

AFTER LEGAL CONSCIOUSNESS

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■ **Abstract** Legal consciousness as a theoretical concept and topic of empirical research developed to address issues of legal hegemony, particularly how the law sustains its institutional power despite a persistent gap between the law on the books and the law in action. Why do people acquiesce to a legal system that, despite its promises of equal treatment, systematically reproduces inequality? Recent studies have both broadened and narrowed the concept's reach, while sacrificing much of the concept's critical edge and theoretical utility. Rather than explaining how the different experiences of law become synthesized into a set of circulating schemas and habits, the literature tracks what particular individuals think and do. Because the relationships among consciousness and processes of ideology and hegemony often go unexplained, legal consciousness as an analytic concept is domesticated within what appear to be policy projects: making specific laws work better for particular groups or interests.

INTRODUCTION

Legal consciousness is an important, conceptually tortured, and ultimately, I have come to think, compromised concept in law and society scholarship. A product of critical shifts in the theoretical arsenal of socio-legal research,¹ this concept's development and deployment may have betrayed the insight it was meant to achieve. Before it is tossed into the storage closet of academic fashion, however, I provide a history of its emergence, a review of its uses and major findings in the literature, and an explanation for why it might be time to move on.

Legal consciousness as a theoretical concept and topic of empirical research developed within law and society in the 1980s and 1990s to address issues of legal hegemony, particularly how the law sustains its institutional power despite a persistent gap between the law on the books and the law in action. Why do people acquiesce to a legal system that, despite its promises of equal treatment, systematically reproduces inequality? It became associated with studies of legal culture more generally, and since the late 1990s, empirical study of legal consciousness

¹I use the terms law and society and socio-legal research interchangeably. Although the latter term was originally used more in Europe, it has become conventional in the United States as well.

has become a growth industry. Recent studies of legal consciousness have both broadened and narrowed the concept's reach, while sacrificing much of the concept's critical edge and theoretical utility. Rather than explaining how the different experiences of law become synthesized into a set of circulating, often taken-for-granted understandings and habits, much of the literature tracks what particular individuals think and do. Because the relationships among consciousness and processes of ideology and hegemony often go unexplained, legal consciousness as an analytic concept is domesticated within what appear to be policy projects: making specific laws work better for particular groups or interests. In this review, I offer an invitation to recapture the theoretical promise for studies of legal consciousness.

WHY LEGAL CONSCIOUSNESS? LEGACIES FROM LAW AND SOCIETY RESEARCH

The story of law and society, with different foci, has been told several times (Lipson & Wheeler 1986, Silbey & Sarat 1987, Sarat & Silbey 1988, Dezalay et al. 1989, Levine 1990, Sarat & Kearns 1993, Sarat et al. 1998, Garth & Sterling 1998, Tomlins 2000, Erlanger 2005). Here, I show that the concept of legal consciousness was implicated in the earliest law and society research. Seeing itself as a critical enterprise, removed from mainstream legal discourse as well as from the authority of the legal profession, law and society scholarship has been traditionally less concerned with what the law *is* than with what the law *does*. Taking up the agenda posed by Roscoe Pound (1910) and the American legal realists in the beginning of the twentieth century (Kalman 1986, Schlegel 1995), law and society scholars at mid-century explored empirically the processes and consequences of implementing and administering the law. They found, repeatedly, the ineffectiveness of law: a persistent, troublesome gap between the law on the books and the law in action (Pound 1910, Sarat 1985). In accounting for this gap, socio-legal research depicted how power is instantiated in all sorts of legal relations and demonstrated not only that social organization matters but also how it matters. In almost every piece of empirical research on law, the insight was confirmed. In historical studies of litigation, in studies of policing, in studies of the legal profession, in histories of how particular legal doctrines and offices developed, in studies of court cultures and judicial biographies, in studies of the regulation of business, and in the extensive literature on crime control, research showed that organization, social networks, and local cultures shaped the uses and consequences of law. Moreover, by the 1970s and 1980s, it was becoming increasingly clear that viewing law primarily as a tool of public policy designed to achieve pre-established purposes, whether an effective or failed tool, obscured the aggregate and cumulative contributions law made to sustaining a common culture, historical institutions, and particular structures of power and inequality.

The developing corpus of law and society research demonstrated that, despite aspirations to due process and equality before the law, the “haves” regularly and

systematically “come out ahead” (Galanter 1974; see Kritzer & Silbey 2003). In what became a canonical statement synthesizing law and society research to that time, Galanter argued that the basic form of legal development through case-by-case adjudication privileged repeat players who, anticipating recurring legal engagements, have lower stakes in the outcome of any particular case. Repeat players have resources to pursue long-term strategies and plan for legal problems by arranging transactions and compiling a record to justify their actions. Thus, repeat players can orchestrate litigation to produce rule changes in their favor. Galanter did not argue that members of the dominant class, or organizations with great wealth, always win in litigation. Rather, he focused on the consequences of systemic organizational processes that create structural advantage for repeat players.

In modern, pluralistic democracies, due process, treating like cases the same, and equality before the law—the foundations of legal liberalism—name the most widely shared and philosophically sustained conceptions of justice (Rawls 1971, 2001). Thus, in documenting a gap between the law on the books and the law in action, and in specifying how social organization and legal procedures reproduced structured inequalities rather than equal treatment, law and society research produced a significant critique of the justice possible through law. By relying on ordinary social logics, local cultural categories and norms, the research had shown that legal action both reflected and reproduced other features and institutions of social life where power and prejudice were unconfined by the techniques of legal procedure. Although the uses of law were shown to be diverse and situationally structured, the seemingly individualized, disparate decisions of legal actors cumulated to reflect the wider array of social forces more than the facts of specific incidents. In its cumulative message, the research challenged the aspirations of those who saw in the law the possibilities of a rationally grounded morality (Fuller 1964), a mechanism for confining arbitrary power (Selznick 1961, 1969), or progressive scholars’ pragmatic policy agendas.

The general thrust of the empirical research confirmed Weber’s hypothesized iron cage of bureaucratic, legal, and technological rationalization. Rather than a machine-like system of constrained action coordinated to achieve officially established goals, it described “an acephalous system in which all are obedient subordinates tending to their particular tasks, and no one is responsible for the overall outcome” (Pitkin 1993, p. xiv). Although it is possible to have action without systematic goals, without any one in charge, having no coordinated purpose may not avoid systematic outcomes. “The rule of Nobody is not no-rule,” Arendt wrote, “and where all are equally powerless we have a tyranny without a tyrant” (1972, p. 178). The progressive triumphalism that had animated the law and society movement’s birth, the confidence that progressive social change could be achieved through law, was slowly giving way to a growing pessimism about what was beginning to seem like an inherent structural connection between the legal form and the forms of inequality and domination characteristic of industrial capitalism (Kalman 1996).

At the same time that social scientists were documenting the power of bureaucratic-legal authority—how republics were being turned into bureaucracies, as Arendt wrote—European observers and writers were making comparisons between the systems of Eastern Europe under Soviet supervision and post-industrial consumer capitalism in the West. Vaclav Havel, for example, described the Czechoslovakian situation as “post-totalitarian” because it relied for its power, for the most part, not on terror but on a routinized administrative bureaucracy and on the habitual, cynical apathy of the population to acquiesce to their own subordination and domination. He worried aloud that the experience of these post-totalitarian systems might be “a kind of warning to the West, revealing its own latent tendencies” toward concentrated, unrestrained power (Havel 1985, pp. 38–39). In both Arendt’s and Havel’s analyses, they discerned something worse than the common tyranny of a monarch or small manipulative elite. They came to believe that we, the people, were collectively imprisoning rather than freeing ourselves (Pitkin 1993, p. xv).

To know what law does and how it works, we needed to know how “we the people” might be contributing to the law’s systemic effects, as well as to its ineffectiveness. If law failed to meet its public aspirations, how did it retain support among the people and how did it continue to achieve the sense of consistency, accessibility, fairness, and thus legitimacy? How could we explain what looked like unrelenting faith in and support for legal institutions in the face of what appeared to be consistent distinctions between ideal and reality, law on the books and law in action, abstract formal equality and substantive, concrete material inequality? We needed to find out more about the consistency or, conversely, the fissures in what looked like consistent allegiance to the rule of law. To answer these questions, we needed to know not only how and by whom the law is used, but also when and by whom it is not used. Thus, we needed to learn what using or not using the law signified to the populace. We had already learned that “neither the purposes nor the uses of any specific law are fully inscribed upon it. . . . [T]he meaning of any specific law, and of law as a social institution, [could] be understood only by examining the ways it is actually used” (Silbey & Bittner 1982, p. 399). Not only would we have to seek out the range of variation in uses and interpretations of law, but we might also have to assess, and perhaps redefine, what we mean by using the law. Thus, in the 1980s, “the ways law is experienced and understood by ordinary citizens” (Merry 1985), i.e., legal consciousness, became a central focus for some law and society scholars.

This reorientation had three components. First, it abandoned a “law-first” paradigm of research (Sarat & Kearns 1993). Rather than begin with legal rules and materials to trace how policies or purposes are achieved or not, scholars turned to ordinary daily life to find, if there were, the traces of law within. They were as interested in the absences and silences where law could have been and was not as much as they were interested in the explicit signs of positive law. Law and society had already moved beyond what Lawrence Friedman (1975, p. 29) identified as lawyer’s law (“ideas, problems or situations of interest to legal practitioners and

theorists”) to legal acts (“rules and regulations of the modern state, the processes of administrative governance, police behavior”) and legal behavior (the unofficial as well as official work of legal professionals). Researchers now attended to the unofficial, non-professional actors—citizens, legal laymen—as they took account of, anticipated, imagined, or failed to imagine legal acts and ideas. It shifted empirical focus from a preoccupation with both legal actors and legal materials to what had in European social theory been designated as the life-world, the everyday life of ordinary people (Lefebvre 1968, 1991 [1958]; Schutz & Luchman 1989 [1973]; Ginzburg 1976; for a recent critique of the uncritical valorization of the everyday in socio-legal studies, see Valverde 2003).

Second, it abandoned the predominant focus on measurable behavior and reinvigorated the Weberian conception of social action by including analyses of the meanings and interpretive communication of social transactions (Habermas 1984, 1987, 1998). From this perspective, law is not merely an instrument or tool working on social relations, but is also a set of conceptual categories and schema that help construct, compose, communicate, and interpret social relations. The focus on actors’ meanings brought into the mainstream of law and society scholarship a stronger commitment to a wider array of research methods. In particular, this new scholarship drew on anthropology and qualitative sociology, which had long been studying actors’ meaning making in other domains.

Third, and perhaps most fundamentally, the turn to everyday life and the cultural meanings of social action demanded a willingness to shift from the native categories of actors as the object of study, e.g., the rules of the state, the formal institutions of law, the attitudes and opinions of actors, to an analytically conceptualized unit of analysis, the researcher’s definition of the subject, legal consciousness. For most of the twentieth century, legal scholars had treated law and society as if they were two empirically distinct spheres, as if the two were conceptually as well as materially separate and singular. They are not. The law is a construct of human ingenuity; laws are material phenomena. Similarly, society is a fiction we sustain through hard work and mutual communication. People’s ordinary transactions presume an objective world of facts “out there,” yet close analysis of the ways people apprehend that world reveals their own collaborative social construction of those social facts (Durkheim 1982 [1895], Gurwitsch 1962, Berger & Luckman 1990 [1966], Schutz 1970, Molotch & Boden 1985). Nonetheless, we had been studying law as if it were a separate realm from society, as something that worked on social relations or was a product of social forces, as if the social experience was consonant with the linguistic distinction (e.g., Friedman 1984). We had been studying law with insufficiently theorized concepts. We were using our subject’s language as the tools for our analysis and in the course finding ourselves unable to answer the questions our research generated. New theoretical materials and research methods were necessary (cf. Gordon 1984, Munger & Seron 1984, Trubek 1984). These involved more intensive study of local cultures, native texts, and interpretive hermeneutical techniques for inhabiting and representing everyday worlds to construct better accounts of how law works, or to put it another

way, how legality is an ongoing structure of social action (Ewick & Silbey 1998, pp. 33–56). These also involved attention to and appropriation of the venerable traditions of European social theory that had been addressing just these questions with the concepts of consciousness, ideology, and hegemony in an effort to understand how systems of domination are not only tolerated but embraced by subordinate populations (Marx & Engels 1970 [1846], Gramsci 1999).

