

In Their Own Words: How Ordinary People Construct the Legal World

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A wave of scholarship about legal consciousness has demonstrated how law shapes the everyday lives of ordinary people (Ewick and Silbey 1992, 1998; Sarat 1990; White 1990; Sarat and Kearns 1995; Hartog 1995; Nielsen 2000). This research tradition decenters formal legal institutions and procedures and takes seriously the idea that ordinary people can be legal actors. The studies map the influence on law and legality in the everyday problems that people confront in their homes, schools, workplaces, and neighborhoods. The articles in this symposium continue this tradition. Putting legal consciousness in action, the authors emphasize everyday social practices that both enact and challenge existing laws. Even more important, the authors accept the invitation to decenter the law. In these articles, the law is present but is hardly the dominant set of frames ordering social life. The authors contextualize legal consciousness by situating their studies in particular problems, particular organizations, and particular social institutions that mediate the meaning of legality for ordinary people. And in keeping with this research tradition, the authors rely on individuals' own words about their everyday experiences.

In legal consciousness research, the push and pull of legal ideas lie at the heart of modern explanations of the texture of law in our everyday existence. On one side is the pull of the law in constructing and constraining individual action and decisions. The law imposes constraints in the form of

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elaborate regulations, codes delineating prohibited conduct, and social norms designed to maintain existing arrangements of power and order. While they enjoy varying degrees of familiarity with these codes, lay people have nevertheless acquiesced or grown accustomed to these formal rules that govern behavior. And, by their often transitory and abstract acceptance of these codes, rules, and norms, the law constitutes their everyday life—shaping the possible, the probable, and even the impossible courses of action in important aspects of daily decision making. Thus, law provides “the principal categories that make social life seem natural, normal, cohesive, and coherent” (Sarat and Kearns 1995, 22).

On the other side, individuals’ own interpretations of law provide the “push,” shaping the new versions of legality. In this new approach, law is not passive, but rather a dynamic force. By enacting legality in daily life, ordinary people give flesh and meaning to what is otherwise an “abstract but binding form” (Habermas 1996, 318). Those everyday enactments, in turn, create the possibility for change—in law, in institutions, in social life. Every decision that involves the law offers the potential for new interpretation, a new legal claim, the introduction of legality into realms of social life it had never before occupied, or the reshaping of common understandings of that social life. Thus, even as legality constrains the range of accepted options for individual action, people nevertheless have opportunities to redefine and challenge those constraints (Ewick and Silbey 1998; Sewell 1992). In addition, legality is a powerful set of frames: By invoking legality, individuals may also call on the vast resources of the state by mobilizing the law. The accumulation of these individual demands on the legal system can have dramatic effects on others, by creating new legal rights and novel legal claims (Zemans 1983; Lawrence 1991a, 1991b; Barclay 1999). Thus, even as law colonizes everyday existence, often embodying oppression and inequality, legality provides a means of resistance (Merry 1995; Sarat and Kearns 1995; McCann and March 1995).

Thus, in the push and pull of legality in our everyday lives lie the interstices between legal consciousness and legal mobilization. Research on legal consciousness has shown that the law provides schemas and frames that construct the meaning people give to their experience (Ewick and Silbey 1992, 1998; Yngvesson 1993; Merry 1990). People draw on legal concepts and resources to make sense of their disputes with their neighbors, their family problems, even their experiences with street harassment (Yngvesson 1993; Merry 1990; Nielsen 2000). For its part, legal mobilization research analyzes the catalysts that transform social conflicts into legal actions (Handler 1978; McCann 1994; Olson 1984; Silverstein 1996). Both approaches share an empirical interest in how individuals react when confronted by problems in their everyday lives that involve legal rules, codes, or social norms. Where they differ is the *direction* of their analyses. The legal mobilization framework adopts an instrumental perspective by asking how people

use law to resolve disputes, while studies of legal consciousness focus more on how law constitutes everyday life and its common problems.

The articles in this symposium acknowledge both the constitutive and instrumental nature of law: In all these papers, law both shapes the meaning that people make of their experiences and provides a set of tools and resources for resolving conflict or making social arrangements (Sarat and Kearns 1995). Each of the authors examines legality in the context of disputes and dilemmas that implicate particular legal rules and social practices. These social practices are firmly grounded in the everyday lives of ordinary people interacting with others in specific institutional and organizational locations: same-sex partners contemplating alternatives to marriage; women evaluating sexually harassing behaviors in the workplace; and employees resolving problems within and without formal grievance procedures. Moreover, the authors demonstrate that these practices construct legality itself in these particular legal domains.

