Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace

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Many employers create internal procedures for the resolution of discrimination complaints. We examine internal complaint handlers' conceptions of civil rights law and the implications of those conceptions for their approach to dispute resolution. Drawing on interview data, we find that complaint handlers tend to subsume legal rights under managerial interests. They construct civil rights law as a diffuse standard of fairness, consistent with general norms of good management. Although they seek to resolve complaints to restore smooth employment relations, they tend to recast discrimination claims as typical managerial problems. While the assimilation of law into the management realm may extend the reach of law, it may also undermine legal rights by deemphasizing and depoliticizing workplace discrimination.

Civil rights law, in particular Title VII of the 1964 Civil Rights Act (Title VII), creates administrative and legal channels for redressing complaints regarding equal employment opportunity and affirmative action (EEO/AA).[1] Employers cannot forbid employees to use these formal legal channels to express their EEO/AA complaints, but they can encourage employees to use internal complaint procedures in an attempt to satisfy complainants and to insulate the employer from lawsuits, liability, and intervention by regulatory agencies.

To the extent that employers handle EEO/AA complaints internally, they essentially privatize the adjudication of public

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[1] Employees may file complaints with the Equal Employment Opportunity Commission (EEOC), which was created by Title VII, or with state or local EEO agencies. The EEOC or state or local agency may attempt to conciliate the dispute and, if that fails, may pursue legal action. If the agency does not pursue legal action, it must issue a "right to sue" letter, which gives the employee the right to initiate a lawsuit.

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rights.[2] This has enormous potential to affect the rights of minority and female employees who claim to be the victims of discrimination, as well as the rights of those (primarily white and male) employees who are accused of discrimination.[3] Similarly, the privatization of EEO/AA complaint handling has the potential to affect both employers' liability for discrimination and their practices to prevent and deal with future problems of discrimination. Thus, the personnel within organizations who are charged with handling discrimination complaints ("complaint handlers") can critically affect the impact of civil rights law within organizations. Since the vast majority of EEO/AA (and other) complaints never reach the courts or even administrative agencies (Miller & Sarat 1981), the internal handling of EEO/AA disputes largely determines the nature of the environment that employees work in and the de facto civil rights in employment. Thus, it is especially important that sociologists of law study the construction of EEO/AA (and other) law *within* the firm.

In this article we examine the role of law in complaint handlers' orientations toward EEO/AA complaints within organizations. In particular, we are interested in how both legal and organizational values shape complaint handlers' conceptions of EEO/AA law and complaint resolution and the implications of these conceptions for the ways they handle discrimination complaints. To address these issues, we conducted semistructured interviews with complaint handlers in ten organizations. The interview data reveal complaint handlers' conceptualization of their work. These data do not necessarily reflect complaint handlers' actions or the complaint-handling process as experienced by the parties to the complaints or by other employees. While the latter also deserve attention, our focus is on complaint handlers' working principles and conceptions of EEO/AA complaint handling, which reveal much about the construction and role of law within organizations.

Theoretical Perspectives on Complaint Handling

Two bodies of social science literature offer theoretical guidance for our inquiry into employers' handling of EEO/AA complaints. Organization theory addresses organizations' re-

[2] Law, including EEO/AA law, creates rights for individuals but with the purpose of pursuing broader public goals, e.g., the elimination of discrimination. Silbey and Sarat (1989:472) argue: "Rights have a clear public aspect in the sense that they imply a willingness to make demands on the state, to use public institutions, or to appeal to collective sentiments for validation of those claims."

[3] We refer to these employees as complainants and respondents, respectively. Note that in legal and administrative forums, the respondent is the employer rather than an individual within the organization who is accused of committing discriminatory acts.

sponses to their legal environments generally and thus has implications for employers' motivations for establishing complaint procedures and their objectives in complaint handling, as well as for the internal structural constraints that may affect complaint handlers' approaches to complaint resolution. The literature on alternative dispute resolution (ADR), which addresses the characteristics and effects of dispute resolution forums that are not constrained by formal legal process and rights, also has important implications for dispute handling within organizations.

Organizations and Legal Environments

The law and society tradition holds that the formal legal process generates and shapes dispute handling outside of the formal legal process (e.g., Macaulay 1963, Selznick 1969). A view that has greatly influenced recent law and society research holds that laws tend to cast shadows over private negotiations so that, overall, the outcomes of private negotiations should be similar to the outcomes of formal litigation (Mnookin & Kornhauser 1979). Organization theory, however, suggests that because of efficiency and legitimacy concerns, the shadow of law may be significantly reshaped in the organizational context.

Rational organization theories emphasize organizations' efforts to adapt efficiently to environmental conditions. Thompson (1967) argues that "under norms of rationality, organizations seek to buffer environmental influences by surrounding their technical cores with input and output components." Although Thompson was referring to the practice of stockpiling supplies so that market fluctuations would not affect production, "buffering" is also relevant in the context of organizational response to law. Organizations may create complaint-handling procedures in part to buffer or insulate their core activities from the threats posed by their legal environment. By handling complaints internally rather than allowing them to reach formal legal channels, organizations avoid the cost, time, and harm to public image that may result from litigation. Thus, internal complaint handling enhances organizational efficiency by insulating organizations (to varying extents) from interaction with the external legal system. A complaint-handling procedure is an adaptive mechanism, facilitating organizational rationality in the face of (what is to management) environmental irrationality. The rational perspective, then, suggests that employers' primary goal in complaint handling will be to keep the complaints out of the formal legal system.

Insulating the technical core does not necessarily imply compliance; it may instead imply greater emphasis on grievance *resolution* without a concomitant effort to reduce discrimi-

nation. In a study of firm risk management in dealing with products liability law, for example, Sanders (1989) finds that in the face of uncertainty, organizations may adopt a "process defense," investing more effort in safety procedures that create the *appearance* of compliance than in safe products per se. Other studies of compliance also emphasize organizations' capacity to resist compliance with law, especially when compliance is seen as requiring irrational behavior (Katz 1977; Vaughan 1982, 1983; Wirt 1970; Blumrosen 1965). Vaughan (1982, 1983), for example, argues that there are structural incentives for organizational deviance: the competitive environment in which organizations operate, as well as many internal processes such as interdivisional competition, encourage individuals within organizations to resist compliance with laws that might interfere with organizational success. Similarly, Macaulay (1986) points to structural barriers to organizational compliance with law. In explaining how a large midwestern university managed to resist affirmative action, he points to the lack of widespread acceptance of affirmative action; the diffusion of responsibility for affirmative action due to the decentralized nature of university administration; social networks among regulators and the regulated that deflect enforcement; and government's reluctance to use severe sanctions to deter noncompliance. Studies of regulatory agencies reinforce this picture, showing that the agencies and their field agents tend to negotiate the meaning of compliance with the organizations they regulate (Hawkins 1984; Clune 1983; Diver 1980; Blumrosen 1965).

Both rational organization theory and the literature on compliance, then, emphasize factors that should minimize the (direct) influence of law on organizations. The compliance literature points to elements of the regulatory process and the structure of organizations that motivate resistance to law, whereas theories of organizational rationality stress organizations' efforts to insulate themselves from legal threats.

Institutional organization theory, however, challenges the idea that organizations are motivated only or primarily by efficiency concerns and suggests that there is another important component to organizations' response to law: normative pressures for compliance both within the organization and in the larger environment. Institutional theory suggests that organizations incorporate legitimated models from their normative environments as a means of demonstrating attention to institutionalized norms. Selznick's early (1969) institutional work on industrial justice suggests that everyday interactions and events motivate organizational participants to draw on the fund of public legal experience to resolve organizational problems. Over time, this process leads to a gradual incorporation of

principles of legality or the progressive reduction of arbitrariness. More recent institutional theory holds that organizations seek to become isomorphic with their normative environments by adopting institutionalized structures and practices, irrespective of their technical value (Meyer & Rowan 1977; DiMaggio & Powell 1983; Meyer & Scott 1983; Powell & DiMaggio 1991).

Edelman (1990, 1992) extends this theory to legal environments, arguing that organizations elaborate their formal structures to create visible symbols of attention to law and legal principles. Discrimination complaint procedures are an example of these symbolic structures; they signify attention to civil rights laws and due process generally. Thus organizations may create discrimination complaint procedures for their legitimacy value as much as for their efficiency value. Edelman (1992) finds that public sector organizations and organizations with federal contracts are especially likely to create symbolic structures; these organizations depend heavily on the public for approval and resources and are therefore more sensitive to normative pressure. Organizations with personnel departments are also more likely to create symbolic structures, a finding she attributes to the fact that the personnel profession is an important carrier of institutionalized practices (DiMaggio & Powell 1983; Edelman et al. 1992).