What became known as the constitutive perspective recaptured some of the critical tradition of law and society research. Focusing on the everyday life of citizens, scholars began to interrogate the ideals and principles that legal institutions proclaim but fail to completely enact. Both policy efforts and abstract principles were interrogated as important parts of how legal institutions create their power and authority. The ideals of law, such as open and accessible processes, rule-governed decision making, or similar cases being decided similarly, may not in practice limit the exercise of law's power; these ideals are, however, part of the popularly shared understandings that shape and mobilize support for legal institutions. They might also be part of what allows the system to be a headless tyrant. This became the study of legal consciousness.

EXPLAINING HEGEMONY BY TRACKING LEGAL IDEOLOGIES AND CONSCIOUSNESS

Scholars pursuing the constitutive paradigm turned from the study of law *and* society to the study of law *in* society, from the effectiveness of laws to law's effects. Pursuing the meanings of law among lay actors as well as professional legal actors, and reconceptualizing the unit of analysis from specific laws to legal ideologies, law and society scholars made what became known more generally as the cultural turn, an interdisciplinary discourse among the social sciences and humanities focusing attention on systems of symbols and meanings embedded in social practices (Chaney 1994). The historical moment derived from, and in its turn contributed to, a more general reconstruction of twentieth century social science scholarship that acknowledged its historicity and inescapable politics and rejected its naive realism. From studies of politics, literature, or film to explorations of the social studies of science and technology, the full spectrum of human production was re-examined to expose the layers of subjectivity and representation. Deconstruction in literary studies, the interpretive turn in social science, the culture wars in science studies, the intellectual effervescence was as noticeable in socio-legal scholarship as elsewhere. I cannot do justice in this space to the range and depth of the poststructural and postmodern critiques of knowledge that suffused academic scholarship and popular culture during the 1980s. Suffice it to say that the critique came in various flavors and was consumed in varying proportions.

Scholars adopting a constitutive perspective for the study of legal consciousness, however, took several lessons from the poststructural critique in efforts to explain how a relatively open system, continually in the making, managed nonetheless to

sustain itself as a durable and powerful institution, in other words, to constitute a rule of law. Drawing from the poststructural critique, they acknowledged, “(1) the need to address the *in* determinacies of meaning and action, events and processes in history; (2) the admonition to regard culture not as an *over* determining, closed system of signs but as a set of polyvalent practices, texts, and images that may, at any time, be contested; (3) the invitation to see power as a many-sided, often elusive and diffuse force which is always implicated in culture, consciousness and representation” (Comaroff & Comaroff 1991, p. 17). Studies emphasized connections between what Goffman (1967) called the interaction order of face-to-face exchanges and social structures understood as ongoing productions of social interaction (Bourdieu 1977; Giddens 1979, 1984; Connell 1987; Sewell 1992). In these sociological theories of action and practice, culture (and legal culture as an aspect of culture) is not a coherent, logical, and autonomous system of symbols but a diverse collection of resources that are deployed in the performance of action (Swidler 1986).²

Although social meanings, processes, and laws are human creations, emerging from the unending contest and struggle of micro-transactions,³ at any moment

²In the best of this work, culture is an analytical term abstracting “the meaningful aspect of human action out of the flow of concrete interactions. . . [by disentangling], for purposes of analysis, the semiotic influences on action from the other sorts of influences—demographic, geographical, biological, technological, economic, and so on—that they are necessarily mixed within any concrete sequence of behavior” (Sewell 1999, p. 4). Importantly, this conception of culture goes beyond a focus on language alone and rejects any notion that culture is uniform, static, or shared ubiquitously. In earlier formulations, the concept of culture as an aspect of social life had been invoked in diverse ways. Referring primarily to learned behavior as distinct from that which is given by nature, or biology, culture had been used to designate everything that is humanly produced (habits, beliefs, arts, and artifacts) and passed from one generation to another. In this formulation, culture is distinguished from nature and distinguishes one society from another. A narrower conception of culture refers to a specific set of social institutions that is specifically devoted to the production of signs and meanings. In this usage, cultural institutions include, for example, art, music, theater, fashion, literature, religion, media, and education. Although the first definition is overly broad, including just about all of human life, the second is too specific: The meanings produced and circulating through the other institutions and “non-cultural” spheres of life are ignored or devalued (Silbey 2001; cf. Ginzburg 1976). Contemporary cultural theory and analysis moved beyond these conceptions. Although cultural resources are often discrete, local, and intended for specific, disparate, and sometimes contradictory purposes, it is possible to observe patterns so that we are able to speak of a culture, or a cultural system. “Symbols communicate only because they have relatively structured relationships to other symbols, are part of a system. Similarly, a cultural system cannot exist independent of the succession of practices that instantiate, reproduce or, most interestingly, transform it” (Sewell 1999, p. 47).

³In using the phrase micro-transactions, I do not mean to suggest an overly rigid dichotomy between the micro and macro perspectives. As Bourdieu (1990, p. 130) says, “[W]hen you look too closely, you cannot see the wood for the trees.” One must be aware of the social space or “point from which you see what you see.”

in time and social space, their malleability and indeterminacy are constrained by history, habit, social organization, and power. “Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past” (Marx 1963 [1852]). The world, particular institutions, and practices may be socially constructed and contingent, not natural and necessary, but this does not mean that the socially constructed world is easily undone. To the defendant who goes to jail, the tenant who is evicted, the immigrant who is expelled, the woman who is denied access to an abortion, the citizen concerned about air pollution or global warming, or the consumer who is injured by a faulty product, the law is less pliable and less amenable to reinterpretation and reconstruction than poststructural critiques of determinacy seemed to suggest. Indeterminacy does not make all things possible; it means only that possibilities are not predetermined or fixed. Although they are indeterminate, events and outcomes may still be, and research has shown them to be, probabilistically predictable. Otherwise why would we keep seeing that the “haves” come out ahead (Kritzer & Silbey 2003)?

Nowhere can anything or everything be thought or written or done or told. Most people live in a world in which many signs, and often the ones that count most, look as though they are eternally fixed. . . . While signs, social relations, and material practices are constantly open to transformation—and while meaning may indeed *become* unfixed, resisted and reconstructed—history everywhere is actively made in a dialectic of order and disorder, consensus and contest. At any particular moment, in any marked event, *a* meaning or *a* social arrangement may appear free floating, underdetermined, ambiguous. But it is often the very attempt to harness that indeterminacy, the seemingly unfixed signifier, that animates both the exercise of power and the resistance to which it may give rise. Such arguments and struggles, though, are seldom equal. They have, *pace postmodernism*, a political sociology that emerges from their place in a system of relations. And so, as the moment gives way to the medium-term, and some people and practices emerge as (or remain) dominant, their authority expresses itself in the apparently established order of things—again, in the dual sense of an edifice of command and a condition of being. What might once have seemed eventful and contingent now looks to have been part of a more regular pattern—indeed, of a structured history, a historical structure (Comaroff & Comaroff 1991, p. 18).

The concept of hegemony has been used to explain the practical determinacy of a legal system that is theoretically indeterminate and refers to just this kind of systemic power in which transactions become habituated as practices and transactional advantage becomes stabilized as privilege (Comaroff & Comaroff 1991, pp. 23–24; cf. Bourdieu 1977, p. 167). Over time, individual transactions are repeated and may become patterned. Patterns may become principled and eventually naturalized. Hegemony does not arise automatically from a particular social arrangement; instead, hegemony is produced and reproduced in everyday transactions,

in which what is experienced as given is often unnoticed, uncontested, and seemingly not open to negotiation. Importantly, the cultural symbols and structures of action become over time so routinized that the distribution of influence and advantage, as well as of burdens and costs, in these transactions are relatively invisible. The institutionalization of power in this way produces commonplace transactions in which both the sources of power and the forms of subordination are buried. In these transactions, no one seems to be demanding obedience, and subordinate parties appear to be normally socialized rather than compliant. The organization of relations and resources obscures the mechanisms that systematically allocate status and privilege of diverse sorts. Social actors are thus constrained without knowing from where or whom the constraint derives.

The law is a durable and powerful human invention because a good part of legality is just this invisible constraint, suffusing and saturating our everyday life. Most of the time, legal authority, forms, and decisions go uncontested or are challenged only within the legally provided channels of contest. The American presidential election of 2000 is a perfect example of the degree to which the (social) fact of law and legal intervention, in contrast to particular legal decisions, is generally uncontested and hegemonic (Gillman 2001). There are many good reasons that the decision in *Bush v. Gore* was not disputed in the streets of American cities, nor in the U.S. Senate. The acquiescence to that decision, however, derives not solely from the specific facts of the case nor from the politics of the moment but rather from a long history of deference to the courts as both the oracles and guardians of the Constitution, the law, and justice. We need only look at the history of constitutional regimes in formation across the globe to observe the difference between taken-for-granted legality and struggles to institutionalize the rule of law (e.g., Ellman 1992, Abel 1995, McAdams 1996, Scheppele 1996, Krygier & Csarnota 1999, Klug 2000, Chanock 2001, Wilson 2001, Gibson & Gouws 2002).

Legal hegemony derives from long habituation to the legal authority that is almost imperceptibly infused into the material and social organization of ordinary life, for example, in traffic lanes, parking rules, and sales receipts, much more than in the acquiescence or capitulation to *Bush v. Gore*. In popular culture, however, the trial stands as the icon of the rule of law, whereas these routinized legal forms that constitute the law's hegemony are rendered invisible, invisible as law that is. Instead of sales receipts and traffic lanes, the trial is presented as the site of legality, a carefully orchestrated contest through which aggregations of persons, words, stories, and material are legitimately transformed into facts of intention, causality, responsibility, or property. Although we take for granted the appropriateness and legitimacy of trials for resolving conflict and for mediating and legitimating the use of force, law and society research has demonstrated that a trial is merely the tip of a giant iceberg of matters that are shaped and interpreted through law. The public focus on litigation obscures the sources of power and hegemony of law. Indeed, of the myriad activities that constitute modern life, this official, iconographic symbol of legality, the trial, is outpaced by the proliferation of expectations, norms, signs, and objects in which the traces of professional and official legal work have become

indiscernible. When we speak of a rule of law, we do so because most of the iceberg of legality lies submerged within the taken-for-granted expectations of mundane life. Rather than contested and choreographed in sometimes spectacular but always statistically rare trials, law is powerful, and it rules everyday life because its constructions are uncontroversial and have become normalized and habitual. Law's mediations have been sedimented throughout the routines of daily living, helping to make things move around in more or less clear ways, without having to invoke, display, or wield its elaborate and intricate procedures, especially its ultimate, physical force.

Of course, this sedimentation and normative regulation is never complete; we do not always stay within the boundaries of legally sanctioned expectations, and the reach of law is always disputed. Thus, much of the visible iceberg of legality is about what to do in the event of breach; some of those matters of concern lead to litigation, and some, although very few, lead to trials, and then even fewer to appeals. An iceberg throws up a calf. These visible legal battles, however, are the outliers of the law's more routine activities. Ironically, the outliers are what end up constituting the textual body of legal doctrine.

More often than not, as we go about our daily lives, we rarely sense the presence of the law. Although law operates as an assembly for making things public and mediating matters of concern, most of the time it does so without fanfare, without argument, without notice. We pay our bills because they are due; we respect our neighbors' property because it is theirs. We drive on the right side of the road (in most nations) because it is prudent. We register our motor vehicles and stop at red lights. We rarely consider through which collective judgments and procedures we have defined "coming due," "their property," "prudent driving," or why automobiles must be registered and why traffic stops at red lights. If we trace the source of these expectations and meanings to some legal institution or practice, the origin is so far away in time and place that the matters of concern and circumstances of invention have been long forgotten. As a result of this distance, sales contracts, property, and traffic rules seem to be merely efficient, natural, and inevitable facts of life.

