance procedure defense” in sexual and racial harassment cases increased dramatically (Edelman, Uggen, and Erlanger 1999) even

⁸ In *Meritor*, the court recognized a new *hostile environment* theory of sexual harassment in which sexual harassment did not have to consist of quid pro quo sexual demands but could arise out of a general atmosphere of harassment. The hostile environment theory invoked agency principles, in which the principal (here, the employer) may be held liable only if s/he knew or should have known about the wrongful acts of his or her agent. In *Meritor*, the court suggested that where an employer has an explicit policy against sexual harassment and an effective grievance procedure calculated to encourage victims of harassment to come forward, an employer may escape liability. The court also suggested that a court would be reluctant to accept a constructive discharge argument (meaning that the employee was forced to quit her job because of hostile working conditions) where an employee chose not to use an internal grievance procedure.

⁹ In these cases, however, the court is rejecting grievance procedures because they do not conform to the liberal legal ideal in *form*: Requiring the grievant to complain to the perpetrator rather than to an apparently impartial arbiter does not meet the requirements of a *symbol* of liberal legal justice. Further, by rejecting grievance procedures that are defective in form, courts are affirming the legality of internal grievance procedures that do meet the symbolic standard. And significantly, courts do not generally look past the form of grievance procedures to the standards of decision-making and therefore do not discover that these forums employ managerial rather than legal standards of justice (Edelman et al. 1993). For example, in *Giordano v. Paterson College*, the court found for the employer on the hostile environment portion of the claim based on the existence of the internal policies and procedures and the employers’ “prompt and remedial action.” Yet facts of that case show that the harassment continued for a full six months *after* the plaintiff filed her internal grievance.

though the court had only indirectly suggested that a grievance procedure might help an employer to avoid liability.

As the grievance procedure defense became more common, both the structure and the defense acquired even greater legitimacy as a form of compliance with civil rights law. The grievance procedure as compliance with civil rights law had begun as a stab in the dark, an effort by employers, management consultants, and lawyers to create a visible symbol of compliance. It was a form that had gained legitimacy in the context of collective bargaining agreements in unionized firms and later became an institutionalized symbol of attention to due process. Employers adopted grievance procedures both as a strategic move to demonstrate compliance and (especially later in the process) because the institutionalization of those procedures made governance without them seem unfair, arbitrary, and even “illegal.” There had been no explicit legal requirement that employers adopt grievance procedures and, more importantly, there was nothing about the presence of those procedures that inherently met the requirements of civil rights law.

It was quite significant, then, that the Supreme Court ruled in 1998 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). Grievance procedures had been irrelevant to employers’ liability under the Civil Rights Act from 1964 until 1986, were somewhat relevant beginning with the *Meritor* decision in 1986, and then – thirty-four years after the passage of the Civil Rights Act – became part of the legal standard of compliance. Although grievance procedures may in fact do little to ensure equal employment opportunity (Edelman, Erlanger, and Lande 1993), the institutionalization of grievance procedures in organizational fields made grievance procedures available as a natural, rational, and *legal* form of compliance. Further, 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.

As the *form* of grievance procedures gains legitimacy, courts (especially lower courts) seem less likely to consider the substance of those procedures, that is, to scrutinize whether the procedures provide any measure of protection for employees. In *Cotran v. Rollins Hudig Hall International, Inc.* (1996), brought before the California Supreme Court (under California law, which is generally more stringent than federal law), Cotran was fired for alleged sexual harassment but a jury found that he was wrongfully terminated. The company appealed on the grounds that an internal grievance proceeding had resulted in a finding that Cotran had engaged in sexual harassment. The California Supreme Court reversed the jury verdict, holding that the jury should never have considered the merits of the case: “In this wrongful termination action tried solely on a breach of contract theory, we hold that the critical issue was whether the employer reasonably and in good faith believed that the terminated employee had sexually harassed other employees, not whether such harassment actually occurred.” It is notable that in this case, it was the harasser rather than the employee who was disadvantaged by judicial deference to grievance procedures. This case supports the argument that courts are deferring to institutionalized organizational practices rather than simply using grievance procedures to undercut harassment claims.

In 2000, in *Leopold v. Baccarat* (82 Fair Empl.Prac.Cas. (BNA) 105, S.D.N.Y., Feb 14, 2000), the court considered a sexual harassment case in which the plaintiff had not used an internal grievance procedure because the procedure would have required her to complain directly to her supervisor, who was the alleged harasser, and did not provide any protections against retaliation. The court held in favor of the employer, stating that “the law is very clear that any reasonable policy will do.” Although not all courts would find the law so clear as the Baccarat court implies, the case exemplifies the lower courts’ tendency to defer to

organizational policies and procedures with very little inquiry into the adequacy or quality of those procedures.

