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## Constructing the Content and Meaning of Law and Compliance

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## *Constructing the Content and Meaning of Law and Compliance*

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For Cambridge Handbook of Compliance

## **Abstract**

### **Constructing the Content and Meaning of Law and Compliance**

This chapter argues that organizational compliance is best illustrated not by a compliance versus noncompliance dichotomy, but by a processual model in which organizations construct the meaning of both compliance and law. I argue organizations must be understood as social actors that are influenced by widely institutionalized beliefs about legality, morality, politics, and rationality. I review the empirical research in this vein and show how institutionalized conceptions of law and compliance first become widely accepted within the business community and eventually come to be seen as rational and legitimate by public legal actors and institutions and thus influence the very meaning of law. Through two distinct waves of research, I offer a theoretical framework for understanding compliance as a process and by specifying the institutional and political mechanisms through which organizations shape the content and meaning of law. First wave studies laid out the initial framework for how to understand organizations as constructors of legal meaning while second wave studies refined and extended the theory in multiple ways. I suggest the increasing complexity and ambiguity of legal rules provides legal intermediaries greater opportunities to influence what compliance means by filtering what law means through non-legal logics. I conclude by discussing the implications of organizational construction of law and compliance for studies of law, business, and the state and suggest directions for a third wave of research.

## **Constructing the Content and Meaning of Law and Compliance**

Typically studies of compliance, especially by businesses, view law as top-down. Under this perspective, law is defined as exogenous or outside of organizations and the role of organizations is limited to reacting to law by either complying or not complying with law. The basis for complying or not complying is often due to rational, strategic considerations and motivations (Simpson 1992, 1998), moral (Tyler 1990), social, and normative concerns (Parker & Nielsen 2011). The majority of compliance research falls within two categories: objectivist and interpretative research. Using objectivist, theory-testing frames, research in these vein map and measure compliance and noncompliance and build and test theories that provide explanations for the association between various concepts relating to the compliant and noncompliant behavior of institutions. The conceptual themes of interest in these studies include explaining motives, organizational characteristics and capacities, regulation and enforcement and social and economic environments. Under a more interpretative frame, scholars attempt to understand how and why businesses comply with law, fail to comply with law, go beyond compliance in some instances (Kagan, Gunningham & Thornton 2003), or interact with regulatory enforcement officials and the regulatory process (Haines 1997; Parker & Nielsen 2011). Under these distinct approaches, law is an exogenous force under which organizations react to by either complying or not complying. The chapters in this book explore not just how to measure and evaluate compliance but articulate the various incentives, social norms, legitimacy, capacity, management processes, and unconscious influences that play a role in organizational compliance behavior.

Whereas most accounts in this book seek to specify the conditions under which organizations do or do not comply with legal regulations, I argue that organizations influence

and shape the content and meaning of law and compliance. The nature of compliance is best explained not by a compliance/noncompliance dichotomy, but by a model in which organizations construct the meaning of law and compliance. Organizations are social actors that are influenced by institutionalized norms and beliefs about rationality, legality, and morality. Largely drawing from new institutional theories of law and organizations, a body of research has developed over the past thirty years that articulates how institutionalized conceptions of law and compliance initially become widely accepted within organizations and eventually institutionalized as they come to be seen as legitimate and rational by public legal institutions like courts, legislatures, and administrative agencies. Unlike an exogenous approach, law is seen as part of an *endogenous* process in which the content and meaning of law and compliance is shaped by private organizations, the very group such laws are designed to regulate.

I articulate this framework for understanding compliance as socially constructed by organizations as undergoing two “waves” or phases. Deriving largely from empirical work in the civil rights context, first wave legal endogeneity studies articulated a theoretical framework for understanding compliance as a process and specified the institutional mechanisms through which organizations shape the content and meaning of law. In particular, empirical research highlights how ambiguous civil rights laws led employers to develop a number of symbolic forms of compliance that were more attentive to managerial ideals and preferences than to legal ideals. These symbolic forms of compliance were eventually incorporated into judicial decisions interpreting civil rights laws (Edelman 2016). Empirical research identified a series of mechanisms including how organizations legalize themselves through the creation of formal policies and procedures, how managerial notions of what constitutes compliance flows the manner that organizations understand law and compliance, and how forms of compliance

developed and were institutionalized within organizational fields and eventually incorporated into judicial conceptions of compliance. Next I turn to second wave studies that have taken the original framework and refined and expanded it into other legal settings beyond the civil rights context. Second wave studies have not just moved legal endogeneity to new areas like consumer protection, insurance, and prisons to name a few, but have elaborated the theoretical framework to explain how organizations can shape the content and meaning of legislation and regulation through institutional *and* political mechanisms. Empirical research in the second wave also reveals how other logics beyond managerial values such as consumer, risk, and penal logics can influence the way actors within organizational fields understand law and compliance. The final section discusses the implications of organizational construction of law and compliance research and briefly offers suggestions for a third wave of research.