As naturalized features of modern life, the signs and objects of law are omnipresent. Through historic as well as contemporary legal decisions that are no longer actively debated, countless aspects of human life as well as matters of concern have been resolved, concretized, and objectified, literally written onto the surfaces and figuratively built into the very structures of ordinary social relations, places, and objects. Every package of food, piece of clothing, and electrical appliance contains a label warning us about its dangers, instructing us about its uses, and telling us whether (and where) we can complain if something goes wrong. Every time we park a car, dry clean clothing, or leave an umbrella in a cloak room, we are informed about limited liabilities for loss. Newspapers, television, novels, plays, magazines, and movies are saturated with legal images, although these very same objects display their claims to copyright. Although much of the time legal forms go unnoticed and cognitively disappear, they are imperfectly naturalized.

At any moment, the stabilized, historical *legalfact*⁴ can reappear, perhaps becoming a matter of concern, debate, or resistance. The iceberg cracks and hits a passing ship. Hegemony is ruptured; the ideological force of law is apparent.

In the most useful formulations, the concept of hegemony is often used in conjunction with ideology, understood in a first but incomplete formulation as a process “by which meaning is produced, challenged, reproduced, transformed” (Barrett 1980, p. 87; cf. Bahktin 1981; Billig 1991; Steinberg 1991, 1999). Ideology is not, however, to be equated with culture or structure in general, or with social construction as an interactive process in general. An ideology always embodies particular arrangements of power, and it affects life chances in a manner that is different from some other ideology or arrangement of power. Meanings can be said to be ideological only insofar as they serve power; thus, ideology is not defined by its specific content but by its contextual construction and function (Silbey 1998, Ewick 2003). Ideologies vary, however, in the degree to which they are contested or conventionalized. Thus, ideology and hegemony can be understood as the ends of a continuum. At one end of the continuum are the still-visible and active struggles referred to as ideology. At the other end are the struggles that are no longer active, where power is dispersed through social structures and meanings are so embedded that representational and institutional struggles are no longer visible. We refer to this as hegemony. Although moments of resistance may be documented, in general subjects do not notice, question, or make claims against hegemony (Scott 1990, Hodson 2001, Ewick & Silbey 2003).

“What differentiates hegemony from ideology is not some existential essence. It is. . . the factor of human consciousness and the modes of representation that bear it” (Comaroff & Comaroff 1991, pp. 24, 28). Just as ideology and hegemony constitute the poles of a continuum of the seen and unseen, contest and convention, norm and deviance, so too does social knowledge and experience vary along a continuum that Comaroff and Comaroff call a “chain of consciousness,” variable processes of awareness and critique of the forms and structures as well as the openings and possibilities of everyday lives. With these theoretical materials in place, Ewick & Silbey (1998) define consciousness as participation in this collective, social production of ideology and hegemony, an integral part of the production of the very same structures that are also experienced as external and constraining. In this framing, consciousness is understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and

⁴Legal objects, signs, forms, rules, and decisions are understood to be a special kind of fact, a legal fact. By collapsing the distance between the words to *legalfact*, we emphasize the procedures of law that are the grounds for constructing facts, that is, *legalfacts*. In other words, jurisprudence recognizes at its core that its truths are created only through its particular procedures and that the relationship between *legalfacts* and empirical facts is at best only a specific method of approximation or invention.

discursive systems that limit and constrain future meaning making. Consciousness entails both thinking and doing, telling stories, complaining, lumping grievances, working, playing, marrying, divorcing, suing a neighbor, or refusing to call the police.

Most importantly for understanding the place of legal consciousness in socio-legal research, legal consciousness in this conceptualization is no longer something that is individual or merely ideational; consciousness is construed as a type of social practice, in the sense that it both reflects and forms social structures. Just as culture implies both practice and system, consciousness is dislodged from the mind of an individual knower, insofar as knowing always entails the invocation of collective cultural schemas and deployment of differentially available resources. Consciousness emerges out of, even as it shapes, social structures contested in ideological struggles or subsumed in hegemonic practices. The study of legal consciousness is the search for the forms of participation and interpretation through which actors construct, sustain, reproduce, or amend the circulating (contested or hegemonic) structures of meanings concerning law. Legal consciousness cannot be understood independently of its role in the collective construction of legality—how forms of consciousness combine to constitute ideological or hegemonic legality.

We should note that as the research field grew, so too did the definitions of the term consciousness. Although debate over uses of the term can be provocative and stimulating for scholars, creating a rich field in which to work their theoretical skills, it can also lead to a great deal of confusion. Authors have defined legal consciousness variously as “all the *ideas* about the nature, function, and operation of law held by anyone in society at a given time” (Trubek 1984, p. 592); as “the ways law is experienced and understood by *ordinary* citizens” (Merry 1985); as “the ways people understand and use the law. . . , the way people conceive of the ‘natural’ and normal way of doing things, their habitual patterns of talk and action and their commonsense understandings of the world” (Merry 1990, p. 5); as “the ongoing, dynamic process of constructing one’s understanding of, and relationship to, the social world through the use of legal conventions and discourses (McCann 1994, p. 7); as interchangeable with legal ideology (Sarat 1990, p. 343); and as a concept that assumes “that the ‘distributed self’ continually evolves with experience, incorporating along the way multiple, sometimes contradictory elements and perspectives” (Engel & Munger 2003, p. 12). In some of these uses, ideology and consciousness are combined; in others, a method of researching consciousness is subsumed by the term without specifying the difference between a method of empirical exploration and a definition of the object of inquiry. Some add a focus on self and identity, and in many definitions the distinction between consciousness in general and legal consciousness is unspecified. Does “legal consciousness refer to consciousness in general as it focuses (perhaps fleetingly) on law and legal institutions or. . . , on the other hand, [does] it refer. . . to a particular kind of thought process that people bring to bear whenever legal matters arise” (Engel 1998, p. 119). Not all uses of legal consciousness theorize relationships to power, ideology, and the contributions of consciousness to hegemony. If understood interchangeably

with ideology, how do we talk about the relationships among subjects and the collective constructions we recognize as a particular pattern of meaning? If the focus is on an evolving identity or self, what is the relationship between that self and consciousness? Often the studies of consciousness move in different directions depending on the tradition of research from which they draw and on the methods of research they employ. A similar variation plagues studies of legal culture (Silbey 2001).

Thus far, I have argued that the study of legal consciousness developed in law and society research as an explicit effort to explore the submerged iceberg, to trace this hegemonic power of law. I have suggested that this research agenda emerged directly out of the results of the first generation of empirical studies of law and society. It was pursued, however, with theoretical framing and methodological tools adopted as part of paradigm shifts in the social sciences and humanities that deconstructed scholarly claims to disinterested truth telling, reconfigured analytical practices to emphasize the ongoing struggles and instabilities in social processes buried by popular and academic master narratives, and attended to the actions, voices, and perspectives of those who had been too often overlooked in the early canon of law and society research (Seron & Silbey 2004). Such oversight was not, of course, unusual across the scholarly fields, although the relative attention to studying up and studying down was certainly not uniformly distributed across the disciplines. At the heart of this project, however, research sought to connect all these pieces: to show how the lived experiences of ordinary people produced simultaneously open yet stable systems of practice and signification; to demonstrate how the law remained rife with variation and possibility; and to explore how we the people might simultaneously be both the authors and victims of our collectively constructed history.

POPULAR UNDERSTANDINGS OF LAW

The research project around legal consciousness was further influenced by a strange contradiction in the research into people's recourse to the law. In this section, I review several genres of the empirical research from which studies of legal consciousness developed.

Surveys of Legal Use, Mobilization, and Assessment

Since the 1960s, law and society scholars had been conducting surveys of legal use: When, where, and under what circumstances do citizens turn to law? Much of the work described unequal access to law and courts with socially disadvantaged groups disproportionately excluded from access to legal remedies. This differential use of legal resources was explained by what is essentially an economic or social structural model. Citizens with greater resources of education, income, or familiarity, which is often a consequence of education or income, are more likely

to use the law as a means of dispute resolution (Carlin et al. 1966, Mayhew & Reiss 1969, Silberman 1985, Goodman & Sanborne 1986). Because minority populations command and deploy disproportionately fewer social resources of education, income, status, and power, they are less likely to turn to the law or the courts with their troubles. And when they become subjects of law, their problems are often reconfigured as crimes rather than interpersonal disputes (Moulton 1969; Merry 1979, 1990; cf. Balbus 1973). Thus, race and income interacted to explain the differential use of law and courts. That differential voluntary use provided some of the evidence for Galanter's (1974) analysis of the systematic legal advantage that attaches to repeat players.

With additional research, however, the picture turned out to be somewhat more complicated. Although the research continually documented the fact that poor people make less use of lawyers (Curran 1977) and that racial and ethnic minorities are more likely to be poor and thus also less likely to use lawyers or turn to courts, it is not poverty per se, nor the interaction between poverty and race alone, that created barriers to law. Since the institution of public legal services in the 1960s, research also showed that the kinds of problems people have rather than their income, education, race, or ethnicity influenced their recourse to law (Mayhew & Reiss 1969, Miller & Sarat 1980–1981, Engel 1984, Silberman 1985). One of the most extensive examinations of disputing behavior in the United States reported that the standard demographic variables (age, income, education, ethnicity, gender) were poor predictors of rates of grievance experience, perception, or acknowledgement⁵ or of the willingness to use law and courts for handling grievances, ordinary disputes, or extraordinary problems. Although demographic variables did not seem to have much impact on grievances in general, they did have consequences for some classes of grievances. It appeared that racial minorities were less likely to assert claims in consumer and tort areas than whites but were significantly more likely to assert discrimination claims (Miller & Sarat 1980–1981, p. 552). Nonetheless, researchers argued that, with the exception of torts and discrimination issues, the probability of making claims and asserting rights depends more on “problem-specific factors than on claimants’ capacities” or on demographic characteristics.

If the literature described differential use of law as a function of substantive issues, it nonetheless described a generally active and assertive citizenry and a widespread, if unevenly distributed, willingness to turn to third parties, law, and courts with problems and grievances. The Civil Litigation Project reported that across all problem areas, rates of claiming and disputing were substantial. Studies of consumer complaining reported figures with a range from 70% to 80% of citizens filing complaints when they were dissatisfied with a product or service (McGuire & Edelhertz 1977, Ladinsky & Susmilch 1981, Silbey 1984). The willingness to use the law derived, Scheingold explained, from “a myth of rights [that] exercises

⁵Grievances are understood as the beginnings of disputes; a grievance is an individual's belief that she or he (or a group or organization) is entitled to a resource that someone else may grant or deny (Ladinsky & Susmilch 1981, p. 5).

a compelling influence. . . and provides shared ideals for the great majority. . . . Even otherwise alienated minorities are receptive to values associated with legal ordering. . . . [W]hile we may respond to the myth of rights as groups. . . most of us do respond" (Scheingold 1974, pp. 78–79). Americans participate in a shared legal discourse, collectively contributing to the construction of what would later be called legality. Thus, one answer to the orienting question of how the law sustained itself as a legitimate and governing institution suggested that citizens use and obey law because they believe in this myth of rights. Studies of public attitudes toward the U.S. Supreme Court also documented a widespread diffusion of beliefs in rights and the legitimacy of the law and courts (cf. Dolbeare 1967).

In one of the most continuously sustained research programs seeking to understand this widespread embrace of law's legitimacy usually referred to as procedural justice, another set of researchers also documented popular beliefs and attitudes, satisfactions and concerns, about the legal system. Rather than a myth of rights, this research describes Americans' attachment to particular procedures, claiming that people evaluate their legal experiences in terms of processes and forms of interaction rather than the outcomes of those interactions or abstract rights. People care, the researchers write, about having neutral, honest authorities who allow them to state their views and who treat citizens with dignity and respect, and when they find such processes, they use and defer to them (Casper et al. 1988, Lind & Tyler 1988, MacCoun & Tyler 1988, Tyler 1990, Tyler et al. 1997, Tyler & Huo 2002). The observation of a relatively homogenous and stable consensus and the lack of systematic variation in these studies, however, raised as many questions as it resolved. Why would intelligent and reflective actors willingly support a system about which, when asked, they voice skepticism concerning its capacities to deliver on the promise of that desired procedural justice? Is it possible that the image of consensus and democratic, procedural commitment emerges from the surveys because researchers inquire about only a limited number of issues, values, and institutional arrangements? It turns out that these studies often begin with a model of fairness as it is defined by existing legal processes and doctrine: the opportunity to be heard, to have professional representation, and to have access to appeal and review. The studies then measure popular agreement or disagreement with those norms. Commitments to alternative conceptions of fairness, such as loyalty, compensatory treatment, or substantive equality, are not measured. In effect, respondents are queried about their support for America's official legal ideals and myths, those aspirations repeatedly announced in public discourse and concretely enshrined in marble pediments and stone. The formulation of the questions encourages conforming answers, lest the citizen appear deviant or disloyal. The research thus reinscribes the values and institutions of legal liberalism without making them problematic for the research subject; it is possible that the research itself effaces the presence and possibilities of conflict, resistance, or attachment to alternative models as it also elides engagement with questions of power and inequality. Thus, to the extent that they are seeking access to popular culture and consciousness, the surveys often treat consciousness as a disembodied mental state, a set of

attitudes and opinions, rather than a broader set of situated practices and repertoires of action. In these studies, too little attention is paid to how people's attitudes are produced in, through, and by social organization, ideological struggles, and culture.

