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Shauhin A. Talesh
University of California, Irvine School of Law, stalesh@law.uci.edu

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Shauhin A. Talesh
stalesh@law.uci.edu
University of California, Irvine ~ School of Law

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Shauhin Talesh

Professor of Law

By courtesy, Professor of Sociology and Criminology, Law & Society

Director | Law & Graduate Studies Program

UNIVERSITY *of* CALIFORNIA · IRVINE | SCHOOL OF LAW

401 E. PELTASON DR., SUITE 3500F | IRVINE, CA 92697-8000

949.824.9214 | stalesh@law.uci.edu

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ABSTRACT

Applying a New Legal Realist framework, this chapter uses the insurance field as a pathway for exploring how insurance institutions shape law in formal and informal settings. Consistent with new institutional organizational sociology studies that highlight how organizations influence the meaning of compliance, I show how the insurance field, largely through a lens anchored around risk, filters and mediates what law means through a risk-based logic. I begin by explaining how insurance exerts a regulatory force over its subjects and acts as a form of governance beyond the state. Next, I show how the presence of liability insurance often shapes how civil lawsuits are structured. I then pivot to the criminal justice system where risk assessment and actuarial techniques increasingly are used to categorize criminals with varying degrees of dangerousness. I then show how risk management now permeates and influences how many judges operate in various problem-solving courts. Finally, I reveal the processes and mechanisms through which insurer risk management techniques influence how organizations understand law and compliance. I conclude this chapter by noting that the insurance field's shaping of law in formal and informal settings can have both positive and negative impacts for achieving access to justice.

Planet of the Insurers: How Insurers Shape and Influence Law and Impact Access to Justice

New Legal Realism encompasses a number of distinct qualities, including multi- and interdisciplinarity, an openness to multiple methods, and a clear acknowledgment of the importance of theory in law and social science. An outgrowth of the law and society movement, NLR emphasizes the social context of law and seeks to develop approaches that account for how law actually works in action. Another additional defining feature of NLR—and slightly different than the law and society movement—is that NLR is focused on how to translate social science to law and lawyers as opposed to just the social science of law (Talesh, Mertz & Klug Ch. 1, forthcoming 2020). NLR also takes seriously the importance of formal legal institutions and the interaction between top down and bottom up constructions of law. Within this interaction are rule or legal intermediaries, *i.e.*, state, business, and civil society actors that affect, control or monitor how legal rules are interpreted, implemented or constructed once they are passed by public legal institutions (Talesh and Pelisse 2019). Legal intermediaries are the key actors on the chain between formal legal institutions and informal constructions of law. Legal and non-legal actors rely on their professional experience, institutional logics, services and products that they offer, and understandings of law and compliance to facilitate and inhibit social change in different situations.

Drawing from this NLR framework, this chapter focuses on how insurers act as legal intermediaries that shape and influence law and legal institutions and impact access to justice. Insurance, insurance risk management techniques, and more broadly, "risk" concepts, shape society. Insurance (1) reframes how we conceptualize fairness and justice, (2) acts as a disciplining instrument by shaping behavior and expectations, and (3) reshapes the state through a definition of its limits, responsibilities, and missions. Although statistics, actuarial tables, and other insurance instruments allow insurers to define, classify, and categorize groups, the rising use of algorithms and big data allow insurers to more easily individually identify and cover risks. These changes and features of insurance identified impact collective life in important ways.

In the shadow of insurance, impacting society across a wide variety of dimensions, is law. Legal institutions play an important role as well. Courts interpret the meaning of insurance policies, statutes establish what social insurance and other public sector insurance arrangements are permitted, and insurance regulations attempt to enforce state insurance laws, promulgate rules and regulations, and conduct hearings to resolve disputed matters pertaining to insurance. Private insurance arrangements in particular depend on a well-defined and robust contract law and a regulated market.

But less explored is how the insurance field influences legal institutions and law more generally. Law shapes and influences what insurance means while the law is simultaneously influenced by insurance. I argue that two conditions help create an environment where insurers are more likely to influence law and legal institutions. First, although state and federal governments regulate many areas, there are still significant areas that are under or unregulated. Thus, insurers fill in this space with policy language that steers individuals and organizations toward regulatory goals. Second, laws regulating organizations are often ambiguous in how they define compliance. Insurers, often acting as de facto regulators, have tremendous space to shape the meaning of law and compliance for organizations. Insurance institutions are influencing law and legal institutions and society.

This chapter starts with a basic premise that risk, as an ideological principle, and risk management, as a particularized technique, are templates through which we govern society and influence legal institutions (Baker and Simon 2002). Acting as an intermediary, the insurance field, including but not limited to, insurance companies, administrators, brokers, risk managers, filter what law and compliance means through a risk-based logic and frame the legal environment in terms of risk (Talesh 2015a). In doing so, the insurance field shapes and influences law and legal institutions.