However, because civil rights law is ambiguous, procedurally oriented, and has weak enforcement mechanisms, it does not guarantee that the symbolic structures organizations create in response to law will cause organizations to realize legal ideals; in the case of discrimination complaint procedures, law does not assure that these structures will produce results similar to those of legal forums for discrimination complaints (Edelman 1992). The substantive effect of discrimination complaint procedures and other symbolic structures is likely to depend on the commitments and role of professionals within organizations (Edelman et al. 1991, 1992).

Although professionals within organizations who handle discrimination issues are often considerably more committed to the goals of civil rights laws than are the top administrators who hire them, their structural position as part of management operates as a serious constraint on their ability to advocate and achieve significant reform (Edelman et al. 1991). Affirmative action officers who take a strong advocacy stance tend to be fired or pushed out of the organization, with little legal recourse (Chambliss 1989). Where pressure from community or employee groups constitutes a counterpressure to the conservative effects of affirmative action officers' career concerns and identification as management, professionals charged with administering legal requirements tend to adopt a neutral stance, asserting that their professional expertise allows them

to mediate between the competing interests of management and aggrieved employees or job applicants (Edelman et al. 1991).

The literature on organizations, then, offers somewhat diverse views of how organizations will respond to civil rights laws, which in turn have different implications for the internal handling of discrimination complaints. Rational accounts suggest that organizations will attempt to insulate themselves from legal threats and that they are strongly motivated to resist laws that interfere with traditional managerial prerogatives. Institutional arguments suggest that organizations are responsive to their legal environments and adopt institutionalized practices and structures for their legitimacy value. This implies that managers charged with handling discrimination complaints may seek methods of compliance that *both* minimize the interference of legal requirements and demonstrate attention to legal ideals. The literature on alternative dispute resolution offers some insights into how that might be accomplished.

Alternative Dispute Resolution

The literature on alternative dispute resolution (ADR) suggests that even if law exerts a shadow over organizations, the informal nature of dispute resolution within organizations is likely to change the focus of complaint handling from legal rights to the individual disputants' problems or interests. The ADR literature does not, for the most part, address dispute resolution within work organizations; rather it focuses on various private and court-annexed forms of dispute resolution that are generally available to disputants who would otherwise take their cases to courts. However, many of the issues raised by that literature also pertain to employers' internal complaint procedures, which might be called *internal dispute resolution* (IDR).[4] Like most forms of ADR, IDR is less constrained by formal legal procedure, statutory rights, and precedent than are courts. Insofar as the ADR literature addresses the characteristics, roles, and effects of dispute resolution procedures that operate in the absence of legal constraints, it contains a number of important insights for our inquiry into the handling of discrimination complaints in corporate forums.

The literature on ADR reflects a tension between two perspectives: (1) a critique of the courts and formal adjudication as nonresponsive to many social needs, and (2) a critique of ADR, arguing that informal alternatives to legal forums undermine

[4] IDR is an example of what Galanter and Lande (1992) refer to as tribunals embedded within organizations that are not in the adjudication business but use the tribunals as part of their internal regulatory process. See Meacham (1984) and Westin & Feliu (1988) for a description of workplace dispute resolution techniques.

legal rights by shifting the focus away from law to other realms. Proponents and critics of ADR generally agree that ADR tends to deemphasize legal rights and emphasize party interests and needs, but they disagree about the effects and desirability of that displacement. The following discussion considers these perspectives and their implications for IDR.

Proponents of ADR cite a number of advantages of ADR over formal litigation; three are particularly relevant to workplace dispute resolution. First, these proponents see the courts as overly concerned with legal rights. They contend that parties have interests or needs that often differ from or go beyond legally justifiable claims and that mediators can help parties to discover their real interests, which may differ from the interests that the parties articulate (Moore 1986; Fisher & Ury 1981; Menkel-Meadow 1984). A second (and related) point is that while courts are limited in the types of problems they can redress, ADR may allow "extralegal justice," or the achievement of goods or rights to which parties have no legal right. Luban (1989:409) gives the example of a mediator helping disputants in an employment discrimination suit in which the plaintiffs have a legitimate grievance but one that would not entitle them to any legal remedy. ADR may offer plaintiffs their only hope of justice in such an instance. Third, proponents argue that relative to courts, ADR offers greater flexibility in fashioning solutions to problems and is therefore more likely to satisfy both parties (Bush 1989; Menkel-Meadow 1984; Pearson & Thoennes 1985; Wolf et al. 1985).[5]

In the employment context, these arguments suggest that, relative to courts, complaint handlers in organizations will be less concerned with the realization of formal legal rights, that they will broadly define the scope of EEO/AA-related complaints they will redress, and that they will provide remedies of a different nature with greater attentiveness to the parties' (stated) wishes and needs.

Critics of ADR do not generally disagree with proponents about the characteristics of ADR, but they do disagree with the societal implications of informalism in dispute resolution. Whereas proponents see the shift from rights to needs as beneficial to all parties, critics of ADR argue that legal rights are important—especially when they protect people who do not enjoy political and social power—and that ADR may seriously undermine those rights by ignoring them (Adler et al. 1988), lowering parties' expectations of what they are entitled to (Crowe 1978; Luban 1989), or changing the way in which dis-

[5] Others question the validity of these arguments (e.g., Galanter 1988; Esser 1989; Tyler 1989; Luban 1989) or present empirical evidence suggesting that differences may be due to characteristics of parties or their disputes rather than those of dispute-handling forums (e.g., Vidmar 1984, 1985, 1987).

putes are framed (Hofrichter 1987; Silbey & Sarat 1989; Macaulay 1986; Merry 1990). The framing of disputes in legal or extralegal discourse is likely to be especially important for the resolution of discrimination complaints in organizations. By determining the discourse applied to a problem, those in control of the dispute resolution process narrow the set of possible solutions; thus, the power to categorize problems is a central feature of power exercised by those who handle complaints (Merry 1990; Edelman 1977). The ADR literature points to several ways in which legal rights are deemphasized in alternative dispute handling forums, especially mediation.

Silbey and Sarat (1989:479) identify a shift from legal rights to parties' needs:

> ADR advances a non-rights based conception of the juridical subject. . . . Eschewing rights, ADR proponents deploy the discourse of interests and needs. They reconceptualize the person from a carrier of rights to a subject with needs and problems, and in the process hope to move the legal field from a terrain of authoritative decision making where force is deployed to an arena of distributive bargaining and therapeutic negotiation.

The ramifications of the shift from rights to interests and needs goes beyond the immediate case: claims based on rights are generalizable whereas claims based on interests and needs are more often individual in nature (Minow 1987; Silbey & Sarat 1989). To the extent that dispute resolution forums transform disputes from rights claims to individual problems, they depoliticize those claims and preclude future claimants from grounding their claims in precedent. The individualization of disputes in ADR occurs largely through the redefinition of rights-bearing subjects as individuals with interpersonal or psychologically based problems (Hofrichter 1987; Merry 1990).

In his study of neighborhood dispute resolution (NDR), Hofrichter (1987) finds that mediators tend to redefine social problems as interpersonal problems, thus divorcing each instance of conflict from other similar cases and from the structural setting in which it occurs. The individualization of conflict inhibits social reform by making similar experiences by other members of a social group (e.g., tenants, employees) irrelevant. Hofrichter (1987:132) writes: "Legal principle is translated into psychological and personal terms, focusing on behavior rather than entitlement. Conflict becomes private, excluded from public scrutiny and made irrelevant to a public interest or, more directly, to a class interest." The result of the individualized focus of NDR, according to Hofrichter, is that disputants move away from claims based on rights, justice, or contract and instead identify themselves as the source of the problem.

Merry's (1990) study of the handling of family and neigh-

borhood disputes through both mediation and the lower (specialty) courts is consistent with Hofrichter's account in that she finds that the language and logic of therapy and morality is far more prevalent in the discourse of mediators than is the language and logic of legal rights. However, she also finds the discourse of morality to be prevalent among lower court personnel: she reports that lower court officials are likely to redefine issues in moral or therapeutic discourse in the process of referring cases to mediation.[6]

These arguments have important implications for the employment context because they suggest both that there is a potential for IDR to undermine legal rights and that the orientation and discourse of complaint handlers may critically affect the scope of claims and of remedies. To the extent that IDR complaint handlers focus on the parties' needs or interests rather than on rights, and to the extent that IDR complaint handlers employ the logic and discourse of therapy or morality rather than of rights, especially in the domain of EEO/AA law, there is a potential for the rights of minority and female employees to be undermined substantially. Claims framed in terms of rights are often absolute: in theory, law grants minorities and women in the workplace an absolute right not to be discriminated against by their employers.[7] When claims are framed in terms of interests rather than of rights, they become more conducive to compromise,[8] which is important in modes of dispute resolution like mediation where resolution requires agreement between the parties. When the logic of problems and therapy is brought to bear on employees' claims of discrimination, the claims are effectively individualized and depoliticized. In cases where one party (in this case, the employee) has a legitimate rights-based claim, then, the shift from legal logic to the logic of interests, needs, or problems requiring therapy can undermine both legal rights and the public policy underlying those rights.