In short, organizations initially created grievance procedures because they carried a legitimate legal form. Grievance procedures became widely accepted as a symbol of compliance with EEO law, but their symbolic value did not guarantee substantive attention to legal rights. Rather, grievance procedures tended to become infused with managerial logic in a way that substantially undercut their ability to bring legal values into organizations. Courts, impressed by the legality of grievance procedures as a form, failed to examine their substance and began to confer legal and economic benefits on organizations that had internal grievance procedures. By deferring to the institutionalized notion that grievance procedures serve to protect employees' rights, courts *rationalized* a mode of compliance that began more as a rational myth. But the rationality of grievance procedures is conditional on the institutional setting: internal grievance procedures provide these market benefits only because legal institutions incorporate, legitimate, and reify the organizations' symbolic legal structures.

Although endogeneity is perhaps clearest with respect to grievance procedures, the trend is evident in other arenas as well. One such arena concerns the mandatory arbitration clauses that are required of many independent contractors and, increasingly, of employees as well. In 1991, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.* that arbitration clauses requiring the waiver of civil rights could be upheld under the Federal Arbitration Act. The court in *Gilmer* did not explicitly overrule the 1974 case, *Alexander v. Gardner-Denver Co.*, which held that an employee could not waive a statutory right to trial under Title VII through an arbitration agreement. Nonetheless, it appears to move the law in a very different direction and a few federal circuit courts have now upheld the validity of employer arbitration clauses that require employees to waive their rights to litigate Title VII claims (e.g., *Mago v. Shearson Lehman Hutton, Inc.* (9th Circuit, 1992); *Cole v. Burns Intern.*

Sec. Services (D.C. Circuit, 1997).¹⁰

A similar process can be seen in the evolution of judicial standards in wage discrimination cases. In these cases, employers often offer a “market defense” for wage inequality, arguing that they cannot be held responsible for paying women less than men because the 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 this sense, Nelson and Bridges (1999) argue that courts have “legaliz[ed] gender inequality.”

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. But to the extent that managerialized conceptions of law and compliance seep into legal fields, the logic of rights is no longer sufficiently distinct from the logic of efficiency to counter institutionalized notions of compliance. Judges become less likely to use the logic of rights to trump the logic of efficiency because forms of compliance that evolve out of organizations’ interest in efficiency take on an aura of legality.

Especially under conditions of legal ambiguity, courts are more likely to look for *symbols* of compliance but to refuse to investigate too carefully the day-to-day operations of the organizations they regulate (see Hawkins 1984; Blumrosen 1993). Given the complexity and decentralization of organizations, it is often quite difficult for courts to determine whether rules in fact affect behavior within the firm, whether offices implement legal ideals, whether written plans are anything more than words on paper, whether grievance procedures provide effective mechanisms for appeal, and more generally, whether practices discriminate on the basis of race, sex, or another illegal criteria. Although the presence of an

¹⁰ The circuit courts are split on whether *mandatory* arbitration clauses that require employees to waive their rights to judicial determination of statutory rights are valid. The majority view places severe limitations on the ability of arbitration agreements to bar litigation of statutory claims (e.g., *Brisentine v. Stone & Webster Engineering* (11th Cir 7/21/97)). But in general one of these limitations

office or functionary or procedure is no guarantee that legal goals are being met because organizations may create structures that are decoupled from their core activities as a means of maintaining ceremonial conformity with external demands or expectations (Meyer and Rowan 1977; Edelman 1990, 1992), courts have neither the resources nor the expertise to uncover sham structures unless there is flagrant evidence of legal violations.

Conclusion: Overlapping Fields and Endogenous Processes

The merging of logics at the boundaries of social fields has implications both for the relationship of law and organizations specifically, and for institutional theory more broadly.

With respect to law and organizations, the merging of field logics means that social understandings of legality and rationality evolve in relation to one another so that each contributes to the social construction of the other. Legality shapes organizational rationality by providing legitimated models of governance that shape the form of organizational response to law. Institutionalized notions of rationality, in turn, shape law as organizational forms of compliance become so taken for granted as to be accepted by courts not just as rational practices but as *legal* practices. The process comes full circle when courts officially legitimate organizational practices and confer real cost savings (through reduced legal exposure) on organizational practices that had previously acquired an aura of rationality. In so doing, courts further legitimate and perpetuate organizational institutions, reinforcing the legal value of institutionalized myths and symbols. Organizational structures that were created as a locally rational response to institutionalized ideas of legality gain rationality on a global scale precisely because they were created in the image of public forms of law.