The following explains how the insurance field shapes and influences not just legal institutions but also formal law. 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 (Edelman 2016; Talesh 2009). 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 (Edelman 2016). Whereas initial studies in this vein focused on how managerial values shaped the way employers understand law and compliance and ultimately led to courts deferring to employer interpretations of compliance, I extend and refine "legal endogeneity" theory to areas outside the civil rights context.[1] In

[1] Initial research on organizational constructions of law, led largely by Lauren Edelman, 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, 2012b, 2013, 2014);

insurance (Schneiberg 2005; Talesh 2015a,b); welfare regulation (Covaleski, Dirsmith, and Weiss 2013); insider trader laws (Bozanic, Dirsmith and Huddart 2012); prison rape regulation (Jenness and Smyth 2011); school sexual harassment policies (Short 2006); restaurant hygiene regulation (Lehman, Kovacs, and Carroll 2014); privacy (Pandy 2013); cybersecurity (Talesh 2018), the medical education field (Dunn and Jones 2010); employers' use of criminal background checks (Lageson, Vulo, and Uggen 2014); financial derivatives (Krawiec 2003, 2005; Holder-Webb and Cohen 2012; Funk and Hirschman 2014); antitrust in the film industry (Mezias and Boyle 2005); tax incentives for employer-sponsored childcare (Kelly 2003); international environmental management standards (Delmas and Montes-Sancho 2011); tax regulation (Mulligan and Oats forthcoming); Canadian wrongful dismissal doctrine (Nierobisz 2010); Australian labor law (Frazer 2014); and British financial service regulation (Gilad 2014). 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). These studies broaden the range of mechanisms through which organizations shape legal meaning. In doing so, these studies of legal endogeneity expand the web of scholars that can potentially use and apply the theory across multiple disciplines beyond the original framework.

particular, I show how the insurance field constructs the meaning of law and compliance. Moreover, I show how other logics beyond managerial values can influence the way actors within organizational fields understand law and compliance (Talesh 2015a,b, 2018). In particular, the insurance field, largely through a lens anchored around risk, filters and mediates what law means through a risk-based logic (Talesh 2015b, 2018). This risk-based frame penetrates the way formal legal institutions such as courts operate and provides a framework for insurers to regulate behavior in society often in areas where the government remains silent. Moreover, risk management principles derived from the insurance field mediate the meaning of law for organizations often tasked with complying with law. Consistent with the New Legal Realist tradition, I use empirical research to show how insurance institutions act as an intermediary and translates what law means in society.

To make this argument, I show how insurance and more broadly, risk influence the legal environment. I define the legal environment to include formal legal institutions such as courts, legislatures, and regulatory institutions, as well as the actors that encounter legal institutions such as judges, regulators, lawyers and organizations. Insurance is also an ideological construct that influences the relationship between law and regulation, such that much of society is governed through risk, both within the boundaries of insurance but even beyond insurance. In doing so, insurance institutions acting as intermediaries can at times inhibit individuals access to justice while also facilitating the achievement of public benefits.

I begin by explaining how insurance exerts a regulatory force over its subjects and acts as a form of governance beyond the state. Next, I show how the presence of liability insurance often shapes how civil lawsuits are structured. I then pivot to the criminal justice system where risk assessment and actuarial techniques increasingly are used to categorize criminals with varying degrees of dangerousness. I then show how risk management now permeates and influences how many judges operate in various problem-solving courts. Finally, I reveal the processes and mechanisms through which insurer risk management techniques influence how organizations understand law and compliance. I conclude this chapter by noting that the insurance field's shaping of law can have both positive and negative impacts for achieving access to justice. Insurer regulatory and legal interventions may improve compliant behavior by businesses and individuals, but may also decouple law from the goals of particular legislative or regulatory frameworks and weaken the meaning of law in action.

INSURANCE INSTITUTIONS AS REGULATORY ACTORS

Insurance institutions, forms, technologies, and visions (Ewald 1991) act as a form of governance beyond the state (Ericson, Doyle, and Barry 2003; Ericson and Doyle 2004). While public legal institutions establish formal laws and regulations in most societies, insurance institutions (1) reshape the state, through a redefinition of its limits, its responsibilities, and mission; and (2) act as disciplining instruments, particularly in the way they shape behavior and expectations. This is especially true since most laws are not specific with respect to how to comply with them and there are under and unregulated parts of society. Moreover, governments across the world are incapable of regulating every facet of social life. The following focuses on how the insurance field, using a risk-based logic, influences legal institutions such as courts and regulatory institutions and the nature of law and compliance. Insurance acts as a gatekeeper and a form of governance of individual and organizational behavior.

Insurance as Gatekeeper

Insurance serves a gatekeeping function in society because it is a prerequisite to other activity. Generally, a person cannot register an automobile without automobile insurance, obtain a commercial business loan without business owners' insurance, bid on a government contract without a surety bond, obtain practice privileges at hospitals without medical malpractice insurance, and sign a commercial lease without commercial property and liability insurance (Baker 2010).

Homeownership in the United States quite clearly illustrates the gatekeeping function insurance plays. Homeownership is traditionally considered one of the fundamental features of the American economy. Thus, the availability of mortgages at a reasonable and affordable rate is often regarded as an important economic indicator. However, homeowners' insurance plays an important role in the availability of mortgages, because one cannot take out a mortgage without homeowners' insurance. In particular, obtaining homeowners' insurance is mandatory for standard mortgages and homeowners' insurers often use their own underwriting concerns that are independent from the screening procedures implemented by the lender (Squires 1997).