A second critique of ADR that is relevant to the employment context is that the lack of formal due process protections (such as the right to an attorney) renders many forms of ADR

[6] Merry also reports that judges in the lower courts often give moral lectures after dealing with legal issues. Although Merry makes few distinctions between the discourses of mediation and the lower courts, it is noteworthy that the courts are at least formally constrained by legal procedure, rules, and precedent; they must address the legal issues even while giving moral lectures. Further, specialty courts such as family and juvenile courts tend to operate more informally and more according to a therapeutic model than do courts of general jurisdiction (McLauchlan 1977).

[7] We do not argue that such rights actually produce discrimination-free workplaces. See, e.g., Edelman 1992. We mean simply that the existence of the right allows *claims* to be framed in absolute terms.

[8] This argument follows from the work of Vilhelm Aubert (1963), who argued that conflicts over values result in absolute positions and are less amenable to compromise solutions than conflicts over interests, which presume a consensus over values.

more sensitive than formal legal mechanisms to power and class differences between the parties (Fiss 1984; Delgado et al. 1985). Without those protections, ADR may reproduce societal differences in power and privilege, which allows more powerful parties to circumvent legal rights won by those with less power (Lazerson 1982; Auerbach 1983; Fiss 1984; Delgado et al. 1985; Macaulay 1986).[9] Class and power differences are particularly salient issues in the context of employment discrimination. Employees with EEO/AA complaints are almost exclusively minorities and women, whereas management is predominantly white and male; in private firms, even affirmative action officers and complaint handlers are often white and male.[10]

Dispute handling in work organizations raises several distinctive issues. First, most ADR mechanisms involve a third-party mediator or arbitrator who is "a disinterested neutral" with no structural connections to the parties in the dispute. While the nature and meaning of neutrality is always problematic (Cobb & Rifkin 1991; Fineman 1988), it is especially so in the employment context where IDR complaint handlers are both adjudicators (or mediators)[11] and management representatives. Within the organization, they play the role of "neutral," but should the complainant file an external complaint, the complaint handler who investigated the complaint is likely to assist or represent the employer (Edelman et al. 1991). Thus, complaint handlers may be cautious about "finding" illegal discrimination because to do so could hinder the organization's position should the complainant file an external complaint. Moreover, employers establish most of the rules of the game: they specify the nature of the complaint process and the conditions under which it may be used. Many internal complaint-handling mechanisms do not provide for decisionmaking by an external third party, and employers retain significant control throughout the process.[12]

[9] For example, Fiss (1984:1078) charges that settlement "is based on bargaining [which] accepts inequalities of wealth as an integral and legitimate component of the process" whereas adjudication "knowingly struggles against those inequalities." Similarly, Delgado et al. (1985) argue that because ADR lacks formal protections, racial and ethnic prejudice are more likely to affect outcomes in ADR than in formal legal processes. Cobb and Rifkin (1991) found that some mediators consciously attempt to compensate for power differences between the parties, but they also note that it is difficult to reach a balance between neutrality and assisting a weaker party.

[10] This statement is based on by the first author's observations while conducting interviews for an earlier study and participating in a workshop for affirmative action officers held by the Bureau of National Affairs.

[11] In some cases, the chief executive officer (CEO) is the final decisionmaker. In other cases, an official in an ombudsperson or personnel capacity adjudicates disputes. While such officials may appear to be more neutral than the CEO or line managers, their personal career interests are likely to constrain their ability to deviate substantially from managerial interests (Edelman et al. 1991).

[12] An example of the potential problems involved when "neutrals" are employed

A second and related point is that even within the organization, complaint handlers' responsibilities and career interests require them to consider many extralegal factors. As Macaulay (1986) notes, complaint handlers in "private governments" (a concept that includes organizational governance) tend to bring their own goals and interests to the dispute resolution process. Complaint handlers bring a number of extralegal interests to IDR, which have diverse implications for dispute handling in organizations. On the one hand, the managers who handle complaints have career ties to the employer and may uphold the legitimacy of management actions to advance their own careers (Edelman et al. 1991). On the other hand, employers' interest in avoiding the costs and adverse publicity of litigation may lead them to take actions to appease aggrieved employees so that in some instances they may grant concessions that are not legally required. Further, employers may view disputing as a feedback mechanism that facilitates management. Gutek (1992), for example, argues that disputing is normal and that it may help management to recognize problems and recuperate from a decline.

Third, IDR is likely to be even more sensitive than other forms of ADR to the effects of party inequality. Whereas disputants in most forums are at least formally equal (e.g., both are citizens), employers and employees are formally unequal: employees agree to a subordinate status when they accept employment. Most disputes within organizations in fact arise out of the power differential: subordinates are challenging the actions or behavior of their superiors (Gutek 1992; Hasenfeld et al. 1987). When employees allege discrimination on the part of their supervisors or other superiors, they are—by virtue of their position in the hierarchy—the less powerful party. Even when employees allege discrimination by co-workers of equal or lesser status, power is an issue because those employees are implicitly, if not directly, asserting that their employers are failing to provide a discrimination-free workplace. Given the formal inequality of employers (or managers) and employees, and the fact that employees who have discrimination complaints often fear retaliation (Bumiller 1988), employees may have difficulty being strong advocates on their own behalf.[13]

The distinctive features of organizations make it especially useful to understand the nature of organizations' internal dis-

by one of the parties may be found in Handler (1986), who recounts an incident in which mediators working for a state agency were fired for informing the nonstate parties of their legal rights.

[13] If employers retaliate against employees who file discrimination complaints, employees may have legal recourse either under Title VII or, in some states, under wrongful discharge doctrines. However, given the expense of legal action and that it is often difficult to prove that retaliation was the motivation for employers' actions, employees may justifiably fear retaliation.

pute handling forums as an alternative to formal legal channels for handling discrimination complaints. Both the organization literature and the ADR literature suggest a tension between legal and organizational goals. The organization literature suggests that organizations will seek *both* to demonstrate attention to legal ideals and to preserve traditional managerial prerogatives. Edelman's (1992) work on organizational response to law suggests that employers may accomplish those goals by creating structures (including complaint procedures) that symbolize compliance while substantively safeguarding managerial interests. The ADR literature, which suggests that the goals of informal dispute handling together with the structural and career interests of the complaint handlers may lead to a displacement of legal goals, implies that internal dispute resolution may achieve those two divergent objectives by shifting the focus of discrimination complaint handling from legal entitlements to individual interests and problems.

Research Questions

Our research seeks to explore the tension between legal and organizational goals in the context of workplace dispute resolution. Thus, the general question we address is: What roles do law and organizational goals play in organizational complaint handlers' orientations toward EEO/AA complaints? This question can be broken down into a number of parts.

1. How do complaint handlers characterize the objectives of IDR? What differences do complaint handlers see between IDR and legal forums for complaint handling? To what extent do complaint handlers' characterizations of IDR goals reflect legal and organizational goals?
2. How do internal complaint handlers construct EEO/AA law? To what extent do internal complaint handlers employ judicial formulas for determining discrimination? What extralegal criteria do internal complaint handlers use to determine discrimination?
3. How do complaint handlers frame employees' discrimination complaints? To what extent do the discourses of law and legal rights, management, morality, or therapy appear in complaint handlers' constructions of discrimination complaints? How do organizational objectives appear to influence complaint handlers' constructions of discrimination complaints?
4. What import do complaint handlers give to legal procedure and procedural protections in IDR? What (if any) relation is there between complaint handlers' orientations toward EEO/AA law and their views on procedure?
5. What are complaint handlers' orientations toward reme-

dies for employees who allege discrimination? What (if any) relation is there between complaint handlers' orientations toward of EEO/AA law and their views on remedies?

Data and Methodology

Our data are based on semistructured interviews with management personnel who handle internal EEO/AA complaints in ten large organizations. The interviews were conducted between August 1990 and March 1991. We selected organizations from lists of the largest employers in two counties, supplied by the local chambers of commerce. Of the ten employers selected, one had fewer than 1,000 full-time employees, six had between 1,000 and 5,000 employees, and three had more than 5,000 employees. Although ours is not a random sample, we selected the organizations without knowledge of their EEO/AA practices or their methods of handling EEO/AA complaints. To ensure that complaint handlers would have sufficient personal knowledge about their current employers to provide reliable information, we conducted full-scale interviews only with complaint handlers who had personally handled at least five internal discrimination complaints for their current employers.[14] We sought variation in types of organizations, and our final sample included a city, a college, an insurance company, a hospital, a medical clinic, a utility, a printing company, a bank, a welding company, and a bottling company.

We spoke with the person in each organization who was principally responsible for handling EEO/AA complaints and setting policy regarding the handling of these complaints. In one organization, two people were involved and both participated in the interview; in all the others, one person was principally in charge of EEO/AA complaint handling. In a few of the organizations, the early stages of IDR were handled by lower-level personnel, but complaints that could not be resolved were handled by the persons we interviewed. In all cases, however, our respondents were responsible for setting the agendas, styles, and objectives of IDR within their organizations. Thus our respondents were well positioned to represent the organization's orientation toward EEO/AA law and dispute handling. Table 1 shows the gender, race, and official title of the complaint handlers we interviewed.