In addition, the authors in this symposium not only decenter formal legal institutions, such as courts and legislatures, they decenter the law itself (Sarat and Kearns 1995; Ewick and Silbey 1998). They all take seriously Ewick and Silbey's admonition that studies of legal consciousness analyze "how, where, and with what effect law is produced in and through commonplace social interactions within neighborhoods, workplaces, families, schools, community organizations and the like" (Ewick and Silbey 1998, 20). The authors have located their studies in families and workplaces where a range of social norms, values, and beliefs—not just the law—shape disputes and the resolution of those disputes. In these analyses of people's complex, sometimes painful lives, law is present, but so are love, fear, violence, friendship, cooperation, resistance, and politics. Thus, in these analyses, the authors are developing "the midlevel theories and cultural practices that could bridge the specificity and abstraction and provide an account of how a cultural, constitutive theory of law actually works" (Mezey 2001, 161).

In the remainder of this introduction, we review the research traditions of legal mobilization and legal consciousness. We identify some points of intersection where the two research traditions meet, and then we discuss how the articles in this symposium build on these intersections. Finally, we preview the articles in this symposium.

DECENTERING THE COURTS: LEGAL MOBILIZATION AND LEGAL CONSCIOUSNESS

Legal mobilization research has traditionally addressed the questions of how and why conflict reaches the judicial system. In one strand of this tradition, scholars analyze the way that social movements use legal strategies to advance their public policy goals (Handler 1978; McCann 1994; Olson

1984; Silverstein 1996). Many excellent studies have shown that social movements rely on litigation not simply to win favorable precedents from the courts, but also to raise public awareness about their cause and to mobilize activists into the movement. By concentrating on social movements and their legal strategies, researchers decenter judicial institutions and focus instead on how litigation fits into the movement's overall political agenda. Their serious consideration of the political agenda also allows these researchers to decenter the law itself—that is, law is just one of the many ideological resources that movements have at their disposal (McCann 1994; Silverstein 1996). For example, McCann's study of the comparable worth movement demonstrated that lawsuits demanding pay equity foundered in the courts, but those suits were still vital to the movement's wider efforts to attract working women to activism and to raise consciousness among workers and the general public about the issues of pay equity (McCann 1994; Katzenstein 1998).

Another strand of legal mobilization has focused on individuals who use the law on their own behalf. For example, early research on disputing also decentered formal legal institutions by asking how everyday events turn into disputes and litigation (Felstiner, Abel, and Sarat 1980–81; Miller and Sarat 1980–81; Kritzer, Vidmar, and Bogart 1991; Curran 1977; Zemans 1983; Jacob 1969). Based on behavioral research, these studies examined the relationship between the development of disputes and such factors as the socioeconomic characteristics of the parties and the type of problem at stake. Moreover, this research showed that individuals' legal mobilization had political consequences (Zemans 1983; Lawrence 1991a, 1991b). Considered together, individual (reported) cases are the legal precedents that constitute, in important part, American law. Moreover, the very act of starting a lawsuit or even invoking legal principles is political, calling on the power of the state to advance individual interests (Zemans 1983; Lawrence 1991a, 1991b). Law, in this conceptualization, is a tool that people use to resolve disputes.

Thus, these studies of legal mobilization decentered the courts in favor of analyzing individual decision making and behavior. Because they explored the underlying causes of disputes, these studies also decentered the law. Although the legal mobilization framework encouraged inquiry into how people conceive of their problems as being "legal," the behavioral approach had only limited methods for measuring this basic form of legal consciousness. For example, in his study of debtors, Jacob (1969) found that the best predictor of declaring bankruptcy was having contact with someone who had already been through bankruptcy and was therefore familiar with the legal procedure. Similarly, the Civil Litigation Research Project measured legal consciousness by asking those who responded to a random survey whether they knew any lawyers (Miller and Sarat 1980–81). These were very basic indicators of respondents' familiarity with law and lawyers, but

they did little to capture the process that led respondents to use law as a frame to conceptualize events.