Insurance as Governance

Insurance is an institutional force that effects individuals, organizations, and institutions inside and outside the insurance industry (Ericson, Doyle, and Barry 2003). Insurance simultaneously produces knowledge of risk, creates a scheme from which risks can be made objectively calculable, and develops a risk pool. Risk is a socially constructed concept. Through actuarial techniques, concrete facts about objective risks are converted into probabilities and ultimately assigned a cost so that prices can be established. Actuarialism creates a risk pool, that is, a population that has a stake in the identified risks and the specific harms they entail. The risk pool transforms the population into a collective that seeks to minimize loss while also compensating those who suffer a loss. Insurance manages risks in the population by using oversight, surveillance, and auditing while also making its risk pool subject to contract and ultimately adjudication. But insurance also assists the law in assigning liability to the party most capable of distributing the loss through insurance. Consistent with the idea that risk is a technique for constructing social reality, Ericson, Doyle, and Barry observe that “insurance is a social technology of justice. It bridges individual and social responsibility through distributive justice (collective sharing of loss) and restorative justice (financial indemnification)”. For that reason, they contend, “insurance is … political, combining aspects of collective well-being and individual liberty in a state of perpetual tension” (Ericson, Doyle, and Barry 2003, 6).

Scholars adopting an insurance-as-governance framework emphasize the way in which private insurers and governments exercise similar power in society and behave in a similar manner. In particular, the private insurance industry has many of the same goals as the state, including seeking forms of social security and solidarity by pooling risks. The private insurance industry provides technologies and social arrangements for allocating risk across pools of risk takers and provides for a sharing of the risks of misfortune through financial compensation of loss. It also attempts to establish preventative security arrangements that try to minimize harm and loss to its citizens. Thus, the private insurance industry governs through its powers to transfer and distribute risk, and it engages and involves the state only when necessary. The private insurance industry also uses many of the same methods as the state to achieve its goals such as surveillance, underwriting (sophisticated information systems for selecting risks), and claims (compensating loss). It also uses a substantial amount of private policing in the form of technologies, investigators, and inspectors to address fraud and achieve loss reduction and preventative security. Similar to the state, the private insurance industry is subject to many social, economic, and political forces such as changes to the environment, economic globalization, terrorism, property and violent crime, and advances in medicine and health. The private insurance industry partners with the state to regulate insurance practices.

More recently, there has been an effort in the past twenty years toward both theorizing and empirically exploring how the private insurance industry plays an active role in constructing the meaning of risk and responsibility in different segments of society (Talesh 2015b). Notable governance-as-insurance studies include: studying the role of property insurers in governing security in the home (O'Malley 1991), exploring how insurers manage moral hazard in property and fidelity insurance relationships (Heimer 1985), highlighting the governance role of insurance companies in the motion picture industry in the United States (Hubbart 1996-97), analyzing the rise of risk management approaches toward campus drinking (Simon 1994), and examining the tort-settlement factoring industry in the United States (Scales 2002).

In sum, the private insurance industry acts as a regulator and more broadly, as a system of governance through various forms of collaboration with state governments: "sharing similar goals of security and solidarity through the pooling of risks; using similar techniques for governing at a distance; and collaborating in insurance regimes" (Ericson, Doyle, and Barry 2003, 65). Insurance institutions are not just pooling and transferring risk, but instead actively shaping the world within which they operate. Insurance policies act as discipline instruments and de facto regulators over people and organizations. As these examples highlight, under a governance conception, insurance does not fit well within a public-private dichotomy. The relationship between insurers and policyholders falls somewhere in between the relationship between a public government and its citizens and a private relationship between two parties to a contract. However, private insurers are not agents of government; they are not subject to the rules, policies and procedures that limit government discretion. Moreover, they are not required to afford policyholders constitutional protections such as due process or equal protection (Abraham 2010). As the private insurance industry's governance role continues to grow, scholars going forward may want to consider standards for regulating the behavior of private insurers beyond those contained in administrative regulations, civil law doctrines, and contract law doctrines.

LIABILITY INSURANCE AS THE PRIMARY FUNDING MECHANISM FOR THE CIVIL JUSTICE SYSTEM

In addition to acting as a governing mechanism and a gatekeeper, insurance shapes our civil legal system. For example, liability insurance acts as a form of tort regulation and in doing so, finances the civil litigation system. Tort law in action is often shaped by the absence or presence of liability insurance. Over the past century, tort law has continually sought available sources of recovery and often creates and expands the liability of individuals and businesses that are likely to be covered by or have access to liability insurance (Abraham 2008). As tort law expands, so does liability insurance.

For example, medical liability insurance grew with medical liability and became so intertwined with it that occasional medical liability insurance crises are widely interpreted as medical liability crises (Baker 2005a). Product liability doctrine has been facilitated by product liability insurance. Insurance companies responded by creating new forms of liability insurance to address the new liabilities when existing insurance was not available. Employment liability insurance rose as employment liability grew in the late nineteenth century. Moreover, state workers' compensation statutes enacted in the early twentieth century addressed the rising number of work-related accidents and the fact that the litigation system was unpredictable, expensive, filled with delays, and often led to small recoveries for people with work-related injuries. Workers' compensation laws allowed individuals suffering work-related injuries to receive compensation relatively quickly and without needing to obtain a lawyer and establish tort liability (Friedman and Ladinsky 1967; Talesh 2012a). Even the United States government took steps after the terrorist attack of 9/11/01 to design a first-party liability insurance scheme, to compensate victims' families who otherwise would have had to use the tort system to seek relief. The compensation fund established by British Petroleum in response to the oil spill that occurred in the Gulf of Mexico in 2010 provides a more recent example of how insurance-based principles are used to pre-empt tort liability. The rise of data breach and cyber security attacks has led to the emergence of cyber insurance (Talesh 2018).