A concern about validity arises from the fact that the interview data are self-reports; complaint handlers may exaggerate the availability, thoroughness, impartiality, and fairness of in-

[14] To obtain our sample, we contacted a total of 28 organizations. Of the 18 with which we did not conduct full-scale interviews, 15 did not meet our sampling criterion and 3 refused to participate.

Table 1. Characteristics of Complaint Handlers

	Organization	Gender	Race	Title
1	Clinic	Female	White	Employee Relations Dir.
2	Insurance	Male	White	Dir. of Affirmative Action & Training
3	College	Female	Black	Dir., Affirmative Action & Compliance
4	Utilities	Male	White	Asst. Vice Pres., Human Relations
5	City	Female	Black	Affirmative Action Officer
6	Printing	Female	White	Dir. of Career Placement
7	Bank	Male	White	Vice Pres., Staffing & Emp. Relations
8	Welding[a]	Male	Black	Personnel Relations Mgr.
9	Bottling	Male	Black	Employee Relations Mgr.
10	Hospital	Female	White	Vice Pres. (Personnel)

[a]This interview included a second complaint handler (a white male), who spoke occasionally. His title is senior personnel relations representative.

ternal dispute handling in order to portray their employers and their own work favorably. Self-reports are less problematic, however, given that we treat their responses not as descriptions of action but as reflections of how they conceptualize EEO/AA law and dispute resolution. We acknowledge that there is still some possibility that respondents' efforts to emphasize compliance or fairness would distort the data. This possibility is less problematic, however, since our questions presume compliance and ask instead about what compliance means and how it is achieved, and because (as we discuss below) respondents were quite frank about discussing their *non-use* of the law.

Because our sample is small and nonrandom, our findings may not represent the general pattern of EEO/AA dispute handling. In particular, since we chose large employers, our findings are not necessarily representative of smaller employers, who may use more ad hoc methods of dispute handling. Further, since we interviewed only the primary discrimination complaint handler(s) in each organization, our findings may not apply to more impromptu handling of complaints by line supervisors. Finally, we asked our respondents to comment only on their handling of complaints outside of any union grievance-arbitration framework; thus our analysis is relevant only to the nonunion context.[15]

The interviews lasted about two hours each, and all were conducted by the same person. Respondents were promised confidentiality. We used a list of questions as initial probes, but the questions were open-ended. We allowed the complaint handlers to speak at length in response to each question and

[15] Since the procedures for handling union grievances generally involve different personnel (including union representatives) than those involving nonunion grievances, and because some of our respondents had experience with union procedures but most did not, we decided to restrict our analysis to the nonunion context.

based follow-up on the complaint handlers' responses.[16] The interviews were tape-recorded and transcribed for analysis.

Our goal in analyzing the data was to look for commonalities and themes in complaint handlers' approaches to resolving discrimination complaints. Our sample size is too small to permit accurate analysis of differences between the organizations or to attempt causal inferences based on differences among them. In fact, given the differences in industry and size of the organizations, we were struck by the similarities among complaint handlers in their approach to dispute handling.

Findings

Our research suggests that law plays a very peripheral role in complaint handlers' orientations toward discrimination complaints. Although complaint handlers are concerned with avoiding external complaints and litigation and are therefore attentive to what courts would do in a given case, they tend to subsume legal goals under managerial goals. Although a major goal of legal forums is to define and announce the boundaries of compliance, the overriding objective of IDR is to maintain the smooth functioning of the organization. Thus, complaint resolution is seen as synonymous with the traditional managerial goal of smooth employment relations, and allegations of rights violations are often recast as typical managerial problems. The result is that, as in the case of ADR, the focus is more on the *resolution* of conflict than on the realization or definition of legal rights or ideals, and conflicts over rights are often transformed into interpersonal problems. But IDR is distinctive in that the logic of management facilitates that transformation.

Management Logic and the Focus on Complaint Resolution

One of the major goals of personnel management is to achieve and maintain good employee relations, which, according to managerial lore, helps to assure efficiency and productivity in organizations' core activities. While history has seen many changes in the ideology and techniques of management, the goal of managing employer/employee relations so that they do not disrupt production has remained largely unchanged (Taylor 1911; Roethlisberger & Dickson 1939; Bendix 1974; Edwards 1979; Perrow 1986).

Law regulating the employment relation creates the poten-

[16] Because of the open-ended nature of our interviews, and because we made some revisions to our questions after the first few interviews, there was some variation in the content and flow of the interviews. However, we were able to obtain fairly consistent information.

tial for disruption of smooth employment relations: it seeks to intervene in the relationship between organizations and their employees by imposing new rules on management and establishing procedures for employees to challenge perceived violations of those rules. Civil rights statutes (together with judicial interpretations of those statutes) create a new legal environment by legitimating employees' claims for nondiscriminatory employment practices and giving force to those claims through the threat of lawsuits (Edelman 1992).

Employers' goals in responding to this new legal environment are to minimize the intrusion of law on the smooth and efficient functioning of the organization and to maintain legitimacy (Meyer & Rowan 1977; Edelman 1990). Given the ambiguity of EEO/AA law (Edelman 1992), organizations are strongly motivated to take a defensive stance to avoid litigation (Sanders 1989). In part, the mere existence of complaint procedures, which create the appearance of nondiscrimination, will serve this function, but in the face of laws that offer employees external channels for grieving their claims of rights violations, employers seek to appease employees. Thus, the focus of IDR is explicitly on *resolving* disputes to keep them out of the formal legal system. Dispute resolution is also seen as beneficial to the smooth functioning of the employment relation. Two examples from our interviews demonstrate these concerns.

> Obviously we're trying to keep things out of the legal system and resolve them on an internal basis. So certainly there's a good business reason for having this in addition to just a good way to treat your employees. [Clinic 49–50]

> You'd like to be able to handle stuff internally because it's less burdensome to the organization in terms of resource drain, because it is a fair amount of time and energy that has to go in the documentation being sent and there's always multiple letters and things that go on. And so from an expedient standpoint we'd rather deal with it internally. [Insurance 30]

Because they are concerned with smooth employment relations and (consequently) avoiding litigation, complaint handlers see complainant satisfaction as critical to a successful resolution. Complaint handlers emphasized that although complainant satisfaction does not necessarily require the complainant to agree with the outcome, it does require that the complainant perceive the process as fair and effective.

> The basic goal is for the organization, the employer, to provide a credible vehicle for its employees to raise concerns or complaints of discrimination and harassment. . . . You need to handle the concerns and complaints in the way that fosters credibility throughout the organization. So you try to do a thorough investigation as promptly as possible with reason-

> able results, if you will, so that people don't get the impression, "Oh my God, if I go there, they're never going to resolve anything." . . . People will only come to an internal dispute resolution vehicle if they feel that, one, they are going to be believed . . . and, two, that you can actually do something for them that is appropriate. And I think it is also the credibility of our office that then we're striving to maintain all the time as well. [College 29–30]

The goals of smooth employment relations and avoiding litigation have significant consequences for how complaint handlers construct EEO/AA law and for how they frame discrimination complaints. Complaint handlers' conceptions of law and framing of discrimination complaints in turn have consequences for the procedures that complaint handlers use to consider complaints and for the nature of the remedies that they offer. We consider these consequences in the following sections.

Consequences for Complaint Handlers' Construction of Civil Rights Law

Although there was some variation among the complaint handlers in their awareness and apparent understanding of civil rights law, it was striking that none of the complaint handlers adopted formal legal standards in their internal dispute handling. Courts have defined two legal theories for determining violations of Title VII: disparate treatment, which focuses on employers' intent, and disparate impact, which focuses on the impact of employment practices.[17] When we asked complaint handlers whether they considered disparate impact or disparate treatment theories in handling complaints, they uniformly told us that they did not. Several pointed out that they were not lawyers and could not be expected to be conversant with legal details. Rather than adopting the calculus of the courts and EEO agencies, complaint handlers simply construe law as a requirement of fair treatment.

The focus on fair treatment is evident in the following

[17] Under the disparate treatment theory, the plaintiff must prove that the employer intended to discriminate on the basis of race, sex, or another forbidden basis and that any legitimate reason articulated by the employer is really a pretext (*McDonnell Douglas Corp. v. Green* 1973). Under the disparate impact doctrine, the plaintiff need not prove intent to discriminate but must prove that an employment practice adversely affects a protected group of employees. If the employer shows that the practice significantly serves a legitimate employment goal, the plaintiff must prove that an alternative practice would be equally effective in achieving the employer's legitimate goals (*Wards Cove Packing Co. v. Antonio* 1989). The rules announced in *Wards Cove* substantially increased the plaintiff's burden of proof and reduced the employer's burden of proof in disparate impact cases from the rules set out in *Griggs v. Duke Power Co.* (1971). As a practical matter, most Title VII suits are brought under the disparate treatment theory. The 1991 Civil Rights Act substantially negated the *Wards Cove* decision and reinstituted language similar to that in *Griggs*.

quote from a complaint handler who said that his understanding of law came from interpretations in professional journals and by legal counsel.