### **I. First wave legal endogeneity studies**

The organizational construction of law and compliance theoretical framework is largely derived from a strand of organizational sociology called new institutional theory. Early work in this area focused on exploring organizational influence on civil rights laws. Lauren Edelman, a sociology of law and organizations scholar, conducted a series of empirical studies in the 1990s and 2000s that explored how law is endogenous, that is, how employers shape the way that courts understand law and compliance. She was part of a movement of organizational theorists exploring how organizational structures form, diffuse, and spread within organizational fields. The following synthesizes the key mechanisms through which first wave studies showed how organizations construct the meaning of compliance and uses examples from studies of the civil rights context to illustrate the theory.

New institutionalists challenge the idea that organizations simply resist, obey, or avoid law in a way that yields the most rational or cost-benefit outcome (Vaughan 1998). New institutionalists argue that rationality is socially constructed by nonmarket factors such as widely accepted norms and patterns of behavior that become taken for granted and institutionalized among the community of organizations that make up an organizational field (Meyer & Rowan 1977; DiMaggio & Powell 1983; Scott 2001). An “organizational field” refers to the subset of the environment that is most closely relevant to a given organization, including suppliers, competitors, and customers, as well as flows of influence, communication, and innovation (DiMaggio & Powell 1983). Just as organizations exist within broader organizational fields, legal organizations such as courts, legislatures, and administrative agencies exist within legal fields (Edelman 2007). Legal fields are institutional environments within which ideas about law evolve, are exchanged, and become institutionalized. Ideas about rational legal behavior, including how to respond to legal regulation, tend to evolve and, in some cases, become institutionalized within legal fields (Edelman & Talesh 2011).

New institutionalists studying the relationship between law and organizations often start with a basic premise that there is nearly always some degree of legal ambiguity in laws regulating organizations. Title VII of the Civil Rights Act of 1964 codified strong protections against employment discrimination but failed to specify the meaning of discrimination (Edelman 1990, 1992). The ambiguity in legal regulation leaves a space for the social construction of the meaning of law through a blending of, and sometimes contest between, the logics of legal and organizational fields (Edelman 2007). In particular, organizations often turn to their legal environments or law-related aspects of organizational fields for ideas on how to respond to legal regulations. An organization’s legal environment is the broad set of rules, norms, practices, and routines that shape

not only an organization's understandings of law and compliance, but also their notion of what is fair and right (Edelman 1990, 1992).

In response to anti-discrimination laws that alter the legal environment, organizations respond by creating written rules, policies, and procedures that fill in law's meaning and adopt many legal practices and structures because their cultural environment constructs adoption as the legitimate or natural thing to do. For example, Edelman (1990, 1992) shows how organizations responded to new laws by creating new offices and developing written policies, rules, and procedures in an attempt to achieve legal legitimacy, while simultaneously curbing law's impact on managerial power and unfettered discretion over employment decisions. In a sample of 346 organizations, only 30 had created anti-discrimination guidelines by 1969, 118 instituted guidelines in the 1970s and 75 more did so in the 1980s. There was also a noticeable increase in other forms of legalization in the 1970s. This included the spread of special offices devoted solely to civil rights issues and special procedures for processing discrimination complaints. Initially early movers or first-adopters created these structures, but eventually it spread through organizational fields (Edelman 1990, 1992; Dobbin et al. 1993; Sutton et al 1994; Edelman & Peterson 1999).

Civil rights offices, grievance procedures and other anti-discrimination rules serve as visible indicators of attention to law and give the appearance of legitimacy. However, these structures often serve to allow for compliance in form, but do not require or lead to substantive change in the workplace environment. As more and more organizations adopt such structures into practice and they become the taken for granted norm, these structures come to be seen as 'rational' forms of compliance (Edelman, Uggen & Erlanger 1999). Once these symbolic structures are established within organizations, they become locations in which the requirements and the

meaning of compliance are encountered and negotiated in the context of daily organizational events.

As organizations legalize themselves, managerial and business values such as rationality, efficiency, and discretion come to influence the way in which organizations understand law and compliance. That is, organizations struggle to find rational modes of response to legal ambiguity and devise strategies to preserve managerial discretion and authority while at the same time maximizing the appearance of compliance with legal principles (Edelman, Fuller & Mara-Drita 2001). When legal ideals conflict with business goals and agendas, compliance officers often interpret law and compliance in a way that tilts toward business values. The meaning of compliance is understood in ways that incorporate managerial values, logics, and ways of understanding the world derived from organizational fields. As this process takes place, law becomes managerialized or infused with managerial values and interests, which in turn leads symbolic structures or structures less likely to further social justice goals.

Prior new institutional research shows that business, management, and legal professionals are key carriers of ideas among and across organizational fields. In particular, human resource officials, personnel managers, management consultants, and in-house lawyers communicate ideas about law as they move among organizations; participate in conferences, workshops, training sessions, and professional networking meetings; and publish professional personnel literature (Jacoby 1985; Baron, Dobbin & Devereaux 1986; Edelman, Erlanger & Lande 1993). Existing empirical research reveals that when organizations attempt to comply with laws, managerial conceptions of law transform sexual harassment claims into personality conflicts (Edelman, Erlanger, & Lande 1993), deflect or discourage complaints rather than offering informal resolution

(Marshall 2005), and broaden the term “diversity” in a way that disassociates it from its original goal of protecting civil rights (Edelman, Fuller & Mara-Drita 2001).