Ethnographic Studies of the Social Meanings and Uses of Law

As an alternative to surveys of citizen attitudes, knowledge, and use of law, some researchers adopted ethnographic methods of extensive observation and intensive interviewing to study disputes, disputing behavior, and the recourse to law. The research sought out more contextualized understandings that had been overlooked in many surveys of the differential mobilization and use of law. "Whether and how people participate and use legal process results," the ethnographers argued, "in large measure from the way law is represented in and through cultural systems in which citizens are embedded" (Sarat 1986, p. 539). In other words, the willingness to use law and courts includes "an ideological or normative dimension, which may operate to inhibit participation for those otherwise seemingly capable of participating" (Sarat 1986, p. 539). The studies specifically addressed the issues of power and inequality that had been effaced in the broad-based survey research.

An early precursor to some of these cultural analyses on legal consciousness was apparent in the work on "the legally competent person," a person who is both aware and assertive, "has a sense of himself [sic] as a possessor of rights and sees the legal system as a resource for validation of these rights" (Carlin et al. 1966, p. 71). This sense of the self and these sets of dispositions and perceptions are cultural products learned, shaped, and framed by interactions in specific locations. Although these perceptions (interpretations, or forms of consciousness, as they were later known) may be understood as matters of skill associated with social class, they have an important and independent normative dimension. The legally competent subject in this stream of research

will see assertion of his [sic] interests through legal channels as desirable and appropriate. This is not to say that he will view law as omni-relevant, as a sort of all-purpose tool. He will be aware of the limits of law. But it is important to stress that he will not be hostile to the extension of the rule of law. When he believes it proper, he will make an effort to bring his interests under the aegis of authoritative rules. This will call for a 'creative act of influence' that will affect the content of official decisions. . . . It is implicit in what we have said that the competent subject will have a sense of himself as a possessor of rights, and in seeking to validate and implement rights through law he will be concerned with holding authorities accountable to law (Carlin et al. 1966, p. 70).

With extended fieldwork in particular social locations—a neighborhood, a housing project, a small community, a county in Illinois—ethnographers were able to capture, in ways inaccessible to the large surveys, the variable meanings of events, grievances, disputes, and law in the lives of citizens. Moreover, the research painted

a very different picture of citizens' responses to grievances and interpretations of law than had been captured in the surveys. The studies confirmed that all social groups experience grievances that could become claims and disputes. They also demonstrated that citizens interpret these events differently and respond to them in culturally specific and variable ways. However, the authors argued that these differences among citizen interpretations of law could not be adequately described by an economic, cost-benefit, rational calculus that had thus far characterized many of the studies of disputing (Merry & Silbey 1984). In these ethnographies, the issues that might give rise to disputes and legal claims are described as cultural events, evolving within a framework of rules about what is the normal or moral way to act, what kind of wrongs warrant action, and what kinds of remedies are acceptable and appropriate.

Ideas about how to respond to grievances are linked with socially constructed definitions of normal behavior, respectability, responsibility, and the good person. . . . Rules about how to fight, or whether to fight, how to respond to insults and grievances, how to live with one's neighbors, are parts of elaborate and complex belief systems which may vary among social groups. . . . In other words, dispute behavior, that may give rise to legal action, or may not, reflects community evaluations, moral codes, and cultural notions, learned but not entirely chosen, of the way people of virtue and integrity live (Merry & Silbey 1984, pp. 157, 176).

Thus, researchers described the diverse cultural conditions of disputing (cf. Macaulay 1963). The work indicated that Americans prefer to handle problems by themselves, by talking with the other party, or by avoiding the problematic situation or the person altogether. In some cases, this reluctance derived from a fear of "making trouble" (Merry & Silbey 1984) or of being perceived as litigious and greedy (Engel 1984) by turning to third parties. In other communities, the reluctance to use law derived from deeply held religious principles (Greenhouse 1986). For these people, invoking the law or litigation would require an unacceptable submission to civil as opposed to religious authority. Conflict and authority were understood as evidence of sin and a fall from God's grace that could be repaired only by deference to God's authority. In another study, Bumiller (1988) described how victims of discrimination also refuse to turn to law. This group avoided litigation because they believed that courts rob them of control of their lives and isolate them from their communities at a time when they are most in need of support. Bumiller's respondents resisted what she described as a "double victimization," first in becoming an "object" of discrimination, and second, in becoming "a case" in law.⁶

⁶Goffman (1963) uses the term "double deviance" to refer to subjects who are stigmatized by a discredited characteristic and then fail to perform appropriately the designated deviant role. Doubling is perhaps one of the special burdens of subordinated classes. See Dubois (1999 [1903]) on the experience of dual consciousness.

When surveyed, these communities and groups registered abnormally low court usage. The courts and law were avoided not because the citizens did not know how to access legal resources or because they lacked the financial resources to invoke its agency. They would have scored well on the standard scales of knowledge of law; they were legally competent actors. They would have also claimed that they prefer processes in which they have a chance to state their case and in which they can be heard, as reported in the studies of procedural justice. However, despite or perhaps because of their knowledge of law, in these studies citizens appeared to turn to law only when their situations or their personal, community, or economic problems seemed entirely intractable, unavoidable, and intolerable. It required an extraordinary effort to overcome routine reluctance and necessitated the development of principled arguments to justify the action. Only when circumstances can be and have indeed reached the point where they are formulated as conflicts of principle do citizens feel comfortable turning to law (Merry & Silbey 1984, Merry 1990). When they get to court, however, the citizen plaintiff rapidly loses control of the process. Thus, Merry (1990) wrote, "recourse to the courts for family and neighborhood problems has paradoxical consequences. It empowers plaintiffs in relationship to neighbors and relatives, but at the same time it subjects them to the control of the court." Some plaintiffs yield to the courts' interpretations and management of their situations, but others often resist, struggling to assert their own definition of the situation (cf. Conley & O'Barr 1990, Yngvesson 1993).

A Research Agenda Emerges

Placed side by side, these studies appeared contradictory. The distinct research communities, using different theoretical resources and research methods, were producing very different accounts of the place and use of law in the lives of ordinary people. The ethnographic studies described ambivalent relationships to law and legal institutions, a much less confident embrace of law or its procedures than the survey research had provided. The ethnographies depicted variability influenced by local situations, norms, and customary ways of doing things, where the surveys had described deep, broad, normative consensus. The surveys seemed to produce generalizable results over large populations but failed to detect the cultural variation in the meanings of events or the skepticism and resistance concerning law described in the ethnographic studies. The studies produced mixed results concerning the rates of legal use, some describing a litigious populace (Lieberman 1981) and others a legally quiescent population (Abel 1973). The most common survey methods and measures systematically excluded just those phenomena that distinguish race, ethnicity, and social class, i.e., variations in meaning systems. Although the community studies sought to investigate and understand social action in its context rather than as disaggregated component variables, measured independently and then reagggregated through statistical procedures, the results and interpretations varied from one location to another and could not be generalized beyond the locale in which each study was conducted. Surveys described consensus

and support for fair and responsive processes; ethnographies described reluctance or resigned engagement and sometimes outright resistance to legal authority and processes. Neither described how the citizens' experiences, interpretations, or attitudes cumulated to produce legal ideology or hegemony. A community of scholars intent on understanding how citizens interacted with, and thus contributed to, the production of law and legal processes were generating very different results based on their research methods. When people were asked directly about the law, their relation to law appeared to be active and assertive. When people were observed in their everyday practices, their relation to law appeared to be reluctant and resistant. Here was a ripe and productive research dilemma.

HISTORICAL STUDIES OF LEGAL IDEOLOGY AND CONSCIOUSNESS

In historical studies of hegemonic law, a corresponding paradox was emerging. Although the historical record clearly revealed the law's development as an ideological tool of repression, research also uncovered spaces of freedom. It began to seem as if the law was constituted by both domination and resistance, consensus and conflict.

In the 1970s, historians working from a Marxist perspective began producing a series of closely observed studies of the eighteenth century foundations of liberal legalism. With data collected on local legal practices rather than national policies and pronouncements, British scholars revised the Enlightenment histories of the progressive march of reason that ultimately, and necessarily, produced objective science, democratic governance, and modern law. They rejected the conventional account of a consensual society "ruled within the parameters of paternalism and deference, and governed by a 'rule of law,' which attained (however imperfectly) impartiality" (Thompson 1975, p. 262). These sociologically informed histories described dialectical processes by which liberal law created spaces of real freedom for newly emergent middle classes and aspirations of citizenship for the masses, while institutionalizing legal processes that in turn contributed to the legitimacy of the developing state apparatus (Hay et al. 1975). Although these historians described "law being devised and employed, directly and instrumentally, in the imposition of class power," this law was more than simply a tool of group interests. It was simultaneously pliant, yet sturdy; it "existed in its own right, [and] as ideology" (Thompson 1975, p. 262). In the emergent rule of law of the eighteenth century, the power of the state lay not with the military, the priests, the press, or the market, Thompson argued, "but in the rituals of the... Justices of the Peace, in quarter sessions, in the pomp of Assizes, and in the theatre of Tyburn," the collective legal spectacles that deluged the cities and county seats of Britain (p. 262). Could these historical analyses provide instruction on how to study contemporary legal consciousness?

Douglas Hay (1975), for example, described the contradictory representations of legal authority in his essay, "Property, Authority and the Criminal Law." Hay

observed that British law was replete with statutes mandating capital punishment, and in particular capital sanctions “to protect every conceivable kind of property from theft or malicious damage” (Hay 1975, p. 106). Not only had Parliament produced an unprecedented number of capital statutes, but it had also sanctioned an increasing number of convictions under these statutes. At the same time, however, Hay observed that there was a noticeable decline in the proportion of death sentences. How and why did the legal system create this blatant and apparent disjunction between legal prescriptions and the practices of criminal law? (The proverbial gap between the law on the books and the law in action seemed to have shown up three centuries before it had been named in twentieth century scholarship.) How was this contradiction managed and what were its consequences for British society, Hay wanted to know. The contradiction was functional, he concluded, protecting the power and resources of the landed gentry exactly as it was supposed to do. The legal system as an ideological phenomenon, Hay argued, helped resolve and pacify social strains created by the emerging capitalist economy and accompanying transformations in land ownership, labor, and class relations.

The more stringent capital sanctions for violations of law, coupled with a noticeable measure of legal formalism, discretionary administration, and publicly visible mercy in the form of pardons, sustained the interests of the landed gentry by establishing not only the sanctity of property rights but the authority of law as well. The criminal law created an explicit set of obligations and materially realizable bonds of obedience and deference that legitimated the status quo by “constantly recreating the structure of authority which arose from property, and in turn protected its interests” (Hay 1975, p. 108). Here, the law served, according to Hay’s analysis, to create the meaning of wealth and definitions of property by naming the actions and relationships that challenged and resisted these definitions as theft, a crime (cf. Hall 1952). At the same time, merciful pardons lessened the burden of the full weight of the law. Because ultimate power—physical strength and numbers—lay with the populace, the landed elite required a means of subjugating the strength of the populace. By strategically deploying mercy, while invoking metaphors of equality, the law served the interests of the gentry. The law provided a political, apparently consensual, solution by which the “motives of the many induce [them] to submit to the few” (William Paley, quoted in Hay 1975, p. 108). In Hay’s analysis, law provided the scripts for the enactment of command and deference. The law was the means by which the power of its authors could be institutionalized, so that the authors of the script and the beneficiaries of the play became less visible. Hay is describing the invention of the discourse that contemporary subjects have been heard to speak. Returning to the metaphor of the hegemonic legality I invoked above, Hay is describing how the ice accumulates to build a glacier that later breaks off to form the submerged iceberg of modern legality.