> I think the fact that the laws exist give us, if you want, the hammer, the tools necessary to enforce—not the law so much but the fact that we believe in fairness, consistency, for this open door mutual respect kind of situation. . . . You can't just nilly-willy pick situations and say, "We'll do it one way this time and the next time we'll do it this way." . . . You tend to start focusing on things like fairness and due process and consistency in your approach. [Bank 54]

One complaint handler, who has a law degree and seemed more knowledgeable about EEO/AA law than the others, gave a particularly lucid construction of EEO/AA law as a fairness requirement. She said that both the procedure and the outcome ought to be fair, and, she explicitly equated the disparate treatment and disparate impact (which she referred to as "differential treatment and business necessity")[18] with fair treatment.

> When you stand back and look at affirmative action laws and policies, the essence of them is whether or not there has been fair treatment. . . . Differential treatment and business necessity and all of those things all have fairness as a premise. . . . Everyone wants to think that not only the resolution is fair but that the Affirmative Action Office conducted a fair investigation. . . . I think the ultimate fairness . . . in terms of society looking at it, is whether you have conducted an investigation that was free of biases. [College 72, 73, 75, 76]

When asked to elaborate what fairness meant, complaint handlers had a variety of responses, but in general they were based more on broad notions of procedural fairness than on the substantive requirements of EEO/AA law. They mentioned consistent treatment, prior notice of rules, protection from retaliation, giving the complainant an opportunity to be heard, and impartial consideration of complaints. Four complaint handlers suggested a more substantive element of fairness: they said that the resolution should be fair. Only three complaint handlers said that fairness meant consistency with law. Complaint handlers may construe EEO/AA law as a fair treatment in part because, as nonlawyers, they need to simplify the complex and amorphous legal doctrines. However, another reason may be that construing law as a fair treatment requirement renders law quite consistent with general principles of good management; thus, complaint handlers need not view law as a new constraint. The following examples illustrate the nexus com-

[18] Business necessity is a legal defense to the use of a procedure that has a disparate impact.

plaint handlers draw between compliance with law and good management.

> I think the law becomes a secondary element. I mean if the law wasn't there, we'd still be doing what we're doing because we think it's the right thing to do and our policies and procedures are based on what we feel are sound personnel practices. Our intent is to maintain a positive working environment and treat all people the same under the same set of expectations. [Insurance 5–6]

> The objective is to assure that our work environment is a positive one that maintains dignity of all employees and doesn't subject any employee to anything that we feel is of a harassing, discriminatory, or intimidating environment or situation and that we resolve it based on those premises. It's a win-win kind of thing—it's the right thing to do for the employee in relationship to the expectations and the work environment. [Insurance 23]

Although complaint handlers' construction of EEO/AA law leads them to be quite attentive to the need to treat employees consistently, it also shifts the focus from legal rights to good organizational governance, thus deemphasizing the specific legal goals of racial and gender equality.[19] To the extent that law is subsumed under organizational goals, it is far less likely to have much impact beyond what employers believe is necessary for good management. Moreover, as we show in the next section, the emphasis on organizational goals has important implications for how complaint handlers frame the discrimination complaints that are brought before them.

The Transformation of Rights Claims to Management Issues

Just as the construction of law is itself subsumed under managerial goals so that compliance becomes synonymous with good management, complaints of discrimination tend to be redefined as indications of managerial problems. Thus, we found the same tendency for IDR complaint handlers to recast legal issues as interpersonal issues as Silbey and Sarat (1989) note in the context of ADR generally and Hofrichter (1987) observed in NDR. In the organizational context, however, the routine management task of identifying personnel problems facilitates that transformation. Complaint handlers tend to identify typical management problems, for example, inadequate or inconsistent management or interpersonal difficulties, as the

[19] There is a debate over whether antidiscrimination law permits race- and gender-conscious treatment to produce fair outcomes or requires race- and gender-blind treatment, which assures equality of treatment but not outcome (Belton 1981). In both cases, however, there is explicit attention to race and gender issues. The organizational construction of law, on the other hand, emphasizes only the need for consistency, thus reducing (if not eliminating) public attention to the need for race and gender equality.

problems generating discrimination complaints and thus to recast discrimination complaints in those terms.

Although our data do not allow us to determine how often the recasting of complaints was correct, they do reflect a consistent inclination among complaint handlers to argue that complaints of discrimination in fact represented other types of problems. This does not prevent them from resolving those complaints to the satisfaction of the complainant. It is likely, however, to prevent them from labeling and condemning discrimination where it does in fact exist.

The following examples illustrate some of the ways in which complaint handlers recast discrimination complaints as poor management problems, personality clashes, or both.

> [Sexual harassment] had nothing to do with it—it was a larger work group issue in terms of how these people work together and so I brought in a psychologist who worked with the group on how to . . . work together as a team. It wasn't that this person was putting down women, he was putting down everybody. [Clinic 22]

> When they come and [complain about] . . . their performance evaluation they didn't like or their discipline or termination . . . usually the ultimate decision has been correct. There have been times when we completely overturned something but those are rare cases . . . usually general management [problems]. It's rare to have an EEO issue out there with the manager. [Clinic 44]

> I can think of one case about four months ago where we had a person of color, female employee who was complaining about her manager. And when we did the investigation, we couldn't really say that it was discrimination. . . . [What we] kind of found out is . . . it really wasn't that he didn't like black females or she didn't like white males, it was the difference in the management style, the difference in the cultural background. [Bottling 48–49]

> The internal dispute resolution process gives us a unique opportunity to use a microscope and find out what is happening in our organizations because it probably it isn't the case that the behavior that's being complained about is unique. It is usually more symptomatic of something that is happening in the organization. . . . Maybe it means people are giving out misinformation. Maybe it means that we have some bad supervisors who have some other kind of agenda and it keeps looking like sexism when it's really not. . . . It is said—and I believe—that about 50% of what comes to an affirmative action office is a complaint or concern [that] really is a result of bad management and not discriminatory behavior. [College 35, 46]

The same complaint handler went on to give a specific example in which a slow response to an accommodation request by a

disabled person was defined as an example of inadequate responses to problems generally and, therefore, as not reflecting a discrimination problem.

> A disabled employee who needed a reasonable accommodation, had requested it through the appropriate channels, and had not been provided the accommodation and felt that the quality of their work was suffering and that they were experiencing some pain consequently because the accommodation they requested [was] something that would help them get around better in their job. We found that just through a number of management problems, if you will, the request for reasonable accommodation wasn't processed and responded to in a timely manner. And it wasn't because it was an accommodation request. . . . Management realized that they really had made poor work assignments to everyone in the area, so the disabled employee was just an extreme example of a poor management decision. . . . So there was a significant management improvement, and that's very good. . . . They revamped the situation and improved the management layout. [College 93–94]

> It wasn't again due to any race or sex issue. When I got to the meat of it, it was a kind of personality conflict issue and a difference of opinion. . . . The person could say it had something to do with the fact that they were older, but then I'd look into the department and there were six people over 40 and they had excellent performance evaluations. This person was also over 40 and was getting bad evaluations. It had nothing to do with age. . . . When you get to the meat of it, it's oftentimes someone who has significant employment problems. Their attendance is terrible. They sometimes have personal problems. In the case of someone with personal problems or other things that are impacting them we do have an [employee assistance program] and so I would try and divert them to that because I am not prepared to help them with legal, financial, personal [or] any of those kinds of things. [Clinic 22–23]

Complaint handlers do not always recast discrimination complaints as management or personality problems. They also offered examples of situations in which they agreed that there had been discrimination. In our sample, these were mostly sexual harassment cases where either there were corroborating witnesses or the respondent admitted contact with the complainant. Two examples follow:

> An employee . . . I can't remember how he touched the woman, but he did make physical contact with her. . . . She first notified the department supervisor, the supervisor notified the department head, [the department head] notified me. . . . We told the department designee as well as my staff person the types of questions we wanted asked and answered and that was resolved extremely quickly. . . . She gave in detail