A study of internal grievance complaint handlers for ten large organizations reveals that complaint handlers were quite often unconcerned with actual formal legal rights and outcomes, were not fully informed of the law, and chose not to invoke legal principles when addressing employee legal complaints. In lieu of formal legal solutions, complaint managers often chose to address employee grievances with managerial solutions, including using training programs, transferring the grievant and providing counseling rather than formal recognition of legal rights violations (Edelman et al. 1993; Edelman & Cahill 1998; Edelman & Suchman 1999; Albiston 2005). Another study reveals that ideas about civil rights were transformed in the context of managerial rhetoric about diversity that reframed legal values in terms of traditional managerial goals. In particular, the term ‘diversity’ was transformed through managerial rhetoric during the 1980s and 1990s such that it became detached or disassociated from the legal ideal of equitable racial and gender representation and instead, transformed into a managerial ideal in which varying backgrounds and viewpoints in a workforce could be mobilized for constructive purposes (Edelman, Fuller & Mara-Drita 2001). Similarly, in France, managerial rhetoric transformed principles of discrimination into managerial categories such as diversity (Bereni 2009) and recast concerns of psychological bullying (Bastard & Cardia-Vonnèche 2003). Thus, managerialization occurs through decoupling of legal rules from organizational activities, rhetorically reframing of legal ideals, and internalizing dispute resolution (Edelman 2016)

The infusion of managerial logics into law is not limited to organizations or organizational fields. The managerialization of law affects the construction of law in legal fields. New institutionalists show how law becomes endogenous as legal rules derived from court cases come

to be determined by organizations—the very group such laws are designed to regulate (Edelman 2016). Similar to employers, employees, compliance professionals and lawyers, judges over time end up equating the symbolic structures that organizations create in response to civil rights law with the achievement of civil rights on organizations. For example, empirical work in the civil rights context shows how ambiguous civil rights legislation led employers to create a variety of symbolic forms of compliance that, despite being more attentive to managerial prerogatives than to legal ideas, were incorporated into judicial opinions interpreting civil rights law (Edelman et al. 1999). Judges in employment cases increasingly defer to the presence of organizational structures as evidence of nondiscriminatory treatment without paying attention to evidence that suggests that these structures fail to protect employees’ legal rights or evaluating whether these structures do anything substantively to curb discrimination (Edelman et al. 2011; Edelman 2016).

In sum, through a series of empirical studies, first wave research on the interaction between organizations and law laid out a series of mechanisms through which we understand how organizations do not just comply or not comply with laws, but shape the content and meaning of laws that are designed to regulate them. Organizations do not resist or avoid ambiguous laws when they are passed, but instead, respond by often creating law-like structures that are designed to symbolize their attention to law. Organizations essentially “legalize” themselves through the structures they create. Once these processes are in place they trigger struggles among professionals and other organizational field actors over the meaning of compliance. Through conferences, professional networking, and professional written and marketing materials, these institutionalized structures diffuse across the organizational field and become the taken for granted norm of acceptable behavior. However, because of their training, experience or professional socialization and perspective, organizational field actors often construct law in ways that are consistent with

managerial values and goals. Thus, as organizations legalize themselves, managerial values seep into the way that organizations understand law and compliance. As these constructions of what law and compliance means become institutionalized over time, they subtly impact how courts and eventually larger society understand law and compliance and what constitutes rational compliance with law.

## **II. Second wave legal endogeneity studies**

First wave research on organizational constructions of law laid a foundation for scholars to continue elaborating the relationship between law and organizational compliance. Scholars have moved in different directions and are exploring various aspects of how organizations construct legal meaning and compliance. Both within and outside the United States, scholars have explored the ways organizations construct the content and meaning of laws that are designed to regulate them in consumer regulation (Talesh 2009, 2012, 2013, 2014); insurance (Schneiberg 2005; Talesh 2015a,b); welfare regulation (Covaleski, Dirsmith & Weiss 2013); insider trader laws (Bozanic, Dirsmith & Huddart 2012); prison rape regulation (Jeness & Smyth 2011); school sexual harassment policies (Short 2006); restaurant hygiene regulation (Lehma, Kovacs, & Carroll 2014); privacy (Pandy 2013); cybersecurity (Talesh 2018), the medical education field (Dunn & Jones 2010); employers' use of criminal background checks (Lageson, Vulo, & Uggem 2014); financial derivatives (Krawiec 2003, 2005; Holder-Webb & Cohen 2012; Funk & Hirschman 2014); antitrust in the film industry (Mezias & Boyle 2005); tax incentives for employer-sponsored childcare (Kelly 2003); international environmental management standards (Delmas & Montes-Sancho 2011); tax regulation (Mulligan & Oats forthcoming); Canadian wrongful dismissal doctrine (Nierobisz 2010); Australian labor law (Frazer 2014); and British financial service regulation (Gilad 2014). I refer to these as second wave studies because they build upon the