To the propertyless Englishmen of the time, Hay writes, the law offered a majestic spectacle, twice a year in the Assizes and four times a year in Quarter sessions. Entire communities would witness “the most visible and elaborate manifestation of state power to be seen in the countryside, apart from the presence

of the regiment” (Hay 1975, p. 109). In its symbolism, management of emotions, and psychic demands, the law’s rituals performed much like religion (Durkheim 1965, Berger 1967). The court spectacles were like carnivals, occasions for the community to coalesce in defense of violated norms and the sanctity and deity of property. The interests and agency of the owners of property were erased by the court performance. This charade was emboldened by the “punctilious attention to forms, the dispassionate and legalistic exchanges between counsel and the judge” (Hay 1975, p. 112) that showed to all how those administering and using the laws were themselves subjugated by it and willingly submitted to its rules. As a critical coda, the majesty of law that demanded equality nowhere else available in eighteenth century Britain displayed a decorous concern for protecting the property of ordinary as well as noble Englishmen. Finally, Hay writes, the regular and consistent pardoning of convicted felons sustained the image of an independent and just legal system. “Discretion allowed a prosecutor to terrorize the petty thief and then command his gratitude, or at least the approval of his neighbors as a man of compassion. It allowed the class that passed one of the bloodiest penal codes in Europe to congratulate itself on its humanity” (Hay 1975, p. 120).

Part of a collaboration with Hay and others to map plebian culture of eighteenth century Britain, Thompson also published in 1975 his monumental account of the history of the Black Act of 1723, one of the statutes under which the judges were extending mercy in Hay’s account. This act introduced the death penalty for many new offenses specifically associated with the recently enclosed common lands, offenses as trivial as deer stalking in disguise at night, cutting down young trees, and writing threatening letters. The act was a product, Thompson (1975) argues, of fierce antagonisms between the foresters who had traditionally lived off the land and those who were recently enriched through the new money economy and expanding state offices and who sought to settle themselves as landed gentlemen, deer park keepers rather than deer hunters. The Black Act was an alliance between the emerging merchant classes seeking legitimacy and security through landholding and Whig politicians and lawyers, and it provided the instruments with which to eradicate subsistence hunting and logging by turning tradition, history, and habit into criminal offenses against property (cf. Polanyi 1944).

At the conclusion of his history of the act and its enforcement, Thompson fashioned what has become one of the most compelling accounts of the hegemonic rule of law (cf. Steinberg 1997). Although eighteenth century British law could be seen, he said, “instrumentally as mediating and reinforcing existent class relations, and ideologically as offering to these a legitimation. . . , class relations were expressed, not in any way one likes, but through the forms of law; and the law, like other institutions which from time to time can be seen as mediating (and masking) existent class relations. . . has its own characteristics, its own independent history, and logic of evolution” (Thompson 1975, p. 262). For several centuries, the law was a terrain of active, bloody struggle against monarchial absolutism, not always an instrument of class rule. However, the piecemeal victories won against the crown over the centuries were inherited, Thompson argued, not by the hunters

and plebian population aspiring to full citizenship but by this newly moneyed and landed gentry. Were it not for law, the legal forms, and the institutions created over those years of struggle against the sovereign, the eighteenth century gentry would face unprotected the much older, ancient heritage of unconstrained noble authority.

Take law away, and the royal prerogative, or the presumptions of the aristocracy, might flood back upon their properties and lives; take law away and the string which tied together their lands and marriages would fall apart. But it was inherent in the very nature of the medium which they had selected for their own self-defense that it could not be reserved for the exclusive use only of their own class. The law, in its forms and traditions, entailed principles of equity and universality which, perforce, had to be extended to all sorts and degrees of men. And since this was of necessity so, ideology could turn necessity to advantage. What had been devised by men of property as a defense against arbitrary power could be turned into service as an apologia for property in the face of the propertyless. And the apologia was serviceable up to a point: for these "propertyless" . . . comprised multitudes of men and women who themselves enjoyed, in fact, petty property rights or agrarian use-rights whose definition was inconceivable without the forms of law. Hence, the ideology of the great struck root in a soil, however shallow, of actuality. And the courts gave substance to the ideology by the scrupulous care with which, on occasion, they adjudged petty rights, and on all occasions, preserved properties and forms.

We reach then, not a simple conclusion (law = class power) but a complex and contradictory one. On the one hand, it is true that the law did mediate existent class relations to the advantage of the rulers. . . . On the other hand, the law mediated these class relations through legal forms, which imposed again and again, inhibitions upon the actions of the rulers (Thompson 1975, p. 264).

In 1980, Duncan Kennedy produced one of the earliest and most ambitious accounts of American legal consciousness that, like the British legal historians, describes a hegemonic ideology mediating class interests. Unlike the British studies, however, Kennedy confined his analysis to the interpretation of doctrinal materials and elite professionals rather than popular culture, although he built his analysis from similar theoretical concepts and resources. Like the British historians, he sought to revise a conventional history that inadequately explained how class interests came to dominate what appeared to be relatively available legal instruments and an open, democratic legal terrain (i.e., the gap in its doctrinal guise). During this period of American history (1840–1935), Kennedy writes, "treatise writers, leaders of the bar, Supreme Court Justices, and the like shared a conception of law that appeared to transcend the old conflicting schools [of jurisprudence], and to ally the profession with science against both philosophical speculation and the crudities of democratic politics" (Kennedy 1980, p. 4). Kennedy describes this synthesizing conception of law as a particular form of legal consciousness that, in his analysis,

explains how the political and economic interests of the time were mediated through legal processes and institutions to produce specific case and policy outcomes.

Kennedy claims that American legal reasoning and practices divided the legal world into four distinct spheres, each of which involved a delegation of “legal powers absolute within their spheres”: relations among citizens, between citizens and state, between branches of government, and between federal and state governments. These institutional boundaries were so taken for granted that the concepts and arguments that enacted them were virtually invisible, “so basic that actors rarely if ever bring them consciously to mind. Yet everyone, including actors who think they disagree profoundly about the substantive issues that matter, would dismiss without a second thought (perhaps as ‘not a legal argument’ or as ‘simply missing the point’) an approach appearing to deny” these salient features of the American legal system (Kennedy 1980, p. 6). American legal consciousness of this period, Kennedy writes, described these four institutions as specific powers delegated by the sovereign people to carry out their will, but within this delegation of sovereign power the authority was absolute. In this system of institutional spheres, the judiciary exercised a special role and commanded a peculiar legal technique: to police through objective, quasi-scientific means the relational boundaries. Each of these relational spheres was organized by qualitatively distinct bodies of law and principles: the common law, sovereignty limited by written constitutions, the equilibrium of forces between separate governmental powers, the union of sovereign states.

Classical legal consciousness, as Kennedy describes it, organized and reconciled what might otherwise appear in alternative epistemological or jurisprudential regimes as conflicts among institutions and contradictions among ideas. “Classical legal thought,” as a particular form of legal consciousness,⁷ “appeared to permit the resolution of the basic institutional and political conflicts between populist legislatures and private business, between legislatures and courts over the legitimacy and extent of judicial review, and between state and federal governments struggling for regulatory jurisdiction. At the level of ideas, it mediated the contradictions between natural rights theories and legal positivism, and between democratic theory of legislative supremacy and the classical economic prescriptions about the optimal role of the state in the economy” (Kennedy 1980, p. 9). Thus, Kennedy describes a body of ideas created by lawyers and through which they conceived the fundamental shape of governance and public policy. This model of American government and law was disseminated through teaching and writing so that while still the province of legal elites, it also infiltrated more popular political discourse, a point I will return to in the conclusion of this essay (cf. Kammen 1994). This emergent consciousness permitted and legitimated the judicial activism and interventionism that built the American state while simultaneously valorizing popular sovereignty and transcendent immutable law. Kennedy claims that classical legal

⁷Kennedy (2003) revisits the topic of legal consciousness in the context of the globalization of legal thought, 1850–1968.

consciousness wove the various strands of public discourse of law into a sturdy hegemonic fabric.

Hartog (1985, 1993) built similarly persuasive analyses with a focus on the everyday life of nineteenth century Americans. His reading of the Abigail Bailey diary (Hartog 1993) provides an apt example. Bailey's diary reveals how this woman, over the course of many years, struggled to make sense of her marriage, her husband's sexual abuse of their daughter, their separation and eventual divorce, as well as her own religious beliefs regarding her duties as a wife and mother. Hartog demonstrates that this narrative of personal tragedy and change is incomprehensible without reference to legal categories such as the prevailing law of coverture (a woman's loss of legal rights or personalty upon marriage). Abigail Bailey's perception and assessment of her situation and of her daughter's experiences were conditioned upon her understanding of the legitimacy of a husband's desires and the priority of his rights. Because the law established a husband as a virtual sovereign within his family, it was difficult to openly question or oppose her husband's actions as inappropriate. Equally important, however, the events of Abigail Bailey's narrative are incomprehensible when viewed only through the lens of formal law.

Because law is both an embedded and an emergent feature of social life, it collaborates with other social structures (in this case religion, family, and gender) to infuse meaning and constrain social action. Furthermore, because of this collaboration of structures, in many instances law may be present although subordinate. To recognize the presence of law in everyday life is not, therefore, to claim any necessarily overwhelming power. Abigail Bailey's thoughts, prayers, and arguments were filled with law; legal facts, remedies, strategies, and institutions were constantly present. Yet the nature of her consciousness was not determined by law. She bargained in the shadow of law, yet the law in whose shadow she bargained was a complex and contradictory structure, experienced as an external control and constraint, reconstructed regularly in conversations and arguments, intertwined in significant tension with religious beliefs and norms.

LEGALITY AND LEGAL CONSCIOUSNESS

In the early 1990s, these productive paradoxes came to fruition. Law was recognized simultaneously as a space of engagement, repression, and resistance. The discrepancy between generalized accounts of law and the specific experiences of actors was seen to be a source of law's power.

Ewick & Silbey (1998)⁸ designed a study of legal consciousness to address the paradoxes in the previous research methods and results, hoping to reconcile the approaches of contemporary empirical research with each other and with the historical accounts. By conducting intensive, in-depth, open-ended conversational

⁸This discussion of legality and legal consciousness derives from work done in collaboration with Patricia Ewick in the 1990s and reported at length in Ewick & Silbey (1998).

interviews, they sought to overcome the limitations of the survey research. By interviewing over 400 people in a randomized sample of an entire state, they attempted to overcome some of the non-generalizability concerns of the anthropological ethnographies. Finally, they wanted to return to an understanding of legal consciousness that was not reduced to an individual-level variable (how people think about the law), but to analyze legal consciousness as participation in the construction of legality. The historians had shown how particular practices cumulated to produce authority, and eventually hegemony, for liberal law. The study of contemporary legal consciousness needed to address this same animating concern: to show how the diverse and sometimes contradictory legal practices nonetheless were experienced as a taken-for-granted unity. Despite an enormous variety of forms, actions, actors, and aspirations, law seems to emerge from local, particular, and discrete interactions with the ontological integrity it has claimed for itself and that legal scholars have long attributed to it. To pursue this project, it would be insufficient to map individual or group variation; it was essential to demonstrate how the variations in what people thought and did about law—that had been documented in the previous research projects—together constituted the rule of law. Ewick and Silbey produced an account not of persons but of what they called legality, defining legal consciousness as the participation in this process of constructing legality.