Because of consumer debt and the ability of bankruptcy courts to discharge civil liabilities, liability insurance is the primary asset on which plaintiffs can count when seeking to collect tort judgments. Without liability insurance, many underserved individuals who were innocently injured as the result of a tort by another person would not be compensated through civil litigation. Liability insurance-in-action means that when an injured victim brings a tort claim against a tortfeasor, it is the liability insurer that often defends the claim and, if necessary, pays the claim (Gross and Syverud 1996). The presence of liability insurance consequently shapes how plaintiffs and defense lawyers litigate cases (Yeazell 2001). A plaintiff lawyer's decision to represent an injured victim in a tort case is predicated not merely on proving the elements of a tort, but on the defendant's ability to pay (Baker 2005b). Liability insurance determines who can be sued, for how much, and for what wrongs. For individuals bringing tort-based lawsuits, "liability insurance is a de facto element of tort law, [and a] de facto cap on tort damages" (Baker 2005b, 13). Even large corporations with significant assets often have liability insurance, but this relationship does not necessarily make litigation more efficient; large corporations involved in tort lawsuits often spend a significant amount of time convincing their own insurance companies to pay (Baker & Griffith 2010).

In one of the early but influential studies of the gap between the law on the books and the law in action, Ross's (1970) study of automobile insurance adjustors in the late 1960s revealed how liability insurance led insurance claims administrators to focus on interpreting and implementing tort law by primarily managing aggregate costs rather than determining the individual fault of defendants (Ross 1970). Thus, under Ross's study, liability insurance is a bureaucratic claim processing mechanism that renders large amounts of tort law into a simple, manageable set of compensation rules and procedures. Although Ross focused on automobile claims, others have demonstrated how tort claiming is highly connected to liability insurance in a number of other tort subfields (Abraham 2008; Abraham and Liebman 1993; Baker 2005a; Vidmar et al. 2005; Baker & Griffith 2010).

In sum, insurance does not just cast a shadow over the regulatory state, but influences lawyer behavior and finances the civil justice system. Risk, risk shifting, risk pooling, and risk reduction drive insurance influence in legal domains.

Risk and Actuarial Thinking Shapes the Criminal Justice System

While insurance operates in the shadow of the civil justice system and drives litigation decisionmaking and access to compensable relief for injuries, risk and risk assessment drives the criminal justice system. Jonathan Simon and Malcolm Feeley's "New Penology" argued that in the late twentieth century, a new model for managing dangerous persons emerged that relied heavily on statistical factors and actuarial methods of risk assessment (Feeley and Simon 1992).

The new penology focused on managing the risk of group populations and replaced the old model of individual moral culpability, clinical diagnosis, intervention, treatment, and retributive judgment. As a result, rehabilitation was replaced with managing career criminals and minimizing risk. In contrast to the correctional continuum of the 1960s and 1970s, "this new custodial continuum does not design penal measures for the particular needs of the individual or the community. Instead, it sorts individuals into groups according to the degree of control warranted by their risk profiles" (Feeley and Simon 1992, 459). Rather than relying on externally imposed social goals, such as public safety or inmate reintegration, criminal justice institutions in the new penology use internal system measures as evaluative performance indicators. The new penology and a focus on risk assessment sought to regulate levels of deviance, not intervene or respond to individual deviants or larger social or structural problems. Feeley and Simon's actuarial paradigm reflects a shift in penal theory and a disturbing trend in criminal justice systems' management of dangerous populations: "the optimism of the rehabilitative ideal that had played such an important role in 18th, 19th, and mid-20th century penology has been replaced by a pragmatic pessimism about the possibility of transformation" (Winick 2000, 59, n. 132 FN 134). In sum, taken collectively, risk and insurance principles penetrate civil and criminal justice systems in powerful ways.

Judges as "Dynamic Risk Managers" in Problem Solving Courts

As the prior sections show, risk and risk management shape regulatory behavior and the criminal and civil litigation systems. Insurance as a financier of the civil justice system and the new penology in the criminal context directly impact lawyer behavior and decisionmaking. Insurance and risk considerations impact whether attorneys take on cases and settle them in the civil context or plea bargain in the criminal context.

But *judicial* decisionmaking, especially in criminal cases, is also increasingly governed and influenced by risk management principles. For example, problem solving courts, including but not limited to, mental health, family, drug, domestic violence, juvenile, juvenile mental health, homeless, and community courts, are emerging across the country as viable alternatives to the traditional criminal process. In these courts, judges do not simply adjudicate cases, but tackle underlying social issues that led the offender to incarceration, while simultaneously diverting the offender out of traditional criminal court. Simply put, these interventionist courts within the criminal justice system seek to link defendants with long-term treatment as an alternative to incarceration. In addition to diverting criminal offenders from the normal criminal process, these courts attempt to address the underlying problems that often result in the incarceration of criminal offenders. Through treatment, supervision, and social services, problem solving courts try to shift the focus from evaluating blameworthiness to changing the future behavior of defendants in order to avoid recidivism. Working with many different stakeholders that act as intermediaries, the judge oversees the problem solving approach.