framework laid out by first wave studies. For the most part, studies of organizational construction of law have explored particular aspects of legal endogeneity theory. In particular, many of these studies analyze particular aspects of legal endogeneity, such as the development of symbolic compliance or the manner in which legal institutions follow norms and practices developed within organizations. However, others have explored the entire cycle of legal endogeneity and in doing so, extended and refined the theory of legal endogeneity to go beyond how organizations influence the meaning of judicial decisions as demonstrated in the EEO context (Talesh 2009, 2012, 2014, 2015a,b). The following highlights how legal endogeneity theory has been expanded and extended theoretically and methodologically. Second wave studies broaden the range of mechanisms through which organizations shape legal meaning. In doing so, second wave studies of legal endogeneity expand the web of scholars that can potentially use and apply the theory across multiple disciplines beyond the original framework.

*How Organizations Shape the Content and Meaning of Legislation and Administrative Agencies*

As opposed to the judicial context, recent research explores the process through which legislation and administrative law are constructed by organizations. Most extant work on the relationship between business organizations and legislators and regulators understands organizations as rational actors. Analyses of interest group politics, mostly in political science, suggest that business interests often co-opt the legislative process through tactics such as lobbying, agenda setting and venue shopping (Bernstein 1955; Stigler 1971; Baumgartner and Jones 1993; Ayres and Braithwaite 2001). With respect to administrative agencies, work in this vein points to the role of strategic organizations in ‘capturing’ regulatory agencies (Bernstein 1955; Stigler 1971). In general the extant literature envisions regulation as a top-down process, whereby regulators try to coerce or in some cases encourage organizations to comply, while organizations

engage in rational, strategic choices as to whether to comply (Braithwaite 2008). In this view law is exogenous to organizations in that it is imposed upon them, although it is open to their influence.

More recent empirical research demonstrates how institutionalized logics operating among organizations play an important role in determining the form and structure of legislation and regulation. Research in this vein brings together sociology and political science to help better explain how organizations shape the meaning of law within organizational fields but also how those constructions of law bubble up into what ends up being codified into legislation and regulations (Barnes & Burke 2006; Talesh 2009, 2014). Scholars have refined legal endogeneity theory to account for politics and power in the interaction organizations have with public legal institutions. As organizations struggle to define the meaning of compliance, the process through which organizational ideas about compliance evolve may be contested as the logics of organizational and legal fields come into conflict (Talesh 2012, 2014, 2015c; Edelman & Stryker 2005; Heimer 1999; Schneiberg & Soule 2005; Edelman et al. 2011). In particular, although political mobilization and contestation remain prevalent in the legislative process, the political frames used by organizations lobbying the legislature reflect logics that are derived from institutionalized norms and structures developed by these same organizations. Contests over the meaning of compliance are particularly likely where multiple interest groups have stakes in the meaning of compliance (Talesh 2014, 2015c). Political battles over legal meaning are particularly salient in the legislative and administrative contexts, where interest groups engage in overt battles regarding the meaning of compliance (Pedriana & Stryker 1997, 2004; Talesh 2014). In sum, through some combination of institutional logics and political contestation, private organizations are able to shape the content and meaning of laws that are designed to regulate them.

Through a quantitative coding and qualitative content analysis of 25 years of legislative history and interviews with legislative analysts involved in crafting laws in both California and Vermont, Talesh highlights how businesses influence legislation in some, but not all, circumstances based on various political alliances that are mobilized during the legislative process. Specifically, automobile manufacturers, who were initially subject to a powerful but ambiguous consumer warranty law in California in 1971 that created powerful rights and remedies in court such full restitution, attorney's fee and civil penalties, transformed and ultimately weakened the impact of this law by creating their own dispute-resolution arbitration forums and eventually convinced the legislature to adopt them into law. These legalized structures diffused among the majority of automobile manufacturers and automotive dealers and became institutionalized among the organizational field. Eventually automobile manufacturers gave control over these arbitration programs to third-party organizational surrogates with whom they contracted with. As this process of legalization by manufacturers took place, manufacturers infused managerial and business values into California legislation in varying degrees and reshaped the meaning of law and compliance among not just organizations, but also in the legislature. At first glance, one might infer that institutionalized business structures may in fact serve as a useful mechanism for resolving these statutory rights. However deference to organizational construction of the California 'lemon law' made powerful consumer rights and remedies contingent on first using manufacturer dispute resolution procedures, where rights and remedies equivalent to those available in court such as civil penalties and attorneys' fees do not exist (Talesh, 2009; 2014).