Ewick and Silbey use the term legality to refer to the meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what purposes. With this analytic term, they distinguish their research and theoretical focus from the institutional manifestations of legality in the laws, legal profession, forms, acts, processes, etc. The analytic construct “legality” names a structural component of society, that is, cultural schemas and resources that operate to define and pattern social life (Sewell 1992). Through repeated invocations of legal concepts and terminology, as well as through imaginative and unusual associations among schemas, legality is constituted through everyday actions and practices. In this work, legal consciousness is decentered in that the research does not document chiefly what people think and do about the law but rather how what they think and do coalesces into a recognizable, durable phenomena and institution we recognize as the law. Law and legality achieve their recognizable character as the rule of law, Ewick and Silbey argue, despite the diversity of constituent actions and experiences (forms of consciousness), because individual transactions are crafted out of a limited array of generally available cultural schemas. These few but generally circulating schemas are not themselves fixed or immutable, but are also constantly in the making through local invocations and inventions.

Several conceptual moves distinguish their work. First, Ewick and Silbey did not directly ask about law; they asked about people’s lives and waited to hear when the law emerged, or did not emerge, in the accounts people provided of an enormous array of topics and events that might pose problems or become matters of concern or conflict. The conversations were analyzed to identify moments when law could have been a possible and appropriate response to a situation and was not

mentioned, as well as moments when law was mentioned, appropriately or not. The conversational topics were intentionally varied and comprehensive, seeking to create rather than foreclose opportunities for people to talk about diverse experiences and interpretations. The researchers were seeking people's experience and interpretations of the law and did not want to assume its place in their lives but rather discover it as it emerged, or did not, in accounts of events. The interview was specifically designed to access the actor's interpretations of legality, not to check the quality of their legal knowledge according to some professional judgment of what constitutes the law and legality. The method did not assume the importance or centrality of law, although the object of the analysis was to create an account of hegemonic legality. It was simply the target of the research, the analysts' construction of the research problem. Thus, the work focused on everyday life, did not adopt a law-first perspective, and waited to see if, when, and how legal concepts, constructs, or interpretations emerged.

Second, Ewick and Silbey organize their work around three common schemas that ran, they say, like "a braided plait through the idiosyncratic stories people told." These schemas of legality are the researchers' constructs, abstracted from their respondents' accounts and resynthesized into narratives of legality they label "before," "with," and "against" the law.⁹ Thus, in reviewing any particular respondent's interview, one encounters only pieces of the researchers' reconstructed meta-narratives, and often pieces of more than one. The researchers organize the pieces of conversations (with respect to law and legality) by identifying a common template of narrative joining social theory to everyday action and meaning. Thus, each of the common schemas of legality emphasizes a different normative value (e.g., objectivity, availability and self interest, power); it also provides an account of how social action is enabled or constrained and located in time and space within that account.¹⁰

The native theories of social action consonant with the dominant value (determinacy, possibility, unjust power) describe action within each meta-narrative as both institutionally constrained and enabled. These dimensions of the narrative schemas are the basic elements of social structure that are usually implicit, and only sometimes explicit, in fully developed narratives. Of course, many stories told in conversation are not fully formed with all dimensions (Bruner 1986, 1987, 1990, 1991; Polkinghorne 1988; Mumby 1993; Riessman 1993; Ewick & Silbey

⁹Ewick and Silbey use the term schemas following Sewell (1992) as informal, not always conscious, metaphors of communication, action, and representation. We use the term narrative (or meta-narrative) to refer to the collation of dimensions (normativity, constraint, capacity, time/space), sometimes, if appropriate, interchangeably with schemas.

¹⁰A similar narrative template, drawing upon the dimensions of constraint, capacity, normativity, time/space to describe social action, can be usefully constructed, we believe, for many other aspects of culture (e.g., science or sport), synthesizing the diverse accounts that have plagued the literatures over time, thus offering the possibility of significant theoretical and empirical advance for sociology (Ewick & Silbey 2002).

1995, 2003; Czarniaska 1997, 1998; Ochs & Capps 2001). Nonetheless, whenever normally competent subjects speak and hope to be understood, they draw from and contribute to a common pool of circulating signs and symbols, including aspects and understandings of social structure (Ewick & Silbey 1995, 2003). The schemas Ewick and Silbey describe as before, with, and against the law, are described as the cultural tool-kit from which popular understandings of legality are constructed. The schemas do not identify persons as having a particular, singular form of consciousness, nor are they categories naming types of action or thought that are likely to be found whole in any one account, act, or experience. One cannot easily use them as coding devices. Rather, these narrative schemas collect and organize the materials out of which people construct their accounts of law, that is, the components that constitute legality in the popular culture (the accounts of law are the native speakers' terms; the structure of legality is the analysts' conceptualization). They are abstracted and synthesized narratives that emplot the relationships among the capacities, constraints, values, and temporalities of law. More specifically for law, the narratives not only mediate alternative social theories, but they also reproduce the variety of jurisprudential conceptions of law that have for so long competed for position as *the* account of law's power and authority. Legal consciousness, in this account, consists of mobilizing, inventing, and amending pieces of these schemas.

Third, although Ewick and Silbey organize their work around the three schemas, the major import of the work is their explanation of how the ensemble of narratives work to constitute both a hegemonic legal consciousness, the rule of law, and openings for change or resistance (Ewick & Silbey 2003). After all, the study of legal consciousness was from the outset animated in large part by this concern. Analytically synthesized from myriad stories people told to the researchers, the three schemas are not three experientially separate or distinct narratives; in operation they cannot be separated, as each one constitutes and enables the other. Ewick and Silbey argue that legality's durability and strength (as a structure of social action) derives directly from this schematic complexity in popular culture and consciousness. Legality is actually strengthened by the oppositions that exist within and among the narratives.

The dialectical set of narratives of legality they develop is not simply the familiar opposition between ideal and practice, or capacity and constraint, but variation between generalized accounts of law and the specific experiences of actors. General, ahistorical truths (the objective, rational organization of legal thought and action, the availability of and access to justice, the fairness of due process) are constructed alongside, but as essentially incomparable to, particular and local practices (importance of and unequal quality of legal representation; the inaccessibility or intransigence of bureaucratic agents; the violence of police). By emphasizing the normative ideals of objectivity, rationality, and accessibility, first-hand evidence and experience—of discriminatory police, incompetent lawyers, and overworked bureaucrats—that might potentially contradict the general truth and values of rationality, accessibility, and objectivity are excluded as idiosyncratic, anecdotal,

and largely irrelevant. However, a durable and hegemonic conception of the rule of law is not achieved by simply discounting everyday experiences and removing law from everyday life through abstractions or rationalized concepts and definitions. At the same time that legality is construed as existing outside of everyday life in its own professional realm and in generalized, abstracted values, it is also located securely within ordinary life and commonplace transactions. Legality is different and distinct from daily life, yet commonly present. The experiences of law in everyday life may be rendered irrelevant by an abstracted, rational, and reified conception of law as expressed in the story before the law, but the power and relevance of law to everyday life is affirmed by the story of law as a game. Any singular account of the rule of law conceals the social organization of law by effacing the connections between the concrete particular and the transcendent general. Consequently, power and privilege can be preserved through what appears to be the irreconcilability of the particular and the general.

Because legality and legal consciousness have this internal complexity, among and within the common narratives, the rule of law achieves hegemony. Any particular experience can fit within the diversity of the whole. To state the matter differently, legality is much weaker and more vulnerable where it is more singularly conceived. If legality were ideologically consistent, it would be quite fragile. For instance, if the only thing people knew about the law was its profane face of crafty lawyers and outrageous tort cases, it would be difficult to sustain the support necessary for legal authority. Conversely, a law unleavened by familiarity and even the cynicism familiarity breeds would in time become irrelevant. Either way—as solely god or entirely a gimmick—it would eventually self-destruct.

Finally, and perhaps most importantly as a contribution to interpretation and research, the schemas that Ewick and Silbey identified theoretically organized the varieties of legal consciousness that had been described in the previous research. They confirmed the observations of deep normative consensus with regard to norms of procedural fairness (Lind & Tyler 1988, Tyler 1990), while also observing tactical, sometimes cynical, sometimes earnest employment of law's devices for a variety of personal or organizational interests that so much of the literature had described. They also documented the resistance to legal processes that Bumiller (1988), Greenhouse (1986), Engel (1993), White (1990), Sarat (1990), and Katz (1988) had described in a wide range of social fields and actions. The combination of extensive data collection with intensive conversations reproduced many of the results of the existing literature, while also developing a theoretical synthesis. More recent studies have challenged some of the methods (Mezey 2001, Levine & Mellema 2001, Villegas 2003, Hertogh 2004) but have also confirmed the description of legality as multiply stranded cultural schemas (Nielsen 2000, 2002, 2004; Quinn 2000; Gilliom 2001; Steiner 2001; Engel & Munger 2003; Fleury-Steiner 2003, 2004; Hoffman 2003, 2005; Hull 2003; Kostiner 2003; Marshall 2003, 2005; Sagay 2003; Cowan 2004; Kourilsky-Augeven 2004; Pelisse 2004a,b; Albiston 2006). Researchers do not all use the same theoretical conceptualizations, especially concerning social structures of resources and schemas; nonetheless, this

literature repeatedly describes heterogeneous popular conceptions of law and legal institutions.

SITUATING LEGAL CONSCIOUSNESS

Three questions animate contemporary studies of legal consciousness: how to socially situate legal consciousness in classes, genders, and racial and other status groups, as well as in organizational settings; how to resolve continuing debates about the theoretical definition, cultural meanings, and social locations of resistance to law; and how to theoretically and methodologically bridge the micro worlds of individuals and macro theories of ideology, hegemony, and the rule of law. I address the first and third questions in this and the next section, directing readers to Ewick & Silbey (2003) for an extended discussion of the second question concerning resistance to legal authority.

In a growing number of studies, scholars continue to trace the understandings of law that circulate through social relations. In much of this the work, “law is understood experientially, in ways shaped by class, education, geography, and occupational position” (Cooper 1995, p. 510). The research documents how legal meanings and resources compete with and compliment other motives, needs, aspirations, and norms, demonstrating “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 law even as they create viable substitutes for its power and authority” (Marshall & Barclay 2003, p. 625). Researchers attempt to map the variations in legal consciousness by associating distinct interpretations and actions with different sociological or demographic markers. Some studies begin with a particular location, such as a government office (Cowan 2004; cf. Sarat 1989; Cooper 1995) or a workplace (Hoffman 2003; Marshall 2003, 2005; Pelisse 2004a,b; Albiston 2006). Others investigate the legal consciousness of people who share social characteristics (not of space but of identity or experience) that are expected to influence their interpretations of institutions and processes including the law such as, for example, working women’s experience of and responses to sexual harassment (Quinn 2000; Marshall 2003, 2005; Tinkler 2003; Sagay 2003); street women’s (prostitutes’ and drug users’) legal and illegal income generating strategies (Levine & Mellema 2001); single sex couples’ efforts to legalize or in some other way sanctify their unions (Hull 2003); or jurors’ experience of capital punishment (Fleury-Steiner 2003, 2004). Because legal rights and social and cultural settings are understood in this research tradition to “mutually shape” one another (Yngvesson 1993, McCann 1994), those who enjoy constitutional or statutory protection for a categorical condition such as a physical or cognitive disability (Engel & Munger 2003) or racial (Fleury-Steiner 2004) or gender identity (Merry 2003, Sagay 2003, Nielsen 2004), and those who enjoy considerably less legal protection and command little economic or social

capital, such as welfare applicants and recipients (Gilliom 2001, Cowan 2004; cf. Sarat 1989; Merry 1990; Yngvesson 1993), are expected to express differential legal consciousness.