Recent research on legal consciousness has taken up this question of the legal meanings that people attach to events and experiences—“the way that people understand and use the law” (Merry 1990, 5). This research tradition adopts a constitutive perspective. Instead of conceptualizing law as a tool for resolving conflict, this approach asks how legal concepts influence the goals, options, choices, and problems of ordinary individuals. In this formulation, legal consciousness is not simply a summary of a person’s attitudes and opinions about law and the legal system. Instead, legal consciousness is reflected in the stories people tell about their everyday lives and in their social practices—going to court, talking about problems, engaging in disputes, and avoiding conflict (Merry 1990; Ewick and Silbey 1998).

Like legal mobilization, legal consciousness focuses on ordinary individuals instead of judges, lawyers, or social movement organizations. The foundational studies examined working-class people who brought their problems to small claims courts (Merry 1990; Yngvesson 1993); poor people interacting with the welfare bureaucracy (Sarat 1990; White 1990); targets of race and sex discrimination (Bumiller 1988); and people seeking divorces (Sarat and Felstiner 1995). But small claims courts, lawyers’ offices, and the welfare bureaucracy are still formal legal settings. The individuals who reached those sites were already aware of the legal nature of their problems.

More recently, legal consciousness research has shifted away from this “institutionally centered, law-first perspective” in favor of a focus on everyday life in commonplace locations like workplaces, schools, and neighborhoods. Formal legal rules, codes, and regulations are less important in this analysis than the commonsense understandings of the law that Ewick and Silbey conceive of as “legality”—“the meanings, sources or authority and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends” (Ewick and Silbey 1998, 22). Legal consciousness is the individual’s “participation in this process of constructing legality” (Ewick and Silbey 1998, 45).

This conceptualization recognizes that people may rely on legal authority when they know little or nothing about the formal rules. Unlike formal law—trickling down from policymakers to the general public—legality is constantly being constructed by the social practices of ordinary individuals (Sarat and Kearns 1995; Ewick and Silbey 1998). According to Ewick and Silbey, the “commonplace operation of law in daily life makes us all legal agents insofar as we actively make law, even when no formal legal agent is involved” (Ewick and Silbey 1998, 20). Thus, law is what people think it is, what they say it is, and what they do to implement the meanings they create.

Using this framework, Ewick and Silbey studied the legal consciousness of a random sample of ordinary citizens. Relying on in-depth interviews,

they asked their respondents about everyday events and experiences that “troubled or bothered” them and then examined the resulting narratives for interpretations of legality. They discovered that law was implicated in a vast array of life’s domains and identified at least three orientations toward law. Those who stood “before the law” thought that the law enjoyed a special authority to govern their behavior; those who played “with the law” considered law a game that provided special benefits to those with the requisite skills; and those who were “against the law” believed that law was an oppressive force (Ewick and Silbey 1998).

Yet by centering the analysis on these orientations toward law, Ewick and Silbey’s study emphasizes the importance of law at the expense of attention to other social norms and structures that also shape meaning and behavior. As Sarat and Kearns have noted:

[S]cholarship on law in everyday life should abandon the law-first perspective and should proceed, paradoxically, with its eye not on law, but on events or practices that seem on the face of things, removed from law, or at least not dominated by law from the outset. . . . By beginning with such circumstances, it is possible to see that more is at stake than law, that motives, needs, emotions, anxieties, aspirations that are not entirely fixed by legal meanings or by legal forces operate throughout without totally losing their identity to law. In fact, it is law that regularly buckles and is resisted, or reinterpreted, or distorted. (1995, 55)

Moreover, the wide variety of people’s problems and social locations in Ewick and Silbey’s study does not allow for analysis of organizational and institutional context that itself can influence the meaning of legality (Edelman, Erlanger, and Lande 1993). The studies in this symposium begin the process of conducting empirical studies that meet these aspirations of legal consciousness research.

THREE COMMON ASSUMPTIONS IN LEGAL MOBILIZATION AND LEGAL CONSCIOUSNESS

In spite of their differences, legal mobilization and legal consciousness share three assumptions about the relationship between individuals and the law. First, *the law’s power depends on the values, beliefs, and behavior of individuals*. The law on the books has less power than the perception of law by those who would invoke it or violate it. Legal rules only shape behavior when people know them and expect them to be enforced. These expectations, in turn, are shaped by many other factors, such as prior socialization and prior experiences. People act on those expectations in a variety of ways—by filing lawsuits, hiring lawyers, making insurance claims, and placing chairs in

shoveled parking spaces (Ewick and Silbey 1998). It is in these common social interactions that ordinary people generate law in the everyday.