Once organizational logic as to the meaning of compliance became formally codified into law, legislative amendments had less to do with protecting consumer rights and more to do with giving legal legitimacy to organizational dispute resolution venues through soft, passive regulatory

monitoring and oversight, and enhancing the degree to which consumers, manufacturers, legislators and regulators defer to institutional venues designed and funded by manufacturers (Talesh 2009, 2014). Thus, as businesses ‘legalized’ their domains with law-like structures, business logics – anchored in informality, efficiency, discretion, and problem solving flowed back into core public legal institutions through the efforts of advocacy coalitions, who reframed the meaning of consumer protection for legislators and regulators. In a multi-layered level of deference, court cases interpreting California’s consumer warranty laws, and the Lemon Law in particular, reflect deference to these quasi-private dispute resolution structures in a manner consistent with the legislature’s codification of manufacturers’ preference for informal, private resolution of statutory rights (Talesh 2009). The content and meaning of consumer protection legislation, judicial decisions, and regulatory rules are determined by manufacturers, the very group such laws were designed to regulate.

As was the case in California, the Vermont legislature in 1984 reached consensus that alternative dispute resolution (ADR) forums as opposed to courts were the proper place to resolve legal disputes. However, the contested and varying political alliances in Vermont, as well as a different developmental path (cf. Pierson 2004), led to a different dispute-resolution structure being codified into law. Unlike California, Vermont did not create a court-based option for consumers in the 1970s. Thus, when Vermont created a lemon law in the 1980s, Vermont considered both court and ADR options. In particular, different interest groups, namely consumer advocates and automotive dealers, dominated the Vermont legislative process. A political trade-off ensued among key stakeholders such as automotive dealers, manufacturers, consumer advocates, and the state attorney general, whereby a court option was eliminated from consideration in return for permitting the state of Vermont to administer a public arbitration

board in addition to allowing the private dispute-resolution process to operate. Thus, by comparing two states that developed two different institutional processes with varying degrees of business control and participation in the dispute-resolution structures, Talesh shows under what conditions business and managerial conceptions of law reshape the meaning of public legal rights and the conditions under which they do not.

The consumer protection example in California highlights why a compliance versus noncompliance dichotomy fails to capture the relationship between business and law. Manufacturers did not strategically choose to ‘comply’ or ‘not comply’ with consumer warranty laws. Instead, manufacturers were able to reshape the meaning of compliance with consumer warranty laws and transform public rights attainable in court into private rights to dispute resolution (Talesh 2009, 2014). As in the employment context (Edelman et al. 1993), dispute resolution processes provided a means through which manufacturers’ values and norms influenced the structure and content of the organizational field far more than did consumers’ interests. However, unlike legal endogeneity in the judicial context, political mobilization in the form of manufacturer advocacy coalitions, influenced the legislative process by claiming that the legal value of these dispute resolution structures lay in their efficiency and informality. Because private dispute resolution structures created and institutionalized within the organizational field ultimately shaped the legislative facet of the legal environment, the politics of consumer protection policy were at least partially rooted within the logic of organizational fields. Vermont provides an actual counterfactual that highlights how different political alliances can shape legislative and regulatory rules in a different manner. Either way, political contestation is a critical factor in determining which legal principles, structures and rules come to dominate the meaning of law as organizational and legal field logics overlap.

The interdisciplinary interaction of sociology new institutionalism and political science augments the reach of legal endogeneity research. Second wave studies of legal endogeneity do not negate political, cultural, instrumental or normative approaches of law and organizations that have been previously explored. Strategic political action, lobbying, political mobilization, cultural reframing, decoupling, diffusion, and other mechanisms developed in prior work by sociologists and political scientists are crucial to understanding the way intermediaries impact law and social change. But more recent scholarship on organizational constructions of law and compliance suggest that these political, cultural, instrumental and even normative processes are often derived from and influenced by the increasing professionalization of law by non-legal actors in organizational fields and how non-legal actors encounter and filter what law means through non-legal logics in their institutional environments. Thus, organizations' lobbying choices, political mobilization agendas, strategic considerations, and cultural and cognitive scripts are often drawn from and shaped by the non-legal logics operating in an organizational field and the intermediary's professional experience. This blending of political science and sociology scholarship gives this theoretical approach more empirical reach.

*Filtering Law and Compliance Through Non-Legal Logics*

Scholars are also increasingly focusing on how rule or legal intermediaries shape organizational construction of law. Rule or legal intermediaries are state, business, and civil society actors that affect, control or monitor how legal rules are interpreted, implemented, or constructed. Legal intermediaries influence the way organizations understand law and compliance by filtering what law means through non-legal logics emanating from various organizational fields (Talesh & Pelisse 2019).

This focus led second wave scholars to broaden the framework beyond managerialization and explore how other non-managerial logics influence the way that organizations understand the meaning of law and in particular, the role of intermediaries who are not legal professionals (Pélisse 2014, 2016). Unlike first wave studies, second wave studies of legal endogeneity more precisely tease out how organizational field actors can filter law and compliance through *multiple* field logics. Consumer, risk, science and prison logics emanating in various organizational fields can influence the way that organizations understand the meaning of law (Stryker, Docka, & Wald 2012; Verma, 2015; Talesh, 2012, 2014, 2015a,c). Although managerial logics are prevalent among businesses, second wave studies highlight how there can be multiple field logics operating and how field actors can have cohesion or settlement among some logics and contestation around others (Talesh 2015a).

