
The Sorry State of Civil Rights

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It has been more than half a century since Washington outlawed workplace discrimination. Title VII of the Civil Rights Act of 1964 spawned a complex, unwieldy compliance system. An army of experts—diversity consultants, human resources professionals, government regulators, plaintiff attorneys, insurance underwriters, management attorneys, judges—has helped to develop, and justify, a host of “symbolic” workplace civil rights measures.

Working Law: Courts, Corporations, and Symbolic Civil Rights, by Lauren Edelman, recounts how we came to accept the dysfunctional system we have today, in which employers create elaborate hiring, promotion, training, and disciplinary protocols to satisfy the courts. Often these protocols do little or nothing to advance equality of opportunity. Some of them routinely backfire. The courts judge whether employers discriminate, and they have come to accept the word of corporate defense lawyers that these protocols prove absence of discriminatory intent. Even liberal judges accept management platitudes about intent and ignore hard evidence that employers continue to select and promote workers based on gender, race, and ethnicity. That a company promotes men at twice the rate it promotes women, or whites at thrice the rate it promotes African Americans, matters not so long as it mandates diversity training and records annual employee performance ratings.

Edelman traces this system to the dynamic between the corporate and legal fields over the last half-century. Many organizational scholars hold naïve views of the law—assuming that regulatory intent is transparent and that judges hold employers to account. Many legal scholars hold naïve views of organizations—assuming that managers follow formal policies, which reflect the intent of executives. Edelman has a refreshingly clear-eyed view of both fields. If the book is a call to action, its premise is

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that all parties need to shed their rose-colored glasses. Regulators need to understand that executives may adopt elaborate structures to symbolize equality, with no intention of changing how they hire or promote people. Employees and civil rights activists must understand that judges often exonerate discriminatory employers on the thinnest evidence of intention to comply with the law. Corporate executives need to understand that they can't prevent discrimination by hiring consultants to rewrite their mission statements. Yet executives understand one thing all too well in Edelman's view: purely symbolic compliance measures will serve most legal purposes.

Because executives little understand the specifics of legal compliance, Edelman shows, HR managers and diversity experts make hay while the regulatory sun shines, exaggerating the legal risk to firms in order to get them to buy all sorts of compliance measures. Many of those measures were hatched in federal workplaces before invading the private sector. But the days of regulatory sunshine may be past, for the courts have made it more difficult for workers to win, and thus more difficult for experts to exaggerate legal risk.

Because the Civil Rights Act outlaws workplace discrimination in very general terms, judges play a special role in this system. They define compliance, but they define it only in reaction to the innovations that management-side attorneys trot out to defend their clients. Thus, as judges encounter the harassment-grievance-procedure defense time and again, they at first *refer* to it

in the occasional decision. Next, they deem the procedure *relevant* in some decisions, but not exculpatory. Soon, in twin 1998 decisions, the Supreme Court vets grievance procedures as a defense in hostile-environment harassment cases. Now judges may ignore evidence of widespread harassment at a workplace, look for a grievance procedure, and check the box.

It is not only judges who are duped by fake equal-opportunity programs. Edelman's review of the social psychological literature suggests that we all are—real-life employees, as well as laboratory subjects, are readily convinced by useless measures. Announce a diversity seminar or post an equal-opportunity notice and your workers will stop seeing the discrimination right in front of their eyes—that is the bad news from social psychology. And indeed, Edelman's own data show that plaintiff lawyers counsel their clients to drop their suits when employer attorneys brandish sham diversity programs. When plaintiff lawyers do stick with their clients, judges presented with fake diversity measures throw their cases out anyway. Judges should know better than to accept the pabulum offered by employer attorneys, in Edelman's view, and plaintiff attorneys betray their clients when they eat the same slop.

When employer equal-opportunity measures fail to stop discrimination, Edelman finds, taking complaints up a level doesn't usually help. These days the Equal Employment Opportunity Commission gets about 80,000 discrimination complaints a year. This is the tip of the iceberg—most people who believe they have experienced discrimination keep their mouths shut. Of those who complain, only a small fraction receives any kind of benefit—as Edelman amply documents and as Ellen Berrey, Robert Nelson, and Laura Beth Neilsen (2017) document at some length in a new book. Yet of those who do complain, nearly half allege that they faced workplace retaliation for speaking out. You are more likely to face retaliation than you are to get satisfaction.