My prior empirical work on mental health courts suggests problem solving court judges act as dynamic risk managers. Rather than simply processing cases and perpetuating the revolving door, judges manage risk, attempt to resolve the underlying problem, and attempt to heal the defendant. With the assistance of team members—including the public defender, prosecutor, and other behavioral specialists—the judge performs the following three tasks: (1) she conducts a risk assessment in order to evaluate the defendant's potential to harm himself and the public; (2) she evaluates and implements a treatment plan designed to manage and reallocate the defendant's risk; and (3) she monitors the risk over a period of time, often requiring frequent return visits by the defendant (Talesh 2007). When managing risk, mental health court judges function as hybrid social workers (diagnosing and implementing a plan) and probation officers (monitoring the offender to ensure compliance). When functioning in its ideal form, the collaborative, team-oriented approach of mental health courts shifts the focus of the criminal process toward healing and away from punishment. Although risk management techniques may have always been embedded in judges' roles, these techniques are now becoming more overtly a part of the judicial routine.

There is some evidence to suggest that the new penology concerns raised by Simon and Feeley are less pervasive in the risk management approach employed by problem solving court judges. For example, mental health court judges focus on each individual in an attempt to divert, treat, and reintegrate them while minimizing future criminality and potential harm to others. The risk management approach is adjustable, individualized, and does not merely sort dangerous people into groups in order to incapacitate them. The variety of approaches judges use are all calibrated to the specific risk presented. Judges try to make decisions about proper interventions, monitoring, and supervision of each individual offender and focus on healing the specific individual. In fact, the assessment of dangerousness is not heavily dependent upon actuarial models, but instead relies on clinical predictions that are continuously updated and adjusted based on the defendant's decreasing or increasing level of risk. Thus, when functioning properly, mental health courts appear closer to an older medical model than the punitive model currently in place because they focus on healing and intervention as opposed to incapacitation. Nonetheless, whether discussing perceived dangerous criminals or more low-level criminals that find their way into problem solving courts, both rely on risk as an assessment tool.

INSURERS AS INTERMEDIARIES SHAPE THE MEANING OF LAW AND COMPLIANCE

Thus far, I have discussed formal interventions and influences on public legal institutions. Insurance and more broadly risk act as a governance mechanism and regulator for society, impact the civil and criminal justice legal systems, and the role of judges. Civil and criminal litigants' access to justice is mediated through insurance and risk management principles. However, risk, risk management, and insurance often occupy a space between the law on the books and the law in action. Insurer intervention in society as a de facto regulator goes beyond mere policy language.

Scholars are also increasingly focusing on how rule or legal intermediaries shape organizational construction of law (Edelman 2016; Edelman & Talesh 2011; Talesh 2015a). 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). Because laws regulating organizations are often ambiguous with respect to how to comply and government oversight is often lacking in significant areas due to resource constraints and lack of political will, the insurance field, including but not limited to insurance companies, brokers, agents, administrators, risk managers, act as intermediaries with varying degrees of success. Insurance companies as intermediaries often influence how organizations understand law and compliance and shape the meaning of laws designed to regulate various organizations. More recently, scholars are increasingly examining how the processes and mechanisms through which insurers act as intermediaries between what formal laws state and how organizations should go about complying with such laws. The following briefly highlights a few case studies that demonstrate insurers as intermediaries is very much a mixed bag.

Cyber Insurers as Compliance Managers

Cybersecurity risks (*i.e.*, "loss exposure associated with the use of electronic equipment, computers, information technology, and virtual reality") are among the biggest new threats facing businesses and most consumers. Data breach events cause financial and public relations damage and threaten an organization's survival. Organizations also face compliance challenges as they are forced to navigate between the various federal and state laws and regulations concerning the collection and use of personal data. Despite these threats, prevailing empirical research suggests private organizations are not significantly changing their behavior. Although many organizations do have formal policies in place, the majority of organizations do not believe that they are sufficiently prepared for a data breach, do not devote adequate money, training, and resources toward protecting consumer's electronic information from data breaches, and fail to perform proper risk assessments (Talesh 2018).

Recognizing this under-preparation and under-compliance gap, the insurance field stepped in and, in the last decade, began offering cyber insurance. Cyber insurance is insurance designed to provide both first-party loss and third-party liability coverage for data breach events, privacy violations, and cyberattacks. Although there is variation in the types of policies being offered, insurers offering cyber insurance provide some risk shifting for the costs associated with having to respond, investigate, defend, and mitigate against the consequences surrounding a data breach event, cyberattack, and privacy violations. Organizations are increasingly purchasing cyber insurance to deal these new risks.

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. In addition to transferring risk, my empirical research suggests that cyber insurance provides 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 are acting as compliance managers and trying to prevent, detect, and respond to data breaches. They also try to help organizations comply with various privacy laws. Thus, 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 (Talesh 2018).