For example, Talesh continued his analysis by studying the present-day lemon law field by attending lemon law conferences, interviewing field actors from across the United States, and participating and observing arbitration training programs that arbitrators undergo in two states (California and Vermont) (Talesh 2012, 2015c). Rather than a single managerial logic dominating an organizational field as first wave studies highlight, Talesh demonstrates how there can be multiple logics operating in an organizational field (Talesh 2015c). Talesh's fieldwork revealed that private actors mediate the purpose of lemon laws and value of informal dispute resolution forums through business logics of efficiency, cost-effectiveness, managerial discretion and productivity whereas public actors such as consumer advocates and state regulators anchor their discourse in a consumer logic that emphasizes consumer rights, public safety, transparency, and following formal law.

Unlike the organizational field examined in the civil rights context, the lemon law field was simultaneously settled in some areas and contested in others. While field actors from across the United States recognize the inherent ambiguity in lemon laws and share a logic that favors alternative disputing forums over courts for resolving lemon law disputes, they contest the meaning and implementation of lemon laws and consumer rights in powerful ways. Thus, compliance is a socially and organizationally constructed concept and the legal rules organizations are tasked with implementing are evaluated through various filters (in this case, business and consumer logics) (Talesh 2015). This is important because law is interpreted and implemented by rule-intermediaries that are tasked with implementing lemon law arbitration programs through two distinct logics.

To that end, Talesh continued his analysis by comparing how two different alternative dispute resolution forums (one created and administered by private organizations in California, and the other administered and run by the state of Vermont) operating outside the court system resolve consumer disputes. Unlike the single-arbitrator system in the private arbitration programs, Vermont uses an arbitration board consisting of a five-person panel of arbitrators (three citizens, an automotive dealer representative, and a technical expert). Talesh finds that the institutional design of dispute resolution, and how business and consumer values and perspectives are translated by field actors in different dispute resolution systems, leads to two different meanings of law operating in private and state-run dispute resolution forums. Managerial and business values of rationality, efficiency, and discretion flow into law operating in California's private dispute resolution structures primarily through an arbitration training and socialization process conducted by third-party administrators hired by automobile manufacturers to run their lemon law arbitration program (Talesh 2012). The institutional context socializes

arbitrators to ignore consumer emotion and narrows the fact-finding role of arbitrators to a passive arbiter reliant on parties to present facts. As a result, arbitrators are taught to adjudicate cases not in the shadow of the formal lemon law on the books, but in the shadow of a managerialized lemon law filled with its *own* rules, procedures, and construction of law that changes the meaning of consumer protection. Moreover, as business values flow through the disputing structure, organizational repeat players gain subtle opportunities for advantages through the operation of California dispute resolution structures.

Vermont's vastly different dispute resolution system has far less tendency than the process in California to introduce business values into the meaning and operation of lemon laws. To the extent business values are introduced into the process by the presence of dealer and technical expert board members, they are balanced with competing consumer logics by the presence of citizen panel members and a state administrator. Rather than emphasizing professional training and socialization, Vermont's structure illustrates how participatory representation, an inquisitorial fact-finding approach, and balancing consumer and business perspectives in the decision-making process can help curb repeat player advantages. In terms of consumer outcomes in these hearings, consumers do far worse in private than state-run disputing structures (Taleh 2012).

Thus, in contrast to prior studies (Edelman et al. 1993; Edelman et al. 2001; Marshall 2005), comparing distinct lemon law arbitration programs within the same organizational field allows one to explore the *variation* in how managerial values flow into the compliance behavior of businesses. In particular, such qualitative empirical studies of the processes and mechanisms through which managerial values seep into the design of legal institutions in varying degrees gives us great insight into the subtle ways managerial values flow into understandings of

compliance in some but not all instances. Moreover, where prior studies focused on how managerial values influence written policies and internal legal structures (Edelman et al. 1993; Marshall 2005), managerial logics flow into *third-party* organizations that train arbitrators on the meaning of lemon laws. This is a critical way that organizational repeat players gain structural advantages through seemingly neutral dispute resolution processes.

Second wave legal endogeneity scholars that focus on how organizations construct the meaning of law note that it is not only the ambiguity of legal rules and regulations that make organizations likely to influence legal meaning. Rather, the variety of second wave studies in different regulatory arenas mentioned earlier in this section emerge in part due to the global shift from government to governance, the inherent ambiguity in legal rules, and the increasing complexity of legal rules (Talesh & Pelisse 2019; Abott et al. 2017). The interaction of these three elements has created greater space for non-traditional actors to emerge and influence law. In this era of co-regulation and public-private partnerships, state, business, and civil society actors act as rule-intermediaries that affect, control, and monitor relations between rule-takers and rule-makers (Abott et al. 2017). In particular, a wide variety of legal and non-legal actors among and within organizations that come into contact with law have increasing discretion in their legal environments. In a world where private actors are increasingly involved in handling functions traditionally run by the government such as lemon law dispute resolution, organizations no longer simply play for favorable rules in the public arena (cf. Galanter 1974). Rather, they play for removing the entire disputing game from the public arena into the private arena, actively create the terms of legal compliance, and reshape the meaning of rights and remedies through business and consumer logics operating in the organizational field.