With few exceptions, the research rarely demonstrates stable relationships between social location or status and what the researchers name as their dependent variable, variously defined, for example, as how legal *consciousness is produced* (Cowan 2004), how *law penetrates* the consciousness of ordinary people (Hull 2003), how women *understand their experience* with sexual harassment (Marshall 2003), how law *produces social change* (McCann 1994, Silverstein 1996, Kostiner 2003), *how law matters* (Levine & Mellema 2001), or how rights talk *shapes identity* (Engel & Munger 2003, Merry 2003, cf. Glendon 1991). The research more often documents how social sites (either human groups or settings) entail heterogeneous legal consciousness. Cowan (2004), for example, describes the subjective experiences of unsuccessful applicants for welfare assistance as they seek access to housing for the homeless in Britain. He describes not a singular interpretation among these particularly disadvantaged people, but rather what he thinks may be a Pandora's box of pluralistic conceptions of law in society. He describes his respondents as expressing confidence in the officials' capacities to act fairly and follow the law; they participate, Cowan says, in reifying the law on the books as more compelling than their own housing need. Here, Cowan observes exactly the hegemonic legality that Ewick and Silbey describe, valorizing the general abstract and discrediting the experiential particular. "There is," Cowan writes, "an exaggerated image of bureaucratic formal rationality whereby the officers apply clear and fixed legal rules in a simple and neutral fashion. . . . What our interviewees did was to distance the person they had personal contact with from the actual decision—they explained this either because the interviewer [housing officer] had to 'go by the book' or, in fact, depersonalized the interviewer within a bureaucratic hierarchy" (Cowan 2004, pp. 949, 950). However, Cowan also describes how some of the applicants recognized that the housing office needed to be played by knowledgeable gamblers, lawyers rather than ordinary citizens, because the outcomes were not preordained by transparent rules. At the same time, Cowan also observed tactics of resistance as applicants refused to go along with the intimidating interviewers who threatened prosecution for lying on the applications that were filled out only through the intermediary of the interviewer's interpretations; applicants performed or masqueraded what they were not (calm and reasonable) in order to deny the interviewer's attribution of the applicant as out of control in the face of bureaucratic coercion and unreason. "'They think you have to wait so it calms you down, you have to calm down but it's the opposite that happens. I don't feel calm about it. When I see them, I'm certainly not, I don't even want to be polite but I know that I have to be polite because I need something off them'" (Cowan 2004, p. 946).

Almost all the research describes the double bind of experiencing constraints in the attempt to enact human agency; the studies specifically emphasize the frustrations and contradictions of empowering oneself by deploying the law's powers. "The attempt to gain power through law caused feelings of powerlessness" (Cowan

2004, p. 945; cf. Bumiller 1988). Speaking of sexual harassment, Quinn (2000, p. 1164) writes, “to take it personal, is to claim simultaneously the harm [one has experienced] and one’s own disempowerment. To move beyond the local and draw on the power of law requires speaking one’s pain and powerlessness to the harassers, to one’s employer, and perhaps to the formal law. In so speaking, one acquires the identity of victim.” Similarly, Engel (1991, 1993) expresses this double bind with regard to protection for the disabled, that one must be cast out of the world of the normal before one is afforded what should be the normal protection of the law, equal social status and respect.

The literature on legal consciousness repeatedly documents how the law’s instrumentalities come with costs that are, as the early law and society research also showed, disproportionately distributed: easier to bear for those who have many forms and volumes of capital; a heavier, often disabling burden that reinscribes disadvantage for those with less. The studies describe among the disadvantaged, however, not a singular, resistant consciousness but this same complex awareness of the opportunities and constraints of legality. Thus, Sarat (1990) describes Spencer, an applicant in a New Haven welfare office, experiencing himself caught within a tightening web of law; at the same time, Spencer believed that he could use law to get what he needed. The welfare recipients Sarat observed and interviewed seem to have had a strong sense of law as an alien, corrupt, vengeful power; they did not subscribe to the myth of rights, to ideologies of legal objectivity or neutrality. Yet, they simultaneously resisted the legal agents’ efforts to demean and control while they played with the legal rules and engaged with the law, hoping its power and authority could be made to work for them in this instance. Unlike most of Cowan’s subjects, Sarat describes his respondents as knowledgeable players able, he says, “to resist the ‘they say(s)’ and ‘supposed to(s)’ of the welfare bureaucracy” (Sarat 1990, p. 346). Welfare recipients do not, however, normally resist the system, the law, the techniques of surveillance and control. As Gilliom (2001, p. 91) writes, they often do not even engage the law. With “few economic or political resources, little education, little solidarity, no organizational structure, no hope of putting rights to work. . . the institutional, structural, and social pressures push against the assertion of rights” or any engagement with the law. Those who do engage or resist are an anomaly.

Cooper (1995) describes government officials very much like Sarat’s knowledgeable welfare recipients. They both engage and resist the law, simultaneously applicants, administrators, and supplicants, actively seeking to enlist the law’s possibilities. The council agents that Cooper interviewed

described themselves in terms remarkably similar to Sarat’s informants—out of control, caught in a tightening web of law. At the same time, they deployed law where they could, challenging government ministers and departments over legislative interpretations. This was notwithstanding the fact many saw law as a ritualistic telling in which they could not be heard, other than to incite retaliation. . . . [However], not all local government actors depicted law as

oppressive, powerful, and politically significant. For others, law functioned primarily as an environmental nuisance, resource or taken-for-granted condition of local governmental activity. The range of responses to law makes it difficult to depict municipal actors as part of a single interpretive community (Cooper 1995, pp. 510–11).

Continuing the effort to situate legal consciousness within particular social spaces, Marshall has studied the construction of sexual harassment policies in workplaces and the interpretations of harassing behavior by working women. She finds that “while legal frames do provide crucial guidance to women evaluating the behavior of their colleagues and supervisors, working women deployed a number of other interpretive frames when deciding whether they had been harmed by such behavior” (Marshall 2003, p. 659; cf. Marshall 2005). Their interpretations drew from feminist ideologies about subordination and discrimination, management ideologies about efficiency and productivity, and libertarian critiques of government policies that limited sexual freedom. Marshall argues that a sense of harm does not necessarily lead to an interpretation of behavior as harassment. Interpretations of harassment and sexuality were embedded, she says, in more general interpretations of subordination, and thus consciousness of law, as measured by embrace of harassment remedies, was not unidirectional. Similarly, Nielsen’s (2000, 2004) efforts to map the relationships among gender, race, and legal consciousness also produced accounts of multiple, heterogeneous interpretations of the utility, availability, and legitimacy of using law to address issues of gender or racial harassment on the public streets. Although the victims often experience themselves as diminished in freedom or status as a consequence of verbally hostile street exchanges, law is not the preferred response, with citizens offering at least four different reasons for opposing legal regulation of street harassment. Fleury-Steiner (2004) explored the legal consciousness of jurors in capital cases, expecting to find some consistent relationship between race and the responses to the crime and possible punishments. Although he sometimes finds clear differences along racial lines, these are not consistent. Race or class affinities may encourage less rather than more sympathy with a defendant, with jurors more rather than less willing to judge and condemn the defendant.

In her study of gay and lesbian couples, Hull (2003, p. 631) also challenges claims that forms of legal consciousness might be expected to correlate with social status. Although marginalized persons are hypothesized to express resistant consciousness, Hull found that her respondents, certainly among the stigmatized populations in American society, expressed some resistant consciousness but it was by no means dominant. Quite the contrary, Hull found that the same-sex couples she interviewed employed a range of schemas of legality: “At the same time that couples resist their current exclusion from official law (i.e., their lack of marriage rights), many couples also act ‘with the law’ by appropriating its terms and practices to define their committed relationships, and some also stand ‘before the law,’ awed by its perceived cultural power” (Hull 2003, pp. 631–32).

It is worth noting, perhaps, that in many of the recent studies attempting to situate legal consciousness, the object of analysis has shifted from law and legality to some other phenomena: sexual harassment, the meanings of marriage, behavior on the streets, interpretations of capital punishment, identity as a person with disabilities, social change. Thus, the research often ends up tracing not consciousness of law but of something else, e.g., race, gender, class, sexuality, identity, disability. Moreover, while much of the research claims to eschew a law-first perspective, to begin “with eyes not on law but on events and practices that seem on the face of things removed from law or at least not dominated” by law (Sarat & Kearns 1993, p. 55), nonetheless much of the research has begun with a legal probe (e.g., harassment, capital punishment). At the same time, the research has made the object of its analysis, as well as data collection, not law but something else (e.g., class, gender).

Although these variations in interpretations and discourses of legality confirm that legal consciousness of ordinary citizens is a variable phenomenon, there are good theoretical reasons why few studies have been able to produce compelling associations between legal consciousness and particular types of laws, particular social hierarchies, and the experiences of different groups with the law. First, the attempts to situate and differentiate legal consciousness among different social locations belie the processes of cultural production in contemporary, postmodern societies. Second, the analyses are too often limited to reports of data, empiricist to a fault, missing, shall we say, the forest for the trees. I take each of these concerns in turn.

Cultural Production

Given the fluidity, disembeddedness, and porousness of popular culture, we are unlikely to find unique or distinguishable cultural schemas categorically distributed among heterogeneous populations that participate in the construction of a commonly shared culture yet occupy different positions in social space (Habermas 1983, 1992, 1998; Apparadurai 1990; Bourdieu 1990; Giddens 1990; Harvey 1990; Sassen 1991; Beck 1992; Bauman 1998). In contrast to most of the studies of particular but dispersed population groups, studies of persons in highly organized, normative settings more characteristic of modern than postmodern social formations have found strong relationships between cultural interpretations, legal consciousness, and social locations. In her study of the municipal agents in Britain, Cooper (1995) suggested that two material conditions correlated with legal consciousness: party affiliation and political ideology. She believes that this differentiation, unremarked in most other studies, is a consequence of the more strongly ideological and mobilized political organizations in Britain. Seron et al. (2004) also finds that political ideology explains differences in judgments of police misconduct among New Yorkers. Thus, the association between political ideology and legal consciousness may not be primarily a British phenomenon. In another American study of two taxicab companies, companies that differed by the degree to which they incorporated worker-management cooperation or a more

conventional hierarchical organizational structure, Hoffman (2003, p. 711) found significant differences in the degree to which employees expressed grievances and used grievance-handling procedures. She suggests that in the cooperative taxicab company workers' more highly developed legal consciousness did not develop by chance. The more explicit and formalized processes in the cooperative that correlated with a particular political orientation helped to habituate a more activist legal consciousness compared with the more conventional company. Thus, both the study of British civil servants and the study of American taxicab drivers suggest that legal consciousness can be developed as part of specific projects of political or workplace mobilization. These are not studies of ordinary citizens in unorganized settings or random citizens responding to standardized stimuli.

McCann's (1994) extensive study of the pay equity movement and the politics of legal mobilization also suggests that when legal consciousness is explored as a component in a political project, researchers observe strong relationships between social position and legal consciousness. McCann argues that despite the failure to win legal battles for pay equity, the litigation and other forms of legal advocacy provided reformers with legal discourse for defining and advancing their cause. The participants in the movement became more aware and active users of legal concepts and ideas, just as they became equally aware of the legal and institutional limitations and constraints on their efforts. Political mobilization and legal consciousness, that is, participation in the construction of legality, went hand in hand. Similarly, in her study of the early Civil Rights movement in the United States, Polletta (2000) suggests that adopting legal strategies and rights claims "inside and outside the courtrooms were essential to their political organizing efforts. Far from narrowing the collective aspirations to the limits of the law," as some critics of rights talk had suggested, "activists' extension of rights claims to the 'unqualified' legitimated assaults on economic inequality, governmental decision-making in poverty programs, and the Vietnam War" (Polletta 2000, p. 367). This broad-based political critique that developed in the Civil Rights movement was enabled by the multivalent character of legal rights, as well as by the institutional and organizational contexts in which they were mobilized. A more recent study of legal consciousness among social movement activists elaborates on this multivalent character of rights, specifically the contradictory ways in which activists for social change criticize the use of law. Here, as with the other mobilized populations, Kostiner (2003) observes a correlation between forms of legal consciousness and something else, in this case, the activists' particular conceptions of social change.

That social movement participation, party affiliation, and political ideology are correlated with specific expressions and forms of legal consciousness is not surprising; indeed, it is what one would expect. "Groups, such as social classes, are *to be made*. . . . They are not given in 'social reality'" (Bourdieu 1990, p. 129, emphasis in original).

Political work consists of producing classes and groups with similar dispositions that assemble closely in social space. Social movements and political parties are ideological fora, with expressly articulated, openly debated interpretations of

social problems, resources, government action, as well as law and justice. If legal consciousness is understood to be the ways of participating in the construction of legality, these organizations are purposely, explicitly, and self-reflexively developing forms of legal consciousness.