The second assumption is that *the law is neither neutral nor passive*. The law carries with it the sanction of the state, which includes both the moral authority attached to the state's legitimacy as well as the state's monopoly of force. The law imposes control on its citizens and regulates their behavior with often oppressive strength. On the other hand, law has the potential to be liberating and empowering. Law encapsulates social meaning in a manner that can be mobilized to create new possibilities of choice and action that may enjoy the legitimacy associated with the state. Thus, law may be conceptualized as an arena for struggle and resistance (Merry 1990, 1995; McCann 1994).

Finally, *the law might be pervasive, but it is not determinant*. In legal mobilization and legal consciousness, the law defines and constrains our choices and actions, but rarely does it directly determine them. Traffic laws direct us when to stop, when to go, and when to turn. But, as anyone who has driven a car knows, each driver chooses whether to obey those traffic laws. Notwithstanding clear laws to the contrary, drivers routinely roll through stop signs and race against the red light. In doing so, they may meet with state intervention in defense of its proclaimed rules. Yet, undertaking such a routine action as rolling through a stop sign requires even reprobate drivers first to choose their preferred position in relation to the existing law or legal norm, and then to act on such a choice in contrast to the published precepts. And in the intersection of the existing law and their own preferred action lies a zone of volition in which individuals make decisions about how law will shape their behavior.

LEGAL CONSCIOUSNESS IN ACTION

The articles in this symposium build on these assumptions by synthesizing legal mobilization and legal consciousness approaches into new theoretical frameworks for studying law in everyday life. First, the authors' papers underline the value of a methodological focus on individuals for understanding the influence of law on social relations. In these articles, ordinary people are legal actors considering workplace grievances, deflecting sexual harassment, and crafting alternatives to marriage. By having individuals speak about their lives "in their own words," the authors can discern the respondents' varied motives for action and the comprehensive meanings attributed to law and legal practices. These meanings and motives are central to the construction of legal consciousness that shapes so many specific decisions, choices and practices.

This emphasis on the individual also allows the authors to account for the development of wide variations in legal consciousness among people

who seem, on the face of things, to be similarly situated (Ewick and Silbey 1998; Nielsen 2000). Because legal consciousness depends on individuals' own perceptions of and experiences with the law and because it incorporates individuals' own hopes for what the law should be in specific circumstances, it is strongly influenced by individuals' circumstances and their beliefs. Thus, focusing on an individual does not rule out the collective effects that socialization and social characteristics exercise over legal consciousness. Rather, it raises the possibility that individuals with similar social characteristics and life experiences could have substantial variations in their legal consciousness (Nielsen 2000). Moreover, these variations may explain different legal choices adopted by such individuals when confronted with legal rules or norms. In this view, some individuals may develop a legal consciousness that spurs them to mobilize the law, while others' legal consciousness will generate reticence, and still others will be prompted to resist. These variations do not occur on a random basis. Rather, legal consciousness plays a defining role.

Second, the papers in this symposium introduce a new version of the "gap study." Gap studies are a time-honored tradition in law and society; they explore the "gap" between the law on the books and the law in action. But in these three articles, the law in action consists of meaning-making activities of ordinary people trying to navigate the opportunities and challenges of everyday life. Moreover, these three papers illustrate the gap between legal consciousness and legal mobilization. It is these gaps that the authors explore by showing that law plays an important, though not exclusive, role in constituting the disputes and conflicts that people confront. In addition, the authors show that individuals are often strategic in their mobilization of law, invoking it when it helps them, ignoring it when it might hurt, and generating more suitable practices and institutions when law is inadequate. Finally, individuals use law—and its alternatives—as a means of resistance against social structures and meanings that oppress them.

In Hull's paper, for example, gay and lesbian couples express their aspirations for the legal right of marriage—to ensure financial stability and to gain recognition of their relationship from family and friends as well as the state—even as they construct alternatives to these legal practices. For the women in Marshall's paper, legal schema provide frames for understanding sexual harassment as an outgrowth of male dominance in the workplace, but those legal schemas compete with management logic that undermines such resistance. In Hoffman's paper, workers' grievances represent an attempt to resolve the most pressing conflicts in their working lives, but the apparently free choices faced by these workers for resolving their grievances are determined by the hierarchical structure of their company.