Scholars writing about prisons highlight how penal field logics operating within the field shaped penal policy among legislators and courts (Verma 2015; Jenness & Smyth 2011). There is some variance among scholars on whether prisons complied with reform efforts substantively or merely symbolically. A mixture of judicial activism and deference drives substantive reform with varying degrees of success. On the one hand, legal deference devised by the corrections professionals and adopted by prisons, coupled with careful monitoring to ensure the standards are met, influenced law and compliance in the prison context (Feeley & Rubin 1999). On the other hand, compliance by prisons with prison overcrowding and conditions in solitary confinement that had been mandated by courts and legislatures have been shown to be large symbolic in many instances (Schoenfeld 2010; Geutzkow & Schoon 2015). Others show that the prison grievance process, although used extensively, only rarely results in substantive relief and a meaningful change in the authority of correctional officials (Calavita & Jenness 2015).

Second wave scholars in the new institutionalist tradition show how institutional and political mechanisms mobilized by intermediaries are not just driven by managerial logics. There have also been a series of studies concerning the way that risk logics and risk management principles operating within a field can mediate the meaning of law and compliance. Different professions are anchored in different logics and these logics shape the prism through which law is interpreted. The insurance industry, as an active intermediary for organizations, uses the logic of risk to shape the way organizations that purchase certain lines of insurance understand law.

Specifically, the insurance field (insurance companies, agents, brokers, and risk management consultants), through Employment Practice Liability Insurance (EPLI) and the accompanying risk management services that the insurance field offers, construct the threat of employment law and influence the nature of civil rights compliance (Talesh, 2015a). Insurers began offering EPLI

in response to perceived threats of employment discrimination lawsuits. Unlike other insurance policies, EPLI policies provide defense and indemnification coverage to employers for claims of discrimination and other employment-related allegations made by employees, former employees, or potential employees. Insurers increasingly offer EPLI and employers increasingly purchase this insurance. Insurers play a role in trying to nudge employers to avert such risk and act as a regulatory intermediary because employers have an incentive to avoid discrimination. But insurers do so in a way that avoids litigation rather than fostering fair governance, due process, and equality in the workplace.

Drawing from participant observation and interviews at EPLI conferences across the country as well as content analysis of EPLI policies, loss-prevention manuals, EPLI industry guidelines, and webinars, Talesh shows how insurance companies and institutions use a risk-based logic and institutionalize a way of thinking centered on risk management and reduction. Faced with uncertain and unpredictable legal risk concerning potential discrimination violations, insurance institutions elevate the risk and threat in the legal environment and offer a series of risk management services that they argue will avert risk for employers that purchase EPLI. Insurers use policy language to build discretion into legal rules and often reframe legal rules and principles around a non-legal risk logic that focuses on avoiding risk and making discrimination claims more defensible (Talesh 2015a,b).

By framing employers' legal environment in these terms, the insurance industry creates a space to encourage employers to engage in managerialized responses and develop formalized policies and procedures by using the various risk-management services offered by insurers to help reduce these risks. Thus, in this instance, risk and managerial values work in a complimentary manner and allow insurers as rule intermediaries greater influence over

compliance issues concerning employers (2015a,b).

The institutionalized practice of EPLI ultimately leads to public legal institutions affording considerable deference to EPLI. In addition to courts expanding coverage afforded insured under EPLI when interpreting coverage questions, federal, state, and municipal governments adopt the logics of EPLI insurers and encourage and in some instances, require public organizations and governmental institutions to purchase EPLI (Talesh 2015b).

Insurers also mediate the meaning of privacy law and compliance in the cybersecurity context through cyber insurance. Recent research suggests that insurance companies and institutions, through cyber liability insurance, do not simply pool and transfer an insured's risk to an insurance company or provide defense and indemnification services to an insured (Talesh 2018). In addition to transferring risk, cyber insurers provide a series of risk management services that actively shape the way an organization's various departments tasked with dealing with data breach, such as in-house counsel, information technology, compliance, public relations, and other organizational units, respond to data breach. Cyber insurers frame the legal environment in terms of risk and then encourage corporations to use their risk management services to avoid data breaches and privacy law violations. Although it is too early to tell how successful cyber insurers are, they are acting as compliance regulators and trying to prevent, detect, and respond to data breaches and help organizations comply with various privacy laws (Talesh 2018).