The Empiricist-Substantialist Problem

The attempts to differentiate legal consciousness among distinct social locations commits what Cassirer (1923) and Bourdieu (1990, p. 125) call the substantialist error, “which inclines one to recognize no reality other than those that are available to direct intuition in ordinary experience. . . . [Yet] the visible, that which is immediately given, hides the invisible which determines it.” A scholar of public opinion has succinctly explained the problem: “[I]f you ask it, they will answer. But reality or its construction. . . does not sit so close to the surface” (Bishop 2005, p. 187). Nonetheless, because opinions, attitudes, and interactions are tangible, because they can be observed, recorded, or filmed so that one can “reach out and touch them,” they provide immediate gratification for our empiricist ambitions. Nonetheless, these empirical surfaces “mask the structures that are realized in them” (Bourdieu 1990, p. 126). Thus, when research manages to provide varying accounts of law that correlate significantly with demographic categories [e.g., as impractical, a challenge to autonomy, a set of rights and constitutional protection, or a arena of untrustworthy power (Nielsen 2004)], the authors need to show us how the different forms of consciousness or ways of participating work with each other to constitute the power of the law, or legality. In most of the studies, unfortunately, the different accounts remain as threads unwoven into the fabric of hegemony. The structure enabling and constraining these perceptions, attitudes, opinions, or, in Bourdieu’s term, dispositions is absent.

The search for invariant forms of perception thus masks, according to Bourdieu, three critical processes in social construction: “firstly, that this construction [perception, attitude, or opinion about law, harassment, race, or utility of law for social change] is not carried out in a social vacuum but subjected to structural constraints; secondly, that structuring structures, cognitive structures [such as Ewick and Silbey’s schemas of legality], are themselves socially structured because they have a social genesis; thirdly, that the construction of social reality is not only an individual enterprise but may become a collective enterprise” (Bourdieu 1990, p. 130).

In the laudable effort to push on the previous studies of legal consciousness, recent studies also seem to confuse the analyst’s construct (legal consciousness, ideology, hegemony, legality) with the empirical measures or indicators of that construct: ordinary citizens’ experiences and discourse about law. Collecting individual interpretations of the law through inquiries about capital punishment or workplace or street harassment is the beginning of an analysis of legal consciousness. Although researchers documented competing frames and interpretative schema, the aggregation of these to a cultural system or social structure of

legality has given way before the task of reporting the experiences of ordinary people. Too many of the studies seem to have rested on the pixels of perception (e.g., attitudes) rather than the ground that enables perception. Legality, a theoretical construct as the object or consequence of legal consciousness, is lost as a structure of cultural production and its contribution to the production of legal ideology and hegemony unspoken. In the excavation and celebration of too often silenced voices, researchers may have inadvertently mistaken the culturally circulating terms of signification for the mechanisms by which those symbols are produced and connected so that “we the people” speak and are heard, but the orchestration and score remain invisible. In the course of this work, scholars have reinvented, without explaining, that canonical socio-legal gap, now elaborated as a gap between legal consciousness and mobilization (Marshall & Barclay 2003, p. 623).

CONCLUSIONS: THE PROFESSIONAL PRODUCTION OF LEGAL CONSCIOUSNESS

In concluding, I urge researchers to redirect studies of legal consciousness to recapture the critical sociological project of explaining the durability and ideological power of law. In doing so, it is important to acknowledge that I write at a particular historical moment: a time of war, of unprecedented political polarization, and of heavily financed and tightly organized challenges to the modern liberal state. A contemporary coalition of extraordinary concentrations of wealth and populist religion seems to be delivering the public weal almost entirely into private hands. We used to call this fascism, but I do not hear that word used very often any longer. Perhaps without the uniforms and jackboots, we do not recognize this political moment for what it is.¹¹

I noted in the early sections of this review that the focus on legal consciousness developed directly from what appeared to be law’s failure to realize its aspirations for equality and justice. In the 1960s and 1970s, prescient observers offered disquieting characterizations of headless tyrannies to describe the transformations of both representative democracies and communist regimes into almost homologous sclerotic bureaucracies. In 2005, we continue to live in Weberian cages, but the metaphoric iron has become silicon and electromagnetic waves, the cage itself quite purposively against Weber’s prediction re-enchanted. Tyranny now seems to flow through the silicon and electromagnetic connections between our incited

¹¹ A full sociology of legal consciousness would not only focus on ideas and publications in an historic moment but would locate these in the social relations of profession, competitions for position, and the injustices of hierarchy that both animate and constrain not only the subjectivity of the persons and social locations we study, but our own positions as well. Unfortunately, space does not permit that analysis. Perhaps this review will provoke such a sociology of the knowledge of legal consciousness.

fears/desires and the apparatuses that promise to protect us from reality while satisfying us with its image (D. Goodman, personal correspondence).

Research seeking to represent the authentic voices of ordinary people belies the suffusion of everyday life by this professional, marketed cultural production. Justin Lewis (2001) describes this process, for example, showing how poll results have become a form of politically manipulated cultural representation, a means of representing the public to the public as supportive of the interests and policies of political and corporate elites. Moreover, this ability to seduce the public through mediated messages is a direct product of social scientific knowledge about human desire and cognition. A recent celebration of the one hundredth anniversary of the publication of Sigmund Freud's *Civilization and Its Discontents* focused on his nephew Edward Bernays, the reputed father of public relations in the United States. Bernays took Freud's complex ideas on people's unconscious, psychological motivations and applied them to the new field of public relations marketing. That field has prospered and with it the ability to sell anything to almost everyone. The cultural representations that suffuse the everyday life of ordinary citizens are not the consequence of a free market of ideas. In another recent account, ex-Senator Bill Bradley (2005) described in the *New York Times* the 30-year campaign of the Republican party to wrest control of the American government. At the core of the Republican strategy was the creation of research institutions, supported by the wealthiest families and foundations to train a cadre of "public intellectuals" to disseminate the party's ideas through higher education and the media. Organized to invent ideologies that would support the policies in their interests, these institutions also develop and test methods for making these ideological discourses palatable to the public whose interests they undermine.

In constructing an account of legal hegemony, it would be foolish to deny experiential, material differences in social spaces and lives. The central theoretical issue is not whether the conditions of our lives vary, but whether the cultural terms with which we understand and communicate, and with which we constitute our lives, can be correlated with concrete inequalities. Legal consciousness should not be understood in relation to external power and internal will, but in relation to the material inequality of our social life and the cultural terms of our understanding. I fear, however, that recent efforts to track legal consciousness may have inadvertently contributed to the loss of the social (Baudrillard 1983, Rose 1996, Sarat & Simon 2003), leaving us with studies of individual psychology and its accommodations to predefined policy goals. But law is not an alien power imposed upon our isolated and anarchic minds. Law is a basic, constitutive attribute of our social consciousness. It is a particular way of organizing meaning and force, and it is out of this that both law in action and law on the books proceed. The analysis of law must not be a choice between pragmatic policy recommendations of law in action or the transcendental interrogations of law on the books. Instead legal consciousness should be a tool for examining the mutually constitutive relationship between these two.

How might we move the field further? The most promising work seems to look at the middle level between citizen and the transcendent rule of law: the ground of institutional practices. In institutions cultural meaning, social inequality, and legal consciousness are forged. In institutions law both promises and fails to live up to its promises. One place to begin is the cultural industries where legal consciousness is most explicitly constructed. To describe the mechanisms by which legal schema are propagated, circulated, and received, we need institutional approaches that describe simultaneously the full range of social construction (e.g., Goodman 2005). Institutional studies of social construction, such as *Arresting Images: Crime and Policing in Front of the Television Camera* (Doyle 2003) or *Distorting the Law* (Haltom & McCann 2004), provide analyses of the production, distribution, and reception of messages about crime, litigation, and law, displaying and probing the professional production of legal ideologies.

However, it would be wrong to suppose that the cultural industries are the only producers of legal consciousness. Studies of specific institutional locations, for example medical clinics (Heimer & Staffen 1998, Heimer 1999), scientific laboratories (Silbey & Ewick 2003), insurance companies (Heimer 1985; Baker 1994, 2002; Ericson et al. 2003; Ericson & Doyle 2004), reclamation engineering (Espeland 1998), marketed rating systems (Espeland & Sauder 2004), universities (Strathern 2000), accounting (Carruthers & Espeland 1991, Power 1999, Rostain 2002), or bankruptcy regimes (Carruthers & Halliday 1998, Halliday & Carruthers 2005), can push the field further. One particularly valuable model is Larson's (2004) comparative study of security exchanges. His analysis reveals that the regulation of these industries is indeterminate because the regulation is constructed within the very field that it regulates. The formal laws and their practical applications are shaped by the types of disputes in which they are invoked, but the types of disputes in which laws are invoked are determined by the particular history of the institution. Hence, nearly identical rules result in widely divergent practices: In one case disputes might be resolved through recourse to formal rules and in another by appeal to internal norms. The temptation here is to use legal consciousness as a vague residual category and to investigate its psychological content. For Larson, however, legal consciousness is a response to the indeterminacy of law. It is not that one society has a stronger legal consciousness, but that the inherent indeterminacy of the law in action is resolved by different forms of legal consciousness, one form stressing internal norms and the other stressing formal rules.

This returns us to the tolerance for the gap between law on the books and law in action that the concept of legal consciousness was originally developed to explain. On the one hand, this gap is not simply the creation of the powerful, because indeterminacy is inherent to the application of formal laws. On the other hand, the gap is infinitely useful to the powerful, because its persistence provides an alibi for the particular form that the gap takes. Similarly, legal consciousness is not inherently hegemonic (indeed, it is the ground for the type of immanent critique favored by critical theorists); however, it is infinitely useful to hegemony. If hegemony is sustained, as I argue, by a dialectic embracing ahistorical, general accounts

of law's transcendent majesty alongside pragmatic instrumental engagement with its techniques, we need to understand better the ideological struggles involved in constructing these accounts, how they provide the grounds simultaneously for valorization and critique.

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CONTENTS

COMING OF AGE: LAW AND SOCIETY ENTERS AN EXCLUSIVE CLUB, <i>Lawrence M. Friedman</i>	1
THE COMPARATIVE STUDY OF CRIMINAL PUNISHMENT, <i>James Q. Whitman</i>	17
ECONOMIC THEORIES OF SETTLEMENT BARGAINING, <i>Andrew F. Daughety and Jennifer F. Reinganum</i>	35
LAW AND CORPORATE GOVERNANCE, <i>Neil Fligstein and Jennifer Choo</i>	61
TRANSNATIONAL HUMAN RIGHTS: EXPLORING THE PERSISTENCE AND GLOBALIZATION OF HUMAN RIGHTS, <i>Heinz Klug</i>	85
EXPERT EVIDENCE AFTER <i>DAUBERT</i> , <i>Michael J. Saks</i> <i>and David L. Faigman</i>	105
PLEA BARGAINING AND THE ECLIPSE OF THE JURY, <i>Bruce P. Smith</i>	131
THE DEATH PENALTY MEETS SOCIAL SCIENCE: DETERRENCE AND JURY BEHAVIOR UNDER NEW SCRUTINY, <i>Robert Weisberg</i>	151
VOICE, CONTROL, AND BELONGING: THE DOUBLE-EDGED SWORD OF PROCEDURAL FAIRNESS, <i>Robert J. MacCoun</i>	171
LAW, RACE, AND EDUCATION IN THE UNITED STATES, <i>Samuel R. Lucas</i> <i>and Marcel Paret</i>	203
LAW FACTS, <i>Arthur L. Stinchcombe</i>	233
REAL JURIES, <i>Shari Seidman Diamond and Mary R. Rose</i>	255
FEMINISM, FAIRNESS, AND WELFARE: AN INVITATION TO FEMINIST LAW AND ECONOMICS, <i>Gillian K. Hadfield</i>	285
CRIMINAL DISENFRANCHISEMENT, <i>Christopher Uggen, Angela Behrens,</i> <i>and Jeff Manza</i>	307
AFTER LEGAL CONSCIOUSNESS, <i>Susan S. Silbey</i>	323
WHY LAW, ECONOMICS, AND ORGANIZATION? <i>Oliver E. Williamson</i>	369
REVERSAL OF FORTUNE: THE RESURGENCE OF INDIVIDUAL RISK ASSESSMENT IN CRIMINAL JUSTICE, <i>Jonathan Simon</i>	397
INDEX	
Subject Index	423