In doing so, insurers absorb many of the responsibilities of an organization's information technology department with risk management services that they offer and try to prevent and detect data breaches before they occur (Talesh 2018). Many of the issues that arise during a data breach that are often handled by internal departments within an organization, such as legal, compliance, information technology and public relations/crisis management, are now being assisted and guided by insurance industry professionals or third-party vendors that insurance companies offer to assist organizations at a reduced fee. Cyber insurance provides a pathway for insurance institutions to act as external compliance monitors and managers of organizational behavior with respect to data theft. Given the under-preparation and under-compliance by businesses, institutionalized risk management techniques developed within the insurance field can potentially improve organizational practices and compliance concerning data breach.

Cyber insurers engage in risk and loss prevention on behalf of the organizations that purchase their insurance and absorb many of the functions of the organizations in terms of preventing risks. Risk prevention takes a series of forms, including conducting cyber health checks and audits that evaluate the kinds of cyber security practices that the organization is maintaining. Risk prevention tools and security ratings act as a disciplinary instrument over organizations. The scans and health checks are sometimes used as a precondition for determining whether a potential company is eligible for cyber insurance.

Insurers construct the meaning of compliance through a series of written value-added services that focus on advising organizations on how to prevent and detect data breaches. Cyber insurers also evaluate an organization's written policies and advise organizations on how to avoid fines and liability for data breach. In particular, these written audits focus on interpreting privacy laws and preventing breaches that lead to regulatory fines. In this respect, insurers are shaping the way that private organizations comply with privacy law challenges on the ground.

Insurers also provide access to services aimed at responding to, investigating, defending, and mitigating against the consequences surrounding a data breach event or privacy law violation. Insurers contract with third-party vendors that the insured can use or have departmental units that deal with various cyber-related problems. Typically, the insured receives a reduced premium to use the insurer's vendors. Cyber insurers are providing risk response well beyond the scope of what insurers typically handle.

Insurers provide organizations access to a designated panel of lawyers and law firms that can assist in managing the legal issues that arise when a data breach occurs. Cyber insurers or their third-party vendors also provide organizations access to and coverage for forensic cyber security experts. These experts help organizations identify the source and cause of the data breach, contain the breach, and ultimately restore the network processes that may have been damaged as a result of the breach. Cyber insurers offer a series of preapproved public relations and crisis management firms that the insured can retain at a reduced premium. These firms provide advertising or related communications to protect and restore the insured's reputation following a breach event. When evaluating the totality of services that the insurers offer organizations, such as the legal services, forensics, and crisis management, insurers can be viewed as managers and quasi-regulators of cyber security risks. Whether insurer interventions improve organizations' data security is an open question. Future research in this area should evaluate the degree that insurer regulatory interventions lead to improved compliance with privacy law and enhanced data security.

Directors and Officers As Neglectful Intermediaries

Despite the obvious financial incentives insurers have for getting involved in the cyber security risk management market, the cyber insurance example highlights how insurer risk management services can potentially help curb the under-compliance and under-preparation gaps that organizations encounter when dealing with cyber threats. In particular, insurance company interventions aimed at preventing, detecting, and responding to cyber threats simultaneously assist the regulated entities—organizations who do not want to experience a data breach—but also help consumers—who do not want their private information compromised. Although certainly not perfect, insurance institutions nudge corporations toward protecting client and customer data.

Insurance companies do not, however, always have positive outcomes as corporate regulators. For example, insurance companies offering directors' and officers' liability insurance are not always effective substitutes as regulatory intermediaries. In particular, direct litigation by shareholders is an important regulatory mechanism over U.S. corporations. Broadly, "shareholder litigation" refers to all civil actions brought by current or former shareholders of a corporation against the corporation or its managers for losses the shareholders suffer as a result of actions taken by the corporation and its managers. In response to the very real threat of shareholder litigation, officers and directors of corporate entities often obtain Directors' and

Officers' Liability Insurance (D&O insurance). This insurance protects officers and directors from personal liability in the event of shareholder litigation. Moreover, D&O insurance also protects the corporation itself from liability it may have in connection with shareholder litigation. D&O insurance transfers the obligations of the prospective bad actor (officer, director, or corporation itself) to an insurer which pays for defense and indemnification. Thus, one concern is that D&O insurance potentially decreases the deterrence function of shareholder litigation by making it easier for directors and officers to pass these risks and responsibilities to the insurance company.

By offering D&O insurance, however, insurers act as a third-party intermediary in the regulatory scheme. In this situation, directors' and officers' insurers have a great opportunity to influence corporate conduct through the insurance relationship (underwriting, monitoring and the settlement of claims) and potentially help directors and officers avoid shareholder litigation. Successful oversight of directors and officer behavior and conduct would preserve shareholder litigation as a regulatory device and encourage corporate actors to engage in compliant behavior.

However, empirical research suggests that D&O insurers rarely discourage wrongful and even illegal behavior of directors and officers (Baker and Griffith 2010). Lack of intermediary intervention by insurers significantly weakens the deterrent effect of shareholder litigation and thus undermines the potential for these lawsuits to act as forms of regulation (Baker and Griffith 2010). Despite having financial incentives to do so, empirical research suggests D&O insurers neither monitor nor provide loss prevention programs to the corporations they insure. In particular, D&O insurers do not condition the sale of insurance on adopting loss-prevention policies (Baker and Griffith 2010). Moreover, brokers and risk managers note that loss prevention advice was not very valued or binding on public corporations. Equally important, insurers rarely try to influence or change corporate behavior or condition insurance coverage on adopting what insurers might consider good corporate governance standards. The D&O insurance example highlights an example of how insurer risk management does not induce positive regulatory outcomes.