> exactly what happened. [He admitted touching her.] . . . He says he was only teasing, only playing, he didn't mean to cause any problems. [City 61–62]
>
> A manager of one of our banking centers was brought to our attention by an employee during an interview for a new position. One of the questions we asked is, "Why are you looking at changing jobs in the company right now?" [She replied] "Because my boss has . . ., it's a real negative environment." "Well what do you mean by that?" "Well, basically the boss refers to me as one of his harem." "What do you mean by that?" "Well, it's kind of the standing joke down in this place that he only hires people with big boobs." This was a woman telling another woman that and I don't know exactly the wording but it was basically going in that direction. . . . And then we stopped the interview and said, "It sounds like you're really not interviewing because you're looking for a new job but because you're concerned about the environment and is this really a complaint about [the man]." And the person said, "Yeah but I don't want to say anything else because I'm afraid I'll lose my job. I need this job, that's why I'm interviewing. And everybody else down there is scared to death of this guy because he's told everybody that if they ever said anything about anything, he says he'll fire them all and the company will support him. . . . We told her basically that, "Look, we're not going to mention this to anybody that works in that area, but what we are going to do is, if you don't mind, we're going to partake in an investigation." [Bank 70–71]

It is important to note that when complaint handlers do recast discrimination complaints as typical managerial problems, they try to resolve the problem. In this regard, IDR differs substantially from legal forums where, if adjudicators decide that a complainant did not present a valid legal claim, they dismiss the case. Because internal complaint handlers' objective is to ensure smooth organizational operations, they are willing typically to handle any type of complaint that presents a managerial concern. Complaint handlers' interest in resolving all complaints that could disrupt organizational activities suggests that they will resolve cases actually involving discrimination (often labeling them managerial problems), but they will also resolve cases that do not actually involve discrimination. In this sense, law casts a broad shadow: it encourages the resolution of many complaints that would find no remedy under law. Consistent with the claims of proponents of ADR, IDR is a source of extralegal justice. Further, in the organizational context, IDR is a vehicle through which law evokes fairer and more consistent management practices.

But at the same time, organizational concerns tend to eclipse the shadow of law and, as critics of ADR argue, to undermine the legal right to nondiscrimination. Complaint handlers in organizations not only equate law with good manage-

ment but also interpret many claims of law violation as instances of bad management. Many employee complaints no doubt arise from personality or management problems; without an independent means of determining whether or how often discrimination occurred, we cannot address that issue. But insofar as discrimination complaints stem from illegal discrimination, the redefinition of legal issues in organizational terms tends to draw attention away both from violations of law and from the class basis of discrimination. Recasting legal issues in organizational terms deemphasizes and depoliticizes workplace discrimination. Moreover, this transformation of law and legal rights has implications both for the procedures employers use to evaluate complaints and for the remedies that they use to redress complaints.

Impact on Procedure

While the construction of law and of employees' complaints may be the most critical determinants of how IDR transforms legal rights, the procedure employed in the complaint resolution process may make a critical difference in the outcome of a dispute. The formal legal system has a number of due process protections designed to safeguard the legal rights of participants (both complainants and respondents). These include the right to representation by legal counsel,[20] limitations on the types of evidence that may be considered, and legally specified burdens of proof.[21] Internal complaint handlers use procedures more appropriate for detecting managerial problems than for defining rights violations. They report that they place a heavy emphasis on conducting thorough investigations in order to find any sources of problems, but they do not incorporate due process protections into IDR processes.

First, lawyers rarely participate in the internal process,[22] and complaint handlers generally felt that they were unnecessary. One complaint handler said that having lawyers present

[20] In external cases, employees do not always exercise their right to representation, especially during the early phases of the administrative complaint process. A hearing officer for a state EEO agency told us that only about 10 to 15% of complainants were represented by attorneys at the investigation stage. She also commented that most attorneys would not take an employee's case unless the agency had already determined that there was probable cause to believe that a violation occurred. For cases that reach the litigation stage, one would assume that the large majority of employees use attorneys.

[21] While administrative agencies, and even courts, may not always pay attention to rules of evidence and burdens of proof and they provide no guarantees of a full investigation, there are at least formal guarantees of these protections, which make it easier for complainants to demand them.

[22] Four of the complaint handlers said that they had never been contacted by an attorney for an employee in internal complaints, four said that they had been contacted by attorneys only rarely or occasionally, and one estimated that she receives some communication from an employee's attorney in 25% of her internal cases.

can change the character of the meeting (presumably making it more formal and adversarial). Another said that when lawyers do get involved, they tend to be friends or relatives of the employees and often just listen and support the employee. Another told us that when lawyers participate in the internal process, they tend not to engage in the kind of adversarial conduct common in litigation.[23]

Second, complaint handlers do not generally follow legal rules about what type of evidence is admissible. Most complaint handlers reported that they generally accepted whatever evidence the parties and witnesses offered, including "hearsay" evidence (second or third party accounts of events), which is inadmissible in formal legal proceedings. However, complaint handlers are aware that hearsay evidence is not legally admissible, and several reported that they were cautious about giving too much weight to hearsay unless they had corroboration for that information. Complaint handlers reported that they generally look for corroborating evidence when there is a conflict over what happened. Further, as the following example shows, complaint handlers' knowledge about what type of evidence is admissible in external cases does shape their own view of what evidence is relevant.

> [External administrative law judges] don't go on hearsay. They don't go on subjective information. They go on what's objective and factual. They're going to look at statistics. . . . They're going to look at a lot of different factors and I do the same thing. [Bank 35].

Third, complaint handlers in organizations also do not generally follow the complex legal rules specifying burdens of proof for plaintiffs and defendants, although they do recognize that there is a standard of proof that would have to be met if the case were to be handled externally.

> We recognize that typically the lawyers in our legal services area are dealing with issues that involve a clear and convincing level of proof being required as opposed to beyond a reasonable doubt in the criminal side, for example. However, no one in an affirmative action office who is not a lawyer is going to have any sense of what is clear and convincing evidence. It's really for the lawyers, once it gets to the outside, to take what we have done and try to argue that we meet the clear and convincing level. [College 63–64][24]

[23] To some extent, the inquisitorial character of the internal process compensates for the lack of legal representation. Whereas judges, at least in theory, play a relatively passive role in adversary proceedings, the complaint handler in an organization (and often in the administrative process) takes the initiative and primary responsibility for directing the process. The inquisitorial process gives the complaint handler considerably more influence over both the process and the outcome of cases, however, so that the consequences of bias may be more substantial.

[24] In this example the complaint handler incorrectly identified the standard of proof as "clear and convincing" rather than the "preponderance of the evidence."

Although legal rules move the burden of proof back and forth depending on what has been proven and what legal theory the plaintiff uses, the plaintiff (employee) bears most of the burden under these rules. Interestingly, two complaint handlers said that, if anything, they operate as if the employer always has the burden of proof. This practice reduces the risk of liability should the employee file an external complaint.

> I guess we always look at the burden of proof as really on our shoulders. And that comes out of—rather than getting down to the specific court case, we know that if any employee or manager has a complaint about a practice here, that we're going to have to prove that the practice that they're claiming is not a practice that we endorse if it's discriminatory. [Bank 61]

> I think any time there's an investigation in companies such as this, . . . the burden of proof basically lies on us—in almost every situation that I can think of. [Bottling 32]

Other complaint handlers said that they do not worry about legal burdens of proof, although several emphasized that complaints are taken very seriously.

> No, we don't go through the same rigors that a formal [process would. We don't operate on the basis that] "you're making the complaint. Now you have to prove that happened." We're just as interested in knowing whether or not something happened as the complaining employee. So we take every complaint as being serious and real and investigate it and resolve it. [Insurance 6]

Thus, employers' internal procedures lack some of the basic due process protections that arguably help to check bias on the part of decisionmakers and to compensate for power differences between the parties. However, this may be offset by another factor: Complaint handlers use their internal procedures as a way to avoid lawsuits or to avoid liability should a lawsuit occur. As a result, complaint handlers are attentive to what types of information would be relevant in an external proceeding, and they try to collect this information as a way of anticipating and defending themselves against potential external claims.

> I think as you go through the externals and you are exposed to the questions that are asked from [fair employment agency] investigators, you start getting a better sense of all the things you need to collect; . . . all the documentation that you might need. So I think, in a sense, it helps us in looking at cases internally in both insuring that [in] what we are doing we have all the facts and the information is—that it creates a trail of documentation that we know if it were to go externally, we would have what we need or what would be requested from an outside group. [Insurance 28]

> [I]f you consider that there are external complaint organiza-

> tions, if you will, that consider complaints like the EEOC and Office of Civil Rights etc., they use a investigatory approach. And so we consider ourselves an extension of them—except within the organization—to try to avoid lengthy and costly litigation. So we are really using that same model, yet we have the latitude to use other models as appropriate. [College 25–26]

In their efforts to remedy managerial problems and avoid litigation, the internal complaint handlers reported that they conduct thorough investigations of all complaints they receive. Unlike legal forums, where a complainant may drop a complaint and thereby stop the investigation process, complaint handlers in six of the ten organizations report that they investigate discrimination complaints whether or not the employee wants them to. This approach follows from management logic: Managers' task is to detect and remedy managerial (and potential legal) problems and they, rather than complainants, control the process.

In sum, complaint handlers' general concern for fair and thorough investigations is evident in their discourse and consistent with the logic of management: thorough investigations are more likely to allow them to detect problems that might interfere with organizational productivity. Because their primary focus is not on the determination of whether rights violations have occurred, however, they do not incorporate specific due process protections that are meant to constrain bias.