Edelman finds that the lawyers who defend corporations have structural advantages over those who represent employees. They are in a long game with repeat rounds and ample resources, and thus choose their battles to shape case law, quickly settling

cases that might set precedents favoring workers and fighting on when cases might set precedents favoring corporations. This helps to explain why it has gotten harder for employees to win. The courts not only accept sham equal-opportunity measures, they increasingly require proof of intentional discrimination, let employers require mandatory arbitration that precludes lawsuits, and refuse to certify class actions. Judges have also issued more and more summary judgments favoring employers, etching dubious pro-management heuristics into case law, such as the "stray remarks" doctrine that a supervisor's racist and sexist comments can't demonstrate discriminatory intent.

Plenty of books decry the failure, or success, of the civil rights regime without a shred of evidence. This is not such a book. Edelman is obsessed with proving every claim. *Working Law* reports on an exhaustive review of civil rights jurisprudence; a retrospective survey of employer practice; interviews with managers; archival data on diversity discourse from professional journals; data from diversity webinars and websites; data from the online resource base of a diversity consultancy; systematic historical data on EEOC guidelines; and extensive longitudinal data on judicial decisions in civil rights cases. The evidence for her claims is overwhelming.

If the book is a rare example of the kind of methodological triangulation that Durkheim advocated, Edelman herself is a rare bird—both a true organizational scholar and a true legal scholar. She studied sociology at Stanford in its organizational heyday and law at Berkeley, where she now teaches, with law-and-organizations pioneer Philip Selznick. The book evinces a deep understanding of how firms work and of how the law works. There is surely no other scholar in America who could have developed such a sophisticated, yet cogent, theory of the sorry state of civil rights.

In Edelman's theory of legal endogeneity, compliance is construed not by the hens but by the foxes—"constructed within the social arenas that it seeks to regulate." This occurs through what might be termed the dual movements of legalization and managerialization. Building on Selznick's idea that workplaces have become increasingly legalized—little fiefdoms with their own

citizenship rights, kangaroo courts, and law-like policies—Edelman theorizes the first movement as the legalization of management. Her most original contribution is to theorize the second movement as the managerialization of the law, whereby judges, federal regulators, and legislators accept innovations designed to achieve managerial purposes as evidence of legal compliance and adjust the meaning of the law to align with managerial norms.

In spelling out the theory of endogeneity, Edelman makes a compelling case for rethinking the sociological concept of organizational fields. Definitions of fields abound, but most encompass groups of organizations that do the same thing (build planes, or house the homeless), their suppliers and customers, and the regulators and professionals with which they interact. Fields are nested and overlapping. Edelman, by contrast, makes a sharp distinction between organizational and legal fields and argues that while they are overlapping, they operate with substantially different practices and understandings of the world. Edelman contends that when these fields collide, each shapes the other. In creating ambiguous regulations governing the workplace, Congress invites employers to devise legalistic internal protocols. The protocols conform to managerial norms but may subvert the law, and yet the courts approve most of these protocols, which then bleed into regulations and legislation. Thus the legal logic comes to infect the firm, and the managerial logic comes to infect the law.

Working Law is Edelman's first full explication of the theory, but she had sketched its broad outlines in articles. Others have used the theory of legal endogeneity to explore everything from insider trading to prison rape to restaurant hygiene. When governments establish broad regulatory principles without specifying compliance criteria, experts spell out law-like solutions and courts sign on, eventually deferring to some solutions as necessary and sufficient proof of compliance. Managers come to view these solutions as obligatory. Take the case of financial regulation after the collapses of Enron, WorldCom, and Tyco, circa the year 2000. Congress passed Sarbanes-Oxley to take executives to task for accounting fraud.

Corporations proposed new ethics codes, endorsed by regulators, but outsourced the drafting to consultants who created one-size-fits-all guidelines with no teeth. Such symbolic compliance measures can make us complacent while utterly failing to address the social problem at issue, whether accounting fraud or restaurant hygiene.

Civil rights law has failed to fundamentally change the corporation, law firm, or university. At the top, corporate executives, law partners, and university faculty look more like America than they did when Congress passed the Civil Rights Act in 1964, but not much more. Change has been faster at the bottom of the workforce, but it is hard to argue that the law deserves any credit. Symbolic equal opportunity measures sometimes promote opportunity; however, what sustains them is not evidence that they work, but evidence that they work in court.

Edelman asks whether we might be better off if the Civil Rights Act of 1964 hadn't passed. Perhaps if industry had quashed the Act, activists would have fought on to win better legislation, giving regulators the power to do more than react to complaints of the downtrodden and compliance measures of corporate design. Anthony Chen (2009) thinks activists might have done better to wait until Congress could get the bill right, creating an agency that could set employer standards. We had something like that in the 1970s for firms with federal contracts, when Washington set standards and held contractors to them. Reagan gutted that system, and we've seen nothing like it since. The current system works only through a private right of action, exercised by individuals who often lack for resources. In the end, judges decide what the law means, and wealthy corporations play too big a role in shaping their thinking.

References

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