Risk logics do not just influence the insurance field or actors that interact with insurance companies. Risk reduction and risk management principles shape the way professional safety officers interpret and implement a variety of environmental, health and safety rules (Silbey 2017). Anchored in risk values and risk management principles, safety officers implement

surveillance technology and databases to manage hazards (Silbey & Agrawal 2011), develop “relational regulation practices” in science laboratories (Huising & Silbey 2011), and use legal rules to manage risks, influence safe practices, and build good working conditions (Borelle & Pelisse 2017; Talesh & Pelisse 2019).

While a deep analysis of each second wave study drawing on legal endogeneity is beyond the scope of this chapter, the theory is clearly moving forward in exciting ways. Second wave studies of how organizations shape the content and meaning of laws designed to regulate them have not just replicated the entire cycle of legal endogeneity theory, but extend, refine, and broaden the reach and applicability of the theory to multiple subject areas. Whereas first wave studies focused on how organizations shape the meaning of law in the judicial context, second wave studies have demonstrated how organizations shape the meaning of legislation and the applicability of administrative regulations. In doing so, they have brought political science studies of business influence over public legal institutions into conversation with organizational sociologists. Second wave studies have moved outside the employment law context and shown how organizations mediate law’s meaning in a variety of other areas. Second wave studies have shown how organizational fields do not filter law through a managerial logic, but that the logic operating in each field is an empirical question unique to each field that is studied. In addition to managerial logics, organizational field actors filter law’s meaning through risk, penal, and consumer logics among others. Not only can multiple logics operate, fields can be simultaneously contested and cohesive which leads to multiple compliance frameworks emerging. Each of these additional dimensions provides nuance into how organizations influence the meaning of law and compliance and set the stage for a third wave of studies to follow.

### **III. Implications and thoughts on a third wave of legal endogeneity studies**

This chapter challenges the ambition of compliance research to explain what organizations do to comply or not comply with legal regulations. In doing so, new institutional theories of organizational constructions of law and compliance turn traditional understandings of regulation and compliance inside out by focusing on the processes and mechanisms through which organizations create their own meanings for regulation and therefore, compliance. Thus, research about what motivates compliance and noncompliance often asks the wrong question since organizations possess the capacity to influence the meaning of compliance. Scholars writing in this tradition do not contend that organizations never respond rationally to top-down mandates. Rather, they argue that studies of compliance that focus only on organizations as rational actors miss a big part of the compliance picture.

Because laws regulating organizations are usually complex, broad, uncoercive, and vague as to how to comply, they motivate a process through which organizations collectively seek to construct legal meaning. First and second wave legal endogeneity studies demonstrate that this process is shaped by institutionalized logics that evolve over time through the processes of organizational life. This process also involves politics as organizations and their employees, customers, and competitors compete for legal constructions that favor their interests. Through the ongoing overlap of organizational and legal fields and interaction among legal and organizational field actors, the meaning of compliance evolves and takes shape. Legal and non-legal actors act as intermediaries of law and shape organizational constructions of law by filtering law through non-legal logics emanating in organizational fields. Understanding law as shaped through a process of institutionalization and political mobilization that takes place within

and at the intersection of, organizational and legal fields reveals the ways that organizations reshape the meaning of compliance.

In sum, first wave studies laid out the initial framework for how to understand organizations as constructors of legal meaning. Second wave studies refined and extended legal endogeneity theory. There is tremendous opportunity for a third wave of studies to emerge in the next decade. Continued inquiry into the subtle processes through which organizations shape the meaning of compliance is important and ripe for further exploration because countries across the world are increasingly moving toward more co-regulatory frameworks. The private role in public governance across virtually all sectors of society is quite real. Because private organizations are not merely influencing governmental institutions but rather, performing many traditional government functions with government approval, organizations have greater opportunity than ever before to shape what constitutes the meaning of legal regulations and compliance itself. Although there are potential benefits to self-regulatory and collaborative governance arrangements, studies of how organizations influence the meaning of compliance that I highlighted in this chapter suggest there is great potential for organizations to inhibit legal ideals through symbolic or ineffective structures and policies.

I briefly outline a few directions for further research. Third wave studies should explore the institutional and political mechanisms through which organizations shape the meaning of compliance in normatively undesirable *and* desirable ways. Whereas first and second wave studies often show how organizational constructions of compliance weaken law's meaning (cf. Taleh 2012), future studies should explore the conditions under which organizational policies, procedures and practices lead to greater compliance or are consistent with the goals of legislation and regulatory rules. While there have been plenty of studies demonstrating structures and

compliance looks, we need to understand the conditions under which symbolic structures can be made more effective. Across a wide-variety of regulatory settings, closer focus is needed on the ways that legal and non-legal actors filter law's meaning through non-legal logics. Comparing cases in regulatory settings, or even across common law and civil law societies, might give us insight into the ways to prevent organizational structures from becoming symbolic (cf. Talesh 2012, 2014). Finally, research should explore what legal reforms or interventions by public legal institutions might limit or prevent legal endogeneity from occurring. Each of these suggestions could expand the research arc into new directions theoretically and methodologically. At a minimum, further research in this manner will move thinking about compliance away from a focus over when organizations do or do not comply with law, but rather, how do organizations construct the meaning of law and compliance.

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