Impact on Remedies

Remedies in IDR also reflect the logic of management in that they are designed to restore smooth employment relations rather than to define and redress rights violations; thus, they differ substantially from legal remedies. In legal forums, remedies are provided only following a finding of illegal discrimination or as part of a settlement. Remedies under Title VII fall into two broad categories: those that compensate victims for past losses (back pay, attorney fees) and remedial employment actions including corrections of discriminatory employment decisions (e.g., opportunities for employment or promotion), cessation of discriminatory actions (e.g., stopping harassing behavior), and accommodations for handicapped employees. Courts may order affirmative action in the form of training or recruitment programs when discrimination is found. These legal remedies essentially recognize two parties: the employee and the organization.

Because the goal of IDR is dispute resolution rather than the recognition of rights, employers tend to provide remedies regardless of whether the respondents violated the law—even

when, for example, they conclude that problems are due to personality clashes, poor communication, or bad management practices. But these remedies tend to be oriented toward correcting organizational problems rather than recognizing or defining rights violations.

In IDR, there are no compensatory awards to victims even when the complaint handlers do find discrimination. In external forums, compensation to victims is an institutionalized form of recognizing rights violations; however, it would not advance the cause of smooth employment relations. IDR does sometimes result in remedial employment actions: when complaint handlers find discrimination, they report that they order (or recommend when they do not have authority to order) modifications to discriminatory employment decisions, cessation of discriminatory actions, or accommodations for handicapped employees. More often, however, the remedies that complaint handlers report using are unique to the organizational setting and generally designed to encourage good employment relations. These remedies are of four types: punitive, educational, pragmatic, and therapeutic.

Punitive actions are aimed at the perpetrator of the action and are seen as most appropriate when the complaint handler decides that illegal discrimination has occurred. Nine of the complaint handlers had taken some sort of disciplinary action, including oral warnings, demands that the offender apologize to the victim, a note in the offender's personnel file, threats of future discipline, modified evaluations, and, in four organizations, termination. The seriousness of the discipline varied greatly: in one organization, 3 of 10 cases resulted in terminations; in another, 2 out of 90 cases resulted in terminations (and only 5 of the 90 cases involved any discipline); another handled 25% of its cases with a temporary suspension and the remaining 75% by requiring an apology, sometimes adding a warning about future discipline.

Terminations, although not the norm, constitute the most explicit recognition that legal rights were violated. Virtually all the termination examples in our sample involved sexual harassment, which is consistent with the finding we reported earlier that complaint handlers seem most likely to recognize discrimination in sexual harassment cases. For example, the sexual harassment case reported by the City, where the man admitted physical contact with the complainant but said he was only teasing, resulted in a termination. The complaint handler explained that termination was appropriate because the manager was well aware of the rules and this was not the first incident involving him.

> First of all, we have past practice. . . . [There was] a policy in place. The person admitted to doing it, admitted to knowing that there was a policy in place and that [he] shouldn't have done it. I think he was employed at the time [during] which training programs were given in the City. [City 63]

Punitive actions, especially termination, explicitly recognize a violation of the employee's rights; in that sense, they are most like the remedies provided by external forums. However, there is a significant difference. An important goal of legal forums is to announce and define the meaning of legal rights. Thus, especially when a lawsuit is tried in court, there is a public declaration that the challenged behavior is or is not discriminatory, and the potential for new precedent regarding definitions of discrimination. In IDR, however, the public aspect of complaint resolution is lacking. Resolutions tend to be private and discreet.

The discreet nature of IDR is in part due to a concern for the offender's rights. Several complaint handlers commented on the "fine line" they walk when exercising discipline: they tend to be very discreet about discipline because they worry about protecting the identity of the complainant and about lawsuits by the person being disciplined for slander or privacy violations. Eight of the organizations have a policy or practice of keeping complaints confidential. Two of those companies said that despite those policies, news of complaints often spreads informally "through the grapevine." None said that they intentionally publicize decisions or disciplinary actions. In resolving the case described earlier where a complaint handler elicited a complaint of sexual harassment from the woman who was reticent to raise it out of fear for her job and then found rampant sexual harassment, the complaint handler terminated the offender but gave the following account of how and why they kept a decision and remedy quiet.

> We did terminate him. We told him the reason was sexual harassment . . . We went back to the employees. We told them that we took an employment action. We didn't tell them why. . . . We didn't go back and say that he was terminated for sexual harassment. We just said that "he was no longer employed by the corporation" because we wanted to protect his rights, the right to privacy that he had. [Bank 73–74]

As this example shows, IDR is generally unconcerned with such matters as elaborating a definition of discrimination or equal employment opportunity, or articulating a standard to which others can appeal.

Complaint handlers appear to use educational remedies when they determine that the problem is due to a lack of information. As with termination, complaint handlers appear to see

educational remedies as most appropriate in the context of sexual harassment complaints.

> We've had a particular division where we felt that there has been more sexual related harassment type things because of the nature of the work. . . . We have gone into that particular division and done a lot of training so that people have a good clear understanding of what is harassment. [Bottling 54]

> It's more or less helping someone figure out how to handle a situation so that the next time it comes up, they handle it in a manner such that it won't happen again, that the person clearly understands that it was inappropriate. Oftentimes—and I would say the majority of the times—the person who said it has no indication that it is offensive to the person they have said it to. They've said it either in a joking manner or just plain didn't understand because of some work settings. You know there's sort of a different level of what's acceptable. And that once that's clarified, oftentimes it immediately stops. So some of it's just that—simply an awareness level. [Clinic 10]

While educational remedies may inform managers and employees about legal rules and rights, the objective is most consistent with the managerial objective of restoring a productive work environment.

> [Violators] are now being encouraged to attend one of our in-house seminars on managing diversity.[25] . . . Our employees are going to have to learn to work with older employees, younger employees, people of different ethnic backgrounds. . . . What we do in this class is we attempt to make them aware of the differences that maybe you and I may have, our backgrounds and so on. And how we can work effectively together as a team. I mean, if you don't have a team, you don't have a company. [Printing 31–32]

Complaint handlers appear to use pragmatic remedies primarily when they determine that the problem involves personality conflicts. These remedies involve individualized solutions to the problem and are based on a belief that it is the interaction between two or more persons, rather than discrimination, that led to the complaint. For example, the complaint handler may arrange to move the complaining employee to another part of the company. Thus, several said that the resolution of some cases involved arrangements so that the employees' "paths don't cross." In cases defined as personality conflicts, there is usually no attribution of fault and no discipline involved. For example:

[25] A few minutes later in the interview, the respondent said that if they had a EEO problem with a particular person, they would make sure that that person took the next class.

> We have the employee, we have the person that they feel that have offended them in some way. . . . [The resolution might involve] moving that person, the offender, to a different shift. [Printing 28]

> [W]e can work with the supervisor as well as the employee and any other parties within the city government to make sure that we can resolve the matter on an informal basis via discussions or actionary steps that we can take to bring about a resolution . . . via relocating [the employee] to a different position within the government. [City 55–56]

Therapeutic remedies, which seemed quite prevalent, generally rest on an assumption that the root of the problem lies with the complainant or in the relationship between the complainant and the respondent, although in some cases the remedy is directed at the respondent. These remedies tend to be private, nonpunitive, and are not oriented around law or the violation of legal rights. The general goal is again managerial in nature; therapeutic remedies are meant to heal relationships to restore good employee relations. Complaint handlers generally referred to these therapeutic remedies as mediation, facilitation, or counseling.

Complaint handlers described some mediation that resulted in the offer and acceptance of an apology, and some that resulted in supervisors being trained in a certain area (usually sexual harassment). As the following descriptions of mediation, facilitation, or counseling show, complaint handlers' goals are often more therapeutic than disciplinary and there is virtually no mention of law or legal rights.

> Sometimes I give them the option of meeting and facilitating a meeting with them and whomever the other person is. I have done that where you have the supervisor and the employee there and you just talked about it together because the employee is uncomfortable doing that. We have people in the organization who are much better trained at facilitation than I am. I mean I can do it but there are people who do it every day in terms of the psych[ological] staff, social services staff and other staff that resources we have within the organization and sometimes I will tap those individuals. If it's a very broad problem in an area, I might bring a consultant in to work with a group on it on an ongoing basis. [Clinic 21]

The Clinic complaint handler described what happens in counseling sessions at that firm:

> Typically the first session is what I call "get it all out." . . . You let them dump the load and you know that's a very tense, difficult, session. . . . It's part of what in this grieving process you call stages and these types of things you have to kind of follow stages. . . . Part of it is just a lay it out on the line and . . . then break it into pieces, you know, look at the different parts of what the cause of some of these things are. And then,

> typically depending upon the nature and the breadth of what's going on here, you try and take it cause by cause and talk it through, "Well how can we do this so you're happy, you're happy with this" and try to problem solve as a group and work up what I would call a "plan of action" to follow. . . . And then, there's usually follow-up meetings. If it's that involved and that deep of a problem, I would try and have one of the professional staff here handle it because . . . I don't have the time to deal with that kind of ongoing therapy. But I have done some of that . . . I typically try and do that when it's more isolated to a specific issue or two versus when there's just a whole load of things that are going on there between the two of them and . . . a major relationship problem. [Clinic 25–26]

Complaint handlers did sometimes use mediation for cases in which the discrimination issue was explicit; in these cases, the goal was to have each party understand the other's position. He reported that about half of these sessions end with an apology on the part of the respondent.