With respect to institutional theory more broadly, my analysis of the endogeneity of law has identified an important set of institutional mechanisms that are involved both in the

is that the arbitration agreement must be entered into voluntarily. This leaves room for employers to pressure employees to accept mandatory arbitration clauses.

flow of logics across field boundaries and in the transformation and crystallization of logics within fields. As institutionalized ideas move across field boundaries, logics embedded within one field become sources of change and new taken for granted understandings in other fields, and those logics are themselves transformed, often inadvertently, through sense-making and problem-solving activity in the area where social fields overlap.

The endogenous construction of social logics is only one process through which social change occurs, and it operates more through constitutive processes such as cultural templates and cognitive schemas than through open contestation, overt political conflict, or direct political mobilization. Perhaps because it operates under the political radar, the endogenous construction of social logics is likely to be an especially powerful source of field structuration and social change.

Future research should explore the ways in which endogeneity intersects with other mechanisms of institutional change. One possibility for such research emerges from recent work on the relationships between social movements and institutional change, which highlights how social movements can challenge the legitimacy of taken for granted structures and beliefs, and introduce new discourses or logics into inter-organizational fields, leading to the institutionalization of new models (Davis and Thompson 1994; McCann 1994; Rao et al. 2000; Lounsbury et al. 2003; Schneiberg 2002; Schneiberg and Soule 2004; McAdam and Scott 2004). Social movements may affect change not only directly, as these works illustrate, but also indirectly by fueling cycles of, or altering the course of, endogenous construction.

An important mechanism through which social movements may affect legal endogeneity is by increasing legal ambiguity. Legal ambiguity is a precondition for endogeneity because it provides the opportunity for organizations to introduce managerial conceptions of rationality into their constructions of compliance in the first place. Legal ambiguity may exist as a result of political contests that produce ambiguity in statutory language, but ambiguity may also result when social movements or political interest groups

introduce new legal measures or call existing understandings of law into question, creating an atmosphere in which the “correct” legal ruling is up for grabs (Davis and Thompson 1994; Rao, Morrill, and Zald 2001; McAdam and Scott 2004; Lounsbury, Ventresca, and Hirsh 2003; Schneiberg and Soule 2004). Challenges that result from collective action can shatter taken for granted understandings, introduce new discourses, laws, and logics, or subvert the legitimacy of extant legal settlements.

In the civil rights context, for example, massive social unrest during the 1960s played a substantial role in important judicial rulings such as *Brown v. Board of Education*, in the passage of the landmark 1964 Civil Rights Act and subsequent civil rights acts, and in motivating administrative orders that mandated affirmative action for public employers and contractors (Edelman 1992; Skrentny 1996). In this sense, the origins of the process of endogeneity discussed in this chapter can be traced, at least in part, to the social movements of the 1950s and 1960s. Although the parameters are less clear, collective action and political mobilization has no doubt also played a continuing role in constructions of civil rights law by courts, legal actors, employers, employees, and job applicants. Judicial retreat from affirmative action, and from constructions of civil rights law that recognize adverse impact, clearly follows in large part from political mobilization by conservative interests (Freeman 1990; Krieger 1998; Stryker et al. 1999). A more nuanced understanding of how social and political action on both sides of the civil rights debate affects the endogeneity of law would be a major contribution to both institutional and socio-legal theory.

Perhaps even more importantly, it is important to consider how social movements (or other forces) that stimulate change in organizational fields may themselves become endogenized through their interactions with organizational fields. Just as legal fields may be transformed through their interplay with organizational fields, social movements may absorb and be transformed by the ideas, practices, or models that they seek to change, as Selznick showed in his now classic study of the Tennessee Valley Authority (1949). To the extent that this occurs, social movements are important not just as exogenous shocks that spur

institutional change but also as vehicles of social transformation that are shaped through the blurring of logics at the intersection of social fields.

Exogenous shocks to social fields are clearly critical sources of social change, but I have suggested in this chapter that these shocks are not necessary conditions for social change. As in the case of civil rights law, endogenous processes emerging in overlapping fields have their own momentum and may continue to alter the landscape of social fields long after the shock has subsided. Moreover, the social forces that we consider to be exogenous, moreover, may not be as exogenous as they appear. Institutions that shock social fields, such as law, social movements, or political contest, are themselves infused with meaning as logics flow across field boundaries.

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