By analyzing legal consciousness in the context of specific kinds of conflicts and choices, the authors expand the project of decentering law—the third contribution of the papers in this symposium. While acknowledging

the significance of legal frames, the articles in this symposium examine how these frames interact with other social norms, beliefs, values, and emotions. For example, Hoffman's paper demonstrates how workers' understanding of the effectiveness of various grievance alternatives shapes how they address workplace problems. Similarly, Marshall's article shows that feminist and antifeminist ideology shapes women's interpretations of their experiences with unwanted sexual attention. Even in Hull's paper, same-sex couples create alternatives to marriage that may not have the same legal significance but that instantiate emotional and social commitments. Thus, by viewing the law in its "natural" habitat, surrounded by other motives, needs, emotions, aspirations, and norms, the authors demonstrate that people make claims on the law, but not necessarily rights claims; that the law leads people to accept and acquiesce to existing social and economic arrangements without making them "lump" their grievances; and that people may reject the formal apparatus of the law even as they create viable substitutes for its power and authority.

Finally, these three papers expand the legal consciousness framework by explicitly placing the social and cultural practices that constitute legal consciousness in an organizational and institutional context. Definitions of legal consciousness emphasize the importance of social practices to the construction and development of consciousness. As Ewick and Silbey have noted, "Consciousness is not merely a state of mind. Legal consciousness is produced and revealed in what people *do* as well as what they *say*" (Ewick and Silbey 1998, 46, emphasis in original). Yet most empirical accounts of legal consciousness focus on the more cognitive aspects of the legal schema that respondents deploy to frame their experience. The three papers in this volume focus more closely on particular social practices—what people do. They examine respondents' decisions to participate in available legal institutions and related practices, to develop their own alternatives, or to ignore the law completely.

The authors in this symposium "bring institutions back in" when analyzing legal consciousness. First, the problems and dilemmas that provide the background for these three papers implicate particular sets of laws and legal institutions. But these institutions have their own agendas, as they translate, magnify, or trivialize the law (Edelman, Erlanger, and Lande 1993). Individuals interact with these institutions, and those interactions constitute an important set of practices in the construction of legal consciousness (Marshall 2001). The papers in this symposium examine situations in which people choose to develop alternatives to available legal practices (such as participating in a public commitment ceremony or creating legal arrangements that simulate marriage) or to ignore the law completely (such as resolving workplace conflict outside of grievance procedures).

ARTICLES IN THIS SYMPOSIUM

This symposium consists of three separate articles. In “The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same Sex Marriage,” Kathleen Hull examines how a legally disadvantaged population—gays and lesbians—view the power of overwhelmingly negative official law in relation to their efforts to create a family. After showing unanimous support among committed same-sex couples for legal same-sex marriage, Hull demonstrates how they use public rituals of commitment to fulfill some of the symbolic functions normally performed by official law. In this sense, same-sex couples are enacting not just legality but also innovations in the institution of families through their cultural practices, despite the absence of acknowledgment from official law.

Anna-Maria Marshall, in “Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment,” synthesizes the legal mobilization framework and social movement theory that concentrate on meaning making. Social movement theory provides extensive insight on how social movements reshape the consciousness of ordinary individuals by circulating messages that reinterpret experience, leading people to see harm where none existed before. Those messages often rely on rights-based arguments, thus making law an important resource in social movement efforts. Moreover, legal concepts help structure the individual’s understanding of experience. Marshall’s article integrates these two perspectives by examining the way women frame their experiences with unwanted sexual attention in a workplace, where the employer might be generating messages that compete with such conduct—messages that emphasize work and efficiency.

Finally, in “Legal Consciousness and Dispute Resolution: Different Disputing Behavior at Two Similar Taxicab Companies,” Elizabeth Hoffmann examines employee choice making at two organizations within the same industry—one with a high level of worker-manager cooperation and one with a rigid hierarchy—to examine how ordinary people construct and understand the rules that govern, enable, and constrain their working lives. She demonstrates how different perceptions of the laws and rules that regulate their workplaces, or different grievance cultures, encourage alternate understandings of available choices for dispute resolution.

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