> We've also had . . . sex discrimination claims in which the individual wanted a particular act stopped and we, in turn, ran through the series of defining the complaint and seeking the resolution and then contacting the respondent. And this took a few sessions and then drawing both of them together for a resolution. These particular cases we mediated to the point that each wanted to respect each others' rights and responsibilities and [we] drew to the respondent's attention [the] clear-cut example of what sex discrimination was and how it had affected the other individual. [Utility 28]

Some of the complaint handlers we spoke to said that complainants often just want someone to talk to about their concerns and do not wish to pursue actual remedies. The example below describes such a case. The example also raises the possibility that the therapeutic approach may serve to cool out complaints because employees feel better after talking the situation over with the complaint handler. Complaint handlers tend to view such a result as appropriate and successful because the employee's interest appears to be met. However, if the complaint is generated by discriminatory behavior, this approach risks that little will be done to end that discrimination.

> I first try to work with the employee to be able to approach the supervisor directly. So I try to get the employee to tell me a little bit about the problem. "Have you talked to your supervisor about this? And then maybe you could attempt talking to them in this way. And do you want to try that out on me? And do want to try a little bit of that?" And if it is clearly not going to work, I'll say to the employee, "What is it that you would like to come from this? What is it that you would like me to do?" And sometimes they say, "I don't really want

> you to do anything about this, I just want to talk it over." [Hospital 5]

In some cases, it appeared that complaint handlers used mediation as a means of convincing the employee that there was no discrimination.

> One example . . . was age discrimination . . . when an individual claimed he or she did not get a particular promotion. We investigated that . . . in seeking the support material to convince the individual, the complainant, that was not the case. . . . The individual . . . didn't accept it totally and we therefore had to, in essence, mediate the conclusion by drawing the supervisor in. . . . Then we try to develop more of a rapport between the supervisor and the individual. [Utility 26–27]

These last two examples suggest that therapeutic remedies to discrimination complaints have a potential to undermine legal rights by encouraging inaction or convincing the complainant that the complaint handler's interpretation of the case is the correct one. To the extent that this is the case, the power structure inherent in the employment relation is likely to exacerbate this potential. In this context, the lack of due process protections (especially the lack of advocates) raises particular concerns.

In sum, our data suggest that unlike remedies in the legal system, which are aimed at compensating the plaintiff for loss due to illegal discrimination and ordering remedial employment actions, remedies in internal complaint forums are primarily geared toward repairing and improving management techniques and relations between employees and their supervisors. And whereas decisions in (adjudicated) legal cases involve public declarations that the employer discriminated, decisions in cases handled internally tend to be private and discreet.

Remedies in IDR may be well designed for redressing typical management problems. However, they yield a potential to undermine legal rights by failing to define and articulate the boundaries of those rights and by indicating to employees that problems are interpersonal, psychological, or managerial in nature rather than legal. To the extent that employees accept these classifications as the underlying causes of their problems, they may be less likely to think that their complaints merit legal redress.

Discussion and Implications

Many questions about internal dispute resolution remain. Because of the small size of our sample, we believe that it would be inappropriate to attempt causal inferences about the effects of complaint handlers' professional training, social backgrounds, and ascriptive characteristics; about the roles of

unions, other organizational departments, or the philosophy of the administration; or about the effects of organizational culture and the communities and industries in which organizations operate. Future research should address these issues. Given the differences among our sample organizations on these dimensions, however, the commonalities we observed in complaint handlers' approach to handling discrimination complaints, in particular the peripheral role of law, are striking.

Complaint handlers' conception of dispute handling appears to subsume law within the broad confines of the managerial realm, thus transforming EEO/AA law into a diffuse standard of fairness. Fair treatment is seen as a means both of compliance and of attaining a productive business environment with good working relationships and high employee morale. This organizational perspective leads complaint handlers to approach EEO/AA dispute handling from a very different perspective and with very different objectives than do legal forums. Legal forums use individual cases to define the vague concept of discrimination, to articulate the nature of and limits of employees' rights under the law, and to fashion appropriate remedies for particular violations of the law. In contrast, complaint handlers' objective is *complaint resolution*, as a means of restoring good work relations and avoiding legal intervention. The legal right to a nondiscriminatory workplace in effect becomes a "right" to complaint resolution.

Implications for Dispute Resolution

IDR as an alternative to legal forums for dispute resolution appears to resemble other forms of ADR. The most salient similarity is that IDR emphasizes conflict resolution and deemphasizes law and legal rights. One result of the deemphasis on law is that IDR may provide remedies to a broader range of cases and provide a wider variety of remedies than do legal forums. Internal forums for handling discrimination complaints may also expand the opportunity for dispute resolution by providing a means of resolving complaints that might not otherwise be voiced. In this sense, the arguments of ADR proponents that alternative forums are less constrained by legal criteria, more flexible, and more oriented toward parties' needs than are legal forums are sustained in the IDR context.

However, our findings on complaint handlers' conceptions of dispute resolution also support the argument that ADR may undermine legal rights by changing the way in which disputes are framed. Whereas the rhetoric of rights is central to courts and administrative agencies, the rhetorics of management and therapy are far more pervasive in organizational complaint han-

dlers' accounts.[26] In contrast, there is almost no language about legal rights. By deflecting attention from legal rights and focusing instead on organizational problems, complaint handlers' conception of dispute resolution privatizes and depoliticizes the public right to equal employment opportunity. Individual complaints are rarely linked to public rights and ideals, and the complaint resolution process does not involve public recognition of those rights or public articulation of a standard to which other employees may appeal. Thus, each employee must renegotiate the meaning of discrimination. Further, IDR is unlikely to have the general deterrent effect that precedent and publicized lawsuits have on at least some employers.

The symbolic value of internal complaint procedures, moreover, may strengthen employers' legitimacy and authority in a way that makes it more difficult for employees to challenge employment practices. First, because internal complaint-handling procedures formalize the right to appeal—a basic element of due process—they symbolize legality and fairness both to employees and to the external world: thus, regardless of their effect on rights, they are an important source of legitimacy and may even constitute evidence of nondiscrimination, should the employer be sued (Edelman 1990, 1992). But where symbolic attention to EEO/AA issues coexists with discriminatory treatment, it may make it more difficult for employees to convince external agencies or courts that they have been victims of discrimination. Second, since employers are the final arbiters of internal complaints, internal forums tend to reaffirm employers' authority over employees and autonomy from outside intervention, which may discourage challenges by employees. In contrast, legal procedures call attention to formal limits on employers' authority and autonomy, which may be empowering to employees.

Implications for Organizational Compliance with Law

While the ten large organizations we studied operate in the shadow of the law, it is a very light shadow with hazy edges. EEO/AA law is clearly an element of the context in which the organizational dispute handling takes place, but resolution is not directly dependent on the content of the law. Thus, this

[26] Especially when discussing mediation, complaint handlers emphasize the importance of encouraging parties to "dump the load," "feel better about the situation," "ease tension," and "grieve." One complaint handler explicitly referred to mediation as therapy, and most of the others spoke of employees' "problems" rather than employees' "rights." Complaint handlers repeatedly characterized remedies in terms of managerial goals such as "developing rapport between employees and supervisors"; rectifying "management problems" or "poor work assignments"; reassigning people to avoid "personality clashes"; and "improving communication."

study is consistent with the large body of sociology of law literature showing that law and formal legal process shape informal legal negotiations at the margins but leave specific outcomes open. Just as business norms carried more weight than contract doctrine in Macaulay's (1963) study of business disputes, organizational norms—reflected in complaint handlers' ideology of dispute resolution—carry more weight than EEO/AA law in the internal handling of discrimination complaints.

This study also elaborates the nature of organizational mediation of law. Even in its peripheral role, law gradually modifies managerial norms and discourse; although organizations do not adopt formal legal standards for discerning discrimination, civil rights law has solidified managers' attention to fairness and consistency in organizational governance. But at the same time the infusion of organizational values in internal dispute resolution produces a transformation of civil rights in the workplace. As courts review and (in some cases) legitimate organizational actions and the results of dispute handling, the symbolic structures that employers create to demonstrate compliance become the vehicles for the infusion of organizational norms and values into law. Thus, once in the organizational realm, law cannot contain its own appropriation; rather it is shaped and reshaped by management ideology and discourse.

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