Employment Practice Liability Insurance –Framing Law As Risk

Whereas D&O insurers had opportunities to engage in loss prevention and discourage wrongful or even illegal conduct but failed to do so, employment practice liability insurers do offer risk management and loss prevention advice but do so in a way that often weakens the meaning of anti-discrimination law and reframes anti-discrimination law around a focus on risk and litigation avoidance.

The rise of Employment Practice Liability Insurance (EPLI) illustrates how insurance institutions mediate the meaning of compliance with civil rights legislation and how these constructions of compliance end up being deferred to and legitimated by public legal institutions. In response to perceived threats of employment discrimination and harassment lawsuits, insurance companies began offering EPLI. Unlike prior forms of business insurance that expressly excludes coverage for liability arising out of employment practices, EPLI policies provide insurance defense and indemnification coverage to employers for claims of discrimination (e.g., age, sex, race, disability) and other employment-related allegations made by employees, former employees, or potential employees.

Insurers increasingly offer EPLI and employers increasingly purchase this insurance. Whereas only a few insurance companies in the 1990s offered EPLI, now over seventy insurance companies offer EPLI and many large employers purchase EPLI. Insurers play a role in averting such risk and act as a regulatory intermediary because employers have an incentive to avoid discrimination; however, insurers do so in a way that focuses on avoiding litigation rather than fostering a discrimination-free work environment.

Specifically, my fieldwork revealed how the insurance field (insurance companies, agents, brokers, and risk management consultants), through EPLI and the accompanying risk management services that the field offers, construct the threat of employment law and influence the nature of civil rights compliance (Talesh 2015a). 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, my empirical data suggest that 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. By framing employers' legal environment in terms of uncertain legal risk,[2] heightened litigation risk,[3] and the need for risk reduction,[4] the insurance

2 Uncertain legal risk refers to the risk of loss to an organization based on some violation of law. My empirical research reveals that insurers frame employers' legal risk as uncertain, vague, and unpredictable (Talesh 2015a).

3 Insurance field actors heighten the litigation risk facing employers by routinely discussing the growth, burden, and cost of employment lawsuits in documentary data and webinars (Talesh 2015a).

4 Once the insurance field frames the legal risks facing employers as uncertain but elevated and likely to occur, the insurance field encourages employers and risk management consultants to

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. Insurers encourage employers to purchase EPLI because these insurance policies and the value-added risk management services that insurers offer will reduce employers' risk. In particular, EPLI insurers offer a variety of risk-management services to employers that try to provide a regulatory check on employer discriminatory practices.

Whereas insurers in the privacy context focus less on interpreting or influencing the meaning of privacy law, EPLI insurers influence the meaning of compliance with anti-discrimination laws in a number of ways. First, conferences, training programs, loss-prevention manuals, and insurance policy language provide an opportunity for the insurance field actors to build discretion into legal rules. In other words, insurance companies develop policy language, which provides work-arounds to certain legal rules clearly forbidding insurance coverage for certain acts or omissions in civil rights contexts (Talesh 2015a).

Second, insurance companies also reframe legal rules and principles around a nonlegal risk logic that focuses on averting risk and making discrimination claims against employers more defensible. For example, U.S. Supreme Court decisions are framed by insurance field actors at conferences that insurers and employers attend around shifting risk and avoiding liability. Thus, unlike the directors and officer context where insurers miss opportunities to engage in insurance loss prevention, insurers do engage in loss prevention, but do so in a manner that is filtered by

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avert or reduce this risk by purchasing EPLI insurance and various risk-management services (Talesh 2015a).

risk-management logics. Law is viewed and understood as risk. While my data suggest EPLI and the series of risk-management services offered with the insurance policy can potentially improve employment practices and compliance, they also suggest that EPLI risk-management services may at times shape compliance in a way that leans more toward making claims defensible rather than fostering a discrimination-free workplace. Despite the questionable regulatory results emanating from insurers as risk managers in the employment context, public legal institutions such as courts, legislatures, and regulatory institutions afford EPLI considerable deference by authorizing, requiring, or encouraging public institutions to purchase EPLI and use the risk-management services that insurers offer. In doing so, I extend legal endogeneity theory into the insurance context and show how in this instance, risk and managerial values work in a complimentary way to shape the meaning of anti-discrimination law (2015a).

In sum, the content and meaning of law and regulatory policy in this instance is determined by private organizations, such as insurance companies. This research extends and refines theories of legal endogeneity in important ways. In this instance, the insurance field maintains a conception of employment law filtered through managerial and risk values, which highlights the enhancement of employers' formal structures that demonstrate compliance and rational governance. The insurance industry communicates and markets this vision by highlighting the risk of not developing policies and procedures, as well as by providing a protective net for employers in the form of EPLI insurance coverage. The government adopts this conception into its policies by encouraging, authorizing, and sometimes requiring governmental institutions to purchase EPLI and the accompanying risk management services. Thus, legal mandates requiring organizations to purchase EPLI look like they emanate from public legal institutions, such as courts, legislatures, and regulatory institutions, but in reality the mandates are generated from the insurance field's responses to employment laws.

Taken together, these case studies reflect a more recent turn toward research directed at looking at how insurance institutions construct the meaning of law and compliance for organizations. As these cyber, D & O, and EPLI studies suggest, organizations across the world are turning to intermediaries, such as insurance companies, to assist with complying with the vast array of laws and regulations. Scholars have explored the relationship between loss prevention and policyholder moral hazard across a variety of domains including legal malpractice (Cohen 1997), medical malpractice (Baker 2005a), motion pictures (Hubbart 1997), and most recently policing (Rappaport 2017). Thus, across a variety of areas, insurers regulate corporations. These studies that focus on how insurance companies tangibly act as risk regulators reveal that insurance and risk management as a regulatory and legal tool should be viewed on a continuum. Acting as intermediaries, insurers are capable of nudging organizations to normatively appropriate behavior, but also ripe with potentially problematic and harmful consequences for access to justice and society more broadly.

CONCLUSION

Consistent with the NLR tradition, this chapter demonstrates law in society is increasingly shaped by non-legal institutions. I focus not just on the bottom up or top down constructions of law but the way that legal intermediaries work in between this space and play a major role in interpreting, translating, and constructing law in society in ways that at times facilitate and inhibit access to justice. Drawing from new institutional studies of law and organizations, this chapter demonstrates how insurance and more broadly, the organizations and actors that make up the insurance field, and the dominant logic operating in that field (risk), influence law and legal institutions. Risk is a template through which we govern. Insurance and the insurance field more broadly, anchored in a logic of risk, reshape the state, act as disciplining instruments for individual and collective behavior, and often influence how we conceptualize fairness and deliver justice in society. Law plays a pivotal role in each of these transformations. But the insurance field is shaping law and legal institutions each step of the way.

Insurance policy language acts as a regulatory force and shapes the structure of the civil justice system. In this way, insurance institutions as intermediaries facilitate and inhibit access to justice in society. More broadly, conceptions of risk influence criminal courts' assessment of defendants in traditional and problem-solving criminal courts. Thus, the insurance field's logic of risk goes well beyond the insurance industry or insurance products and services, but impacts how key legal actors and institutions operate in society. Insurance influences society not just by policy language, but by a myriad of risk management services offered when purchasing insurance. Here, insurers are not simply pooling or spreading risk or providing litigation defense costs and indemnification, but are attempting to influence the nature of compliance in organizations.

The empirical turn towards studying the processes and mechanisms through which insurers act as risk regulators and intermediaries is significant. Focusing on the forms and functions of insurance and analyzing the conditions under which insurance companies impact society are crucial. However, more recent empirical explorations of insurer risk management that are also highlighted in this chapter focus on the *processes* through which insurance institutions construct the meaning of compliance and law. Insurance as regulation is not just about deterrence, moral hazard, and loss prevention focus. The fact that the insurance field transforms the moral logic of anti-discrimination law through a risk management filter demonstrates that the insurance-as-regulation narrative is not simply one of assessing how well liability insurance delivers law's deterrence signal. Rather, insurance as regulation is also a story of how insurance organizations *transform* that deterrence signal.

This chapter explores what governing through risk looks like as society increasingly gravitates toward thinking about legal problems from a lens of risk. Because there is variation in the extent to which insurer risk management and compliance programs embrace or neglect formal adherence to privacy, corporate, and employment laws, future studies should examine under what conditions insurers, in their capacity as risk managers, facilitate or inhibit corporate social responsibility and the goals of regulation. Preliminarily, we see that insurer risk management services and intermediary interventions in organizations may reflect some best practices, lead to improved written policies and procedures, promote a better work culture, and induce greater compliance with law. Thus, there is a potential positive role for insurers to play. This is especially important since public legal institutions are incapable of regulating every aspect of society. To the extent insurers can induce lawful and normatively appropriate behavior by individuals and organizations, there is a net benefit for society.

On the other hand, insurer risk management services make it easier for organizations to develop policies and procedures without actively drafting them. Insurers may decouple or shift responsibility for hard normative judgments away from organizations. In doing so, organizations will not be as responsible for making moral, ethical, and legal choices involved with compliance. Also, insurance company guidance on these issues sometimes focuses on how to avoid litigation as opposed to providing steps to build a more legally compliant business environment.

Regardless of one's normative position on the insurance field's influence on society, insurance influence is here to stay and is growing. To the extent risk is a template through which we govern society and that insurance and risk principles are influencing law and legal institutions, scholars interested in the study of insurance should explore the insurance field's influence on law and how insurer risk management techniques facilitate or inhibit inequality in society and transform organizational and individual behavior and expectations.

I have used the insurance field as a pathway to not just exploring how insurers shape law and influence access to justice in civil and criminal settings, but also to explore the value of doing such an analysis using an NLR framework. In particular, the research drawn upon in this chapter is multi- and interdisciplinary, theoretically-informed research that translates social science for lawyers. In particular, NLR takes seriously the interplay between formal legal institutions and law-in-action. Most importantly, this interplay is mediated by legal intermediaries such as the insurance field. We hope scholars doing empirical work on law—whether social scientists or law professors—will pay particular attention to the role that legal intermediaries play in how law is constructed, interpreted, and implemented in everyday life.

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